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TRANSCRIPT OF PLEADINGS FOR TRIAL.

New Jersey Supreme Court

ESSEX COUNTY.

ROSEVILLE TRUST COMPANY, by GEORGE M. LA MONTE, Commissioner of Banking and Insurance of the State of New Jersey, *Plaintiff,*	Roger Hinds, Attorney for Plaintiff.
vs.	Samuel D. Williams, Attorney for Defendant, National Surety Company.
NATIONAL SURETY COMPANY and RAYMOND E. SMITH, *Defendants.*	

(Summons Issued August 30th, 1915.)

AMENDED COMPLAINT.

Filed February 21st, 1917.

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

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

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

III. That prior to December 7, 1908, plaintiff appointed defendant, Raymond E. Smith, as its Treasurer, and he continued as such treasurer in plaintiff's service until August 14, 1913.

IV. That the by-laws of the plaintiff corporation required its treasurer to give the corporation a bond for the faithful performance of the duties of his office; and that accordingly on or about December 7th, 1908, defendant Raymond E. Smith, de-

livered to plaintiff a certain bond executed by the defendants, a copy of which is annexed hereto as Schedule "A."

V. That for the considerations therein mentioned, the defendant National Surety Company, on or about the 24th day of September, 1909, duly executed and delivered to the plaintiff an instrument, of which a copy is annexed hereto as Schedule "B," whereby said defendants again bound themselves to plaintiff, upon a like obligation. That on the 30th day of September, 1910, for the consideration therein mentioned, the defendant, National Surety Company, duly executed and delivered to the plaintiff an instrument of which a copy is annexed hereto as Schedule "C," whereby said defendants again bound themselves to plaintiff, upon a like obligation. That on the 5th day of September, 1911, for the consideration therein mentioned, the defendant, National Surety Company, duly executed and delivered to the plaintiff an instrument, of which a copy is annexed hereto as Schedule "D," whereby said defendants again bound themselves to plaintiff upon a like obligation. That on the 6th day of November, 1912, for the consideration therein mentioned, the defendant, National Surety Company, duly executed and delivered to the plaintiff an instrument, of which a copy is annexed hereto as Schedule "E," whereby said defendants again bound themselves to plaintiff, upon a like obligation.

VI. That between December 11, 1910, and August 14, 1913, defendant Raymond E. Smith, was dishonest, and in connection with his said position as treasurer, stole and embezzled from plaintiff and certain of its depositors upwards of $88,283.78, the property of plaintiff and of its said depositors, to whom plaintiff was legally liable. A more particular statement of said acts of dishonesty, theft and embezzlement is annexed hereto as Schedule "F."

VII. Defendant Raymond E. Smith has not repaid said sums hereinbefore mentioned nor any part thereof.

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

IX. That upon the discovery by plaintiff of facts indicating that a loss had probably been sustained because of the dishonesty of defendant Raymond E. Smith, plaintiff immediately so notified the defendant, National Surety Company, in writing at its office in

the City of Newark; that thereupon, and while there was still time for plaintiff to give such notice immediately to defendant, National Surety Company, at its principal offices in the City of New York as required by said bond, said defendant, being fully advised of the foregoing, duly waived the provision in said bond requiring said notice to be given at defendant National Surety Company's principal offices in the City of New York; that thereupon an officer of said defendant National Surety Company offered to plaintiff that he would, and he did immediately, communicate said notice to the principal office of defendant National Surety Company in the City of New York. That immediately thereafter the defendant National Surety Company sent its investigator to plaintiff to examine plaintiff's books and inquire into the facts of the said loss; that with plaintiff's permission said investigator proceeded without delay to make and did make such examination of the books and inquiry into the facts as was required by said defendant National Surety Company.

X. That on or about August 14th, 1913, said plaintiff was in an unsafe and unsound condition for the transaction of business, and that it was then and still is insolvent; that on or about August 14th, 1913, George M. La Monte, Commissioner of Banking and Insurance of the State of New Jersey, took possession of and is still in possession of the property and business of plaintiff under the provisions of Chapter 171 of the Laws of 1913, and brings this action in behalf of and in the name of plaintiff.

XI. That plaintiff, by George M. La Monte, Commissioner as aforesaid, has demanded payment of said sum of $88,283.78 from defendants, but that defendants have refused and still refuse to pay said sum or any part thereof.

Plaintiff demands as damages the sum of forty thousand dollars $(40,000), with interest from the 13th day of February, 1914.

ROGER HINDS,
Attorney of Plaintiff.

Amended Complaint—Schedule A.

SCHEDULE "A."

KNOW ALL MEN BY THESE PRESENTS, That we, Raymond E. Smith, (hereinafter called the Employee) as Principal, and the NATIONAL SURETY COMPANY, a New York Corporation (hereinafter called the Company), as Surety, are held and firmly bound unto Roseville Trust Company, Newark, N. J. (hereinafter called the Employer), in the penal sum of Twenty Thousand Dollars, good and lawful money of the United States, for the payment of which amount we do bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated this seventh day of December, 1908.

WHEREAS, the Employer has appointed the Employee to the office or position of Secretary and Treasurer, at Newark, N. J., in the service of Roseville Trust Company, and the Employer requires security in a stated amount as indemnity against loss on account of the personal dishonesty, amounting to larceny or embezzlement, of the Employee in the performance of his duties in the position to which he has been appointed or may be appointed by the Employer;

NOW, THEREFORE, for and in consideration of a premium computed at an agreed rate, the Company hereby covenants and agrees to and with the Employer, that it will, subject to the conditions and provisions herein contained, which shall be conditions precedent to the right of the Employer to recover under this Bond, at the expiration of three months next after due and satisfactory proof of the loss herein mentioned shall have been furnished the Company, make good and reimburse to the Employer any and all pecuniary loss of money, securities or other personal property, belonging to the Employer, or in its possession and for which it is legally liable, sustained by the Employer by or through the personal dishonesty amounting to larceny or embezzlement, of the Employee, and for which the Employee shall be legally liable to the Employer, occurring at any time after the 1st day of December, 1908, at 12 o'clock noon, and prior to the 1st day of December, 1909, at 12 o'clock noon, such times to be governed by the time of the locality in which the loss occurs, which said loss shall be discovered during such term, or within six months after the expiration of such term, and within six months after the Employee's death, or his dismissal or retire-

ment from the Employer's service, and within six months after the termination of this obligation, PROVIDED, HOWEVER, the Company's liability on account of the Employee shall in no case exceed the amount for which the Company shall have become surety hereunder.

THIS BOND is executed by the Company upon the following express conditions:

First: The Employer may at any time transfer the Employee during the continuance of this Bond, from one position to another and shift such Employee about at pleasure, without notice to the Company and the Company shall be and remain liable to the Employer for any loss occasioned by such Employee as fully and to the same extent as if no transfer had been made.

Second: The Company shall not hereafter be responsible to the Employee under any previous guarantee in behalf of such Employee, it being mutually understood that it is the intention of this provision that but one (the current) guarantee in behalf of the Employee shall be in force at one time; PROVIDED HOWEVER, that the Employer shall have the right within six months after the termination of any previous guarantee in behalf of the Employee to make claim for, and proof of any loss occurring thereunder. But it is expressly understood and agreed that if any claim be so made under any previous guarantee in behalf of the Employee during the said period of six months, and if loss also occur under the current risk or guarantee in behalf of such Employee, the aggregate liability of the Company for all losses under all guarantees, under all bonds in behalf of such Employee, shall not exceed a sum equal to the amount of the largest of the respective guarantees under which such losses occurred, nor shall the Company be liable under any specific guarantee for any loss occurring under any other guarantee.

Third: If the Employee has at any former period been a defaulter, and if such fact be known to the Employer at the time of the execution of this bond, or at the time of the appointment of such Employee by the Employer, this Bond shall be void and the Employer shall not be entitled to recover hereunder for any loss sustained by or through any act of such Employee.

Fourth: If the Employee resign or be discharged from the service of the Employer, the Company shall not be liable to the Employer for any loss sustained by or through any act of such Employee thereafter committed.

Amended Complaint—Schedule A.

Fifth: The Company shall not be liable under this Bond for any sum or amount whatever which the Employee may, at the commencement of the term hereinbefore provided for, owe the Employer, or for funds or property thereafter used or applied directly or indirectly by the Employee towards or on account of any such sum or amount, it being the intention of this Bond that the Company shall be responsible to the Employer only for loss sustained by or through the personal dishonesty amounting to larceny or embezzlement, of the Employee within the said specified term.

Sixth: If at any time after the beginning of the term for which this Bond is written, the Employer or any officer of the Employer, suspect, or if there comes to the notice or knowledge of the Employer, or any officer of the Employer, any act, fact or information, tending to indicate that the Employee is or may be unreliable, deceitful, dishonest or unworthy of confidence, the Employer shall immediately so notify the Company in writing at its principal offices in the City of New York, and if the Employer fail or neglect so to do, the Company shall not be liable for any act of the Employee thereafter committed; and if at any time after the beginning of the term for which this Bond is written there come to the notice or knowledge of the Employer, or any officer of the Employer, the fact that the Employee is unreliable, deceitful, dishonest, or unworthy of confidence, the Company shall not be liable for any act of the Employee thereafter committed.

Upon the discovery by the Employer that a loss has been sustained, or facts indicating that a loss has probably been sustained, the Employer shall immediately so notify the Company, in writing, at its principal offices in the City of New York, and shall within the time limited in lines 24 to 29 inclusive of this Bond make and furnish to the Company in writing, at its principal offices in the City of New York, claim for, and proof of, loss, if any sustained, and failure to give such immediate notice, or to make such claim or such proof within such time, shall relieve the Company from all liability hereunder on account of the Employee.

Seventh: All written statements and declarations concerning the Employee, or his duties or accounts, made to the Company by the Employer, or any officer of the Employer, at or prior to the execution of this Bond or any renewal hereof, are hereby

made the basis of this Bond as to the Employee and are each, every and all warranted by the Employer to be true; and if any of such statements or declarations be false or untrue in any particular, or if any willful suppression or misstatement be made in any claim for, or proof of, any loss under this Bond, or of any fact affecting the risk of the Company at any time, then this obligation shall be void, and the Company shall in no case be liable hereunder.

Eighth: The Employer shall, whenever, requested by the Company, give all information within its knowledge or which can be obtained from its books or records, and render all assistance (not pecuniary) which will in any way aid in the apprehension, arrest or prosecution of the Employee for any criminal offense committed by the Employee involving liability of the Company, and in like manner aid and assist the Company in suing for and obtaining reimbursement from the Employee, or from the Employee's estate, for any moneys which the Company may have paid or become liable to pay under this Bond on account of such Employee.

Ninth: The Company may at any time terminate the obligation which it shall have assumed in behalf of the Employee under this Bond, by giving the Employer written notice of its election so to do, and such termination shall take effect at the expiration of fifteen days from the receipt of such notice by the Employer; and the Company shall not be liable for any act of the Employee thereafter committed. If the Company subsequently pay any loss hereunder, on account of such Employee, the whole premium paid shall be held to have been fully earned and to belong to the Company; otherwise, the Company shall, upon demand and the execution and delivery to the Company by the Employer of a full release of the Company from all liability hereunder, refund the premium paid, less a pro rata part thereof for the time this obligation shall have been in force.

Tenth: If the Employer, at the time of sustaining any loss, hold any other security from or in behalf of the Employee and the amount of such loss be less than the aggregate amount of such other security and the amount for which the Company shall have become surety hereunder, for the Employee, the Company shall be liable for only such proportion of the loss as the amount for which the Company shall have become surety hereunder,

bears to the total security held by the Employer, whether such other security be available or not.

Eleventh: The Company shall not be liable for any loss occasioned by accident, mistake, negligence, robbery, error of judgment on the part of, or breach of contract by, the Employee, nor the failure of any bank or other institution where funds may have been deposited, nor from any other cause save the personal dishonesty, amounting to larceny or embezzlement, of the Employee.

Twelfth: The premium due the Company for becoming surety hereunder must be paid within thirty days after the delivery hereof, and if not so paid this Bond shall be void from the beginning, and the Company shall not be liable for any loss hereunder.

Thirteenth: So long as the Company and the Employer agree so to do, this Bond may be renewed and continued in force from year to year, and in case of any such renewal, the Company's liability on behalf of the Employee shall be as continuous as if this Bond had been originally written for a term including the period of such renewal.

Fourteenth: The receipt and retention hereof, or the making claim for any loss under this Bond by the Employer, shall be taken and held as a covenant upon the part of the Employer consenting and agreeing to all the terms, provisions and conditions herein contained, and that it will make frequent audits and examinations and at all times during the term hereof, take and use all reasonable steps and precautions to detect and prevent the commission of any act, upon the part of the Employee, which would tend to render the Company liable for any loss.

Fifteenth: This Bond shall not become effective until after it has been duly executed by the Employee named herein.

Sixteenth: The Employee agrees to immediately pay to the Company the amount of each and every loss which it may have been required to pay or may be liable for hereunder and all damage and expense, direct or incidental, incurred by the Company by reason of any claim hereunder and that any proper evidence of payment by the Company of any such loss, damage or expense shall be conclusive evidence (except for fraud) against it and his estate of the fact and amount of his liability to the Company under this agreement.

Seventeenth: None of the conditions or provisions contained in this Bond shall be deemed to have been waived by or on behalf of the Company unless the waiver be clearly expressed in writing over the signature of its President, Vice-President or Resident Vice-President at the Home Office of the Company, and its seal be thereto affixed, duly attested.

IN WITNESS WHEREOF, the Employee has hereunto set his hand and seal and the Company has caused this Bond to be signed by its officers proper for the purpose, and its seal to be hereunto affixed on the date above written, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

RAYMOND E. SMITH,
Employee.

Signed, sealed and delivered by
the Employee in the presence of:

W. S. THOMPSON.

NATIONAL SURETY COMPANY,

By WILLIAM B. JOYCE,
President.

(SEAL)

Attest:

DAVID W. ARMSTRONG, JR.,
Secretary.

Countersigned at New York this 7th day of December, 1908, by M. CROOKE, Authorized Representative.

Amended Complaint—Schedule B.

SCHEDULE "B."

National Surety Company.

The National Surety Company (hereinafter called the Company) hereby continues in force Bond No. 412125, in the sum of twenty thousand dollars ($20,000), on behalf of Raymond E. Smith (hereinafter called the Employee), in favor of Roseville Trust Company (hereinafter called the Employer), for the term beginning on the 1st Day of December, 1909, at 12 o'clock noon, and ending the 1st day of December, 1910, at 12 o'clock noon, such times to be governed by the time of the locality in which the loss occurs, subject to all the covenants and conditions of said Bond.

This continuation is granted upon the condition that the representations of the Employer made to the Company at the time said Bond was issued are to be taken as continuing warranties, that such of said warranties as apply to the system of accounting, examination and audits as set forth therein, have been strictly adhered to, and will be strictly adhered to, and that all examinations and audits therein mentioned have been and will be made; and that the Employer is aware of no reason why the Company cannot safely continue its risk on account of said Employee. It is also conditioned on the part of the Company that its liability under said Bond and this continuation together shall not exceed the amount of said Bond.

It is also conditioned that the premium due the Company for this renewal be paid to the Company within thirty days from the date of the beginning of the term of suretyship hereunder, and if not so paid, then this obligation to be null and void from the beginning, and the Company shall not be liable to the Employer for any loss sustained.

In witness whereof, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal affixed this 24th day of September, 1909.

NATIONAL SURETY COMPANY,

By M. Crooke,
Resident Vice-President.

(seal)

Albert E. Winters,
Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Amended Complaint—Schedule C.

SCHEDULE "C."

National Surety Company.

The National Surety Company (hereinafter called the Company) hereby continues in force Bond No. 412125, in the sum of twenty thousand dollars ($20,000), on behalf of Raymond E. Smith (hereinafter called the Employee), in favor of Roseville Trust Company, Newark, N. J. (hereinafter called the Employer), for the term beginning on the 1st day of December, 1910, at 12 o'clock noon, and ending on the 1st day of December, 1911, at 12 o'clock noon, such times to be governed by the time of the locality in which the loss occurs, subject to all the covenants and conditions of said Bond.

This continuation is granted upon the condition that the representations of the Employer made to the Company at the time said Bond was issued, are to be taken as continuing warranties, that such of said warranties as apply to the system of accounting, examinations and audits as set forth therein, have been strictly adhered to, and will be strictly adhered to, and that all examinations and audits therein mentioned have been and will be made, and that the Employer is aware of no reason why the Company cannot safely continue its risk on account of said Employee. It is also conditioned on the part of the Company that its liability under said Bond and this continuation together shall not exceed the amount of said Bond.

It is also conditioned that the premium due the Company for this renewal, be paid to the Company within thirty days from the date of the beginning of the term of suretyship hereunder, and if not so paid, then this obligation to be null and void from the beginning, and the Company shall not be liable to the Employer for any loss sustained.

In witness whereof, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal affixed this 30th day of September, 1910.

NATIONAL SURETY COMPANY,

By M. Crooke,

Resident Vice-President.

(seal)

Attest:

Albert E. Winters,

Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Amended Complaint—Schedule D.

SCHEDULE "D."

National Surety Company.

The National Surety Company (hereinafter called the Company), hereby continues in force Bond No. 412125, in the sum of twenty thousand dollars ($20,000), on behalf of Raymond E. Smith (hereinafter called the Employee), in favor of Roseville Trust Company, Newark, N. J. (hereinafter called the Employer), for the term beginning on the 1st day of December, 1911, at 12 o'clock noon, and ending on the 1st day of December, 1912, at 12 o'clock noon, such times to be goverened by the time of the locality in which the loss occurs, subject to all the covenants and conditions of said Bond.

This continuation is granted upon the condition that the representations of the Employer made to the Company at the time said Bond was issued, are to be taken as continuing warranties, that such of said warranties as apply to the system of accounting, examination and audits as set forth therein, have been strictly adhered to, and will be strictly adhered to, and that all examinations and audits therein mentioned have been and will be made, and that the Employer is aware of no reason why the Company cannot safely continue its risk on account of said Employee. It is also conditioned on the part of the Company that its liability under said Bond and this continuation together shall not exceed the amount of said Bond.

It is also conditioned that the premium due the Company for this renewal be paid to the Company within thirty days from the date of the beginning of the term of suretyship hereunder, and if not so paid, then this obligation to be null and void from the beginning, and the Company shall not be liable to the Employer for any loss sustained.

In witness whereof, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal affixed this 5th day of September, 1911.

NATIONAL SURETY COMPANY,

By M. Crooke,
Resident Vice-President.

(corp. seal)

Attest:

Albert E. Winters,
Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Amended Complaint—Schedule E.

SCHEDULE "E."

NATIONAL SURETY COMPANY.
New York.

(Duplicate.)

In consideration of the payment of the annual premium charge on the 10th day of December, during each and every year, or within sixty (60) days thereafter, that the bond hereinafter referred to shall continue in force, the NATIONAL SURETY COMPANY hereby continues, for an indefinite term, beginning on the 10th day of December, 1912, its individual Fidelity Bond No. 412125 on behalf of Raymond E. Smith in the amount of twenty thousand dollars in favor of Roseville Trust Company, Newark, N. J., so as to cover, according to its terms and conditions, any acts or defaults of said Raymond E. Smith committed after the date of the execution of the said Bond and before its termination, as provided therein.

IN WITNESS WHEREOF, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal to be affixed this 6th day of November, 1912.

NATIONAL SURETY COMPANY,

By J. SCHMIDT, JR.,
Resident Vice-President.

(SEAL)

Attest:

E. SHAW,
Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Amended Complaint—Schedule F.

SCHEDULE "F."

Savings Accounts.

Date. 1911.	Items of Default.		
Dec. 18	Pass Book 115, R. Sharwell		5,112.80
Jan. 11	Pass Book 1433, P. J. Clossick		
	Entered on Pass Book.....	$4,000.00	
	Entered on Ledger.....	1,000.00	3,000.00
Apl. 17	Pass Book 1651, A. Magnani, Admr.		
	Entered on Pass Book.....	452.00	
	Entered on Ledger.....	1.00	451.00
Apl. 17	Pass Book 1652, A. Magnani, Admr.		
	Entered on Pass Book.....	1,999.12	
	Entered on Ledger.....	1.00	1,998.12
Apl. 17	Pass Book 1653, A. Magnani, Admr.		
	Entered on Pass Book.....	1,198.12	
	Entered on Ledger.....	1.00	1,197.12
Apl. 17	Pass Book 1654, A. Magnani, Admr.		
	Entered on Pass Book.....	598.00	
	Entered on Ledger.....	1.00	597.00
Apl. 17	Pass Book 1654 (Duplicate), A. Magnani, Admr.		
	Entered on Pass Book.....	1,320.58	
	(No entry on Ledger).....		1,320.58
Apl. 17	Pass Book 1655, A. Magnani, Admr.		
	Entered on Pass Book.....	529.10	
	Entered on Ledger.....	1.00	528.10
May 4	Pass Book 1697, F. Cardoni		
	Entered on Pass Book.....	6,000.00	
	(No entry on Ledger).....		6,000.00

Amended Complaint—Schedule F.

1912.				
Jan. 5	Pass Book 2045, Jas. Crump			
	Entered on Pass Book.....	5,800.00		
	(No entry on Ledger).....		5,800,00	
Feb. 20	Pass Book 2274, New Jersey Adamant Mfg. Co.			
	Entered on Pass Book.....	5,000.00		
	(No entry on Ledger).....		5,000.00	
Mar. 1	Pass Book 2287, Benjamin Hughes			
	Entered on Pass Book.....	1,000.00		
	Entered on Ledger.....	1.00	999.00	
Aug. 23	Pass Book 1928, Catherine Haney			
	Entered on Pass Book.....	9,284.78		
	Entered on Ledger.....	284.78	9,000.00	
Sept. 16	Pass Book 2685, Peter Scola			
	Entered on Pass Book.....	2,000.00		
	(No account on Ledger)....		2,000.00	
	Pass Book 2610, E. J. Brooks			
Aug. 2	Entered on Pass Book....$1,000			
Aug. 7	Entered on Pass Book....$1,000			
Aug. 29	Entered on Pass Book....$1,000	3,000.00		
	Entered on Ledger	1,000.00	2,000.00	
Mar. 7	Pass Book 2305, Rev. Jos. Hevey (In Trust for Dennis Hevey)			
	Entered on Pass Book.....	1,279.00		
	Entered on Ledger.....	100.00	1,179.00	
Aug. 15	Pass Book 1383, Margaret E. Vale			
	Entered on Pass Book.....	500.00		
	(No entry on Ledger).....		500.00	
			46,683.72	

Amended Complaint—Schedule F.

DEMAND ACCOUNTS.

Date: 1912.	Items of Default.		Amount.
	Account of Helen Marsh or Chauncey Marsh		
	Entered on Pass Book.....	$9,704.60	
	Entered on Pass Book.....	4,000.00	13,704.60
Aug. 29	Account of Catherine Haney		
	Entered on Pass Book.....	10,396.46	
	(No entry in Ledger).....		10,396.46
Sept. 16	Account of Peter Scola		
	Entered on Pass Book.....	3,000.00	
	(No entry in Ledger).....		3,000.00
Mar. 5	Account of James Lees & Son		
	Entered on Pass Book.....	5,000.00	
	(No entry in Ledger).....		5,000.00
			$32,101.06

ACCOUNTS ABSTRACTED.

1910.	From the following receipts:	
	Pass Book 793, E. E. O'Connor	
Dec. 12	A charge of $3,000 was made against this account upon a check signed by Raymond E. Smith; not entered on pass book, nor was the charge authorized by E. E. O'Connor	3,000.00
1911.		
	Pass Book 114, Alma M. Mott	
Oct. 14	A charge of $6,500 was made against this account upon a check to which it is claimed Raymond E. Smith forged the name of Mrs. Mott; not entered on pass book, nor was the withdrawal authorized by her.....	6,500.00
	Total	9,500.00
	Total of savings account items of default, demand accounts items of default and amounts abstracted	$88,283.78

(Filed February 21, 1917.)

ANSWER OF DEFENDANT, NATIONAL SURETY COMPANY, TO AMENDED COMPLAINT.

Filed March 27, 1917.

The defendant, National Surety Company, a corporation organized under the laws of the State of New York, with its principal office at 115 Broadway, in the City, County and State of New York, says:

1. Defendant admits that part of the first paragraph of the amended complaint (not numbered) wherein it is alleged that plaintiff was a corporation of the State of New Jersey. As to the balance of said first paragraph (not numbered) defendant has not sufficient knowledge or information to form a belief.

2. Defendant admits the allegations of paragraph numbered one of the amended complaint.

3. Defendant admits the allegations of paragraph numbered two of the amended complaint.

4. As to the allegations of paragraph numbered three of the amended complaint, defendant has not sufficient knowledge or information to form a belief.

5. As to those allegations of paragraph numbered four of the amended complaint, referring to the by-laws of the plaintiff, this defendant has not sufficient knowledge or information to form a belief. Defendant admits the other allegations of the paragraph numbered four of the amended complaint.

6. Defendant denies the allegations of the paragraph numbered five of the amended complaint.

7. Defendant denies the allegations of paragraph numbered six of the amended complaint.

8. As to the allegations of paragraph numbered seven of the amended complaint, defendant has not sufficient knowledge or information to form a belief.

9. Defendant denies the allegations of paragraph numbered eight of the amended complaint.

10. Defendant denies all the allegations of paragraph numbered nine of the amended complaint.

11. As to the allegations of the paragraph numbered ten of the amended complaint, defendant has not sufficient knowledge or information to form a belief.

Answer of National Surety Company.

12. Defendant denies the allegations in paragraph numbered eleven of the amended complaint.

SEVERAL DEFENSES.

Defendant by way of defense to the action of the plaintiff, says:

1. That the plaintiff, in violation of the terms of the bond in suit, failed and neglected and still fails and neglects to notify the defendant in writing at its principal office in the City of New York, of notice or knowledge of the plaintiff or its officers, of acts, facts or information tending to indicate that the employee Raymond E. Smith was or might be unreliable, deceitful, dishonest or unworthy of confidence.

2. That the plaintiff, in violation of the terms of the bond in suit, failed and neglected and still fails and neglects to furnish the defendant with a proof or itemized statement of its alleged loss.

3. That the plaintiff should not have or maintain its action against this defendant because it had, or might in the exercise of reasonable care have acquired knowledge that its employee Smith had been a defaulter prior to his employment by the plaintiff.

4. That the plaintiff should not have or maintain its action against this defendant because there came to the knowledge or notice of the plaintiff or its officers, acts, facts or information tending to indicate that the employee Smith was or might be unreliable, deceitful, dishonest or unworthy of confidence in his office as Secretary-Treasurer of the plaintiff corporation, which knowledge or notice, plaintiff failed and neglected to communicate to the defendant, National Surety Company, as provided in the bond in suit.

5. That the plaintiff should not have or maintain its action against this defendant, because it has not sustained a loss by or through the personal dishonesty amounting to larceny or embezzlement of its said employee Smith.

6. Plaintiff should not have or maintain its action against this defendant because, in violation of the terms of the bond in suit, it failed and neglected to take and use all reasonable steps and precaution to detect and prevent the commission of any

act, upon the part of its employee Smith which would tend to render the defendant liable for loss.

SAMUEL D. WILLIAMS,
Attorney for Defendant, National Surety Company.

PLAINTIFF'S REPLY TO ANSWER OF DEFENDANT, NATIONAL SURETY COMPANY, TO AMENDED COMPLAINT.

Filed November 21, 1917.

Plaintiff hereby replies to the answer heretofore filed by the defendant, National Surety Company, to the amended complaint, and says that it denies the allegations contained in the 1st, 2nd, 3rd, 4th, 5th and 6th defense, set up in said answer of the defendant, National Surety Company.

ROGER HINDS,
Attorney of Plaintiff.

AMENDMENT TO ANSWER OF DEFENDANT, NATIONAL SURETY COMPANY.

The fourth affirmative defense of the defendant, National Surety Company, to the above entitled suit is hereby amended to read as follows:

4. That the plaintiff should not have or maintain its action against this defendant because there came to the knowledge or notice of the plaintiff, or its officers, act, facts or information tending to indicate that the employee Smith was or might be unreliable, deceitful, dishonest or unworthy of confidence in his office as Secretary-Treasurer of the plaintiff corporation, which knowledge or notice the plaintiff failed and neglected to communicate to the defendant, National Surety Company, as provided in the bond in suit.

SAMUEL D. WILLIAMS,
Attorney for Defendant, National Surety Company.

Further Amendment to Amended Complaint.

FURTHER AMENDMENT TO AMENDED COMPLAINT.

Filed April 12, 1918.

The amended complaint is hereby amended so as to add to paragraph VI thereof the following allegations:

VI (continued). That between December 10, 1912, and August 14, 1913, defendant, Raymond E. Smith, was dishonest, and in connection with his said position as treasurer stole and embezzled from plaintiff, in addition to the sums hereinbefore alleged, the sum of $37,449.50, the property of plaintiff. A more particular statement of said acts of dishonesty, theft and embezzlement is annexed hereto as "Schedule G." On or about February 13, 1914, plaintiff delivered to defendant, National Surety Company, due proof of loss according to the terms of said bond describing the items mentioned in "Schedule F" hereof, whereupon said defendant returned same to plaintiff and notified plaintiff that it recognized no liability whatsoever under said bond. Plaintiff's books and records, because of the manipulations and frauds of said Raymond E. Smith, were in an involved and confused condition, and the complete details of his stealings and embezzlements could be reconstructed only with difficulty and the expenditure of much time and labor. of all of which facts defendant, National Surety Company, was well aware because of its examination and inquiry described in paragraph IX hereof, from which it also learned that there had been other embezzlements by said Smith than those described in "Schedule F" hereof. Defendant, National Surety Company, by reason of all the foregoing, and by reason of the examination and inquiry described in paragraph IX hereof, waived proof of loss of the items mentioned in the said "Schedule G," none of which were discovered until after defendant, National Surety Company's, notification to plaintiff as aforesaid. By the said acts of defendant, National Surety Company, plaintiff was led to believe, and was entitled to believe, that formal proof of such additional, and any further, items of loss was not desired by defendant, National Surety Company, and would be futile.

ROGER HINDS,
Attorney for Plaintiff.

Further Amendment to Amended Complaint.

SCHEDULE G.

Abstractions of Cash.

December 30, 1912	$325.00		
January 11, 1913	5,000.00		
" 18 "	300.00		
" 27 "	5,000.00		
" 28 "	400.00		
" 30 "	100.00		
February 1 "	4,100.00		
" 10 "	1,500.00		
" 18 "	100.00		
" 20 "	125.00		
" 21 "	100.00		
March 10 "	100.00		
" 11 "	990.21		
May 26 "	10,000.00		
June 13 "	1,189.04		
July 21 "	2,000.00	$31,329.25	
Checks on Roseville Trust Company's account with Irving National Bank, payable to Windsor Trust Company (wrongfully drawn and paid by Smith for his own use and benefit).			
December 31, 1912	$3,262.75		
January 27, 1913	2,857.50	$6,120.25	
		$37,449.50	

(Filed April 12, 1918.)

ANSWER TO "FURTHER AMENDMENT TO AMENDED COMPLAINT."

Filed.

The answer of the defendant, National Surety Company, to the further amendment of paragraph six of the amended complaint is as follows:

1. As to those allegations wherein it is alleged that between December 10, 1912, and August 14, 1913, the said Raymond E. Smith was dishonest, and in connection with his said position as Treasurer, he stole and embezzled from the plaintiff in addition to the sums hereinbefore alleged the sum of $37,449.50, the property of the plaintiff, this defendant has not sufficient knowledge or information to form a belief.

2. This defendant denies all those allegations in the "further amendment" respecting the delivery to this defendant by the plaintiff of proof of loss according to the terms of the bond and the return of said proof of loss to the plaintiff of the defendant.

3. As to the allegations in said "further amendment" respecting the condition of the books of the plaintiff, this defendant has not sufficient knowledge or information to form a belief.

4. This defendant, National Surety Company, denies those allegations of the "further amendment" respecting knowledge by this defendant of the involved and confused condition of the books of the plaintiff or of the fact that there were other embezzlements by the defendant, Raymond E. Smith, than those described in schedule "F" of the amended complaint.

5. Defendant denies those allegations of the "further amendment" alleging a waiver by it of proof of alleged loss of the items mentioned in schedule "G" annexed to said "further amendment."

6. Defendant, National Surety Company, denies acts, omissions or conduct by virtue whereof, plaintiff was lead to believe or was entitled to believe that formal proof of such alleged additional or further items of loss was not desired by this defendant and would be futile.

SAMUEL D. WILLIAMS,
Attorney for Defendant, National Surety Company.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

ROSEVILLE TRUST COMPANY

vs.

NATIONAL SURETY COMPANY, *et al.*

Transcript of shorthand notes of testimony, &c., taken in the above-stated cause, at the trial thereof, at the court house, Newark, N. J., March 17, 1919.

Before Hon. Nelson Y. Dungan, Judge, and a jury.

Roger Hinds and Edward F. Clark of the New York Bar, for plaintiff.

Samuel Williams and Robert H. McCarter for defendants.

(Jury drawn and sworn.)

Mr. Hinds opened for plaintiff.

Mr. Williams opened for defendant.

The Court. I have listened very carefully to this opening and have wondered whether it is going to be disputed that the defalcation of Smith amounted to the sum the plaintiff claims. If not, it seems to me we would save hours, and perhaps days of time by admitting that fact, and proceeding practically at once to the defense, which seems to be, according to the opening, entirely a defense on the terms of the bond.

Mr. McCarter. It is possible, after some proofs are offered, we may be able to conclude that our surmises in the matter are incorrect. At present we do not feel we can do so for want of information. Thus far I have not been able to tell definitely. I can only assure the Court that the moment we are convinced that that is the fact we will cheerfully adopt your Honor's suggestion. I think it will be obvious in a very short time one way or the other.

Mr. Clark. Your Honor's suggestion would change our order of proof only if it is done with the full sanction of the Court. We would not put on, as we otherwise would, in order, em-

ployees of the bank to identify handwritings and books, and so on, but would first put on an accountant who will give a detailed account of the first period of stealing, following that with another accountant who would give a summarized account of the stealing from cash, but necessarily this would be without taking up the books. So that if counsel for the defense really were looking for information for the purpose of determining where they stood, this might answer, but if they are going to stand on their legal rights in that respect we would have to retrace our steps and put on these separate witnesses and identify these books at great length.

The Court. What is your attitude with reference to that suggestion?

Mr. McCarter. I think that suggestion is a good one. We are not going to be technical in this thing. We have a theory with reference to some of these losses that they are out of the purview of the bond.

The Court. Then suppose you adopt that course.

GEORGE D. VANDERVEER, sworn for the plaintiff.

Direct examination by Mr. Hinds.

Q What is your occupation? A Attorney at law and accountant.

Q How long have you practiced as accountant? A Well, at various times for twenty-five years, perhaps more.

Q And in a general way what has your practice as an accountant comprised? A In connection with bank work mostly.

Q Has it included any insolvent bank other than this particular one? A Yes, several.

Q As the result of your experience as an accountant are you familiar with the system which is generally employed by banks? A I think so.

Mr. Hinds. Any cross examination as to qualification?

Mr. McCarter. No.

Q Mr. VanDerveer did you make an examination of what were described to you as the books and records of the Roseville Trust Company? A Some of them.

Mr. Hinds. In all of my questions I will assume that the books are what I describe them as being, being out of the

order of proof, and if there is any question later that can be connected up.

Q Will you tell us what books and records you examined?

Mr. Hinds. First I will state that this witness is to be examined on the subject of what I described to the jury as pass-book stealing as distinguished from cash already in the bank, and covered up by manipulation.

Q Will you tell us what books and records you examined in that connection? A I examined a great many pass-books, I don't remember how many, and the corresponding ledger accounts, if there were any, in the savings department, together with the credit books of the same date upon which the deposit appears to have been made.

Q By credit book do you mean credit side book? A Credit side book.

By the Court.

Q From which they are posted to the ledger? A I don't know whether their system was to post to the ledger from the ticket or from the books.

Q But at any rate posted into this cash-book and also into the ledger? A Into the ledger.

By Mr. Hinds.

Q I did not understand you whether you have examined the teller's proof-book in connection with these items? A Yes, sir.

Q Will you describe briefly, as far as you can tell us, what the books you have examined of the institution and your general knowledge, in a simple way, what the system was of receiving and making entries when the depositors brought in say a depositor's pass-book with a thousand dollars deposit? A Seems to have been usually to enter on the pass-book, make out a ticket and post from that ticket into the deposit ledger account or from the ticket to the cash-book and from that to the depositor's account.

Q In the ordinary way who takes in the deposit? A I assume the receiving teller.

Mr. McCarter. I think that is wrong; he is to speak from the books, not what the practice was.

Witness. I don't know who took it.

George D. VanDerveer, direct.

Q From your comparison of handwriting can you tell us whether or not the person who received the deposit is the person who, from the basis of the deposit-book, later makes the entry in the side-book, or individual ledger? A I could not tell that, because I have not seen the deposit-book.

Q Then I will proceed directly to the first item, that of—have you your notes with you? A I have some memorandum.

Q Will you tell us in the case of the first item on our schedule F of the complaint, Sharwell, $5,112.80, December 18, 1911, will you tell us what books and records you inspected with respect to that item, and what you found to be the fact? A I found the pass-book No. 115 which had the credit upon it. I found no entry upon any of the side-books, nor was any part of that credited to her account in the ledger.

Q Did you ascertain whether or not the proof-books of the tellers disclosed whether there was any so-called overage? A There did not seem to be any overage.

Q What was the significance of that fact in connection with the fact that the pass-book apparently showed that the money had been deposited, and the other books of the bank showed it did not get into the bank; in connection with that what was the significance of having no overage? A That the money did not get into the cash of the bank.

Q What would have been the effect on the teller's proof-book had the money been received, and by some honest mistake the deposit ticket had been lost and hence no entry had been made in the credit side-book and the individual ledger? A The cash would have been over the amount of the deposits.

Q (*By the Court.*) If all the other items of the day had been properly entered and were correct? A If they had, yes.

Q (*By Mr. Hinds.*) So if everything else was proved up in the case of this Sharwell, and the person who received the money had mislaid the deposit ticket, the teller's proof-book would have been over to the amount of $5,112.80? A Yes, sir.

Q Take up the next item, that of E. J. Cossick, where we allege a loss of $3,000 in the complaint?

Mr. McCarter. I notice in this schedule it is December 18th, and is said to be 1911, and the next is January, if that is so, then January must be 1912. What is the real date?

Mr. Hinds. The real date is December, 1911.

George D. VanDerveer, direct.

Q What did you find from examination of the books as to that item? A I found pass-book No. 1433 had a credit of $4,000, but entered to that account on the credit side-book was $1,000, and to the depositor's account $1,000 on the individual ledger.

Q Did you inspect the teller's proof-book on that date? A Yes.

Q Did you find any overage? A No.

Q Now this particular account I am going to ask you about, look at the pass-book and what is disclosed there and tell us further what you found?

Mr. McCarter. I don't think the pass-book proves anything as against us.

The Court. I assume that if Mr. VanDerveer knows the handwriting of Mr. Smith, the purpose may be to show that the entries were in his handwriting.

Mr. Hinds. To refresh his recollection as to what he found. We do not intend to offer this as evidence, but simply to elicit further information from him as an accountant as to a feature which existed in this case which did not exist in the first case.

Mr. McCarter. I do not understand that Mr. Smith was a teller. I do not understand that he made these entries in these books, and I fail to see how this witness can refresh his recollection as to a line of proof he wants to make by referring to a pass-book which was the property of the depositors, not the bank. Counsel seems to think that all these are evidential, pass-books and everything else; I must say, he did not make this memorandum, and how can he refresh his recollection from something he found in this pass-book that he did not make, and Smith did not make.

The Court. I suppose the Court would be constantly embarrassed by questions of that kind by this method of proof. These things have not been proved, and cannot be proven in advance by this method of proof. I suggest that the proof be received and motion made later to strike it out if it is found not to be relevant.

Mr. Clark. We will prove that all the entries in the pass-books to which we refer were made in Smith's handwriting.

Q All the pass-books which you examined with reference to entries in your investigation were the entries all in the same handwriting? A It was.

Q In the cases where a deposit ticket was found was that in the same handwriting as the entry in the depositor's pass-book in each case? A It was.

Q (*By Mr. McCarter.*) Did you see the tickets? A Not all of them.

Q (*By Mr. Hinds.*) Did you in your examination find there was a deposit ticket in that same handwriting in the case of Cossick where the pass-book showed $4,000? A Yes.

Q And what did the deposit ticket show? A A credit of $1,000.

Q And by credit you mean deposit? A Deposit.

Q Turn to the next item.

The Court. Do you want that marked for identification in any way?

Mr. Hinds. Perhaps it is just as convenient not to.

The Court. Mr. VanDerveer has referred to the numbers of the pass-book; I suppose that is identification.

Q The next item is on April 17th, 1911, where we claim a loss of $451, pass-book 1651 of A. Magnani, administrator, what did your investigation disclose in that case? A No entry upon the credit side-book, but there was an entry in the ledger of $1 credited to that account.

Q And what was the entry in the pass-book? A $452.

Q And that was in the same handwriting as the other pass-book? A The same handwriting as the pass-book No. 1651.

Q Was there any overage in the teller's proof-book on that day? A No.

Q And the next item, No. 1652, same date, same man, and there will be four more of the same date, same man, the amount we claim is $1,999.12. What did you find on that date? A I found no entries on the credit side book, but a credit of $1 to that account in the depositor's ledger.

Q And what did you find in the pass-book? A A credit of $1,999.12.

Q And where you say credit you mean deposit? A Deposit.

Q Was there any overage shown in the teller's proof-book? A No.

George D. VanDerveer, direct.

Q And assuming the handwriting in the first book to have been that of Raymond E. Smith, in whose handwriting was the entry in the pass-book on this occasion?

Mr. McCarter. Objected to.

The Court. The objection will be sustained. He said they were all in the same handwriting.

Q Now we turn to the next item, which is pass-book No. 1653, same date, same Magnani, administrator, wherein we claim a loss of $1,198.12?

The Court. That is the one you just passed.

Mr. Hinds. I think that is the second one of the same account.

The Court. Not two of the same amount, according to your schedule here.

Mr. Clark. That $1,198 should be $1,998; it is an obvious mistake.

The Court. $1,998.12, one dollar less, $1,997.12.

Mr. Clark. It should be $1,999.12 with one dollar out, $1,998.

Mr. Hinds. The amount we claim is $1,198.12. I am asking the witness to explain what he found with reference to that item?

By the Court.

Q What is the number of the book? A 1653 according to my memorandum, and upon the book there is a deposit of $1,198.12. No entry upon the side-book of the item but there is a credit upon the ledger of $1 to that account.

Q What did the proof-book show?

The Court. He already says that on that date—

Q What is the date? A April 17, 1911.

The Court. He has already answered that question that on that date there was no overage.

Q The claim of loss respecting pass-book No. 1654, same day, same man, $597 loss, what did you find respecting that item? A A deposit credit upon the pass-book No. 1664 of

$598; no entry upon the side-book of that item, and a credit to the depositor's account of $1.

Q (*By the Court.*) Which you call the individual ledger? A Yes.

Q (*By Mr. Hinds.*) The next is No. 1654, duplicate, same man, same date, $1,320.58, what did you find respecting that item? A I found an entry of the deposit upon the pass-book No. 1654 at that time of $1,320.58. I did not find any entry upon the credit side-book, nor any account in the individual ledger.

Q From your inspection of the pass-book, did you find that that was the first entry, or had there been previous entries in the pass-book? A I don't remember, but I think it was the first entry.

Q And no account of it in the ledger? A None in the ledger.

Q The next item, same date, same man, pass-book No. 1655, respecting which we claim a loss of $528.10, what did you find there? A Found credit deposit upon the pass-book No. 1655 of $529.10; no entry upon the credit side-book, but a credit of $1 upon the individual ledger to that account.

Q On May 4, 1911, we claim a loss respecting pass-book 1697, name of F. Cardoni, $6,000, what did you find in connection with that item? A Found the pass-book had a deposit of $6,000 on May 4, 1911; no entry upon the credit side-book, nor any credit to the account in the individual ledger.

Q Turn back for a moment to these six Magnani items, did your investigation show, or did it not show that the entry of $1 in each case appeared in the ledger as having been deposited, as distinguished from the other amount in the pass-book? A My recollection is that it did.

Q The next is an item of January 1, 1912, according to pass-book No. 2045, James Crump, where we claim a loss of $5,800, what did you find? A I found on January 5th a memorandum—

Q Yes, that is correct, January 5, 1912.

The Court. "1st" is to be crossed out then in this schedule?

Mr. Hinds. May we do so? Change it to 5?

The Court. Yes.

Q January 5, 1912, what did you find? A I found upon pass-book 2045 a credit deposit of $5,800. There was no entry

upon the credit side-book of this item, nor any entry of the items to the depositor's account in the individual ledger.

Q Will you tell us about the proof-book of that date? A No apparent overage.

Q The next item, February 20, 1912, pass-book 2274, New Jersey Adamant Manufacturing Company, wherein we claim $5,000 to have been stolen, what did you find? A Found on pass-book 2274 a credit deposit of $5,000; found no entry upon the credit side-book nor any entry to the depositor's account on the individual ledger of any part of the amount.

Q And the proof-book? A Apparently proved, did prove.

Q Was that a new account, or old account? A I don't know.

Q You say you found no account— A Found no entry of the item or any part of it on the account.

Q Did you find any account at all? A I don't remember that now.

Q March 1, 1912, pass-book 2287, Benjamin Hewes, $999 claimed to have been lost, what did you find? A Found on pass-book No. 2287 a credit deposit of $1,000, but entered upon the credit side-book under that date is a credit to that account of $1, and the depositor's account-book recorded $1.

Q In the ledger? A In the ledger.

Q What about the proof-book? A No apparent overage in the proof.

Q By the way, in each instance you do not mean the general ledger? A I mean the individual ledger in the savings department.

Q Catherine Haney, pass-book No. 1928, we claim $9,000, what did you find there? A Found a credit upon the pass-book of $9,284.78, the entry on the credit side-book under that date to that account was $284.78.

Q And the proof-book? A In proof, no overage.

Q (*By the Court.*) How about the ledger? A Credit on the ledger, $284.78.

Q (*By Mr. Hinds.*) September 16, 1912, pass-book 2685, Peter Scola, $2,000, what did you find? A Found credit upon the pass-book No. 2685 of $2,000 on that date; no entry upon the credit side-book, nor any entry to the depositor's account in the individual ledger.

Q Any overage in the proof-book? A No overage.

Q August 2, and subsequent date, pass-book No. 2610, E. J. Brooks, what did you find in connection with that item? A I found on the pass-book an entry on August 2nd of $1,000; found also an entry August 7th on pass-book of $1,000; no entry appeared upon the credit side-book of either of those items on that date, but on August 13th there was an entry on the side-book of $1,000, as a credit to account No. 2610.

Q By credit you mean deposit? A Deposit, and it was credited to the depositor's account.

Q Did you find any such deposit as that you last mentioned on the pass-book? A Not on that date; there was no such deposit on August 13th on the pass-book. There was also on August 29th on the pass-book a credit of $1,000. This did not appear either upon the credit side-book nor upon the depositor's account in the ledger.

Q And did you on each of these dates look in the teller's proof-book to see whether there was any overage? A I did; there was none.

Q (*By the Court.*) How about an overage on August 13th? A It did not show any. This $1,000 was entered on the side-book and the teller's proof-book agreed with that.

Q (*By Mr. Hinds.*) March 7, 1912, book No. 2305, Reverend Joseph Heavey, $1,172 appears to have been abstracted, what did you find? A I found upon the pass-book on March 7, 1912, a credit deposit of $1,279. There was no entry in the credit side-book under this date, and no credit to this account, but on March 8th there appeared an entry to this account of $100, and a credit to the depositor's account.

Q Respecting that $100, was there any entry for that on March 8th in the pass-book? A None on the pass-book.

Q Did you find any deposit ticket? A No.

Q Now I will refresh your recollection on that and ask you whether you have seen that deposit ticket in your investigation. A Yes, I believe I have.

Q Do you wish to correct your testimony? A Yes, I had forgotten; it was a deposit slip for $100.

Q Is that in the same handwriting as the pass-book entry? A Yes.

Q I forgot to ask you about the proof-book? A It was in proof, no overage.

George D. VanDerveer, direct.

Q August 15th, 1912, pass-book No. 1383, Margaret E. Vale, $500, what did you find? A Found an entry on her pass-book of that date of $500, no entry made in the credit side-book of any credit to this account on that date.

Q And no overage in the proof-book? A No overage in the proof-book.

Mr. Hinds. That concludes the list of saving deposits abstractions and amount to $46,683.72.

Q Now turn to the items of alleged default from the commercial or demand accounts; take the account of Helen Marsh or Chauncey Marsh, of $13,704.60, the date does not appear in my copy here; what did you find respecting that account? A This is the checking account of Helen E. Marsh, Helen E., or C. H. On May 9th a credit account appears on the pass-book of $9,704,60, which was not entered upon the ledger nor in the credit side-book to that account.

Q What else? A September 16th, 1912, I found a credit upon the pass-book of the deposit of $4,000. This did not appear upon the credit side-book, nor upon the depositor's account in the ledger.

Q Did you look in the proof-book on both those dates? A Both dates, and there was no apparent overage.

Q Turn to the next item in the account of Catherine Haney, a commercial account, August 27th, 1912, $10,396.46? A On August 29, 1912—

Mr. McCarter. August 29th?

Witness. That is my memorandum.

Mr. Hinds. I think we will have to ask to change that to the 29th instead of the 27th.

The Court. If there is no objection it will be made.

Q What did you find on August 29th? A A credit on her pass-book of $10,396.46 and also a credit of $9,000; neither appeared upon the credit side-book nor were entered upon her account in the ledger.

Mr. McCarter. With reference to that last item there is no complaint about that.

The Court. I think Mr. VanDerveer was going to make some explanation.

Witness. I was. They will appear, perhaps, somewhere in the complaint as a savings account, because there seems to have been a transfer by someone from the checking account to the savings account of that $9,000 upon her book, but not upon the books of the bank.

Mr. Hinds. We claim no loss on that transfer from one account to another. We claim the loss mentioned in the original of each item.

Q Turn to the next item, apparently another account of Peter Scola. Did those credits in the Haney account go on the side-book or individual ledger. A No, neither.

Q And the proof-book? A Does not show any overage.

Q (*By the Court.*) What do you say that other entry was on that date? A $9,000.

Q (*By Mr. Hinds.*) I will ask you about September 16, Peter Scola, $3,000. I cannot give the pass-book numbers, because they were missing? A I found an entry upon his pass-book of the deposit of $3,000, which did not appear in either books of the bank and no account was opened with him on the individual ledger.

Mr. Hinds. We will ask the witness to omit the next item, as he has not investigated that.

Q Did you tell us about the overage on that? A There was no overage in the teller's proof.

Q The next item is that of December 12, 1910, pass-book 793, savings account, Emma E. O'Connor, $3,000; what did you find there? A Well, I found on December 10, there is an apparent withdrawal from that account of $3,000, and an entry was made on the debit side-book of that date as a charge of $3,000 to this account.

Q Of course you personally don't know whether she withdrew the money or not? A I do not.

Q Did you find anything in the pass-book to indicate that she withdrew that $3,000? A No.

Q Any entry of that? A No.

By Mr. McCarter.

Q May I get some information, Mr. VanDerveer, if I understand you correctly the deposit was not made until December

12? A That is the withdrawal we are talking of, Mr. McCarter.

Q This is quite different, I understand, from all the other items in that this is a withdrawal which may or may not have occurred and the others were deposits which were made and did not get into the books? A Yes, this was a withdrawal.

Q Was that a savings or commercial account? A That was a savings account, No. 793.

By Mr. Hinds.

Q What is the practice and what from your investigation of these books did you find to be the practice in the Roseville Trust Company respecting the withdrawal of funds, as to whether or not in the savings account the pass-book should be presented and charged with the withdrawal. A That is the rule, I understand, that the pass-book be presented with every withdrawal.

Mr. McCarter. I ask that that be stricken out.

The Court. It will be.

Q The next to the last item of this pass-book stealing occurred on October 14, 1911, pass-book 1144, savings department, Alma H. Mott, $6,500, what did you find there? A I found a charge against that account as a withdrawal on that date of $6,500, and the entry made of the same amount upon the debit side-book, and the account was charged with $6,500 on the individual ledger.

Q What did the pass-book show? A My recollection is it did not show any withdrawal at all.

Q Is that the book that was shown you as being the pass-book? A Yes.

Q And does that show any withdrawal on that date of any sum? A It does not.

Q And respecting these two last items where the books of the bank show the withdrawal, but the pass-book showed none, did you look at the proof-book? A Yes, they appeared to be in proof, were in proof.

Q In the ordinary course of business when a withdrawal had been made but was not entered on the pass-book or other books of the bank, what would the proof-book have shown?

George D. VanDerveer, cross.

The Court. You see that is not the condition; you are asking a question which is not based upon the testimony. Mr. VanDerveer says it was in the other book.

Q Then let us assume a credit was made erroneously, an honest mistake, on the books of the bank, the debit book and the withdrawal ledger, through some error, but that as a matter of fact no withdrawal had been made, that the money had not been abstracted by anybody, what would have occurred then on the proof-book? A The proof would have shown an overage in the cash.

Q But you found no overage on those dates? A No.

Q From your examination of the books and your familiarity with the system of banking, assuming that the man whose handwriting—that the handwriting in the several pass-books is that of Raymond E. Smith, what is your opinion as to what actually occurred respecting those several losses?

Mr. McCarter. Objected to. That is for the jury to say.

Mr. Hinds. We have a right to his opinion; he is an expert.

The Court. I have some doubt of that.

Mr. Hinds. May we postpone your decision on that then, until later?

The Court. Yes.

Cross examination by Mr. McCarter.

Q What books in the savings department, exclusive of pass-books, were kept by this institution, from your investigation? A The debit and credit side-books and the individual ledger.

Q What do you mean by the debit and credit side-books? A I mean by credit side-book a book in which the various deposits on each day were entered.

Q That is to say, a depositor would come in and deposit a thousand dollars with the bank teller, and he was supposed, or whoever received it, was supposed to enter in what you call a credit side-book the thousand dollars received? A Well, someone was supposed to do so; I don't know whether the receiving teller himself did or some other clerk, but that would be the process.

Q And then later on someone was supposed to enter in an individual ledger in the name of the depositor a credit of a thousand dollars? A To that account.

Q So those two entries in the regular course of business should have appeared on the books of this company in each one of these cases? A Yes.

Q Then, of course, the depositor would have the pass-book in which he would get presumably the ordinary entry, and he would make out a ticket and that ticket would be left with the bank? A I don't know whether the depositor always made out the deposit slip.

Q There would be a deposit ticket in which the entry would be supposed to be made of the deposit? A There ought to be a deposit ticket.

Q (*By the Court.*) Was that the usual practice from what you found? A Yes.

Q (*By Mr. McCarter.*) Where would the ticket be kept? A When?

Q During the life of the bank? A I don't know.

Q You took hold of these books after the bank was closed? A Oh, yes; sometime.

Q Did you examine at all for the department during the life of the bank? A No.

Q To your knowledge, did the same person act as receiving teller for the savings account as for the regular account? A I think so, Mr. McCarter; I am not sure about that; I think they only had the one.

Q And you learned, did you not, that they had a receiving and paying teller? A Yes.

Q Do you remember their names? A I think the receiving teller's name was Jennings, and, if they had a paying teller, it may have been Thompson; I am not very clear about that.

Q Did you find any entries of any of those items which did not appear on the side-book or individual ledger made on memorandums or sheets of papers? A I do not exactly understand you, Mr. McCarter. Do you mean sheets separate from the books?

Q Yes. A Well, there was one or two deposit tickets discovered in connection with these items, if that is what you mean; I know of no other memorandums.

Q Does your memorandum enable you to tell us what these one or two deposit slips were? A No; but they are in the box.

Q When you speak of deposit slips, do you mean regular deposit slips? A I mean regular deposit slips.

Q Did you find, except in one or two instances, all the deposit slips missing? A I did not look for them, but they were not produced by anybody to me, excepting two or three that were apparently laid away carefully by Mr. Smith.

Mr. McCarter. I move that that be stricken out.

The Court. It will be.

Q Where did you find these two or three deposit slips? A I did not find them.

Q You said you were both an accountant and a lawyer; how do you know, if you did not find them, that they had apparently been laid away by Mr. Smith? You did not even find them. A Well, I know where they came from.

Q Somebody told you? A No; not exactly that.

Q You did not find them yourself? A No; but I saw them found.

Q In which accounts were they? A One in the Sharwell account and the other, $5,800, the Crump account.

Q To both of which you referred? A Yes, sir.

Q With those exceptions you had no deposit slips shown you? A Except one or two small ones that I testified to this morning.

Q How many deposit slips did you see? A I think there were four or five.

Q Now, this bank, I think, closed about the 14th of August, 1913? A That is my recollection.

Q When did your examination commence? A Where, on this part of the work?

Q Of course, I have not talked about anything else. A Well, I went there right away, but I did not examine this particular branch of it until later in the year.

Q When was that? A Along in December, I think, or just before the first of December.

Q Were other people there examining on behalf of the department besides yourself? A Oh, yes.

Q Who? A Mr. Vredenburgh was there, Mr. Fergusen, Mr. Dillison, Mr. Grosscup, I remember, and I don't know whether there were any others or not; I have forgotten.

George D. VanDerveer, re-direct.

Q Had the depositor's books that you examined been collected from the several depositors before you commenced your work on this branch of the case? A Yes.

Q Who had collected them? A I don't remember; whoever was on the case had to collect at the time when they came in.

Q Were these books loose-leaf books? A What, the pass-books? 10

Q Not the pass-books, but the regular books themselves. A The ledgers were.

Q Loose-leaf ledgers? A Loose leaf.

Q They are here; won't you pick them out? A The ledgers for these various accounts?

Q The ledgers you looked at—the individual ledgers. A Yes; these are here.

Q Won't you pick them out and show them to us? A Surely.

Q The three books that are before us on the table are what, 20 Mr. VanDerveer? A Individual depositors' ledger in the savings department.

Q And they are in each case loose leaf? A Loose leaf.

Q Any one of these pages can be abstracted and substituted with another? A With the proper utensils; yes sir.

Q What are the proper utensils? A There is a key of some kind that unlocks it.

Q And it was one or the other of these three books that you looked into with reference to the savings bank account that you testified about? A Yes; perhaps all of them.

Q Was Smith there during your examination? A He was 30 there all the time during the period I was there; I don't know whether he was there when I was looking at this particular line or not; I think he had gone again, then.

Q Did he aid you any? A No.

Q All the testimony that you have given was readily ascertainable by your own examination of the books? A Yes.

Q Very obvious, wasn't it? A Quite.

Re-direct examination.

Q Credit side-book and debit side-book you have mentioned, 40 were they loose leaf? A No.

Q Or the teller's proof-book? A No.

Q Or the general ledger? A I had nothing to do with the general ledger.

William J. Thompson, direct.

Q How about the pass-books? A The pass-books are not.

WILLIAM J. THOMPSON, sworn for the plaintiff.

Direct examination by Mr. Hinds.

Q What was your occupation, Mr. Thompson, between 1909 and 1913? A I was employed by the Roseville Trust Company in different capacities.

Q Will you take us through that period and tell us as nearly as you can what different capacities? A I started in as bookkeeper; then I was—

By the Court.

Q When? A At the time the bank opened.

Q That was 1908? A 1908 or 1909; I don't just remember. December of 1908, I think. And was afterwards made receiving teller. At the time the bank closed I was paying teller.

By Mr. Hinds.

Q Do you recall when you ceased being receiving teller? A I acted generally as receiving and paying teller towards the end of the bank's career. I think I was made receiving and paying teller sometime in the late spring or early summer of 1913.

Q Do you recall when it was that you moved from bookkeeper to receiving teller? A No, I don't; I think I was teller for approximately a year.

Q Who was the secretary and treasurer of the trust company during that period? A Raymond E. Smith.

Q You are familiar, of course, with his handwriting? A I am; yes.

Q Will you take these books that I show you and look them over and tell me what books those are, in general; I will take up each one separately later? A They are, with the exception of three, they are all pass-books of different depositors in the savings department of the trust company; three of them are pass-books of commercial accounts.

Q You have had those in your hand before, haven't you? A I don't know that I have had all of these in my hand; I probably have.

Q You are fairly familiar with those books? A Yes, sir.

William J. Thompson, direct.

Q Take the one on top—is that pass-book No. 115? A No. 115.

Q Shown the date December 18, 1911, see if you find there an entry of $5,112.80. A December 18, 1911, $5,112.80.

Q In whose handwriting is that? A Smith's.

Q A deposit or withdrawal? A Deposit.

Q Do you find a deposit ticket there in the book? Look in the envelope. A I find a ticket, a deposit slip.

Q In whose handwriting is that ticket, and what does it show? A This gives the amount and—

Q What is the amount? A $5,112.80.

Q Can you recognize the handwriting? A Smith's handwriting.

Mr. Hinds. I offer in evidence the pass-book and deposit ticket.

Mr. McCarter. Objected to until it is proven that the deposit was made.

Mr. Hinds. Without any other reason, it is an admission by Smith that he received the deposit; he was a principal at the time, and admissions are binding upon the sureties made during a time the relationship existed, so it would be an admission by the principal that he received a deposit to that amount, since it is an entry to that effect in his own handwriting made contemporaneously.

The Court. They may be marked for identification.

Same marked P. 1 and P. 2 for identification.

The Court. My inclination would be to admit them, but I have not so ruled and will rule later.

Q Is the next one E. J. Cossick? A Yes.

Q Turn to January 11, 1911, and see if you find an entry of a deposit of $4,000. A I do.

Q In whose handwriting? A Smith's.

Q Is there any deposit ticket in that book? A There is.

Q In whose handwriting is it? A Smith's.

Q What does it show?

Mr. McCarter. Objected to.

A $1,000.

William J. Thompson, direct.

The Court. Those will be similarly treated.

Same marked P. 3 and P. 4 for identification.

Q The next one I believe is pass-book No. 1651, is that right? A Yes, sir.

Q Will you turn to April 17, 1911, and see if you find a deposit of $452 to A. Magnani? A $452, April 17, 1911.

Q In whose handwriting? A Smith's.

Q Is there any deposit ticket in the book? A There is not.

Same marked P. 5 for identification.

Q Is the next one No. 1652? A Yes, sir.

Q Same man? A Yes, sir.

Q April 17, 1911, do you find a deposit entry of $1,999.12? A I do.

Q In whose handwriting? A Smith's.

Q Any deposit ticket there? A No.

Same marked P. 6 for identification.

Q The next one is No. 1653, is it—Mr. Magnani? A Yes, sir.

Q April 17, 1911, you have a deposit entry of $1,199.12? A I have.

Q Whose handwriting? A Smith's.

Q Any deposit ticket there? A No.

Same marked P. 7 for identification.

Q The next is No. 1654, A. Magnani, administrator? A Yes.

Q April 17, 1911, do you find a deposit there of $598?

The Court. Let me call your attention again that you have apparently, reading from your minutes, mentioned the inaccurate amount of pass-book No. 1653; you have given the amount of pass-book 1652 in your question, $1,119.12, instead of $1,198.12.

Q I show you P. 7 for identification; what is the entry on April 17th, 1911? A $1,199.12.

Mr. Clark. That should be changed on the schedule.

The Court. It will be changed to $1,199.12, less $1, leaving $1,198.12.

William J. Thompson, direct.

Q Now, No. 1654, I ask you whether on April 17th you find a deposit entry of $598? A I do.

Q In whose handwriting? A Smith's handwriting.

Q Is there any deposit ticket in the book? A No.

Same marked P. 8 for identification.

Q I show you No. 1654, pass-book, duplicate, do you find A. Magnani, administrator? A Yes.

Q April 17, 1911, see if you find a deposit entry of $1,320.58? A I do.

Q In whose handwriting? A Smith's.

Q Any deposit ticket in there? A No.

Same marked P. 9 for identification.

Q The next number, 1655, A. Magnani? A Yes.

Q Turn to the same date, April 17, 1911, do you find a deposit entry of $529.10? A I do.

Q In whose handwriting? A Smith's.

Q Is there a deposit ticket in there? A No, there is not.

Same marked P. 10 for identification.

Q Is the next book No. 1697, F. Cardoni? A Yes.

Q May 4, 1911, a deposit entry of $6,000? A $6,000.

Q In whose handwriting? A Smith's.

Q Any deposit slip? A No deposit slip.

Same marked P. 11 for identification.

Q Do you find the next book that of James Crump, No. 2045? A I do.

Q January 5, 1912, see if you find a deposit entry of $5,800? A I do.

Q In whose handwriting? A Smith's.

Q Do you find a deposit ticket? A I do.

Q Of what date? A January 5, 1912.

Q And what amount? A $5,800.

Q In whose handwriting? A Smith's.

Q Do you find a figure in the upper left-hand corner? A The figure 0.55.

Q Does that signify anything to you? A It does not signify anything to me.

Same marked P. 12 for identification.

Deposit ticket marked P. 13 for identification.

Q No. 2274 next? A 2274.

Q New Jersey Adamant Manufacturing Company? A Yes.

Q Turn to February 20, 1912, and see if you find a deposit entry of $5,000? A I do.

Q Is there any ticket there? A Yes.

Q In whose handwriting is the ticket? A Smith's.

Q What date? A February 20, 1912.

Q What amount? A $5,000.

Book marked P. 14 for identification.

Ticket marked P. 15 for identification.

Q Referring to all these deposit tickets you found can you identify them other than by the fact that they are in Mr. Smith's handwriting—that is, from the printed matter, size, shape, &c.? A They are the tickets that were used in the savings department of the trust company.

Q The next is that of Benjamin Hewes, No. 2287? A Yes.

Q Turn to March 1, 1912. Do you find a deposit there of $1,000? A I do.

Q In whose handwriting? A Smith's.

Q Do you find a ticket there? A I do.

Q What is the amount of the ticket? A $1.

Q In whose handwriting? A Smith's.

Q What date? A The date has been changed. It looks as if it might have been February 27, but changed to March.

Q In whose handwriting? A Smith's.

Said book marked P. 16 for identification.

Said deposit slip marked P. 17 for identification.

Q Next, No. 1928, Catherine Haney? A Yes.

Q Do you find on August 23rd a deposit of $9,284.78? A I do.

Q In whose handwriting? A Smith's.

Q Is there a deposit ticket there? A There is not.

Said book marked P. 18 for identification.

Q Peter Scola, No. 2685? A Yes.

Q Turn to September 16, 1912, and see if you find a deposit entry of $2,000? A I do.

William J. Thompson, direct.

Q In whose handwriting? A Smith's.
Q Do you find any deposit ticket? A No deposit ticket.

Same marked P. 19 for identification.

Q Pass-book No. 2610, of E. J. Brooks; do you find on August 2nd a deposit of $1,000? A I do.
Q And on August 7th a deposit of $1,000 in the book? A I do; yes, sir.
Q And on August 29th a deposit of $1,000? A I do.
Q In whose handwriting are those three? A Smith's.
Q Do you find a deposit on August 13th of $1,000? A I do not.
Q Is there any ticket there? A No.

Said book marked P. 20 for identification.

Q Pass-book No. 2305, Reverend Joseph Hevey? A Yes, Reverend Joseph Hevey in trust for Dennis Hevey.
Q Do you find on March 7, 1912, a deposit of $1,279? A I do.
Q In whose handwriting? A Smith's handwriting.
Q Any deposit slip there? A There is.
Q In whose handwriting? A Smith's.
Q What is the amount? A $100.
Q What date? A March 8th, 1912.

Said book marked P. 21 for identification.
Said deposit slip marked P. 22 for identification.

Q Pass-book of Margaret E. Vale? A Yes.
Q What is the number? A 1383.
Q Do you find on August 15, 1912, an entry showing a deposit of $500? A I do.
Q In whose handwriting? A Smith's.
Q Is there a ticket there? A There is not.

Said pass-book marked P. 23 for identification.

Q Do you find a pass-book in the name of Helen Marsh, or Chauncey Marsh? A I do.
Q Is it numbered? A No.
Q Do you recognize that as a pass-book of or in the Roseville Trust Company? A I do.
Q In the commercial department? A Yes.

William J. Thompson, direct.

Q Look on May 9, 1912, and see whether you find a deposit entry for $9,704.60. A I do.

Q And one of $4,000 in September? A I do.

Q What is the date of the $4,000? A September 16, 1912.

Q Are they both in Smith's handwriting? A They are.

Q Do you find any deposit tickets? A No, I do not.

Said book marked P. 24 for identification.

Q Do you find that of Catherine Haney? A I do.

Q Is that a pass-book which was in use in the Roseville Trust Company? A It is.

Q August 27, 1912, do you find a deposit entered of $10,396.46?

The Court. That was charged to the 29th.

Q On August 29th? A August 29th, $10,396.46.

Q In whose handwriting? A Smith's handwriting.

Q Any deposit ticket in the book? A There is.

Q In what handwriting is the ticket? A The name and date and the two separate amounts are, as I remember it, in the handwriting of Mrs. Haney; the total $10,396.46, is in Smith's handwriting.

By the Court.

Q What do you say is in Smith's handwriting? A The total.

Q And what is in Mrs. Haney's? A Two separate checks entered on the deposit ticket, and the name and date.

By Mr. Hinds.

Q What do you find in the upper left-hand corner of the ticket? A The figures 055.

Pass-book marked P. 25 for identification.

Deposit ticket marked P. 26 for identification.

Q September 16, 1912, Peter Scola, do you find a deposit on that date of $3,000? A I do.

Q In whose handwriting? A Smith's.

Q Any ticket there? A No.

Same marked P. 27 for identification.

Q Do you find the savings deposit-book 793 of Emma E. O'Connor? A I do.

William J. Thompson, direct.

Q Turn to December 12, 1910, and tell me whether you find a withdrawal of $3,000. A Not on the book; no sir.

Q (*By the Court.*) On the pass-book, you mean? A Not on the pass-book.

Q (*By Mr. Hinds.*) Do you find there a savings draft form? A I do.

Q Do you find any part of that to be in Smith's handwriting? A All of it.

Q What date? A December 12, 1910.

Q Do you find there a signature of Emma E. O'Connor? A I do.

Q In whose handwriting? A Smith's.

Said pass-book marked P. 28 for identification.

Said savings draft marked P. 29 for identification.

Q Look at the draft again and tell me whether there is any indication on there that it has been paid?

Mr. McCarter. I do not think these papers are substantative proof of the fact. If it is just a description of what the paper has on it, that is a different thing, but our idea is that we can satisfy your Honor that the documents themselves, that is to say, Smith's written admissions, while they may be binding on him, cannot be binding on us.

The Court. The question may be answered.

A There is no indication on there that the draft has or has not been paid.

Q Are you familiar with the practice that existed in the Roseville Trust Company respecting the payment of drafts? A I am.

Q Was there any practice as to making any endorsements on the draft if it was paid?

The Court. From the savings account, you mean?

Mr. Hinds. Yes.

A No. That is, may I explain that, a draft of that kind, there would not be any indication on it that it was paid.

The Court. What is that in the form, a receipt?

Mr. Hinds. A sort of combination receipt and draft and refers to the number of the pass-book.

Q Do you find the books there of Alma M. Mott? A I do.
Q Savings pass-book? A Yes.
Q No. 114? A Yes.
Q Look at October 14, 1911, and see if you find any entry there showing a withdrawal of $6,500? A I do not.
Q Is there any entry on that date of withdrawal? A October 14, 1911?
Q Yes. A There is not.
Q Is there a draft there? A There is.
Q In whose handwriting is the draft? A Smith's.
Q Is there a signature there, "Alma M. Mott"? A There is.
Q Whose handwriting is that? A Smith's.
Q For what amount? A $6,500.
Q What date? A October 14, 1911.

Said book marked P. 30 for identification.
Said draft marked P. 31 for identification.

Q I show you a book marked "Ledger, Special department," being one of the ledgers concerning which Mr. VanDerveer testified on cross examination, and ask you if you can tell me what that book is? A It is one of the ledgers holding the balance of accounts in the savings department, the accounts that range from No. 1 to No. 1450; it is one of a series of ledgers.

Said book offered in evidence and marked Exhibit P. 32.

Q I show you another of the three books you heard Mr. VanDerveer speak of on cross examination. What is that book? A The same kind of ledger containing the balance of accounts from No. 1450 to No. 2549 inclusive; the second of the series.

Said book marked Exhibit P. 33.

Q The third book of the three discussed by Mr. VanDerveer I show you, what is that book? A It is the third of the series of savings accounts, this one containing balance of accounts from No. 2550 to No. 3422 inclusive.

Said book marked Exhibit P. 34.

Q Would it be correct to describe those books as individual savings account ledgers? A That would be correct.
Q (*By the Court.*) I notice you say those books contained the balances; do they contain only the balances? A Balances and entries.

William J. Thompson, direct.

Q (*By Mr. Hinds.*) Will you take these five books, and take them in order, and tell the jury what each one is giving the period, so I can have them offered in evidence? A The first of these books is the debit side-book in the investment department or savings department, covering a period from June 11, 1912, to May 31, 1913.

Q Is that book arranged by dates, or by depositors? A Well, it is arranged by dates, and then each day's work is arranged in numerical order, the accounts in the savings department being given numbers and that is the identification, rather than the name.

Q Did you ever keep a debit side-book while in the bank? A I did.

Q And was the system throughout the period of your connection with the bank the same as during the time you kept a debit side-book? A It was.

Q What was the system respecting the debit or withdrawal side-book in the savings department? A That the deposit ticket, or the draft on the account, was entered in the side-book either before or after the entry was made in the ledger, and the total of the book and the total of the deposit ticket were to agree with the totals as secured in the teller's cages.

Q Upon what information did the person making the entry in the debit side-book make such entry? A From the original draft.

Q And in the case of the credit or deposit side-book, what was the information from which the entry was made? A From the deposit ticket.

Q In the ordinary course of business in your institution, and assuming no irregularity, what fact would be indicated by the fact that on a given date there appears to be no entry opposite the name of a given person in the credit or deposit side-book? A You mean that—

Q Suppose you look in the credit side-book and find that on such and such a date, say February 12, 1910, that John Jones has no entry at all respecting him, what does that indicate to you respecting the deposit book? A It would indicate that there had either been a mistake made in the teller's work on that day, which should show in his proof, or that the money had gone somewhere other than through the regular channel.

William J. Thompson, direct.

Q Now, suppose there were no overages shown in the teller's proof-book—

Q (*By the Court.*) Would not it mean one other thing. Might it not mean that he made no deposit? A No, sir, it would not mean that, because if he had not made a deposit it would not be entered in his deposit book.

The Court. I am not sure that that was included in the question.

Mr. Hinds. No, it was not.

Q (*By Mr. Hinds.*) What would be the significance of there being no such entry with respect to coming or not coming through of a deposit ticket, if you find no entry in the side-book? What does that mean respecting a deposit ticket coming through or not coming through? A Well, if the deposit ticket came through without the amount represented on the deposit ticket it would mean that there was a difference in the teller's cage. If the deposit ticket did not come through it would mean that the money and deposit ticket had been withheld.

Q Suppose that the teller's proof shows no overage and suppose that you found no entry on that date in the deposit side-book you would say, would you not, that no deposit ticket had reached the clerk who made the entry in the side-book?

Mr. McCarter. Objected to as pure hypothesis.

The Court. It seems to me from what he has previously said that that answers itself.

(Question read.)

The Court. The question may be answered.

An exception to this ruling is noted by defendant as ground of appeal.

A I forget now, myself, the gist of the question.

Q (Question read.) A I would say that no deposit ticket had reached the clerk who made the entry in the side-book.

By the Court.

Q Provided he made no omission. A In view of the fact that he and others handling the deposit tickets are surrounded by checks on their work I would say the deposit ticket had not reached him, regardless of whether he had made a mistake in the day's work, or not.

William J. Thompson, direct.

Mr. McCarter. I move the answer be stricken out because he is taking into consideration other elements than those included in the question.

Q What are those checks you refer to? A The checks I refer to are the different totals that accrue. For instance, the teller's department, he would have a total on the deposit tickets of that day; the bookkeeper would have a total for the deposit tickets of the day; the clerk handling the investment side-book would have his total. All three totals necessarily must agree before the work is correct, and if there be a difference in the total that accrued say to the clerk entering this book, the difference must be corrected and the work proven before the day's work will show absolute proof.

The Court. With that explanation the objection will be overruled.

An exception to this ruling is noted by defendant as ground of appeal.

By Mr. Hinds.

Q Let us suppose first, the teller's proof shows no overage and no shortage, and let us suppose we find on a certain date in the credit side-book a deposit to a certain depositor's credit of $100, what fact does that indicate to you respecting the deposit ticket? A It indicates to me that the deposit ticket for $100 was put through the receiving teller's cage and the other departments, and that the $100 represented on that deposit ticket was really received by the receiving teller.

Q And would your answer be the same even though you were not shown and could not find at this date the actual ticket itself, just merely from the inspection of the deposit side-book, and reflected by an inspection of the receiving teller's proof, which is in proof? A I should say so, yes, sir.

Mr. Hinds. I offer in evidence the debit side-book which he has identified.

Q I will ask one other question about the debit side-book. Suppose you find in the debit side-book on a given date against a given depositor an item of withdrawal in the ordinary course of business, assuming the teller's proof-book was in proof, what would that indicate to you as to the coming through or not

coming through of a debit ticket from the teller? A It would indicate that a debit ticket had gone through the regular channels.

Q Of that amount? A Of that amount.

Said book offered in evidence and marked Exhibit P. 36.

Q Concerning the book which has just been offered in evidence, do you find anything except debit entries there? A I do; there are credit entries covering deposit checks received from November 18, 1912, to May 31, 1913.

Q Are those in a separate part of the book? A There is a division made between the debits and credits by leaving a number of pages blank.

By the Court.

Q Both debit and credit in one book? A Yes, sir.

Q (*By Mr. Hinds.*) Is that true of most of the books, or do they have separate books for debit and credit? A We had separate books for debit and credit.

Q (*By the Court.*) Does that mean the investment department? A Yes, sir.

Q Then you had two debit books running through a period? A No, sir, one debit book.

Q You said the one that has just been marked ran from June 11, 1912, to May 31, 1913? A Yes, sir.

Q And the other, this one, runs from June 11, 1912, to May 31, 1913? A That represents debit entries, not credit entries; They are both in the same book.

The Court. Oh, that is the same book.

By Mr. Hinds.

Q What is the next book? A Credit-book No. 1, in the investment department covering a period from December 1, 1908, to April 24, 1911.

Q Do you find any debits in that book? A No, I do not.

Q All deposits? A All deposits.

Said book offered in evidence and marked Exhibit P. 36A.

RECESS.

William J. Thompson, direct.

Q Will you tell us what the next book is? A Credit side-book, investment department, covering the period from April 25, 1911, to November 16, 1912.

Q And nothing in that but savings department? A That is all.

Q (*By the Court.*) That is credit? A Credit-book, yes, sir.

Said book offered in evidence and marked Exhibit P. 37.

By Mr. Hinds.

Q What is the next book? A Investment department, debit side-book covering the period from December 22, 1908, to June 10, 1912, debits only.

Said book offered in evidence and marked Exhibit P. 38.

Q Debit, of course, means withdrawals? A Withdrawals.

Q (*By the Court.*) Those books there are all the debit and credit side-books from the time of opening the bank up to May 31, 1913? A I presume so, sir, I don't know just the periods, nor whether they run in succession, or not.

Q (*By Mr. Hinds.*) What is the book you have in your hands? A Investment department, debit side-book, covering the period from June 2, 1913, to August 13, 1913.

Same offered in evidence and marked Exhibit P. 39.

Q (*By the Court.*) It contains credits also? A Debits, only, sir.

Q (*By Mr. Hinds.*) Here is one other book? A Investment department credit side-book, covering a period from June 2, 1913, to August 13, 1913.

Same offered in evidence and marked Exhibit P. 40.

Q (*By the Court.*) That is the date the bank closed? A Yes, sir.

Q (*By Mr. Hinds.*) State in general what those three books are that I now show you? A Receiving teller's proof-books.

Q You recognize those as books in use in the Roseville Trust Company? A I do.

Q Between what dates is the one you now have in your hand? A December 6, 1910, to April 8, 1912, inclusive.

Said book offered in evidence and marked Exhibit P. 41.

William J. Thompson, direct.

Q What is the next book? A This is the second of the receiving teller's proof-books covering a period between April 9, 1912, and May 27, 1913, inclusive.

Same offered in evidence and marked Exhibit P. 42.

Q What is the next? A The third of the series of receiving teller's proof-books covering a period from May 28, 1913, to August 13, 1913, inclusive.

Same offered in evidence and marked Exhibit P. 43.

Q What is the book which I now show you? A Paying teller's proof-book.

Q For what period? A November 17, 1911, to June 30, 1913, inclusive.

Q You recognize that as a book that was in use in the trust company? A I do.

Said book offered in evidence and marked Exhibit P. 44.

Q What is the next one? A The second of the paying teller's proof-books, covering a period from July 1, 1913, to August 13, 1913, inclusive.

Same offered in evidence and marked Exhibit P. 45.

Q What is this book which I now show you? A That is the credit side-book in the commercial department; it is a record of all deposits made to the commercial accounts from November 5, 1910, to July 20, 1912.

Said book offered in evidence and marked Exhibit P. 46.

Q Did those comprise any particular part of the alphabet? A Subdivision of the alphabet covering from M to Z.

By the Court.

Q Are they entered alphabetically? A Yes, sir; there may be four or five different sets of alphabets in one day.

Q The book is not subdivided alphabetically? A No, sir; simply day by day.

By Mr. Hinds.

Q What is this book? A This is A to L, credit-book in the commercial department, covering the period from April 9, 1912, to August 13, 1913.

William J. Thompson, direct.

Said book offered in evidence and marked Exhibit P. 47.

Q (*By Mr. McCarter.*) The first ledger runs from M to Z, therefore do you have any particular page for "McCarter"? A No, sir, the books are sorted alphabetically, then subdivided into two groups, one from A to L and the other M to Z and then they are entered in the particular date in this book indiscriminately.

Q (*By Mr. Hinds.*) What is the next book? A The credit side-book covering the accounts from M to Z, for the period from July 22, 1912, to August 13, 1913.

Said book offered in evidence and marked Exhibit P. 48.

Q What is this book I now show you? By the way, those are not all of the credit side-books in the commercial department, those three? A I did not notice the period they cover. This is the cash-book. It is really the total of the entries to be made in the general ledger; the debit and credit cash-book.

Q Covering any particular period? A From April 30, 1913, to August 13, 1913.

Said book offered in evidence and marked Exhibit P. 49.

By the Court.

Q That does not mean the individual cash, does it? That is carried into that in bulk? A That is in bulk in that book, yes, sir.

Q Except for that it does not carry the items of individual cash, does it, that book? A No, sir, it carries the total of the general ledger charges.

Q But not the total of cash transactions with customers? A No, sir.

By Mr. Hinds.

Q What is this book? A This is the cash-book that covers the period from May 10, 1912, to April 29, 1913.

Said book offered in evidence and marked Exhibit P. 50.

Q Who kept the general ledger? A Different ones of us; I kept it for quite a period of time.

Q I show you another book, what is that? A That is the general ledger covering the period from October 23, 1911, to August 13, 1913.

William J. Thompson, direct.

Q In whose handwriting do you find that was kept? A Smith's.

By Mr. McCarter.

Q The whole book? A I have not gone through it entirely, sir. I believe this book was kept by Smith entirely. I kept it previous to this time.

Q That is, you kept the general ledger prior to this volume of the general ledger? A Yes, sir.

Q But this volume is entirely in Smith's handwriting? A Smith's.

Said book offered in evidence and marked Exhibit P. 51.

By Mr. Hinds.

Q What is this book? A This is an individual ledger for the accounts between G and M inclusive.

Q What department? A This is in the commercial department.

Said book offered in evidence and marked Exhibit P. 52.

By the Court.

Q Can you state between what dates that is? A That would cover the entire period of the bank's activities with non-active accounts. If an active account during that period had too many pages they would be taken out and put in a transfer binder.

Q It is a loose-leaf ledger? A Yes, sir.

Q Covering from the opening of the bank down to the date it closed? A Yes, sir.

By Mr. Hinds.

Q What is this book? A First of the individual ledgers in the commercial department containing all accounts from A to G.

Said book offered in evidence and marked Exhibit P. 53.

Q What is this book? A Individual ledger including accounts from M to Z inclusive.

Said book offered in evidence and marked Exhibit P. 54.

Q (*By the Court.*) Commercial department? A Yes, sir.

William J. Thompson, direct.

Q (*By Mr. Hinds.*) Do you recognize this book? A Yes, I do. That is the bills payable book.

Q Does that mean obligations due by the trust company, or obligations due to the trust company? A Obligations due to the trust company.

Q (*By Mr. McCarter.*) Bills receivable? A Bill purchased, that is what it is, notes discounted in the bank.

Q (*By Mr. Hinds.*) And how are those pages arranged, by date or number? A By dates.

Q (*By the Court.*) Arranged according to their maturity dates? A The maturity date appears here, but they are arranged according to the date of discount.

Q (*By Mr. Hinds.*) Any particular period, or does that cover the entire history of the bank? A This is the complete story; covers the history of the bank.

Said book offered in evidence and marked Exhibit P. 55.

By the Court.

Q Was there any particular time with reference to an account when the earlier pages were taken out and transferred to a separate book? A Yes, sir—was there any particular time?

Q I don't mean with reference to date, but the time the account had run? A No, sir; depend entirely upon the activity of the account, to keep the ledger from becoming too bulky we would transfer the sheet from a very active account to a transfer binder; that binder would relate only to accounts in the commercial department.

Q And the number of sheets that would be left in the individual ledger would depend upon the length of time the account had run, or the number of sheets? A Depend upon the number of sheets.

Q How many sheets would you retain in the individual ledger? A Retain all the sheets if the book had not been balanced; if the book had been balanced we would retain all the sheets covering the period of time from the time the book was last balanced.

William J. Thompson, direct.

By Mr. Hinds.

Q Do you recognize that object? A Transfer binder of the savings department, investment department, all accounts from account No. 1 to account No. 2383.

Said book offered in evidence and marked Exhibit P. 56.

Q I show you the credit side-book for the period including December 18, 1911, and ask you to turn to that page and tell us what the exhibit number is?

Mr. Clark. That is P. 37.

Q Do you recognize the handwriting with which that page work was made? A The date was what?

Q December 18, 1911? A Yes.

Q Whose? A Why, Miss Hicks, that we had as a stenographer in the bank.

Q Do you find any entry there of a deposit by R. Sharwell, pass-book 115, of $5,112.80, or any other amount? A I do not.

Q Now look at the day before and day after and see if you find any such deposit or any other deposit to that account?

The Court. Why do you go into this when it has already been admitted on Mr. VanDerveer's testimony? I understand this is not what is going to be required. If I am wrong about that I want to be corrected. It seems to me that that was the very thing about which you questioned Mr. VanDerveer, and Mr. VanDerveer said there was no entry. Why go over that again when an examination of the books would undoubtedly verify Mr. VanDerveer's testimony?

Mr. Hinds. There is one point that probably can be cleared up by stipulation. Mr. VanDerveer was not clear whether the man who received the deposit was or was not the man who made the entries in the side-book, or ledger; and that would be an element, because we wish to show there was a person independently operating who kept the side-book and ledger, and not Mr. Smith, so it would be necessary for him to state in whose handwriting it was in each case, unless they would concede that those entries were made by other clerks than Mr. Smith.

Mr. McCarter. We do not know anything about it; we have not been permitted to examine the books.

Mr. Clark. You have not been excluded from the books; they have been available for two or three years.

The Court. Of course, if you are not willing to acceed to it—

Mr. McCarter. We do not know, because we have never been apprised of it at all.

The Court. Of course if the mere purpose is to show there was no entry corresponding with those credits upon the pass-book, then, as I have said, that has already been covered by Mr. VanDerveer's testimony. If there is any other purpose, you may proceed.

Q (Question read as follows): "Now look at the day before and day after and see if you find any such deposit, or any other deposit to that account?" A I do not.

Q Now, look at the individual savings deposit ledger comprising that account and state whether you find a record of a deposit on that date to the account of R. Sharwell, of $5,212.80, or any other amount? A I do not.

Q What handwriting do you find in that account in the individual ledger for that date, or a week or so each side? A There is an entry here on December 13, 1911—

The Court. December 18, 1911, was the date.

Witness. He was asking me whether there was an entry within a week of that date. There is no entry on December 18th. The nearest date is November 13th, 1911, $148.26 in Smith's handwriting—no it is not in Smith's handwriting, it is in the handwriting of Mindnich, who was the bookkeeper.

Q Can you tell us, so far as you know, Mr. Smith ever made entries in the side-book?

Mr. McCarter. I object; the book will show for itself.

The Court. The objection is sustained.

Q Do you know whether or not Mr. Smith made entries in the side-book? A I know that he did.

Q Then take the next account, that is the proof-book—

William J. Thompson, direct.

Q (*By the Court.*) You have been testifying from Exhibit P. 32, haven't you? A From Exhibit P. 32, yes, sir.

Q (*By Mr. Hinds.*) Look at the receiving teller's proof-book for that date, December 18, 1911?

The Court. Exhibit P. 41.

Q Whose handwriting is that? A Mr. Jennings'.

Q What was his office at that time? A Receiving and paying teller.

Q Do you find any overage on that date? A $19.59 apparently.

By the Court.

Q How was it the day before? A It proved, sir—I beg your pardon, there was a difference of one penny.

Q (*By Mr. Hinds.*) Now, in the ordinary course of keeping the receiving teller's proof-book, does it occur in the ordinary course of business that there may be some overage? A Yes, very frequently.

Q Of small amounts? A Very frequently. It is usually considered that the—

Mr. McCarter. I object.

Q Does the fact that the overage on that date is only nineteen dollars odd, indicate to you from your experience with keeping similar books, and knowledge of the trust company's system, that loss of $5,112.80 is not indicated by such overage?

Mr. McCarter. Objected to.

Objection sustained.

Exception to this ruling is noted by the plaintiff as ground of appeal.

By the Court.

Q Does it show, Mr. Thompson, whether that overage was compensated next day, or when it was compensated for? A No, sir; it merely shows there was an overage of $19.59 in the work of that day.

Q What does your next day show? A Proved.

Q What does that indicate as to the overage the day before? A It would not indicate anything, because the overage, if car-

ried, would be carried into the paying teller's cash; the receiving teller's cash was transferred day by day to the paying teller's.

Q It would not be customary to carry that overage anywhere next day? A If carried anywhere it would be the paying teller's cash.

Q And carried in the cash for how long? A It would not be carried there, sir, it would be just simply $19.59 more than necessary to establish proof in the receiving teller's cash would be turned over to the paying teller, and that difference should show up the next day in the paying teller's cash, unless the amount was found to be incorrect, or unless the difference was found the next day.

Q And unless there was some other error the next day it would show up the same the next day, shouldn't it, if it was not found? A I cannot just remember now, sir, whether we charged it off, a difference of that kind, or credited it in case of overage; I think we had an over and short account, I am not sure though; and in a difference of that kind it would be, if it be a shortage, it would be charged to this account, and if an overage it would be credited to that account until such time as the difference was located.

Q Every day? A That, I think was the custom, I am not sure of that.

Q You are sure you had such an account? A I am reasonably sure of it; I don't know.

Q Would it be in the general ledger? A It would not appear in the general ledger, no.

Q Where would it appear? A I am not at all clear on that, I don't know just exactly where that account was located, it if was located.

By Mr. Hinds.

Q Do I understand you to say that in the receiving teller's proof the book starts clean each day regardless of whether there may be a small overage or shortage on the previous day? A Yes.

Q What disposition is made at the close of each day of the receiving teller's cash and vouchers? A The receiving teller's cash is turned over to the paying teller.

Q In its entirety? A In its entirety.

William J. Thompson, direct.

Q Look at the paying teller's proof, December 19, the following day, and see if that throws any light one way or the other on that overage of $19? A It shows here that the paying teller on that same day was short $11.27.

Q (*By the Court.*) When you say that same day, do you mean December 18th? A December 18th, 1911.

Q (*By Mr. Hinds.*) That would make an overage then of $30 and some cents? A No, sir, not the difference of $11.27; one was over, and the other short; receiving teller's cash $19.59 over; paying teller's cash, $11.27 short.

Q Was there any practice in your bank as to the amount of overage or shortage which would be tolerated or permitted to exist in the accounts of the receiving or paying tellers?

Mr. McCarter. Objected to.

The Court. Objection sustained.

Exception to this ruling is noted by the plaintiff as ground of appeal.

Q Now take up the next item. I show you the individual savings deposit ledger, which has been marked Exhibit P. 32, the account of P. J. Cossick, and ask you if you recognize that as such account? A I do.

Q Do you find a deposit entry on January 11, 1911, of $4,000? A I do not.

Q Do you find any deposit entry on that date? A I do.

Q In whose handwriting? A Mr. Mindnich.

Q For what amount? A $1,000.

Q In the ordinary course of business at the Roseville Trust Company what does that entry indicate to you with respect to a deposit ticket?

Mr. McCarter. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A It indicates that a $1,000 deposit ticket was received by the bookkeeper to open up an account in the name of P. J. Cossick on January 11, 1911.

Mr. McCarter. Suppose Mr. Mindnich was the person that was the crooked one on this. This witness simply

said on the assumption that Mr. Mindnich was doing his duty, he got, presumably a deposit slip of $1,000, and entered it up, whereas all we know, apparently, is that we have no deposit slip that I recall.

Mr. Hinds. Yes, we have in this particular case.

The Court. Then show it to Mr. McCarter.

Mr. Hinds. Mr. Mindnich is here and will take the stand.

Mr. McCarter. I think it is improper, and move to strike it out.

The Court. It may remain.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Now, look at the credit side-book for that date? A What was that date?

Q January 11, 1911, and see whether you find a deposit to the account of P. J. Cossick entered on that date for $4,000? A I have not the January, 1911, side-book.

Q (Book handed to witness.) A That date is January 11th?

Q Yes. A There is no entry here to P. J. Cossick's account on January 11, 1911.

Q Do you find an entry on either the day previous, or the following day? A I do not.

Q Look at the receiving teller's—whose handwriting are the entries on that date in the side-book? A Mine.

Q Refreshing your recollection from an inspection of that book can you say now yes or no, having in mind the course of business, whether a deposit ticket for $4,000 indicating a deposit to the account of P. J. Cossick reached you on that day? A It did not reach me.

Q Or on either the date prior or subsequent? A No.

Q (*By the Court.*) Have you looked carefully through? A Yes, sir.

The Court. Because I understood Mr. VanDerveer to say there was an entry on that date. It so appears upon my minutes.

Mr. Hinds. There was one in the deposit ledger. He says there was an entry of that amount on the credit side-book and in the deposit account.

Q Now, make sure. A January 11, 1911?

William J. Thompson, direct.

Q Do you find a deposit of $,4000 to the account of P. J. Cossick? A I do not. On that date there is a credit here of $1,000 to the credit of P. J. Cossick.

Q Your previous testimony was on the erroneous assumption you saw 1911 before you, and it was 1910. A Yes, sir.

Q In whose handwriting is the entry? A Mr. Mindnich's.

Q In the ordinary course of business what does that entry indicate to you, assuming Mr. Mindnich acted regularly with respect to the deposit ticket?

Mr. McCarter. Objected to.

The Court. The objection is overruled.

Exception to this ruling is noted by defendant as ground of appeal.

A It indicates he received a deposit ticket of $1,000 to be to be credited to the account of P. J. Cossick.

Q Look at the receiving teller's proof on that date, January 11, 1911, and state whether there was any overage on that date? A No, there is a shortage.

Q How much? A 54 cents.

Q Now look at the credit side book as of April 17, 1911, do you find a deposit to the account of pass-book No. 1651, the account of A. Magnani, administrator, $452? A I do not.

Q Do you find any deposit to that pass-book? A I do not.

Q Sure you have the right year? A April 17, 19—

Q —11.

The Court. Is that the credit side-book?

Witness. 1911.

Q And there is no entry of any deposit in the side-book? A (Not answered.)

Q (*By the Court.*) Are you sure about that? A Not on April 17th, sir.

Q (*By Mr. Hinds.*) Now, look in the individual deposit ledger and find whether there is an entry there to that account on that date? A There is not.

Q (*By the Court.*) That is Exhibit P. 33? A This is P. 33.

Q (*By Mr. Hinds.*) What is the entry next following April 17, 1911? A The entry that opened the account is on April 25, 1911, the first entry in the account.

Q And what is the amount? A $1.

William J. Thompson, direct.

Q Do you find any entry there at all in that account of $452? A I do not.

Q In whose handwriting is the entry of $1 on April 25th? A Mr. Mindnich's.

Q Look in the side-book at date in between and see if you find any entries on that account? A The 25th is not in this book.

Q While we are looking in that book can you tell us in that ledger account No. 1652, tell us whether there is a deposit entry on April 17, 1911, of $1,999.12? A There is not.

Q Is there a deposit on any date shortly thereafter? A April 25, $1.

Q Whose handwriting? A Mr. Mindnich's.

Q Look in account No. 1653? A April 25, $1, the first opening deposit.

Q Any deposit there of $598 on any date? A There is not.

Q Now look at No. 1654, does that account open with $1 deposit? A $1 deposit, April 25, 1911.

Q In whose handwriting? A Mr. Mindnich's.

Q Look at the next account, No. 1654, duplicate, do you find that? A No.

Q What is the next account in the book? A No. 1655.

Q Look in the transfer ledger and see if you find any account No. 1654 duplicate? A There are no such accounts in the ledger as duplicate accounts.

Q In all your experience in the Roseville Trust Company did you know of any account bearing a number with the word "duplicate" after it? A I do not.

Q Now you say this account where the $1 was deposited opened the account? A Opened the account on April 25th, is the first day in one of these books. This book here stops at April 24th.

Mr. Hinds. There are other books which have not yet arrived; we will have to cover that later.

The Court. Exhibit P. 37 covers that date.

Q Have you got that there? A Yes, sir; it is here.

Q Tell us about the first one, No. 1651, do you find on such book an entry there on April 25th? A I do.

Q What is the amount? A $1.

Q In whose handwriting? A Miss Hicks'.

William J. Thompson, direct.

Q No. 1652? A $1.
Q Whose handwriting? A Miss Hicks'.
Q No. 1653? A $1, Miss Hicks' handwriting.
Q No. 1654? A $1, Miss Hicks' handwriting.
Q 1654 duplicate? A There is no such thing.
Q Look in the previous book and see if you find any entry at all in the side-book after April 17, down to that date in the account No. 1654 duplicate? A No such account.
Q Do you recall whether you have ever examined the books with respect to that account prior to your doing so in court today? A I do not.
Q No. 1655, do you find that? A Under date of April 25th there is an entry of $1, in account No. 1655 in Miss Hicks' handwriting.
Q Look in the previous book on and after April 17th, and find if you find any entries at all to A. Magnani, in any of the books? A I do not.
Q What do those facts indicate to you, having in mind your experience with those books as to deposit tickets or lack of deposit tickets on those dates?

Mr. McCarter. Objected to.

The Court. Objection sustained. I am making a distinction between those for which there are deposit tickets produced, and those for which there are no deposit tickets produced.

An exception to this ruling is noted by plaintiff as ground of appeal.

Q If a deposit ticket had been put through and reached the hands of the clerk who kept the side-book on that date, and if those books had been kept regularly in the ordinary course of business, would a corresponding entry have been made in the side-book corresponding with the deposit ticket?

Mr. McCarter. Objected to.

The Court. Objection sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

The Court. He may tell the regular course of business in the bank, but I do not think he can tell as to any particular case.

William J. Thompson, direct.

Q Turn to the next account, May 4, 1911. A I have the side-book here.

Q What is the exhibit number? A P. 37.

Q Look on May 4, 1911, and tell me whether there is any deposit entry there to the account of F. Cardoni, whose pass-book is No. 1697? A There is not.

Q Do you find any on the following date? A I do not.

Q Now look in the ledger, No. 1697—by the way, whose handwriting is the side-book of that date? A With the exception of the two last entries they are all in the handwriting of Miss Hicks.

Q What two last entries? A Mr. Mindnich's. That was account number—

Q No. 1697? A There is no such account in this book.

Q (*By the Court.*) That is Exhibit P. 33, isn't it? A P. 33, yes, sir.

Q (*By Mr. Hinds.*) Look at pass-book marked for identification P. 11, and tell me whether or not the item of $6,000, on May 4, 1911, opened the account? A It did.

Q What is the page? Do you find page 1696 there? A I do.

Q Do you find 1698? A I do.

Q Look in the transfer ledger and see if you find any page for that account? A No, I do not.

Q In the ordinary course of business in the Roseville Trust Company to whom would a depositor be directed and go desiring to open an account for a large amount?

Mr. McCarter. I object, "large amount."

Q Upwards of $1,000?

The Court. It seems to me you are traveling exactly the same ground you went over with Mr. VanDerveer. I understood, when I called attention to that a while ago, you wished to find out in whose handwriting the particular items were.

(Question read.)

The Court. What was the usual course of business in the case of a depositor going there to open an account?

Q (*By the Court.*) Did it make any difference whether the account was large or small? A No, sir.

Q Then, in the usual course of business to whom would a depositor go desiring to open an account? A To Mr. Smith.

William J. Thompson, direct.

Q (*By Mr. Hinds.*) Have you the ledger there for the account of James Crump, pass-book No. 2045? A Yes, I have that account here.

Q Do you find any handwriting there of Raymond E. Smith in that account? A I do not.

Q Whose handwriting do you find there?

The Court. P. 33, isn't it?

Witness. P. 33, yes, sir.

A Mr. Mindnich's.

Q Entirely? A Entirely.

Q Look at side-book, January 5, in whose handwriting is that? A Miss Hicks.'

The Court. That is P. 37.

Q. Now, March 1, 1912, in whose handwriting is the side-book, March 1st?

The Court. You missed one.

Q February 20, 1912, whose handwriting in the credit side-book?

The Court. Exhibit P. 37.

Witness. Exhibit P. 38.

A February 20, 1912, the entries in the side-book are made in my handwriting.

Q Now, since you made the entries, refreshing your recollection, can you tell us, looking at that book whether on February 20, 1912, a deposit ticket for $5,000 came through to you to the account of the New Jersey Adamant Manufacturing Company, pass-book No. 2274? A It did not.

Q Look at March 1, 1912, and tell me in whose handwriting the side-book is for that date? A You are referring to the credits now, Mr. Hinds? This is the debit.

Q I am referring to credits, March 1st? A This is the debit side-book.

Q Have you the credit side-book there? A I have not. What date?

Q February 20, 1912? A Yes, I have.

Q Now, do you find the February 20 credit book? A I do.

Q In whose handwriting is it? A Mine.

William J. Thompson, direct.

Q Looking at that book tell us whether on that date you received a deposit ticket of $5,000, to the account of the New Jersey Adamant Manufacturing Company, pass-book No. 2274?

Mr. McCarter. I object to the question. How will the book show him whether he received a deposit ticket?

Witness. The lack of entry would indicate that I did not have it.

By Mr. McCarter.

Q Lack of what entry? A Lack of entry to the account.

Q Is there any entry in the book to indicate that you had or had not a deposit slip? A There is no such entry.

By Mr. Hinds.

Q What does the lack of that entry indicate to you respecting whether or not you received a deposit ticket?

The Court. He already answered that question.

Q I show you deposit ticket marked for identification P. 15, and ask you whether or not you ever received that deposit ticket? A I don't know whether I ever received it or not.

Q I mean did you receive it in the course of business on that date? A I did not.

Q Now, will you turn to March 1st, in the side-book? A I have it.

Q 1912? A Yes.

Q Whose handwriting? A Mine.

Q Do you find a deposit entry of $1 to the account of Benjamin Hewes, pass-book No. 2287? A I do.

Q What was the information upon which you made that entry? A A deposit ticket.

Q I show you deposit ticket P. 17 for identification, is that the ticket? A That, or one exactly like it.

Said ticket offered in evidence and marked Exhibit P. 17.

Q Is August 23rd embraced in that side-book, 1912? A Yes, it is, credit.

Q In whose handwriting? A I don't know, sir.

Q Is it that of Raymond E. Smith? A No, sir.

Q Is September 16, 1912, embraced in that book? A Yes, sir.

William J. Thompson, direct.

Q In whose handwriting? A I don't know.

Q Is it that of Raymond E. Smith? A No, sir.

Q Look at August 2nd, August 7th and August 29th, and tell me if you recognize the handwriting in the book on any of those dates? A August 2nd I do not recognize. August 7th I do not recognize. August 29th I do not recognize.

Q Are any of them in the handwriting of Raymond E. Smith? A They are not.

Q August 13th? A I do not recognize the handwriting. It is not that of Mr. Smith.

Q March 7th and March 8th? A 1912?

Q Yes. A March 7th is in my handwriting.

Q And March 8th? A My handwriting.

Q Do you find there an entry in your handwriting of $100 deposited to the account of pass-book No. 2305, Reverend Joseph Hevey? A March 8th there is an entry of $100 to the credit of Reverend Heavey, pass-book No. 2305.

Q I show you deposit-book Exhibit P. 22 for identification and ask you whether that is the book, the information, on which you made the entry? A That is it.

Said book offered in evidence and marked Exhibit P. 22.

Q Is August 15, 1912, there in the side-book? A Yes.

Q In whose handwriting?

The Court. November 16th that book runs to, that same side-book.

Q In whose handwriting is it? A I don't know.

Q Is it that of Raymond E. Smith? A It is not.

Q Now, turn to the individual savings deposit ledger. Have you the book there referring to the account of the New Jersey Adamant Manufacturing Company, No. 2274, February 20, 1912? A I have.

Q Is it in the book? A It is not.

Q Is No. 2273 there? A It is.

Q No. 2275? A It is.

Q Look in the pass-book and tell me whether or not that account was opened with the deposit on February 20, 1912? A An entry here, February 20, 1912, $5,000, opening the account.

William J. Thompson, direct.

Q Look in the transfer binder and see if you find that account? A I do not.

Q Look at No. 2287 in that ledger, Benjamin Hewes, March 1st, do you find an entry there? A March 1st.

Q In whose handwriting? A Mr. Mindnich's.

Q Turn to No. 1928, Catherine Haney, do you find an entry for August 23rd? A August 23rd, 1912.

Q Whose handwriting? A Mr. Mindnich's.

Q Now, look in No. 2685, is that in the book, Peter Scola, or could it be in that book? A No.

Q See if you can find it in this book, that is Exhibit No. — A No. 34.

Q No. 2685, Peter Scola? A There is no such account here.

Q Is No. 2684 there? A Yes.

Q 2686? A It is not.

Q What is the one that mentioned Peter Scola? A 2684, 2686 is not here.

Q 2685 you say is not here? A 2685 nor 2686.

Q Look at the pass-book and tell me whether that account was opened by a deposit of September 16, 1912, of $2,000? A It was.

Q Look in the transfer binder and see if you find any such account? A There is no such account in the transfer binder.

Q Now look in the ledger No. 2610, have you got that there? A I have.

Q In whose handwriting is that account? A Mr. Mindnich's.

Q Anyone else's? A No.

Q Look at No. 2305? A The account of Reverend Joseph Hevey in trust for Dennis, No. 2305.

Q Do you find an item there on March 8th, of $100 deposit? A I do.

Q In whose handwriting? A Mr. Mindnich's.

Q Do you find one for March 7th? A I do not.

Q Look at the account for pass-book No. 1383, Margaret E. Vale, have you got that book there? A No, it is not here.

The Court. That would be in Exhibit P. 32.

Witness. 1383, Margaret E. Vale.

Q In whose handwriting is that kept? A This is in the handwriting of Mr. Mindnich.

William J. Thompson, direct.

Q Any other handwriting at all besides his? A There is an entry of mine there, I think. This shows two entries of mine, July 7, 1911, and July 13, 1912.

Q Any deposit there of $500 on August 15th, 1912? A There is not.

Q Now I show you the receiving teller's proof-book for the items I have not covered. Take May 4, 1911, first. I think you will find it in there. This is Exhibit P. 41. Was there any overage on that date?

Mr. Hinds. I will withdraw that question and confine myself to the handwriting.

Q In whose handwriting is that book on May 4, 1911? A Mr. Jennings'.

Q In whose handwriting is the receiving teller's proof-book, on January 5, 1912? A Mr. Jennings'.

Q And on February 20, 1912? A Mr. Jennings'.

Q March 1, 1912? A Mr. Jennings'.

Q And March 7th and 8th, 1912? A Mr. Jennings', both days.

Q Now tell me whose handwriting on August 23, 1912, receiving teller's proof-book, Exhibit P. 42? A August 23, 1912, Mr. Jennings'.

Q And August 7th, 1912? A Mine.

Q Any overage? A No.

Q August 2nd? A My handwriting.

Q Any overage? A $10.

Q August 29th? A My handwriting.

Q Any overage? A No.

Q August 15th? A Mr. Jennings'.

Q September 16th? A Mr. Jennings'.

Q Now, while you have got it look at August 29th, now going into the demand accounts? A My handwriting.

Q Any overage? A No.

Q September 16th, I believe you have already testified to. Look at March 5. Would that be in that book? A 1912?

Q Yes. A No, it is not.

Q I believe you said August 29th was in your handwriting, didn't you?

The Court. March 5th is in P. 41, it should be, according to the dates you gave here it runs to April 8th, 1912.

William J. Thompson, direct.

Witness. Starts at April 9th, 1912, your Honor.
The Court. Then you are looking at P. 42?
Witness. Yes, sir.

Q While you are looking at P. 42, look under the date of August 29th? A August 29th, 1912?
Q Whose handwriting? A Mine.
Q And any overage? A No.
Q Look at P. 41, again, March 5? A March 5, 1912.
Q Whose handwriting? A Mr. Jennings'.
Q Would October 14, 1911, be in that book? A Yes.
Q In whose handwriting? A Mr. Jennings'.
Q December 12, 1910, is that there? A Yes.
Q Whose handwriting? A Mr. Jennings'.
Q Now I am going to show you the debit side-book for the savings department covering December 12, 1910, which is Exhibit P. 38, in whose handwriting? A December 12, the handwriting of Mr. Mindnich.
Q Make sure I have got the right year there? A December 12, 1910.
Q Do you find any entry there of withdrawal of $3,000? A I do not.
Q Look on October 14, 1911? A I have it.
Q Whose handwriting? A I don't know.
Q Is it Mr. Smith's? A It is not.
Q Now look at the ledger for account No. 114. Do you find any item of withdrawal of $6,500 on October 14, 1911? A There is.
Q In whose handwriting? A Mr. Jennings', I should say.
Q What is the name of that account again? A Alma May Mott, Samuel Harvey.
Q Now, take the commercial side-book— (Not answered.)

By the Court.

Q Look at that same book, Mr. Thompson, and see if there is a charge against the account of O'Connor, No. 793? A What date?
Q December 12, 1910. A Yes, there is.
Q And whose handwriting is that? A Mr. Mindnich's.

William J. Thompson, direct.

Mr. Hinds. Do you desire to correct your previous testimony on that then? I think he said there was not any, previously.

The Court. You did not ask him about that item.

By Mr. Hinds.

Q Now, turn in the commercial credit side-book, Exhibit P. 46, to May 9th, 1912, and tell me in whose handwriting that is? A The handwriting of Mr. Mindnich.

The Court. Is that the March account?

Mr. Hinds. Yes, your Honor.

Q Now look at September 16, and tell me what handwriting it is? A September 16, is not in this book.

Q I think it is in this book. I show you Exhibit P. 48. In whose handwriting is the credit side-book, commercial department, on that date? A September 16th?

Q Yes. A I don't know.

Q Was it that of Raymond E. Smith? A It was not.

Q In August 29th in that book? A It is.

Q In whose handwriting? A I don't know.

The Court. That is the Haney account?

Mr. Hinds. Yes, your Honor. I desire to call the Court's attention to the fact that we have not offered any proof yet on the James Gleason & Son. The items other than that aggregate $83,283.78.

Q These three books have just come in and I will ask you to identify them—six books—what is the one I now show you? A Debit side-book M to Z accounts; April 29, 1910, to January 19, 1911.

Same offered in evidence and marked Exhibit P. 57.

Q What is that book? A These are the A to L debits, from March 6, 1911, to October 10, 1911.

Said book offered in evidence and marked Exhibit P. 58.

Q What is this? A These are the A to L debits, November 8, 1912, to April 22, 1913.

Said book offered in evidence and marked Exhibit P. 59.

William J. Thompson, direct.

Q And what is this? A These are the debits on all the accounts from A to Z, from December 1, 1908, to October 27, 1909.

Said book offered in evidence and marked Exhibit P. 60.

Q And this? A M to Z debits, from October 9, 1911, to May 7, 1912.

Said book offered in evidence and marked Exhibit P. 61.

Q What is this book? A M to Z debits, from May 8, 1912, to November 11, 1912.

Said book offered in evidence and marked Exhibit P. 62.

Q What is this? A This is the general cash-book from May 24, 1911, to May 9, 1912.

Said book offered in evidence and marked Exhibit P. 63.

Q I am not entirely sure that I asked you whose handwriting the entry of $3,000 on December 12, 1910, is in the individual ledger P. 32, Emma E. O'Connor, No. 793? A Mr. Mindnich's.

Mr. Hinds. I offer in evidence the draft to that account which Mr. Thompson has said is in the handwriting of Raymond E. Smith, signed "Emma E. O'Connor," marked P. 29 for identification. I now offer it in evidence.

The Court. It will be admitted.

Same marked Exhibit P. 29.

Q (*By the Court.*) Let me ask, does that appear in the cash? A I don't know as I looked that up in the side-book, your Honor.

Mr. Hinds. Yes, he did. You asked him that, your Honor, and I just asked him again as to the ledger, and he said it is there too but it is not in the pass-book.

I offer also similar draft for $6,500 signed "Alma M. Mott," in the handwriting of Raymond E. Smith, which has been marked P. 31 for identification.

Mr. McCarter. I desire to object to that, and also, if I may, object to your Honor's ruling, with reference to the last exhibit, upon the ground that assuming all the other points we have with reference to this matter were for the moment brushed aside, it seems to me that the liability, if any, on account of these particular matters, is a liability arising out of forgery. The liability that the surety company stands responsible for is solely dishonesty on the part of Smith arising out of embezzlement or larceny, and all other dishonesty is excluded especially. Now, it appears here that money in the possession of the bank was gotten out of the bank, and they are going to argue into the possession of Smith, by two forged checks or drafts signed and forged by Smith; and assuming, if you will, that it follows that because Smith forged each one of these documents that he got possession of the funds—which, as yet, has not been proven—nevertheless it would seem to me that the crime that Smith then committed is not a crime for which we are responsible under the bond, and therefore, the documents are not admissible.

The Court. It may be noted that the objection is timely, and the objection will be overruled and exception noted.

An exception to ruling is noted by defendant as ground of appeal.

Said draft is marked Exhibit P. 31.

Q In whose handwriting is the side-book pass-book No. 793—
A Mindnich's.

Q Mr. Thompson, what other officers were there in the trust company while you were there other than Raymond E. Smith?
A There were no active officers, that is officers that had to do with the daily transactions of the bank.

Q Will you state in general the functions of the different officers and employees of the bank as you observed them?

Mr. McCarter. Well, the functions of the officers are prescribed by the by-laws.

Mr. Hinds. I want to find out how they actually did function.

The Court. What they actually did.

A The directors were split up into different committees. Just what they were, or who acted on those committees I do not remember.

The Court. I suppose what Mr. Hinds means is what they did in the bank.

Mr. Hinds. Particularly the officers.

The Court. The clerks.

Q Yes, and the officers as distinguished from the other directors? A As I say, the officers took no active part in the daily activities of the bank at all with the exception of one group of directors who constituted the examining committee. They were the only ones that I know of who came in contact with the work of the clerks in the bank.

Q (*By Mr. Clark.*) Do you mean the examining committee? A I mean the examining committee, yes, sir.

Q (*By Mr. Hinds.*) As to the president, what was his name? A Mr. Odell. He came in almost every morning before taking an early train for New York and, beyond, as a rule, conferences with Mr. Smith for a period of five or ten minutes, sometimes more, sometimes less, that was the extent of his connection with the work in the bank.

Q What about the vice-president, what was his name? A I believe there were two of them, Mr. Foster and Mr. Fairlie.

Q And Mr. Fairlie is now deceased? A He is.

Q What did they do, if anything, as you observed them? A I think that those two gentlemen were on the examining committee, either all the time or some part of the time.

Q How often, roughly, would they do anything? A The examining committee?

Q Yes. A Oh, as I remember it, about two or three times a year, something like that, possibly more often.

Q Except for the activities you have mentioned of the president and two vice-presidents was there any supervision or management of the bank, aside from what Mr. Smith rendered? A You mean management of the bank in so far as the work of the employees in the bank, or as pertaining to the discounting of notes and things like that?

Q I mean the daily operation of the bank? A The employees of the bank were directly responsible to Mr. Smith, and Mr. Smith only.

Q Who were the employees? A Jennings was the paying teller and receiving teller up to the time he was made receiving teller; he acted then as paying teller until two or three months previous to the closing of the bank. At that time I took over the receiving and paying tellers cages. Mr. Mindnich was the assistant bookkeeper and was afterwards made bookkeeper; and those two with myself were the only employees who were there for any great length of time. We did have assistant bookkeepers, quite a number of them, from time to time; I don't know who was assistant bookkeeper at the time the bank was closed, I cannot remember.

Q (*By the Court.*) I understand you were first paying teller and then receiving teller? A No, I was first receiving teller and then was receiving and paying teller in combination.

Q (*By Mr. Hinds.*) Did you have any knowledge of any thefts or any other irregularities respecting any of the accounts concerning which you have testified, except such information as you may have acquired since the bank closed?

The Court. Any knowledge?

Mr. Hinds. I want to exclude any possibility that this witness had any participation.

A I had no knowledge of any irregularities as far as the embezzlement of money was concerned by Mr. Smith or any other person connected with the institution.

Mr. McCarter. That is not the question. I move the answer be stricken out.

(Answer read.)

The Court. The answer may remain.

Q Confining your answer particularly to those accounts concerning which you have testified, did you, prior to the closing of the bank, know or take part in any irregularities whatsoever, whether embezzlement or not—those particular accounts? A I took no part in any irregularities so far as these particular accounts are concerned.

Mr. McCarter. You have not answered that question.

The Court. That is a directly responsive answer.

Q Did you know of any such irregularities in those accounts prior to the closing of the bank? A I think there were one or

two instances where the accounts showed some difference in the entries, was brought to my attention by reason of the fact that a draft, I think, in one or two of the cases, a draft on that particular account was drawn by the person who opened the account in the bank, and that draft was for a greater amount than the account represented on our books to the credit of that account. That being brought to my attention, as I remember it, once, or possibly twice.

Q And that was one of the accounts concerning which you have testified that the original deposit entry in the cash-book is in the handwriting of Raymond E. Smith? A Yes.

Q And what did you do then? A Well, if I was concerned in the rectifying of the account I brought it to Mr. Smith's attention; Mr. Smith being responsible for it; had the transaction completed; that is, I either had a deposit made to the account, or an explanation by Mr. Smith, of why the account showed a difference.

Q By "deposit" do you mean a deposit entry or an actual deposit by Mr. Smith or someone else, of cash?

The Court. I think you had better ask him just what was done.

Q What do you mean by "deposit"? You say a deposit was made—

Mr. McCarter. I object. Counsel is constantly leading this witness.

The Court. The question may be finished.

Mr. Hinds. Perhaps I may make it less objectionable by asking him what he means by "deposit" in his statement that he saw to it that some deposit was made.

The Court. The question may be answered in that form.

A I mean there was one or two cases where a deposit, as Mr. Smith explained it, was pending, that is, credit should have gone to that particular account because of a note going to be discounted, or something of that nature; and when it was brought to his attention such deposit was made so that the account was covered to the extent of the draft drawn.

William J. Thompson, direct.

By the Court.

Q What do you mean by that, actually made in the account? A Actually made in the account.

Q By whom? A By Mr. Smith.

By Mr. Hinds.

Q How did he make the deposit—Mr. Smith? A I think in both cases it was by a general ledger charge, as I remember it, charging bills receivable in the ledger; the explanation was that the note was pending.

Mr. McCarter. One moment. I object to conversations by this witness.

Mr. Hinds. I consent that it be stricken out.

The Court. It may be stricken out.

Q Do you recall whether in connection with the bookkeeping charges, or whatever you described, there was any actual cash deposited by Mr. Smith in the bank? A I do not recall it at all.

Q (*By the Court.*) Meaning you do not recall whether there was or was not? A I do not recall just what the deposit was, whether it constituted cash, or what it was.

Adjourned to March 18th, 1919.

SECOND DAY.

Newark, N. J., March 18th, 1919.

Continued pursuant to adjournment.

Appearances as before.

WILLIAM J. THOMPSON, resumed the stand.

Further direct examination by Mr. Hinds.

Q Mr. Thompson, I show you Exhibit P. 31 which is the draft signed Alma M. Mott, and ask you whether or not that name "Alma M. Mott" is the natural handwriting of Raymond E. Smith? A It is.

Q Is there any apparent attempt to disguise the handwriting?

William J. Thompson, direct.

Mr. McCarter. Objected to.

The Court. The objection is sustained.

Exception to this ruling is noted by the plaintiff as ground of appeal.

Q Are you familiar with the subject of handwriting in general from your experience as a bank teller? A I should not consider myself an expert, but I have had to do with signatures for a great many years.

Q In the course of your experience as a teller was it your business to scrutinize handwriting and signatures, was it not? A It was.

Q For how many years? A About four years.

Q Will you look at this signature and tell me whether there is any departure from the natural handwriting of Raymond E. Smith in that signature?

Mr. McCarter. Objected to.

The Court. Objection overruled.

Exception to this ruling is noted by the defendant as ground of appeal.

A There is no attempt to depart from the ordinary handwriting of Mr. Smith.

Q Are you familiar with the signature of Alma M. Mott? A I am.

Q Does that bear any resemblance to it? A It does not.

Q Now, I show you Exhibit P. 29, being a draft with the name of Emma E. O'Connor, the initials, "R. E. S." underneath the name. Are you familiar with the signature of Emma E. O'Connor? A I am.

Q Does this signature bear any resemblance to her signature? A It does not bear any resemblance.

Q State whether or not that is the natural handwriting of Raymond E. Smith?

Objected to as immaterial and irrelevant.

The Court. The objection is overruled.

An exception to this ruling is noted by defendant as ground of appeal.

A It is in the natural handwriting of Raymond E. Smith.

Q And the initials underneath? A Written by him.

William J. Thompson, direct.

Q Was there any practice of the Roseville Trust Company respecting the presentation of savings pass-books, in connection with the deposit or withdrawal of funds affecting such account? A Savings pass-books invariably had to be presented before a draft was honored.

Q Was there any practice respecting deposits? A Possibly in one or two instances, or in a very few instances, deposits were received without the pass-book being presented, in such case if the pass-book had been lost or something of that kind, but the custom was that pass-books be presented with all deposits and drafts in the investment department.

Q Where presented with deposits were there any proceedings—

Mr. McCarter. Objected to as leading.

The Court. Objection sustained.

Q What was the practice in cases where the deposits were made and the book was presented respecting the giving or not giving of receipts? A Deposit was entered on the pass-book, investment department, and that constituted a receipt.

Q But as to the withdrawal—you have spoken of there being one or two instances in the case of deposit—do you know of any exception in the case of withdrawals, where withdrawals were actually made? A I do not.

Q Now, turning to the deposit tickets, will you tell us the regular course of business of the trust company respecting the disposition, or what was done to these deposit tickets, after they left the receiving teller's cage and were taken to the final resting place, if you can? A The receiving teller would from time to time during the day make up a—take a batch of deposit tickets and get a total of those for his own proof, and then in turn hand them to the assistant bookkeeper, or bookkeepers. The assistant bookkeeper would enter the deposit tickets in the credit side-book, and he in turn secure a total of that group of deposit tickets; then the bookkeeper would enter those tickets to their respective account, after which the deposit tickets were filed in a group day by day.

By the Court.

Q They were put up in packages each day by themselves? A Yes.

William J. Thompson, direct.

Q Put away? A Yes.

Q Where? A For a time they were kept within easy access, that is, they were kept in the small safe; after a period of two or three months had gone by they were sent downstairs to the cellar where they were supposed to have been kept in the same order, so that it would be possible to refer to them at any time in the future.

Q No practice to destroy them after a certain time? A Absolutely not, no, sir.

By Mr. Hinds.

Q You were still in the employ of the bank when it closed? A I was.

Q At that time where were the deposit tickets kept that had, as you say, gone through the regular course of business? A Some were kept in the vaults, those of recent date; the rest of them were downstairs in the cellar.

Q And about how large a bulk would that represent, the ones in the cellar? A Well, represented about two years of deposit tickets, which would be a very large number.

Q Fill a large trunk or be smaller or larger? A They would fill a large trunk.

Q Do you know as to the condition of orderliness of those tickets at the time the bank closed?

Mr. McCarter. Of your own knowledge, now.

A I know they were not in the condition they should have been.

Q I show you Exhibit P. 51, being the general ledger which you stated was in the handwriting of Raymond E. Smith. Turn to December 30, 1912, in the account of building income, and state what you find there as to the receipt or payment of moneys in the account? A I find a deposit of $550.03.

Q That means a payment? A Yes, two credits of $325 and $100.

Q $325 and $100? A $325 and $100.

Q You say you found two credits, is that regular, or irregular?

Mr. McCarter. I object.

Mr. Hinds. I will show it to the jury, then.

Mr. McCarter. I think the whole thing is immaterial.

William J. Thompson, direct.

Mr. Hinds. It will be material in connection with the first item of our schedule G in which we allege an abstraction of $325.

The Court. What is the purpose of showing the book to the jury?

Mr. Hinds. Well, it can be done later, but I thought it would be kept better in their minds if they saw it as they go along.

The Court. If it has reference to that item.

Mr. Hinds. It has directly.

(The entry is shown to the jury.)

Mr. McCarter. The juror asked counsel to explain and counsel replied. I object to it.

The Court. I think it is always better to have the impressions come only in the proper way to the jury, and that is through the medium of testimony. Statements of counsel should never be made in such a way as to amount to testimony unless that is agreed to.

Q Now, will you look at the balance to cash on that date, December 30, 1912, and tell us what you find? A Find an extension of $32,309.85, and above it, "$325."

Q In whose handwriting? A Smith's.

Q What are the figures at the head of the column, top of the page, or letters, "Dr." A "Dr."

Q What does "Dr." mean in the trial balance of the general ledger in lay language? A It means an asset that the company has.

Q And what does "Cr." mean? A A liability.

Q Then cash appears as an asset? A It does.

Mr. Hinds. If there is no objection I will show that to the jury.

The Court. Just a minute, now. He says cash appears as an asset. I have not yet understood that was a cash item. That has not gotten to me yet.

Q What do you find in the asset, or debit column for cash as of December 30, 1912? A An entry of $325.

Q Any other entry? A Nothing in the debit side.

Q I mean the balances, I do not mean the debit and credit for the day? A In the balance column of cash there are two entries on the debit side, one is $325, and the other is $32,309.85.

Q (*By the Court.*) They are on the debit side? A Debit side of the balance column.

Q (*By Mr. Hinds.*) Describe the item of $325 as to size and apparent regularity on the page? 10

Mr. McCarter. I object to that, it speaks for itself.

Mr. Hinds. That is why I want to show it to the jury.

The Court. You may show it to the jury, but that does not include the making of any remarks at the present time.

Q Now I show you Exhibit P. 50, being the cash-book of the institution at that time?

Mr. McCarter. What time?

Mr. Hinds. December 30, 1912. 20

Q Will you state the amount of cash at the close of that date as shown by the cash-book? A $32,309.85.

Q And that is the same figure as the larger figure in the general ledger, is it not? A It is.

Q Are you able at this time, from an inspection of the receiving teller's and paying teller's proof-books at that time to state what the cash was in the institution on the close of that date, from the book? A I think I can do that.

Q I first show you the receiving teller's proof-book, Exhibit P. 42, December 30, 1912, is the date. A (After examining book.) Let me have the paying teller's proof-book, please. (Book handed to witness.) $32,309.85. 30

Q Who kept the paying teller's proof-book? A Jennings.

Q And who kept the receiving teller's proof-book? A I did.

Q Is my understanding correct that from those proof-books and from the cash-book you state that the amount of cash in the possession of the tellers at the close of that date was $32,309.85? A It was.

Q (*By the Court.*) The building income, what is the credit on that date? A $325 and $100, two credits. 40

Q (*By Mr. Hinds.*) Are you familiar with the use of that book? A Yes.

Q Normally used should there be two credits under one date to one account?

William J. Thompson, direct.

Mr. McCarter. Objected to.

The Court. What is the practice?

Q What is the practice normally? A Well, the practice normally is to have one credit, or one entry, appear.

Q Turn, if you will, to January 10, 1913, the balance to the account of bills purchased, what do you find the amount to be? A $641,697.74.

Q (*By Mr. McCarter.*) What book is that? A General ledger.

Q (*By Mr. Hinds.*) In whose handwriting? A Smith's.

Q Is that at the close of January 10, 1913? A Close of January 9.

Q I asked you for January 10? A $646,541.74.

Q In whose handwriting? A Smith's handwriting.

Q Do you find any debits or credits to that account on the following dates, January 11th? A I do not.

Q What do you find the balance to be to that account on January 11th? A $641,541.74.

Q And in Smith's handwriting? A Smith's handwriting.

Q That is a difference of $5,000?

Mr. McCarter. Objected to as leading.

Mr. Hinds. It is purely arithmetical. Matters demonstrable on the book can be agreed upon. If your Honor desires me not to do that I will desist.

The Court. I thought the Court had already expressed a rather strong desire to that effect. It is so simple to ask the witness what the difference is, Mr. Hinds.

Q Now, will you turn to the balance on January 11 to cash, the assets to cash on that date. What do you find? A Two entries, one of $28,080.02.

By the Court.

Q Where do you find that? A In cash balance column.

Q As of what date? A January 11. And an entry directly over that amount of $5,325.

By Mr. Hinds.

Q Will you describe that latter entry with respect to its size and position on the page, that $5,325? A With respect to its size?

Q Yes, the size of the figures? A Well, they are just a little bit smaller than the original entry of $28,080.02.

Q And the position of the figures? A Directly over the $28,080.02.

Q Look on the three or four preceding business days for cash and see whether you find any interlined small figures over the cash balances on those dates?

Mr. McCarter. I object to that. I suppose if there is anything significant in the entry it ought to be compared with the whole book. What significance can be attached to two or three days?

Mr. Hinds. It will appear what the significance is. I will take the entire period, if you please.

The Court. From December 30 to January 11.

Q Start with December 30, 1912, the date you already testified concerning $325 interlineation over the balance of cash, and state what you find on previous days to the date we are now discussing? A On each succeeding business day up to and including January 10 the figures $325 appear directly over the cash balance.

Q And what is the difference between that and the figure you find interlined over the January 11th balance cash? A $5,000.

Q In whose handwriting are all these figures? A Smith's.

Mr. Hinds. If your Honor please, I understand the entire book is offered in evidence, unless your Honor thinks it would be more orderly to number each page concerning which testimony is given.

The Court. This book is in evidence.

Q Turn to January 18, 1913, what do you find balance to cash on that date? A Two entries, one of $33,334.35, and directly above it the figures $625.

Q And what do you find in cash on the preceding date as to any figures above the ordinary figure? A I find a figure above the ordinary balance figures of $5,325 on the succeeding days from January 11, up to January 18.

Q (*By the Court.*) Each of the succeeding days? A Each of the succeeding days there is a figure directly above the cash balance figure of $5,325.

William J. Thompson, direct.

Q (*By Mr. Hinds.*) Please turn to the—what is the charge to bills purchased in the general ledger of January 18, 1913? A $5,000.

Q Turn to the cash-book of that date and state whether you find a charge there to bills purchased, and if so to what amount?

The Court. What date is this?

Witness. January 18, sir.

A I find no entry here of bills purchased on January 18, 1912.

By Mr. McCarter.

Q What book is that? A General ledger or general cash-book, rather, I am referring to now.

Q What it is? A General cash-book, there appears to be no $5,000 entry there in the general cash-book on January 18, 1913.

By Mr. Hinds.

Q Whose handwriting is the cash-book on that date? A I don't know whose it is.

Q Is it Raymond D. Smith's? A It is not.

Q Can you ascertain from the general ledger on what week day that January 18th fell? A Saturday.

Q Can you tell us the practice in the Roseville Trust Company respecting charges to bills purchased on Saturday? A The same practice as every other day, that the general ledger charges were turned over from the tellers to the man who is going to enter the general cash-book. After he makes the entries the general ledger is then ready to be written up in the general cash-book.

Q Tell us in ordinary lay language what is meant, what operation is signified by the expression, "charged to bills purchased?" A Charge to bills purchased is that many more notes—notes that were discounted that day in the bank.

Q And what would you do when a note is paid? A Credit is entered on the general cash-book and likewise on the general ledger.

Q Now, do you find any credits to bills purchased on this date? A I do.

Q And that would mean then, that somebody paid a note?

Mr. McCarter. Objected to.

William J. Thompson, direct.

Q What would be the significance of that expression, "credit to bills purchased." A Means that there were three notes paid that date, January 18th, 1912, reducing the balance of bills purchased.

Q Now, turn to January 27, 1913, balance to cash, what do you find? A $33,598.18.

Q Anything else? A Not in the general cash-book.

Q Referring to the general ledger? A January 27, 1913, there is a debit balance of cash $33,598.18, and directly above it the figures $5,625.

Q In whose handwriting? A Smith's.

Q Just run over the ledger balance cash January 18th on to January 27th, and tell us what you find, if anything, written over the main figures. A $625 is written over the cash balance from January 18th up to and including January 25th. On January 27th, which is the succeeding business day, the figure is changed to $5,625.

Q Look on January 26th, or January 25th, I think you said was the preceding business day, and tell me what the balance is, of bills purchased? A $651,913.82.

Q In whose handwriting? A Smith's.

Q (*By the Court.*) That was what date? A January 25th.

Q And the balance? A $651,913.82.

Q (*By Mr. Hinds.*) Now, what credit do you find to bills purchased on January 27th? A Two credit entries here, one of $11,510.47 and another of $5,000.

Q In whose handwriting? A Smith's.

Q Look at the cash-book and see what credits you find to bills purchased on that date? A I find a series of credits to bills purchased the total of which is $11,510.47.

Q And the difference between that and the credits in the ledger is how much? A $4,000.

Q And how is it represented on the general ledger? A The figure 4,000 directly above the bills purchased credit entry on that day.

Q In whose handwriting? A Smith's.

Q Look on that date in the general ledger, the balance certified check, what do you find? First, look on the preceding business day, ledger, January 25, certified checks, what do you find? A Balance of $485.03.

Q Do you find that as an asset or a liability? A A liability.

Q And what do you find in the account of treasurer's checks, January 25th? A I will have to correct my testimony there; that certified check balance appears as an asset.

Q And what about the treasurer's check? A Appears as an asset of $106.99.

Q In whose handwriting are those entries? A Smith's.

Q Now, will you tell us what is meant by balance to treasurer's checks and balance certified checks normally in the ordinary course of business. A Treasurer's checks are the checks drawn by the treasurer of the institution, and are already charged against the account or in payment of bills that the trust company has contracted. The treasurer's check is sent for that bill. The total of outstanding treasurer's checks represents the figure in the general ledger—is represented by the figure in the general ledger.

Q Is that normally represented as a liability or an asset? A Liability.

Q Can you say whether it is possible that there should be an asset of treasurer's checks or an asset of certified checks? A Not in the ordinary course of business.

Q What do you find, what credits and debits do you find, if any, on January 27th, the preceding business day, to the account of certified checks in the general ledger? A I find a debit of $101.65.

Q Now look at the cash-book and see what you find on that date on that account? A A debit of $101.65.

Q Now, just look at the credit of that account in the general ledger on that date? A $600 credit.

Q In whose handwriting? A Smith's.

Q Look in the cash-book? A There is no credit.

Q Now, on January 27th, do you find the balance to be an asset or liability in the general ledger? A Liability.

Q In whose handwriting? A Smith's.

Q Now look at the treasurer's check account on January 27th, do you find any credit to that account in the general ledger? A $400 in the treasurer's check credit column.

Q In whose handwriting? A Smith's.

Q Now look in the cash-book? A There are no credits there.

William J. Thompson, direct.

Q On January 27th do you now find the balance to be a liability or asset? A A liability.

Q In whose handwriting? A Smith's.

Q Turn to May 26th, 1913—I think I am asking that a little out of order—turn to January 28th, 1913? A January 28th, 1913?

Q January 28th, the next following day? A 1912?

Q 1913, the day following the one you have been discussing? A January 28th, 1913.

Q Look at the balance to cash in the general ledger? A $34,079.99.

Q In whose handwriting? A Smith's.

Q What do you find in the cash-book on that date? A The same figures, $34,079.99.

Q Is there any other figure in the general ledger in the balance there? A There is a figure there of $6,025.

Q In whose handwriting? A Smith's.

Q In what account? A Cash balance column.

Q What was the interlined figure on the previous date? A $5,625.

Q A difference of how much? A $400.

Q (*By Mr. McCarter*) Was there an interlined figure the day before? A There was, sir.

The Court. $5,625.

Q (*By Mr. Hinds.*) Look at the balance to cash on January 30th, 1913?

The Court. In the general ledger?

Mr. Hinds. Yes, sir.

A $35,200.19.

Q Anything else? A A figure above it of $6,125.

Q What is the difference between that and the figure if any, interlined on the previous day? A $100.

Q In whose handwriting are those interlined figures? A Smith's.

Q Turn to February 1, cash balance? A $30,735.85 and the figure above $10,225.

Q The difference between that and the interlined figure over the cash on the previous date? A $4,100.

Q And that is in Smith's handwriting? A It is.

Q Turn to February 10, do you find any credit to treasurer's checks on that date? A $100.

Q Whose handwriting? A Smith's.

Q Look in the cash-book and see what you find on that date? A I find no credit to treasurer's checks.

Q Look in the general ledger under the certified checks, what do you find there? A A credit of $1,400.

Q In whose handwriting? A Smith's.

Q What do you find in the cash-book? A Nothing.

Q Look in the cash on that date, what do you find? A On the general ledger I find a balance of $39,945.

Q Any interlined figures? A $1,500.

Q What is the total of the two credits, one certified check and the other treasurer's checks, which you find in the ledger and do not find in the cash-book? A $1,500.

Q The same amount as interlined. Turn to February 18th in the general ledger, what credits if any do you find to treasurer's checks? A What date was that?

Q February 18th. A Treasurer's checks, credit of $216.74.

Q Any other? A The figure above $100.

Q See what you find in the cash-book? A $216.74 is the credit ledger in the cash-book.

Q In whose handwriting are those figures in the ledger? A Smith's.

Q Look in the cash on that date and see if you find any figures interlined above the normal figure in the ledger, cash account in the ledger? A I find an interlined figure of $16,825.

Q Whose handwriting? A Smith's.

Q And is there a figure interlined on the previous date? A Yes, there apparently was, it has been almost eradicated, though.

Q Look on the day previous? A The same holds good there; it is quite apparent there was a figure.

Q Can you tell the handwriting? A Smith's.

Q Look back to the nearest date prior and tell us what you find? A There are pencil figures of $16,725 on February 11, up to and including February 17th when the figure changes to $16,825, a difference of $100.

Q All in Smith's handwriting? A All in Smith's handwriting.

Q Turn to February 20th? A I have it.

William J. Thompson, direct.

Q Is that the next business day? A No, February 19th intervenes.

Q Turn to February 20, and tell me whether you find any credit to treasurer's checks in the general ledger? A $125.

Q In whose handwriting? A Smith's.

Q What do you find in the cash-book on that date? A Nothing.

Q What do you find the balance to cash in the ledger on that date interlined if anything? A Interlined figure of $16,950.

Q What is the difference between that and the one interlined on the previous date? A $125.

Q Are those in Smith's handwriting? A They are.

Q Turn to the next date, February 21, is there an interlined figure to cash on that date? A $100.

Q In Smith's handwriting? A Yes.

Q Look at treasurer's checks, is there a credit? A There is.

Q How much? A $100.

Q In whose handwriting? A Smith's.

Q Look in the cash-book? A Nothing there.

Q Turn to March 10th, 1913, certified checks, credit, is there one? A Two credit entries, one of $543.28, and one of $100.

Q Are those in Smith's handwriting? A They are.

Q What do you find in the cash-book? A Nothing—wait a minute. Yes, one of $543.28.

Q But none for the $100? A None for the $100.

Q Now look over the balance cash and find whether you find any interlined figures on March 10th. You have already answered that.

The Court. No, not as to March 10th.

Q Well, then, look on March 10th? A There is no interlineation here.

Q Turn to March 11th, 1913, certified checks, is there a credit? A Two credit entries, one interlined of $990.21.

Q And the main figure? A $20.584.54.

Q Smith's handwriting? A Yes.

By the Court.

Q Are those certified checks? A Certified checks.

Q What is the main figure? A $20,584.54.

William J. Thompson, direct.

By Mr. Hinds.

Q Did you tell us the cash-book items? A Same figure in the cash-book as the larger of the two; no entry for the $990.21.

Q Look at the cash ledger on that date and see if there is any interlineation? A $990.21 interlined.

Q In whose handwriting? A Smith's.

Q Go back to March 8th, do you find any interlineation over the cash on that date in the general ledger? A I do.

Q How much? A $17,050.

Q What do you find on March 9th? A No interlineation.

Q And on March 10th? A $990.21.

Q That was what date? A March 10th there is no interlineation but the—

Q (*By Mr. McCarter.*) I thought you said there was? A No, I said there was not; not on March 10th; there is one on March 11th.

Q (*By Mr. Hinds.*) What is it on March 11th? A $990.21.

Q Will you correct your testimony and tell us the interlineation on March 10th? A None.

Q And on March 11th? A $990.21.

Q In whose handwriting? A Smith's.

Q And the certified check interlineation on March 11th is how much? A $990.21.

Q Turn to May 14th, 1913. A I have it.

Q Do you find any interlineation over the cash on that date? A I do.

Q How much? A $5,100.

Q In whose handwriting? A Smith's.

Q Run that along until it changes. A It changes on May 16th; there is no interlineation there.

Q Now look on May 14th in special deposits; do you find a credit there to special deposits? A May 14th.

Q How much? A $5,182.

Q Look in the cash-book. A I have not the cash-book here.

Q Is that in Smith's handwriting? A Yes, sir [book handed to witness]. There is a credit in entry to special deposits of $82 in the cash-book.

Q What is the difference between that and the credit in Smith's handwriting? A $5,100.

Q Turn now to May 26th, 1913. A I have it.

William J. Thompson, direct.

Q Is there a credit to bills purchased? A There is; two of them.

Q What are they? A $13,457.87, and above it $10,000.

Q In whose handwriting? A Smith's.

Q Look in the cash-book and see whether you find any credit to bills purchased. A Yes, $13,457.87.

Q Do you find the $10,000? A I do not.

Q Now look in cash in the general ledger and tell me what balance you find? A $22,873.53, and above it $15,100.

Q Both in Smith's handwriting? A Both in Smith's handwriting.

Q What was the interlined figure the day before over the cash? A Nothing.

Q The day before that? A $5,100.

Q And the difference between that and the interlined figure on May 26th is how much? A $10,000.

Q Now look in the cash-book and tell me how much cash there was in the institution as shown there at the close on May 26th, 1913. A $22,873.53.

Q How much does that differ from the amount of cash shown in Smith's handwriting on the general ledger? A $15,100.

Q And that is the same amount as the interlineation? A The same amount as the interlineation.

Q Look in the two proof-books and perform the necessary arithmetic and tell us how much cash the tellers had at the close of business on that date. A $22,873.53.

Q How does that compare with the main figure of cash in the ledger in Smith's handwriting? A Compares with the main figure.

Q In the normal course of business at the close of the day where is the cash? A In the vault. After the close of the day the cash is put in the vault. For a few minutes, while the proving is being attempted, the receiving teller retains his cash and the paying teller his cash.

Q To what book or books would you turn to find all the cash that existed in the institution at the close of business normally? A Receiving and paying tellers' proof-book.

Q And that is what you have done? A Yes.

Q Now, turn to June 15th, 1913. A I have it.

Q Look at the balance to cash, June 13th, in the general ledger; what do you find? A Two figures; one of $6,064.27, and the figure above it of $1,189.04.

Q Both in Smith's handwriting? A Both in Smith's hand writing.

Q Look in the cash-book and tell me how much cash was on hand on June 7th. A $60,664.27.

Q Look in the proof-book and tell us how much. A $60,-664.27.

Q How does that compare with the main figure in the ledger? A It compares.

Q What interlineation do you find on the previous business date to June 13th over the cash in the general ledger? A Not any.

Q And the interlineation on June 13th is how much? A $1,189.04.

Q Now, look on that date account of treasurer's checks and see if you find a credit.

The Court. You say "that date"; do you mean June 15th?

Mr. Hinds. June 13th.

A $1,189.04 is the entry on June 13th; treasurer's check.

Q In whose handwriting? A Smith's.

Q (*By the Court.*) You are reading from what book? A General ledger.

Q (*By Mr. Hinds.*) How does that compare with the interlineation over the cash? A Exactly the same figure.

Q Look in the cash-book and see whether you find a credit to treasurer's checks on that date. A There is no credit.

Q Now turn to July 21, 1913, in the general ledger; how much cash balance is shown? A $21,887.30, and $3,189.05 written above it.

Q In whose handwriting? A Smith's.

Q Look on the previous business day in the general ledger; what interlineation do you find over cash, if any? A $1,189.05.

Q A difference of how much? A $2,000.

Q Look in the cash-book and find out how much cash on that date. A $21,887.30.

Q Now look at the account in the general ledger for accrued interest payable, and turn first to the account on the preceding business day; what is that, July 20th? A July 19th.

Q What balance do you find in the accrued interest payable account? A $4,197.23.

William J. Thompson, direct.

Q Is that an asset or liability? A A liability.

Q That is to say, a credit? A Credit; liability.

Q What credit and debit do you find to that account on the 16th? A I find a debit, no credit; the debit figure is $6,958.56.

Q Will you take a piece of paper and subtract those two figures, or add them—subtract them, rather? A I have it.

Q What do you find? A Find the balance should be extended $1,761.33.

Q And do you find that credit in Smith's handwriting? A I do.

Q (*By the Court.*) Are you sure about that? Isn't it $2,761.33? A 27 is right, sir.

Q (*By Mr. Hinds.*) Look at the balance on July 21 to that account in the general ledger; what is that? A $761.33.

Q Is that in Smith's handwriting? A Yes, sir.

Q What is the difference? A $2,000.

Q How does that compare with the difference between the interlineation to cash on that date, and the interlineation to cash on the previous date? A The difference is $2,000 between the interlined figure in cash this day and the interlined figure the day previous.

By the Court.

Q When is that entry of $761.33? A The entry is made, sir, on the 21st; that is the balance.

Q Balance of what? A Balance to accrued interest payable.

Q That is on the general ledger? A Yes, sir.

By Mr. Hinds.

Q Prior to the closing of the institution did you have any knowledge of any of the irregularities concerning which you have testified this morning? A I did not.

Q Did you have any part in those irregularities? A I did not.

Q Or derive any benefit whatever? A I did not.

Mr. Hinds. Now, I offer in evidence the pass-books which have been marked for identification.

Mr. McCarter. I object to them. It is my view, your Honor, after reflection overnight on this subject and gathering some law, that these pass-books are not com-

petent to be put in evidence against us without at least further proof than has already been adduced in reference to them. It seems to me that the mere fact, speaking first concerning those to which there is no slip attached at all, as is the fact in the majority of cases, no deposit slip, the mere fact that there is an entry in the pass-book in Smith's handwriting, and a failure to pass that along, without any indication as to the basis of its being passed along by proof of a false ticket, proves nothing so far as Smith is concerned, *non constat,* that the crookedness which is apparent may have been that of any other people who had a part in the transaction. I am speaking now, of course, of those that had no ticket. For instance, I walk into the Howard Savings Institution and deposit $100, and either the paying teller or one of the numerous clerks there—it may happen to be lunch hour or something or other—writes in my pass-book, which is in the name of Robert H. McCarter, $100. Now, it is obvious from the testimony of Mr. Thompson that the orderly and regular course of business after that proceeding has taken place, there being, of course, a ticket, would be for the ticket to go into the hands of the receiving teller, who would make some entry with reference to it, and then to the bookkeeper, who would make some entry in reference to it, and either one of them could destroy the ticket, could falsify the account, and the receiving teller, certainly, could show the balance of cash; and it does not follow at all that the mere fact that the bank-book bears the entry in the handwriting of Smith, without any proof now of anything more, and no further proof in reference to the matter—we have not had any yet—that Smith had that money at all. There cannot be any presumption that he had; there is not a thing to indicate that he had the money. The money went into the treasury of the institution; and merely because the entry in the bank-book is of a thousand dollars, and when you come to look at subsequent entries in other books which Smith does not make, and the others having the cash in their power to dispose of, how can you say that the book of itself is competent evidence that Smith embezzled the amount of money, or the difference in the amount of the money between the entry in the bank-book and the entry on the other books?

The Court. Should not it be received at least as admission that Smith received into that institution that amount of money?

Mr. McCarter. Well, now, I want to be frank and candid with your Honor; I had not thought of that feature before. Perhaps it would be, to that extent, but I think it ought to be limited to that. I do not think it ought to be evidence against us of anything more than the fact that, as it is entered in the respective books, that that much money was received by the institution.

The Court. The only question is whether they should be admitted in evidence.

Mr. McCarter. I think, therefore, in view of your Honor's suggestion, I had better withdraw my objection.

The Court. The objection may still remain, and the objection will be overruled, and the books will be admitted.

The said books are marked Exhibits P. 1, P. 2, P. 3, P. 4, P. 5, P. 6, P. 7, P. 8, P. 9, P. 10, P. 11, P. 12, P. 13, P. 14, P. 15, P. 16 (P. 17 already marked), P. 18, P. 19, P. 20, P. 21 (P. 22 already marked), P. 23, P. 24, P. 25, tickets, P. 26, P. 27, P. 28 (draft already marked P. 29), P. 30 (draft already marked P. 31).

Mr. McCarter. Now, I notice these books that have just been marked in evidence have several memoranda and papers in them other than the draft that has been referred to, or the ticket; I think they should all be taken out; memoranda of the bank examiner's observations; they have all sorts of things.

Mr. Hinds. Before giving them to the jury they will be taken out; we only offer the actual tickets and drafts in evidence.

Cross examination by Mr. McCarter.

Q Who first employed you, Mr. Thompson? A Mr. Smith, sir.

Q How long had you known him? A That was the first time I made his acquaintance.

Q And what experience as an accountant had you had previous to your service with the Roseville Trust Company? A I was employed as assistant bookkeeper, and, at times, bookkeeper in the Federal Trust Company for a year previous to that.

Q In this city? A Yes, sir.

Q Did you leave the Federal to go to the Roseville? A I did, sir.

Q At Smith's solicitation? A I applied for the position to go there.

Q Applied to Smith? A Yes, sir.

Q When? A Some time previous to the bank's opening.

Q How did you hear of the proposition of opening the Roseville Trust Company? A I heard that a new bank was going to be opened in Roseville.

Q And you bettered your salary? A Yes, sir.

Q Now, at first, you became receiving teller? A Bookkeeper.

Q And as such you kept what books? A The general ledger, commercial ledger, investment ledger. I guess I kept all the books of the bank except the paying teller's proof-book and the receiving teller's proof-book.

Q You say you guess you did; you know you did, don't you? A I think I did. There may have been one or two books I did not keep, but I kept the records of the bank.

Q And that continued until what time? A Until such time as the work became so heavy it was necessary to have an assistant bookkeeper.

Q When was that? A I don't remember. I should say some time within six or eight months.

Q That would be about the middle of 1909? A Yes, I should think so.

Q The bank started in December, 1908? A Yes.

Q Who was that assistant bookkeeper? A Mr. Mindnich.

Q Did he continue in the employ of the bank down to the time the doors closed? A He did.

Q After you were promoted to tellership did he become the bookkeeper? A He did.

Q Did he have an assistant? A He did.

Q What was his name? A There was a procession of them; we had one assisting during the week, and I think we had a high school boy come in on Saturday; but there was at least six or eight of them.

Q When was it you became receiving teller? A I think some time in 1911.

William J. Thompson, cross.

Q See if you cannot tell us when it was? A I cannot, sir. I might be able to tell from the receiving teller's proof-book when I began to regularly make the proofs of the receiving teller's cash, but that is the only way I could refresh my memory.

Q Had you made any entries in the receiving teller's proof-book before you became receiving teller? A I had handled the receiving teller's cash on Saturday mornings for quite a time previous to that, and at other times when it was needed.

Q Again I ask you when it was you assumed any of the duties of receiving teller? A I don't know, sir.

Q How long before you became regular receiving teller did you become a sort of assistant receiving teller? A Approximately six or seven months.

Q So that on Saturdays and whenever the bank was busy you assisted the receiving teller? A Yes, sir.

Q From the start? A Not from the start, no, sir. I should say that I continued as bookkeeper, with no work in the cages at all, for something like eight or ten months after the bank opened. I don't remember the date at all, it is quite a while ago.

Q Each teller has a cage? A When Mr. Jennings was paying teller and I was receiving teller all of the time we did have separate cages, yes.

Q Well, before that, how was it? A When I was assisting Jennings, except on Saturday morning, we ran the two cashes in the same cage, but with different windows and different cash drawers.

Q I am anxious to find out, and I think you ought to be able to tell us by reference to these books and otherwise, when you assumed the duty, either sporadically, or regularly, of being in there where the cash came in? A I said I could get those dates for you by referring to the receiving teller's books.

Q Please do so. A I will, if it is given to me.

Q You would not come down and pick it out yourself? A I would, yes, sir.

Q Then do so, please. A (Witness leaves the stand and gets a book.) It appears that I acted as receiving teller on Saturday morning from December, 1910, up to July, 1912, when I was made receiving teller.

Q Well, you also acted as receiving teller from time to time when you were busy other than Saturday mornings, did you not? A Yes, sir.

Q In that intermediate period? A Yes, sir.

William J. Thompson, cross.

Q So that you do not confine it entirely to Saturday morning? A No, sir.

Q Well, what do you mean, when you were busy? A Well, for instance, on an unusually heavy day where the line would become so long that it would hold up the people making deposits or drawing checks, that would occur sometimes, we might anticipate it and just change over the two cashes, Monday night, for instance, when we kept open.

Q Then you and the regular receiving teller received the deposits? A Yes.

Q And entered them in the books? A Yes, sir.

Q And the cash would be subject to your control? A Yes, sir.

Q And that commenced in December, 1910, and continued to July, 1912, when you assumed the regular position of receiving teller? A Yes, sir.

Q After you assumed the regular duties of receiving teller did anybody assist you? A No, sir.

Q You alone did the work? A Yes, sir.

Q Down to the time the bank closed? A No, sir; until some two or three months before the bank closed, when I was made receiving and paying teller; I combined the two duties then.

Q Did the business grow less? A It did not, no.

Q Did you have a separate paying teller, from what date? A With the exception of Saturday mornings and the other busy days we did not have a separate cash until some time in June or July, 1912.

Q Then in June or July of 1912 the business got brisk enough to make it proper to have both a receiving and paying teller? A Yes, sir.

Q And then for a period how long before the bank closed did you assume both those duties? A About two or three months before the bank closed.

Q At whose suggestion was that? A Mr. Jennings had left the bank employ at that time, and I don't know whose suggestion it was, but it just happened, that is all.

Q Now, at the close of each day, after you became receiving teller, you were responsible for the cash you received? A I was.

Q If you received a deposit, you likewise received a slip? A Yes, sir.

William J. Thompson, cross.

Q In both departments, both the savings and commercial? A Yes, sir.

Q Sometimes you would make out the slips, wouldn't you? A I would, yes.

Q In both the savings and commercial? A Yes.

Q It was quite customary for the different clerks or officials to accommodate the customer in that way? A Not customary, but we would do it.

Q Quite frequently? A Yes.

Mr. Hinds. May I ask that the questions be made a little clearer? I think there is an ambiguity there. I wonder whether counsel means customary for the clerk who happened to be receiving the deposit to do that, or customary for some clerk who might happen to be there.

Mr. McCarter. I will clear that up.

Q When you speak of its being customary, or not infrequent, for somebody connected with the bank to accommodate the depositor by the making of the slip, to whom do you immediately refer? The person receiving the deposit? A Yes, the person receiving the deposit would, if there was some reason for him doing it. Anybody in the bank would be only too glad to do it if they had the time and opportunity.

Q Then it was not necessarily the person who received the deposit, but some other clerk might help out? A Well, it would necessarily have to be some one of the tellers, because they were the only ones, or Mr. Smith.

Q So you made out the slips, or Jennings made out the slips, or Mr. Smith? A Yes, sir.

Q Where was Mr. Smith's desk? A Directly facing the door.

Q He was not in the cage? A No.

Q In order to make out the slip, or have access to the customer, he would have to come to the cage? A No, sir; the customer could go directly to Mr. Smith's office, which was only surrounded by the rail, and he was the first one they would see when they came into the room.

Q He sat at his desk and sometimes would receive deposits, is that your idea? A Yes, sir.

Q In which event he would make out deposit slips? A Yes.

William J. Thompson, cross.

Q Sometimes he would make deposits where the customer might not see the slip? A Yes.

Q Now, what other record did you have as receiving teller, in the cage or at your command, than the slips, of the amount of deposit, say, of Mr. A.? A No other record.

Q You did not enter anything at the time the deposit was made in any book? A We did not.

Q Except the bank-book? A That is the idea.

Q (*By the Court.*) Let me ask this point: Who made the entry in the bank-book? A The person receiving the deposit, sir.

Q (*By Mr. McCarter.*) Was that invariably true? Would not, sometimes, when there would be a hurry, a long line, and you were in there assisting, or somebody was in there assisting you, one person make the entry while the other fellow counted the cash? A No, sir.

Q Did you initial the entry in the bank-book? A Commercial department, yes, sir.

Q In the savings department? A No, sir.

Q Why not? A Because the length of the entry necessarily was proof enough who made the entry. In other words, the amount had to be written out not only in figures, but in words, and that would identify the person receiving the deposit.

Q So you could tell at a glance at one of these bank-books whether, commercial or savings, who received the money? A If I knew the writing, yes, sir.

Q Well, don't you know the writing of all the people who were receiving the money during that period? A I know the writing of the four people that were connected with the bank right along; some of the others might have written some record I don't know, but the ones that I have seen I do know.

Q Did other people, then, receive deposits and enter entries in the bank-books, than the receiving or paying tellers, or their assistants? A It was not customary.

Q I did not ask you about the custom; I asked you if other people did it? A I think Mr. Mindnich received some deposits.

Q He was never receiving teller, was he? A He was acting receiving teller, the same as I was during lunch hour, something of that kind.

Q So, during lunch hour, Mr. Mindnich has acted as receiving teller? A Yes.

William J. Thompson, cross.

Q You know his writing, don't you? A I do.

Q Who else would there be whose writing you don't know? A There is no other party whose writing I don't know.

Q So, now, you are quite clear that during the period we have been discussing you would receive deposits, Smith would receive deposits, Jennings would receive deposits, and Mindnich would receive deposits. Now, anybody else? A Not that I remember.

Q And it would be not at all unlikely that any one of them might make out the slips? A Very possibly.

Q Where would those slips remain during the day and down to the time the bank closed on a given day? A They would remain in the receiving teller's cage up until such time as a group of them accumulated, when he would turn them over to the bookkeeper.

By the Court.

Q He made no record of them? A He made an adding machine list, which was necessary in order to make up his proof.

Q Personally did that? A Personally did that.

By Mr. McCarter.

Q Before or after he turned them over to the bookkeeper? A Before.

Q He could not interrupt the day's work to do that, could he? A He could, yes.

Q Did he keep a current record of his deposit slips? A An adding machine list.

Q When would he do that, as each one was put in? A No, sir; as he found leisure during the day.

Q Sometimes Saturday mornings he was too busy? A No, never too busy to do that.

Q Where were these slips kept, on a spindle? A Yes, sir.

Q Now, the bookkeeper had nothing to judge by or to make the entries from, except the slips? A That is all.

Q So that if the slips were altered or another one made by anybody that had charge of them, the bookkeeper, of course, in making the entry in his book would follow the alteration? A That is the idea; that is his only guide.

Q (*By the Court.*) Did the same person write in the debit and credit side-book who wrote in the ledger? A No, sir.

Q A different clerk? A Yes, sir; the assistant bookkeeper wrote the side-book and the bookkeeper wrote the ledger.

Q And does that apply to the individual ledger? A That applies to all ledgers.

Q (*By Mr. McCarter.*) I am a very poor bookkeeper, and I will have to ask you to explain to me what is the object of this side-book? A It is really the detail of the entries that go into the ledger, because accumulated entries are made in most of the ledgers. In other words, if you have drawn a large amount of these checks today, instead of putting those checks in the ledger the sum total is put in and the side-books show each check.

Q The side-book gives the detail amount of each check, whereas the ledger simply gives the gross amount for each day's doings? A That is the idea; that is one of the purposes of it.

Q Well, now, if checks were received on deposit in every one of the departments they were temporarily put in the drawer of the cage? A Checks would not be received on deposit in every one of the departments; they would only be received for deposit in the receiving teller's department—I beg your pardon—you mean the commercial or savings department? Yes, they would be held in the receiving teller's cage.

Q So the man who normally gets the cash or checks for deposit is the receiving teller? A Yes.

Q Now, how far away is Smith's desk? A Well, one corner of the receiving teller's cage is directly next to Smith's desk.

Q How far from the entrance to the cage? A Well, about twelve feet, I should say.

Q Well, after the slip has gone up to the bookkeepers, all the record you retain as receiving teller is the cash register, or whatever you call it, adding machine? A Adding machine list of deposit tickets; yes.

Q And if the ticket has been altered, or falsified, all you have to do is to falsify the adding machine as well, falsify the entry in the adding machine to correspond with the ticket? A What do you mean if the ticket is falsified?

Q For instance, suppose I take a check for a thousand dollars and deposit it and take $100 in cash and deposit it, and that for some reason the ticket is for $1, the adding machine would correspond with the ticket? A The adding machine would, yes, but the deposit would not.

William J. Thompson, cross.

Q Have I asked you anything about the deposit? A You are asking me something I have got to explain in a different way than you want me to explain.

Q You will answer my questions, I think. A I will try to.

Q If the adding machine and tickets corresponded that would be all right? A If the deposit corresponded with the other two it would be all right.

Q What became of these adding machine slips? A They were destroyed after proof was secured of the total of the deposits for the day.

Q (*By the Court.*) The same night? A Yes, sir.

Q (*By Mr. McCarter.*) Destroyed by the receiving teller? A Yes.

Q (*By the Court.*) They were just checked off that day? A That is all.

Q (*By Mr. McCarter.*) You, of course, received deposits of cash in both departments? A Yes, sir.

Q That is to say, the savings and commercial? A Yes.

Q Would they remain in the cage until the end of the day? A The cash, or the checks, which do you mean?

Q (Question read.) A The cash would; yes, sir.

Q Then what would become of it? A Put in the vault over night.

Q Who would do that? A The receiving teller.

Q Who had control of that vault? A The paying teller, and the combination was given me, I think, sometime in the year 1912.

Q Given you? A Yes.

Q 1912? A Yes, sir.

By the Court.

Q Let me ask you this, this record which you kept from the adding machine, was that only a record of cash you received, or cash and checks? A Merely a record of the deposit ticket; it might have been cash, or checks; it represented just really what the customer deposited; just check off the total on the adding machine and the total of the deposit tickets.

Q So you had no independent checks upon just the cash deposits except that shown by the books? A It might be cash on the deposit tickets; there is a space on the deposit tickets for cash, and checks, and currency. Three different headings; if it be cash, it would be entered opposite the word "cash."

William J. Thompson, cross.

Q That is on the deposit ticket? A That is on the deposit ticket.

Q But you kept no copy of that, did you? A No, but if there was any difference in the cash it would be referred to the deposit ticket, and get better proof of the cash.

By Mr. McCarter.

Q How often would those tickets be removed from the cage? A Whenever the receiving teller had a chance to unload them.

Q When the receiving teller was through with them he would notify the bookkeeper, or take them out? A Hand them through to the bookkeeper, through the cage.

Q Then at night, when he proved—that is, the receiving teller proved—the checks had already gone out, hadn't they? A No, sir; the checks would not have gone out until the receiving teller proved.

Q What was the ceremony that he went through to prove? The checks had gone; what is he going to prove? A I said the checks had not gone.

Q The cash had gone? A No, sir; neither had gone.

Q The checks remained all day? A The checks remained all day; yes.

Q (*By the Court.*) When were they entered in the bookkeeper's book? A They were entered in the bookkeeper's cage, if the checks drawn were not frequent enough to make up a bulky group, we would keep the checks deposited by one customer, and drawn on another customer, in our bank; we would keep those until the end of the day most of the time. If we did not keep them until the end of the day we had them in the bookkeeping department where we could refer to them in a very few moments.

Q (*By Mr. McCarter.*) I want you to answer my question. You have told us both ways; I will give you a chance to tell us which is right. Were the checks kept all day in your cage? A Some of the checks were; yes, sir.

Q And some were not? A A very few were not.

Q If they were not there how could you prove? A Because we had a total of them before they went up to the bookkeeper; the ones of them that we did not have have there.

Q That is to say, you had a total on your adding machine? A That is the idea; yes, sir.

Q So that your proving consisted in adding your figures on your adding machine to what? A To the total debits and credits. The debit side of the proof sheet had to agree with the credit side.

Q All right; now, some of the checks had gone out, some of the cash is here, the deposit slips have gone out, and you are in the cage proving, say, after three o'clock in the afternoon. What do you try to do? What do you endeavor to make correspond? A The debit and credit side of the proof sheet.

Q I know that sounds very learned; what do you do? A Enter on the debit side of the proof sheet all the debits of the day.

Q And where do you get that? A From the total of the adding machine or from the cash itself.

Q You add up the figures on the adding machine to the cash on hand? A Yes, sir.

Q That gives you what? A The total on the debit side.

Q On the other hand, your credits, how do you prove that up? A The credit represents the total of the deposits for the day as secured on the adding machine, both individual and commercial departments and investment department, and the general ledger credits.

Q Do you compare the figures you reach in your cage with what appears to be in the general ledger outside? A No; we have the general ledger charges and credits for the day right in the receiving teller's department.

Q They are both in there? A Yes, sir.

Q By the bookkeeper? A No; the bookkeeper did not make the general ledger entries; Smith did.

Q Always? A Not always; no sir; the paying teller sometimes made general ledger entries.

Q You made several of those general ledger entries yourself, didn't you? A Yes.

Q Well, again, you were, in making up your credits dependent upon your adding machine, weren't you? A Yes.

Q When did you last see the trunk of deposit slips that were down cellar? A The deposit tickets were not held in a trunk.

Q I understood you to say it was a trunk full. A I just was asked to describe what the bulk of it was, and I was asked whether it would fill a large trunk, and I said it would.

William J. Thompson, cross.

Q Where were they kept? A In the cellar, in pasteboard boxes, on the shelves.

Q When did you last see them? A Sometime after the close of the bank.

Q How long did you remain there after the close of the bank? A A month and a half.

Q In the employ of the bank? A Yes, sir.

Q You have been employed by the State to prepare for this trial, haven't you? A No, sir.

Q You are giving this evidence without any arrangement of that kind? A Absolutely no arrangement, sir.

Q What did you say was your present position? A I am a salesman, sir.

Q For whom? A For the Elliott-Fischer Co.

Q Did you ever have occasion to go down and take out any of those slips from those boxes downstairs? A I did; yes, sir.

Q When? A Oh, if a dispute arose about a deposit that had been made by a customer, we would show them the original deposit ticket.

Q So that from time to time you did go and take out the deposit slip you wanted and use it in the way you wanted? A Yes.

Q Did that often occur? A No, sir.

Q I show you Exhibit P. 28 for identification, being the bank-book of Emma E. O'Connor, and in it seems to be this draft, Emma E. O'Connor, and the initials beneath it, "R. E. S."; was that draft paid? A I don't know whether it was charged against the account, or not, unless I refer to the investment department debit book for that day.

Q Look at the draft itself; does it indicate it was paid in any way? A There would be no indicating marks on it.

Q You had no way of stamping it paid, or otherwise? A No, unless the check was cashed.

Q This is payable to cash, isn't it? A Yes, sir.

Q Do you mean to tell me that if the cash were drawn on that check, or draft, it would not be stamped somewhere? A If it were cashed it would be marked, yes, sir.

Q What else can happen to it? A It could be deposited.

Q Deposited? A Yes.

William J. Thompson, cross.

Q Just look and see what did happen to that if you can? A I cannot tell whether this was even charged against the account, sir, unless I get the side-book for that day.

Q You knew you were testifying here, didn't you, to try to indicate that Smith had taken that $3,000? A I knew no such thing; I was merely answering questions the same as answering your question.

Q You did not know the effort was made to indicate by that draft that Smith had stolen $3,000? A I didn't know anything of that kind.

Q What did you suppose you were doing? A Merely answering questions as I am answering yours.

Q Can you refer to any book here which will give you any light as to what became of that $3,000 which is sought to be charged here that Smith had stolen, and suing on the bond for, can you tell us by any of these books? A I can tell whether it has been charged to this account.

Q All right. A (Witness examines book.)

Q (*By the Court.*) Look at the debit side-book? A Debit side-book of that date shows a charge of $3,000 to the account.

Q (*By Mr. McCarter.*) Where is that? That is in what book? A Credit side-book, investment department.

By the Court.

Q Look and see what exhibit it is? A Exhibit P. 38.

Q And will you look at account No. 793 in the ledger and see if it is charged on that, that is P. 32? A It is charged against the account December 12th.

Q In Exhibit P. 32? A P. 32.

By Mr. McCarter.

Q In view of these two entries in the two books you last referred to, would you say that there would regularly be any marks indicating payment on the check itself? A I said not unless it was cashed.

Q Well, if it was charged—

Mr. Clark. I object unless the question is qualified to call for the regular order of business. The whole object of the introduction of this proof in this case, in connection with all the other times, showed that whatever happened there was not regular. Mr. Thompson is being asked only

what would be the procedure in the event of a draft regularly cashed by a depositor, what would happen, and I say that the question is improper in connection with this particular draft, which all the evidence up to date shows was not regular. The evidence shows it is Mr. Smith's signature with "R. E. S." under it.

The Court. The objection will be overruled.

Q These two books, now, indicate that there was a charge to the account of Emma E. O'Connor of $3,000. In whose handwriting is that entry on the book that I hold in my hand, Exhibit P. 38? A Mr. Mindnich's.

Q I ask you again if that check was paid? A That check was charged against the account, yes, sir.

Q Was it paid? A Paid, yes, if you want me to say yes.

Q I want you to tell the truth. A I don't understand what you mean by the question; it was charged against the account.

Q Have you anything more to say than that about it? A Nothing.

Q I show you the draft marked Exhibit P. 31, Alma Mott, is that the same situation? A Same situation.

Q In whose handwriting in the ledger is the entry to which you referred concerning the draft for $3,000, signed "O'Connor, R. E. S.," Exhibit P. 29? A Mindnich's.

Q Mr. Mindnich was indicted, wasn't he? A Yes, sir.

Mr. Hinds. I ask that the question be stricken out; it is absolutely irrelevant to ask whether a person who was not a witness was indicted, and if he was a witness it would be improper to ask if he was indicted.

The Court. The objection was timely and will be sustained, and the answer if recorded will be stricken out.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Will you look to see what charges, if any, appears on these or other books, with reference to Exhibit P. 31, being the Alma Mott draft? A A $6,500 draft was charged against the account of Alma Mott.

Q When? A On October 14, 1911.

Q Found in what book? A Exhibit P. 32.

Q Account 114, in whose handwriting? A Mr. Mindnich's.

William J. Thompson, cross.

Q What else? A And it also appears in the debit side-book of that day, in whose handwriting I don't know.

Q Under date of October— A 14th.

Q In somebody's handwriting you do not know? A No, sir.

Q Book No. 114, Mott, A. M., $6,500? A Yes.

Q Who regularly kept Exhibit P. 38? A One of the assistant bookkeepers, sir.

Q Whose handwriting is on page, October 17th? A Miss Hicks, stenographer.

Q The entries under date of October 14th, including that to which you have referred, are in the handwriting of some of these ambulatory clerks that came in on Saturday afternoons? A Yes, sir.

Q You don't know whom? A No, sir.

Q One of these accounts—one of these books—appears to be a duplicate; did I understand you to say yesterday that you knew of no duplicate except this one? A No, I said there were no such things as duplicate accounts.

Q Suppose I had a savings book account and lost my bank-book, would you issue me a duplicate? A Issue a duplicate, yes.

Q There is nothing peculiar, then, about this duplicate book? A No.

Q In whose handwriting are the entries of interest and drafts in this Exhibit P. 9, being the duplicate book? A All in Smith's handwriting.

Q The whole business? A Yes, sir.

Q Was it customary for Mr. Smith to enter small interest payments like four dollars and some cents? A It was entirely his privilege, but it was not customary.

Q It was not customary? A No, sir.

Q So the entries on the other side are in Mr. Smith's handwriting? A Yes, sir.

Q You are sure about that? A Positive.

Q You knew his writing pretty well, didn't you? A Yes, sir.

Q Now, you stated yesterday that no other officers than Mr. Smith attended to the business, except as Mr. Odell, the president, would come in there every morning before taking a train; don't you know that the latter part of the time that was not

true and Mr. Odell was there a great deal of the time? A I do not know that, no, sir.

Q Don't you know that Mr. Smith, during the latter part of the business, went out to drum up business, and that either Mr. Odell or Mr. Foster was there practically all the time he was away? A I think there was a short period when Mr. Foster was in the bank during the absence of Mr. Smith.

Q You now recall that? A Yes.

Q When was that? A I don't just recall how long it was, nor how long it obtained.

Q You stated that you had no knowledge of any of what has been called the irregularities connected with these items, except, as I have your evidence, "I knew of one or two instances where the difference in entry was brought to my attention because a draft was drawn by a person who opened an account, and it was for more than the amount at which it was opened"; is that correct? A That is correct; yes, sir.

Q That evidence was correct, was it? A That evidence was correct.

Q Then the only irregularities that you were aware of all this time at that bank was what? Just explain that again to the jury and to me? A In a case where an entry has been made in the customer's bank-book, or a customer had been notified that such a credit was to his or her account, and drew a draft because of the notification, and when the draft reached the bookkeeper, it was apparently not good on the ledger.

Q You mean by that it was an overdraft? A Yes, would have been, if it had been charged.

Q Never was charged; did not go through? A Yes, quite frequently it did.

Q Then all the irregularity you did know of was this custom of permitting overdrafts? A Yes, there was permission of overdrafts.

Q Is that what you refer to? A Yes.

Q How long had you been aware of that custom? A Why, that had been going on for, I guess, a year or a year and a half.

Q All the time that you were receiving teller? A Yes.

Q And before that, when you were bookkeeper? A I think there were some before that, yes.

Q Where directors were permitted to make overdrafts? A Directors were not permitted to make overdrafts; no, sir; nobody was permitted to make overdrafts.

Q But they did it? A I believe there were two instances where the directors were overdrawn.

Q And those are examples of the irregularities you were aware of? A Yes, sir.

Q And the only type of irregularities you knew anything about? A Yes.

Q You are sure about that? A Yes.

Q Positive? A Yes.

Q There cannot be any mistake about it? A No, sir; not as near as I can remember.

Q A minute ago you said you were positive, now you are beginning to hesitate about it? A No, sir, not a bit.

Q You are positive of it? A Yes, sir.

Q Did you testify in the Chancery suit before Vice-Chancellor Stevens when the directors were being sued for their neglect? A I think I did.

Q Now, don't you know you did? A Personally, I cannot see any reason for your ridiculing a statement like that. I have testified in about fifteen of these cases; I cannot remember whether it was before Chancellor Stevens, or who it was before.

Q Have you testified outside of criminal cases? A Yes.

Q Except before Vice-Chancellor Stevens? A Yes, I have.

Q And you did testify before Vice-Chancellor Stevens, didn't you, down in the Chancery Chambers, in the Prudential Building? A Yes, sir, I testified in the Chancery Chambers, Prudential Building.

Q I have what purports to be a stenographic report of your testimony, and I am going to read a little bit of it in view of what you have just said, and see how you reconcile it. Do you remember testifying on page 542 as follows: "Q Was there any irregularity in the keeping of those books by any employee, to your knowledge, while you were an employee of the bank? A While I was connected with the bank? Q Yes. A No. Q You understood my question, did you? A I did. Whether there was any irregularity in the keeping of the books while I was connected with the bank? Q Yes. A I did not know of any. Q Was there any irregularity in the manner of keeping those books or any of them while you were an employee of the trust company? A Yes. Q What? A Why, the holding of checks in one case would be an irregularity; holding sundry items for the length of time they were held. Q Which is ir-

regularity two; what else? A Certification of checks. Q Which is three; what else? A That is all I know of. Q How soon after you became an employee of the bank did you notice these irregularities? A That I don't know; possibly a year. Q Did you notice it frequently, or infrequently? A Very frequently, yes. Q Did you call those irregularities to the attention of Mr. Odell, the president? A No, sir."

Mr. Clark. I object to the introduction of any other evidence which has no relevancy, because counsel has not asked him whether or not he called anything to the attention of the president. I think counsel should be held strictly to contradicting evidence which is in the case.

The Court. That is my opinion.

Mr. McCarter. I think I have the right to complete the question down to the middle of page 543.

The Court. I think if you limit your questions to where you have marked, it is admissible, and that includes this question, and you may have your objection to the ruling of the Court.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q "Q Did you call those irregularities to the attention of Mr. Odell, the president? A No, sir. Q Why, not? A Why should I?" Did you testify that way before Vice-Chancellor Stevens? A I presume I did, yes, sir.

Q Then there were other irregularities than that to which you have referred today, namely, the overdraft?

Mr. Hinds. I object to it; it is quite obvious on the face of it there were none.

The Court. It is not obvious to me.

Mr. Hinds. He has testified to three classes of overdraft.

The Court. It may be entirely susceptible to explanation, but to me, knowing nothing about it at all, it is not so plainly consistent with his present testimony.

Q (Question read.) A Those are the overdrafts to which I referred.

Q You spoke before Vice-Chancellor Stevens of certification of checks? A Yes.

Q Is that an overdraft? A Yes, sir.

Q The holding of checks in one case would be an irregularity; what do you mean by that? A Holding them for a great length of time.

Q What do you mean by holding checks for a great length of time? A Holding them in the cash really constitutes an overdraft, holding them in the paying teller's cash for quite a length of time.

Q Explain how. I mean, now, I present a check? A Yes.

Q And it is met? A Yes.

Q And it is held in the paying teller's cash for a long time? A Yes.

Q Why? A Because the account was not good or had already been drawn to such an extent it would not permit of any greater overdraft.

Q How long would you hold it? A Why, I believe some of them were held at most about a week or ten days, something like that.

Q Any directors in that? A I think not, although there might have been one or—

Q Who? A Scarlett, I believe, had a check or two held some time or other.

Q He was a director? A He was.

Q Where is he now? A I don't know.

Q What? A I don't know.

Q By the way, where is Smith? A I don't know that, either.

Q He is not dead, is he? A He could be for all of me; I don't know, I tell you.

Q You have seen him within two weeks, haven't you? A I have not seen him in five years.

Q Five years? A The last time he testified at a trial.

Q Five years? A Maybe it is not five years; it is very nearly five, though.

Q Now, you knew that the examining committee of the board of directors undertook to make at least two annual examinations into the affairs of the bank? A I knew that, yes, sir.

Q Did you ever call their attention to any of these irregularities we have been speaking of?

Mr. Clark. I object to that as not relevant to the issues in this case.

The Court. The point is as affecting the credibility of the witness. The objection will be overruled.

An exception to this ruling is noted by plaintiff as ground of appeal.

Q Did you ever call the attention of any of these directors or this examining committee who were making examinations of the bank to these irregularities? A There were but two examinations—

Q Answer my question. A I am answering it, sir. There were but two examinations made when there were any irregularities existing that I could call their attention to, and those two examinations the items held in the sundries, which were considered irregular, were still held in the sundries for the directors to see.

Q Do you think you have answered my question? A I do, absolutely.

Q Did you call the attention of the directors, that is, the examining committee of the board of directors, to the fact that in the form of over-certifications, in the form of overdrafts, in the form of holding checks back, the affairs of the bank were irregular? A I did not.

Q And do you make the same answer to the inquiry, "Why not?" that you made before Vice-Chancellor Stevens, namely, "Why should I?" A Yes.

Q "Why should I?" A Yes.

Q Well, why should you? You were paying teller of the bank, weren't you? A I was paying teller for a time.

Q Next to the treasurer and secretary the highest official in it? A Yes.

Q I will ask you again, if you will tell me, when you first became aware of any of these irregularities to which we have referred? A About a year or a year and a half after the opening of the bank.

Q If the bank opened on the first of December, you think, then, that it was about the first of December, 1909, or about June, 1910? A Yes.

Q Do I understand you to say the examining committee only made two examinations after June, 1910? A I think you said so, sir; I did not.

Q I asked you if they did not make two a year? A I said they did, yes; how many more they made I don't remember. I think in my testimony before I said that they made two or three a year, something of that kind.

Q Did you ever have the curiosity to look at the by-laws to see how often they were supposed to make them? A They were not available to me.

Q You did not have occasion to ascertain from the by-laws? A Whether I had the occasion or not I could not get them.

Q Then, as a matter of fact, from June, 1910, to August, 1913, there were at least two examinations a year by the examining committee of the bank? A Yes.

Q And on none of these occasions did you bring any of these irregularities to their attention? A Not specifically in words, no, sir.

Q Well, how unspecifically, and in other manners did you bring them? A Because the documents were right there, sir.

Q What documents? A The checks that were held in the cash, they were right there; they had to be held there in order to prove that day's work; that was what the examining committee was endeavoring to do; to prove the records of the bank.

Q How many accounts were opened in this trust company with a dollar? A I have not the faintest idea.

Q Well, one hundred, or ten or two? A I could not tell you whether there was one hundred, ten or two.

Q Did the fact that the ledger showed an account or two opened in the amount of a dollar strike you as unusual or ? A No, sir; certainly not.

Q Did you invite deposits of that amount? A We did not invite them; we certainly did not refuse them.

Q You know perfectly well that down at the Fidelity Company they have on the windows "Deposits of $2," don't you? A Yes.

Q And you know over at the Dime they have a similar suggestion? A Yes.

Q I ask you, if any invitation, or suggestion of any kind appeared in any of your literature or advertisements on the windows indicating that you received deposits as low as a dollar? A I think they did.

Q Where? A I don't know, but I think the purpose of the bank was soliciting small accounts; certainly we never received less than a dollar; I know we did receive a dollar.

Q How often? A Quite a number of times; many times, I should say.

Q Can you give us any estimate? A Not in the least, sir.

Q Now, Mr. Thompson, you were indicted, were not you?

Mr. Hinds. Objected to.

The Court. Objection sustained.

Mr. McCarter. May I be heard on it? I propose to show, if I may, by this witness, that he was indicted, that he turned State's evidence, and was given immunity, and I think that goes to affect his credibility in this case. To be sure, he is not now engaged in testifying in a criminal case, but he is engaged in endeavoring to lead this jury to infer that certain transactions which might have been managed by him, or by Mr. Jennings, or some of these other clerks, were wholly managed by somebody else, and to the effect that he, of course, had nothing to do with it. I think it affects his honesty and credibility here to show just what I have stated. I recognize the fact that the ordinary rule is that the only evidence along that line is evidence of a conviction; but in the famous case of State *v.* Young, a witness, a dentist, was called for the State, and I was permitted to ask him if he was not under indictment, to indicate his interest in testifying against Young, and whether he was not promised immunity, to indicate, of course, that he would come up and testify against somebody else, he himself was relieved from any responsibility. That was sanctioned by the Court of Appeals. Now, it seems to me here, with this witness testifying in this way in this case, we ought to be permitted to show just what I state by my question.

The Court. The argument has not served to change the view of the Court, and an exception to the ruling will be noted.

An exception to this ruling is noted by the defendant as ground of appeal.

RECESS.

William J. Thompson, cross.

Q Referring again, Mr. Thompson, to your evidence concerning the fact that Mr. Smith was the only officer who paid any attention to the bank, isn't it the fact, that Mr. Odell, when he made these morning calls, before going to New York, would do something else besides confer with Mr. Smith, as you testified yesterday? A I do not remember any time when Mr. Odell conferred with anybody else than Mr. Smith.

Q I ask you if he did not do anything else than confer with Mr. Smith? A I think he did not, except make a deposit.

Q I call your attention to your evidence in this same Chancery case, on page 561: "Q Did Mr. Odell, while you were keeping the individual ledger, for instance, did he come any time to look it over, and look over other of the books that you had under your charge? A Oh, I believe he came in and looked over the accounts receiveable in the general ledger. Looked over the balances of different accounts; just the accounts he was interested in." Do you remember testifying that way? A I don't remember.

Q Would you say you did not? A No, I would not say I did not.

Q Is it a fact he did do that, now, that you recall? A He did do that, I think, at times, just the accounts he was interested in.

Q He did look over your shoulder. Did not Mr. Fairlie and Mr. Monroe, both of whom were directors as well as Mr. Odell, come into the bank every day? A I don't think he did.

Q Page 568 of your evidence in the same case: "Q During that period, Mr. Odell, Mr. Fairlie and Mr. Monroe came into the bank right along nearly every day? A I guess they did, yes sir"; which is right? A That is practically the same answer that I gave just now; they came in nearly every day, possibly, but they did not make a practice of coming in every day.

Q Did they inquire anything about the bank? A From whom?

Q You or anyone else in your hearing? A Not from me, sir.

Q From anyone else in your hearing? A From Mr. Smith, yes, in my hearing.

Q Do you remember there was an account in the trust company in the name of the Intercity Loan & Security Company? A I do.

Q And did not a great many of those checks come in, and were not they paid without funds to meet them? A Yes, sir.

Q You knew that, didn't you? A Yes, sir.

Q Over how long a period was that? A I don't remember.

Q As nearly as you can recall. A Well, for quite a length of time previous to the closing of the bank.

Q Well, six months? A I don't know whether it was six months or a year, sir.

Q To what extent was that account overdrawn, roughly? A Quite an extent; I don't know the figures, even roughly, but it was considerably overdrawn.

Q Did you ever call that to the attention of the directors? A No, sir.

Q You felt that was so conspicuous they could see it for themselves? A Yes, sir.

Q Would you say this overdraft by the Intercity Securities Company was less than $30,000? A I don't remember whether it was less or more.

Q Do you remember the Armstrong account? A I do.

Q Do you remember being told by Mr. Smith to honor all the Armstrong checks that came in, whether there was money to meet them, or not?

Mr. Clark. I object to this question and ask whether it is on the same ground of attacking the credibility of this witness, whose testimony has been directed almost entirely to what he has seen on a page offered to him.

Mr. McCarter. The object of the testimony is to show that Mr. Thompson, who has said that he knew only of certain irregularities, knew of a great many irregularities, and was participating in those irregularities and believed that so many of them were so patent that anyone who runs, could read them, that he did not even think it was worth while to direct the attention of the directors to them.

Mr. Clark. This is cross examination. If they desire to make this witness their own witness, I submit there is not the slightest basis for further investigation along this line from the standpoint of attacking his credibility. He has told of knowing of overdrafts. These are all in line, and part of the overdraft system. He has not given any evidence as to the extent of those overdrafts. The whole effect of this testimony is to bring into this case

a lot of matters which are absolutely immaterial and irrelevant.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A I do remember that, yes, sir.

Q And you did so, didn't you? A Yes, sir.

Q During how long a period? A Possibly a year and a half.

Q Possibly longer than that? A Possibly.

Q And you never called the attention of the directors to that? A No, sir.

Q You thought that was patent on the books, and they must know it if they made any examination? A Yes, sir.

Q Who was Mr. Armstrong? A A real estate contractor.

Q Is the same thing true of Mr. Scarlett, who was a director?

Mr. Clark. I make the same objection.

Objection overruled.

Exception to this ruling is noted by the plaintiff as ground of appeal.

Q Namely, that Mr. Scarlett, who was a director, was permitted to draw and overdraw for a period of a year and a half or two years or less, and that you participated in that and never even called the directors' attention? A I think not; no, sir.

Q How long a time was Mr. Scarlett permitted to overdraw? A He was overdrawn, I think, for a period of something like a year and a half.

Q You understood that? A Yes.

Q You acted as teller at the time? A Yes.

Q And at Smith's direction? A Yes.

Q You did not bring that to the attention of the board of directors because you thought that was obvious and they could see it?

Mr. Hinds. I object to inquiring of the witness as to his mental process.

The Court. Ruling upon the objection to this particular question, the objection will be overruled.

An exception to this ruling is noted by plaintiff as ground of appeal.

Q (Question read.) A That was one of the reasons I did not bring it to the attention of the directors, yes, sir.

Q Now, Mr. Jennings was a teller? A Yes, sir.

Q By the way, assuming an exchange check came in from one of the other banks, what function, if any, would either of the two tellers have in the settling up of that check? A After looking over the signature on the check, and verifying it, the teller would have nothing to do with it until it had been returned by the bookkeeper for one of the various reasons that a check could be returned.

Q If it was returned for some one of those reasons what would be some of those reasons? A Insufficient funds, signature, endorsement—

Q Perhaps you have answered enough. That being so, it would be up to the teller to determine that question as it arose? A No; it would be up to the bookkkeeper who returned it to the paying teller for that reason—returned it to the receiving teller, rather.

Q Having returned it to the receiving teller, it would be up to him to determine what to do with it? A Yes.

Q Do you remember the fact that a check of Mr. Jennings for $2,000 came through in the regular course by exchange from the Merchants Bank and was paid, although he had a deposit of less than $200?

Mr. Hinds. Objected to for the same reason.

Objection overruled.

A No, sir.

Q You do not recall that? A No, sir.

Q You never before heard that that was the fact? A I have heard it was the fact; yes.

Q Well, if it were a fact—do you remember when it is said to have occurred? A No, sir; I do not.

Q Don't you recall that as teller you permitted a check of Mr. Jennings, your associate teller, to be paid, which check was in round figures $2,000, although he only had less than $200 in the bank? A I neither permitted it, nor did I know of it.

Q You are quite clear about that? A Positive.

Q Which of the directors was it that to your knowledge were overdrawn, using that term in the particular sense that you used it? A Mr. Scarlett.

William J. Thompson, cross.

Q Any other? A No, sir.

Q Sure about that? A Not in the sense that you are talking about overdrafts now; that is, these large overdrafts for an extended period.

Q I haven't signified that I— A That was your question to me, in the broad sense that I was talking about.

Q I mean whether it was for over-certification, or either one of the branches of overdrafts you have been speaking of; I am adopting your definition; I say, which one of the directors, to your knowledge, were permitted to have overdrafts? A Mr. Scarlett.

Q Who else? A There was not anybody else permitted to have overdrafts; there were two other directors that had overdrafts.

Q Well, who permitted it? You were teller, weren't you? A Yes.

Q Who were they? A Mr. Foster.

Q He was vice-president? A Yes, sir.

Q Who else? A Mr. Munroe.

Q He was director and counsel? A Yes, sir.

By the Court.

Q What was the nature of their overdrafts? A Temporary. Mr. Munroe's overdraft was made good the same day we notified him of it, and Mr. Foster's was made good on the following morning, at the earliest moment he could make it good.

Q So they were not held in cash over one day? A They were not; no sir; in fact, they were not held in cash at all.

Q Were not charged? A They were charged.

By Mr. McCarter.

Q You spent some time this morning testifying concerning some items which are said to be on schedule G in the amended complaint; they had not come to your attention when you left the employ of the liquidator, had they? A I don't know what you refer to.

Q Do you remember testifying to some matters this morning? A I certainly do, but whether they were G or H I do not know.

Q Do you remember those derelictions you called attention to this morning—double entries, and differences, and all that kind of thing? A On the general ledger?

William J. Thompson, re-direct.

Q Yes. A Yes.

Q Had you had your attention directed to any of them after the failure, and while you were still working for the liquidator? A I think I possibly had; yes, sir.

Q How long did you continue to work for the liquidator after the bank closed on August 13th? A A month—a month and a half.

Q And some of them had already been called to your attention; do you know which they were? A No, I do not.

Re-direct examination by Mr. Clark.

Q When you say that some of those items had been drawn to your attention during the period of one month after the close of the bank, will you tell us what you mean by that? A I mean that I was just simply retained there in the bank to assist the bank examiner to get to some of the troubles that existed at the time. I was the only one present that knew enough about the working to be of assistance to them; that is, in some respects.

Q Well, can you remember any of those items specifically ever having been called to your attention? A I do not remember any of them specifically being called to my attention.

Q Now, Mr. Thompson, were you or were you not subpoenaed to attend this trial? A I was.

Q Have you or have you not discussed with counsel in this case any phase of the matters concerning which you have testified at any time? A I have not.

Q Or have you, within six months, discussed any of the matters concerning which you have testified with any person identified with the banking department of the Roseville Trust Company? A Not within two years.

Q So that until you went on the stand this morning and were asked about these questions from the books you had not given these matters any thought for at least two years? A I have not.

Q Now, Mr. Thompson, we want to get at the facts here and we want to clear up things which are now not clear. I wish you would take the instance of the specific overdrafts, Armstrong, we will say, and just tell the jury in simple language just the process in connection with the overdraft, and everything that happened. A A check came into the bank in the exchanges. I would go to the bookkeeper—I think there was an understanding

that we referred checks for any amount, say, for instance, anything over $100—we were rather given to understand that we were to refer those to Mr. Smith, or did refer them, because that was the logical thing to do, and asked his ruling on a check of any amount over $100. If it was for anything less than $100 we were in the habit of holding the check in the cash in direct—following directly Mr. Smith's ruling on the Armstrong matter, we held the check in the cash. The receiving teller would hold it for one day, when it would be turned over to the paying teller, and he would hold it indefinitely or until such time as it was charged against the account.

The Court. I do not think that answers the question at all. You were asked as to directors. While those checks would overdraw the account I do not understand that they were charged up as overdrafts.

Mr. Clark. That is true, and all through this case, your Honor will find confusion in nomenclature, because these were not overdrafts.

Q I will ask you what you mean? A I should consider an account overdrawn, certainly, if the checks were being held in the bank, regardless of whether they were carried on the books or not.

Q (*By the Court.*) If they were paid? A Yes, sir.

Q And those checks were paid? A Those checks were paid. Any check held over one day is considered paid and the bank is responsible for it.

Q (*By Mr. Clark.*) Did you tell us what, if any statement, Mr. Smith made to you in the course of business at the time of presenting him one of these checks with a request for directions? A Mr. Smith, I think, invariably, I don't know, but what we may have returned some few checks, but the great bulk of the checks were paid by Mr. Smith, or, rather, were paid under instructions of Mr. Smith, under a general instruction received right off, or specific instruction received when we referred the check to him.

Q What did he say, if anything? A He said there was a note or notes—

Mr. McCarter. I object to what Mr. Smith said.

The Court. Objection overruled.

William J. Thompson, re-direct.

A (Continued.) He said a note or notes were now in the possession of the bank, and were to be placed to his credit on the account, but either had not been ruled upon by the directors as yet, or had been favorably acted upon by the directors, but had not been credited to the account.

Q You say "his credit"? A Armstrong's.

Q Does the same hold true with regard to other accounts? A It does.

Q To what extent? A In all of the cases where the overdraft amounted to—where the holding of checks amounted to anything like a large amount that explanation was given.

Q Now, Mr. Thompson, you have not been clear as to when you became paying teller; will you examine P. 32, and see if by identifying the handwriting you can fix the date beyond which you acted as paying teller in addition to acting as receiving teller?

The Court. P. 32 is the ledger.

Witness. This is P. 44.

The Court. That is the paying teller's proof?

Witness. Yes, sir. It is not in here, Mr. Clark.

Q Look at the succeeding paying teller's proof, P. 45. A It appears here that Mr. Jennings ceased being paying teller on July 23rd, 1913.

Q And the bank closed when? A August 13th.

Q So you were paying and receiving teller combined for— A Just a short period.

Q How many weeks? A July 23rd, about three weeks.

Q What is the latest date upon which you made any entries in the general ledger? A It is not in this book; it is in a previous book.

Q And when does that book begin? A October 23, 1911.

Q So that during a period of the transactions concerning which you have testified this morning the earliest of which was December 30, 1912, you had no contact with the general ledger to make entries in it? A No, I had not; but the reference I made in answer to counsel's question was in reference to making up the debit or credit slip.

Q Explain that. A The charge was to be made out on a charge ticket, and the credit to be made out on a credit ticket, they being general ledger credits and general ledger debits.

William J. Thompson, re-direct.

Q On what accounts? A Most of the accounts effective in the general ledger there.

Q Will you take your receiving teller's proof-book as of any day—here is July 25, 1912, this is P. 42—and explain how those credits figured in those transactions for that day? A They became part of the receiving teller's proof.

By the Court.

Q What is that? A General ledger credits and general ledger debits.

Q From whom did you receive those slips? A I made up some of them, sir, in the regular course of business.

By Mr. Clark.

Q What were comprised in those slips? A For instance, charged to bills payable—credit to bills payable—charged to one of the general ledger accounts.

The Court. I suppose counsel means whether or not there was anything outside of cash items.

Mr. Clark. No; the witness has explained to me, explaining that it relates to bills purchased; discount received or paid.

Witness. Yes.

The Court. May I see that book?

(Book handed to the Court.)

Q Will you show the Court the points where that comes in?

(Witness indicates on the book.)

By the Court.

Q Are those debits and credits for a particular day only? A Yes, sir.

Q No balances carried forward? A No, sir; the balances were carried forward in the general ledger.

By Mr. Clark.

Q Will you show the Court the general ledger, P. 51, for that same day, July 25, 1912?

Mr. Clark. There is no significance in the date, except we happened to open at that page.

William J. Thompson, re-direct.

Q And point out where the credits on the general ledger are shown, and which you take into your receiving teller's proof, are shown there, if they are shown there? A On the debit side of the ledger for that same day.

By the Court.

Q Now, then, these two items that are discounted upon your trial balance of that day under the head of general ledger, on both the debit and credit side, from whom did you get those items? A Some of them from Mr. Smith, others of them from the paying teller, some of them I made myself.

Q I am speaking only of those items which are stated here to be general ledger? A Those are the ones I mean.

Q I thought you said you made none of the entries in the general ledger? A I made none in the general ledger, but I made some of the entries that go to make up that amount.

Q But, in putting it down in this trial balance book, where did you get these figures from? A Total of the general ledger charges.

Q That is self-evident. Now, from whom did you get this balance? Not the items that go to make it up, but from whom did you get these totals? A Those were the totals; if I was acting as receiving teller, I would make it myself when running up the adding; the slips were made up by any of three men, and kept until the end of the day, when an adding machine slip was made of the charges and that total was then placed in the receiving teller's proof-book, as the total of the general ledger charges for that day.

Q What is the significance of these items over here where it speaks of individual ledgers, which appear to correspond with individual checks and individual deposits on the receiving teller's proof-book? A Those are the separate totals secured during the day by the receiving teller. For instance, batches of deposits that were handed over to the bookkeeper from time to time during the day, after the adding machine list was made of them, or simply taken at the end of the day and put in just as they appeared on the adding machine list.

Q And this had nothing to do with the paying teller? A No, sir.

William J. Thompson, re-direct.

Mr. Clark. Will your Honor note at this point that this reference to the trial balance means the receiving teller's proof-book?

The Court. Yes.

By Mr. Clark.

Q Now, Mr. Thompson, when a depositor came to the bank to draw out money from what is known as the special department, or investment department, would they receive that money without an entry being made in their pass-book showing the receipt of it? A No, sir.

Q (*By the Court.*) Would money be paid out of that account without the production of the pass-book? A No, sir.

Q Never? A No, sir.

Q (*By Mr. Clark.*) Now, Mr. Thompson, you have testified that you found in the debit side-book of the investment department, under date of December 12, 1910, an entry showing that $3,000 was paid out and charged to the account of O'Connor? A Yes, sir.

Q If that money had not left the bank on that day what would have been the condition of the proof-book? A It would have shown $3,000 over.

Q I will ask you to look at the receiving teller's proof-book, P. 41, and the paying teller's proof-book—

Witness. Possibly this is the one I have here.

Q (Continued.) For the date December, 12, 1910— A It is not in this one; I want the other one.

Mr. Clark. I withdraw the question.

Q I show you a book and ask you to describe what it is? A Paying teller's proof-book.

Q Beginning what period? A December 6, 1910, up to and including December 16, 1911.

Said book offered in evidence and marked Exhibit P. 64.

Q Now, will you look at paying teller's proof-book, P. 64, for December 12, 1910, and also at the receiving teller's proof-book for the same date, and tell me what you find as to whether or not the books are in proof, or out? A I find them to be in proof.

William J. Thompson, re-cross.

Q Now, will you turn to October 14, 1911, paying teller's proof-book, P. 64, and receiving teller's proof-book for the same date and answer a similar question? A There is an overage of $20.07 in the receiving teller's proof that day.

Q And how about the paying teller's? A The paying teller's proof in proof.

Q Were you under bond to the Roseville Trust Company? A I was.

Q Has any claim, or demand, ever been made upon you by or on behalf of the Roseville Trust Company for the repayment of any money whatever?

Mr. McCarter. Objected to.

A There has not, sir.

The Court. I think the objection was timely.

Mr. Clark. My reason for making this inquiry is because one of the issues very strenuously urged by the method of his cross examination by my opponent, is that Mr. Thompson, being one of the persons who had access to the records, might conceivably have received some of these moneys himself.

The Court. I think every suggestion of that kind was overruled by the Court; certainly that suggestion which was contained in the question of his indictment, and if the presumption of innocence prevailed there, I think you may safely rest upon that at this point.

Re-cross examination.

Q Mr. Thompson, suppose that these two drafts, O'Connor and Mott, that have been referred to so often, or rather, the proceeds thereof, had been applied to some of these accounts that were withdrawn, for instance, like Scarlett's, when then happened to the proof? A It would be in proof.

Q In other words, if the proceeds of the O'Connor draft had been taken by Mr. Smith or by any other person in the bank and credited to the account of Scarlett, the books would have been in proof? A Yes, sir.

Q And the same thing is true of the other draft? A Yes, sir.

Q Now, I understand you to say that you were the only one for a month or so that continued at the bank after the Commissioner took hold that knew anything about the situation; that was right, wasn't it? A Why, some of the situation, yes, sir.

Mr. Mindnich was there. Mr. Mindnich and myself were the only ones there.

Q And you recall, do you not, that during that month some of the matters that have been referred to here this morning as Schedule G, which I show you, and concerning which you testified, came to your attention? A No, sir, I could not tell you that they came to my attention.

Q What did you mean by telling me that you learned of some of these during that month, as you did? A Why, possibly I did. All you are showing me here, sir, is simply a collection of figures. I have no doubt during the month I was there, some of these matters, I presume, came to my attention because that is why I was retained by the bank examiners.

Q You recall you testified this morning concerning several entries in Smith handwriting, showing that on the different dates they appeared the books were monkeyed with, don't you? A If I so testified as relating to these particular entries, I was incorrect.

Q I ask you if you recall having testified this morning concerning these instances? A I testified concerning them, yes.

Q Do you now say you were incorrect in the statement you made before recess, that your attention was not directed to any of them during that month? A If I made that statement before recess, that my attention was, or was not directed to them, I should not have made it, because my attention was directed to so many things it may possibly be I saw all of these, and may possibly be I saw none of them.

Q You don't know anything about it? A As to whether they were referred to me in 1913 I know nothing.

Q You cannot say whether you knew about them, or did not? A In 1913?

Q During that month you remained there in the bank? A I don't know whether I knew anything about them or not.

Q When did you have your attention called recently to them? A This morning.

Q On the stand? A Yes, sir.

Q You had not been told before you took the stand that you were to testify concerning them? A No, sir.

Q Had not the slightest idea what you were going to testify about this morning? A No, sir.

Q Don't you know, as a matter of fact, that it was customary very frequently for Mr. Smith to take money that was de-

posited by A and put it to the account of B? A Do I know that to be a fact?

Mr. Clark. I object to that testimony as irrelevant and immaterial.

The Court. In Mr. Thompson's testimony you have opened up the general practice and policy of the bank, so far as its bookkeeping and accounts are concerned, and so much so that it has seemed to me, and that has been the basis of my ruling on the other objections, that almost anything relating to the practice of bookkeeping and accounts of the bank were the subject of cross examination.

Mr. Clark. My objection goes to showing other frauds of Smith, because they are so numerous we would never get to the issue. I have no objection whatever to matters directed to the course of business in the bank, but I say it is an unncessary complication of the issue to try to follow the numerous frauds that Smith committed in the institution. We are only claiming under a specific number of them. We are not claiming that any moneys that Smith used in this direction, or that, are larceny or embezzlement, but we are claiming straight out on instances where he received the money, and the bank never got it.

The Court. The objection will be overruled and an exception may be noted, although, if you desire it I might say that it is necessary, even after the Court's ruling, for you to indicate your dissent from that ruling, and to have your exception noted, if you desire to rely upon that, as ground of appeal.

Mr. Clark. I will ask for such an exception.

An exception to this ruling of the Court is noted by plaintiff as ground of appeal.

Q I am not criticizing you in my inquiry, but I am simply asking you, as a matter of fact, whether it is not true, to your knowledge, that during these years that you were there associated with Mr. Smith, that it came to your knowledge that Mr. Smith had a habit by which he would credit the account of A by taking money from the account of B, and subsequently credit

B by taking money from the account of C, and juggled them around that way? A As I remember, sir, during my time with the bank, I knew of no case of that kind.

Q Haven't you learned it since?

Mr. Clark. I object to that. That is clearly outside the—

The Court. I sustain the objection.

Mr. McCarter. May I be heard on that?

The Court. Yes.

(Argued.)

The Court. An exception will be noted; I think it is not proper cross examination.

An exception to this ruling is noted by defendant as ground of appeal.

EMMA E. O'CONNOR, sworn for the plaintiff.

Direct examination by Mr. Hinds.

Q You were a savings depositor of the Roseville Trust Company, were you not? A Yes, sir.

Q Will you look at this draft marked Exhibit P. 29, and tell me whether you made that draft? A Oh, that is not my writing.

Q Did you ever at any time withdraw any money from your account without presenting the pass-book in the savings department? A That I cannot remember.

Q Can you say whether or not you withdrew $3,000 in December, 1910, or at any time near that? A No, I cannot.

Q Did you ever withdraw $3,000 from the Roseville Trust Company savings department? A No.

Q Did you authorize Raymond E. Smith or any other person to make this draft which I show you against your account? A No, I don't remember any draft.

Q I show you a book marked Exhibit P. 28, and ask you if you know what that is, if you remember having seen that before? A It is so long since I have seen those books that they look kind of—yes, I have seen this; I have a copy of this exactly.

Q What is that book? A It is my own personal book in the Roseville Trust.

New Jersey State Library

Charles M. Mindnich, direct.

Q When you were depositing, did you frequently consult this book? A Yes.

Q It was in your possession, was it not? A Yes; that is my own book.

Q Will you look at it and tell us whether you withdrew any money during the year 1910, refreshing your recollection, if it serves that purpose? A I did draw; I had to draw; I drew very little in my own personal account.

Q But you cannot tell by consulting this book, and refreshing your recollection, whether you drew any money at all in 1910? A I don't think I did.

Q Are you here under subpoena? A Yes.

Cross examination by Mr. McCarter.

Q Did you know Raymond Smith? A I was introduced to him when I brought my money up there; that is all I know about him.

CHARLES M. MINDNICH, sworn for the plaintiff.

Direct examination by Mr. Hinds.

Q What is your business? A Banking.

Q Where are you employed? A Federal Reserve Bank, New York.

Q How long have you been there? A About three and a half weeks.

Q Prior to that, where were you? A I spent eleven months in the service of the United States Army.

Q Prior to that? A Savings Investment & Trust Company, East Orange.

Q And prior to that? A Public Service Corporation, Newark.

Q Were you in the employ of the Roseville Trust Company? A Yes, sir.

Q Between what dates? A From April 21, 1910, to August 13, 1913.

Q Had you any experience in banks prior to going to the Roseville Trust Company? A Yes, sir; about three months with the American National Bank, Newark.

Q About how old were you when you went into the employ of the Roseville Trust Company? A About sixteen years old.

Charles M. Mindnich, direct.

Q When you first went with the Roseville Trust Company what were your duties? A I was assistant bookkeeper.

Q And in connection with that work what books did you make entries in? A I kept the side-books of the investments department and side-books of the commercial department.

Q And by side-books you mean both debit and credit books? A Both debit and credit books.

Q When did you first begin to make entries in other books? A Why, when Mr. Thompson became receiving teller, on Saturday mornings I was the bookkeeper, acting bookkeeper.

Q And as bookkeeper, what books did you make entries in? A The individual ledgers, demand ledgers and individual investment ledgers.

Q Will you turn to the debit side-book containing the date December 12, 1910, and state whether you find an entry of the withdrawal, or purporting to be a withdrawal by Emma E. O'Connor, December 12, 1910? A December 12, 1910, book 793, Emma E. O'Connor, $3,000.

Q Is that in your handwriting? A Yes, sir.

Q I show you exhibit—

Mr. McCarter. What exhibit is that, please?

Witness. P. 38.

Mr. McCarter. Side-book, is it?

Witness. Yes, debit side-book.

Q Upon what information did you make that entry, if you know? A From the debit slip.

Q I show you Exhibit P. 29 and ask you whether, if you know, you can say whether or not that is the debit slip? A That is the slip the entry was made from.

Q Can you, having in mind the practice in the ordinary course of business in the trust company, state whether or not that draft was paid? A The mere fact that it was entered in the side-book shows the draft had been paid.

Q I show you the individual savings department ledger for the account of Emma E. O'Connor, 793, which has been marked in evidence, and ask you whether any of those entries were made by you?

The Court. That is P. 32, isn't it?

Witness. P. 32, yes, sir.

A Quite a number of entries here in this Emma O'Connor account were made by me.

Q Do you find an apparent withdrawal there on December 12, 1910, of $3,000? A Yes, sir.

Q In whose handwriting? A My own.

Q Will you tell us upon what information entries were made in the individual deposit ledgers? Not the side-books, but the individual deposit ledgers? A They were made either from the checks, or from the deposit tickets themselves.

Q Having in mind the entry I have just shown you, does that confirm or alter the answer that you made as to whether or not that draft was paid? A It confirms it.

Q I show you debit side-book, October 14, 1911, savings department, and ask you to turn to that date. Do you find an apparent withdrawal of $6,500 from the account of Alma M. Mott, which is No. 144? A Yes, sir.

Q In whose handwriting? A That I cannot tell.

Q (*By Mr. McCarter.*) Which book is that? A P. 38.

Q And that is what? A Debit side-book, investment department.

Q (*By Mr. Hinds.*) I show you the individual ledger and ask you to turn to that same date, to the account of Alma M. Mott, and ask you if you find what purports to be a withdrawal by her of $6,500 on that date, October 14, 1911? A Yes, sir.

Q In whose handwriting? A Smith's.

Mr. McCarter. What book is that?

The Court. P. 32.

Q I show you the credit side-book P. 37 and ask you to turn to December 18, 1911. Do you find a deposit there to the account of R. Sharwell, pass-book 115? A No, sir.

Q Who kept the book on that date? A Miss Hicks.

Q Look at the individual ledger for that account and tell us who kept it on that date, this is P. 32, December 18, 1911? A I was keeping the ledger at that time.

Q Do you find the deposit to the account of R. Sharwell? A No, sir.

Q Of any amount? A No, sir, not on that day.

Q Refreshing your recollection from that book will you tell us whether or not a deposit ticket came through to you on that date? A No, sir.

Charles M. Mindnich, direct.

The Court. You mean you cannot tell?

A There is no deposit came through, sir.

Q (*By Mr. Hinds.*) Now I show you a portion of a deposit ticket that has been marked in evidence as Exhibit P. 2, the figures, "055" up in the left-hand corner, will you tell us whether on that date you received such a deposit ticket to the account of R. Sharwell? A No, sir.

Q If you had received such a ticket what entry would you have made? A There would have been an entry in the side-book here, and one in the ledger for that amount.

Q Now, turn in the side-book to January 11, 1911, Exhibit P. 36, who kept the side-book on that date? A I did.

Q Do you find an entry there of a deposit by P. J. Cossick? A Yes, sir.

Q What is the amount? A $1,000.

Q Can you state, refreshing your recollection from that book on what information you made that entry? A That entry was made from a deposit ticket.

Q For how much? A For $1,000.

Q I show you exhibit P. 4 and ask you whether that is the ticket from which you made that entry? A Yes, sir.

Q Now look at the individual savings deposit ledger to the account of Cossick and tell me whether you find on January 11, 1911, an apparent deposit by him? A Yes, sir, of $1,000.

Q In whose handwriting? A Mine.

Q What was the information on which you made that entry? A A deposit ticket.

Q (*By the Court.*) You do not copy those items from the side-book? A No, sir.

Q (*By Mr. Hinds.*) Do you recognize the handwriting on that deposit ticket? A Yes, sir.

Q Whose? A Smith's.

Q If a deposit ticket for $4,000 had come through to you on that day what entry would you have made in the ledger, and what entry in the side-book? A There would have been a credit to Mr. Cossick's account of $4,000 entered in the ledger, and a credit on the side-book of $4,000 to Cossick's account.

Q Turn to April 17, 1911, in the side-book, in whose handwriting are the entries on that date? A Miss Hicks'.

Q Then I won't ask you further about that book, it has already been testified to. Look at the savings department ledger

to the account of A. Magnani, and tell me who was keeping that book on April 17, 1911? A I was.

Q In his account, No. 1651, do you find any credit entry on April 17, 1911? A Under April 17th, no, sir; on April 25th there is one here of $1.

Q Is that the earliest entry in the account? A Yes, sir.

Q When was the account opened? A April 25, 1911.

Q Do you find any entry there of $451? A No, sir.

Q If a deposit ticket of $451 had come through to you what entry would you have made in the book? A An entry of $451.

Q Turn to the page for book 1652 in the special ledger account of A. Magnani, do you find any entry there on April 17, 1911? A No, sir.

Q What is the next earliest entry? A April 25, 1911.

Q Is that in your handwriting? A Yes, sir.

Q Does that open the account? A Yes, sir.

Q Turn to account No. 1653, is that in your handwriting? A Yes, sir.

Q What is the earliest entry on that account? A April 25, 1911.

Q For how much? A $1.

Q In whose handwriting? A My handwriting.

Q Account No. 1654, what is the earliest entry there? A April 25, 1911.

Q For how much? A $1 credit.

Q In whose handwritingf? A My handwriting.

Q Any deposit entry there of $598 on any date? A No, sir.

Q Turn back to No. 1653, do you find any deposit entry there of $1,199.12? A No, sir.

Q Now, turn to No. 1654, who kept that? A I did.

Q What is the earliest entry? A April 25, 1911.

Q What was the deposit? A $1.

Q Is it in your handwriting? A Yes, sir.

Q Do you find any deposit of $598? A No, sir.

Q Turn to No. 1655, who kept that? A I did.

Q What is your earliest entry? A April 25, 1911, $1.

Q Any deposit of $529.10? A No, sir.

Q What was the information upon which you made those several $1 credit entries in the ledger? A From the deposit tickets themselves.

Charles M. Mindnich, direct.

Q See if you find in that book an account No. 1654, duplicate? A No, sir.

Q Have you ever heard of such an account in the name of A. Magnani, administrator? A Not that I remember, no sir.

Q Have you ever heard of any account at all in the bank bearing a number and the word "duplicate?" A No, sir.

Q I am not referring to duplicate pass-books, but account duplicates. See if you find such an account in the transfer ledger? A No, sir.

Q Now, turn in the side-book, credit side-book to May 4, 1911; who kept that book on that date? A Miss Hicks.

Q Have you one of the ledgers there? A Yes, sir.

Q See if you find the account of F. Cardoni. No. 1697? A No such account.

Q Do you find No. 1696? A Yes, sir.

Q And 1698? A Yes, sir.

Q I show you pass-book, Exhibit P. 11, can you state when the first deposit was received after May 4, 1911, and for how much? A $6,000.

Q Do you recognize the handwriting? A Yes, sir.

Q Is there any handwriting in there except that same handwriting? A Yes, sir.

Q Whose? A Thompson, Jennings and Smith. There is a $3,000 withdrawal here on August 24th, Mr. Jennings' handwriting, and on November 28th, one of $2,000 withdrawal in Mr. Jennings' handwriting.

Q Now turn to side-book for January 5, 1912. A Debit or credit?

Q Credit. Who was keeping the side-book on that date? A Miss Hicks.

Q Turn to the ledger for James Crump, pass-book No. 2045; were you keeping the ledger at that time? A That sheet is not in here.

Q Find No. 2044. A 2044 is here.

Q 2006? A 2044 is in here.

Q What is the name? A James Crump.

Q In whose handwriting is that kept? A The opening credit is in my handwriting.

Q When was it? A November 3, 1911.

Q Do you find a deposit entry of $5,800 on January 5, 1912? A No, sir.

Charles M. Mindnich, direct.

Q Can you state whether or not you were keeping the book at that time? A Yes, sir, I was.

Q Refreshing your recollection from that book can you state whether or not you received a deposit ticket on that date to that account? A No, sir, I did not receive it.

Q Turn to February 20, 1912, in the credit side-book.

The Court. Is not Crump the one in which there is a deposit slip?

Mr. Hinds. Yes. I will show him the deposit slip.

Q I show you a deposit slip R13, marked "055, James Crump, January 5, 1912, $5,800," and ask you whether you received that deposit ticket? A No, sir.

Q If you had what entry would you have made in the ledger? A He would have been given credit for it on the ledger.

Q Now, have you found February 20, 1912? A Yes, sir.

Q Who kept the book on that date? A Mr. Thompson.

Q Turn to No. 2274, account of New Jersey Adamant in the savings ledger? A (Not answered.)

By the Court.

Q You are speaking of the credit side-book when you say Thompson kept it? A Yes, sir. There is no such credit in that book on that day.

Q In the ledger? A In the side-book.

By Mr. Hinds.

Q Turn to the ledger, New Jersey Adamant account, No. 2274. Tell us who kept that book on that date? A No such account in the ledger.

Q Do you find No. 2273? A Yes, sir.

Q And No. 2275? A Yes, sir.

Q Suppose in the ordinary course of business you received a deposit ticket to an account and there is no account in the ledger, what do you do?

Mr. McCarter. Did you ever have such a practice?

Witness. No, sir.

Mr. McCarter. Then I object to it.

Q Did it ever occur that a deposit ticket came through to you when there was no account in the ledger? A I presume then it was a new account.

Charles M. Mindnich, direct.

Q What did you then do? A Opened up a sheet in the ledger for it.

By the Court.

Q In the ledger are the sheets consecutively numbered or is that a loose leaf? A They are consecutively numbered.

Q Is it a loose leaf ledger? A Yes, sir.

By Mr. Hinds.

Q March 1, 1912, in the credit side-book, who kept it on that date? A Mr. Thompson.

Q Turn to the account of Benjamin F. Hewes, No. 2287 in the ledger? A Credit appears on the side-book of $1.

Mr. Hinds. To save time I was not going to ask this witness about any items except he found it in his handwriting.

Q Will you turn to the ledger and see who kept the ledger on that day, March 1, 1912, No. 2287 is the account? A I did.

Q Do you find a deposit entry on that date? A $1.

Q Can you say what the information was on which you made that entry? A From the deposit ticket.

Q I show you the deposit ticket marked P. 17, and ask you whether that is the ticket? A Yes, sir.

Q In whose handwriting? A Smith's.

Q Now, turn in the side-book to August 23, 1912; who kept it on that date? A I do not recall that handwriting.

Q Turn to the ledger account of No. 1928, Catherine Haney, and tell me who kept that book on August 23, 1912? A I did.

Q Do you find any deposit entry on that date, August 23, 1912? A No deposit on that day.

Q Can you state, refreshing your recollection from that book, whether or not you received a deposit ticket to that account— A I beg your pardon, there is a deposit here, August 23rd.

Q How much? A $284.78.

Q What is the name of that account? A Catherine Haney.

Q Upon what information did you make that entry? A From the deposit ticket.

Q How much? A $284.78.

Q If you had received a deposit ticket of $9,284.78, what entry would you have made? A $9,284.78 credit to that account.

Charles M. Mindnich, direct.

Q Turn to September 16, 1912, in the credit side-book, who kept it on that date? A The handwriting is not familiar to me.

Q Do you find in the ledger No. 2685 the account of Peter Scola? A No, sir.

Q If a deposit ticket had come through to you on that date of $2,000 to the account of Peter Scola and you had found no account in the ledger, what would you have done in the ordinary course of business? A Opened up a sheet in the ledger for him.

Q Turn to August 2, 1912, in the side-book.

The Court. He has not said he was keeping the account on that date.

Q Were you keeping it on that date? A No, sir, I was not.

Q Can you tell us whether you kept the ledger at all in the month of August, 1912? A That I cannot say unless I go through the book.

Q Look in the account of 2610, E. J. Brooks, in the ledger, did you make any entries there? A I made an opening credit.

Q Of how much? A $1,000.

Q What date? A August 13, 1912.

Q That was the opening credit in the account? A Yes, sir.

Q Do you find any deposit entry in the account on August 2nd? A No, sir.

Q August 7th? A No, sir.

Q August 29th? A No, sir.

Q Can you state whether on any of those days you received a deposit ticket of $1,000 to that account? A Any of which days?

Q Any of the dates I have just mentioned, August 2nd, August 7th and August 29th? A I received none.

Q Look in the side-book and tell me whether you kept that on any of those three dates, August 2nd, August 7th and August 29th? A No, I did not.

Q Turn to March 7, 1912, in the side-book, credit side-book, did you keep it on that date? A Mr. Thompson kept it.

Q March 8th? A March 8th, Mr. Thompson also.

Q Look in the ledger account of Reverend Joseph Hevey, pass-book No. 2305, who kept that on March 7th, 1912? A March 8th, here.

Charles M. Mindnich, direct.

Q Whose handwriting? A Mine.

Q Any entry on March 7th? A No, sir.

Q What is the entry on March 8th? A A credit of $100.

Q Upon what information did you make that credit? A From the deposit ticket.

Q I show you ticket marked Exhibit P. 22, is that the ticket? A Yes, sir.

Q On August 15, 1912, who kept the side-book ? A I don't know the handwriting.

Q Who kept the ledger on that date, the account of Margaret E. Vale, No. 1383? A I did.

Q Do you find a deposit entry August 15, 1912? A I beg your pardon, Mr. Thompson seems to have been on the ledger at that time.

Q Now, turn to May 9, 1912, in the side-book. Just a moment, I will give you a different item. Exhibit P. 47, May 9, 1912, credit side-book, commercial department, who kept that on that date? A I did.

Mr. McCarter. Pardon me, Mr. Hinds, which item are you drawing attention to now?

The Court. That is the first on the second page; that is the Helen Marsh.

Q Do you find a deposit entry there to the account of Helen Marsh, May 9, 1912? A It would not be in this book anyhow, this is A to L credit-book.

The Court. P. 46, Mr. Hinds.

Q See if this is the book (showing witness P. 46)? A Yes, that is it.

Q Did you keep that book too, on that date? A May 9th?

Q Yes. A Yes, sir, I did.

Q Do you find any deposit entry to the account of Helen Marsh or Chauncey Marsh? A No, sir, no deposit to that account.

Q Can you state whether or not a deposit ticket came through to you on that date to that account? A No ticket came through.

Q Will you step down here a moment and tell me who kept the ledger, commercial individual ledger, on May 19, 1912? A Mr. Thompson.

Q And on September 16, 1912? A I was on the ledger at that time.

Charles M. Mindnich, direct.

Q Do you find any deposit entry there of $4,000 to the account of Helen Marsh? A No, sir.

Q Can you say whether or not you received a deposit ticket of that amount on that date? A No, sir, received no such ticket.

Q Now, will you look in the side-book again for the date September 16, 1912? A I will have to have another book for that.

Q (Showing witness Exhibit P. 48.) Credit side-book, commercial department, September 16, 1912? A No, I did not keep the book on that date.

Q (*By the Court.*) Who did? A Wallace Gannon, a young man we had up at the bank.

Q (*By Mr. Hinds.*) Who kept it on August 29th, 1912? A I do not recognize that handwriting.

Q Look at the commercial department ledger, individual ledger account of Catherine Haney, August 29th, 1912, who kept that? A I did.

Q Do you find any deposit entry to her account on that date? A $20.

Q (*By Mr. McCarter.*) Where is that, in the side-book? A Ledger.

Q (*By Mr. Hinds.*) Can you state whether, if you had received a deposit ticket to that account on that date of $10,396.46 what entry you would have made in the ledger? A There would have been given proper credit for it on the books of the bank.

Q I show you deposit ticket of that date to that account and marked "055" Exhibit P. 26, and ask you whether you ever received that deposit ticket in the course of business? A No, sir.

By the Court.

Q Do you recall what you did receive? A $20 on that date.

Q Well, do you say that that does not appear in the credit side-book on that day, the $20? A The $20 does.

By Mr. Hinds.

Q Does that ledger include the account of Peter Scola? A No, it is in the other ledger.

Q Look in the side-book for September 16th, I believe you testified in respect to another account that you did not keep the side-book on that date, but just make sure—no, I think that

was with respect to the savings book. Look in the commercial side-book, Peter Scola, September 16, 1912, and see whether you kept that side-book? A No, sir.

Q (*By the Court.*) Who did? A The handwriting is not familiar to me.

Q (*By Mr. Hinds.*) Can you find the ledger account of Peter Scola, commercial department? Come down here please.

The Court. Exhibit P. 54.

Witness. There is no such account in the ledger.

Q Can you state who was keeping the ledger in which that would have been if it existed on that date? A What is the date?

Q September 16, 1912. A I was on the ledger at that time.

Q If a deposit ticket of $3,000 had come through on that date to the account of Peter Scola, and you had found no account on the ledger, what would you have done in the ordinary course of business? A Opened an account for him, $3,000.

Q Prior to the closing of the bank did you have knowledge of any irregularities respecting any of the accounts concerning which you have just testified? A No, sir.

Q Did you take part in them, or receive any proceeds of such irregularities? A No, sir.

Q You are here under subpoena? A Yes, sir.

Q Tell us the practice, if there was one, and if you know, in the trust company, respecting the posting of the side-book total into the cash-book? A They were given on a slip to whoever posted the cash-book, whoever entered the entries in the cash-book, they were given by me as assistant bookkeeper to whoever was running the cash-book at that time, both the deposits and credit totals.

Q (*By the Court.*) What did he do with it? A He entered it in the cash-book.

Q (*By Mr. Hinds.*) Now, let us suppose that a deposit is received in the ordinary course of business and through some honest mistake, or oversight, either no ticket at all or a wrong ticket goes through to the side-book, what would be the effect of such a transaction as reflected in the cash-book? A I don't quite get your question.

Q Would the cash-book prove, under such circumstances, if a deposit had been made and through an honest error a wrong

ticket, or no ticket at all had been put through? A No, sir, the cash-book would not prove on that date.

Q How about the teller's proof-book? A That would not prove, either.

Q Now, suppose, take the other side, a withdrawal—

By the Court.

Q Just one minute. What would have been the effect upon the cash-book and teller's proof-book? A They would not have proved.

Q Would not have proved? A The debits would not agree with the credits.

Q There would be either an excess of deposits or an excess of credits? A If a ticket had been lost it would show in the excess of credits, the debits would have been more than credits on the cash-book.

Q Shown an over, wouldn't it? A Yes.

By Mr. Hinds.

Q Now, suppose that somebody had by mistake put through a charge, check or draft, purporting to show a withdrawal by some savings depositor, but no such withdrawal had in fact been made by the depositor or entered in the cash-book, what would have been the effect of that transaction through an honest mistake upon the cash-book? A The cash would show an overage of that amount.

Q What about the proof-book? A (Not answered.)

Q (*By the Court.*) If the cash had not actually gone out? A Yes—no. If the cash had not gone out it would show an overage.

Q (*By Mr. Hinds.*) What would have been the effect on the proof-book? A The same thing.

Q Will you tell us what the practice was in the institution as to presentation and entry in the cash-book upon the withdrawal of funds from the savings department? A A pass-book has to accompany the draft in every case.

Cross examination by Mr. McCarter.

Q Is that true in both the commercial and the savings? A No, sir, not true in the commercial.

Charles M. Mindnich, cross.

Q Why was it true of one and not true of the other? A A commercial deposit is subject to check at any time, but on the investment deposit a pass-book had to accompany the draft in every case. That is one of the rules of the institution.

Q You say that practice, or rule, was never departed from? A No, sir, not to my knowledge.

Q Well, you did not attend at the teller's window, did you? A No, sir.

Q It might have been departed from a hundred times and you never know it?

Objected to as argumentative.

Objection overruled.

Q I say the teller might have departed from that rule a hundred times and you never knew it, mightn't he? A Yes, sir.

Q In other words you only know it as a rule? A Yes, sir.

Q Whether it was lived up to or not, you don't know? A No, sir.

Q Now I am a little at sea, I am frank to say, both to the Court, counsel, jury and witness, as to one thing. Who kept the credit side-book? Different bookkeepers? A Yes, sir.

Q And from what did he make the entry in the credit side book? A From the tickets.

Q So that if an entry appears on a given date as an entry on the credit side-book, but not in the ledger, then there is some slip in the regular routine? A It would have to appear in the ledger, because they are checked back with the ledger every day, and it would necessarily have to be in the ledger if it was in the side-book.

Q If then, it does not appear in the ledger, inferentially it would not appear in the side-book? A That is the idea.

Q What is the purpose of the side-book? A A sort of keeping each individual name and amount that a certain party has deposited.

Q In gross? A Yes, sir.

Q Or in detail? A Yes, sir.

Q Which? A The gross amount.

Q Whereas in the ledger it is entered up in detail? A No, sir; also in gross amounts: you are thinking of checks; checks are entered in the side-books in detail, the gross amount in the ledger.

Charles M. Mindnich, cross.

Q All of the questions that you have answered today have been from your recollection of the mode of practice; you have no specific recollection of the given items that your attention was directed to, I suppose? A Yes, sir.

Q You personally, today, on the 18th of March, 1919, remember specifically every one of these specific entries that your attention was directed to? A I remember handling all those entries, yes, sir.

Q Every one of them? A Yes, sir.

Q Notwithstanding the somewhat varied and somewhat creditable career you have had in the army and elsewhere since? A Yes, sir.

Q Then it was not necessary to rely upon a course of practice, but you can remember whether you did or did not on a given day have a ticket? A If I see the book I know whether I made the entry, or not.

Q I suppose you can, but when you say that what would have happened if a certain thing—if a ticket had been presented, you are speaking now of an assumed practice, aren't you? A No, sir.

Q Well, haven't you said in as many as a dozen cases today that if a ticket had been presented you would either have opened a new account, or added to the old account? A Yes, sir.

Q That would be in accordance with your regular practice? A Yes, sir.

Q You are, by that answer, assuming that everything was done exactly correct? A Yes, sir.

Q Namely, that if in the regular course of the day's business a slip is brought to you you would enter up that slip honestly? A Yes, sir.

Q If no slip was brought to you you would not enter up anything? A No, sir.

Q And the books in that respect were very accurately kept? A Yes, sir.

Q No mistakes at all? A Mistakes in addition, in carrying out balances, that happens frequently.

Q How could you prove them? A Had to prove our ledgers every week or every two weeks.

Q If you had mistakes in footings how could you prove your books? A We had to have the debits and credits and compare them and make them agree with the balances.

Q Who made those mistakes? A I did; everybody does.

Q Everybody? A Yes.

Q So there were at least mistakes in footings? A Yes, sir.

Q Those were all the mistakes? A No, sir.

Q What other mistakes were there? A Those are all the mistakes, mistakes in the footings, that is all; for instance, if a man has a balance of $10 and makes a deposit of $10, you may give him a balance of $30, that is $10 more than he ought to have, that is what we call an error in extension.

Q That is in what book you are speaking of? A In the individual demand ledger.

Q And would not that footing disarrange everything the moment it is made? A No, sir.

Q (*By the Court.*) Throw out the balance? A Throw out the balance, that is all; balance up the ledger, find out we had $10 difference and had to go through the footings until we found it.

Q (*By Mr. McCarter.*) When would you do that, every night? A No, sir, not every night, every week.

Q (*By the Court.*) There are no figures taken from your ledger then to the daily proof sheet? A No, sir.

Q (*By Mr. Clark.*) It is the individual ledger you are referring to? A Yes, sir.

Q Only? A Yes, sir, only individual ledger.

Adjourned to March 19, 1919.

Charles M. Mindnich, cross.

Newark, N. J., March 19, 1919.

Continued pursuant to adjournment.

Appearances as before noted.

CHARLES M. MINDNICH resumes the stand.

Further cross examination by Mr. McCarter.

Q Mr. Mindnich, you testified yesterday with reference to the O'Connor account, the draft, you remember? A Yes, sir.

Q That the fact that it was entered in the debit side-book showed that it had been paid? A Yes, sir.

Q Won't you refer to the account, whichever book it should be in, and see whether that account is not afterwards credited with that $3,000?

Mr. Clark. I object to the question on the ground it is irrelevant and immaterial, the proof having been that the money was paid out of the bank and charged to that account. The proof now sought to be elicited constitutes nothing more than an entry, and unless they can prove by Mr. Mindnich's knowledge that the entry in the ledger actually represents a deposit the effect is only to confuse the issue.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A There is a deposit to the credit of the O'Connor account on April 6th, 1911, of $3,000.

Q What other credits are there? A There is one here on April 27th of $90.60.

Q Does the $3,000 credit to which you have just referred appear in her pass-book? A No, sir.

Q Is there any other book, Mr. Mindnich, and I am appealing to your knowledge of bookkeeping, than this particular one where there would appear a credit entry? A Yes, sir; in the credit side-book.

Q Look at that please. A There is a deposit here under date of April 6th, Emma E. O'Connor, of $3,000.

Q (*By the Court.*) What date is that? A April 6th, 1911.

Charles M. Mindnich, cross.

Q (*By Mr. McCarter.*) Will you look at the account of Mrs. Alma M. Mott, pass-book 114, and see if there is a credit either in the side-book, credit side-book or the other book to which you refer of $6,520? A No, sir.

Mr. Clark. Your Honor will allow me the same objection to the admission of this testimony?

The Court. The objection is overruled.

An exception to this ruling is noted by plaintiff as ground of appeal.

Q Look in the credit side-book. A It would not be in here if it is not in there. I don't know what date to look under.

Q You do not find any credit in this account of $6,500? A No, sir.

Q Referring to this account of Mrs. Mott, pass-book 114, I think there is an entry in one of the books to which you referred yesterday in which you said you could not tell whether it was your writing or not. Will you please look again at the book? A Yes, sir; I have it.

Q What date? A October 14, 1911.

Q What is that entry? A No. 114, Mott, A. M., $6,520.

Q That is in what book? A In the debit side-book.

Q That indicates what? A That that draft had been paid.

Q That indicates that that draft that has been produced here came to someone who entered it in the debit side-book? A Yes, sir.

Q Under what date? A October 14, 1911.

Q Whose handwriting is that entry? A I cannot tell.

Q Is that yours? A No, sir.

Q It is not Smith's? A No, sir.

Q And you don't know whose it is? A No, sir.

Q Does it seem to differ from those above it? A It does somewhat; yes sir. It has been written in pencil and then written over in ink.

Q And the footing has been changed, hasn't it? A Yes, sir: $6,500.

Q The column for the date had been footed before, and then this put in apparently? A Yes, sir.

Q And the new footing made? A Yes, sir.

Q In different handwriting and darker ink? A Yes, sir.

Q Perfectly obvious, isn't it? A Yes, sir.

Charles M. Mindnich, cross.

Q This Catherine Haney demand account, business account, I show you the ticket contained in the book.

The Court. August 29th.

Q 1912, look at the ticket and tell me in whose handwriting the figures are. A Mrs. Haney's.

Q Can you recall who was receiving teller on August 29th, 1912?

Mr. Clark. I object, because the receiving teller's book will show; we can then get it accurately.

The Court. The question may be answered.

A I can, by referring to the book.

Q All right, you may do so. A Mr. Thompson's.

Q (*By the Court.*) That is the receiving teller? A Yes, sir.

Q (*By Mr. McCarter.*) Now, Mr. Mindnich, I understood you to say yesterday that with the possible exception of some mistakes in extensions in one or two instances that anybody is liable to make the books, so far as you were concerned were accurately kept, am I right? A Yes, sir.

Q Now, there is no doubt about that, is there? A No, sir.

Q No misunderstanding between you and me about that? A No, sir.

Q You will stand for that as you did yesterday? A Yes, sir.

Q Have you always said that? A To the best of my knowledge, I have; yes, sir.

Q How long was it customary to have these, what I have called ambulatory bookkeepers, to come in on Saturday, whose handwriting nobody seems to know? A That started from the time Mr. Thompson took over the receiving teller's window on Saturday morning.

Q And my recollection is he testified that that took place about two months after the bank commenced, does that accord with your recollection? A No, sir; long after that.

Q About when was that, according to your recollection? A I can find out by looking at the receiving teller's book.

Q All right, as quick as you can; better to refer to books than to guess.

The Court. December, 1910, look at.

A Here is one on December 31st, 1910, in Mr. Thompson's handwriting.

Q Does December, 1910, about conform to your recollection of when he assumed— A That is about it; yes.

Q Then from somewhere about the end of 1910 it was customary to have some people come in who were not permanently connected with the bank to make entries in the book? A Yes, sir.

Q Would they come in more frequently than Saturdays? A No, sir.

Q Only Saturdays? A Only Saturday morning.

Q On account of the rush? A Yes, sir.

Q Would they come there holidays? A No, sir.

Q Who would they happen to be? Who chose them? A Who picked the men?

Q Yes. A Mr. Smith.

Q They were not on the regular pay-roll? A No, sir.

Q And they differed from time to time? A Well, we had one man for quite awhile by the name of Searles.

Q You knew his handwriting? A Yes, sir.

Q When you did not recognize the handwriting it must have been someone other than Mr. Searles? A Yes, sir.

Q Who were those, boys? A Yes, sir.

Q Schoolboys? A Yes, sir.

Q Now, I understand your evidence, with the exception of these mistakes in extension, which were very few, the books were accurately and regularly kept? A Yes, sir.

Q No question about that? A No, sir.

Q And they were kept in proper manner? A Yes, sir.

Mr. Hinds. You mean by the witness? May I have the question explained? I think when the first question was asked it was with reference to this witness keeping the books; now, when it is asked again there may be some little doubt as to what is meant.

The Court. You may make a minute of that and have it explained on re-direct examination, if it needs any explanation.

Q Do you remember being examined in the suit down in the Prudential Building before Vice-Chancellor Stevens? A Yes, sir.

Charles M. Mindnich, cross.

Q And being interrogated by Mr. Scott German, who was counsel for one of the defendants? A Yes, sir.

Q You know him, don't you? A Surely.

Q In reply to this question, "What two false entries did you make?" Your reply was, "I made an entry on Mr. Scarlett's account and one in Jacob Dorer's savings account. Q How did you happen to do that? A I did it under Mr. Smith's orders." Did you testify that way? A Yes, sir.

Q Was it true? A Yes, sir.

Q Then, in addition to mistakes in extensions, to which you testified both yesterday and to-day, there were these two falsifications in the accounts made by you? A Yes, sir.

Q Why did you tell us a little while ago, if that was true, that the only mistakes you made, and the only inaccuracies you were aware of were in extensions? A I did not remember.

Q Do you remember testifying at the same time as follows: "Q When did you first find out that you had made this irregular entry, and knowing it to be irregular? A About three or four months after the bank closed. Q Who called it to your attention? A Mr. Mayhem, the man that had charge of the proceeding at that time." Did you testify that way? A Yes, sir.

Q That is correct? A Yes, sir.

Q Did you ever testify as follows on the same hearing, page 722: "Well, now, in the meantime how would anybody know, any officer, I mean, of the bank, know how that account stood; suppose a check came in, how would the paying teller know whether the account was good or not?"

Mr. Clark. I object to this as not responsive to any testimony of this witness, not contradicting him in any manner, it takes up a question piecemeal, which, lacking the explanatory previous matter, is not clear, and I believe the witness should first be shown to have testified to something which this testimony directly contradicts.

(Mr. McCarter replies.)

(The testimony is handed to the Court.)

The Court. Without knowing what books the witness is here testifying to it is quite difficult for me to determine.

Charles M. Mindnich, cross.

Mr. Clark. I will withdraw my objection if counsel will start back at the explanatory question, so the witness will understand?

Mr. McCarter. Certainly.

Q I will ask you if you testified as follows, commencing at the point Mr. Clark asked me to, on page 722: "Q (*By the Court.*) I want to ask you a question with reference to these individual accounts. How often did you balance the account of the individual depositor? A Each individual account? Q Yes, so that you would know what sums stood to this credit on the books? A I would run proof about every two weeks on each ledger. Q Well, now, in the meantime, how would anybody know, any officer, I mean, of the bank, know how the account stood; suppose a check come in how would the paying teller know whether the account was good or not? A Well, if he wanted to prove the account all that would be necessary to do would be to foot the debit and foot the credit and subtract the debit from the credit and that would give the balance, and that should agree with what is on the third column in the ledger, there are three columns, debit, credit, and balance. Q Then he could not from the book, from the mere inspection, tell whether the depositor's account was good or not? A Surely he could. Q He could after performing that operation? A Well, it all depends on the accuracy of the bookkeeper. If it is a good bookkeeper he doesn't make very many mistakes in his extension. Q I know that, but what I am calling attention to is this, you say that the amounts standing to the account of the individual depositor were ascertained by you about once every two weeks? A Yes, sir. Q Now, in the meantime there might have been deposits or there might have been drafts; that is true, is it not? A Yes, sir. Q Well, then, when the paying teller went to the book for the purpose of finding out just how that account stood he would have to perform some additions, would he not? A No, sir, not necessarily. Q Why not? A He could take it for granted that the amount then standing to the man's credit was correct. Q (*By Mr. Stiefel.*) You mean in the balance column. A In the balance column. Q (*By the Court.*) Well, that would relate to his standing perhaps two weeks before?

"*Mr. Clark.* Will your Honor glance at the sheet and you will see that the balance is struck each day in each account.

Charles M. Mindnich, cross.

"Q (*By the Court.*) That is what I asked, and I understood him to say it was only struck about once every two weeks. A I meant by that that the ledgers were written, each individual account was written up to see whether the grand total agreed with what stood on the general ledger; for that ledger the account was struck every night, the balance was extended every night. Q Well, now, that being so, what I want to ask you is this: Do you recall any instance in which the account was overdrawn? A Whose account do you mean? A The individual depositor. A Any particular account? Q I am not speaking of any particular name, but I ask you whether or not in any instance that you can now remember, that the account was overdrawn? A Well, I had overdrafts, I always had overdrafts on the ledger." Did you testify that way? A Yes, sir.

Q Did you further testify, middle of the page: "Q (*By the Court.*) How often did that happen? A Well, you take, for instance, if a man had a balance of $4.89 to his account and drew a check for $5, it wouldn't be good policy for a bank to send a man's check back for eleven cents' shortage, and we gave that man the eleven cents over and sent him a notice. Q I am not asking you about those insignificant amounts. I am talking about substantial amounts; did the depositor's account at times indicate that the depositor had overdrawn his account in a substantial way? A Well, in that case, if there was any big overdraft to be made I would have to consult Mr. Smith or one of the officers of the bank for permission to pay such amount over." Did you testify that way? A Yes, sir.

Q What particular officer did you ever consult besides Mr. Smith? A Mr. Smith was always around, it would not be necessary to consult anybody else. At times, when Mr. Smith was out soliciting business, and any of those occasions happened at that time, I would have to consult Mr. Foster.

Q What time was that? A I believe July, 1913.

Q I refer you to page 727, referring to the Bruno account, were you asked as follows: "Q Well, on an account under the name of Frank Bruno, on June 16, 1913, his account appears overdrawn here to the extent of $295.22. Q (*By Mr. Hinds.*) Is that your handwriting? A That is my handwriting." So then you had in your own handwriting indicated an overdraft to Bruno of $292, hadn't you? A Yes, sir.

Q "Q Look on April 12th, or April 11th, what do you find? A I find he is overdrawn $994.07. Q The next day? A $1,019.07. Q Your handwriting? A Yes, sir." Do you think those overdrafts were regular?

Mr. Clark. Objected to.

The Court. Objection sustained.

An exception to this ruling is noted by the defendant as ground of appeal.

Q The overdrafts appeared in red ink, did they not? A Yes, sir.

Q Will you point out one of those red ink entries in one of these books? A Here is one (indicating).

Q Turning to the Sam Brody account, what book? A Exhibit P. 53.

Q Exhibit P. 53, the entries in red ink in the long column of figures under "balance" indicate that at the time they are entered they were overdrawn to the extent indicated by the red ink? A Yes, sir.

Q They happen to be very small overdrafts; find some of these big ones; take Ford or Fusco? A Fusco has got no overdraft here.

Q Perhaps not in that book, but I guess in some of the others, J. J. Fusco, January 29, 1913, overdrawn $1,099.09? A It don't appear in red ink there.

Q Now take Mr. Ford? A $107.39.

Q Ford was an employee of Mr. Lurich, wasn't he? A I don't know; I think he was in the company, I am not sure.

Q In a company in which Mr. Lurich was interested? A Yes, sir.

Q And Lurich was one of your directors? A Yes, sir.

Q Look in the book on the page above the date May 21, 1913, under the name of Bruno, how many overdrafts in red ink on that particular page, in that particular column appear above that date? A Ten.

Q I ask you whether it was not quite customary for the bank in the savings department, when a person presented a pass-book and wanted to draw out some money, to have the officer draw the check or draft, which would be the voucher to indicate the draft? A Not to my knowledge, no, sir.

Charles M. Mindnich, cross.

Q Do you remember testifying in the American Surety Company case before Judge Adams in this building, right across the way here? A Yes, sir, I do.

Q On page 100, printed book, as follows: "Q A man comes in with his pass-book and says, 'I want $10' and gives you a check, and you give him $10? A Yes, sir. Q The question is, 'By whom would that withdrawal check be ordinarily drawn?' A In most cases by the people themselves, or, if they didn't care to, it was filled out by one of the tellers." Did you testify that way? A Yes, sir.

Q Then it was customary? A Not in all cases; in that case there.

Q I do not ask you whether it was done in all cases, I ask you if it did not occur when a person wanted to draw a savings bank account the bank official, the teller, would draw the draft rather than the customer? A No, sir, I would not say that.

Q What is your answer? A No.

Q Now, I ask you, did you testify as follows: "Q The question is, 'By whom would that withdrawal check be ordinarily drawn?' A In most cases by the people themselves, or, if they didn't care to, it was filled out by one of the tellers." Did you testify that way? A Yes, sir.

By the Court.

Q By "filled out" what do you mean? A Filling out the dates and amount.

Q Then what would be done? A The person would have to sign it themselves.

Q (*By Mr. McCarter.*) Look at this O'Connor draft, what do you call that document, apart from the signature? A A draft on the account of Emma O'Connor, No. 793, for $3,000.

Q Was that known as a withdrawal slip? A Yes, sir.

Q And all withdrawals from the bank when made from the trust account were made upon such withdrawal slips? A Yes, sir.

Q So far as you know they were always signed by the customer? A Yes, sir.

Q That purports to be signed by the customer per R. E. S., doesn't it? A Yes, sir.

Q Now, in this particular case before Judge Adams, on page 167 of the printed book, did you testify as follows: "Q Did

you not testify, Mr. Mindnich, in the trial of the case of John Scarlett, as follows: 'As a matter of fact, the books of the bank were more or less manipulated in the bank; isn't that true?' and did you not answer, 'I think so; yes, sir.' " Is that correct? A Yes, sir.

Q Now, do you want to stand for that today? Were they more or less manipulated? A No, sir; not to my knowledge at that time.

Q Then why did you testify in the Scarlett case, and why did you admit in the American Surety case, that they were more or less manipulated, if you say now they were not? A Because your side partner, Mr. English, had me so balled up in the Scarlett case, I did not know what I was saying; I volunteered more information that I should have at that trial.

Q You were under oath? A Yes, sir.

Q You were being examined in the case in which Mr. Scarlett was being tried for his liberty? A Yes, sir.

Q He was one of your directors? A Yes, sir.

Q By whom were you called, the State or Mr. Scarlett? A The State.

Q Scarlett was under indictment? A Yes, sir.

Q Being asked the question, "As a matter of fact, the books of the bank were more or less manipulated in the bank, isn't that true?" you said, "I think so; yes, sir." A I made that statement from what I had heard, not from my own knowledge, just for the very reason that I—

Q You had been a bookkeeper and not—

Mr. Clark. Let the witness answer.

A I made the statement because Mr. English had me so balled up I did not know what I was saying.

Q You would say white was black, or blue? A No, I would not say that, but in that particular case he had me so much excited.

Q Do you think there was anything very mysterious in that question, "As a matter of fact the books of the bank were more or less manipulated in the bank, isn't that true?" Was that very mysterious? A No, it was not mysterious.

Q Was not that the very essence of the defense Mr. Scarlett put in? A Yes, sir; I made my answer from what I had heard in the meantime, not from my own personal knowledge.

Charles M. Mindnich, cross.

Q Did not you manipulate them yourself? A I only found out after the bank was closed. At the time I perpetrated these deeds I had no knowledge of it at all.

Q You manipulated it without manipulating it? A Yes, sir.

Q And falsified the Scarlett account without knowing it? A At Mr. Smith's direction.

Q You didn't know it? A No, sir.

Q What did you do in Mr. Scarlett's case? A Dropped a line on the account.

Q What do you mean by dropping a line? A When a man is overdrawn and he draws a check, and there is no deposit through that day, leave a space for credit to be put in on the next day. It is a thing done thousands of times every day in every bank in this city.

Q How many banks have you been connected with? A Two.

Q What are they? A The American National and the Roseville Trust Company.

Q You knew at the time you were doing that you were enabling Mr. Scarlett to have an appearance of credit that he was not entitled to? A No. Mr. Smith promised me to add a credit to Mr. Scarlett's account to make good that check; that was a day before Christmas, and he did not do it, and I only got the credit the day after Christmas.

Q Was that the only time you did it? A Yes, sir.

Q The day before Christmas? A Yes, sir.

Q Didn't you do it twice? A That Dorer was a different affair.

Q Falsified the Dorer account, didn't you? A No, I did not.

Mr. Clark. I would like to object to further testimony along this line. On the theory of attacking the credibility of this witness they are dragging out some things which have no possible relevancy or materiality in this case. I want to enter an objection to any further deviation from the issues in this case on the theory that it is attacking the credibility of the witness.

The Court. Is there any question before the Court?

Mr. Clark. I move to strike out.

The Court. The motion will be denied.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q I further ask you, on page 168 of the printed book, if you testified before Judge Adams in the American Surety case as follows: "Q And the further question: 'Q And it is a fact that the books of the bank did not show accurately the deposits made or debits which were paid out; that is true?' and your answer, 'Yes, sir.' Did you so testify? A Probably I did." A I did, if it is there; I cannot deny that.

Q I am not trying to keep anything from you. There you are (handing witness book).

The Court. The question apparently quotes from his testimony in some other case.

Mr. McCarter. In the Scarlett case.

Witness. Yes, sir.

Q Did my side partner have you mixed up then, too? A That is in reference to Scarlett's case, isn't it?

Q I didn't ask you whether it is in reference to Scarlett's case or not; I asked you—

Mr. Hinds. That is a perfectly necessary question, because he has got a case within a case there, and the witness is entitled to have it explained.

The Court. I think he understands it.

Q Did my side partner have you bamboozled, or to use your own word, manipulated, when he asked you that question? A I don't know to what it refers.

Q "And it is a fact that the books of the bank did not show accurately the deposits made or debits which were paid out, that is true? A Yes, sir." A That is in reference to the American Surety case?

Q Now, Mr. Mindnich, I am confronting you with your evidence across the hall before Judge Adams in the American Surety case, when Mr. Smith was cross examining you, and he is confronting you with what you had testified to in the Scarlett case before Judge Osborne. A Yes, sir.

Q I am asking you whether, in giving the testimony that you admit you gave, you now say you were confused? A That is right.

Q You were confused on that, too? A No; I was confused in the Scarlett case only.

Q So, when you were asked whether the books of the bank did or did not accurately show the deposits and debits, and you said they did not, you were confused? A Yes, sir.

Q And in all the examinations when you have heretofore testified, have you given the explanation about the day before Christmas that you gave this morning? A Yes, sir.

Q Where? A I don't remember. Two or three cases that I remember.

Q (*By the Court.*) You have been a witness in a number of these cases? A Yes, sir.

Q (*By Mr. McCarter.*) You were a witness in the Nones case, weren't you? A Yes, sir.

Q My side partner, the confuser, was not in that case, was he? A I don't remember.

Q Well, don't you remember that Mr. Borden D. Whiting represented Mr. Nones? A No, I do not remember.

Q You know Mr. Whiting? A Yes, sir.

Q Is he a confuser? A I don't know; I don't remember.

Q Did you, in the Nones case, on page 28, printed book, testify as follows: "Q You have testified before in one of these Roseville Trust Company cases? A Several of them. Q Do you remember testifying in Mr. Scarlett's case? A Yes, sir. Q And do you remember testifying as to the accuracy of the accounts with reference to that book? A Yes, I remember one transaction. Q What was it? A $300 transaction. Q What did you do? A I don't remember that. Q What is the best recollection you have of that? A I remember moving a credit up a few days." Did you testify that way? A Yes, sir.

Q That was not a mistake in the extension, was it? A No, sir.

Q What do you mean by moving a credit up? A I explained a little while ago.

Q What do you mean by moving a credit up a few days? A Well, a check for $300 of Mr. Scarlett's came to the bank on the 24th of December, the account was not good, and Mr. Smith told me to drop a line, that would give me a credit on the same day. Mr. Smith forgot all about the credit, and I did not get it until the 26th day of December. Naturally, that credit had

to be moved up in the space before the 24th to make the account appear to be good.

Q Did you testify, "Q Do I understand by that that is was a proper thing to do? A It was just to cover up overdrafts, or so an overdraft would not show." Did you testify that way? A Yes.

Q That was a fact, was it? A Yes, sir.

Q That was true? A Yes, sir.

Q "A little thing like that did not occur to you as an inaccuracy, is that right? What do you mean, Mr. Mindnich, are those books true or not? A I will say all with the exception of that Scarlett transaction." Do you remember testifying that way? A Yes.

Q Now, I want to ask you, in view of the testimony to which you have been recalled in two or three of these previous cases, you want to stand pat on the testimony you gave yesterday and repeated this morning, that with the exception of one or two errors in extensions, the books, so far as you knew, and particularly your part of them, were entirely accurate? A Yes, sir.

Q You still think so? A Yes, sir.

Q You are just as positive about all the rest of your testimony as you are about that? A Yes, sir.

By the Court.

Q Mr. Mindnich, as a matter of fact, your extensions would show the individual balances were made each day, or after the entry of each item of charge or credit? A After each entry of charge or credit.

Q The extension showing the balance was made? A Yes, sir; after each entry of each debit or credit; nothing was left to the close of the day; the extension was made the same moment that the entry of debit or credit was made.

Q Was there a balance made at the close of business each day of the bank-books? A No, sir.

Q How frequently was that balance made? A Of the bank-books? Whenever a customer left his book to be balanced.

Q Now, I am speaking of checking up the day's work at the end of the day; I mean your part of it, now; I am not speaking of the individual side-books and individual ledgers alone; I am speaking now of the general work of the bank, whether at the

close of each day's business the books of the bank were balanced. A Yes, sir.

Q That is, proved? A Not of the individual ledger; that was done every two weeks.

Q Yes, but the entries made in the individual ledger of debits and credits of that day were included in that proof, were they not? A Yes, sir.

Re-direct examination by Mr. Clark.

Q Mr. Mindnich, will you take the general ledger?

Mr. McCarter. I think, in the regular course of events the same counsel that examined should re-direct; for two counsel to conduct the examination is not regular. I am not going to object directly to Mr. Clark, but I think the counsel who conducted the examination should continue.

Q Will you take a typical day in the general ledger; take July 25, 1912, a day which has no significance for the purpose of this trial, and explain to the Court the operation of checking up the work of the day each day at the close of the day? A Just what work do you mean, Mr. Clark?

By the Court.

Q Let me ask you this, before you answer that question, were there any books or accounts used in the proving of the day's work except the operations shown in the receiving and paying teller's proof-books? A No, sir.

Q And, except the general ledger, the accounts in the general ledger? A The cash-book.

Q The cash-book was included, was it? A Yes, sir.

Q And that was carried to the general ledger? A Yes, sir.

Q And the account carried from the cash-book to the general ledger was given to the receiving teller and included in his proof-book, wasn't it? A Yes, sir.

Q The paying teller's proof-book was the result of that carried to the receiving teller's proof-book? A No, sir.

Q So they were entirely independent? A They were independent.

Q So that the receiving and paying teller's proof-books were in no way dependent each upon the other? A No, sir.

Charles M. Mindnich, re-direct.

Q But the receiving teller's proof-book was dependent upon the figures which he obtained from the general ledger in order to complete his proof, wasn't it? A No, sir; it is the opposite way; the cash-book was dependent upon the receiving teller's figures for the proof of the cash-book.

Q Well, in the receiving teller's proof-book did he not include every one of the items shown upon the general ledger in the debit and credit column? I am not speaking of the debit and credit balances; I am speaking of the debit and credit columns alone; did not the receiving teller's proof-book include every one of those items in the debit and credit columns of your general ledger? A I am not able to say now whether those items are run through the paying teller's cash or receiving teller's cash.

Q Well, it went through one or the other, didn't it? A I don't know. I don't remember how that was handled, those general items.

By Mr. Clark.

Q You never kept the general ledger, did you, Mr. Mindnich? A Not that I remember; no.

Q Did you or did you not have anything to do with completing the proof each night? A No, sir.

Mr. Clark. That had better be brought out by other witnesses who are more familiar.

The Court. That may be done.

Q Is it or is it not necessary that the cash-book compare and prove with the receiving teller's and paying teller's proof-books? A Yes, sir.

Q And although there be no comparison made with the individual ledger balance, there is a comparison made with the debit and credit side-book of the day's work? A Yes, sir.

Q Now, Mr. Mindnich, you have known since the close of the bank of irregularities having occurred during the life of the trust company, have you not? A Yes, sir.

Q When you testified before in response to questions of Mr. McCarter that you did not know of any irregularity other than those which you subsequently testified to here, what did you mean? A I meant that at the time the bank was running, and

up to the close, until I found out how conditions were, I knew of absolutely no irregularities in the bank.

Q You are here under subpoena? A Yes, sir.

Q Have you had any conference with counsel for plaintiff at any time in connection with the issues in this suit? A No, sir.

Q Within what period have you talked with any person whatever on any of the matters concerning which you have testified to here? A It must be two or three years now.

Q With the exception of the testimony elicited upon the stand in your direct? A Yes, sir.

Q Now, Mr. Mindnich, you, in response to questions today or yesterday, indicated that you remembered each item as it was handed to you. What do you mean by that? A I remember having seen the item at some time when making the entry.

Q (*By the Court.*) Do you mean that you would remember without having your recollection refreshed by anything shown you here at this trial? A Yes, sir.

Q (*By Mr. Clark*) Mr. Mindnich, if I ask you about a withdrawal slip without showing it to you can you testify concerning it? A No, sir.

The Court. Then I do not quite understand your last answer.

Mr. Clark. I knew the witness did not understand, your Honor.

Q (*By Mr. Clark.*) You have testified on cross examination that there was a period during which Mr. Foster was at the bank, and you said from July, 1913, on. Do you or do you not recall ever having discussed with Mr. Foster any question of paying an overdraft? A No, sir.

Q Or any other question outside of the routine business? A No, sir.

Q Now, Mr. Mindnich, you testified that you had been employed in two banking institutions, have you been employed in any others? Two only, you said. Have you been employed in any others? A Since then?

Q Yes. A Yes, sir; I have worked for three—for the Savings Investment & Trust Company, East Orange, and am now over in New York, in the Federal.

Charles M. Mindnich, re-direct.

Q Is it not a fact that in the institution, the Savings Investment & Trust Company, you have seen entries in their books indicating overdrafts?

Mr. McCarter. Objected to as immaterial.

(Argued.)

Q (*By the Court.*) Do you know from your connection with other banks the practice relating to overdrafts, whether there is or not any practice relating to overdrafts?

Mr. McCarter. I pray an exception to your Honor's question.

Q Whether or not you know by your association with other banks whether or not there is any practice respecting overdrafts? A No, sir.

The Court. Now we come to this question, and it may be answered. The reason for the ruling is because the state of mind of this witness has been inquired into, or it has been involved in the question which have been asked him as to his participation in alleged irregularities, entering up overdrafts on the books of this bank, that knowledge being as of the time of which he testified, and if he has knowledge of similar transactions in other banks it is admitted as reflecting his mind at the time he testified, and an exception to that ruling may be noted.

An exception to this ruling is noted by the defendant as ground of appeal.

(Question read.)

A Yes, sir.

Q Very infrequent or more or less frequent?

Mr. McCarter. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Infrequent.

Q Will you state whether or not more infrequently than such red ink entries were shown in the books of the Roseville Trust Company?

Charles M. Mindnich, re-direct.

Mr. McCarter. I object to that; it must be mere guess.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Less.

Q Will you explain that, less where?

The Court. Less in which?

A Less in the Savings Investment & Trust Company.

Q That is to say, they occurred more frequently in the Roseville Trust Company? A Yes, sir.

Q Is the same answer true with regard to your experience in the American National Bank?

Mr. McCarter. Objected to.

The Court. Objection overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A At that time I was not a bookkeeper.

Q At the time of this Scarlett matter can you recall how old you were?

The Court. Scarlett trial?

Q No, at the time of the December 24th entry in the Scarlett account? A 17 or 18.

By the Court.

Q Let me ask you this, at the time you testified in the Scarlett case had you then been employed in the Savings Investment & Trust Company? A No, sir; I think I was with the Public Service at that time.

Q And your employment with the Savings Investment & Trust Company has been since that time, or was it before that time? A Since that time.

The Court. The reason for the admission of that testimony then fails.

Mr. Clark. No, my point is directed toward the credibility of his testimony given in this court, which is based on his actual contact and experience acquired since the Roseville Trust Company, has confirmed the feeling he had

while he was there that these overdrafts were not irregularities. Now, if he had left the banking business after leaving the Roseville Trust Company he would have had nothing to go on except his personality as to whether he was telling the truth, but he having been in another institution, and having seen in that institution instances similar to those brought out on cross examination merely for the purpose of showing lack of credibility, I think it is all the more admissible because it occurred after, than having occurred before, his services with the trust company.

The Court. Proceed with your examination.

Q Mr. Mindnich, you were asked by counsel for the defendant on the cross examination whether the signature was "Emma E. O'Connor, per R. E. S.," and answered, "Yes"; is there any "per" there? A No; it is "Emma E. O'Connor" and "R. E. S."

By the Court.

Q Could you state whether that came to you in the regular course of business? A The entries are in my handwriting, both in the ledger and in the side-book.

Q And did you know at that time it was not Mr. Smith's signature? A I did not question it at all.

Q Do you recall whether you observed there the initials "R. E. S."? A No, sir.

Q (*By Mr. McCarter.*) I thought you said you remembered all these transactions?

(Not answered.)

Q (*By Mr. Clark.*) Now, Mr. Mindnich, I show you the passbook of Emma E. O'Connor, and ask you to tell the Court and jury whether there is any entry there indicating a deposit as of April 6th, 1911, in the sum of $3,000? A No, sir.

The Court. That question has already been asked and answered on cross examination.

Mr. Clark. I withdraw the question. I should like to have permission to recall this witness later on on another branch, having merely to do with identification.

Alma M. Mott, direct.

Re-cross examination.

Q During what period was it that the vice-president was there actively, every day? A From some time in July, I think the middle of July.

Q Until August? A Until August.

Q About a month? A About that time.

Q He was regularly attending to the business as an officer of the company at that time, wasn't he? A While Mr. Smith was out; yes, sir.

Q In addition to that you saw frequently the directors around, didn't you? A Meeting days; yes, sir.

Q Mr. Munroe was a director? A Yes, sir.

Q His office was right upstairs in the same building? A Yes, sir.

Q Didn't he come in from time to time and examine the books? A No, sir.

Q Sure about that? A I never saw him examine books.

Q Did you see Mr. Odell there almost every day? A Yes, sir.

Q Did you see him examining books? A He used to go over the general ledger with Mr. Smith.

Q Did you ever see any of the other directors in there from day to day? A Not that I recall at the present time.

Q You do remember Odell? A Yes, sir; he came in nearly every morning.

Q And you remember Munroe? A Yes, sir.

ALMA M. MOTT, sworn for the plaintiff.

Direct examination by Mr. Hinds.

Q Mrs. Mott, you were a depositor in the Roseville Trust Company's savings department? A I was.

Q I show you Exhibit P. 30 and ask you if you can identify that book? A Yes.

Q What is that book? A My pass-book.

Q I show you Exhibit P. 31 and ask you whether that is your signature? A Yes, sir.

Q Refreshing your recollection from the pass-book, will you state whether or not on October 14, 1911, you withdrew $6,500 from your account? A I don't remember, but that is not my signature.

Charles M. Mindnich, direct.

Q Did you authorize the making of this draft? A I did not.
Q Did you receive any part of that money? A No.
Q Or derive any benefit from it whatever? A Not at all.

Not cross examined.

CHARLES M. MINDNICH, recalled for the plaintiff.

Direct examination by Mr. Hinds.

Q Mr. Mindnich, I believe you stated that—

Mr. McCarter. Now, what is this?

Mr. Hinds. One further confirmation, making doubly certain that the cash-book checks up in each instance with the side-book, with these so-called pass-book stealings that check up the proof-books, by the expert and other witnesses whom we have not taken the cash-book and shown that the debits and credits in the side-book were merely reflected in the cash-book, negativing still further any possible claim that there was a mistake made when these deposits did not get into the side-book, or when some that did get into the side-book did not actually happen. It is a new subject concerning which there has been no examination of any witness, except that Mr. Mindnich did say that the cash-book correctly reflected the entries in the side-book, and that if the side-book entries were incorrect through honest mistakes the cash-book would be out of proof, as well as the proof-books. It is already shown the proof-books were not out of proof. I now want to show that the cash-book was not out of proof, but actually conformed with these side-book totals.

The Court. Why was not that done when Mr. Mindnich was being examined?

Mr. Hinds. The reason is, frankly, that it did not occur to us until after his cross examination had been started, and then we thought it would be fair to Court and counsel on the other side to announce that it was not re-direct and not try to pretend we were covering him on re-direct when it is a new subject, and he is, to that extent, a new witness.

The Court. I am not willing to regard him as a new witness; I am willing to hear this testimony if counsel say it was something that was unintentionally omitted.

Mr. Hinds. Yes, that is the fact.

Q I simply want you to take the credit side-books in each of these deposits I will give you the date, and which should, on the face of the side-books, be carried into the side-books, and then tell me whether or not you find the cash-book to be in proof on each of these dates. I will start with the first item in point of time, which, I believe, is January 11, 1911.

The Court. Why not take them up in the same order in which we have been taking them up all along?

Mr. Hinds. Then I will take December 18, 1911, first.

Q Now, Mr. Mindnich, I show you the credit side-book, December 18, 1911, and I show you also the cash-book as of that date, and I ask you whether if a deposit had been made, but had by honest mistake been inaccurately recorded in the side-book that would have any effect on the proof in the cash-book? A Yes, sir.

Q What would be the effect? A There would be an overage in the cash-book.

Q Will you state on that date whether there is any overage in the cash-book, and whether the entries in the side-book are— A The entries in the side-book agree with the entries in the cash-book, and the cash-book on that date proves.

Q Now, turn to January 11, 1911.

The Court. I do not find any cash-book entry of that date; the earliest cash-book begins May 24, 1911.

Witness. That is right.

Mr. Hinds. For that purpose I will skip to the date beginning in the earliest cash-book, omitting two or three entries temporarily, we do not seem to have them here at the moment.

Q On January 5, 1912, do you find that in the book you have there? A The total in the side-book shows $305, and the total in the cash-book $305, and the cash-book proves on that day.

Q How many items are there in the side-book? A Ten items.

Q Aggregating only $305? A $305.

Q So if a deposit of $5,800 had come through on that day it would have been an outstanding feature of the day's work, would it not? A It would.

Q Turn to February 20, 1912. A The total on the credits of the day $3,404.07, and in the cash-book $3,404.07, and the cash-book proves.

Q March 1, 1912. A Total credit $3,496.27, and in the cash-book $3,496.27, and the cash book proves.

Q August 23, 1912. A $440.78 total credit, total cash-book $440.78, and the cash-book proves.

Q September 16, 1912—by the way, on that last one, where you say the total was $440.78, on that date if a deposit of $9,000 came through it would be an outstanding feature of the day's work? A Yes, sir.

Q September 16th, 1912. A $468.62 total credit, in the cash-book $468.62, and the cash-book proves.

Q Now turn to August 2, 1912. A $1,183.97 is the total of the credits in the credit-book, and in the cash-book $1,183.97, and the cash-book proves.

Q August 7, 1912. A $819 in both books and the cash-book proves.

Q August 29, 1912. A Totals agree in the side-book and in the cash-book, and the cash-book proves.

Q March 7, 1912.

The Court. One minute; that entry was made of a thousand dollars in the week's account on August 13th or the 23rd?

Mr. Hinds. That was August 13th.

Q (*By the Court.*) How about the 13th, what does the 13th show? A $2,834.58 credit total, and in the cash-book $2,834.58, and the cash-book proves.

Q And that included an item of $1,000 to the Brooks account? A Yes, sir.

Q (*By Mr. Hinds.*) Turn to March 7, 1912, and on March 8, 1912? A On March 7th, total side-book $430.37, and in the cash-book $430.37, and the cash-book proves. On March 8th, $871.91 in the side-book and $871.91 in the cash-book, and the cash-book proves.

Q August 15th, 1912? A They do not appear to agree.

Q What do you find? A I find in the side-book $396.75 and in the cash-book $737.50.

Q Sure you have got the right page? Well, you say you find a discrepancy on that date between the totals in the credit side-book and the corresponding figures in the cash-book? A Yes.

Q Let us look at the teller's proof-book on that date, and see if you can find any explanation of that discrepancy? A The receiving teller's proof-book on that date had an overage of $9.35.

Q Well, can you find figures in the proof-book, which should, in the normal course of business, correspond with the side-book? A Yes, sir.

Q And did you find that they correspond? A According to his proof-book the receiving teller's proof on the credit side, on the special department credit, $737.50, which agrees with the cash-book on that day.

Q Does it agree with the side-book? A No, sir; it does not.

Q What is the difference? A $340.75.

Q Now, can you look in the general ledger. Can you determine from the general ledger the corresponding figure, or would not that be carried into the general ledger? A Carried in according to the cash-book.

Q I will turn to the next item. Will you now look in the commercial credit side-book for May 9, 1912, and compare that with the cash-book? A May 9th the total credits in the side-book of the commercial department are $22,969.38, and in the cash-book $22,969.38, and the cash-book proves on that day.

Q Look at September 16th, in the commercial deposit side-book and then in the cash-book. A Credit $41,324.34 in the side-book, and in the cash-book $41,324.34, and the cash-book proves.

Q Now look at May 29, 1912. A Side-book $15,452.96, cash-book $15,452.96, and the cash-book proves.

Q September, 16, commercial deposit side-book and cash-book. A We had that before.

Q No, you had it in the savings side-book.

The Court. No, we had it in this.

Q Then I show you next—we will have to skip full confirmation for the moment in the O'Connor account, because the pass-book does not seem to be here, so turn to the Alma M. Mott entry $6,500; look at August 14, 1911, in the debit side-book and

then look in the cash-book? A $505 in the side-book and $505 in the cash-book.

Q You have got August 14, 1911? A Yes.

Q Debits? A Yes.

Q Do you find a debit there to the account of Alma M. Mott, $6,500? A No.

Q Looking at August 14, which should be October 14? A October 14, there is one for $6,500. The totals in the side-book are $6,948 and in the cash-book $6,948.

Q Does that include the debit of $6,500 to the account of Alma M. Mott? A Yes, sir.

Q Now, when you have repeated the amount found in the cash-book, is that the amount of the aggregated total of the side-book? A Yes, sir.

Q What appears to have been originally underneath that? A The original total in the side book was $448, and with the addition of the $6,500 made it $6,948.

Q Now, look in the paying teller's proof-book, look at the corrected figure which is written over the other figure and see whether that corresponds with the paying teller's proof on that date? A I see no record of the draft here, $6,500.

Q Is the book in proof? A I don't know.

Mr. Hinds. I will take that up with another witness.

Q I will ask you, having compared the aggregated total in the debit side-book on that date, including the $6,500 Mott draft to which your attention is called by Mr. McCarter, do you desire to correct your testimony in view of the cash-book corresponding with the aggregated amount to the effect that the draft was paid?

Mr. McCarter. One moment, you are leading him.

Q Do you desire to correct your testimony in view of the fact that Mr. McCarter has shown you the figure was changed and after looking at the cash-book? A No, sir.

Q You still say the draft was paid? A Yes, sir.

Q If it had not been paid how would the cash-book total have compared with the aggregate total in the side-book? A Excess of credit, $6,500.

Not cross examined.

Catherine Haney, direct.

CATHERINE HANEY, sworn for the plaintiff.

Direct examination by Mr. Clark.

Q Mrs. Haney, I show you Exhibit P. 18 and ask you if you know what it is, what is the book? A Why, it is my pass-book at the Roseville Trust Company.

Q Checking or savings? A Savings account.

Q Mrs. Haney, I show you in the savings department pass-book, Exhibit P. 18, an entry August 23rd, $9,284.78, and ask you if you recall making a deposit of approximately that amount at that time?

Mr. McCarter. I object to the question as leading. I think the witness should be asked what she deposited.

The Court. The question should be asked, perhaps, in that way.

Mr. Clark. It is impossible for a witness to answer what she deposited at any time without being permitted to refresh her recollection.

The Court. There is no objection to that.

Q Can you, without reference to the book to refresh your recollection, testify to what you deposited on any day I might pick out, Mrs. Haney? A Why, I tried very hard to forget everything connected with the Roseville Trust Company.

Q Could you tell me on any day, October 1st, from memory, what you deposited?

The Court. The use of the book is not objected to.

Q Will you, by reference to the book, tell us what you deposited on August 23rd, 1912? A By looking at the book?

Q Yes. A $9,284.78.

Q I show you this book, which is Exhibit P. 25, and ask you to tell me what that is? A (Not answered.)

Q Is that your pass-book? A Yes.

Q Mrs. Haney, I show you Exhibit P. 26, which has been offered in evidence, and ask you if a portion of that is your handwriting? A It is.

Q Mrs. Haney, is the total your writing? A It is not.

Q Do you happen to know whose it is? A I do not.

Catherine Haney, cross.

By the Court.

Q Which portion is in your handwriting? A The two items on the deposit slip.

Q Just state what is in your handwriting? A $9,922.95, $473.51.

By Mr. Clark.

Q Will you, by looking at your pass-book, tell us what you deposited on August 29th, 1912, in the commercial checking account? A $10,396.46.

Q You remember making those particular deposits concerning which you have testified? A I do.

Cross examination by Mr. McCarter.

Q You recall each of the occasions, Mrs. Haney, then, when these two deposits were made? A I do.

Q Are you in business? A No, I am not.

Q You were accustomed to go to the bank from time to time? A Very often, sir.

Q And you made out your own tickets? A I did, sir.

Q And did you know the gentleman who received the deposit, the man behind the cage? A I do remember seeing him, and very often Mr. Smith himself would come and attend to my business.

Q Behind the cage? A He would come to the window and say he would take care of it.

Q Sometimes he would do it and sometimes the other man would do it? A Yes.

By the Court.

Q When he came to you to attend to your business, did he come into the cage, as it is called, the place where the tellers were, or did he come outside? A Why, there was a desk as you enter and he sometimes saw me; he would come up and ask me if there was anything he could do for me, and then sometimes I would go to the deposit window, and if I was there for, perhaps, a second, and he saw me, he would come up and he would say he would take care of it for me.

Q At the depositor's window? A Yes, sir; there were two windows, one facing the door, and then there was one window that opens into just a place like cages that was supposed to be

for the use of ladies, and he would sometimes take it at the outside window that opened from the main corridor.

Q Did that open into the place where the receiving teller was? A Yes, sir; there were two openings, one at this side place and then one just facing the door.

By Mr. McCarter.

Q There was a separate window for the ladies? A As I say, there was just a little recess something like this here, and a desk there, and then there was a window right here facing the same cage, and then a window right about here.

Q Well, when you made your deposits and made out your slips, you would hand the slips in? A I did, sir.

Q Now, I imagine, and, of course in what I am now saying, I do not want to be personal nor offensive, but I imagine from your bank-book that a deposit of $9,922.95 was quite an event, so naturally you remember that time? A I do.

Q And you tell us it was on the 25th of August, 1914? A If that is the date, it was, that I don't remember.

Q Look at the book and see.

Mr. Hinds. Not 1914, 1912.

Q 1912, whatever it is, look at the book and tell us? A What, the date?

Q When it was you made that deposit, if you can tell. A August 23, it is marked here.

Q You presume it is accurately marked? A I do.

Q The 23rd of August, do you remember what year? A 1912, I know that.

Q Now, I see on the 4th of September, 1914, you drew out $9,000, do you remember that? A I had that transferred from my savings account to my checking account.

Q Well, this is your savings account, isn't it? A Yes, sir.

Q And apparently on 9/4—what do you understand that to be, when was that, according to the book, if you can tell, and I am only asking for information, when was it you transferred the $9,000? A I should imagine that that was the ninth month and fourth day.

Q (*By the Court.*) Does it give a year? A At the top of the page it is marked "1912."

Catherine Haney, re-direct.

Q (*By Mr. McCarter.*) Can you tell us when it was you made the transfer? A I judge from those figures it must have been the ninth month and fourth day.

Q Of what year? A 1912.

Q So that in September, shortly after you made your deposit of nine thousand two hundred and odd you had $9,000 transferred to another account? A To my checking account.

Q And that is the entry that appears there on the credit side of that book? A Yes, sir; I expect it is.

Q Now, do you remember both of those transactions? A I remember this particular one, for the reason that I had also a safe deposit box at the bank at that time—before that I had to use it very often, and I visited my deposit box, and Mr. Smith had stopped me and asked me, he said, "Mrs. Haney—"

Q I am not asking you what— A Well, I want to tell how—

Q I have not asked you why, you do remember it? A Yes, sir.

Q (*By the Court.*) When you say "this particular transaction," do you refer now to the deposit or the transfer of the $9,000? A To the transfer of the $9,000.

Q (*By Mr. McCarter.*) Did you have a safe deposit box at the trust company? A I did, sir.

Q Did Mr. Smith act for you when you made the transfer or one of the other gentlemen? A I don't recall that it was Mr. Smith, because later he had asked me why three had made that transfer.

Q I simply ask you the question whether the transfer, if you can recall, was conducted by Mr. Smith or one of the other gentlemen? A I cannot recall that.

Q Do you recall whether the deposit of the $9,284 was conducted by Mr. Smith or some of the other gentlemen? A That I do not remember.

Re-direct examination.

Q Mrs. Haney, I want you, if the Court permits, to tell the jury what it is, I don't know what it is, that causes you to remember that transfer; what occurred? A The transfer of the $9,000?

Q Yes, what occurred, which you started to tell us about, that fixes that event in your memory? A Mr. Smith inquired of me why I did that.

Edward F. Cloran, direct.

Mr. McCarter. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Will you go on, please? A And I said, "I do not intend to leave the money lying here at four per cent., and I want it so I could draw it by check," and he said, "Well, it is unusual, Mrs. Haney, and I would not want you to mention it to anybody, but if you let it lie I will let you have five per cent. on your checking account"; that is why I recall it.

By the Court.

Q After that did you withdraw it? A No, sir.

Q It continued to remain there? A It did, sir.

Q Both the $9,000 and the $10,000 deposit? A Well, I put it in my regular account.

Mr. McCarter. The book shows several drafts, your Honor.

By Mr. Clark.

Q Can you recall what was the amount you had on deposit at the time the bank closed, in round figures? A I don't know, but I imagine it was—

Mr. McCarter. One moment; I think the imaginings are not in evidence.

(Question withdrawn.)

EDWARD F. CLORAN, sworn for the plaintiff.

Direct examination by Mr. Clark.

Q Mr. Cloran, where do you reside? A Ridgefield Park, New Jersey.

Q What is your business? A Public accountant.

Q How long have you been a public accountant?

Mr. McCarter. The qualifications of the witness are admitted.

Q Have you, in the course of your work, had occasion to examine into the conditions of banking institutions? A I have; yes, sir.

Edward F. Cloran, direct.

Q To what extent other than the Roseville Trust Company? A On and off for twenty-three years.

Q Can you mention any one bank, New York City, for example, whose books you have examined? A The Irving Trust Company and the American Exchange National Bank.

Q Now, will you tell us what you have done in connection with the examination of the books of the Roseville Trust Company, stating when you started to look at the books, as nearly as you can recall, and what you did on them? A I started examining these books some time around two and a half years ago, and beginning with the period the latter part of 1911 made an exhaustive examination of all the books of original entry, proof-books and ledgers, irrespective of any particular items or vouchers, making an examination of the books as a whole and prepared a chronological statement of the falsification, manipulations of the accounts, taking the latter part of 1911 up to the close of the bank.

Q Can you, without refreshing your recollection, tell us what you found to be the total shortage shown on the books of the bank at the time of its closing?

Mr. McCarter. I object; I am assuming he cannot remember it without referring. What has that to do with this case?

Mr. Clark. One of the issues is as to whether or not there was a loss suffered by the trust company. One of the items of proof showing the loss is the fact that at the time the trust company closed, constantly, under Smith's management, there was a shortage shown on the books actually existing, as shown on the books, of several hundred thousand dollars. Another reason for it is that the defendant denies that it was in an unsafe and unsound condition at that time for the transaction of business. So we have a right to prove by this witness—in fact, proof is almost essential—that having taken the books of account of the Roseville Trust Company at their own face, by careful examination of all of them, they show at the time the trust company was closed, on August 13, 1913, that there was a deficiency of money, or corresponding assets, over the amount which is payable to the depositors of several hundred thousand dollars. I cannot, for the life of me, see why any such proof should in the slight-

est degree prejudice Raymond E. Smith or Raymond E. Smith's sureties, who stand in his shoes.

The Court. Without showing what proportion of this, if any, Raymond E. Smith was responsible for, you could not recover.

Mr. Clark. That is very true, but we have shown and said so in our pleadings, losses aggregating nearly $125,000 as chargeable directly to Smith and as being largely an embezzlement. It is a perfectly proper item of proof for us to show by an examination of the books as a whole, or otherwise, any shortage, no matter by whom caused now, of not only that sum, but a much larger sum.

(Mr. McCarter replies.)

(Question read.)

The Court. There is no objection to this question; there may be to the next question. I am just thinking how it will be possible for this witness to get directly to the losses occasioned by Smith without going over the entire losses and by process of elimination—I suppose what the total losses of the bank are would be quite immaterial in this issue, if possible for the accountant to segregate from the mass of other items those items which amount to an embezzlement on the part of Smith, wouldn't it?

Mr. Clark. That will be a later step in the examination for him to testify to, to what extent the total loss is of the character—

The Court. The total loss we are not concerned with here, probably, only those portions of the loss which result from fraud and dishonesty of Smith amounting to larceny or embezzlement, isn't that true?

(Argued.)

The Court. The present question may be answered. When the next question is asked, which involves the total loss to the bank, it may be assumed that this objection relates to that question, and the objection will be overruled, and an exception noted.

An exception to this ruling is noted by the defendant as ground of appeal.

Edward F. Cloran, direct.

Q (Question read as follows: "Can you, without refreshing your recollection, tell us what you found to be the total shortage shown on the books of the bank at the time of its closing?") A Not without refreshing my recollection.

Q Looking at the statement which you have yourself prepared, will you now tell the Court and jury what you found from your examination of the books to have been the total shortage shown by the books on August 13, 1913? A $312,580.63.

Q Will you refer to your statement, and will you state whether in arriving at the figure of $312,580.63 as the shortage, you included in that any losses by reason of the inclusion among assets of items which proved to be worthless? A I did not.

Q So that by your answer of three hundred and twelve thousand dollars, you meant what? A Shortage as manifested by the figures in the books themselves.

Q So that, taking every asset on the books as being worth 100 per cent., there was still, by three hundred and twelve thousand dollars not enough of them on the books— A To meet the liabilities of the bank.

Q And did that take into account among the liabilities, if you can recall, the capital and surplus? A It did not; no.

Q So that if there were added the capital and surplus with which the company started business the total would be increased much more—

Mr. McCarter. Objected to as immaterial and irrelevant.

The Court. What was the capital?

Mr. Clark. Cannot we agree on the amount?

Mr. McCarter. I think it is immaterial.

The Court. Do you object to the Court's question?

Mr. McCarter. No, sir; I do not know what the amount was and therefore cannot agree.

The Court. I will withdraw the question.

Q Will you now explain to the Court and jury, using the words "deposit" and "withdrawal" rather than bookkeeping terms, the process shown by these books under which the bank operated?

The Court. I would like to ask one question before that question is asked.

Edward F. Cloran, direct.

By the Court.

Q When you speak of shortage of $312,580.63, do you refer to the difference between the indebtedness of the bank and assets of the bank to pay that indebtedness exclusive of capital stock? A Exclusive of capital and surplus, your Honor.

Q Well, surplus would be included in assets of the bank, available for the payment of debts, wouldn't it? A They would not from a banker's standpoint; they would become a liability to the stockholders. They are a liability of the bank to the stockholders, the surplus.

Q Then just what does $312,580.63 include? A The bank's liability to outsiders, outside of the stockholders, as compared with the assets to meet that liability; just the depositors, not the stockholders.

By Mr. Clark.

Q (Question read as follows: "Will you now explain to the Court and jury, using the words 'deposit' and 'withdrawal' rather than bookkeeping terms, the process shown by these books under which the bank operated?") A Starting with a deposit, the books indicated a deposit was made to a receiving teller, covered by a deposit slip; that these slips were entered into a book known as the credit side-book in the case of the commercial department and a credit side-book in the case of the savings department, which side-books are nothing more than auxiliary cash-books. They are totals of the cash deposits that are entered in the main cash-book. At the close of each day the postings to the general ledger were made from the deposit ticket.

Q (*By the Court.*) The general ledger? A I mean the individual ledger—were made from the deposit ticket in the case of the savings deposits; in the case of a deposit the entry is made in a pass book, the savings department pass-book being in substance a receipt—

Mr. McCarter. I object to that and move that it be stricken out.

The Court. It will be.

A (Continued.) In case of withdrawals in the commercial department they were made by check, the check being handled similar to the deposit ticket, being entered in the side-book in the case of the commercial department, debit side-book, and also a

debit side-book in the case of the savings department. The debit to the individual ledgers being made from the checks themselves. The debit side-books were also auxiliary cash-books, being the totals of the items of withdrawals made in the general cash-book at the close of each day.

Q (*By the Court.*) In a single total? A In a single total, yes, your Honor; that is, the total was divided as the ledgers are divided.

Q So far as deposits and withdrawals are concerned it was a single item? A Yes, sir; one on one side, and the other on the other side. The treasurer's transactions, that is drawing of the checks, treasurer's checks, certificates of deposit, the transfer of money between correspondent banks, etc., were entered directly in the general cash-book.

Q By items? A By items.

Q Detail items? A No, not always. In the case of a check the stub of the check would be the detail, and that one item carried in, in many instances, in many more we have the total.

By Mr. Clark.

Q Would that also be true of checks drawn on correspondent deposit banks? A Oh, yes, the same thing. Those do not go through the tellers at all. The only thing that went through the tellers of the bank were deposits and withdrawals. All the transactions were confined to the secretary's office, secretary and treasurer. The tellers arrived at the proof of their respective cages by totalling the deposit slips in the case of the receiving teller of the day, being the debit items against him, and the credit items being the cash, or cash items that he had in his cage. The receiving teller—

Q (*By the Court.*) Having charged himself at the opening of the day with the cash that appeared in his cage? A No, the receiving teller opened every day without a cent; he had no cash, he had nothing to pay out, everything was incoming to him, so he started fresh every day without any money whatever. His cash, however, went over to the paying teller, the next morning, at the beginning of the day. The paying teller was accountable, charged for the entire cash of the bank, except such current cash as may be in the hands of the receiving teller; and he proved at the close of each day by charging himself with the sum total of all checks drawn, and crediting himself with the cash that he

found himself to have on hand at the close of the day, plus the reserve cash.

RECESS.

By the Court.

Q Did the paying teller on his proof-book charge himself with all the cash in the bank or only what he had brought out that morning? A All the cash in the bank with the exception of such cash as was in the hands of the receiving teller.

Q And which was turned over to him that same morning? A No. This cash would come in next morning, but his proof would not be until the close of the day.

Q So his charge in the morning was of all the cash in the bank except what was in the hands of the receiving teller? A At the beginning of the bank day, you mean?

Q Yes. A At the beginning he would be charged with every cent in the bank.

Q Including that which was in the hands of the receiving teller which he had received the previous day? A No, it was in the hands of the receiving—

By Mr. Clark.

Q At the opening of business the paying teller would or would not charge himself with all the cash in the bank? A He would.

By the Court.

Q I do not quite understand this. What else would he charge himself with? Anything besides the cash in the bank? A The cash and its equivalent, cash items, that is all.

Q Now, in detail? A In detail.

Q They would appear on his proof-book in detail? A Yes.

By Mr. Clark.

Q Would the cash items be detailed? A No.

By the Court.

Q But each class of items would be in detail? A Yes.

Q Now, what did he credit himself with? A Starting?

Q Yes, starting, or any time in the day. A There would be no credit to him, he would be just charged with cash.

Edward F. Cloran, direct.

Q When he comes to prove at night what is he credited with? A Credited with whatever he disburses during the day.

Q And ought to have a balance on hand? A Has a balance of cash on hand.

Q How does he know? What kind of record does he keep of what he has disbursed? A He either has the check that he has paid, or he has a representative of them in the form of adding machine lists of any checks he may have sent to the bookkeepers to be charged to the account.

Q It is true his department gets only the checks that have been cashed? A Cash paid.

Q The checks that have been paid through having been received by the receiving teller do not enter into his account? A No, sir. You mean checks received by the receiving teller from one depositor chargeable to the account of another?

Q That is it. A They go right from the receiving teller direct to the books.

Q I am speaking now solely of his proof-books? A He has nothing to do with them.

Q Those checks do not enter into, in the case of this bank, the paying teller's proof at the end of the day? A No, sir.

By Mr. Clark.

Q Now, what happens in the case of checks drawn by the Roseville Trust Company and deposited, we will say, in the National Newark Banking Company, when they reach the Roseville Trust Company?

The Court. May I have it just as clear, before you go further, as to the receiving teller's proof-book? Will it interrupt you if I do that?

Mr. Clark. Not a bit.

By the Court.

Q I understand the receiving teller begins with nothing? A Nothing.

Q And he is charged with what he receives during the day as evidenced by the deposit slips? A Yes.

Q Is he charged with anything else? A No, sir.

Q He is credited with what? A He is credited with the cash that he turns over to the paying teller, cash and cash items.

Edward F. Cloran, direct.

He is credited also with the cash that has been charged against the account of some depositor in the bank.

Q I am speaking about his proof? A He is credited with what he has received against the account. In other words, his account is made up of what he has received, irrespective of whether chargeable against another depositor in the bank, or some other bank.

Q He is not charged with the items that come in through the mail, I mean except for individual deposits? A The items that come in through the mail from other depositors?

Q I mean through other banks, through the clearing? A Yes, he is charged with everything that comes into the bank, no matter what it is.

Q And he is credited with what he turns over to the paying teller, and nothing more? A No, he is credited with what he turns to the paying teller, what may go through the outclearing, which is the check, he receives no deposits that are drawn on banks other than the Roseville Trust Company; that is the outclearing; and also credited with whatever goes to the bookkeeper, charged against the accounts of other depositors in the bank.

Q And the difference should be the cash he has on hand? A Actual cash or checks he has on hand.

Q Which he turns over the next morning to the paying teller? A Yes.

By Mr. Clark.

Q Assuming that a man in making a deposit, looking at the receiving teller's proof-book, does not make the deposit of cash or a check, but has a note discounted at the bank that day, does that figure through the receiving teller's proof, and if so, how and where, or does it not? A You mean the proceeds of the notes?

Q Yes, what is the item, general ledger credits, is it not? A That is what it is; it is the proceeds of those notes that go to the credit of the customer. In other words, that is a form of bookkeeping entry; as a matter of fact there is no cash passed there. The customer brings in the note, and that is discounted and goes to his credit.

Edward F. Cloran, direct.

Q And even that does not go through him at all; he gets those items where, in his proof-book? A It does go through him in the form of a credit.

Q Does the teller discount the notes? A Well, I cannot say what the performance is in this bank; as a rule there are separate tellers for that.

By the Court.

Q How does he get those items? A He gets the amount through what we call the credit tickets, which were the tickets referred to yesterday showing how much goes to the credit of the customer, and how much to the credit of interest unearned.

Q Who gives those tickets? A A clerk in the bank, whoever discounted a note makes out a credit ticket giving credit to the purchaser.

Q Take the case of certified checks, treasurer's checks, items of that character, which the testimony is here were handled by the treasurer, do they go through the books? A Certain checks go through the paying teller. Treasurer's checks would not go through every day, we would have a direct general cash-book entry.

Q What is the theory of its going through the paying teller's proof, a certified check? A It is just the same as though they took the customer's check and gave in exchange to the customer a bank check.

Q In other words, his account is charged and certified checks credited? A Immediately.

By Mr. Clark.

Q If we say, then, that a customer comes in and sees some person authorized to discount a note, do I understand you that some slip is made out as a result of that transaction which is given to the receiving teller? A Yes, just what the form is here I could not say, but it is a memorandum of some form that shows the proceeds that goes through to the receiving teller.

Q Checks up the cash-book? A The general cash?

Q Yes. A General cash embodies a total of the side-book, the debit side-books; the debit side-book being of the paying teller's end, the credit side-book being of the receiving teller's end. It also embodies all transfers which would go through either the paying teller's or receiving teller's books, such as

transfer of funds between the Roseville Trust Company and correspondent banks, the drawing of checks against any of these funds; these correspondent bank funds do not enter into the teller's proof, they are entered directly into the general cash-book, crediting the correspondent bank, for instance, and debiting whatever general ledger account is affected.

By the Court.

Q I understand you to say that there did go through the receiving teller's proof-book the checks which come in to him which were drawn on other banks? A Yes, but these are drawn by the treasurer of the Roseville Trust Company on a correspondent bank.

Q On a reconcilement of the account, or settlement of the account? A For instance, if a party came into the Roseville Trust Company and wanted exchange on Chicago, he would draw a Roseville Trust Company check on the correspondent bank in Chicago which happened to be the Corn Exchange Bank. In that case the Corn Exchange Bank would receive credit for this check, and if it happened to be a customer's account it would be debited.

Q And that part of it would go through the receiving teller's book? A It would not; it is not a receipt at all, it is an outgo; that is the outgoing.

Q Then would not it go through the paying teller's proof? A Yes, sir; so far as the general ledger is concerned.

By Mr. Clark.

Q So that every one of these checks on correspondent banks is the Roseville Trust Company's action in paying out some of this money to someone else? A Some of its own money.

Q And did it have correspondent banks in a number of out-of-town cities? A Not a large number, seven or eight of them.

Mr. McCarter. May I ask the witness a question?

By Mr. McCarter.

Q Assuming I had no money in Chicago at all, I was a depositor in the trust company, and I presented a check for a thousand dollars to the order of Marshall, Field & Co., Chicago, would that check go way out to the Chicago bank, or would they work that through their own correspondents with Chicago?

Edward F. Cloran, direct.

The Court. You mean by way of certified check? Certify that check?

Q Either way. A Your check would go to Chicago if the check was drawn on Chicago.

Q No, I am drawing a check on the Roseville Trust Company to the order of Marshall, Field & Co.? A That would go to the correspondent bank.

By Mr. Clark.

Q Mr. McCarter is speaking as though he had an account with the Roseville Trust Company. Suppose instead of drawing his check to the order of Marshall, Field & Co., he came and drew it to the order of the Roseville Trust Company, and said "Give me your check on your bank in Chicago to the order of Marshall, Field & Co."? A That would be an exchange of checks.

Q (*By the Court.*) And that would show only on the general cash-book? A Yes.

Q (*By Mr. Clark.*) What would happen to his check on his own account drawn to the order of the Roseville Trust Company? A That would go through the paying teller to the debit of his account.

Q I don't know whether you had finished about the general cash? A Why, all the auxiliary books of the bank center in the main cash-book of the bank, with the exception of the bills purchased book. The bills purchased book does not take on an exactly or strictly cash transaction. A customer brings in a bill for discount, and it is entered in the bills purchased book showing the amount of the bill, the discount, and the proceeds. Bills purchase is debited and the customer's account is credited, it being a strictly bookkeeping transaction, and for that reason does not enter into cash.

Q (*By the Court.*) That is, the individual is credited with the proceeds? A With the proceeds.

Q And the profit and loss is credited with the discount? A Honor and interest.

By Mr. Clark.

Q What are the entries on the cash-book on either side relating to bills purchased? A On both sides, as a matter of fact they had them in detail at this period, but later on they changed

from—this is 1912—at this time they were entering in the cash-book both the bills purchased and the bills paid, but later on the posting of bills purchased is made direct from the bills purchased book, and did not enter into the cash-book.

Q Now, then, you have spoken of the debit and credit side-books as being auxiliary cash-books; now, I would like to ask you whether there is any book, and if so, what, which acts as an auxiliary or side-book to accounts in the general ledger? A Yes, there is the check-books on the correspondent banks; there is the certificate of deposit book; there is the certified checks register, and there is the treasurer's check-book.

Q Now, then, the cash-book is also such a book so far as showing the checks drawn, although not the items, on the correspondent banks? A Oh, yes, this is the only place it is entered, in the main cash-book. The checks in the main cash-book, drawn on the correspondent banks are always in detail.

Q Will you look at the individual ledgers and explain the operation of those? A (Not answered.)

By the Court.

Q Before you leave that, you say that checks on correspondent banks show in the cash-book? A Yes, sir, in detail.

Q How about certificates of deposit? A They are entered in the cash-book in lump sum; there were very few, anyway, I believe, in the whole life of the bank, something like fifty-six.

Q Not in detail? A I believe I might say they were in detail, because I don't think there was more than one item in any day.

Q How about certified checks? A Certified checks entered in the cash-book in total, came from certified check register.

Q How about treasurer's checks? A Came from the stub themselves.

Q They do all show in the cash-book? A In the total, aggregate amount.

Q As a matter of practice is entry made in the general ledger from these side-books or from the cash-book itself? A Strictly from the cash-book.

By Mr. Clark.

Q Now, take up the individual ledgers, first, savings account? A I found in this institution three ledgers, I believe they were

numbered 1, 2 and 3 in the savings department the ledgers run in agreement with the number of the pass-books; these pass-books, the numbers were printed on them in advance of the issue, and in opening up the account in the ledger the corresponding number to the pass-book was given to the ledger folio, so that they were in harmony, and these ledgers were run in that order, numerically arranged.

Q The number on the ledger is in pen and ink? A In pen and ink, on the upper right-hand corner; on the pass-book it is printed.

Q Now, will you explain to the jury what appears on the page of the individual ledger, and how the transactions with the depositor is shown there? A A column is provided in the ledger, at the top is the name, first comes the number of the book, then the name of the party at the head, then, although there was a number of spaces provided on the sheet, for the address, occupation, birthplace, father's name, mother's name, etc., none of these were ever filled out. There is a column for the date, one column for date of either the debit or credit. Now, if there should be a credit on the same day it will have to follow on the line below in order to change the date, then the year, then comes a debit column which would correspond with withdrawals from the account, then a credit column corresponding with deposits to the account, and balance. The balance is drawn out in both the savings department and commercial department as each entry is made.

Q You mean extended? A Extended, showing what is left, or the balance after another deposit happened to be made, or a draft. As each entry was made the balance was drawn out, so reference to the book at any one time would show you immediately just exactly what stood to the credit of that party in the bank.

Q Just explain about the individual demand ledger. First, tell us how these entries get in there? A They get in there from the deposit tickets on the one hand, and from the drafts on the other hand, or withdrawal tickets.

Q Now, take the individual demand ledger? A They are arranged according to the name of the customer, alphabetically arranged, and I believe there are two of them, the first one running from A to M inclusive, the other from M to Z. They differ from the savings department in as much as the credit has its

date column and the debit has its date column. In other words, the arrangement in the ledger is the date column, a remark or history column, a folio column and an amount column, followed by a date column and balance column. The debits are to the extreme left of the sheet, the credits to the extreme right of the sheet. This is arranged a little different. It runs with date column, then remark or history column, then a debit column, which is the withdrawal column, credit column which is the deposit column and balance column.

Q The debit column in the individual ledger is the deposit column? A No, it is a withdrawal. Then in here they run a day column, then a rate column, which applies, apparently, to interest, then a column which is headed "Aggregate," which I take would mean the average balance upon which the interest was calculated, then a column headed "Interest." They never used any of those columns whatever.

Q (*By the Court.*) Then is the aggregate balance in between the two columns, or to the extreme right? A To the extreme right of the two columns, your Honor.

Q (*By Mr. Clark.*) Now, have you explained about the credit side-books, from what point the entries are taken, and where they go?

The Court. I rather think so.

A I think so.

Q Now, then, will you take the general ledger and— A I may say in conection with the side-books they are not made up by the tellers, they are copied from the deposit tickets and drafts which come out of the tellers' cages by bookkeepers.

Q (*By the Court.*) The entries which go upon the individual ledgers, are they made from the side-books or from the deposit tickets and drafts? A From the deposit tickets and drafts themselves.

Q (*By Mr. Clark.*) Will you briefly run over the general ledger, omitting items concerning which there are no entries, or are entries, and state what the accounts are? A The general ledger of the Roseville Trust Company is identical with the general ledger found in most any bank in the country, which is known as the Boston ledger. It starts with a balance as at the close of each Saturday, beginning with the entries, the debit and credit entries, for Monday, and the balance at the close of Mon-

day. The debit and credit entries are totals taken from the various side-books and auxiliary-books we have just described.

Q So while the items of withdrawal and deposit are entered into the individual ledgers of the depositors as the details here, when entered in there are entered from the items themselves, are the totals in here entered from the items themselves? A No, they are entered from the cash-book, and the cash-book finds its totals from the auxiliary cash-books. In other words the side-books themselves are auxiliary cash-books, the mathematical calculation of this book. The idea of this book is to obtain a trial balance at the close of every day of the condition of the bank.

By the Court.

Q Every double page represents a week? A Yes, represents an entire week. Those are balances at closing. Those are the asset and liability accounts. Those are debit and credit entries to the account, whether they be debit or credit, at the close of the day. This represents asset balance at the close of the day and this the liability at the close of the day. Those two columns must balance in order to have the ledger prove.

Q And on Monday debit and credit must be added to or subtracted from the balance carried over on Saturday to effectuate the balance on Monday? A In the case of a debit balance at the close of Saturday the debits on Monday are added and the credits subtracted and the balance brought out, whatever the result may be. In the case of a credit balance at the close on Saturday the debits would be subtracted, the Monday debits, and the credits added.

Q And the total carried into the credit balance column? A Well, if there happened to be a credit balance.

By Mr. Clark.

Q Will you run down the various accounts, naming them? A The first account in the general ledger is capital, covering the capital stock.

Q (*By the Court.*) Which is carried exactly the same every day? A Every day all the way through, as it happened in this bank the entire authorized issue was issued. The surplus is the next item.

Q (*By Mr. Clark.*) And that, unless a specific additional amount is charged for surplus, is carried the same every day? A Yes, as a rule in banking the surplus is maintained the same.

Q Both of those, capital and surplus, are liability items? A Liability items to the stockholders of the bank. The next is profit and loss, which represent the undivided profits.

Q How often does that change? A It is liable to change every month, whatever the earnings of the bank happened to be at the close of the month changes that figure.

Q It is not changed every day? A It is not changed every day. The next item in here we can omit, because there is nothing in it. The next is interest received, and in this item is the earnings from discounted notes, and from any other investment which they may have had in the way of stocks, bonds, etc.

Q Actually earned, or does it include unearned? A This includes unearned in this bank. Exchange and commission received is an item which explains itself, and is a very small item. Individual deposits No. 1, that refers to the commercial ledgers, accounts running from A to L inclusive, and No. 2 includes from M to Z inclusive; and the savings department in here is known as special deposits. Certificates of deposit are self-explanatory; they are money received for a time deposit, maybe thirty, sixty, ninety days or even one year.

Q Negotiable certificates? A Negotiable certificates, bearing interest. Treasurer's checks. Checks drawn by the treasurer of the Roseville Trust Company on the Roseville Trust Company, and are usually issued for the expense of the bank, as a rule.

Q But it is not those checks that go in settlement with customers? A No, not treasurer's checks. Certified checks is checks of depositors of the bank certified, become a liability of the bank; they are charged to the depositor the moment they are certified and credited to certified checks immediately, and remain a liability of the bank until the check is presented and paid by the bank; becomes a liability of the bank from that time on.

Q (*By the Court.*) Usually at a clearing bank, another bank? A Yes. Accrued interest payable is the interest that may have accrued on bills payable, or if they allow their customers interest on account it will be credited to the customer say once every three months, every six months, it would then become a

profit and loss item at the time they credit it; in the meantime it would be carried in here as accrued interest.

Q (*By Mr. Clark.*) I notice that item does not change an entire week. A The probability is it accrued once a month. Bills payable is their outstanding bills payable. That is a demand liability on the bank. As a rule it is borrowing money from other banks and giving them a Rosevelle Trust Company bill due on a specific date, or on demand, and bearing interest, and payable the same as any other bills payable. Collateral loans are loans made and supported, or secured by collateral, mortgages, stocks and bonds, and other forms of collateral. Bonds and mortgages are—this form of bond is a bond that accompanies mortgages, and these are loans made on mortgages.

Q (*By the Court.*) And neither of them, whatever their form is, included any bills purchased? A No, no, it is an absolutely different thing entirely; it is a loan made on mortgage. The collateral loans are not included. This secured loan, it is discounted paper; ordinarily means go into the market and buy it from a note broker.

Q (*By Mr. Clark.*) What is the amount on that day of bills purchased? A $638,082.52.

Q And was by far, was it not, the largest single item the company had? A It was the largest item.

Q And was it also quite an active item? A Changes every day.

Q Now, go on. A Stocks and bonds are investments of the company; they have invested their surplus cash in stocks and bonds. This is a correspondent bank, the Bloomfield National. This shows, in this particular case, that the Bloomfield National had $631.90 with the Roseville Trust Company.

Q Owed the trust company that much money? A They owed the Roseville Trust Company that much money. Accrued interest receivable is interest they are due to receive from the collateral loans, bonds and mortgages where the discount was taken in advance, or stocks and bonds, as the case may be. This is their reserve for taxes. Essex National, Montclair, is another correspondent bank having a deposit there to the credit of the Roseville Trust Company. The Banking House was the institution itself, that item never changed all the way through, the item marked as banking house, it is a liability, never changed. The Building Income was an income received from letting out

offices above the bank, letting a hall they had up there. The National Iron of Morristown, another correspondent bank. Then we come to the cash account itself, which represents actual cash on hand in the bank. When I say "actual cash" I have reference to the cash and the cash items, which would be checks, etc., carried in the bank.

Q They do not carry into the general ledger the receipts and disbursements each day, but only the balances? A Only the balances shown by the cash-book, total debits and credits each day as found in the cash-book. Then we have correspondent banks, that is the Irving National Exchange Bank, New York City; the Union National Bank of Newark, New Jersey; New York State National Bank of Albany; the Corn Exchange National Bank, Chicago, Illinois; the National Shawmet Bank; the Fourth Street National Bank, Philadelphia, and the Orange National Bank, the Second National of Paterson. The next account is expense account, which is all of the expense of running the bank, salaries, light, heat, power, whatever it may be. That changes very frequently; it is carried here as a debit, which is a profit and loss account, it is neither, it is a liability. Exchange paid is the same thing, it is exchange paid by them on checks they received through their windows; they may charge this to their customers, and may not.

Q Exchange in this instance means a collection charge? A Yes, and then dividend checks, which would represent a liability on dividends declared by the bank, and checks issued, the checks never presented for payment so they were outstanding against the bank. That represents the entire general ledger account of the Roseville Trust Company.

Q Now, Mr. Cloran, I think you testified that this general ledger has a footing each day? A Has a footing each day.

Q Of both columns? A Of both columns; both footings are identical if the ledger is in proof.

Q And should every asset of the bank be included in the total for assets in this book? A They should.

Q And should the correct amount of the liabilities be included in the liabilities column? A They should.

Q Now, I will ask you in connection with your examination of the books for the purpose of determining from day to day the amount of the discrepancy between the assets as they appeared, and the real liabilities, as you could find them in the book, what

you did in the way of ascertaining the amount which is represented to have been on deposit in other banks? A I reconciled all the correspondent banks for each month for a period, I think, of fourteen or fifteen months, up to the close of the bank.

Q From the close of the bank prior? A Prior.

Q And what did you have to go on? A I had the bank statements as rendered, the correspondent bank statements as rendered, and the accounts of the Roseville Trust Company.

Q For example you had a statement from the Irving National Bank as of the close of June, 1913? A I did.

Q Showing how much on that date the Roseville Trust Company had on deposit there? A Yes, and showing also the various items they received and disbursed for the Roseville Trust Company during the current month.

Q Now, then, of course, in arriving at the amount of cash which is represented to be in the institution, you have had to rely on the bank-books, but what have you done which has satisfied you as to the correct amount of cash, if it be correct, on any day, as shown in the general ledger? A I have examined the receiving and paying tellers' proof-books, and determined the amount of cash that entered into their proof for that particular day.

Q Now, will you state generally to the Court and jury what you found in connection with your examination relating to the individual account totals as compared with the amount of those totals given in the general ledger. Was it always correct? A Do you mean from the side-books?

Q No, we will say that, for example, on the 7th day of June, 1913, individual deposits No. 1 is given as $167,000. Did you, in connection with your examination, do anything to determine whether that amount was correct, or whether it was understated? A Oh, I went back to, I think, the latter part of 1911, starting with a balance at that time; I took the—

Q Balance where, and what? A A balance to, say individual deposits No. 1, as found in the general ledger, and also with individual deposits No. 2, and also with the savings accounts and starting with the balance as I took it from that ledger I took the debit and credit side-books and added the debits to the balance, deducted the withdrawals, as found in those side-books, and arrived at a balance, and compared with the balance of

each and every day from that point up to the close of the bank, arriving at a new balance each day.

Q Now, then, did you find that at times the amount given for individual deposits Nos. 1 and 2, and special deposits in the general ledger, was correct? A I found it quite the other way.

Q (*By the Court.*) The balance which you found by the method indicated by your previous answer, was that carried forward day by day? A I carried it forward every day to the close of the bank.

Q (*By Mr. Clark.*) Now, just for the sake of getting this general situation outlined, I wish you would give us a brief summary of the methods discoverable from your examination of the books, and which you did discover, by which the shortage was concealed, or made a little more difficult of ascertainment, in the general ledger? A First by the method I have just described, starting, I believe, in October, 1911, at a point where I was convinced that the figures were accurate, in as much as I failed to find anywhere in thirty or sixty days of that point any manipulations in the account, I accepted those figures as representing the true balance at that time of that deposit liability—

Q Let me interrupt you at this point by asking whether, in connection with your examination into the discrepancies, if any, between the individual ledger on all accounts, and the general ledger, you took into account the pass-book discrepancies which did not get on the general ledger? A No, not at all, only the figures on the general ledger; the figures I found in the side-books only; anything that was not in the side-books was not in my calculation at all.

Q Is that also true as to whether or not it was in the individual ledger? A Yes, sir.

Q So if it were not in the individual ledger, or in the side-book, you did not have that figure to use? A Not at all.

Q (*By the Court.*) Then nothing is included in your figures of the total shortage except such shortages as appears from the books of the bank, exclusive of the deposit-books? A Exclusive of whatever was abstracted from the deposit-books, but did not get into the books of the bank. I was dealing with the figures in the books of the bank.

Q And that figure of three hundred and twelve thousand odd relates only to figures which you discovered in the books of the bank? A Yes, sir.

Edward F. Cloran, direct.

Q They do not include the pass-books? A Not at all.

By Mr. Clark.

Q I interrupted you at a point where you were saying you had arrived at a figure, and had then carried forward the deposits and credits, now will you go on? A In the same way I took each of the accounts, although I did not prepare a schedule of them, I took each of the general ledger accounts, starting at the same time, and made the mathematical calculation, arriving at the balance of the next day and carried that calculation on through to the close of the bank. In addition to that I reconciled the account as I have stated in each of the correspondent banks for, I think, fourteen or fifteen months, each month, and I footed the general ledger each day, arriving at the difference in the footings. I found by this method that the manipulation of the books, or the shortages, was covered by an under extension; and by "under extension" I mean this: If the balance at the close of Saturday should be $10 and there was a dollar debit and a dollar credit which would leave $10, it would be extended $5; it would be under extended the amount that it should be. In other words, if the balance properly extended amounted to $200,000 it would be brought out $100,000. I found by the same method that the bills purchased were manipulated in the same way, under extended, and in cases, over extended. The correspondent bank accounts were the same way, under and over extended; and, in fact, most, or many of the accounts having the larger figures were handled in the same way, by under and over extension. I found false debits and credits appearing in the debit and credit columns, and not appearing in any of the original books of entry of the bank. I found the asset column to be over footed, a greater amount to the column than the column truly added. I found the liability column to be under footed on many days. These under and over footing would extend anywhere from fifty to two hundred thousand dollars.

Q Now, in order to make this clear, I want to ask you whether you found any of these errors in any book but the general ledger? A I found in the cash-book one instance where at the close of the day the cash balance of $27,000 was brought forward at the opening of the next day as $31,000.

Q (*By the Court.*) That is the cash balance? A That is the general cash-book, yes.

Edward F. Cloran, direct.

Q (*By Mr. Clark.*) With the exception of the general ledger and the general cash-book did you find any of the other books showing errors or manipulations?

Mr. McCarter. I did not understand that.

Q You have testified to errors in the general ledger and general cash-book, have you found such errors or manipulations in the receiving or paying tellers' proof-books? A No.

Q Have you found them in the side-books? A No.

Q What have you found, if any, in the individual ledgers themselves? A I found nothing except omissions as compared with the pass-books.

Q Now, will you tell us also—you have told us about under and over extensions, tell us how that would appear in connection with the depositor's bank account? A It would overstate in every case the amount of money on deposit in the correspondent banks, how much the Roseville Trust Company had there to their credit, by the over extension to the corresponding bank account, which is also an asset account; he would claim the assets in the correspondent bank to be greater than it really was.

Q And where were those entries showing debits and credits to the asset account of moneys in the depositor's bank kept? A Where were the entries kept?

Q Yes. A In the general ledger.

Q Anywhere else? A The details in the check-books themselves, that is all.

Q You mentioned one instance of carrying forward a balance wrongly in the cash-book; were there other such? A There was, I believe, and the cash-book was under and over footed a number of times; it was under footed on the receipt side and over footed on the disbursement side.

Q You testified that you started this exhaustive examination at a late date in 1911; did you make any earlier examination of the books so far as they related to certain pass-book irregularities? A Yes, so far as any of the pass-books were concerned, were called to my attention by the bank department, I went back as far as the pass-books went back.

Q And in relation to those pass-book transactions what was your process? What books did you look at? A I looked at the side-books if it happened to be a deposit that was in ques-

tion, I examined the side-books, the tellers' proof-books, the cash-book and the ledgers.

Q And if it was a withdrawal? A I examined the debit side-book, the proof-books and the ledger.

Q (*By the Court.*) Individual ledger? A Individual ledger.

Q (*By Mr. Clark.*) I show you schedule F attached to plaintiff's complaint, and ask you if you have examined into the facts with reference to each of the items shown on such schedule, with the exception of the item under date of March 5th, under the heading of "Demand Account," entitled "Account of James Lees & Son"? A I examined all of these, I think. The reason I did not look at Lees was because I did not have the pass-book.

Q Now, will you state whether or not, in your opinion, as a result of the examination of these transactions through the books of the Roseville Trust Company, you are of the opinion that as to each of the said items of default in schedule F, except the item of account of James Lees & Son, the Roseville Trust Company suffered a loss in connection with each of said transactions?

Mr. McCarter. I object.

The Court. Cannot he go further, and state whether, from the books as he found them, there was a loss?

Q Will you answer the question as changed by the Court.

The Court. Do you object to the question as stated by the Court? I suppose it is but another way of saying whether or not, as he found the books, the appearance of these items would indicate a loss to the bank?

Mr. McCarter. Well, it seemed to me, perhaps I am wrong, but it seems to me that that is improper; the transactions should speak for themselves; the details should be explained.

The Court. I assume that the purpose of the question is to ascertain the extent, instead of taking the details in each case, which we already have from Mr. VanDerveer, from Mr. Mindnich and from Mr. Thompson.

Mr. McCarter. I am not anxious to have that all gone over again, that is not the point, but those facts, until contradicted in some way, it seems to me, show certain results, and it is for the jury to determine exactly what those results are, it is not for the witness to come here

and assume the duty of the jury; for instance, in some of those cases the accounts seem to be transferred; whether there is a loss is a thing which may involve specific inquiry.

The Court. As I recall that refers to two accounts only. That is a transfer in Mrs. Haney's book of $9,000 from her special account to her general account, and in the case of Mrs. O'Connor, where the $3,000 seems again to have been entered on her account. Do you recall any other?

Mr. McCarter. For the moment I do not. What I object to is a general opinion by this witness. The facts must speak for themselves.

(Question read.)

The Court. I understand the objection is not that the details ought to be given instead of this general statement, but the objection is to the general form of the question.

Mr. McCarter. Yes, sir, as asking for an opinion.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Will you answer the question? A I found that the Roseville Trust Company did suffer a loss in each instance.

Q And to what extent in each instance? A To the extent set forth in this schedule. This schedule I think I prepared.

Q Exclusive of the Lees? A Exclusive of that one; that one I did not examine.

The Court. Will you take up the Haney account, if this witness knows about it.

Q Mrs. Haney testified this morning that on September 9, she put in her commercial account $9,000 which she had drawn out of her savings account. Does that fact change your conclusion as to whether or not there was a loss suffered by the trust company when $9,000 was deposited by Mrs. Haney in the special account with the Roseville Trust Company, and no entry made on the ledger or in the side-book? A It does not, no.

Q Do you say that there was a loss suffered by the Roseville Trust Company to the extent of that $9,000? A I do.

Q Now, with regard to the account of Emma E. O'Connor, it has been testified to that on April 5, 1911, there is shown in the

credit side-book, and in the individual ledger account of Emma E. O'Connor a purported deposit of $3,000. You have no knowledge as to whether or not at that time there was in fact a deposit of $3,000 made? A There is no indication of it.

Q You have no knowledge as to whether or not—

Mr. McCarter. Are you testifying, or is he? 10

(Question withdrawn.)

Q Do you say from an examination of all the books that, in spite of the entry referred to tending to indicate a credit deposit by Mrs. O'Connor on that day, there was, in fact, on account of the O'Connor account, a loss suffered by the trust company to the extent of $3,000? A I do.

Q I show you Schedule G, headed "Abstractions of Cash," annexed to the complaint in this case, and ask you if you are familiar with the figures noted underneath there? A I prepared 20 that schedule.

Q Was it this schedule, rather than the other, that you prepared? A Rather than what other?

Q G, the first one; the other was F. A Yes; the other I had the pass-books handed me by the banking department.

Q Now, will you take this schedule and, calling off such books as you may require from time to time, tell the Court and jury exactly what happened in connection with each of these items, and your conclusion? A General ledger and cash-book for December 30, 1912. (Said books handed to witness.) 30

Mr. McCarter. Now, if the witness is going to go through what was done yesterday, I do not think that is necessary.

Mr. Clark. There has been no coherent statement with regard to these transactions by anybody, because the witness who was put on the stand before never heard of these, and was only asked to identify handwriting, and identified each of these items to be in the handwriting of Mr. Smith. This witness does not know anything about that. 40

Witness. I want the proof-books, too. (Books handed to witness.)

A (Continued.) The first item, December 30, 1912, schedule G, amounting to $325 on that date in the general ledger, there ap-

pears a credit to building income of $325. That credit of $325 does not appear in any way in the cash-book on that date, or any of the next succeeding thirty days; nor does it appear in any of the figures that constituted the receiving and paying teller's proof of that date, which was necessary to obtain a balance in the general ledger. That account was included in the debit column, and was necessary to prove the general ledger for that date. The main cash figure appearing that day opposite cash in the general ledger is $32,309.85. The receiving teller—

Q (*By the Court.*) That is the main item in the general ledger? A Main item in the general ledger is $32,309.85.

Q (*By Mr. Clark.*) May I suggest that the testimony, I think, yesterday did show that the aggregate of the receiving and paying tellers' proof-books agreed with the cash-book on each of these days, so you need not take the time for that.

The Court. And also what the interlined figures were.

A Interlined figures, $325, and that appears in no book in the bank except the general ledger.

Q If, as a matter of fact, you have in your work done these things or proving that the paying and receiving tellers' proof-books corresponded with the amount in the cash-book, and that in turn corresponded with the main figure in the general ledger, I wish you would tell us that as you go along, but you need not do it all over again. A I established that the main figure, $32,309.85, agreed with the balance as shown by the cash-book on that date, and as shown by the receiving and paying tellers' proof-books on that date.

Q What does that item, as the result of your study, indicate to you? A It indicates the receipt of a sum of $325 properly belonging to the credit of building income as having been abstracted, and was fictitiously carried in cash.

Q While on this subject will you state whether the item building income appears in any other book of the bank? A No other book of the bank except the general ledger.

Q Take up the next item. A January 11, 1913, $5,000.

Q Did you find whether or not the item of $325, building income, went into the cash-book? A It did not go into the cash-book on January 11, 1913, which was a Saturday; I find the fictitious figure over the top of the main figure in the cash account amounted to $5,325. Reference to the cash-book discloses

that the balance of cash as of the close of that date was $28,080.02. The receiving and paying tellers' proof-books as of the close of that date established the amount of cash on hand in the bank was $28,080.02. This figure of $5,325 was included in the debit, or asset, column in the general ledger as of that date, and was necessary to balance the ledger. I find that the balance to the credit of bills purchased at the close of the day on January 10th was $646,541.74. The general ledger on Saturday, January 11th, showed no deposits or credits to bills purchased account.

Q What does that mean? A It means there were no transactions in the account for that day. Reference to the cash-book showed that there were no transactions on January 11th in the bills purchased account.

Q From your examination of the bank's transactions what would you say as to whether or not it was natural to have no transactions in bills purchased on Saturday? A That is true, because no transactions take place—

Mr. McCarter. One moment. I object to that. The books speak for themselves. Whether it was or was not natural has nothing to do with the case.

The Court. I suppose he means the usual course of business in the bank.

Q What do you find from your examination of the books was the practice in this bank as to discounting or buying bills or notes on Saturday? A They did not do it.

Q Now, did you finish up stating what the items was shown as of January 11th? A This balance at the close of Saturday, which, by the way, is on the next page, is brought over, $641,541.74, a difference in the extension of the balance of $5,000.

By the Court.

Q And that $5,000 added to the $325 on December 30th made $5,325? A $5,325.

Q Which was the amount of the interlineation? A Yes, sir. The next item on January 18, 1913, amounting to $300, appears over the top of the main cash figure.

By Mr. Clark.

Q May I interrupt? Did you tell us whether or not you had examined the proof-books and the cash-book? A Yes; I have said that. In connection with this $5,000 item?

Q Yes. A Oh, yes.

Q Have you given us the amount of cash that is found in the cash-book that day?

The Court. $28,080.08.

A Yes. I found a figure over the main cash figure of $625. The sum of $5,000 that appeared over the sum of $5,325, $5,000 of it disappears on this date, and is falsely charged in the sum of $5,000 to the bills purchased account.

Q (*By the Court.*) I thought you said that disappeared in carrying over the balance from the 10th to the 11th? A It did. Now it has come back, your Honor, by a false charge to bills purchased account.

Q (*By Mr. McCarter.*) It disappears by appearing? A It disappears on the 11th and comes back on the 18th.

Q (*By Mr. Clark.*) What is the story as to the interlined item between January 11th to the 18th in cash? A On January 11th the interlined item continued over the cash in the sum of $5,325 until it reaches January 18th, when $5,000 disappears from the interlined figure, and this $5,000 is represented by a false charge of $5,000 to the bills purchased account on January 18th, which happens to be a Saturday.

Q Now, tell us about the cash-book and proof-book. A Leaving in the account of $325, which is increased on January 18th by $300, this $300, or $625, as it now appears on January 18th, is necessary in order to prove the ledger, in order for the debit and credit columns to balance. The cash-book on January 18th showed a balance of $33,334.35. The receiving and paying tellers' proof-book showed an aggregate of cash, and cash items, as of the close of January 18th, in the amount of $33,334.35. The $300 which has been added to the $325 originally, over the top of the main cash, does not appear in any of the books of the bank except the general ledger.

Q What does that indicate to you, the entire transaction indicate? A The abstraction of $300.

Q On January 27th, an item of $5,000, there appeared over the top of main figure in the cash account in the general ledger $5,625, as an interlined figure, the balance as shown by the cash-book at the close of January 27th, as $33,598.18. How does that compare with the main amount of cash in the general ledger? A Cash in the general ledger figure was $34,223.18.

Edward F. Cloran, direct.

Q (*By the Court.*) The difference being $625? A $625; that is the main cash figure in the ledger, but the cash figure in the book is $33,598.18; that is the balance in the cash-book, and also in the proof-book.

Q (*By Mr. Clark.*) It may save time if, where the facts are that way, you will state that the main amount of cash in the ledger is the same as it is in the cash-book, and the same as you find in the proof-book, without giving the amount. A In this case that does not appear to be true.

Q Where they are alike just state that fact.

By the Court.

Q Why should there not be different figure if the interlined figure is $5,625— A That figure is on the side, it is in the column to the side of the main cash figure in the general ledger.

Q But not included in the balance? A $625 included in the main figure; it is absorbed in the main figure, not shown as an interlined figure at all, and in addition to that there is $5,000 over the top. The $625 is absorbed in the main figure.

Q And $5,000 over the top? A Yes.

Q That is included in the total? A Yes.

Q But not in the main figure? A Not in the main figure.

By Mr. Clark.

Q $5,000 over the top is included in the general ledger, but is not shown in the cash and proof book? A That is right.

Q $625 does not appear as an interlineation? A Does not appear as an interlineation; it is in the main figure, but the main figure differs from the cash- and proof-books by $625.

Q (*By the Court.*) So the figure over the main figure is not $5,625, but $5,000? A $5,000; the $625 is absorbed in the main figure.

By Mr. Clark.

Q The main figure, $34,233.18, which appears in the general ledger, is $625 more than the $33,598.18, which appears in the cash-book and proof-book? A In the debit and credit for the day there is $5,625, but that is in your total; there is the debit and credit column of the day and asset and liability column.

Q Then there is $5,000 over the column and $625 to the northwest or southeast of the column? A To the left. I find in the

bills purchased account of this day a false credit of $4,000. This credit does not appear in the cash-book, nor is it comprehended in the figures of the receiving and paying tellers in their proof-books. I also find a false credit to certified checks of $600, which does not appear in the cash-book, nor is it comprehended in the figures of the receiving and paying tellers' proof-books. I find another false credit of $400 to treasurer's checks which does not appear in the cash-book, nor is it comprehended in the figures of the receiving or paying tellers' proof-books.

Q (*By the Court.*) $600 found in what? A Certified checks. However, I might say that on the day prior—certified checks is always a liability of the bank, can never be anything else, nor can treasurer's checks be anything but a liability; it is either a liability or it is nothing—and on the day prior to that both accounts showed as an asset treasurer's checks in the sum of $10,699; certified checks showed as an asset of $485.03.

Q What is that date? A January 26th.

By Mr. McCarter.

Q They should appear as a liability? A Yes, sir.

Q And this is on the general ledger? A Yes, sir.

Q And the date? A At the close of January 25th.

By the Court.

Q That would be $592.02, which really makes an error of double that amount, does it? A Yes; it would have that effect. There appears to be on Monday, January 27th, a debit to treasurer's checks of 30 cents, which would make a liability of $107.29, when he faces the false credit of $400, bringing it over by the false credit of $400, resulting in a credit balance at the close of January 27th of $292.71. In the certified checks the debit on Monday, January 27th, was $101.65, with a false credit of $600, resulting in a credit or liability balance of $13.32.

By Mr. Clark.

Q What does your study of these transactions indicate with regard to any abstraction, or not, on that day, and, if so, how much? A An abstraction of $5,000.

Q On what date? A On January 27th.

Q When you say a false credit, and so on, will you explain what you mean, and how you arrive at that conclusion? A An

item of false credit, there is a credit that has been passed irregularly to the account; in other words, it does not appear in the cash-book, nor form any part of the receipts or disbursements, so far as the books of the bank are concerned, outside of this general ledger.

Q Does that also include a search of any other books? A Search of the other books in the bank that would be affected by this entry.

Q And as to the credits there are certain books where it would appear in due course? A Yes, in the treasurer's checks, or certified checks ledger; it would also appear in the general cash-book.

Q Go on to the next one. A On January 28th I found an interlined figure over the top of the main cash figure in the sum of $6,025, or an increase of $400 over the day previous. An examination of the cash-book shows that the balance of cash as shown by the cash-book on that day is $34,079.99. The receiving and paying tellers' proof-books show a balance of cash on hand of $34,079.99. The $6,025 is necessary to result in a proof of the general ledger, to have the asset and liability columns balance. I find in certified checks account of January 28th a credit of $1,050.56. This credit is also found in the cash-book, but over the top of this credit I find an additional or false credit of $400.

Q (*By the Court.*) Where? A Over the top of the main, or true credit figure of certified checks account in the general ledger.

Q Do you find that in the cash-book? A That $400 is not in the cash-book or comprehended in the figures making up the receiving and paying tellers' proof-books. On the date previous, January 27th, the credit to certified checks was $13.32. On January 28th there appears in the general ledger a debit of $1,074.41. This debit I find in the cash-book, and it is comprehended in the paying teller's proof-book. I find a debit on January 28th of $1,050.56, which I also find in the cash-book, and which was comprehended in the receiving teller's proof. The result of these entries would have again thrown the certified checks account into the asset column if it had not been for the false credit of $400 that was inserted over the top of the main figure, and which left the certified check account in the liability column in the amount of $389.47.

Edward F. Cloran, direct.

Q (*By Mr. Clark.*) Was there an interlined figure in cash the day before? A There was.

Q How much? A $5,625.

Q How much is the excess? A (Not answered.)

Q (*By the Court.*) I thought you said it was $5,000 in the interlined figure? A And $625 in the main balance; that was a few days before; it has come back now.

Q (*By Mr. Clark.*) What is the date now of the $5,625? A It comes back for the first time in the sum of $5,625 on January 28th; on the day before it was $5,000 interlined $625.

Q Look again at that date you have been telling us about, January 28th. A Yes.

Q And I would like to ask what the interlined figure in cash, if any, is on January 27th? A Interlined figure, $5,000.

Q On January 27th? A Yes. $625 is absorbed in the main figure.

By the Court.

Q On January 28th you say it came back interlined figure of $5,625? A No, $6,025.

Q Which is $6,625 and $400? A That is right, your Honor.

By Mr. Clark.

Q Will you state whether there is any orderly sequence in connection with this interlined figure? A None whatever.

Q What, in your opinion, did these transactions as you have investigated them indicate? A This transaction here indicates the abstraction of $400 on this date, January 28th.

Q Now take up the next one? A On January 30th I find interlined figure over the top of the main cash figure in the sum of $6,125, an increase compared with the interlined figure the day previous, or two days previous, of $100. This $6,125 is necessary to create a balance in the ledger, that is, to have the assets and liability columns balance. Reference to the cash-book shows that the balance of cash on hand at the close of that day was $35,200.92. Reference to the receiving and paying tellers' proof-book shows that the cash on hand that day was $35,200.19.

Q (*By the Court.*) The main balance in the ledger? A The The main balance in the ledger, $35,200.19. $100 was necessary to balance the cash. No other account in the ledger was affected for that $100; the book was out of balance by $100.

Edward F. Cloran, direct.

Q (*By Mr. Clark.*) The indication by that was what? A The abstraction of cash.

ADJOURNED to March 20, 1919.

FOURTH DAY.

Newark, N. J., March 20, 1919.

Continued pursuant to adjournment.

Appearances as before.

EDWARD F. CLORAN, resumed the stand.

Further direct examination.

Q Have you your schedule there? A I have.

By the Court.

Q I think you did not tell us in relation to that item of January 30th, Mr. Cloran, what there was balance on the other side? A That item was necessary to balance the ledger; there was no effect on the other side at all unless he included that $100 in the interlined figure, but the ledgers would have been out of balance $100, the assets would have been $100 less than the liabilities.

Q Yet I understood you to say that the cash-book showed $35,200, and the teller's proof-book showed $35,200, and that that was the main balance in the ledger. Is there any indication of where that $100 came from which you say was an abstraction? A Yes, the indication is it came from the cash, inasmuch as the interlined figure of the cash was increased $100.

Q And yet the cash agreed, that is, the cash-book agreed with the cash on hand as shown by the teller's proof? A Yes, sir, and the main figure.

Q Now, what was the opportunity to abstract that $100 without the abstraction appearing in the proof balance? Anything to indicate what the opportunity was to get away with the $100 without the abstraction appearing in the teller's proof? A The opportunity would be this, that whatever account was affected was not changed, there was no false credit. If you will remember in the case of each of the others there is a credit which is a

false credit, and in this case the account that that $100 came from is not affected at this time, it remains the same, and for that reason he would have been $100 short if he had not included it in the interlined figure. He passed no credit at this time.

Q (*By Mr. Clark.*) If Mr. Smith had received $100 in cash from a depositor and had not passed it through the books, would it have shown as a part of the liabilities? A It would not.

Q Then if there were no liabilities as shown for this additional $100, what would have been the object in adding the $100 to the cash? A There would have been no object whatever; he would have been out of balance if he added the $100 to his pretended cash, and had not taken it in as a liability on the other side.

Q What have you discovered, if anything, in connection with your examination of the general ledger, as well as the other books, concerning any practice of the person who kept the general ledger to preserve a memorandum of things which constituted, as you have found, irregularities? A The memorandum is this fictitious figure we speak of as a rule running over the top of these various figures.

Q Will you explain generally to the jury how, that in bookkeeping work serves any purpose, if it does serve any purpose? A It serves the purpose here of balancing the ledger; in other words, the pretended cash figure over the top of the main cash figure is necessary to balance the asset column with the liability column.

Q (*By Mr. McCarter.*) Is that fictitious figure always in pencil? A No, sir; it is in ink, sometimes in pencil, but wherever you find it in pencil you will find the next day the same figure in ink.

Q (*By Mr. Clark.*) Did you, in your examination of the daily shortage shown by the books each day find that when an interlined asset figure disappeared from the general ledger it reappeared, whether interlined or not, in the liability column? A Always.

Q As a deduction? A As a deduction.

Q Now, will you resume and tell us what you have discovered in connection with the date of February 1, 1913, on the books of the bank? A (Not answered.)

The Court. May I just say a word there?

Edward F. Cloran, direct.

By the Court.

Q You say that when the interlined figure disappears from the asset column it appears a corresponding figure in the liability column the same day? A No, I won't say that wholly; it may, and it may appear as a false debit against some other account. It is now a false debit against cash, and it may appear as a debit against some other account.

Q When it disappears from the asset column and is entered in the liability column, what is done when it reappears, as it sometimes does, from the asset column to the liability column? A The liability column is brought back to its correct figure, and the asset column is again falsified. If he does not reduce his liabilities he increases his assets. The figure jumps back and forth, one way or another. In that case here, I will say that this figure, after becoming quite some size, is reflected in an overage of the footings of the column. In other words, he forces the footing of his asset column to agree with the liability column. As a matter of fact, the aggregate footing on the asset column is just as much short of the footings shown in the general ledger as this fictitious figure appearing over the cash, the same amount.

By Mr. Clark.

Q To clear up something which is not clear, will you refer to your prepared statement showing daily shortage and—perhaps I can find it more quickly—and tell us, if you can, how much you find the aggregate shortage to have been on January 31, 1913? A The aggregate shortage on January 31, 1913, is $147,652.70. Do you want how it was made up?

Q Just state in what account that was concealed, and how. A It was concealed in the commercial department, A to L deposit ledger accounts, which were understated $97,762.75.

Q (*By the Court.*) Restate that item, please. A The item is A to L, individual deposits, ledger, in the commercial department. That item, which is a liability item, by the way, is understated $97,762.75. The bills purchased account in the general ledger, which is an asset account, is overstated $2,310.13. The bills payable account, which is a liability account, is understated $17,000. The certificate of deposit account, which is a liability account, is understated $12,000. The Corn Exchange National Bank account, which is an asset account, is overstated $10,261.46.

The Irving National Bank account, which is an asset account, is overstated $466.01. The Union National Bank, which is an asset account, is overstated $6,872.01. The New York National Bank account, which is an asset account, is overstated $345.02. The Fourth Street National Bank account, which is an asset account, is overstated $635,32; a grand total of $147,652.70.

By Mr. Clark.

Q Well, then, does this include any abstractions from pass-books not entered in the ledger? A No; it does not.

Q So, when you were testifying yesterday afternoon and this morning in regard to items of Schedule G, were you attempting to give the total shortage of those? A No; no, indeed.

Q What is the difference in aspect concerning the items to which you have testified, and the items concerning which you have just testified as making up the total shortage? A The items to which I am testifying now run from approximately December 30, 1912, through to the close of the bank, and are manifestly abstractions from the cash.

Q Now, will you take up the item on Schedule G of February 1, 1913, and tell us what you find? A The pretended cash figure of $6,125, appearing over the top of the main cash figure of January 30 again appears over the top of the main cash figure in the same amount on January 31, which was Friday. On Saturday, February 1st, this pretended cash figure increased from $6,125 to $10,225, or a difference of $4,100. An examination of the cash-book at the close of February 1, indicated a cash balance on hand of $30,735.87. An examination of the receiving and paying tellers' proof-books at the close on February 1, 1913, indicated a balance of cash on hand of $30,735.87. The pretended cash figure of $10,225 is a component part of the total of the asset column in the general ledger, which included the $10,225, and the assets are in agreement with the liabilities.

Q (*By the Court.*) And the main figure in the ledger corresponds to the cash balance and proof balance? A The proof balance and the cash balance, your Honor.

Q (*By Mr. Clark,*) What is indicated to you by the facts shown by the books with reference to this item? A An abstraction of $4,100 on this day. I want to say there is no corresponding false credit on the other side, but it is necessary to balance the ledger—no apparent false credit.

Edward F. Cloran, direct.

Q So that if on that day the liabilities had not been manipulated, as a matter of fact, $4,100 in cash had been taken out of the bank, what would have been the process necessary to prove the general ledger? A He would have had to force his figures to the same extent to prove it.

Q What did he do? A He did force it by a fictitious figure over the top of the general ledger.

Q Take up the next item on Schedule G, February 10th, claiming a loss of $1,500. A (Not answered.)

Q (*By the Court.*) Right there, before you answer that question, will you state for how many days after February 1 this entry of $10,225 appears as an interlined item? A It continues to appear, your Honor, each day over the top of the cash. On February 3rd, however, it is absorbed in the main cash figure. It does not appear on February 3rd as an interlined figure.

Q Well, on February 3rd, then, does the cash figure, the main cash figure, correspond with the cash balance as shown by the cash-book, and by the cash balance as shown by the proof-book? What is the main cash figure on February 3rd? A $49,617.30.

Q And what is it in the cash-book? A The cash-book is not balanced on this day. By the way, there is no balance figure shown whatever.

Q Totals given? A I have got some totals here, the accuracy of which I won't certify to at this time, but the difference between the lead pencil totals shown by the cash-book is $47,392.30.

Q That would be a difference of $2,225, instead of $10,225? A Yes, as far as the cash-book is concerned.

Q Well, how about the proof-books? A The proof-books show $47,392.30.

Q Any explanation of that $8,000 difference? A Yes, your Honor. On February 3rd a false charge is made against the Irving National Bank of the City of New York to the amount of $13,000.

Q A difference of $5,000 the other way? A That is covered up by another $5,000 that appears above this in another account that is not connected with the figures in this case, and is a part of this big figure I have been reading.

Q But there is an item of $5,000 to offset that? A Oh, yes; the book is full of them.

Q But on this date? A On this date I am speaking of this false charge to the Irving National Bank appears as an interlined figure over the top of the main debit.

Edward F. Cloran, direct.

Q $13,000? A $13,000.

Q Now, is there in the liability column there a false credit of $5,000 to balance that on that date anywhere? A I can tell you very shortly.

Q Well, I suppose there is no excuse for complicating this more than it is. If you do not find it readily, never mind it. A I will find it for you. I have it, your Honor.

Q All right. A On February 1st there was a debit balance to bills purchased account of $645,753.61.

Q Where? A In the general ledger. On February 3rd there is a debit to bills purchased of $17,564.73, and a credit to bills purchased of $18,804.98. If properly extended the balance at the close of February 3rd would be $644,513.36. The balance as shown by the general ledger at the close on February 3rd is $639,513.36, or a difference of $5,000.

By Mr. Clark.

Q Now, we were just starting on February 10th. Will you, for our information, tell us whether any interlined figure appears in the cash between February 3rd and February 10th? A Every day.

Q On February 4th? A On February 4th appears in the cash.

Q And what is the amount on the 9th interlined? A On the 7th; the 9th happens to be on a Sunday.

Q Well, then, the next previous day. A On the 7th it is $15,225.

Q Now, tell us about the 10th of February. A (Not answered.)

By the Court.

Q Where does that extra $5,000 come from? A That extra $5,000 comes into the account on February 4th, and is brought back in there by a false credit to the Irving National Bank of New York of $13,000, which is just the false debit of the day before.

By Mr. Clark.

Q How then do you determine, if you have, that these interlined charges to the bank are false? A By reconciling the banks, every one, for fourteen months preceding the close of the bank.

Edward F. Cloran, direct.

Q Based on— A Statements rendered by the correspondent banks.

By the Court.

Q Of course, the false charge to the Irving National Bank the day before was $13,000, not $5,000? A $13,000 and there is a false charge now of $13,000, $5,000 of which is going back into the cash, and the other into the books here. On February 10th the general ledger shows a main cash figure balance of $39,945. Reference to the cash-book shows that the balance of cash on hand at the close of the 10th was $24,720, a difference of $15,225. The receiving and paying tellers' proof-books show that at the close on February 10th cash on hand in the bank of $24,720. In addition to this discrepancy there appears over the top of the main cash figure in the general ledger a pretended or interlined cash figure of $1,500. On that same date there appears a false credit to treasurer's checks account of $100; and also on the same date there appears a false credit to certified checks account of $1,400; both of those accounts being liability accounts. These credits were necessary in these accounts inasmuch as on February 8th, at the close of February 8th, there is a credit balance in certified checks account of $1,221.91, and on February 10th there was a debit to treasurer's check account of $2,550. If this false credit had not been made the result would have been to show this liability account as an asset at the close of that day. That is also true as regards the treasurer's checks account. The $1,500 figure appearing over the top of the main cash figure in the general ledger is included in the totals of the asset and liability columns as of the close February 10th, and balanced the ledger for that day.

By Mr. Clark.

Q What is indicated to you by these facts? A An abstraction of $1,500 on that date.

Q Now, you tell us in these various instances of an abstraction on these various dates. Is it, or is it not, a fact that they represent a former abstraction, or do they represent in each instance a new abstraction? A They represent a new abstraction to the extent of the increase in the pretended cash figure.

Q Will you explain that answer? A The abstraction on any particular day is in a like amount with whatever the increase of

that pretended cash figure is over the former pretended cash figure. For instance, if the pretended cash figure today is $15,000 and the former pretended cash figure was $10,000, the abstraction on this date would be $5,000.

Q (*By Mr. McCarter.*) When you say pretended cash figure do you mean the interlineation? A Yes. On this date, February 10th, the total of the former abstractions are absorbed in the main cash figure, which is $39,945, and the abstraction on this date appears by itself over the top of that main cash figure in the amount of $1,500. On the next date, February 11th, the main cash figure in the general ledger is $26,190.12, but reference to the cash-book discloses that the balance of cash on hand at the close of that date was $26,190.12, the receiving and paying tellers' proof-books indicate the balance of cash on hand at the close on that date was $26,190.12. I find over the top of the main cash figure in the general ledger on February 11th, a pretended cash figure of $16,725. This figure continues over the top of the main cash figure until February 18th, when the figure appearing over the top of the main cash figure is $16,825, the main cash figure being $26,000.95. Reference to the cash-book for February 18th shows balance of $26,000.95. Receiving teller's and paying teller's proof-books show a cash balance of $26,000.95. I find on February 18th a credit to treasurer's checks account of $216.74. This credit is shown in the cash-book and is comprehended in the paying teller's proof; but in addition to that credit I find above it a false credit of $100, offsetting the $100 increase in the fictitious cash figure; the cash figure of $16,825 is a component part of the total of assets, and assists in balancing and proving the ledger for that date. This $16,525 continues to February 20th to remain over the top in the main cash figure. On February 20th I find that fictitious cash figure to be—

By Mr. Clark.

Q Before we come to that, that is the next item in our schedule, February 20th, what would you say as to the facts shown there by the books of the Roseville Trust Company concerning this item of February 18th, $100? A An abstraction of $100 on that date.

Q Now, will you take Schedule G and foot up the amount of the abstractions as claimed, and concerning which you have testified, down to, but not including the item of February 18th.

The Court. I have already done that—$16,725.

Q And will you now give us again the figure interlined in the cash and which you spoke of as pretended cash on February 17th? A $16,725.

Q Now, will you go on and take up the item of February 20th? A On February 20th the pretended cash figure interlined over the top of the main cash figure in the general ledger is $16,950, the main cash figure being $27,041.94, which is in agreement with the balance, or cash figure, in the cash-book itself, and the proof-books also. I find on February 20th a false credit to treasurer's checks account of $125. On the day previous there was a balance in treasurer's checks account of $24.49. On February 20th there was a debit made to treasurer's checks account of $137.97, which debit appears in the cash-book and being the total of five items. There is no credit in the cash-book to treasurer's checks account on February 20th, and if this false credit had not been made the treasurer's checks on that date would have become an asset account and by the false credit it was retained as a liability account in the sum of $11.52. The $16,950 interlined over the top of the main cash figure is a component part of the total of the asset column of February 20th, which column is in agreement with the liability column proven in the ledger for that date. On February 21st—

Q What have you to say concerning the result of your study of these facts of February 20th? A There was an abstraction of cash on that day of $125.

Q Now, take up the item of February 21? A On February 21, the main cash figure shown in the general ledger is $41,840.28. The balance of cash on hand as shown by the cash-book is $24,890.28. The receiving and paying tellers' proof-books as of February 21st show a total cash on hand of $24,890.28, or a difference of $16,950. Over the top of the main cash figure in the general ledger I find a pretended cash figure of $100, and on that same day I find a false credit to treasurer's checks account of $100. The $100 interlined over the top of the main cash figure is included in the total of the asset column, and is needed to balance and prove the ledger for that day.

Q What have you to say concerning the facts shown by those transactions on February 21st? A Indicates an additional abstraction of cash of $100 on that day.

Edward F. Cloran, direct.

Q Take up the item of March 10th. A On February 24th the entire amount of these abstractions up to and including February 21st is merged in the main cash figure, the main cash figure being $52,563.08, whereas the balance shown in the cash-book of that date is $35,503.08.

Q (*By the Court.*) The difference being $17,050, is that correct? A That is right, your Honor. That is the sum total of those items up to that point. The paying teller and receiving teller's proof-books of February 24th indicate an agreement with the cash-book. The main cash-book for each day up to March 8th continues to include or absorb that fictitious cash. On March 8th the main cash figure is $28,125.68, whereas the cash-book shows cash on hand that day of $28,124.68; appears to be a difference between the figures of $1. The receiving and paying tellers' proof-books for that day show a cash balance on hand of $28,124.68, but in the general ledger over the top of this main cash figure I find a pretended cash figure in the amount of $17,000.50, and this figure is needed to balance the ledger, and included in the total of the assets for that day.

By Mr. Clark.

Q What will you say as to the result of your study of the transactions of this day, March 10th? A Up to this point it is simply absorbed in the main cash figure; it now comes out again and is shown above the main cash figure. Now, on March 10th, I find that the entire pretended cash figure is again absorbed in the main cash figure, the main cash figure being $45,593.24, the balance as shown by the cash-book is $28,443.24, a difference of $17,150, or an increase over the pretended cash figure of the period previous of $100. The receiving teller and paying teller's proof-books on March 10th show a total of $28,443.24. I find on March 10th that a false credit of $100 was passed to certified checks account, and appears as an interlined figure over the top of the main credit to certified checks that day, which main credit was $543.28, and which agrees with the cash-book, being the total of four items, indicating that an additional $100 was abstracted from the cash on this day.

Q What would be the effect of the issuance of a treasurer's check, or of a certified check, without the trust company having received any consideration therefor? A It would be equivalent to taking cash out of the trust company's funds. To certify a

check or to issue a treasurer's check, without receiving its equivalent, is equivalent to disbursing the trust company's funds.

Q Have you, or have you not, found, in connection with these pretended credits to certified checks and treasurer's checks subsequent entries showing that they were paid? A I have, yes.

Q Will you take up the item of March 11th? A It is the payment of the check that necessitates these false credits. On March 11th the main cash figure shown in the general ledger is $43,154.27, whereas a balance of cash on hand as shown by the cash-book is $26,004.27, or a difference of $17,150, which is the aggregate of the pretended cash figure of the day previous. The receiving and paying tellers' proof-books as up to the close of March 11th indicates balance on hand at the close of that day of $26,004.27. In addition to this discrepancy as between the main cash figure and the cash balance as shown by the cash-book and the tellers' proof-books, there appears a pretended cash figure over the top of the main cash figure in the general ledger on March 11th of $990.21. I find that this pretended cash figure is included in the total of the assets column for that day, and was needed to prove or balance the ledger for that day. I find also that on March 11th, in the general ledger, there appears a credit to certified checks account of $20,584.54, which agrees with the entry found in the cash-book, and which is the aggregate of eight items. In addition to this credit figure as shown in the cash-book and in the general ledger, I find interlined over the top of that figure a false credit of $990.21.

Q That is in what book? A That is in the general ledger.

Q In any other? A No. Indicating an abstraction of cash on this date, March 11th, of $990.21. The total of these items, at this time, aggregates $18,140.21.

Q Now, Mr. Cloran, take up by week periods from this point on and tell us whether there does or does not appear during each week subsequent to March 11th any interlined figure in the cash account, in the asset items of cash? A After March 11th. On March 12th the entire sum of $18,140.21 is absorbed in the main cash figure. On March 13th it is the same, was absorbed in the main cash figure—

Q Do not give us by days, just tell us when it first reappears, if it does, as an interlined item? A On March 14th the main cash figure shown in the general ledger is $26,963.11, and that

figure is in agreement with the balance as shown by the cash-book, and as shown by the tellers' proof-books, but I find that the interlined figure, or the pretended cash figure that had aggregated the sum of $18,140.21, is, on March 24th, falsely charged against the Union National Bank.

Q Our next item on the list is that of May 26th, the claim being for $10,000. Will you turn to that date in your several books and tell us what your study of the books reveals concerning the transactions of that date? A I just wanted to show where those figures disappeared, because they never came back into cash again. Falsely charged against the Union National Bank on March 14th, and appears as an interlined figure over the main charge figure against that bank on that date.

Q (*By the Court.*) The interlineation is $18,140.21? A Which is taken into account in determining the balance of cash that is supposed to be held belonging to the Roseville Trust Company by the Union National Bank, thus falsely overstating the balance by that amount.

Q (*By Mr. Clark.*) Then when does it appear, if it does, in the cash account reappear on the general ledger? A It don't.

Q Still running on subsequent weeks and months? A It continues to appear in the Union National Bank account until March 22nd, when it is falsely charged to A to L deposit accounts, done by falsely crediting the Union National account for that amount.

Q Decreasing the assets? A Decreasing the assets and by falsely charging the A to L deposit account; decreasing the liabilities.

Q (*By the Court.*) What date was that? A That date was March 22nd, that it went to the A to L deposit account.

Q I thought you said it was March 24th it went into the Union National Bank? A March 14th, and came out of the Union National Bank March 22nd, and is charged to the A to L deposit accounts. It does not get back into the cash at all again.

Q This credit in the A to L or the charge to the A to L deposits, was that charged to any particular debits? A No, your Honor, only in the general ledger.

Q (*By Mr. Clark.*) Won't you show to the Court the items on the general ledger? (Witness indicates on the ledger.)

Q Now, take up the next item. I will ask you first to refresh your recollection from your daily shortage investigation,

and tell us what the total shortage as you found it, or discrepancy, shown by the books between the assets as they were shown and liabilities as they were ascertainable, in the individual ledgers amounted to on March 31, 1913? A The shortage by the books on that date was $204,067.06.

Q Well, take up the item of May 26, 1913, on which a loss is claimed of $10,000? A Do you want me to make any explanation of this $5,000 item that is alluded to?

Q Yes. A On May 14th I find a main cash figure in the general ledger of $28,484.67, and this is the first date since March 14th that any interlined figure has again appeared in cash. Reference to the cash-book as at the close of May 14, 1913, indicates cash balance on hand of $28,484.67. The receiving teller's and paying teller's proof-books as at the close of May 14, 1913, indicates balance of cash on hand of $28,484.67. Over the top of the main cash figure in the general ledger at the close of May 14, 1913, I find a pretended cash figure interlined of $5,100. I find that that pretended cash figure was included in the total of the asset column of that date and by this inclusion the general ledger was proven. On that same date I find a credit to special deposits of $5,182 in the general ledger. Reference to the cash-book discloses a credit of $82 to the special deposits a difference of $5,100.

Q What do you find in the side-book, do you find any records? A There is nothing in the side-book, no credit of $5,100 in the side-book; I find $82. This $5,100 continues as an interlined figure over the top of the main cash figure until May 26th, when the interlined figure over the top of the main cash figure in the general ledger is $15,100, or an increase of $10,000, the main cash figure being $22,873 53. Reference to the cash-book shows there was a balance of cash on hand at the close of May 26th, 1913, of $22,873.53. The receiving and paying tellers' proof-books as at the close on May 26th, 1913, shows a balance of cash on hand of $22,873.53. I find that the $15,100 interlined figure in the general ledger over the top of the main cash figure was included in the total of the assets column for that date and was needed to prove or balance the ledger. On this same day, May 26th, 1913, I find that there was a false credit made to the bills purchased account in the amount of $10,000, which appears as an interlined figure over the top of the main credit figure to the bills purchased account, the main credit figure being $13,457.87. Ref-

erence to the cash-book as of May 26th, 1913, shows credit to bills purchased of $13,457.87, indicating additional abstraction from the cash as of May 26th, 1913, of $10,000.

Q (*By the Court.*) Well, does not the entry of May 14th show the same thing, to the extent of $5,100? A The abstraction of cash? It does.

Mr. Clark. We have, through an oversight, failed to include it in our schedule, so we cannot set it up here. It is admissible first as showing the growth of the abstraction and as an instance of other fraud, but it has been inadvertently omitted from our schedule; our schedule calls for more than the amount of the bond without that.

Q (*By Mr. Clark.*) Now, Mr. Cloran, have you testified what the facts concerning these transactions of May 6th and 26th indicate to you? A I have. The abstraction of $10,000 on that date, an additional abstraction.

Q Now, will you refresh your recollection from your prepared statement of daily shortage and tell us what you find the total discrepancy between book assets and real liabilities as at the close of business on May 31, 1913—real liabilities as shown by the individual ledgers? A I find the discrepancy shown by the cash-book is aggregated $297,532.48.

Q Now, our next date on Schedule G is on June 13th, amount claimed $1,189.04. Prior to testifying concerning that date, if there are any intermediate items on intermediate dates which you need to explain to check up the transaction of June 13th, please tell us of them, otherwise come to the date of June 13th. A I find the interlined figure over the top of the main cash figure to continue there until June 2, 1913.

By the Court.

Q That is the interlined figure of $15,100? A That is right, your Honor. Then on June 2, 1913, I find the interlined figure to be $17,019.36, an increase of $1,919.36. The main cash figure in the general ledger of June 2 is $31,247.15; the balance of cash on hand as shown by the cash-book at the close of June 2, 1913, is $31,247.15. The receiving teller's and paying teller's proof-books indicate a balance of cash on hand at the close of June 2, 1913, of $31,247.15.

Edward F. Cloran, direct.

Q Which corresponds with the main figure in the ledger? A Which corresponds with the main figure in the ledger and the balance in the cash-book. I find that $17,019.36 appearing as an interlined figure over the main cash figure in the general ledger is included in the total of the assets column of that day, and was necessary to balance or prove the ledger of that date. I find that a false credit to the Corn Exchange National Bank of Chicago on that day of $1,196.35. I find a false credit to bill purchased account on that day of $5,000. I find also a false credit to the accrued interest payable on that day of $1,100. I find a false debit to the Irving National Bank of $8,732.54. I find a false debit of $50,000 to the Union National Bank. I find a false debit of $5,000 to the New York State National Bank.

By Mr. Clark.

Q Now, Mr. Cloran, are you now able to come to June 13th? A Yes. I was trying to make up the list of $1,300, but it is mixed up in all these figures I have given. This $17,019.36 is brought through the various accounts from that day on until June 9, when it is brought back into the cash.

Q Now go on and tell us what happened?

The Court. Into the main cash figure, you mean?

Witness. Into the main cash, your Honor.

A The figure appearing in the cash-book in the general ledger, main cash figure being $52,253.85, the balance of cash on hand as shown by the cash-book is $35,234.49. The balance of cash on hand as shown by the receiving and paying tellers' proof-books is $35,234.49, and this figure continues in the main cash figure until and including June 13, where, in addition to the discrepancy, there appears above the main cash figure a pretended cash figure of $1,189.04, the main cash figure on June 13, 1913, is $60,664.27. The cash-book on this day don't seem to show the balance. I find cash on hand June 13, 1913, as shown by the receiving and paying tellers' proof-books to be $60,664.23; I find the figure in the cash-book to be $60,664.27. The receiving teller was short four cents on that day. I find the figure in the general ledger to be $60,664.27, the main cash figure.

Q (*By the Court.*) How does that reflect the fact that there is included in that main figure in the ledger an abstraction of $17,092? A It is not included there now, your Honor, it is

not in the figure now. That 17,000, by the way, is now carried in the figure at the bottom of the asset column.

Q (*By Mr. Clark.*) Just explain that to us. A There are two figures at the bottom of the asset column now, which appears—

Q What are they? A One is $17,019.36.

Q Is that opposite any item? A None whatever.

Q What is the other figure? A In this particular case it happens to be opposite dividend checks, but has no reference to it.

Q Dividend checks would be a liability? A Yes.

Q And is the $17,000 in the asset column? A Yes, and is included in the footings.

Q Now, what is the other figure at the bottom of the asset column on that day? A The other figure happens to be a lead-pencil total; that is, in arriving at the total.

Q Is it necessary or not to use the intermediate $17,000 to arrive at a total for the asset column on that date which will agree with the total of the liability column? A It is needed, and is included in the total.

Q And also the $1,189.04? A Well, this total appears down here in a lead pencil figure on the 7th of June, and then it runs out and comes back on the 11th of June and continues on until and including June 14th.

Q My question is whether or not that item of June 13th is necessary to balance the general ledger? A It was; yes, sir.

Q What other, if any, irregularly entered figure was necessary to balance on June 13th? A $1,189.04.

Q Where and how? A It appears as an interlined pretended cash figure over the top of the main cash figure in the general ledger on June 13th.

Q (*By the Court.*) In that column, then, there are two together? A There are two false figures.

Q (*By Mr. Clark.*) What did your study of the transaction of June 13th indicate to you? A I found a false credit to treasurer's checks account of $1,189.04, which is the same as the interlined figure over the top of the main cash figure in the general ledger, and indicates the abstraction of that sum on that day.

Q The next item on Schedule G is under date of July 21, 1913, the amount of loss claimed being $2,000, will you come to the transaction on that day or just immediately prior, if you need

to for purposes of explanation, and tell us what you find? A Continuing on from the time it first appeared over the top of the main cash figure the $1,189.05 appears each day over the top of the main cash figure in the general ledger in the sum of $1,189.05 until July 21st.

Q (*By the Court.*) And how about the $17,019.63? A That is a long story, your Honor.

The Court. All right, then; never mind.

Witness. It appears and comes back and goes out and comes back in a much larger figure. We can identify the figure for you.

The Court. No.

Witness. It is shooting all over the books now.

A (Continued.) On July 21, 1913, the interlined figure over the top of the main cash figure in the general ledger is $3,189.05, an increase of $2,000. The cash-book on July 21, 1913, shows a balance of $21,887.30. The receiving and paying tellers' proof-books on July 21, 1913, show a balance of cash on hand as at the close of the day as $21,887.30. I find that the figure appearing, or interlined, over the top of the main figure in the general ledger was included in the total of the asset column for that day.

Q (*By the Court.*) What was the main figure in the general ledger? A $21,887.30. I also find that the general ledger did not balance on that day by $5,000. I find, in addition to that, that at the close of July 19th there existed to the credit of accrued interest payable the sum of $4,197.23. I find that on July 21 there was charged to accrued interest payable the sum of $6,958.56. Reference to the cash-book discloses that there is a charge in the cash-book to accrued interest payable of $6,958.56, and that that charge of $6,958.56 was comprehended in the figures of the tellers in arriving at the proof of the bank for that day. Deducting the credit balance appearing in accrued interest payable account on July 19th, amounting to $4,197.23, from the debit appearing in the account on July 21, amounting to $6,958.56, would result in a debit balance to accrued interest payable, which, by the way, is a liability account of $2,761.33. I find in the general ledger a balance on July 21, 1913, to the debit of accrued interest payable of $761.33, or a false extension of $2,000, indicating an additional abstraction of cash on this day of $2,000.

Edward F. Cloran, direct.

Q Mr. Cloran, will you look at Schedule G and give us the total of the abstractions as shown on said schedule concerning which you have now testified? A $31,329.25.

Q And that does not include the $5,100 item? A Nor the $1,919.

Mr. Clark. If the Court please, we have not been able to locate certain items of proof connected with the two subsequent items below the $31,329 total on Schedule G, and shall offer no proof in connection with them.

The Court. I think you have also made some statement with reference to the James Lees account.

Mr. Clark. In the account of James Lees Sons, in Schedule F, the pass-book is missing, and, therefore, we offer no—

Mr. McCarter. I object to that.

The Court. I suppose the reason, perhaps, is not important; the announcement that you will not or are unable to offer proof is proper.

Mr. Clark. Then I will put a witness on the stand subsequently who will prove the precise fact; I simply want to make a brief recital, which is not that we lack proof; it is as to—

Mr. McCarter. I object to these statements; I do not think they are proper.

Q Now, Mr. Cloran, in connection with your examination of the items concerning which you have testified and shown on Schedule G, beginning with December 30, 1912, and going to July 21, 1913, and aggregating $31,329.25, I will ask you whether, in connection with any of those items in the entries which go to prove what you call abstractions you found any irregular entries in the paying teller's proof-book? A None whatever.

Q Or in the receiving teller's proof-book? A None whatever.

Q Or in the debit side-books? A No.

Q Or in the credit side-book? A No.

Q Are these of either the investment or the commercial department? A No.

Q Or in the individual demand ledger? A No.

Q Or in the investment ledger? A No.

Edward F. Cloran, direct.

Q Do you find or do you not find that the entries in the cash-book, the general cash-book, during this period are in the same handwriting as the handwriting of the general ledger during this period? A I do.

Q Do you find all entries in the general ledger during the period concerning which you have testified and affecting these transactions in any way are all in one handwriting? A They are, for the entire period.

Mr. Clark. Now, if your Honor please, when we had the witness Mindnich on the stand we lacked some of the earlier books, and as it is merely to bring out what the books show as to the items down to the May date we want to prove it by this witness.

The Court. On Schedule F?

Mr. Clark. On Schedule F.

The Court. That is the second, third, fourth, fifth, sixth, seventh and eighth items?

Mr. Clark. Yes, sir. We have not offered these two books in evidence, and unless Mr. McCarter is willing it be offered subject to being stricken out if not connected up later, we will withdraw this witness and put Mr. Vredenburgh on.

The Court. I understand it is the general cash-book?

Mr. McCarter. If you say it is the regular general cash-book, of course, we won't object. During what period?

Mr. Hinds. Prior to May, 1911.

Q Now, I show you, Mr. Cloran, a special department credit side-book, Exhibit P. 36, and ask you to state the total which you find there under date of January 11, 1911? A $1,324.10.

Mr. Clark. I offer in evidence the general cash-book for the period from March 23, 1910, to May 23, 1911.

Said book marked Exhibit P. 65.

Q Now, Mr. Cloran, I show you the cash-book, Exhibit P. 65, and ask you if you will state what amount is shown there as being entered on the credit side-book under date of January 11, 1911, which I have shown you? A $1,324.10.

Q That is the same as you found in the credit side-book? A Yes.

Edward F. Cloran, direct.

Q Will you state what, if any, entry on that January 11, 1911, in the credit side-book, Exhibit P. 36, appears for P. J. Cossick? A Appears an entry pass-book No. 1433, P. J. Cossick, $1,000, and is included in the total of $1,324.10.

Q (*By Mr. McCarter.*) Whose writing is it? A I could not tell you; I don't know the writing.

Mr. McCarter. I think we ought to have that part, and I object to this witness proving it; I think we ought to have the person in whose handwriting it was made.

Mr. Clark. You will recall that the credit side-book, the witnesses themselves did not know whose handwriting it was.

Witness. I think the handwriting in all the credit side-books has been identified.

Mr. Clark. I think it is probable we did have the handwriting of this identified.

The Court. Some of the side-books the writing was not identified. Mr. Mindnich testified that these side-books were kept by boys who came in Saturday mornings, some of the entries were made.

Mr. Clark. I think we attempted to identify all of the entries in the side-book, but as to certain entries Mr. Mindnich or Mr. Thompson neither could tell in whose handwriting they were.

The Court. It is only these cash-books prior to May, 1911.

Mr. McCarter. We did not understand his insisting in going over the side-books again.

Mr. Clark. We have not had any evidence showing that the cash-book for this period contained or did not contain the same entries as are given for the total of the day's business in the credit side-book. What I am seeking to prove now is that on this particular day the total entries in the side-book were so much and the entries as taken in the general cash-book for that day is so much.

The Court. Proceed with the next item.

Mr. McCarter. I think we can save time on that if it is conceded that the entries in none of these books, that is, the cash-books or side-books, are in Mr. Smith's hand-

writing. I will concede the fact that the entries in the cash-books and side-books are the same.

Mr. Clark. I will concede that none of the entries in the credit side-book are in Smith's handwriting. I can withdraw this witness and prove it by recalling one of these other men, but I have stated quite clearly what I am attempting to prove by this witness is what appears by the books themselves.

The Court. With that statement are you willing to concede that the amount carried forward on those two days, January 11th and April 17th, from the credit side-book to the cash-book of that date will correspond?

Mr. McCarter. Yes, sir.

Mr. Clark. Well, I want to bring out from what is already in evidence, the entry which is here as of April 17th, in the pass-book does not get on the credit side-book of that day, but there is an entry of a dollar on the side-book on a later day, April 25th; that has already been brought out, so that it would not do for me to offer the credit side-book of April 17th unless I also offered the credit side-book of the 25th.

The Court. Will that be conceded, that they correponded on the 25th?

Mr. McCarter. Yes, sir.

Mr. Clark. Also May 4, F. Cardoni, that was not here.

The Court. Is that conceded also?

Mr. McCarter. Yes, sir.

Mr. Clark. And also at that early date, from June 1 to December 12, 1910, Emma E. O'Connor, that the entry in the debit side-book, the totals of the entries in the debit side-book as of December 12, 1910, were carried into the cash-book at the same total.

Mr. McCarter. I don't know anything about that.

The Court. The testimony already is that they were entered in those books, the debit side-books.

Mr. Clark. Now, we need the cash-book.

The Court. All right; show that, then.

Q Will you look at Exhibit P. 38, special department, debit under date of December 12, 1910, and give me the total, and the

largest single item? A The total is $5,745; the largest single item appears to be $3,000.

Q What is the name? A The name seems to be E. O'Connor.

Q Now, will you look at the cash-book of December 12, 1910, and Exhibit P. 65, and tell me how much was carried into the cash-book that day from the debit side-book savings department? A $5,745.

Q And that corresponds with the amount shown as total in the debit side-book? A Yes.

Q Now, Mr. Cloran, if a deposit had been made on any of the days concerning which we have had testimony affecting pass-books, and if by honest mistake that deposit had not been entered in the credit side-book, what would have been the effect upon the cash-book, assume a figure of $4,000? A They would have $4,000 of cash that would exceed the cash balance. In other words, they would be over $4,000 and the proof-books would show over $4,000.

Q If on the date of December 12, 1910, a mistake had been made in charging Emma O'Connor with having withdrawn $3,000 and if that mistake consisted in the fact that the money did not go out of the bank, what would have been the result in the cash-book? A The cash would be over in the cash-book $3,000 and the same thing in the proof-books, they would be over $3,000.

Cross examination by Mr. McCarter.

Q Before proceeding to the regular order of my attempted cross examination, I want to ask you for information whether, with regard to the individual ledger in the savings department, you have been saying that the balance was "thrown out" as each entry was made: that was true, that was without footing? A Yes, as a rule they—

Q No, no. I am not asking as a rule; please refer to the book and see. I am wondering whether there did not have to be a footing in order to be— A No.

Q Now, you credit in your credit column so much and you debit so much, the balance appears on the right, doesn't it? A Yes, sir.

Q That assumes the balance is entered up? A The balance is entered up as each item is entered in the account.

Mr. Clark. That is the proof by Mr. Mindnich, that that was the way it was done.

Q Didn't you hear one of the witnesses say that he balanced every two weeks, or so? A What that had reference to was the proving—

Q No, did you hear a witness say that? A I did.

Q Who was that witness? A I think Mr. Mindnich.

Q What was he referring to? A Referring to proving these books with the general ledger.

Q Your statement that the balance would be thrown out as each entry was made would be based upon the hypothesis that the balance is always entered as the deposit or draft is entered? A On examining these books I found that to be true, that the balance was always thrown out.

Q But in order to have it thrown out you had to enter the balance, hadn't you? A Absolutely.

Q Now, I want to take up a little leisurely, if I may, the question of the irregularities that you have discovered, have described at such lengthy detail, and I understood you to say that you failed to find any manipulations in the account earlier than about October, 1911, and that you therefore started at that point and continued your examination from them down to the closing of the bank, am I right? A I think I testified that for thirty or sixty days prior to October—I went back for about thirty days and found no manipulation within that prior period of thirty days; I accepted that as my starting point and from there worked on.

Q Then from October, 1911, down to the close of the bank you found constant manipulation of the books? A Yes.

Q And, in the first place, turning to the general ledger, those manipulations appeared constantly? A Practically every day.

Q How do they appear, if you were going to describe to the jury, as a layman, or to me, as a worse layman, about bookkeeping, in what general way would you describe how these manipulations appeared every day on the general ledger? A They appeared in the form of false debits, over and under extensions, false footing, interlined figures, and alterations in figures.

Q Now, exclude for the moment, the false footings, because that would involve adding up the column? A The adding of the column.

Edward F. Cloran, cross.

Q Exclude them. The other matters you referred to are all obvious to the eyes, aren't they? A It requires a mathematical calculation from the balance of the previous day to the new balance.

Q For instance, the figures over the top are perfectly obvious? A They are.

Q Sometimes in lead pencil and sometimes in ink? A True.

Q Have no place there at all? A None whatever.

Q And appear perfectly plain to the eye? A Yes.

Q Is there a single page in the general ledger from the date you have named when there are not this kind of obvious monkeyings with the general ledger? A Well, they are very obvious to me, whether they are to others—

Q Will you answer my question? A They are obvious to me.

Q Is there a single page where they do not appear? A Oh, yes.

Q How many? A I could not say that.

Mr. Clark. I object to further cross examination on this line on the ground the questions are irrelevant and immaterial, and do not affect any issue in this case. If counsel is seeking to bring out facts tending to show that some other officer of the bank, or the directors of the bank, were negligent, why, he is seeking to bring something into this case which does not belong there.

The Court. Mr. Cloran comes upon the stand as an expert, regardless of the correctness or incorrectness of your contention of law as applied to the plaintiff's right to recover, and upon cross examination the other side has a right to search his entire knowledge of the subject about which he testifies, and particularly in relation to the particular examination which he has made in this case.

Mr. Clark. Yes, if the testimony is offered for that purpose I withdraw my objection.

The Court. And if it is relevant for any purpose the Court cannot overrule it.

(Objection withdrawn.)

Q Now, Mr. Cloran, we have covered the point of the interlineations that appeared yesterday, sometimes they appeared

over the top, sometimes on the left side or right side; they have no place there? A That is right.

Q Now, you mentioned yesterday at least one instance where there were assets that apparently belong in the liabilities column, or vice versa, I have forgotten which it was? A They are liability accounts, but the balance appeared in the asset column.

Q They are accounts which are obviously liabilities? A Could not be anything else.

Q Could not be anything else by their very terms, and where they are put in the general ledger in the asset column— A It won't appear by the calculations.

Q (*By the Court.*) The account would show they had more certified checks than they had issued, is that right? A Yes.

Q (*By Mr. McCarter*). Do you recall more than one of these instances? A Oh, yes.

Q Several times? A I think I have testified already to two.

Q And maybe more? A Maybe three or four.

Q Well, what other obvious errors are there of this kind, or manipulations upon the face of the general ledger? A Well, there is the treasurer's checks.

Q What about them? A They show as an asset also at times.

Q Where they should have been liabilities? A Could not have been anything else.

Q About how many times was that? A About the same number of times, I should say, as the certified checks.

Q And can you remember any other mislocation of assets as liabilities, or liabilities in assets, beside the treasurer's checks and certified checks? A Yes, I mentioned one this morning, accrued interest payable.

Q That would be— A A liability account.

Q Obviously? A Yes.

Q The balance was in the assets? A Yes.

Q Obviously a manipulation? A It was a result of the calculation.

Q Plainly a manipulation? A Yes.

Q How often did that occur? A That was the only time I knew of that.

Q Now, did you have any other misplaced, or any other misplacements of assets or liabilities besides those you have mentioned; we have three instances now? A No, I do not recall.

Edward F. Cloran, cross.

Q Therefore, we have the interlineations, then we have the misapplications of assets and liability, now what other evident errors have you found on the face of the general ledger that do not involve a column being added up? A Well, interlined debits or credits; that may be obvious, or may not be. By that I mean this: They may have made an entry and at some subsequent time, when they came to prove the book and found they were out and go back and follow up their work and find they did leave out an item and enter it in over the top.

Q As a matter of fact, a proper ledger would not have any interlineations, would it? A Oh, no; the proof is arrived at before any entry is made in the general ledger.

Q Give us any more examples of errors or manipulations that appear on the general ledger during this period? A I found $17,000 under the bottom of the column that is opposite dividend checks, running along there, and it was needed to bring about a proof of the general ledger.

Q Well, that would mean what, that there had been a dividend of $17,000? A No, that would be outstanding dividend checks.

Q Could there have been any such account as outstanding dividend checks at that time? A Could not have been because the correct amount was also stated in the account.

Q How much was that? A I think a matter of four or five dollars, the true balance of the dividend checks.

Q (*By the Court.*) They collected their dividends pretty promptly up there? A I imagine they did.

Q (*By Mr. McCarter.*) Now, what other obvious error, I mean an error patent, without a calculation, manipulation? A I believe we have covered them all.

Q And they existed in the general ledger from some time, we will say, to adopt your starting point, since October, 1911, down to and including the time that the bank closed, in 1913? A No, I won't say that the interlineations over the top of the cash began then.

Q I say these errors, these manipulations, extend over all that period? A Oh, yes; either in one form or another.

Q (*By the Court.*) Would you say that the inclusion in the cash balance of a large amount in excess of the amount shown upon the cash-book, and of the proof-book, was that an obvious error? A I should say it was not; it would necessitate a cal-

culation; a man would have to understand the proof-books to get it.

Q (*By Mr. McCarter.*) Did you, in the course of your examination of the affairs of this institution become aware of the fact that an examination purported to be made by a committee of the board of the bank's books twice a year?

Mr. Clark. I object to this question; I cannot see what it has to do with the evidence given by this witness on his direct examination.

The Court. I am inclined to think that it so, Mr. McCarter; the objection will be sustained.

Q Suppose there were an understatement of liabilities, of deposit liabilities, how could that be ascertained? A A very, very long operation, necessitates the checking of the adding machine, and carrying each of the balances that appear in each account in the individual ledger.

Q You say that would be a very difficult thing? A A very long operation.

Q I refer you to your examination in the case before Vice-Chancellor Stevens, page 1250 of your evidence, where you are reported to have said: "Any understatement of deposit liabilities could always be discovered by a comparison of the item in the general ledger with the total in the individual ledger. This understatement of deposit liabilities became so great in 1913—upwards of $200,000—that it could have been very easily discovered by even a hasty examination of the books." Did you say that? A I did.

Q Is it true? A It is true.

Q Did you find any overstatement of collateral loans, bills purchased or cash, in your examination? A Oh, yes.

Q They could have been readily discovered, couldn't they? A I believe so, yes.

Q Would there have been the slightest difficulty in discovering the manipulations or irregularities in the under or over extensions? A No, sir; it is a simply arithmetical operation.

Q (*By the Court.*) Did it require an understanding of the books, or would an observation of the books be sufficient to disclose? A It would require an understanding to a certain extent. He would have to know there was a balance, and these

deposits and credits affected that balance, and resulted in the next balance; that is all he would have to know.

Q (*By Mr. McCarter.*) Assuming an examiner, on the day of any examination, I mean now, not a bank examiner, but the committee of examiners, had made the slightest examination, without any addition or subtraction, would not he have seen these mistakes and irregularities in over and under extensions?

Objected to as irrelevant, immaterial and not cross examination.

The Court. I think the form of the question is objectionable, because it seeks to obtain from this witness the knowledge of somebody else. The objection will be sustained.

Q Any individual, without the use of either a pen or a pencil, could have easily observed manipulations in the way of under or over extensions, could not he?

Mr. Clark. I object to the question on the ground it is irrelevant.

The Court. Objection overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A Yes.

Q I want to know if it is not a fact, from your examination of these books, that any ordinary business man, by following the methods necessary to check up and balance the usual individual or business checking accounts in any bank or trust company, would have found that the accounts would not reconcile or prove with the depositors' accounts? A That is true.

Mr. Clark. What accounts?

Mr. McCarter. The question is answered.

Q Did you find that on the face of the general ledger there existed obvious falsifications on practically every day from October, 1911, to August, 1913? A Yes.

Q I ask you if it is not true that it is impossible to open the general ledger for most of that period—that is, from October, 1911, to August, 1913—at a single page where falsities are not manifest, even to the lay observer?

Edward F. Cloran, cross.

Mr. Clark. Objected to as irrelevant, immaterial and not proper cross examination.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q (Question read.) A That is true.

Q Is it not a fact that frequently these interlined figures appearing on the face of the general ledger played no ostensible part in the day's work, except that they were needed to force an arithmetical result? A That is the fact.

Q Now, I understand your evidence to be that all the entries in this book to which we have been referring, namely, the general ledger, are, as you understand it, in the handwriting of Mr. Smith? A I do not say whose handwriting it is; they are in the same handwriting.

Q Did you assist at all, Mr. Cloran, in the preparation of the bill of complaint that was filed against the directors? Did you give the data or assist counsel in the preparation of that matter? A I made the examination of the books and furnished schedules, &c.

Q Those schedules included overdrafts by directors—Scarlett, for instance? A I don't think I made such a schedule.

Q Along with the irregularities that you discovered in these books, did you find any instance where the directors, particularly Mr. Scarlett, had been permitted to overdraw to a certain extent? A I did not go into those. I had nothing to do with the Scarlett case at all.

Q You did not know anything about that? A No.

Q When did you commence and when did you finish the examination you did make with reference to Schedule F or G particularly, that you testified about? A I think Schedule G showed other extractions from other various schedules I had made of the total manipulations of the books throughout.

Q When did you finish that work? In other words, when did you become aware of the facts which collated together form Schedule G? A About eighteen months ago.

Q That would be when? A Sometime before, as I remember, last spring.

Q That is the spring of 1917? A Yes; pretty nearly two years ago.

Edward F. Cloran, cross.

Q What month, as near as you can recall? A Around June.

Q June, 1917? A I think so.

Q Had you talked with Mr. Vredenburgh concerning any of those matters before then? A Oh, I have been in consultation with Mr. Vredenburgh on and off during my entire examination.

Q Did Mr. Vredenburgh tell you he himself had discovered these matters? A No, sir; I acted entirely independent of Mr. Vredenburgh.

Q I asked you if he told you he had himself gone through and discovered those matters. A No.

Q Now, passing for a moment from the general ledger, assuming that to have been kept by Smith, you found irregularities in the other books, didn't you? A I found a few irregularities in the cash-book.

Q Did not you find that the paying teller, the receiving teller and the bookkeeper were concerned in making false entries? A You mean in the side-book and proof-books?

Q Now, just read the question.

(Question read.)

Mr. Clark. The examination of this witness as to irregularities in other books was limited almost entirely to items affecting Schedule G, and there was no opportunity to go into other items not pertaining to Schedule G, except for the purpose of showing a shortage from time to time. I object. It is not proper cross examination; it is not directed to any matter brought out on the direct examination.

The Court. The objection is overruled.

An exception to this ruling is noted by plaintiff as ground of appeal.

Q Answer the question. Did not you find that the paying teller, receiving teller and bookkeeper were concerned in making false entries? A I do not recall whether I did or not. I do know—you say, "paying teller."—I don't know any of this handwriting at all, and I can only tell you where I found certain falsifications and in what books; who made them I cannot tell.

Q In all these labored examinations of the books you have not any idea of how Smith wrote, how Jennings wrote, how Thompson wrote or how Mindnich wrote? A I could not tell you; I did not see either gentleman write.

Edward F. Cloran, cross.

Mr. Clark. Objected to.

The Court. Objection sustained.

Q Didn't you get familiar with what purported to be Smith's handwriting? A Who was to tell me? None of these men were in the bank when I was there.

Q Do you still say that you have no information that the paying teller, receiving teller and bookkeeper were concerned in making false entries? A Yes, I say that; that I don't know that they made false entries.

Q Whoever it was, you know that the paying teller had certain records to keep? A Yes, sir.

Q Whoever it was, you know that the receiving teller had certain records to keep? A I do.

Q And you know the bookkeeper had certain records to keep, whoever he was? A I do.

Q I call your attention to page 1329 of your evidence before Vice-Chancellor Stevens in the suit against the directors, where you are reported to have testified as follows: "Mr. Cloran, after examining the books had you formed any opinion as to the conduct of other employees besides Smith?" and your answer is, "Yes;" and the question, "Was there any employee that worked on the books that was not concerned in making false entries, as far as your examination goes? A I found the paying teller, receiving teller and bookkeeper were concerned in making false entries." Did you testify that way? A I think I did.

Q Do you differ now from it? A No; I do not.

Q Then you do think that the paying teller, receiving teller and bookkeeper, whoever they were, were concerned in making false entries, don't you? A I will say yes.

Q Now, did the manipulations that you have referred to only apply to the general ledger or did they extend to the other books? A Only applied to the general ledger. You mean those I have testified to this morning and yesterday?

Q You have testified that you found a great many irregularities and imperfections in these books? A Yes.

Q I am asking you if they extended into other books than the general ledger? A They did; yes, sir.

Q What other books? A Cash-book.

Q What other books? A Pass-books.

Q What other books? A I do not recall any other books.

Edward F. Cloran, cross.

Q Did you not testify on page 1330 at the same hearing as follows: "*By Mr. Steifel.* Never mind, I am satisfied with that answer. The manipulations and improprieties are not confined to the general ledger; they run into the other books, too? A Oh, yes. Q And there is no question in your mind there was co-operation between one or more employee and Smith? A At times there was." Do you remember testifying that way? A I do not remember testifying there was any co-operation between other employees and Smith.

Q Look at what purports to be the stenographic report of your testimony and see whether you can refresh your recollection therefrom. A I do not recall, Mr. McCarter, at this time what it was I had reference to at that time, but I do not recall any co-operation on the part of any employees and Smith, as far as I was able to learn he operated independently.

Q Assuming that the minutes which I have shown you is a correct transcript of your evidence before Vice-Chancellor Stevens, are you willing to say whether you remember it now or not, that you then did say in reply to the question, "And there is no question in your mind that there was co-operation between one or more of the employees and Smith," you replied, "Well, at times there were"? A I am not willing to say it this time that there was; no.

Q You are not answering my question; I am asking you whether you are going to require me to bring the stenographer here to prove you said that, or whether you will, from the fact that it appears in this official copy of your testimony, say that you said it then? A No; I won't admit I said it then. I don't think I made the statement. I don't know on what grounds I made it.

Q Didn't you also on the same occasion say, next page, 1331, concerning these other employees, and these irregularities, "And they, the irregularities, were of such a character that any experienced bank clerk would know that something was wrong and should be disclosed, as the result of it, is that so? They were of such a character that no honest, efficient bank clerk would pass them over?" And your answer is, "Well, I would not exactly say that; I would say that so far as the paying teller and receiving teller is concerned, but I would not say that so far as the bookkeeper was concerned." Did you say that? A I did.

Q That is correct, is it? A I do say it now; yes, sir.

Edward F. Cloran, cross.

Q It is true, is it not, Mr. Cloran, that these irregularities that you found in these books were of such patent character that any man possessed of the ability to read, and having his eyesight, would have seen them, and that that was true of all of the books in general?

Mr. Clark. I object to the question on the ground it is irrelevant and immaterial and not proper cross examination.

The Court. The objection is overruled.

An exception to this ruling is noted by plaintiff as ground of appeal.

Q (Question read.) A That is true as far as the general ledger is concerned.

Q Do you recall as one of the things that you discovered in the course of your examination of these books a certain series of transactions with reference to a check of $2,000 given by Mr. Jennings? A I do, yes, sir, very distinctly.

Q You knew Jennings was the teller? A Paying teller.

Q Will you tell us what that transaction was?

Mr. Clark. I renew my objection on the same grounds to questions of this character.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A Mr. Jennings had an account in the Roseville Trust Company, a checking account, commercial department.

Q About how much was in it at the time in question, if you recall; about $200? A Well, maybe $100; less than $100, I think; a little less than $100—$90. He drew a check on that account to a man, I think his name is Meyers, for $2,000. This check was deposited by the payee at his bank, which happened to be some one of the Newark banks.

Q The Merchants Bank? A I think it was. In the course of business this check landed in the Union National Bank, which was the clearing bank for the Roseville Trust Company, and came through to the Roseville Trust Company in the clearing. The clearings, although charged to the receiving teller, as a rule go to the paying teller for verification of signatures, endorsements, and the $2,000 check was removed from the clearing by Jennings,

and in its place a debit ticket against himself was put in in lieu of the check. This debit ticket went to the bookkeeper. The bookkeeper having no such account as a paying teller's account, included the debit ticket in his return items. By "return items" I mean such checks that he found in the clearing that were no good. Either there was not sufficient funds to meet them, or the date wrong, the date of the check may have been dated ahead, something of that sort, and with those return items they went into the receiving teller's cage. When the clearings come through they are paid up by the Roseville Trust Company to the clearing bank in full, irrespective of whether they contained good, bad or indifferent checks. The clearings are always paid for in the full amount. Such items as are found in the clearings to be no good are returned to the receiving teller, and he sends them out by his messenger to the banks from which they originally came, and collects from that bank what he calls redemption checks. In other words, they return a no good item back to the bank and the bank gives them a redemption check or cash for it, and he brings that cash back to the receiving teller. But the receiving teller had left in his cash and he was forced to include in his proof at the close of the day a debit ticket against the paying teller for $2,000.

Q Who was the paying teller at that time? A Mr. Jennings.

Q Who was the receiving teller? A Thompson. Thompson would put the debit ticket in his proof, and the debit ticket together with Thompson's cash at the close of that day became the paying teller's cash the next day.

Q Then, so far as Thompson was concerned, he never saw the $2,000 check; all that he saw was this debit ticket, wasn't it? A That is all Thompson ever saw.

Q You have spoken a great deal this morning, and I think also yesterday, in reference to correspondent banks. I am not very familiar with that, and possibly some of the jury are not; see if I am right to this extent. This Roseville Trust Company had what are known as correspondent banks in different localities—Bloomfield, Newark, Albany, Philadelphia and elsewhere, New York City? A And Chicago.

Q Chicago? A (No answer.)

Q (*By the Court.*) Boston? A Boston.

Q (*By Mr. McCarter.*) And Boston. Now, it is always supposed to have on hand in those several correspondent banks a cer-

tain amount of money or cash or credit, is it not? A Do you mean the banks require that?

Q Oh, no. A Do you mean the law requires that?

Q Oh, no. That is the reason you have correspondent banks, because you have some money there? A Have some money there.

Q And the amount of money in a correspondent bank at any given time enters in the amount of assets, or cash, that the given bank, the Roseville Trust Company, has on hand at that time? A Oh, yes; just the same as your bank account plays a part in your assets.

Q So that if an examination of the affairs of the Roseville Trust Company is to take place on a given day by anyone, one of the things that the examiner has got to ascertain, to be sure that he is right, is the amount on hand in these given correspondent banks?

Mr. Clark. I object to the question as not proper cross examination, not relevant or material.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q (Question read.) A That is right.

Q I think we know of the fact that one of the irregularities pointed out by you was a discrepancy in the amount on hand in six of the correspondent banks, five or six of the correspondent banks of the Roseville Trust Company, on a given date, do you recall that? A I believe I did, from the detail of the items read from my chronological statement of the Roseville Bank.

Q The Corn Exchange Bank, the Irving National, the Union National, New York State National, and the Fourth Street bank, when you were describing the aggregate shortage on January 31st of a given year as being $147,652.70 and you said that that shortage was made up of undersized deposits or overstatements in bills purchased, understatements in bills payable, understatements in certificates of deposits and overstatements in all these banks, do you remember that? A That is right.

Q How did you ascertain the fact that the amount stated on the general ledger as being in the several banks to which I have referred was overstated? A By obtaining from the trust com-

pany a statement of the account of the current month which started with the balance, starting at the beginning of the month, which showed the various debits and credits made to the account during the month, and which balanced up indicating the balance of the cash standing to the credit of the Roseville Trust Company at the close of the month on the schedule from the books of the bank; the balance shown by the ledger at the beginning of the month's schedule the debits and credits made to the correspondent banks account in the general ledger during the month, arriving at the balance shown by the Roseville Trust Company at the close of the month; by the process of elimination eliminated such debits as found in the Roseville Trust Company's books that appeared on the statement of the bank, and such credits in the Roseville Trust Company books as appeared as debits on the statement of the correspondent banks. In other words what the correspondent banks charged to the Roseville Trust Company, the Roseville Trust Company would credit it for.

Recess.

(The last answer is read.)

A (Continued.) And what they would credit the Roseville Trust Company would appear on the Roseville Trust Company's books as a charge against them. By this process of elimination I would have the items appearing as debit or charges upon the Roseville Trust Company's books against the correspondent bank that did not appear upon the correspondent banks' statements as credits to the Roseville Trust Company; and credits appearing upon the Roseville Trust Company books to the credit of the correspondent banks that did not appear upon the correspondent bank's statements as charges or debits against the Roseville Trust Company; or vice versa; deposits appearing upon the correspondent bank's statements did not appear upon the Roseville Trust Company's books as credits, and credits appearing upon the correspondent bank's statement that did not appear upon the Roseville Trust Company's books as debits. Having established these items the statement of the next month was taken.

Q Statements from where? A Statements of the correspondent banks for the next month was taken and such items as —I might say that most of the time there are items in transit,

coming both ways, from and to the correspondent banks; they will be checked up in the next month's statement; however, such credits as appeared upon the correspondent banks' statement in the last month and do not appear as debits upon the Roseville Trust Company's books, will, in this month, appear as debits upon the Roseville Trust Company's books; and such debits as might appear upon the correspondents' statement of the previous month that do not appear upon the Roseville Trust Company's books, will appear this month. And the same thing applied to the Roseville Trust Company's debits and credits this month will appear in next month's statement.

By the Court.

Q How about checks certified upon those banks? If they have not come in will they appear? A The Roseville Trust Company could not certify any checks upon another bank.

Q Certify a check payable at one of the other correspondent banks, they can do that, can't they? A No, the correspondent bank would have to certify the check. If the Roseville Trust Company drew a check upon a correspondent bank the correspondent bank would have to certify that check.

By Mr. McCarter.

Q Suppose I want to send a check to California, and I go down to the Roseville Trust Company and say, "Certify this as good in San Francisco"? A In that case they would give you a cashier's check drawn upon the correspondent bank in San Francisco, but it would not be a certified check. The checks that traverse between the bank and the correspondent banks are identically the same as checks that would travel between a depositor in the bank and the bank itself, if the depositor drew a check upon the bank he could not certify it.

Q Does that mean that all these items must necessarily come in the succeeding month? A They may not; they may come in the following month, but in most cases I may say I have never known a case where the items run over more than a month. There may be protest charges. In other words, the correspondent banks may have made a charge to the Roseville Trust Company on a check that went to protest. In that case the correspondent bank would charge the Roseville Trust Company with the protest fees. If the Roseville Trust Company, for instance, remitted

the correspondent bank $10,000 for its own credit, it would not get in there until the first of the next month, hence it would not appear as a credit against the Roseville Trust Company until the next month.

Q (*By the Court.*) This method you call shortly reconcilement of the account? A Yes.

Q (*By Mr. McCarter.*) That is the method you employed in doing this thing *ex post facto?* A Yes.

Q Now, suppose I am an examiner and I come into a bank which is in operation today and make an examination and among the assets that the officers list is $10,000 at Albany, $15,000 at Boston, and $25,000 at Philadelphia, and $10,000 at the Union Bank, Newark, do I accept his sayso? A No.

Q Now, you speak of items in transit. What do you mean by that? A That would be an item of remittance, we will say, made by the Roseville Trust Company, of a sum of money that was to be placed by the correspondent bank to the credit of the Roseville Trust Company. That may have been made on the 31st of the month and it would be in transit until the correspondent bank received it and placed it to the credit of the Roseville Trust Company.

Q We will take today, the 20th of March; I am an examiner, and I walk into the Fidelity Trust Company, and I meet a big, fat fellow there and I say, "I want to know what your assets are," and he says, "We have so much money in these correspondent banks," and he would also claim so much in transit? A No, he would not claim so much in transit; that item you would have to establish yourself.

Q How would I verify his statement? A You would write to the correspondent bank for a statement as at the close of the day you wanted to examine.

Q Suppose that shows less than this gentleman told me, and he comes back and says, "Ah, there are items in transit which have now got there"? A Within two or three days I write again and call the attention of the bank that since we called upon them there appears to be in transit certain items remitted by the Roseville bank on a certain date, naming the amount, and requesting the correspondent bank to confirm the receipt of those items.

Edward F. Cloran, cross.

Q That, then, would make sure the claim of the officer of the bank that the sum reported at the close of a given day was increased or decreased by the items in transit? A Yes.

Q Now, can you, without getting down to the last cent, tell us approximately the amount, on the average, carried in correspondent banks by this institution? A Oh, it is varied. Not only did it vary, but the amounts were so badly manipulated that I could not say.

Q That is, the correspondent bank accounts were manipulated? A Yes, sir.

Q Was it large or small, in the aggregate? A The greater part of their cash, 60 or 75 per cent. of their cash, was carried in correspondent banks.

Q As compared with the securities on hand? A By securities, do you refer to stocks and bonds, or bills discounted?

Q Stocks and bonds. A Had about $50,000.

Q You have not given us any credit of the assumed amount for cash? A I might say the cash ran around approximately the same amount in the banks, more or less; some months it would be considerably more and some months less; they had an account of H. B. Claflin in this bank; they had another account of McCreery of New York.

Q They were large accounts? A Yes. Some days McCreery would deposit checks drawn on out of town banks, for instance Chicago, coming from customers, would be drawn on Chicago, Albany, Boston; these checks would be forwarded to these banks; on that day there would be a very heavy account in favor of the Roseville Trust Company in those banks; but they were using this bank as a collection bank to make out exchanges.

By the Court.

Q Would these checks be credited when received or when collected? A When received.

Q And so credited in the correspondent bank? A Charged to the correspondent bank; that is the same as cash.

Q It would be a credit in the correspondent bank? A Yes, sir; upon receipt.

Edward F. Cloran, cross.

By Mr. McCarter.

Q Of course, these what you call items in transit may be either credits or debits, drafts or checks? A Oh, yes, they are, as a matter of fact, both ways.

Q Now, in the course of your examination of these books did you find that all the amounts of shortage that you have spoken of a considerable quantity had been manipulated in the way of misapplications and diversions, in other words crediting A's account with something taken from B's account? A Not in the sense that you speak of; the manipulations took place in the general ledger, not on the individual ledger.

Q What I mean to say is, and you will have to pardon my lack of accountancy, did not you discover, in the course of your examination that in a large degree the irregularities that existed in the bank consisted in paying Mr. A with the funls that belong to Mr. B and then paying Mr. B with funds that belonged to Mr. C? A No, I can't say that I did. The accounts that were manipulated most were the asset accounts of the bank, which were general accounts, not individual accounts at all, as a whole; that is the A to L ledger accounts, for instance; that is not an individual account, it is a controlling account in the ledger of all the balances appearing in the individual ledger; that account was manipulated, but the individual ledger account was not manipulated at all.

Q You say that you participated in the preparation of the exhibits attached to the bill of complaint; are you not aware that the bill of complaint states that the amount of such embezzlements, misapplications and diversions of funds increased from and after such a date?

Mr. Clark. In the first place, Mr. Cloran did not say that he had anything to do with the preparation of the schedules for the bill of complaint.

(Question read.)

Q Am I mistaken? A Yes, I had nothing to do with the bill of complaint at all, but I made a distinct report on my examination.

Q Did not you say before luncheon that you assisted and prepared the schedule attached to the bill of complaint? A No; I said I prepared schedules and I supposed from those schedules the bill of complaint was prepared.

Edward F. Cloran, re-direct.

Q Did not you tell us before luncheon that you prepared these schedules attached to the bill of complaint? A Oh, no, no; I did not have anything to do with the bill of complaint at all.

Q Do you mean to say from your knowledge of the books that there were no diversions and misapplication of the funds by the men in charge of that institution? A I don't say that.

Q There were large diversions and misapplications, weren't there? A I believe there were, but I never picked out specific instances.

Q What do you mean by diversions and misapplications? A Transfer of funds from one account to another; juggling around.

Q You never pursued the question of the diversions or misapplication? A There was only one side of this thing open to me, and that was those books, you know.

Q I ask you whether you did pursue the question of the extent of diversions and misapplications? A No, I did not.

Q Were not interested in that? A No, I was not; I was not called upon to make that extensive examination.

Re-direct examination.

Q Mr. Cloran, your examination of the discrepancies existing from day to day, beginning some time after October, 1911, down to the close of the banking institution, ended where? Did it end with the discovery and establishment that there was a discrepancy, or did you attempt to trace any of the cases where the moneys represented by that discrepancy had gone? A No, I did not.

Q With regard to the items in Schedule G you have testified that you regarded them as showing in each instance an abstraction from cash? A Yes, sir.

Q And with regard to the understatement of the aggregate on depositor's ledgers, did you, or did you not find what they represented?

Mr. McCarter. Objected to.

The Court. Objection overruled.

A You mean did I find what the understatement represented?

Q As to whether or not it was an abstraction from cash, or some other kind of an irregularity? A No, I did not.

Edward F. Cloran, re-direct.

Q Now, will you tell us to what extent the irregularities in the general ledger did or did not progressively increase in amount and openness towards the close of the institution? A They were more frequent, and with considerable less care towards the close of the institution.

Q (*By the Court.*) When you say "less care" do you mean less care for concealment? A Less care for concealment, they were more open.

Q (*By Mr. Clark.*) Now, with regard to the items contained in Schedule G concerning which you have testified, can you recall when you first reported concerning them as indicating abstractions of cash as distinguished from irregularities of entry to any representative of the banking department?

Mr. McCarter. I object. The witness himself is a representative of the banking department.

The Court. I have not so understood him.

Mr. McCarter. I do not understand he was employed by anybody. He was part of the machinery of the banking department in making this examination and became a part of the banking department.

The Court. Assuming that to be true, what is then the objection to the question? It would then amount to nothing more than when he had completed his examination and reported to the department which employs him. What is the objection to that?

Mr. McCarter. The point of my inquiry which this is intended to rebut was to indicate whether or not the claim that is included in schedule G was properly brought to the attention of the defendant, the surety company, under the bond.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q (Question read.) A If I remember correctly I prepared a schedule about a year ago in March, 1918.

Q Well, now, Mr. Cloran, will you just tell the court and jury what kind of examination you made on each occasion when you made an examination?

Mr. McCarter. I object. Have we got to go all through that now?

Mr. Clark. I am trying to refrain from being in any way leading, and so I must make my question very general.

Mr. McCarter. I thought he had given us a most complete and thorough description of the examination he had made.

(Question read.)

The Court. Well, you mean generally, not in detail?

Mr. Clark. Yes.

The Court. You may answer the question.

Q What was the first examination? A The first examination I made was made for the Jennings trial, and was confined wholly to certain pass-books which were handed to me by the banking department. That examination, as I say, was confined directly to these pass-books and to nothing else. The second examination that I made was a general examination beginning with the latter part of October, 1911, and continuing on through all the books of the bank up to the close of the bank. The third examination I made was in connection with the directors suit, and special items identified with that suit. The fourth examination that I made was made for this suit and was identified wholly with schedule G.

Q Subsequent to the examination you made in connection with the Jennings suit did you direct any attention, during your subsequent examinations, except the last one, to the question as to whether or not items of irregularity did or did not indicate abstractions of cash? A I did not.

Q Now, Mr. Cloran, I want to get things cleared up which are not clear to my mind. Suppose that when the exigencies —suppose that when the checks came through from other banks which contained the Jennings check of $2,000 had also contained a check on which the signature was wrong, what would have been the course of business? A If a check should come through the clearings wherein the signature was wrong, or wherein it was decided by the paying teller that it was a forgery, that check would be removed, and in its place would be placed a debit ticket.

Q Removed by whom? A By the paying teller.

Edward F. Cloran, re-cross.

Q Who is, in the regular course of business, the judge of signatures in a bank? A The paying teller. That check would be removed from the clearing items and in its place would be put a debit ticket against the paying teller, charging himself with that item.

Q What is the object of that debit ticket? A To allow the receiving teller to arrive at his proof for that day, in as much as the clearings are charged to the receiving teller.

Q And on the morning of the following day what would happen in the regular course of business to that debit ticket? A The ticket would come back into the paying teller's cage, the ticket would be removed, and in its place the item which had been previously removed the day before would take the place of the ticket.

Q I direct your attention to the testimony which was brought out on cross examination as having been given by you in the directors' suit in the cross examination of Mr. Steifel?

Mr. Clark. Can you recall the page, Mr. McCarter?

Mr. McCarter. I think I can, page 1329.

Q It is on page 1331, continued, where Mr. McCarter read, the answer was, "Well, I would not exactly say that, that is I would say that so far as the paying and receiving teller is concerned, but I would not say that so far as the bookkeeper was concerned;" do you desire to explain the answer there given? A Yes. The receiving and paying teller are one and the same person, at that time Mr. Jennings.

Q That continued, as you found from the books, for a period of at least one or two years after the bank opened? A Yes.

Q And your answer is "Paying and receiving teller is concerned," singular? A Right.

Re-cross examination.

Q You knew at the time that the Jennings $2,000 check came in that Mr. Thompson was one of the tellers? A He was receiving teller.

Q Now, whose business was it to pass upon the correctness of the signature of that check? A The paying teller.

Q Who did it come to? A The clearings that morning came to the paying teller.

Edward F. Cloran, re-cross.

Q That is not in accordance with the regular practice, is it? A Oh, yes, the paying teller passes upon the signatures in the bank.

Q It passes over to him from the receiving teller, doesn't it? A Oh, no.

Q You say then, the clearings do not come, in the first instance, to the receiving teller? A No, sir.

Q Would not the regular routine, referring to the Jennings $2,000 matter have been that the debit slip for $2,000 would be held by Thompson, the receiving teller, as a cash item, until the close of the day?

The Court. That is what he said.

Q And then be turned over by him, along with his cash, and other cash items, that would be the idea? A That would be the idea, that is part of the cash items returned from the receiving teller to the bookkeeper.

Q What connection would Thompson have further with the matter? A After he passes his cash over to the paying teller?

Q Yes. A None whatever.

Q Do you know what time Thompson was both receiving and paying teller? I mean, Jennings? A I believe I have in my memorandum, my minutes here, when the cages changed.

Q I ask you if you know what time Jennings filled both places? A I do not, offhand.

Q How, then, can you say that in your evidence before the Vice Chancellor that you were speaking of a time when the position was filled by the same man, your question and answer being as follows, and, in order to bring it before your mind, I will read two or three previous questions which were already read to you, page 1330: "Q Never mind, I am satisfied with the answer. The manipulations and improprieties are not confined to the general ledger, they run into the other books, too? A Oh, yes. Q And there is no question in your mind that there was co-operation between one and more employees and Smith? A Oh, apparently. Q * * * A I imagine in every case in which they assisted him they did. Q And they were of such a character that any experienced banker would know that something was wrong and should be disclosed as a result, is not that so? They were of such character that no honest efficient bank clerk would pass them over? A Well, I would

not exactly say that. That is I would say that so far as the paying and receiving teller is concerned, but I would not say that so far as the bookkeeper is concerned." A I was not referring to Thompson then, I was referring to the individual keeping the receiving and paying teller's cage, who at that time happened to be Thompson. I know in my examination I did not find an item against Thompson.

Mr. McCarter. I move that that be stricken out.

The Court. It will be.

Q What did you mean when you said "I imagine in every case in which they assisted him." Were you speaking of one individual then, when speaking of "they?" A No, I was speaking of two.

Q Who? A Bookkeepers and receiving and paying teller.

Q Don't you exclude the bookkeeper on the next page when you say "I do not think it is true of the bookkeeper, but I do think it is true of the receiving and paying teller?" Now, who do you mean by "they?" A I mean Mr. Mindnich for one, whose manipulations were—

Q I am not asking you to describe his manipulations. A And I refer to Mr. Jennings as the other, and to no one else.

Q Who is Mr. Mindnich? A The man who kept the books, the ledger.

Q Then when you made that statement you were referring to Jennings and Mindnich were you? A I was.

Q On page 1329 I see you said, in reply to this question, "Q Was there any employee that worked on these books that was not concerned in the making of false entries, as far as your examination goes? A I think the paying teller, receiving teller and the bookkeeper were concerned in making false entries." Do you think you had but one person in mind when you made that answer? A I think, Mr. McCarter, that—

Q Now, answer my question. Do you think you had one person in mind? A No, I do not. I have just recalled now what those questions you are asking me there are connected with.

Q I am not caring anything about what it is connected with, I am simply calling your attention to the fact that you have endeavored, a moment ago, in reply to Mr. Clark's inquiry, to say that when you were speaking on page 1331, of the paying

La Rue Vredenburgh, direct.

and receiving teller, you meant the same individual? A I did in that case.

Q But on two pages before that, 1329, in reply to the question as to who was concerned in making false entries, you say, "I think the paying teller, receiving teller and bookkeeper were concerned in making false entries;" then you had two tellers in mind, didn't you? A Yes.

Q Who were they? A They were Thompson, Jennings and Mindnich.

Further re-direct examination.

Q What were the acts of Thompson that you had in mind? A Overcertification of checks.

By Mr. McCarter.

Q Including directors? A I could not say whether directors, or not.

Q Don't you know that he certified Mr. Scarlett? A I did not go into Mr. Scarlett's account.

Q Didn't you know? A Of my own knowledge I did not.

Q Didn't you hear him say so on the stand? A I did, yes, but that is not my knowledge.

Q Don't your knowledge of law go so far as to know that it is a crime to overcertify a director?

Mr. Clark. Objected to.

Objection sustained.

LA RUE VREDENBURGH, sworn for the plaintiff.

Direct examination by Mr. Clark.

Q Mr. Vredenburgh, where do you reside? A Somerville, this state.

Q What is your occupation? A I have been an examiner in the Department of Banking for about twenty years, and in connection with the Roseville Trust Company matter I was acting as Special Assistant Deputy Commissioner of Banking and Insurance.

Q Prior to being connected with the department of banking were you admitted to the bar in this state? A I was.

La Rue Vredenburgh, direct.

Q Prior to that had you been employed in a bank? A I had been employed in a bank for a number of years before I was appointed an examiner.

Mr. McCarter. I will concede Mr. Vredenburgh is an expert.

Q In the course of your connection with the Department of Banking have you had occasion to inquire into the condition of banking institutions which were insolvent? A There have been cases, yes.

Q Now, will you tell us, Mr. Vredenburgh, on what date and under what circumstances your connection with the affairs of the Roseville Trust Company, beginning in August, 1913, started? A I was called up by telephone in the night between August 13th and August 14th, and instructed to come to Newark and close and take possession of the Roseville Trust Company, if the apparent insolvency found by the examiner seemed to me to be true. I reached here early in the morning, before the hours of opening, and the examiner showed me the figures they had reached in the course of the evening of August 13th. The examiner making the examination—I should say that the figures they showed me convinced me that the institution was insolvent, in an unsound condition, and I may say further, had insufficient funds to continue business. At my suggestion the notice closing the institution was posted in the name of the examiner, as I did not yet have my written commission from the Department. I took possession practically immediately, after the examiner had taken possession himself, and I remained in possession actually or constructively from that time on until the assets were disposed of. It became evident that day, the 14th of August, which was a Thursday, that there was a confusion of accounts that would require considerable analysis to disclose the true conditions. The work of the examiners in the afternoon and evening of the 13th disclosed a liability to depositors much greater than the liability shown by the general ledger. That excess of liability had been ascertained by doing what we know as proving the individual ledger, which consists of taking all the individual balances in the ledgers and aggregating them to see the total of them. That total taken off in that way showed a liability over and above the liability shown on the general

ledger of upwards of $200,000, which wiped out completely the capital, surplus, and undivided profits of the trust company.

Q Did you receive your commission as Special Deputy Commissioner of Banking? A I received my commission that day.

Mr. Clark. Will it be conceded that Mr. Vredenburgh had such a commission, or shall we offer it in evidence?

Mr. McCarter. Has he got it here?

Mr. Clark. I have it.

Mr. McCarter. I would like to look at it for a minute.

(Witness produces a paper and same is handed to counsel.)

Mr. McCarter. It is conceded upon the record that on August 14th, 1913, Mr. LaRue Vredenburgh was appointed Special Deputy Commissioner of Banking and Insurance, to assist George M. LaMonte, Commissioner of Banking and Insurance, in the matter of the liquidation and the distribution of the property and funds of the Roseville Trust Company at Newark, New Jersey.

Q Now, Mr. Vredenburgh, will you give the court and jury a general summary of the condition of the books, and then I will put another question right after that, as you found them on August 14, 1913? A It would be very difficult to give it briefly; the more that was learned the more evident it became that the condition was rather extraordinary. Creditors came in for their pass-books, and more discrepancies developed. Communications with some of the banks where the general ledger showed they had funds on deposit disclosed that instead of there being funds there there were either none, or the account was overdrawn. There developed, too, that in addition to the problem of learning what amount the trust company owed to depositors, there was another series of troubles as to the amount a large number of depositors owed to the trust company. There was found in the desk of—

The Court. You mean overdrafts?

A There had been cases of failure to charge checks and credit notes. I was about to say that in the desk of the treasurer I found notes amounting to several hundred thousand, I have forgotten now, I think $500,000, some of them, I think, three years

old. Some of these notes, by careful study and analysis, were found apparently to be a series of renewals, others were discounted. There were checks there of depositors that had not been added to the depositor's account in the ledger.

Q (*By Mr. Clark.*) Did they appear to be paid? A Bearing the "paid" stamp of the trust company, the honored stamp, but later developments concerning the items found in the desk, I may mention here, showed that most of those checks, if not all of them, I would not be positive now that it was true of all of them, but that most of them could be and were traced into the bank by what is called the return-item book. The ledger keeper—I will call him ledger keeper, he has been spoken of during this trial as bookkeeper; he was really ledger keeper—had returned them back to the paying teller as not good. Mr. Thompson and Mr. Mindnich have both spoken of them as cash items, they were carried as cash items the first day in the receiving teller's department, the next day in the paying teller's department, where they would remain for one day to ten days, or until they were in one way or another taken out by some entry in the general books, and by "general books" I mean the general cash-book and general ledger, covering their removal from the paying teller's department, and then put by Mr. Smith in his desk, and found there by me. I think the aggregate of checks found there was upwards of $100,000.

Q Where else did you find any items of assets— A I would like to clear up, if I may be permitted, a little more about the desk items. The notes found there were examined in connection with the trust company record of notes purchased. There may have been one or—there may have been a few notes—there were a few notes—that had been through the note records of the company and had been paid, not returned to the debtor. The great mass of the notes had never been through the books of the trust company. As to how much of the notes were then really obligations of those debtors to the trust company, in other words how many of those notes represented debts still due to the trust company, was a problem that could be worked out only by very careful analysis, and perhaps not then, it would have to be a matter of adjudication in the court. Those debtors I think in every case also owed the trust company money upon other notes that had been regularly put through the books of the trust company. An effort had to be made to collect from these debtors;

to collect something must be done to determine the amount they owed, and it was a difficult and complicated accounting, perhaps to ascertain the indebtedness upon those notes, and in some cases litigation was absolutely necessary to determine. You asked me a moment ago about other items of the same kind.

Q Yes. A Taking up that matter next I had better start in by saying that the trust company conducted a safe deposit department, in which were perhaps 50 or 75 boxes, maybe more. There being a possibility that some of the holders of those boxes were indebted to the trust company for loans, I wanted to ascertain who the tenants of those boxes were, to impound the contents of the boxes. An examination of the record of the safe deposit department showed that there were some boxes locked, the keys out, the keys not there, without any names being stated as tenants, and the tenants whose names were known were communicated with and their boxes identified, and there remained, I think, three or four boxes unclaimed. Two of those boxes were learned to be used by Mr. Smith, and I intended to open them, but the trustee, or the receiver in bankruptcy of Raymond E. Smith, appeared with an order of some kind, I have forgotten the exact nature of it, from the bankruptcy court, and took possession of the contents of those two boxes. The contents were listed by a representative of the trustee in bankruptcy and my representative. The contents did not appear to have much value, not enough for me to ever make any effort to regain possession, even though I had been able to set up a good title to any of it. There was a third box, a larger one, that Mr. Smith seemed to have used, that was unclaimed, and after a further lapse of time it was opened under my direction by authority of the act of 1913. The contents of that box—

Mr. McCarter. Box 55?

A (Continued.) That was box 55. The contents of that box were listed, and the contents appeared to be distinctly property of the bank, and the contents accordingly were retained by me in the box where found; quite an assortment of things that I could not undertake by memory to mention. There were a large number of notes and a large number of checks. The checks all had passed through substantially the same course and method of honoring and hiding away without charging them to the customer's accounts, that was pursued in connection with the checks

I found in Smith's desk. During that period, the early part of that period, I should say, I had a very careful proof made of the depositors' liabilities, and while I have not the data with me as to what the individual ledger liability was as compared with the general ledger liability, to individual depositors, I can say from recollection that it was somewhere around $300,000 in excess of the general ledger, or more.

Q (*By the Court.*) A liability, $300,000 of liability in excess of that shown on the general ledger? A Yes. I had caused notice to be published and had mailed notice to all the depositors to present their pass-books to be balanced. I had men engaged in comparing those pass-books and balancing them; I had accountants engaged working on the depositors' accounts where perhaps the balance was the other way, depositors owing us on the overdrafts occasioned by these uncharged checks that I mentioned I found in Smith's desk and in box 55. An effort had to be made to collect from those men, Armstrong, Miele and Bruno, Intercity Land & Securities Company, and a lot of others whose names I do not recall. Conferences were being held with the debtors, investigations being made as to the responsibility of people to determine the better course to pursue in making collections whether to press, or be easy. The second day here I was approached by one of the directors in regard to reorganization. A good deal of time was taken up considering matters of reorganization, plans and suggestions; meetings, conferences, calculations in connection with the various suggestions. None of the reorganization plans appeared to be practical until, in October, I think it was, we reached one that seemed to be workable. Now, to go back to another point before I go any further. As soon as the discrepancy on the pass-books appeared it was at once suggestive of embezzlement. Raymond Smith had disappeared on the 13th; it was not known where he was. The first discrepancies in the pass-books were in his handwriting. He kept the general ledger which appeared to have been manipulated. The responsibility for the correctness appeared to be his. I could not find anything—

Mr. McCarter. I think that ought to be stricken out.

Witness. Well, I will say suspicion was directed to Raymond Smith. I will correct that and say suspicion pointed to Raymond Smith. I could not find the surety bonds, and at that time Box 55 had not been opened.

There were other things that should have been there that were not there. I had no suspicion of the contents of Box 55, nor that there was anything mysterious about it, as afterwards it was termed. I made a suggestion to someone, either directly, or indirectly, to one of the officers, as to what surety company bonds the trust company held and the matter of notice and the request was made either to one of the officers by me or indirectly at my instance, to notify the agency of the company upon Smith's bond, if they knew what company it was, and I was informed later by the officer—

Mr. McCarter. I object to that.

Q I show you a letter which is marked P. 66, for identification, dated August 15, 1913, addressed to you, or addressed to the Roseville Trust Company, Newark, New Jersey, and ask if you recall receiving that letter, without describing it? A I do.

(Said letter is marked P. 66 for identification and is handed to Mr. McCarter.)

Said letter is offered in evidence by consent and is marked Exhibit P. 66.

Mr. Clark. I will read into the record Exhibit P. 66, a letter on the letterhead of the National Surety Company, No. 115 Broadway, dated August 15, 1913.

"Roseville Trust Company, Newark, N. J.

Gentlemen: This letter will be presented to you by Mr. J. E. Reilly of this office, together with our accountant, who desires to at once make an inspection and investigation of the books and records of the bank in relation to the claim that you have reported under the bond of Raymond E. Smith, pursuant to the terms and conditions of the bond. Yours truly,

A. W. BIRDSALL, Assistant General Solicitor."

Q Now I show you again Exhibit P. 66, and ask if you will state to the court and jury what you recall of the circumstances in connection with the receipt of that letter, if any? A The man whom I assumed was Mr. Reilly, named in the letter, presented this in person. Whether or not there was an accountant with him I am not now sure. He may have been not alongside

of him, I am not sure that I knew whether the accountant was there. I was not disposed to accept unnecessary responsibility in the matter, and before granting an inspection of the books and records of the bank thought it my duty to communicate with the commissioner whom I represented, and accordingly told Mr. Reilly, or whoever bore this letter, that I would give him an answer on Monday, that leaving time to communicate with the Trenton office of the commissioner.

Q I think you said that August 14th was on Thursday? A Monday would have been the 18th.

Q So that this letter, if presented to you on its date, would have been presented to you on Friday? A On Friday.

Q Did you at the time make any memorandum on there in your writing? A No, but one of my clerks made a memorandum at my request of the telephone number of the company, in order to communicate to the surety company the answer, and the company was advised—

Mr. McCarter. One moment.

By the Court.

Q Did you call the company? A I called the company.

Q On Monday? A After communicating with the department at Trenton, I won't say positively that it was Monday; might been Saturday, might have been Monday or Tuesday; within two or three days after this letter was presented.

By Mr. Clark.

Q What did you say to the company? A (Not answered.)

Q (*By Mr. McCarter.*) Who did you have? A I am not sure. I made no memorandum of who answered.

Q (*By Mr. Clark.*) Did you have any other name than Mr. Birdsall, or Mr. Reilly, to call on the 'phone? A I can only say what is probable. In other words that I asked for the gentleman whose name is signed to the letter. It may have been I asked for Mr. Reilly, and I have no knowledge of who answered me, nor have I any knowledge now as to exactly what I said to them. I do remember that in my telephone conversation with the Department I told the Department—

Mr. McCarter. One moment. I hardly think what he said to the Department is competent.

The Court. I think not. If it was communicated subsequently to the surety company he may state what he said to the surety company.

A Well, a decision had to be reached by the Department for—

Mr. McCarter. I object.

Q Can you give the substance of your telephone conversation with the National Surety Company? A I can give the substance; that they would be permitted to make such examination as they pleased.

Q Now, at this time I will ask you whether—

Mr. Clark. I offer in evidence the bond of the National Surety Company to the Roseville Trust Company, dated the 7th day of December, 1908.

Same marked Exhibit P. 67.

Mr. Clark. I also offer in evidence renewal certificate of guarantee bond No. 412125, dated September 24, 1909, for a term ending on the 1st day of December, 1910.

Same marked Exhibit P. 68.

Mr.Clark. I also offer in evidence renewal certificate of the same bond dated September 30, 1910, for a term ending on the 1st day of December, 1911.

Same marked Exhibit P. 69.

Mr. Clark. I also offer in evidence renewal certificate of the same bond, bearing date the 5th day of September, 1911, for a term ending the first day of December, 1912.

Same marked Exhibit P. 70.

Mr. Clark. I also offer in evidence extension certificate of the same bond bearing date the 6th day of November, 1912, for an indefinite term, beginning on the 10th day of December, 1912.

Same marked Exhibit P. 71.

Mr. Clark. Each of the renewal certificates and the extension certificates are executed by the National Surety Company. It is conceded on the record that the premium payable under the terms of the said bond and under the terms of each of said renewal certificates and under the extension certificate for the year ending December 12,

1913, has been duly paid to the National Surety Company by the Roseville Trust Company.

Q Now, when you found these items in box 55 how did you indicate them? A They were all marked, or stamped "O 55" for identification as having come from there.

Q I show you exhibit P 5, bearing a stamp "O 55," and ask you if that is the stamp to which you refer? A That is one of the items stamped in the manner I have mentioned.

Mr. Clark. Without seeking to cumber the record with a reidentification of each one of these, I am going to just show him these deposit slips bearing that mark.

Q Now, then, I show you Exhibit P. 2, and ask you if that stamp "O 55" indicates that that was one of the items found in box 55? A It does.

Q Exhibit P. 15, deposit slip of the New Jersey Adamant Manufacturing Company for $5,000? A That indicates it was found in box 55.

Q And Exhibit P. 26, deposit slip account of Catherine Haney? A Found in box 55.

The Court. How about P. 22?

Q Exhibit P. 13, a deposit slip of Crump, book 2045? A That was found in box 55.

Q What is the amount of that? A $5,800 deposit.

Q And the amount of the Haney, P. 26, deposit slip is how much? A Dated August 29, 1912, two items aggregating $10,396.46.

Q Exhibit P. 15 is for what amount? A $5,000.

Q Found in box 55? A Yes.

Q (*By the Court.*) P. 22.

Mr. Clark. P. 22 would not bear that stamp as that went regularly through the books.

Q Mr. Vredenburgh, whom did you retain as counsel, or attorneys, to represent you in connection with your work in the Roseville Trust Company? A By direction of the Commissioner, Messrs. Pitney, Hardin & Skinner were retained as general counsel.

La Rue Vredenburgh, direct.

Mr. Clark. I offer in evidence a letter from Messrs. Pitney, Hardin & Skinner to the National Surety Company of New York, dated September 13, 1913.

Same marked Exhibit P. 72.

Said letter read as follows: "National Surety Company, New York, 115 Broadway, New York City. Gentlemen: In behalf of the Commissioner of Banking & Insurance, and supplemental to the notice already given to your company of your possible liability upon the bond of Raymond E. Smith and thus to the Roseville Trust Company, which original bond was dated December 7, 1908, and has been extended at various times, expiring December 10, 1913, I beg to give notice in writing that the said Commissioner of Banking & Insurance, and the said Roseville Trust Company have discovered facts indicating that loss has been sustained, and that such loss is due to the dishonesty of the said Raymond E. Smith. Very truly yours, Pitney, Hardin & Skinner."

Mr. Clark. I offer in evidence by consent a letter of the National Surety Company, dated September 16, 1913, addressed to Messrs. Pitney, Hardin & Skinner, Prudential Building, Newark.

Same marked Exhibit P. 73.

Mr. Clark. Letter National Surety Company, 115 Broadway, New York, dated September 16, 1913, addressed to Messrs. Pitney, Hardin & Skinner, Prudential Building, Newark, N. J. "Gentlemen: Your favor of the 17th regarding bond of Raymond E. Smith at hand, and the matter will receive our attention. Yours very truly, A. M. Birdsall, Assistant General Solicitor."

I offer in evidence by consent letter from Pitney, Hardin & Skinner, bearing date January 28, 1914, addressed to Joel Rathbone, Esq., Second Vice President, National Surety Company, 115 Broadway, New York.

Same marked Exhibit P. 74.

Mr. Clark. Letter addressed to Joel Rathbone, Esq., Second Vice President, National Surety Company, 115 Broadway, New York, dated January 28, 1914. "We have taken up with your local manager, Mr. Wolf, the matter of an extension of time in which to file the claim on behalf

of the Roseville Trust Company, at present in charge of the Commissioner of Banking & Insurance of the State of New Jersey, in liquidation under the provision of Chapter 171 of the laws of 1913, and have been referred by him to you. Mr. LaRue Vredenburgh, the Special Deputy Commissioner in charge of the Trust Company's affairs has been engaged continuously for the last several weeks in making such adjustments as are necessary in order to effect the transfer of the Trust Company's assets to a new bank which is being organized with a view to taking over and thus protecting the interest of such depositors and creditors as are agreeable to the plan. This work has so completely occupied Mr. Vredenburgh's attention that it has been impossible for him to give the several accounts which were manipulated by Raymond E. Smith, the late treasurer, the detailed examination which will be required in order to properly prepare such a statement and claim as is required under the surety bond. We therefore respectfully request that the time for the filing of the claim be extended by your company to the 15th day of April next. We suggest this date because the details of the transfer will require Mr. Vredenburgh's attention during the month of February, and it is not possible for him to take up other matters until after the transfer has been effected. An early reply will be appreciated by very truly yours, Pitney, Hardin & Skinner."

Mr. Clark. I offer in evidence by consent letter from the National Surety Company, William P. Joyce, President, dated January 31, 1914, addressed to Pitney, Hardin & Skinner.

Same marked Exhibit P. 75.

Mr. Clark. (Reading.) National Surety Co., William P. Joyce, President, 115 Broadway, New York, dated January 31, 1914, addressed Pitney, Hardin & Skinner, Prudential Building, Newark, N. J. "Gentlemen: Your letter of January 28th was duly received. This company recognizes no liability in the case mentioned, and naturally will not take any action that will prejudice our case. I am quite sure that upon reflection you will agree with us that this is the only position we can take. Very truly yours, William P. Joyce, President."

Mr. Clark. I offer in evidence by consent, letter from the National Surety Company, New York, dated March 16, 1914, addressed to Mr. L. P. Vredenburgh, Special Assistant Deputy Commissioner, Banking & Insurance, Roseville Trust Company, Newark, N. J.

Same marked Exhibit P. 76.

Said letter read as follows: "Dear sir. Re Raymond E. Smith case, secretary-treasurer, Roseville Trust Company, Newark, N. J., there was left at this office a paper addressed to this company on the part of the Roseville Trust Company, purporting to be the detailed statement of loss of certain amounts of money through the acts of Raymond E. Smith. As this paper is sworn to in an affidavit signed by you we are returning to you said paper, as this company does not recognize any liability whatever under its bond of Raymond E. Smith. We are also enclosing a copy of President Joyce's letter of January 31, to attorneys Pitney, Hardin & Skinner, which letter we beg to confirm. Yours very truly, A. M. Birdsall, assistant general solictor."

A paper is marked Exhibit P. 77 for identification.

Q I show you P. 77 for identification and ask you if it is the paper which was delivered to you with the letter P. 76 dated March 16, 1914, which I have just read? A Yes.

Mr. Clark. I offer in evidence by consent paper addressed to the National Surety Company.

Mr. McCarter. I wish you would withdraw that "consent"; I know nothing about it.

Mr. Clark. All right; the witness has identified it. We offer in evidence P. 77 for identification which Mr. Vredenburgh has identified as the paper he received at the time he received Exhibit P. 76, a letter from the National Surety Company, dated March 16, 1914.

The Court. Enclosed with it, was it?

Witness. Yes.

Mr. Clark. Which paper is addressed to the National Surety Company, and is endorsed "Proof of Loss of Roseville Trust Company, dated February 13, 1914," and which appears to have been verified by L. R. Vredenburgh

under date of the 13th day of February, 1914, before William L. Morgan, Notary Public.

Said paper marked Exhibit P. 77.

Q Mr. Vredenburgh, when was that sent by you to the National Surety Company? A I directed Mr. Morgan to send it over by messenger on the 13th of February, 1914.

Mr. McCarter. Mr. Clark, this seems to be a copy of F. Is that what it is?

Mr. Clark. It is a copy of F. Counsel states on the record that Exhibit P. 77 includes a detailed statement containing the items which are comprised in Schedule F of the bill of complaint.

Mr. McCarter. Subject to confirmation.

Mr. Clark. And in addition the following: "State of New Jersey, County of Essex, ss. The undersigned, La-Rue Vredenburgh, Special Deputy Commissioner of Banking & Insurance, in charge of the property and business of the Roseville Trust Company, being first duly sworn, states that the foregoing statement is correct, and that the loss resulting to the Roseville Trust Company from the default of Raymond E. Smith is as above stated, and that the items composing the debits are chargeable to said defaulter on the specified date, and that all sums due or owing said defaulter by the said Roseville Trust Company, are therein correctly stated. L. R. Vredenburgh." Sworn to before W. R. Morgan, Notary Public.

Q Do you recall whether the language of the affidavit was taken from any form printed by the National Surety Company? A My recollection is that a blank—that Mr. Morgan had in his possession a blank or proof of claim, and that there was not room enough in the blank, and that we had this written in this form, and used the form of affidavit attached to their blank. I won't be sure, but that is my impression.

Q That is your best recollection? A That happened with one of the surety bonds and I think this is the one.

Q Mr. Vredenburgh, it has appeared that certain of the deposit slips in evidence were recorded in the side-book and individual ledgers and bear no mark "0 55." and that other deposit slips in evidence were not recorded in the books and bear the

mark "O 55"; from your investigation of the books and accounts, and all of the records, will you explain, if you can, to the jury, what that situation indicates to you?

Mr. McCarter. That I object to, how can we be bound by any inference that Mr. Vredenburgh draws from certain facts that he finds.

The Court. The objection will be overruled.

Exception to this ruling is noted by the defendant as ground of appeal.

A I think I had better have that question read.

Q (Question read.) A That might involve a rather lengthy reply. My work, in comparing the pass-books several thousand of them, were instructed in the case of—

Mr. McCarter. One moment. I do not think that is competent.

The Court. I have some doubt about that. He is starting to show the transactions between him and the clerks.

Q Mr. Vredenburgh, will you confine your answer and make it the answer of one versed in bank-books, who has examined these books and seen these deposit tickets? A The deposit tickets bearing no mark "O 55" nor any other specially distinguishing mark, came from the regular files of the trust company; they were where they ought to be. The other deposit tickets, those marked "O 55" were not found in the regular files, but were found in the box which Mr. Treasurer Smith used, and therefore the distinction I draw, as inquired in the question, between the two classes of deposit tickets mentioned in the question, is that the tickets marked "O 55" were secreted by Smith for a purpose. Now, have I answered?

Mr. McCarter. I move that that be stricken out; I certainly do not think that that is competent evidence. I should think if there is anything in the matter at all it will be for the jury to determine.

The Court. The words "for a purpose" will be stricken out.

Mr. McCarter. I move that the answer be stricken out.

The Court. I decline to strike it out.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Will you give your conclusions purely as an expert witness, and, in this case, an interested witness to the extent that you represent the plaintiff, as to whether or not the transactions, to the extent that deposit slips were found in box 55, and not in the regular place for deposit slips, and in instances where the pass-books showed the receipts in Raymond E. Smith's handwriting of the amount of money corresponding to those deposit slips found in box 55, whether or not in your opinion in those instances there is proof, or you conclude that there was an embezzlement of funds in those cases from the institution?

Mr. McCarter. I object to that.

The Court. I sustain the objection.

Exception to this ruling is noted by the plaintiff as ground of appeal.

Q Mr. Vredenburgh, will you tell us what, if any, search was made for deposit slips in connection with pass-books which have been offered in evidence under Schedule F? A That was what I wanted to explain awhile ago in order that I might make this whole subject perfectly clear. The clerks examining and comparing the pass-books to be balanced were instructed by me to search for the deposit tickets —

Mr. McCarter. I object to that.

Q (*By the Court.*) Was what they did under your supervision and direction? A Yes, sir.

Q And what they actually did was where you could supervise and overlook them? A I could not stay over them; I gave my directions and as far as I could observe it my instructions were followed out.

Mr. McCarter. If there is any significance at all in the question of search for—

The Court. I am not inclined to permit the answer.

An exception to this ruling is noted by the plaintiff as ground of appeal.

La Rue Vredenburgh, direct.

Q Mr. Vredenburgh, in liquidating the affairs of the institution you were obliged to require the assistance of several persons, were you not? A Quite a number.

Adjourned to March 21, 1919.

FIFTH DAY.

Newark, N. J., March 21, 1919.

Continued pursuant to adjournment.

Appearances as before.

LaRUE VREDENBURGH, resumed the stand.

Mr. McCarter. Lines 24 to 29, page 7 of the transcript, in which the contract is recited, say that upon discovery by the employer that loss has been sustained, or facts indicating that probably a loss has been sustained, the employer shall immediately notify the surety company in the time limited by lines 24 to 29. There is nothing in the transcript indicating what lines 24 to 29 are.

Mr. Clark. Lines 24 to 29 of the bond read as follows: "At any time after the first day of December, 1908, at twelve o'clock noon, and prior to the 1st day of December, 1909, to twelve o'clock noon, such times to be governed by the time of the locality in which the loss occurs, which said loss shall be discovered during such term, or within six months after the expiration of such term, and within six months after the employee's death, or his dismissal or retirement from the employer's service, and within six months after the termination of this obligation." The remainder of line 29 relates to another subject. By consent of counsel for the defendant it is admitted that if James F. Dennis, second, whom counsel for the plaintiff states is in France, were present in court, he would testify to the following facts, represented by his affidavit sworn to under date of February 16, 1914: "State of New Jersey, County of Essex, ss. James F. Dennis, second, of full age, being duly sworn on his oath, deposes and says that on Friday, February 13, 1914, he served on William C.

Armitage, a vice president of the National Surety Company, at the office of the aforesaid National Surety Company, 115 Broadway, New York City, the original proof of loss of the Roseville Trust Company, of which the annexed is a true copy. James F. Dennis, second."

Counsel for the defendant having examined the annexed copy in comparison with the original Exhibit P. 77, admits that the copy attached to the affidavit is a correct copy of Exhibit P. 77.

Mr. McCarter. That is subject to verification.

Direct examination resumed.

Q Mr. Vredenburgh, I believe yesterday you told us of a telephone conversation had by you with the office of the National Surety Company on or about August 18th, 1913. Did you— A I beg your pardon, Mr. Clark, I remember I would like to make a couple of corrections in my testimony of yesterday. In thinking over the questions, just before the close, and my answers that were excluded, I realized that an answer I had given earlier in my testimony, differentiating between the deposit-books that are on exhibit here, and marked "O 55" and the other deposit books not marked "O 55," I characterized the latter class as from the regular files of the trust company. I desire to correct in as much as my own direct knowledge does not reach that point, and make my answer like this, that the tickets marked "O 55" came from box 55; that the other tickets did not come from box 55.

Q Any other corrections? A Yes. Earlier in my testimony, in speaking of the incidents of the morning of August 14th, I stated that there appeared to be insufficient funds to carry on the business of the company. I do not suppose the point is material, but in thinking that over I am not sure that I knew that at that time.

Q Did your subsequent examination of the books reveal that to be the fact? A Yes, sir.

Q As of August 13, 1913? A Yes.

Q (Previous question read as follows: "Mr. Vredenburgh, I believe yesterday you told us of a telephone conversation had by you with the office of the National Surety Company on or about August 18th, 1913.") Did you subsequent to that tele-

phone conversation receive a call at the trust company from any representative of the National Surety Company? A I did.

Q Will you state just what occurred, the best you can recall, giving the date as near as you can? A It is not recollected by me with certainty as to the names of the representatives of the National Surety Company that came there subsequent to their being informed that the books were open to their inspection. There were two different persons there; one, my recollection is, was from the legal department of the surety company.

Q Do you recall what he did, if anything, at the trust company? I should like to have you state the whole occurrence, what was said and done? A I will say this in a general way, that he was allowed to examine whatever he desired that we had. There was one thing one of them desired to examine that had not been found, consisting of a section of a considerable number of pages from the minute-book of the trust company, which was a loose leaf book.

Q What section? A A section which later was found to cover a period of a correspondence between the Commissioner of Banking and the institution—

Q No.

Mr. Clark. I ask that the answer be stricken out as not responsive, and ask to withdraw the question.

Mr. McCarter. I object to the withdrawal of that answer.

Mr. Clark. Also upon the ground that the witness cannot, of course, state the contents of a minute which speaks for itself, or any section which speaks for itself.

The Court. The answer may remain.

Q Mr. Vredenburgh, what period of time, approximately, did the minutes purport to relate to which were found detached from the minute-book? A In regard to the period of time, I think the latest of the pages missing from the minute-book were about the summer or early fall of 1909; the earliest date of the meetings recorded in those abstracted pages, I think, was in the very early spring of 1909; that is as near as I can speak from recollection.

Q (*By the Court.*) Were they subsequently found? A Yes, sir.

Q (*By Mr. Clark.*) Where were they found? A They were found in box 55 heretofore mentioned.

Q Which was under the control of whom?

Mr. McCarter. I object to that question as a conclusion.

The Court. I am inclined to sustain the objection, although he has twice before said it was under the control of Smith, without objection.

(Question withdrawn.)

Q You mentioned yesterday that beginning in October your time was occupied in part by reorganization plans; will you tell us briefly, beginning October on, the history of the liquidation proceedings down to February 14, 1914?

Mr. McCarter. I object to that as utterly immaterial. I really cannot see how the details of the transactions that Mr. Vredenburgh busied himself with for the first two months of his position as special deputy in charge concern this suit. They have proven a loss to the company. Of course, whether that loss is attributable to this surety is a very important question which has got to be determined. But, having proven the loss, how Mr. Vredenburgh busied himself in negotiating an adjustment or reorganization, or bringing about a new institution, and what he did in the performance of those duties is immaterial in this case.

(Question read.)

The Court. If that means what I understand by it, his occupation with the reorganization, I—

Mr. Clark. I will withdraw that question because it is too wide.

Q Mr. Vredenburgh, will you state briefly, and only in a summary way, with what matters in connection with the Roseville Trust Company you were principally engaged subsequent to October, 1913, until February 13, 1914?

The Court. The question may be answered.

An exception to this ruling is noted by the defendant as ground of appeal.

A For some time during the month of October another outline of proposed reorganization was submitted to me, and after some

modifications approved by me as a workable plan. The plan was reduced to details, and as a part of the plan—

Mr. McCarter. Now, is the nature of the plan—

Witness. No, I only want to mention one thing.

Mr. McCarter. I object to going into the plan.

Q What did you do, Mr. Vredenburgh? A As part of the things I did I appraised the assets of the trust company for the purpose of selling them, with the approval of the Chancellor, to a new bank to be incorporated for the purpose of reserving from such—

Mr. McCarter. I object to that. What is the reason for displaying here the details of that plan? He is telling us now what he was doing, not what the plan was.

Mr. Clark. It is necessary in order to make clear the work he was doing.

The Court. The answer may be continued.

A (Continued.) Reserving from the proposed sum the possible right of recovery upon this surety bond, the surety bond of the American Surety Company upon Jennings', and the possible right to recover against certain officers and directors, and also reserving any assets subsequently discovered. The plan and the sale were subsequently approved by the Chancellor at the appraised value. The delivery of assets to the new bank was made as of February 9, 1914.

By the Court.

Q And upon what day? A It took several days to make the delivery.

Q When was the transfer and delivery commenced? A They were made as of February 9, 1914.

Q Can you tell when the beginning of the transfer actually took place? A I can answer only from recollection; it took place two or three days prior and a few days subsequent.

Q To the 9th? A They had to be listed, delivered, checked up by the new bank and receipted for.

La Rue Vredenburgh, direct.

By Mr. Clark.

Q In the work of appraising the assets, was that a matter of a few hours' work? A No, sir; a matter of a good many days' work, weeks' work, I suppose I might say several weeks' work.

Q Does each asset have to be considered separately? A It does.

Q And were there or were there not a great many notes in the bank? A A very large number of notes.

Q Now, during this period did you have any communications with former directors, or their counsel, with regard to proposed demands to be made by your compromise for their alleged negligence?

Mr. McCarter. I think that is immaterial.

The Court. I am inclined to think so.

(Question withdrawn.)

Q Now, Mr. Vredenburgh, can you recall what was done with the books of the Roseville Trust Company on and after the delivery of assets to the reorganized bank? A Up to the time when the new bank, which I have not yet named, and I better name, as the Mutual Bank of Roseville, took title to the assets, while I was in possession of the banking house, safe, vaults, and so forth, and could safeguard the books and records of the trust company, after the turning over the banking house to the new bank, I could not safeguard them; it was either before or after, I am not sure which, very shortly after if afterwards at all, that the Prosecutor of the county, Mr. Hood, in order to make sure of his evidence, impounded the books and records.

Q Can you recall generally how long they were in the possession of the Prosecutor? A My recollection is that they were brought here either in January or February, 1914; they were still here—

Q Still in the office of the Prosecutor? A Still in this court house, locked up in a storeroom in the custody of the Prosecutor, at least until June, 1915, and I think considerably longer; I cannot now give any nearer date.

Q Did you and any of your staff spend any time between the closing of the bank and February, 1914, in aiding the work of the Prosecutor in examining the books? A Yes, but when they were aiding him they were not, as a rule, on my staff.

Q That is, not on your payroll? A Not on my payroll, although we were assisting more or less during the whole period. I can supplement my answer in regard to the length of time the books remained here. After the three months we spent in the spring of 1915 trying criminal cases here; there were one or two cases tried later, and the books were here, at that time.

Q (*By the Court.*) Well, relating to that, Mr. Vredenburgh, the examination which was made under your direction was, or the results of that examination were useable in the criminal cases, I suppose? A I think nearly every matter upon which the Grand Jury found indictments were discovered in the course of the investigation conducted by me, or at my direction. There may have been one, or possibly two or three discovered by the Prosecutor's own representative, who worked with us up at the Roseville Trust Company.

Q (*By Mr. Clark.*) But after the books were brought down here in January or February 1914, was it necessary for you to come here during that period in order to see them? A Absolutely.

Q Have you at any time subsequent to the telephone conversation with the National Surety Company on August 18th ever declined or refused to permit any representative of the National Surety Company to see and examine the books? A I have not, but I should make one reservation in that answer. A representative of either the National Surety Company or the American Surety Company engaged in the investigation of the books for two or three days, possibly more, became a serious embarrassment at that time. Every desk and table that could be used was being used by my employees and myself, and the only place for the representative of the surety company to do his work was out in the corridor or in the inner room that I used as consulting room with debtors and others, and I requested him—I cannot say at this time whether it was a representative of the National or American Surety—

Mr. McCarter. We admit it was ours—

Mr. Clark. We do not admit it was yours for a single minute.

Q Well, go on? A I requested him to postpone the further examination temporarily in order that I might have that room for some necessary consultations.

La Rue Vredenburgh, direct.

Q What did he say? A He acquiesced. I made the request courteously and explained the reason to him; he saw the reason and acquiesced.

Q Can you give any physical description of the man? A I cannot.

By the Court.

Q Did he suspend his examination? A Shortly afterward; he said he would like to finish one thing he was doing.

Q Did he ever come back? A I think he did.

By Mr. Clark.

Q Now, Mr. Vredenburgh, after you took possession of the affairs of the Roseville Trust Company did you cause an investigation to be made to learn whether or not any of the employees had participated in the diversion of the funds of the Roseville Trust Company? A I did.

Q And by employees, I mean also officers? A I included employees, officers, directors and also customers.

Q Now, did you find facts from which you concluded that certain of the funds had been diverted through the acts of Raymond E. Smith?

Mr. McCarter. I object. In the first place, he said he caused investigation to be made; did not make them himself, and in the second place, he must produce his investigation.

The Court. I am inclined to sustain that objection.

Mr. Clark. It would be quite physically impossible in any instance of this kind for one man to do all of the work, in the very nature of things; he being in charge, selecting his subordinates and directing them, he is entitled to testify here—

The Court. Of course, Mr. Clark, if, after having his attention called to certain things by his employees he personally examined and investigated those things, then I assume there would be no difficulty about his testifying; but if he simply accepted the information that came from them, then I think it would be improper.

Q I show you Schedule F attached to the complaint and ask you what you know of items and transactions indicated on that

schedule, as to whether or not they, as a result of your investigation, personally, in your opinion, constituted a diversion of the funds of the Roseville Trust Company by Raymond E. Smith?

Mr. McCarter. I object. We are entitled to know what he did; he cannot conclude. Counsel seems to think it is up to Mr. Vredenburgh to give a conclusion. It is largely a matter of inference and the jury is to draw the inference, not he.

The Court. What, if anything, did you do?

Witness. I would like to ask whether Schedule F contains the items in my proof of claim?

The Court. Yes.

Q I will ask you to refer, since it is your own paper, to Exhibit P. 77, rather than Schedule F? A Every item in my proof of loss, Exhibit P. 77, was very carefully inquired into by me, and the evidence that has been submitted in this case, when I was in the court room, and perhaps other evidence, was personally investigated by me before the proof of claim was made up.

By the Court.

Q That is, you mean by examination of the books? A Books, records, papers, slips, all the evidence I could find, every irregularity was supposed to be brought to my attention.

Q And was, in connection with this? A As far as I know, they all were brought to my attention, and some of them are included in this proof of loss. There were other items not as large in amount or number, chargeable against Mr. Jennings, and were included in the proof of loss on his bond. Other items, perhaps not included in either proof of loss, were simply turned over by men in charge of the investigation to the Prosecutor.

By Mr. Clark.

Q As a result of your total examination personally made of the books, records, accounts and slips, what did you find concerning the items set forth in your proof of loss, Exhibit P. 77?

Mr. McCarter. I object. It speaks for itself. His conclusion cannot bind us. The facts are all important, and

I am going to concede now that he did personally become aware of each one of the details of evidence that have been offered here by witnesses with reference to items that were included in Schedule F. But, your Honor, to go on now and give us a conclusion about it—

(Question read.)

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A The books, papers and records seemed to show that Raymond E. Smith was chargeable with the items mentioned in my proof of loss. Does that cover the question?

Q As an honest loss?

Mr. McCarter. Objected to.

The Court. Objection sustained.

Q What do you mean by "chargeable"?

Mr. McCarter. The same objection.

Mr. Clark. He may explain his answer, if your Honor please.

The Court. The question may be answered.

An exception to this ruling is noted by the defendant as ground of appeal.

A Chargeable in the sense of having embezzled the amounts mentioned in those items.

Mr. McCarter. I ask that that be stricken out.

The Court. It will be stricken out.

Mr. McCarter. The harm is done. I ask for a mistrial. I was timely in my objection, and the witness knew the nature of my objection. Jury trial is a farce if this kind of thing happens.

(Argued.)

The Court. An exception may be noted to the striking out of that answer.

The exception is noted by the defendant as ground of appeal.

Q Did you intend to convey by your answer any legal significance to the words "embezzlement"?

Mr. McCarter. I object.

The Court. The objection is sustained.

Q Now, Mr. Vredenburgh, did you find from your investigation that the teller, Jennings, had also participated in transactions indicating a diversion of funds of the Roseville Trust Company? A I so testified a few minutes ago.

Q Can you recall the maximum of extent of those transactions?

Mr. McCarter. Objected to as immaterial.

The Court. I sustain the objection.

(Question withdrawn.)

Q Did you find that in case of the books they indicated that teller Thompson had participated and profited by any diversion of funds of the Roseville Trust Company?

Mr. McCarter. I object to the question as involving the words "profited by."

Mr. Clark. I will withdraw the question.

Q Did you find any facts indicating that the teller Thompson had participated in any diversion of funds other than by making book entries in connection with checks paid to depositors who had no funds there?

Mr. McCarter. Objected to.

The Court. Objection sustained.

Q Did you find that the bookkeeper, Mindnich, participated in any diversion of funds of the Roseville Trust Company?

Mr. McCarter. Objected to.

The Court. Objection overruled.

An exception to this ruling of the Court is noted by the defendant as ground of appeal.

A You will have to change that question a little. Any diversion of funds to himself?

Q And if so, in what way and to what extent? A Nothing to show any diversion of funds to himself. There has been men-

tioned here an overdraft made by him on the ledger to Scarlett by direction of Mr. Smith; a diversion of funds to Mr. Scarlett.

Q Did you find any such transaction with reference to teller Thompson?

Mr. McCarter. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Only such as—no diversion of funds to his own benefit—

Mr. McCarter. I object to the answer.

The Court. The answer may remain.

Mr. McCarter. I move that it be stricken out.

The Court. It may remain.

An exception to this ruling is noted by the defendant as ground of appeal.

A (Continued.) Only evidence of such diversions as may have come from certifying checks by order of the treasurer that were not good on the ledger.

Cross examination by Mr. McCarter.

Q How soon did you employ counsel, Mr. Vredenburgh—Messrs. Pitney, Hardin & Skinner? A I think it was on the 15th. I closed it on the 14th; my recollection is that Mr. LaMont gave me instructions on the 14th to employ Messrs. Pitney, Hardin & Skinner. I think I consulted counsel on the 15th.

Q The matter was deemed of sufficient importance to employ special and local and distinguished counsel, not to rely on the Attorney General, who is the official representative of the Department of Banking? A In May of 1913—

Q Won't you answer the question? A That was not the reason for employing Pitney, Hardin & Skinner.

Q You were in close touch with your counsel during the time from the closing of the bank until the transfer to the new company? A I guess I was.

Q Their office is right here in the Prudential Building? A It is.

Q And they were paid, of course, for their assistance rendered? A They were.

La Rue Vredenburgh, cross.

Q Now, turning to the desk, as to the contents of which you testified in direct examination. Was that Smith's own desk? I mean the desk that he used in the bank? A It was.

Q Was that desk locked or unlocked when you got in charge? A Unlocked.

Q Was it a flat or roll top? A Roll top.

Q And you found in the desk several notes and other papers connected with the business of the trust company, did you? A I did.

Q Just what did you find there? A I think there were two drawers of the desk, the lower drawers on the side, one filled, and the other partly filled with papers relating directly to the Roseville Trust Company. There was not much in the way of private personal papers in the desk.

Q I am asking you to summarize as quickly as you can what those papers were that were trust company papers in the desk? A In addition to the things I mentioned in my testimony—

The Court. I think Mr. McCarter wants you to repeat those.

Witness. Do you desire me to repeat what I said yesterday?

Q Well, you found notes aggregating $500,000 in the desk? A Some such amount as that.

Q They were notes that had been cashed or discounted in the bank? A Some had been treated as discounts, so far as the customers were concerned, but had not appeared on the books of the bank.

Q Indicating that customers had gotten money from the bank although the notes themselves did not appear on the books of the bank, is that right? A Correct.

Q About how large a sum was that? A As I said yesterday, it was something that could not be accurately computed.

Q I have asked you about how much? A My recollection is now out of that mass of notes there were somewhere between $150,000—I will say somewhere around $150,000—that was found to be due and owing to the bank. I won't be sure now of the amount. A large sum.

Q Found to be due and owing? A Yes.

Q Where customers had had the proceeds, but the facts, the true facts with reference to the situation did not appear on the

books of the bank? A That was it. I can illustrate it to make it clear if you will permit me.

Q Perhaps I can state it and see if I understand it right. For instance, you found in the neighborhood of $150,000 of notes of Messrs. A, B, C, D, E, F, G and H, who had apparently left those notes there and received the discount proceeds, but as to which transactions there were no entries of any kind on the books of the bank. Am I correct? A I should not say that that was exactly correct. I might say a concrete case that would be very closely analogous to it.

Q I wish you would. A A customer, A, brings in his note of $5,000 and desires discount. Treasurer Smith tells him it will be all right—

Q I am not asking you to summarize a long conversation between Smith and this man; I am asking you what the note indicated. Did it indicate that the customer, A, had had the proceeds and the fact had not been entered on the books? A No; the note would not indicate that; you have got to go further to take the concrete incident; that is all the conversation I was going to make.

Q Was it a fact that in this drawer of the desk was a package of notes that indicated to your mind that the makers had had the discount proceeds of those notes, the record of which did not appear on the books? A I cannot say either yes or no to that; there must be different answer. The notes themselves would not show whether the drawer or owner of the note had had the proceeds. You have to go further to tell whether he got the proceeds.

Q Well, what was there, if anything, further involved that led you to the conclusion which I understood you entertained— A A check.

Q —that, therefore, the holder, maker of the note, had had the money of the bank? A A check. You have to take the papers all together to draw any conclusion.

Q Then attached to the given note was a check? A No; not attached.

Q But you found it? A Somewhere; and I should make a correction. The $150,000 I mentioned awhile ago should be considered as including also many notes still owing to the owners that we found in box 55; I forgot that when I spoke awhile ago.

La Rue Vredenburgh, cross.

Q So you had checks and had notes indicating that Mr. A, Mr. B and Mr. C had received the discount proceeds of the notes, but you failed to find on any of the bank's books entries showing those facts. Now, is that right? A Not quite yet. I must take a concrete incident to make it plain and definite to you, and I can do it very briefly.

Q Go ahead. A A brings in a note—

Q I don't want any of that summarizing; I want what you found. You did not see A come in.

The Court. Let me ask a question.

Q (*By the Court.*) The notes which you found, some of which indicated that advances had been made to customers—some of which you determined afterwards advances had been made to customers upon—were there any entries made in the books of those notes themselves? A In some cases, yes, and in some cases, no.

Q (*By Mr. McCarter.*) In aggregate, as near as you can recall, how many notes and other documents did you find in your investigation in connection with the contents of the desk and of box 55, where there were otherwise no entries in the books?

The Court. The entry of the notes themselves?

Mr. McCarter. Yes, sir.

A I think upwards of $400,000.

Q In each instance were the notes those either of individuals or corporations, and were the checks checks to the order of the individual or the corporation? A There may have been and probably were some checks to the order of the corporation or individual which gave the note, but the checks that I had reference to yesterday were the checks that would have been chargeable against the note had the note been discounted upon the books of the bank.

Q Can you recall the names of some of these persons or corporations in whose name or to whose order respectively the notes were drawn and the checks likewise given? A For instance, I found in box 55 and in the desk together notes of William P. Armstrong, amounting to, speaking from recollection, sixty or seventy thousand dollars. One or two of these notes were evidently—

Q Well, now, I shall want to interrupt you. I am trying to summarize, if we can, from your memory, the names of these persons or corporations you have referred to. A Then there were checks of Armstrong's that had been honored, amounting to approximately $40,000.

Q Now, were they all independent transactions from the notes? A You cannot say that they were independent or not. The checks had come in through the teller's exchanges and had been honored.

Q What I am driving at is, is the $40,000 of checks included in the $50,000 of notes, or are they exclusive of each other? A They are chargeable against the proceeds of the notes.

Q Now, go on; the next name. A Intercity Land & Securities Company.

Q Go ahead. A I don't know that I can give amounts in that case, but there were large amounts; not as large as in the case of Armstrong.

Q Well, about. A Notes, say $30,000, and checks to the amount of $25,000, chargeable against the account had the notes been credited to the account. I could mention Miele and Bruno, Home Ice & Products Co.

Q How much Bruno? A I don't think I recall the amount, excepting that it was large.

Q Could you refer to the exhibit attached to the Chancery bill to refresh your recollection? A Yes; perhaps.

Q Please do so. A You do not care for the exact amount; it will take a computation to make it.

Q Round figures. A I find here on page 66 three notes, Frank Bruno, amounting to $24,000 in the aggregate.

Q Now, are you able to recall the checks? A No; the checks—

Q Now, the Ice & Products Company. A There are some of those notes not listed in that schedule, but probably in one of the others. They were in bankruptcy; they were put in bankruptcy by me, and the claim is in a little different shape. I find here in Exhibit D, on page 62, which, I think, is a list of checks—page 60, 61 and 62—checks of William C. Armstrong, given as $35,000; I had mentioned it as $40,000. I find checks of the Intercity Land & Securities Company given as $24,000. Checks of the Home Ice & Products Company to the amount of $14,000.

La Rue Vredenburgh, cross.

Q What is the nature of the Home Ice & Products Company? A I think those notes aggregated $100,000; somewhere in that neighborhood. But, of course, there ought to be considered, in connection with the amount of the note, that would be counting as a duplicate, a note and its renewal. I endeavored awhile ago to state that some of the notes were obviously renewals of one another.

Q I am trying to learn only the net amount. I am not asking about a duplicate, a note and renewal. A The amount of the net—all these cases required litigation to determine.

Q Give us the benefit of your litigation, or anything else. Who is the next one? A John B. Scarlett seems to be the next in amount and size. It would require computation to give the amount, but approximately about fifteen or twenty thousand dollars.

Q (*By the Court.*) Notes? A Checks.

Q (*By Mr. McCarter.*) How about the notes? A I don't think there was much in the way of notes in this case.

Q Well, then, he had from fifteen to twenty thousand dollars? A Yes; my recollection is the schedule of proof against him in bankruptcy contained something like twenty, twenty-one thousand.

Q Now, go ahead, please. A Do you care for the small ones?

Q There were others aggregating in rough—I would not go through them all; I ask you about the number of individuals and the extent of the details, approximately. A This same—

Mr. Clark. I want to ask a question for information here. Is the question asked as to the notes and securities only which he found in box 55 and in the desk?

Mr. McCarter. That was the extent of my inquiry.

A (Continued.) Are there included in Exhibit G in this Chancery complaint other items that were regularly on the files of the trust company? I think there must be in the Scarlett case. I said I did not think there was any large amount of notes. I meant a large amount in the desk and box. There were regularly discounted considerable paper for him.

Q Can you approximate the extent of the additional notes of the character you have described that were found either in box 55 or the desk? A Only by a computation. I can mention the

names of some of the people appearing in this list and the amounts given.

Q I wish you would. A This list mentions the checks that were found that had been honored and not charged.

Q Now, you are going to speak of checks alone, are you? A Of checks alone; the amount of notes not mentioned here.

Q Go ahead. A F. W. Holbrook.

Q The amount? A I will give it in round figure, $1,000; H. A. Bellows, $1,000; James J. Frisco, $2,000; L. B. Haag, $5,000. The other amounts seem to be rather small. Now, there were notes of Armstrong, the Home Ice & Products, Intercity Land & Trust in desk and box that had not gone through the books, and there were quite a number of smaller items mentioned in Exhibit H in this Chancery Bill of Complaint.

Q All right. Now I will relieve you of that book. Who was this Armstrong? A He was described by one of the witnesses this week, but my description of him would be a speculative builder.

Q Mr. Scarlett was one of the directors? A He was.

Q Now, there were some checks, as I understood your evidence, either in the desk or in the box 55, that were independent of note transactions, apparently, or am I wrong about that? A You could not connect them all with the notes.

Q So that in some instances you found checks of third persons, customers, so-called, that had been honored from bank funds, with no entry on the bank books? A That is true—I beg pardon, that is not quite true; I should explain.

Q I would be glad to have you, as quick as you can. A A check that came in through the exchanges which appeared on the bank books, even though they do not get charged—they come in to the teller, as has been explained here, both tellers, and carried over, appearing in the paying teller's cash the next day. They may not appear anywhere else. These checks, if you will permit me to say so, that were found in the desk and in the box, were, substantially all of them, the checks spoken of here as having come in through the teller, and went over. carried as a cash item for a period of from one day to ten, and then taken out of the teller's cage by a crooked entry and put in the desk, or box; so that there was a record on the bank books; I do not want to say that they do not appear.

La Rue Vredenburgh, cross.

Q Well, so far as I had in mind, there was no entry; that is to say, they do not appear in the customer's account? A They did not appear in the customer's account.

Q And can you recall the names of some of those customers, as I have called them? A The ones I have named were remembered by me for that very reason, probably, Armstrong, for instance.

Q I am asking you now, Mr. Vredenburgh, for checks, independent of notes. A Well, I am not sure that all of his checks were connected directly with notes.

Q Now, try to help us and keep us from confusion, if possible. A I will give one case independent of notes, which has relation to one of the items in Schedule F, I think it is, the Marsh account, Helen and Chauncey Marsh.

Q I want the names, if you can recall, of any number of these checks that may have gone through the exchange, but were not entered up against the customer's account, that you found either in the desk— A The Bellows check I mention awhile ago; my recollection is that that had no connection with a note.

Q Were there quite a considerable number of them? A No; not—oh, I remember some other checks. Ed Dunn.

Q Was he a director? A He was. His account was good, and I charged the checks up, and, therefore, they did not appear in the Bill of Complaint.

Q As a matter of fact, I wish you would not keep on— A I will try not to digress.

Q Among the checks that had been honored and at the time you took hold of the affairs of the bank in either the box or the desk was a check of director Dunn, for how much, about? A I will have to make a slight correction; it was not a check, as I recall it now, but a charge ticket of Smith's to charge his account, and it covered two or three checks that had come in, and I charged it up. The amount, I think, was upwards of $2,000. I am not sure.

Q Just one matter, I do not understand about that. A charge item to Mr. Dunn for $2,000, that represented checks; were the checks there, too? A I think not. I think that the date of the charge ticket permitted, by an analysis of the records, to work out the fact that it did represent certain checks. I cannot be sure of it now. It is too long ago.

La Rue Vredenburgh, cross.

Q In other words, do you understand that Dunn had had the benefit of this money? A It would be an injustice to Mr. Dunn to give the simple answer, "Yes."

Q I am not going to care whether it is just or unjust. A He had the money.

Q And you subsequently charged his account with it? A Yes.

Q And he never disputed that the subsequent charge was correct? A He did not.

Q That indicated that he had had the money? A Yes.

Q Any more? A I do not recall any; there may have been; if I had a complete list of those checks I could give the whole answer.

Q I may ask you to produce that list, if you will, later. A I do not think there is any now; if there is, it would take some hunting.

Q Now, coming back to the desk, I will go to the box a little later, what else did you find in the drawer of the desk beside these notes and checks? I mean which you looked upon as not personal papers of Smith. A It would be very difficult to enumerate things that did not seem to be of any present or prospective value. My recollection is I had a large number of the carbon duplicates of his weekly, I think it was, statements to the executive committee on the condition of the bank. I think I had some statements made by borrowers of their assets and liabilities. I am not sure that I do remember the other papers of no special value or importance.

Q Now, you took charge on the morning of the 14th? A Yes.

Q Was Smith there that day at all? A No.

Q How soon did he come back? A I think it was about a month.

Q Where were those safe deposit boxes located? A In a large safe in the counting-room.

Q In the big safe? A Yes.

Q Was there a master key? A Yes.

Q To all the boxes? A It was not called a master key, in speaking of the safety deposit boxes; it may be a little different thing from what is called a master key in a hotel; in a hotel the master key opens every door; the master key is in a safe deposit vault has to be used before the customer's key can be used. There was such a key.

La Rue Vredenburgh, cross.

Q That you found there? A Yes.

Q Was there a list of the box owners? A Yes.

Q Now, while Smith was away you obtained access to box 55, and what were the two other numbers? A I have forgotten the others; I think they were 20 and 21, or 17 and 21.

Q Well, call them 17 and 21; it don't make the slightest difference, except to identify them. A Small boxes.

Q You found in 17 and 21 documents and papers that you subsequently delivered to the trustee in bankruptcy of Mr. Smith? A Yes, referee in bankruptcy.

Q The representative of the bankrupt estate of Mr. Smith? A Yes.

Q The contents of box 55 you did not deliver to Smith's bankruptcy representative? A I did not; I retained that.

Q You concluded that the contents of box 55 belonged to the trust company? A I did.

Q The trust company also had a box down in the Fidelity Company, didn't it? A Yes.

Q How did you get access to that? A By breaking it open.

Q The same way you broke open 55? A Well—

Q Well, I mean to say you had to break it open? A Yes, under different authority.

Q Did you personally conduct or supervise, and, therefore, see the abstraction from box 55 of its contents? A I saw it.

Q And made a list? A I did not make the list myself.

Q Did you personally mark the papers that came out of "O 55" or was that done by somebody else? A It was done under my supervision and observation; I might say, not quite constant observation, but approximately.

Q Well, are you able to say that you personally saw every item that came out of box 55 marked "O 55"? A I think I did.

Q Are you sure? A I think I can be sure; it was a matter of a great deal of interest as to what was there and I might have been, perhaps, diverted for a minute or two.

Q How many documents and papers, roughly, were so marked? A It is a hard thing to guess at, I might say a thousand; there might have been two thousand, I don't know.

Q Two thousand? A There is a witness in court who could make a better guess than I can; there were lots of them.

Q Well, several hundred? A Oh, yes.

La Rue Vredenburgh, cross.

Q Was this one of the largest boxes? A I don't think they had any larger ones to rent.

Q This box had never been rented, had it? A It did not appear as rented.

Q For instance, I hand you Exhibit P. 2, which I observe is stamped, not in writing, but by some kind of prepared stamp, "O 55"; did you have a stamp prepared for stamping all these two thousand documents? A No, there was one available.

Q And who operated that stamp? A The bank had—

Q Who operated the stamp? A I cannot say at the moment.

Q You did not, did you? A No, it was done right alongside of me.

Q How long did it take to stamp, segregate and get out in shape and stamp two or three thousand pieces of paper, books and anything else? A I could not tell you now.

Q Well, did it take a day? A I don't think it did; my recollection is—

Q Was there more than one person on it? A I can't remember.

Q Well, you did not do it, did you? You did not do the stamping? A No.

Q I want to know if you want the jury to understand that you will say—I have great confidence in your statement—that you personally saw every one of those several thousand documents actually stamped with that particular stamp there? A As I said a while ago, it was done under my observation; the man sat at the same table with me, and my recollection is that it was not all done in one job, but some important items found in the desk were not left to the last, they were preserved a little more carefully, and were marked earlier.

Q What clerk did the stamping? A I don't remember now.

Q Is the individual in the room that knows more about it than you do? What is his name? A I don't know whether there is anyone.

Q I understood you to say a moment ago there was somebody in the room could tell us more about this than you? A No; more about the number of items in the box.

Q Who was that? A Mr. Mayham.

Q Now, what else did you find generally, besides the papers that are produced here marked "O 55," papers and books? A You are speaking about box 55?

La Rue Vredenburgh, cross.

Q Box 55. A The charter of the trust company, a $5,000 letter of credit which had been a matter of some anxiety was found there; the pages that were missing from the minute-book of the trust company were found there.

Q Go on. A I don't know that I can enumerate specifically anything else.

Q I would not, of course, expect you to remember two thousand items, but have you given us generally—you have only mentioned new, perhaps—we have got ten articles here and you have mentioned five or six more. A There might be nearly 200 checks in one bunch.

Q There were bunches of checks? A There were bunches of checks that constituted this amount that I spoke of.

Q And some notes? A Yes.

Q (*By the Court.*) Do you recall, except by having your recollection refreshed by their production, any deposit slips? A My recollection is that there was another deposit slip, but with that exception these are the only ones found. My present recollection is the ones marked as exhibits in this case were all the deposit slips, with one exception; I am not sure there was any exception.

Q (*By Mr. McCarter.*) Something has been said in the case with reference to some pasteboard boxes in the cellar of the bank containing deposit slips; did you have occasion to observe those boxes? A I saw them; I am not sure that they were pasteboard; I know there were boxes there containing deposit slips.

Q I understood Mr. Thompson to say they were pasteboard. A I say they may have been; I don't rememebr that detail.

Q They lay on the cellar floor or on shelves? A They were a larger volume than I think has been testified to, and some of them in boxes on the floor and some of them on the shelf, not in boxes, and others in boxes on shelves; I think we had them in all three ways.

Q So some lay loose on the shelf? A Some lay loose on the shelf; the rubbers on this bunch had become weakened, broke, and the contents scattered.

Q Did you personally examine those? A I did not. I had two or three doing it; in some cases I worked with the men where I was very anxious to find the tickets.

La Rue Vredenburgh, cross.

Q How large a force did you have up there? A All I had come to work—I had four, I think, of the examiners for a while, in addition to myself.

Q Four of the regular department examiners? A I think there were four.

Q Mr. VanDerveer? A He is not a regular examiner.

Q Go on. A Mr. F. C. Ferguson, Mr. Ray E. Mayham, who after a while went into the employ of the Prosecutor, and was under my direction; Mr. Edward Grosscup.

Q Is he the present State Purchaser? A No, he is now a clerk in the National Reserve Bank in Philadelphia. Mr. Horace Biddle. I may have had another one, I won't be sure.

Q In addition to that you had a corps of clerks? A I retained, of the employees of the bank, Mr. Thompson, and Mr. Mindnich for some little time, a month or six weeks; I retained the stenographer.

Q Miss Hicks? A No, there had been a change shortly before the closing of the bank. I do not for the moment recall the name of the stenographer I found there, but it was not Miss Hicks. I retained her until I ceased to need a stenographer. I retained two, I think, of the junior clerks for a few days. Mr. VanDerveer was employed by me; he had had no connection with the bank, and has had an occasional connection with the department. I think that covers the employees; there may—oh, I did, later on, I had to let some of the men go; I had later one or two men, successors, from outside, their names I could perhaps recall if you desire it.

Q Oh, no, how long did this corps of associate workers and clerks continue actively engaged in examinations of these books? Down to the time of the transfer in February? A I think I had let most of the examiners go; I should say all of the examiners, to resume their regular duties, in October or November, I won't be sure, except Mr. Ferguson, who stayed with me well on into 1914, closing and completing the complicated calculations in regard to the reorganization.

Q With the exception, then of Ferguson, and after, about November, there was no one there? A I won't say that, I gradually reduced the force.

Q The books remained there, did they not, until about the time when the transfer was made, when they were brought down here to the court house? A Yes.

La Rue Vredenburgh, cross.

Q And you always had access to the books in the court house, didn't you? A After a fashion, yes.

Q What do you mean by "after a fashion"? A Well, appointment had to be made, the cases were in the custody of Mr. Hargan, and he oftentimes was out on duty.

Q You and the other gentlemen who had worked under your direction upon these books, assisted the State in the use made by the State of the books, didn't you? A Mr. Mayham did.

Q And how about Ferguson? A Mr. Ferguson came into it in 1915, in the spring, and I am not sure whether he did not then practically supplant Mr. Mayham for the Prosecutor; I won't be sure as to that.

Q When was Mr. Cloran employed by you? A Well, he was indirectly employed by me; it was done through my counsel.

Q You mean Pitney, Hardin & Skinner? A No; the counsel in special cases as distinguished from general counsel; I mentioned a while ago that there were certain assets reserved, and in the handling of the collection of those items Messrs. Pitney, Hardin & Skinner were not the special counsel for them.

Q But Messrs. Hinds & Clark were? A Yes. I think in one case Mr. Vanderbilt was associated with Mr. Clark.

Q And it was Messrs. Hinds & Clark, or either or both of them, that brought Mr. Cloran into the case? A He was recommended by them.

Q (*By the Court.*) And his employment was with relation to these reserved assets? A Not necessarily confined to that, but employed more directly in connection with them at first.

Q (*By Mr. McCarter.*) So he did not commence any of his examination until after the transfer to the new bank in February? A Not until then, or later.

Q Now, I want to direct your attention for a few minutes to Schedule G, that is the second schedule. You became familiar with the situation on the books and records in the preparation of Schedule G, and anterior to the preparation of Schedule G by Mr. Cloran, did you not? A In a general way. When I say "general way," there should be a distinction. I am not sure, I cannot say from recollection that any one of these particular items were investigated by me any further than to note that it constituted a discrepancy.

Q In other words, the discrepancy growing out of the interlineations and the transfers, and all that kind of thing, that Mr.

Cloran explained the other day, had all been brought to your attention? A There was not much on the general ledger that was brought to my attention. I at times worked on it myself and found discrepancies, but the discrepancies did not necessarily constitute a loss of cash; it would require a further investigation.

Q You became aware of the fact that there was apparently a loss of cash from these discrepancies that you noted before Mr. Cloran made his report, didn't you? A It would take a complete analysis of the day's work to determine whether there was an actual loss of cash.

Q I did not ask you about the amount, I asked you if it was not a fact that you were impressed, from your own observations or the result of investigations made by your own associates, with the fact of these irregularities on the cash-book, and with the probability that they would show a shortage if investigated to the end? A I must answer that in this way. I was impressed with the irregularities and discrepancies. It would require a closer analysis than I had given it to determine that it did actually represent a loss of cash. There might be compensatory entries that would show that it was not a loss of cash, and a complete analysis was required to determine.

Q In view of the cautious way you answer these questions, I want to ask you if it is not the fact that while Mr. Cloran was testifying the other day that you sat right to my left, and if you did not say to me, "Mr. McCarter, I had worked all that out myself before Cloran got at the job," or words to that effect? A That was when he was on his third item, and I did not say, Mr. McCarter, that I had worked that all out.

Q What did you say? What did you mean to convey to me? A I meant to convey to you that this crookedness that he was disclosing was familiar to me.

Q And had been familiar to you before he brought it to your attention? A No. You must make the distinction. I knew the discrepancies, but did not know they were cash discrepancies.

Q After you found in box 55 a portion of the loose leaf minute-book, what did you do with that portion? A I think the leaves were bound together; those leaves we found in box 55.

Q Put in a binder? A They were bound by themselves in some way, I think a string through the perforations; I put the

whole bunch still fastened together in the minute-book, without fastening it to the fasteners in the book.

Q And that was about when? A I should say about a month after the close.

Q When did you last see that minute-book? A I think it was in the court room of Vice-Chancellor Stevens during the trial of the directors' suit.

Q And was the portion that you had thus put in the binder there at that time? A I don't know whether I noticed; the book had been out of my custody for some little time.

Q Where had it been? A When the Prosecutor was through with the books they were taken to the Mutual Bank vault and they were in their care, and brought to the court room as they were needed, and brought by them to the Vice-Chancellor's chambers, and brought here.

Q They were taken back to the building of the Roseville Trust Company? A Yes.

Q What old directors in the Roseville Trust Company re-existed in the new institution? A Not one, unless possibly one of them as a depositor in the trust company became under the reorganization plan a stockholder in the bank automatically. I do not think any of them did become stockholders, but it is possible that one or more of them did.

By the Court.

Q No, you are asked about directors only. A There may have been directors who were depositors in the trust company, and who assented to the reorganization plan. If there were they would automatically have become stockholders in the bank.

Q But not directors? A Not directors. I thought the question was, was any director of the trust company interested in the new bank?

By Mr. McCarter.

Q Now, when you made the transfer you reserved the claim, and you spoke of another reservation of the claim on the bond of Jennings. Recovery was had on that, wasn't there? A Yes.

Q Jennings was indicted and convicted? A Yes.

Q You say you also reserved the claims that the bank had, or you, as liquidating officer, had, or Mr. La Monte, your superior, had, against the directors. That is a suit that had crystallized

into a suit in Chancery in the name of the Roseville Trust Company against the individual directors, has it not? A Against a part of the directors; they are not all included in that suit.

Q Such as had not settled with the department? A Yes.

Q Directors had settled, hadn't they? A Some of them.

Q By which the liquidator recovered either in the surrender in cash, surrender in paper, or payment in cash, a certain sum of money? A Yes.

Q Aggregating upwards of $140,000? A I think it was between $140,000 and $141,000, my recollection.

Q In addition, therefore, to that, this suit against the remaining directors was commenced?

Mr. Clark. Now, if the Court please, I did let counsel wander from one thing to another on issues which have no bearing in this case, but I believed it would do no harm in the interests of justice to know all of these matters which counsel has been bringing out, but I must object to this last question as irrelevant, immaterial and incompetent, and as having no possible bearing on the issues in this case, and can in no sense be deemed cross examination.

The Court. The objection to this question is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

(Question read.)

A Yes.

Q Were you at all concerned in the preparation of the bill of complaint, or did you read it over before Mr. La Monte signed it?

Mr. Clark. Objected to as irrelevant and immaterial; and even if it were relevant and material, certainly any statements contained in the complaint in another action would be wholly improper as being brought out in this connection.

The Court. The objection is overruled.

Exception to this ruling is noted by the plaintiff as ground of appeal.

Q (Question read.) A My recollection is that I read it over, and I was, to some extent, concerned in its preparation.

La Rue Vredenburgh, cross.

Q And before the signature of Mr. La Monte, your superior, he then being Commissioner of Banking and Insurance of New Jersey, and not yet having entered the political field as candidate for United States Senator, you assured him it was all right, didn't you, for him to sign it?

Mr. Clark. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A I have no recollection on the subject. If the bill was signed by him it was signed upon my recommendation, I expect.

Q I have not the bill, but I hold what purports to be a copy of it; look at the copy and see if you think it was signed by him. A Well, it purports to be signed by him, and I have no doubt it was, and it is probable that it was signed upon my recommendation.

Q And the signature upon the copy seems to be George M. La Monte as Commissioner of Banking and Insurance of the State of New Jersey, doesn't it? A Yes, sir.

Mr. McCarter. Now, I will also clear up something that I think was left inaccurate through inadvertence by Mr. Clark. I call the Court's attention to the fact that the summons in this case is exactly the same way, "George M. La Monte, Commissioner of Banking and Insurance, State of New Jersey;" so the suit in Chancery and the suit at bar are brought by identically the same persons.

Q I observe that in the twenty-third paragraph of this bill—

Mr. Clark. If your Honor please, apparently counsel is about to read from the bill, and we object on the ground that any statement in that bill, even if made on the recommendation of this witness, by the Commissioner of Banking, is in no sense an admission against this plaintiff, because it was not one of Mr. La Monte's powers to make admissions binding upon the Roseville Trust Company at a time subsequent to the closing up of that institution. He was not their agent for the purpose of binding them by admissions made in one suit and used in another action.

La Rue Vredenburgh, cross.

The Court. I do not quite see how I can rule upon objections when there is not anything before the Court.

Mr. Clark. I want to forestall the divulging, as in the course of his question he would get the words out, and then my objection would be academic.

Mr. McCarter. I am perfectly willing, for the purpose of the determination of the question, to have it determined, if we can, without reading the thing. I am not anxious to get before the jury anything that should not get there. But the thought I had in my mind is this: Assuming this cross examination—it has not yet been suggested that any admission in this bill binds the plaintiff, which is the same man; the man comes here and seeks to hold the American Surety Company responsible for certain shortages; suppose that man, out of his own mouth, has made claims with reference to the situation which, it may be argued, are inconsistent with the claims now made, cannot we show that? I mentioned the other day that Mr. La Monte has not been produced; I do not suppose he knows anything about it; he trusted everything, as he was quite right in doing, to Mr. Vredenburgh. Mr. Vredenburgh says he recommended the bill, and Mr. La Monte signed it. Now, if Mr. La Monte has made admissions in this bill, certainly those admissions would be competent in another suit by him. This witness has stated, among the things reserved was this claim against the directors, and, I think, he went on to say that suit had been later instituted against the directors; he has also undertaken to give evidence with regard to his views as to the legal liability of Smith, over my objection in this case. Now, if there be anything in this bill of complaint by the same plaintiff, vized and sanctioned by this witness, which is contrary to the claim, or the evidence of this witness, I think it is directly cross examination, and I would have the right of confronting him with that.

(Argued.)

The Court. I am not prepared to adopt the view suggested by counsel for the defendant that the plaintiff in this case would be bound by allegations in the bill in the Court of Chancery, but I am inclined to think if, upon the

testimony which has now been elicited from Mr. Vredenburgh, that he undoubtedly recommended the signing of this bill, he read it over, and undoubtedly recommended the signing of the bill by Mr. La Monte, if there should be in it anything inconsistent with his present testimony, it may now be called to his attention. To the extent that the question is directed to that, the objection will be overruled.

Q I notice that in the twenty-third paragraph of the bill reference is made, "The misapplication and diversion of funds increased from and after November 1, 1912, steadily down to the date of the closing of the institution." Do you recall those words? A No; it is not likely that I would, but I am not surprised they are there.

Mr. Clark. Did you intend to read exactly the words that are there?

Mr. McCarter. I did not intend to read all the words that are there.

Mr. Clark. Did you notice the word "embezzlement" immediately preceding the word "misapplications"?

Mr. McCarter. Yes. I am not directing his attention to embezzlement; I am directing his attention to misapplications and diversions. I have no desire to conceal anything; the point I had did not include that feature of the allegation; however, if counsel wants me to I will read the whole thing.

Mr. Clark. No.

Q "That the amount of said embezzlements, misapplications and diversions of funds increased from and after November 1, 1912, steadily down to the date of the closing of the institution, resulting in the losses herein referred to," as set forth; I am now directing your attention particularly to the words "misapplications and diversions." You meant by that, did you not, that a portion of the loss which this institution had suffered through the claimed neglect of the directors for which in this bill you sought to hold them responsible, was what you called misapplications and diversions?

La Rue Vredenburgh, cross.

Mr. Clark. I object. It is not proper cross examination, not contradictory of anything testified to; it is simply confirmatory.

The Court. The objection is overruled.

An exception to this ruling is noted by plaintiff as ground of appeal.

A Yes.

Q What do you mean by those two terms? A At the moment I have in mind, and on reflection I might think of other matters that would be included, the diversions and misapplications of trust company funds to the payment of checks of W. C. Armstrong, and other such checks.

Q Where persons other than officers or employees of the bank had benefited by the misconduct of the directors, rather than officers of the bank themselves? A There was one director of the bank himself concerned in the same sort of business.

Q That was Mr. Scarlett? A Yes. This was substantially a conspiracy between certain—

Q One moment. I have not asked you that. With the exception of Scarlett you have in mind the abstraction of funds from the bank treasury for the benefit of outside individuals?

Mr. Clark. The objection is renewed.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A Yes.

The Court. Had you finished that subject.

Witness. I, perhaps, should make one reservation there, and that is whether the word "misapplication" is inclusive of larceny or embezzlement; we can, perhaps, better, after lunch, get a closer definition of terms that might, perhaps, require an amendment to that answer.

Adjourned to Monday, March 24th, 1919.

SIXTH DAY.

Newark, N. J., March 24, 1919.

Continued pursuant to adjournment.

Appearances as before.

LA RUE VREDENBURGH resumes the stand.

Cross examination (resumed) by Mr. McCarter.

Witness. If it please your Honor, the last question before adjournment I suggested after answering that on a clearing up of the definition my answer perhaps should be amended. I would like to have that point taken up first.

(Previous testimony read.)

Q Do you want to correct your testimony?

The Court. That is what Mr. Vredenburgh said; that is the substance of what I understood him to say and he now says he desires to make an explanation.

Q I have no possible objection to your making any correction in your testimony you desire to make, but I do not wish you to go into a discussion of what you deem larceny and what you deem embezzlement; that is a question the Court will have to deal with. With that understanding, I have no possible objection to making any correction to the former answer you wish to make.

A When I made that reservation on Friday it occurred to me that misapplication was broader than embezzlement, and I was using the word "misapplication" in the narrower sense, and that I ought to broaden it, and at the moment I was not sure which was the broader.

Q Leaving out now the niceties of legal definitions with which possibly neither you or I have any concern, that being a matter for his Honor to determine, am I right, or wrong, speaking generally, in the view that the two terms in the bill of complaint in the equity suit to which I before directed your attention and which terms are "misapplications" and "diversions of funds" referred to disposition of the funds of the bank to persons other than officers or employees of the bank, except in the case of

La Rue Vredenburgh, cross.

Mr. Scarlett? A That is a little intricate; I may possibly answer it.

Q (Question read.)

Mr. Clark. Objected to as incompetent, irrelevant and immaterial.

The Court. I am obliged to confess I have not comprehended it, Mr. Clark. It may be, perhaps, because I have not sufficient knowledge.

Mr. Clark. He is asking the witness the meaning he gives to two of three terms used in sequence in a bill of complaint. Now, the matter of the interpretation of words used in the bill of complaint in another action has no possible bearing on the issues in this action. I have no objection to asking the witness what his interpretation of the words "misapplication" and "diversion of funds" mean, but I do most certainly object to any such question as that put, unless the witness is permitted to read the paragraph in which those words are used.

Mr. McCarter. In view of the fact that your Honor does not understand the question, I will endeavor to make a short explanation of what I have in mind in putting the question. The fundamental difference between the bond in this suit, and the bond in the Jennings suit, which ought to be constantly before us, I think, is the fact that the Jennings bond covered misapplications as well as embezzlement and larceny; this bond is narrower.

The Court. May not "misapplication" include "embezzlement"?

Mr. McCarter. My theory of this case is that where he details, it may be conceded, many cases of misapplication on the part of Smith, for which this bond is not responsible, they not amounting to larceny or embezzlement, for instance, where Smith permits one of the directors, Scarlett, to overdraw, and finally, to avoid detection of them both, pays Scarlett's overdraft with Jones' funds, that is not an embezzlement, that is a misapplication. Smith does not benefit by that, and I understand it to be the well-settled rule of law that one of the essential elements of embezzlement is that the alleged embezzler should himself have benefited. Therefore, the fact that there

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were losses to this bank which depositors suffered by having those accounts misapplied, if you will, by Smith, to paying an overdraft of one of the directors from somebody else's funds, would not convict Smith, if he were indicted, of embezzlement, and would not charge his surety for the conversion to his own use of that fund, which is embezzlement. Now, therefore, I am anxious, in view of the fact that the witness has already stated his connection with the bill of complaint, to bring it to his mind more clearly, I want to show by him that a large part of the loss that this institution suffered was a loss suffered by the fact that Mr. Smith, if you will, permitted the account of Jones to be charged with funds that Scarlett got the benefit of. In other words, that he had favorites whom he played, and that he robbed Peter to pay Paul, but he did not benefit himself. So that I am anxious to produce, if I may—and all that I was seeking in the somewhat complicated question which I asked—to show by this witness that a large part of the losses which this bank suffered were losses of the character I have described; and if your Honor now will, in view, of what I have just said, hear the question, you can then determine whether it is intelligible. If not I will withdraw it and endeavor to make it so.

The Court. I will say at this time, without ruling, as perhaps it is not necessary, that my thought is that your definition in a case of this kind is rather too restricted, if I am right in thinking misapplications may also include embezzlement, I see no harm permitting questions bearing upon that issue. If you are right about it, then you have a right to develop that. If you are not right about it, and if the word "misapplication" may include "embezzlement," I can see no harm that can come from that, and therefore I will be inclined to permit questions to that effect.

Mr. McCarter. I would like your Honor to look at Given *v.* Skinner, 187 U. S., p. 181. My theory is that the essence of embezzlement or larceny is self-enjoyment. For instance, take Juror No. 2, and I have charge of his bank account; by some misapplication of the books I take a thousand dollars from his account and give it to the fore-

man. That is not an embezzlement of money; it is something else; it is criminal; it is misapplication of funds; it is alteration of accounts, but it is not embezzlement, which means that McCarter has got the benefit. I have got to take the money and enjoy it or dispose of it in some way. But if I simply rob Peter to pay Paul I am monkeying with the account, may abstract funds and misapply them, but, as I understand the law, I am not guilty of embezzlement. Having that view in mind, I am trying to find out from the witness whether, having in mind the word "misapplication" and "diversion" applies to cases where persons other than officers of the bank, except Mr. Scarlett, received the benefit.

The Court. Since I have had a little different view, and as it may be necessary for me to rule upon the matter later on in the case, I would like to hear you, Mr. Clark.

Mr. Clark. I would prefer delaying the dealing with this matter more fully until a little later, when it will come up in a little different form. My objection to this testimony, in addition to the general ground I have stated, is that it does not seek to bring out this witness' understanding or interpretation of those transactions with regard to the checks of other customers, but only ask him what was meant by the use of these words in a suit against directors. Your Honor can understand that in a suit against directors we are holding them for the losses, no matter out of what cause they arose; and we recite in this bill of complaint a large number of various accounts, and in this same twenty-third paragraph we say that he continued at frequent intervals and in increasing amounts to embezzle and misapply the funds of said trust company. Then we go on to say that the amount of such embezzlement, diversion and misapplication of funds increased. The point is not what is meant by this complaint, but what are the facts; and I am perfectly willing to withdraw my objection if Mr. McCarter simply seeks to obtain from this witness what were the facts in the trust company funds.

Mr. McCarter. The fact that Mr. Clark has failed to understand my point, which is evident from his objection,

makes it important that I again state it. The Court of Errors and Appeals in the Jennings case, Mr. Clark, pointed out very specifically that the Jennings bond covered misapplications as well as dishonesty amounting to larceny and embezzlement. Of course, the obvious distinction between our case and that—

Mr. Clark. May I interrupt to state that the only matter the Court of Errors and Appeals had before it in the Jennings case was an item where Jennings drew his own check on the Roseville Trust Company, in which he had an account, and the money was paid on that check, and the question before the Court grew out of the refusal of Judge Adams to submit that to the jury, because Judge Adams erroneously believed that while it was a debt, it was not even a misapplication of funds. The Court of Errors and Appeals had nothing to do with the pass-book stealings nor anything of the drawing of this check on his own account.

Mr. McCarter. The opinion of the Court of Errors plainly points out the distinction between that bond and the bond in suit. In addition to the case in the Supreme Court of the United States, I also direct your Honor's attention to the case of Guaranteed Company of North America against Mechanics Savings Bank & Trust Company, 100 Federal Reporter, page 559, where there is an opinion of the Supreme Court, in which the distinction I am making is the very point of the case. Therefore, it is necessary for the plaintiff in this case, in order to hold a bondsman, as I understand the law, to show that all of the losses for which they seek to hold the bondsman responsible are losses that went to the personal aggrandisement of Smith, as distinct, from what went to persons other than Smith. In other words, to use this homely phrase we so often use, it was not a case of robbing Peter to pay Paul, but was a case where Smith robbed the bank and got the benefit of it; embezzlement, larceny. I am not infatuated with my question, and if counsel desires I will withdraw it and frame it without reference to the bill of complaint, and see if, when Mr. Vredenburgh has, in the course of his evidence, spoken of diversions and misapplications, he does not mean robbing Peter to pay Paul.

The Court. I might say the basis of my suggestion as to the use of the word "misapplication," which word is not used here, it is true, is this, found in Cyc.: "In order to constitute embezzlement the accused must be shown to have apparently converted money, or other property, to his own or someone else's use." Then there is a large number of cases from different states.

Mr. McCarter. I think you will find, if you look in Bouvier's Dictionary, and, as far as I am aware, of the authorities, the distinction that is made between larceny and embezzlement and other forms of dishonesty of that character, is, in the one case, larceny and embezzlement, the alleged thief is supposed to get the benefit himself. In other words, he is guilty of conversion to his own use. And in the other case, misapplication is where somebody else has benefited.

The Court. You may proceed.

Q I will ask you this question.

Witness. I want to qualify an answer I have already made, and asked about on Friday.

Q I beg pardon? A On Friday, as the stenographer read, I wanted to qualify an answer, and the discussion that has taken place in regard to the distinction between embezzlement and misapplication seems to justify me in raising that point at the close.

Q Just there, if you please, you are not here as an expert lawyer, but as an expert accountant. Now, make any modification or correction you want to make. A I only want to say that I think I was testifying on Friday with regard to the word "misapplication" in the narrower sense that it did not include embezzlement, and right at the adjournment it occurred to me that misapplication was inclusive of embezzlement or larceny, and I desired to have the definition in order that my answer might be strictly correct.

Q (*By the Court.*) And when you spoke of misapplication, you meant to convey the impression of a definition of that word which did not include embezzlement? A Exactly.

By Mr. McCarter.

Q Now, let us leave out legal definitions; it is a fact, isn't it, that a great many of these drafts and checks that were found

in the drawer of the desk and box 55, instances where money of the bank had been diverted from the bank to the accounts of A, B, C and D, friends if you will, of Mr. Smith? A Yes, I think I may add, and save time, did not appear to be embezzlement.

Mr. McCarter. I move that that be stricken out.

Q Now, I insist you try to be fair. I have asked you specifically not to bother yourself about definitions.

The Court. That part of the answer will be stricken out.

Q You also discovered, did you not, that the way that that had been done was that the tellers had carried for long periods of time, on some occasions, checks as cash in their drawers, that represented no real cash in the bank, or on the part of the drawer of the check, and that when those checks had finally to be made good as cash they were made good by charging either the correspondent bank or some of the depositors, with the amount of them. Did you discover that? A Not exactly in the form you state it, but pretty close to it; if you will allow me to be a little more definite.

Q Was not that one of the ways that the accounts of this bank were manipulated? A One of the ways was to charge cash items against correspondent banks.

Q Were they never charged against individuals? A I don't recall that they were, except where the account had been made good.

Q By taking the payment from some other account? A It did not so appear.

Q Well, it might have been that way? A It was investigated.

Q By you? A Yes, and for me, both.

Q I ask you to confine your answers to my questions. A Yes, it was investigated by me.

Q So, that do you say that in every instance where checks or notes were found in this box, or this desk, of persons who at the time the notes were paid had no account to that extent in the bank, they were paid from correspondent banks? A I don't think I can say either yes or no to that question.

Q Didn't you hear Smith testify time and again that he also charged them to depositors?

Mr. Clark. Objected to.

The Court. Objection sustained.

Q Don't you know that time and again he charged the individual depositors as well as correspondent banks? A I only know he charged some of them to depositors when the account had been made good.

Q Now, when a customer presented a note or check, we will say, for $5,000, and that check was paid at the teller's desk, and the depositor had no money in the bank at the time, or insufficient to meet the draft, and that check or draft or note was carried on the cash in the teller's drawer for a period and later paid by being charged to a correspondent bank, if you will, then the correspondent bank suffered the loss, and the depositor or maker of the check or draft, got the cash, and not Smith, didn't he? A No, sir; the correspondent bank suffered no loss, because they were not compelled to honor it.

Q Because somebody else's account made good the correspondent bank, wasn't that it? A No.

Q Now, Mr. Vredenburgh, suppose Mr. Scarlett, a director of the bank, who had not a dollar in the bank, presented at the bank on a given day his check for $5,000, and suppose, if you will, under Smith's direction, or without Smith's direction, I don't care which, Jennings paid that check, and kept the check in his drawer as cash for, say, a day or two or three, and then when it had to be otherwise taken care of, he charged the amount of the check to the Union National Bank, the correspondent bank, and let it remain in that condition, who got the benefit, and who suffered the loss? A I shall assume—

Q I will ask you to answer my question. A Did you mean that the—

The Court. I am not quite sure but Mr. Vredenburgh will have to assume something there, because I do not recall any proof to that effect. I mean charges of the character you speak of to a correspondent bank. I am not taking your question literally, I am taking your question as involving a principle; and I recall no testimony which involves just that principle in the case.

Mr. McCarter. Well, I thought there was testimony?

Witness. Instead of saying, "I will assume," I will ask you this question: You have not mentioned in your hypo-

thetical question the name of the bank upon which that check was drawn. I assume you meant drawn on the Roseville Trust Company.

Q All right. A With that assumption in this hypothetical question, that Scarlett's check was drawn on the Roseville Trust Company, cashed by the teller, and carried in the cash, I believe, for a day or a week or more, and finally charged to the correspondent bank, that check would not go to that bank and would not appear on the books of the bank, and would not affect the account of that bank. It was nothing but a fictitious debit upon the books of the Roseville Trust Company.

Q Scarlett gets the money, doesn't he? A He gets the money.

Q He has no account of his own to get it from? A Your hypothetical question assumed number one.

Q Well, he had a dollar; now where does the $4,499 come from? A Came out of the funds of the trust company, and composed a part of the deficit at the end.

Q In the meantime it had been charged to the Union National Bank? A Yes.

Q All right. A And it would make it a little clearer to say appeared on the general ledger of the trust company as an asset, but was a fictitious asset.

Q How did it appear on the books of the company as an asset? A A debit to a bank, a correspondent bank, or any other bank, would increase on the general ledger the previously existing debit balance, which is the asset side of the ledger.

Q In other words, whereas the Union Bank before this entry peared to have $10,000, it now appears to have $15,000? A Whereas previously the Roseville Trust Company appeared to have $10,000 at the Union National, it would, after that entry, appear to have $15,000, but the balance in the Union Bank would not have changed by reason of the entry.

Q Of course not. Now, suppose a director on that day walked down to the Union Bank, or suppose an examiner walked down to the Union Bank and said, "You have got $15,000 here belonging to the Roseville Trust Company," he would have been told pretty quickly by Mr. Scheerer, or somebody, that they only had $10,000, wouldn't he? A Yes, very likely.

Q Suppose that $5,000 had been made up by taking $5,000 from somebody else's account and crediting to the Union National

Bank, it would still be robbing Peter to pay Paul, wouldn't it? A If that had been done, it would.

Q Now, so far as the correspondent bank is concerned, is not what I have described in my imperfect way exactly what was done, as you found a great many times, by Smith? A I would say, no, if you include the hypothesis of somebody else's money as being made use of to make it good, and, yes, if you are not including that part in your question.

Q I expressly included that by saying so far as the correspondent bank was concerned.

Mr. Clark. Is not the question answered?

Mr. McCarter. I think it is now; yes.

Q Now, how do you find that the situation at the bank was corrected? It had to be, didn't it? A It was not corrected.

Q It was left uncorrected? A Yes.

Q In every case? A I would not be sure that there was no correction of any kind. I think there were some fictitious credits to offset in part the kind of fictitious debits I have mentioned. I won't be sure there were any, but I think there were; not necessarily in the Union National, but, perhaps in other correspondent banks—

Q Are you through? A I was wondering whether there were any of those cash items charged to any other correspondent banks. I am not quite sure at the moment.

Q Let us assume that the example of Juror No. 2 is excluded from the matter, and we will leave the matter with the correspondent bank alone, and suppose two days after that occurred the bank failed and went into your hands, who has the benefit of the $5,000? A The man who received the money on the check.

Q Scarlett? A Hypothetically, yes; in your hypothetical question.

Q And, of course, the bank, the trust company, suffered the loss? A Yes.

Q Now, about how many instances did your investigation disclose losses of that character? A You mean the character of cashing checks that were not good?

Q Where persons were permitted, either by checks, or notes, or certification, or otherwise, to get money out of that bank which they were not entitled to, and the notes, or drafts, or cer-

tified checks were carried in the drawer awhile as cash and then put into a correspondent bank? A I would have to, of course, speak from recollection as to the amount, as I have all through my testimony, except where I could read figures. The amount of cash items, I think, by that term we can—

Q Oh, Mr. Vredenburgh, you can answer my question without going into a long disquisition. A It cannot be answered yes or no.

Q (Question read.) A By "number of instances" do you mean the number of persons or the number of items?

Q Well, we will take persons. A I will be guessing at it now. Speaking from recollection alone, a dozen, twenty, perhaps a few more than twenty.

Q In amount? A Well, sir, we stumbled awhile ago on that question, because there are two classes of such items, the ones charged up before the failure and the ones not charged up, but in his desk or box. My recollection of the amount of the not charged cash items found in Smith's desk and box amounted to a little something over $100,000. The amount that had been charged up was relatively small; I don't think I ever aggregated the amount that had been charged.

Q Do I understand you to say, then, that the total loss suffered by the bank by proceedings of the general character that I undertook to describe in my hypothetical question, whereby the bank recognized fictitious checks or drafts, and the act was covered up by charging the amount to correspondent banks, only aggregated about $100,000? A I have not testified that all of these cash items when taken from the teller's cage were covered by fictitious charges to correspondent banks. I think some were covered in other ways. I do not recall the aggregate of the charges of these cash items to correspondent banks; it ran into large figures. I am not sure whether I have covered the whole question or not.

Q What was the total amount of the loss, whether it was charged to correspondent banks or not? The losses of this character? A I do not think it was possible to determine the exact amount.

Q Well, roughly. A I would be guessing to mention any figure.

Q Now, Mr. Vredenburgh, have not you any idea, in your investigation of this bank, how much loss you found that the

bank had suffered in that way? A I do not know that I ever worked that out, as to the loss suffered in that way.

Q Then you want to say to this jury that you have not any idea whether it was $200,000, $300,000 or $50,000? A I won't say I haven't any idea. My idea would be in the neighborhood of $125,000.

Q At the outside? A Approximately pretty close to the amount, and yet it might be larger; I am speaking from recollection.

Q Now, assuing that covers everything, whether charged to correspondent banks or not, am I correct? A No; I am speaking of the amount charged to correspondent banks.

Q That is it; including the amount charged to correspondent banks. A You mean the aggregate loss of cash items?

Q Yes; I do mean that. A I could not give the amount.

Q As nearly as you can recall? A I do not remember that it was worked out.

Q As nearly as you can recall. Come, out with it—out with it; let us have it; you have an idea? A I have not.

Q No? A I don't think it was worked out definitely.

Q Well, won't you tell me this: How could the books be in proof, and the accounts balanced, if the incidents that I have described occurred, as I understand you to say it did occur, and there was no charge to correspondent banks? A I think I have testified that the covering charge might have been to some other account than correspondent banks.

Q To an individual account? A No; some other account on the general book.

Q Like what? A Bills purchased, for instance; something of that sort. Any other account on the ledger.

Q I am not asking what is might have been; I am asking what it was. A I can't tell you.

Q There were other entries then than correspondent banks, weren't there? A I think there were one or two.

Q Of course, the payment of these checks or drafts that we have been referring to decreased the cash in the trust company, didn't it? A Yes; or their cash on deposit, otherwise.

Q And some accounts, in order to carry the books in proof, had to be charged with that draft? A Temporarily.

Q Of course. A It was charged on the teller's proof-book; ultimately charged to—

Q Somebody. A Not somebody.

Q Someone, then, if you will. A Some account.

Q Anything to prevent Smith from—if it be true that on the 20th of February, 1912, the New Jersey Adamant Manufacturing Company paid $5,000 to the Roseville Trust Company, and this book, Exhibit D. 14, was issued—from taking that $5,000 and applying it to such an account? A I think you will have to put that question a little differently.

Q (*By the Court.*) The question is, was there anything to prevent his doing it? A There was nothing to prevent his doing so.

Q (*By Mr. McCarter.*) No. In other words, assuming it to be proven, which I am not conceding, but assuming it to be proven that on the 20th of February, 1912, some concern known as the New Jersey Adamant Manufacturing Company brought to this bank and handed to either the paying teller, receiving teller or Mr. Smith $5,000, which $5,000 was never entered on the ledger, as I understand it, to the credit of the New Jersey Adamant Manufacturing Company, there was nothing in the world to prevent Mr. Smith taking that $5,000 and making good the cash in the drawer that was deficient by the same amount by virtue of one of these drafts? A There was nothing to prevent his putting it in the drawer.

Q To make good the loss that way? A Yes.

Q You have assumed he did not do that, hadn't you, in this case? A I have.

Q What is the basis of that assumption? A Had he put it in the drawer there would have been a surplus of cash.

Q Why, when the drawer had already been charged with a check or draft, or some other call upon it, by the hypothesis, for $5,000, that has got to be made good? A No; because the checks that come in and were paid are then counted as cash.

Q But suppose a man put a memorandum in, $5,000, just a mere memorandum, that could not be made good, and the memorandum taken out instead of being charged to a correspondent bank. A Put in a debit memorandum?

Q I do not care what you call it; leave these big phrases out. A Well, a memorandum might be in the cash, either credit or debit would affect the answer to your question.

Q (*By the Court.*) Suppose there was a debit memorandum, Mr. Vredenburgh, in the paying teller's cage for $5,000, could

not the $5,000 in cash thus taken supplant that debit memorandum? A Yes.

Q Would there be any entry of any kind to show that if that was done? A Not unless the debit memorandum had been there long enough for the teller to list it.

Q But if that had not been listed as a debit memorandum and $5,000 simply supplanted it, there would be nothing upon the books to show that fact, would there? A I don't think there would.

By Mr. McCarter.

Q Now, isn't it a fact, and haven't you this information, that sometimes those drafts, or debit charges, debit drafts or debit memorandums or checks or notes that had been paid and were permitted to be carried in the teller's drawer for a long period of time, would reach a large amount, and that then Smith would take them from the drawer and make good, so that the discrepancy would be accounted for by removing them to box 55, where you found them, and by charging either—charging the total to the correspondent banks, or in some other way providing for the deficiency that would otherwise appear? A I think I should say yes to that question; it is a little complicated.

Q Now, I ask you if it is not a fact that after such a charge had been made as I referred to in my last inquiry you did not find further instances where later the account of an inactive depositor was charged with the amount that previously had been charged, we will say, to a correspondent bank? A I do not at the moment recall any incident of that kind, but I won't say there was not.

By the Court.

Q Recalling, Mr. Vredenburgh, the cases of O'Connor and Mott, were they instances of that kind? A I would have to look at the drafts themselves; they might explain it.

Q Suppose there is nothing endorsed upon those drafts? A My recollection of both these withdrawal receipts is that they were at once charged to the respective ledger accounts.

Q And not to a correspondent bank, and then changed? A No; they were regularly charged right away; that is my recollection of what the individual ledger shows. It was in testimony the other day.

La Rue Vredenburgh, cross.

By Mr. McCarter.

Q But this is true also, isn't it, Mr. Vredenburgh—we will take a case where there has been what we will call first a charge to a correspondent bank, and then a charge to bills payable, or some other account, both charges being fictitious, by reason of the abstraction to these favored note drawers, or check drawers, in the first place, and that after this fictitious charge had run for some time against certified checks, bills payable, or any one of these other accounts, where it had no business to be, and a depositor came along with $5,000, the sum we are assuming all the time, he was a negative depositor, did not draw frequently, he would take that money, credit the correspondent bank, or the bills payable, or any other of the accounts which had been fictitiously charged, and put this money in the drawer, failing at the time to credit on the books of the company, the depositor with that money? A I do not think there was anything to show just that thing was done. There was an approximation to it. In speaking of this you have frequently used the expression "check or note." Notes should be omitted, except in very rare cases no notes were presented there for payment; notes were presented for discount, but rarely for payment. You have spoken of these people cashing their checks there. As a matter of fact, nine-tenths of the aggregate of these cash items came in through the exchanges and were not presented over the counter.

Q I do not care how it was done; the check of Mr. Scarlett, whom I am using as an example, either comes through an exchange or comes over the counter and is paid, although there are no funds to meet it. Now, whichever way that check reaches the bank, the bank, the moment it pays the check, assuming that Scarlett has no money, is out $5,000, isn't it? A It may.

Q And has got to be in some way or other, if the bank account is going to prove, covered up? A Yes.

Q Now, Scarlett gets the money. In the regular orderly course of events a first list of it was put in the cash as cash, wasn't it? A Yes.

Q But it cannot stay there very long, because it won't do; it is not cash; it is a check, and the plan was to take that check out of the drawer as cash and charge it, we will say, first to the correspondent bank? A Or some other general account.

La Rue Vredenburgh, cross.

Q All right; very good. Now, along comes the New Jersey Adamant Manufacturing Company and says to whoever comes, if he does come, "I want to deposit $5,000 here in your savings department." Mr. Smith, all right, takes a book and writes in it in his own handwriting what occurs on the first page; that is correct; and he writes a ticket, indicating that on the 20th of February, 1912, there had been a deposit of $5,000; he makes no entry on the ledger at all; there was nothing to prevent his taking that $5,000 that the New Jersey Adamant Company had deposited by the question and applying it to this situation that existed, by which the drawer would now have $5,000, the correspondent bank, or their account, could be credited with what it had been previously charged, and everything would be lovely, so far as the bank was concerned, but the New Jersey Adamant Manufacturing Company would apparently be out of pocket, is that right?

(Question read.)

Q I will add this further fact to the question: He puts the book and slip in drawer 55, where it is found. A Let me look at that book, please. (Book handed to witness.) In replying to your question I do not understand what drawer you are referring to, the teller's drawer or the drawer in Smith's desk, but there does not appear in the account of the correspondent banks the credit of the amount you speak of.

Q You think that answers the question? A I don't think it does, but it is a complicated question.

Q I asked you if it is not possible, perfectly possible, and, if, in fact, it is not a likely explanation of the New Jersey Adamant Manufacturing Company book being found in box 55, where all these other papers of the overdrafts were found, that Smith, in order to make good to the bank moneys that he permitted Scarlett, or someone else, to have, falsely and improperly taken from the proceeds of the bank, he made it good by taking the money of the New Jersey Adamant Manufacturing Company, which, by the hypothesis, is presumed to have paid in there, and appropriated it to make good that shortage and put the book and slip both in box 55? A That is the kind of question—

Q Will not you answer my question? A I cannot answer without some reflection.

Q Please reflect. A These kind of questions of what can and cannot be done cannot be answered offhand, always.

Q Reflect as long as you want. A I am not prepared to say at present that it is not impossible, and yet I am inclined to think that an analysis of the books might show it was impossible to have used the $5,000 of the Adamant Company to make good a cash item.

Q (*By the Court.*) The question goes further than that and asks if it is not a likely explanation.

The Court. From an accounting standpoint, Mr. McCarter, I suppose.

Mr. McCarter. Yes.

A I do not know that I am prepared to express an opinion as to the probable use of it.

Q (*By Mr. McCarter.*) Well, Mr. Vredenburgh, of course, I have named certain amounts here of money as overdraft in favor of Mr. Scarlett, or any individual; I only used his name because that happens to be a conspicuous one. A That is what I understand.

Q I, of course, have not had the benefit of examining all these things, even if I could understand them, which I could not; but I want to know what would appear in the book under the situation I am surmising: A payment of a check drawn by Scarlett for $5,000 that came in from, we will say, the Merchants Bank; Scarlett has no money; that paid check lies in the teller's drawer for two or three days; other transactions of the same kind have in the meantime occurred, until we have in the drawer, we will say, paid checks or debit memoranda, temporarily carried by the teller as cash, aggregating, if you will, $50,000, which are temporarily charged to correspondent banks, $25,000, to bills payable, $25,000. Now, the day of doom is come, when it will appear that the correspondent bank has not got the $25,000, and the bills payable account has not actually got the $25,000, and it is necessary somehow or other to make up in the drawer the deficiency. Along comes the New Jersey Adamant Manufacturing Company, which, while a manufacturing concern, says, "we want to get into your savings account; we want to make a permanent deposit here." Is there anything to prevent the issuance of a pass-book and the ticket for both being placed in box 55, where you found them, no entry being made in the ledger or a

single book in the bank other than the pass-book, if that is a book of the bank; the cash in the drawer thereby made good, so to speak—I mean the teller's drawer—the $5,000 cash on hand, and a corresponding credit made either in bills receivable, bills payable or correspondent bank, as the case may be?

The Court. The question is, is there anything to prevent that situation.

A There is nothing to prevent that being done.

Q And what would appear on the books to show it had not been done? A The credit of the $5,000, or $25,000 bills purchased, or $25,000 to the correspondent banks, show on the ledger.

Q If, for instance, the correspondent bank at that time had received credit of $5,000, it would show there? A It would be here.

Q If there were an overcharge to bills payable it would show? A Yes.

Q How much was the overdraft on February 20th, 1912, of the character I have described? A I don't remember.

Q I understand you found all these Magnani books in box 55? A I would have to look at the mark; I think that is correct. (Books shown witness.) Yes, six books.

Q I understand that in each of these cases, when the pass-book shows an apparent deposit of a considerable sum of money, the proof is that upon those dates the ledger entries were made of a dollar. A That is my recollection of the proof.

Q And is there anything to prevent the exact repetition of what I described with reference to the New Jersey Adamant Company with regard to the difference between the amount of the deposit and the dollar in each case; anything to prevent that? A I don't think of anything now to prevent it any more than in the Adamant case.

Q And the fact that the Magnani book, like the Adamant Manufacturing books, were found in box 55, where these overdraft checks lay, might give some indication that that is what occurred, mightn't it? A I did not go as far as to draw that conclusion.

Q Well, it is rather a curious thing that Mr. Magnani and the New Jersey Adamant Company did not have their pass-books, wasn't it? Wasn't that rather curious? A My recol-

lection is the six books issued to Magnani had been withdrawn and they would not, therefore, have the books.

Q Is that true of the Adamant book? Look at that, please. A Yes. I don't know whether the book shows it or—

Q I am asking you if that happened, which you said your recollection was that the book issued to Magnani had been withdrawn; is that true in the Adamant case? A I am not sure that the pass-book shows it. If you will let me look at it?

Q Do you find anything there to indicate the withdrawal of the money? A No; it don't appear in the pass-book.

Q Do you wish to go on record as testifying that each one of the Magnani books show the money had been drawn? Look at them and see. A Book No. 1651, Exhibit P. 5, appears by the handwriting of Smith to have been—shows by the handwriting of Smith that the money had been withdrawn before the failure of the trust company.

Q By the way, are these figures in leadpencil in six of the Magnani books in Smith's handwriting, as well as the ink?

Mr. Clark. I object to figures not in the figure column.

A I would not like to say that the figures out of the column, and in pencil, are in Smith's handwriting, but I think so.

Q The same is true of the figures in leadpencil in the column? A Yes.

Q All right. Now, take the next book. A Pass-book 1652, Exhibit P. 6, shows withdrawal of a part of the money only prior to the failure of the trust company.

Q So you were mistaken in the statement a little while ago that your recollection was that it had all been withdrawn, weren't you? A Yes.

Q How much remained not drawn at the time of the failure upon the account evidenced by pass-book 1652? A I am not sure that any remained undrawn. I was speaking a moment ago of what this pass-book shows.

Q That is what I am asking you. A But, according to the pass-book there still remained in this account, at the time of the failure, $1,797.08, assuming the footing in the column to be correct, without my verifying them now.

Q The next book. A Book 1653, Exhibit P. 7, shows the withdrawal prior to the failure of the trust company, of $335.50.

La Rue Vredenburgh, cross.

Q Well, on the opposite side? A And a balance remaining on deposit of $894.02.

Q So you were mistaken about that. Look at the next one. (Not answered.)

Q (*By Mr. Clark.*) What is the date of the balance? A Well, the book don't show the date the balance was computed.

Q (*By Mr. McCarter.*) The balance was made by one of your clerks, wasn't it, after the failure? A I think so; I think this one was.

Q Go on. A Book 1654, Exhibit P. 8, shows withdrawals in Smith's handwriting, prior to the failure of the trust company, of $240.50.

Q Leaving a balance? A Leaving a balance, according to this book, assuming the footings are correct of $371.87.

Q The next book? A Book 1654 duplicate, Exhibit P. 9, shows withdrawals in the handwriting of Smith prior to the failure of the trust company of $523.87, leaving, according to this book, a balance on deposit of $848.69. Book 1655, Exhibit P. 10, shows withdrawals in Smith's handwriting of $152 prior to the failure of the trust company, and a balance as shown by this book as remaining on deposit of $391.26.

Mr. McCarter. I do not know that it makes any difference one way or the other, but I have just heard for the first time that apparently each of these books represent a distinct personality, while they are issued in the name of Magnani, they are issued in the name of separate *cesqui que trusts.* I do not think it is worth while to burden the record with the names of these different *cesqui que trusts,* but I think that should appear.

Mr. Clark. That is conceded.

The Court. Is that true with reference to No. 1654 and 1654 duplicate?

Mr. McCarter. No, they are the same, apparently.

Q You had assumed, before I directed your attention to the fact that in the case of the New Jersey Adamant Company, as well as in the case of the several Magnani accounts, where a balance remained until after the failure, that that was not true, had you not? A I don't think I made any assumption. My recollection is that both the New Jersey Adamant Company—

La Rue Vredenburgh, cross.

Q No, you say you had not made any assumption, is that the idea? A My impression was that the pass-books showed money had been withdrawn; I knew that the—

Q Never mind; you have answered my question. And the peculiarity of the fact that those books lay in box 55, where the charter of this company and other documents, including all of these notes and drafts we have been talking about, had not occurred to you in the light of the fact that a good deal of money appeared on the books to be due to the alleged depositors, did it? That had not occurred to you? A These two depositors you have been speaking of?

Q Yes. When I asked you if it was not singular that the depositors had not these books, you said the accounts had been paid off? A I think they were; that they got their money before the bank failed; I know that was the fact with the New Jersey Adamant Company.

Q Didn't you testify that nobody could get money without presenting the books? A The books had been presented, and had been paid, and not entered on the pass-books and the books locked up in box 55.

Q Well, what evidence can you present to show, from the books, that these accounts of Magnani had been paid in full? A I am not sure now exactly what the evidence was, but I think my conclusion that they had been paid was due to the fact that no claim was made on the books.

By the Court.

Q The special account ledger in their acocunts, does that show anything? A Well, it has been testified to, but I don't remember. Were those the one dollar accounts?

Q Those were the dollar accounts. A No claims were filed on them. In the case of the New Jersey Adamant Construction Company I found the evidence of the payment of the $5,000.

Q Are you familiar with those ledgers? A I understand them.

Q Could you tell anything by looking at the accounts in those ledgers? A My recollection is the accounts do not show any withdrawal.

Q Take the Magnani? A Pass-book account 1651 there is a credit of one dollar, and four credits of interest on that dollar of two cents each, with the balance at the time of the closing of

La Rue Vredenburgh, cross.

the trust company of $1.06, to which I added a credit of two cents, making a total balance of $1.08; and my recollection is that no claim was filed with me on that account. The next book, 1652—shall I go along with them?

Q I have no desire to pursue it further. A In the next account there is more than the one credit.

Q How does it show as to balance? A $159.67.

Q Just tell us the balance of the different accounts. A No. 1652, balance $159.67; ledger account 1653, balance $1.08; ledger account 1654, balance $1.08; ledger account 1655, balance $1.08; ledger account 1656—

Q That is not Magnani, is it, 1656? A Yes.

Q Is it? There is no pass-book.

Mr. Clark. It is not one of the matters in issue here.

Q Please look at pass-book 1655, account of A. Magnani, administrator; do you find any entry of a dollar, or anything else, there, on the ledger? A $1, April 25th, 1911.

Q Any claim made by Magnani? A My recollection is there was no claim made on any of these accounts.

By Mr. McCarter.

Q Are you quite sure about that? A I can make sure. He filed a claim on his demand account; I don't think there was any claim filed on these accounts.

Q There are no credit entries on the ledger of the receipt by Mr. Magnani of these three, four, five, payments you have referred to, are there? A You mis-spoke yourself; you should say debits.

Q Debits. A No. One moment; I had better look. No debits in any of them.

Q And, as I understand it, in the case of the New Jersey Adamant Manufacturing Company there is no entry in the ledger? A My recollection is that the account itself was never opened.

By the Court.

Q And that is so with No. 1654, duplicate in Magnani, wasn't it? A I know there was one of the books that did not have an account; one of the Magnani books no account was opened.

La Rue Vredenburgh, cross.

By Mr. McCarter.

Q Now, take the account of Mrs. Haney; that is the account, I think, in which the transfer was made? A Mrs. Haney, do you say?

Q Haney or Heeney. I call your attention to pass-book 1928, Catherine Haney, by which she is shown to have withdrawn, and she testified that that was a transfer to her other account, $9,000. Will you please tell us, at the time of the closing of the bank, how her savings bank account stood?

The Court. According to the ledger?

Mr. McCarter. Yes, sir.

A The ledger shows a balance to the credit of Catherine Haney, book 1928, $206.51.

Q You made a list of the contents of box 55, didn't you? A I did not do it personally.

Q Well, you had one prepared? A Yes.

Q Have you got that list with you? A Mr. Clark had it, the last I saw it.

Mr. McCarter. I would be glad to see it.

Witness. I don't know whether it is here or not.

Mr. Clark. I have no objection to counsel seeing it, but I must certainly protest against the record being burdened with the contents of this list.

Q The document that has been handed to me by Mr. Clark is headed "List of contents of safe deposit box No. 55"; that was made under your direction? A Yes.

Q Did you make a list of the contents of the drawer in the desk? A Made a list of part of the contents of the desk.

Q You did not make a complete list? A No.

Q Why not? A It was not worth it.

Q Well, at the time you made this list did you have in mind the value of each particular piece of paper, or did you undertake to make a list of what you found? A I listed the things in his desk that seemed to be worthy of listing.

Q Where is that list? A I don't know.

Mr. Clark. I haven't it, nor have we had it, Mr. McCarter.

Mr. McCarter. I would like an opportunity to look at this during recess, so as not to encumber the record with it, as you suggest.

Mr. Clark. Oh, yes.

Q You appraised in value the contents of the box at $16,029.05, didn't you? A I don't remember the amount now; I made an appraisement of it; if you have that from one of my—

Q I am referring you to your evidence before the Vice-Chancellor on page 1382. A I testified there as to the amount, and that must be correct.

Q You appear there to have set a price on the contents of the desk and box together of $16,029.25? A If that compared with the testimony, that is correct.

Q You sold it, didn't you? A I did.

Q At the appraised value? A Yes.

Q In the course of your investigation did you find out that while the bank was in operation Mr. Jennings and the bookkeepers, Mr. Thompson and Mr. Mindnich, or any of them, had had access to box 55? A I did not find out definitely that anybody had access to it but Mr. Smith.

Q You heard, did you not, that those three had had access? A No.

Mr. Clark. I object to hearsay.

The Court. He says "No."

Q Never even heard that? A No. I did hear—to give the information as fully as possible—I heard that Jennings had had access to it, but I could not confirm it, and Mr. Jennings said he had not.

Witness. If it please the Court there is something I would like to have on the record, if it is proper.

Mr. McCarter. I think you had better wait until you are recalled.

Witness. It is in regard to a matter I testified to on Friday. We seemed to have a little question of veracity between us, that I may clear up. You were questioning me in regard to a remark I had made to you a day or two before, and shortly after adjournment I recalled the circumstance of that remark, and the mention of it I think

will show that we are both correct. It was a remark I had made when Mr. Cloran was on the stand and to the effect that I had been over all of these, something of that sort. I denied I had used exactly the expression Mr. McCarter quoted, I denied it, not that I recalled exactly my words, but I could not bring myself to believe that I had said what he seemed to understand. Right after adjournment I recollected the circumstance under which I made the remark. Mr. Cloran had gotten along far enough in his testimony to disclose to me the fact that he was running into the hopping around of entries in the general ledger from one account to another. To an accountant it was an interesting matter to work out, and realizing what his testimony was running into, and that it might be interesting to others as well as to me, I made the remark that I had been over this. I was referring to the hopping around of these items.

Mr. McCarter. If your Honor please, I consider it is quite important that I have an opportunity to examine this monumental document that has been referred to. If it be possible I would like very much to close the cross examination except with reference to that, and have an opportunity during recess to do so, and recall Mr. Vredenburgh if I desire upon that.

Mr. Clark. That is consented to.

The Court. You may do so.

Mr. McCarter. With that understanding, that is all of the cross examination.

Re-direct examination.

Q Mr. Vredenburgh, you testified on cross examination that there was some diversion of funds which you have traced to Jennings, and concerning which counsel asked you about a suit on Jennings' bond. Will you state what was the maximum amount of any such items that you found evidence indicating any participation by Jennings? A A maximum of eleven or twelve thousand dollars, as I recall.

Q Examining your proof of claim, Exhibit P. 77. I ask you whether there is any item shown there concerning which you found any participation by Jennings?

La Rue Vredenburgh, re-direct.

Mr. McCarter. I object to that question. I do not understand that this witness made up Schedule F; it was made up by Mr. Cloran.

The Court. That was Schedule G.

Mr. McCarter. Has he sworn he made it up?

The Court. Yes. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I found no evidence of any participation by Jennings in any of these items. I have to qualify that. Jennings was teller. Some of these items may appear in the teller's proof-book. I could answer the question in a different form.

Q Please explain your answer. A I could not find any evidence of these items being chargeable to Jennings, either in whole or in part. Does that cover the ground, and meet the approval?

Q Then, as I understand it, you say that it is possible that certain facts in connection with these items might possibly have passed through the paying teller's proof-book? A Yes.

Q How is that? I do not just understand that; perhaps you can explain it? A Well, in one of the proof-books appears a list of the total of the deposits and—

Q Will you look at the paying teller's proof-book? A I am not sure—

Q (*By the Court.*) You realize the inquiry is as to Schedule F? A Yes. And I would not like to testify in regard to the paying teller's proof-book. It is an extremely complicated book, and I am rusty on it. I must decline to testify in regard to the interpretation to be put on the paying teller's proof-book; it is a complicated book, and I am not sure that I would correctly construe it. I am inclined to make some little reservation in my testimony in regard to a participation of Jennings, thinking that there might be, on running through of this book either in the form of an item, or total, something that included the items in the proof of claim.

Q Well, we will go on to something else. You have finished your answer now on this or have you not? A I think I have. I would have to study that book to say whether it would or would not show anything.

La Rue Vredenburgh, re-direct.

Q Now, I will ask you how many depositors were there of the Roseville Trust Company at the close? A Something upward of three thousand, as I recall it.

Q Mr. Vredenburgh, what happened, so far as you were concerned, in connection with your routine duties, in July, 1916? A I closed the Mutual Trust Company of Orange by direction of the Commissioner.

Q And have you since that period been devoting some of your time, and to what extent, to that institution? A Almost all of my time to the affairs of that institution.

Q Now, you mentioned the fact that the examiners whom you had assisting you left in October, or November; why was that? A For the reason that the work of the department, the regular examination work of institutions under their supervision, was getting badly in arrears, and I was being importuned to let them resume their regular duties.

Q Mr. Vredenburgh, why was it that a detailed list of the contents of box 55 was made under your supervision?

Mr. McCarter. Objected to as immaterial.

The Court. He may explain the reason.

Q Why did you make a list of the contents of the deposit box, and not of the desk? A They were both listed.

Q There was not a complete list of the desk? A Everything worth listing was listed; that one is not here, the other is, that is the only difference.

A paper is marked P. 78 for identification.

Q I show you P. 78 for identification and will ask you to tell us if you know whether that was found among the effects of the trust company, and, if so, where? A It was found in box 55.

Mr. Clark. I offer this letter in evidence, being a letter headed "New Jersey Adamant Manufacturing Co., dated December 20, 1912," addressed to the Roseville Trust Company.

Marked Exhibit P. 78.

(Letter read.)

Q Mr. Vredenburgh, in connection with the pass-book irregularities concerning which you made claim on Jennings' bond, in

whose handwriting were the entries in each of those matters, the handwriting in the pass-book?

Mr. McCarter. The pass-book ought to be here, I think.

Mr. Clark. You have brought out a great deal of the facts in the Jennings matter, but not one particularly essential fact which I am now asking for.

Mr. McCarter. I object to your proving it in that way; this witness might not recollect, and you are speaking of the contents of the books. I do not think he ought to give his evidence in regard to the handwriting in the Jennings case.

The Court. I am inclined to sustain the objection.

(Argued.)

The Court. The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Can you recall, without reference to the pass-books which were involved in the Jennings diversions, in whose handwriting they were?

Mr. McCarter. Objected to.

The Court. He may answer that "Yes" or "No"; I suppose the objection is to the next question.

A I do remember.

Q Now, will you state—do not answer until the Court has ruled—whether or not the handwriting indicating abstracted deposits in the pass-books which were the subject of claim against Jennings and Jennings' surety, were or were not in the handwriting of Jennings?

Mr. McCarter. Objected to for the same reason.

The Court. The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q What did you find to be the fact when you took possession of the trust company with regard to whether or not the Roseville Trust Company borrowed money? A Its own ledger shows a pretty large amount of borrowing for the size of the institution.

Q (*By the Court.*) In the account of the bills payable? A Yes, sir.

Q (*By Mr. Clark.*) Where were most of those borrowings made? A Most of it in New York.

Q Will you just look under August 13, 1913? A Shall I give the amount?

Q Please. A The general ledger of the Roseville Trust Company, under date of August 12, 1913, shows a liability upon bills payable to the amount of $122,500.

Q Mr. Vredenburgh, that is a source from which the Roseville Trust Company's depleted coffers could be replenished, was it not? A That was a means of supplying the funds to continue to carry on their business.

Q Now, at the time you were making up the items constituting your claim against Raymond E. Smith and the National Surety Company, Exhibit P. 77, did you or did you not make any investigations to determine whether those moneys represented by the items in P. 77 had been paid out to Armstrong, and so forth? A I did.

Q What did you determine? A I could not trace it as being used for the benefit of any of the customers of the bank.

Q Did you testify in many of the criminal trials affecting persons who had by conspiracy with Smith—customers who, by conspiracy with Smith, had unlawfully obtained funds? A I testified in some of the cases.

Q Subsequent to making up your proof of loss would you say or would you not say that any of the—that your investigation shows that any of those items were used in paying checks of Armstrong and others?

The Court. I understood his last answer to relate to the present time.

Q (*By the Court.*) Did you so intend it? A Yes.

Q (*By Mr. Clark.*) Now, Mr. Vredenburgh, did I understand that there are any irregularities traceable to paying checks of Armstrong, or any others, which appear on any of the individual accounts in the individual ledger? A I think you will have to make that question a little more specific.

(Question withdrawn.)

Q I wish you would state the process which you found to exist, starting with the coming through the exchanges of one or

more checks drawn by, we will say, Armstrong, and paid by the Roseville Trust Company, at a time when Armstrong had no money there to meet that check? A The check in the manner described here by other witnesses in the case, when examined by the individual ledger keeper, to see whether he had funds to that account to pay it, and whether the signature and endorsement and so forth were correct, that examination showed a reason for returning, for instance, insufficient funds, the check went back to the receiving teller that—

Mr. McCarter. I submit that is not answering the question. He is asked to give what his investigation of the books disclosed.

The Court. Went back to the teller.

A (Continued.) Went back to the teller. Now, that check had come through the exchanges, and therefore had come through another bank. The next proper step would be the return of that check to the bank that sent it up there, and for the purpose of enabling the entry to be made. I was about to say that in expectation of that entry a record was made on what was called the return item-book of this check which the individual ledger keeper had rejected. The return item-book, therefore, would supply, if properly kept, a record of this hypothetical check of Armstrong's being returned by the individual ledger keeper, spoken of in this case as the bookeeper, to the teller; the teller's book—I think the receiving teller's book—and he receives it from the individual ledger keeper—would show a record of the check, the amount of the check, provided there were not money. The next day, the check, if it did not go back to the bank from which it was received, it would the next day go to the paying teller.

Q And how would the fact that some one or more of those had that day come in to the paying teller be indicated by the paying teller? A Come in to the paying teller or the receiving teller?

Q Yes, how would that fact that one or more of such items had come from the receiving teller to the paying teller be indicated on the paying teller's proof? A It would appear under the items on the paying teller's proof-book under cash itemized.

Q Will you resume your answer at the point where I interrupted you, the check having reached the paying teller, and being included among the cash items, or cash itemized? A The

check would continue to be counted as a part of the cash until paid for, either in cash or equivalent as a bookkeeping entry, taking it out of the cash.

RECESS.

Q Now, Mr. Vredenburgh, on what book, or books, were any such bookkeeping entries made, making a credit or allowance for the taking of these cash items out of the cash? A I remember some of them on the general cash-book and general ledger.

By the Court.

Q Now, you are not referring to those items which were contained in Schedule F, are you? A No; referring to what has been spoken of as the cash items.

Q Schedule G? A No, items found in the desk and box 55.

Mr. Clark. That is, the Armstrong checks, not good, but paid.

By Mr. Clark.

Q As the result of your examination of the Armstrong and Scarlett, and all these other checks paid without funds there to meet them, will you state whether or not your investigation disclosed that any of those were involved in the items of your proof of claim against the National Surety Company, Schedule F?

Mr. McCarter. How are we to tell? He says, Armstrong, Scarlett and others. I do not think we ought to have conclusions. The assumption that Smith got this money arises from the entry in the deposit book, and failure to enter it on the ledger. I assume that is their argument, and it is up to us to overcome the presumption. Now, if Mr. Clark, in seeking to examine this witness, seeks to overcome whatever was the effect of the evidence as to whether those shortages were or could have been made up, I do not think he should ask the general impression.

The Court. The objection is overruled.

La Rue Vredenburgh, re-direct.

An exception to this ruling is noted by the defendant as ground of appeal.

(Question read.)

A I was unable to ascertain any connection between any of the checks we found in Smith's desk, and box 55, and the items included in Schedule F. Is that the point of your question?

Q Yes. Mr. Vredenburgh, do you recall the aggregate, roughly, of the amount of checks and notes found in box 55, or in Smith's desk of the Home Ice & Products Company? A I was questioned somewhat in regard to the Home Ice & Products Company paper yesterday, and I said that I thought that the aggregate of the notes of the Home Ice Company was in the neighborhood of, or it may have been upwards of, $100,000. The notes did not all appear to be still owing. The amount of the checks of the Home Ice Company, of which I read yesterday from a schedule in the bill of complaint, or testimony in the suit against the directors, the amount the Home Ice & Products Company seems to owe the trust company on both notes and checks, I think, was upwards of $60,000.

Q Did you ascertain whether or not Raymond E. Smith was connected with the Home Ice & Products Company?

Mr. McCarter. Objected to as hearsay, and not the way to prove it.

The Court. Well, I suppose the objection is to the next question rather than to this one. I will overrule the objection to this question.

A I did.

Mr. McCarter. May I cross examine him on that?

The Court. You may.

By Mr. McCarter.

Q What steps did you take to ascertain? A The signatures on the notes and checks themselves.

Mr. McCarter. That is all.

By Mr. Clark.

Q And what were those signatures? A Smith signed as treasurer, I think; he signed in some official capacity.

La Rue Vredenburgh, re-direct.

Q For what? A For the Home Ice & Products Company.

Q Did you ascertain whether or not Smith was connected with the Intercity Land & Securities Company?

Mr. McCarter. I object to that in the same way.

The Court. Answer "yes" or "no," whether you did.

A I satisfied myself that he was connected with it.

By Mr. McCarter.

Q How did you satisfy yourself he was connected with it? A Among other things, I found a report of an auditor, report by an auditor, of an audit of the Intercity Company, for Mr. Smith, which was not of itself conclusive that he was interested. There were a good many little things, perhaps none of them conclusive, that seemed to—

Q Well, now, I want what you found, how you satisfied yourself; you saw some reports of some auditor which said something, and a good many little things? A And a bookkeeper of the Intercity.

Q What he told you? A Yes, sir.

Q Anything more? A I don't remember.

Mr. McCarter. I submit there is no legal foundation for any conclusion the witness may have that Mr. Smith was interested in the Intercity Securities Company.

The Court. I think that is so, Mr. Clark.

By Mr. Clark.

Q Do you remember whether or not you ever asked Smith?

Mr. McCarter. Objected to.

The Court. I suppose some of the declarations might be admissible, but nothing outside the suit.

Q And if you asked him, was such inquiry made on or about the date of his return, which it has been testified to was a month after the trust company closed?

Mr. McCarter. Now I object.

The Court. I sustain the objection.

An exception to this ruling is noted by the plaintiff as ground of appeal.

La Rue Vredenburgh, re-cross.

Q Now, Mr. Vredenburgh, as the result of your investigation of matters affecting the Intercity Land and Securities Company, and its connection with the Roseville Trust Company, did you ascertain whether or not Raymond E. Smith was connected with the Intercity Land and Securities Company?

Mr. McCarter. I object.

The Court. Now, as I suggested before, the answer to that question, "Yes" or "No," I think would be unobjectionable, but I suppose we might as well meet the next question. This question may be answered "Yes" or "No." I understood him to say that he had in answer to a previous question.

Q Will you state whether or not Raymond E. Smith was, according to your investigation, connected with the Intercity Land & Securities Company?

Mr. McCarter. I object.

The Court. I think under the cross examination of Mr. McCarter, and his previous testimony, that would be objectionable.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Counsel asked you on cross examination whether there was anything to prevent Smith, at the time of receiving a deposit, entering it in the pass-book, and not passing it through the ledgers, but put it in the drawer for the purpose of making good some other item, such as a Scarlett or Armstrong check; I will ask you whether or not, as a result of your investigation, you found anything whatever to indicate that it had or had not been done, with regard to the items in Schedule F? A I did not.

Re-cross examination.

Q Did you ever make examination to see? A I beg pardon?

Q Did you ever conduct an examination to see whether it had been done, or not, yourself, personally? A I did everything that the books made it possible to do.

Q Well, now, I want to know if you did not hear Smith testify in the Chancery suit before Vice-Chancellor Stevens. Did you? A I did not.

La Rue Vredenburgh, re-cross.

Q You were not present in that case? A I did not hear his testimony.

Q Now, I do not want to pursue this too long, but assume that $5,000 was paid in cash or by check, to Smith, by the New Jersey Adamant Manufacturing Company, and Smith had in the drawer of the teller, one of these overdrawing checks or two or three overdrawn checks, what would necessarily appear further in the books, if Smith had credited the account to which the amount of the overdrawn check had been charged with the amount that he desired to deposit in the drawer, and then left that check or cash in the drawer? There would not be anything, would there, to show on the books of that? A There would be the credit in the account of the depositor whose check was in the cash, and expected to be paid by charging it against his account, and if the check to be made good in that manner was accordingly charged to the account of the drawer, if it had been a check of any of these six, ten or a dozen customers who were largely overdrawn, and whose accounts were closely analyzed, the fictitious character of the credit would have attracted attention.

Q Did you personally carefully analyze each of the accounts of these several overdrawn depositors? A They were all first analyzed for me, and then when I got a chance the analysis was all gone over by me personally.

Q You went over the analysis? A I went over the analysis and all the evidence.

Q You took what somebody else had reported to you the books contained? A No, the books were there and show for themselves.

Q Do you mean to tell me you personally followed through the books the careful analysis of every one of these large overdrawers? A I had to.

Q You did? A Yes.

Q No dispute about that? A No.

Q You went through the books yourself? A Yes.

Q Very good. A There may, perhaps, be a little explanation that would clear up the question of the physical possibility of doing it, that is all.

Q I am asking you the fact, not your explanation; if you wish to go on record before this jury that you personally, with these four or five examiners there working on these books, and

La Rue Vredenburgh, re-cross.

you attending to the readjustment and the reorganization, that you personally made the inherent examination yourself of these books showing these items, I am content to leave it there, if that is what you wish to say? A That is what I wish to say. Everything was marked for me so as to save time.

Q Now, I am a depositor, and I thing $5,000 to the bank and give it to Smith, and Smith makes no entry in the books at all crediting me with the money $5,000, could not the shortage that arose by virtue of the fact that the teller was carrying a check which was no good as cash, or else that the shortage had been improperly charged to correspondent banks, be made up without a single entry on the book, except crediting the correspondent bank? Couldn't it? A If you will put your hypothetical question in this way, I can say yes—

Q Answer it as it is, first. A I am not sure that I can. I can save a lot of time.

By the Court.

Q I understood that question to be asked and answered this morning. If Mr. McCarter, as he suggested, brought there $5,000 and deposited it, and no credit was given him on the books, but there had been carried a debit ticket, we will say, by the paying teller, for $5,000, could not that debit ticket have been replaced with that $5,000 which Mr. McCarter brings there to deposit, without showing anything upon the books? A It could be without that thing itself showing on the book, but there would still remain this fact, that a check, say of John B. Farrel, had come in the previous day, and had appeared to be turned down by the individual ledger keeper and entered upon the return item book as having gone back to the teller; and then if the $5,000 of the New Jersey Adamant Company is substituted for the "N.G."—no good—check of Scarlett, there is no bookkeeping entry made by the teller, but there still remains on the return item book a memorandum of the individual ledger keeper that he turned down that check, and you go back through the book to see what became of it, and the fact that it disappeared, say, on the day that has been mentioned, when the New Jersey Adamant Company made that deposit, whoever is making the analysis, finds that a check of Scarlett's of $5,000 disappeared that day, and that a deposit of the New Jersey Adamant Company of $5,000, that they are both off of the books,

and have disappeared. Now, with a situation of that kind I would consider there was a connection, or participation, such as was inquired of me either today or yesterday, by either you or Mr. Clark. Now, have I answered your question, Mr. McCarter.

By Mr. McCarter.

Q The question you attempted to answer was asked by his Honor, asking you if it is not a fact that if Scarlatt had overdrawn to the extent of $5,000, and the return item showed that the check was no good, I ask you what further entry would be made if the check was afterwards made good by a deposit of $5,000? A There would not be any entry subsequent to the entry in the return item book.

Q So that the return item book would simply indicate that at the time the bookkeeper made it, at that time the account was no good, but if it was subsequently made good in any way there would be nothing on the return item book, or in any other book, to indicate that, would there? A If made good that day a stroke would be run through the item on the return item book.

Q Suppose made good the next day? A It would be allowed to stand until the next day.

Q Now, don't you know, as a matter of fact, the way Smith did this thing, over a long period of time, was, in the first place, to permit Scarlett and Armstrong, and a number of individuals, to overthrow to an extent that got to be perhaps a hundred and so thousand dollars; that he would let the overdrawing checks or drafts remain for awhile as cash, and then would charge them either to correspondent banks, or to individual ledgers A to L, or M to Z, and that letter, when it became necessary to remedy individual ledgers A to L or M to Z, he would, by further manipulation, take care of the situation, or make it good, by the deposit of money which in the meantime had come in? A It was the other way around.

Q All right, tell us how it was? A The items included in Schedule F are, in the main, prior to any large volume of these cash items.

Q (*By the Court.*) You mean the overdrawing items? A The overdrawing items came in large volumes and later than these abstractions of cash.

La Rue Vredenburgh, re-cross.

Q (*By Mr. McCarter.*) Do you mean to say there were no overdrawing items during the period when these abstractions of cash appeared? A No, I do not say that. I said "in the main."

Q Several of Scarlett's withdrawals were during 1912, weren't they? A I don't remember now.

Q Are you able to tell when the Armstrong withdrawals commence? A I am under the impression that the bulk of the—

Q I did not ask about the bulk? A I can only speak of it in that way.

Q I asked you if you can remember when the Armstrong withdrawals commenced? A No, I cannot say when they began.

Q Can you remember when the Bruno commenced? A They were older, as I recall it, than the Armstrong. Home Ice, and Intercity.

Q And when did the Meile? A They were partners, and practically the same concern as the Bruno; Meile and Bruno, some items would be signed by one drawer and some items signed by the other as drawer.

Q According to this B, Schedule B, that is the Bill in Chancery, Armstrong overdrew to the extent of $35,000, didn't he? A I am not sure whether that was the amount he overdrew, or the amount of checks found in the drawer.

Q But it includes— A It is one or the other, either the amount he owes on checks—I am not familiar with this thing—my recollection of Armstrong, Home Ice, Intercity were all—substantially all—I cannot say when it began, but the bulk of them—

Q I have not asked you that at all; I insist upon an answer to my question. Will you pay attention to the question and answer it? A If I can.

Q (Question read as follows: "According to this Schedule B, that is the Bill in Chancery, Armstrong overdrew to the extent of $35,000, didn't he?") A That was either an overdraft, or it was the amount of the checks that had been honored by the bank and not yet charged to him. There would not be very much difference in the account between the uncharged checks or overdraft.

Q How about Scarlett, how much was he overdrawn? A Nine thousand and odd dollars.

Q How about Bruno? A $18,000 and odd.

Q Now I want to take up this monumental document. I show you the paper that is produced upon our call as being the list of the articles that were contained in box 55; please look at it and see if, on the first page of the typewritten paper attached to it appears your signature? A It does.

Q I notice that that signature appears under the following statement. "An examination of the contents indicates to us a probability that the same is the property of the Roseville Trust Company," and you meant that the contents of the box 55 were the property of the Roseville Trust Company, did you not? A Yes.

Q Now, among other items scheduled in this long list that you found in this box 55, appear to be checks and charge tickets Intercity Land & Securities Company, $19,307.12, what does that mean— Oh, 98 checks and one charge ticket Intercity Land & Securities Company, total on slip attached $19,307.12, that means that checks of the Intercity Land & Securities Company to the extent of $19,000 were there and had been paid? A Yes.

Q In this item seems to be one bunch of checks signed by J. R. Clair, W. B. Armstrong, James J. Fusco, William H. McEwen, Frank Bruno Company, Intercity Land & Securities Company and Helen Esther Marsh, all on the Roseville Trust Company and uncancelled, and slip attached totals $31,233.64, not verified, that means that there were checks of these several individuals that I have named that had been paid, and were contained in this box? A In a bundle, with an adding-machine list attached, showing the amount, but that the amount upon the books did not verify that list.

Q I observe that among them is Helen Esther Marsh; she seems to be one of the people you have included in your schedule F attached to the complaint here. Do you remember about that? A Yes.

Q Was Helen Esther Marsh, then, one of the persons who was permitted to overdraw her account? A She was one of the persons whose—of course, I am speaking from recollection —she was one of the persons whose checks had come in and

were not good because she had failed to receive credit for a deposit.

Q She was a person then who stood in the same position, except as to amount, as Armstrong and Scarlett and these other people. A She stood in the character of, perhaps, some of the other people, whose checks were in the box, her checks having been turned down by the ledger keeper because her deposit had not been credited; the others named having no deposit to meet them.

Q How do you know that the ledger keeper made that distinction? How do you know that? A Why, because that is right; I know it only by inference.

Mr. Clark. Will you point out where he said the ledger keeper made any distinction?

Mr. McCarter. I think my question has been answered.

Q Now the next item is a policy of insurance of the Penn-Mutual Life Insurance Company, on the life of Charles M. Morrell; was that collateral for a loan to Mr. Morrell?

Mr. Clark. If your Honor please, I am reminded that by failing to object to a lot of testimony that we deem irrelevant and immaterial, it seems to have gone in by consent; I object to this testimony as entirely irrelevant and immaterial, and not within the issue, and the only effect of which is to unnecessarily drag out the proof.

The Court. I am unable to see the relevancy.

Mr. McCarter. I wish to show that this box contained assets of the company.

Mr. Clark. The objection is withdrawn.

A My recollection is that that was intended as collateral for some note.

Q Of Mr. Morrell's? A Yes.

Q That he had given, and on which he received the proceeds. A Notes he had given, and received the proceeds.

Q I notice among the other items is a mortgage of Minnie A. Havens and William L. Havens, to the Roseville Trust Company, and not recorded, was that collateral? A I think we did have that mortgage as collateral.

Q I notice other items mortgage stamped Rizzolo, and Vincezo Phillipo, on Newark property, $1,200; is that a mort-

gage as collateral for some loans that had been made? A I don't recall that mortgage.

Q Special department pass-book 8290, Essex County Trust Company in the name of Pauline Richfield, do you recollect that? A We had two pass-books in the box, one I remember how we disposed of it; we found the owner of the book; I don't remember now what happened to the other book.

Q Now, Mr. Whitman was a large borrower, wasn't he? A I don't think he was personally, but he was one of the Intercity Land & Securities Company bunch.

Q I show you a record of a deed, Clarence P. Whitman, to William J. Thompson, of Bronx property, New York City, not recorded. Did you find that deed? A I don't remember anything special about that.

Q Well, it is there, isn't it? A Well, it must have been there.

Q Did it strike you strange that Mr. William J. Thompson, this bookkeeper, should have taken a deed to secure some of the loans to Whitman?

Mr. Clark. Objected to.

The Court. The objection is sustained.

Q Did you investigate to find out what that deed was for? Wasn't it as collateral to secure loans to Whitman or Whitman's company, Intercity Land & Securities Company? A I did find out, I don't remember now what I did find out, I don't remember that, I know I found out, and I think, I assume now that it was collateral.

Q For loan to Whitman? A Yes, it may have been his indorsement on a note of the Intercity.

Q Now, did you inquire why James J. Thompson took that deed? A I don't remember.

Q He was the bookkeeper that testified here, wasn't he? A He was the bookkeeper—he was the teller.

Q Have you told us about all the deposit slips you found in that place? A I don't know.

Q You knew of the suit by the company, or the liquidator, to recover on the Jennings bond, didn't you? A I filed the claim.

La Rue Vredenburgh, re-cross.

Q Assuming that the printed book before you is a copy of that claim, you find there, do you not, a claim in the name of Jacob Dorer, for— A $2,870.

Q And a claim in the name of Henry C. Sauter, for $500? A Sauder, yes.

Q Now, look at this schedule which contains what was in box 55, and see if you find that therein contained were the deposit slips in the names of those two individuals? A I found in this list of contents of box 55 listed a deposit ticket of Jacob Dorer, 1955, for $2,830. I found in the same box 55 contents, a deposit slip of Harry B. Sauder's pass-book, 1997, dated December 4, 1911, $500.

Q Then there were included in the box 55 two deposit slips indicating claims that you listed as claims against Mr. Jennings on his bond, were there not? A I don't know.

Q What? A I don't know.

Q Well, did you have two claims against Mr. Sauder for $500? A No, but I don't know what this Schedule B is you have just shown me.

Q Look at it and see if you cannot refresh your recollection, attached to the complaint in the Sauder's case? A In this suit against the American Surety Company?

Q On the Sauder's bond.

Mr. Clark. Jennings.

Q On the Jennings bond; upon that understanding that appeared to have included those two tickets in the claim. My impression was the claim on file in that case was eleven or twelve thousand dollars, instead of the eighteen thousand dollars mentioned in Schedule B. You prepared the claim that afterwards resulted in a suit on the Jennings bond; you yourself made up a schedule, just as you made up the schedule in this case? A Yes.

Q And the conclusion that you had at the time you made it up was that the presence in box 55 of those two slips justified the presentation of the claim against Mr. Jennings?

Mr. Clark. I object to the question as incompetent and irrelevant, and as calling for the conclusion of this witness at another time, in another matter.

The Court. I think the question may be answered.

La Rue Vredenburgh, re-cross.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A I so thought.

Q Do you know where those slips are? A I do not.

Q When did you last see them? A At the time of the Jennings trial. And I might say—

Q Who had them? A I think they were in the—I don't know. If they were involved in that case my counsel had them.

Q That is Mr. Hinds and Mr. Clark? A Yes.

Q The present counsel? A Yes.

Q I further notice upon the same list of articles in box 55, was a special department deposit ticket account 2094, in the name of Annie Moreback, for $900, special account No. 2093 of Louis Moreback, $995. Another one, account No. 1383, in the name of Margaret E. Wade, $500. Do you recall those slips? A I do not, reading them off that way, and I do not recall anything about them.

Q Where are those slips, if you know?

Mr. Clark. I make the same objection to this question on the ground it is irrelevant to the issues in the case.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A I cannot say.

Q What became of the contents of box 55? A The papers have been in court so often, and a list of them, and one thing and another, that I ought to say in regard to a great many of the separate pieces of evidence that we did have, that now I don't know where they are.

Q Did you sell the deposit tickets when you sold the contents of box 55 and the desk for $65,000? A No,

Q Did you keep these deposit slips? A We kept everything of that kind.

Q You produced some here the other day in this case, I ask you where are those just referred to? A Those that are here were segregated, and in Mr. Clark's hands for use in this case.

Q Where are the others? A The others have been lost in several shuffles.

Q You don't know where they are? A No.

La Rue Vredenburgh, re-cross.

Q At any rate, there were several other deposit slips in this box 55, were there not, beside those that have been produced and offered in evidence in this case? A Yes.

Q Turning to the Haney account, which, of course, is included in the schedule F— A The account on the ledger?

Q The ticket that has been offered in evidence, and marked Exhibit P. 26, was evidently found in box 55, for it bears the mark? A Yes.

Q The bank-book of Mrs. Haney shows a credit to her account on the fourth day, ninth month, 1912, of $9,000, and that is entered on the ledger, isn't it? A This ticket belongs in the commercial or checking account, and the book you hand me is the savings account.

Q Well, you can answer my question, I don't care which account it belongs in. I ask you that question. A That deposit would not be credited on this book, that $9,000 item you mention is a withdrawal and not a deposit.

Q Which I understood perfectly. You have not given me a bit of information. I ask you again if it is not a fact that Mrs. Haney's account received a credit, both in the bank-book and in the ledger of $9,000 on the fourth day of the ninth month? I am referring to the savings account and ask you if it does not appear on the personal ledger, as well as in the bank-book, that on the fourth day of the ninth month it does not appear that Mrs. Haney was credited with $9,000? A Which account? That one or this one?

Q Savings account. A No, this $9,000 is not a credit, it is a debit.

Q She was charged with $9,000? A No.

Q Did not she draw $9,000 on the fourth day ninth month, 1912? A According to the pass-book, yes, but it was not charged on her account.

Q In any way? A No.

Q Then it appears in her pass-book that she got the $9,000? A Yes.

Q It appears on her account-book? A It appears on her pass-book that on August 23rd, she received a credit, made a deposit of $9,284.78, $284.78 was credited to her ledger account, but the $9,000 was not credited in August, neither was the $9,000 withdrawal on September 4th charged.

Q Was the $9,000 credited at all? A No.

La Rue Vredenburgh, re-cross.

Q Never? A Neither credited nor charged.

Q How about the pass-book, was it credited at all? A Yes, both the credit and debit are on the pass-book.

Q When? A The credit in August and the charge in September.

Q Neither one being entered on the ledger? A Yes.

Q Well, do you find—you recall that she testified that she transferred that to the other account, don't you? A Yes.

Q Do you find it entered in the business bank-book? Do you find it entered in the pass-book? A The pass-book shows—

Q In the commercial department? A In the commercial department pass-book, of Mrs. Haney, Exhibit P. 25, shows a deposit of $9,000, the same date of the withdrawal from the savings account, but the credit—

Q An entry appears in the ledger? A The credit does not appear in her ledger account.

Q On either side? A It does not appear in her ledger account in the department in which that pass-book belongs, the checking account.

Q Do I understand you, then, that there is no entry in either the personal ledger account in the commercial department, or in the commercial ledger account in the savings department, of that transfer of the $9,000? A The hasty examination I have just made, without referring to the side-book, or other accompanying books, seems to show that, and that is my present recollection of the case.

Q Then the $9,000 that was withheld from her account when she deposited it, started the account in the savings bank department in the eighth month, twenty-eighth day of 1911, or rather the 23rd of August, 1912, was made by the draft on the fourth of the ninth month? A No, because that transfer don't appear to have gotten here.

Q But she got credit for it? A That is a debit.

Q Well, she is charged with it, isn't she? A She is charged with it on her pass-book.

Q So it went out of the savings bank account, didn't it? A So far as the pass-book is concerned.

Q And it went over into her business account? A So far as the pass-book is concerned.

La Rue Vredenburgh, re-cross.

By the Court.

Q Are we to understand, then, that the transaction is one merely of pass-book entries? A I think that is true, with the exception of the two hundred and some dollars.

Q $284? A Yes.

Q That $9,000, that is a fact, is it? A That is my recollection of it, and that is what this looking now shows.

By Mr. McCarter.

Q What is the balance shown in the commercial account at the time the bank closed, as shown by the pass-book? A The pass-book does not show.

Q Cannot you make it show? A No, because from the checking account the charges are not on the book and the savings account withdrawals are on the pass-book.

Q Can you turn to the ledger and see? A At the time the institution was closed her ledger account shows a balance of $3.78.

Q Does that mean that she had been paid back everything that she had put in according to the ledger except $3.78? A I don't think I can answer that question.

Q According to the ledger? A Oh, according to the ledger, yes.

Q Has she proven any claim? A She did.

Q For how much? A She proved a claim for a balance of $17,612.96.

Q Have you got the claim here? A No.

Q Will you produce it tomorrow? A I could not, it is down in the vault of the department at Trenton.

Q Can you recall what that was made up of? Could not you telephone or telegraph down to the department? A I can come pretty close to telling you offhand what it is, if you will let me look at my proof of claim filed with the surety company.

Q (Paper handed to witness.) A Will you let me see the savings account pass-book of Mrs. Haney?

Q (Book shown to witness.) A I cannot figure it up as precisely as I thought perhaps I could; the amount probably would be—

Q I am not asking for guesses, if you cannot tell us what it is then we will have to ask you to send for it to Trenton. A

La Rue Vredenburgh, re-cross.

I can only add the amount of these two deposits, one of ten and one of nine, less certain checks.

Q Will you telephone, or telegraph, something or other, and endeavor to get that proof of claim here, Mr. Vredenburgh? A I will ask Mr. Hinds to do it, to give them a chance to find it. By the time I got out of court and sent word there would be no one to look it up.

Mr. Hinds. Is there any particular person to ask?

Witness. I don't know. I sent the claim down to Trenton, and whenever that claim is needed I have to send down there for it, and I expect there will be two claims, one in the savings account, and I think you had better take this number of the pass-book.

Q The ticket, have you got that in your book? The ticket is not the ticket of deposit in the account to which you referred in your schedule F, but is a ticket in the mercantile account when the transfer took place?

Mr. Clark. I object to the question; they are both in Schedule F, shows both in Schedule F, savings account and demand account, and it happens that this ticket in Schedule F is for the transfer account.

The Court. I do not understand that Schedule F pretends to show any transfer from the savings account to the commercial account; I suppose that is what Mr. McCarter means.

Mr. McCarter. That is it.

The Court. Whether this ticket is the one which pretends to transfer from the savings account to the commercial account $9,000, or whether it is the ticket indicating the deposit in the savings account.

Mr. Clark. It is a week before the transfer.

Q What relation has that ticket, Exhibit P. 26, to either of the Haney accounts scheduled in your proof of claim? A This particular item—let me see my proof of claim, or Schedule F, either one.

Q (Paper handed to witness.) This is the item set out in proof of claim under date of August 27, 1912, $10,396.46.

La Rue Vredenburgh, further re-direct.

Mr. Clark. That date has been corrected in Schedule F to August 20th.

Mr. McCarter. That is right.

A (Continued.) Now, the other item of $9,000 has no connection with the transfer; it has to do with a deposit in the savings pass-book of $9,284, and some cents, credited only as $284 and some cents.

Q How can it refer to that? A Speaking of the item in the proof of claim under date of August 23rd.

Q (*By the Court.*) I thought you said it does not refer to that? A This $9,000 on August 23rd has nothing to do with the transfer.

Q The slip has no reference to the $9,000 claimed to be owed under date of August 23rd in pass-book 1928? A That $9,000 is not the amount said to be due, that is the amount of the credit.

Q Don't you claim that $9,000 under date of August 23rd? A Yes, as a short credit.

Q You claim it is due, don't you? A Due to the trust company.

Q The slip has nothing to do with the item? A No.

Q It has to do with the other item deposited on the 23rd of August, 1912, in the mercantile account of $10,396.46? A Yes.

Q Of which there is no entry in the ledger at all? A I think it has been so testified, and I think we looked it up just now.

Further re-direct examination by Mr. Clark.

Q As a matter of fact is there any item of $9,000 even on this deposit slip, P. 26, in the commercial department on August 29th?

The Court. That speaks for itself.

Q Now, I will clear up these things very rapidly, Mr. Vredenburgh. Will you explain to us something that is not clear. What is the transaction shown to be by all of your study with regard to Helen Marsh, her checks, or a check or checks of her's found in box 55? A She had made a deposit and had not been credited to her account on the individual ledger. Accordingly, her checks came in, the bookkeeper turned them down as not good, and they went—

La Rue Vredenburgh, further re-direct.

Mr. McCarter. Is this surmise, or what the fact is?

Witness. The books show it, and they went through the usual course that were taken by the other cash items.

Q Was she, or was she not, an innocent person? A As far as we could learn, absolutely innocent, and I charged the checks against the credit she should have had.

Q Items on demand account in Schedule F has shown, does it not, that $13,704, was entered in their pass-book, and not entered in either ledger?

The Court. That is already testified to by Mr. Cloran.

Q Now, I ask you to refresh your recollection from the same book which Mr. McCarter has offered you, the record of the trial in the American Surety case, and ask you if it is not a fact that in that case, you, at the outset, withdrew from the Jennings claim, anything to do with Dorer $2,830?

Mr. McCarter. Objected to as leading.

The Court. The question may be answered.

A It was withdrawn.

Q What was done to the Scarlett claim, the claim resting on the Scarlett checks?

Mr. McCarter. Objected to as immaterial.

Q In the same case?

The Court. The objection is overruled.

A That item of $5,700, John B. Scarlett, was also withdrawn from the claim.

Q The item of how much? A $5,700, John B. Scarlett. I want to say that Mr. Clark spoke of it as a check; it was an alleged deposit.

Q That was also withdrawn? A Yes, sir.

Q The aggregate of those withdrawals is about $8,000? A Yes.

Q Now, Mr. Vredenburgh, if the Morrell life insurance policy was collateral to a loan, was it in the place where you found collaterals for loans were regularly kept, when it was found in box 55? A No.

Q What is the fact with regard to the Havens mortgage, and the other one you mentioned, was that found in the place where

mortgages were regularly kept when it was found in box 55? A Well, I do not remember enough about the Havens mortgage to answer that question either yes or no. There was a place where mortgages were regularly filed, and there was a place where collaterals were regularly filed.

Q And was box 55 that place? A And box 55 was not the regular place for either.

Further re-cross examination.

Q Going back to this Helen Marsh account, did you ascertain how the deposit that Helen Marsh made was paid—how the draft she made was paid? A You mean what her deposit consisted of?

Q No, how the draft that you say she made, or check, whichever it was, was made in fact? A The draft. I suppose you refer to the checks that we mentioned in this list of box 55 contents?

Q Yes. A I think they were all traced through the teller's cash items.

Q Funds of the bank were used to pay that, were not they? A They must have been, yes.

Q Can you tell us either tonight, or tomorrow, on investigation, when that was paid? A No, sir.

Q You cannot? You cannot find out? A Too big a job to do in that time.

ROY E. MAYHAM, sworn for the plaintiff.

Direct examination by Mr. Clark.

Q What is your occupation? A I am one of the New Jersey State Bank Examiners.

Q In 1913 were you assisting Mr. Vredenburgh in the affairs of the Roseville Trust Company? A I was.

Q Do you recall what date you arrived at the trust company in August, 1913? A It was on the 13th day of August, 1913.

Q Did you thereafter continue to be directly under Mr. Vredenburgh's employ all of the period you were there? A After a short period I went into the employ of the Prosecutor, and for the remainder of the time I remained there I was at times in the employment of the Commissioner, and at times in the employ of the Prosecutor.

Roy E. Mayham, direct.

Q Do you recall having seen in the Roseville Trust Company any representative of the National Surety Company, on and after August 14, 1913? A I do.

Q Will you state generally who, and what you saw, and about how many times? A I saw Mr. Birdsall, who, I understood, was an attorney and their representative. I saw him there, I think, I am not sure, I saw him there at least twice, and I am rather inclined to think that I saw him there a third time, and I saw a man by the name of Reilly there at least twice, and if my recollection serves me correctly, they also brought a third man there with them on at least one other occasion.

Q Did you know that Reilly was identified with the National Surety Company? A I did; I heard Mr. Birdsall state so, and my recollection is that I heard Mr. Reilly state so on the stand in the bankruptcy court.

Q What did you observe that they did generally while at the Roseville Trust Company? A They spent considerable time there, they conversed with Mr. Vredenburgh, Mr. Ferguson, and myself, and looked at some of the books and papers of the trust company.

Q Do you recall—what is your recollection as to whether or not any of the visits of any of them were after the return of Mr. Smith? A My recollection is that Mr. Birdsall was there in conference with Mr. Smith.

Q Do you recall that there was found in box 55 a certain portion of the minutes of the trust company? A My recollection is that there were one hundred pages of the minute-book of the trust company found in box 55. The sheet which you have here in court will show how many pages, and all about them.

Q Can you recall when that box was opened? A The date will be on that sheet, but my recollection is that it was in the neighborhood of two weeks after the close of the trust company. I know there was some discussion about it for some days as to our right to break open the box, and finally it was determined to break it open, which we did, according to the provision of the law.

Q What was the practice with regard to the custody of all matters having a possible criminal bearing, so far as you observed it, after you became identified with the Prosecutor? A As soon as anything was turned up which seemed to have a criminal aspect to it, it was turned over to me for further inves-

tigation, and to make report to the Prosecutor, and I kept those matters in another safe deposit box or in the vault of the Roseville Trust Company, until I finally delivered it to the Prosecutor.

Q Has any application ever been made to you by or on behalf of the National Surety Company for an inspection of any of the matters you have referred to? A Not to my recollection.

Cross examination by Mr. McCarter.

Q Mr. Vredenburgh was in charge of the bank, wasn't he? A He was in charge of the liquidation of the trust company.

Q And you were one of his assistants? A I testified already that a few days after the trust company failed I entered the employ of the Prosecutor.

Q Between the time you went into the employ of the Prosecutor and the time you went up there, in whose employ, or under whom, were you working? A Working under the direction of Mr. Vredenburgh.

Q How long a time was that? A I am unable to state just the number of days.

Q As nearly as you can? A We had a conference with Mr. Hood, who was the Prosecutor, shortly afterwards, and it was agreed at that conference that I should assist the State in the preparation and prosecution of any criminal work.

Q You continued your work right up there at the trust company's office, didn't you? A From necessity I remained there, yes, sir.

Q How long? A I remained there for several months.

Q Working just as the other gentlemen were working? A Not just as the other gentlemen were working; the difference was they received pay from the department; I received mine from the County of Essex; they worked under the direction of Mr. Vredenburgh; I did not work under his direction; I had papers in my possession which Mr. Vredenburgh had to request to see; I was holding them for the Prosecutor, and impounded them for the Prosecutor.

Q When did they leave the building? A The books left when I brought them down here and delivered them to the Prosecutor.

Q (Question read.) A I have testified they left when they were taken in a truck and brought down to the court house.

Roy E. Mayham, cross.

Q (*By the Court.*) You are asked to give the date. A I should think, the first case we brought before the Grand Jury was, I think, in November, and that was only one case we brought at that time.

Q (*By Mr. McCarter.*) Won't you kindly answer my question, when the books left the trust company and were brought to the court house? A They left about the beginning of the December term of the grand jury.

Q And remained here all the time? A A few of them may have been taken back at times, but I think they stayed here.

Q And after they left for the December term of the grand jury which I think is the first Tuesday in December, you continued to work up at the bank? A No, sir; I completed my work down here; I was there at times, but I returned to my regular duties with the State Bank Examiner.

Q Now, do you recall when the gentlemen were there from the surety company, that they were asked by Mr. Vredenburgh to quit for a while? A No, sir.

Q You did not hear that? A I did not hear that.

Q This is the first time you ever heard about that?

Mr. Clark. If your Honor please, the testimony of Mr. Vredenburgh was that some investigator, but he carefully qualified it by saying that he did not know whether it was the National Surety or the American Surety to whom he made that remark.

The Court. Well, Mr. McCarter is asking whether he remembers it.

A The first I ever heard about it was since this trial has been going on. Mr. Vredenburgh spoke to me about it and asked me whether I had any recollection as to whether or not he had made any such remark to the representative of the National Surety Company, or the American Surety Company representative and I told him it was the first I had heard of any such matter coming up.

Q Was Mr. Birdsall there alone, or in company? A I think that—I know positively that one time he came there with Mr. Reilly.

PLAINTIFF RESTS.

Motion to Non-suit Plaintiff.

Mr. McCarter. I respectfully move, your Honor, to non-suit the plaintiff in this case for the following reasons: First, this is a case to recover against the surety for loss the plaintiff claims he, or it, suffered by reason of the personal dishonesty of Smith amounting to larceny or embezzlement, and there is no proof in the case of any such loss amounting to either of those alleged crimes. Secondly, that the bond upon which the suit is brought requires on the part of the employer, the trust company, that it will make frequent audits and examinations at all times during the term hereof, take and use reasonable steps and precautions to detect and prevent the commission of any act upon the part of the employees which would tend to render the company liable for any loss. And that, in the sixth paragraph, if at any time after the beginning of the term for which this bond is written, the employer or any officer of the employer suspects, or if there comes to the notice or knowledge of the employer, or any officer of the employer, any act, fact or information tending to indicate that the employee is or may be unreliable, deceitful, dishonest or unworthy of confidence, the employer shall immediately notify the company in writing at its principal office in the City of New York, and if the employer shall fail to do so, the company shall not be liable for any act of the employee thereafter committed; and if at any time after the beginning of the term for which this bond is written, there comes to the notice or knowledge of the employer, or any officer of the employer, the fact that the employee is unreliable, deceitful, dishonest or unworthy of confidence, the company shall not be liable for any act of the employee thereafter committed. There is no proof that these two conditions of the bond were carried out by the trust company.

(Argued. During the argument Mr. McCarter moves to strike from the complaint such items as postdate the 30th of October, 1911.)

ADJOURNED to March 25th, 1919.

SEVENTH DAY.

Newark, N. J., March 25, 1919.

Continued pursuant to adjournment.

Appearances as before.

(Argument on motion for non-suit continued.)

The Court. The motion for non-suit is refused, and an exception to that ruling as ground of appeal on behalf of the defendant may be noted.

An exception to this ruling of the Court is noted defendant as ground of appeal.

SAMUEL B. SIMON, sworn for the defendant.

Direct examination by Mr. McCarter.

Q Mr. Simon, in what business are you engaged? A New Jersey Adamant Manufacturing Company.

Q How long have you been connected with it? A Nearly thirty years.

Q Hold an official position there? A I do.

Q What is it? A Vice-President and Secretary.

Q Where is the location of their office and plant? A 79-103 Passaic avenue, East Newark.

Q Just across from the Bridge street bridge? A Well, we adjoin the D. L. & W.

Q It appears in this case that on the 20th of February, 1912, a deposit by the New Jersey Adamant Manufacturing Company was made in the Roseville Trust Company's savings department; have you the check? A I have.

Q For that deposit? Will you produce it? A (Witness produces check.)

Mr. McCarter. I offer it in evidence.

Said check marked Exhibit D. 1, being check No. 11898, dated Newark, N. J., February 20, 1912, North Ward National Bank, Pay to the order of the Roseville Trust Company, $5,000. New Jersey Adamant Manufacturing Co., J. W. Day, President; Herbert E. Day, Treasurer. Endorsed, "Pay to the order of any bank, banker or trust company. February 20, 1912. Restrictive endorsement

guaranteed, Roseville Trust Company, Newark, N. J., Raymond E. Smith, Treasurer;" and then bears the puncture "paid," and some other marks that will be explained later.

The Court. Is that written or stamped?

Mr. McCarter. Stamped on the back.

Q Do you recall getting the money out of the bank? A I do.

Q I show you Exhibit P. 78, being on the letterhead of the New Jersey Adamant Manufacturing Company, please look at that and see if you are the Mr. Simon referred to in that letter? A I am the party.

Q Did you personally take that letter to the trust company? A I did.

Q About the time the letter bears date? A I did; yes, sir.

Q What did you receive? A I received the entire amount of our deposit, plus the interest.

Q In what form? A Check of the Roseville Trust Company.

Q And what became of that check? A We deposited it in our regular business account in the North Ward Bank.

Q And it was paid? A It was paid.

Cross examination by Mr. Clark.

Q Mr. Simon, when you made the deposit did you get this book? A Well, I have not seen that book in years, you know. I surrendered that when I took the money out.

Q Well, did you get a book? A Yes, sir.

Q And during the time prior to withdrawing the money where was the book? A In our office.

Q That is the pass-book? A Pass-book.

Q When you withdrew the money what did you do with the book? A I left it in the bank.

Q What bank? A The Roseville Trust Company.

Q Do you happen to recall by name the man with whom you dealt when you withdrew the money from the bank? A Raymond R. Smith.

Q Personally? A Yes, sir.

Q Did you happen to go to him, or to a window, or what? A I went to his desk by arrangement that I was coming up.

Samuel B. Simon, re-direct.

Q Was it part of that arrangement that you were to see any particular one in the Roseville Trust Company? A Well, I left the money originally with Mr. Smith, and naturally I called him up when I went in.

Q There was some interest? A Yes, there was some dispute about the interest percentage; he finally decided I was right.

Q When was that question of the interest settled, at the time you drew the money? A Yes, sir.

Q After your talk with him? A Yes, sir.

Re-direct examination.

Q You got what you wanted at the time in the way of interest? A I did.

By the Court.

Q Did I understand you to say that when you made the deposit originally it was made with Mr. Smith? A Yes, sir.

Q Where? A At his office in the bank.

Q Not at the window? A No, sir.

Q How did you happen to go to his office? A Well, I understood he was the cashier of the bank.

Q You did not go to the receiving teller's window? A No, sir; I had called Mr. Smith up, you see, to see about what interest they would pay on that account, and made arrangements with him, and naturally when I went up I saw him, called him up prior, because I wanted—

Q (*By Mr. McCarter.*) You opened the account at that time? A Yes, sir.

Q (*By Mr. Clark.*) What rate of interest were you allowed? A Well, I didn't figure it since, but I think it was four per cent. on the entire amount, instead of the regular rate which I think then was four per cent. on the first thousand, and three and a half after; but I think we made a straight arrangement throughout.

Q And you got the higher rate? A Yes, sir.

By Mr. McCarter.

Q Where was Mr. Smith's desk? A At the front of the bank.

Clarence G. Appleton, direct.

Q The check you deposited was a check on the North Ward Bank? A Yes.

Q That was paid regularly? A Yes.

CLARENCE G. APPLETON, sworn for the defendant.

Direct examination by Mr. McCarter.

Q Mr. Appleton, what is your present business? A I am an official of the Fidelity Trust Company.

Q What is the position you fill there? A Comptroller.

Q Previous to your being connected with the Fidelity Trust Company what position did you hold? A Bank examiner for the State Department.

Q How long had you been a bank examiner of our State Department? A Between seven and eight years.

Q During the year 1909 who was the Commissioner of Banking and Insurance of this state? A David O. Watkins was commissioner until April 1st and after April 1st Vivian N. Lewis.

Q Who was the deputy commissioner during this period? A Thomas K. Johnson.

Q And he is still down there? A Still deputy commissioner.

Q He has been deputy commissioner for a number of years? A Way back before this century started.

Q And does he have particular charge of the banking part of the business? A Yes.

Q Now, it was your duty to go, when you were one of the examiners, to the different state banks and trust companies and make an examination of their books? A It was.

Q Did you do so with reference to the Roseville Trust Company? A I did.

Q They, it appears, commenced business about the first of December, 1908, how soon did you make your first examination? A As of the date of March 11, 1909.

Q Up at their bank in Roseville? A Yes.

Q Will you please give us the facts that you discovered on your examination with reference to what I will, for identification's sake, designate as the Nones transaction.

Mr. Clark. Did you fix the period?

The Court. March 11, 1909.

Clarence G. Appleton, direct.

Mr. Clark. We object, first on the ground that no such evidence is competent, because the only proper method of proving the facts which the books will show is from the books themselves. Second, and very much broader, we object to the question as calling for evidence which is irrelevant and immaterial to the issues, because any matters which were discovered by this witness, or anyone else, in the year 1909, cannot possibly be availed of in this action. The defense in the case under which only this evidence would be relevant, is that the employer failed to communicate to the surety facts, and so forth, information indicating or tending to indicate that Smith was, among other things, unworthy of confidence. If your Honor please, those obligations, if violated, were during a period with which we have nothing to do. This objection of ours is fundamental; is not made haphazard, or made for the purpose of hoping that we will succeed. We stand firmly on the proposition that the transactions which occurred in the year 1909 in this case have absolutely no bearing. The contract, as your Honor will see by looking at it, is a definite contract for the period of one year. Except for the paragraph which permits of only one thing—permits of the continuance of the surety's liability by a system of renewals—the contract ended and terminated in its entirety at the end of the period in December, 1909. There is a great volume of law under which surety companies have successfully defended suits because the loss was not discovered within six months after the period of the bond, although the bond had been renewed, and defended successfully solely on the ground that it was a separate contract. I cited to your Honor the language of Frost on Guarantee and Insurance which has collected and collated these authorities. That grew to be such a hardship that the surety companies, prior to the giving of this bond, broadened the proposition in one respect, for the sake, as one court put it, of good business, by permitting the liability to continue as to losses occurring during a previous period. But nothing in the past, and nothing in any present day authority, or any authority, can be found to justify the proposition that any breach by this insured of a condition in an earlier contract can be availed of as

a defense in this action. I expressly except such things as would indicate bad faith on the part of the insured, such as an early stealing, or very patent fraud. But that does not arise in this case because there is no such plea. The only plea is that we did not give notice, and so forth, of something which occurred in the year 1909. Your Honor has before you the bond, and you see it is an absolutely separate instrument by the appearance of the bond which is in suit, and which is intended, not for this particular business, or this particular company, but it is a standard piece of business. Now, then, when they come to their renewal, they renewed "hereby continued in force," and then it goes on to say that the continuation is granted upon the condition that the representations of the employer, and so forth, and no representations have been pleaded in this case whatever. It is also conditioned, and it goes on to say, also the employer is aware of no reason why the company cannot safely continue its risk on account of the said employee; and there is no such offence of concealment, or suppression, or misleading, pleaded in this case. And the United States Supreme Court has decided in 92 U. S. that even were it pleaded, it did not constitute a defense unless they pleaded the specific acts which had served to mislead the surety into renewing the obligation. Your Honor will understand that if, for example, you have made to me a lease for one year, among other conditions being that if I fail to pay the taxes, or assessments, I may be dispossessed, and if that lease be renewed year after year by a five-line continuation, and in the fifth year for purposes of your own you desire to regain possession of that property, you could not by any pretense that if the taxes and assessments were not then outstanding so that they were a liability under the then existing contract, that any default on my part in a prior period could be availed of. And the proposition here is exactly the same with every other contract which is absolutely ended at its termination, except for the specific provision which has extended it here; and except for that extension of liability there can be no recourse had to the old bond at all; it is gone, for all practical purposes; and, as we pointed out in the

decision, if we did not have that continuance of liability, which, presumably, we paid for in our premium, every dollar of loss which had occurred earlier than six months after the first bond of course would have been gone. The law is fixed that they are separate contracts—

The Court. You are seeking to recover under it, however, are not you?

Mr. Clark. Yes. We have been at pains to point out that they are separate contracts, but by express provision they contain an arrangement under which the liability of the surety as to losses may be continued, and if there were losses which had occurred in the year 1909 those losses would be out, assuming that those facts were proved, and all of the other conditions complied with. But during the period for which we allege the losses occurred there is no claim that these matters occurred or had any application.

(Counsel cited authorities.)

(Question read as follows: "Will you please give us the facts that you discovered on your examination with reference to what I will, for identification sake, designate as the Nones transaction?")

The Court. The objection will be sustained, but by sustaining the objection I do not wish to be understood as deciding that the proof sought to be adduced by this question is improper. In other words, that the bond and subsequent renewals are separate and distinct agreements, so far as the provisions relating to warranty in the original contract is concerned, but only as to deciding that were the information about which the witness testifies is information which appears from the books, that if the books can be produced, the information which the witness obtained should be produced, unless it cannot be produced, in which event its absence may be accounted for.

(An exception to this ruling is noted by the defendant as ground of appeal.)

Mr. Clark. Then before we finish this matter will your Honor keep your mind open on this point of the separate—

The Court. You noticed I said I was not deciding that. I have had produced the books which you say supported your contention, can you quote from them in support of it?

(Argument continued.)

(The witness is withdrawn.)

ROGER H. HINDS, sworn for the defendant.

Direct examination by Mr. McCarter.

Q You are the attorney of record of the plaintiff in this case? A I am.

Q And have, since the sale of the assets of the old bank to the new bank, represented the department in liquidating what remained in the hands of the department, as counsel? A In part of the work, yes.

Q Which included the claim in this suit? A I took part in the liquidation affecting this suit.

Q And representing the department in it? A Yes, as one of its representatives.

Q Are you the counsel of the new bank? A Not except indirectly.

Q Are the books that have been produced here of the Roseville Trust Company all the books of that institution? A I believe not.

Q You agreed, as attorney of the plaintiff, with Mr. Williams, my associate, who is the attorney of the defendant, that if possible you would produce any books that were needed by the defense in the progress of this case. A Not in the unqualified way in which you state it. We had a verbal stipulation, which was reduced to writing by the exchange of letters, and I have since that time had a conversation with Mr. Williams in which we have accorded as to the exact meaning of the written embodiment of the stipulation.

Q What was the arrangement? A The arrangement—I will now confine myself only to that portion of it affecting the books—as to the portion of it that had to do with the production of books by the plaintiff which might be needed by the defendant, I pointed out that the books were voluminous, and that it took time to get them; I said, however, that we would not require Mr. Williams to subpoena those books, provided as

to any particular books which he would indicate, he would give us reasonable notice, and if he gave us reasonable notice we would do the looking for him to the extent of acting within the notice, and to that extent we would assume the burden of hunting for the original documents to permit the introduction of secondary evidence, and not himself, and that, I think, is not at all inconsistent with the written stipulation.

Q Now, pursuant to notice, did you last evening go to the cellar of the present bank, the successor of the old bank, and examine there to find, if you could, the check books on the account of the New York State National Bank of Albany from February to May, 1909, and the check books of the Philadelphia National Bank from February, 1909? A The facts are these, I did go to the cellar of the Roseville Trust Company for the purpose of getting such books as I could find, such as you mentioned, but without dates; I had no specific dates in mind, nor was any called to my attention; and I did look over all the books which were pointed out to me there by the assistant cashier of the present bank as custodian of what is in the building. I did look at all the books that were pointed out to me by that gentleman as being check books on correspondent banks, and I did pick out the check books of the Fourth Street National, and the New York State Bank of Albany, as being of the earliest dates; I think one was dated as early as April, and another as early as February; those were the earliest dates I found there. I do not know what would be disclosed if I had time to look elsewhere, because I personally have never seen those books, or any other books, as far as I know, books affecting correspondent banks.

Q Where else could the books be? Do you know of any other place where the books are? A I know of other places where the books might be, by inference.

Q And you did not look for them? A I did not have opportunity; I only had notice last night. They might be at Trenton, or in the possession of the department at other points, or in the possession of counsel; I don't know.

Q You found some books on the New York State Bank of Albany? A Yes, sir; and I brought them here.

Q You found other books of the Philadelphia National Bank? A I found some, and I brought the earliest I could find.

Clarence G. Appleton, direct.

Cross examination by Mr. Clark.

Q Was the matter of the searching and getting of these books as suggested by the counsel for the defendant? A No, not if I understand your question. Mr. Williams, in the verbal conversation that I had over the telephone, asked whether I would produce all the books here, so that it would be unnecessary for him to subpoena them. I said, "No, we will produce what we need"; I said, "If you want any others we will be glad to get them for you, and relieve you of the difficulty of search and subpoena, provided you give us reasonable notice, as it takes considerable time."

Q When did you first hear of the necessity of having in court any books of early 1909? A At the close of the trial last evening.

Q And, from what source? A From Mr. Williams.

Q Prior to that had it been taken up by counsel for the plaintiff with the Court? A I heard yourself talking to the judge and Mr. McCarter, but I did not hear all of the conversation. I did not understand you were discussing that subject, and I saw you go first and beckon to Mr. McCarter to follow you; exactly what was said I don't know.

By Mr. McCarter.

Q You could not find any earlier check books up in the cellar of this bank than those you have referred to? A Well, I did not find any, and after a search lasting fifteen minutes, in the dark, by means of a flashlight, the best of my belief is there are no earlier books in the old building of the Roseville Trust Company.

CLARENCE G. APPLETON resumes the stand.

Direct examination (continued) by Mr. McCarter.

Q Will you take such books as are here that you may need to be able to proceed with an explanation of what was disclosed therefrom, and what you further did with regard to the Nones transaction that I referred to in my earlier inquiry. What are the books you have before you? A The general ledger of the Roseville Trust Company, number one, covering the period under investigation, and the general cash-book for the same period.

Mr. McCarter. I offer them both in evidence.

Mr. Clark. Subject to our rights under our main objection.

These books marked Exhibits D. 2 and D. 3.

Q Now you may proceed. A One of the necessary processes during an examination is the verification of accounts of correspondent banks. The Roseville Trust Company, like all trust companies, or banking institutions, is required to carry accounts with other banks; first, in the nature of reserve banks, and also in the necessary course of its business.

Q (*By the Court.*) You mean by practice, not by law? A The law does for reserve purposes. In a verification of these correspondent bank accounts an examiner sends out a circular letter, which is replied to by the bank receiving the same, stating the balance at the close of business on the date of his examination, as requested, and also giving the items of debit and credit for two or three days previous and following the date of the examination.

Q (*By Mr. McCarter.*) This is so as to take care of what are called checks or drafts in transit? A Yes. In reply to my circular to the Philadelphia National Bank, when I attempted to reconcile that with the balance shown by the Philadelphia National Bank, with the balance shown by the books of the Roseville Trust Company, there was a deficiency of $2,350. In other words, the books of the Roseville Trust Company showed that they had on deposit with the Philadelphia National Bank $2,350 more than that shown by the books of the Philadelphia National Bank.

Q Did you bring that fact to the attention of Mr. Smith? A Oh—

Q What was the date of your discovery of that as nearly as you can recall? A I should say on Tuesday, the 16th, I guess it is.

Q Of March, 1909? A Of March, 1909. The circulars were sent out either Friday or Saturday, and presumably were back in my hands on Tuesday.

Mr. Clark. Please do not testify to presumption; the witness is supposed to testify to facts.

The Court. To the best of his recollection.

Witness. Do you wish me to tell how it was caused?

Clarence G. Appleton, direct.

Q Yes. A The books before me show that on February 13th there were two items of $1,350, and also an item of $1,000, charged in the cash book against the Philadelphia National Bank, and, in later conversation with Mr. Smith these debits were made against the Philadelphia National Bank to cover entries —to cover cash—that he stated that he had handed over the counter to Nones.

Mr. Hinds. I object to the last answer. I could not make any objections to the question because—

The Court. You may move to strike it out.

Mr. Hinds. I move to strike out the portion wherein the witness stated he learned from conversation with Raymond E. Smith as not binding upon us, and information gathered from any other books beside those in evidence; I would like to have that stricken out.

Mr. McCarter. I propose to follow what Smith admitted by proving that it was brought to the attention of the president of the bank.

The Court. With that understanding the testimony may remain, and if counsel is not able to fulfill that promise you may renew your motion.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q You say these deposits in the Philadelphia National Bank will you explain that answer a little? A Those charges against the Philadelphia National Bank account.

Q When was it that you had this conversation with Smith that you have just detailed in which he explained that the charges against the Philadelphia National Bank had been entered to cover payments to a man named Nones? A On Tuesday evening.

Q What date was that? A The 16th of March.

By the Court.

Q What are the items in the general cash-book? A In extension $1,350 and $1,000.

Q Is that the entire item? A No, there are—

Q Under what date is it? A February 13, 1909. There are five items constituting the total of this aggregate in the general ledger. The first is $9,213.52.

Clarence G. Appleton, direct.

Q No name? A No name. The second is $1,500.39.

Q (*By the Court.*) There is "Philadelphia National," isn't it? A Charged against.

Q Just start and read the whole item. A Debit against Philadelphia National Bank composed of five items as follows: $9,213.52, $1,500.39, $3,870.75, $1,350 and $1,000, making a total of $16,934.66.

Q What does the general ledger show? A A debit of $16,934.66 charged against the Philadelphia National Bank.

By Mr. McCarter.

Q Now, the reconciliation showed a deficiency of how much? A $2,350.

Q Smith, then, when his attention was called to that by you, made the statement that you have already related, namely that he had made those charges to cover money that he had paid to a man named Nones from the cash of the bank, is that correct? A That is right.

Q Did you bring this matter to the attention of any of the officers of the bank? A I did.

Mr. Hinds. If your Honor please we object, and I presume, your Honor, pursuant to the previous ruling, will overrule the objection.

The Court. The objection is overruled.

An exception of this ruling is noted by the plaintiff as ground of appeal.

Q How soon after your conversation with Mr. Smith did you bring this matter to the attention of any officers of the bank, who were they, and what occurred? A My recollection is that it was Thursday evening, that would be the 18th, that by previous appointment I met Mr. William C. Odell, president of the bank, at his house.

Q Go on. A That the matter was mentioned; that he insisted that before he heard me he send for the counsel of the bank, G. Rowland Munroe. After Mr. Munroe's arrival I detailed the facts as just testified to, and also went over general conditions there at the institution.

The Court. Hadn't you better tell us what you said to him? I think that would be better.

Clarence G. Appleton, direct.

Q Tell us what you said to Messrs. Odell and Munroe with relation to this Nones transaction.

Mr. Clark. I just want to make sure that my objection runs to this new line of testimony upon the ground it is irrelevant.

The Court. Yes, upon the ground, I understood you to insist, that the bonds, so far as carrying forward the conditions of the main bond, are separate and distinct obligations. That, in short, is your ground.

Mr. Clark. Yes, so far as carrying forward any of the obligations which may have been breached by the insured during a former period.

The Court. All of this testimony relating to the Nones transaction it will be assumed is taken subject to that objection.

Mr. Clark. And an exception granted to your Honor's ruling.

The Court. You are entitled to that.

Q I will modify my inquiry, or, rather, withdraw the last question I put to you which was interrupted by the objection of counsel, and ask you this, Mr. Appleton, if in your talk with Mr. Smith he spoke to you, or told you, of any transaction of a similar nature that had occurred with reference to the Albany Bank, which was later brought to the attention of Messrs. Odell and Munroe.

Mr. Hinds. I object, now, on the additional ground, first that the admissions and declarations of Raymond E. Smith are not binding upon us. The second, and broader ground, that new matters sought to be elicited by this question are not pleaded, and, I believe, not embraced in the bill of particulars, and certainly not within the issues, or relevant to the issues.

The Court. The objection will be overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q (Question read.) A No.

Q Did you learn from Smith of an earlier transaction in connection with the Nones matter between him and the Albany

account? A Well, there were two transactions. I don't know which one you refer to now. In my letter to the department there were two transactions referred to.

Q The one you first learned about. A The one I first learned about was the $1,350 item which was originally on the sixth of February, one week prior to this charge against the Philadelphia National Bank, charged against the Albany Bank, New York State National Bank of Albany. That was the beginning of this transaction.

Q Namely that on the sixth of February a charge had been made to the Albany bank of how much? A Of $1,350.

Q Did you find an entry in the books of that charge to the Albany bank? A No charge to the Albany bank.

Q What did Smith tell you about that that was later brought to the attention of Mr. Odell and Mr. Munroe? What did Smith tell you about that transaction on February sixth in connection with the Albany bank that you later brought to the attention of Mr. Odell and Mr. Munroe?

Mr. Hinds. We make the same objection.

The Court. I understand that an objection to this entire line of testimony has already been noted.

Mr. Hinds. This is an additional ground, that these declarations of Smith are not competent.

The Court. The objection is overruled.

An exception of this ruling is noted by the plaintiff as ground of appeal.

Q Mr. Smith, as I understand, told you that prior to the two entries against the Philadelphia bank he had made some charge to the Albany bank of $1,300? A $1,350, and had handed the money to Nones.

Q What did he tell you he had done after that in connection with the Albany transaction? A That Nones had come to see him on the thirteenth of February, and had said that he needed an additional thousand dollars; that Smith had given him a thousand dollars, and that, to correct his entry with the Albany bank, he had credited the Albany bank with $1,350 on February thirteenth, and had charged the Philadelphia National Bank with that $1,350, and also with the additional $1,000.

Q Where was that interview between Smith and you? A In Montclair where I was boarding.

Clarence G. Appleton, direct.

Q When did it occur with relation to the discovery of the shortage by the reconciliation? When did it occur with reference to the discovery after your reconciliation of the false charges to the Philadelphia bank? A When did I go over the figures?

Q No, when did this conversation occur with reference to the reconciliation of the figures from the Philadelphia bank, before or after? A My conversation with Smith was on Tuesday evening.

Q (*By the Court.*) Was that before or after you made your reconciliation with the Philadelphia bank? A I may have made that on Tuesday afternoon, or Wednesday morning. I cannot tell you which.

Q If you had not your reconciliation how would you have known of any irregularity? A If I had not I would not have known.

Q Then had you made your reconciliation before or after you saw Smith in which he made these statements? A My impression is that my reconciliation was not made until the following day, on Wednesday.

Q Then, at the time you had your conversation with Smith you did not know of the irregularity? A That is my impression.

By Mr. McCarter.

Q Smith and you saw one another on the evening of Tuesday, whatever date that was, and he told you of these facts that you have related, and either that day, or the day after, you cannot now recollect, you received your reconciliation sheet from the Philadelphia bank which indicated that what Smith said was the fact, is that correct? A That is right.

Q How long had you been examining the books of the bank at this time of your talk with Smith? A I started my examination Friday morning, the twelfth.

Q He was, of course, aware that you—

Mr. Hinds. Objected to as leading.

(Question withdrawn.)

Q Was Mr. Smith around when you were examining the books? A He was.

Clarence G. Appleton, direct.

Q Now, you have started to tell us the conversation between yourself, Mr. Munroe, the counsel and notary of the bank, and Mr. Odell, the president, won't you please repeat now as much as you recall of that whole conversation after Munroe had arrived? A I started in by speaking of this matter, that the reconciliation with the Philadelphia National Bank had shown a shortage in the account of $2,350; and I also told them with reference to that that Smith had been to see me and had confessed to the falsification of the books. After that we talked over—and it may have been after that, or not—we talked over also the general conduct of the bank.

Q Not concerning Nones? A Not concerning Nones.

Q Well, I won't pursue that. Have you told us all that you recall that was said between Odell, Munroe and yourself, concerning the Nones transaction on that occasion? A Concerning the Nones transaction, yes.

Q What did they say they would do? What did Mr. Odell or Mr. Munroe say? A I told Mr. Odell that the banking department could not stand for crooked work of that kind, and could not stand for the retention of Mr. Smith as treasurer of that company.

Q And what did he say, if you recall? A My recollection is that I asked him the question— However, the conversation, whether it was brought out in that way, or not, was as follows: Mr. Odell told me that evening, I may have questioned him whether he knew anything about Smith's past history, and his connection with the Second National Bank of Orange where he was the teller, whether that was the way the conversation was developed I don't know, but Mr. Odell told me that someone, I cannot recollect now whether he mentioned who it was, had suggested to him, when they were—after Smith had been employed by the Roseville Trust Company—that if he would call on President Poor of the Garfield National Bank of New York—

Mr. Clark. I object to this as something entirely apart from the Nones transaction, and is not in issue, unless the witness has knowledge that this information was in fact communicated to the directors of the bank.

The Court. The conversation with Mr. Odell is permitted.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A (Continued.) President of the Garfield National Bank, he would receive information about Smith's past history in connection with his relations with the Orange National Bank. I asked Mr. Odell whether he had gone to see President Poor; he said he had not, and did not intend to.

Q Now, have you given us the extent of the confession, as you call it, that Smith made to you in Montclair of the transactions he there confessed? A He there confessed only to this one transaction of $2,350 covering two different incidents.

Mr. Clark. I object to the characterization by the witness, I think we are entitled to have the conversation as it occurred.

Q Now, did you later, after your conversation with Smith, to which you referred, and after your conversation with Mr. Munroe and Mr. Odell, to which you have referred, discover some further matters in connection with the Nones transaction? A I think I had specified two, and on account of the condition of the draft-books—

Mr. Hinds. I object on the additional ground, now, we are having secondary evidence of books which have not been produced, and the foundation has not been laid for secondary evidence.

The Court. He has not testified as to what the condition was, or what he found in the draft-books.

Q What did you later learn with reference to Smith and Nones over and above the transaction with reference to the $1,300, first with the Albany bank, later covered up, as you said, by the transaction for the two amounts of $1,300 and $1,000 with the Philadelphia bank, in connection with Nones? A I went back to the institution somewhere around the first part of April in order to secure a complete reconcilment, reconciling statements from the various corresponding banks. I went over them carefully; I took the various check-books—

Mr. Hinds. I object to any secondary evidence respecting check-books.

Clarence G. Appleton, direct.

The Court. I suppose he may state that he compared books, without stating what that comparison showed.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Proceed. A I will omit how I found it. I went back there in April and I found that the transaction of the characters just narrated as happening in February had happened in the previous December.

Q Not the same transaction? A Not the same transaction, but of similar nature.

Q Tell us what you discovered had happened in December.

Mr. Hinds. Objected to on the ground it is trying to bring out evidence shown by the check-books and draft-books on the ground that no foundation has been laid for secondary evidence.

The Court. Is it an admitted fact that the books to which the witness is now referring are not here?

Mr. Hinds. That is admitted, and if we had had some notice coming more nearly to the reasonable notice in our stipulation, then we would have assumed the burden of search and production.

Mr. Clark. We will consent that the counsel may later supply further proof of an effort to find the books, and failing which, evidence which would be improper without that further proof which may later come out, may now go in upon the understanding that they may later supply it.

The Court. My thought is that you have, perhaps, gone a step too far, and that the stipulation should be that this testimony may now be received with the understanding on your part, and that you will reserve to yourself the right to move that it be stricken out. I rather thought that by remaining silent at this time might give the impression that that would be the ruling of the Court if it was not further connected. I have not quite decided yet that, by the testimony already given that these books are not where the other books of the institution are, as testified to by Mr. Hinds, secondary evidence may not be given.

Clarence G. Appleton, direct.

Q Mr. Appleton, what books did you have to consult other than books that are before you to ascertain the facts as to what had transpired in December? A The two books that are before me, and also the check-books, cancelled vouchers on the various banks.

Q Well, which bank as far as these transactions are concerned? A The New York State Bank at Albany.

Q At that time there was a check-book on the New York State Bank of Albany for the period covering December, 1908? A My recollection is that there was.

Q Was there a check-book on the Philadelphia National Bank for the same period? A There was not.

Q Now, which books other than those that are here, was it that you did consult in order to ascertain what you did ascertain concerning the December transactions at Albany? The Albany check-book? A The Albany check-book.

The Court. I understand that that is here.

Mr. McCarter. No, that is not here; that is one of the books asked for, and it is not here. Mr. Hinds said he could not find it. I understand that the request was made that they would produce the check-books covering this period, all these books, and that in response to request the books that are here are all that were produced, and Mr. Hinds says all they could find. We did not know anything about the dates, and asked him to produce check-books of the correspondent banks covering this period.

The Court. I understand objections are now withdrawn to these questions relating to books which are not produced, reserving the right to move to strike out the testimony later.

Q Now, what did you find when you had consulted the check-books, earlier check-books, covering December, 1908, of the Albany National Bank with reference to these December transactions? A That Smith had advanced money, he said, to Nones, and covered it in this way.

Q Covered it in what way? A By making false entries in the New York State National Bank account.

Q These are earlier entries than those to which you have referred, and which were the subject of your conversation with

Mr. Odell, and Mr. Munroe on the evening in question? A That is right.

Q Had Smith referred to the December transactions in his conversation which, I will take your description, and call his confession, had he referred to them? A He had not.

Q At the time, then, of your talk with Odell and Munroe you knew nothing about these December transactions? A I did not.

Q Did you bring those facts which you had discovered, both in regard to the February matter and in regard to the December matters, to the attention of the department at Trenton? A I did.

Q I'll show you a letter which, on our call, the other side produces, dated May 14, 1909, addressed to William P. Odell, Esq., president Roseville Trust Company, Newark, N. J., and ask you by whom that letter is signed.

Mr. Hinds. We will concede the authenticity of the letter. Our objection, we feel, is broad enough to cover the admission, both on the same ground your Honor has already ruled, and our exception noted; but as to the authenticity there is no question.

Letter offered in evidence and marked Exhibit D. 4. (Reading same.)

Mr. Hinds. I was unable to make exception without interrupting counsel. As to the other part of the letter, other than the Nones matter, I ask that it be stricken from the record, and that the exhibit be confined to the Nones matter, and the other part stricken out, on the ground that as to the other matters which are not within the pleadings, and not within the issues, and even if they were the letter is not competent, but is merely hearsay as to the facts therein contained. It is not admissible on the theory of being noted to the bank, because there is no proof that the facts themselves occurred; it would be equivalent to proving those facts by means of this hearsay evidence.

The Court. What you say about the letter may be true, but it is rather difficult to pick out from the letter just those portions which are and which are not relevant. Of course, the letter is to be considered by the jury only

in reference to those portions which do refer to matters in issue. The motion will be denied.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Mr. Appleton, is it true, as this letter says, that there was no check-book on the Philadelphia bank? A There was not at that time.

Mr. Hinds. That may explain why I was not able to find that particular book.

Q And what was the fact with reference to the stub of the check-book, whichever one it was, from which the check on the Philadelphia bank had been drawn? Was it filled up? A Checks, drafts drawn on the Philadelphia National Bank at that time were simply a blank draft form that you can go and buy at any stationery store; there was no stub.

Q No stub? No stub entry whatever? A No.

Q Now, Mr. Appleton, I will pass to another subject. I am showing you Exhibit D. 1, which is the check of the Adamant Manufacturing Company that was deposited on this bank account. Are you able, as having been a bank examiner for years, to read the perforations on that check? A There are two perforations, one is of the amount, $1,350, and the other is the paid perforation of the bank paying the check, and read, "Paid to 2/21/12," which means February 21, 1912, in other words, paid February 21, 1912.

Q And that is the perforation of the correspondent bank of the Roseville Trust Company? A No.

Q Which bank? A The paying bank which, in this case, is the North Ward.

Q From your examination of the books of this institution you knew who the exchange bank—it was the exchange bank of the Roseville Trust Company in Newark in 1912? A I cannot testify from knowledge in 1912.

Q Did you at that time of this examination in March, 1909, discover any other irregularities other than the Nones transaction to which you have referred? A I did not.

Q (*By the Court.*) That was your last examination of this bank? A No, I made two others.

Clarence G. Appleton, cross.

Q When were they? A One was October, I think, 1909, and the other was April, 1910.

By Mr. McCarter.

Q It appears from the letter of the commissioner which I have just read that the Nones shortage concerning which you have testified was subsequently paid. Assuming that to be the fact, did that restoration or payment leave the Roseville Trust Company at that time, so far as you were able to have learned from your examination, in a solvent condition? A It did.

Cross examination by Mr. Clark.

Q Mr. Appleton, you have stated in response to questions of the Court that you had made two subsequent examinations of the Roseville Trust Company, is that right? A That is right.

Q What are the dates of those subsequent examinations? A October 6, 1909; May 25, 1910.

Q When did you sever your connection with the department? A On June 30, 1910.

Q And the examination was made what day? A May 25, 1910.

Q How long had you been connected with the department prior to the March, 1909, examination of the Roseville Trust Company? A I went with the department in May, 1903.

Q What was the practice of the department with regard to making or not making a prompt examination of a banking institution within a reasonable period after it started. A The practice was to make an examination within the first two or three months.

Q And that was true of all new banking institutions? A It was.

Q Whether there was anything suspicious about them or not? A Yes.

Q So that the examination in March, 1909, of the Roseville Trust Company was in the ordinary routine of the department? A It was.

Q It was not prompted by any information, so far as you knew, of any irregularity? A No.

Q And had nothing to do with the fact that someone may have thought Smith at some time might have done something else that was wrong? A Not as far as I know.

Clarence G. Appleton, cross.

Q Now, Mr. Appleton, are you familiar with the practice adopted by Newark institutions which clear through another bank? A I think so.

Q What is the practice with regard to an institution in Newark clearing through another bank, handling deposits consisting of checks drawn on a third Newark bank?

Mr. McCarter. I understood you were objecting to our going into the other transaction I wanted to, because he was not there at the time, 1912.

Mr. Clark. Oh, I did not object. You asked him if he knew what was the depository or correspondent bank of the trust company in 1912. I have no objection to the testimony showing the course of business in Newark institutions.

A The present custom is of the bank clearing through another bank will list their checks on the various Newark banks in separate envelopes, and will send them through their corresponding, or clearing bank, or clearance, and receive credit for the total amount.

Q What would you say as to whether or not the omission of any stamp of the clearing bank had any significance? (Showing witness a paper.) A Well, it is very frequently the case that a clerk, in stamping a lot of checks, will omit one or two or three, maybe. In the regular course of business there are checks coming back continually through the mail, and from the exchanges for lacking stamps.

Q In the regular course of business if the Roseville Trust Company had followed the practice you mentioned of sending this to its clearing bank which, we will assume, is the Union National, would the Union National in the regular course of business have put their stamp on there?

Mr. McCarter. Objected to.

The Court. The objection is overruled.

A Yes.

The Court. Your question should be the practice at that time.

Q I was referring to the practice in 1912; did you so understand my question? A My recollection is that it was practically the same at that time as it is today.

Clarence G. Appleton, cross.

Q Now, Mr. Appleton, you are employed by the Fidelity Trust Company? A I am.

Q Of which Mr. McCarter's brother is the head? A He is.

Q In your testimony you made the statement that Smith stated that he had handed the money over to a man named Nones; were those his exact words? A As I recollect them.

Q As a matter of fact Smith received a note from Nones for the full amount of this money, did he not? A He said he did.

By the Court.

Q Did you see it? A Not until afterward.

Q Well, did you subsequently see the note? A Yes.

By Mr. Clark.

Q Then you did see that Smith had received a note from Nones? You did see a note from Nones which was the same one which Smith said he had received? A Toward the close of the examination.

Q Then, why did you answer that question by saying, "Smith said he did." A I thought you said at the time he handed the money.

Q Did you find anything to indicate that Smith did not receive a note from Nones at the time he handed the money? A No.

Q As a matter of fact, Mr. Appleton, if any depositor comes in and discounts a note would not Smith hand the money over the counter after he discounted the note? A If it was bought in that way.

Q Now, then, it would appear that you had made on this occasion a very thorough examination, is that a fact? A I believe so.

Q Will you state to the Court and jury whether in your opinion there existed any irregularity or manipulation in the affairs of that trust company on that date?

Mr. McCarter. On what date?

Q On the date of your examination, in March, 1909, which you did not discover.

Mr. McCarter. You mean other than the Nones?

The Court. He discovered that; it would not be included in the question.

A My understanding is that you are asking me whether there were any other irregularities which I did not discover on that date.

Q (*By the Court.*) Whether there were any irregularities which you did not discover. A There was only one irregularity which I did discover, and, I believe, there were none other.

By Mr. Clark.

Q And that one was the shortage in the Philadelphia bank? A Yes.

Q Now, then, you found that things were pretty careless in the institution, did you not? A I did.

Q Just for our information, I have not the slightest idea—what would you say as to the comparison between this as a matter of careless condition aside from the Nones affair and the average new institution of which you were accustomed to make examination?

Mr. McCarter. Objected to as immaterial and irrelevant.

The Court. I sustain the objection.

An exception to this ruling is noted by the plaintiff as ground of appeal.

RECESS.

Q Mr. Appleton, did you find on your return to the trust company in April that Nones' indebtedness had been paid? A It was.

Q Your report to the department, which is included in the Commissioner's letter, as read, refers to the fact that you did discover there had been previous transactions of a similar nature with the Nones; did you find that after those transactions the company suffered any loss? A They did not.

Q And, of course, they suffered no loss in connection with this February, 1909, transaction? A They did not.

Q Now, then, when you called the attention of Mr. Odell and Mr. Munroe, as you state, to what you discovered in your examination in March, 1909, did you tell them about the other

things that are comprised in this letter from the Commissioner which has been read, Ex. D. 4? A I did.

Q Well, that made quite a list of things to talk about, didn't it? A It did.

Q Did you tell them that when you inspected the draft-books you found that the stubs in many cases had not been filled out when the drafts were drawn? A I did.

Q That in one case, the National Shawmet Bank, there were five or six of these missing drafts, the stubs being blank, and that for one of the drafts, number twenty, Treasurer Smith, when he was asked to produce it, said that he had torn up the draft; did you tell them about that? A I think that was afterward, was it not?

Q This is all in the letter of May 14, 1909? A The question is whether that did not develop in my April examination, and then, of course, I could not tell them.

Q Mind you, this is a physical fact; not anything to do with reconcilment. A If that was developed in my April statement I could not have made the statement on March 18th.

Q Now, then, did you make physical examination of the books of the bank in April—all of them? A No.

Q You did all that in March, didn't you? A Yes.

Q So that what was there in the way of physical presence, or absence of entries, you learned in March, didn't you? A What is that?

Q (Question read.) A You are trying to mix me up in April and March.

Q Not a bit of it. Will you answer the question? If you cannot, I will withdraw it and re-frame it.

Mr. McCarter. Make it plain, Mr. Clark.

The Court. As I understand the inquiry it is whether or not you discovered the absence of notations upon the stub, and the missing draft on the Shawmet Bank, and the absence of entry on the stub in the book in your February examination.

Witness. I discovered certain of those things in my examination in March, and that is what caused me to go back in April to make a complete survey, or examination of all the accounts. In other words, practically made two examinations, one on the eleventh of March and one, according to the report I sent back, in April.

Clarence G. Appleton, cross.

Q Did your examination which you made in April include examination of the stubs of these check-books on correspondent banks? A It did in April.

Q Did it in March? A It did, some of it, in March, and it was the irregularity that I saw in March that caused me to come back in April.

Q How could you check up in March as the drafts themselves were not present without observing the condition of the stubs? A I say I did observe that the stubs were not in regular form.

Q In March? A Yes.

Q I want the fact about the stubs perfectly clear. When you returned in April was not your examination directed particularly to a Nones-Smith transaction? A My examination then was a second verification of all the bank balance.

By the Court.

Q With reference to correspondent banks? A With reference to correspondent banks.

Q Was that all? A That was all.

By Mr. Clark.

Q I want to get the facts whether or not you ever called to the attention, yourself, when you were there, either in March or April, of any officer of the trust company, with the exception of Smith, to the fact that you found, when you inspected the draft-books, that the stubs in many cases had not been filled out when the drafts were drawn. A Yes, that matter was talked over with Mr. Odell.

Q Then you talked to him, did you not, about all this stock in the American Commercial Bank? A Yes.

Q And then you told them all about these papers that were not in place? A I did.

Q Mortgages, certificates, and so on? A I did.

Mr. McCarter. Told whom, Mr. Clark?

The Court. He is speaking of Mr. Odell.

Witness. Mr. Odell, at his house.

Q Was it at that time that you also told them that the surety bonds should be kept with the securities owned in restricted access? A I did.

Clarence G. Appleton, cross.

Q Now, then, will you tell the jury for our information whether or not the bulk of your examination in March, 1909—the standpoint of time consumed—was not spent on an examination of the credit and financial responsibility of the borrower? A A portion of it.

Q What portion, relatively? A Well, I could not tell you.

Q The first information which came to you from any source, including your own searching, about this Nones transaction came from Smith, is not that what you testified to? A That is right.

Q He volunteered it? A Yes.

Q Did he tell you whether or not he gained any profit or personal advantage out of the Nones matter? A Nothing was said with reference to that that I remember.

Q He did not say whether he did or not gain any personal advantage or profit? A I don't remember that he did.

Q (*By the Court.*) Do I understand that before you had spoken to Smith about the Nones matter he came and told you about it? A He telephoned in the night to my home and made an appointment to meet me in Montclair on Tuesday evening.

Q (Question read.) A He did.

Q (*By Mr. Clark.*) When Mr. Commissioner Lewis in his letter of May 15, 1909, Ex. D. 4, said, "Taking the various matters together they seem to disprove the statement of Treasurer Smith that he had no interest in any of the transactions, and that they were all made out of friendship for Nones," does that refresh your recollection as to whether or not Smith had made any statement as to whether or not he personally profited out of these transactions? A Your point is whether he told me?

Q Oh, the question is very simple, particularly to a bank examiner. (Previous question read.)

The Court. The question is, does that statement in that letter refresh your recollection?

Witness. I do not recollect that he—

The Court. No; the question is, does that refresh your recollection?

Witness. No.

Q Did anyone on behalf of the Department of Banking have any contact with the Roseville Trust Company at the time of this

March, 1909, examination but you? A Was someone else with me, do you mean, at the examination?

(Question withdrawn.)

Q Did Commissioner Lewis ever go to the Roseville Trust Company at the time of the 1909 examination? A Not that I know of.

Q Did anyone but you report to Commissioner Lewis the results of your examination? A No.

Q So that any information contained in this letter to Commissioner Lewis concerning this examination is based upon reports that you made personally? A That is right.

Q And you do not recall that Mr. Smith made any statement to you as to whether or not he had any personal advantage in connection with these Nones transactions? A Not to my recollection. He may have.

Q You want to leave it that way? Now, when you talked with Mr. Odell at his house concerning all of these matters, did you find that he was an experienced bank officer? A No.

Q What did you find in that respect?

Mr. McCarter. Objected to as not cross examination, and irrelevant and immaterial.

The Court. I do not quite see how this witness can tell, or is qualified to express an opinion upon the qualifications of Mr. Odell. The objection will be sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Mr. Appleton, can you state whether or not Mr. Odell's conversation to you indicated that he was aware of the practices that were being carried on in the bank?

Mr. McCarter. I object. Do you mean to practices referred to by the witness?

Mr. Clark. I do.

The Court. The objection will be overruled.

A I do not think so.

Q (*By the Court.*) You do not think what? A That he knew about it.

Q (*By Mr. Clark.*) Did Mr. Odell display in his conversation with you any familiarity with the books?

Mr. McCarter. I object.

The Court. The objection will be sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Mr. Clark. It is on the point, which I would like to have noted on the record, that the impression which information brought to the officers and directors makes on them, which is an issue in this case, and it is quite impossible, out of a hostile witness on cross examination to get anything more than the result of the conversation in so far as it indicated, or did not indicate, familiarity with affairs and methods of conducting the bank.

The Court. Conceding that, the impression which that made upon him is for the jury to determine from what he said and what he did, not by the impression which this witness received as a result of what he said and did.

Q Mr. Appleton, what, exactly, did Mr. Odell answer to any of your statements with regard to these transactions concerning which the letter of May 14, 1909, relates? A It is hard to recollect. With reference to the important matters that he would take them up at once with the directors and Mr. Smith, and as to the minor matters he would see that the corrections were made.

Q Did you say to Mr. Odell that the practice which you found of the treasurer, leaving stubs blank in the past, indicated that the Nones transaction did, or did not, indicate anything wrong on the part of Mr. Smith? A I do not think I said anything about that.

Q Can you recall whether, in your conversation with Mr. Odell, you spent as much as an hour on the loans of the bank to Nones? A I should say not.

Q Do you recall how long the entire conversation lasted? A My recollection is that it was between eight and half-past until about half-past eleven.

Q Now, then, Mr. Appleton, this conversation with Odell and Munroe is the one you mean when you were talking about the conference with Odell, is it not? A It is.

Q And that occurred on Tuesday after the Friday when Smith told you all about it, is that right, or am I wrong on that? A You are wrong.

Clarence G. Appleton, cross.

Q Well, I will go at it this way: Did Mr. Odell or Mr. Munroe tell you at that conversation you had with them whether or not Smith had talked with them about this matter previously? A I do not recollect.

Q You have no recollection? A I do not recollect. According to the letters read it would indicate that he had spoken to them.

Q But you have no recollection? A I do not recollect.

Q There is nothing in your memory concerning anything that Mr. Munroe or Mr. Odell told you as being an explanation of these occurrences given to them by Smith previously? A No. That Saturday referred to, I don't know whether it means Saturday during my examination or afterward.

Q (*By the Court.*) On Tuesday was your conversation with Mr. Odell and Mr. Munroe? A Thursday; they are speaking of Saturday in the letter.

Mr. McCarter. Saturday following the examination according to the letters.

Q (*By Mr. Clark.*) Now, then, Mr. Smith had told you on Tuesday that he had already discussed the matter with Odell and Munroe, did he not? A I do not know, I cannot remember.

Q Will you refresh your recollection; you may look at the original letter. Refresh your recollection from Exhibit D. 4, and tell us what you now recall the facts to be. A This letter would indicate that the confession was made on the thirteenth of March; that is before my conversation with Mr. Odell.

Q And you like to describe it as a confession, Mr. Appleton? A I should say that was what it was.

Q Now, the question was whether or not, after refreshing your recollection from this letter, you would testify as to whether or not Mr. Smith had told you previous to your conference with Mr. Odell and Mr. Munroe that he, Smith, had told Munroe and Odell about these occurrences, the Nones matter. A According to the letter he had.

Q You have no recollection apart from the letter? A Well, that must be true.

Q Have you any recollection apart from the letter? A From my own knowledge, ten years ago, I cannot say yes or no, but I am willing to stand by that letter, because that is a quotation from my report.

Clarence G. Appleton, cross.

Q Now, then, suppose these stubs—first, do I understand from your testimony given to Mr. McCarter that the drafts drawn on the Philadelphia bank were not in a binder, in a leather draft-book? A They were not.

Q You described them as such as you would buy from a stationer's? A Yes.

Q Do you recall whether or not there had been, since the opening of the bank in the end of 1908, until this date, February 6, 1909, many transactions with that Philadelphia bank? A I could not state that.

Q What is your recollection? A I have no way of knowing.

Q Can you look at the cash-book and tell? A I can tell here how long the account was running, I could not tell how many drafts had been drawn.

Q So that on that matter you have no recollection? A No, not as to the number of drafts.

Q Were there any stubs with those drafts bought at the stationer's? A Yes, but they were not used, were not filled in.

Q In what form were the stubs? A You know what the regular draft form is, has a little stub on the end, but those were simply used for the Philadelphia National Bank, simply torn out and nothing filled in on the stub. That is my recollection.

Q Were they bound? A The stubs were bound, yes.

Q In how many instances had drafts on that bank been used without stubs being filled out at the time of your examination? A I could not state.

Q Do you recall any except these Nones transactions? A Yes. That was the only form used on the Philadelphia bank.

By the Court.

Q None of them filled in? A None of them filled in.

Q That had been drawn on the Philadelphia bank? A That had been drawn on the Philadelphia bank.

By Mr. Clark.

Q I do not know whether you testified as to whether or not any entry had been made in the cash-books? A Of what?

Q Of these drafts drawn on the Philadelphia bank. A Which ones?

Q Any of which the stubs were not filled out. A Oh, yes.

Clarence G. Appleton, cross.

Q Entries had been made in the cash book? A Yes. You are speaking in general terms, I understand it now, of drafts drawn on the Philadelphia bank.

Q Yes, and I should like very much whatever qualification or restriction necessary you want to make you should make; I am not interested in confusing, I only want the facts; now qualify your answer in any way you like. A I will have to have the question again, please.

Q You have answered the question that in all cases where the stubs of drafts drawn on the Philadelphia bank during this period prior to your examination in March, 1909, were not filled out; that in all those cases, as a general proposition, the draft entries had in fact been made in the cash book, is that so? A That is so.

Q Is that so with regard to the Nones checks? A No.

Q Then, will you look in the cash-book for February 6th and 7th, and see if there is any entry with regard to the $1,350.

The Court. He has already testified about that, that there was not. I am right about that, am I not?

Witness. Yes, there was no entry here on the New York State.

Q I am speaking of the Philadelphia, whatever the proper date is.

The Court. Well, that was the 13th.

A The 13th two debits made against the Philadelphia National Bank.

Q So with the cash-book, and that was also carried into the general ledger? A It was.

Q So that the cash-book and general ledger both showed the items regularly entered, is that not correct? A No; these are drafts; you are putting a debit there; they are simply amounts forced in the account on the debit as though they had sent those items to the Philadelphia National Bank.

Q So that the entry which was made in the cash-book and the ledger—let us get the facts here—was what, instead of what it should have been? Will you just explain that? A Were debits made against other accounts with the Philadelphia National Bank?

Clarence G. Appleton, cross.

Q And what should they have been? A When drafts are drawn a credit is made.

Q Well, then, did you call that to Mr. Odell's attention? A I explained the transaction to him, how it was done.

Q No, no; the question is did you call that to his attention? A Yes.

Q What did he say? A I can't remember now.

Q Did he say whether or not he knew anything about book-keeping? A I cannot remember that.

Q Did he say whether or not he knew anything about the conduct of the trust company business? A I cannot remember.

Q Now, Mr. Appleton, you have testified that as a matter of fact you found that a note was given by Nones for this transaction which note was subsequently paid. Now I will ask you whether, if Smith had filled out those draft stubs, and had made the entry the other way about in the cash-book, there would have been anything for you to have criticized in that transaction? A There was nothing—

Q No, no, it is a perfectly simple question. (Question read.) A There would still have been a shortage somewhere.

Q And you say that there was a shortage somewhere, although at the time that Smith had paid out the money he had received an obligation in the form of a note of Nones? A Yes; he had not put the note through.

By the Court.

Q Suppose it had gone into the bills payable account? A That would have been all right, it would have wiped out the account.

Q Bills purchased, I should have said. A Bills purchased, yes, sir.

By Mr. Clark.

Q So there were two things wrong, the failure to put the note with the other notes? A And put the entries through on the cash-book and general ledger.

Q And the failure to fill out the stubs, plus the failure to put the cash-book entries on the right side? A Yes.

Q And you found that in none of the Nones transactions the trust company, as a matter of fact, suffered any loss? A It did not.

Clarence G. Appleton, cross.

Q Well, did you find that the Roseville Trust Company suffered any loss in connection with any of those Nones transactions? A I said they did not.

By the Court.

Q The result of entering up a note in bills purchased would have been the same, so far as bookkeeping is concerned, as entering up that same amount as a debit to the Philadelphia National Bank, would it not? A Exactly.

Q Because the entry of the bills purchased would have gone to the same side of the book, the debit side? A Yes.

By Mr. Clark.

Q Now, when you told Mr. Odell and Mr. Munroe, as you have testified, that you had heard something about Smith in connection with the Second National Bank, where he had formerly worked, were you told by Mr. Munroe at that conversation concerning the investigation of Smith he had made prior to his engagement as treasurer of the Roseville Trsut Company? A I don't think so.

Q Or by Mr. Odell? A I don't think so.

Q Will the name Judge Thomas A. Davis of Orange, as one who recommended Smith to Munroe, recall to you whether or not you heard anything at that conference concerning investigation of Smith made prior to his engagement? A It does not.

Q Now, a few more questions about this March, 1909, investigation. You looked at all the bonds and mortgages? A I did.

Q And all the bills purchased? A I did.

Q Did you look at all the surety bonds? A I did.

Q Did you just throw them aside or did you read them? A I did see that they were in proper form, and by a proper company, and that all the employees are covered.

Q Did you read them? A I could not testify now whether I read that specific bond or not.

Q In that examination did you read any bond? A I could not tell you.

Q So that although you found and reported to your superior that all of these facts affecting Smith, you do not recollect whether you read the bond that covered Smith, is that right? A That is right.

Clarence G. Appleton, cross.

Q Then you did not, as a matter of fact, call to the attention of anybody, did you, that any notice should be given to Smith's bonding company? A I did not.

Q You did not say to Odell or to Munroe, "Look at Smith's bond," did you? A Not that I know of.

Q You did not say to Odell or to Munroe, "Notify Smith's surety company?" A Not that I know of.

Q Why didn't you?

Mr. McCarter. Objected to.

The Court. The objection is sustained.

Q Now, Mr. Appleton, when did you next examine the affairs of the Roseville Trust Company? A The following October, I think.

Q Do you recall, Mr. Appleton, anything which you found in your June, 1909, examination, whatever that date was?

The Court. October, 1909, and April, 1910.

Q October, 1909, what did you find out, if anything, about the condition of the trust company then? A I do not remember that there was anything serious except a number of minor details.

Q Did you find any traits of any irregularities? A I did not.

Q Did you make special search for them? A I did.

Q Did you have any conference with Odell or Munroe, or any director or officer at that time, other than Smith, that you recall? A I did with Mr. Odell. We always talked the matters over with the president of the company, one of the officers.

Q Did you at any time say anything to Mr. Odell about the good or bad conduct of Mr. Smith?

Mr. McCarter. Objected to as immaterial, irrelevant and not cross examination.

The Court. The objection is overruled.

A I simply talked with him over whatever criticism I had made at the examination.

Q (*By the Court.*) Was Smith present at the conversation? A I should say not directly, simply the way the bank was being run.

Q (*By Mr. Clark.*) Did you ever, subsequent to your conference with Odell and Munroe, subsequent to your examination of

March 9th, call the attention of any officer or director of the Roseville Trust Company to any other, or later, misconduct or irregularities of Raymond E. Smith?

Mr. McCarter. Objected to as immaterial, irrelevant and not cross examination.

The Court. The objection is overruled.

An exception to this ruling of the Court is noted by the defendant as ground of appeal.

A I did not.

Q The next examination was when? A May 25, 1910.

Q Do you recall whether you found any misconduct of Smith in connection with that examination? A I did not.

Q Or any irregularities? A Not on his part, except the general running of the company.

Q Did you at that examination, or on any other occasion prior to that, and after March, 1909, say to any officer or director of the Roseville Trust Company that Mr. Smith should be removed?

Mr. McCarter. Same objection.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A So far as I remember only at that conversation I had with Mr. Odell at his house after the first examination.

Q In March, 1909, never subsequent? A No.

Q Now, with regard to the system in force at the Roseville Trust Company of keeping books, did you require any changes in the methods.

Mr. McCarter. Objected to as immaterial, irrelevant and not cross examination.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I suggested a good many changes.

Q Are all of those changes set forth in the correspondence between the department and the bank? A I think not.

Q To your knowledge were those changes made which you suggested.

Clarence G. Appleton, re-direct.

Mr. McCarter. I make the same objection.

The Court. The objection is overruled.

A Some of them were, and some were not; most of them were, not all; most of them were.

Q You do not remember any that were not, do you? A I could not tell; nine years ago.

Q You remember whether you testified that after your April re-inspection, at which time you claim to have found earlier Nones transactions, whether or not you testified you did at that time, in April, while at the trust company, discussed those matters with any officer or director of the trust company? A I think not, other than Smith.

Q You knew, did you not, Mr. Appleton, that Mr. Odell was at the trust company only part of the day?

Mr. McCarter. Objected to as immaterial, irrelevant and not cross examination.

The Court. Objection is overruled.

An exception is noted to this ruling by the defendant as ground of appeal.

Q (Question read.) A I did.

Re-direct examination.

Q When did you first see the note that Mr. Clark has been talking about given by Nones on account of these transactions? A Some time the latter part of the week, I don't know what day.

Q (*By the Court.*) You mean in your March examination? A March examination.

Q (*By Mr. McCarter.*) Who showed it to you? A Mr. Smith.

Q Where did he get it from, do you know.

Mr. Clark. Objected to.

The Court. Objection overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A Out of his desk, I think.

Q And there had been no entry made of that note at any time? A There had not.

Clarence G. Appleton, re-cross.

Re-cross examination.

Q You remember that quite well? A I said, "I think."

Mr. Clark. If the witness does not know, I move that the answer be stricken out.

The Court. Well, if he is just guessing at it it must be stricken out; if he has any recollection about it it must not.

Q (*By the Court.*) Have you any recollection about it? A That is my recollection, that he got it from his desk.

The Court. It may remain.

Q (*By Mr. Clark.*) You remember that incident, but you do not remember the talk with Munroe and Odell very well, is that right? A I thought I had given you most of that, all that I remembered.

Q You do not remember whether Smith told you he had any advantage out of the Nones transaction? A I cannot remember yes or no about that.

Q But you do remember a note coming out of the desk? A Yes.

Q Do you remember whether there were any others there? A I could not say.

Q Did you examine the desk to see? A Certainly not.

Q You say "Certainly not." That is all.

(Not answered.)

Mr. McCarter. We next offer in evidence a letter dated May 17, 1909, on the letter-head of the Roseville Trust Company, Newark, N. J., addressed to Vivian M. Lewis, Esq., Commissioner of Department of Banking and Insurance, Trenton, N. J., and signed William P. Odell, President.

Letter marked Exhibit D. 5.

Mr. Hinds. We concede the authenticity of the letter, but it goes in under our general objection.

The Court. All this testimony is received under the general objection.

(Letter read.)

Mr. McCarter. I now offer in evidence the minutes of a special meeting of the board of directors of the Roseville Trust Company held on the 21st of June, 1909, and found on pages 58 and 59 of the minute book of the company.

Same marked Exhibit D. 6 and read.

Mr. McCarter. I offer in evidence a letter from William P. Odell, president, to Vivian M. Lewis, commissioner, dated June 21, 1909.

Same marked Exhibit D. 7 and read.

Mr. McCarter. I now offer in evidence a letter from the commissioner to William P. Odell, Esq., president of the Roseville Trust Company, dated July 16, 1909.

Same marked Exhibit D. 8 and read.

ALFRED TYRILL, sworn for the defendant.

Direct examination by Mr. McCarter.

Q What is your business? A Adjuster of claims and fidelity bonds.

Q In what company? A The National Surety Company.

Q In what branch or department of the company's home office business is that work carried on? A Claims department.

Q And in what branch is the correspondence with reference to claims of the character here in suit located? A In the underwriting department.

Q Have you searched the files of the company to ascertain whether or not there is on such files any notice in writing from the Roseville Trust Company, or any of its officials, concerning the conduct of Mr. Raymond E. Smith, treasurer of the company? A I have.

Q From March, 1909, did that examination go? A Yes.

Q Do you find any such notice? A No letter.

Cross examination by Mr. Clark.

Q You found no letters from the Roseville Trust Company to the National Surety Company? A No, sir.

Q At any time during that period? A No, sir.

Q Did you find any written statement of the Roseville Trust Company making any representations with regard to the conduct of the employee, Raymond E. Smith?

Thomas B. Merrilees, direct.

Mr. McCarter. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A No.

Q Or with regard to the condition of his accounts? A No.

Q Or with regard to his previous conduct during any renewal terms, previous terms? A No.

THOMAS B. MERRILEES, sworn for the defendant.

Direct examination by Mr. McCarter.

Q What is your business? A Accountant at the present time; United States Department of Justice.

Q When you are not employed by the government are you pursuing your profession in the City of New York? A Since 1914 I have been working for the United States Government solely; previous to that date public accountant three years in New York City.

Q Did you receive any employment by the National Surety Company with regard to an attempted examination of the books of the Roseville Trust Company? A I did, yes, sir.

Q When was that? A In August, 1913.

Q What did you do pursuant to that employment? A The first occasion I went out there was on August 15th with Reilly, a claim adjuster, and we looked over the situation generally.

Q Did you make a report of your transactions out there? A Not on that day, sir; later on I did.

Q Whom did you see with Mr. Reilly when you went out there? A I am unable to recall. We went over the whole thing generally.

Q How long were you there? A Several hours in the afternoon.

Q Part of an afternoon? A Yes, sir.

Q You and Reilly? A Reilly and me.

Q What date was that? A August 15th.

Q Did you complete your examination that day? A No sir; I didn't make any examination that day.

Q What did you do? A Looked over the situation generally.

Thomas B. Merrilees, direct.

Q What do you mean by that? A Saw different people, heard what they had to say.

Q Did you go out again? A I did.

Q When? A August 19th.

Q You went out with Mr. Birdsall? A Yes, sir.

Q He was one of the officers of the company? A He was assistant general solicitor at that time. 10

Q What occurred that day? A Mr. Birdsall made arrangements for me to have access to the books of the bank so I could begin an examination the following day.

Q Did you hear that arrangement made? A Yes, sir; it was made when Birdsall and I were there.

Q With that gentleman, Mr.— A My recollection is that it was made with Mr. Vredenburgh, and I think Mr. Ferguson was also present.

Q Did you go up the next day? A I did; yes, sir. 20

Q Did you conduct an examination? A I started my examination on the twentieth day.

Q What occurred? A I got the minute book and made an examination from that, and made notes from it.

Q At the time were all the minutes there? A No, sir.

Q It was a loose leaf book? A That is my recollection.

Q You were there all day on the 20th? A In the bank? No, sir; part of the time in the afternoon I saw Jennings.

Q You went to see Jennings also? A Yes, sir.

Q Did you go out again the next day, the 21st? A I did. 30

Q What did you do on that day? A I saw Mr. Vredenburgh that day, or later; previous to that I found Mr. Ferguson; he said Mr. Vredenburgh wanted to see me, and Mr. Vredenburgh said it was inconvenient for me to be there at that time, that it interfered with the privacy of his examination, and that he did not have a man to spare to detail to stay with me in another part of the bank, and he asked me to try to get the Surety Company to call me off for a week or two. I telephoned to the New York office, and that agreement was made.

Q Now, when did you next go out there again? A To the bank or to Roseville? 40

Q To Mr. Vredenburgh. A That was August 26th I saw Mr. Vredenburgh the second time.

Q What occurred? A I asked Mr. Vredenburgh whether there had been any development at all, and he asked me not

to go over the books at that time, that he was following the thing, all the details, up, and if there was any new development he would let us know.

Q Did you ever get word from Mr. Vredenburgh that you might return to the books? A No, sir; I never received word from him or from the Surety Company after that.

Q That terminated your experience with the books? A Yes, sir.

Q Did you make reports to the company of what occurred? A I did at the time; yes, sir.

Q And are they here? A Yes, sir.

Q You have refreshed you recollection as to what occurred from them? A I have refreshed my recollection.

Q I show you a letter attached to your report of what occurred, upon your talk to Mr. Birdsall; look at the middle paragraph and refresh your recollection by reading what is there stated, and then I will ask you, after you have so refreshed your recollection, to state a little more in detail the conversation between Mr. Vredenburgh and yourself, the last day that you were at the bank. A Mr. Vredenburgh at that time told me he was not satisfied that there had not been—

Q Have you refreshed your recollection now? A I have; yes, sir.

Q Now, tell us what the conversation was between Mr. Vredenburgh and yourself on the 26th of August, which, I think, is the day you referred to. A Mr. Vredenburgh told me then that he was not satisfied that others were not involved in aiding and abetting Smith, and that he was endeavoring to trace all the items, whether checks or cash, and if there was any new development he would let us know; that he was very anxious to work with us.

Cross examination by Mr. Clark.

Q What date was that last conversation, please? A August 26, 1913.

Q Did you state that he was satisfied that Smith had stolen money? A He did not use those words.

Q What words did he use? A The words that he used were in connection with others; that he thought that perhaps others had aided and abetted Mr. Smith.

Thomas B. Merrilees, cross.

Q Aided and abetted Smith in what? A In connection with his defalcation.

Q At that conversation on August 26th that you had with Mr. Vredenburgh was anyone else present? A I don't think so; I am quite sure we were alone.

Q And where was it? A At the office of the bank.

Q At what point? A I could not state today where.

Q He had to speak a little loud for you to hear? A Not at that time.

Q Your hearing then was all right? A Yes, sir.

Q Now, Mr. Merrilees, when you had that talk with Mr. Vredenburgh, and he asked you to come back, that was on August 26th? A No; he didn't ask me to come back in those words.

Q What did he say? A He asked me to refrain from going over the books; in the meantime if there was any other development he would let me know.

Q Did you say anything about coming back? A Not that I recall; I was under order of the New York office when to go.

Q How long did you continue in the employ of the National Surety Company after that? A I was only employed by them case by case.

Q How long did you continue to be employed by them occasionally? A Over two months.

Q You are an accountant? A Yes, sir.

Q And when you went out there you went for the purpose of looking at the books of accounts, did you not? A That was part of what I went out there for.

Q Will you please tell this jury what books of accounts you looked at, and in what order you looked at them? A I never got opportunity to look at any books of accounts; the only book I got an opportunity to look at and make a digest of was the minute book.

Q You never saw the inside of the general ledger? A I may have seen it in passing.

Q Did you ever see the inside of the cash-book? A No, sir; I cannot say that I made an examination of any other book but the minute book; I am certain I did not.

Q Did you ever see the inside of the cash-book? A Not that I recall.

Q Or any of the proof-books? A Not that I recall.

Harry W. Foster, direct.

Q So that the only book you remember looking at was the minute-book? A The only book that was given to me, or that I could get at, was the minute book; the following morning I was called off.

Q The question was whether any other book you remember looking at but the minute-book? A No, sir.

Q And what would you, an accountant, be doing looking at the minute-book? A That is one of the first books I would take in my investigation of the bank.

Q Why, what were you looking for? A To find out what connection the officers had with the bank, what their duties were.

Q And had you finished your inspection of the minute-book? A Not quite; I had got pretty well through it that afternoon.

Q Did anyone take the minute-book away from you? A My recollection is I sent it back to Ferguson in the evening.

Q Had you finished with it? A No, I had not.

Q Did you ask for it again? A The next morning; yes, sir.

Q Did you get it? A I am quite sure I was working on that book the following morning a little while.

Q What date was that? A August 21, 1913.

Q Did you finish with it that day? A No, sir; never got an opportunity to finish it.

Q Did you look at it on the 26th? A No, sir.

Q Did you ask for it? A Mr. Vredenburgh asked me to refrain from looking at the books that day.

Q No; the question is did you ask for it? A Not that I recall.

DEFENDANTS REST.

HARRY W. FOSTER, sworn for the plaintiff in rebuttal.

Direct examination by Mr. Clark.

Q Mr. Foster, you were one of the directors of the Roseville Trust Company? A I was.

Q And were you also an officer? A I was.

Q What office? A Second vice-president.

Q Was that from the formation of the trust company right down to the close? A It was.

Q And who were the other officers? A Mr. Odell, president; Mr. William Fairlie, first vice-president.

Harry W. Foster, direct.

Q Now, Mr. Foster, will you refresh your recollection from those pages and tell us who the directors of the institution were at the time it was organized in 1908?

Mr. McCarter. Cannot we agree about that and save time?

Mr. Clark. I think it is proper that the jury should know who the men were who were on this board.

The Court. Proceed.

Mr. McCarter. What is he referring to?

Mr. Clark. For the purpose of refreshing his recollection, he is referring to a list of directors contained in the minute-book.

Mr. McCarter. At the time of the formation?

Mr. Clark. Yes.

A William J. Banister.

Q Will you tell who they were in the business world? A William J. Banister was of the hardware firm of Banister & Pollard; Emil P. Battaille; he was a banker in connection with the American Commercial Bank; James B. Banister, president of the Banister Shoe Company; William T. Benjamin, also connected with the Banister Shoe Company in some capacity; John S. Bell; he was general manager of the Union Ice Company.

Q What had he been years ago? A Chief of the Detective Bureau of the United States, something to that effect. William Fairlie, one of the Fairlie & Wilson Coal Company; Wellington H. Ingersoll, of the Ingersoll Flour Mills; William F. Kine, physician, doctor; Frederick Kilgus, contractor and builder; George E. Krug, architect; Charles C. Lurich, real estate.

Q Builder, broker or what? A I don't know; real estate is all I know. Clinton F. McCord, insurance, Penn Mutual, I believe, state agent; Harvey Mott; I don't know what his business was; G. Rowland Munroe, lawyer; William P. Odell, cashier of the Claflin business, New York; John B. Scarlett, real estate promoter and operator; Elmer K. Sexton, something to do with the Board of Education of the City of Newark; Raymond E. Smith, secretary and treasurer of the Roseville Trust Company; William W. Woodward, hardware business. That is all.

Q (*By the Court.*) Were not you one? A Yes, I was one.

Q Did you forget? A Harry W. Foster, manufacturer.

Mr. Clark. On Thursday, when this list was made up, Mr. Foster's name was not included in this list.

Q (*By Mr. Clark.*) Now, Mr. Foster, was Edward Dunn afterward elected a director? A Afterwards, yes, sir.

Q Now, Mr. Foster, was there an executive, or finance committee at this institution? A Yes, sir.

Q And can you recall how many men were on it; how many members?

Mr. McCarter. Objected to as not rebuttal. How does that rebut anything?

Mr. Clark. Necessarily, the rebuttal in this case will have to cover a wide field at first, in order that the jury may be apprised of the conditions which were operating in the trust company, for the purpose of determining what was the situation presented to it by the information which the defendant made such a time about, and we are entitled to show, I submit, that there was an executive committee of so many members of the board, that it met at such and such intervals, and transacted such and such business; that in addition there was an examining committee which met at such and such intervals, and transacted such and such business. You will recall that the only possible basis for the attack on the renewals is this claim that counsel for the defendant spoke of as to what the employer should do in the way of making audit. We wish to show the actual methods of conducting the affairs of the trust company, so that we may then have the facts before us when we come to find out what the board of directors did, and why they did it, in connection with this Nones transaction.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q (Question read as follows: "And can you recall how many men were on it, how many members?") A Not exactly; six or seven; I don't know how many.

Q How often did they meet? A The executive committee?

Q Yes. A Once a week.

Harry W. Foster, direct.

Q And did they—you were a member of the committee? A I was of the executive committee.

Q For practically the whole life of the trust company? A Yes.

Q (*By the Court.*) How often did the directors meet? A Once a month.

Q (*By Mr. Clark.*) At the executive committee what was the practice in regard to receiving reports of the business of the institution from Smith?

Mr. McCarter. Is that material, your Honor?

The Court. Well, do you object to it?

Mr. McCarter. Yes, sir.

The Court. The objection will be overruled.

Q Just briefly, Mr. Foster. A Our order of business, you mean?

Q Yes. A Reading of the minutes of the previous meeting; going over the paper that was purchased, and the loans that were made, and such other business as was called to our attention.

Q Did Mr. Smith have authority from the board to make loans up to a certain amount? A I believe there was, but I do not exactly remember; I believe that there was a minute to that effect.

Mr. McCarter. I suppose the minutes will show that.

The Court. That ought to be the source of the authority.

Mr. Clark. Do you object on that ground?

Mr. McCarter. I am objecting to all of this evidence, I do not think that it is proper.

Mr. Clark. The question will be withdrawn.

Q What was the practice at the institution concerning reporting of bills already purchased? A We were handed a list of the loans that were made by Mr. Smith in the interim from the previous meeting and the time we met.

By the Court.

Q You had no discounting committee, or bills purchasing committee? A No, sir, other than the executive committee.

Q Which met and acted only once a week? A Yes.

Harry W. Foster, direct.

Q And as a matter of practice in the meantime all bills purchased were purchased by whom? A Mr. Smith.

By Mr. Clark.

Q Now, Mr. Foster, was Mr. Odell there all day at the trust company? A He was not.

Q For about how long on an average roughly? A Well, I don't know from actual experience, only what I heard.

Q How much time, with the exception of the last two months of the bank's existence, on an average, every day, did you spend at the trust company? A No average; I dropped in once in a while.

Q Any stated period of time? A No.

Q What is your knowledge as to Mr. Fairlie's time spent at the trust company? A I have no knowledge.

Q What was your practice in the trust company with regard to making an examination or audit of the affairs of the company? A We had an examining committee.

Q And how often did they act in each year? A I don't know how often; they were supposed to make an examination every so often, I don't know what the usual period was.

Q Was it frequently called to your attention as a member of the executive committee, and a director, that periodical examinations were being made by the State banking department? A Yes.

Q Can you recall offhand how often they were? A No.

Q Would you say as often as once a year? A Yes.

Q It was a fact, was it not, that the trust company paid the expense of the banking department's examinations each time? A Always.

Q And it was customary, or wasn't it, for you to receive a letter from the department following each examination?

Mr. McCarter. Objected to as immaterial and not rebuttal.

The Court. The objection will be overruled.

A It was.

Q Now, Mr. Foster, at the time the trust company was formed can you recall whether or not there was reported to your board any investigation which had been made by anyone in its behalf concerning Raymond E. Smith.

Mr. McCarter. Objected to.

The Court. I suppose your objection is to the next question. The question may be answered "yes" or "no."

Q (Question read.) A There was.

Q What was reported to your board concerning the desirability, or lack of it, of employing Raymond E. Smith as treasurer?

Mr. McCarter. Objected to.

The Court. I am inclined to sustain that objection. I will hear you.

(Argued.)

The Court. The objection will be sustained.

Mr. Clark. We pray an exception, and ask that the testimony be allowed in the case as an essential part of the plaintiff's rebuttal, for the purpose of establishing the truth concerning the effect which the disclosures testified to by Mr. Appleton had upon the minds of the directors.

Q Now, Mr. Foster, can you at this time recall when you first heard anything about the Nones matter? A No specific time.

Q Can you recall whether or not you heard of it prior to the meeting of June 21 which has been read here? A I believe I did.

Q Did you ever talk with Raymond E. Smith about this matter? A No, sir.

Q Did you hear his explanation of the transaction to the board? A I did not.

Q Well, you were present at the special meeting of June 21, were you not? A Yes, sir.

Q Can you now recall whether Smith at that meeting made any explanation of the matter? A I cannot recall.

Q Did you ever call upon the Commissioner of Banking and Insurance in connection with the Nones matter? A Yes, sir; I called there.

Q Will you state what was said in your presence at that time, either by yourself, or any other representative of the Roseville Trust Company, or by the Commissioner of Banking and Insurance, or his deputy?

Harry W. Foster, direct.

Mr. McCarter. Now, your Honor, it seems to me that any conversations that Mr. Foster may have had with the Commissioner of Banking and Insurance, the predecessor of the plaintiff in this case—the plaintiff in this case is Mr. LaMonte, who was himself banking commissioner—cannot be competent as against us. The banking commissioner is not the National Surety Company; and the gist of the situation as left by the defense is this requirement; now, all of the other prerequisites that in the month of March, 1909—

The Court. Let me make this suggestion: these letters from the Commissioner of Banking and Insurance are introduced for the purpose of showing the impression which it made, or ought to have made; the notice which was given by these letters to the directors, if that was modified, the effect of those letters was modified in a conversation with him by directors who called upon him officially, would that not be relevant?

Mr. McCarter. I do not see how it can be.

(Argued.)

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q (Question read.) A I would like to make the same answer I did before Vice-Chancellor Stevens.

Mr. McCarter. We had a suit against the directors.

Q What is your answer? A The commissioner, Mr. Lewis, after the gentlemen had talked with him, made the remark, as I remember it, something like this, that "if you gentlemen feel that way about it, go ahead, I withdraw my objection."

Q Who went down from the Roseville Trust Company? A I cannot recall who all.

Q What was said? A conversation preceded the remark of the commissioner, generally? A I do not recall.

By the Court.

Q One minute, when did this conversation take place? A I don't know the date.

Harry W. Foster, direct.

Q When was it with reference to that meeting that was held June 21, before or after? A That I don't remember.

Q When was it with reference to that letter dated June 21 that was sent to the commissioner? A I don't remember whether it was before or after.

By Mr. Clark.

Q Had the conversation prior to that remark been directed to ordinary explanation of what—

Mr. McCarter. Objected to.

The Court. Objection sustained.

Q What do you remember was the general substance of the conversation preceding that remark? A I don't remember.

Q Well, did it have to do with the affairs of the common council of the city of Newark?

Mr. McCarter. Objected to.

The Court. Objection sustained.

Mr. Clark. May I refresh the witness' recollection a little further?

Q You remember one part of the conversation, can you remember who said anything to the commissioner before that? Did you say anything yourself? A I did not.

Q Was the name Smith used before that? A I presume it was, I don't know.

Q You don't remember anything about it? (Not answered.)

Adjourned to March 26, 1919.

EIGHTH DAY.

Newark, N. J., March 26, 1919.

Continued pursuant to adjournment.

Appearances as before.

HARRY W. FOSTER resumed the stand.

Further direct examination by Mr. Clark.

Q Mr. Foster, after the incident connected with the Nones matter, extending up to June, 1909, when that meeting was held, did you thereafter learn of any conduct in connection with the Roseville Trust Company on the part of Smith which indicated to you any wrongdoing on his part?

Mr. McCarter. Objected to as immaterial and irrelevant.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I did not.

Q Was any criticism thereafter made to you by any person of any act of Smith? A None that I know of.

Q Did you, Mr. Foster, ever learn by examining the books of any irregularities? A No, sir.

Q During the period just before the bank closed, for a month or two, when you were there more of your time, did you learn of any irregularities during that period? A I did not.

Q Did you while you were there ever know that a check was paid for which there was not funds there? A Yes, one instance.

Q And what is that one instance? A Mr. Jennings came to me and said there was no—

Mr. McCarter. Objected to.

The Court. You are just asked to tell the instance.

Mr. Clark. I will withdraw the question on the objection. The witness may be cross examined.

Harry W. Foster, cross.

Cross examination by Mr. McCarter.

Q What was this one incident where you knew of the overdraft, Mr. Foster? A That was during the last—

Q Just answer my question, what is the one incident where you knew of the overdraft? A A customer of the bank had a payroll to make up, and he did not have enough money for his payroll; Mr. Jennings asked me if it might go through, he was a good customer, and I said it was a poor practice, but under the circumstances, it was only a few dollars, it might go through.

Q You are not referring to the time when your own account was overdrawn? A Absolutely, I do not; I never knew of an overdraft of my own.

Q You did not? A Not until after the bank closed.

Q Oh, you learned it after the bank closed? A Yes, sir.

Q You did not know how much you had in the bank while the bank was running? A I supposed I knew.

Q Well, you did not know, did you? A It seems not.

Q You had an overdraft? A They proved that I had, yes, sir.

Q How much? A Three hundred and some odd dollars.

Q How long? A Oh, I think it was a few days before the bank closed.

Q How long a time had the overdraft existed? A I don't know.

Q To the best of your recollection? A I think two or three weeks before the bank closed.

Q And continued to the close? A So they claimed, yes, sir.

Q Did you learn that Mr. Munroe was overdrawn? A Not until after the bank was closed, no.

Q You did learn that, didn't you? A After the bank was closed.

Q He was one of the directors and counsel of the bank? A He was.

Q Now, you used to stop in the bank every little while? A Yes, sir.

Q Even before you assumed the president's duties, the last few weeks of the life of the bank? A I did not assume the president's duties.

Harry W. Foster, cross.

Q Well, you undertook to act in place of the president—in place of Mr. Smith, for the last two or three— A No.

Q Didn't you stay there awhile? A I did a couple of hours a day, yes, sir.

Q All right, I don't care whose duties you assumed, you were there two or three hours a day for a few weeks before the bank closed? A Yes, sir.

Q Leaving that out, you used to go in now and then? A Yes, sir.

Q Did you ever look at the cash-book? A No, sir.

Q Did you ever look at the ledger? A No, sir.

Q What committee were you on? A Executive committee.

Q What duties did the executive committee perform? A It met once a week and went over the loans made during the interval of our previous meeting, and such other business as came before the committee.

Q What other business? A I don't recall now; the collateral loans, or other matters that might come before us; the payment of bills, and so forth.

Q And you never, as a director of this bank, once looked into the general ledger? A No, sir.

Q Did you ever look into any of the individual ledgers? A No. I did, though, help in the collateral loans, bond and mortgage, at my solicitation a few weeks before the bank closed; I didn't want to stay there doing nothing; I asked if I could be of some assistance, and I helped with the bonds and mortgages; see that the fire insurance was all right, and so forth.

Q At these meetings of the executive committee Mr. Smith would make a report of the business? A Yes, sir.

Q And would he upon a typewritten sheet give his report as to the condition of the bank? A Yes, sir.

Q Did you ever undertake to verify that? A No, sir, I did not.

Q Where did the executive committee meet? A In the directors' room.

Q Where was that? A At the rear end of the bank.

Q Behind the other rooms? A Well, to one end.

Q Right on the same floor with the bank? A Yes, sir.

Q Right next room? A Yes, sir.

Q Who were with you the day you went to Trenton? A I cannot remember all who went; the parties that I recall were

Harry W. Foster, cross.

Mr. Woodward, Mr. Munroe, Mr. Fairlie and one of the Banisters, which one it was I do not remember.

Q And yourself? A And myself.

Q You were a committee? A I presume that was a committee; I don't know; we were asked to go down.

Q Did you have an appointment? A I don't recall that; I don't know whether we did or not.

By the Court.

Q I have in mind a question that occurs to me to ask in connection with that trip to Trenton, so if counsel object to it I will withdraw it. What was said by your committee to Mr. Lewis which called forth from him the statement to which you have testified?

Mr. McCarter. He said he could not remember that conversation.

A Well, I did not do any of the talking, and I am not competent to judge just what was said to the commissioner.

Q You do not recall it? A I do not recall what was said.

The Court. I understood him to say that, but I thought perhaps he had refreshed his recollection.

By Mr. McCarter.

Q You were only down there on that one occasion? A That is all, sir.

Mr. McCarter. I call upon the other side to produce a telegram from the Roseville Trust Company to Vivian M. Lewis, commissioner of banking and insurance, dated June 15, 1909.

Mr. Clark. I never saw one; there is a copy in the printed book of the equity suit.

Mr. McCarter. I would like to have marked for identification the telegram to which I have just referred, found on page 84 of the printed copy of the bill of complaint dated June 15, 1909.

The Court. I understand there is no objection to your offering it in evidence.

Mr. Clark. No.

Mr. McCarter. Then I offer it in evidence.

Harry W. Foster, re-direct.

Same marked Exhibit D. 9.

Mr. Hines. It is subject to our general objection.

(Said telegram read.)

Q Now, Mr. Foster, you attended the meeting of the board held on the 21st of June? I believe so.

Q Don't you remember? A No, I do not remember actually, I believe I did, but I could not state positively that I was there; the minute would show whether I was there or not.

Q But you have not any recollection? A I have not any at this time, no, sir, it is so many years ago.

Q Do you wish to go on record before this jury that you have no recollection of attending the meeting of the board of directors especially called, held in the evening when so many gentlemen were present, when the matter of Smith and his connection with the Nones matter was referred to? A That was a special meeting?

Q Yes, sir. A Yes, sir, I remember being at the special meeting.

Q Do you recall attending the meeting where the matters were discussed, whether it was a special meeting or not? A I was present when they were discussed.

Q It appears that meeting was held on the 21st of June, this letter of July 16th, Ex. D. 8, you saw that letter, being letter dated July 16th, in which Mr. Lewis says, "I am in receipt of a letter dated 21st ultimo, and signed Mr. E. K. Sexton, secretary pro tem of the special meeting of the Board of Directors of your company, held on the last mentioned date, embodying the action of the board upon the resignation of Mr. Raymond E. Smith, secretary and treasurer of the institution, which will have my consideration. I will say now, however, that I emphatically disapprove of the decision of the board in the matter." You saw that letter? A I remember hearing the letter.

Re-direct examination.

Q What were the facts connected with the overdraft on your account concerning which you testified on cross examination? A Well, I had given Mr. Smith three notes aggregating $2,500, to be sold to what we call country banks, outside banks, and I asked him if he could sell it out of town, I did not want to put any loans through our own bank; he said if opportunity offered

G. Rowland Munroe, direct.

he would do so, and put it to the credit of my account, and if I would call him up beforehand, before I drew on it, he would let me know if it was all right; I said I was in no special hurry; so I don't know how long it was, but some time after I handed him the note I called him up and asked him if it was all right; he said, "Why, yes, that is all right—"

Mr. McCarter. I do not think these conversations are admissible; the facts, I suppose, are admissible; that is, conversations with Smith on this particular issue are not competent as against us.

The Court. As I understand, the effect of that testimony upon cross examination can have no other purpose than to affect his credibility as a witness.

Mr. McCarter. Showing that he had knowledge of irregularity.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A (Continued.) He said I might draw, the credit would be there, and I drew on that account, on Mr. Smith assuring me that the credit would be there, as those notes had been sold, something to that effect, I could have $1,600 or $1,700. Instead of that they claimed there was an overdraft.

Re-cross examination.

Q You had a bank book, didn't you? A Oh, yes, I had a bank book.

Q Did those, what you call credits, appear there at the time you overdrew? A No, sir, they never appeared there.

Q Had you anything entered on the stub? A No, sir.

Q You simply overdrew? A Yes, sir.

G. ROWLAND MUNROE, sworn for the plaintiff in rebuttal.

Direct examination by Mr. Clark.

Q Mr. Munroe, you are a member of the bar? A I am, sir.

Q Do you recall when you were admitted to practice? A I think it was in 1914—I mean 1894.

G. Rowland Munroe, direct.

Q Do you recall when you ceased the active practice of the law? A Well, I never have ceased the active practice of the law; I ceased my personal practice about three or four years ago, perhaps.

Q When was it with reference to the closing of the trust company, if that will recall it? A I should think about two years after that.

Q Now, Mr. Munroe, did you have something to do with the reorganization of the Roseville Trust Company? A Yes, considerable.

Q Did you have something to do with the investigation of the character of Raymond E. Smith preparatory to selecting a man for treasurer?

Mr. McCarter. Objected to as immaterial, irrelevant and not rebuttal.

The Court. I think there is no objection to this question, so suppose we hear what the next is.

A I had a good deal to do with it.

Q Mr. Munroe, what did you, in regard to your investigation on behalf of the Roseville Trust Company, learn and report to the board of directors concerning the character and recommendation and reputation of Raymond E. Smith?

Mr. McCarter. Objected to.

The Court. The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q What did you learn and report to the board of directors concerning whether or not Raymond E. Smith had a good reputation?

Mr. McCarter. Objected to.

The Court. The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Did you report to the board, make any report to the board concerning Raymond E. Smith?

Mr. McCarter. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I did.

Q What did you report?

Mr. McCarter. Is that rebuttal? The proof, as I understand it, at the close of the defendant's case was upon the issue with reference to the character of Smith; that Mr. Odell had made a statement of what he heard and what occurred, with reference to Mr. Poor. Now, it seems to me the only rebuttal that is competent is to rebut that specific matter, either to deny it or to show what was the fact with reference to it. But I fail to see how this case can be met upon that point by endeavoring to show that Mr. Munroe made some kind of report concerning Mr. Smith generally.

The Court. How do you think that differs from the questions upon which the Court has already ruled, Mr. Clark?

Mr. Clark. For this reason: It is an essential part of the rebuttal. Let me correct right here the position repeatedly urged by counsel for the defendant, that a plaintiff suing on a surety bond has to do anything more than prove the defaults that have occurred by the principal whom they guaranteed; and it is that—

The Court. I think you need not argue that; the ruling yesterday, and the reason given for it, indicates the views of the Court.

Mr. Clark. Now, my proposition here is that it is a proper and material element, which can only be brought out in rebuttal, the only proper place to bring it out, to show the facts which were in the mind of this board of directors concerning what had been reported to them about Raymond E. Smith and his previous conduct, at the time that the commissioner's letter was presented, and they were obliged to consider and weigh the effects of Smith's act reported to them.

The Court. I find my mind unconvinced, Mr. Clark, and will sustain the objection.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Mr. Munroe, what was the fact concerning whether or not Raymond E. Smith brought to the Roseville Trust Company any business from customers formerly identified with banks in Orange with which he had been employed?

Mr. McCarter. Objected to as immaterial and not rebuttal.

The Court. The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Mr. Munroe, did you on behalf of the bank, as their director or counsel—were you also a member of the executive committee? A I was.

Q Or, as member of the executive committee, have anything to do with the procuring of this bond on Raymond E. Smith? A I cannot remember that I did more than examine—

Mr. McCarter. One moment; the question is yes, or no, I take it.

The Court. The question is whether or not you had anything to do with it.

A Yes.

Q (*By Mr. Clark.*) Now, what did you have to do with it?

Mr. McCarter. Objected to as immaterial and irrelevant; the bond is in existence and speaks for itself.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Before the bond was accepted it was examined by me, and by the committee.

Q Did you have any communication with the surety company? A I don't think so.

Q Mr. Munroe, coming now to the incidents of March, 1909, Mr. Appleton testified in this court concerning a conversation with you and Mr. Odell at Mr. Odell's house on or about March 16th, I think it was, 1909, at which he told you and Mr. Odell concerning what he had found in the Nones matter, but he does

not recall anything that either you or Mr. Odell said to him; will you now tell us what you recall was said to Mr. Appleton by you or by Mr. Odell in your presence on that occasion? A Well, as I recall, we, of course, said that the matter would be brought to the attention of the board, but that we felt, for several reasons, that his view of the matter was extreme. In the first place, that Mr. Smith had had such an enviable reputation up to that time, had been so very highly recommended to us in the first instance by national bank examiner, Mr. Bryan, who had first suggested him to us, and then by Judge Davis of Orange, by Mr. Calhoun, who was attorney for the bank, by some of the leading business men of Orange, that we felt it was a very extreme position to take, that a matter of this kind should be regarded as branding him as dishonest, or unworthy of confidence. We pointed out the fact that the bank was very new, and, of course, we were striving very earnestly, and Mr. Smith, having the chief responsibility, was working very hard, to try and bring business to the bank; and that he had explained to us that Mr. Nones and his family were among the best customers of the bank there in Orange, that he knew from his knowledge of the affairs of the family that Mr. Nones was, with his mother, the heir, one of the heirs of the estate, which was very substantial, and that it was about to be divided, and that, had it not been for some legal technicality delaying the settlement of the estate, that Mr. Nones would have been in funds before this time; that Mr. Nones had brought a number of good clients to the bank from among his New York business friends, and seemed to be in a position to bring a great deal of business to the bank; and, as a friend of Mr. Smith, we felt that it was for the interests of the bank to encourage him and make of him a good customer; and that, therefore, while we felt undoubtedly Mr. Smith had, perhaps, in his overzeal, done something he should not have done, and which he frankly acknowledged he should not have done, that he did it in his interest for the bank, without any thought of personal gain, and, really, from an unselfish motive, and that we did not believe there was any wrong intent on Mr. Smith's part; that he surely, as he said to us, had found this to be a lesson and would be extremely careful that we should never have any cause to criticize him again. For those reasons I remember we stated to Mr. Appleton that we

thought his extreme and rather rancorous arraignment of Mr. Smith was unjustified.

Q Mr. Munroe, do you recall whether in the conversation with Mr. Appleton and Mr. Odell and yourself anything was said one way or the other as to the experience or lack of experience of Mr. Odell in bank affairs? A Why, as I remember, Mr. Odell said, of course he was not a practical banking man, that he had not had experience, and still it seemed to him that this was rather a technical matter, rather than anything that involved any wrong intent on Mr. Smith's part; that he should have made an entry in the books; that seemed to be the chief charge against Mr. Smith; that he did not make this entry. Mr. Odell said he was not a practical banking man, but it seemed to him that it was a technicality, rather than anything, as Mr. Appleton seemed to think, a crime.

Q A letter from Commissioner Lewis, Ex. D. 4, contains reference to a great many matters, and the witness Appleton testified as to all those matters, except such relating to reconcilment of bank balances which he might have discovered something about further in April, all other matters than that which are indicated by this letter, he went over those matters that night with you and Mr. Odell. A I do not recall that there was any matter of conversation between us that night except in relation to Mr. Smith. It has been a long time, and I would not say there was not, but that is my recollection.

Q Mr. Appleton testified yesterday that he did not remember—or, he testified yesterday, first, that he examined all the surety bonds at this examination to see that they were in form, and he did not remember that he said anything to Mr. Odell and you at that conversation concerning any necessity of notifying the surety company on Smith; how is your recollection? A I am sure he did not.

Q Mr. Munroe, Mr. Appleton testified that at this conversation with you and Mr. Odell, Mr. Odell said something to him about having received some information that if he applied to Mr. Poor, of a New York bank, he might hear something concerning Mr. Smith that was unfavorable, what do you recollect, if anything, about that? A I recall that Mr. Odell said that he had met a Mr. Poor at some dinner or banquet, or something of the kind, and incidentally, in the course of conversation, Mr. Poor had asked him what sort of secretary and treasurer he

had at the Roseville Trust Company, and Mr. Odell had replied that he was a very fine young man, that he had come from a family of bankers, and had been long with the Orange bank, and had brought a great many friends to the institution, because he was very popular; that he had made a very fine impression among bankers generally down in Newark. "Well," Mr. Poor said, "I think if you"—I am just giving my best recollection of the conversation—"if you should get in touch with Mr. Bonnell of the Orange bank he might give you some information about Mr. Smith;" and Mr. Odell said, "What do you mean? Anything disparaging to Mr. Smith?" "Well," he said, "you had better talk to him." That is all he would say. Then Mr. Odell came to my office, and called up Mr. Bonnell on the telephone—

Mr. McCarter. One moment.

Q Was all this told Mr. Appleton? A I think it was.

Q (*By Mr. McCarter.*) Are you sure about that? A That is my best recollection, Mr. McCarter. Mr. Odell came to my office, and on my telephone called up Mr. Bonnell and told Mr. Bonnell who he was, what his relation to the Roseville Trust Company was, and told him about this conversation with Mr. Poor, and Mr. Bonnell wanted to know what he wanted to see him for; Mr. Odell had said that some of us wanted to come up and see him, and Mr. Bonnell, as I understood the conversation, wanted to know what he wanted to see him for. Then he related the conversation with Mr. Poor. Mr. Bonnell said to him that he would be glad to see Mr. Odell, but that he knew nothing against Mr. Smith; if that was what he wanted to talk to him about, that he certainly knew nothing disparaging as to Mr. Smith, they thought very highly of him at the Orange bank.

Q (*By Mr. Clark.*) You cannot recall exactly, but it is your best recollection this was discussed at the Appleton meeting? A That is my best recollection.

Q Will you just tell us, in a brief summary, what, if anything, was done or said, either by you or in your presence, in relation to this Nones matter, between the time of the Appleton conference and the meeting of June 21?

Mr. McCarter. We object to that question. Our view is that nothing they may say is competent against us.

How can talks and conversations in our absence be admissible against us?

Mr. Clark. I confined my question to conversations with other officers or directors of the Roseville Trust Company.

Mr. McCarter. Our objection still applies.

(Argued.)

The Court. The Court is inclined to sustain the objection as to conversations between the directors. I suppose Mr. Munroe can only tell, if he can tell at all, the effect which was produced upon his mind and he ought not be permitted to state the effect that was made upon other minds by what was said.

(Argued.)

The Court. The objection will be sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Coming, now, to the meeting of June 21, which was the special meeting called for the purpose of considering this Smith-Nones matter, I show you minutes of the meeting marked as Ex. D. 6, and ask you whether there was discussion in the meeting not down in the minutes? A Yes.

Q Now, Mr. Munroe, will you state to the Court and jury what occurred at this special meeting beyond what is down in the minutes.

Mr. McCarter. I object to the question, that involves the same question over again. The minutes have, of course, been offered by us, and speak for themselves. The discussion that is not incorporated in the minutes is not part of the transaction, and is never included in the minutes unless it purports to be included, and, by introducing the minutes, we do not make competent the conversations which have been excluded at other times.

(Argued.)

The Court. I am inclined to think that if the matter thought to be elicited from the witness by this question relates to action taken by the directors which does not appear upon the minutes, it is admissible; beyond that, the mere conversations which occurred at that time, will not

be admissible, and the witness may say that it does not include action taken by the directors at the time. He may state what action was taken by the directors which is not included in the minutes.

Mr. McCarter. But not conversations.

The Court. Well, not the conversations, except those which have a direct bearing upon that action, and, by "direct bearing" I mean which are a part of the resolution; something of that kind.

(Question withdrawn.)

Q Mr. Munroe, after the meeting was called to order, what was the first business brought up and by whom?

Mr. McCarter. I respectfully object.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I think the president first called on to appoint a secretary pro tem.

Mr. McCarter. That appears in the minutes.

A (Continued.) And then that the letter from the commissioner was read, and then I don't know whether it took the form of a resolution, or not, I have not examined the minutes, but Mr. Smith was asked to appear before the board, or he had requested the privilege of appearing before the board, and he did so appear, and made a statement.

Mr. McCarter. I object to what he said.

The Court. I am inclined to overrule that objection as to what Smith said, and make an exception of that to what I said.

An exception to this ruling is noted by the defendant as ground of appeal.

A (Continued.) It does not appear in the minutes. Mr. Smith appeared before the meeting and made a statement as to just what he had done, and why he had done it, which was virtually—

Mr. McCarter. One moment.

G. Rowland Munroe, direct.

Q For brevity will you state whether that statement corresponded with the summary of it which you testified to as having been given in the Appleton conference.

Mr. McCarter. Objected to.

The Court. Oh, yes. I think that Appleton conference was in March, and this statement of Smith was in June.

(Question withdrawn.)

Q Will you state what Smith stated?

Mr. McCarter. That is respectfully objected to, on the theory that the obligation of the trust company upon this bond is measured by the bond, and adopting what I understood your Honor to say a moment ago was the view that possibly it may be considered to be the law that it was the question of what was the effect upon the minds of the directors and officers of the letter of the banking commissioner to the directors, I direct your Honor's attention to the fact that Smith by anything that he said, cannot modify an impression to be gained by a written communication. Smith cannot modify the situation. If a bank that discovers through a bank examiner that its officer has been guilty of what these Nones transactions revealed, can be relieved from its obligation to inform the surety bond by the phraseology of this bond, by something Smith says about it, why, of course, the whole integrity of these bonds is destroyed. Therefore it seems to me that conversations not resulting in acts, not entered on the minutes, in our absence, particularly statements by Smith to these gentlemen, are immaterial and incompetent as against us.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q (Question read as follows: "Will you state what Smith said?") A Mr. Smith said that he was conscious now, as he had not been at the time of the transaction, that he should not have failed to make the entry in the book of this transaction, but that he stood ready at any time to make good anything that resulted from the transaction, as he had known Mr. Nones for

many years, and had had many dealings with him, and with his family, in the Orange bank, and that already the bank found a connection with Mr. Nones of great benefit, as he had brought a great many customers to the bank; that he did not regard that there was any risk in the transaction; that he knew that Mr. Nones was heir to this estate which would have been settled before this time, and which, according to a notice which Mr. Nones showed him at the time he asked for this credit, indicating that the estate would be settled within twenty-four hours, or forty-eight hours; so that he had regarded that the transaction was simply for the moment, so to speak, and it had not occurred to him that he had done anything wrong in failing to make proper entries; that he now realized that it had been wrong; that he would feel that the directors were entirely within their rights if they accepted his resignation, but that he had done what he had done thinking it was for the best interests of the bank, and without stopping to realize its full significance; that he heartily assured the directors that if they saw fit to trust him to continue in his position, that this having been a very bitter lesson to him, he could assure us there would never be any cause for criticism of him again in any connection if he could help it. He also stated something that I judge perhaps is not clear on the record, that he—

Mr. McCarter. Well, one moment.

The Court. Just state what he said.

A (Continued.) He said that he had reported this matter to Mr. Odell before it was brought to anyone's attention by Mr. Appleton; that he had voluntarily brought the matter to Mr. Odell's attention; that when the matter was referred to by Mr. Appleton he realized it was a matter that should have been reported to Mr. Odell as president, and he so reported it; that the first information came not from Mr. Appleton, but from Mr. Smith himself.

Q Now, Mr. Munroe, what next occurred in the meeting not down on the minutes? A As I recall, Mr. Odell asked me if I—

Mr. McCarter. I object.

The Court. No, I think that is within the ruling of the Court, that conversations should not be stated, an exception having been made in the case of Mr. Smith.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Witness. I next made a report which is not shown in the minutes.

Q (*By the Court.*) By virtue of what? A By virtue of the fact that I was chairman of the committee that investigated Mr. Smith's record and character, and recommended him as our secretary and treasurer.

Q (*By Mr. Clark.*) Did you also report to the board at that special meeting concerning the conference with Mr. Appleton? A Yes, sir.

Q And did that report consist of—

Mr. McCarter. I object again to any conversation.

Q Did that report consist of stating to the board what the conversation between you and Messrs. Appleton and Odell had been?

Mr. McCarter. I object. That is an indirect way of getting in the conversation between Odell and Munroe and Appleton.

The Court. I am inclined to think so, although Mr. Munroe characterizes it as a report. He had not been appointed a committee for any specific purpose by the board of directors to make them a report of this meeting; and is it any more than a conversation, the mere fact that he at this meeting chose to state by way of report, as he characterizes it, what he had learned at the time he was a committee to investigate Mr. Smith. Would that make it admissible if, in the view of the Court, conversations would not be admissible. That duty had entirely been done; he had investigated Smith as a committee, a report had been made, and Mr. Smith had been hired.

(Argued.)

The Court. The objection will be sustained.

An exception to this ruling will be noted by the plaintiff as ground of appeal.

Q Now, Mr. Munroe, you are not permitted to testify to conversations under the Court's ruling. What next transpired

in the meeting? You did make a report to the board concerning the conference between Appleton, Odell and yourself? A Yes, sir.

Q What next transpired? A I think the minutes state that the directors thoroughly discussed the letter of the Commissioner of Banking and Insurance and decided to have an informal secret ballot taken on the resignation of Raymond E. Smith.

Q Did he stay in the room? A No, he left the room as soon as he had made his statement.

Q Now, was that a pretty full meeting?

The Court. You mean largely attended by the directors?

Mr. Clark. Yes.

The Court. I think you named eighteen.

Witness. Fifteen, my recollection is there were twenty directors at that time.

The Court. Oh, yes. The eighteen were those that signed that letter.

Q What next transpired with the taking of the secret ballot? What was the result? A The result of the ballot was without a dissenting vote, that appears in the minutes.

Q Now, following the taking of the ballot resulting in the retention of Mr. Smith as treasurer what, if anything, further transpired at that meeting? A Nothing excepting the announcement of it to Mr. Smith.

Q Now, following that meeting the Commissioner of Banking and Insurance wrote the company a letter, from Commissioner Lewis, under date of July 16, Exhibit D. 8: "Dear sir, I am in receipt of a letter dated 21st ultimo and signed by Mr. E. K. Sexton, secretary pro tem of the special meeting of the board of directors of your company, held the last mentioned date, embodying the action of the board upon the resignation of Mr. Raymond E. Smith, secretary and treasurer of the institution, which will have my consideration." Did he thereafter, to your recollection, communicate to the bank, or the board, further, concerning this matter, after this letter, on the subject of the retention of Smith? A Not according to my recollection, except when we sent a committee to wait upon him, and he expressed verbally—

G. Rowland Munroe, direct.

Mr. McCarter. One moment.

Q I will leave that for a minute. The remainder of this letter states, "I will say now, however, that I emphatically disapprove of the action of the board in the matter." I will now ask you what, if any other, further indication on the part of the commissioner of his consideration of this matter was brought to the attention of the board, and where and how?

Mr. McCarter. I object to that for reasons already indicated.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I do not recall any further communication from the commissioner on this matter. I do not recall that he ever made any further indication of disapproval or criticism after this letter.

Q You started to tell about going to see him; tell us what you can recall about that. A As a matter of courtesy to the commissioner we felt that it would be proper to send a committee to him to explain our reason for our action. We did not want to seem to disregard his communication.

Mr. McCarter. Objected to.

The Court. It will be stricken out, the answer, so far.

Witness. We sent a committee to Trenton and had a talk with the commissioner.

Q (*By the Court.*) When? A I do not remember the date.

Q (*By Mr. Clark.*) At the time Mr. Foster went? A Yes, Mr. Foster and Mr. Odell, I think. We arranged the interview by telephone, but there seems to be a telegram in evidence.

Q Is that the date? A Yes.

Q That is June 15th? A I judge that is the date.

The Court. The telegram is dated June 15th.

Mr. Clark. That undoubtedly is the same visit, but we do not absolutely know that some other committee did not go at some other date.

Witness. I do not at all remember the date; I do remember the visit.

G. Rowland Munroe, direct.

By the Court.

Q Did you go once or twice? A I would not be sure that we did not go more than once, some of us, but I do not distinctly recall.

Q I mean you, personally? A Yes, I know I was there more than once.

Q With a committee? A I do not recall that it was with a committee. I was frequently in the State House, and dropped in there.

By Mr. Clark.

Q Now, will you state what you recall of the incident of this occasion when you and some other men of the Roseville Trust Company went to the commissioner?

Mr. McCarter. Objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A We waited upon the commissioner and explained to him the reasons for our failure to accept his advice, saying that we thought the personal element entered into it largely, and he not knowing Mr. Smith personally, and not knowing the conditions, was hardly in a position to form an opinion, he simply had the facts as reported by an examiner who, it seemed to us, was prejudiced; and we wanted him to understand that we had not lightly disregarded his advice, but had acted with the best interests of all concerned in mind, conscientiously. That, he had not questioned, but that his duty as commissioner seemed to him to insist that his recommendation stand; that it was quite possible that if he knew of the facts, and was on the board, he would have acted as we had done; but that as commissioner he felt that he could say nothing other than he had said.

Q Now, then, did you at that interview say anything to the commissioner, or anyone in your presence, about an investigation you had made of Smith? A Yes, I remember that I personally made that statement.

Mr. McCarter. One moment. I object.

The Court. The answer, so far as it has proceeded, is not harmful and may remain.

G. Rowland Munroe, direct.

Q Mr. Munroe, did you learn of any conduct on the part of Smith subsequent to the matters arising in connection with Nones which indicated to you his retention in office was inadvisable?

Mr. McCarter. Objected to.

The Court. The question may be answered.

An exception to this ruling is noted by the defendant as ground of appeal.

A Never at any time, anything.

Q Did you ever hear of any of these irregularities consisting of paying checks when there were no funds there to meet them? A Never.

Q Will you tell us about the matter which has been brought out here of an incident of overdraft in which your name was concerned? A Yes, sir. First, I recall that at the time of this overdraft I was in Ohio, I was gone two or three days; when I returned it was brought to my attention that there was an apparent overdraft I do not remember how much, perhaps $60— in that neighborhood. I looked over my check-book and found that I had made a mistake of $100 in addition. Of course, it was at once rectified. That was two or three years, as I remember, before the bank closed. I had several other accounts there which had substantial balances.

Q You were on the executive committee? A Yes.

Q And you were counsel for the bank? A I was.

Q Did you serve on the examining committee? A Never.

Q Did you ever examine any of the books of the trust company? A No, sir; not to make any examination.

Q Did you ever make any examination of the accounts of corresponding banks? A Never.

Q And did you ever make an examination of these big ledgers? A No, sir.

Q Now, did anyone—you said you had not examined them— did anyone ever call to your attention any irregularity on the general ledger or any other book? A Never.

Q Mr. Munroe, will you tell us concerning the fact as to whether or not the directors of the institution personally, and through their friends, did or did not continue to make deposits at least as frequently as formerly after the Nones transaction?

Mr. McCarter. Objected to.

The Court. How can he know that if he never examined the books? The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Did you withdraw any of the accounts which you had in the Roseville Trust Company after the Nones transaction?

Mr. McCarter. Objected to as immaterial and irrelevant.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I did not.

Q What was the fact in that respect?

Mr. McCarter. Objected to.

The Court. Objection overruled.

An exception to this ruling is noted by the defenadnt as ground of appeal.

A I kept my accounts there and influenced all the accounts I could to come there.

Q Mr. Munroe, do you recall to what extent, relatively, Raymond E. Smith was a stockholder of the trust company?

Mr. McCarter. Objected to as immaterial, and not rebuttal.

The Court. Objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A He was relatively a large stockholder, and he bought stock from time to time whenever it was offered and he could buy it.

Q Mr. Munroe— A I happen to know that.

Q Mr. Munroe, do you know whether or not Raymond E. Smith was financially interested in the Home Ice & Products Company?

Mr. McCarter. One moment.

Mr. Clark. All right.

The Court. You may answer.

G. Rowland Munroe, cross.

Mr. McCarter. I understood the question was withdrawn. I object to it, your Honor.

The Court. I did not understand that there was an objection.

Mr. McCarter. The point was I understood the question had been answered, when I objected to it. Does your Honor overrule the objection?

The Court. I did not understand there was an objection.

Mr. McCarter. I object to the question.

The Court. Since there has been a misunderstanding, the objection will be considered as having been made in time.

Q (Question read.)

Mr. McCarter. I object to the question as not rebuttal.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Will you please answer? A He was.

Q Was he, to your knowledge, a director and stockholder in the Home Ice & Products Company?

Mr. McCarter. Objected to for the same reason.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A He was.

Cross examination by Mr. McCarter.

Q Mr. Munroe, you have been a member of the Bar since when? A 1894, I think, sir.

Q Until your recent trip to Europe you continued your practice, did you not? A Yes, sir.

Q And you promoted and attended to the legal features of the organization of this corporation? A Yes, sir.

Q Of course, you are familiar with the provisions of the Trust Company Act under which it was organized? A I have examined it a number of times.

Q Well, were you familiar with it? A Fairly so, I think.

Q And prepared the charter of the company? A Yes, sir.

Q And to do that you had to examine the act, didn't you? A Yes, sir.

Q You knew of the provisions of the act? A I think so.

Q Now, you recall with considerable distinctness the interview between Mr. Appleton, Mr. Odell and yourself? A I think so.

Q That was at Mr. Odell's residence? A Yes.

Q You were sent for to come there? A Yes.

Q Mr. Appleton explained to you what he had discovered, after you arrived? A Yes.

Q Namely, that Mr. Smith, in order to accommodate Mr. Nones, had let him have some money which was falsely charged to the Albany corresponding bank, and that later that false charge had been corrected, and that he had given him a thousand dollars more, and then made two false entries on the Philadelphia bank? A I do not remember those details, Mr. McCarter.

Q Well, have you today in mind the nature of the charge, or claimed disclosure that Mr. Appleton brought to your attention on that occasion? A The thing that—

Q Have you in mind the nature of the disclosure which Mr. Appleton brought to your attention at that time? A I could not recall those facts; no, sir.

Q Well, do you say that he did not tell you what I have told you? A I do not say that; I say I do not remember those details. I remember the fact of an advance to Mr. Nones which was not reported to the committee.

Q Did he, or did he not, tell you that there had been an overstatement with reference to the Albany bank? A If that is the fact I presume he did.

Q I asked you if you recall it? A I do not.

Q Did he tell you there had been two false entries of checks credited to the Philadelphia bank? A I do not recall now.

Q And that in order to conceal what he had done with the Albany bank, he not only made the false entry on the corresponding bank account in Philadelphia, but he gave a thousand dollars more to Nones and covered that up with another false charge? Do you remember that? A I do not remember.

Q You won't say he did not, will you? A I do not say he did not; I do not remember.

Q Now, I notice that—I understood from your evidence that it had appeared somewhere that previous to the conversation between Mr. Appleton, Mr. Odell and yourself, Smith had, so to speak, confessed to Mr. Odell. Is that a fact? A That is my recollection.

Q He also confessed to you? A No; not personally; no, sir.

Q Then if Mr. Smith told Appleton that he had told you as well as telling Mr. Odell, he misstated that fact? A I do not recall that he told me personally; I do not say that he did not.

Q Was the information which you received on the evening that has been referred to from Appleton the first intimation that you did have of the transaction? A No; I think Mr. Odell had told me, the first intimation I got.

Q When did Odell tell you? A Well, as soon as he learned; I don't know just when that was.

Q How long before the meeting? A Before which meeting?

Q The meeting of you, Odell and Appleton. A Well, as I recall, it was within a day or two.

Q Now, you are aware, are you not, that it was not until after the examination by Mr. Appleton of the books was in progress, and the reconciliation of the corresponding banks in procurement, that Mr. Smith told Mr. Odell, aren't you? A I think I stated so in my direct examination.

Q Well, how long is it that you have not been able to recall the nature of the disclosure by Mr. Appleton on that evening? A I have always been able to recall the fact that—

Q No, no; how long is it that you have been unable to recall the facts as I detail them as having been the nature of the disclosures that evening? A That I cannot say, Mr. McCarter; such details would not have lingered in my mind; they were not the facts I was interested in.

Q You, of course, read the letter of the commissioner? A Yes; at the time I read it.

Q And it was your view that if the facts stated in the commissioner's letter were accurately stated, Smith had been guilty of manipulation, wasn't it? A Yes.

Q Now, I judge from something that you said in the course of your examination that the fact that Smith, so to speak, had made a clean breast of this thing to Mr. Odell, and to Mr. Apple-

ton, when Appleton was on the trail, had some influence upon your mind when the subject came up? A Yes.

Q Did he make a clean breast of it? A As far as I remember, he did.

Q What? A As far as I know, he did.

Q Did he tell you at that time a word about what he had done in December? A In relation to what?

Q To this Albany account? A As I remember—

Q Had he? A I am going to tell you, Mr. McCarter, if you will let me. As I remember, he had said that Mr. Nones was not able to return the money as he had expected, which did not enter into his original thought at all; he had made certain entries to carry him until Mr. Nones could clear it up.

Q What he told you was that in the month of February Smith stated that he had made some false entries in the corresponding banks' accounts to cover up money that he had improperly given to Mr. Nones; he told you that, didn't he? A Something to that effect.

Q He did not tell you anything of what he had done in the month of December, did he? A I do not recall the date, Mr. McCarter.

Q Did he tell you about some entirely other transactions, utterly disconnected with the transaction to which we have alluded as having occurred in February? A Unconnected with Mr. Nones?

Q Unconnected with these transactions? A I do not remember the particular transaction; I remember the person and fact that he had made advances which did not appear in the statement to us.

Q You read the letter from the commissioner, didn't you? A I did at the time; yes, sir.

Q Do you recall that it says as follows: "On April 6th, when the examiners returned to the trust company's office for the purpose of making certain verifications, all the drafts on the various correspondents being then on hand to March 31st, full comparison of all the paid drafts was made with the stubs of the check-books, where there were any stubs, and with the general cash-book, to see the various dates that the credits were made to the banks upon which the drafts were drawn. This led to the discovery that the above transactions with Nones were not the first of the knd, but that similar transactions had oc-

curred in December and January." Do you remember that? A I remember it now that you read it.

Q Now, Smith had not disclosed to Mr. Odell, or to you, those previous transactions in December and January, had he? A I do not recall that he had not.

Q Well, do you say he had? A I would say that he had, so far as I remember.

Q What? A As far as I remember.

Q What did he say about them? A As I remember, he stated whatever transactions he had had with Nones that were not regular; I do not remember the exact details, Mr. McCarter.

Q Will you say, therefore, that the contention of the commissioner in his letter was incorrect, that he had failed to disclose all of his shortcomings with Nones? A I have no recollection of that, sir. I do remember that he had made allusions to Nones which were ultimately authorized by the committee.

Mr. McCarter. I move that that be stricken out.

The Court. It will be stricken out.

Q Did not you testify before the Vice-Chancellor, on page 1485, as follows: "Q Now, coming back to the Nones matter, did Mr. Smith at the time he explained it to you, mention that he had advanced unlawfully to Nones on more than one occasion? A I do not recall that there was more than one occasion." A Well, I do not recall now that there was more than one occasion, or that there was not.

Q Your recollection is, according to this book, that he mentioned only one occasion, one specific instance. "That is all I recall"; is that correct; did you testify that way? A I do not know, sir.

Q Well, look at the notes. A I did not take those notes.

Q Do you want to deny it? A I do not deny it; I do not remember it.

Q Well, you did testify, didn't you? A I did testify.

Q Before the Vice-Chancellor? A Yes, sir.

Q And you were examined at some length? A Yes, sir.

Q And who was the stenographer, Miss McKenna? A Yes.

Q You know her as a lawyer, do you not? A Yes, sir.

Q She is an accurate stenographer? A Very careful.

Q Any reason to doubt this being her report, that it is correct? A Not at all.

Q Then the probability is that you did state as she said you did? A Yes.

Q "That is all I recall"? A Right.

Q I notice, stamped upon this bond, on it folded outside, the words, "Familiarize yourself with the conditions of the bond by reading it carefully"; do you see that? A Yes, sir; I see that.

Q Do you remember the recommendation in the commissioner's letter that the bond of Smith and the other employees be kept in a place distinct from one to which Smith had access and its removal to the Fidelity Trust Company? A I do not remember that; no, sir.

Q Now, as a matter of fact, you said you personally called upon the commissioner on some occasions alone, when you happened to be at Trenton, other than the time you went with the other gentlemen of the committee. A I do not think I said that, sir.

Q Well, I misunderstood you. A Well, I did not say I had seen the commissioner; I called in his office; I saw Mr. Johnson.

Q As a matter of fact, the day after the meeting of June 21, at which Smith's resignation was rejected, you went to Europe, didn't you? A I went to Europe; I don't remember the date.

Q I call your attention to the fact that the letter of Mr. Sexton, reciting the minutes, calls attention to the fact that the reason your signature is not appended to it is because on the day after the meeting, namely, the 22nd, you had gone abroad. A I had forgotten that, sir.

Q Referring to the letter of June 21st, Exhibit D. 7, the last paragraph says: "You will notice that Director Munroe's signature is lacking, he having sailed to Europe the day after the meeting was held, June 22nd; if you wish his signature we would suggest you return the letter to us later in September." Having that called to your attention, do you remember that you did go to Europe about that time? A Yes, about that time.

Q How long did you remain? A I returned about the second week in September, as I remember.

Q So that the visit you referred to as having taken place, the visit of the commissioner must have been after you returned in September, anyway? A I really do not remember the time, sir, whether it was before—

Q Well, you did not fly over from Europe by aeroplane? A No, sir; it was not during the time I was in Europe.

Q Now, this man Nones, whom you say Mr. Smith made some statements concerning, was indicted and convicted of conspiracy to loot your bank, and is undergoing sentence in the penitentiary, isn't he? A I believe he is, sir.

Mr. Clark. I think the fact is the sentence has been found to be illegal, Mr. McCarter, that is the statement made to Mr. Hinds by Mr. Jerome Gedney.

Mr. McCarter. That is off of the record.

Q Smith, in his talk with you, promised to reform. A He said it would be a lesson to him; that he had never done such a thing before, and never would again.

Q How many ballots were taken at this June 21st meeting? A To tell the truth, if it had not been for the minutes I would not remember there was a ballot taken; I thought there was a vote taken.

Q How many votes were taken? A As far as I remember only one.

Q Your office, your personal office, was in the same building with the trust company? A Upstairs; yes, sir.

Q You would go in the bank almost every day, wouldn't you? A Why, at times, yes.

Q And as a member of the executive committee you met how often? A Once a week at least.

Q As a member of the board of directors you met how often? A Once a month at least.

Q Did you, as a rule, have any idea of your duties and responsibilities as a member of the committee and as a member of the board of directors? A I did have; yes, sir.

Q Do I understand you to say, regardless now of any formal examination or any periodic examination by any examining committee, do I understand you to say that you, yourself, never on any occasion of these visits at the bank, glanced into any one of these books? A I would not say that.

Q Did you ever glance at the general ledger? A I do not remember any occasion when I did; I would not say that I did not; I do not remember. I knew nothing about bank bookkeeping.

Q I understand that. You had eyes? A Yes; poor eyes.

Q And you could read? A Yes, sir; I had to, to pass a bar examination.

Q You say you never examined the general ledger? A I would not say that; I don't remember, Mr. McCarter.

Q What books did you look into? A If I had occasion to look in any of the books, I did so; I never called on purpose to look at any of them.

Q I didn't ask you whether you called on purpose. A I don't recall.

Q Did you ever look in the individual ledgers? A I don't recall that I did.

Q Will you say that you did not? A I do not recall that I did; I don't remember any occasion when I did.

Q You cannot say, then, what particular book you looked into? A No, I cannot.

Q But you did look in some books? A I don't know that; I don't remember whether I did or did not. I did not regard it as part of my duty to do so; if I did, it was incidental.

Q You say that the conclusion that you acquiesced in was that, on the whole, it was for the best interests of the bank to retain Smith? A Best interests of all concerned; yes, sir.

Q That was your view at the time? A Yes, sir; honestly and conscientiously.

Q Do you still retain that view? A Well, it is pretty hard to—

Q One moment.

Mr. Clark. That is objected to. The issue is entirely out of the question as to the effect now, in view of all the disclosures; that is one that has not any bearing on the issues in this case. The question is what was the impression made on the directors at the time.

The Court. The objection will be overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A If I had known then what I know now I certainly would not have rested a day until he was discharged.

Q In other words, you do not entertain the views? A No.

Mr. Clark. The question is objected to.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q You were a lawyer, weren't you? A Yes, sir.

Q You knew the Trust Company Act, didn't you? A Yes, sir.

Q You had some idea of the duties of directors and officers, and of secretary and treasurer, didn't you? A Yes, sir; some idea.

Q You had personally received and read, as one of the directors, and as counsel of the company, a communication from the banking commissioner which you, yourself, characterized as indicating that Smith had been guilty of manipulations, hadn't you? A Yes.

Q And because Smith told you that he would be good, and because Smith told you that the man to whom he had done this hoped some day to inherit some money which would probably come to the bank, you felt it comported with the responsibility of your position as counsel and director of your bank to remain silent, so far as the shortage was concerned, and to continue that man in his position of trust and confidence, did you?

Mr. Clark. I object to the question as being argumentative, and, second, as not being material.

The Court. The objection is overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

A Those were not the reasons.

Q Were they not among the reasons? A No, sir; not as you state them.

Q Didn't you mention them? A Not as you stated them.

Q What have I stated wrong about them? A I do not remember that Mr. Smith promised to be good at all.

Q Didn't you say that he promised never to do that again? A Yes.

Q Well, that is what I meant by "be good." A There was a good deal more to it than that.

Q Well, in view of the fact that you realize, as a lawyer and as a director, that the letter of the commissioner showed that Smith had been guilty of manipulations, as you yourself said, you, for the reasons you have stated, explained to the commissioner the reason why you had voted in favor of disregarding

his advice and suggestion, didn't you? A I did explain my reasons, yes, sir, to the commissioner.

Q Have you given us the explanation? A Yes.

Q Did you know—of course, you knew—Mr. Scarlett? A Yes.

Q I notice that Mr. Scarlett moved the resolution in the meeting of June 21st that Mr. Smith be retained. When did you first learn that Mr. Scarlett had been permitted to overdraw his account in the bank to a large extent? A On the taking over of the institution by the banking department.

Q Well, as a director and member of the executive committee, and counsel of this bank, did it never occur to you to inquire during this period who were the borrowers of the bank? A We had a report every week of every borrower, as we had good right to suppose.

Q What? A We had a typewritten statement of every loan that had been negotiated each week, and having absolute confidence in Mr. Smith, as I did, I supposed that that was every transaction that had occurred of that nature.

Q Did not the commissioner, in his letter, direct particular attention to the Scarlett loan? A Yes, sir, and we made every—

Q One moment.

Mr. Clark. What letter are you referring to?

Q Was not the fact, as early as 1909, brought to your attention that Mr. Scarlett was—in the letters from the commissioner—brought to your knowledge the fact that Mr. Scarlett was permitted to borrow money upon the bank without the committee properly having passed upon it? A I do not remember the date at all. I do remember that the bank commissioner brought to our attention something that we were quite familiar with.

Q With reference to Scarlett? A Yes.

Q And it never occurred to you to look up the Scarlett account and find out what Scarlett was doing? A Oh, we had frequent—

Q I asked you if it never occurred to you— A Not personally; we had a committee giving personal attention to that.

Q What committee? A Somebody who saw Mr. Scarlett quite frequently; I think it was Mr. James B. Banister, if I remember correctly, tried to see if we could help Mr. Scarlett get the account reduced. Scarlett's affairs had changed very rad-

ically; we knew he was having hard times to keep up his payments. We had to pay his premiums to keep his life insurance, which he had given us as security, alive.

Q When was that? A I do not remember, but it was some months before the bank closed.

Q As counsel to the bank, in view of the information you were getting with reference to the instability and insecurity of the Scarlett account, it never occurred to you to look at the Scarlett account to see how it stood? A Why, no, sir.

Q To see why he was frequently, contrary to law, permitted to be overdrawn? A As far as I understand now it would not have done a bit of good if I had looked; it did not appear on the books.

Mr. McCarter. I ask that that be stricken out.

The Court. It will be stricken out.

Q It never occurred to you to look it up? A No, sir.

Re-direct examination.

Q Mr. Munroe, I show you now the account of J. B. Scarlett in the ledger of the bank, which is Exhibit P. 54, and ask you, upon referring to the pages in that account, state whether it shows any one single instance of red ink line indicating an overdraft? A In the column of balance there is nothing of that kind; it shows a balance at all times.

Q Is there anything in the book that shows an overdraft in any way? A Nothing that I can see, sir.

Mr. Clark. I offer the Scarlett account in evidence.

Mr. McCarter. It is objected to.

The Court. The book is in evidence.

Q Now, Mr. Munroe, will you refresh your recollection by looking at Exhibit G. in the equity bill of complaint, which has nothing to do with Schedule G in this case, and tell us how many items are shown as checks of Scarlett paid, but not charged, during the year 1911?

Mr. McCarter. I object. This witness did not prepare G, and he cannot testify as to what is included in it, or refresh his recollection; he has no information about it.

The Court. It is not shown that he has any knowledge about it.

G. Rowland Munroe, re-direct.

Q Since you testified in the suit before Vice-Chancellor Stevens you have been in France? A I was in France fourteen months.

Q Engaged in civilian work connected with the war? A Y. M. C. A. work.

Q Now, then, Mr. Munroe, I call your attention to the very point where counsel for the defendant stopped reading on page 1485 in your testimony before Vice-Chancellor Stevens, and read the next question and answer: "Q Now, when the letter of the commissioner of May 14, 1909, was read, which disclosed the incident which occurred on two different occasions, when that letter was brought to your attention, did you then doubt Mr. Smith's word and take steps to investigate it? A I do not recall distinctly whether there was one transaction, or more than one, and at that time, if there were two occasions, I undoubtedly knew about them, or it would have struck me." Does that refresh your recollection at all about this matter?

Mr. McCarter. I object to the question; that is not the way, as I understand it, the record can be used.

The Court. The question is whether he there testified to those facts.

A I have no question but that I did; that is the way I should testify now.

Q Mr. Munroe, did you at any time learn, and communicate to any other officer or director of the Roseville Trust Company, any facts respecting Mr. Appleton which caused you to regard him as prejudiced, as you have testified?

Mr. McCarter. Objected to.

The Court. I do not see the relevancy of that. The objection is sustained.

Q Did you at any time communicate to the president of the institution after the receipt of word from—receipt of information concerning this Nones matter—information which had been brought to your attention respecting Mr. Appleton and his point of view with regard to the Roseville Trust Company?

Mr. McCarter. Objected to.

The Court. I am inclined to sustain the objection, although this question itself is unobjectionable, it amounts to nothing without the next one.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Mr. Munroe, counsel for the defendant has asked you whether, as a lawyer and director, you, upon receiving this communication from the banking department, felt that you were justified in continuing to retain Mr. Smith. I will ask you whether there was any other information upon which you acted in addition to that concerning which you have testified?

Mr. McCarter. He has gone fully into the whole situation in his examination. Are we to go over the case anew, and have him give more explanations?

The Court. This question may be answered "yes" or "no."

A Yes.

Q What?

Mr. McCarter. Objected to.

The Court. I sustain the objection.

An exception to this ruling is noted by the plaintiff as ground of appeal.

WILLIAM P. ODELL, sworn for the plaintiff in rebuttal.

Direct examination by Mr. Clark.

Q Mr. Odell, how old are you? A Fifty-nine.

Q You were the president of the Roseville Trust Company? A I was.

Q Beginning at the opening of the trust company, and continuing down to the close of the institution? A I was.

Q Mr. Odell, what was your employment during the period of your connection with the Roseville Trust Company, other than at the Roseville Trust Company? A I was cashier of H. B. Claflin Company, dry goods.

Q And where was your work done? A New York.

Q Will you state generally to the jury the duties which you performed at the Roseville Trust Company as president?

Mr. McCarter. Objected to as not rebuttal.

The Court. The objection is overruled.

William P. Odell, direct.

An objection to this ruling is noted by the defendant as ground of appeal.

A I called there each morning about quarter to eight when the bank was opened, conferred usually with Mr. Smith, looking over or talking over different loans he was contemplating making; advising with him until, maybe, well, I think I usually took the 8:20 train down to New York; and would be there Monday evenings possibly an hour or longer, when the bank was open, and at that time confer with him; and on Tuesdays, I think it was, our executive committee meetings were held, and I would be there from four o'clock until sometimes our meetings would last until seven or eight o'clock in the evening; once a month allowed for the executive meeting, and once a month, I think it was Thursday, would be a full board meeting; that would last indefinitely during the evening; I would preside at all those meetings.

Q Did you have an account there? A I did.

Q Your family? A They did.

Q Any of your business associations?

Mr. McCarter. Objected to as immaterial.

Mr. Clark. It is introductory, if your Honor please, to what has been allowed as material.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q (Question read.) A They did.

Q What is the fact, Mr. Odell, concerning the—or, can you recall now, whether any of your business associate's accounts had been brought into the bank as early as March, 1919?

Mr. McCarter. Objected to as immaterial, irrelevant and not rebuttal.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Personally, at the present moment; I cannot remember at what date they were brought in.

Q Was one of those accounts the Claflin account? A It was.

Q And was another the McCreery account? A The McCreery account came in unsolicited.

William P. Odell, direct.

Q Did you, after the incidents of March, 1909, and June, 1909, affecting the Nones transaction, withdraw any of your accounts?

Mr. McCarter. Objected to as immaterial, and not rebuttal.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A No, sir; I want to say right here that I had no control over the accounts; when I was answering I meant my own personal account; I did not control the other accounts.

Q Did you at any time after the Nones transaction take any steps to have the accounts of the Claflin Company withdrawn from the Roseville Trust Company?

Mr. McCarter. Objected to as immaterial, and based upon a hypothesis.

The Court. The objection is sustained.

Q Did you at any time after the Nones transaction of 1909 take any steps to have withdrawn or lessened, any accounts that may have been in the institution, even though it came in at a subsequent date?

Mr. McCarter. I make the same objection.

The Court. The objection is overruled.

A No, sir.

Q Now, coming to the question of the Nones matter, I simply want to skip as much as possible the ground which has been covered by another witness. Will you state—did you hear the testimony of Mr. Munroe? A I did.

Q You heard all his testimony this morning? A Yes.

Q Do you recall, Mr. Odell—well, I will ask you whether the testimony given by Mr. Munroe this morning in relation to the conversation between you and Appleton and Munroe in March, 1909, was substantially according to your own recollection?

Mr. McCarter. Objected to.

The Court. The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

William P. Odell, direct.

Q Will you tell the Court and jury as nearly as you can recall, what transpired at the conversation between you and Appleton and Munroe in March, 1909? A I think it was as early as seven or eight o'clock in the evening I was called up by telephone, and explained that it was Mr. Appleton had made that morning an examination of one or two things he wanted to speak to me about, wanted to know if I would be home; I said I would. He called and said that he had called to let me know what the condition was that he so far had found at the bank, and certain matters there that he would like to talk over with me. I said, "Just wait one minute; you have no objection to having our attorney of the bank, Mr. Munroe, hear what you have to say." He said, "No, I would be glad to have him." I said, "Just wait; I will see if he is at home." I called him on the telephone and he came around. When Mr. Munroe came around the matter of the Nones matter was—that was the only matter conversed on at the whole meeting. In fact, I think that was the only matter spoken of personally; the Poor matter was not brought up there; Mr. Munroe was a little mixed on that, and I think Mr. Appleton was also somewhat mixed on the Poor conversation.

Q While on that subject what do you recall about the matter that Mr. Appleton testified to concerning some reference you made to a Mr. Poor? A One day, which I think was some time after this whole matter was brought up, the commissioner's letter—what day I can't say, but I can usually tell by looking at O'Neill-Adams' account; it was another account, and I was very well acquainted with the manager of that account, Mr. Jeffries, and they kept an account at the Garfield Bank, of which Mr. Poor is the president; he was, and I think to this day is president, and Mr. Jeffries knew him very well, and knew me very well. I think in the conversation Mr. Jeffries told me afterwards—the conversation was brought up by—

Mr. McCarter. One moment.

A (Continued.) I mean Mr. Jeffries was not the reason this came up between Mr. Jeffries and Mr. Poor—

Mr. McCarter. One moment.

The Court. You are permitted to state what occurred between you and Mr. Adpleton.

A (Continued.) Mr. Jeffries said that—

Mr. McCarter. One moment, Mr. Odell; the point is, as I understand it, you are permitted to tell us what you said to Mr. Appleton about the matter.

The Court. Not your conversation with Jeffries.

A (Continued.) Oh, I didn't say anything to Appleton about Poor.

Q At any time? A I don't remember ever saying anything to Appleton about Poor. Mr. Appleton has got that, no doubt, from my indictment trial.

Q So that you never said anything to Appleton at that conference, or any other, about any Poor matter? A Not to my best recollection.

Q And your recollection on that point, is it clear? A Very clear.

Q I will ask you whether or not you ever learned from Mr. Poor, or anyone else, prior to the closing of the trust company, that Raymond E. Smith had been dishonest? A I did not.

Q What did you learn from Mr. Poor? A Mr. Jeffries called me up and said that Mr. Poor had something he could tell me about Smith; that is all that was said with Jeffries. I called up Mr. Poor and asked him if I could have an interview with him; he said, "Certainly, come up whenever you see fit." So one afternoon I went up and saw him; he asked me what he could do for me; I told him the circumstance, that Jeffries said he could tell me something about Smith. He said, "No, I don't know Smith." I said, "You know who he is?" "Yes," he said, "I know Smith; a gentleman in Orange told me about Smith." I asked him who it was; he said, "Mr. Bonnell, of the Orange National Bank." He said, "That is as far as I can go; I don't know anything about Smith." That evening I called up Mr. Munroe's office in the bank, and called up Bonnell's home, and told him what Poor had informed me. He said, "I think he has got something else in his head; I never told him that; I know nothing of Smith but what is good if there is anything in the matter." He said he would be glad to talk to me, but there is nothing to say. So I told Mr. Munroe—

Mr. McCarter. Objected to.

The Court. The objection is sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

William P. Odell, direct.

Q Did you communicate to Mr. Munroe all of your conversation with Mr. Bonnell? A Well, Mr. Munroe was standing alongside of me and heard me talk with Mr. Bonnell, and heard my answers to Mr. Bonnell, so I suppose he inferred—

Q (*By the Court.*) The question is, did you tell him what Bonnell said? A I think I did, afterwards.

Q (*By Mr. Clark.*) Do you recall that any report was made to the board of directors early in its career, at the time it was being organized, by Mr. Munroe, as a committee, concerning his investigation of Raymond E. Smith, calling at Orange, and so forth? A I do not recall any incident, although we had a meeting of the directors.

Q Did he ever tell it to you as a—

Mr. McCarter. Objected to.

A He has told it to me.

Q Was Mr. Munroe a committee entrusted with the details of the organization? A I do not know what you mean by the details of the organization.

The Court. Legal details, I suppose you mean.

Q Did you personally look into the previous career of Raymond E. Smith? A I did not.

Q Upon what information did you rely in connection with your association with him as an officer? A On the recommendation of the organization committee of the trust company.

Q Now, who were on that organization committee? A I could not say who.

Q Was Mr. Munroe? A Mr. Munroe was; yes; and Mr. Foster was one, too.

Q Now, Mr. Odell, it has been testified here that there are numerous errors and irregularities in the books of the company. I wish you would tell us to what extent any of those came to your attention during the life of the trust company? A They never came to my knowledge until the night of the examiners being there, and I was there until three o'clock in the morning going over it.

Q Did you have a deposit in the Roseville Trust Company at the time it was closed?

Mr. McCarter. Objected to as immaterial and not rebuttal.

The Court. The objection is overruled.

A Yes, sir.

Q How much did you have? A $41,000.

Q Mr. McCarter has brought out in the examination of some other witness that there was a total of something like $140,000 paid by directors for releases from negligence; how much of that did you pay?

Witness. May I ask a question, your Honor?

The Court. Yes.

Witness. I object to being put in for "negligence"; there was nothing said about negligence when I turned in my money; far from it. I object to that, Mr. Clark.

Q Will you answer the question, then, qualify it as you may need to? A I can answer there was no money paid for any negligence. He asked me how much money there was paid in for negligence; there has never been any suggestion against me, or for me, or money paid in in which there was negligence.

Q It has been brought out through the examination by Mr. McCarter that directors have paid, since the close of the bank, to the Roseville Trust Company, in the hands of the liquidator, the total of $140,000; how much of that did you pay? A $40,000.

Q Coming back to the affairs of 1909, did Smith communicate with you prior to the meeting of the board of directors on June 21, telling you his version of the Nones transaction? A He did.

Q And what did he say? When was it? A I think the next morning after Mr. Munroe was at my house; I mean Mr. Appleton was in my house; the next morning after that evening. When I went there I went in company of Mr. Fairlie, our vice-president, and Mr. Smith brought the matter up himself right away, without my saying a word.

Q And what did Mr. Smith say?

Mr. McCarter. I object for the reasons stated before.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A He explained it by saying that Mr. Nones was an old schoolmate, boyhood friend of his, and would be eventually well off,

as his mother was well off and he was the only heir, as I understood it, and out of those facts he had made this loan this way, not putting entries on the books, through the understanding that Nones would pay back right away, it was only a question of going down to New York and getting a certified check on some stock transactions, and coming back again to Smith; that that had been put off from day to day; and that was the reason the transaction had been carried forward on the book.

RECESS.

Q Did you see Mr. Appleton again after the conference at your house that you have referred to? A I may have seen him, but I would think I had no conversation with him. May I say right here, in finishing up that Nones matter, that that matter was cleaned up and settled up—

Mr. McCarter. I object to that answer.

Q Mr. Appleton has testified that he went over with you, on the occasion of each examination which he made, and he testifies that he examined the bank in March, 1909; October, 1909; May, 1910; he went over with you the various matters of detail, including the matter of loans, at the time he made each of these examinations; is that the fact? Do you recall that? A Just at present I never remember him being back for another examination. I suppose it must be so, if it is in the minutes.

Q Now, will you look at the minutes of the special meeting of the board held on June 21, 1909, Exhibit D. 6, and refresh your recollection as to what the minutes contain. (Witness examines book.) Tell us what, if any, action was taken at that meeting in addition to that shown by the minutes, beginning with the start of the meeting.

The Court. I suppose the first question is, having refreshed your recollection with the minutes, was any action taken which you do not find upon the minutes?

Witness. I think not.

Q You, perhaps, do not understand the meaning of counsel, as to what is meant by action taken at the meeting. Do the minutes show the various intermediate steps taken in that meeting? A Yes, they do.

William P. Odell, direct.

Q Do the minutes show what reports, if any, were made to the directors concerning the talk with Appleton? A The minutes do not show it.

Q Will you state whether you reported to the meeting concerning your conference with Appleton?

Mr. McCarter. That has already been shut out.

The Court. Let him answer "Yes" or "No" to that question. I do not think the report he made is admissible. I think that is the view I expressed this morning.

Mr. Clark. Yes. I wanted to ask this witness, and offer by him to prove it.

The Court. I suppose there is no objection to this question, but, anticipating the next one, I am inclined to sustain the objection.

Mr. Clark. I pray an exception to the exclusion of the testimony which this question forecasts.

Q Did Mr. Smith at that meeting make any statement to the board concerning the Nones transaction? A He did.

Q What did he say?

Mr. McCarter. That I object to.

The Court. The objection to that will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Why he practically went over the same explanation I have already given to the answer that Smith gave me.

Q Answer to what? A To the same explanation he gave to the directors he gave to me personally, with the addition that he would never do such a thing again; that he saw now his wrongdoing in the matter; that he had made an error in judgment in carrying it on the books in the way he did.

Q Was any report made at that meeting concerning the investigation that had been made of Smith a few months before, at the time the trust company was opened?

Mr. McCarter. Objected to as indirectly calling for the same question your Honor has excluded.

The Court. The question may be answered "Yes" or "No."

A No.

William P. Odell, direct.

Q You do not recall that A I do not recollect that any was made.

Q Would you say that there was no such—

Mr. McCarter. Objected to.

The Court. I suppose the question is whether there was no such report, or whether you do not recollect it; is that what you mean?

Witness. I do not recollect.

Q Mr. Odell, did you, or did you not, give instructions, following the talk with Mr. Appleton, to the effect that thereafter all stubs should be filled out?

Mr. McCarter. Objected to.

The Court. I suppose that question is rather leading. The question, if at all, is what directions were given in reference to stubs.

Mr. McCarter. Not only leading, but it is improper, I think.

The Court. I do not quite see the relevancy of that; that would not bear upon the state of mind of Mr. Odell.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Now, Mr. Odell, after the date of the Nones transactions, did any irregularities of Raymond E. Smith come to your attention? A They did not.

Q Did you, or did you not, personally, look at the general ledger? A I did, quite often.

Q Did you discover in the general ledger any matters which appeared to you to be an irregularity? A No, sir.

Q You have testified earlier concerning an indictment of yourself; to what period of time did the transactions with which you were indicted relate?

Mr. McCarter. Objected to. There was no such testimony.

The Court. Yes, he spoke of it himself.

Mr. McCarter. Then the indictment would speak for itself, if material at all, I think it should be produced, your Honor.

The Court. The objection will be sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q What happened on the trial of your indictment?

Mr. McCarter. Objected to.

The Court. Objection is sustained. You mean the record of the trial?

Mr. Clark. Yes.

The Court. That may be answered.

Mr. McCarter. One moment. I have not brought this out; I don't know what the purpose of it is; if this witness volunteered the fact that he was indicted how can it be proper for him to say what happened? The rule, as I understand it, is, that the only significance of a criminal proceeding is the conviction, and I have not cross examined him about that subject, and I do not see now how he can testify on a subject which he volunteered.

The Court. The question may be answered.

A I was acquitted.

Q Mr. Odell, prior to your connection with the Roseville Trust Company, what, if any, experience had you with the conduct of banking institutions? A No experience.

Q In your capacity as cashier of the Claflin Company were you required to keep any books yourself? A Yes, sir.

Q What were those books? A Daily balance with the bank, and so forth.

Q What did they consist of? A Making deposits and withdrawing money; about all.

Q Did you have anything to do with the keeping of a ledger? A No, sir.

Q Had you ever been—I don't know whether you had ever been—a director of any banking institution before? A No, sir.

Q Had you ever been anything but a depositor? A That is all.

Cross examination by Mr. McCarter.

Q The concern of which you were cashier was the large wholesale drygoods house of H. B. Claflin & Company? A Yes, sir.

William P. Odell, cross.

Q How much business do they do in the course of a year, gross? A Oh, $30,000,000 on an average.

Q Their home office is in New York? A Yes.

Q A large building, occupying a block? A Yes, sir.

Q How long had you been their cashier? A It is now thirty-five years, I think; connected with the institution thirty-five years.

Q Been connected with the Claflin concern thirty-five years? A Yes.

Q Gone through all the positions? A Office boy, and keeping of the cash-book, and so on, up to regular cashier.

Q I do not care about "so on," I want to know what they were. A That is all.

Q First, office boy, and then you were put on the books? A Yes, sir.

Q How long were you on the books? A When you speak of books, their books are subdivided there; I could not say I was on all the books.

Q How long were you on the books that you were on? A Maybe thirty years.

Q Now, what duties did you discharge with the books before you became cashier? A Writing up of the credits to the different customers on payments, and withdrawals of money, if they did withdraw any.

Q In other words, you had charge of a certain department of the general scheme of bookkeeping of H. B. Claflin & Company? A Yes, sir.

Q Did you vary your work during the thirty years you were on the books? A No, sir.

Q You were kept in one department? A Yes, sir.

Q You know what a general ledger is, don't you? A What it is in a commercial sense; yes.

Q You know the difference between a debit and a credit, don't you? A Yes, sir.

Q You recognize it as being somewhat irregular to have lead-pencil interlineations in columns, don't you? A Yes, sir.

Q If things that should be properly entered as credits are entered as debits, you would know that, wouldn't you? A Yes, sir.

Q In other words, you understand the system of double entry bookkeeping? A More or less; yes, sir.

Q What? A Yes, sir.

Q And for thirty years worked on the bookkeeping of the great concern of H. B. Claflin & Company? A Only one line of it; not the regular bookkeeping.

Q Of one department? A Yes, sir.

Q The work you did entered in the general work, didn't it? A Yes, sir.

Q Did they have a general ledger? A Yes, sir.

Q Did you ever look into that? A No, sir.

Q Never looked into it? A Oh, I have looked into it, but I did not keep it.

Q You frequently looked into it, didn't you? A No, sir, not frequently; that was kept by the treasurer.

Q Did you look into it? A I have looked into it.

Q Now, when were you promoted from bookkeeper to cashier? A I cannot give the time, maybe 1885—something like that.

Q And have been cashier from about that time down to the present? A Yes, sir.

Q You are still with them? A No, sir, I am not with them.

Q When did you leave Claflin? A Just before my indictment trial; that is about four years ago, I think.

Q What is your business now? A I am not in any business.

Q Were you one of the promoters of this bank? A No, sir.

Q Now, I understand you to say that you did every day pursue the custom of going into the bank on your way to the train, is that right? A Yes, sir; mostly every day.

Q Well, we will call it a daily practice; sometimes varied from that? A Yes.

Q Which committees did you serve on? A Nothing but the executive committee.

Q You never were on the examining committee? A No, sir; no committee whatever, except the executive committee; presided at the executive committee and full board meetings.

Q Were you the first president of the company? A The only one.

Q You were familiar with the by-laws of the company? A Well, I could not recite them right off; I have read them a number of times.

Q Do you recall among the duties of the president are: "He shall have the general superintendence and direction of all the other officers of the company, and shall see that their duties are

properly performed''? A I suppose that is what I read if that is the by-law.

Q Were you aware of what the by-law required you to do? A I have read it, yes, sir.

Q Were you aware of what the by-law required you to do? A Yes.

Q And did you, in the course of the execution of your duties, pursue the direction of the by-laws and exercise a general superintendence and direction of all the other officers of the company, and see that their duties were properly performed? A As far as I was able.

Q As far as you were able? A Yes.

Q Among those officers being the secretary and treasurer, Mr. Smith? A Yes, sir.

Q You looked at the general ledger, didn't you? A I looked at the general ledger, yes, sir.

Q Did you ever observe any lead pencil interlineations in this ledger? A I can't say that I have.

Q What? A I cannot say that I have ever seen any lead pencil interlineations.

Q Do you say that you did not? A I do not remember to have seen any, unless they were footings.

Q I do not mean footings, I mean lead pencil interlineations right in the column of figures. Will you say that you did not see them? A I won't say I did not, I do not remember seeing them.

Q Do you remember—how often did you examine the ledger? A Well, usually Monday nights, when I was there, took it up and looked through.

Q For what purpose? A To see what balances were being carried in the bank at the time, and the amount of loans.

Q To ascertain the condition of the company, didn't you? A No, sir; I did not ascertain the condition of the company.

Q You were able to read the ledger, weren't you? A I think I was.

Q You knew the makeup of the ledger? A Yes, sir.

Q Assets, liabilities, different charges and credits? A Yes, sir.

Q And do you wish this jury to understand that you never noticed any irregularities on the face of the ledger? A Yes, sir.

Q Never a thing? A No, sir.

Q Never noticed that things that were liabilities were entered as assets, and things that were assets were entered as liabilities? A No, sir.

Q While we are on this subject I will anticipate for a moment and ask you if you recall the fact that the commissioner, in his letter of May 14th, which is in evidence, called your attention to the fact that the stub, in many cases, had not been filled out of the drafts drawn by Mr. Smith, do you remember that? A I don't remember what all the letter called for, but if it is in the letter I remember it.

Q (*By the Court.*) Do you remember that fact, whether that is so or not? A I can only say that I think I do; it is a long time ago.

Q (*By Mr. McCarter.*) I am reading from the letter. A I say if it is in the letter there, no doubt my mind is called to it.

Q Did you have that corrected? A Yes, sir.

Q Right away? A I spoke to him, and had it corrected; saw him correct some of the entries.

Q Will you say now that that was corrected immediately? A Some of the entries were corrected immediately.

Q Was it the practice of drawing checks— A So far as I was concerned it was instantly stopped; I gave orders for it to stop.

Q I am asking you whether you do not know that the practice of Smith of drawing drafts with blank stubs, adverted to in the letter of May 14th, was not stopped? A No, I do not remember that.

Q You do not remember that? A No, sir.

Q Will you say it was stopped? A I gave orders for it to stop; I do not know whether it was stopped, or not.

Q Now, I understand that the first information that came to you as president of Smith's connection with the Nones transaction was when Appleton called upon you at your residence? A Yes, sir.

Q Did you know, previous to the call, that Mr. Appleton was there making—was at the bank, making an examination? A I met him that morning, was introduced to him by Smith.

Q How long had he been there to your knowledge? A Just came in that morning.

William P. Odell, cross.

Q So that the evening when the interview took place was the evening of his first day at the bank? A Yes, sir.

Q Sure about that? A I am pretty sure of that.

Q He explained the situation to you? A He explained the Nones situation; I do not think he got any further than Nones.

Q I am confining myself to the Nones. A Yes, sir.

Q And he told you, did he, that Nones had been given some money by him, and that in order to conceal it he had made a false entry in the ledger with reference to the correspondent bank in Albany, and that in order to cover up that he had subsequently made a false entry in the ledger in two items with reference to the Philedelphia bank? A No, sir, I do not think he went over all those items; I do not remember him explaining it in that way to me.

Q Do you say he did not? A I would not say that he did not, nor that he did; I do not remember the exact explanation that he made.

Q Well, is that your recollection of what the transaction was, or isn't it? A Why, I have that inference on that subject, having read it from the commissioner's letter, he explains it there; I do think, if I remember rightly now, ten years this is, that Appleton did not explain it as minutely as that, nor did he say that Smith—I think you quoted from the letter—had tried to conceal anything from the Nones; just stated there was no entries on the book of the Nones matter; just explained that he had loaned him the money without entering it upon the books.

Q Have you given us the explanation? A That is the explanation as I remember at the time.

Q Do you understand that Smith and Appleton had a conversation on the matter before Smith saw you? A No, I did not so understand it.

Q Smith saw you the next morning, didn't he? A Fairlie and I went there the next morning at quarter of eight.

Q Did the fact that you had gotten this information from Mr. Appleton the evening before have anything to do with you and Mr. Fairlie going to the bank the next morning. A Yes, sir.

Q Did you call up Fairlie? A I think I met Mr. Fairlie on the street, and took him along with me.

Q It was not customary to take him, was it? A No, I usually met him there every morning; he was there the same as I was.

Q And you brought the matter up to Smith's attention? A No, sir, he brought it to my attention before I could say anything.

Q What did he tell you? A The same explanation.

Q What did he tell you? A That no doubt Mr. Appleton had found some errors in Nones' account, and he wanted to tell me that he had loaned him some money that was not authorized by the directors. "I think the directors had already authorized a loan of $3,000 to Nones that I put on the books; I loaned him some money that I did not put on the books." I said, "I know that; Mr. Appleton was at the house." And then he explained the thing, that Nones was an old friend of his, and he expected to get the money back the very next day and have the matter settled up immediately. He said he would have it settled up that day.

Q Did he have it settled up that day? A I think it was that day, or the next day.

Q Did he have it settled up that day? A I don't know whether he had it settled that day, or not.

Q What Nones transaction did he refer to? The same Nones transaction that Mr. Appleton had referred to the night before? A I suppose he did.

Q I am not asking you what you suppose. A That is what I inferred he referred to; he did not designate it; he designated the one that was not shown on the books; Smith did; so it must have been the one that Appleton—

Q It was in connection with the Albany bank and Philadelphia bank, wasn't it? A He did not say anything about that, as I remember.

Q Do you remember the date when this thing had occurred? A No, I do not.

Q He did not tell you anything about any previous transaction of Nones, did he? A No, sir.

Q That you learned later? A Yes, sir.

Q Where something had been done on a previous occasion; that he told you about on the morning of the call with Appleton? A Yes, sir.

William P. Odell, cross.

Q When did you learn that? From the letters of the commissioner? A From the letters of the commissioner, as I remember.

Q Smith had never told you about that, had he? A No, sir.

Q You said that you had $41,000 in the bank, and that you paid $41,000 in liquidation. Assuming that to be correct that you paid $41,000, what did you do it for? A For the reorganization of the new banking institution.

Q Whom did you pay it to? A I suppose the banking department took that. I did not actually pay it to them.

Q Don't you know that you and several other of the directors made payments in one form or another, and thereby secured releases from the banking commissioner for liability for negligence? Don't you know that? A I don't know as to the insertion of "negligence," was put in there.

Q Didn't you get a release? A I got a release from the banking department.

Q From any liability of your neglect, oversight, misconduct, as a director? A Not so worded.

Mr. Clark. I recall counsel's objection made over and over again against counsel reciting the contents of written instruments; the release is in existence, and speaks for itself.

The Court. The fact that he got a release is competent.

Q Will you bring it at the next session? A Provided I get it back again.

Q We won't take it out of your hands, simply let you read it to us. A I will.

Q That simply does not pertain to the reorganization of the bank, as your construction of the release, simply a receipt of money for the reorganization of the bank. A Not a release, no, sir.

Q You made a payment for the reorganization of the bank? A I did not make a payment, I simply retained the deposit there for the reorganization of the bank.

Mr. Clark. I simply call attention of counsel to the fact that my question concerning which this witness testified was carefully stated; it was to the effect that counsel for the defendant had brought out on cross examination of

another witness that $140,000 was paid, and "How much of that $140,000 did you pay?" Now, as a matter of fact, as counsel knows, the $140,000 is made up as shown in Ex. J, prepared by us in another matter, and requires the addition of $86,000 paid in cash, to the sum of $53,000 and mortgages, surrender of securities, to make up $140,000, which this counsel brought out from another witness as one lump sum which had been paid to the banking department. My objection is to the effect that the cross examination is not proper, because the tendency of the answer is to mislead the witness concerning what the witness testified to on his direct examination; and in that connection I am referring to the form of my question which absolutely followed the question put by Mr. McCarter to another witness, to which the answer was "yes."

Q I will ask you again whether you paid it or whether you set off a claim against the bank? A I set off a claim against the bank.

Q You said on direct examination that you paid it, didn't you? A Yes.

Q What you did do was set off. You had a claim of $41,000 which was your deposit at the time of the failure, and you released the bank from any claim for that $41,000. A $40,000.

Q And what you got in return was a release? A I suppose it was; I am not a lawyer.

Q Who was your lawyer? A Mr. Ralph Lum.

Q And that release you will produce if we have another hearing? A Yes, sir.

Q And whatever you surrendered your deposit of $40,000 for, it was not for negligence, was it? A I did not look at it that way; it may have been worded that way.

Q Just gave it; voluntarily surrendered it? A Sure, that is it.

Q Like manna from heaven? A I don't know anything about that.

Q Dropped it out altruistically; gave it up; what did you give it up for? A For reorganization purposes.

Q Now, during your time as president did the concern pay dividends? A It did.

William P. Odell, cross.

Q Did you vote those dividends? A I did—I don't know that I voted; the board voted for them.

Q At a meeting at which you presided? A Yes, sir.

Q And you did not dissent? A No.

Q Did you realize it was your duty, before declaring dividends, to satisfy yourself that the profits that were declared in the way of dividends, had been made? A I do not quite understand the question.

Q (Question read.) A They were reported by the executive officer that they had been made. We did not look over the books to see if profits were there any more than anybody else did.

Q You did not look at any books to see? A No, sir; they were reported to me at the meeting that these were the profits of the bank.

Q And you accepted it blindly? A Not blindly.

Q Did you follow it up at all to see if it was accurate? A No, sir.

Q Notwithstanding the letter of May 9th, you never pursued the matter at all? A No, sir, I did not prove the books or anything.

Q Notwithstanding the letter of May 9th? A I did not prove the books.

Q Notwithstanding the letter of July 15th in which the board is told that the examiner insist upon his position that Mr. Smith should resign? A No.

Q Nevertheless you ignored everything? A I did not ignore the executive officer's figures; I took them as being true; had full confidence in them as being true.

Q Mr. Munroe was counsel of the bank, wasn't he? A Yes, sir.

Q During the evening that you, Appleton and he were together, you heard him criticize the transaction as one of manipulation by Smith? A I do not remember that fact; I do not remember what the general line of conversation was; that is, I remember what the general line was, but what it actually was I do not remember.

Q You heard him admit on the stand this morning that that is what he deemed it to be. A Yes, he has got a better memory than I have.

William P. Odell, cross.

Q What effect, if any, upon your mind, did it have that the commissioner called your attention, in his letter of May 14th, to the fact that in the conversation of Smith with Appleton, and in the conversation of Smith with yourself, while confessing to irregularities with reference to Nones in February, he had concealed previous irregularities in December and January? What effect did that have on your mind? A I suppose at that time I must have thought it was not regular. I cannot tell just what effect it did have on my mind.

Q At the meeting of June 21 did Smith remain during all the meeting? A Is that June 21st—that is the full board meeting?

Q Yes, the 21st. Smith did not remain during all the meeting, did he? A No, sir; he was not in there but a few minutes.

Q He withdrew? A He withdrew.

Q Now, there were three ballots, weren't there? A Two, I think.

Q Were not there three? A I don't think so; no, sir; two.

Q On the first ballot you voted in favor of accepting his resignation, didn't you? A No, sir; I did not.

Q Sure about that? A Sure.

Q Did you not change your vote? A Changed it on the second vote. There were two on the first voting against it.

Q How did you vote on both? A I voted "no" on the first one, and with the majority on the second.

Q You voted against Smith on the first vote? A On the first vote; and Mr. Fairlie voted against him. I didn't know it at the time.

Q When you voted "no" on the first vote was it the fact that Smith had deceived you, or, rather, failed to tell you about the earlier manipulations with the Nones account that influenced you to vote "no"? A No, sir.

Q Well, was it the fact he had done what he did do? A The general aspect of the situation. I felt I had full faith in Smith.

Q But you wanted to have his resignation accepted on account of the general aspect? A Yes.

Q Mr. Smith didn't come in between the time of the two ballots, did he? A No, sir.

Q So nothing that he said made you change your mind? A No; only conversation between the directors, talking about it;

as I remember it the ballot was not taken immediately; there was an hour in between.

Q The directors deliberated an hour between the first and second ballot? A Yes, sir.

Q Were you getting hungry? A No, sir; I just had my supper before I came; I always have a pretty good appetite.

Q Now, isn't it a fact there were three ballots, and that you voted twice against Smith? A No, two.

Q Are you sure about that? A Quite sure.

Q And didn't you swear, in one of the proceedings before the Vice-Chancellor, I think, to that effect? A I do not remember that I did; if I did then it is wrong, that is all.

Q I call your attention to your evidence on page 93. I am reading, I will say, for your satisfaction from the stenographic report of the evidence. "Q At the board meeting I understand that Mr. Smith tendered his written resignation? A This was a special meeting, you know, special board meeting. Q And at that meeting of the board he tendered his resignation? A Yes. Q What was the first action taken; wasn't it an acceptance of his resignation? A Accepted the resignation, yes, sir. First he made his explanation and plea for, I won't say mercy, but his plea for forgiveness for what he had done; he offered his resignation; we accepted it, and he left the room." Did you testify that way? A If it is there I expect I did.

Q Then Mr. Smith's statement, whatever else it included, was, as you have expressed it, a plea for forgiveness for what he had done, was it? A I suppose so, yes.

Q "Q Did you vote for his being restored to his position after the resignation had been accepted? A I voted twice against it, but I didn't have much to say in the thing, there were eighteen or twenty against me, and the third time I went with the majority." Now, did you testify that way? A If it is there I suppose I did.

Q Is it true or not? A To the best of my recollection it was twice; I think it was twice. There were two votes taken; I do not remember there being three votes.

Q "Q Finally you voted with the majority? A Yes; I think there were two votes against it, and I know one of them was my vote."

Mr. Clark. Will counsel state to the Court what this contradicts of the testimony given by the witness as to the number of ballots?

Mr. McCarter. I am going to ask the witness whether he testified as follows on that day.

Q "Q And you had in mind, of course, the facts contained in the commissioner's letter? A Yes, more or less. Q You had in mind what you had learned by conversing with Mr. Smith? A Well, I hadn't learned anything particularly detrimental to him outside of the letter. Q Why did you vote finally for him to be restored to his position? A Why, to be restored? Q Yes. A On account of, as I say, the majority, I went with the majority; that is all; I wasn't fully against it exactly, but I felt that it wasn't just the right thing to put him back again, but when the eighteen or nineteen were against me I voted with them to make it unanimous." Did you testify to that? A I expect I did, if it is there.

Q So, notwithstanding the fact that you thought it was not just the right thing to put him back, because eighteen or nineteen of the others voted the way they did, you followed them blindly, did you, is that right? A Not blindly.

Q Well, followed them? A I followed them, yes.

Q You, the president of the company? A Yes, sir.

Q You, the chairman of the executive committee? A Yes, sir.

Q "There was no question that he should be elected unanimously, it was just a question that they would keep on voting, and so they took a third vote, and the third vote brought them all in, myself included; that was the end of it." Did you testify that way? A I dare say I did.

Q So there must have been three ballots? A Not necessarily so, I may have been mistaken, though, my recollection now is there were only two ballots.

Q Scarlett was quite active in Smith's behalf, wasn't he? A No.

Q Didn't he make speeches in his favor that day? A Well, we had two or three others, too.

Q I ask you if he was not quite active in Smith's behalf? A Talked the matter over; there were no speeches; we conversed about it the same as anybody else.

William P. Odell, cross.

Q He made the motion that appears in the minutes of that date that Mr. Smith be retained, do you remember that, that Mr. Scarlett made that motion? A I do not remember it, I only know it is in the minutes; I see it in the minutes.

Q Mr. Scarlett is the man who had, as you subsequently learned, been permitted by Smith to have large overdrafts, wasn't he? A Yes, sir.

Q Several thousands of dollars? A I never knew just how much; I suppose so.

Q You have stated that at this conference meeting between Odell, yourself and Munroe, at your house, when the disclosure was made of the Nones transaction, that nothing was said by you at all in reference to the previous history of Smith; am I right?

The Court. Change that word to Appleton; you said "Odell, yourself and Munroe"; make that Appleton.

A I do not think there was any conversation about Smith's standing; we may have had it, but I do not remember. The main thing was Nones, I remember that distinctly.

Q What is your recollection whether anything was said at that meeting about the previous history of Smith? A I have no recollection of the general conversation.

Q I call your attention to your evidence before the Vice-Chancellor, on page 96: "Q Wasn't there a conference between you and Mr. Munroe and Mr. Appleton at your house in regard to this Smith affair, either before or after you received the letter from the department? A Before. Q Were there any facts disclosed in that conference in regard to Smith's actions which were not included in the letter from the department? A I cannot recall that there was. Q Then all the facts that the department— A Well, now, let me think a little. It runs in my head, to the best of my knowledge, maybe Appleton did quote something about Smith, his previous position that he held up at the Second National Bank, something about that, that there had been fault found up there about him. Q Is that all? A That is as far as I can remember, to the best of my knowledge." Did you testify that way? A I may have testified at that time.

Q Well, is it true, or not? A If it is in the minutes, it is true; I do not remember the facts now. I do not remember Appleton talking with us about the matter at the present time.

Q If Mr. Appleton disclosed to you the facts with reference to the Nones matter, what inquiry, or investigation, did you cause to be made concerning these facts that were brought to your attention, other than the conversation next morning with Mr. Smith? A I do not think there was anything to bring out facts about. He just told me about the Nones matter; he did not explain how it was covered up; and a day or so after Smith—

Q (Question read.) A Why, I asked Mr. Smith—

Q Other than that, what investigation did you make of the subject? A I cannot say I made any.

Q Did you send for Nones? A No, sir; I never sent for Nones.

Q I understood you to say the explanation of Smith about the matter was Smith told you that Nones had a rich mother who might die, and that it was only the question of going down to New York to get a certified check, is that right? A Not exactly.

Q Well, what was it? A Smith said it was only a question of Nones going down and selling some stock so he could pay the loan by certified check, and he was going down that day to do so.

Q The loan had been made to Nones, if you call it a loan, a month or six weeks before, hadn't it? A I don't just recall.

Q Well, it was in February, wasn't it? A I don't know how long it was; I don't remember.

Q Well, it was a long time before that talk with Appleton, some weeks before your talk with Appleton? A I don't know the fact, how long it was.

Q Cannot you now recall? A No, I don't know how long it was.

Q Didn't it interest you to find out whether Nones had in the meantime gone down and sold that stock? A Smith said he had.

Q When? A Two days afterward.

Q I am talking in the meantime, when a month or six weeks had elapsed. The question is whether it occurred to ask whether in the meantime, of the manipulation of the account, he gave Nones the money which Appleton explained to you by saying that Nones could go any day and get the cash, whether Nones had gone. You did not ask that, did you? A I cannot answer that; Appleton never said to me that Nones could go down and get the money any day.

William P. Odell, cross.

Q Did not Smith tell you that Nones had told you that? A Smith tell me that?

Q Did not Smith tell you that Nones had told him that? A No, not that day.

Q What was said about his going down that day? A Appleton told me the next morning that Smith said he would have Nones fix the matter up; get right in touch with him that day and have him fix it up; two days afterwards, as we understood from Smith's assertion that it was settled up, or I knew of it about two days.

Q Did not you tell us twice on your previous examination that Smith, in his explanation of why he had done it at the time he did do it, said that Nones had told him that all he, Nones, would have to do would be to go down and get some check from New York to pay the loan? A No, I don't think I did.

Q You did not mean to say so? A I don't think I told you that. I may have said that Nones promised to go down, but did not do so.

Q What did Smith tell you when he made his explanation when you and Fairlie called in and talked to him? A He said he had loaned this to Nones because Nones only wanted the loan to go down to New York at ten o'clock, something like that. I am speaking of the original loan. And he said Nones had promised from day to day to square it up, and had not done so, and he would get on to Nones, and have it straightened up right away, which I understood he did, and had it fixed up in forty-eight hours.

Q Then Smith did tell you that at the time he made the loan Nones told him that it would be paid right back, and all that was required was for him to go to New York and get the money? A Just sell the stocks.

Q So I was right about that, wasn't I? A Yes and no.

Q Now, did it occur to you to inquire why Nones had not done so in the four or five or six weeks that intervened? A I cannot say that it did.

Q It did not occur to you to inquire of any other person except Smith? A I don't know of anybody else I could have inquired of.

Q And having accepted Smith's explanation, you not only ceased any further investigation, but you, although it was against your better judgment, and against what you thought was right,

you finally voted in favor of keeping him; that was correct, wasn't it? A That was three months afterwards, or so, that I made that vote.

Q What had you heard from Smith in the meantime? A The examiner's letter only.

Q Did that make it better? A It did not.

Q Made it worse? A I suppose so.

Q Brought out the fact that Smith had done this before and never told you? A Yes.

Q And the directors held the meeting and let it go. Who took Smith's bond down to the Fidelity Company; did you? A No, sir; I think Mr. Fairlie did. I did not have access to that box at all.

Q Did you subsequently become aware of the fact that Mr. Nones was indicted and convicted in connection with transactions concerning this bank? A From the newspapers.

Q You had not curiosity enough to investigate it beyond that? A The banking department was doing that.

Q This is Mr. Nones? (Indicating a person in the court room.) A I suppose it is.

Q Had his mother died? A I don't know.

Q Did you ever make any effort to investigate the character of Nones? A No, sir.

Q Did you ever investigate thereafter to see whether the correspondent bank account was kept as Mr. Smith promised to keep it? A Personally I did not.

Q Who did, Smith? A Our own examination committee so reported.

Q What? A Our own examining committee at the bank reported on the balance, and so forth.

Q I asked you if you never took the trouble to find out whether Smith's promise to reform, and cease the habit of manipulating the correspondent bank accounts, had been observed. A Not personally, no.

Q You never did that? A No.

Q Did you ever request anybody to do so? A I think I requested the examining committee to do so.

Q Are you sure about that? A Not for a certainty, no.

Q You know, as a matter of fact, that they were grossly manipulated, don't you? You have heard so since? A I have heard so since from the trials, that is all, from the testimony.

William P. Odell, cross.

Q Do you recall the fact, that, say during the next few years, the curious anomoly presented itself in the records of that bank, more particularly during the years 1911 and 1912, that while the number of depositors was increasing, the amount of deposits was decreasing? A I recall that the printed slips that he gave us at our executive committee meetings more or less showed that; the typewritten slips.

Q That became a matter of some comment, so much so that you had it investigated, didn't you? A No, sir, not investigated; I took his reason, that is all.

Q What? A I took Mr. Smith's reason, and other directors did the same thing at the meeting.

Q That struck you as rather peculiar, didn't it? A No, sir, not necessarily.

Q It did not; that while the number of depositors was increasing, the amount on deposit was getting less? A It did not strike me as peculiar.

Q Then why did you ask about it? A Just asked off-hand, that is all.

Q Did you get any report by anybody that investigated on your inquiry? A No, sir, only Smith, the treasurer, that people like Sloane and large concerns had withdrawn quite a good deal of balance, and the reason that other people who had large balances there had been using their money, withdrawing it, had cut down the deposits, and the increased number of depositors, there was a lot of small accounts being made.

Q Did it occur to you to look at the records to see? A No.

Q Did he tell you that Claflin's account had been reduced? A No; I knew that. He told me that McCreery's account had been reduced; withdrawn about $80,000.

Q Did you ever once look at the individual deposit ledger in that connection? A Not in that connection.

Q Did you ever look at that? A I looked at them Monday nights when I was spending an hour or so there.

Q Did you look in the individual ledgers? A Do you mean individual or commercial department?

Q Both. A I looked at them both.

Q Are you color blind, or do you know the difference between red ink and black ink? A I can tell the difference.

Q In these lookings at the individual ledgers, did you see constant entries in red ink? A I don't remember seeing any;

I did not look at any accounts, just casually glanced through them.

Q What did you look at them at all for? A Just to look at the ledgers, that is all. I don't remember looking at any particular account.

Q Now, I ask you, Mr. Odell, fairly, now, between man and man, do you mean to tell me you never noticed in a single one of the ledger accounts entries in red ink, indicating overdrafts? A I do not recall of any.

Q You would have known what that meant, if you had seen it? A I think I would.

Q You would have known that red ink indicated overdraft? A If it was there I would have known it.

Q In the conversations that arose with reference to the unusual incident of an increase of the number of depositors, with a decrease in the amount, did you ever hear anyone say who, at your suggestion or otherwise, had looked up this matter, that the books showed a great disparity between the ledger A to L, and that from M to Z? A No, I do not remember it.

Q (Question read.) A No, sir.

Q Do you not know that on the very day that a dividend was, with your sanction, declared, on the face of the general ledger, which would affect the figures which would justify the dividend, there was a disparity in the accounts between A to L ledger, and the M to Z ledger of the difference between $105,349 and $255,860? A No, I did not.

Q You never had that brought to your attention? A No, never had that brought up.

Q Did you look at the general ledger at all? A On that day do you mean, that you are speaking of, the dividend day,

Q The day you declared a dividend. A No, I don't know as I did; I can't tell just when I did look at the general ledger.

Q If you did look at it, what did you look at it for? A Just as I told you before, to see how the bank accounts were running; the amount of notes discounted.

Q Were you here when Mr. Cloren testified, Mr. Odell? A Yes, sir.

Q Did you hear him describe the nature, extent, quantity and amount of irregularities apparent in the general ledger? A Yes, sir.

William P. Odell, re-direct.

Q On the date October 30, 1911, down to the close of the bank? A I heard him describe certain dates, I don't remember that date.

Q Well, whatever the dates were, you heard him describe the discrepancy? A Yes, sir.

Q Now, you, the cashier of the H. B. Claflin Company, and for thirty years on its bookkeeping staff, in charge of one of its books, mean to tell me that while you from time to time inspected the general ledger you never observed one of these things? A I did not go over the balances of the general ledger, no.

Q I didn't ask that. A That is the only way I could arrive at any decision at all.

Q I didn't ask you that, I asked you if you want this jury to understand that you never observed any of these irregularities? A No, sir, I never did.

Q Never saw any interlineations in pencil? A Not to my knowledge, no.

The Court. He has already answered that.

Re-direct examination.

Q Do you recall that the witness Cloren testified specifically only to interlineations occurring beginning and running after December, 1912? A I do not recall the exact date, but I know there was dates brought up.

Q Now, Mr. Odell, on your cross examination you were asked concerning the vote which you cast at this special meeting of June 21, and reading your testimony before Vice-Chancellor Stevens you were quoted as testifying that it was the general aspect of the situation. I will ask you what part was played in the general aspect of the situation by the fact that you had an inclination to placate the Department of Banking and its representative?

Mr. McCarter. Objected to as immaterial, irrelevent, and not re-direct examination.

The Court. The question may be answered.

A No part as I know of.

Q Did you determine at the time that you changed your vote, if you did change it, and voted for the retention of Smith, that

the facts were any different than they were when you voted the other way? A No, sir; the facts were not any different.

Q I want to get for my own information, and that of the jury, an explanation of what prompted your change of vote. A The opinion of eighteen or twenty other men against my own, and they were just as good business men as I am, and no doubt, better.

Q So that the facts that you had in your possession at the time you voted "no" were just as favorable to Smith, or as unfavorable to Smith, as when you voted "yes."

Mr. McCarter. Objected to.

The Court. He has already said he had no other information.

Q Now, then, do you recall which Mr. Banister seconded the motion? It appears that a motion for the retention of Mr. Smith was seconded by Mr. Banister; can you recall which one it was? A I do not think I can.

Q Who were the two gentlemen? A James B. Banister of the Banister Shoe Company, and William Banister of Banister & Pollard.

Q What kind of men were they?

Mr. McCarter. Objected to.

The Court. As to what?

Q What would you say as to the standing in the business community of Newark of each of these gentlemen?

Mr. McCarter. Objected to as irrelevant.

The Court. The objection is sustained.

Q Did the fact that Mr. Banister, whoever of them seconded this resolution, have any weight with you?

Mr. McCarter. Objected to.

The Court. You may answer that.

A I think it did.

Q Mr. Odell, counsel on cross examination brought out something about the examining committee; how often did they examine the affairs of the bank? A I am sure they examined it every six months, and I think oftener sometimes; you said the Banking Department?

Q No, the committee. A The committee of the bank?

Q How often did the banking department examine the institution during its existence? A While it was in business I don't know whether they came in twice a year, or whether they did not. I know there was one period there they went for a long period; I don't know just when it was. I remember calling the attention of some of the directors to it.

Q Do you recall there was an examination in 1912?

Mr. McCarter. Objected to.

A I don't know when any of the examinations were, just when it was.

Mr. Clark. I desire to have it noted on the record that in response to the request of counsel for the defendant plaintiff produced in court yesterday while defendant's case was in progress of presentation, the proof of claim of Catherine Haney, and same was submitted to counsel for the defendant.

The Court. Do you desire to offer it in evidence?

Mr. Clark. Have you any objection to its being offered in evidence?

Mr. McCarter. I do not care anything about it.

Mr. Clark. I offer in evidence proof of claim signed by Catherine Haney, subscribed and verified to on the 10th day of November, 1913.

Same marked Ex. P. 79, and read.

Mr. Clark. I call no further witnesses. I want to renew, by a motion to strike out, my proposition of law with regard to all of the evidence which has been offered and received over our objection relating to the Nones transaction, upon the grounds, generally stated in full in my earlier objection to the offering of the evidence, and upon the further ground that it now appears by the evidence of the defendant, and also by their failure to offer any evidence to the contrary, that the renewal instrument in all instances, except the last period, beginning December 1, 1912, being for an indefinite period, each of the earlier renewals contains this language: "This continuation is granted upon the condition that the representations of the employer made to the company at the time

said bond was issued are to be taken as continued warranties; that such of said warranties as apply to the system of accounting, examination and audit as set forth therein have been strictly adhered to, and will be strictly adhered to; and that all examinations and audits therein mentioned have been and will be made; and that the employer is aware of no reason why the company cannot safely continue its risk on account of said employee." That it now appears that the National Surety Company has not at any time received from the employer, either at the time of the original bond, or in connection with any subsequent renewal, any statement or representations as to these facts; that no plea is offered of any concealment or failure to disclose as a condition and part of the renewal; that there is no evidence that the employer had any contact with the surety company in connection with the obtaining of the bond or any renewals; and that all of the matters relating to the Nones transaction occurred in, and slightly under, a period of 1908 to 1909, with which period no loss whatever is claimed by the plaintiff; that the renewals from year to year each constitute separate and distinct obligation; and that any breach or default by the employer during the period of 1908-1909, not amounting to an absolute and real fraud, or indicating absolute bad faith, is not available to the surety company as a defense under any subsequent renewal; and that even if it could be held to be a matter of fraud, or bad faith, there is no such plea in this case.

The Court. The motion will be denied.

An exception to this ruling is noted by the plaintiff as ground of appeal.

PLAINTIFF RESTS.

Mr. McCarter. Your Honor recalls that this is an action commenced by George M. La Monte, Commissioner of Banking and Insurance of the State of New Jersey, against the National Surety Company, so that the plaintiff in this case is Mr. La Monte, the Commissioner of Banking and Insurance. The bill of complaint to which reference has been made is filed in the name and signed by

the same individual in the same capacity, and it appears from the testimony of Mr. Vredenburgh that among the things that were reserved on the sale of the assets to the new bank were the claims against the directors and the claims under the bonds. The claim against the directors is the equity suit; one of the claims under the bonds is this suit. Now, therefore, the plaintiff being the same plaintiff that was in the equity case, is trying to rebut the force and effect of our defense with reference to the Nones transaction by molification, or excuse, trying to sweeten the pill; trying to dull the situation. I now offer in evidence a copy of the bill of complaint by Mr. La Monte in which his attitude with reference to the Nones transaction is diametrically opposed to the position here taken, in that he stigmatizes it as evidence of the most wilful and outrageous neglect on the part of the directors.

Mr. Hinds. Under the cover of an offer of this paper it is not competent for counsel to give us the gist of its contents.

The Court. The jury may withdraw until ten o'clock tomorrow morning.

(The jury retires.)

Mr. Hinds. We object to the offer as incompetent.

(Argued.)

The Court. The offer will be rejected. I observe, as has already been suggested, that the bill of complaint in chancery is without vertification, in addition to which the opening paragraph of the bill is "Humbly complaining, saith upon information and belief," which is plainly saying that the bill does not purport to be a definite and precise statement of knowledge upon the part of the complainant in the bill, but is merely founded on information and belief; and I do not understand that the rule which will permit of the introduction of pleadings in another case as evidence in this case will apply to the pleading which is now offered. An exception to that ruling as ground of appeal will be noted.

An exception to this ruling is noted by the defendant as ground of appeal.

Mr. McCarter. I have no sur-rebuttal.

The Court. Then the case is closed with the exception of any motions or arguments.

Mr. McCarter. Yes, sir.

TESTIMONY CLOSED.

The Court. I assume there may be a motion.

Mr. McCarter. Oh, yes; I shall move for the direction of a verdict.

The Court. How long will that probably take?

Mr. McCarter. I do not think it will take a great while; I might say fifteen minutes.

The Court. I can take that time now if you prefer to make the motion tonight, or if you prefer to make it in the morning you may do so.

Mr. McCarter. I prefer to make it in the morning.

The Court. Very well, then. I will ask counsel, if you can conveniently do so, to hand me now any requests to charge which may already have been prepared and any others which you may conclude to prepare as early in the morning as possible.

Adjourned to March 27th, 1919.

NINTH DAY.

Newark, N. J., March 27, 1919.

Continued pursuant to adjournment.

Appearances as before.

Mr. McCarter. I respectfully move your Honor to direct a verdict in favor of the defendant, the National Surety Company, in this case, upon the ground that, upon the assumption of the correctness of all the evidence in the case, it now appears that the plaintiff, the Roseville Trust Company, did not carry out the provisions of the bond requiring notice to be given to the surety company of facts and information tending to show that the insured was unworthy of confidence and trust, etc.; and that the plaintiff failed to carry out and perform other provisions of the bond, and is, therefore, not entitled to recover under said bond; and they are, therefore, estopped from bringing this suit.

(Argued.)

The Court. The motion for the direction of a verdict will be denied. I give no reason at this time for that ruling, as I must deal with the question in the charge, and I think the reason will appear from what will necessarily be said in the charge upon that subject.

An exception to this ruling is noted by the defendant as ground of appeal.

It is agreed by counsel that the contract in suit is a New York contract, and is to be construed by the laws of New York.

RECESS.

Counsel sum up.

NEW JERSEY SUPREME COURT.

ROSEVILLE TRUST COMPANY,

vs.

NATIONAL SURETY COMPANY.

Newark, N. J., March 27, 1919.

AFTER RECESS.

Mr. McCarter summed up for the defendant.

Mr. Clark summed up for the plaintiff.

CHARGE OF THE COURT.

The Court charged the jury as follows:

DUNGAN, *J.*

Gentlemen: Both counsel in this case have taken occasion to compliment the jury upon its intelligent attention to this case, and rightly so. To what they have said the Court desires to add his compliments. This has been a long and tedious case. Tedious in the sense that a case involving a mass of figures is tedious. It has been enlivened in many of its phases, but it has involved a mass of figures, but most of which, of course, you are not expected to carry in your minds. You have been prompt in your attendance; not a single juror during the entire trial has been late a single minute, and when you are discharged, which you will be when you have rendered your verdict, if the clerk and sheriff are ready to give you your warrants, it will be with the sincere thanks and appreciation of the Court for your intelligent attention to, and consideration of, this case.

This action is brought by the Roseville Trust Company, by George M. La Monte, Commissioner of Banking and Insurance of the State of New Jersey, in charge of said trust company in the liquidation of its affairs, against the National Insurance Company, on what is known as an indemnity bond, made by the

National Surety Company, dated December 7, 1908, in and by which, for the consideration therein named, and subject to the conditions therein contained, it agreed that at the expiration of three months after proof of loss it would make good and reimburse to the Roseville Trust Company any and all pecuniary loss of money, securities, or other personal property sustained by the Roseville Trust Company, not exceeding the sum of $20,000, by or through the personal dishonesty, amounting to larceny and embezzlement, of Raymond E. Smith. Of course, this suit is not brought in any way to benefit Mr. George M. La Monte, the nominal plaintiff, nor is it brought to benefit the directors whose acts have been so severely criticized, and, as to some of them, rightly so; but it is brought on behalf of the depositors and stockholders of the bank. But this does not entitle you, as members of a jury, to take that fact into consideration, and permit it to influence in the slightest degree your sympathies in the case. Nor are you to be prejudiced by the fact that this suit is against a surety company. Neither sympathy nor prejudice should enter into your consideration of this case. Your oath requires you to find a verdict according to the evidence, and the Court is very well satisfied, from the character of the men who compose this jury, that that is exactly what you will do.

There seems to be no question but that the trust company was the loser of a large sum of money by reason of the manipulation of its financial affairs by Smith, and, at least, another of its employees; and that these manipulations were dishonest manipulations. But it will be observed by this contract that the National Surety Company does not agree to make good losses which may result from bad management, or the bad judgment of Smith, or the negligence of Smith, or even from his dishonesty, unless it be the particular kind of dishonesty mentioned in the bond. As has been suggested during the argument, this bond does not indemnify the trust company against loss by reason of the permitted overdrafts of the directors, or the falsification of the books of account of the bank, or the perjury of Smith, or of any other irregularity or dishonesty, but only for the particular brand of dishonesty mentioned in the contract, which is dishonesty amounting to larceny or embezzlement. While the term of this bond was one year, by successive agreements it was continued in force during the occurrence of the events for which this suit is brought, each of which agreements, except the last, covered one

year of time, and the last, dated November 6, 1912, continued the contract in force indefinitely, so long as the annual premium should be paid. Therefore, the original bond, and these renewal covenants, so far as this case is concerned, constituted one continuing agreement, and the provisions of the original agreement, so far as they may be applicable, became a part of the continuation agreements, and continued to be binding upon both the surety company and the trust company. Therefore, upon the question of liability, if the surety company would have been liable for losses occurring during the first year for which the bond was originally written, it is liable for losses which occurred during any and all years of its continuance. Therefore, there arises naturally to be first considered and decided by you the question whether or not the losses sustained by the trust company involved in this suit were not only the result of Smith's dishonesty, but whether they were the result of such dishonesty on his part as amounted to larceny or embezzlement.

A general definition of the term "larceny" is the felonious taking of the money or other property of another with the intent to convert it to the use of the taker without the consent of the owner. A general definition of "embezzlement" is that it is the fraudulent appropriation, as distinguished from the taking in larceny, of the money or other property of another by a person to whom such property has been entrusted, or into whose hands it has lawfully come. These two offenses have much in common, but the fundamental difference is that in larceny the felonious intent must have existed at the time of the taking, while in embezzlement such intent may have been entirely lacking when the property came into the possession of the party, and the wrong arises from its subsequent fraudulent appropriation by him to his own use. The result in both cases is very much the same; that is, to deprive the person owning or entitled thereto of his money or property. I have stated that these are the usual definitions, but it has been agreed in this case that this contract is governed by the law of the State of New York, which is somewhat broader than the definitions which I have read, so far as the term "embezzlement" is concerned, or, rather, "larceny and embezzlement." By the New York State code they are both included in the term "larceny," and I will read that statute: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the

same to the use of the taker, or any other person having in his possession, custody or control''—I am omitting some things and reading only what is applicable to this suit—''having in his possession, custody or control as the bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold or take such possession, custody or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use or that of any other person other than the true owner, or person entitled to the benefit thereof,'' then it goes on and says, ''steal such property, is guilty of larceny.'' These are the definitions of larceny and embezzlement under the New York statute, and you will observe the difference between the general definition which I have read to you and the definition under the New York statute, which speaks not only of the appropriation to the use of the taker, but also of the appropriation to the use of any person other than the true owner.

The aggregate of the amounts which the plaintiff claims to have lost through the dishonesty of Smith which amounts to larceny or embezzlement, which are involved in this suit, is $114,613.03. The plaintiff claims the right to recover in this suit $40,000 of this amount upon the theory that it is permissible, under contracts of this character, where the loss exceeds that sum, to recover the whole amount of the penalty of the original bond as continued up to the last continuation agreement, and a similar amount under the last continuation agreement. But the Court is unable to agree with that insistment, and you are, therefore, instructed that the maximum limit of the amount which may be recovered under the circumstances of this case, if you shall determine that the plaintiff is entitled to a verdict, is $20,000, with interest at six per cent. from the 13th day of May, 1914, three months after the service of the proof of loss, to this 27th day of March, 1919.

These claimed losses fall naturally into four classes. First, where the savings account pass-books show amounts therein credited, indicating deposits to various savings accounts, which do not appear to have been credited to the depositors upon the books of the bank, or where the credits shown on the account-books of the bank are insignificant compared to those credited upon the pass-books. These items on the plaintiff's bill of par-

ticulars, Schedule L, amount to $46,682.72. Second, items of similar character in the demand or commercial accounts which are subject to check. These items in the bill of particulars are shown as $27,101.06. The last item leaves out $5,000, there having been no proof offered in support of it. The total in the bill of particulars is $32,000; the amount I have indicated is $27,000. Third, amounts which it is claimed were drawn from the accounts of O'Connor and Mott for moneys on fictitious drafts on their respective accounts. This totals $9,500. And, fourth, abstractions of bank funds accomplished through false entries on the general ledger. These items amount to $31,329.25. As to all of these classes the questions arising are, first, whether or not these sums, or some of them, were actually misappropriated and abstracted from the funds of the bank; second, whether or not they were dishonestly abstracted by Smith and appropriated to his own use, or to the use of any other person than the true owner, and, third, whether or not such dishonesty amounted to larceny or embezzlement.

As to the first class, it appears that the regular course of business in the bank in relation to the savings accounts was that they were handed with pass-book and deposit slip to the receiving teller. It is testified that sometimes, as a matter of accommodation, the receiving teller or person receiving the deposit would himself make out the slip. The person receiving the deposit then made an entry on the depositor's pass-book, showing the amount of the deposit, not only in figures, but written out in words as well. The deposit-book was then handed back to the customer, and the deposit slip placed on a spindle. At some time during the day it would go to the bookkeeper, and from this deposit slip entries would be made in a credit side-book and in an individual ledger to the credit of the depositor, and at the end of the day the amount of the deposit would be included in the total amount of cash received during the day, which was entered in the general cash-book and in the general ledger. Thompson was the receiving teller during all of this time, and, I think, the last two months paying teller as well. He testified that he, the person who normally would have received these deposits, did not, in fact, in his judgment, receive them, because the entries in the pass-books and on the few deposit slips which are produced in connection with them, are not in his handwriting, but that both the entries in the pass-book and on the slips are in the hand-

writing of Smith, indicating, as he said, that Smith received them. As to some of these deposits absolutely no entries were made on any of the books kept by the bank. As to others, the deposit slip in Smith's handwriting and the books of the bank indicate deposits of insignificant amounts compared with the amounts of the entries on the pass-book entered on the same date in the depositor's pass-book. For instance, in the case of Clossick's book, No. 1433, the deposit in the book is $4,000; the slip, in Smith's handwriting, and which went through the books, is for $1,000. The Hughes book, No. 2287, shows an entry of $1,000, while the deposit slip, in Smith's handwriting, is for $1, and this is the amount which went through the books of the bank. The Hevey book, No. 2305, shows a deposit of $1,279, while the deposit slip, in Smith's handwriting, and which went through the books, shows a deposit of $100. In others no slip was found, but entries for comparatively insignificant amounts were made in the books, indicating, Mindnich says, that slips for those amounts had come through. For instance, there are five Magnani books, numbered 1651 to 1654, inclusive, in which the deposits are $452, two separate deposits of $1,999.12 each, one of $598 and another of $529.10, where the deposit entries in the books of the bank is for $1 in each instance. The Catherine Haney book, No. 1928, the deposit shown is $9,284.78, while the amount carried through the books is $284.78, a difference of $9,000, and Brooks' book, No. 2610, shows deposits of $3,000, while the amount which went through the books is $1,000. Such deposit slips as were found were not with the regular files of old slips in the cellar of the trust company, but were discovered in a safe deposit box, No. 55, which, Mr. Vredenburgh says, was one of three boxes used by Smith, and of which no key was found after his disappearance, August 13th, and that subsequently this box was broken open and found to contain not only these deposit slips, but checks, notes and other papers involved in the manipulation of the accounts of the bank.

It is insisted upon the part of the defendant that by reason of some of the papers found in this box it was a bank depository; and it is true there were found in this box the charter and some papers, such as a mortgage and notes, which appeared on their face to have been entirely regular, but it also appears by the testimony that this was not the place where the securities and papers were regularly and normally kept by the bank. The

result of these deposits and failure to enter them upon the books of the bank was to cause these short credits. If the money represented by these deposits had not been abstracted by someone there would have been what is called "an overage" in the cash for that day. That is, if the cash had been received and placed in the bank's cash for that day, but by mistake or by the neglect of someone it had not been credited upon the books of the bank, the books would have shown on hand more money by the amount of such deposit than should have appeared. But this was not so, according to the testimony of Mr. Thompson and other witnesses —I am not sure that it appeared by Thompson's testimony—it appears according to the testimony of the witnesses and by the books of the bank, which are here produced. For instance, one of the depositors, Mrs. Catherine Haney, testified to having made, herself, a deposit of $9,284.78, which appears as a credit on her pass-book, No. 2305, to which your attention has already been called, for which there was a credit in the books of the bank of only $284.78. This was on August 23, 1912; that on August 29th she deposited $10,396.46 to her demand account, of which there is no credit in the books of the bank, and although she does not recall whether or not Smith handled these particular deposits, she says that very often Smith came and attended to her business. She did have a conversation with Smith about withdrawing her deposit, and he said if she would let it lay he would pay her additional interest on it. The fact is, however, according to Mr. Thompson, that the handwriting on the pass-books and that portion of the deposit ticket not in the handwriting of Mrs. Haney, which accompanied the demand deposit, are in the handwriting of Smith. These accounts, that is, receipts, were naturally and normally handled by Thompson and Mindnich, or by them and such others as might work upon the side-books. They disclaim any knowledge of dishonesty of these or any other transactions, that is, any knowledge at the time and until the closing of the bank. And the bank examiners and accountants who testified on that subject say that they found nothing on their examination of the books of the bank to indicate dishonesty or irregularity as to any of the items involved in this case on the part of Thompson and Mindnich.

The second class of items relates to the demand account, and these were handled in substantially the same manner. Attention has already been called to the Haney deposit of $10,396.46. The

others are Helen Marsh, May 9, 1912, and September 16, 1912, aggregating $13,704.60, and Peter Scala, September 6, 1916, $3,000, in which there has been produced only the deposit ticket in the Haney matter; and what the Court has already said about the deposits to the special account—to the savings account—so far as they apply, apply to this second class of items.

Acts of the character involved in this suit are seldom done in the broad open light of day, so as to be seen and known of all men. If that were necessary, a conviction or recovery on account of such acts could seldom be accomplished. Therefore, the law permits a conviction, or recovery, upon what is called circumstantial evidence. Most of the evidence to which I have called attention stand uncontradicted. The inference to be drawn from those facts, that is, not only the uncontradicted facts, but all facts which you find to have been established, is the peculiar function of the jury, and, therefore, it will be for you to say, not only from the evidence quoted, but from all the other evidence in the case bearing on that subject, which has been so ably and fully called to your attention by the attorneys in their arguments, whether the money represented by any of those items was abstracted from the funds of the bank, and which ones, and if so, whether or not they were so abstracted by Smith. If you find that they were, then, if the moneys represented by them were converted by Smith to his own use, or to the use of any other person than the true owner, that would be an embezzlement of that sum of money, and would be covered by the language of the bond agreeing to make good to the trust company for the dishonesty of Smith amounting to larceny and embezzlement.

The proofs in support of the third class of items is that deposits were made in the pass-books of Emma E. O'Connor and Alma M. Mott, and it appears that an amount sufficient to cover certain drafts to which I shall call your attention remained on deposit to their credit in their savings account when these drafts on these accounts were drawn and paid. It appears that on December 12, 1910, a draft on the O'Connor account in the sum of $3,000 was put through the books, which resulted in the withdrawal from that account of that sum of money. It appears that on October 14th a similar transaction in the sum of $6,500 took place with reference to Mrs. Mott's pass-book, No. 114. Both of these drafts, including the signatures, were in Smith's handwriting, and both of these drafts went through the books of

the bank and were charged to these respective accounts, thus diminishing these accounts by these amounts. If this money had remained in the bank, if it had been taken by any possible mistake, or if it had been credited to some other account, so that these amounts had not actually been abstracted, the result would have been an overage in the balance of the bank for that day of these amounts—$3,000 on December 10th and $6,500 on October 14th. It has been testified that there were no overages of these amounts, or anything approximating them, on these days, indicating, Mr. Thompson says, that these moneys—or may indicate to you the abstraction of these moneys. There may be testimony to that effect, although I do not now recall it. If you do, you will apply it to your consideration of the case. Mrs. O'Connor and Mrs. Mott both testify that they themselves did not receive these respective sums represented by these drafts, and that they did not authorize Raymond Smith to sign their names, or to draw these amounts from their accounts in the bank; and the books which it is testified it is necessary to produce in the savings account, when amounts are withdrawn, and have indicated upon them the amounts of the withdrawal, do not show that any such amounts were indicated upon these pass-books as withdrawals at the time these drafts passed through the bank.

It does not seem to be seriously disputed but that the evidence points to Smith as the person who may have received the money on these drafts; but it is insisted that the form of dishonesty which accomplished the withdrawal of these moneys, if they were withdrawn by Smith, was forgery, which is not covered by this bond; and I have already stated that if it be purely a matter of forgery, it is not covered by the bond. But is that so that it is nothing but forgery? Smith was constructively in the possession and control of these funds as the treasurer of the trust company, and if the drawing of the drafts by him was only a matter of bookkeeping, a part of the process by which, according to the system of bookkeeping of the bank, the accounts of these customers were charged with these amounts, to cover up an abstraction by him of the sums of money represented by these drafts, that would constitute an embezzlement of the funds of the bank, and would be covered by the provision of the bond by which the surety company agreed to make good to the trust company for Smith's dishonesty amounting to larceny and embezzlement.

Charge to Jury.

As to the fourth class of items: These items are those contained in Schedule G. According to the provisions of this bond, which is the contract sued upon, and by which both parties, as I have said, are bound, notwithstanding the continuation agreements, which the Court has already stated, with the original bond, form one agreement, it is provided that the surety company shall be legally liable to the employer, which is the bank, for losses which shall be discovered during such term; that is, the term of the bond, or the continuation; or within six months after the expiration of such term, and within six months after the employee's default, or his dismissal, or retirement from the employer's service. It is not disputed in this case, I think, that the items appearing upon Schedule G were not discovered within this period; but it is insisted that because of the receipt of the letter from the surety company, written sometime the latter part of January, and before the six months had expired, disclaiming any liability on this bond, that the surety company waived this provision. I am not inclined to adopt that view. Admittedly, this part of the claim embodied in Schedule G had not been discovered at the time the proof of claim was filed under Schedule F, which was on the 13th day of February, 1914, the very last day upon which it could be filed. Mr. Vredenburgh himself says that it had not been discovered, and, according to the testimony of Mr. Cloran, his examination did not begin until, I think, in the early part of 1917. It may have been some time earlier than that. You will recall. But certainly not until long after six months from the termination of his employment by Smith by his running away, or his going away—and he had not made up his statement demonstrating this loss to himself, and those in charge of the trust company, until a little over a year ago. Therefore, I charge you that, so far as class four is concerned, this Schedule G, there can be no recovery by the plaintiff in this case for the items contained in that schedule. That being the situation, it is for you to say whether or not, under Schedule F, which includes the first three classes to which your attention has been called, the trust company is the loser of any of the items mentioned in that schedule—exclusive of James Lees & Son, that I have already indicated, of which item no proof has been offered—through the dishonesty of Smith amounting to larceny and embezzlement. If so, which ones, and to what amount?

Charge to Jury.

This bond provides that upon a discovery by the employer, which is the trust company, that a loss has been sustained, or facts indicating that a loss has probably been sustained, the employer shall immediately so notify the surety company, in writing, at its principal office in the City of New York, and shall, within the time limited in lines 24 to 26—that is, six months—make and furnish to the company in writing, at its principal office in the City of New York, claim for and proof of loss.

Notwithstanding the defendant's answer it has conceded during the trial that as to Schedule F, the aggregate of the items of which is $83,283.78, this provision of the bond has been complied with.

Therefore, if nothing else appeared in this case, if the case ended right here, the plaintiff would be entitled to your verdict for such amount, not exceeding $20,000, as the trust company lost through the dishonesty of Smith, which amounted to larceny and embezzlement, including interest, as I have already indicated.

And right here I ought to state, as I have not before stated, that the burden of proof is upon the plaintiff to establish all ese facts by the greater weight of the evidence, which are necessary to the plaintiff's right to recover in this case. That is, first, that the bank lost these moneys; that they were lost through the peculations of Smith; and, third, that they were lost through dishonest actions of Smith, and that the dishonesty was such as amounted to larceny or embezzlement.

But that is not all there is to the case. The defendant insists that even though you should decide that the trust company has lost money through the dishonesty of Smith amounting to larceny or embezzlement, yet the trust company is not entitled to one dollar. They base that contention upon this provision of the bond—and I might say at this point, that although in matters of doubt as to the construction of a contract such as this, such doubts are to be resolved in favor of the insured, against the surety company, yet that does not prevent the parties to such a contract from binding themselves by the plain agreements of the contract. This sixth paragraph is: "If at any time after the beginning of the term for which this bond is written the employer, or any officer of the employer, suspects, or if there come to the notice or knowledge of the employer, or any officer of the employer, any act, fact, or information tend-

ing to indicate that the employee is, or may be, unreliable, deceitful, dishonest, or unworthy of confidence, the employer shall immediately so notify the company in writing at its principal office in the City of New York; and if the employer shall fail or neglect so to do the company shall not be liable for any act of the employee thereafter committed. And if at any time after the beginning of the term for which this bond is written there come to the notice or knowledge of the employer, or any officer of the employer, the fact that the employee is unreliable, deceitful, dishonest, or unworthy of confidence, the company shall not be liable for any act of the employee thereafter committed." The reason for this is apparent, and is indicated by the ninth paragraph of this bond, which is to this effect, that the company may at any time terminate the obligation which it shall have assumed in behalf of the employee under this bond by giving the employer written notice of its election so to do, and such termination shall take effect at the expiration of fifteen days from the receipt of such notice by the employer, and the company shall not be liable for any act of the employee thereafter committed. Therefore, if the notice should be given as provided for by the sixth paragraph, it would enable the surety company to terminate its contract, if it should decide so to do, in accordance with the terms of the ninth paragraph.

What are the facts bearing upon that subject? I shall not attempt to recite them all, because they have been argued in such great detail by counsel for both plaintiff and defendant. I shall simply summarize them.

Something has been said about a statement made by Mr. Odell, the president of the bank, to Mr. Appleton about information which came to him through the president of the Garfield Bank of New York, Mr. Poor, that Mr. Odell had said that Mr. Poor had told him that if he would consult some officer of the Second National Bank of Orange, where Smith had been employed, he would tell him something about Smith. Some of the details of this conversation are denied by Mr. Odell. In fact, he said he never had such a conversation with Mr. Appleton. But he does say that some such information came to him by a friend of his, who first referred him to Mr. Poor, and that he did go to Mr. Poor, and that Mr. Poor told him that he himself knew nothing about Mr. Smith, and referred him to an employee or officer of the Second National Bank of Orange. And

Mr. Odell says that he called him up on the telephone, and that this officer said that he would meet him, but there was no necessity for that, because he knew nothing to the discredit of Smith. Therefore, that not being disputed, it seems to have been pursued to its conclusion. If you believe that testimony, the plaintiff is not to be prejudiced in its recovery in this suit by anything relating to that incident.

But it appears that soon after this bank was organized, in March, 1909, Mr. Appleton, one of the examiners of the State Department of Banking and Insurance, went to the Roseville Trust Company to make an examination, and in the first or second day of his examination he discovered an entry which showed in a reconcilement of the accounts of the Philadelphia National Bank that there has been charged to that account by Smith two drafts aggregating $2,350, one of $1,350, and another for $1,000. That upon that discovery he telephoned to Mr. Odell for an appointment and did meet Mr. Odell, at which meeting Mr. Munroe was present, and he told these gentlemen—the president and counsel of the bank—what he had discovered. Thereupon, according to Mr. Odell, he had a conversation with Mr. Smith the next morning. Mr. Munroe says that Mr. Odell told him the night of this conference with Appleton that Smith had confessed to him; and Mr. Appleton says the same thing. But Mr. Odell says they are mistaken; that it occurred the next morning at the bank, in the presence of one of the other directors whom he had asked to accompany him, and that then Smith confessed that he had done this thing, and stated that he had received a note for this amount, and that he recognized the fact that he had done wrong in putting through the entry as he had, but that no wrong was intended; that he had this note of Mr. Nones, that Nones was good, and, according to Mr. Odell, he said that all Nones had to do to make it good was to go down to New York and close out some stock transaction—sell some stock. Mr. Appleton and Mr. Munroe speak of his explanation being with reference to money which he expected to receive from some estate, and, while confessing that what he had done was irregular, he disclaimed any dishonest intention, and promised never again to do such a thing. It does not appear affirmatively that anything at that time was stated about any other manipulation of the books; and Mr. Appleton says that there was not; that in his conversation with Smith, which he detailed, Mr.

Smith, while confessing this one manipulation of the books, said nothing about another; and Mr. Munroe and Mr. Odell, while testifying that they do not recall anything having been said about the first manipulation in December, to which your attention will presently be called, that seems to have made little or no impression, which they recall at this time, upon their minds. The thing which impressed them was that Nones had been allowed to have this money, and that false entry, or entries, had been made upon the books, or irregular entry, or entries. But it appears by a letter dated May 14, 1906, the Commissioner of Banking and Insurance says: "On February 6th, last, Mr. Smith drew a draft on the New York State National Bank of Albany to the order of Charles A. Nones for $1,050, which was endorsed by the latter, and given by him to one Richard C. Jones of New York—" I think, on reflection, I shall not read this letter through; it is long and you will have it with you when you go to the jury room. To sum it up, the commissioner says: "Taking the various matters together, they seem to disprove the statement of Treasurer Smith that he had no interest in any of the transactions, and that they were all made out of friendship for Nones. But, be this as it may, no sufficient excuse can be offered by Mr. Smith for his action, which seems indefensible, and deserving of the strongest condemnation. No confidence can be placed by this department in any official who would be guilty of this sort of thing; nor does he seem worthy of the confidence of the directors of the institution. He should be required to resign, and cease his connection with the company." Thereafter a meeting was held on the 21st day of June, 1909, in which, according to my understanding of the testimony of Mr. Odell upon cross examination, a vote was taken on Smith's resignation, which was presented at that time, and the first vote of the directors was for the acceptance of that resignation. However, Mr. Odell says that but two votes were taken; that is his present recollection; that upon the first vote there were eighteen votes for the rejection of the resignation, and two for its acceptance; that upon the second the vote was unanimous. I may be mistaken about that, but you should consider that testimony, and apply your own recollection, if it be important for you to do so, upon this point. Sufficient to say that at that meeting it was determined by the unanimous vote of the officers and directors, as appears on the minutes of the trust company,

that the resignation of Smith should be rejected. Subsequently, or before that time, I am not quite certain which, probably before that meeting, according to the testimony which shows that Mr. Munroe was present, and the fact that he went to Europe the day following that meeting of the directors, there was a meeting with the Commissioner of Banking and Insurance, in which this whole matter was gone over with him, and in which he said something to the effect: "If you feel that way about it, I have nothing more to say." But we have here the letter of the commissioner dated on the 16th day of July, which was after this meeting, stating, in response to the letter notifying him of the transactions of that meeting, that he distinctly disapproved of their action in retaining Smith.

The question here presented is not one alone of the fact whether or not what Smith then did, and which was brought to the attention of the officers and directors, was dishonest, whether his conduct was such as to indicate that he was unreliable, deceitful, dishonest, or unworthy of confidence, because all now, after the dishonest transactions and manipulations of Smith have been brought to light, are willing to admit that what he then did was the forerunner of the larger manipulations and defalcations which came later, and that they then were the product of a dishonest mind and disposition, but the question is whether the officers and directors knew, or ought to have known, that the character of his acts was such as to indicate, or tend to indicate, at that time, or afterwards, that Smith was unreliable, deceitful, dishonest or unworthy of confidence. Smith confessed that he had done wrong, and promised to reform, or promised to refrain from a like offense in the future. But his promise to refrain from similar acts, and the willingness of the directors to forgive him and to give him another chance, and the fact that the irregularity was made good, or that there were no irregularities for some months thereafter, would not excuse the plaintiffs from giving the notice required by the bond. This letter to which attention has been called was read in the presence of every director of the bank at that meeting on June 21st. Odell, the president, here testifies that he recognized that what Smith had done was not regular. He says, as already indicated, that he voted to accept his resignation upon the one ballot, and he appears to have testified in the Chancery suit that he voted upon two ballots to accept the resignation; that he felt it was not just

right to put him back again; and it does not appear from what he says that he changed his mind upon any information which he then received, because he says that his third vote, which was to retain Smith, was based upon no other information than that which he had when he at first voted; but he voted that way because he thought, he says, that the judgment of the other eighteen directors must be better than his.

The officers and directors who were called to testify in this case disclaim a comprehension at that time that what Smith then did was dishonest or deceitful; and it is insisted that they were justified in regarding his actions as indicating bad judgment, or negligence. But such disclaimer would not avail the trust company if the information which they then received was such as must necessarily have impressed an ordinary mind, or the minds of these directors, that Smith was unreliable, deceitful, dishonest or unworthy of confidence.

Therefore, if in 1909, or at any time before the condition of the bank was discovered in 1913, the officers and directors of the trust company, from what came to their knowledge or notice, knew, or ought to have known, that the character of those things which were called to their attention was such as to create a suspicion, or tend to indicate Smith to be unreliable, deceitful, dishonest or unworthy of confidence, then the plaintiff cannot recover in this case; for it is an admitted fact that no notice of what then came to their attention was ever communicated by them to the surety company. But if that was not the impression made upon them, and if the mind of an ordinary person would not be impressed by those facts, but the impression which those facts conveyed was only that Smith had used bad judgment, or had been neglectful of his duty, and that what he did did not tend to indicate to them, or any of them, that he was unreliable, deceitful, dishonest or unworthy of confidence, then the plaintiff would not now be barred from recovery against the surety company by reason of the failure to give such notice.

There are here a mass of exhibits, many of which, particularly these books of account, will not be taken to the jury room unless you should require them. If you require any of them in your consideration of this case, they will be taken to the jury room upon your request by the officer in charge of the jury, unless there be any of them which counsel in the case particularly insist should be sent; if they do, then they will be sent.

Charge to Jury.

I have here a large number of requests to charge which will take a long time to cover, most of which I think I have covered, and if counsel will look over the requests, and indicate those which I have not, I will dispose of them.

I decline to charge No. 1 of the defendant's requests, except as charged.

I also decline to charge No. 2 of the defendant's requests.

I also decline to charge No. 3 of the defendant's requests except as charged.

Mr. McCarter. No. 4 you have charged.

The Court. I decline to charge No. 5 of the defendant's requests.

I also decline to charge No. 6 of the defendant's requests.

I also decline to charge No. 7 of the defendant's requests.

I decline to charge No. 8 of the defendant's requests except as charged.

No. 9 of the defendant's requests is as follows: "By the terms of the bond, if any officer of the trust company suspected, or if there came to the notice or knowledge of the trust company, or any of its officers, any acts, fact or information, tending to indicate that Smith was or might be unreliable, deceitful, dishonest or unworthy of confidence, it was the duty of the trust company immediately to notify the surety company in writing, at its principal office, and failure so to do will relieve the surety company from liability for any act of Smith thereafter committed. If the jury believe that any officer—president or vice-president of the trust company, had notice or knowledge of any act, fact or information that tended to indicate that Smith was or might be unreliable, deceitful, dishonest or unworthy of confidence, then the surety company is relieved from any liability for any loss subsequently arising from any act of Smith's." I charge you that.

Mr. McCarter. We withdraw No. 10.

The Court. The eleventh request of the defendant is as follows: "The surety company is entitled to the notice provided for in the bond, to which reference is made in the foregoing request, in order that it may investigate the matter, and determine whether it shall terminate the obligation assumed by the bond, as the ninth clause thereof permits it to do, and thereby

be relieved of further liability for Smith; any suggestions of Smith's, or of anyone else, that its shortcoming be overlooked, cannot relieve the trust company from the duty of apprising the surety company. No one can supplant the surety company of its right to be apprised, and to conclude thereafter as to its future action by reason thereof." I charge you that.

Mr. McCarter. No. 12 has been charged.

The Court. No. 13 of defendant's requests to charge is as follows: "The trust company's officials were in no way relieved from their obligation to apprise the trust company of any act, fact or information that came to their notice tending to indicate that Smith was or might be unreliable, deceitful, dishonest or unworthy of confidence, by reason of any conversation they or any of them may have had with the Banking Commissioner after the receipt of such notice." I charge you that.

I decline to charge No. 14 of the defendant's requests.

I decline to charge No. 15 of the defendant's requests.

I decline to charge No. 16 of the defendant's requests.

I decline to charge No. 17 of the defendant's requests.

I decline to charge No. 18 of the defendant's requests.

No. 19 of the defendant's requests reads as follows: "The jury should be instructed to weigh carefully the presence in box 55 of documents and other papers, both of the company and of teller Jennings, in construing the inference sought to be drawn from the presence there of pass-books, and other papers connected with Smith's peculations, by the testimony of the witness Vredenburgh." I charge you that.

Now, Mr. Clark, will you let me have those of your requests which you desire to have charged?

Mr. Clark. All of the plaintiff's requests are withdrawn except Nos. 3, 10, 11, 12 and 13.

The Court. I decline to charge No. 3 of the plaintiff's requests.

I decline to charge No. 10 of the plaintiff's requests.

No. 11 of the plaintiff's requests is as follows: "It is the duty of the jury to consider for themselves the facts which have been directly proven respecting the transactions of Raymond E. Smith in connection with the account of Charles A. Nones, and to determine from the evidence of those facts (and not from the

statements and characterizations in the letter of the Commissioner of Banking and Insurance), whether or not under all of the circumstances of the case, said facts tended to indicate to the directors that Raymond E. Smith was unreliable, deceitful, dishonest or unworthy of confidence, and if the jury find otherwise, plaintiff's failure to notify defendant thereof will not bar its recovery."

Do you mean by that that they cannot consider in that connection the letter of the Commissioner of Banking and Insurance?

Mr. Clark. Oh, no; they may, and they should, but their attention should be called to the—

The Court. Then, gentlemen, I will say that you, of course, may consider the letter of the Commissioner of Banking and Insurance in connection with the facts that have already been brought to your attention; but you are not obliged, nor were the directors obliged, to adopt the conclusion reached by the Commissioner of Banking and Insurance, as stated in that letter.

Does that cover it?

Mr. Clark. Yes, sir.

The Court. I decline to charge No. 12 of plaintiff's requests.

Plaintiff's request No. 13 is as follows: "That in determining whether or not the information respecting the Nones matter tended to indicate to the trust company that Smith was unreliable, deceitful, dishonest or unworthy of confidence, the jury may consider the fact that they thereafter kept Smith in the trust company's employ."

Of course, that is one of the facts you may consider in connection with all the other facts, as tending to indicate the impression which was made upon them by information which they had received. You may retire.

The jury thereupon withdrew.

Defendant's counsel prays exception to the refusal of the Court to charge No. 1 of defendant's requests specifically as follows: "In order to recover in this action the plaintiff must have shown, by a preponderance of the evidence, that the trust company not only suffered a loss through the dishonesty of Smith, but that Smith personally received the benefit of the money or funds abstracted—that is, that it was converted to him to his own use."

The exception is noted as ground of appeal.

Exceptions to Charge.

Defendant's counsel prays exception to the refusal of the Court to charge No. 2 of defendant's requests as follows: "No recovery can be had in this action for money abstracted from the bank by Smith for the benefit of others, or to make good the losses the bank suffered by Smith's having permitted other people to overdraw their accounts, or to take money from the bank when they had no money there."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 3 of defendant's requests specifically as follows: "The burden of proof is upon the plaintiff to show that the peculations complained of went to the personal use of Smith; if from all the evidence the jury be in doubt, as to this, although they may believe that the sums taken, were dishonestly abstracted, then there must be a verdict for the defendant."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 5 of defendant's requests as follows: "Under no circumstances can there be a recovery for the item of $6,500, deposited by Alma M. Mott, October 14, 1911, and drawn out by a forged draft of said Mott."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 6 of defendant's requests as follows: "In the case of the deposit by the New Jersey Adamant Manufacturing Company, any presumption arising from the fact that the money was received by Smith, and the entry in the pass-book made by him, is overcome by the proof that the check was endorsed as appears, and in the absence of further proof connecting Smith with the transaction, there can be no recovery of that item."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 7 of defendant's requests as follows: "If the jury believe that Mrs. Heney's savings account was charged and credited with the amount of $9,000, which was not entered on the bank's ledger, there can be no recovery on that item."

The exception is noted as ground of appeal.

Exceptions to Charge.

Defendant's counsel prays exception to the refusal of the Court to charge No. 8 of defendant's requests specifically as follows: "If the jury believe that the other clerks or officers of the bank—Jennings or Thompson, or Mindnich, or either of them—were involved in the transactions complained of, then before they can hold the surety company responsible, they must have determined by the preponderance of the evidence, that Smith, and he alone, abstracted, and had the sole benefit of, the amount included in the recovery. Any doubt upon this question must be solved in favor of the defendant, as the surety company is in no way answerable for the dishonesty of such other employees or officers."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 14 of defendant's requests as follows: "If the books of the bank contain on their face such patent, glaring evidences of falsification as would apprise the examining committee, or other officials of the bank, as reasonably prudent men, that Smith was unreliable, deceitful, dishonest or unworthy of confidence, and such facts were not reported to the surety, then there can be no recovery for shortages thereafter."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 15 of defendant's requests as follows: "The terms of the bond in suit required of the plaintiff the making of audits and examinations, and the taking and using of all reasonable steps and precautions to detect and prevent the commission of any act upon the part of Smith tending to render his surety liable. If the jury believe that such audits and examinations or precautions were not, in fact, made or taken, or we made or taken in such a careless and negligent manner as not to disclose such patent, glaring irregularities on the face of the books as would have been by proper audits, examinations and precautions, then there can be no recovery for shortages thereafter."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 16 of defendant's requests as follows: "The surety having the right to rely upon the performance of their respective duties by the officials of the bank regarding the

audits, examination and supervision, if the jury believe that such officials so failed in the performance of those duties as to fail to discover patent irregularities or large overdrafts, or facts of a similar nature, upon the face of the books, indicating unreliability, deceitfulness, dishonesty or unworthiness on the part of Smith, such as would have been disclosed by a reasonably careful audit, examination or supervision, then there can be no recovery for shortages thereafter."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 17 of defendant's requests as follows: "The jury in considering the character of the notice of acts of Smith embodied in the disclosures of the commissioner and his examiner, should give to those disclosures the additional weight to which they are entitled as advices coming from the State Department created and existing under the statute, charged with the duty of the general supervision of all trust companies in the state, and in the light that the facts of those disclosures are not refuted."

The exception is noted as ground of appeal.

Defendant's counsel prays exception to the refusal of the Court to charge No. 18 of defendant's requests as follows: "The jury should be charged that only an absolute refutation of the disclosures of the examiners and commissioner justified the refusal of the officials of the bank to cause Smith's dismissal, or a notice to his surety of the disclosures made to them."

The exception is noted as ground of appeal.

Exceptions to Charge.

Plaintiff's counsel prays exception to the refusal of the Court to charge No. 3 of plaintiff's requests as follows: "For the purpose of determining maximum amount of recovery in this suit (exclusive of interest) the original bond and its renewals (except the last) together furnish a maximum of $20,000. The last renewal or continuation furnishes an *additional* liability of $20,000 maximum (if the jury find that loss as defined in the bond has occurred within its period), because it constitutes a *distinct liability,* upon its separate consideration, to make good the loss occurring during its term."

The exception is noted as ground of appeal.

Plaintiff's counsel prays exception to the refusal of the Court to charge No. 10 of plaintiff's requests as follows: "Even though the jury find that the information which came to the directors of the plaintiff in the year 1909 respecting the transactions of Raymond E. Smith in connection with the account of Charles A. Nones was such as to lead a reasonably prudent person, under the same or similar circumstances and surroundings, to believe that Smith was unreliable, deceitful, dishonest and unworthy of confidence, the plaintiff's failure to notify defendant surety company will not bar the recovery of plaintiff for losses sustained during a subsequent continuation period of said bond, provided the jury find that plaintiff exhibited good faith in permitting defendant to continue the said bond."

The exception is noted as ground of appeal.

Plaintiff's counsel prays exception to the refusal of the Court to charge No. 12 of plaintiff's requests as follows (12): "Even though the jury find that plaintiff committed a breach of the sixth clause of the bond by failing to notify the defendant surety company of the acts, facts and information set forth in the commissioner's letter of May 14, 1909 (Deft's. Exhibit 4), that finding will not bar plaintiff's recovery, because such failure did not constitute a breach of any of the contracts represented by the so-called renewal or continuation certificates (Exhibits P. 68, 69, 70 and 71)."

The exception is noted as ground of appeal.

Exceptions to Charge.

Mr. McCarter. I respectfully pray exception to that part of your Honor's charge which stated, in the language of your Honor, which I cannot literally recall, that this case should not be considered as for the benefit of the directors, in view of the fact that the directors are necessarily stockholders, and, therefore, while it may not be for the benefit of the directors, nevertheless, being necessarily stockholders, it must be for their benefit.

The exception is noted as ground of appeal.

Mr. McCarter. I also respectfully except to that part of your Honor's charge which construed what is meant by the words, "larceny" and "embezzlement" in the bond in suit, by reason of the statute of the State of New York, there having been no proof of that statute in this case.

The exception is noted as ground of appeal.

Mr. McCarter. I also pray exception to all that was said in your Honor's charge, either in immediate juxtaposition to what I have just referred to, or otherwise, indicating that the New York statute would govern in the determination of what was or was not larceny and embezzlement.

The exception is noted as ground of appeal.

Mr. McCarter. I also pray exception to that part of your Honor's charge which authorized the jury to consider, as part of the sum lost, and, therefore, for which the defendant should respond, whether or not the man Smith himself received the benefit of it.

The exception is noted as ground of appeal.

Mr. McCarter. Also to that part of your Honor's charge which left it to the jury to say whether, in the O'Connor case, it was or was not forgery, or whatever your Honor's language was about that; or to determine under all the circumstances, although the signature was undoubtedly forgery, nevertheless, it might not have been embezzlement under your Honor's definition of that term.

The exception is noted as ground of appeal.

Mr. McCarter. I also pray exception to that portion of your Honor's charge which left it to the jury to determine whether or not the officers knew, or ought to have known, that the acts or facts, which were brought to their attention, were such as to in-

dicate that Smith was guilty of the four things specified in the bond—dishonesty, and so forth.

The exception is noted as ground of appeal.

Mr. McCarter. Also to that part of your Honor's charge which said that the officers disclaimed knowledge of the dishonest or deceitful character or intent of the acts, or whatever your Honor's language was about that.

The exception is noted as ground of appeal.

Mr. McCarter. Also to that part of your Honor's charge to the effect that if the officers, from what came to their knowledge, believed that the facts indicated were done not dishonestly, but for an honest purpose, or whatever your Honor's language was; the impression was that Smith had used simply bad judgment, and bad management, or whatever your Honor's language was; that then the company was not required to give the notice; whatever your Honor's language was about that.

The exception is noted as ground of appeal.

Mr. Hinds. I respectfully desire the following exceptions noted: To that portion of your Honor's charge wherein you instruct the jury that the maximum of their verdict, exclusive of interest, should be $20,000, and not regarding the last continuation as a distinct contract, affording an additional maximum, making a total of $40,000 exclusive of interest.

The exception is noted as ground of appeal.

Mr. Hinds. Also to that portion of your Honor's charge wherein you instructed the jury that they were not to consider any of the losses described in Schedule G annexed to the complaint as constituting part of the plaintiff's recovery; and to your Honor's statement in that connection that those losses had not been discovered until after six months after the termination of Smith's employment, being the manipulations of the accounts covering those losses which had not been discovered.

The exception is noted as ground of appeal.

Mr. Hinds. And also to that portion of your Honor's charge wherein you refer to the fact that the jury might find that the directors ought to have known facts and information in the Nones incident which tended to indicate that Smith might be

unreliable, as distinguished from knew and actually indicated to them.

The exception is noted as ground of appeal.

The Court. Mr. McCarter, I think your objection to what I said about the directors is, perhaps, a proper one, and I am inclined to recall the jury upon that point, if you think it is of sufficient importance to do so.

(The jury returns into court.)

DUNGAN, *J.*

Gentlemen, my attention has been called to one of the opening statements in my charge, in which I said that this suit was not brought for the benefit of the directors; and, of course, it is not brought for their benefit as directors, but it may be assumed that they would not be directors unless they were stockholders, and to the extent that they are stockholders as well as directors they may, of course, be benefited by the results of this suit, after the satisfaction of the depositors. The depositors come first, and the stockholders next. That is all.

(The jury again retired.)

Mr. Hinds. I pray exception to the addition to your Honor's charge.

The exception is noted as ground of appeal.

PROOF OF LOSS OF ROSEVILLE TRUST COMPANY.
(Exhibit P. 77.)

TO—THE NATIONAL SURETY COMPANY:

THE ROSEVILLE TRUST COMPANY, whose property and business is in the possession of the Commissioner of Banking and Insurance of the State of New Jersey, under the provisions of Chapter 171 of the Laws of 1913, herewith presents its claim against your Company in the matter of the default of Raymond E. Smith, for whose honesty the National Surety Company issued its bond, No. 412125, in the sum of Twenty thousand dollars ($20,000.), under which this claim is made. The original bond

bears date December 7, 1908, and has been extended at various times and expires December 10, 1913. The following is a detailed statement of the loss resulting from said default and of all sums due and owing said defaulter, and the balance stated below is the true net loss resulting from said default between December 11, 1910, and August 14, 1913:

DEBIT.

Savings Accounts.

Date. 1911.	Items of Default.		Amount.
Dec. 18	Pass Book 115, R. Sharwell		5,112.80
Jan. 11	Pass Book 1433, P. J. Clossick		
	Entered on Pass Book.....	$4,000.00	
	Entered on Ledger.....	1,000.00	3,000.00
Apl. 17	Pass Book 1651, A. Magnani, Admr.		
	Entered on Pass Book.....	452.00	
	Entered on Ledger.....	1.00	451.00
Apl. 17	Pass Book 1652, A. Magnani, Admr.		
	Entered on Pass Book.....	1,999.12	
	Entered on Ledger.....	1.00	1,998.12
Apl. 17	Pass Book 1653, A. Magnani, Admr.		
	Entered on Pass Book.....	1,198.12	
	Entered on Ledger.....	1.00	1,197.12
Apl. 17	Pass Book 1654, A. Magnani, Admr.		
	Entered on Pass Book.....	598.00	
	Entered on Ledger.....	1.00	597.00
Apl. 17	Pass Book 1654 (Duplicate), A. Magnani, Admr.		
	Entered on Pass Book.....	1,320.58	
	(No entry on Ledger).....		1,320.58
Apl. 17	Pass Book 1655, A. Magnani, Admr.		
	Entered on Pass Book.....	529.10	
	Entered on Ledger.....	1.00	528.10

Proof of Loss of Roseville Trust Company (Exhibit P. 77).

May	4	Pass Book 1697, F. Cardoni		
		Entered on Pass Book.....	6,000.00	
		(No entry on Ledger).....		6,000.00
1912.				
Jan.	1	Pass Book 2045, Jas. Crump		
		Entered on Pass Book.....	5,800.00	
		(No entry on Ledger).....		5,800,00
Feb.	20	Pass Book 2274, New Jersey Adamant Mfg. Co.		
		Entered on Pass Book.....	5,000.00	
		(No entry on Ledger).....		5,000.00
Mar.	1	Pass Book 2287, Benjamin Hughes		
		Entered on Pass Book.....	1,000.00	
		Entered on Ledger.....	1.00	999.00
Aug.	23	Pass Book 1928, Catherine Haney		
		Entered on Pass Book.....	9,284.78	
		Entered on Ledger.....	284.78	9,000.00
Sept.	16	Pass Book 2685, Peter Scola		
		Entered on Pass Book.....	2,000.00	
		(No account on Ledger)....		2,000.00
		Pass Book 2610, E. J. Brooks		
Aug.	2	Entered on Pass Book....$1,000		
Aug.	7	Entered on Pass Book....$1,000		
Aug.	29	Entered on Pass Book....$1,000	3,000.00	
		Entered on Ledger	1,000.00	2,000.00
Mar.	7	Pass Book 2305, Rev. Jos. Hevey (In Trust for Dennis Hevey)		
		Entered on Pass Book.....	1,279.00	
		Entered on Ledger.....	100.00	1,179.00
Aug.	15	Pass Book 1383, Margaret E. Wale		
		Entered on Pass Book.....	500.00	
		(No entry on Ledger).....		500.00
		Total Savings Accounts		$46,682.72

Proof of Loss of Roseville Trust Company (Exhibit P. 77).

DEMAND ACCOUNTS.

Date: 1912.	Items of Default.		Amount.
May 9	Account of Helen Marsh or Chauncey Marsh		
	Entered on Pass Book.....	$9,704.60	
	Entered on Pass Book.....	4,000.00	13,704.60
Aug. 27	Account of Catherine Haney		
	Entered on Pass Book.....	10,396.46	
	(No entry in Ledger).....		10,396.46
Sept. 16	Account of Peter Scola		
	Entered on Pass Book.....	3,000.00	
	(No entry in Ledger).....		3,000.00
Mar. 5	Account of James Lees & Son		
	Entered on Pass Book.....	5,000.00	
	(No entry in Ledger).....		5,000.00
	Total Demand Accounts		$32,101.06

AMOUNTS ABSTRACTED BY RAYMOND E. SMITH.

1910.	From the following accounts:	
	Pass Book 793, E. E. O'Connor	
Dec. 12	A charge of $3,000 was made against this account upon a check signed by Raymond E. Smith; not entered on pass book, nor was the charge authorized by E. E. O'Connor	3,000.00
1911.		
	Pass Book 114, Alma M. Mott	
Oct. 14	A charge of $6,500 was made against this account upon a check to which it is claimed Raymond E. Smith forged the name of Mrs. Mott; not entered on pass book, nor was the withdrawal authorized by her.....	6,500.00
	Total	$9,500.00

CREDITS.

None

Proof of Loss of Roseville Trust Company (Exhibit P. 77).

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss:*

The undersigned, LA RUE VREDENBURGH, Special Deputy Commissioner of Banking and Insurance, in charge of the property and business of the Roseville Trust Company, being first duly sworn, states that the foregoing statement is correct and that the loss resulting to the Roseville Trust Company from the default of Raymond E. Smith is as above stated, and that the items composing the debits are chargeable to said defaulter on the specified dates, and that all sums due or owing said defaulter by the said Roseville Trust Company are therein correctly stated.

L. R. VREDENBURGH,
Special Assistant Deputy Com'r of Banking & Ins.

Sworn and subscribed to before me, a Notary Public for the State of New Jersey, this 13th day of February, 1914, in testimony whereof I have hereunto subscribed my official seal the day and year first aforesaid.

(SEAL) W. L. MORGAN,
Notary Public in the State of New Jersey.

Exhibit P. 67.

EXHIBIT P. 67.

KNOW ALL MEN BY THESE PRESENTS, That we, Raymond E. Smith, (hereinafter called the Employee) as Principal, and the NATIONAL SURETY COMPANY, a New York Corporation (hereinafter called the Company), as Surety, are held and firmly bound unto Roseville Trust Company, Newark, N. J. (hereinafter called the Employer), in the penal sum of Twenty Thousand Dollars, good and lawful money of the United States, for the payment of which amount we do bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated this seventh day of December, 1908.

WHEREAS, the Employer has appointed the Employee to the office or position of Secretary and Treasurer, at Newark, N. J., in the service of Roseville Trust Company, and the Employer requires security in a stated amount as indemnity against loss on account of the personal dishonesty, amounting to larceny or embezzlement, of the Employee in the performance of his duties in the position to which he has been appointed or may be appointed by the Employer;

NOW, THEREFORE, for and in consideration of a premium computed at an agreed rate, the Company hereby covenants and agrees to and with the Employer, that it will, subject to the conditions and provisions herein contained, which shall be conditions precedent to the right of the Employer to recover under this Bond, at the expiration of three months next after due and satisfactory proof of the loss herein mentioned shall have been furnished the Company, make good and reimburse to the Employer any and all pecuniary loss of money, securities or other personal property, belonging to the Employer, or in its possession and for which it is legally liable, sustained by the Employer by or through the personal dishonesty amounting to larceny or embezzlement, of the Employee, and for which the Employee shall be legally liable to the Employer, occurring at any time after the 1st day of December, 1908, at 12 o'clock noon, and prior to the 1st day of December, 1909, at 12 o'clock noon, such times to be governed by the time of the locality in which the loss occurs, which said loss shall be discovered during such term, or within six months after the expiration of such term, and within six months after the Employee's death, or his dismissal or retire-

Exhibit P. 67.

ment from the Employer's service, and within six months after the termination of this obligation, PROVIDED, HOWEVER, the Company's liability on account of the Employee shall in no case exceed the amount for which the Company shall have become surety hereunder.

THIS BOND is executed by the Company upon the following express conditions:

First: The Employer may at any time transfer the Employee during the continuance of this Bond, from one position to another and shift such Employee about at pleasure, without notice to the Company and the Company shall be and remain liable to the Employer for any loss occasioned by such Employee as fully and to the same extent as if no transfer had been made.

Second: The Company shall not hereafter be responsible to the Employee under any previous guarantee in behalf of such Employee, it being mutually understood that it is the intention of this provision that but one (the current) guarantee in behalf of the Employee shall be in force at one time; PROVIDED HOWEVER, that the Employer shall have the right within six months after the termination of any previous guarantee in behalf of the Employee to make claim for, and proof of any loss occurring thereunder. But it is expressly understood and agreed that if any claim be so made under any previous guarantee in behalf of the Employee during the said period of six months, and if loss also occur under the current risk or guarantee in behalf of such Employee, the aggregate liability of the Company for all losses under all guarantees, under all bonds in behalf of such Employee, shall not exceed a sum equal to the amount of the largest of the respective guarantees under which such losses occurred, nor shall the Company be liable under any specific guarantee for any loss occurring under any other guarantee.

Third: If the Employee has at any former period been a defaulter, and if such fact be known to the Employer at the time of the execution of this bond, or at the time of the appointment of such Employee by the Employer, this Bond shall be void and the Employer shall not be entitled to recover hereunder for any loss sustained by or through any act of such Employee.

Fourth: If the Employee resign or be discharged from the service of the Employer, the Company shall not be liable to the Employer for any loss sustained by or through any act of such Employee thereafter committed.

Exhibit P. 67.

Fifth: The Company shall not be liable under this Bond for any sum or amount whatever which the Employee may, at the commencement of the term hereinbefore provided, for, owe the Employer, or for funds or property thereafter used or applied directly or indirectly by the Employee towards or on account of any such sum or amount, it being the intention of this Bond that the Company shall be responsible to the Employer only for loss sustained by or through the personal dishonesty amounting to larceny or embezzlement, of the Employee within the said specified term.

Sixth: If at any time after the beginning of the term for which this Bond is written, the Employer or any officer of the Employer, suspect, or if there comes to the notice or knowledge of the Employer, or any officer of the Employer, any act, fact or information, tending to indicate that the Employee is or may be unreliable, deceitful, dishonest or unworthy of confidence, the Employer shall immediately so notify the Company in writing at its principal offices in the City of New York, and if the Employer fail or neglect so to do, the Company shall not be liable for any act of the Employee thereafter committed; and if at any time after the beginning of the term for which this Bond is written there come to the notice or knowledge of the Employer, or any officer of the Employer, the fact that the Employee is unreliable, deceitful, dishonest, or unworthy of confidence, the Company shall not be liable for any act of the Employee thereafter committed.

Upon the discovery by the Employer that a loss has been sustained, or facts indicating that a loss has probably been sustained, the Employer shall immediately so notify the Company, in writing, at its principal offices in the City of New York, and shall within the time limited in lines 24 to 29 inclusive of this Bond make and furnish to the Company in writing, at its principal offices in the City of New York, claim for, and proof of, loss, if any sustained, and failure to give such immediate notice, or to make such claim or such proof within such time, shall relieve the Company from all liability hereunder on account of the Employee.

Seventh: All written statements and declarations concerning the Employee, or his duties or accounts, made to the Company by the Employer, or any officer of the Employer, at or prior to the execution of this Bond or any renewal hereof, are hereby

Exhibit P. 67.

made the basis of this Bond as to the Employee and are each, every and all warranted by the Employer to be true; and if any of such statements or declarations be false or untrue in any particular, or if any willful suppression or misstatement be made in any claim for, or proof of, any loss under this Bond, or of any fact affecting the risk of the Company at any time, then this obligation shall be void, and the Company shall in no case be liable hereunder.

Eighth: The Employer shall, whenever, requested by the Company, give all information within its knowledge or which can be obtained from its books or records, and render all assistance (not pecuniary) which will in any way aid in the apprehension, arrest or prosecution of the Employee for any criminal offense committed by the Employee involving liability of the Company, and in like manner aid and assist the Company in suing for and obtaining reimbursement from the Employee, or from the Employee's estate, for any moneys which the Company may have paid or become liable to pay under this Bond on account of such Employee.

Ninth: The Company may at any time terminate the obligation which it shall have assumed in behalf of the Employee under this Bond, by giving the Employer written notice of its election so to do, and such termination shall take effect at the expiration of fifteen days from the receipt of such notice by the Employer; and the Company shall not be liable for any act of the Employee thereafter committed. If the Company subsequently pay any loss hereunder, on account of such Employee, the whole premium paid shall be held to have been fully earned and to belong to the Company; otherwise, the Company shall, upon demand and the execution and delivery to the Company by the Employer of a full release of the Company from all liability hereunder, refund the premium paid, less a pro rata part thereof for the time this obligation shall have been in force.

Tenth: If the Employer, at the time of sustaining any loss, hold any other security from or in behalf of the Employee and the amount of such loss be less than the aggregate amount of such other security and the amount for which the Company shall have become surety hereunder, for the Employee, the Company shall be liable for only such proportion of the loss as the amount for which the Company shall have become surety hereunder,

Exhibit P. 67.

bears to the total security held by the Employer, whether such other security be available or not.

Eleventh: The Company shall not be liable for any loss occasioned by accident, mistake, negligence, robbery, error of judgment on the part of, or breach of contract by, the Employee, nor the failure of any bank or other institution where funds may have been deposited, nor from any other cause save the personal dishonesty, amounting to larceny or embezzlement, of the Employee.

Twelfth: The premium due the Company for becoming surety hereunder must be paid within thirty days after the delivery hereof, and if not so paid this Bond shall be void from the beginning, and the Company shall not be liable for any loss hereunder.

Thirteenth: So long as the Company and the Employer agree so to do, this Bond may be renewed and continued in force from year to year, and in case of any such renewal, the Company's liability on behalf of the Employee shall be as continuous as if this Bond had been originally written for a term including the period of such renewal.

Fourteenth: The receipt and retention hereof, or the making claim for any loss under this Bond by the Employer, shall be taken and held as a covenant upon the part of the Employer consenting and agreeing to all the terms, provisions and conditions herein contained, and that it will make frequent audits and examinations and at all times during the term hereof, take and use all reasonable steps and precautions to detect and prevent the commission of any act, upon the part of the Employee, which would tend to render the Company liable for any loss.

Fifteenth: This Bond shall not become effective until after it has been duly executed by the Employee named herein.

Sixteenth: The Employee agrees to immediately pay to the Company the amount of each and every loss which it may have been required to pay or may be liable for hereunder and all damage and expense, direct or incidental, incurred by the Company by reason of any claim hereunder and that any proper evidence of payment by the Company of any such loss, damage or expense shall be conclusive evidence (except for fraud) against it and his estate of the fact and amount of his liability to the Company under this agreement.

Exhibit P. 67.

Seventeenth: None of the conditions or provisions contained in this Bond shall be deemed to have been waived by or on behalf of the Company unless the waiver be clearly expressed in writing over the signature of its President, Vice-President or Resident Vice-President at the Home Office of the Company, and its seal be thereto affixed, duly attested.

IN WITNESS WHEREOF, the Employee has hereunto set his hand and seal and the Company has caused this Bond to be signed by its officers proper for the purpose, and its seal to be hereunto affixed on the date above written, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

RAYMOND E. SMITH,
Employee.

Signed, sealed and delivered by
the Employee in the presence of:

W. S. THOMPSON.

NATIONAL SURETY COMPANY,

By WILLIAM B. JOYCE,
President.

(SEAL)

Attest:

DAVID W. ARMSTRONG, JR.,
Secretary.

Countersigned at New York this 7th day of December, 1908, by M. CROOKE, Authorized Representative.

Exhibit P. 68.

Endorsement:

Rate 25c
Premium $50.00

Familiarize yourself with the conditions of this bond by reading it carefully.

Bond No. 412125
of
National Surety Company
to
Roseville Trust Company,
Newark, N. J.,
Expires December 1st, 1909
Form I-G-12 2500-8-08

Your attention is respectfully drawn to the fact that under the terms of the above bond, if premium is not paid on or before Jan. 8, 1909, the said bond becomes void from the beginning.

EXHIBIT P. 68.

NATIONAL SURETY COMPANY.

The NATIONAL SURETY COMPANY (hereinafter called the Company) hereby continues in force Bond No. 412125, in the sum of twenty thousand dollars ($20,000), on behalf of Raymond E. Smith (hereinafter called the Employee), in favor of Roseville Trust Company (hereinafter called the Employer), for the term beginning on the 1st Day of December, 1909, at 12 o'clock noon, and ending the 1st day of December, 1910, at 12 o'clock noon, such times to be governed by the time of the locality in which the loss occurs, subject to all the covenants and conditions of said Bond.

This continuation is granted upon the condition that the representations of the Employer made to the Company at the time said Bond was issued are to be taken as continuing warranties, that such of said warranties as apply to the system of accounting, examination and audits as set forth therein, have been strictly adhered to, and will be strictly adhered to, and that all examinations and audits therein mentioned have been and will

Exhibit P. 68.

be made; and that the Employer is aware of no reason why the Company cannot safely continue its risk on account of said Employee. It is also conditioned on the part of the Company that its liability under said Bond and this continuation together shall not exceed the amount of said Bond.

It is also conditioned that the premium due the Company for this renewal be paid to the Company within thirty days from the date of the beginning of the term of suretyship hereunder, and if not so paid, then this obligation to be null and void from the beginning, and the Company shall not be liable to the Employer for any loss sustained.

IN WITNESS WHEREOF, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal affixed this 24th day of September, 1909.

NATIONAL SURETY COMPANY,

By M. CROOKE,
Resident Vice-President.

(SEAL)

ALBERT E. WINTERS,
Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Endorsement:

Familiarize yourself with the conditions of this certificate by reading it carefully.

Renewal Certificate
of
Guarantee Bond No. 412125
of
National Surety Company
in behalf of
Raymond E. Smith,
in favor of
Roseville Trust Company.

Amount $20,000.00
Date effective—December 1st, 1909.
Date of expiration—December 1st, 1910.
A. P. R-2—8-08-5M.

Your attention is respectfully drawn to the fact that under the terms of the above bond, if premium is not paid on or before Jan. 1, 1910, the said bond becomes void from the beginning.

Exhibit P. 69.

EXHIBIT P. 69.

NATIONAL SURETY COMPANY.

THE NATIONAL SURETY COMPANY (hereinafter called the Company) hereby continues in force Bond No. 412125, in the sum of twenty thousand dollars ($20,000), on behalf of Raymond E. Smith (hereinafter called the Employee), in favor of Roseville Trust Company, Newark, N. J. (hereinafter called the Employer), for the term beginning on the 1st day of December, 1910, at 12 o'clock noon, and ending on the 1st day of December, 1911, at 12 o'clock noon, such times to be governed by the time of the locality in which the loss occurs, subject to all the covenants and conditions of said Bond.

This continuation is granted upon the condition that the representations of the Employer made to the Company at the time said Bond was issued, are to be taken as continuing warranties, that such of said warranties as apply to the system of accounting, examinations and audits as set forth therein, have been strictly adhered to, and will be strictly adhered to, and that all examinations and audits therein mentioned have been and will be made, and that the Employer is aware of no reason why the Company cannot safely continue its risk on account of said Employee. It is also conditioned on the part of the Company that its liability under said Bond and this continuation together shall not exceed the amount of said Bond.

It is also conditioned that the premium due the Company for this renewal, be paid to the Company within thirty days from the date of the beginning of the term of suretyship hereunder, and if not so paid, then this obligation to be null and void from the beginning, and the Company shall not be liable to the Employer for any loss sustained.

IN WITNESS WHEREOF, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal affixed this 30th day of September, 1910.

NATIONAL SURETY COMPANY,

By M. CROOKE,

Resident Vice-President.

(SEAL)

Attest:

ALBERT E. WINTERS,

Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Exhibit P. 70.

Endorsement:

Familiarize yourself with the conditions of this certificate by reading it carefully.

Renewal Certificate
of
Guarantee Bond No. 412125
of
National Surety Company
in behalf of
Raymond E. Smith
in favor of
Roseville Trust Co., Newark, N. J.

Amount $20,000.00
Date effective December 1st, 1910.
Date of expiration December 1st, 1911.
F. 1531. 6-1910-5M.

Your attention is respectfully drawn to the fact that under the terms of the above bond if premium is not paid on or before Jan. 1, 1911, the said bond becomes void from the beginning.

EXHIBIT P. 70.

NATIONAL SURETY COMPANY.

THE NATIONAL SURETY COMPANY (hereinafter called the Company), hereby continues in force Bond No. 412125, in the sum of twenty thousand dollars ($20,000), on behalf of Raymond E. Smith (hereinafter called the Employee), in favor of Roseville Trust Company, Newark, N. J. (hereinafter called the Employer), for the term beginning on the 1st day of December, 1911, at 12 o'clock noon, and ending on the 1st day of December, 1912, at 12 o'clock noon, such times to be goverened by the time of the locality in which the loss occurs, subject to all the covenants and conditions of said Bond.

This continuation is granted upon the condition that the representations of the Employer made to the Company at the time said Bond was issued, are to be taken as continuing warranties, that such of said warranties as apply to the system of account-

Exhibit P. 70.

ing, examination and audits as set forth therein, have been strictly adhered to, and will be strictly adhered to, and that all examinations and audits therein mentioned have been and will be made, and that the Employer is aware of no reason why the Company cannot safely continue its risk on account of said Employee. It is also conditioned on the part of the Company that its liability under said Bond and this continuation together shall not exceed the amount of said Bond.

It is also conditioned that the premium due the Company for this renewal be paid to the Company within thirty days from the date of the beginning of the term of suretyship hereunder, and if not so paid, then this obligation to be null and void from the beginning, and the Company shall not be liable to the Employer for any loss sustained.

IN WITNESS WHEREOF, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal affixed this 5th day of September, 1911.

NATIONAL SURETY COMPANY,

By M. CROOKE,
Resident Vice-President.

(CORP. SEAL)

Attest:

ALBERT E. WINTERS,
Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Exhibit P. 71.

Endorsement:

Familiarize yourself with the conditions of this certificate by reading it carefully.

Renewal Certificate
of
Guarantee Bond No. 412125
of
National Surety Company
in behalf of
Raymond E. Smith
in favor of
Roseville Trust Company, Newark, N. J.

Amount of bond $20,000.
Date effective December 1st, 1911.
Date of expiration December 1st, 1912.
F. 1531. 6-1910-5M.

Your attention is respectfully drawn to the fact that under the terms of the above bond, if premium is not paid on or before Jan. 1, 1912, the said bond becomes void from the beginning.

EXHIBIT P. 71.

NATIONAL SURETY COMPANY.
New York.

(Duplicate.)

In consideration of the payment of the annual premium charge on the 10th day of December, during each and every year, or within sixty (60) days thereafter, that the bond hereinafter referred to shall continue in force, the NATIONAL SURETY COMPANY hereby continues, for an indefinite term, beginning on the 10th day of December, 1912, its individual Fidelity Bond No. 412125 on behalf of Raymond E. Smith in the amount of twenty thousand dollars in favor of Roseville Trust Company, Newark, N. J., so as to cover, according to its terms and conditions, any acts or defaults of said Raymond E. Smith committed after the date of the execution of the said Bond and before its termination, as provided therein.

Exhibit P. 71.

IN WITNESS WHEREOF, the Company has caused this instrument to be signed by its officers proper for the purpose and its corporate seal to be affixed this 6th day of November, 1912.

NATIONAL SURETY COMPANY,

By J. SCHMIDT, JR.,
Resident Vice-President.

(SEAL)

Attest:

E. SHAW,
Resident Assistant Secretary.

Rate 25¢—Premium $50.00.

Endorsement:

Familiarize yourself with the conditions of this certificate by reading it carefully.

Extension Certificate
of
Guarantee Bond No. 412125 (Duplicate)
of
National Surety Company
in behalf of
Raymond E. Smith
in favor of
Roseville Trust Company,

Amount $20,000.00.
Bond extended from December 10th, 1912.

Exhibit D. 1.

EXHIBIT D. 1.

No. 11898 Newark, N. J., Feb. 20, 1912.

THE NORTH WARD NATIONAL BANK

Pay to the order of, The Roseville Trust Co.....
Five Thousand and no/100.....Dollars

The N. J. Adamant Mfg. Co.

$5000.00

J. W. Denz, President
Herbert E. Dey, Treasurer

On Back
Pay to the Order of
Any Bank, Banker or Trust Co.
Feb. 20, 1912.
Restrictive.....Guaranteed

ROSEVILLE TRUST COMPANY, Newark, N. J.
Raymond E. Smith, Treas.

Perforated.
$5000
Paid 2-21-12

Exhibit D. 4.

EXHIBIT D. 4.

May 14, 1909.

William P. Odell, Esq., President,
The Roseville Trust Company,
Newark, N. J.,

Dear Sir:

The report on the official examination of your Company as of March 11th last, which recently came to hand, shows a conditions of affairs which is by no means satisfactory to this Department. The most serious matter is the use by the Treasurer, Mr. Smith, of the Company's funds, without the knowledge of the other officers or directors, for the benefit of one of his friends. The facts are reported to be as follows:

"On February 6th last Mr. Smith drew a draft on the New York State National Bank of Albany, to the order of Charles A. Nones, for $1,350, which was endorsed by the latter and given by him to one Edward G. Johns, said to be a New York broker, who deposited it to his (Johns) credit in the National Copper Bank of New York. The account of the New York State National was not credited with this draft until a week later, February 13th, when two checks were drawn on the Philadelphia National Bank, of Philadelphia, one for $1,350 and the other for $1,000. The account of the New York State National was then credited with the $1,350, and an additional $1,000 in cash was handed to Nones. For neither of these checks, of $1,350 and $1,000, drawn on the Philadelphia National Bank, was there any credit made on the books of your Company, but the total amount, $2,350, was charged to the Philadelphia National, thus covering the credit of $1,350 to the account of the New York State National and the handing out of the $1,000 in cash, hence at the date of the examination the Company's account with the Philadelphia National showed a shortage of $2,350.

The examination was made on Friday, March 12th, but no word was dropped by Treasurer Smith of this shortage at that time, although he evidently realized that it must come out in the course of the examination. On Sunday, March 14th, Mr. Smith called the Examiner up at his

Exhibit D. 4.

home by telephone, and made arrangements to see the latter the following Tuesday evening, March 16th, when he confessed the whole matter to the Examiner and stated that he had made a similar confession to yourself and Mr. Munroe, a director and attorney of the bank, on the Saturday following the examination. The explanation offered by Mr. Smith was that Nones, a friend of his, had come to him on February 6th, stating that he must have $1,350, and that he (Mr. Smith) had advanced Nones the money in this manner, taking the note of the latter for the amount. As Nones already had in the bank $6,000 of paper, of which only $3,500 was known to any of the directors of the Company, the other $2,500 having been put in by Treasurer Smith without reporting it to the Board or Executive Committee, he (Mr. Smith) therefore did not put the $1,350 through as a loan, but allowed it to stand without any entry on his books, thus making a deficit of $1,350 in the Company's Albany account.

On February 13th, one week later, Nones again came to Mr. Smith and stated that he could not pay the $1,350 as agreed, but that he must have another $1,000, and in order to accomplish this Mr. Smith drew the two drafts above mentioned, for $1,350 and $1,000, on the Company's Philadelphia correspondent (The Philadelphia National Bank), giving Nones the $1,000 in cash, and with the other draft, $1,350, crediting the Albany account, so that all the shortage would be in one account. Mr. Smith then received another note from Nones for the $1,000, which he also failed to put through. This left a shortage in the Philadelphia National Bank account from that date, February 13th, to the date of the examination, of $2,350, which difference showed in the Examiner's reconcilement of the account with the Philadelphia National for the 11th of March, the date of the examination.

The reason for transferring this shortage to the Philadelphia National Bank is apparent when it is stated that the Company has no regular draft book on that Bank (it has such a book in the cases of its other correspondents), only ordinary bank drafts being used for the purpose of drawing on Philadelphia, the stubs not being filled

Exhibit D. 4.

in, hence there were no telltale stubs to show these two transactions.

On April 6th, when the Examiner returned to the Trust Company's office for the purpose of making certain verifications, all the drafts on the various correspondents being then on hand to March 31st, a full comparison of all the paid drafts was made with the stubs of the check books, where there were any such, and with the general cash book, to see the various dates that the credits were made to the banks upon which the drafts were drawn. This led to the discovery that the above transactions with Nones were not the first of the kind, but that similar transactions had occurred in December and January. Another peculiar feature discovered was that where such transactions had been made the stubs of the check books were blank, having neither name, amount nor date. The Examiner also noted that those checks all found their way to the above mentioned Edward G. Johns, said to be a broker.

No mention was made by Treasurer Smith of these earlier transactions to either the officers of the Company or to the Examiner, and when his attention was called to the same he admitted the fact and said that previously Nones had always made good, while this last time he had not."

Taking the various matters together they seem to disprove the statement of Treasurer Smith that he had no interest in any of the transactions and that they were all made out of friendship for Nones. But be this as it may, no sufficient excuse can be offered by Mr. Smith for his action, which seems indefensible and deserving of the strongest condemnation. No confidence can be placed by this Department in any official who would be guilty of this sort of thing, nor does he seem worthy of the confidence of the directors of the institution. He should be required to resign and cease his connection with the Company. The Examiner states that the matter is known only to yourself and directors Foster and Munroe, and that at the interview he had with you and Director Munroe, at your home, on the evening of March 18th, the matter was thoroughly gone over and that he informed you and Director Munroe that the facts

Exhibit D. 4.

must be made known to every director, which I assume has been done.

The Examiner further reported that the Nones loans of $6,000, as well as the $2,350 items, above, were taken out of the institution on March 18th, payment being made in cash.

The Examiner calls attention to the fact that when he inspected the draft books he found that the stubs in many cases had not been filled out when the drafts were drawn, that in one case, the National Shawmut Bank, there were five or six missing drafts, the stubs being blank, and that for one of the drafts, No. 20, Treasurer Smith, when he was asked to produce it, said that he had torn up the draft which seems peculiar to say the least. Draft #1 on the New York State National Bank of Albany, stub dated February 15th and reading "Yourselves," for $5,000, could not be found. This account reconciled, however, as the Examiner states, both at the date of the examination, March 11th, and at the close of business on March 31st. In several instances it was found that drafts had been drawn and sent away, yet no credit had been given in the accounts of the institutions for a day or so thereafter. This also applies to the Treasurer's checks, which when issued are liabilities of the Company and should be at once credited (when issued) to Treasurer's check account, and the corresponding charge made. The latter has not been done as was shown by the $2,168.24 of Treasurer's checks outstanding which did not appear on the books as liabilities at the date of the examination and the largest check, being for $1,997, was dated March 4th, eight days previous to the examination. The practice must be discontinued.

On February 5th last the Treasurer sent $2,500 to the Mutual Trust Company for deposit. In January he had some $1,625 of unsecured loans there, besides other loans which the Mutual Trust Company has put in the Bernardsville National Bank for him, and on February 5th he obtained a loan at the Mutual Trust Company of $2,000, on the endorsement of Mr. George E. Krug, which seems to make evident why the deposit of $2,500 was made. I note the statement of the Examiner that the account was ordered closed by the President (yourself) on March 19th and that the $2,500 has since been withdrawn, which is approved.

At date of examination your Company owned some 255 shares of the stock of the American Commercial Bank, this being over

Exhibit D. 4.

one-half of the total capital of that institution, and it appears that the shares were taken on November 16th last, which permitted the opening of the Bank for business on November 19th. I understand that the Company has since disposed of some of this stock, which please confirm and state the particulars. I do not regard it as wise or desirable that your Company should hold such a large proportion of the stock of this or any other banking institution, and if its holdings had not been very materially reduced, this should be done without further delay.

I also disapprove of the reciprocal deposit account of the two institutions. At date of examination your Company had some $10,872.87 due from, and $5,019.95 due to, said Bank. The account should be closed out, and the Company's surplus funds kept on deposit with its legal reserve agents.

It is noted by the report of examination that the shares of the American Commercial Bank were not originally taken in the name of the Trust Company, but in the names of individuals, the Company not then being authorized to begin business; that at a meeting of the Executive Committee, held December 8th, the purchase of 260 shares of the stock was authorized; that the latter was not taken on the Company's books at that time because if it had been this would have necessitated showing it in the Company's report for December 31st, hence it was disposed of as follows (this, as the Examiner says, is Treasurer Smith's statement and only confirms his, the Examiner's view): 155 shares (5 having been withdrawn) were hypothecated at the Essex County National Bank for a loan of $15,708.15, on the note of Directors J. B. Bannister, Bataille, Foster, Woodward, Smith and Munroe; 100 shares were hypothecated at the Union National Bank for a loan of $10,043.05 on the note of Directors J. B. Bannister, Foster, Woodward, Ingersoll, Munroe and Smith; that these notes were allowed to run until February 15th when they were paid, with 5% and 6% interest to that date, by the Treasurer's drawing a Treasurer's check for $15,786.69 to pay the Essex County National Bank and a draft on the Company's New York correspondent for $10,086.10 to pay the Union National Bank; that the check and draft which, as stated, were drawn on the 15th of February, were not credited to the respective accounts and the charge put through to both accounts until February 18th, three days later. The paying of the interest on these individual loans, secured by said stock, shows that the

Exhibit D. 4.

intended ownership was in the Trust Company and that the reason it was not openly carried on its books (instead of paying 5% and 6% interest on the loans) was that it would not appear on the Company's books at the end of the year when a report was required. This deception is certainly not creditable to those concerned.

No written applications were on file for loans to directors of the Company, although the minutes indicated that such loans had had the approval of the Executive Committee before they were made. Section 15 of the Trust Company Law expressly require such written applications, and no further loans to directors, etc. should be made unless they are furnished.

The papers pertaining to the mortgages owned were incomplete, as follows:

#1, Scott, $3,000, no certificate of valuation.

#2, Cooper, $2,800, no valuation nor abstract of title, and the attorney's certificate showing title only since 1904, was one day short of the date of record of the mortgage.

#3, Mott, $2,800, no valuation nor abstract of title, and the attorney's certificate one day short of the date of record of the mortgage.

#4. Mott, $3,000, same as #3.

#5. Mott, $2,750, same as #3.

#6. Mott, $2,750, same as #3.

#7. Mott, $2,800, same as #3.

#8. Naylor, $3,300, no valuation nor abstract of title, and attorney's certificate not dated.

#9. Harper, $4,000, no valuation nor abstract, and no insurance policy.

With every mortgage there should be an abstract of title as well as an attorney's certificate and a certificate of valuation of the premises mortgaged, as otherwise an Examiner cannot know whether the mortgagor had good title and whether the mortgage is a first lien or not, nor whether the value is sufficient to cover the loan unless he should have the records searched and obtain independent appraisals of the properties. All of the above defects should be corrected and missing papers supplied, otherwise searches and appraisals will have to be secured by the Department and the expense charged to the insti-

Exhibit D. 4.

tution, which would add very materially to the cost of the examination. All abstracts and attorney's certificates should be brought down to the date of the record of and show the mortgage to the Company.

The foregoing also applies to mortgages held as collateral, of which there were three at the date of the examination, which were not accompanied by abstracts of title or attorney's certificates or certificates of valuation.

It is recommended that the surety bonds of the officers and employees be kept with the securities owned under restricted access, instead of being in charge of any one of the obligors.

A book for transferring the shares of the Company's capital stock should be obtained and used, and legal transfers made for all the stock so far transferred.

In proving the stock ledger it was found that all the stock had been practically issued, although there were still outstanding the interim receipts for sixty shares, and no bonds of indemnity were on file. This seems to constitute an over-issue of stock to that extent, and the matter must have attention and correction at once.

On December 31st last the Company owed four months' rent for its office building, amounting to $400, but its report for that date shows no charge on that account, the word "None" being written opposite the words "Rent accrued." Greater care must be exercised to have such reports entirely correct in every particular. The Examiner reported that there is an agitation on the part of some of the Directors to advertise and pay four per cent. interest on all time deposits. This would be an increase over the present high rate of four per cent. on the first $1,000 and three and one-half per cent. on the balance, now paid by Newark institutions, and I strongly advise against taking this course, which I think would be a very unwise move on the part of any institution in the locality, and especially so for a new one.

The Examiner's summary of condition at the end of the report shows a net reduction of $6,541.68 in the undivided profits and surplus fund, making the total $44,499.97. The account of furniture and fixtures, then carried at $8,149.25 is reduced to $6,782. To the $8,149.25 at which the items were carried at date of examination are added Treasurer's check No. 233 for $1,997, representing a final payment to the Veit Manufacturing

Exhibit D. 4.

Company, and check No. 254 for $150, representing a payment to S. W. Gordon & Co., for heating, etc., making a total of $10,-296.54, from which is deducted $3,514.25, consisting of $3,000 for improvements put upon the building (which expense is not a proper part of furniture and fixtures account), $182.25 paid Gordon & Co., for plumbing, $150 paid Butterfield on account of steam-heating, and $32.00 paid Hedden Construction Company for iron door, also Treasurer's check No. 254 for $150, not credited to Treasurer's check account, and representing an additional amount paid S. W. Gordon & Co., for heating, etc. The liabilities are increased by accrued rent, $633.33, accrued salaries, $133.61, interest accrued on deposits, $351.39, accepted bill of G. R. Munroe for services in organizing Company, $1,000, and amount due Adams, Groesback & Maher, balance account of stationery, printing, etc., carried as a note, $554.96. The last mentioned item should have been charged to expense and not carried as an asset. The $1,000 bill of the Attorney, Mr. G. R. Munroe, for organization expenses, has been voted paid by the Board, as per the minutes of March 17th, viz.:

> "It was moved by Mr. Ingersoll, seconded by Mr. Woodward, that a bill of G. R. Munroe, for $1,000, for services rendered in connection with the promotion and organization of the Roseville Trust Company, be paid, same to include the various expenses that were incurred. The motion was carried by unanimous vote."

It is recommended that no new loans be granted to Director Bataille.

The statement of Director Lurich shows equities of some $26,000, but does not state his outstanding liabilities other than encumbrances on real estate, and a supplementary statement showing all his liabilities, both absolute and contingent, should be called for. The loans on paper bearing his name were evidently obtained, as the Examiner states, for a speculative real estate venture and so far as the security goes are practically single-name paper. Directors who borrow the Company's funds for speculative purposes are under obligation to secure the institution beyond question, for the advances, by responsible endorsements or pledge of good marketable collateral for the same, and if they are not in a position to furnish that character of security the loans should not be made. Another important thing to be taken into consideration is the extent of loans to the parties

Exhibit D. 4.

by other institutions, as to which full information should be demanded.

At date of examination the notes bearing the name of Mr. Henry W. Smith aggregated some $10,500, as security for which he had pledged collateral reported as having a market value of $11,950. Since the examination, however, he put in another note, for $1,500, endorsed by him and made by William P. Smith. Mr. Smith is reported to have large liabilities elsewhere and it does not seem prudent for your Company to make further advances to him unless the notes are covered by collateral or bear the endorsements of entirely responsible persons.

The Examiner characterizes the following other notes as not very desirable and considers it advisable that they should be required to be paid when due, viz.: Underwood, $2,500; Ingalls, $2,500; Fresnal Mines Company, $9,000; Pike Adding Machine Company, $4,210.

In making loans on collateral the provision of the law that the security shall have an actual market value of not less than 10% in excess of the amount of the loan, should be carefully kept in mind. The Cogswell & Boulter Company's stock and Welch Grape Juice Company's preferred stock, held as collateral for a $3,060 loan to George H. Jacobs and a $1,500 loan to Frederick H. Higby, respectively, may have intrinsic value, but appear to lack the element of actual market value, and therefore they are not the kind of collateral security contemplated and required by the law.

I desire you to submit this letter to every director of the Company, and advise me fully, in writing, of the action taken upon its contents. The letter should be signed by yourself and all of the other directors of the institution.

Yours truly,

VIVIAN M. LEWIS,
Commissioner.

Exhibits D. 5—D. 6.

EXHIBIT D. 5.

(Letterhead of ROSEVILLE TRUST COMPANY,
Newark, New Jersey.)

May 17th, 1909.

Vivian M. Lewis, Esq., Commissioner,
Department of Banking and Insurance,
Trenton, N. J.

Dear Sir:

We beg to acknowledge the receipt of your letter of May 14th. And wish to say it will have our careful attention, and will be gone into minutely. It being of so much length, and also the request by you, that I submit it to all of our Directors (there being 20 of them, and some residing out of town) may take some time. I would like to say here, that most of your suggestions were attended to, within a short time after your Examiner was here.

I remain,

Yours truly,

WM. P. ODELL,
President.

EXHIBIT D. 6.

This exhibit is not available, but contains the minutes of the special meeting of June 21, 1909, particularly set forth in the letter, Odell to Lewis, dated June 21, 1909, Exhibit D. 7.

Exhibit D. 7.

EXHIBIT D. 7.

(Printed Letterhead of Roseville Trust Company, Newark, New Jersey)

June 21st, 1909

Vivian M. Lewis, Esq., Commissioner.
Department of Banking and Insurance,
Trenton, N. J.

Dear Sir:

A special meeting of the Board of Directors was called by the President for June 21st, at 7.30 p. m. as per the following notice, sent to each Director by registered delivery as shown by the enclosed Post Office record.

(Notice Sent) There will be a very important meeting of the Board of Directors of this Institution Monday evening, June 21st at 7.30 p. m. It is urgently requested that every member of the Board be present, as a matter of vital importance to the Institution will come up before the Board at this meeting.

Yours very truly,

(Signed) WM. P. ODELL,
President.

P. S. This meeting is called to consider an important communication received by us from the Commissioner of Banking and Insurance.

Those present were Messrs. Odell, Fairlie, Foster, W. J. Bannister, Bataille, Benjamin, Mott, Ingersoll, Kilgus, Krug, Monroe, Lurich, Scarlett, Sexton and Woodward.

The meeting was called to order by President Odell, who called for nominations for secretary protem. Director Elmer K. Sexton was duly elected.

The letter of the Commissioner of Banking and Insurance, dated May 14th, 1909, was duly read as was also the reply letter of President Odell dated June 3rd, to the Commissioner.

Exhibit D. 7.

The resignation of Secretary-Treasurer Raymond E. Smith was read as follows:

June 18th, 1909.

Mr. Wm. P. Odell, President,
and Members of the Board of Directors of Roseville Trust Co.

Gentlemen:

I beg to hand you herewith my resignation as Secretary and Treasurer of your Institution.

Yours very truly,
R. E. SMITH (Signed)

The Directors thoroughly discussed the letter of the Commissioner of Banking and Insurance, and decided to have an informal secret ballot taken on the resignation of Secretary-Treasurer Raymond E. Smith.

The result of the ballot was without a dissenting vote against the acceptance of Mr. Smith's resignation as Secretary and Treasurer of the Roseville Trust Company.

A motion was then made by Director Scarlett and seconded by Director Bannister that Raymond E. Smith be retained as Secretary and Treasurer of the Roseville Trust Company. The motion being put it was unanimously carried.

The meeting then adjourned.

E. K. SEXTON,
Sec'y pro-tem.

Exhibit D. 7.

The undersigned subscribe their signatures as part and parcel of the aforesaid sheets #1 & 2.

Wm. P. Odell
President.
Wm. Fairlie.
1st Vice President.
H. W. Foster
2nd Vice President.
Wm. J. Bannister.
Clinton F. McCord.
Harvey Mott.
John B. Scarlett.
E. C. Bataille.
Geo. Edw. Krug.
E. K. Sexton.
Charles C. Lurich.
Wm. F. Keim.
Fred Kilgus.
John S. Boll.
W. W. Woodward.
W. H. Ingersoll.
J. B. Banister.
W. T. Benjamin.

P. S. The reason for the delay in sending this letter is because of many of our Directors being out of town, it being vacation time.

You will notice that Director Monroe's signature is lacking, he having sailed to Europe the day after the meeting was held, June 22. If you wish his signature, we would suggest that you return the letter to us later in September.

WM. P. ODELL,
President.

Exhibits D. 8—D. 9.

EXHIBIT D. 8.

July 16, 1909.

William P. Odell, Esq., President,
The Roseville Trust Company,
Newark, N. J.

Dear Sir:

I am in receipt of a letter, dated 21st ultimo and signed by Mr. E. K. Sexton, Secretary pro tem of the special meeting of the Board of Directors of your Company, held on the last mentioned date, embodying the action of the Board upon the resignation of Mr. Raymond E. Smith, Secretary and Treasurer of the institution, which will have my consideration. I will say now, however, that I emphatically disapprove of the decision of the Board in the matter.

Yours truly,

VIVIAN M. LEWIS,
Commissioner.

EXHIBIT D. 9.

(On Postal Telegraph Blank.)

Newark, N. J., June 15/09

To Vivian M. Lewis,
Comr. of Banking & Ins.
Trenton

Our committee will call on you today at twelve forty-five p. m.

ROSEVILLE TRUST CO.

Notice of Appeal of National Surety Company.

NOTICE OF APPEAL OF NATIONAL SURETY COMPANY.

Filed.

To Roger Hinds, Esq.,
Attorney of Plaintiff.

Sir:

TAKE NOTICE that the defendant National Surety Company appeals to the Court of Errors and Appeals from the whole of the judgment in favor of the plaintiff entered in this cause on the grounds specified in the reasons served herewith.

SAMUEL D. WILLIAMS,
Attorney of Defendant National Surety Company.

Service acknowledged March 12, 1920.

ROGER HINDS,
Attorney of Plaintiff.

REASONS OF DEFENDANT, NATIONAL SURETY COMPANY.

Filed.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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

vs.

NATIONAL SURETY COMPANY and RAYMOND E. SMITH,
Defendants.

Reasons.

Roger Hinds, Esq., Attorney of Plaintiff.

SIR:

TAKE NOTICE that the defendant, National Surety Company, writes down the following reasons for its appeal from the judgment entered in the New Jersey Supreme Court, Essex Circuit, in favor of the plaintiff:

Because the following questions were overruled:

1. To the witness Thompson: Haven't you learned it since (referring to a reputed habit of Smith's of "robbing Peter to pay Paul")?

Because the following questions or answers were admitted:

2. To the witness Thompson: In the ordinary course of business at the Roseville Trust Company, what does that entry indicate to you with respect to a deposit ticket?

3. By the witness Thompson: A It indicates that a $1,000 deposit ticket was received by the bookkeeper to open up an account in the name of P. J. Cossick on January 11, 1911.

4. To the witness Thompson: In the ordinary course of business what does that entry indicate to you, assuming Mr. Mindnich acted regularly with respect to the deposit ticket?

Reasons of Defendant, National Surety Company.

5. To the witness Mindnich: Do you think those overdrafts were regular (Bruno & Miele)?

6. To the witness Mindnich: Is it not a fact that in the institution Savings Investment & Trust Company you have seen entries in their books indicating overdrafts?

7. To the witness Mindnich: Very frequent or more or less frequent (referring to overdrafts in Savings Investment & Trust Co.)?

8. To the witness Mindnich: Will you state whether or not more infrequently than such red ink entries were shown in the books of the Roseville Trust Company (referring again to books of Savings Investment & Trust Co.)?

9. To the witness Mindnich: Is the same answer true with regard to your experience in the American National Bank?

10. To the witness Cloran: Can you without refreshing your recollection tell us what you found to be the total shortage shown on the books of the bank at the time of its closing?

11. To the witness Cloran: Now, will you state whether or not in your opinion, as a result of the examination of these transactions through the books of the Roseville Trust Company, you are of the opinion that as to each of the said items of default in Schedule F except the item of account of James Lees & Son, the Roseville Trust Company suffered a loss in connection with each of said transactions?

12. To the witness Vredenburgh: Mr. Vredenburgh, it has appeared that certain of the deposit slips in evidence were recorded in the side-book and individual ledgers, and bear no mark "O 55" and that other deposit slips in evidence were not recorded in the books and bear the mark "O 55"; from your investigation of the books and accounts and all of the records, will you explain, if you can, to the jury what that situation indicates to you?

13. To the witness Vredenburgh: As a result of your total examination personally made of the books, records, accounts and slips, what did you find concerning the items set forth in your proof of loss (Exhibit P. 77)?

14. To the witness Vredenburgh: What do you mean by "chargeable"?

Reasons of Defendant, National Surety Company.

15. To the witness Vredenburgh: As the result of your examination of the Armstrong and Scarlett and all these other checks paid without funds there to meet them, will you state whether or not your investigation disclosed that any of those were involved in the item of your proof of claim against the National Surety Company Schedule F?

16. To the witness Appleton: Did you ever, subsequent to your conference with Odell and Munroe, subsequent to your examination of March 9th, call the attention of any officer or director of the Roseville Trust Company to any other or later misconduct or irregularities of Raymond E. Smith?

17. To the witness Appleton: Did you at that examination or on any other occasion prior to that, and after March, 1909, say to any officer or director of the Roseville Trust Company that Mr. Smith should be removed?

18. To the witness Appleton: You knew, did you not, Mr. Appleton, that Mr. Odell was at the trust company only part of the day?

19. To the witness Foster: Will you state what was said in your presence at that time either by yourself or any other representative of the Roseville Trust Company or by the Commissioner of Banking and Insurance or his deputy?

20. To the witness Foster: Mr. Foster, after the incident connected with the Nones matter extending up to June, 1909, when that meeting was held did you thereafter learn of any conduct in connection with the Roseville Trust Company on the part of Smith which indicated to you any wrongdoing on his part?

21. To the witness Munroe: Did you report to the board—make any report to the board—concerning Raymond E. Smith?

22. To the witness Munroe: Mr. Munroe, after the meeting was called to order, what was the first business brought up, and by whom?

23. To the witness Munroe: Will you state what Smith stated?

24. To the witness Munroe: I will leave that for a minute. The remainder of this letter states: "I will say now, however, that I emphatically disapprove of the action of the board in the matter." I will now ask you what, if any other, further indication on the part of the commissioner of his consideration of this

matter was brought to the attention of the board, and where and how?

25. To the witness Munroe: Mr. Munroe, did you learn of any conduct on the part of Smith subsequent to the matters arising in connection with Nones which indicated to you his retention in office was inadvisable?

26. To the witness Munroe: Did you withdraw any of the accounts which you had in the Roseville Trust Company after the Nones transaction?

27. To the witness Munroe: Mr. Munroe, do you recall to what extent relatively Raymond E. Smith was a stockholder of the trust company?

28. To the witness Odell: Any of your business associations (have an account there)?

29. To the witness Odell: Did you after the incidents of March, 1909, and June, 1909, affecting the Nones transaction, withdraw any of your accounts?

30. To the witness Odell: And what did Mr. Smith say (to Fairlie and Odell next morning)?

31. To the witness Odell: What did he say (Smith to board)?

Because the Trial Judge refused to strike out the following answer by the witness Vredenburgh:

32. By the witness Vredenburgh: A The deposit tickets bearing no mark "O 55" nor any other specially distinguishing mark came from the regular files of the trust company; they were where they ought to be. The other deposit tickets, those marked "O 55," were not found in the regular files, but were found in the box which Mr. Treasurer Smith used, and therefore the distinction I draw, as inquired in the question between the two classes of deposit tickets mentioned in the question is that the tickets marked "O 55" were secreted by Smith for a purpose. Now, have I answered?

To the overruling of the following answer by witness Foster:

33. By the witness Foster: A Well, I had given Mr. Smith three notes aggregating $2,500, to be sold to what we call country banks—outside banks—and I asked him if he could sell it out of town. I did not want to put any loans through our own bank. He said if opportunity afforded he would do so, and put it to the credit of my account, and if I would call him up beforehand,

before I drew on it, he would let me know if it was all right; I said I was in no special hurry; so I don't know how long it was, but some time after I handed him the note I called him up and asked him if it was all right. He said, "Why, yes; that is all right—"

Because the following evidence was admitted as proof of dishonestly "amounting to larceny or embezzlement":

34. Draft, Emma E. O'Connor, Exhibit P. 29.

35. Draft, Alma M. Mott, Exhibit P. 31.

36. The bill of complaint in the suit in the Court of Chancery of New Jersey entitled, "George M. LaMonte as Commissioner of Banking and Insurance of the State of New Jersey, in behalf of and in the name of the Roseville Trust Company, of Newark, N. J. *v.* Harvey Mott, *et als.*, was excluded from evidence."

37. The motion for non-suit as to the defendant, National Surety Company, was denied.

38. The motion for the direction of a verdict on behalf of defendant, National Surety Company, was denied.

The Court refused to charge the jury as follows:

39. In order to recover in this action the plaintiff must have shown, by a preponderance of the evidence, that the trust company not only suffered a loss through the dishonesty of Smith, but that Smith personally received the benefit of the money or funds abstracted; that is, that it was converted by him to his own use.

40. No recovery can be had in this action for money abstracted from the bank by Smith for the benefit of others, or to make good the losses the bank suffered by Smith's having permitted other people to overdraw their accounts, or to take money from the bank when they had no money there.

41. The burden of proof is upon the plaintiff to show that the peculations complained of went to the personal use of Smith; if from all the evidence the jury be in doubt as to this, although they may believe that the sums taken were dishonestly abstracted, then there must be a verdict for the defendant.

42. Under no circumstances can there be a recovery for the item of $6,500 deposited by Alma M. Mott, October 14, 1911, and drawn out by a forged draft of said Mott.

Reasons of Defendant, National Surety Company.

43. In the case of the deposit of the New Jersey Adamant Manufacturing Company, any presumption arising from the fact that the money was received by Smith, and the entry in the pass-book made by him, is overcome by the proof that the check was endorsed as appears, and in the absence of further proof connecting Smith with the transaction, there can be no recovery of that item.

44. If the jury believe that Mrs. Haney's savings account was charged and credited with the amount of $9,000, which was not entered on the bank's ledger, there can be no recovery on that item.

45. If the jury believe that the other clerks or officers of the bank—Jennings or Thompson, or Mindnich, or either of them—were involved in the transactions complained, then before they can hold the surety company responsible, they must have determined by the preponderance of the evidence, that Smith, and he alone, abstracted, and had the sole benefit of, the amount included in the recovery. Any doubt upon this question must be solved in favor of the defendant, as the surety company is in no way answerable for the dishonesty of such other employees or officers.

46. If the books of the bank contain on their face such patent glaring evidence of falsification as would apprise the examining committee, or other officials of the bank, as reasonably prudent men, that Smith was unreliable, deceitful, dishonest or unworthy of confidence, and such facts were not reported to the surety, then there can be no recovery for shortages thereafter.

47. The terms of the bond in suit required of the plaintiff the making of audits and examinations, and the taking and using of all reasonable steps and precautions to detect and prevent the commission of any act upon the part of Smith tending to render his surety liable. If the jury believe that such audits and examinations or precautions were not, in fact, made or taken, or were made or taken in such a careless and negligent manner as not to disclose such patent, glaring irregularities on the face of the books as would have been by proper audits, examinations and precautions, then there can be no recovery for shortages thereafter.

48. The surety having the right to rely upon the performance of their respective duties by the officials of the bank regarding the audits, examination and supervision, if the jury believe that

such officials so failed in the performance of those duties as to fail to discover patent irregularities or large overdrafts, or facts of a similar nature, upon the face of the books, indicating unreliability, deceitfulness, dishonesty or unworthiness, on the part of Smith, such as would have been disclosed by a reasonably careful audit, examination or supervision, then there can be no recovery for shortages thereafter.

49. The jury in considering the character of the notice of acts of Smith embodied in the disclosures of the commissioner and his examiner, should give to those disclosures the additional weight to which they are entitled as advices coming from the State Department created and existing under the statute, charged with the duty of the general supervision of all trust companies in the State, and in the light that the facts of these disclosures are not refuted.

50. The jury should be charged that only an absolute refutation of the disclosures of the examiners and commissioner justified the refusal of the officials of the bank to cause Smith's dismissal, or a notice to his surety of the disclosures made to them.

Because the Court charged the jury substantially as follows as shown by the exceptions of defendant's counsel:

51. There having been no proof of the statute of the State of New York regarding larceny and embezzlement, an exception was taken to that part of the Court's charge which construed what was meant by the words "larceny" and "embezzlement" under that statute in the following words:

> "A general definition of the term 'larceny' is the felonious taking of the money or other property of another with the intent to convert it to the use of the taker without the consent of the owner. A general definition of 'embezzlement' is that it is the fraudulent appropriation, as distinguished from the taking in larceny, of the money or other property of another by a person to whom such property has been entrusted, or into whose hands it has lawfully come. These two offenses have much in common, but the fundamental difference is that in larceny the felonious intent must have existed at the time of the taking, while in embezzlement such intent may have been entirely lacking when the property came into the possession of the party, and the wrong arises from its subsequent fraudulent appropriation by him to his own use. The result in both cases is very much the same, that is,

to deprive the person owning or entitled thereto of his money or property. I have stated that these are the usual definitions, but it has been agreed in this case that this contract is governed by the law of the State of New York, which is somewhat broader than the definitions which I have read, so far as the term 'embezzlement' is concerned, or, rather, 'larceny and embezzlement.' By the New York State code they are both included in the term 'larceny,' and I will read that statute. 'A person who with the intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the same to the use of the taker, or any other person having in his possession, custody or control'—I am omitting some things, and reading only what is applicable to this suit—'having in his possession, custody or control as the bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold or take such possession, custody or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use or that of any other person other than the true owner, or person entitled to the benefit thereof,' then it goes on and says 'steal such property, is guilty of larceny.' These are the definitions of larceny and embezzlement under the New York statute, and you will observe the difference between the general definition which I have read to you, and the definition under the New York statute, which speaks not only of the appropriation to the use of the taker, but also of the appropriation to the use of any person other than the true owner."

52. I also pray exception to all that was said in your Honor's charge, either in immediate juxtaposition to what I have just referred to, or otherwise, in indicating that the New York statute would govern in the determination of what was or was not larceny and embezzlement, as follows:

"I have stated that these are the usual definitions, but it has been agreed in this case that this contract is governed by the law of the State of New York, which is somewhat broader than the definitions which I have read, so far as the term 'embezzlement' is concerned, or, rather, 'larceny and embezzlement.' By the New York State code they are both included in the term 'larceny,' and I will read that statute. 'A person who, with the intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the same to the

use of the taker, or any other person having in his possession, custody or control'—I am omitting some things and reading only what is applicable to this suit—'having in his possession, custody or control as the bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold or take such possession, custody or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use or that of any other person other than the true owner, or person entitled to the benefit thereof,' then it goes on and says 'steal such property, is guilty of larceny.' These are the definitions of larceny and embezzlement under the New York statute, and you will observe the difference between the general definition which I have read to you and the definition under the New York statute, which speaks not only of the appropriation to the use of the taker, but also of the appropriation to the use of any person other than the true owner."

53. I also pray exception to that part of your Honor's charge which authorizes the jury to consider, as part of the sum lost, and, therefore, for which the defendant should respond, whether or not the man Smith himself received the benefit of it, as follows:

"By the New York State code they are both included in the term 'larceny,' and I will read that statute. 'A person who, with the intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the same to the use of the taker, or any other person having in his possession, custody or control'—I am omitting some things and reading only what is applicable to this suit—'having in his possession, custody or control as the bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold or take such possession, custody or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use or that of any other person other than the true owner, or person entitled to the benefit thereof,' then it goes on and says 'steal such property, is guilty of larceny.' These are the definitions of larceny and embezzlement under the New York statute, and you will observe the difference between the general definition which I have read to you

and the definition under the New York statute, which speaks not only of the appropriation to the use of the taker, but also of the appropriation to the use of any person other than the true owner."

Also, "As to all of these classes the questions arising are, first, whether or not these sums, or some of them, were actually misappropriated and abstracted from the funds of the bank; second, whether or not they were dishonestly abstracted by Smith and appropriated to his own use, or to the use of any other person than the true owner; and, third, whether or not such dishonesty amounted to larceny or embezzlement."

Also, "If you find that they were, then, if the moneys represented by them were converted by Smith to his own use, or to the use of any other person than the true owner, that would be an embezzlement of that sum of money, and would be covered by the language of the bond agreeing to make good to the trust company for the dishonesty of Smith amounting to larceny and embezzlement."

54. Exception is taken to that part of the Court's charge which left it to the jury to say whether in the O'Connor case it was or was not forgery; or to determine whether under all the circumstances although the signature was undoubtedly forgery, nevertheless, it might not have been embezzlement under the Court's definition of that term, as follows:

"It does not seem to be seriously disputed, but that the evidence points to Smith as the person who may have received the money on these drafts; but it is insisted that the form of dishonesty which accomplished the withdrawal of these moneys, if they were withdrawn by Smith, was forgery, which is not covered by this bond; and I have already stated that if it be purely a matter of forgery, it is not covered by the bond. But is that so that it is nothing but forgery? Smith was constructively in the possession and control of these funds as the treasurer of the trust company, and if the drawing of the drafts by him was only a matter of bookkeeping, a part of the process by which, according to the system of bookkeeping of the bank, the accounts of these customers were charged with these amounts, to cover up an abstraction by him of the sums of money represented by these drafts, that would constitute an embezzlement of the funds of the bank, and would be covered by the provision of the bond by which the surety company agreed to make good to the trust company for Smith's dishonesty amounting to larceny and embezzlement.

Reasons of Defendant, National Surety Company.

55. Exception is taken to that part of the Court's charge which left it to the jury to determine whether the officers knew or ought to have known that the acts or facts which were brought to their attention were such as to indicate that Smith was guilty of the four things specified in the bond, whether he was dishonest, unreliable, deceitful or unworthy of confidence, as follows:

> "The question here presented is not one alone of the fact whether or not what Smith then did, and which was brought to the attention of the officers and directors, was dishonest, whether his conduct was such as to indicate that he was unreliable, deceitful, dishonest, or unworthy of confidence, because all now, after the dishonest transactions and manipulations of Smith have been brought to light, are willing to admit that what he then did was the forerunner of the larger manipulations and defalcations which came later, and that they then were the product of a dishonest mind and disposition, but the question is whether the officers and directors knew, or ought to have known, that the character of his acts was such as to indicate, or tend to indicate, at that time, or afterwards, that Smith was unreliable, deceitful, dishonest or unworthy of confidence."
>
> "The officers and directors who were called to testify in this case disclaim a comprehension at that time that what Smith then did was dishonest, or deceitful; and it is insisted that they were justified in regarding his actions as indicating bad judgment, or negligence. But such disclaimer would not avail the trust company if the information which they then received was such as must necessarily have impressed an ordinary mind, or the minds of those directors, that Smith was unreliable, deceitful, dishonest, or unworthy of confidence."
>
> "Therefore, if in 1909, or at any time before the condition of the bank was discovered in 1913, the officers and directors of the trust company, from what came to their knowledge or notice, knew, or ought to have known, that the character of those things which were called to their attention was such as to create a suspicion, or tend to indicate Smith to be unreliable, deceitful, dishonest or unworthy of confidence, then the plaintiff cannot recover in this case; for it is an admitted fact that no notice of what then came to their attention was ever communicated by them to the surety company. But if that was not the impression made upon them, and if the mind of an ordinary person would not be so impressed by these facts, but the impression which those facts conveyed was only that Smith had used bad judgment, or had been neglectful of his

duty, and that what he did did not tend to indicate to them, or any of them, that he was unreliable, deceitful, dishonest or unworthy of confidence, then the plaintiff would not now be barred from recovery against the surety company, by reason of the failure to give such notice."

56. Exception is taken to that part of the Court's charge which said that the officers disclaimed knowledge of the dishonest or deceitful intent of Smith's acts, as follows:

"The officers and directors who were called to testify in this case disclaim a comprehension at that time that what Smith then did was dishonest, or deceitful, and it is insisted that they were justified in regarding his actions as indicating bad judgment, or negligence. But such disclaimer would not avail the trust company if the information which they then received was such as must necessarily have impressed an ordinary mind, or the minds of these directors, that Smith was unreliable, deceitful, dishonest, or unworthy of confidence."

57. Exception is taken to that part of the Court's charge to the effect that if the officers, from what came to their knowledge, believed that the facts indicated were done not dishonestly, but for an honest purpose, the impression being that Smith simply used bad judgment and bad management, then the company was not required to give the notice required by the bond, as follows:

"But if that was not the impression made upon them, and if the mind of an ordinary person would not be so impressed by those facts, but the impression which those facts conveyed was only that Smith had used bad judgment, or had been neglectful of his duty, and that what he did did not tend to indicate to them, or any of them, that he was unreliable, deceitful, dishonest or unworthy of confidence, then the plaintiff would not now be barred from recovery against the surety company, by reason of the failure to give such notice."

SAMUEL D. WILLIAMS,
Attorney of Defendant, National Surety Company.

Service of a copy of the within Reasons is hereby acknowledged this 12th day of March, A. D. 1920.

ROGER HINDS,
Attorney of Plaintiff.

PLAINTIFF'S CROSS NOTICE OF APPEAL.

Filed.

SIRS:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from so much of the judgment entered in this cause as fails to award to plaintiff, and fails to include in said judgment, an additional sum of Twenty thousand dollars ($20,000), with interest thereon from the 13th day of May, 1914, being the amount of the liability of the defendant National Surety Company to the plaintiff by reason of losses occurring on and after the 10th day of December, 1912, as particularly referred to in the "further amendment to the amended complaint" and Schedule G thereunto annexed, as created by instruments set forth in the complaint as Schedule A and Schedule E thereunto annexed, and from so much of said judgment as disallows said item on the following grounds:

1. Exception is taken to that part of the Court's charge wherein the jury was instructed that the maximum of their verdict, exclusive of interest, should be Twenty thousand dollars ($20,000) and that the last continuation is not to be regarded as a distinct contract affording an additional maximum, making a total of Forty thousand dollars ($40,000) exclusive of interest, as follows:

> "* * * the original bond, and these renewal covenants, so far as this case is concerned, constituted one continuing agreement * * *"
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> * * * * * * * * *
>
> "The aggregate of the amounts which the plaintiff claims to have lost through the dishonesty of Smith which amounts to larceny or embezzlement, which are involved in this suit, is $114,613.03. The plaintiff claims the right to recover in this suit $40,000 of this amount upon the theory that it is permissible, under contracts of this character, where the loss exceeds that sum, to recover the whole amount of the penalty of the original bond as continued up to the last continuation agreement and a similar amount under the last continuation agreement. But the Court is unable to agree with that insistment, and you are, therefore, instructed that the maximum limit of the amount which may be recovered under the circumstances of this case, if you shall determine that the plaintiff is entitled to a verdict, is $20,000, with interest at six per

cent. from the 13th day of May, 1914, three months after the service of the proof of loss, to this 27th day of March, 1919.

* * * * * * * * *

Therefore, if nothing else appeared in this case, if the case ended right here, the plaintiff would be entitled to your verdict for such amount, *not exceeding $20,000,* as the trust company lost through the dishonesty of Smith which amounted to larceny and embezzlement, including interest as I have already indicated."

2. Exception is taken to that part of the Court's charge wherein the jury was instructed that they were not to consider any of the losses described in Schedule G annexed to the complaint as constituting part of the plaintiff's recovery, and to the Court's statement in that connection that those losses had not been discovered until after six months, after the termination of Smith's employment (it being the manipulations of the accounts covering those losses which had not been discovered), as follows:

"As to the fourth class of items (abstractions of bank funds, accomplished through false entries on the general ledger amounting to $31,329.25). These items are those contained in Schedule G. According to the provisions of this bond, which is the contract sued upon, and by which both parties, as I have said, are bound, notwithstanding the continuation agreements, which the Court has already stated, with the original bond, form one agreement, it is provided that the surety company shall be legally liable to the employer, which is the bank, for losses which shall be discovered, during such term; that is, the term of the bond, or the continuation; or within six months after the expiration of such term and within six months after the employee's default, or his dismissal, or retirement from the employer's service. It is not disputed in this case, I think, that the items appearing upon Schedule G were not discovered within this period; but it is insisted that because of the receipt of the letter from the surety company, written some time the latter part of January, and before the six months had expired, disclaiming any liability on this bond, that the surety company waived this provision. I am not inclined to adopt this view. Admittedly this part of the claim embodied in Schedule G had not been discovered at the time the proof of claim was filed under Schedule F, which was on the 13th day of February, 1914, the very last day upon which it could be filed. Mr. Vredenburgh himself says that it had not been discovered, and, according to the testimony of Mr. Cloran,

his examination did not begin until, I think, in the early part of 1917. It may have been some time earlier than that. You will recall. But certainly not until long after six months from the termination of his employment by Smith by his running away, or his going away—and he had not made up his statement demonstrating this loss to himself, and those in charge of the trust company, until a little over a year ago. Therefore, I charge you that, so far as class four is concerned, this Schedule G, there can be no recovery by the plaintiff in this case for the items contained in that schedule."

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

(3) "For the purpose of determining maximum amount of recovery of this suit (exclusive of interest) the original bond and its renewals (except the last) together furnish a maximum of $20,000. The last renewal or continuation furnishes an *additional* liability of $20,000 maximum (if the jury find that loss as defined in the bond has occurred within its period), because it constitutes a *distinct liability,* upon its separate consideration, to make good the loss occurring during its term."

* * * * * * * * *

(10) "Even though the jury find that the information which came to the directors of the plaintiff in the year 1909 respecting the transactions of Raymond E. Smith in connection with the account of Charles A. Nones was such as to lead a reasonably prudent person, under the same or similar circumstances and surroundings, to believe that Smith was unreliable, deceitful, dishonest and unworthy of confidence, the plaintiff's failure to notify defendant surety company will not bar the recovery of plaintiff for losses sustained during a subsequent continuation period of said bond, provided the jury find that plaintiff exhibited good faith in permitting defendant to continue the said bond."

* * * * * * * * *

(12) "Even though the jury find that plaintiff committed a breach of the sixth clause of the bond by failing to notify the defendant surety company of the acts, facts and information set forth in the commissioner's letter of May 14, 1909 (Deft's Exhibit 4), that finding will not bar plaintiff's recovery, because such failure did not constitute a breach of any of the contracts represented by

the so-called renewal or continuation certificates (Exhibits P. 68, 69, 70 and 71)."

Dated, March 25th, 1920.

Yours, etc.,

ROGER HINDS,
Attorney for Plaintiff-Respondent,
No. 22, Midland Avenue, East Orange, New Jersey.

To:

SAMUEL D. WILLIAMS, ESQ.,
Attorney for Defendant, National Surety Company,
810 Broad Street, Newark, N. J.

Service acknowledged March 28, 1920.

SAMUEL D. WILLIAMS,
Attorney of Defendant, National Surety Company.

New Jersey Court of Errors and Appeals.

ROSEVILLE TRUST COMPANY, by George M. LAMONTE, Commissioner of Banking and Insurance of the State of New Jersey,
Plaintiff-Respondent,

vs.

NATIONAL SURETY COMPANY and RAYMOND E. SMITH,
Defendants-Appellants.

ROSEVILLE TRUST COMPANY, by George M. LAMONTE, Commissioner of Banking and Insurance of the State of New Jersey,
Plaintiff-Appellant,

vs.

NATIONAL SURETY COMPANY and RAYMOND E. SMITH,
Defendants-Respondents.

BRIEF FOR RESPONDENT, ROSEVILLE TRUST COMPANY.

Introduction.

The defendant, National Surety Company, has appealed from the judgment entered upon the verdict of a jury at the Essex Circuit, in the sum of

Twenty thousand dollars, with interest from May 13th, 1914, in favor of the plaintiff against the two defendants.

The action is based upon a so-called fidelity bond or more properly a contract of indemnity or insurance, by which the defendant, National Surety Company, contracted to indemnify the Roseville Trust Company against loss on account of the personal dishonesty, amounting to larceny or embezzlement of the employee (defendant, Raymond E. Smith), in the performance of his duties as secretary and treasurer of the Roseville Trust Company.

The Roseville Trust Company in August, 1913, was found by the Commissioner of Banking and Insurance to be in an insolvent condition and has since that time been in liquidation under the provisions of Chapter 171 of the Laws of 1913, which authorizes, among other things, the bringing of actions by the Commissioner in the name of and in behalf of the institution under liquidation.

The plaintiff itself has taken the cross-appeal from so much of the judgment as fails to include an additional sum of Twenty thousand dollars with interest, being the amount of the defendant, National Surety Company's liability to the plaintiff by reason of the losses occurring on and after the 10th day of December, 1912, to which plaintiff claims to be entitled in addition to the amount recovered under the previous renewal certificates.

The Facts.

The original contract was dated December, 1908, and indemnifies the Trust Company against any loss of the description above mentioned occurring between December 1st, 1908 and December 1st, 1909, the extent of the indemnity being Twenty thousand dollars.

On December 10th, 1912, in consideration of the

payment of an equal premium during each and every year, the defendant became bound for an indefinite term beginning on said date, in the amount of Twenty thousand dollars. This instrument is relied upon by plaintiff upon its cross-appeal as affording a basis for its claim for losses occurring after December 10th, 1912, to the extent of Twenty thousand dollars, in addition to the Twenty thousand dollar maximum for losses occurring during the earlier periods.

The losses upon which recovery was had, resulted from the embezzlements of Raymond E. Smith, secretary and treasurer of the Roseville Trust Company, principal on the bond and co-defendant in this action.

These losses naturally divide themselves into four classes or groups; the first group comprises losses occurring between December 18th, 1910 and August 15th, 1912, to the total amount of $46,683.72, and resulting from embezzlements accomplished by Smith in connection with deposits in certain savings accounts. The second group includes items of similar character but respecting the demand or commercial accounts which are subject to check. These items, aggregated $27,101.06 (omitting one $5,000 item for which no proof was offered), and occurred between March 5th, 1912 and September 16th, 1912.

The third group comprises two items of embezzlements which were covered up by means of fictitious withdrawals by depositors, occurring on December 12th, 1910 and October 14th, 1911, respectively, and aggregating $9,500.

The total of the losses included in the first, second and third groups is $83,283.78, and they form the basis for the recovery in this action, which, under the terms of the bond and of the renewal certificates, except the last one, is concededly limited to a maximum of Twenty thousand dollars, with interest.

The fourth group comprises items of embezzlements occurring after December 10th, 1912, on which date the contract was renewed for an indefinite term by a certificate differing from the earlier renewal certificates principally in the respect that it did not provide, as did the earlier certificates, that the "liability under said bond and this continuation together shall not exceed the amount of said bond.

The items in this fourth group are the subject of the further amendment to the amended complaint and the Jury was not permitted, by the Trial Court, to consider them, either as the basis for a recovery limited to $20,000, or as the basis for any additional recovery beyond that sum. The items in the fourth group are exclusively the subject of plaintiff's cross appeal. These items occurring between December 30th, 1912 and July 31st, 1912, and aggregating $31,329.25, were abstractions of cash concealed by manipulations of the general ledger.

The details, as to dates, nature and amounts of the items included in the first, second and third groups are found in Schedule F of the amended complaint (pp. 14, 15 and 16). The items of the fourth clause are found in Schedule G of the further amendment to the amended complaint (p. 21). These losses are analyzed into four groups as above, and described in considerable detail in Judge Dungan's Charge to the Jury, at pages 489 to 494, and we shall discuss them in further detail at a later page.

The Trust Company was incorporated in 1908. Raymond E. Smith was one of the original subscribers to the stock and held a substantial stock interest throughout the trust company's existence. The institution was organized by a group of local business and professional men in the community known as Roseville in the City of Newark. A com-

mittee was appointed to procure a secretary and treasurer to assume the active management of the institution, and an investigation was made as to the previous record and character of Raymond E. Smith who was under consideration for the position. The information obtained was entirely favorable. Smith was engaged and acted continuously as secretary and treasurer of the Trust Company from that time until the institution closed its doors in August, 1913.

A fidelity bond was required of Smith, and he procured personally the contract of indemnity, which is the basis of this action (Complaint, p. 1, fol. 40; Answer, p. 17, fol. 30). No application was made by the Trust Company itself, through any of the other officers or directors, and no statements or warranties were made either in connection with the original contract or with any of the renewals—at least, none have been proved or even claimed by the defendants to have been made. Nor, apparently, were any representations whatsoever made by the Roseville Trust Company with regard to the conduct of the employee, Raymond E. Smith (p. 403). Apparently Smith alone handled the matter of his fidelity bond, in behalf of the institution.

It is not seriously disputed that the Trust Company actually suffered the various losses which are claimed in the pleadings, nor that these losses were made possible by the fraudulent manipulations of Raymond E. Smith. It is, however, contended by the defendant, National Surety Company, that plaintiff has not sustained the burden of establishing that these losses were the result of acts fully within the precise scope of the terms "larceny and embezzlement" and that the plaintiff has not sustained the burden of establishing that the money was abstracted for the personal use and benefit of

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Raymond E. Smith. We shall discuss this at a later page in the course of the argument proper.

In order to describe intelligently the nature of the manipulations, it is necessary to summarize the system under which the ordinary transactions of the Trust Company were conducted.

Deposits were at the outset received by a clerk combining the functions of paying-teller and receiving teller. Later, two windows were provided with a receiving teller at one and a separate paying-teller at the other. It sometimes occurred, for the convenience of customers, that deposit slips were written out by the teller instead of by the depositor. It also frequently occurred that Smith himself would relieve the receiving teller and himself receive deposits, on which occasions he would, at times, write out the deposit tickets.

It was an invariable practice to require presentation of pass-books when withdrawals were made from savings accounts so that appropriate entries might be made therein. Moreover, inasmuch as the pass-book was the savings depositor's evidence of his deposit, it was the invariable practice of depositors to present their pass-books upon making deposits so that credit entries might be properly made therein. It was this latter fact that made possible the ultimate discovery of the losses resulting from manipulations of savings account deposits.

When a deposit was made, the deposit ticket was filed by the teller and at the close of the day, a comparison was made by him of the amount of cash in his drawer with the total of the deposit tickets as accumulated during the day. This "proof" was entered in a book known as the "Receiving Teller's proof-book" and the cash was thereupon turned over to the paying-teller to be used by him in his operations of the following day. The deposit tickets themselves were then used by bookkeepers as the basis for entries in two different books in which

deposits were recorded, viz: the credit side-book in which the deposits were entered in order, day by day, showing the depositor's name and the amount of deposit; and the individual deposit ledgers (loose-leaf) in which the entries were grouped under the accounts of the separate depositors, not listed under the successive days as in the side-books. The totals were entered in the general cash book and in the general ledger.

Withdrawals from the savings accounts were in each case accompanied by a withdrawal slip or draft. This draft was ordinarily signed by the depositors. Its principal function was to furnish a memorandum to the bookkeepers for their entry in the debit side-books and individual deposit ledgers.

The trust company's protection in the instance of withdrawals, was the debit entry in the depositor's pass-book.

The paying-teller made up a "proof" each day, in a book known as the "Paying Teller's proof book". This was somewhat more complex than the receiving teller's proof and included a totaling of the disbursements upon checks and withdrawal tickets, cash at the window, and checks presented by other banks and a comparison of the cash with which the day was started, including that received the previous afternoon from the receiving teller, and the cash at the close of the day.

The general ledger was the book which summarized and controlled all the other books and which furnished daily, complete summarized statements of the assets and liabilities of the institution. The assets or debit column included the items of cash, bills purchased and notes, credit balances with the several banks with which the Trust Company had funds on deposit, mortgages, etc. The liability or credit column included the items of savings deposits, demand deposits, certificates of deposit, bills payable (to other banks) and the like. Bal-

ances to each of these accounts were struck off each day and the aggregate of debits and the aggregate of credits for each day, in each of these accounts, was entered in an appropriate column affording a simple means of arriving at balances to each account for the following day.

Smith's embezzlements, as listed in Schedule G, were for the most part concealed by manipulations in the general ledger itself.

The embezzlements described in Schedule F had to do entirely with accounts with depositors; all but two consisted of abstractions by Smith from deposits taken in by him personally at the window. Proper entries were in each case made by him in his handwriting in the depositor's pass-book, but either no entry at all, or an entry for a fraudulently reduced amount, was entered in the books of the bank, the difference being abstracted by Smith. This does not mean that Smith himself necessarily made false entries in the books of the bank in order to conceal these particular embezzlements. In instances where he abstracted the entire amount of a deposit, he simply suppressed the deposit ticket presented by the depositor or failed to make one out himself, so that the bookkeeper would have no reason to make any entry whatsoever of the transaction, and none was made. And since both the cash and the entry was missing, the books were entirely harmonious and consistent, the discrepancy appearing only when the records of the bank were at some future date, possibly remote, compared with the depositor's pass-book.

If, by some mishap, the failure to make the appropriate entry were the result of a mistake (the money not having been stolen) the obvious result would be that at the close of the day, the teller's cash would exceed the total of deposits as indicated by deposit tickets and this "overage" would appear in the receiving teller's proof-book. In each case of

Smith's embezzlements, there was no such "overage" in the proof-book. Smith did not always entirely suppress the deposit ticket. In many cases, he prepared in his own hand-writing, a deposit ticket, but for a much smaller amount than was actually deposited (as shown by the concurrent entry by Smith in the depositor's pass-book). In these cases entries would, in the normal course of business, be, and actually were, made by the bookkeepers on the basis of the fraudulent deposit tickets as filed by Smith. Smith, in such instances, did not steal the entire amount of the deposit but left in the cash, the amount shown by the fraudulent deposit ticket from which entries were made in the credit side-book and in the individual deposit ledger. Since the receiving teller's proof book did not show an overage, it necessarily followed that the discrepancy in the amounts of the deposit tickets (and hence in the amounts entered in the books) was not the result of honest mistake; in fact, in these instances, the fraudulent character of the transaction was most dramatically evidenced by a mere comparison of deposit tickets and pass-book entry, both in Smith's handwriting, both on the same date and in the same account, but of widely different amounts.

These frauds were discovered after the institution had closed its doors and the pass-books were called in by the Commissioner of Banking. The pass-books were in each instance introduced in evidence, it being undisputed that the entries therein were in each instance in Smith's own hand-writing.

In the case of the two instances where embezzlements were accomplished in connection with fictitious withdrawals (foot of p. 16) the withdrawal ticket was placed by Smith among the others in the paying teller's cage and an equivalent amount of cash taken by him. The result, so far as the bank's own *books* were concerned, was exactly as

though the money had actually been withdrawn by the depositor and the true facts could be and were disclosed only when a comparison was made between the bank's records and the depositor's passbook, and this occurred only after the Bank was closed.

Since cash was abstracted to the exact amount of the false deposit tickets, the paying teller's "proof" at the close of the day was correct, and in the usual course of events the bookkeepers made their debit entries in the side-books and individual deposit ledgers corresponding to the false deposit tickets. It is contended that these transactions are in no sense embezzlements since *forgeries* were involved. We shall consider this contention in our argument in the appropriate place. It is enough to point out here that the withdrawal tickets were interior documents required for bookkeeping purposes of the Bank itself and that there was no attempt by Smith to imitate the handwriting of the depositors. In fact, in one instance, Smith's initials appeared beneath the depositor's name and in another instance the handwriting is frankly his.

In view of the language of the contract, it is important to consider at what times the several losses were discovered because the defendant National Surety Company's liability extends only to losses "which shall be discovered during such term or within six months after the expiration of such term, and within six months after the employee's death or his dismissal or retirement from the employer's services, and within six months after the termination of this obligation".

It is not disputed that the losses upon which recovery was had, were discovered within the prescribed period, but the Trial Court held that the losses described in Schedule G were not discovered until much later. The fact, however, is that the

losses were discovered within a few days after the close of the Trust Company, but the manipulations of the books concealing those losses were so extensive and complicated that the exact bookkeeping devices by which the particular portion of the loss corresponding to the Schedule G falsifications was accomplished, were not fully investigated and analyzed until after the six months period had elapsed. For the greater part of the intervening time the books had been in the custody of the Prosecutor of Pleas and were not conveniently available to the Banking Department. Moreover, the defendant National Surety Company, had, within the six months period, a full opportunity to make such investigations from the books, as desired, which opportunity it availed itself of to the extent of securing an expert investigator for that purpose. The *losses* were promptly discovered and reported to the Surety Company. The methods of *concealing* those losses were alone left for more leisurely investigation. This distinction, as we have said, is pertinent only with respect to the cross-appeal.

We shall defer our consideration of the facts of the so-called Nones incident, which was the basis of the principal defense, to the argument itself, and we shall in the course of the argument consider the other facts in greater detail, where pertinent.

POINT I.

The law is settled that obligations such as the one in suit are to be regarded as contracts of indemnity or policies of insurance; and are to be construed in favor of the insured for the purpose of assuring the consummation of the purposes intended thereby.

The rule as stated by Joyce in his work on the Law of Insurance, Second Edition, Vol. 4, page 4609, is as follows:

> "Another point to be considered in connection with risks and losses is that fidelity guaranty insurance is a contract of indemnity; and inasmuch as obtaining full indemnity is the general purpose, it should not be defeated except by limitations which are expressly and clearly set forth without ambiguity in the contract."

The same writer, on page 4610, says:

> "Again, in the construction of bonds for the faithful performance of duties or obligations, reference should be had to the hazards against which security is sought, as well as to the situation of the parties, the principal as well as the surety, and also the character of the employment or trust. (Citing *Rochester City Bank* vs. *Elwood* (21 N. Y. 88.)) So the rule of construction against insurer and in favor of assured, will also apply in determining whether, in view of the nature of the employment and the character of the bond, a shortage constitutes an embezzlement, * * *."

In the case of *American Surety Company* v. *Pauly* (170 U. S. 133, at pp. 144-5), the Court says:

> "These questions depend largely upon the interpretation to be given to the provisions of

> the bond in suit. If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the Bank and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the Court is invited to interpret was drawn by the attorneys, officers or agents of the Surety Company. This is a well established rule in the law of insurance (citing cases) * * * As said by Lord St. Leonards, in *Anderson* v. *Fitzgerald* (4 H. L. Cas. 484, 507), 'it (a life policy) is of course, prepared by the company, and if, therefore, there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it'. There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank."

See also *Ætna Indemnity Company* v. *J. R. Crowe Coal and Mining Company* (154 Fed. 545); and *Richards on Insurance*, Third Edition, Section 473, which goes so far as to lay down the following rule:

> "In case of fidelity bonds issued to trust companies, banks and other institutions of fiduciary character, so far as the phraseology of the instrument is susceptible of such a result, powerful reasons exist in favor of an interpretation which will hold the surety to the full measure of its responsibility, undisturbed and

> undiminished by acts of omission or commission, whether fraudulent or merely inadvertent, on the part of any representatives of the insured."

See also, *American Bonding Company of Baltimore* v. *Spokane Building & Loan Society* (130 Fed. 737), in which the Court said:

> "The object of the bond in suit was to indemnify or insure the defendant in error against loss arising from any act of fraud or dishonesty on the part of Romaine L. Bogardus in connection with his duties as secretary. That object should not be defeated by any narrow interpretation of its provisions nor by adopting a construction favorable to the plaintiff in error if there be another construction equally admissible under the terms of the instrument executed for the protection of the defendant in error. As was said by the Court below in refusing the motion for a new trial:
>
> > 'If bonding corporations are to be sustained by the business interests of this country as being useful and worthy of support, they should be required to meet their obligations in all such cases as we have presented in this record'."

In *Fass* v. *Illinois Surety Company* (177 App. Div. 596), the Court said (pp. 600-601):

> "The difference between the objects and methods of life insurance companies and surety companies must be borne in mind. The former are generally mutual in character and pay promptly out of funds in which all of the policy holders are mutually interested, without conducting an elaborate investigation into all the facts and circumstances to see whether there is not some possible defense to the contract of insurance. Promptness of payment being essential, it is reasonable to require verified proofs of death for the protection of all policy holders where it is customary to pay out the policy holders' money without careful in-

dependent investigation. Surety companies on the other hand are engaged in business for profit, and judicial notice may be taken of their common practice to investigate very fully before making any payment in order to discover some tenable defense to the enforcement of claims against them."

See also *Stearns on Suretyship,* Section 237, a brief quotation from which is as follows:

"The view which now prevails as announced by the courts in the later cases, establishes the undoubted policy of applying such construction as will prevent a forfeiture of the bond, on account of stipulations which are so worded as to render it nearly impossible to make a claim against the surety company, and at the same time comply with the conditions.

Where the object to be attained in giving bond has been carried out, it is deemed against public policy to so construe a condition in the bond as to give the surety, and the principal whose contract he secures, all the benefits of the arrangement without imposing the burdens. * * *"

And also, in Section 240, the same author says:

"* * * but the stipulation for notice of any act of the principal or any facts within the knowledge of the obligee which 'may' lead to default and loss to the surety if not in every case an impossible condition, is in all cases an evasive one and will not be enforced. It puts upon the obligee not merely the duties of observing closely the conduct of the principal but in addition thereto, charges him with the duty of determining the character of the acts of the principal and the probability that a line of conduct apparently innocent may be fraudulent. * * *"

See also case of *Peabory* v. *Richards Realty Co.* (69 Misc. 582-586), affirmed 145 App. Div. 903; reaffirmed 207 N. Y. 642, in which it is said:

"It is held that the doctrine of strict construction in favor of the surety does not ap-

ply where the bond is executed by a corporation organized to make such bonds for profit. Their contracts are usually in the terms prescribed by themselves and should be construed most strongly in favor of the obligee. 32 Cyc. 306, 307. It would seem, therefore, that the case should be a very gross one indeed to justify the court in relieving the surety company from the plain terms of a contract made with evident deliberation and with full, accurate and precise knowledge of the legal signification of the language employed to express the measure or extent of its obligation."

As was said by this Court in

Owens v. *Metropolitan Life Insurance Co.*, 74 N. J. L. 770,

"But these warranties like all conditions that are to work a forfeiture of a contract otherwise valid are to be strictly construed in order to prevent a forfeiture."

POINT II.

The trial Court properly left it for the jury to determine whether the directors' failure to report the Nones incident constituted a breach of the contract.

The pertinent language of the contract is as follows:

"SIXTH: If at any time after the beginning of the term for which this Bond is written, the Employer or any officer of the Employer, suspects, or if there comes to the notice or knowledge of the Employer or any officer of the Employer, any act, fact or information tending to indicate that the Employee is or may be

unreliable, deceitful, dishonest or unworthy of confidence, the Employer shall immediately so notify the Company in writing, at its principal offices in the City of New York and if the Employer fail or neglect so to do, the Company shall not be liable for any act of the Employee thereafter committed, * * *."

In view of the importance attaching to this subject and the necessity thereby imposed upon the Court for the careful examination of the evidence bearing upon the Nones transaction, the plaintiff will not attempt to set out at any length the evidence upon this subject. It is comparatively easy, in the light of the subsequent developments, Smith's wrongdoing and the ultimate closing of the institution, to give to this Nones transaction an importance, to which for the purposes of an indemnity contract case, it is not entitled. With reference to the Nones matter, it should be observed at the outset, that the question is to be considered in the light of the effect which the transaction had or would then naturally have had, in the light of the attendant circumstances, upon the directors of the trust company, because, as has elsewhere been pointed out, the surety is presumed to have contracted with reference to the known conditions existing at the trust company, and among the known conditions was that the treasurer was to run the whole bank; that the bank was new; that the directors were comparatively inexperienced in banking; that no other officer gave any particular time to the operation of the institution; that Smith was in sole undisputed charge and had authority to make loans.

The Nones transaction as the facts appeared to the directors of the Trust Company amounted to neither more nor less than an act on the part of Smith, irregular in its nature, inspired wholly by a desire to increase the business of the trust company of which he was a substantial stockholder.

To them it appeared, as Smith explained it, that the entire transaction involved merely a loan to Nones whom Smith regarded as a valuable, potential customer or client of the institution, whom Smith reported and the directors believed to be abundantly good for the obligation—and in fact the obligation was taken up in full, a few days after the examiner's criticism. To the directors it appeared, as Smith explained it, that the chief reason for not entering the note in the books,—which, when the transaction is analyzed, is the essence of the irregularity of the entries involved in the Nones transaction—was that Nones expected to need the loan from the trust company for only a short period. At this time it should be observed that, as appears by the defendant's own witness, Appleton, the irregular entries on the books would have been entirely corrected by the formal entry among the assets of the trust company of the note which Smith in fact obtained from Nones for the trust company and which the witness Appleton saw personally. In other words, the "shortage" which is constantly referred to throughout the witness Appleton's testimony and defendant's brief, may, upon the last analysis, be shown to be "shortage" of entries in that Nones' note was not put through the books.

Appleton, page 397.

So far as the omission to fill out the stubs involved in the Nones transaction is concerned, it must have appeared to the directors that there was nothing furtive in this for the reason, first, that the Philadelphia National Bank account had no checkbook but merely stationer's drafts, and, second, as appears by the Commissioner's letter of May 14, 1909 (Ex. D-5, at p. 533), numerous other instances were reported, of failure to fill out stubs when drafts were drawn. The Court will bear in

mind, as defendant's witness Appleton testified, the entire subject was first brought up by Smith volunteering information on the subject to Appleton. This must have impressed the directors. Appleton explained the matter to Odell and Munroe but at the same time, as he testified, he was explaining or complaining about all the other matters which are the subject of the long letter of May 14, 1909 (p. 388).

> "Q. Now then, when you called the attention of Odell and Munroe, as you state, to what you discovered in your examination in March, 1909, did you tell them about the other things that are comprised in this letter from the Commissioner which has been read (Ex. D. 4)?
>
> A. I did.
>
> Q. Well, that made quite a lot of things to talk about?
>
> A. It did.
>
> Q. Did you tell them that when you inspected the draft books, you found that the stubs in many cases had not been filled out, when the drafts were drawn?
>
> A. I did" (p. 389).

Obviously, the importance of the disclosures with regard to the Nones transaction, was clearly minimized by the long discussion in which Appleton pointed out numerous other instances of shortcomings on the part, not only of Smith, but of the trust company itself. These directors had knowledge of the things which were being complained of, as acts of the trust company, such as loans made by the trust company; the bond and mortgage transactions; the company's building transaction; the stock of the American Commercial Bank and the various other matters referred to in the long letter of the Commissioner. It must have seemed to them that, in this their first contact with the Department of Banking, that the Examiner was unnecessarily precise and technical.

For example, Munroe says (pp. 425-26), "for those reasons I remember we stated to Mr. Appleton that we thought his extreme and rather rancorous arraignment of Smith was unfair."

The directors say they were impressed by the fact that Smith's conduct was undoubtedly to be explained upon the ground of desiring to advance the interests of the bank and therefore involved no discreditable reflection upon him. Smith was a large stockholder in the trust company, one of the largest. This therefore is not the case frequently found in the books of a hired officer having no other interest in the institution than his salary, whose conduct can scarcely, under any circumstances, be attributed to desire for the advancement solely of the institution. The directors thought that Smith by his large stockholdings, had given hostages. To the directors, it seemed unthinkable that Smith, for the small amount involved in the Nones transaction, $2,350, compared to his large investment in the stock of the trust company, could have had any purpose other than the benefit of the institution.

As we have elsewhere pointed out, it should also be borne in mind that the technical manifestations in the books of Smith's irregularity in failing to put the Nones note through in the usual form, would not convey to the directors a meaning such as it would mean to the technically trained examiner whose viewpoint was, regularity first and business afterward. The directors did not act flippantly in this matter; it was undoubtedly a matter to which they gave the most thoughtful consideration. At the time of the trial, which was ten years after the date of the occurrences, it is natural to find the directors without the accurate recollection of the details which we should expect in the case of more recent occurrences.

The fact that the directors retained Smith in

the management of the institution is an outstanding fact of importance in connection with this indemnity contract, which must not be overlooked. As far as the directors were concerned, they had their investments in the trust company; they had their names at stake and it is to be presumed that as a matter of common human experience, based upon the ideas of self-preservation, they would not have retained Smith if they had received the impression from the Nones' transaction, that it was unsafe to retain him; that he was unworthy of their further confidence. The officers continued in office, Odell being president, from the beginning until the end. So far as it appears, none of them made any change in their viewpoint of complete reliance on Smith. At the close of the trust company Odell had the large sum of $41,000 upon deposit—a man who had been a bookkeeper and cashier throughout his business life.

At this point we desire to emphasize that the sole question involved in this appeal, upon this branch of the case, is whether or not the defendant Surety Company by inserting such a provision in its indemnity contract, may reasonably expect the courts to nonsuit every plaintiff who may, during the pendency of the employment of a defaulter, have received any kind of information which, in the light of subsequent events, reveals that it indicated the employee was unworthy of confidence.

It is safe to say that in a great majority of cases of defalcation, the surety company may, by exercising sufficient ingenuity, discover and point out instances which, although apparently explained as innocent and not culpable at the time, may be presented to the court at the time of the trial, in the light of the losses subsequently shown as something which should at the time of their occurrences have been reported to the surety company. In the case at bar, the entire matter has been submitted

to a jury and found by them, after a protracted trial conducted on behalf of the surety company by able and distinguished counsel, against the surety, and we submit that there is nothing involved in this indemnity contract or in any facts or any proof offered, which shows that the surety has not received a fair and impartial trial, nor that the result is other than a fair and proper one.

In consideration of this case and of the authorities cited by the defendant, the distinction should be borne in mind, between instances such as in the case at bar in which the employer is obliged to determine whether or not any given facts are innocent or culpable, showing honest intention or the contrary, and those cases in which the conduct was plainly fraudulent or dishonest. If Smith, in connection with the Nones transaction, had stolen any money, there would have been nothing for the directors to weigh and judge. That fact would have stood out by itself and would not and could not be explained. Of this character is the case of *Dominion Trust Company* v. *National Surety Company* (221 Fed. 618) on which great stress is laid by the defendant in its brief. In that case the officer of the trust company, whose bond was the subject of suit, had previously "abstracted from its safe, cash and securities belonging to the trust company amounting to $30,000". Still another class of cases obviously different from the case at bar and the distiguishing characteristic of which must be borne in mind, in interpreting the extent of the authority thereof, is the case of *Guarantee Company* vs. *Mechanics' Bank* (183 U. S. 402). The authority of this case is also stressed by the defendant, but the distinction between that case and the one at bar is the very important one that in the Guarantee case the employer had agreed to do a specific thing, to wit: notify the surety company in case the employee was concerned with any gambling transac-

tions. The proof showed that the employer had actual knowledge that the employee had been gambling but forgave him and failed to notify the surety company. In that case, of course, there was nothing to weigh and nothing to judge.

In lieu of further argument under this point, there is respectfully submitted extracts from the opinion in the case of *Fidelity & Deposit Co.* v. *Courtney* (186 U. S. 342) in which the facts were very much stronger, we contend, than in the case at bar. The employer (a bank) having knowledge of more serious shortcomings than those of Smith, deliberately certified to the surety company that everything was all right with the employee and thus procured the continuation or renewal of the bond. Although deciding that the Trial Court erred, in the serious respect of refusing to permit evidence with regard to the employer's certificate to be offered in evidence, yet the Supreme Court finds that in fact no error was committed sufficient to justify overturning the recovery of the plaintiff. We respectfully submit, to the Court, this case as an authority also in connection with the contention of the defendant, treated under another point, that the judgment of the Court below should be reversed because the volume of the New York Laws from which the Court read to the jury is not shown to have been formally offered in evidence.

We also refer the Court to the case of *Ætna Indemnity Co.* v. *Farmers National Bank* (169 Fed. 737) decided by the Circuit Court of Appeals in the Third Circuit, and presenting a very much stronger situation in favor of the surety company than that presented by the facts in the case at bar, and ask indulgence of the Court for quoting at length from the opinion in this case. We have been unable to find any case which questions the authority of either the Courtney case or of Farmers National Bank case above mentioned, nor have we

found any competent authority ruling that where the acts are capable of a reasonable explanation, as indicating other than a dishonest purpose, the Court is justified in directing a verdict.

In *Fidelity & Deposit Co.* v. *Courtney, supra* (186 U. S. 38, 342), it was said:

> "We are constrained to the conclusion that error was committed in rejecting the evidence referred to in the foregoing contention. It was competent for the defendant to show that the bank had concerned itself in and about the obtaining of the bond and renewals in such manner as to cause the transaction to become in effect the business of the bank. The bank had notice from the terms of the original bond that it was issued in reliance upon statements and representations made on its behalf to the surety company, and that, in the ordinary course, renewals, which were to be optional with the surety company, might also be based upon further statements to be made on behalf of the bank. Thus, in the original bond, it was recited that 'The said employer has delivered to the company a certain statement, it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed'. It was a reasonable and proper precaution, in anticipation of a desired renewal, to propound the inquiries which were submitted by the surety company. The inquiry was contained in a written communication addressed *to the bank,* it was received by the bank, and it was proper to presume that it was delivered to the officer who made reply thereto, by authority of the bank, he being the executive officer who was charged with conducting the correspondence of the bank. We think the making of the certificate was an act done in the course of the business of the bank, by an agent dealing with the surety company for and on behalf of the bank."

And at pages 351-353:

> "But the fact that error was committed in the particulars just stated does not necessarily

lead to a reversal, since the settled doctrine is that even if error has been committed, yet if it appears clearly from the record that such error was not prejudicial, the judgment cannot be disturbed. *Origet* v. *Hedden,* 155 U. S. 228-235; *Fidelity Association of Philadelphia* v. *Mettler,* 185 U. S. 308. In order to determine whether prejudice resulted from the rulings referred to, it becomes essential to state the facts as portrayed in the bill of exceptions.

* * * * *

Now with this state of the record in mind, we come to consider the statements in the certificate signed by the cashier on May 29, 1896, in answer to the letter of the surety company, shortly before the bond was renewed, to determine whether prejudicial error arose rejecting the certificate. The certificate stated that the president 'has performed his duties in an acceptable and satisfactory manner and we know of no reason why the guarantee bond should not be continued'. There was certainly proof showing that the action of the president as to the three checks and the charging them to accounts on the books of the bank, deceived the officers of the bank and caused them to be satisfied with the transactions. Certainly also there was uncontradicted evidence establishing that the explanation given by McKnight of the discount of the two thousand dollar note satisfied the directors. There was no justification in the evidence on these subjects to take the case from the jury and instruct a verdict for the defendant upon the theory that in and of themselves, the transactions were of such a character as to preclude the possibility of a belief in the sufficiency of the explanation made by the president, however apparently reasonable those explanations may have been and how honest may have been the belief in their truth. This being so, it follows that the only basis upon which it could have been found that the bank was dissatisfied was the deduc-

tion from the facts and circumstances that the bank knew of the fraud which the transactions were intended to effectuate.

In *Ætna Indemnity Co.* v. *Farmers National Bank* (169 Fed. 737), it was said at pages 739-740-741 and 742:

"The bond in suit is one of high class indemnity demanded by modern business standards, and is not simply against embezzlement or misappropriation, but for the larger liability for dishonesty or bad faith of employees, by which financial loss is experienced. As with respect to all agreements of such character, the utmost good faith is called for in obtaining it, and misrepresentation in a material point is ground for avoidance. Application for the bond in suit, although made by the cashier, was authorized by the bank, and the bond was issued directly to it, as was the renewal, the bank in each case paying the premium and the obligation thus being of its own procuring. Attached to the application was a so-called 'employer's certificate'; executed by the president on behalf of the bank, wherein it was stated the applicant, the cashier, had been in the service of the bank for twenty years and had 'at all times, so far as known, faithfully and satisfactorily performed his duties'; and that his accounts were last examined April 7, 1906—about three weeks before that—by the national bank examiner, and found correct to date in every particular. At the time of the renewal, a year later, there was also a further certificate, similarly executed by the president, to the effect that, for the year then ending, Hartman had been continuously engaged in the service of the bank and to the best of his (the president's) knowledge and belief, had given satisfaction in his personal conduct and in the performance of his duties and had kept and rendered his accounts correctly and without default, and that no reason was known why his bond should not be renewed; that his accounts

had been supervised and checked, and were last examined and audited March 14, 1907, by the Examining Committee by whom they were found to be correct. It is contended that both the president and the directors had knowledge at the time of practices by Hartman in the interest of Hillegass which were at variance with these statements, in the face of which there can be no recovery.

There can be no question that the assurances so given were material, and that the bond was obtained and renewed on the strength of them. If, therefore, they were untrue to the knowledge of the officers of the bank, or were made without proper effort on their part to inform themselves, the bond is not enforceable. It cannot be denied that the practices indulged in by the cashier, of which complaint is made, by which losses occurred, were known to the president, if not all, of the directors; and they now realize their dishonest character and that they ought not to have countenanced or condoned them. There is evidence, for instance, that in April, 1906, not long prior to the procuring of the bond and the giving of the first certificate, Hartman, in violation of the rules of the bank and the instructions of the directors, had permitted Hillegass to make large overdrafts running into thousands of dollars, which, in the shape of dishonored notes and checks, he carried in his drawer among his cash items, not entering them on the books, as he should, and thus concealing them from the directors, in the same way that he did the subsequent overdrafts which, on the ground of dishonesty, are the subject of the present action; and that, when this was discovered, Hartman was not only admonished but censured by the whole board, and expressly ordered not to let it happen again, nor accept anything from Hillegass for the future, except actual cash or certified checks—directions, the disregard of which resulted in the losses sued for; also that, contrary to the instructions of the directors, he had taken from Hillegass, as security for overdrafts, $10,000 worth of bonds

of the same kind and character as the $5,500 worth which he later accepted for the same purpose, the loss on which also formed a part of the verdict. It is admitted that he should have been discharged for this, as soon as it was discovered; from which it is maintained that the certificate on which the bond was originally secured, as well as the one on which it was renewed and extended—that he had 'faithfully and satisfactorily performed his duties', according to the one; and had given 'satisfaction in his personal conduct * * * and had kept and rendered his accounts correctly and without default * * *' according to the other —not only was not true, but could not have been asserted with any regard for the facts as known to the directors, amounting to misrepresentation, which avoided the bond as well as the renewal.

But whatever argument of this kind could legitimately have been drawn from the evidence, and however the jury would have been justified in finding according to it, we are not prepared to say that it was so preponderantly one way that but one view could be taken of it, requiring the direction of a verdict for the defendant, as contended. Take the $10,000 bond transaction, for instance. While the directors, no doubt, were a great deal staggered by this when it was discovered, and expressed themselves pretty freely with regard to it, yet, to a certain extent, they ratified it at the end, by taking the bonds as collateral for a loan, which, even as the best way out of a bad bargain, they hardly would have done had they considered the conduct of Hartman as positively dishonest. Capable of explanation, as it was, as a matter of bad judgment merely, and evidently so regarded by the directors at the time, however differently they may now view it, they are relieved from the charge of having made a willful misstatement in the certificate as argued. And the same is to be said as to the overdrafts allowed to Hillegass which led up to this. It is true that they were kept off the books, and so concealed from the

knowledge of the directors which might well have aroused their suspicions and raised doubts in their minds as to the honesty of Hartman when it was discovered. And looking back at the transaction, now that Hartman has confessed, and after they have become aware how, in other respects the books were manipulated to cover up the way Hillegass was being favored, they may be prepared to admit that he ought to have been discharged on the spot, in which we agree with them, yet the question being one of alleged misstatement and bad faith, we must look at it as it appeared at the time and according to what was then known, and not as we now see and appreciate it, as to which, the fact the directors kept the cashier in his position goes to show that they did not regard his conduct as seriously reprehensible. It is to be remembered that the avoidance of the bond is asserted on the ground of misrepresentation knowingly made, amounting to fraud; as to which it is not enough that the directors of the bank might, or even ought to have realized what the conduct of Hartman amounted to. The fact is that they did not, as they all with one accord declared; and however their denial may have been drawn out under the leading of counsel, the Jury have believed it, and we are not prepared to say that they were not entitled to do so. The certificates in question, undoubtedly, are strong; stronger by far than we know that they should have been; but no stronger than was held in *Fidelity Company* v. *Courtney,* 186 U. S. 382; 22 Sup. Ct. 833; 46 L. Ed. 1193, not to invalidate a similar certificate, also given to obtain a fidelity bond, on the proof of actually questionable practices by a banking officer. In line with what is there said, Hartman having satisfied the directors, for the time being, as to what he had done, which was accepted and passed over, the certificate, that he had faithfully and satisfactorily performed his duties, and given satisfaction personally—which referred as it is to be noted, to his honesty and not to his competency—was fulfilled to all

intents and purposes. One of the defenses, indeed, set up at the trial, as already stated, was that in all the things complained of, Hartman did not act dishonestly as he must have, to entitle the plaintiff to recovery, but only through incompetence, or by mistake of judgment, for proof of which the knowledge and acceptance by the directors of what he did was relied on; a position entirely at variance with the one now taken, that it was so manifestly dishonest that they were bound to recognize it. Nor does this commit us to the converse. It does not follow, in other words, that, if what Hartman did before the giving of the bond was not dishonest or in bad faith, the same conduct afterwards must be similarly regarded. It is not claimed by the bank that his acts were not dishonest. They were; only the directors did not realize it, not knowing the facts in all their fulness that they do now—thus freeing the certificate from being intentionally misleading. Nor can the assurance on which the bond was procured be regarded as recklessly given thereby having the same avoiding effect as if made knowingly. *Cooper* v. *Schlesinger,* 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382. These were not made without regard for the truth in other words, nor in the face of knowledge, but only under a mistaken view of the facts, or without complete acquaintance with them, or at least, they are capable of this construction; which relieves them from any such imputation."

Also at pages 744-745, it is said:

"This is not very material, the directors knowing pretty much all that was known to the president; but knowledge of president or directors having in any event to be shown, the same thing is to be said of them as was said with regard to the alleged misrepresentations. There was evidence from which knowledge might possibly have been found, but it was by no means so conclusive that a verdict could have been directed. The same argument is

made here, as there, as to the allowance and concealment of overdrafts by Hartman, and the acceptance of bonds which proved worthless. It could not be asserted with any regard for the facts, as it is said, that he had performed his duties with honesty and in good faith to the knowledge of the board, in the face of the censure which they had administered and the admission now made that they ought to have discharged him. But the views with regard to this have been expressed above and do not need to be enlarged upon. The cashier was not known to be dishonest, however much it might be that he ought to have been. Nor does censure necessarily imply bad faith comporting equally, as it does with neglect or incompetence. Indeed, as earlier intimated, the continuance of Hartman in his position goes to prove that, notwithstanding what had occurred, the directors still had confidence in him. And in response to the argument that they had ought to have known of his dishonesty, which they had merely to look into the books to discover, it may be pointed out that he had so manipulated his accounts that even the bank examiner was deceived, and it could hardly be expected that the directors would be any better able to unravel them. It is to be remembered always that the question is not whether the acts referred to were in fact dishonest, as to which indeed there can be no controversy, notwithstanding that the defendant, as already stated, to avoid responsibility, endeavored to persuade the jury otherwise; but whether the directors knew, or ought to have known, that this was of their character, as to which it is sufficient to say that this, as it had to be, has been disposed of by the jury.

But it is further said that it was expressly covenanted by the bank that if, at any time during the term for which the bond was given or any continuance thereof, there should come to its knowledge the fact that any employee for whom the indemnity company was bound, was dishonest or had done anything in bad faith, and not through mere neglect or error of judg-

ment, the bank would promptly notify the company of the fact, the failure to do which should relieve it from liability for loss thereafter arising. And it having come to the knowledge of the directors, as early as April 20 or possibly April 23, 1907, that Hartman was allowing Hillegass to overdraw his account in a way which is now charged to have been dishonest, and that he had also taken from Hillegass the $5,500 worth of bonds which proved worthless, recovery of which is sought upon the same basis, nothing in the way of overdrafts, after that, is collectible, the officers of the bank having failed to notify the indemnity company of these facts as they covenanted, until demand was made upon the bond on May 21st, 1907, some twenty-eight days afterward. It may be conceded that this was too late to meet the requirement of promptness if the case turned on that. *National Surety Company* v. *Long,* 125 Fed. 887, 60 C. C. A. 623; *Ætna Indemnity Co.* v. *Crowe Coal,* 154 Fed. 545, 83 C. C. A. 431. But it is clear that it does not. The position of the defendant with respect to this is much the same as with regard to that which has been already disposed of, of which it is merely a variation: that is to say: the acts of the cashier having come to the knowledge of the directors regardless of whether they appreciated their dishonest character, the bank is bound by it. The same fallacy appears in this as in the rest of the argument. The contention is that, knowing the facts, the directors were bound to recognize the dishonesty involved in them and cannot be heard to say that they did not. But this has been fully answered. They could not of course close their eyes to palpable bad faith, and maintain that they did not know when everything was so plain that they bound to. But that is not the case. The conduct of Hartman was not so manifestly wanting in honesty that this could be said of it. No doubt it was bad banking and ought to have been seen, as it was not. But his acts, while derelict, were possibly referable to incompetency or bad

judgment which, to that extent, would extenuate them. The test being how they appeared at the time, they were not so clearly and positively dishonest that the failure of the directors to realize this and notify the surety was a breach of the covenant which relieved them from loss afterwards."

In *National Union Fire Insurance Co. of Pittsburgh* v. *Empire State Insurance Co.*, 80 N. J. L. 405, this Court had occasion to deal with the particular subject involved in this appeal. The bond, which was the subject of suit in that action contained a paragraph identical with paragraph sixth of the bond in suit, and the precise question here involved was before this Court at that time.

In that case the bond was given to cover an agent for an insurance company, who was authorized to receive premiums, and after making certain deductions to remit from time to time the net sums. Payment of the bond was refused by the surety company in that action upon the ground that the employer had knowledge after the beginning of the term for which the bond was issued, of facts tending to indicate that Fowler (their agent) was or might be unreliable, deceitful, dishonest or unworthy of confidence, and that plaintiff having failed to give such notice to the Surety Company, the latter was not liable for the losses thereafter sustained.

In considering that case it should be borne in mind that the bond, as has elsewhere been stated, must be considered in the light of the circumstances affecting the risk. In that case the only thing which the employer was to be protected against was delinquency on the part of the agent in making his remittances. He was not, like Smith in the case at bar, entrusted with the management of the employer's entire affairs, handling all its books and being in complete charge. Although Smith in the

Nones transaction was guilty of excess of zeal or bad judgment in the viewpoint of the directors, they knew that in all other respects he was running the institution, as they thought, well and faithfully and was under their very eyes, as they believed, performing his duties in a most creditable manner. On the other hand, in the case referred to, Fowler had failed in the *one* respect and only respect in which he could fail, namely in failing to send in his moneys as required. There was no other thing that Fowler could do wrong; there was no other respect in which his employer could form any judgment of him. When Fowler fell in arrears and became delinquent in making his payments, the one and only occurrence by which his employer could have any knowledge or notice of his becoming unworthy of confidence, had arrived.

Moreover in the Empire Surety case we have affirmative evidence of the *attitude* of the employer in the form of a letter written by it to Fowler. How much more forceful is this writing setting forth the complete viewpoint of the employer than the characterization of an outsider,—the Commissioner of Banking, which to the directors of the Roseville Trust Company seemed unfair and unfounded. The letter to Fowler is strong. Among other things it says (p. 408 of opinion of the Court):

> "My attention is directed to the balances which are *delinquent* at your agency. * * * This matter of delinquent balances has been discussed with you personally by the writer and we had a very distinct understanding at the time, * * * and desire to state very positively that unless some arrangement can be made whereby we are relieved of the continual annoyance of dunning you for balances, we would prefer to terminate the connection with your agency."

The lower Court, adopting the viewpoint of the surety company, regarded this letter as conclusive

evidence of knowledge on the part of the employer indicating that Fowler was unreliable or deceitful, and directed a verdict for the defendant.

This Court, however, ruled that the letter "must be construed in connection with and aided by the circumstances which called it forth, and when this is done, it cannot be given the conclusive effect necessary to support the ruling below", and this Court proceeded to analyze the testimony and determine that in the light of the testimony it was not proper to take the question from the jury.

We submit that it was no more conclusively shown in this case in view of the different circumstance and the different nature of the employment and the duties which the servant was to perform, that the employer had knowledge indicating that Smith was deceitful and unworthy of confidence, than it was in the *Empire Surety* case, which, we submit, is *controlling upon the case at bar.*

An instance of an even more flagrant delinquency which an employer failed to report to a surety company was left to the jury in the case of *Farmers Bank* v. *Ogden* (182 S. W. 501; 192 Mo. App. 243), under a clause identical with the one here under consideration.

And in this case there was an additional clause as follows:

> "If the employee has at any former period been a defaulter, and if said fact be known to the employer at the time of the execution of this bond, or at the time of the appointment of such by the employer, this bond shall be void and the employer shall not be entitled to recover hereunder for any loss sustained by or through any act of such employee."

It developed that the President of the Bank (whose fidelity bond was the subject of the suit) had, to the knowledge of several of the directors of the plaintiff bank, served a term in a penitentiary

prior to his becoming President of the Bank and had during the original term of the bond in suit (to quote the opinion of the Court, p. 503) "forged a note for $1,800 payable to the plaintiff bank, purporting to be executed by George O'Hare."

Again we beg leave to quote at considerable length because of the aptness of the decision, both on facts and the principles, as bearing on the case at bar. The Court said at page 503:

> "He negotiated this note to the Lowry City Bank indorsing it with his own name as President of plaintiff bank, and also himself signing or indorsing the name of plaintiff's cashier thereon. A circumstance not connected with any suspicion of the note caused the Lowry City Bank to ask that it be paid, and to that end its cashier spoke to plaintiff's cashier about it one evening while the latter was at a neighbor's house, and the latter denied having indorsed the note. It was then shown to him, and he looked at the indorsement only. He saw Ogden had indorsed it as President of the bank and that his indorsement as cashier was not his signature, but was in Ogden's handwriting. He then handed it back to the Lowry Bank's cashier, saying that he would see Ogden about it next morning. In a few days Ogden paid the note to the Lowry Bank, and thus it became a closed incident so far as that bank was concerned. It afterwards developed that O'Hare's name as maker was also forged, but this was not known at the time we are referring to. Plaintiff's cashier having thus become possessed of knowledge of Ogden having signed his name to the indorsement without authority, did not notify the defendant, but he did speak of it to the vice-president and to one of the directors and neither of these notified defendant. The latter therefore insists that it is not liable on the Tally transaction under that part of the fourth condition above quoted, which requires notice when the employer becomes possessed of knowledge of any act, fact, or information tending to indicate that the employee is or may be unreliable, de-

ceitful, dishonest or unworthy of confidence; and it asked, and the trial court refused, an instruction to that effect. The court took plaintiff's view that Ogden's act in signing the cashier's name did not come within the terms of the condition, unless it was forgery, and that there was room for the conclusion by plaintiff's officers that Ogden had not intended to commit that crime. Adopting this view, the Court made a jury question of it by an instruction to the effect that information these officers had must be such as would lead a reasonably prudent person under the same or similar circumstances and surroundings to believe that Ogden was unreliable, deceitful, dishonest and unworthy of confidence. * * *

"The propriety of the Court's action on those instructions is the question for decision. It may be stated at the outset that defendant's obligation as surety is not so limited and circumscribed with protective requirements as that of an ordinary surety who acts for accommodation without gain to himself. Organized companies and corporations have now taken up suretyship as a business which they prosecute throughout the country for profit, and their engagements are considered more in the nature of guaranty insurers. These contracts are made out by themselves, and their terms, when subject to two meanings are construed in favor of the party to be indemnified. *American Surety Co.* v. *Pauly* (170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. Ed. 977); *Roark* v. *Trust & Deposit Co.*, 130 Mo. App. 401, 110 S. W. 1; *Boppart* v. *Surety Co.*, 140 Mo. App. 675, 126 S. W. 768; *Rule* v. *Anderson*, 160 Mo. App. 347, 142 S. W. 358; *People* v. *Rose*, 175 Ill. 310, 51 N. E. 246, 44 L. R. A. 124."

In the above case the bank placed a charitable construction upon the proven delinquencies of its President, including a transaction which in flagragcy makes the Nones affair pale into insignificance. The word "forged", applied several times to the employee's conduct, is the characterization

of the court itself in the decision sanctioning the trial court's ruling in permitting the question to be determined by the jury.

In that case also the directors saw even in the past penitentiary record of the employee, nothing which made it incumbent upon them to notify the surety. Contrasted with this is the fact that Smith's record, so far as it was known to the directors or proven in the case, had been absolutely clean and creditable prior to the Nones affair.

The defendant has attempted to prove that the directors' failure to report the Nones affair to the surety company was a breach of the sixth clause of the contract, by quoting from a brief filed in another case by counsel for the plaintiff in the case at bar.

The two cases are *not* based "upon the same facts", as stated by counsel for the defendant. In the Chancery suit the issue was whether or not the directors were *negligent* in retaining Smith in office—and of course there were other issues in the case.

The issue here is not whether or not the directors were negligent in retaining Smith, but rather whether or not the facts "tended to indicate to them that Smith was unreliable, deceitful, dishonest or unworthy of confidence".

The two questions are entirely different.

"Ordinary negligence will certainly not be sufficient to visit a bank with the loss of its security."

Wayne v. *Commercial Natl. Bank,* 52 Pa. St. 343, 349.

In the Chancery suit counsel argued that the directors were negligent. In the action at bar counsel argues that the question was properly left for the Jury to determine whether or not the facts in the Nones affair "tended to indicate that Smith was or might be unreliable, dishonest, deceitful or

unworthy of confidence". It seems hardly debatable that the issues in the two cases are different.

Unless two cases are so involved one with the other by their inter-relations and by pleadings setting forth such inter-relations, that a judgment in one will be *res adjudicata* in the other, then neither the testimony nor the arguments in one action can have the slightest pertinency in the other action.

POINT III.

The successive renewals of the original bond constituted separate contracts which were not breached by the failure to report the Nones incident during the original period.

Before discussing the authorities which establish that each renewal of a contract of fidelity insurance constitutes a distinct and separate contract based upon its own consideration, let us state concisely our contention respecting the application of that general principle to our particular facts:

Our contention is that, in the absence of any express provision to that effect, an act or omission constituting a breach of an earlier contract, is *not, ipso facto,* a breach of a renewal contract.

The first three renewals (Schedules B, C and D, pp. 10, 11 and 12) provide as follows (omitting words not here pertinent):

> "The National Surety Company hereby continues in force bond No. 412125 * * * for the term beginning , and ending * * * subject to all the covenants and conditions of said bond."

The effect of this language taken alone, is exactly the same as though the parties executed and delivered an entirely new bond upon exactly the same printed form as was used in the earlier bond. The phrase "subject to all the covenants and conditions of said bond", is merely a convenient substitute for the employment of another printed form, and requiring execution each time by the employee.

The last mentioned phrase is *not* to be interpreted or supplemented by the addition of any such imaginary words as the following:

> "and inheriting all the effects and disabilities of any breach of such covenants and conditions as may have occurred in the said bond or any earlier renewals thereof".

Yet in order to give to the phrase "subject to all the covenants and conditions of said bond" the effect which is claimed for it by the defendant, we should have to read into the renewal certificate an imaginary phrase precisely like the one which we have invented as above—in effect, if not in precise verbiage.

We are not here considering the question of *bad faith*. Concededly if the Nones incident had been such a flagrant occurrence as to have required its disclosure by the Roseville Trust Company to any Surety company which should subsequently be requested by Smith to go on his bond in favor of the Trust company, as a matter of good faith, then of course it would have been the Trust company's duty to make this disclosure at or before the time of any renewal of the original contract. But this would have resulted from the fundamental principles of suretyship, and not because of the presence in the renewal certificate of the condition "subject to all the covenants and conditions of said bond".

The Nones affair was not the sort of thing, that it would have been *fraud* for the Trust company not to have disclosed to a Surety Company, in the ab-

sence of specific inquiry. It was consequently not one of those facts, the failure to disclose which would void the contract as a matter of law.

The rights of the assured under the new contract, evidenced by the renewal certificate, are no different from what they would have been if the assured had gone to an entirely different company and taken out a new contract in the same printed form as the original contract (except of course for any differences occasioned by express provisions in the renewal certificate, in addition to the mere phrase "subject to all the covenants and conditions of said bond").

Let us next see what express terms are included in the first three renewal certificates (Schedules B, C and D) beyond the mere phrase "subject to all the covenants and conditions of said bond". In the first place there is the following additional provision:

> "This continuation is granted upon the condition that the representations of the Employer made to the Company at the time said Bond was issued are to be taken as continuing warranties, that such of said warranties as apply to the system of accounting, examination and audits as set forth therein, have been strictly adhered to, and will be strictly adhered to, and that all examinations and audits therein mentioned have been and will be made."

Obviously the foregoing language is in the case at bar absolutely immaterial and without effect, for the simple reason that *no representations were made* by the employer to the company at the time the bond in suit was issued, and there were no warranties applying to any system of accounting or examination or audits or any warranties of any description whatsoever. No such representations or warranties were pleaded or proved, and from the testimony of defendant's adjuster, Alfred Tyrill, none whatever were given (p. 403).

The next express provision is: "that the Employer is aware of no reason why the Company cannot safely continue its risk on account of said Employee".

No plea has been made assigning any breach of this provision as a defense upon the contract. And this merely states the common-law rule which requires the assured, as a matter of good faith, to disclose to the proposed Surety company any fact concerning the employee which it would be fraud to withhold.

Our position is, as we have said, that it was properly left to the jury to determine whether the Nones affair was under the circumstances required to be reported even under the provision of the original contract. And we say here that even if we assume for the sake of argument (contrary to our contention) that this question should not be left to the jury, still there was no duty to disclose the affair, in the absence of specific inquiry, merely because of the language of the renewal certificate, and therefore the failure to disclose the matter was not a breach of the subsequent contracts even though it may be assumed (for the sake of argument only) to have been a breach of the original contract, terminating December 1st, 1909.

The next express provision of the renewal certificates (Schedules B, C and D) is as follows:

> "that its liability under said bond and this continuation together shall not exceed the amount of said Bond".

We consider this under Point VII (*infra*).

The last and only other express provision of the renewal certificates (Schedules B, C and D) has to do with the prompt payment of premiums, which of course is not questioned in the case at bar.

It should be kept in mind that if, as contended by the defendant, the failure to report the Nones

affair to the Surety Company, is to be regarded as a breach of the distinct contracts evidenced by the renewal certificates, then an effect will have been read into the several contracts which is not only extremely oppressive upon the assured but is an effect which certainly could not have been contemplated by the assured, and which would have certainly resulted in the rejection of the bond by the assured if such effect had been literally and plainly expressed in the instruments.

For the effect would be to permit, year after year, payment of substantial premiums by the Trust Company and the acceptance of those premiums year after year by the professional Surety Company engaging in the business of fidelity insurance for a profit, and yet to utterly negative and damn in advance any protection whatsoever to the Trust Company and its innocent depositors.

The plaintiff's contention that each renewal constituted a separate independent contract is not inconsistent in the slightest degree with its position claiming a loss occurring more than six months after the termination of any particular renewal period, because such a right is expressly granted to the plaintiff by the terms of the bond thus renewed. Paragraph 13 of the bond provides:

> "So long as the Company and the employer agreed so to do, this bond may be renewed and continued in force from year to year, and in case of any such renewal the company's liability on behalf of the employee shall be as continuous as if this bond had been originally written for a term including the period of such renewal."

In order to sustain the position of the defendant that it must be relieved for losses occurring during the year December, 1911, to December, 1912, over

three years after the so-called Nones transaction, it must establish that although the bond does not say so, yet by implication against the insured instead of in its favor (as the rule requires), there must be read into the bond the provision that any default on the part of the insured during any previous term of the bond shall operate to deprive the insured during a subsequent renewal period of all rights to recover under said bond, even though during the particular renewal period the insured may have conducted itself with the greatest circumspection and good faith. The plaintiff is claiming for the losses occurring under the subsequent renewals in reliance upon the express provisions of the contract and having paid a premium for that particular renewal period.

The defendant can defeat the plaintiff, if at all, only by establishing that although there is no provision of the contract thus providing, yet any default by the plaintiff under a previous period shall operate against the insured at a subsequent period, no matter how remote.

It is submitted that in the absence of express provisions having this effect, no such result can follow. To read such an interpretation into this renewal contract would do violence to the whole purpose of the contract, and would require the court to make infinitely stronger in the Surety Company's favor than it is, the provision prepared by it.

Full effect can be given to the clause in paragraph sixth of the bond by construing it to mean that if during any term of the bond, whether during the first term, or during any renewal term, there shall come to the knowledge of the employer, etc., then the Surety Company is relieved from loss thereafter accruing during the said period within which the said knowledge was acquired.

The authorities establish that renewals for

successive years of contracts of fidelity insurance comprise separate and distinct contracts.

Hawley v. *U. S. F. & G. Co.,* 100 N. Y. App. Div. 12; affd. 184 N. Y. 549.

Campbell Milk Co. v. *U. S. F. & G. Co.,* 161 N. Y. App. Div. 738.

Ætna Indemnity Co. v. *Crowe,* 154 Fed. 545.

Green v. *Fid. & G. Co.,* 135 Tenn. 117.

DeJernette v. *Fid. & Cas. Co.,* 33 S. W. 828.

Brady v. *Insurance Co.,* 11 Mich. 425.

Long Bros. Grocery Co. v. *U. S. Fid. & G. Co.,* 130 Mo. App. 421.

Proctor Coal Co. v. *U. S. Fid. & Guar. Co.,* 124 Fed. 424, in which the Court said (p. 427):

> "The correct view seems to be that each renewal is a separate and distinct contract, and such, I think is the effect of the authorities on the subject", citing *Mayor, etc., of Brunswick v. Harvey,* 114 Ga. 133."

The case of *Ætna Indemnity Co.* v. *Crowe,* 154 Fed. 545 (*supra*), furnishes a strong analogy to the case at bar (assuming for the sake of argument that the original contract was voided because of the directors' failure to report Smith's delinquencies in the Nones affair) in that the original bond in the *Crowe* case was void because of the failure of the principal to sign it, while the original bond in the case at bar is said to have become void because of the trust company's alleged breach of the sixth clause requiring notice of any "act, fact or information tending to indicate, etc." Yet in the *Crowe* case the validity of the contract, which was held to have arisen by the execution of the renewal certificate and payment of premium thereunder, was held not to be affected in an way by the invalidity of the original contract because the court declared the

subsequent contract to be separate and distinct and having no connection with the original instrument except by verbal reference to an incorporation of its language.

By a parity of reasoning, the contracts of 1910, 1911 and 1912 between the Roseville Trust Company and the National Surety Company, were contracts which had no other connection with the original contract of 1909 than to incorporate its language, for convenience, and this was true whether the 1909 contract was voided from its inception or breach during its term, or for that matter never entered into at all. Its sole contribution was the language afforded by its printed form.

> "We may concede for argument without so holding, that the original bond was void on account of the omission of plaintiff to disclose the real nature of the employment, but since the fact appears in the statement made by plaintiff, the rule is generally recognized that 'a renewal of a policy constitutes a separate and distinct contract for the period of time covered by such renewal'. It is, however, a contract with the same terms and conditions as is evidenced by the bond which is renewed, because the renewal receipt recites that it is renewed in accordance with the terms of the bond" (citing cases).
>
> *Long Bros. Grocery Co.* v. *U. S. Fidelity & Guaranty Co.*, 130 Mo. App. 421.

POINT IV.

The Trial Court did not err in declaring the New York Statute defining embezzlement.

During the course of the testimony it appeared that the defense intended to make a distinction between money that was stolen and kept by Smith, and money that was stolen by Smith and turned over to his confederates and favorites, *though there was no evidence tending to indicate that Smith had turned over any of the money to any one else.*

The effort apparently was to persuade the court that it would not have been "embezzlement" for Smith to steal money which was entrusted to him as Treasurer, provided he turned that money over to his confederates.

Though this distinction appeared to plaintiff's counsel to be without substance, it was pointed out for the sake of saving a useless consumption of time on such an argument, that the contract was made in New York and is to be construed by the laws of New York, and that the New York Penal Law happens (we believe unnecessarily) to define embezzlement (included under "larceny") as including conversion by a servant of property entrusted to him either "to his own use or that of any other person other than the true owner or person entitled to the benefit thereof" (pp. 488, 489).

With that point in view, the following stipulation was entered into upon the record by counsel (p. 435):

> "It is agreed by counsel that the contract in suit is a New York contract and is to be construed by the Laws of New York."

There immediately followed the charge to the Jury by his Honor, the Trial Judge, in which (at

pages 488, 489 of the record), he read to the jury from an official printed copy of the Penal Law, comprising Chapter 40 of the New York Consolidated Laws, Article 122, Section 1290, subdivision 2 (Embezzlement in New York is included within the term "larceny", *People* v. *Gibson,* 218 N. Y. 70; *People* v. *Meadows,* 199 N. Y. 1, etc.).

Lest we be accused of introducing matters into our brief which are not matters of record, we hasten to state that while that was the particular volume and statute read by the trial judge (which counsel cannot and will not deny), by an inadvertence it did not expressly appear upon the record what the volume or page was, the Judge saying merely: "I will read that statute. These are the definitions of larceny and embezzlement under the New York statute, but you will observe the difference between the general definition which I have read now and the definition under the New York Statute."

If the above-quoted concession of counsel made immediately before the charge to the jury was intended to have any effect at all, it naturally implied that both sides approved and conceded the authenticity of the book from which Judge Dungan read to the jury. In fact, it is not now claimed that the Judge did not read correctly and fairly from the statute or that his quotations were not precise.

But it seems that counsel for the defendant have chosen to place important reliance on this appeal upon the fact that the authenticity of the volume was not made the subject of a further formal concession upon the record by counsel.

Since counsel have been willing to urge such a ground of appeal we have no choice but to argue seriously against the contention that prejudicial error resulted from the incident. *Even if there was error in declaring the New York Statute without*

formal concession or proof of its existence and authenticity, such error was not prejudicial.

It seems almost unnecessary to urge upon this Court that if the volume from which Judge Dungan read to the jury was sufficiently authentic to satisfy Judge Dungan, and is now found by comparison of the record and the statute to have been correctly read and quoted, any error that may be laboriously and ingeniously predicated on the technical omission is totally without substance and could not possibly have prejudiced the defendant.

If we can conceive of it being necessary to impose upon the community the burden of another long trial of this cause, the result would be merely that counsel for the plaintiff on this second trial would be careful to deprive counsel for the defendants of an opportunity to dispute upon appeal the authenticity of Judge Dungan's volume of the New York Penal Law, assuming that the language of that law is at all necessary or material to the issues of this case.

In fact there was no error whatsover because the New York statute is presumed to express the rule of New Jersey or common law and under that rule the term "larceny" and "embezzlement" include appropriations to the use of the taker's confederates as well as to his own use.

As Judge Dungan correctly charged the jury, "A general definition of the term 'larceny' is a felonious taking of the money or property of another with the intent to convert it to the use of the taker without the consent of the owner and a general definition of 'embezzlement' is that it is the fraudulent appropriation, as distinguished from the taking in larceny, of the money or other property of another by a person to whom such property has been entrusted or into whose hands it has lawfully come."

Counsel for the defendant do not even pretend to

cite to this Court any authority holding that money feloniously appropriated by a servant to the use of his confederate is not embezzlement merely because the servant did not keep the money himself. Such a contention is so untenable on its face that apparently the precise question has not been urged before, or made the subject of judicial determination. We confidently assert that when money is appropriated by an employee to the use of his confederate, it is none the less appropriated "to his own use", as that classic phrase is universally applied.

We refer the court to the text of Cyc. which says (15 Cyc. 495 "Embezzlement" note 16):

> "In order to constitute embezzlement the accused must be shown to have converted money or other property to his own, *or someone's else,* use. * * *" (*Italics ours.*)

While the above quoted text is supported by numerous authorities, the precise question now considered was, so far as we can learn, never presented one way or the other. Apparently the text writer of Cyc. was equally confident that his definition of embezzlement was so obvious as not to require citation nor fear challenge.

The lack of substance in this assignment of error is made clearer when examined in connection with the New Jersey statute providing for the introduction in evidence of the statute of a sister state. Section 23 of the Evidence Statute, Volume 2, Compiled Statutes, page 2228:

> "The printed statute books * * * of any of the United States * * * shall be received as evidence of the public laws of such state or territory in any court of this state * * * and the court may determine whether any book or pamphlet offered as such was so printed and published, either from inspection or the knowledge of the judge or judges, * * * nor

shall any error assigned for the admission of such book or pamphlet be sustained unless it be shown in support thereof that the statute offered in evidence or some material part thereof, was not in force in such state or territory at the time of the transaction or matter to which it was offered as pertinent or material" (P. L. 1900, p. 366).

POINT V.

Smith's acts fell clearly within the scope of the terms "larceny and embezzlement".

"The decided weight of authority is to the effect that it is not necessary in order to his relief that the employer introduce such proof as would convict the delinquent employee of the crime of larceny or embezzlement as defined in the criminal law. *Champion Ice Mfg. Co.* vs. *American Bonding Co.,* 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356; *City Trust, etc., Co.* vs. *Lee,* 204 Ill. 69, 68 N. E. 485; *Rankin* vs. *U. S. Fidelity & G. Co.,* 86 Ohio St. 267, 99 N. E. 314; 19 Cyc. 518."

"The reasoning of these cases, which leads us to adopt the rule they announce, is: That the parties were not contracting on the basis of an enforcement of the criminal laws of the State; that, if only for indemnity for losses suffered by reason of technical larceny or embezzlement had been intended, that purpose could have been expressed clearly and in fewer words; that the words 'larceny and embezzlement' in the bond, are used as generic terms to indicate the dishonesty and fraudulent breach of any duty or obligation upon the part of the officer in connection with his duties as president."

Green v. *Fidelity, etc., Co.,* 135 Tenn. 117.

But in the case at bar the acts of Smith fall so clearly within the scope of the words "larceny and

embezzlement" even if they are used in their most narrow criminal sense, that there is hardly any occasion to fall back upon the liberal interpretation of the terms in fidelity bond cases, as sanctioned by the authorities.

(*a*)

There is no merit in the contention that Smith's abstractions from the O'Connor & Mott acts were not embezzlements because they involved forgery.

In the first place these abstractions did *not* involve forgery. The instruments to which Smith signed the depositors' names were not *uttered.* They were interior documents used only for bookkeeping purposes inside the trust company. The original evidence or document of the transaction was the debit entered (in words and figures) into the depositor's pass-book.

Moreover, there was no attempt to imitate the handwriting of the depositors. The depositors' names were frankly in Smith's handwriting and were of course known to be such by the bookkeepers in the institution. Moreover, in one of the instances Smith frankly wrote his own initials under the depositor's name. So we say that no forgery was involved, which view the Trial Judge adopted in his charge to the jury (p. 494).

(*b*)

But even if the O'Connor and Mott transactions did include forgery (which we dispute), they nevertheless involved also embezzlement because they included all the elements of embezzlement.

A given crime may be none the less murder because it also involves robbery or burglary.

Smith had the custody of the funds and securities of the trust company. If he unlawfully appropriated those funds he committed the crime of embezzlement. This would have been none the less the fact even if he had also incidentally committed the crime of forgery (which he did not happen to do) and also the crimes of arson and murder by way of concealing his abstractions. It should be noted that the embezzlement consisted of the abstraction of the cash. The forgery—if it was forgery to sign the depositor's name to the withdrawal ticket, was something that was done afterward to *cover up* the embezzlement. The crime of embezzlement was complete when the money was abstracted from the cash box in the teller's cage. If no false withdrawal tickets had been prepared by Smith, the embezzlement would nevertheless have been accomplished, but Smith might have been obliged to devise some other method of concealing the embezzlement.

POINT VI.

The burden of proving failure on the part of the plaintiff to make audits and examinations was upon the defendant, and no such proof was offered by the defendant.

The only provision concerning this matter is that contained in the original bond in the fourteenth paragraph, reading as follows:

> "* * * and that it will make frequent audits and examinations and at all times during the term hereof take and use all reason-

> able steps and precautions to detect and prevent any act upon the part of the employee which would tend to render the company liable for any loss."

It is exceedingly doubtful whether this provision in the original bond is applicable in this action. No loss is claimed during the period represented by the original bond. Each of the continuation certificates up to, but not including, the last, seek to impose some obligation upon the part of the employer with regard to audits, but such obligation is referable only to the "representations of the employer made to the company at the time said bond was issued", and no such representations were offered or proved, and in fact, the representative of the defendant company upon the stand testified that their files showed no representations. The renewal certificate for the last renewal is entirely silent on this subject.

Counsel for the defendant in the brief proceed upon the erroneous theory that the provision with regard to audits is a condition precedent which must be pleaded and proved by the plaintiff. That this is not the law is conclusively shown by the case of *Title Guaranty & Surety Co.* v. *Nichols,* 224 U. S. 346, in which the Court said:

> "The bond on its face requires the employer to take and use all reasonable steps and precautions to detect and prevent any acts upon the part of the employee which would tend to render the company liable for any loss."
>
> "The question was whether the requirement was a condition precedent to liability which the bank was required to aver and prove, or whether it was a defense to be made out by the defendant. But a construction which makes the bond inoperative until the employer shows that it had made such examination is not a fair and reasonable interpretation. The distinction between conditions precedent and subsequent is plain enough. The condition here in-

volved, if properly a condition at all, is of the latter class. * * *

"The plaintiff was plainly entitled to recover upon proving the bond, an embezzlement and a breach by a refusal to indemnify. It was not obliged to aver that it had made the examinations which it agreed should be made. If it has failed in that duty, it was for the surety company to so plead and prove. Such indeed was the course of the pleading in this case and the breach of the agreement to make such examinations was set up as a defense. There was no error in the ruling of the Court that the burden was upon the surety company to prove a breach of the obligation to make examinations" (citing cases).

In the case at bar, as has been said, the defendant offered no testimony whatever upon this subject. The extracts from the record on this general subject in defendant's brief are taken almost entirely from the cross-examination of witness Cloran offered by the plaintiff, and this cross-examination, as appears by the ruling of the court (p. 238, fol. 30), was permitted under the right upon cross-examination of an expert "to search his entire knowledge of the subject about which he testifies".

The testimony in the case shows that the trust company had an examination committee which made examinations of the bank every six months, that examinations were made by the Banking Department from time to time, the expenses of which were paid by the trust company; defendant's witness Appleton testified that on behalf of the Banking Department he examined the trust company in October, 1909, and April or May, 1910, and that, although he made a special search for irregularities he found none (p. 399, fol. 30); that he never, subsequent to his conference with Odell and Munroe (in March, 1909), called the attention of any officer or director of the trust company to any other or later misconduct or irregularities of Smith; that

in the examination of May 25th, 1910, he could not recall having found any misconduct of Smith in connection with that examination (p. 400, fol. 10).

It was further brought out that the irregularities were confined largely to the general ledger (Cloran, p. 244), that the irregularities in the general ledger were more frequent and with less care for concealment toward the close of the institution (p. 256).

It is, of course, apparent to the Court that, so far as relates to the items of loss which were the subject of recovery in the court below, detection of such losses by the directors would have been most difficult. These losses were due almost entirely to transactions in which Smith personally received the deposit and made the entry in the depositor's passbook and then kept the deposit, either destroying the deposit slip and thus insuring no entry whatsoever in the books of the company, or making out a deposit slip for a fictitiously small amount from which an entry would thereupon be entered in the books of the trust company.

The only method to insure the discovery of such transactions was that of calling in all of the passbooks of the depositors—a dangerous proceeding.

The attention of the Court is respectfully directed upon this general subject to the numerous authorities in which the irregularities and manipulations were more glaring than in the case at bar and where there was, in addition, the element of an *affirmative certification by the employer that the books of the employee had been examined and found correct,* yet the court has repeatedly refused under these circumstances to permit the surety company to escape its liability.

Fidelity & Deposit Co. v. *Courtney,* 186 U. S. 342.

Ætna Indemnity Co. v. *Farmers National Bank,* 169 Fed. 737.

It would be startlingly contrary to the general doctrine of these leading authorities, as well as other numerous cases, for the court upon a record such as that upon this appeal to deprive the plaintiff of the benefit of its indemnity.

POINT VII.

The Trial Court erred in refusing to permit the jury to find for the plaintiff in the sum of forty thousand dollars, and interest, instead of the sum of twenty thousand dollars and interest.

Under this point will be grouped discussion of the assignments of errors and the grounds of appeal comprehended under plaintiff's cross notice of appeal. The plaintiff contends that by the terms of the contracts in suit, consisting of the original indemnity contract, the various renewals thereof, down to but not including the last one, and specifically by the terms of the last renewal, differing materially in form from the previous renewals, the plaintiff is entitled to recover the full limit of Twenty thousand dollars under the early renewals and a corresponding sum under the last renewal. It is the undoubted rule of law, as has been previously pointed out herein, that contracts of the character under consideration in this action must be construed most favorably against the defendant and in favor of the plaintiff, the insured. The result intended by the contract, namely, the full protection and coverage of the insured, should be promoted by the Courts unless such definite limitations have been so imposed therein that the Court, even though construing the same favorably to the insured, must deny to the insured the full amount

of protection to which it would have been otherwise entitled. Therefore, unless the Surety Company has successfully limited the recovery which may be had against it by the clear meaning of the language employed, the plaintiff should have recovery for the full amount lost through the dishonesty of its employee during each of the separate periods of employment up to the maximum of the obligation for that period. It is conceded that the defendant has so successfully limited the recovery which may be had against it, to one recovery of Twenty thousand dollars for the period down to and including the bond and all renewals, up to the last renewal. Each of the renewals, prior to the last renewal, contained this provision:

> "It is also conditioned on the part of the Company that its liability under said bond and this continuation together shall not exceed the amount of said bond."

This provision is not found in the final renewal certificate and its absence is all the more significant because by the last renewal, a new kind of working arrangement between the insured and the surety was provided for. Each of the earlier renewals was for the limited period of one year, requiring the retaking of the business with the surety company, in default of which it would lose the business. In other words, an affirmative act was required, presumably of the principal—the employee—in order to make sure of the continuing writing of the business by this company. Business experience shows that automatic self-renewing contracts are more profitable and effective, with less opportunity for termination, than contracts which require to be rewritten at the end of annual periods. This last renewal is also the product of the surety company's own writers and presumably embodies the result of their large experience, as the most profitable arrangement for themselves. It contains no limita-

tion upon the amount of the recovery to be had thereunder, in connection with any previous loss under the bond or earlier renewals, and therefore none should be applied unless it can be said that in spite of the absence of such a limitation, one is to be written into the renewal contract, because of the form of the original bond.

When we examine the original bond prepared by the Surety Company for its own use, printed, we find that it contains the following paragraph:

> "SECOND: The Company shall not hereafter be responsible to the Employee under *any previous* guarantee in behalf of such Employee, it being mutually understood that it is the intention of this provision that but one (the current) guarantee in behalf of the Employee shall be in force at one time; provided, however, that the Employer shall have the right within six months after the termination of any *previous* guarantee, in behalf of the Employee, to make claim for, and proof of any loss occurring thereunder. But it is expressly understood and agreed that if any claim be so made under any *previous* guarantee in behalf of the Employee during the said period of six months and if loss also occur under the current risk or Guarantee in behalf of such Employee, the aggregate liability of the Company for all losses under all guarantees, under all bonds in behalf of such Employee, shall not exceed a sum equal to the amount of the largest of the respective guarantees under which such losses occurred, nor shall the Company be liable under any specific guarantee for any loss occurring under any other guarantee" (*Italics ours*).

It will be noted that the provisions above are directed solely to limiting the loss which may be collected under this specific bond and under any *previous* guarantee or bond. In this case, there was no guarantee previous to this contract. If the surety company had continued to use this form of instrument by re-execution of the same, each year

of the period covered by the employment of Smith, the plaintiff would not expect to recover a greater sum than Twenty thousand dollars and interest, but it did not use this form for re-execution on the occasion of each annual expiration. It did, however, successfully limit the recovery which might be had against it under the separate renewals up to and including the renewal for the period ending December 1st, 1912, by inserting in each of the respective renewal instruments, the provision quoted, to wit:

> "It is also conditioned, on the part of the Company, that its liability under said bond and this continuation together shall not exceed the amount of said bond."

It thus appears that under these annual renewals, it felt it necessary to expressly provide, in plain language, against the possibility of being held for a larger aggregate recovery than Twenty thousand dollars, showing conclusively that it did not regard the language contained in the original contract, referring as it does to that contract in connection with previous guarantees, as protecting it from a larger aggregate recovery than Twenty thousand dollars. We have, therefore, this situation: the original bond is directed solely to limiting the maximum recovery collectible under that and under any previous guarantees. It happens that this printed form did not apply in the instance of Roseville Trust Company because there had been no previous guarantee. Instead of using this same form of instrument in subsequent years, *verbatim,* they used the renewal certificates, but in each of those renewal certificates, except the last, expressly limited the aggregate recovery, the last certificate being for an indefinite term and containing no provision limiting the aggregate recovery. The plaintiff, as insured, is entitled to be protected by the Courts in the rights which it acquired thereunder, to obtain

a separate recovery up to the amount of the bond, to wit: Twenty thousand dollars, under this last renewal standing by itself. This right was denied by the Trial Court which erroneously considered the limitation contained in the original contract as extending to and included in this last renewal contract.

Pringle vs. *Philadelphia Casualty Co.*, 218 N. Y. 1.

And why should not the insured have the benefit of the contract without limitation, contained in the last renewal? It was paying, as premium, just as much as it was required to pay during the first year when there was no provision for indefinite renewal. The Trust Company, in lieu of accepting the last renewal for the indefinite term, could, in 1912, have required a new bond in a new surety company under which it would have had the protection in full of this defendant's bond for its period, and would, in addition, have had the full protection and coverage of the bond for the subsequent period in another Surety Company.

In this connection we desire to cite to the Court the case of *Hawley* v. *U. S. Fidelity Co.* (100 App. Div. 12), affirmed by the New York Court of Appeals, 184 New York 549. In lieu of further argument upon this point, there is added herewith a quotation from the opinion of the Court, which fully discusses this question.

"WILLIAMS, *J.*:

"The judgment and order should be affirmed, with costs.

"The action was brought upon bonds given by the defendant, as surety for one Tipton, the secretary and treasurer of the Switchmen's Union, represented by the plaintiff, to recover an amount misappropriated by Tipton. There were two bonds, one given January 11, 1899, and the other June 5, 1900. The whole amount

misappropriated was $2,638.89. The jury by a special verdict found that $1,035. of this amount was misappropriated during the time the first bond was in force and before the second bond was given; concededly the remaining $1,603.89 was misappropriated after the second bond was given and while it was in force. The theory of the plaintiff, presented by its complaint and upon the trial, is that the second bond was not a separate and distinct one, but was a renewal of the first one, a continuance of the original liability in an increased amount, and for that reason, among others, the $1,035. was recoverable even though misappropriated before the second bond was given. It seems to us, however, that this amount is recoverable even regarding the bonds as separate and distinct obligations. A determination of this question involves a construction of some of the language of the bonds. They both alike provide that the defendant shall be liable for moneys misappropriated, and now we quote, 'occurring during the continuance of this bond or any renewal thereof and discovered during said continuance or within six months thereafter, or within six months from the death or dismissal or retirement of the employee from the service of the said employer.' And again, 'That the company, upon the execution of this bond, shall not thereafter be responsible to the employer, under any bond previously issued to the employer on behalf of said employee, and upon the issuance of any bond subsequent hereto upon said employee in favor of said employer, *all responsibility hereunder shall cease and determine,* it being mutually understood that it is the intention of this provision that *but one (the last) bond shall be in force at one time,* unless otherwise stipulated between the employer and the company.'

"*First,* it is said that the misappropriation of this $1,035. was not discovered within the time provided in the bond as above quoted and, therefore, it cannot be recovered. The second bond was given June 5, 1900, and the discovery of the misappropriation was not until March

6-11, 1901. So that it may be said that the discovery was not during the continuance of the first bond, or within six months thereafter. But the employee was dismissed at once upon the discovery being made. So that the discovery was within six months from his dismissal or retirement from the service of the employer.

"There is no reason under this provision of the bond, therefore, why this amount should not be recovered. *Second,* it is said that no recovery can be had of this amount under the second bond, by reason of the provision above quoted, the misappropriation having occurred before such bond was given, and this is true. But a recovery can be had for this amount under the first bond, and nothing in the provision above quoted forbids such recovery. The language is that 'upon the issuance of any bond subsequent hereto * * * *all responsibility hereunder shall cease and determine,* and then it is added that the intention is that *but one bond shall be in force at one time.* In this case the defendant was liable under the first bond for $1,035. before the second bond was given, though the discovery of the misappropriation had not been made. The defendant did not, upon giving the second bond, become liable thereunder for this amount upon discovery of the misappropriation. Was it the intention of the provision quoted to release the defendant, upon the giving of the second bond, from all liability for the money which had been misappropriated, but not then discovered? The language of the former provision quoted implies that the defendant would be liable for money misappropriated during the continuance of the first bond, though not discovered for six or more months thereafter. So that when the first bond had been terminated for any other reason than because another one was given, the liability would continue beyond the continuance of the bond, until the discovery of the misappropriation. It is not reasonable to suppose that in the same bond a provision was made that a liability thereunder not discovered at the time the sub-

sequent bond was given would be cancelled by the giving of such subsequent bond.

"The more reasonable construction of the provision quoted is that the intention was to terminate all responsibility under the first bond upon the issuance of the second one, so far as future misappropriation was concerned, so that there should be but one bond in force at the same time, but that it was not intended to cancel any liability already incurred while the *first* bond was in force. The rule of liability would then be the same, whether the first bond was terminated by the giving of a second bond or for any other reason. Liability already incurred for undiscovered misappropriation would still continue. The provision is that all *responsibility,* not all *liability,* should cease and determine upon the issuance of the subsequent bond. It would be unconscionable to provide that all liability for prior undiscovered misappropriation should be cancelled by the giving of the second bond."

See also *Campbell Milk Company* vs. *U. S. Fidelity and Guaranty Company* (161 App. Div. 738) from which the following is taken from the opinion:

"The bond contained this provision:

"The company, upon the execution of this bond, shall not thereafter be responsible to the employer, under any bond previously issued to the employer on behalf of said employee, and upon the issuance of any bond subsequent hereto upon said employee in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company."

"The defendant's contention that plaintiff may not recover in excess of $2,500, under the bond and the three continuation certificates because of this provision has been overruled by the courts of this State. (*Hawley* vs. *U. S.*

Fidelity Co., 100 App. Div. 12; affd. 184 N. Y. 549.)

"The bond also contained the following provision:

"'The company shall not in any wise be responsible to the employer, under this bond, to a greater extent than $2,500.'

"Each of the continuation certificates contains the following provision:

"'In consideration of the sum of..... .....dollars, The United States Fidelity and Guaranty Company hereby continues in force Bond No..... in the sum of.....dollars, on behalf of....., in favor of ..... for the period beginning the.....day of....., 190..., and ending on the.....day of ....., 190..., subject to all the covenants and conditions of said original bond heretofore issued.'

"Defendant insists that the association of these clauses by reference limits the liability in any event to $2,500. I cannot so read the instruments. In my opinion the bond and the renewals would be distinct liabilities. The obligation of the bond is to make good the loss occurring during its term; the obligation of each renewal is to make good the loss occurring during its term. Each stands upon its separate consideration and provides for its designated period of time. (*U. S. Fidelity & Guaranty Co.* vs. *Williams,* 49 So. Rep. 742, and cases cited.)

"By neither bond nor renewals in express terms or necessary implication is cumulative liability under all inhibited, or aggregate liability under all definitely fixed. Thus the cases construing bonds and renewals effectively containing such provisions have no application."

POINT VIII.

The Trial Court erred in refusing to permit the jury to give consideration to the items of proof offered under Schedule G.

This refusal by the Trial Court is of importance, upon the hearing of this appeal, principally in connection with the previous point involving the contention that plaintiff should have been allowed to go to the Jury upon the question of a maximum recovery of Forty thousand dollars instead of the maximum of Twenty thousand dollars fixed by the Trial Court. The items under Schedule G all occurred during the final renewal period, to wit: from December, 1912, to the closing of the Bank in August, 1913, and the testimony with reference thereto was not contradicted in any manner by the defendant. The Trial Court refused to permit the Jury to consider proof under this schedule because the Court regarded the proofs as showing that these items were not discovered within six months after the expiration of Smith's employment on the closing of the Bank in 1913, and also because no proof of loss, showing these items of loss, was submitted by the plaintiff to the defendant.

Taking up these objections in order, we refer to what has been heretofore said in this brief on the subject, showing that the Court erroneously regarded the discovery of the technical methods by which the losses was concealed as equivalent to the discovery of the losses themselves. As a matter of fact, the losses were discovered by the Banking Department Examiners within a very short time after the closing of the institution in August, 1913, because the Department, upon an examination of the books, ascertained the extent of the losses, which were by the

way, very much larger than is claimed by the plaintiff against the surety company. Word of the closing of the Bank and losses was given to the surety company and they sent to the Trust Company an examiner within a few days after the trust company had closed. This examiner proceeded to institute an investigation but appears to have withdrawn from the investigation after having completed an examination of the minute books in which he found reference to the letter from the Commissioner of Banking to the Trust Company of May, 1909, involved in this appeal, and the special meeting of the board of directors of the Trust Company of June, 1909.

We further contend that, under the circumstances and the proof shown in this case, further itemization of losses was wholly unnecessary and not to be required of the plaintiff. This contention is based upon the fact that prior to the expiration of the six months' period, during which the plaintiff might file itemized proof of claim, the contract was *repudiated in its entirety* by the defendant; this repudiation is by the president of the surety company and is contained in the letter over his signature which is found at page 272, dated January 31st, 1914, addressed to Pitney, Hardin & Skinner, who, as appears by letter written by them to the surety company (foot of page 271) had requested, on behalf of the trust company, an extension of time in which to prepare a detailed statement. The letter from Mr. Joyce, is as follows:

> "Your letter of January 28th was duly received. This company recognizes no liability in the case mentioned, and naturally will not take any action that will prejudice our case. I am quite sure that upon reflection you will agree with us that this is the only position we can take. Very truly yours, William P. Joyce, President."

As showing that this attitude was continuous up to the last, we find, upon page 273, a letter from the Assistant General Solicitor of the defendant, addressed to Mr. Vredenburgh in charge of the liquidation of Roseville Trust Company, returning a proof of claim left with the surety company by a representative of the Trust Company (which proof of claim comprised the items shown in Schedule F); the letter is as follows:

> "*Re:* Raymond E. Smith case:
> Secretary and Treasurer
> of Roseville Trust Company, Newark,
> New Jersey.
>
> There was left at this office a paper addressed to this company on the part of Roseville Trust Company, purporting to be the detailed statement of loss of certain amounts of money through the acts of Raymond E. Smith. As this paper is sworn to in an affidavit signed by you, we are returning to you said paper, as this company does not recognize any liability whatsoever under its bond of Raymond E. Smith.
>
> We are enclosing also a copy of president Joyce's letter of January 21st to attorneys Pitney, Hardin & Skinner which letter we beg to confirm."

We submit that, under the authorities, this repudiation of the contract by the surety company, this refusal to recognize any liability at all or to be bound by it, made futile and unnecessary any further attempts at compliance with the contract by the Trust Company. Nor does the action of the Trust Company, through Mr. Vredenburgh, in filing a proof of claim which did not include the items of Schedule G deprive the plaintiff of the rights which became vested in it upon the repudiation of the contract by the defendant, to thereafter be further relieved of the necessity of further complying therewith.

Sinclair vs. *National Surety Co.* (132 Iowa, 549) in which the Court said at page 559:

> "Failure on plaintiffs' part to furnish proofs of loss is relied upon as a defense. It seems that plaintiff attempted to make two separate proofs of loss, one under the Two thousand dollar bond and the other under the increased one. As to the second, the defendant denied all liability under the increased bond because of want of authority upon the part of its agent who granted the increase and received the premium. This was a clear waiver of any proof of loss and of defects, if any, in those furnished, for an attempt to make or correct them would have been an idle ceremony."
>
> *Nichols* vs. *Scranton Steel Co.* (137 N. Y. p. 471);
>
> *Smith* vs. *Wetmore* (167 N. Y. 234).

We quote from the opinion in the last mentioned case as follows:

> "Moreover, when performance of the contract is alleged by the plaintiff and denied by the defendant, it is competent for the plaintiff to prove that the defendant would not allow him to perform or repudiated the contract, or had committed a breach of it himself by hindering the performance or refusing to abide by its obligations (citing cases). Assuming that there was no proper proof in the case to excuse the production of the certificate, there was proof tending to show that the defendant refused to allow the plaintiff to go on and that he virtually repudiated the contract as binding upon him. He treated the contract as broken and refused to abide by it any longer. This gave the plaintiff an immediate cause of action even though something still remained to be done and relieved him from any obligation to produce the certificate."

The certificate mentioned in the previous case, *Smith* v. *Wetmore, supra,* was the usual certificate

of the architect, required to be produced in order to entitle the contractor to his money, on a contractor's bond, a much more important requirement than is any requirement in this contract for detailed items of loss.

See also

Building & Loan Association vs. *Fidelity Company* (118 Iowa, 729);

Equitable Surety Company vs. *Bank of Haxen* (121 Ark. 422);

Atlantic Horse Ins. Co. vs. *Nero,* 66 South. R. 780.

It is submitted therefore that a new trial should be allowed the plaintiff as to the items of loss involved under Schedule G, under which the plaintiff claims to be allowed an additional recovery of Twenty thousand dollars and interest. The amount for which plaintiff has had judgment, which is the subject of the appeal here, by the defendant, should be affirmed, the items being entirely separate and thus coming within the rule laid down by this Court in *Roseville Trust Co.* vs. *American Surety Company* (91 N. J. L. 588), in which a separate new trial was ordered only for the item found by this Court upon said hearing, to have been improperly disposed of in the Court below.

POINT IX.

A considerable portion of the defendant's brief is devoted to argument and citation of authorities on two propositions, neither of which are involved in this appeal.

The first proposition is that fraud or concealment on the part of the insured will void the obligation of the insurer. This presents no question for con-

sideration upon this appeal, for the reason that there is no plea of fraud or concealment, neither is there any proof thereof.

The law is definitely settled that in order that a surety may successfully avoid its obligation upon the ground of fraud or concealment, it must affirmatively plead the same, including the detailed facts constituting such fraud or concealment. *Magee* v. *Manhattan Life Ins. Co.,* 92 U. S. 93. There is no such plea in this action, nor has any proof been offered showing the slightest fraud or concealment upon the part of the employer.

In order to charge the employer with fraud or concealment, it must be first shown that the employer in fact had knowledge of facts or circumstances, the failure to disclose which to the surety company would amount to or constitute fraud or concealment, but the proof in this case shows that the employer had no such knowledge. It may now be argued that it should have derived such knowledge from what has been referred to as the Nones transaction, but all of the proof goes to show that the employer did not, in fact, acquire such knowledge, and the jury by their verdict have so found.

Before leaving this subject of fraud and concealment, it should be pointed out that so far as the proof in this case shows, there was never any inquiry made by the Surety Company of the employer, either at the time of the original bond or upon the occasion of any renewal, concerning any fact whatsoever; no representations by the employer were ever sought or obtained; no certificate by the employer ever asked for or received. In fact, for anything that appears in this record, the Surety Company relied entirely, in writing the original bond and in writing each and all of the renewals, wholly upon information derived from its principal, the employee Smith.

In this connection, it was said in the case of

Citizens Trust Co. v. *Globe & Rutlers Fire Ins. Co.*, 229 Fed. 326:

> "It is admitted by the plaintiff that when the $5,000 bond was given on July 15, 1908, the agent owed a considerable balance on his account. The defendant insists, as a matter of law, that the failure of the insurance company to inform the surety company of this default was a fraud which annulled the bond. The undisputed fact is that the insurance company had no communication with the surety company as to the giving of the bonds, and that it merely received the bonds which the agent had procured. The surety company made no inquiry of the insurance company as to the state of the agent's account. Having chosen to act on its own responsibility in the absence of concealment of knowledge of the insurance company of wrong-doing of the agent, the surety company must abide by the consequences. Under the same conditions, the surety was held liable in *Magee* v. *Manhattan Life Ins. Co.*, 92 U. S. 93."

In the *Magee* case last mentioned, the Court said:

> "But there is a duty incumbent on him. He must not rest supine, close his eyes and fail to see important information within his reach. If he does this and a loss occurs, he cannot in the absence of fraud on the part of the creditor, set up as a defense the facts then first learned which he ought to have known and considered before entering into the contract. * * * Where one of two innocent parties must lose and one of them is informed, the law throws the burden upon him."

The second proposition upon which stress is sought to be laid by the defendant which does not properly belong in this appeal is the claim that the employer at some time or other had information that Smith had formerly been dishonest in another employment, which knowledge it failed to commu-

nicate to the Surety Company. The evidence is all the other way.

Odell testified, and he was not contradicted, that upon making inquiry concerning a suggestion which had at one time been made to him concerning Smith's conduct in a former employment, he was assured by the former employer that there was no truth in it, that "I know nothing of Smith but what is good * * *" (p. 454, fol. 30). This was corroborated by Monroe, who states that this former employer had said to Mr. Odell, "He certainly knew nothing disparaging as to Mr. Smith, they thought very highly of him at the Orange Bank" (p. 427, fol. 30).

We therefore respectfully submit that the judgment appealed from should be affirmed except in so far as it fails to include an additional recovery based upon the contract arising from the last continuation certificate, as to which a new trial should be ordered.

Respectfully submitted,

ROGER HINDS,
Attorney for Plaintiff-Respondent.
EDWARD F. CLARK
(of the New York Bar),
of Counsel.

June Term, 1920.

New Jersey Court of Errors and Appeals

ROSEVILLE TRUST COMPANY, by GEORGE M. LAMONTE, Commissioner of Banking and Insurance of the State of New Jersey, *Plaintiff-Respondent,* *vs.* NATIONAL SURETY COMPANY and RAYMOND E. SMITH, *Defendants-Appellants.*	*Action at Law.*

BRIEF FOR APPELLANT, NATIONAL SURETY COMPANY.

Introduction.

This is an appeal from the judgment entered on the verdict of the jury March 27th, 1919, in the Supreme Court, Essex Circuit, Honorable Nelson Y. Dungan presiding, in favor of the plaintiff and against the defendant in the sum of $25,905.76.

The judgment as against the appellant is based upon a surety bond given by it to Roseville Trust Company, dated December 7th, 1908 (Exhibit P. 67, page 516, state of case), and the several extensions of that bond pleaded by the plaintiff (Exhibits P. 68, P. 69, P. 70, P. 71, pages 522-528, state of case).

The bond is in the penal sum of twenty thousand dollars and provides that subject to its conditions the surety-appellant will make good and reimburse the employer (Roseville Trust Company) any and all pecuniary loss of money, securities or other personal property belonging to the employer, or in its possession and for which it is legally liable, sustained by the employer by or through the personal dishonesty amounting to larceny or embezzlement, of the employee, and for which the employee shall be legally liable to the employer. * * * The employee bonded was one Raymond E. Smith, and the office in Roseville Trust Company held by him was secretary and treasurer.

Each of the extension certificates extend the obligations of the surety according to the terms and conditions of the bond, and the bond is specifically and by number referred to in each of the certificates of extension.

The present action was commenced August 30th, 1915, by George M. LaMonte, then Commissioner of Banking and Insurance, under authority of the provisions of Chapter 171 of the Laws of 1913, the suit being in the name and in behalf of the trust company. By an amendment filed February 21st, 1917, the amount claimed against Smith's surety was increased from $20,000 to $40,000 and certain additions were made to the schedule of losses alleged to have been sustained by the acts of Smith of the character specified in the bond to $88,283.78. The theory of this amendment is that the plaintiff has the right to recover in his action under contracts of this character where the loss exceeds that sum, the whole amount of the penalty of the original bond as continued up to the last continuation agreement and a similar amount under the last continuation agreement. This theory was not accepted by the court below and a cross appeal was taken for that among other reasons.

The appellant defended upon the theory, first, that the losses sustained by the bank were not of the character mentioned in the bond in suit, namely, losses caused by the personal dishonesty of Smith amounting to larceny or embezzlement; and that aside from this the bank and by analogy the commissioner was not entitled to enforce the obligations of the bond against the surety because of breaches by the bank of various of the conditions precedent set up in the bond and which were specifically pleaded; among others its failure to take and use all reasonable steps and precautions to detect and prevent the commission of any act, upon the part of its employee Smith which would tend to render the defendant liable for loss and because there came to the knowledge of the bank or its officers or to its notice, acts, facts or information tending to indicate that Smith was or might be unreliable, deceitful, dishonest or unworthy of confidence, which notice or knowledge the bank failed to communicate to the surety in accordance with conditions of the bond and to the prejudice of the surety.

Failure of the Trial Court to enter a non-suit and subsequently to direct a verdict upon the evidence in the case upon the various affirmative defenses of this appellant were the subject of exceptions which among others furnished the grounds for the present appeal.

Roseville Trust Company organized under the New Jersey Trust Companies Act, commenced business in the Roseville section of Newark in the month of November, 1908, with Smith as its secretary-treasurer and the one actively in charge of the con-

duct of its business. The directorate was composed of about eighteen or nineteen others than Smith, none of whom had had any previous banking experience. None of the directorate other than Smith gave more than a part of his time during business hours to the affairs of the bank and the president was in the habit of calling at the bank each day for about an hour early in the morning. Most, if not all, of the officers of the bank at its start remained in office until the bank was closed. It was the custom of the bank to hold executive committee meetings weekly and directors' meetings monthly. The president of the bank, Odell, was cashier of Claflin & Company of New York and had been identified with that company in that position for a great many years.

The company continued to do business until August, 1913, when the Commissioner of Banking and Insurance satisfied himself that it was insolvent and took over the administration of its affairs under Chapter 171 of the laws of 1913.

It appears that from the beginning Smith ran the bank. It also appears that his authority was greatly increased as time went on. The directors and officers justified their action in this regard upon the ground that Smith's past reputation had been excellent and that they had great confidence in him. It is shown that within a month after the bank opened its doors Smith started on a course of illegal practices which by August, 1913, had resulted in the wiping out of both the capital and the surplus of the bank, and in the creation of a condition from which the depositors and creditors have not yet fully recovered. At least one of the witnesses for the plaintiff indicates that as early as 1911 Smith had become so bold and so careless of detection that he left upon the face of the books of the bank patent glaring evidences of his manipulations and that these continued with increasing frequency until hardly a page of the general ledger did not contain some plain evidence of the dishonesty of the employee Smith (Cloran, pp. 237-242).

This condition was a logical sequence of what any reasonably prudent man might expect following the acts of Smith in December, January and February, 1909, disclosed to the bank by the Department of Banking and Insurance and of which no word was communicated to Smith's surety.

The chief contention of the appellant in its defense upon the theory of breaches of the conditions precedent by the bank is

founded upon the failure of the bank to give to the surety any notice of what occurred at the bank in 1909 and which has been referred to as "the Nones transaction."

In March, 1909, one Appleton, an examiner for the Commissioner of Banking and Insurance, commenced the first examination of the business of Roseville Trust Company resulting in the disclosure of the Nones transaction to the officers and directors of the bank.

It is conceded that no information or notice regarding this examination or what was discovered by it was communicated to the surety.

During his examination Appleton received from Smith a confession to the effect that early in February he, Smith, had given one Nones $1,350 of the bank's funds without the knowledge or consent of the officers or directors and had concealed his action upon the books of the bank. He said that Nones promised to repay this sum in a day or two but that not only did he fail to keep this promise but a week later asked for an additional $1,000 and was again accommodated by Smith out of the funds of the trust company. Again without the knowledge or consent of the directors or officers, and that he again attempted by a falsification of the books of the bank to cover the transaction. That he got notes of Nones but failed to put them through. The examiner verified the details of Smith's statement from the books of the bank and ascertained that its accounts showed a shortage in the correspondent banks amounting to $2,350. Appleton at once communicated these facts to the president of the bank at a conference attended by the counsel of the bank. It is curious to note that the first thing the president said when the examiner appeared at his home and gave him some inkling of what he was about to disclose was that they had better have the counsel present. The day after the disclosures by the examiner to the president and counsel of the bank, Smith admitted the accuracy of the statements of the examiner to the president and to the vice-president. At the conference between the examiner and the president and counsel, the examiner had analyzed for their benefit the transactions making up the Nones affair and told them from the fund of his experience how grave was their import and that they amounted to crookedness on the part of Smith, stating that the Banking Department would not stand for such crookedness and insisted that Smith's connection with the enterprise be terminated. This was in March, 1909.

Of this not a word to Smith's surety.

After waiting until May, 1909, for action by the directors upon the disclosures of his examiner, the commissioner repeated those disclosures in a letter to the president of the receipt of which he required the written acknowledgment of each of the directors. In this letter he repeated for their benefit in all of its details the transactions confessed by Smith. In addition he for the first time brought to their attention the fact that transactions of a similar nature had been perpetrated by Smith in the December and January preceding the one about which they knew; thus discounting the large credit given Smith by the directors for what up to that time had been thought a manful, honest confession of wrong doing, but was in fact but a necessary admission of that which he knew would be discovered by the examiner and a studied concealment of what he hoped the examiner would overlook.

In his letter the commissioner in the light of his experience and of the experience of his office characterized Smith's actions as those of one in whom the Department could have no confidence and repeated the direction of his examiner to the effect that Smith's connection with the bank should be terminated without delay. This was in May, 1909.

And still no word to the surety.

Upon receipt of the letter of May, 1909, the officers of this bank probably realized that the commissioner would not stand for their policy of inaction. In any event a committee was appointed to wait upon the commissioner in Trenton. According to the witnesses for the plaintiff the idea of the officers and directors in having this conference was to explain their reasons for their refusal or failure to follow his advice. The evidence, however, showed that the conference preceded the action which they took upon the letter, and it also showed that at the conference the commissioner stood fast.

After the letter and after the conference they held a special meeting of the directors, June 21st, at which the entire matter was discussed and the written resignation of Smith presented. After three ballots it was unanimously voted not to accept the resignation and Smith continued to guide the destinies of this enterprise until the commissioner in 1913 stepped in to save what was left for its depositors. What he thought about the action of the directors is eloquently expressed in his letter of July 16th in which he says he emphatically disapproves of it.

They went all the way to Trenton about the Nones transaction but still no word to the surety. They can't plead ignorance of their obligation to the surety because they have admitted that

they examined and approved the bond when it was presented, and these occurrences took place within six months of the time when this bond was examined and approved.

The facts as outlined above were proved in the trial below and are not refuted.

It is contended that they clearly show a willful breach of that condition precedent provided in the sixth section of the bond and entitled the appellant to the direction of a verdict in its favor.

The other errors assigned will be treated under their appropriate sub-heads.

Assignments Nos. 13, 14, 15, 21, 33, 36, 43 and 44 are not briefed.

POINT I.

The appellant claims error in the refusal of the Trial Court to direct a verdict in its favor at the closing of the taking of testimony.

(Assignments 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 38, 46, 49, 50, 55, 56, 57.)

THE CONTENTION.

That the bond in suit fastened a liability upon the appellant which continued only so long as the respondent observed the conditions in the bond upon which that liability was expressly predicated. That the respondent breached at least one of these conditions, the sixth, in 1909; that the breach was of a substantial nature in that it deprived the appellant of the right reserved to it in the bond of judging for itself the nature of the hazard upon which it was bound and of terminating its obligation under the ninth condition in case it saw fit to do so, and in addition caused it to remain bound in ignorance of facts relating to its principal and known to the obligee, which were material in considering the advisability of the annual extension of its liability after 1909. That this breach of the conditions of the bond by the respondent released the appellant from liability for losses thereafter occurring, barring a recovery in this action, inasmuch as all of the losses for which claim is made herein occurred after 1909 and entitled this appellant to the direction of a verdict; the evidence of the breach being undisputed.

The contention of the appellant in this regard is based on the following proposition, (a) that the bond in suit and its renewals

constitute a continuing contract between the parties with mutual and continuing covenants; (b) that by their terms these covenants placed upon the obligee a burden of performance precedent to the right of the obligee to recover under the bond, and (c) that the obligee has failed in the performance of several of these covenants, notably those provided in the third, sixth, eighth, ninth, eleventh and fourteenth conditions of the bond, and (d) that these failures constitute breaches of the bond prior in point of time to the alleged breach by the appellant, and (e) relieve the appellant from any obligation under the bond thereafter; (f) that the evidence produced by the appellant in support of subdivision (c) of its contention is either conceded, proved or is not refuted by the respondent.

THE EVIDENCE.

The bond in suit provides:

> That the covenants by the surety are "subject to the conditions and provisions herein contained, which shall be conditions precedent to the right of the employer to recover under this bond."
>
> "THIRD: If the employee has at any former period been a defaulter, and if such fact be known to the employer at the time of the execution of this bond, or at the time of the appointment of such employee by the employer, this bond shall be void and the employer shall not be entitled to recover hereunder for any loss sustained by or through any act of such employee."
>
> "SIXTH: If at any time after the beginning of the term for which this bond is written, the employer or any officer of the employer, suspect, or if there comes to the notice or knowledge of the employer, or any officer of the employer, any act, fact or information tending to indicate that the employee is or may be unreliable, deceitful, dishonest or unworthy of confidence, the employer shall immediately so notify the company in writing at its principal offices in the City of New York, and if the employer fail or neglect so to do, the company shall not be liable for any act of the employee thereafter committed; and if at any time after the beginning of the term for which this bond is written there come to the notice or knowledge of the employer, or any officer of the employer, the fact that the employee is unreliable, deceitful, dishonest or unworthy of confidence, the company shall not be liable for any act of the employee thereafter committed.

Upon the discovery by the employer that a loss has been sustained, or facts indicating that a loss has probably been sustained, the employer shall immediately so notify the company, in writing, at its principal offices in the City of New York, and shall within the time limited in lines 24 to 29 inclusive of this bond make and furnish to the company in writing, at its principal offices in the City of New York, claim for, and proof of, loss, if any sustained, and failure to give such immediate notice, or to make such claim or such proof within such time, shall relieve the company from all liability hereunder on account of the employee."

"EIGHTH: The employer shall, whenever requested by the company, give all information within its knowledge or which can be obtained from its books or records, and render all assistance (not pecuniary) which will in any way aid the apprehension, arrest or prosecution of the employee for any criminal offense committed by the employee involving liability of the company, and in like manner aid and assist the company in suing for and obtaining reimbursement from the employee, or from the employee's estate, for any moneys which the company may have paid or become liable to pay under this bond on account of such employee."

"NINTH: The company may at any time terminate the obligation which it shall have assumed in behalf of the employee under this bond, by giving the employer written notice of its election so to do, and such termination shall take effect at the expiration of fifteen days from the receipt of such notice by the employer; and the company shall not be liable for any act of the employee thereafter committed. If the company subsequently pay any loss hereunder, on account of such employee, the whole premium paid shall be held to have been fully earned and to belong to the company; otherwise, the company shall, upon demand and the execution and delivery to the company by the employer of a full release of the company from all liability hereunder, refund the premium paid, less a pro rata part thereof for the time this obligation shall have been in force."

Roseville Trust Company commenced business in November or December, 1908, with Smith, the principal, in the bond in suit as secretary-treasurer. He was also a director and the one actively in charge of the conduct of the bank's affairs (Foster, p. 409). The appellant gave the bond in suit as his surety from the beginning of his connection with the bank and continued to be bound for him until its closing in 1913. The bank was organ-

ized under the New Jersey Trust Company Act and for the most part its directors and officers were men inexperienced in banking affairs. None of the officers or directors, save Smith, gave more than a small part of each day to an active participation in the conduct of the bank's affairs (Thompson, p. 76). It appears that Smith began a systematic looting of the bank from the start of his connection with it (Appleton as to 1909, Van Derveer, Cloran, Vredenburgh as to 1911, 1912, 1913).

The Nones Transaction.

(Appleton, pp. 366-403.)

In March, 1909, one Appleton, then a bank examiner employed by the Commissioner of Banking and Insurance of this State, commenced the first official examination into the affairs of the institution. As a necessary part of his examination, he attempted a reconcilement of the accounts of the institution with its correspondent banks, among which were the New York State National Bank of Albany and the Fourth Street National Bank of Philadelphia (p. 373). According to Appleton, the bank had not provided itself with a check or draft book for use in withdrawing funds from the Philadelphia bank, although it had one for use in the Albany bank (p. 382). Drafts on Philadelphia were made upon the draft forms commonly sold by stationers and no stubs were kept (p. 384). This was the condition found by the examiner at his first examination. The reconcilement of the Philadelphia account showed a shortage of $2,350 (p. 373), and either just before or just after this condition was discovered Smith by appointment saw the examiner in the evening at his home and confessed to the following facts (p. 374), which the examiner verified from an examination of the books of the institution, and traced from those books at the trial, so far as the books were then available:

On February 6, 1909, Smith had given one Nones a draft on the Albany bank for $1,350, which being used constituted a depletion of the funds of the trust company on deposit in the Albany bank. At the time Nones was a note borrower of the trust company in the usual course. He gave Smith a note for this $1,350 (p. 387), the note was never put through nor did any of the officers or directors of the bank know of the transaction until after the disclosures to the examiner. The draft on the Albany bank was not credited on the day when it was drawn, February 6th, and from that date and until February 13th Smith

caused the books of the bank to show a false condition in that its funds at Albany had been depleted to the extent of $1,350 which did not appear. On February 13th Nones again applied to Smith for help, this time for $1,000, and Smith again, without the knowledge or consent of the officers or directors, obliged him with the bank's money. This time he drew two drafts on Philadelphia (of which he kept no stubs), one for $1,350, with which he wiped out the Albany draft, *then for the first time credited,* and the other for $1,000. The $1,000 in the form of cash went to Nones. No credits were made for either of these drafts on the books of the trust company, but the total of them, $2,350, was *charged* to the Philadelphia bank on the cash book and general ledger, thus showing a shortage in the reconcilement as of March 11th, just two days short of a month after the drafts were drawn. A note was also taken by Smith for this $1,000 but was not put through the books of the bank. Smith admitted these facts to the president, the vice-presidents and the counsel at the direction of the examiner at a conference at the home of the president in the evening (pp. 374-379). April 6th, on his return to the trust company for the purpose of a more complete reconcilement of the accounts of correspondent banks, all the drafts and checks then having been returned, the examiner discovered transactions of a similar character had occurred in the December and January preceding (p. 381). Of these Smith had said nothing to the examiner or to the officers or directors at the conference in March, and they were first brought to the attention of the officers and directors in a letter from the Commissioner of Banking and Insurance in May, 1909 (Odell, pp. 466-467), Exhibit D. 4 (p. 532).

> "On April 6th, when the examiner returned to the trust company's office for the purpose of making certain verifications, all the drafts on the various correspondents being then on hand to March 31st, a full comparison of all the paid drafts was made with the stubs of the check books, where there were any such, and with the general cash book, to see the various dates that the credits were made to the banks upon which the drafts were drawn. This led to the discovery that the above transactions with Nones were not the first of the kind, but that similar transactions had occurred in December and January. Another peculiar feature discovered was that where such transactions had been made the stubs of the check books were blank, having neither name, amount nor date. The examiner also noted that those checks all found their way to the above-mentioned Edward G. Johns, said to be a broker.

> No mention was made by Treasurer Smith of these earlier transactions to either the officers of the company or to the examiner, and when his attention was called to the same he admitted the fact and said that previously Nones had always made good, while this last time he had not."

Thus it appears from the examination that during the first three months of the bank's existence, Smith had in each of those months used the funds of the bank without the knowledge or consent of the officers or directors and had covered his acts by a falsification of the bank's books and records to conceal his acts not only from them but from the bank examiner.

In disclosing to the president and to the counsel of the bank the facts regarding the February Nones transactions (he had not yet discovered those of December and January), the examiner told these officers that the Department of Banking and Insurance could not stand for crooked work of that kind, and could not stand for the retention of Mr. Smith as treasurer of that company (Appleton, p. 379). This conference was a few days subsequent to March 12, 1909, and Smith himself confirmed the correctness of the examiner's disclosures the morning after the conference (Odell, p. 456). No action was taken upon the matter by the officers or directors thereafter until in May following the Commissioner himself in a letter to the president repeated the disclosures already made by the examiner, *adding those as to the December and January transactions,* and himself insisting that Smith's resignation be obtained without delay (Exhibit D. 4, p. 530). He demanded and received an acknowledgment of the receipt of his communication from each of the directors (Exhibit D. 7, p. 540). He had not then or has he now the power of removing a trust company officer.

After the receipt of his communication the directors held a special meeting, June 21st, 1909, at which the resignation of Smith was presented, and after three ballots unanimously rejected, and Smith continued in charge of the bank until its close (Exhibit D. 6, p. 540). This action of the directors was communicated to the Commissioner in a letter signed by all of the directors excepting Munroe, who was absent at the time it was mailed (Exhibit D. 7, p. 540). What the Commissioner thought of the action of the directors is shown by his reply of July 16th (Exhibit D. 8, p. 543), in which he says, "I will say now, however, that I emphatically disapprove of the decision of the board in the matter."

It is conceded that none of the facts concerning the Nones transactions or the actions of the Department of Banking and Insurance by its commissioner or examiner, or of the officers or directors of the trust company thereon, were ever communicated to the surety, this appellant, and it is not disputed that its first knowledge of these facts came after the closing of the bank in 1913.

The facts that came to the notice of the directors in 1909 were not disputed by Smith; they were admitted by him; the books showed them; they were in addition some months later carefully analyzed for the benefit of the officers and directors by the Commissioner—reduced to words of one syllable, stripped of all semblance of bookkeeping terminology and communicated in a letter with his conclusions and his advice. The letter was not of itself information; it was but a statement of facts already known to the officers and directors of the bank; facts admitted by Smith and which were demonstrable from the books and records of the bank. They were facts proving Smith not only unreliable, dishonest, deceitful, and unworthy of confidence, but proving him guilty of a specific misdemeanor under the Trust Company Act, a falsification of the bank's records with intent (partially successful for a time) to deceive the bank examiner. The directors were not called upon to act hastily. In fact, they took almost four months in the consideration of these disclosures before finally acting.

Analyzed as they should and could have been analyzed by these men at this time, the disclosures amounted to the following:

(a) Smith gave Nones $1,350 of the bank's funds in the form of a draft in that amount without the knowledge or consent of any of the officers or directors of the bank;

(b) He omitted to make any record of the transaction at the time on the books of the bank, thus concealing it;

(c) He further concealed it by making an unauthorized withdrawal on the funds of the bank on deposit in the New York State National Bank of Albany;

(d) He made no entry of the draft on Albany in the books of the bank until a week later, at which time

(e) He covered the Albany draft by two drafts on Philadelphia in the sum of $2,350, also unauthorized, and with the proceeds of which he first paid the Albany withdrawal, and secondly, made available an additional $1,000, which he turned over to the same man, again without the knowledge or consent of the officers or directors;

(f) He made no stub entry of these two drafts, and

(g) He failed properly to enter them in the account of the Fourth Street Bank on the books of the trust company.

In addition, and as a fitting climax to such a course, and when concealment of this particular transaction was no longer possible, he confessed, making a virtue of necessity, but carefully limiting his confession to this particular transaction, carefully omitting from it similar transactions in the two months preceding the one in question.

THE ARGUMENT.

We hope and we believe that the issue and the evidence in this case as to this point have been so drawn and so produced as to place squarely before this Court for its decision the concrete proposition as to whether this bond is to be given effect as a whole or whether, on the contrary, as contended for by the respondent, only certain of the terms, selected by them, are to be made effective and the rest disregarded.

While it is true that the contract in question is one produced by the appellant, this fact of itself is of little or no importance in the consideration of this case for two reasons; first, there are no ambiguities calling for a construction which in case of doubt might be resolved against the appellant, and secondly, the respondent or its predecessors assented to the terms of the bond when the bank by its officers accepted it.

By its terms the bond fixes a liability upon the surety only so long as the bank observes the conditions precedent therein set forth, of which some are the basis of our contention on this point, and our contention is that the bank having breached these conditions in 1909 without our knowledge, but to our prejudice, cannot now hold us on the theory of our breach which, did it exist, must necessarily be a subsequent breach. The sixth condition is plain and its terms are easy to understand; it is reasonable; the officers and directors of the bank were familiar with the terms of the bond; the counsel and executive committee had examined and approved it (Munroe, p. 424); they had never taken exception to its terms, and by accepting it they became expressly bound by its conditions. Observance of its terms is calculated to be of as much, if not greater, benefit to the bank than to the surety inasmuch as one of the objects sought to be attained by them is the prevention of defalcation by the observation of vigilance. The condition was written in the light of wide-

spread experience in banking losses by men who have come into contact with many forms of defalcation and to enable them to judge facts and circumstances in the light of that experience coldly and unhampered by bias, friendship, inexperience or considerations beside the main question for decision.

The disclosure of these facts were to men admittedly inexperienced in banking affairs; they came from men admittedly of great experience, one of whom was charged by law with the supervision of all state banking institutions; here was no idle gossip, no rumor or anonymous communications; here are no disputed facts; here are facts so plain and so eloquent of the true character of their author that none could misunderstand their purport. Nor did the directors misunderstand them, as will be afterward demonstrated.

It made no difference under the terms of this bond what the directors thought about the disclosures made by Commissioner Lewis; it made no difference under the terms of this bond what motives influenced Smith in the perpetrating of this illegal transaction; it would have made no difference had it been clearly shown that he had done it in the interests of the bank. It is submitted that although all or any extraneous factors or elements influencing Smith might be properly considered by the directors in considering if Smith should be continued in his office, that his surety alone had the right, after considering all of the facts, to decide if they wanted to continue their bond, and that they were deprived of this right by the failure of the directors to communicate all or even any of the evidence they had. The fact is that the greater the ignorance and inexperience of the directors the more they should have leaned upon and been guided by the advice and counsel of the supervising officer of all banks in this State, instead of setting up their judgment, surmise and impression against his statement of cold facts and his characterization of those facts as indicating Smith's unworthiness. Had the loan to Nones been duly entered; had the stubs of the Albany bank been properly filled out; had either or both of the loans been entered or appeared upon the minutes of the executive committee or of the finance committee, then there would have been some justification for Smith's elaborate statement, backed up by the directors, that what he did was simply an instance of bad business judgment, and for their failure to follow the direction of the Commissioner and discharge him, but not only did he conceal them from the records of the bank and fail to inform its officers either by the proper entries on the minutes or by personal com-

munication, but he actually went further and concealed them by false entries.

Vice-Chancellor Stevens in his opinion in the directors' suit has based his entire conclusion upon the failure of the directors to take proper precautions after the disclosures of the letter of May, 1914. He has plainly stated that it was their duty then to discharge Smith, and he has charged them in money for their failure to do so. If it was an obligation on their part to discharge Smith and their failure to do it was negligence, how much more was it their obligation simply to pass on to his surety the information they had, in accordance with the sixth provision of the bond. It required no active participation in or endorsement of the views expressed in the Commissioner's letter—it made no difference in the performance of their duty what they thought —they had simply to copy the letter and mail it to New York, and their obligation under the bond would have been fully complied with and the surety would have been permitted to judge for itself whether it would continue on this risk.

Much importance has been given in the consideration of this case to the "impression" made upon the directors by the Commissioner's letter of May, 1909. This phrase was dwelt upon eloquently and at length by counsel for the plaintiff in his summing up; it was the subject of some consideration by the Trial Court in its charge to the jury.

The Court charged the jury on the question of "impressions" as follows:

> "The question here presented is not one alone of the fact whether or not what Smith then did, and which was brought to the attention of the officers and directors, was dishonest, whether his conduct was such as to indicate that he was unreliable, deceitful, dishonest, or unworthy of confidence, because all now, after the dishonest transactions and manipulations of Smith have been brought to light, are willing to admit that what he then did was the forerunner of the larger manipulations and defalcations which came later, and that they then were the product of a dishonest mind and disposition, but the question is whether the officers and directors knew, or ought to have known, that the character of his acts was such as to indicate, or tend to indicate, at that time, or afterwards, that Smith was unreliable, deceitful, dishonest or unworthy of confidence. * * * "
>
> "The officers and directors who were called to testify in this case disclaim a comprehension at that time that what Smith then did was dishonest or deceitful; and it is in-

sisted that they were justified in regarding his actions as indicating bad judgment, or negligence. But such disclaimer would not avail the trust company if the information which they then received was such as must necessarily have impressed an ordinary mind, or the minds of these directors, that Smith was unreliable, deceitful, dishonest or unworthy of confidence."

"Therefore, if in 1909, or at any time before the condition of the bank was discovered in 1913, the officers and directors of the trust company, from what came to their knowledge or notice, knew, or ought to have known, that the character of those things which were called to their attention was such as to create a suspicion, or tend to indicate Smith to be unreliable, deceitful, dishonest or unworthy of confidence, then the plaintiff cannot recover in this case; for it is an admitted fact that no notice of what then came to their attention was ever communicated by them to the surety company. But if that was not the impression made upon them, and if the mind of an ordinary person would not be impressed by those facts, but the impression which those facts conveyed was only that Smith had used bad judgment, or had been neglectful of his duty, and that what he did did not tend to indicate to them, or any of them, that he was unreliable, deceitful, dishonest or unworthy of confidence, then the plaintiff would not now be barred from recovery against the surety company by reason of the failure to give such notice."

Arguing from the standpoint of impression it is ingeniously pointed out that while it is admitted *now* that the directors were wrong in their impressions and conclusions of 1909 that they had not then the benefit of what is now hindsight. It is submitted that nothing could be less germane to the issues of this case. These impressions are as many and as varied as the minds that conceive them. They but illustrate the individuality of human nature. They were conflicting in this very board and on this very letter, for at least one director says he was influenced to vote with the majority by the very weight of numbers and against his better judgment. This also illustrates how unreliable are impressions and by what elements they may be influenced. It is conceded that "circumstances may alter cases." That to steal bread to maintain the spark of life in those near and dear may be less heinous as a crime than to steal for more gross material gain. But it is submitted that these circumstances, if they are to be considered at all, should only influence the *punishment* of the crime, and never the *conviction.* That this may have been the influence at work in the Roseville Trust Company is shown by the testimony of its counsel Munroe in this case. The transaction

was past, the bank had not suffered in money loss and they did not want to brand Smith as a crook. They felt the consequences of such a course were excessively harsh.

All this about impressions. Whose impressions? The directors. They had our bond; their counsel was thoroughly familiar with its terms, but in spite of those terms it never occurred to them that we might also have some impressions and that under our bond we had a right to them and to be guided by them and not by the impressions of others. We wonder how much faith they had in their own wisdom when their counsel in this case admits that the Nones transaction constituted a manipulation. They evidently feared our "impressions."

It is submitted that impressions have no bearing on the issues of this case respecting the letter of May, 1909, because that letter dealt in *facts,* not opinions—not surmises. It stated what had occurred so plainly that he who ran might read. It informed the directors where the evidence of the wrong might be found in the books of the bank and that Smith had admitted those wrongs. It called to their attention his perfidy in the so-called "clean breast" he made of the matter. And then it goes one step further. From the fund of his experience and the long experience of his office the Commissioner seeks to advise the directors in the interests of the bank as to the proper course to pursue. This was the limit of his power. Had he possessed the power to discharge, can there be any doubt what he would have done?

Then, too, the result of the influence of these impressions upon the minds of these directors, resulting in their retention of Smith, who from then on, realizing how easily they were impressed, proceeded to take advantage of their confidence until he had brought disaster and ruin upon this enterprise, all too clearly illustrates at one and the same time the fallacy of the impression theory and the sound, conservative value of the sixth condition of the bond, providing as it did (when observed) for a judgment upon the acts of the bonded officers of this bank uninfluenced by friendship or favor, unhampered by fear or lack of confidence in one's judgment, unswayed by a pride in the enterprise more fervent than wise—unfettered by inexperience and aloof from the eloquent if penitent pleadings of the author of all this evil—a judgment of the facts based upon the cold logic of bitter and expensive experience. This is what the bond afforded the Roseville Trust Company, and its failure to use it and to keep a plain, solemn covenant in their bond has produced the result they now seek to mitigate from the pocket of their surety, thus not only failing

to keep faith with that surety, but penalizing the surety for that failure.

In support of this theory of "impressions" and under the guise of rebuttal three of the former officers and directors are produced, Foster, a vice-president and director; Munroe, counsel and director; Odell, president and director. According to the respondent they are called for the purpose of showing the "impressions" made upon their minds by the disclosures of the Banking Department in 1909. Putting aside for a moment any question as to the relevancy or the materiality of their impressions in view of the bond terms let us examine and analyze their evidence.

"FOSTER."

Mr. Foster says nothing at all about impressions. He is not even questioned about them. He says nothing at all about the effect made upon his mind by the disclosures regarding the Nones transactions.

"MUNROE."

Mr. Munroe was attorney for the bank, and one of the two officials to whom the examiner first made his disclosures regarding the Nones transactions; he says at page 440 he was not interested in the details—that Smith admitted what he had done was wrong, p. 431; that he (Smith) told them (the directors) they would be entirely within their rights if they accepted his resignation (p. 431). That Appleton told Monroe and Odell that he thought the Nones transaction constituted a crime (p. 426), but "we thought this extreme and rather rancorous arraignment of Mr. Smith unjustified." That the Commissioner at the Trenton conference said he felt he could say nothing other than he had said (p. 435); that he (Munroe) knew in 1909 that Smith was guilty of a manipulation (p. 440); that Smith's "clean breast" of the thing had some influence on his mind when the subject came up (pp. 440-441) that the conclusion be acquiesced in was that, on the whole it was for the best interests of all concerned to retain Smith (p. 445), and he winds up his statement with "If I had known then what I know now I certainly would not have rested a day until he was discharged" (p. 445).

"ODELL."

Mr. Odell says that he investigated the Nones transactions by asking Smith about them—that he made no other investigation (p. 474); that though Smith had told Fairlie and Odell that Nones had only to go to New York to get the money to pay the bank, he, Odell, had made no inquiry except of Smith why this had not been done in the month preceding the discovery (p. 475), and that he could not recall what effect was made on his mind by Smith's failure to disclose the December and January transactions in March (p. 470); that he wanted to have Smith's resignation accepted on the general aspect presented; (p. 470) that he finally voted in favor of keeping Smith to make it unanimous, though he felt it wasn't just the right thing (p. 472); that his change in vote was prompted by the weight of the views of the eighteen or twenty others against his (p. 480); that the fact that Bannister seconded the resolution to retain Smith had some weight with him (p. 480).

Hence of the three officers called to support this theory of "impressions," one (Foster) fails to express any view about them—apparently had none; one (Munroe) says he thought the views of the examiner extreme, but admits he knew that the transaction spelled a manipulation and that had he known what he knows now he would have discharged him, and the third (Odell) frankly admits he was under no misapprehension as to the character of the acts of Smith in the Nones transaction, but was influenced by the weight of numbers against him. Of the three, two admit that they fully realized the nature of the transactions, but were influenced in their actions upon it by matters entirely disconnected with the facts; Munroe by what he called the "best interest of all concerned"; Odell by "the views of eighteen or twenty others," and the third, Foster, has no impression.

While we are on the subject of impressions, it might not be amiss to quote Mr. Clark himself on the subject, and to contrast his views on the subject in another suit upon the same facts with his view as expressed in this action. He says over his signature and that of his associate, Mr. Hinds, on page 9 of the brief in the Chancery suit entitled "George M. LaMonte, as Commissioner, &c., *v.* Harvey Mott, *et al.*," in which he successfully maintained a suit based on the negligence of some of these directors:

> "The Nones affair revealed Smith as utterly unworthy of trust or responsibility."

It will be noted that untrustworthiness is one of the very things provided for in Section 6 of the bond. He says on page 11:

> "The directors were grossly negligent in retaining Smith after the Nones affair,"

and further:

> "The Court will, of course, not be misled by the efforts of the defendants on the trial to dismiss the incident as involving nothing more serious than the making of the loan to Nones without the knowledge or authorization of the directors; though it may be observed that this alone would have involved willful disobedience of a by-law essential to the safety of the trust company, and a furtive disposition to deceive and conceal. Moreover, the fact that these unauthorized 'loans' had occurred on at least two prior occasions indicated that Smith's failure to inform the directors and get their approval was no mere oversight or carelessness."

And again on page 12:

> "Certainly Commissioner Lewis was amply justified when he wrote, 'Taking the various matters together they seem to disprove the statement of Treasurer Smith that he had no interest in any of the transactions, and that they were all made out of friendship for Nones.' "

And again on page 12:

> "Smith next willfully misapplied another thousand dollars. We use those words advisedly."

And again on page 12:

> "The fact that Smith hoped that Nones would make good this shortage, and the fact that Nones did subsequently do so * * * did not make the affair any less a willful and fraudulent misapplication of funds."

And again on page 13:

> "But we see only crass negligence and willful breach of duty where a confessed embezzler is retained as custodian of the money or others at the risk of others, and without the knowledge or consent of those others."

And again on page 15:

> "In his recital of facts and expressions of opinion in the letter of May 14th, 1909, Commissioner Lewis was acting in his official capacity, in the performance of a statutory duty. He was acting in the light of facts carefully collected and conservatively presented by an expert examiner. His experience in such matters, and his access to banking data and expert advice gave his findings and conclusions actual as well as official weight. Compliance therewith would have been a matter of course."

And then in this case (p. 410) we have the same gentleman making this remark:

> "Mr. Clark. Necessarily, the rebuttal in this case will have to cover a wide field at first, in order that the jury may be apprised of the conditions which were operating in the trust company, for the purpose of determining what was the situation presented to it with *the information which the defendant made such a time about.*" * * *

In addition, it might not be amiss to quote from the opinion of the late Vice-Chancellor Stevens in the directors' suit above referred to:

> "Now, it seems to me, that to call such transactions mere irregularities is impossible. Had Smith forgotten to enter a single draft on his books after having been authorized by the president or executive committee to make it, that would have been an irregularity, but he lent without authority; concealed what he lent, and falsified the accounts until discovery was imminent. He did this several times within a few weeks after the company commenced business.
>
> It is moreover admitted that when the bank examiner communicated to Mr. Odell and to Mr. Munroe what he had learned, he told them of rumors as to Smith's record. Mr. Munroe testifies that he investigated it, but he does not tell us how or what he learned, if anything. He says that whatever Appleton told him he reported to the board. When the board met on June 18, 1909, the minutes state that the directors thoroughly discussed the Commissioner's letter, but they say nothing about any investigation of the rumors. In view of the fact that Smith's conduct had been so reprehensible from the start, it is quite surprising that it was not thought advisable to follow up the rumors in order to find out what, if anything, Smith had done to give rise to them. The information came from a man in daily contact with bankers.
>
> The argument advanced on behalf of the board is that it was composed of business men of excellent reputation, and perfectly honest in all that they did; that they were unwilling, without necessity, to cast a shadow upon their undertaking at its start; that, to quote counsel's argument, 'the transaction was an isolated one—not involving moral turpitude; that it must have appeared to them more like an irregularity in banking matters than an absolute wrong, and that for judgment honestly exercised no action will lie.' It is undoubtedly true that the directors who so acted were, with one exception, men of business experience, and perfectly honest. But this would not exonerate them if they with the best of intentions knowingly retained a dishonest man. The institution was small. Its whole working

force consisted of Smith himself, a teller, a bookkeeper, a stenographer and a janitor, all subject to Smith's direction. If the directors were going to entrust the money of the depositors (over 3,000 in number in 1913) to the keeping of one man, that man should, certainly, have been above suspicion. Now, what did the directors know? They knew that Smith had lent money in disregard of the by-laws; that he had failed to advise with Mr. Odell, whom he saw daily; that he had failed to make the proper entries, not from forgetfulness or carelessness, but because he intended to conceal what he had done; they knew (for they were so informed by the examiner and the Commissioner's letter) that he had done it more than once, and they knew, too, that in doing so he had, necessarily, either falsified the general ledger or caused it to be so falsified. The falsification of books or the making of a false statement of facts is a 'high misdemeanor' under Section 17 of the Trust Companies Act. Under these circumstances had they given the matter real consideration it seems to me that they would have come to no other conclusion than they had in their employ a man who was willing to deceive them."

AUTHORITIES.

The principle at common law, in the absence of bond conditions.

Story's Equity Jurisprudence, Vol. 1, page 240:

"Sec. 215. Thus, if a party, taking a guaranty from a surety, conceals from him facts, which go to increase his risk, and suffers him to enter into the contract under false impressions, as to the real state of the facts, such a concealment will amount to a fraud; because the party is bound to make the disclosure; and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist. So, if a party, knowing himself to be cheated by his clerk, and, concealing the fact, applied for security, in such a manner, and under such circumstances, as holds the clerk out to others, as one whom he considers as a trustworthy person; and another person becomes his security, acting under the impression, that the clerk is so considered by his employer; the contract of suretyship will be void; for the very silence, under such circumstances, becomes expressive of a trust and confidence, held out to the public, equivalent to an affirmation."

Page 349, Sec. 324. " * * * The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage, taken

> of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract. Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety. If any stipulations, therefore, are made between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract * * * "

Phillips v. *Foxall*, 7 L. R. Q. B. D. 666.

In this case Foxall became surety for one Smith, employed by Phillips, agreeing to make good and be answerable for any loss not exceeding the sum of 50£. Thereafter Smith appropriated moneys to his own use, which, upon being discovered by Phillips, she agreed to accept repayment of in small installments continuing him in her service. The facts regarding the defaults and arrangements for payment were not communicated to surety and he pleads this failure as a defense to payment of losses occurring after defaults became known to employer. Plea held good.

Case heard before Cockburn, *C. J.*, and Lush, Blackburn and Quain, *JJ.* Opinion of Cockburn, Lush and Quain, delivered by Quain, *J.* (Blackburn, *J.*, separate opinion).

> Quain, *J.* (p. 672): "We think that in a case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service."

He states the principle to be same as if dishonesty had existed to the knowledge of employer before surety became bound, citing *Smith* v. *Bank of Scotland*, 1 Dow. 272, 292; *Railton* v. *Matthews*, 10 Cl. & F. 934, 943, and distinguishes *Hamilton* v. *Watson*, 12 Cl. & F. 109, and *North British Ins. Co.* v. *Lloyd*, 10 Ex. 523, 24 L. J. (Ex.) 14.

Again, at page 674:

> "If the guarantee at its inception was founded, as suggested by Lord Eldon in Smith *v.* Bank of England, on the trustworthiness of the servant, so far as that was known

to both parties, as soon as his dishonesty is discovered and becomes known to the master, the whole foundation for the continuance of the contract as regards the surety fails; and it seems to us in accordance with the plainest principles of equity and fair dealing, that the master should on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, then he must himself stand the risk of loss arising from any future dishonesty."

Again, at page 675, quoting Lord Loughborough, in *Rees* v. *Barrington,* 2 Ves. 540, 543:

"You cannot keep his bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

At page 676 he distinguishes *Shepard* v. *Beecker,* where surety after notice of default elected not to get off bond, 2 P. Wms. 288, 290.

At pages 677-678, he quotes with approval the dictum of Malins, *V. C.,* in *Burgess* v. *Eve,* Law Rep. 13 Eq. 450, 458:

"My opinion is (he says) and I have no hesitation in expressing it, that a person who gives a guarantee would have a right to say to the person taking it, 'you will continue at your own peril to employ the person on whose behalf I gave the guarantee'; provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the persons giving that guarantee for him. If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because the Court would direct the bond to be delivered up to be cancelled."

Blackburn, *J.,* comes to same conclusion as others, but only on strength of *Burgess* v. *Eve.*

Brandt on Suretyship and Guaranty, p. 494.

Sec. 368. "Where there is a continuing guaranty for the honesty of a servant, if a master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing continues him in such service without the knowledge or consent of the grantor, express or implied, he cannot afterwards have recourse to the guarantor to make good any loss which may arise from the dishonesty of the servant during the subsequent service. If the dishonesty had existed before the surety

became bound, and the master had concealed it, the surety would not have been liable, and the cases are the same in principle. * * * "

Morris Canal v. *Van Vorst,* 21 N. J. Law 100, 131.

Nevins, *J.* "Under the 6th and 7th notices, I think the defendant has a right to show that she was prejudiced by an omission on the part of the plaintiffs, to give notice of defaults by A. B., known to them. Such defaults could not be known to the surety without notice from the plaintiffs; and if they knew of them, it was their duty instantly to advise the surety of them, that he might secure himself against the consequences. If they failed to do so, they failed in an essential part of their duty; and if the surety has been prejudiced, he has a right to this defense. If there be negligence on the part of the obligee, which results to the injury of the surety, the latter has a right to show it."

Saint, et al., v. *Wheeler & Wilson Mfg. Co.* (Sup. Ct. of Ala., Jan. 26, 1892), 10 Southern 539, 543.

"They insist that Saint was at that time a defaulter by embezzlement; that Walls knew this fact, and, without giving any notice of it to them, he, acting for the company, continued Saint in its employment, and committed other funds to him, which were also converted; and that this action of Walls discharged them from all liability for funds thus converted after he knew of Saint's dishonesty. The general pinciple here relied on finds abundant support in the authorities. In the leading case of Phillips *v.* Foxall, L. R. 7 Q. B. 666, the proposition is thus stated by Quain, *J.*: 'We think that in a case of continuing guaranty, &c.' (quoting from Phillips *v.* Foxall). And this proposition is rested upon considerations which, to our minds, are eminently satisfactory. Premising that had a default involving dishonesty, and occuring before the surety became bound, been known to the creditor, and concealed by him from the surety, the effect would have been to discharge the surety—a doctrine which appears to be well established—the court proceeds to declare the same result from a concealment of dishonesty pending a continuing guaranty, as follows: 'One of the reasons usually given for the holding that such a concealment (at the time the surety enters into the obligation) would discharge the surety is that it is only reasonable to suppose that such a fact, if known to him, would necessarily have influenced his judgment as to whether he would enter into the contract or not; and, in the same manner, it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that after the servant's dishonesty in the service had been discovered

the guaranty * * * should continue to apply to his future conduct, when the master chose, for his own purposes, to continue the servant in his employ, without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination.' The citations directly suppporting this conclusion are *quasi dicta* of Lord Redesdale in Smith *v.* Bank, 1 Dow. 287, and of Malins, *V. C.*, in Burgess *v.* Eve, L. R. 13 Eq. 450; but the case was subsequently followed in England and the United States and nowhere abstractly doubted. We follow these authorities and adopt their conclusions as sound in principle. Sanderson *v.* Aston, L. R. 8 Exch. 73; Brandt, Sur. Sec. 368; Roberts *v.* Donovan, 70 Cal. Barnes, 64 N. Y. 385; Newark *v.* Stout, 52 N. J. Law 35, 18 Atl. Rep. 943."

Sooy ads. State, 39 N. J. L. (10 Vroom) 135, 147.

Beasley, *C. J.* "In my opinion, the law should be regarded as at rest upon this subject to the extent that it is the duty of a person taking a guaranty for the good conduct of an employee, to disclose the past malpractices of such employee in the course of the business to which the guaranty relates, and that if such duty is not performed, the instrument so taken is, *ipso facto*, invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implications inevitably arising from his own conduct."

Dinsmore v. *Tidball,* Ohio Supreme, 34 Ohio 411.

Bond of individual sureties for express agent. Agent had been formerly employed by same company and was known to have been dishonest in that employment. Officer of company gave him form of bond to have filled out not knowing who sureties were to be. Bond is executed and sent to officer at a distant place. No disclosure of previous defaults. Verdict by jury for sureties—affirmed on error as to points of charge. Court says at page 418, "Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent is not bound, under all circumstances, to communicate to the guarantor every fact within his knowledge which increases the risk; yet, we think there can be no doubt, either upon principle or authority, that where an agent has acted dishonestly in his employment, the

principle with knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstance would be a fraud upon the guarantor." The bad faith in withholding from the guarantor such information, so material to the risk assumed, is manifested not only by the fact that the dishonest character of the agent was peculiarly within the knowledge of the principal, but the holding of him out as a person entitled to confidence by continuing him in the service was equivalent to a declaration that the principal had no knowledge of the dishonesty of the agent.

White, Admr., v. *Life Ass. of Am.*, 63 Ala. 419, 35 Am. Rep. 45. Alabama Sup. Court, Dec., 1879.

Case involved question of discharge by conduct of creditor. Court says (p. 46):

> "The contract of a surety imports, it is said by Judge Story, entire good faith and confidence between the parties, in regard to the whole transaction. The creditor being informed of the relation, is bound to the duty of disclosure of all facts and circumstances which are calculated to affect materially the discretion of the surety or the degree of his responsibility. The good faith which must be observed in the making of the contract, must be kept inviolate in all subsequent transactions between the creditor and principal."

Aetna Insurance Co. v. *Fowler*, 108 Mich. 557, 66 N. W. 470, Michigan Supreme Court 1896.

Bond of individual sureties for insurance agents providing for faithful performance and for a turning over of funds as per instructions from employer. Evidence showed instructions were to remit by the 12th of each month and a three-months' default prior to September 1st. Company had not required a strict compliance with instructions, but on August 1st became aware of employees' misappropriations. Judgment for plaintiff. Reversed. Page 470:

> "The duty which the company owed to the sureties was not a duty of active vigilance to ascertain whether the agent had been guilty of fraud (the sureties undertaking was a guaranty of his fidelity), but what was due from the employer was good faith to the sureties. Just as it would have been a fraud to withhold knowledge of previous dishonesty of the agent presumably not known to the sureties, but possessed by the company, so it would be a

breach of good faith for the company to continue the agent in a place of trust; after discovering his dishonesty or defalcation, which is presumptively and in fact unknown to the sureties, and without notifying the sureties of the facts and giving them an opportunity to elect as to whether they will continue the risk. This is the doctrine of the leading case of Phillips *v.* Foxall, L. R. 7 Q. B. 666. The case of Ins. Co. *v.* Simmons, and Telegraph Co. *v.* Barnes, are not inconsistent with this. The substance of the holding in each of these cases is that the mere failure of remittance does not necessarily amount to notice of dishonesty on his part, and that applies to the present case as regards the charges occurring before August. There is no evidence that prior to August the company had actual notice that Fowler had converted any of the funds to his own use, or was more than negligent in remitting or collecting the premiums, but as to the transactions in August the case is different. Under section 9191 How. Ann. St. it is made an offense for an insurance agent to receive and invest money of the company without its assent, and as we before stated, we think there was testimony tending to show notice to the company about the 1st of August that Fowler had invested the funds of the company in realty. If the company through its special agent then knew this fact, it can be said to have had notice of the dishonesty of the special agent and, if it had such notice, it was the duty of the company not to longer trust its funds with the agent until the sureties had consented with knowledge of the facts, to be held responsible for the acts of a dishonest agent." Brandt Sur. Sec. 423; Ins. Co. *v.* Scott, 81 Ky. 540.

La Rose v. *Logansport Nat. Bank,* 102 Ind. 332, 1 N. E. 805.

The authorities in cases where bond clauses are considered.

Admitting, then, that as the authorities abundantly testify, there is an obligation, even in the absence of express covenants, to act in good faith, between the parties, obligee and surety, how much greater and more solemn is that obligation, how little capable of argument when it takes the form of plain simple written covenants, as in the bond in suit.

Rice v. *Fidelity & Depo. Co. of Maryland,* 103 Fed. 427 (C. C. of Appeals, 8th Cir., July, 1900).

Agreement in writing on separate instrument by employer at time of giving bond or shortly after that checks signed by prin-

cipal would have to have counter-signature of at least one other person. Sanborn, *J.*, at page 433:

> "Again, the bond and the instrument of Aug. 30, 1895, must be read, construed and enforced together. The contract of these parties consists of all the stipulations and agreements in both instruments. Both instruments are parts of a single contract. When they are so read, the agreement of these parties is found to contain mutual covenants, a covenant by the employers that they will invariably require the counter-signature of their bookkeeper Grible on all checks of Perry against their account and a covenant of the Fidelity Co. that it will pay the losses resulting from the dishonest and fraudulent acts of Perry. Now, the plaintiffs have entirely failed to keep their covenant. Consequently they cannot enforce the fulfillment of the covenant of the Fidelity Company. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform." Cases cited.

Gamble-Robinson Co. v. *Mass. Bond & Ins. Co.*, 129 N. W. 131 (Sup. Ct., Minn., 1910).

The bond contained a clause for notice on discovery of fraud or dishonesty making surety liable. Employee salesman and collector. He presented a report showing a balance of some $500 due and no cash. Made explanation that credits, allowances, etc., would wipe out balance. Employer checked books sent two inspectors into territory of man and accepted $75 in monthly installments from him without notifying surety. Then, when a new shortage was discovered discharged him, made claim and gave notice. Direction for defendant. Affirmed. Court says:

> "In the present case the insured was required to report acts of dishonesty; that is, acts which should have satisfied the officers as reasonable men that Frisbie had been guilty of dishonesty. *The object of requiring the notice was to enable the insurer to make investigations and take the necessary steps to indemnify itself.* After ascertaining the facts, and being informed that there was a probable shortage, the plaintiff was required to give the notice within a reasonable time. The officers were bound to comply with the terms of the bond and the delay until Sept. 28th was inexplicable on any reasonable theory. The question of shortage had passed beyond mere suspicion. It was standing out as a probable fact and there was no further ground for hesitancy. It was not necessary to brand Frisbie as a thief. All that plaintiff was required to do was lay the facts before the insurer."

National Surety Co. v. *Long,* 125 Fed. 887 (C. C. of Appeals, 8th Cir., Nov., 1903, Eastern District Arkansas).

Bond for faithful performance and as against loss on a building contract. The contract provided for completion by Sept. 1st and fixed $5 per day as liquidated damage for each day after Sept. 15th; that completion was delayed. Contractor abandoned work Sept. 9 and left. Owner notified surety Sept. 12, asking them to complete, which they refused to do. Owner completed and sued for $3,037.44, being excess of cost over contract. Proof showed that owner knew on Sept. 1 that building was not finished, no roof, windows, doors, floors or plastering.

Bond contained a clause making its liability limited to and subject to the conditions therein set forth, "which shall be conditions precedent to the right of the obligee to recover hereunder." Also failure, neglect or refusal of obligee to keep and perform any matter or thing stipulated by it to be done shall relieve surety.

Bond provided that should principal fail, neglect or refuse to keep, do or perform the terms of his contract obligee shall immediately write surety at N. Y. Also same provision, should it appear that he has abandoned the work or will not be able or does not intend to carry out or perform the contract. Also clause, that in such event surety could assume contract, sublet and be entitled to balance due principal.

Judgment for plaintiff below. Writ of error, Court says, p. 889:

> "In this state of the case the Circuit Court refused to instruct the jury to return a verdict for the defendant and charged them that the time fixed by the contract for the completion of the building was Sept. 15th; that if the plaintiff gave the notice of the inability or failure of the contractor to perform his contract to the surety company in such time as a man of ordinary prudence would have given it under similar circumstances, they might return a verdict in his favor, but that if he was guilty of negligence in this matter, their verdict should be for the defendant. The surety company excepted to these rulings and it has assigned them as error.
>
> "The care or negligence with which an obligor, who fails, seeks to perform his contract, is no defense to an action for damages for his failure. The only test of the right to recover in such an action is the existence of the breach of the covenant. It is no answer to an action for a failure to pay a promissory note that the maker, although he paid no part of it, exercised all the care to pay it that a person of ordinary prudence in similar circumstances

would have used. It is no defense to an action for the breach of a contract that, although the obligor failed to perform it, yet he exercised ordinary care to do so. The very purpose of a promise or of a covenant is to relieve the obligee of all inquiry relative to the care or negligence with which the obligor acts in its fulfillment, and to impose upon the latter the absolute obligation to perform it. Nothing less than full performance satisfies the undertaking. The obligation of a promise or of a covenant to pay a debt or to do an act, is not to use ordinary care to comply with the terms of the agreement, but it is to perform it, and, in an action for its breach, it is not material what care the obligor used, or what negligence he was guilty of, in his endeavor to fulfill it. The only question is, did he perform his contract? Guarantee Co. *v.* Mechanic, etc., Co., 183 U. S. 402. The covenant of the plaintiff in the case under consideration was to immediately notify the surety company of any failure or inability of the contractor to construct and complete the building at the time and in the manner specified in the contract, and the question was not whether or not, although he failed to give the notice, he had exercised ordinary care to do so, but whether or not he had actually given the notice immediately upon the appearance of the known inability and failure of the contractor to perform his agreement. The Circuit Court fell into an error when it instructed the jury that the care or negligence of the plaintiff conditioned his right to recover here."

Again at page 890:

"It is said that the question whether or not this notice given eleven days after the known failure of the contractor was an immediate notice was a question for the jury, and was properly submitted for their consideration. There may be cases where the sufficiency of a notice in time and manner of service should be submitted to the consideration of the jury. Cases where the evidence is contradictory, where facts and circumstances are established which render doubtful the question whether or not there has been a fair compliance with the provisions of the contract in this regard, may authorize this course of procedure. But there is nothing of this character in the case in hand. The act of giving the notice was a simple one. Its performance required nothing but the mailing of a writing containing the notice. It could have been performed as well on Sept. 1st as upon any later day, and its performance would have required less than an hour of time. No facts or circumstances are established to excuse the delay. Under these circumstances, there is no question for the jury, because the evidence conclusively shows that the plaintiff did not immediately notify the surety company of the failure of the contractor when he first learned that fact."

And again p. 892:

"The parties to this bond agreed that the failure, neglect or refusal of the obligee to fully perform any matter or thing in this bond stipulated to be done, kept or performed by him, at the time and in the manner specified, should relieve the company from all liability under it. On Sept. 1st the principal of the bond was not able to carry out or perform the contract of construction which he had made with the plaintiff, and he had neglected and failed to complete the building upon the day when, by the terms of his contract, he had agreed to finish it. The plaintiff had covenanted with the surety company in the bond that in the event of such inability or failure he would immediately notify the defendant, in writing, of that fact. He failed to fulfill this condition precedent to the liability of the company. That company was the surety of the contractor. If a condition of the liability of a surety company known to the obligee is not complied with, the surety is discharged; citing cases.

Again this bond contains the mutual covenants of the parties—covenants by the surety company that Humphreys, the principal, should construct the building and keep it free from liens; covenants by the plaintiff that, if Humphreys was unable or failed to perform the contract in time and manner therein specified, he would immediately notify the surety, and that the latter might then take the contractor's place. The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account he cannot enforce the fulfillment of the covenant of the defendant. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party, for a subsequent failure on his part to perform." (See cases cited.)

"The plaintiff failed to comply with the conditions precedent upon which he knew and upon which he had agreed that the defendant contracted to be bound, and he committed the first substantial breach of the contract between them. On account of these facts, he was not entitled to recover anything of the defendant, under the evidence in this record, and the jury should have been instructed to return a verdict in favor of the surety company."

United States v. *Fidelity & Deposit Co. of Maryland* (Circuit Court of Appeals, Second Circuit, Apr. 13, 1915), 224 Fed. Rep. 866, 872.

During the military occupation of Cuba by the United States, the President by an order authorized the extension of the postal service over the island, and by virtue of such

order the Postmaster-General appointed a Director-General of Posts for Cuba. The latter established a Bureau of Finance, appointed a chief thereof, and required him to give a bond. Such bond, given by defendant, named the Director-General as the "employer," recited that it executed on the faith of statements and declarations made by the employer, and that it should become void if the employer or his successor should fail to promptly notify defendant of the discovery of any act of the employee which could be made the basis of a claim under the bond, or if, after discovery of any such act, the employee should be intrusted with money or property without notice to and the consent of defendant. At the time the bond was given the Director-General knew that the employee had previously embezzled funds coming into his hands officially, and also knew of continuous embezzlements thereafter, but withheld such knowledge from defendant. HELD, in an action by the United States on the bond, that, having designated the Director-General as its agent to make the contract, plaintiff was bound by its terms, that the requirement of notice by the named employer was reasonable and proper, and that the violation of such requirement invalidated the bond.

Before Lacombe, Coxe and Rogers, Circuit Judges.

Opinion by Lacombe, Circuit Judge. Affirmed.

MARTIN, District Judge, page 872:

"Such conduct under ordinary contracts would constitute a fraud and invalidate the bond (failure to notify). The surety has the right to infer that the continuance of the employee in the service of his master is, in effect, an assertion that the master has no knowledge of any criminal conduct in the service of his servant. Where silence is sure to effect deceit, silence is culpable. 'Neither in morals nor in law can an obligee stand by and knowingly allow an obligor to take a risk which the former knows the latter has no intention to assume.' If a man knows that his servant has betrayed his trust, and he still holds him out as a trustworthy man, it is deceit.

In Franklin Bank *v.* Cooper, 36 Me. 179, the defendant had executed a bond as surety for the good conduct of the cashier of the bank. The bank officers failed to inform the surety that the cashier was a defaulter at the time when the bond was executed. There was a judgment for the defendant. In the opinion of the Court this language is used: 'The law should be regarded as at rest upon this subject, to the extent that it is the duty of a person taking a guaranty for the good conduct of an employee to disclose the past malpractices of such employee in the course of the business to which the guaranty relates, and that if such

> duty is not performed the instrument so taken is *ipso facto* invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implications inevitably arising from his own conduct."

See, also, *Smith* v. *The Governor and Company of the Bank of Scotland*, 1 Dow. 272; *Phillips* v. *Foxall*, L. R., 7 Q. B. 666; *United States Life Insurance Co., etc.*, v. *Salmon*, 91 Hun. 535, 36 N. Y. Supp. 830; *Howe Machine Co.* v. *Farrington*, 82 N. Y. 121; *Connecticut General Life Ins. Co.* v. *Chase*, 72 Vt. 176, 47 Atl. 825, 53 L. R. A. 510. A large number of other cases may be cited in support of this doctrine, but it is so well settled that further citations are unnecessary.

Guarantee Co. of No. America v. *Mechanics Savings Bank, etc. Co.*, 183 U. S. Rep. 402, at p. 416.

Mr. Chief Justice Fuller delivered the opinion of the Court:

> "The teller's bond, as originally given, expired January, 1889, and was renewed from year to year. Before each renewal the bank was informed by the company that it was necessary that a certain certificate by the president or cashier should be furnished, which was done, and stated, among other things, that the accounts of the teller had been examined and verified by the finance committee of the bank. The bond provided that it was issued and renewed 'upon the express understanding that the employee has not within the knowledge of the said employer at any former period in this or other employment been guilty of any default or serious dereliction of duty'; that the employer shall observe or cause to be observed, all due and customary supervision over the said employee for the prevention of default and that there shall be 'an inspection or audit of the accounts or books of the employee on behalf of the employer at least once in every twelve months from the date of this bond.'
>
> The company, not unnaturally, contends that as when the bond was renewed in January, 1892, the bank's books showed that the employee was a defaulter in the sum of $19,600 understate liabilities, and of $3 765.44 abstracted from bills receivable, both of which could have been detected by the taking of a trial balance as is customary, or a mere comparison between the books kept by Schardt and the individual ledger, and a correct footing of the notes, the bank had not only not complied with its engagements above referred to, and falsely certified to a verification which in fact had not been had, but was guilty of such *laches* as in itself to defeat a recovery.

These are matters which, while not controlling our decision, should be considered in connection with that aspect of the case which we regard as decisive.

In addition to the provisions already mentioned, it was agreed 'that the employer shall at once notify the company on his becoming aware of the said employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.'

The legislation of Tennessee and the decisions of its courts placed dealing in futures, when either party did not contemplate delivery, in the category of gambling, and aimed to suppress it. Allen *v.* Dunham, 92 Tenn. 257; McGrew *v.* City Produce Exchange, 85 Tenn. 572; Palmer *v.* State, 88 Tenn. 553; act of March 30, 1883, acts 1883, c. 251, 331.

The evidence showed that in the summer or fall of 1892 the cashier of the bank was told that the teller was part owner in a concern engaged in speculative business; he at once informed the president of the bank, and also called Schardt's attention to the matter, who admitted that he had once been engaged in such a concern, but said he had sold out, and also that he had speculated to some extent, but had ceased to do so. The cashier further testified that he afterwards received an anonymous letter that Schardt was speculating, and showed it to the president; that he spoke to Schardt about it; that the latter said he thought he knew the author, and asked for the letter, that he might bring the party before the cashier and make him acknowledge that it was false. The letter was given him, but nothing came of it, although he was asked about it more than once. This conversation was reported to the president. A leading director and a member of the finance committee was shown by another director an anonymous letter to him, to the same effect, which was reported to the president. The letter stated that Schardt was in partnership in a bucket shop. Schardt said it was a lie, and brought his partners before the president and the two directors, and they said that they had opened a brokerage association with Schardt, but that Schardt had sold out. This director subsequently heard again that Schardt was speculating and went to Schardt's house and interviewed him, and he said he did not own any stocks at all; he had sold everything he had. He heard this again shortly after the cashier's bond was given, and Schardt again denied it. Complainant did not put the president of the bank on the stand.

In these circumstances was it the duty of the bank to notify the company of what it had heard?

In American Surety Company *v.* Pauly, 170 U. S. 133, 144, which was an action against the maker of a bond given to insure a bank against loss arising from acts of fraud

or dishonesty on the part of its cashier, the applicable rule was thus laid down:

'If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the surety company. This is a well established rule in the law of insurance. * * * As said by Lord St. Leonards in Anderson *v.* Fitzgerald, 4 H. L. Cas. 484, 507, "it (a life policy) is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken according to law, most strongly against the person who prepared it." There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank.'

But this rule cannot be availed of to refine away terms of a contract, expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon.

Whatever the common law duty on the part of the employer to notify the guarantor of the fraud or dishonesty of the employee, whose fidelity is guaranteed, the parties to this contract undertook to declare the duty of the bank to the company in certain specified particulars. It required that the employee should not have been guilty of previous default or dereliction within the knowledge of the employer. It provided for notification of any act of the employee which might involve a loss without unreasonable delay after the occurrence of the act came to the knowledge of the employer. And it required immediate notification on the employer's becoming aware of the employee being engaged in speculation or gambling. The words 'becoming aware' were manifestly used as expressive of a different meaning from having 'knowledge.'

In Pauly's case, where the bond required that the company should be notified in writing 'of any act on the part of the employee, which may involve a loss for which the company is responsible hereunder, as soon as practicable

after the occurrence of such act may have come to the knowledge of the employer' it was ruled that it had been properly held 'that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicious, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty.'

But the bond before us not only contained that clause but the clause under consideration, which was a different and additional clause intended to secure the safety of prevention through timely warning.

It seems to us that the obvious meaning of 'becoming aware' as used in this bond, is 'to be informed of' or 'to be apprised of', or 'to be put on one's guard in respect to' and that no other meaning is equally admissible under the terms of the instrument. These are the definitions of the lexicographers, distinctly deducible from the derivation of the word 'aware', and that is the sense in which they are here employed. It is used in the same sense in the cashier's certificate on the renewals of the teller's bond.

To be aware is not the same as to have knowledge. The bond itself distinguishes between the two phrases and used them as not synonymous with each other. And, in view of the plain object of the clause, we cannot regard the words equivalent to 'becoming satisfied' though perhaps they may be to 'having reason to believe.' Even then these facts would have demanded investigation or notification, for we think the bank cannot be heard to say it did not have reason to believe that Schardt was speculating when it took his professions of repentance as sufficient assurance that he had ceased speculating, and turned its back on any independent inquiry or investigation. Our understanding on the provisions is that what the company stipulated for was prompt notification of information by the bank in regard to speculation or gambling on the part of the employee. It was entitled to exercise its own judgment on that information and had not agreed to rely on the bank's belief in that regard. It had the right to investigate for itself whether the bank did so or not. Notification of the existence of reason for inquiry was exactly what the clause was intended to secure. The bank neither investigated nor gave the company notice of the information it had, and substituted its own judgment as to the value of that information for that of the company. In our view this conduct on its part amounted to a breach of the stipulation.

The Circuit Judge in his opinion said, 'The language of the bond is that the employer shall report "on his becoming aware of the employee being engaged in speculation." Without now stopping to consider at length the meaning of

the terms here used, I am of opinion that, in the absence of fraud or bad faith, the failure to disclose the result of the inquiry made in this instance did not invalidate the bond as to the surety. Certainly, speculation in a reasonable and substantial sense is meant, such in length of time or magnitude as would make it serious. This, when brought to the attention of the bank officials, was a past event, and apparently in itself unimportant. The bank was under no duty by the contract or independently of it to actively institute or prosecute inquiries about Schardt, or to run down loose rumors or anonymous letters.' 68 Fed. Rep. 459, 465.

The Circuit Court of Appeals said, 'There is not the least evidence of any bad faith on the part of any of these officers of the bank, including Sykes, the old cashier, in not making a disclosure of what was known, but only of bad judgment in not being more considerably affected by their information.' 47 U. S. App. 115.

The quotations show that the Circuit Court of Appeals and the Circuit Court concurred in the opinion that if the president and directors had such confidence in Schardt that they did not feel called upon to make any investigation in view of the information that they had received, or to notify the company of that information, and were not guilty of intentional bad faith, then the bank could not be held to have violated the stipulations of the bond on its part.

As will have been seen, we are unable to accept this conclusion. The company's defense did not rest on the duty of diligence growing out of the relation of the parties, but on the breach of one of the stipulations entered into between them. The question was not merely whether the conduct of the bank was contrary to the nature of the contract, but whether it was not contrary to its terms. Engagement in speculation or gambling was what the company sought to guard against, because experience had admonished it of the probability that the speculation or gambling would lead to acts involving loss for which it would be responsible. Bad faith in the view of the courts below would not exist if the bank had such confidence in Schardt's integrity that it accepted his bare statement that he was not speculating as overcoming the weight of his admission that he had been. How anything but such a denial could be expected it is not easy to see, nor how careful and prudent men could have been justified in omitting independent inquiry.

The truth is that in spite of strict supervision and the pursuit of the best systems of keeping accounts, there is always a risk of defalcation. The prevention of defaults or their detection at the earliest possible moment are of

even more vital importance to financial institutions than to the guarantors of the fidelity of their employees. The provisions intended to protect the company in this case were not in themselves unreasonable and so far as they operated to compel the bank to exercise due supervision and examination, and due diligence, were consistent with sound public policy. We think it was the duty of this bank to have made prompt investigation, or at all events, to have notified the company at once of the information that it had, and we decline to hold that the bank's misplaced confidence in Schardt affords sufficient ground for enforcing the liability of the surety company on the theory of good faith.

Our conclusion is that the failure of the bank in the particulars adverted to defeats a recovery on the teller's bond for defalcation after information of Schardt being engaged in speculation was received."

Dominion Trust Co. v. *National Surety Co.*, 221 Fed. Rep. 618, at p. 619 (Third Circuit, Western District Penn., 1915):

"Woolsey, Circuit Judge. By bond executed and delivered, the National Surety Company undertook to reimburse the Dominion Trust Company, which is also described as the employer, for any loss sustained 'by or through the personal dishonesty, amounting to larceny or embezzlement, of the employee.' The bond was executed August 18, 1909, and was effective from September 1, 1909, to September 1, 1910. Then by various renewals, made upon dates prior to dates to maturity, it was continued from September 1, 1910, to September 1, 1911, and from September 1, 1911, to January 16, 1912, and from that date to January 1, 1913.

This action was brought by the trust company on December 28, 1912, to recover on the defendant's bond for loss sustained through the personal dishonesty of William T. Lyon, its president, the employee named in the bond. Lyon's dishonesty was of two kinds, occurring at different times. Recovery is sought, however, for loss occasioned by dishonesty of but one kind, the acts of which are as follows:

Lyon was a stockholder, as well as president of the trust company. He held a number of valid certificates of stock, each being for a very small number of shares. From time to time he surrendered these certificates to himself as president, cancelled them and then as president reissued to himself new certificates for greatly increased numbers of shares. He then sold and pledged the raised certificates. The loss sustained by the trust company in meeting its liability upon this fraudulent issue of stock amounted to $41,300, which in part is the sum sought to be recovered by this action.

The surety company defended upon two grounds: First, that its obligation of suretyship was restricted to loss sustained by the trust company 'through the personal dishonesty, amounting to larceny or embezzlement, of the employe,' and that the dishonesty of which Lyon, the employee, was guilty, was not of the kind against which it had obligated to protect the trust company; and, second, that by reason of the failure of the trust company to notify the surety company of other dishonest acts of the employee, it was relieved of liability for the loss sustained by the acts of dishonesty declared upon.

The District Court directed a judgment of non-suit, and upon motion refused to take off the judgment. These acts of the Trial Court constitute the principal errors assigned. * * * But the record, however, suggests another reason which conclusively precludes recovery by the plaintiff. The bond, by its terms, was 'executed by the surety company upon the following express condition,' agreed by the parties, to 'be conditions precedent to the right of the employer to recover,' the sixth of which is as follows:

'If at any time after the beginning of the term for which this bond is written * * * there comes to the notice or knowledge of the employer * * * any act, fact or information tending to indicate that the employee is * * * dishonest * * * the employer shall immediately so notify the company in writing * * *

Upon the discovery by the employer that a loss has been sustained * * * the employer shall immediately so notify the company in writing, * * * and shall within the time limited * * * make and furnish to the company in writing * * * claim for and proof of, loss, if any sustained, and failure to give such immediate notice or to make such claim or such proof within such time shall relieve the company from all liability hereunder on account of the employee.'

The circumstances which have a bearing upon the condition recited are these: Lyon raised the stock certificates during the period from February, 1910, to March, 1911. Discovery thereof was not made until February, 1912, and written notice thereof was not given the surety company until April 24, 1912. In the early part of Ju' 1911, which was after Lyon's dishonest acts in raising s. certificates, but before discovery thereof, the trust co. ny, through its treasurer and board of directors, discovered that Lyon had abstracted from the safe cash and securities belonging to the trust company amounting to $30,000. The loss occasioned by this dishonest act was partly repaired by Lyon giving and the trust company accepting certain mortgages. Notice of this dishonest conduct, however, was not given the surety company.

Not until long after these acts of dishonesty were discovered and composed was Lyon's resignation as president of the trust company demanded, nor was his re-election as a director opposed, even after the discovery of the over-issue of stock. An express condition upon which the bond was executed was that notice of dishonesty of whatsoever character should be given the surety company immediately upon its discovery. Of Lyon's dishonesty in taking cash and securities of the trust company, formal notice was never given the surety company, nor claim made for the loss thereby sustained. With full knowledge of his dishonesty, the trust company sought, and in complete ignorance thereof, the surety company from time to time renewed, the bond for Lyon's fidelity. We are of opinion that the failure of the trust company to notify the surety company of Lyon's dishonesty in abstracting cash and securities of the trust company in July, 1911, and its failure to make claim therefor in the manner required and within the time limited, in order thereby to enable it to protect itself from loss by such means as it might employ, was a breach of one of the conditions upon which the bond was issued, and thereby relieved the surety company 'from all liability' even for antecedent dishonesty of which notice was subsequently given, and therefore the District Court committed no error in directing a judgment of non-suit and in refusing to take it off."

Jex v. *Jewel Tea Co.* (Appellate Court of Ohio, June 29, 1917), 7 Ohio App. 167.

Union Central Life Ins. Co. v. *U. S. F. & G. Co.,* Maryland Court of Appeals, 58 Atl., 437.

Dressler v. *Bates,* 250 Fed. 525.

Larrabee v. *Title Gty. & Surety Co.,* (Sup. Ct. Pa. 1915), 95 Atl. 416.

POINT II.

The respondent failed in sustaining the burden of proving losses of the character specified in the bond, namely, losses arising out of the personal dishonesty of Smith amounting to larceny or embezzlement.

(Among others assignments Nos. 2, 3, 4, 10, 34, 35, 42, 45, 54.)

The contention of the appellant on this phase of the case entered into his motion for a non-suit—his motion for a direction and in addition is covered in some of his requests to charge which were denied. Its contention under this head colors and is colored by his contention under the second point.

Briefly our contention is that the plaintiff did not prove any losses by which Smith was shown to have benefited, but that on the contrary, if losses were shown either others than Smith were shown to have benefited or the losses were caused by the illegal acts of others than Smith or were not of a character specified in the bond, that is to say, losses arising out of the personal dishonesty of Smith amounting to larceny or embezzlement.

The plaintiff's evidence on the question was confined to a showing only of irregularities on the face of the books of the bank and to what may have been dishonest acts of Smith more nearly approaching forgery than any other dishonesty, such as the Mott and O'Connor drafts. They sought to spell out losses of the character specified in the bond by identifying the irregularities appearing on the face of the books as his handwriting, but irregularities on the face of the books were also shown to be in the handwriting of others, namely, Thompson and Mindnich, and at times the various steps in their proof of a single item would depend upon entries made in the handwriting of Miss Hicks or of persons to the witness unknown.

But it is submitted that in none of these instances was it possible even to infer a taking to the benefit of Smith or a loss indicating an act of dishonesty on his part amounting to larceny or embezzlement, and that on the contrary there was in some of the instances shown a benefit to persons other than Smith, for example, directors Scarlett, Foster and Munroe and Smith's friend Armstrong.

To sum it up the plaintiff showed that there were irregularities on the face of the books, some of them in the handwriting of Smith and some in the handwriting of others. That losses had accrued to the bank by reason of the use of spurious drafts on some of the savings department accounts; by the payment of a

large number of checks of favorite customers who had little or no money in the bank, but in none of these instances it is submitted did they show a larceny or embezzlement as those terms are limited in the bond in suit. That they confuse the extent of the liability with its character.

It is submitted that on this branch of the case as well as on all others the alleged errors of the Trial Court were influenced by his failure to appreciate the character of the covenants to be kept by the plaintiff, namely, that they were conditions precedent, and that this misapprehension colored his rulings on the admission and exclusion of evidence on request to charge as well as his refusal to non-suit and to direct a verdict.

AUTHORITES.

Guarantee Co. of North America v. *Mechanics Savings Bank and Trust Co.,* 100 Fed. 559. At page 560 the Court said:

> "The obligation of the surety by its expressed term was limited to that character of wrongdoing on the cashier's part (fraudulent acts equivalent to embezzlement or larceny). The evidence in the case is very explicit that the defalcations of Schardt during the period when the cashier's bond was in force, namely, from January 1, 1893, to April 17, 1893, was $22,964.17 of which $5,992.95 was on account of overdrafts paid by him but not authorized by the bank. This defalcation even if it had been in some respects fraudulent must necessarily have been on account of moneys paid out on the checks of customers who had no funds to their credit to meet them; but it is not shown that Schardt embezzled or appropriated any part of the proceeds of these overdrafts or received any benefit therefrom. If this be true it is manifest that while Schardt was individually responsible for it to the bank as his principal no act was done by him which was either embezzlement or larceny and consequently that the loss was not one which by any fair interpretation would bring it within the obligation of the surety on the bond of the cashier."

Dominion Trust Co. v. *National Surety Co.,* 221 Fed. 618.

> "There is no question that the Trust Company sustained a pecuniary loss by reason of the personal dishonesty of Lyon, its president. The question is whether the personal dishonesty of which Lyon was guilty was personal dishonesty of the kind against which the Surety Company undertook to save the Trust Company harmless.
>
> In construing contracts of fidelity insurance, we recognize that the general purpose of such contracts is to procure full indemnity, and that this purpose should not be

defeated, except by clear and unambiguous limitations, assented to by the parties, and that all ambiguities of expression, as in contracts of fire and life insurance, are to be construed most favorably to the assured. Guarantee Co. v. Mechanics Savings Bank, 80 Fed. 766, 26 C. A. 146. This principle of law, however, admits that the parties may, without ambiguity, assent to limitations in an undertaking of assurance. Such a limitation, we believe, was inserted in the bond sued upon and assented to by the parties. When the Surety Company undertook to make good and reimburse the Trust Company for pecuniary loss sustained by it through the personal dishonesty of its employe, it specified and defined in the bond, the character and the nature, and therefore the extent, of the personal dishonesty against which it undertook to protect the employer, and this was personal dishonesty 'amounting to larceny or embezzlement.' What amounts to larceny or embezzlement cannot be ascertained by the extent or the certainty of the pecuniary loss sustained, though such loss be in fact as complete as though money were stolen or embezzled. It must be ascertained from the meaning of the words by which the undertaking is limited, considered, in certain cases, in connection with the circumstances, if any there be, with respect to which the undertaking relates.

In maintaining that the dishonesty of its employe amounted to larceny or embezzlement, the Trust Company relied upon the case of the City Trust, etc. Co. *v.* Lee, 204 Ill. 69, 68 N. E. 485, which was an action upon a bond given by a surety company to indemnify the obligee against loss sustained 'through the dishonesty or any act of fraud of Morrow (the employe) amounting to larceny or embezzlement.' Morrow was an agent of the obligee. He collected rents for him, and out of the rents was entitled to commission. It was urged in that case, under a well-known principle of criminal law, that as Morrow had an interest in the funds collected to the extent of his commissions he could not be convicted of embezzlement, and as his dishonesty did not amount to that crime recovery could not be had on the bond. It appeared, however, that in the application for the bond a statement of the nature of Morrow's employment was made, and the court held, in construing the contract of suretyship most strongly against the surety, that the bond 'was intended to protect (the obligee) from financial loss from just such dishonest acts of Morrow, namely, the failure to account for and to pay over rents collected.'

We are of opinion that the law of the case cited is not applicable to the case under consideration, for in this case it does not appear, either from the bond or other instrument connected with its issuance, that indemnity against dishonesty of the type of which Lyon was guilty was

> sought or intended, and that the acts done by Lyon did not approach larceny or embezzlement within the definition of either of those crimes, but amounted more nearly to forgery, against which the Surety Company did not undertake to protect the Trust Company." * * *

The Trial Judge while admitting the correctness of the view above expressed attempted to avoid its effect by holding that the bond was to be construed under the laws of the State of New York; and he then read some alleged provisions of some alleged statutes of that State which he claimed broadened the common law definition of larceny and embezzlement—and this leads to our next point.

POINT III.

(Among others assignments Nos. 1, 15, 39, 40, 41, 51, 52, 53.)

The appellant claims prejudicial error in that the Trial Court in the absence of any proof or offer of proof of the law of the State of New York regarding larceny and embezzlement; charged the jury giving definitions of those crimes under the law of the State of New York and that said definitions as charged differ from the definitions of these crimes at common law, which the appellant contends should have been used in the absence of proof of the law of the State of New York, in that they included takings to the use of others than the taker.

Larceny at Common Law.

> Wharton on Crimes, Sec. 862: "The wrongful and fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner."

Embezzlement.

> Bishop says in Vol. 2, page 319: "The law of embezzlement is statutory—it originated in a bungling attempt to amend the common law of larceny—the first statute on the subject was the English one, 21 Hen. 8 C. 7, which provides 'where any caskets, jewels, money, goods or chattels are delivered to servants by their masters or mistresses to keep, if any such servant or servants withdraw him or them from their said masters and mistresses, and go away with the said caskets to the intent to steal the same and

defraud his or their said masters or mistresses thereof, contrary to the trust and confidence in him or them put by his or their said masters or mistresses; or else being in the service of his said masters or mistresses he emblezzles the said caskets, etc., or otherwise converts the same to his own use with like purpose to steal it—the transaction shall be a felon.'

No reason appears why this statute should not have a common law force in this country though there is little practical scope for it for in effect it only confirms a common law doctrine of larceny."

There was no offer and no proof of the law of the State of New York regarding larceny and embezzlement.

The Trial Court could not take judicial notice of a statute of a sister State.

Wigmore, Vol. 4, Sec. 2573:

"The laws of other nations and states—not being laws of the forum at all, except by casual adoption—will not be noticed—

(a) Relatively to each other, the States of the United States are independently sovereign, and for the present purposes foreign; hence their laws, equally with the laws of other nations, will not be noticed by the Courts of any one of the United States."

Greenleaf, Vol. 1, page 541, Sec. 486:

"In regard to foreign laws, the established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts."

And page 544, Sec. 489: "The relations of the United States to each other, in regard to all matters not surrendered to the general government by the national constitution, are those of foreign states in close friendship, each being sovereign and independent. Upon strict principles of evidence, therefore, the laws and public documents of one State can be proved in the courts of another only as foreign laws."

The Chancellor in 19 Eq. 193, *Condit* v. *Blackwell,* at page 196:

"The laws of Wisconsin are not, in fact or by theory of law, known to the courts of this state, and must be proved, either by experts, counsel learned in the law of that state, or copies of its statutes, with the decisions of its courts thereon."

The method of proving such a statute is provided by the Evidence Act, Sec. 23, Comp. Stat. Vol. 2, page 2228, and the method provided under the Federal Constitution and the Act of Congress referred to in *Title Guarantee, etc. Co.* v. *Trenton Potteries, infra.*

The present Sec. 23 of the Evidence Act is substantially the same as the provision in the Act of 1847, Gen. Stat., p. 1401, Sec. 22, referred to by Gummere, *J.*, for the Court of Errors in *Title Guarantee, &c. Co.* v. *Trenton Potteries Co.*, 56 N. J. Eq. (11 Dick. Ch.) 441 at 447.

See also *Boehm* v. *Rall*, 51 N. J. Eq. (6 Dick. Ch.) 541, at 545-546; *Ball & Hill* v. *Consolidated Franklinite Co.*, 32 N. J. L. (3 Vroom) 102, 104, and *Perkins* v. *Trinity Realty Co.*, 69 N. J. Eq. (3 Robb.) 723, at 730, affirmed 71 Atl. 1135.

There being no proof of any losses sustained by the bank which would fall under the classification of the common law definitions of larceny or embezzlement, namely, a taking to the use or benefit of Smith, and on the contrary there being evidence that some of the losses sought to be charged upon this appellant did or could have resulted to the benefit of others than Smith; the appellant was prejudiced by the error of the Trial Court in refusing to grant the appellant's motion to non-suit predicated as it was upon such lack of proof among other things and further in that the jury could under the charge of the Court fasten upon the appellant liability for losses of the bank from which Smith did not benefit.

POINT IV.

Failure to make audits and examinations and to take and use reasonable steps and precautions to detect and prevent acts on the part of Smith tending to render his surety liable.

(Among others assignments Nos. 46, 47 and 48.)

The Contention.

The pertinent section of the bond on this point is the 14th, as follows:

> "The receipt and retention hereof, or the making claim for any loss under this Bond by any Employer, shall be taken and held as a covenant upon the part of the Employer consenting and agreeing to all the terms, provisions and conditions herein contained, and that it will make frequent audits and examinations and at all times during the term hereof, take and use all reasonable steps and precautions to detect and prevent the commission of any act, upon the part of the Employee, which would tend to render the Company liable for any loss."

To the extent that this condition forms another of the conditions precedent set up in the bond, the argument and the author-

ities set up under the first point apply and will not be repeated at length.

The burden of proving a compliance with this, one of the conditions precedent in the bond, is upon the respondent. He alleges a compliance in his pleadings. His proof however fails to sustain his allegation, and this is equally true of the other conditions precedent upon which the appellant depends.

No member of the examining committee of the bank was called by the plaintiff, those officers of the bank who were called admit to but the most casual acquaintance with the books of the bank; no effort was made to check or verify the reports of Smith (Odell, p. 468) even on dividend days. Even after the warning regarding the Nones transaction the president himself is not sure that Smith's practice of omitting stub records is discontinued (Odell, p. 464). Odell was somewhat familiar with bookkeeping methods (p. 461). He says he never saw any irregularities on the face of the ledger (p. 478) yet Cloran, another of their witnesses says irregularities showed on each page of the ledger from 1911 on. Thus did the plaintiff bear the burden of proving his obligation under the bond.

Cloran's evidence is eloquent as to the conditions plainly appearing on the books of this bank. Some of his answers to questions on this phase of the case are as follows (p. 237):

> "Q Then from October, 1911, down to the close of the bank you found constant manipulation of the books? A Yes.
>
> Q And, in the first place, turning to the general ledger, those manipulations appeared constantly? A Practically every day.
>
> Q How do they appear, if you were going to describe to the jury, as a layman, or to me, as a worse layman, about bookkeeping, in what general way would you describe how these manipulations appeared every day on the general ledger? A They appeared in the form of false debits, over and under extensions, false footing, interlined figures, and alterations in figures."

(Page 238):

> "Q For instance, the figures over the top are perfectly obvious? A They are.
>
> Q Sometimes in lead pencil and sometimes in ink? A True.
>
> Q Had no place there at all? A None whatever.
>
> Q An appear perfectly plain to the eye? A Yes.
>
> Q Is there a single page in the general ledger from the date you have named when there are not this kind of ob-

vious monkeyings with the general ledger? A Well, they are very obvious to me, whether they are to others.

Q Will you answer my question? A They are obvious to me.

Q Now, Mr. Cloran, we have covered the point of the interlineations that appeared yesterday, sometimes they appeared over the top, sometimes on the left side or right side; they have no place there? A That is right."

(Page 239):

"Q Now, you mentioned yesterday at least one instance where there were assets that apparently belong in the liabilities column, or vice versa, I have forgotten which it was? A They are liability accounts, but the balance appeared in the asset column.

Q They are accounts which are obviously liabilities? A Could not be anything else.

Q Could not be anything else by their very terms, and where they are put in the general ledger in the asset column— A It won't appear by the calculations.

Q (*By the Court.*) The account would show they had more certified checks than they had issued, is that right? A Yes.

Q (*By Mr. McCarter.*) Do you recall more than one of these instances? A Oh, yes.

Q Several times? A I think I have testified already to two.

Q And maybe more? A Maybe three or four.

Q Well, what other obvious errors are there of this kind, or manipulations upon the face of the general ledger? A Well, there is the treasurer's checks.

Q What about them? A They show as an asset also at times.

Q Where they should have been liabilities? A Could not have been anything else.

Q About how many times was that? A About the same number of times, I should say, as the certified checks.

Q And can you remember any other mislocation of assets as liabilities, or liabilities in assets, beside the treasurer's checks and certified checks? A Yes, I mentioned one this morning, accrued interest payable.

Q That would be— A A liability account.

Q Obviously? A Yes.

Q The balance was in the assets? A Yes.

Q Plainly a manipulation? A Yes."

(Page 240):

"Q I say these errors, these manipulations, extend over all that period? A Oh, yes; either in one form or another."

(Page 241):

"Q I refer you to your examination in the case before Vice-Chancellor Stevens, page 1250 of your evidence, where you are reported to have said: 'Any understatement of deposit liabilities could always be discovered by a comparison of the item in the general ledger with the total in the individual ledger. This understatement of deposit liabilities became so great in 1913—upwards of $200,000—that it could have been very easily discovered by even a hasty examination of the books.' Did you say that? A I did.

Q Did you find an overstatement of collateral loans, bills purchased or cash, in your examination? A Oh, yes.

Q They could have been readily discovered, couldn't they? A I believe so, yes.

Q Would there have been the slightest difficulty in discovering the manipulations or irregularities in the under or over extensions? A No, sir; it is a simple arithmetical operation."

(Page 242):

"Q Any individual, without the use of either a pen or a pencil could have easily observed manipulations in the way of under or over extensions, could not he? A Yes.

Q I want to know if it is not a fact, from your examination of these books, that any ordinary business man, by following the methods necessary to check up and balance the usual individual or business checking accounts in any bank or trust company, would have found that the accounts would not reconcile or prove with the depositors' accounts? A That is true.

Q Did you find that on the face of the general ledger there existed obvious falsifications on practically every day from October, 1911, to August, 1913? A Yes.

Q I ask you if it is not true that it is impossible to open the general ledger for most of that period—that is, from October, 1911, to August, 1913—at a single page where falsities are not manifest, even to the lay observer? A That is true."

In addition, it appears by the evidence of other of the witnesses of the plaintiff to be treated upon another branch of the case, that the books of the bank were full of patent glaring irregularities (Thompson, Mindnich).

Even the fact that whereas the number of the depositors of the bank were increasing the amount of its deposits were decreasing aroused the officers to no further inquiry than that contained in the weekly reports of Smith to the finance committee.

There is no pretense that shows attention was ever directed to evidence of these irregularities on Smith's part. It is undisputed that there was an examining committee of the Board of Directors of the trust company which made periodic examinations of the books (Foster, p. 412; Odell, p. 480). Not one of this committee was called to testify by the plaintiff and hence the conclusion is inevitable that these obvious irregularities were discovered and ignored and that the trust company thereby in failing to bring the matters to the attention of the surety not only failed to observe the sixth covenant in the bond, to which we refer in Point I, but also violated the fourteenth covenant quoted above in not taking and using all reasonable steps and precautions to detect and prevent the commission of any act upon the part of the employee which would tend to render the company liable for any loss.

In this connection it is important to remember that notwithstanding the warning of the Nones transaction in 1909, not a step was taken in any way to check up or supervise the conduct of Smith thereafter. He was given freer rein after than he had theretofore, and the result was that by 1913 he had succeeded in bringing loss to the bank of hundreds of thousands of dollars.

AUTHORITIES.

The authorities quoted under Point I, of course, have equal force on this point to the extent that they deal with the question of the failure to observe the obligation of the condition precedent in the bond.

Hunt v. *Fidelity & Casualty Co. of N. Y.*, 99 Fed. 242 (Circuit Court of Appeals, Second Circuit of N. Y.)

Policy of insurance against loss through embezzlement of agent. Certain statements by employer made a part of the contract among which was one that cash would be compared and verified with accounts and vouchers monthly. Evidence showed this had not been done. Court directed a verdict for the defendant on this among other grounds. Affirmed. At page 245 the Court said:

> "In ruling that the promise of the assured had not been fulfilled, and that the defendant was therefore entitled to a verdict; the court below was clearly correct."

The above case is cited and followed in *Sinclair Co.* v. *National Surety Co.*, 107 N. W. 184.

See also *Young* v. *Pacific Surety Co.*, (Calif. Supreme) 137 Cal. 596, 70 Pac. 660.

Knight & Jilson Co. v. *Arthur Castle, et al.,* 87 N. E. 976, 27 L. R. A. (N. S.) 573.

Bond for faithful performance by a contractor of a building contract. Clause requiring notice of claim within ten days after default. Judgment for defendant affirmed.

The Court said at page 585 of L. R. A.:

> "There is, however, another branch of this case upon which appellant must fail. It is expressly stipulated in the bond that the liability of the surety depends upon the condition, among others, that the surety shall be notified in writing of any act on the part of said principal or his employees which may involve a loss for which said surety is responsible hereunder, within ten days after the occurrence of such act with a verified statement of the facts, etc. This is a condition precedent to a recovery, and compliance therewith must be averred and proved."

At page 588:

> "Nor is appellant right in its contention that the failure to give notice is a matter of defense. If the undertaking of the surety company had been generally to guarantee the performance of the contract, without condition, then the failure to give notice of the breach from which damages has resulted is a matter of defense * * * But that is not the contract we have before us. Here the surety company has imposed conditions of its liability—conditions which are not unreasonable, but for its protection and adapted to that end; and we must presume for a lawful end; and we cannot make a new contract for the parties, or extend the liability of one or the rights of the other * * * "

Rice v. *Fidelity & Deposit Co. of Maryland,* (Circuit Court of App., 8th Circuit), 103 Fed. 427.

The Court said at page 433:

> "When they are so read, the agreement of these parties is found to contain mutual covenants—a covenant by the employers that they will invariably require a counter signature of their bookkeeper Dribble, on all checks of Perry against their account, * * * Now, the plaintiffs have entirely failed to keep their covenant. Consequently they cannot enforce the fulfillment of the covenant of the Fidelity Company. * * *
>
> The result is that there was no error in the charge of the court that the failure of the plaintiffs to require the counter signature of their bookkeeper upon the checks of Perry upon their account was fatal to their action, if the agreement of August 30th, 1895, was the basis of the bond."

Brandt Suretyship and Guarantee, page 471:

> "It is a general rule, that if the condition, known to the creditor, upon which the surety agrees to become bound, is not complied with, the surety is discharged."

Weider v. *Union Surety Co.,* 86 N. Y. Supp. 105.

Bond against loss by fraud or dishonesty of employee amounting to larceny or embezzlement.

The Court says at page 106:

> "The bond also provided that it was entered into on the condition that the business of the employer shall be continued to be conducted in accordance with certain statements in writing * * * furnished by the employer, among which was one that employees cash securities and stock will be compared and verified with his accounts and vouchers twice a week. No attempt to keep this covenant was made."

The Court said at page 107:

> "It is well settled that parties to a contract have the right to insert any lawful statement and conditions that they may mutually agree upon, and which may be deemed necessary to protect their interests. The courts may not arbitrarily disregard such conditions when unmistakably and deliberately entered into between the parties. * * * The failure on the part of the plaintiff to comply with the stipulation to compare and verify the accounts of the said Harry Cohen constituted such a non-performance of a condition precedent required by the bond as to preclude any recovery thereunder."
>
> *Guarantee Co. of North America* v. *Mechanics Savings Bank, etc. Co.,* 183 U. S. Rep. 402.

POINT V.

(Among others assignments Nos. 1, 5, 6, 7, 8, 9, 10, 11 and 12.)

Finally the appellant contends that the Trial Court erred in its ruling on the exclusion and admission of evidence and on its refusal to charge as requested, all to the prejudice of the appellant.

Reason 1, page 135, line 8. Question to witness Thompson:

> "Q Haven't you heard it since? (Referring to Smith's habit of 'robbing Peter to pay Paul.' ")

This question was properly a subject of cross examination.

Reason 5, page 159, line 3. Question to witness Mindnich:

"Q Do you think those overdrafts were regular?" (Bruno & Miele.)

This question was properly a subject of cross examination, the answer to it having been given by witness at a former hearing.

Reason 6, page 169, line 1. Question to witness Mindnich:

"Q Is it not a fact that in the institution Savings Investment and Trust Company you have seen entries in their books indicating overdrafts?"

Reason 7, page 169, line 36. Question to witness Mindnich:

"Q Very frequent or more or less frequent?"

Reason 8, page 169, line 42. Question to witness Mindnich:

"Q Will you state whether or not more infrequently than such red ink entries were shown in the books of the Roseville Trust Company?"

Reason 9, page 170, line 17. Question to witness Mindnich:

"Q Is the same answer true with regard to your experience in the American National Bank?"

These questions should not have been allowed because conditions existing in other banks were not proper evidence nor did they go to the proof of larceny or embezzlement connecting Smith.

Reason 10, page 183, line 21. Question to witness Cloran:

"Q Can you, without refreshing your recollection, tell us what you found to be the total shortage shown on the books of the bank at the time of its closing?"

The admission of this evidence harmed the appellant in that it was calculated to impress the jury with the extent of the loss whereas they were confined to its character.

Reason 11, page 205, line 17. Question to witness Cloran:

"Q Now will you state whether or not in your opinion as a result of the examination of these transactions through the books of the Roseville Trust Company you are of the opinion that as to each of the said items of default in Schedule 'F' except the item of account of James Lees & Sons, the Roseville Trust Company suffered a loss in connection with each of said transactions?"

The admission of this evidence called for a conclusion and substituted the opinion of the witness for that of the jury.

Reasons 12 and 32, pages 274 and 275, line 42. Question and answer—Witness Vredenbergh:

> "Q Mr. Vredenbergh, it has appeared that certain of the deposit slips in evidence were recorded in the side book and individual ledgers and bear no mark 'O 55' and that other deposit slips in evidence were not recorded in the books and bear the mark 'O 55.' From your investigation of the books and accounts and of all the records will you explain, if you can, to the jury what that situation indicates to you? A The deposit tickets bearing no mark 'O 55' nor any other specially distinguishing mark came from the regular files of the trust company. They were where they ought to be. The other deposit tickets, those marked 'O 55' were not found in the regular file but were found in the box which Mr. Treasurer Smith used and therefore the distinction I drew as inquired in the question between the two classes of deposit tickets mentioned in the question is that the tickets marked 'O 55' were secreted by Smith for a purpose. Now have I answered?"

By this question and answer the jury are given not facts but the inference of the witness and an inference based upon what the witness thinks he knows of what existed in the mind of another.

For these reasons it is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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June Term, 1920.

Filed after the Oral Argument
by leave of Court.

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New Jersey Court of Errors and Appeals

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

vs.

NATIONAL SURETY COMPANY and RAYMOND E. SMITH,
Defendants-Respondents.

Action at Law.

SUPPLEMENTAL BRIEF FOR THE NATIONAL SURETY COMPANY IN ANSWER TO THE CROSS-APPEAL.

Before turning to that portion of the cross-appellant's brief that bears upon the subject of the cross-appeal, we feel that fairness requires a reference to an inaccuracy in that portion of their brief which bears upon the Nones transaction. On page 18 appears:

> "To the directors it appeared, as Smith explained it, that the chief reason for not entering the note in the books—which, when the transaction is analyzed, is the essence of the irregularity of the entries involved in the Nones transaction—was that Nones expected to need the loan from the trust company for only a short period."

The fact is, as admitted by Mr. Clark in his oral argument, that Nones, in his previous dealings with the trust company, had exhausted his collateral, and was unable to offer any further collateral for this particular loan. The illegality of the transaction therefore (section 1 of the Trust Company Act forbidding a discount without collateral) lies fundamentally behind the whole transaction, as well as in the method of sanctioning it without knowledge of the board, whose sanction by the by-laws was necessary and also by falsifying the books—a high misdemeanor—in order to conceal the transaction.

Turning now to the argument in support of the cross-appeal of the trust company, our understanding of their argument is simply this: They admit that the original bond anticipated its continuation, and that during the first three continuations no cumulative liability existed over and above the $20,000 named in

the original bond, but that owing to a change in phraseology in the last renewal (case, p. 527) the situation was changed, and notwithstanding the fact that the surety company received no additional premium for the alleged increase in its risk, a cumulative liability was thereby created. This contention is based upon the omission in the last renewal (case, p. 526) of the words

> "It is also conditioned on the part of the company that its liability under said bond and this continuation together shall not exceed the amount of said bond,"

which appeared in each of the three previous continuations (pp. 522, 523, 524, 525).

A moment's reflection will indicate that this contention is absolutely groundless. Turning to the original bond, it is evident from the 13th section (case, p. 520),

> "So long as the company and the employer agree so to do, this bond may be renewed and continued in force from year to year, and in case of any such renewal, the company's liability on behalf of the employee *shall be as continuous as if this bond had been originally written for a term including the period of such renewal*" (italics ours).

that the parties contemplated a continuous obligation and that in the absence of express language increasing the obligation and in view of the fact that the premium remained the same, the extent of that obligation was the same as had been provided by the original bond.

The above quoted section when read in connection with the whole bond indicates that a continuation by renewal was anticipated by the parties at the time the original bond was executed. When the first renewal was executed (p. 522) the company expressly continued in force the old bond by reference to its number for a definite time *subject to all the covenants and conditions of said bond.* The next two clauses in these certificates recite a few, but not all, of the conditions of the bond, making assurance doubly sure with reference to their being continued by the renewal. No one can question that the words at the end of the first paragraph, "subject to all the covenants and conditions of said bond," would have been sufficient to have continued in the renewal period all the terms and conditions that were set out at length in the original bond. When the last renewal was executed (p. 527), being for an indefinite period instead of a year, the company evidently concluded that this reference to a few, but not all, of the terms and conditions of the bond was unnecessary, and so exscinded them, including the one first above quoted,

evidently intending to have the bond which was expressly renewed "so as to cover according to its terms and conditions any acts or defaults of the said Raymond E. Smith dated after the date of the execution of the said bond, and before its termination as provided therein," speak for itself with reference to the terms and conditions and thereby making a continuing liability limited in amount to $20,000 for losses of the type specified in the bond occurring from the date of the original bond to the termination of the contractual relation by Smith's disappearance in August, 1913, and his consequent termination of his employment, such losses to be discovered within six months after such termination.

It seems, therefore, to us in view of the cross-appellant's concession that under the first three continuations no cumulative liability arose that its main contention is groundless, based as it is on a change in phraseology, or to speak more clearly, an omission of words which without consideration it contends imposes a double liability.

In this connection the theory propounded by counsel for the cross-appellant that the bank would have been better off, for instance, had it gone to another surety company after December 1, 1912, is in our opinion without merit. Had it done so it would have retained the *responsibility* of the National Surety Company for liability for loss occurring from December 1, 1908, to December 1, 1912, discovered within six months after the latter date, to wit, June 1, 1913, and it would have had for a new consideration to another company a liability of that company for the period December 1, 1912, to December 1, 1913, on which also the responsibility would have extended for six months discovery assuming that the new bond had the same type of conditions as this one. It will be observed that the cross-appellant's contention with reference to cumulative liability is based wholly upon a presumed failure by the omission of certain clauses to exclude the conclusion that it seeks to infer from the absence of certain language. The fact is that no presumption of double liability exists at all, the authorities being practically unanimous to the effect that under bonds of this nature, containing the same or equivalent phraseology, the liability throughout the term of the original bond, and the continuation periods, is limited to the one penalty contained in the bond.

We respectfully urge that the terms of this bond with its continuation certificates, including the last, provides a continuous liability for the consequences of the acts specified in the bond

from its date, December 7, 1908, to the termination of the contractual obligations upon Smith's retirement from the bank in 1913, subject to the conditions and covenants of the bond among which were those provided in the first section of the bond (case, p. 516), providing for a recovery for those losses only within six months after their discovery or within six months after the employment is terminated either by death, retirement or dismissal which made it possible for the bank (had all of the covenants and conditions of the bond been observed) to recover up to $20,000 for losses of the kind specified in the bond discovered within six months from Smith's retirement or dismissal, but occurring at any time between his retirement or dismissal and December 7, 1908. In other words, that there was no termination of the obligation until 1913, the various certificates continuing it automatically and that during each of the periods of continuation all of the bond terms were automatically and bodily shifted over to apply to that particular period covered by the continuation certificate. We cannot conceive a cumulative liability construction upon the instruments in this case particularly in view of the 13th condition of the bond (case, p. 520) and the terms of the last continuation certificate (case, p. 527) continuing the bond by specific number "so as to cover according to its terms and conditions any acts or defaults of said Raymond E. Smith *committed after the date of the execution of said bond and before its termination, as provided therein*"; its termination as provided therein in this instance being his retirement or dismissal from the service of the bank.

John Church Co. v *Aetna Indemnity Co.* (Ga. Court of Appeals), 80 S. E. 1093;

Rankin v. *U. S. Fidelity & Guaranty Co.*, 99 S. E. 314;

U. S. Fidelity & Guaranty Co. v. *Citizen's National Bank of Monticello,* 143 S. W. 997;

U. S. Fidelity & Guaranty Co. v. *First National Bank of Dundee,* 84 S. E. 670;

Chatham Real Estate & Improvement Co. v. *U. S. Fidelity & Guaranty Co.,* 90 S. E. 88.

It will be noted that the Court in the case of *Green* v. *U. S. Fidelity & Guaranty Co.* (Supreme Court of Tenn.), 185 S. W. 726, cited by the cross-appellant, refuses to accept the theory of cumulative liability, although it expressly considers the two New York cases, *Hawley* v. *Fidelity* and *Campbell Milk Co.* v *Fidelity,* upon which the theory was grounded. The Hawley case, as

pointed out by this court on the argument, is a case involving *two* bonds, and the Milk Company case, although it finds a cumulative liability on the bond considered, bases its authority for so doing upon the Hawley case. In addition, there is nothing in the report of the Hawley case to show what the penal sum of the bonds was, and it may be that the penal sum of each of them was greater than the recovery allowed, in which event the case would not be a precedent for the cross-appellant's theory of cumulative liability, even though but one bond were considered.

Respectfully submitted,

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