INDEX

PLAINTIFF'S TESTIMONY

NEW JERSEY SUPREME COURT,
BURLINGTON COUNTY.

WILLIAM HOLMES, Plaintiff, vs. FIRST NATIONAL BANK OF WRIGHTSTOWN, NEW JERSEY, Defendant.	Action at Law. Notice of Appeal.	10

To Willis P. Bainbridge, Esquire, attorney for plaintiff:—

Please take notice that defendant in the above entitled cause appeals to the New Jersey Court of Errors and Appeals in the last resort, in all causes in New Jersey, from the whole of the judgment entered in this cause. 20

Dated: November 30, 1928.

PALMER & POWELL,
Attys. for Defendant.

NEW JERSEY COURT OF ERRORS
AND APPEALS

WILLIAM HOLMES, Plaintiff-Respondent, vs. FIRST NATIONAL BANK OF WRIGHTSTOWN, NEW JERSEY, Defendant-Appellant.	On Appeal. Answer.

And thereupon, the said William Holmes, by Willis P. Bainbridge, his attorney, comes into court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray here that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters assigned for error and the judgment aforesaid in manner aforesaid were given them, in all things be affirmed.

WILLIS P. BAINBRIDGE,
Attorney for Plaintiff-Respondent.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

WILLIAM HOLMES, Plaintiff-Respondent, vs. FIRST NATIONAL BANK OF WRIGHTSTOWN, NEW JERSEY, Defendant-Appellant.	On Appeal. Grounds of Appeal.	10

The defendant-appellant in the above entitled cause hereby files the following grounds of appeal:—

1. Because the trial court refused to non-suit the plaintiff, upon plaintiff's opening to the jury.

2. Because the court permitted the plaintiff, William Holmes, to answer the following questions:—
"Q. Any conversation as to the bonds?
A. Yes, I asked—

BY MR. PALMER:

This is objected to unless the person with whom the conversation was had is established.

BY THE COURT:

Q. I understand you to say, Captain, it was with Mr. Smith or Mr. Titus?
A. Yes.
Q. You cannot recall which?
A. I do not."

3. Because the trial court permitted the witness, Paul H. Smith, to answer the following question:—

Q. Do you know whether the bonds of the Bank were insured or not."

4. Because the trial court permitted the witness Paul H. Smith, to answer the following question:—

"Q. Do you know whether or not the bonds belonging to Mr. Holmes were ever insured?"

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5. Because the trial court permitted the witness, Paul H. Smith, to answer the following question:—

"Q. Now, Mr. Smith, it was your duty, was it not, to examine all the securities in the Bank to see that they were there?"

6. Because the trial court permitted the witness, Robert W. Carter, to answer the following question:—

20 "Q. Do you know whether any insurance was ever placed on the bonds that were in your custody?"

7. Because the trial court permitted the witness, Robert W. Carter, to answer the following question:—

"Q. And you had conferences with Mr. Palmer as to how you should handle this Holmes matter?"

8. Because the trial court permitted the witness,

30 Robert W. Carter, to answer the following question:—

"Q. Well, did you have any conference with him in November and December at about the time that you had trouble in your Bank?"

9. Because the trial court permitted the witness, Robert W. Carter, to answer the following question:—

"Q. All right. Now then, tell me why you did not pay to Mr. Holmes for those bonds?"

10. Because the trial court permitted the witness, Robert W. Carter, to answer the following question:—

"Q. Did you lose any money because of the theft of your bonds?"

11. Because the trial court permitted the witness, Robert W. Carter, to answer the following question:—

"Q. Did you recover any money on those bonds from the insurance company?"

12. Because the trial court refused to non-suit the plaintiff upon the ground that no negligence had been shown on the part of the defendant.

13. Because the trial court permitted the witness, William Holmes, to answer the following question:—

"Q. Will you state as nearly as possible the words used by Mr. Carter on that occasion when he explained that they could not pay you for those bonds, and why?"

14. Because the trial court permitted the witness, William Holmes, to answer the following question:—

"Q. What was your purpose in writing that letter?"

15. Because the trial court refused to strike out the answer of the witness, William Holmes, to the question asked him and assigned as the fourteenth ground of appeal.

16. Because the trial court refused to non-suit the plaintiff at the conclusion of the plaintiff's case, upon the ground that there was no testimony in the case to show any negligence on the part of the defendant, and because there was not sufficient testimony before the jury as to the value of the bonds at the time that they were stolen.

17. Because the trial court refused to withdraw a juror and direct a mis-trial upon the ground that the case had been opened upon a theory of trover and conversion and testimony offered under that theory which was prejudicial to the defendant, upon the theory of negligence, which was the theory upon which the case was submitted to the jury.

18. Because the trial court refused to direct a verdict in favor of the defendant and against the plaintiff, upon the ground that the case had been opened on a theory of trover and conversion, as well as upon a theory of negligence, and that there was testimony offered on the theory of trover and conversion which was prejudicial to the defendant, upon the theory of negligence, and because the testimony showed no negligence on the part of the defendant, and because there was not sufficient testimony to go to the jury on the question of the value of the bonds.

19. Because the trial court refused to charge defendant's request to charge, as follows:

"1. That if the jury believe that the bond in question was stolen by the former cashier of the bank, and that the board of directors had no reasonable ground to suspect the integrity of the cashier prior to the discovery of the defalcation, then the verdict should be for the defendant.

2. That if the jury believe that the board of directors provided a reasonably safe place for the keeping of plaintiff's bond and exercised the same degree of care that it did with its property, and had no reasonable ground to suspect the integrity of the cashier prior to the discovery of his defalcation, then the verdict should be for the defendant.

3. That the burden is upon the plaintiff to show by a fair preponderence of the evidence that the defendant was guilty of negligence, either in its failure to use a reasonable degree of care in providing a safe place in which to keep the bond or in its selection of employees; and that if the plaintiff has failed to prove either of these elements of negligence, then the verdict should be for the defendant.

4. That the failure of the directors of the bank to detect the peculations of the cashier when examinations were held at regular and reasonable intervals by both the board of directors and the national bank examiner, is not such negligence as to make them liable for theft by the cashier.

5. That the plaintiff is bound by the testimony of his own witnesses and cannot contradict that testimony by other witnesses except in the case of surprise as to such testimony, and there is no proof of surprise in this case.

6. That a bank is not obliged to secure and pay for insurance against loss of securities of which it is only a gratuitous bailee, but is only bound to use a reasonable degree of care in its selection of a place in which to keep such securities and in its selection of employees.

7. If the jury believe that the defendant bank secured and paid for its insurance against loss by theft of securities which it owned, and securities which it held in any relationship other than as gratuitous bailee, their failure to secure such insurance for securities held as gratuitous bailee is no evidence of negligence and the verdict should be for the defendant.

8. There is no testimony in this case as to the kind or character, if any, of the insurance carried by the defendant, so that there is nothing to warrant any inference that the bank failed to insure any securities that it held as gratuitous bailee, belonging to the plaintiff."

PALMER & POWELL,
Attys. for Defendant-Appellant.

Service of copy of within grounds of appeal is hereby acknowledged this 14th day of December, 1928.

WILLIS P. BAINBRIDGE,
Atty. for Plaintiff-Respondent.

NEW JERSEY SUPREME COURT,
BURLINGTON COUNTY

WILLIAM HOLMES, Plaintiff, vs. FIRST NATIONAL BANK OF WRIGHTSTOWN, NEW JERSEY, a national banking corporation, Defendant.	Action at Law. Complaint.

Plaintiff, of the County of Burlington, in the State of New Jersey, says that:

1. The defendant is a national banking corporation organized and existing under and by virtue of the Acts of Congress of the United States, having its banking house and principal place of business in the Borough of Wrightstown, in the County of Burlington and State of New Jersey.

2. On September 12th, 1921, plaintiff deposited for safe-keeping with defendant, one $1000 Victory Bond of the United States of America, with coupons attached; two third Liberty Loan bonds of the United States of America, of the par value of $100.00 each, with interest coupons attached; one second $50.00 Liberty Loan bond of the United States of America with coupons attached; and two 4th $50.00 Liberty Bonds of the United States of America with coupons attached, and defendant promised and agreed to keep and safely preserve said bonds for the plaintiff until the return of the same was demanded by the plaintiff.

3. On November 20th, 1922, plaintiff demanded of the defendant that it deliver to him the said bonds but the defendant refused and neglected and still refuses and neglects to do so.

4. Notwithstanding defendant's promise to safely keep and preserve said bonds and to return same to plaintiff upon demand, defendant failed to exercise care or to use reasonable or proper precaution for the safe-keeping of said bonds to insure their return to their owner, and the bonds were stolen, or removed from the place where they were left by plaintiff for safe-keeping, by one of defendant's agents or employees.

5. At the time of the demand for delivery as aforesaid, said bonds were of the value of $1,400.00.

6. By reason of defendant's negligence in failing to safe-guard and return upon demand said bonds, in accordance with their agreement, plaintiff suffered a loss of $1,400.00, besides the use of said sum since November 20th, 1922, when demand for delivery was made, no part of said sum having been paid.

Plaintiff claims damages of $1,400.00 besides interest from November 20th, 1922, and costs of suit.

WILLIS P. BAINBRIDGE,
Attorney for Plaintiff.

NEW JERSEY SUPREME COURT,
BURLINGTON COUNTY

WILLIAM HOLMES, Plaintiff, vs. FIRST NATIONAL BANK OF WRIGHTSTOWN, NEW JERSEY, Defendant.	Action at Law. Answer.	10

The defendant, the First National Bank of Wrightstown, New Jersey, a corporation under and by virtue of the national banking laws of the United States of America, located and doing business at Wrightstown, in the County of Burlington and State of New Jersey, says that:— 20

1. It admits the allegations in paragraph one of the complaint.

2. It denies the allegations in paragraph two of the complaint.

3. It denies the allegations in paragraph three of the complaint. 30

4. It denies the allegations in paragraph four of the complaint.

5. It denies the allegations in paragraph five of the complaint.

6. It denies the allegations in paragraph six of the complaint.

FIRST DEFENSE.

1. Defendant says that on or about the 12th day of September, 1921, plaintiff left with defendant for safe keeping one One Thousand Dollar ($1000) Victory Bond of the United States of America, with interest coupons attached; two Third Liberty Loan Bonds of the United States of America of a par value of One Hundred Dollars ($100) each, with interest coupons attached; one Second Fifty Dollar ($50) Liberty Loan Bond of the United States of America, with interest coupons attached; and two Fourth Fifty Dollar ($50) Liberty Loan Bonds of the United States of America with interest coupons attached, without compensation to the defendant, and for the sole protection and benefit of the plaintiff.

2. That said bonds were stolen from the said bank by the cashier thereof, Harry M. Titus, without the knowledge of the bank or its Board of Directors, or any of them, or any other employe of said bank, and without any negligence whatsoever on their part; which said bonds were sold by the said Harry M. Titus and the proceeds thereof used for his own use and benefit.

3. That defendant, having exercised an ordinary degree of care in the protection and safe-keeping of these bonds, is in no way responsible for their loss by reason of the theft of said bonds by its cashier.

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Attys. for Defendant.

NEW JERSEY SUPREME COURT,
BURLINGTON COUNTY.

WILLIAM HOLMES,
Plaintiff,
v.
FIRST NATIONAL BANK OF WRIGHTSTOWN, N. J.,
Defendant.
} Action at Law.

Mount Holly, N. J., October 5, 1928.

TESTIMONY

Before Hon. Frank B. Jess, Judge, and a Jury.

APPEARANCES

For Plaintiff—ANDREW CELLA, ESQ.
For Defendant—MESSRS. PALMER & POWELL.

MR. CELLA:—I would like to ask that the complaint be amended, the paragraph where the date is on November 20, 1922, I would like to make that on or about the 1st day of September, 1922.

THE COURT:—Any objection?

MR. PALMER:—Neither date is correct. If he wishes to make the amendment I have no objection to it.

THE COURT:—All right. It may be amended.

OPENING FOR THE PLAINTIFF—

MR. CELLA:—If the court please, ladies and gentlemen of the jury: This is an action brought by William Holmes, the plaintiff in this suit, against the First National Bank of Wrightstown, a banking corporation organized and existing under and by virtue of the laws of the United States.

Sometime in the year 1921, or, to be more specific, in September of 1921, Captain Holmes desired to purchase some bonds through the First National Bank of Wrightstown. He did purchase a $1,000 bond and never received custody of that bond, that is, actual custody. Instead of taking the bond he took a receipt for the bond, which stated that this First National Bank of Wrightstown was holding this bond for Mr. Holmes. Sometime later he bought some more bonds of various denominations, $50 and $100, such that the total amount of bonds in possession of the First National Bank of Wrightstown was $1,400.

Now this was in September of 1921, these bonds were brought there—all that we know in this case of the time. In September of 1922 Captain Holmes was transferred from Camp Dix, where he had been stationed, to another camp. He goes to the First National Bank of Wrightstown and demands his bonds. They refuse to give them to him. Subsequently he is in Georgia and a communication is addressed to the

bank and in October they write to him and tell him that his bonds had to be transferred and registered, and so forth and so on, and insured; and immediately that that was done they would send the bonds to him. Sometime later, or to be exact, in November, 1922, Captain Holmes received word that his bonds were stolen and that the bank was not responsible because they were stolen by an employee.

Our contention in this case is that the bank, not having insured the bonds of Mr. Holmes, being the custodian of those bonds, was responsible to Mr. Holmes for any act that an employee may have done; further than that, that the minute that the demand was made upon them for these bonds, and they refused to return them, that they are naturally converters of those bonds and responsible to Mr. Holmes.

If we can prove to you these facts we would ask a verdict for the amount of the bonds plus interest for the principal for the past six years.

MR. PALMER:—If your Honor please, I desire to move for a non-suit upon the opening. Assuming those to be the facts to be proved, they show no negligence.

THE COURT:—Was this case heard once before?

MR. PALMER:—Yes, your Honor nonsuited it at that time.

THE COURT:—This is the same case, is it?

MR. PALMER:—Yes, sir.

THE COURT:—What is the negligence?

MR. CELLA:—If the court please, my contention in this case is this: That when Mr. Holmes made demand for his bonds of this bank on September 1, 1922, and they refused to turn those bonds over to him, the relationship between these parties ceased. Not only they were not gratuitous bailees any more, but that they were actual converters of those bonds; and regardless of whether there is any negligence or not upon the part of the bank, they are the principals in the matter and guilty of conversion.

MR. PALMER:—The complaint is not based upon conversion, the complaint is based upon negligence.

MR. CELLA:—If the court please, I think that there is a paragraph here where we specifically allege.

MR. PALMER:—You say so, but you are basing your complaint upon negligence, as I read it.

MR. CELLA:—Take paragraphs 2 and 3, it specifically states their refusal and neglect to turn over the bonds after demand was made, making them—

THE COURT:—You say on September 1, 1922, demand was made?

MR. CELLA:—Yes. It may have been the last day of August, but it was around that time,—no later than September 1st.

THE COURT:—Well, I don't quite understand what you mean by their failure to turn them over, their refusal upon demand. Had the bonds been stolen at that time?

MR. CELLA: That is a question. From the testimony that we have the bonds had not been stolen, because we have a letter subsequent to September 1st which specifically stated they would send the bonds immediately after they had been registered, and so forth, signed by one of the agents of the banking corporation; so our contention is that they were still in possession of the bank at the time we made demand, and therefore when thy refused they became converters of those bonds, naturally responsible to us and liable for the least amount of negligence.

THE COURT:—Well, that would be a question of fact there upon the main issue.

MR. PALMER:—Your Honor denies my motion, I suppose?

THE COURT:—Yes, I will deny it.

(Objection noted for defendant as ground of appeal.)

(Mr. Palmer opens for the defendant.)

WILLIAM HOLMES, Sworn for Plaintiff.

DIRECT EXAMINATION BY MR. CELLA:—

Q. Captain, you are in the United States Army? A. I am.

Q. Where are you at the present time stationed? A. I am stationed at Montpelier, Vermont.

Q. Were you ever stationed at Camp Dix, New Jersey? A. I was.

Q. Do you remember when? A. I arrived at Camp Dix, New Jersey, in October, 1920.

Q. How long did you stay there? A. I left Camp Dix for Fort Benning, Georgia, on or about the 10th day of September, 1922.

Q. Did you have any business dealings about that time with the First National Bank of Wrightstown? A. I had done business with the First National Bank of Wrightstown.

Q. Purchased any bonds through them? A. I had.

Q. What had you purchased? A. I purchased a $1,000 Victory Loan bond.

Q. Anything else? A. No.

Q. Did you ever get that bond in your possession? A. No.

Q. Physical possession? A. No.

Q. What did you do with that bond? A. Well, I never had it.

Q. Did you leave it or—

MR. PALMER:—I object to the leading type of examination.

MR. CELLA:—I will withdraw that question.

Q. What did you pay for that bond? A. Approximately the face value of the bond.

Q. Do you know? A. Not exactly. It was within a few cents of $1,000.

Q. To whom did you pay for this bond? A. I wrote a check on my account and turned it over to the cashier of the bank. At that time I think Mr. Smith was the man that I transacted that particular business with.

Q. Did they deliver the bond to you? A. Physically, no.

Q. What happened to the bond? A. It remained in the possession of the bank.

Q. Did you receive a receipt for it? A. Yes.

Q. I show you a receipt dated September 12, 1921, signed by Paul H. Smith, Assistant Cashier, First National Bank, and ask you if you received that receipt from them A. This is the receipt that I received at that time. There has been something added to it since then.

Q. Did you have any other bonds? A. I had some other bonds in my possession in camp at that time.

Q. At the time that you made this purchase or agreed to make this purchase with whom did you talk? A. I talked with Mr. Titus originally about the matter.

Q. And subsequently when you were notified that your bond was in did you go in again into the bank? A. I was informed in some way that the bond was there, and I am not sure whether I was called to the bank or happened to be at the bank when I was informed that the bond was there.

Q. State just exactly what occurred when you were informed that the bond was there.

MR. PALMER:—That is objected to, if your Honor please, in that form, because it gives an opportunity for the witness to make answers which are not competent testimony, and I have no opportunity to object until after the answer is in.

MR. CELLA:—All right. I will withdraw that question.

Q. Now you had a conversation, did you not, with Mr. Smith, the assistant cashier, when your bond was in and you received this receipt? A. Mr. Smith

was the cashier in the bank at the time that I paid for the bond, to the best of my recollection.

Q. You later took over more bonds, did you not? A. I did.

Q. Do you remember the denomination of those bonds? A. There was one of them, I am not sure whether it was a $200 bond or two ones, and three $50 bonds; but they were deposited two different times.

Q. Two different times? A. I think the last $50 was deposited at a separate time.

Q. Were they all placed on the same receipt? A. Yes, they were placed on this same receipt and initialed by persons receipting.

Q. Can you tell from that receipt who you gave those other bonds to? A. Yes.

Q. To whom did you give those bonds?

THE COURT:—Which bonds?

MR. CELLA:—Those other bonds, the two $100 denomination and three $50.

A. The two $100 and two $50 were turned over to Mr. Titus. The last item, a $50 bond, was turned over to Mr. Smith.

Q. How can you tell that from that receipt? A. Well, the initials were placed on the receipt at the time that I deposited the subsequent bonds.

MR. CELLA:——Now, if your Honor please, I offer that in evidence.

MR. PALMER:—No objection.

(Receipt marked Exhibit P 1.)

Q. Now at the various times that you brought those bonds there or left those bonds in the custody of the bank did you have a conversation with Mr. Smith or Mr. Titus? A. Naturally, I had some conversation, but just what do you mean? I don't quite gather.

Q. Anything said about leaving the bonds there? A. Oh, yes; they advised me to leave them there?

Q. Who? A. Mr. Titus.

Q. And you followed his advice? A. Yes.

Q. Had you been doing business with that bank regularly? A. I had done business with the bank from the time of my arrival at Camp Dix.

Q. You kept an account there? A. Yes, I had three accounts.

Q. Now then, Captain, we will come down to September of 1922. Did you go in the bank again? A. I did.

Q. For what purpose? A. I went to withdraw my account from the bank for the reason that I was leaving.

Q. Did you withdraw your account? A. I drew a check for my checking account and I took my savings account book with me. I withdrew my savings account and I also took my receipt—this receipt—for the bonds.

Q. Was there any conversation had about these bonds? A. Yes, I asked—I told the cashier the circumstances.

BY MR. PALMER:—

Q. With whom were you talking at this time? A. I don't recall definitely which cashier it was, whether it was Mr. Titus or Mr. Smith. This is six or seven years ago. But I know I made a trip to the bank for the express purpose of closing my account, having been transferred to Fort Benning, Georgia.

BY MR. CELLA:—

Q. Any conversation as to the bonds? A. Yes, I asked—

MR. PALMER:—This is objected to unless the person with whom the conversation was had is established.

BY THE COURT:—

Q. I understand you to say, Captain, it was with Mr. Smith or Mr. Titus? A. Yes.
Q. You can't recall which? A. I do not.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

A. I explained my mission.

MR. PALMER:—Objected to.

BY MR. CELLA:—

Q. State the exact words, if you can, again. A. I can't do that; it is too far in the past. I can give the gist of my conversation.

BY THE COURT:—

Q. Substantially what you said and what he said to you. A. Substantially what I said. I told the cashier, Mr. Smith or Mr. Titus, I don't recall which, that I had come down to close my account, and told the cashier why, simply as a matter of courtesy, and

I drew a check for the amount I had in my checking account. I had in the neighborhood of bewteen $800 and $900 in the savings account. And the requirement of the bank was that I have my savings account book with me to draw against this at any time, and that was the reason I had taken it along, and asked for my bonds and my savings account. And Mr. Titus or Mr. Smith during the conversation told me not to take my bonds or money, that is, my savings account, and gave a reason that he thought it was foolish to take them in my personal possession, as I might be robbed or something en route. And eventually I left the bank with the understanding, upon the advice of the cashier that I talked with, that I would go to Columbus and establish connections with a bank there and they would arrange for the transfer of my savings account and bond.

BY MR. CELLA:—

Q. Did you establish that connection with the banks? A. I did.

Q. Now as a result of this action did you receive this letter from the First National Bank, dated October 4, 1922? A. I did.

Q. Did you ever get your bonds? A. Never did.

MR. CELLA:—If the court please, I offer this letter in evidence.

(Letter marked Exhibit P 2.)

Q. Now, Captain, will you read that letter? A.

"The First National Bank,
Wrightstown, N. J.,
Camp Dix, October 4, 1922.

Capt. William Holmes,
Box 220,
Fort Benning, Georgia.

My Dear Captain Holmes:—

We have this day forwarded to the First National Bank of Columbus, Columbus, Georgia, (Columbus is repeated) for your account our New York draft amounting to $815.88. The interest on your savings account from June amounted to $7.99, which amount you will see we have credited to the account. We are enclosing herewith for your records the closed out book. We will forward to you the bonds which we are holding for safekeeping within the next few days. The cause of the delay is that we have to have them insured as well as registered and our insurance blank book is filled up. We have sent for another and expect it any day.

With kindest personal regards, I am,
Harry M. Titus, Cashier."

Q. Did you ever receive your bonds? A. Never have.

Q. Did you make any further inquiry? A. I did.

Q. How? A. By attempting to communicate with the bank. I also went to the bank that I had established connection with in Columbus.

Q. Now then, did you send any further communications? A. I did.

Q. What kind? A. My recollections are that I wrote, and failing answer I wired once or twice.

Q. What was the answer that you received after your wire? A. I didn't receive an answer to my first one or two communications, but I think the third, if I recollect correctly, was a wire, and I received a letter from Mr. Smith informing me—

MR. PALMER:—That is objected to. The letter is the best evidence of that.

THE COURT:—Have you the letter?

Q. I ask you if that is the letter that you received. (Letter shown witness.) A. Yes, that is the letter that I received in answer to my last inquiry. There was an enclosure with it.

Q. Is this the enclosure that came with it? A. It was a newspaper clipping. Yes, this is the clipping that came with the letter. I think it is mentioned in the body of the letter.

MR. CELLA:—I would like to have those marked as exhibits.

MR. PALMER:—No objection to the letter. The newspaper clipping has no relevancy.

MR. CELLA:—The newspaper clipping was sent by an agent of the bank.

THE COURT:—Is there any relevancy?

MR. CELLA:—Well, there is really no relevancy, I will say that.

MR. PALMER:—What is the date of that letter?

MR. CELLA:—This is November 21, 1922.

(Letter marked Exhibit P 3.)

Q. Will you read that letter, Mr. Holmes, please?

A. "The First National Bank,
Wrightstown, N. J.
Camp Dix, November 21, 1922.

Capt. William Holmes,
Fort Benning,
Georgia.

My dear Captain Holmes:—

Your wire in regards to bonds received this morning. Our cashier, Mr. Titus, was arrested last Saturday for embezzlement and among the bonds were the ones you left for safekeeping. The bank is protected and the bonds will be replaced. It is only a question of a little time until we hear from the bonding company. Your wire a week ago was sent to Mount Holly and same was received by Mr. Titus but no copy was sent to the bank. I suppose that you haven't heard anything in regards to this, so will enclose a clipping of a newspaper. Now, Captain Holmes, I am sorry that we have kept you waiting so long for the bonds, but assure you that you will be fully reimbursed for all that was taken. As soon as we have this matter adjusted with the bonding company, will advise you at once. Any other information you may want will only be too glad to furnish same for you.

Yours truly,

Paul H. Smith,
Assistant Cashier."

Q. The matter has never been adjusted, has it, Captain? A. No.

CROSS EXAMINATION.

BY MR. PALMER:—

Q. How many bonds do you say that you left there, Captain, is the correct and par value? A. $1,350, I think.

Q. The complaint deals with $1,400, and that is the reason that I was not sure. $1,350, is that right? A. $1,350 is my recollection of it. I think the receipt shows that amount.

Q. Captain, are you sure that the first bond, the $1,000 Victory bond, was delivered to you at the bank, or was it mailed to you? A. It was delivered to me at the bank.

Q. You are sure about that? A. At the time I paid for the bond.

Q. I show you what purports to be a copy of a letter dated September 12, 1921, addressed to Captain William Holmes, 18th Infantry, Camp Dix, New Jersey. It says, "Enclosed please find receipt—"

MR. CELLA:—I object to that going in.

THE COURT:—That is, the reading of it?

MR. CELLA:—Yes.

MR. PALMER:—I think you are right.

Q. Did you receive the original of that letter? A. I have no recollection of it. This is a carbon.

Q. Yes, I ask you if you received the original. A. I have no recollection of it.

MR. PALMER:—I ask that this be marked for identification.

THE COURT:—It may be marked for identification.

(Letter marked Exhibit A. for Identification.)

Q. This receipt, Captain Holmes, bearing date September 12, 1921, which is the same date of the carbon copy of the letter that I just showed you, was received by you from Paul H. Smith, was it not, the assistant cashier? A. Yes, sir.

Q. And that is the receipt when you left the first $1,000 bond at the bank? A. When I paid for the bond.

Q. And left it there? A. Well, actually, I never had the bond.

Q. No, but you left it there and accepted this receipt for it, did you? A. I accepted that receipt.

Q. And that receipt says, "Received from Captain William Holmes for safekeeping the following," and then recites the bonds, the first of which is the Victory bond; that is true, is it not? A. Yes, sir.

Q. Now, Captain, you testified in this case at its former trial, did you not? A. My recollection of it, yes.

Q. Well, you know whether you did or not, don't you? A. I think the case was stopped.

Q. You testified, didn't you? A. I was on the stand, if that is what you mean.

Q. That is what I mean, you were on the stand and you gave your story and were cross-examined; that is, I asked you some questions; you remember that, don't you? A. I have some recollection of it, yes.

Q. And at that time did you not produce this letter, October 4, 1922, which you now produce? A. I think so. It was in the hands of my lawyer at that time.

Q. Did you produce that letter, the letter dated October 4, 1922? A. I didn't produce it personally, because it was not in my possession.

Q. Well, it was in your lawyer's possession? A. Yes, sir.

Q. And he was here in court, wasn't he? A. Mr. Lenox, I think, was here.

Q. Well, he was trying the case for you? A. Just a minute now. I don't wish to be brow-beaten. If you will ask me a simple question—

Q. I have asked you a simple question, if your lawyer was here in court? A. I heard you quite well.

Q. Well, answer the question A. Now what is your question?

Q. (Question repeated.) I have asked you a simple question, if your lawyer was here. Your lawyer was present in court? Mr. Bainbridge was the lawyer? A. I engaged him, but apparently he employed some one else.

Q. Well, he was here in court trying the case for you? A. Mr. Lenox, yes.

Q. You say the letter was in his possession? A. To the best of my knowledge, yes.

Q. Do you know whether it was or was not? A. Well, I turned the papers over to the lawyer.

Q. And among those was this letter of October 4th? A. To the best of my recollection.

Q. It was not produced on the former trial, was it? A. I don't know.

Q. Don't you know whether you were asked to read that or not? A. I read some letters.

Q. I haven't asked you any other. You were asked to read that letter of October 4th? A. I don't recall.

Q. Were these questions asked you and answered, Captain Holmes: "How came you to have

this receipt, Captain? What was the purpose of that receipt? A. The time that I paid for the bond this receipt was made out and handed to me, to show that I had the bond there. There was no explanation or anything of that nature took place. I was simply given the receipt when I paid my check for the bond."? A. If that is a transcript, I assume the testimony is correct.

Q. And that was what took place, wasn't it? You were given a receipt for the bond that you were leaving in the bank for them to keep for you? A. I received a receipt.

Q. And you left the bond? A. The bond remained there.

Q. For them to keep for you? A. For them to keep.

Q. For you, not for themselves? A. I assume for me.

Q. Now was this asked you, Captain, upon the former trial of this case: "Q. Did you ever write to the bank and demand possession of the bonds? A. I wrote to the bank and instructed them to send them to my bank at Columbus, Georgia." A. I don't recollect, but I am willing to assume that it is correct.

Q. And you so made that answer? A. I say I don't recall. This is three years ago.

Q. Well, that is what happened, wasn't it? You wrote to the bank and asked him to send the bonds to your bank in Columbus, Georgia? A. This was direct conversation that took place before I left here.

Q. I am asking you about a letter. Didn't you testify that you wrote a letter. "I wrote to the bank and instructed them to send them to my bank at Columbus, Georgia." A. I wrote more than one.

Q. Well, answer the question. Did you write any such letter as that? A. I do not recall.

Q. Did you so testify A. I do not recall.

Q. Now, Captain, when you took this receipt to the bank and the other bonds, the smaller denomination bonds, the bank didn't buy those for you, did they? A. No.

Q. You took them down to the bank to be kept by the bank for you A. Yes.

Q. And you took your receipt with you? A. They told me they would put them with my receipt.

Q. Well, you took it with you, had it with you? A. I had it with me.

Q. And they put the smaller denomination bonds on the same receipt that your $1,000 Victory bond was on? A. And initialed the entries.

Q. And the person who received them initialed the entries? A. Yes.

Q. Two of them were given to Mr. Titus and one to Mr. Smith? A. Three of them to Mr. Titus, the receipt shows.

Q. I show you a letter dated September 23, 1922, addressed to the First National Bank, Wrightstown, New Jersey, and ask you if that is your signature? A. That is my signature, yes.

MR. PALMER:—I would like this letter marked.

THE COURT:—It may be marked.

(Letter marked Exhibit B for Identification.)

REDIRECT EXAMINATION.

BY MR. CELLA:—

Q. Captain, do you remember what these bonds were worth in September, 1922? A. Bonds were down at that time. They were below par.

Q. Can you tell us the value of them? A. Some of the loans were down in the 80's.

Q. What was the value of the $1,000 bond? A. I don't know. I paid the bank what they said it would cost me.

Q. What was it you paid? A. I can't give you the exact figures, but just within a few cents of the par value of the bond.

Q. It was within a few cents of $1,000 A. Yes.

Q. What was it for the two $100 bonds? What was it you paid for those? A. I bought those during the war and paid par value for them.

Q. $200? A. Yes, sir.

Q. How about the $50 bonds A. I paid par value for all those that were purchased except one $50 bond we purchased during the war. I had had that quite a long time.

Q. Do you remember the one you had purchased during the war, what you paid for that, $50? A. It was bought from a soldier in my company.

Q. What did you pay him for it? A. I paid him par value. He was going down to the bank to sell it but I told him that I would give him $50, and I told him he could come back at any time and redeem it, which he never did, and eventually I deposited in the bank.

PAUL H. SMITH, Sworn for Plaintiff.

DIRECT EXAMINATION BY MR. CELLA:—

Q. Mr. Smith, did you work for the First National Bank at Wrightstown? A. Yes, sir.

Q. How long did you work there? A. About eight to nine years.

Q. Were you working there during September, 1921? A. I was.

Q. In what capacity? A. I don't remember.

Q. I show you a receipt dated September 12, 1921, signed by Paul H. Smith, Assistant Cashier, and ask you if that is your signature? A. It is.

Q. Then you were assistant cashier at that time? A. Yes, sir.

Q. Did you receive from one Captain William Holmes a $1,000 Liberty bond? A. Yes, sir.

Q. There are three other bonds there with the initials H. M. T. Do you know whose initials they are? A. Harry M. Titus.

Q. And does that signify that bonds to the extent of $300 were received by him? A. Yes, sir.

Q. Now there is also another item of $50, P. H. Smith; and I ask you if that is your initials A. Yes, sir.

Q. Did you receive them from Mr.— A. Yes, sir.

Q. Did you receive those on or about that day? A. I don't remember.

Q. Well, do you remember when you received the $1,000 bond? A. No, sir.

Q. Would you say that it would be the same day that this receipt is dated? A. I would think so.

Q. Now after you received those bonds what did you do with them? A. I put them in an envelope with the man's name on the envelope and placed

them in the vault with the other bonds of the bank.

Q. With the other bonds of the bank? A. Yes.

Q. Who had access to that vault? A. The employees.

Q. All of the employees? A. Yes.

Q. Were these bonds insured?

MR. PALMER:—Objected to as incompetent and immaterial.

A. I don't remember.

Q. Do you know whether the bonds of the bank were insured or not?

MR. PALMER:—Objected to as entirely incompetent, immaterial and irrelevant.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

Q. Can you answer that question, Mr. Smith?

THE COURT:—Does he understand the question?

A. Well, all bonds must have been insured. If one bond was all were.

Q. Mr. Smith, I ask you if that is your signature? (Paper shown witness.) A. Yes, sir.

MR. PALMER:—Referring to what?

MR. CELLA:—Referring to the letter marked Exhibit P 3, dated November 21, 1922.

Q. Do you recognize the signature on this letter marked Exhibit P 2?

MR. PALMER:—We admit that.

MR. CELLA:—Do you admit that signature?

MR. PALMER:—Oh, yes; there is no question about that. Your client testified that he received it from the bank and no objection was made. There will be no question about it at all, about either of your letters.

Q. Do you know whether or not the bonds belonging to Mr. Holmes were ever insured?

MR. PALMER:—Objected to as irrelevant.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

Q. Do you know whether they were insured or not? A. All of them left were insured.

Q. All left were insured? A. All the bonds.

Q. Do you know when Mr. Titus left the bank? A. I don't remember. It was the latter part of 1922.

Q. If you will read this letter perhaps it will refresh your memory as to when he left. A. He left previous to that letter.

Q. Previous to that letter? A. Yes.

Q. How long previous to that letter?

MR. PALMER:—The letter doesn't tell.

MR. CELLA:—The letter does say he was arrested.

MR. PALMER:—Yes; there is quite a difference.

THE COURT:—Well, does he know?

Q. Do you know when he left, how long previous? A. I don't remember.

Q. Now, Mr. Smith, it was your duty, was it not, to examine all the securities in the bank to see that they were there?

MR. PALMER:—It can't possibly be an assistant cashier's duty. The question is objected to.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

Q. It was your duty, was it not, to examine to see if the securities were there? A. Yes, sir.

Q. And how often would you examine the securities? A. Once a month and sometimes twice a month.

Q. Previous to September 1, 1922, did you examine to see if the securities were there? I mean during the month of August. A. I don't remember.

Q. Well, you would make an examination once a month, wouldn't you? A. Yes, sir.

Q. Then do you remember missing the month of August? A. I don't remember missing.

Q. Then when you examined for the securities were all the securities there? A. To my recollection they were all there.

Q. When did you first know that the securities were missing? A. In November, at the time that they announced the embezzlement of Mr. Titus.

Q. Did you examine the securities in October? A. As far as I know.

Q. You didn't miss the month of October? You wouldn't say that, would you? A. Yes, if they wasn't there—

Q. If the securities were not there you would have known it; is that correct? A. Yes.

Q. Then the first time that you knew that Captain Holmes' bonds were missing was in the month of November, 1922; is that correct? A. Yes, sir.

CROSS EXAMINATION.

BY MR. PALMER:—

Q. I show you the letter of November 21, 1922, and ask you at whose direction that letter was written. A. Mr. Brown, the National Bank examiner.

Q. Did any member of the board of directors know of the writing of that letter? A. No, sir.

Q. Were they consulted about it before it was written by you? A. No, sir.

Q. They knew nothing about it? A. No, sir.

Q. It was done by you at the suggestion of the National Bank examiner? A. Yes, sir.

REDIRECT EXAMINATION.

BY MR. CELLA:—

Q. Isn't it part of your duties to write letters? A. Yes, sir.

Q. On the business policy of the bank? A. It all depends on what it is.

Q. On a matter of this character wouldn't it be one of your duties to also write? A. As a rule.

Q. It would be part of your duties, would it not? A. Yes, sir.

Q. The board of directors knew that you had written this letter, didn't they? A. No, sir.

Q. Didn't you ever report it to them? A. No, sir.

Q. Then the board of directors have never seen this letter? A. Not to my knowledge.

Q. What did you do with the carbon copy of it? A. I had a carbon copy in the bank.

Q. In the bank? A. Yes.

Q. And it is still in possession of the bank, is it? A. As far as I know.

Q. How often would the board of directors meet? A. Every two weeks.

Q. And they would look over your correspondence, wouldn't they? A. No.

Q. They wouldn't look over your correspondence? A. No.

RECROSS EXAMINATION.

BY MR. PALMER:

Q. I show you a carbon copy of a letter dated September 12, 1921, addressed to Captain William Holmes, Camp Dix, New Jersey, and ask you whether or not you sent the original of that letter to Captain Holmes. A. I did.

Q. Mailed it to him? A. Yes, sir.

Q. And signed it yourself A. Yes, sir.

MR. PALMER:—I offer this carbon copy.

MR. CELLA:—If your Honor please, I object to the offer of it in evidence. No notice to produce was served upon the plaintiff. The plaintiff was on the witness stand and specifically states that he never received such a letter, had no recollection of receiving such a letter.

MR. PALMER:—That is quite different.

MR. CELLA:—Unless he had served a notice to produce it is only secondary evidence and I feel it should not be admitted as evidence.

MR. PALMER:—If your Honor please, the witness testifies that he mailed the original of this letter to Captain Holmes. To the extent that he did mail the letter and that this is a true carbon copy of it it is admissible. It doesn't prove that Captain Holmes got it, but it does prove that the original was mailed to him.

MR. CELLA:—If the court please, if he can prove that the orignal was stolen or lost or destroyed or it is not a self-serving declaration I would agree with Mr. Palmer in his law, but I disagree with him otherwise.

MR. PALMER:—I don't see upon what theory it can be regarded as a self-serving declaration. Does your Honor want to see it or do you know what it says?

THE COURT:—Yes; let me see it. (Examines letter.)

Q. Let me ask you just one more question. May I have the receipt?

(Receipt produced.)

Q. Was this receipt dated September 12, 1921, and which has been marked Exhibit P 1 in this case, enclosed with the letter of September 21st that you sent to Captain Holmes? A. Yes, sir.

MR. PALMER:—Now I offer the letter. He got the receipt; he must have got the letter.

THE COURT:—Well, no, not necessarily, because Captain Holmes' testimony is that he didn't get it by letter, he got it by person, that it was handed to him in the bank.

MR. PALMER:—It is competent then to the extent of showing that this original receipt was mailed with this original letter of which this carbon is a copy.

THE COURT:—No, not without any notice to produce, I don't think, Mr. Palmer. The proper basis has not been laid for the production of the carbon copy.

(Objection noted for defendant as ground of appeal.)

BY MR. CELLA:—

Q. Didn't you testify on direct that you gave this receipt to Mr. Holmes the day that he paid for the bond? A. No, sir.

(Letter shown Mr. Palmer by Mr. Cella.)

MR. PALMER:—I admit that I sent that letter, yes.

MR. CELLA:—I offer this in evidence.

MR. PALMER:—I object to it. It has no relevancy to this issue whatsoever.

THE COURT:—The objection is sustained.

(Objection noted for plaintiff as ground of appeal.)

ROBERT W. CARTER, Sworn for Plaintiff.

DIRECT EXAMINATION BY MR. CELLA:—

Q. Mr. Carter, what is your occupation? A. Why, I am retired now, sir.

Q. Retired? A. Yes, sir.

Q. Were you ever connected with the First National Bank of Wrightstown? A. Yes, sir.

Q. In what capacity? A. Why, I was a director, vice president and president.

Q. What were you in September, 1922? A. President.

Q. How long had you been president of the bank? A. Oh, probably a year or so. I was vice president previously.

Q. Did you have a man by the name of Titus working for you? A. Yes, sir.

Q. Was he cashier of the bank in 1922? A. Yes, sir.

Q. Was Paul H. Smith also working for the bank? A. Yes, sir.

Q. Assistant cashier? A. Yes, sir.

Q. Do you know the date that Mr. Titus left your employ? A. Why it was along about the 20th of November, I think, along towards the last.

Q. About the 20th of November, 1922? A. Possibly a few days earlier.

Q. Was it a habit or was it a custom in your bank to accept bonds for safekeeping? A. From customers they used to.

Q. Only from customers? A. Well, we didn't advertise for it or anything like that.

Q. But you were just giving that as an additional accommodation for your customers; is that right? A. Well, we didn't make a business of it.

Q. But you still accepted bonds; is that true? A. When a customer had a bond and wished it taken care of we told him he could leave it.

Q. Now then, Mr. Carter, did you bring the books with you of your bank? A. No, sir, I haven't been connected with the bank for several years.

Q. You haven't been connected with the bank for some years? Are you still a director? A. No, sir.

Q. You have been out of the bank? A. Yes, sir.

Q. How often would your board of directors during the time that you were president in 1922 examine the securities that were in the bank? A. Well, there was a committee of the board appointed to do that.

Q. How often would they look them over? A. I don't just remember.

Q. Would it be once a month? A. I don't recollect.

Q. Do you know whether any insurance was ever placed on the bonds that were in your custody?

MR. PALMER:—Objected to as entirely incompetent, immaterial and irrelevant.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

A. Why, we had insurance, I don't know, on—the bank; I don't know whether it was specifically on those bonds.

Q. You did have insurance on some of the bonds; is that correct? A. I didn't say on some of the bonds. I say we had—we were protected by the American Casualty Company on some of our—

Q. Now, then, Mr. Carter, that was on all your own bonds; isn't that correct? A. No, sir; I didn't say that.

Q. Oh, you had it on other people's bonds too; is that true? A. Well, I couldn't just say what it was on now, but we had insurance.

Q. All right. Then we will come down to the bonds of Captain Holmes himself. Did you ever know they were in your possession? A. Not personally.

Q. How did you know if you didn't know personally? A. Well, I mean I didn't know at the time. I have known since that he had bonds there but I didn't then.

Q. When did you first know that he had bonds there? A. Well, I don't recall.

Q. You don't recall? A. No.

Q. Did you ever have a conversation with Mr. Holmes? A. I might have had in court here when he had a case here before. I possibly spoke to him then but I don't recollect any other time..

Q. Did you ever receive any communications from Mr. Holmes about those bonds or from his attorney? A. Not personally.

Q. Not personally? I mean as president of the bank. A. Not that I recollect.

Q. Did you retain Mr. Palmer to represent your bank? A. He was attorney for the bank.

Q. And you were seeing Mr. Palmer from time to time about the affairs of the bank? A. Well, yes. Mr. Palmer was a director at one time.

Q. And you also instructed Mr. Palmer, didn't you, in regard to the Holmes matter and asked him

to represent you, didn't you? You knew this was coming into court? A. Well, I don't think that I was in the bank then.

Q. Well, now, in December, 1922, you were still with the bank, weren't you? A. Yes, sir.

Q. And you had conferences with Mr. Palmer as to how you should handle this Holmes matter?

MR. PALMER:—Objected to as entirely incompetent, irrelevant and immaterial. Any conference that he had with me certainly has no relationship to this issue. He says that I was the attorney for the bank, which was true, and certainly he cannot be obliged to tell anything that he said to me with reference to the affairs of the bank.

THE COURT:—On the ground that it was a confidential communication?

MR. PALMER:—Yes, absolutely. I don't see how it can be anything else. I was the attorney for the bank and he asked as to the date of the embezzlement by Mr. Titus. Now what the president of the bank said to me or communicated to me with reference to the bank's affairs or anything at all of that kind certainly is a confidential communication. He could not ask me if he put me on the stand; why can he ask the other man with whom he says I had a conversation?

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

Q. Will you answer that question? A. Ask it again, please?

Q. (Question repeated.) And you had conferences with Mr. Palmer as to how you should handle this Holmes matter? A. I don't recollect any.

Q. Well, did you have any conferences with him in November and December, at about the time that you had trouble in your bank?

MR. PALMER:—Objected to.

THE COURT:—The same ruling; overruled.

(Objection noted for defendant as ground of appeal.)

A. Well, I don't recollect any. We probably had, but I don't recollect any.

Q. Now I am going to ask you to read this letter dated December 23, 1922, and signed "V. C. Palmer."

MR. PALMER:—Now what question are you going to ask him first?

MR. CELLA:—I just want him to read it himself.

MR. PALMER:—That is objected to. The letter has been offered and your Honor sustained the objection as to the offer of the letter. Now I object to it being shown to the witness and he asked to read it over, for what purpose I don't know.

MR. CELLA:—I am leading up to lay a proper foundation for the introduction of this letter as evidence.

THE COURT:—I presumed you were. I overrule the objection.

(Objection noted for defendant as ground of appeal.)

Q. Now read that to yourself.

THE COURT:—You are not asking any question now, are you?

MR. CELLA:—No question; just asking him to read that letter.

(Witness reads letter.)

Q. Now then, Mr. Carter, did you on the 18th of December receive a letter as president of the First National Bank of Wrightstown from Captain William Holmes? A. I don't recollect receiving any.

Q. Did you turn over any letters to Mr. Palmer to answer for you from Captain William Holmes? A. Not that I recollect.

Q. Who handled the matter for your bank with Mr. Palmer? Was a committee appointed? A. I don't remember that there was.

Q. Who retained Mr. Palmer to defend this case?

MR. PALMER:—That is objected to as entirely incompetent and immaterial.

THE COURT:—Yes, the objection is sustained.

Q. Now then, Mr. Carter, you have read this letter. Can you tell me now whether or not you had all the bonds that were in your possession insured? A. I can't tell you.

Q. You can't tell? A. No.

Q. Do you know whether the bonds of Captain William Holmes were insured? A. No.

BY THE COURT:

Q. That is, you don't know? A. I don't know, no, your Honor.

BY MR. CELLA:—

Q. Do you remember Mr. Holmes' being present at a meeting of your board of directors? A. Yes, I think I do.

Q. And do you remember at that time his asking you about his bonds? A. I suppose he did. I don't recollect the conversation. I recollect his being there.

Q. And didn't you tell him at that time—

MR. PALMER:—Just a moment. When was this?

Q. When was this? A. Why, I am not sure of the date. It might have been—I don't think it was right away after the bonds had been lost; I think it was later.

Q. It might have been a year afterwards? A. Well, I couldn't say about that.

Q. And didn't you at that time tell him those bonds were not insured? A. I don't remember.

Q. Did you hear anyone else, any other member of the board of directors, tell Mr. Holmes that? A. Not that I recollect.

Q. All right. Now then, tell me why you didn't pay to Mr. Holmes for those bonds.

MR. PALMER:—Objected to as entirely incompetent. Whatever his reason was has nothing to do with the situation at all. The question is objected as being entirely incompetent and immaterial and not being within the issue of this case at all.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

Q. Answer that question, Mr. Carter. A. Well, the bonds were left for safe keeping. We only agreed to take care of them the best—the same as we did our own bonds.

Q. You did agree to take care of them the same as your own bonds, did you not? A. That was the receipt. He had the receipt for that.

Q. Did you take care of them like you did your own bonds? A. I think so.

Q. Did you lose any money because of the theft of your bonds?

MR. PALMER:—Objected to as entirely incompetent, irrelevant and immaterial to this issue.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

A. Did we lose money? Why, yes.

Q. Did you recover any money on those bonds from the insurance company.

MR. PALMER:—That is objected to, if your Honor please.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

A. Why, I suppose for some of the securities, we got—the insurance company paid some of it, yes.

Q. Who is president of the company now, do you know, Mr. Carter? A. Mr. Riley, I think.

Q. Now, Mr. Carter, the only reason that you didn't pay Mr. Holmes for these bonds was because you didn't have them insured and you were not going to take the money of the bank to do so; is that correct?

MR. PALMER:—Objected to. He hasn't said so at all.

MR. CELLA:—He can answer yes or no, if your Honor please.

MR. PALMER:—No, he can't. It is a double question. It is not susceptible of a yes or no answer; entirely immaterial and irrelevant.

THE COURT:—Objection sustained.

Q. If you had these bonds insured and received the money on them, you would have paid Mr. Holmes?

MR. PALMER:—That is objected to. It is based upon a hypothesis, upon a supposition, purely speculative, entirely incompetent and immaterial.

THE COURT:—Yes, I will sustain the objection.

NO CROSS EXAMINATION.

PLAINTIFF RESTS.

MR. PALMER:—If your Honor please, I desire to move for a non-suit.

THE COURT:—I will hear that at side bar.

(Court and counsel retire to chambers.)

MOTION FOR NONSUIT.

MR. PALMER:—I desire to move for a nonsuit on the ground that no negligence on the part of the bank or evidence of any conversion, according to which way you take the complaint, has been shown. The testimony shows that the bank was a gratuitous bailee and as such kept those bonds in the same place that it kept its own securities, which were stolen by a defaulting cashier of the bank. There is no evidence before the court in the case now of anything to put on the bank or its board of directors—when I say bank I mean its board of directors—upon guard or indication that there was anything wrong with the cashier. I have a line of cases which have been given to your Honor before on that subject, as to the responsibility. If you would like to look at them again I will get them for you. The principle is that a gratuitous bailee is bound to take only reasonable care of securities that are left for that purpose. The testimony in this case is that they were placed in an envelope with this plaintiff's name marked on it and placed in the same vault with the other bank securities.

(MR. CELLA REPLIES.)

THE COURT:—I think there is now enough to go to the jury on the question of whether the defendant used the care that was required under the circum-

stances, that measure of duty being, as I understand it, to take as good care of the property of its customer left with it for safe-keeping as it did of its own property.

MR. PALMER:—It is already in the case. I can't add anything to the proof on that point as it stands now. The man who took the bond, who received the $1,000 bond, said that it was put in an envelope marked with Captain Holmes' name, and the other bond put in there too, and put in the same vault, the same place with the bank's securities.

THE COURT:—What about the insurance?

MR. PALMER:—I don't think there is any proof of any insurance one way or the other in this case as the testimony stands.

(The court ordered the case reopened for further testimony of the plaintiff.)

WILLIAM HOLMES, Recalled for Plaintiff.

DIRECT EXAMINATION.

BY MR. CELLA:

Q. Captain, didn't you have a meeting with the board of directors of the Wrightstown Bank? A. I did.

Q. And do you remember when that was? A. I had two meetings with them; one, the first one, in 1923. I am fairly positive above that. After I re-

turned from Georgia I was reassigned to the same regiment that I had left and I rejoined them again at Camp Dix.

Q. And was Mr. Carter there, the president? A. He was.

Q. Did you have a talk with him about these bonds? A. I did; I talked with the directors in general, and Mr. Carter apparently was the spokesman for the directors.

Q. And what was said? A. I appealed to the directors. I had gone to the bank and found out that the directors met, and told Mr. Smith that I would be down on the day that they gathered at the bank, which I did. And I spoke to the directors as a body to the effect that I thought that they should refund to me the amount of my bonds;all I wanted was what was due me and in all fairness to me, and the moral was with the bank if nothing else; that it was money that I had saved in France; I had put it away for a specific purpose, to educate my boy; and I thought that they would listen to me and settle the case.

Q. What did they say to that? A. There were a number of them—five or six, I should think—apparently all farmers with the exception of Mr. Riley, I think, and Mr. Carter; my understanding that they were farmers living in the vicinity; and it appeared to me—

Q. What did they say? A. Well, the directors talked amongst themselves, not to me directly; but Mr. Carter spoke directly and stated that they had not been able to recover anything for the loss of my bonds, to the fact that there was no insurance on them, and that they would not repay me.

Q. Then they gave as their reason that there was no—

MR. PALMER:—Objected to.

THE COURT:—Yes.

MR. CELLA:—I will withdraw that question in that form.

Q. Will you state as nearly as possible the words used by Mr. Carter on that occasion when he explained that they couldn't pay you for those bonds, and why?

MR. PALMER:—Objected to on the ground that it has already been asked.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

A. I will give it to the best of my recollection and the gist of the matter. I can't give the exact words. Mr. Carter said to me that in view of the fact that the bank was not insured for the loss of my bonds, that he didn't think the bank should reimburse me, because it was not a question of persons, it was a question of the interest of the bank. Now that is the gist of the thing, it is not the actual words.

Q. Did you have a second meeting with them? A. I did.

Q. And did you ask again for your bonds? A. I did.

Q. And what did they tell you then?

MR. PALMER:— When was this?

Q. When was this second meeting? Was it subsequent to this first one? A. Yes, this was in—let me see—I was back in Camp Dix on duty in 1925 or

1926. I imagine it was 1926. I think it was subsequent to the time I was here in court. And I went down to the bank and made another appeal to the directors, and was given practically the same answer.

Q. By whom? A. Well, I don't recall whether Mr. Carter was there the last time or not. I don't think he was. I am not sure about that.

Q. But it was the board of directors of the bank? A. Yes; there was a gentleman—I think it was Mr. Riley—who was very deaf. He had an arrangement to use at his ear—apparently was at the head of this second meeting. That is my recollection, but I am almost sure it was in 1926.

Q. Did you write a letter on the 18th of December, 1922, to the First National Bank of Wrightstown, around Christmas time? A. I don't recall. It is very possible that I did.

Q. Did you receive this letter in answer to your letter to the First National Bank? A. This refreshes my memory in regard to the matter.

Q. All right. Now then, did you write a letter to the First National Bank of Wrightstown? A. I did.

Q. Around Christmas of 1922 A. Approximately that time.

Q. What was your purpose in writing that letter?

MR. PALMER:—Objected to.

THE COURT:—Objection overruled.

(Objection noted for defendant as ground of appeal.)

A. It was based upon the fact that they had promised with a short delay to reimburse me for the bonds stolen and I had written, to the best of my recollection, as to when I could expect this money.

MR. PALMER:—I move the answer be stricken out, if your Honor please. There has been no demand for the letter.

THE COURT:—Motion denied.

(Objection noted for defendant as ground of appeal.)

Q. Did you receive that letter in reply? (Letter shown witness.) A. I did.

MR. CELLA:—I ask that that letter be admitted in evidence.

MR. PALMER:—Objected to.

THE COURT:—Objection overruled. The letter may be admitted.

THE WITNESS:—This is the letter that I received.

THE COURT:—Have it marked.

(Letter marked Exhibit P 4. and read by Mr. Cella as follows:)

LAW OFFICES, PALMER & POWELL,
117 Main St.,
Mt. Holly, N. J.,
December 23, 1922.

Capt. William Holmes,
2703 Beacon Ave.,
Columbus, Ga.

Dear Sir:

Your letter of the 18th inst. addressed to the cashier of the First National Bank, Wrightstown, New Jersey, with reference to some bonds that you had

left with Mr. Titus amounting to the sum of $1,350, and which were stolen by Mr. Titus and the money used by him, has been handed to me for reply.

The First National Bank of Wrightstown was not covered by any insurance that would take care of a situation where the cashier stole property belonging to some one else other than the bank. Our policy was for embezzlement of the funds of the bank and not for anything that might belong to individuals. I have advised the bank that they are not responsible for this loss. I regret very much to have to advise you in this situation, because if we were covered by insurance we would be more than glad to see that you were taken care of. Inasmuch as we had no protection against the stealing of things belonging to other individuals, we do not feel that we should assume the responsibility of paying for these bonds.

I am sorry to have to advise you to this effect, but such seems to be the law in a situation of this kind and we therefore must decline to make good for these bonds.

Very truly yours,

V. C. Palmer."

NO CROSS EXAMINATION.

PLAINTIFF RESTS.

THE COURT:—Have you anything further to add to your motion?

MR. PALMER:—I renew my motion, if your Honor please.

THE COURT:—The motion will be denied.

Adjourned till October 8, 1928, at 10.00 A. M.

Mount Holly, N. J., October 8, 1928.

Trial of the cause resumed at 10.00 A. M.

MR. PALMER:—May I ask whether or not there appears upon the record an exception to your Honor's refusal to grant the motion to nonsuit taken after the additional testimony was offered? I am not sure in my own mind whether I did ask for it or not.

THE COURT:—You did ask for it and it was refused and I think an exception was noted. If not it will be.

(Objection noted for defendant as ground of appeal.)

MR. PALMER:—May I add another reason for the motion for nonsuit, and that is that there is no testimony before the jury, no sufficient testimony, as to the value of the bonds at the time of the defalcation on the part of the cashier from which a jury can ar-

rive at a proper verdict as to their value. The testimony, as I recall it, is that the plaintiff paid for the Victory bond practically par. There is no testimony as to the bond, as to the value at the time it is alleged it was taken by the cashier. Then as to the other bonds the plaintiff's testimony was to the effect that at the time that he demanded their return they were selling somewhere in the 80's.

THE COURT:—Well, that is a new ground. Do you wish to be heard in reply to that motion? The motion is now, or at least the additional ground for the motion, that according to counsel's contention there is not sufficient testimony which would enable the jury, if they found for the plaintiff, to say what the market value of the bond was at the time of the alleged demand. I am not quite clear as to just what the testimony did show as to the market value of the bond.

MR. CELLA:—If the court please, do you desire to hear from me on that?

THE COURT:—Yes.

MR. CELLA:—We have testimony on the question as to just exactly what was received by the bank. We have a receipt here to the extent of the reception of $1,350 worth of bonds. We have the testimony of Mr. Holmes, who testified just exactly what he paid for the bonds, and that testimony I think is sufficient, such that if the bonds were of lower value Mr. Palmer can introduce testimony to prove that lower value. And then if we go one step further and take the fact of Mr. Holmes' testimony that they were around 80 at the time of the asking for the bonds back in 1922, that is sufficient testimony to prove

what the value of the bonds was. He also testified that these bonds were a few cents less than $1,000, when he specifically mentioned the $1,000 bond.

THE COURT:—When he bought the bond he paid, he said, a few cents less than the par value.

MR. CELLA:—I think there is sufficient evidence to prove the value, even if we go to the question that they were worth $80 on the hundred at the time he made demand for the bonds. If there is any lower value than that Mr. Palmer has a right to produce that testimony, but that is sufficient. There is no burden as to proof of any further value than that.

THE COURT:—Well, is it your idea that the testimony as to the market value of 80 applied to the $1,000 bond as well as to the other?

MR. CELLA:—If I recollect the testimony Mr. Holmes did testify that the bonds were worth somewhere in the 80's, which would make it $80 on the hundred for each of the bonds in their possession. Of course, if that is the contention and no other proof is produced here of any other value, that is the value that we will have to go to the jury on.

THE COURT:—My own recollection is not entirely clear as to what the testimony did show in that respect, and I think there is testimony which would enable the jury to arrive at the market value of the bonds, and therefore I will deny the motion.

MR. PALMER:—May I have an exception?

THE COURT:—Yes.

(Objection noted for defendant as ground of appeal.)

MR. PALMER:—Now, if your Honor please, I desire to move for the withdrawal of a juror and a direction of a mistrial. This case was opened upon the theory of conversion. A motion was made at the conclusion of the opening for a nonsuit on the facts stated in the opening. Upon those facts your Honor held that it might show a conversion, and we proceeded to the taking of testimony. There evidently and I think unquestionably is no proper testimony before the jury to justify the trial of the case upon the theory of conversion. The basis of the suit has been shifted to one of negligence. The result has been that testimony that was offered on the theory of conversion was and is prejudicial to the defendant on the question of the theory of negligence. I, therefore, ask for the withdrawal of a juror and the direction of a mistrial.

THE COURT:—Well, the complaint is clearly broad enough to cover the matter of negligence. The court has already ruled that there is no evidence before the jury which would justify a finding of conversion. Therefore the motion to withdraw a juror and declare a mistrial is also denied.

MR. PALMER:—May I have an exception?

THE COURT:—Yes.

(Objection noted for defendant as ground of appeal.)

DEFENDANT'S TESTIMONY.

MR. PALMER:—I desire to offer in evidence a letter bearing date September 23, 1922, addressed to the First National Bank of Wrightstown. New Jersey. signed, "William Holmes."

(Letter marked Exhibit D 2 and read by Mr. Palmer as follows:)

"Fort Benning, Ga.,
September 23, 1922.

First National Bank,
Wrightstown, N. J.
Gentlemen:

Please find enclosed herewith my deposit book for my savings account and request that same be transferred to the First National Bank of Columbus, Columbus, Georgia, as of October 1, 1922. Also request that my Liberty bonds deposited with your bank be forwarded to me by registered mail.

Thanking you for past favors, I am,

Very truly yours,
William Holmes,
Captain Infantry,
Fort Benning, Ga."

May I ask, if your Honor please, if it will be admitted that the transcript that I hold in my hand is a correct transcript of the testimony taken in the case of William Holmes, Plaintiff v. First National Bank, of Wrightstown, New Jersey, a corporation? The testimony was taken before your Honor on May 26, 1925. If there is any doubt about it, Mr. Kelley reported the former case and can testify as to the transcript.

MR. CELLA:—If the court please, I want to object to all of it going in. I don't object to having those parts that Mr. Palmer read as being presented to the jury, but to have all the testimony go in that was on that case, I do not think is proper.

THE COURT:—Well, I don't know what the object of the offer now is. You are asked to say whether you will admit that that is a correct transcript. That is the only question now.

MR. CELLA:—Oh, I will admit that is a correct transcript, being Mr. Kelly's transcript, yes.

MR. PALMER:—I desire to read from page 5 of this transcript a question that was asked Mr. Holmes upon cross-examination. "Q. How came you to have this receipt, Captain? What was the purpose of that receipt? A. The time that I paid for the bond this receipt was made out and handed to me, to show that I had the bond there. There was no explanation or anything of that nature took place. I was simply given a receipt when I paid my check for the bond."

Another question on page 9 of this transcript: "Q. Did you ever write to the bank and demand possession of the bonds? A. I wrote to the bank and instructed them to send them to my bank at Columbus, Georgia."

Now I desire, if your Honor please, to read into the record for the purpose of contradicting the plaintiff and as an admission against his interest, in contradiction of his testimony given in this case, two or three questions and his answers thereto which were asked him on cross-examination and which refer to

the letter of September 23rd which has now been offered in evidence and which was marked for identification in the former case and never offered because we did not reach that point, and his responses thereto, as being contradictory of the testimony that has been given in this case.

MR. CELLA:—If the court please, I object to any such purpose for the reading of those two questions and answers. Captain Holmes was on that witness stand; Mr. Palmer had all the opportunity in the world to question him on those particular points. His reading of those questions will make it appear, at least, that Captain Holmes did not answer those questions in the beginning. If Mr. Palmer desires I will put Captain Holmes on the witness stand again, with the court's permission, and he can cross-examine on those particular points. I would prefer that he do not read from the record.

THE COURT:—Well, the rule is, as I understand it, that a party to a suit may be contradicted by inconsistent statements whether he has been examined in cross-examination or not in regard to those particular questions. This transcript having been admitted to be a correct transcript of what was testified to by Captain Holmes—that is the effect of it—I think it is entirely competent for counsel to read to the jury answers to questions if he feels that those questions or those answers are inconsistent with the testimony or for the purpose of contradicting the witness, who is, as I say, in this case the plaintiff in the suit. The objection therefore is overruled.

MR. PALMER:—"Q. I show you a letter dated September 23, 1922, addressed to the First National Bank of Wrightstown, N. J., and signed "William

Holmes, Captain Infantry, Fort Benning, Georgia," and ask you if that is the letter that you wrote to the bank after you left Camp Dix A. Yes, that is the letter written by me.

Q. Did you receive any reply to that letter? A. I did.

Q. From whom? A. I am not sure, but I think it was signed by Mr. Titus.

Q. And have you that letter? A. No, I have not."

BOTH SIDES REST.

MOTION FOR DIRECTION.

MR. PALMER:—If your Honor please, I desire to move for the direction of a verdict for the defendant: First, that this case was opened and has been tried on the theory of trover and conversion; and second, upon the theory of negligence. There was considerable testimony admitted on the theory of conversion which would not be admissible upon a theory of negligence and therefore prejudicial to the defendant.

Upon the theory of negligence there is no testimony to warrant a proper inference of any negligence on the part of the defendant unless the court is of the opinion that the question of insurance played some part in reference to the charge of negligence. As the case now stands there is clearly contradictory testimony as to the question of insurance by the plaintiff's own witness, and he cannot contradict his own witness except in the event of surprise, and no such condition exists in this case.

Further, that there is no testimony before the jury on the question of the value of the bonds. I, therefore, move for the direction of a verdict in favor of the defendant.

THE COURT:—The motion will be denied.

MR. PALMER:—May I have an exception?

THE COURT:—Yes.

(Objection noted for defendant as ground of appeal.)

CHARGE OF THE COURT:.

Ladies and gentlemen of the jury: This suit is brought by William Holmes against the First National Bank of Wrightstown, in this county. The object of the suit is to recover the market value of certain government bonds which Captain Holmes left with the bank for safekeeping. These bonds, as I understand the testimony, consisted of a $1,000 par value Victory bond which the plaintiff had purchased through the bank and two $100 and three $50 Liberty bonds which he had previously acquired. There is no question that the bonds were left by Captain Holmes with the bank and that the bonds have not been returned to Captain Holmes. The reason for the failure of the bank to return them appears to be that Captain Holmes' bonds, together with securities which were owned by the bank, were abstracted and stolen by the cashier of the defendant bank.

Now the plaintiff at the outset of this case based his right to recover against the bank upon two dis-

tinct grounds: first, that the bank refused to deliver the bonds upon demand of the plaintiff, and therefore was guilty of what is known in the law as conversion; and second, that the bank was guilty of negligence in discharging the duty or such duty as it owed to the plaintiff as bailee or custodian of his property. There is no evidence which would justify a finding that there was any conversion by the bank of the plaintiff's securities, so that element has been eliminated from the case by the action of the court and you are not to consider it.

That leaves for submission to you the single question of negligence, and that question is confined by the evidence within very narrow limits. It is important to bear in mind that the bank was what is known as a gratuitous bailee; that is, it undertook to keep the bonds of the plaintiff as an accommodation to him, without any reward or pay to the bank for that service. The rule is established by the highest court in this state that bank which accepts as a gratuitous bailee securities left with it for safekeeping is required to exercise only ordinary care to protect the owner from the loss of his property. Ordinary care in this connection means such care as persons of common prudence in like situation and business usually bestow in the custody and keeping of similar property belonging to themselves. In this case the evidence is that the plaintiff's bonds were placed in the vault or safe in which the bank kept its own securities. As to the place where the bonds were kept, the bank would seem to have used the same care that it exercised in the custody and keeping of its own property. In lodging the plaintiff's bonds in a place where it kept its own securities the bank subjected the plaintiff's property to no greater risk than it assumed as to its own property. The chance that a dishonest employee of the bank might steal the

bonds, in the absence of any negligence in the bank in employing or retaining an employee who subsequently took the bonds, was a risk that the plaintiff was bound to assume so long as the bank used the same care in safeguarding the plaintiff's property as it used in the custody of its own property. And there is no evidence that the bank had any knowledge of the dishonesty of its cashier or any reason to suspect his dishonesty. In other words, there is no evidence from which the jury might find or even infer that the bank was negligent either in employing its cashier or in retaining him in its service. The bank, therefore, in respect to the place of keeping bonds, used the ordinary care required.

It appears, however, that in addition to keeping the bonds in a reasonably safe place, the bank, as a further measure for the protection of its property, insured it against such loss as subsequently occurred, but did not insure against such loss the plaintiff's property. You will understand that the acceptance of the bonds by the bank for purposes of safekeeping did not impose any duty upon the bank to insure the plaintiff against loss of his property by theft or otherwise; but the fact that it did insure its own securities and did not insure those of the plaintiff is to be considered by the jury in determining the question whether the defendant discharged the duty resting upon it to use ordinary care for the protection of the plaintiff's property left in its custody. That question is submitted to you to be answered in accordance with the facts as you find them and the law given to you by the court.

If your verdict is in favor of the plaintiff it should be for the market value of the bonds of the plaintiff at the time they were stolen or as nearly as that time can be fixed by the evidence, with interest thereon from the time the plaintiff asked the bank for the

delivery of the bonds, and I think there is evidence which would justify the jury in fixing that date as November 21, 1922.

Now you will understand that a verdict for the plaintiff, if there should be such a verdict, would not entitle the plaintiff to recover the par value of his bonds. The measure of damages would be the market value of the securities at the time they were taken or at the time, at least, that they were not returned upon the plaintiff's request. It is for the jury to say from the evidence what that value was. I understood counsel for the plaintiff to say that his recollection of the testimony was that the market was somewhere in the eighties. That question would have to be determined by the jury if you reach the conclusion that under the facts and the law the plaintiff is entitled to a verdict. If you find that the plaintiff has failed to establish his claim in this case by the greater weight of the evidence, then your verdict would be no cause of action.

The requests to charge submitted both by the plaintiff and the defendant are not expressly charged, except as they may be covered by the general instructions of the court.

Ladies and gentlemen, you may retire to consider your verdict.

DEFENDANT'S EXCEPTIONS.

MR. PALMER:—I desire an exception to your Honor's refusal to charge the requests as submitted by the defendant.

2. I desire an exception to your Honor's charge in which you said, "It appears, however, that in addi-

tion to keeping the bonds in a reasonably safe place the defendant bank took the additional precaution of insuring its own bonds against such loss as subsequently occurred."

3. I desire an exception to that part of your Honor's charge in which you said that the fact that there was such insurance on the part of the bank is to be considered by the jury in determining whether or not the bank discharged its full duty toward the plaintiff when they failed to insure his bonds.

THE COURT:—Those exceptions will be noted and allowed.

DEFENDANT'S REQUESTS TO CHARGE.

1. That if the jury believe that the bond in question was stolen by the former cashier of the bank, and that the board of directors had no reasonable ground to suspect the integrity of the cashier prior to the discovery of the defalcation, then the verdict should be for the defendant.

2. That if the jury believe that the board of directors provided a reasonably safe place for the keeping of plaintiff's bond and exercised the same degree of care that it did with its property, and had no reasonable ground to suspect the integrity of the cashier prior to the discovery of his defalcation, then the verdict should be for the defendant.

3. That the burden is upon the plaintiff to show by a fair preponderance of the evidence that the defendant was guilty of negligence, either in its failure

to use a reasonable degree of care in providing a safe place in which to keep the bond or in its selection of employees; and that if the plaintiff has failed to prove either of these elements of negligence, then the verdict should be for the defendant.

4. That the failure of the directors of the bank to detect the peculations of the cashier when examinations were held at regular and reasonable intervals by both the board of directors and the national bank examiner, is not such negligence as to make them liable for the theft by the cashier.

5. That the plaintiff is bound by the testimony of his own witnesses and cannot contradict that testimony by other witnesses except in the case of surprise as to such testimony, and there is no proof of surprise in this case.

6. That a bank is not obliged to secure and pay for insurance against loss of securities of which it is only a gratuitous bailee, but is only bound to use a reasonable degree of care in its selection of a place in which to keep such securities and in its selection of employees.

7. If the jury believe that the defendant bank secured and paid for its insurance against loss by theft of securities which it owned, and securities which it held in any relationship other than as a gratuitous bailee, their failure to secure such insurance for securities held as gratuitous bailee is no evidence of negligence and the verdict should be for the defendant.

8. There is no testimony in this case as to the kind or character, if any, of the insurance carried by the

defendant, so that there is nothing to warrant any inference that the bank failed to insure any securities that it held as gratuitous bailee, belonging to the plaintiff.

10

5-26-25—Ex. P 1 K 20

No. 25 Wrightstown, N. J., Sept. 12, 1921.

Received from Capt. Wm. Holmes
for safe-keeping, the following:

1 Victory Bond No. J2021136	@ $1000	$1000.—	
H.M.T Third Loan	- - - -	200.—	
H.M.T Second "	- - - -	50.—	
H.M.T 4th "	- - - -	50.—	
P. H. S. " "	- - - -	50.—	30
		$1350.—	

First National Bank, Wrightstown, N. J.
Paul H. Smith,
Asst. Cashier.

(Ex. P 1—K)

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

WILLIAM HOLMES, Plaintiff, vs. FIRST NATIONAL BANK OF WRIGHTSTOWN, N. J., Defendant.	Action at Law. Judgment.

This action was tried before Judge Frank B. Jess, with a jury, at the Burlington County Circuit.

The cause having been heard and submitted to the jury, they returned a verdict in favor of the plaintiff, of Fifteen Hundred Twenty Dollars and Forty-four Cents, ($1,520.44.)

Whereupon, it is adjudged that the plaintiff recover from the defendant, the sum of Fifteen Hundred Twenty Dollars and Forty-four Cents ($1,520.44), and his costs which are taxed at the sum of Sixty-eight Dollars and Sixty-two Cents ($68.62), making in the whole the sum of Fifteen Hundred Eighty-nine Dollars and Six Cents ($1,589.06).

Judgment entered October 11, 1928.

New Jersey Court of Errors and Appeals

WILLIAM HOLMES,
Plaintiff-Respondent,

vs.

FIRST NATIONAL BANK
of Wrightstown, New Jersey,
Defendant-Appellant.

Brief for
Plaintiff-
Respondent

FACTS

This suit was brought by William Holmes, plaintiff, an officer of the United States Army stationed at Camp Dix, New Jersey.

On September 12, 1921, the plaintiff used his savings earned as an officer of the United States Army while serving in France to purchase a $1,000.00 Victory Loan Bond through the defendant. (S. C. p 52,1.20). He accepted from the defendant a receipt for said bond which stated in unmistakable language that the bond was being left with the defendant for safe keeping. (S. C. p. 71, 1.20). Subsequently, several other bonds of smaller denominations were taken by the plaintiff to the defendant bank and left there for safe keeping, and the acceptance of these smaller bonds was evidenced by the notation on the receipt of September 12, 1921, of the fact that these smaller

bonds had been left with the bank, which acceptance was initialed on the receipt by the officer to whom they were delivered. (S. C. p. 20, 1.28). Thse bonds of smaller denominations were not purchased by the plaintiff through the defendant, but the plaintiff had purchased them elsewhere and taken them to the bank for safe keeping. (S. C. p. 31, 1. 5).

All of the bonds that were delivered to the defendant bank, as well as the first bond for $1,000.00, were placed by the Assistant Cashier of the defendant bank in an envelope marked with the plaintiff's name, and were placed in the vault in the bank where securities belonging to the defendant bank were also kept and stored. (S. C. p. 33, 1. 35).

The bonds that the plaintiff had left with the defendant bank for safe keeping, in accordance with the receipt above-mentioned were subsequently stolen by Harry M. Titus, a defaulting cashier of the defendant bank. (S. C. pp. 26 and 56).

The defendant bank carried insurance against loss by embezzlement of its own securities and those that were left with the bank as collateral for loans, but did not carry insurance against loss by theft of property left for safe keeping. (S. C. p. 56 lines 1 to 20).

ARGUMENT

There were several grounds stated as the reason of appeal but as these were not argued in the appellant's brief, they may be considered as abandoned. Carter vs. Allenhurst, 100 N. J. L. 138, 143.

Argument

The sole question for consideration is whether a bank which accepts securities left with it for safe keeping by its customers, as an incidence of its business in the ordinary conduct of its business, is required to exercise ordnary care to protect the owner from loss of his property.

It is respectfully submitted that the Court laid down the proper rule when it charged the jury that: "Ordinary care in this connection means such care as persons of common prudence in like situation and business usually bestow in the custody and keeping of similar property belonging to themselves." (S. C. 66, 1.14). "You will understand that the acceptance of the bonds by the bank for purpose of safe keeping did not impose any duty upon the bank to insure the plaintiff against loss of his property by theft or otherwise; but the fact that it did insure its own securities and did not insure those of the plaintiff is to be considered by the jury in determining the question whether the defendant discharged the duty resting upon it to use ordinary care for the protection of the plaintiff's property left in its custody." (S. C. p. 67 lines to 30).

The fact that the bailee may use ordinary care in part does not excuse the bailee from using ordinary care under all the circumstances of the particular case. Carter vs. Allenhurst, 100 N. J. L. 138.

The defendant places too much weight on the arguments that the bank used due care in selecting the place to keep the securities and used due care in the selection of its employees, and that without more argue that the bank

should not be answerable. But that argument is not all inclusive. The bank must use the ordinary care that ordinary prudent persons use under the same or similar circumstances, in the keeping of property belonging to themselves. S. C. p. 66, 1, 14.) Mayer vs. Brensinger, 180 Ill. 110, Knights vs. Piella, 111 Mich. 9.

The defendant erroneously argues that the Court below failed to distinguish the difference between ordinary care and a high degree of care, and the defence seeks to pull itself up by its own bootstraps, by not having any testimony to support itself, when arguing that the bank used a high degree of care, and not simply ordinary care, by insuring its own securities (page 3 of defendant's Brief L. 20) but a case cited in defendant's own brief cites the rule to be that every man is presumed to exercise ordinary care of his own property until the contrary is shown. (Page 10 of defendant's brief, L. 30) Erie Bank vs. Smith (1871) 3 Brewst, (Pa.) 9.

While in that case the presumption was invoked to aid the bailee, it is only just that the same presumption should be equally employed in aid of the bailor.

Nor does the defendant distinguish the difference between degrees of care in the supposition in his brief. (Defendant's brief Page 3, L. 36). It may very well be that where a neighbor in an emergency asks a farm neighbor to put a large sum of money in his safe over night that due care under those circumstances does not require the bailee to insure the money against theft.

But the facts in our case are much different

from those in the supposition of the defendant's argument. Here there is no unexpected emergency that gave rise to the bailment. The bank had been constantly doing this work for its customers as a part of its business. S. C. page 41, L. 36.) While the bank got no pay directly for the safe keeping it had a direct money value return to the bank in the form of good will and business and the bailor in the particular case had three deposit accounts with the bailee. (S. C. p. 21, L. 14). One of these accounts was between $800.00 and $900.00. (S. C. p. 23, L. 2).

In our case there was plenty of time for the bank to insure the goods and while a bank may not be required to insure securities left with it for safe keeping by a customer as an incident of the bank's business it must use the ordinary care that the entire circumstances of the particular case requires and the fact that the bank took the precaution to insure its own securities left in the same place with the bailor's securities is a question for the jury whether the bank used the ordinary care that the particular circumstances required. Charge of Court below. (S. C. p 67, Lines 20 to 30).

On page 15 of the defendant's brief, line one, the defendant argues that the Supreme Court (In Fountain vs. The First National Bank of Wrightstown 134 Atlantic 188) had found sufficient testimony in the cause to warrant its consideration by the jury before it reached the question of insurance.

But we respectfully submit that that is not so; that there was nothing in that case to show that the bank used any other degree of care in

keeping its own securities than it did in keeping the securities of others pledged as collateral before the question of insurance was reached.

The question of insurance was the only difference in the care of the various securities in that case and in this case in which the bank kept the securities and the securities of others whether as an incident of its service to depositors or as collateral.

Hence it was necessary for the Supreme Court in that case to say that the question of insurance was a proper question for the jury in determining whether there was negligence and that it was necessary for the Supreme Court on the appeal to determine the question of insurance in the Fountain case in order to discharge the rule to show cause.

It is therefore, respectfully submitted that the part of the opinion of the Supreme Court, insofar as it relates to the question of insurance, was not obiter dicta, and was entirely necessary for the decision of that case.

In the Fountain case the bank contended that there was nothing in the evidence to justify a finding by the jury that the bank was guilty of negligence in failing to use proper precautions to protect the plaintiff against its loss by theft. (S. C. p. 13, L. 30.)

But the Court held that this matter was concededly one to be determined by the jury and that their finding of negligence on the part of the defendant bank was justified by the proof and the Court went on to say: "The obligation of the bank as obligee was to exercise reasonable care in the safe keeping of this bond and reasonable care is that degree of care which a

prudent business man would exercise in regard to his own property of a similar kind under similar circumstances. In the present case the testimony shows that the defendant bank insured all of its own securities against loss by theft or fire or otherwise; and this was a factor to be considered by the jury in determining whether the defendant had discharged itself of the obligation to use the degree of care that we have indicated for the protection of the plaintiff's property. They found that such care had not been used and we think they were justified in that finding." (S. C. p. 14, L. 14.)

It is respectfully submitted that the Supreme Court on appeal laid down the proper rule in the Fountain case and that the Court below based upon the testimony in this cause properly followed the ruling in the Fountain case.

It is respectfully submitted that the court laid down the proper standard of care under the testimony of this case.

It is respectfully submitted that the bank was not a gratuitous bailee in which the bailment was entirely for the benefit of the bailor, but that it was a bailment for the mutual benefit of the bailor and bailee. That the bank rendered the service of bailment as an incident of its business with its customers from which it hoped to create good will among its depositors by attracting and keeping business to itself and did so make attractive the doing of business with the bank by this Plaintiff-respondent from the whole transactions of which the bank expected to make a profit and would have done so but for the theft.

Argument

It is not disputed that the bank rendered this service as an incident of its business and we herewith submit the testimony of Robert W. Carter, who was president of the bank at the time of the defalcation. (S. C. p. 41, L. 18.)

Q. Was it a habit or was it a custom in your bank to accept bonds for safe keeping? A. From customers they used to. (S. C. p. 41, L. 35).

Q. Only for customers? A. Well, we didn't advertise for it or anything like that.

Q. But you were just giving that as an additional accommodation for your customers; is that right? A. Well we didn't make a business of it.

Q. But you still accepted bonds, is that true? A. When a customer had a bond and wished it taken care of we told him he could leave it. (S. C. p. 42, lines 1 to 8.)

It has been held that as an employee was authorized to do that which was necessarily incidental to the business of the employer, impliedly to invite a prospective purchaser in the store to lay her cloak aside while trying on a garment, the employer is liable for lack of care on the part of the employee as to its custody. Bunnell vs. Stern 122 N. Y. 539.

While in our cause the bailment may not have been a necessary incident of the business of the bank it is undisputed that it was an incident of the service of the bank in the ordinary conduct of its business, and the bank should equally be charged for the standard of care to be used in the protection of the plaintiff's property; the service being extended to customers in both cases as a benefit to the respective business.

Argument

One case has gone much farther than is the case in our cause to find a bailment for mutual benefit and to require the bailee to exercise an ordinary degree of care in the protection of the bailor's property, the same standard of care as a bailee for hire. In that case the bailment was not even in any manner an incident of the proprietor's business, but simply an accommodation for the customers of another man's business to leave their package at the store of the proprietor. That case held that it was a bailment for the benefit of the bailor on the theory that what be thus permitted brought him an increase in business.

The court on appeal sustained the exception to the charge which in effect declared the rule to be that in order to make the bailment for hire, a bailment for the mutual benefit of bailee and bailor, that the jury must find a certain benefit and not a mere contingent, uncertain and indirect benefit or expectation of profit.

The Supreme Court on the appeal said as to the charge: "The only error in this case was in the instruction given to the jury and insisted in telling them that the defendant could not be considered a bailee for hire unless his compensation was for some certain benefit to himself, and that a mere contingent, uncertain and indirect benefit would not constitute such a consideration as was necessary to establish a contract of bailment for hire or reward. This was stating the proposition more broadly than the rules of law will warrant. A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and the amount of the compensation

are immaterial. The law will not inquire into its sufficiency or the certainty of its being realized by the bailee. The real question is, Was the contract made for a consideration? If so, then it was a locatum and not a depositum, and the defendant's were liable for want of ordinary care. The general rule as to the consideration of a contract is well understood, and is the same in the case of bailments as well as all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value though slight or of a nature which may inure to the benefit of the party making the promise. Haigh vs. Brooks, 10 Ad. & El. 320 and 2 P. & Dav. 484. Lawrence vs. McCalmont, 2 How. 452. Hubbard vs. Coolidge 1 Met. 92. Where such a consideration exits, a contract cannot be said to be nudum pactum, nor a bailment a gratuitous undertaking." Newhall vs. Paige 10 Gray (Mass.) 366.

In our case there can be no doubt, and there is no dispute upon the point, that the bank rendered the service of bailment as an incident to its business which was a benefit to itself.

It becomes most clear then that the bank was chargeable for a lack of ordinary care and the jury in this cause below must have so found upon the testimony in the light of the charge of the jury. It necessarily follows that the jury found that the bank was negligent in that it failed to exercise the ordinary care that the circumstances required, which was the proper

degree of care for which the defendant bank was chargeable.

The Court of Errors and Appeals of New Jersey held that where a temporary bailment arose as an incident of the general business of the bailee it became the duty of the bailee to use ordinary care in safe keeping the bailor's property. Carter vs. Allenhurst, 100 N. J. L. 183.

In the Carter vs. Allenhurst case, 100 N. J. L. 138 the plaintiff rented a bath house. The operator of the bath house rendered a service without any additional charge to its patrons of allowing the patrons to deposit their valuables in the office of the bath house. The court held that once the bailment arose by a patron leaving his valuables for safe keeping at the office, the bailee must use ordinary care in safe keeping the valuables of the bailor.

In the Carter vs. Allenhurst case and in our present cause the plaintiff availed himself of a service ordinarily extended to the defendant's customers as an incident of the respective business in the ordinary conduct of those respective businesses and in either case there was no direct charge for the service of the bailment but the consideration or benefit to the bailee in either case was the then actual business with their respective customers and the attraction of more business by encouraging a more frequent use of the particular business facilities for profit by making the service of bailment an incident to the regular business of the respective bailors.

It is, therefore, most respectfully urged, that as the bailment was an incident to the ordinary

business of the bank from which business the bank without dispute ordinarily derives a profit, and as there was testimony from which the jury might infer and must have so found in our cause that the bank did not use the ordinary degree of care required under the particular circumstances when it insured its own securities but failed to take the precaution to insure the securities of others left at the same place, and as the charge of the court as to the standard of care required under the testimony in this cause was correct, and as the jury were justified in their finding that the bank failed to exercise the proper or ordinary degree of care under the particular circumstances, that the appeal in this cause ought to be dismissed.

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NEW JERSEY
COURT OF ERRORS AND APPEALS

WILLIAM HOLMES,
Plaintiff-Respondent,

vs.

FIRST NATIONAL BANK OF WRIGHTSTOWN, NEW JERSEY,
Defendant-Appellant.

Brief for Defendant-Appellant.

FACTS.

This suit was brought by William Holmes, plaintiff, an officer of the United States Army stationed at Camp Dix, New Jersey.

On September 12, 1921, the plaintiff purchased a $1000.00 Victory Loan bond through the defendant. (S. C. p. 18, l. 12). He accepted from the defendant a receipt for said bond which stated in unmistakable language that the bond was being left with the defendant for safe keeping. (S. C. p. 71, l. 20). Subsequently, several other bonds of smaller denominations were taken by the plaintiff to the defendant bank and left there for safe keeping, and the acceptance of these smaller bonds was evidenced by the notation on the receipt of September 21, 1921, of the fact that these smaller bonds had been left with the bank, which acceptance was initialed on the receipt by the officer to whom they were delivered. (S. C. p. 20, l. 30). These bonds of smaller denominations were not purchased by the plaintiff through the defendant, but the plaintiff had purchased them else-

where and taken them to the bank for safe keeping. (S. C. p. 31, l. 5).

All of the bonds that were delivered to the defendant bank, as well as the first bond for $1000.00, were placed by the Assistant Cashier of the defendant bank in an envelope marked with plaintiff's name, and were placed in the vault in the bank where securities belonging to the defendant bank were also kept and stored. (S. C. p. 33, l. 35).

The bonds that the plaintiff had left with the defendant bank for safe keeping, in accordance with the receipt above mentioned, were subsequently stolen by Harry M. Titus, a defaulting cashier of the defendant bank. (S. C. pp. 26 and 56).

The defendant bank carried insurance against loss by embezzlement of its own securities and those that were left with the bank as collateral for loans, but did not carry insurance against loss by theft of property left for safe keeping. (S. C. p. 56, lines 1 to 20).

ARGUMENT.

The sole question for consideration is whether or not a national bank is bound to carry insurance against loss by theft by its employes of securities left with the bank as gratuitous bailee. This question was clearly raised at the trial upon the motion for non-suit, and on the motion for direction of verdict in favor of the defendant, and in the defendant's request to charge, which were refused.

The Court told the jury that there was no evidence of negligence in the case, other than the failure of the defendant bank to carry insurance against loss of securities which it held as gratuitous bailee; that there was no negligence on the part of the defendant bank in its selection of a proper and safe place in which to keep and store the securities, nor in the selection of

its employes. The Trial Court further told the jury that the acceptance by the defendant bank of securities as gratuitous bailee did not impose upon the defendant bank any duty to carry insurance on those securities so accepted. But he left to the jury to decide the question of whether or not the failure of the bank to insure securities left with it as gratuitous bailee was a failure to use ordinary care for the protection of those securities.

Now, if the acceptance of those securities as gratuitous bailee imposed no duty on the bank to carry insurance for their protection, how is it possible to say that their failure to carry such insurance was an act of negligence? Negligence in this case could only be a failure to do something which a reasonably prudent person, under the circumstances, ought to have done. Now if there was no duty on the part of the defendant bank to carry insurance on those securities left with it is as gratuitous bailee, how can it be said that there was any possible question as to whether or not such failure was an act of negligence?

The Court clearly failed to distinguish the difference between ordinary care and a high degree of care. Because the bank chose to exercise, so far as its own securities were concerned and those which were left with it as collateral for loans, the extremely high degree of care evidenced by insurance against loss by theft or otherwise of such securities, does not, by the same rule, make it liable for loss of securities that it held as gratuitous bailee. To impose this rule in the case of a gratuitous bailee would impose upon the bank in this case, or upon any gratuitous bailee, absolute and entire responsibility for loss by any means whatsoever of property left with the bailee where no compensation was paid for it.

The difference in the two rules, I think, can be very well illustrated from the following: Suppose a

man living somewhat remote from any town, but engaged in some business that required his having on hand in his house for immediate use, certain securities and some considerable sums of money, did, for his own protection, procure and have in his house a fireproof or burglar-proof safe in which he placed his own money and his own securities, and suppose that as a means for still further protection of his property he caused said securities and money to be insured because of its location and possible danger of loss. And then his neighbor comes in to see him some evening and says to him, "I have here a considerable sum of money that has just been paid to me, but by reason of the lateness of the hour, it is impossible for me to take it to town and deposit it in the bank, and would you mind putting it in your safe for me until I can get it to a bank?" The owner of the safe, naturally, would say "Yes," and the money would be placed in the safe. Now you have the identical situation we have of the defendant bank in this case. Its own securities had been insured; it takes from the plaintiff in this case some bonds for safe keeping, the same as the man took from his neighbor the money for safe keeping.

Now suppose that in the course of the night the safe is robbed by an employe of the owner of the safe, and among the things taken was the money belonging to his neighbor which had been placed there for safe keeping. And suppose that no negligence could be shown either in the selection of the place for the keeping of the money, or in the selection of the employes. Could it be said, or would it be said, that the owner of the safe was negligent in his failure to have insurance against loss by theft by his own employe of the money that had been left with him as gratuitous bailee by his neighbor? If the answer to that question is "Yes," then there is a duty

imposed upon a gratuitous bailee to exercise not only ordinary care in the protection of property left with him as gratuitous bailee, but to exercise the highest degree of care, yes, even to do everything that human ingenuity has been able to devise for the protection of the property left with him as gratuitous bailee.

The above illustration clearly shows, I think, the difference between the degrees of care that are required of a gratuitous bailee, or of a bailee for hire.

Now unquestionably, in this case, the bonds in question were left with the bank merely for safe keeping purposes, which would make the bank a gratuitous bailee and obliged to exercise only a reasonable degree of care, and it is respectfully submitted that there is no proof in this case that the bank failed to exercise such degree of care. The following cases support this doctrine:—

"In a suit against a bank, a gratuitous bailee, to recover the value of securities left with it, and which have been stolen by one of its employees, a want of ordinary care on the part of the bank not appearing, the bank is not liable for the loss of the plaintiff." Smith v. Elizabethport Bank, 69 N. J. L. page 288.

"A bank which receives bonds for safe keeping without compensation is bound to exercise such reasonable care as men of common prudence would usually bestow for the protection of their property of a similar character." Preston v. Prather (1890) 137 U. S. 604, 34 L. Ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Rep. 599. 4 A. L. R. 1208.

"Failure on the part of the officials of a bank

to detect the peculations of a teller during a period of two years which might have been discovered by an examination of his individual ledger, is not such negligence as will render them liable to the owner of bonds deposited for gratuitous safe keeping and stolen by such teller, the loss not arising from the accounts as kept by him, but from a larceny outside of his employment." Scott v. National Bank (1874) 72 Pa. 471; 13 Am. Rep. 711. 4 A. L. R. 1222.

"Bank is not insurer of securities left in its care without compensation, being liable only for negligence."

"Where bonds were deposited with bank for safe-keeping and stolen by cashier without knowledge of bank or Board of Directors, bank held not liable, unless negligent in employment or retention of cashier." Holmes vs. First National Bank of Wrightstown, 128 Atl. 150.

"A pledgee of securities who retains possession thereof after the loan secured by the pledgee is paid in contemplation of future loans continues liable for the want of ordinary and reasonable diligence in their custody." Ouderkirk v. Central Natl. Bank, 119 N. Y. 263. Hollister v. Central Natl. Bank Id. 634. 17 L. R. A. 193.

"A pledgee is not liable for the loss of pledged articles stolen from him providing he was exercising ordinary care." Petty v. Overall 42 Ala. 145; 94 AM. Dec. 634, et als. 171 L. R. A. 193.

"In Ouderkirk v. Central Natl. Bank 119 N. Y. 263, 23 N. E. 875, where bonds deposited with a

bank as collateral security were not redelivered upon demand, it was held that the burden of showing the circumstances of the loss was upon the bailee. The bonds had disappeared and there was evidence that the cashier was a defaulter, but the evidence did not show conclusively what had become of the property." 43 L. R. A. (N. S.) 1191.

The case of Firestone Tire and Rubber Company v. Pacific Transfer Company, 129 Washington, 665; 208 Pacific, 55 and 26 A. L. R., 217, is a particularly well-considered and well-reasoned case on the question of the responsibility of bailees; and there is appended to it in 26 A. L. R. 217, a very extensive note which quotes a great number of cases dealing with this subject and shows the decisions of them and the law rules applicable thereto. I have not put all of these cases in this brief because of their number, but an examination of it will show a very clear exposition of the law on this subject.

"The prevailing rule is well stated in 3 R. C. L. page 151, as follows: 'But if the bailee proves that the property was stolen or destroyed by fire, or accounts for his failure to return, or for the injury, in any other way which does not, on its face, involve negligence, or call for further explanation, the bailor must prove negligence.' "

"All that the testimony shows in this case is that the bailee did not return the goods because they were stolen by two of its employees without its knowledge or connivance. Under ordinary circumstances, the mere fact that the goods in storage have been stolen no more shows negligence than the fact that in a personal-injury

case the plaintiff was injured while in the employ of the defendant shows negligence. The burden here was on the respondent to show that the theft of its goods was the result of some negligent act of the appellant. Mere proof of theft is not proof of negligence." 40 Cyc. 470; 27 R. C. L. 1002.

"We hold that the prima facia case made by the bailor, by showing that the bailee failed to return the goods, may be overcome by the bailee showing that the goods have been stolen, and that thereafter the burden of showing negligence rests on the bailor.

"It is contended, however, that this rule should not be applied where it is shown that the theft was committed by a servant of the bailee. It is argued that the mere fact that the bailed property was stolen by the servant of the bailee imposes upon the latter the burden of showing that he was without fault. No authorities are cited in support of this proposition, nor is any satisfactory reason given why such should be the rule. We have made a very extended search of the authorities, and are unable to find any case or textbook which discusses this particular question. Simply put, the question is: Does proof that the servant of the bailee stole the bailed goods raise a presumption of negligence on the part of the bailee, and impose on him the burden of showing his want of negligence?

"The master is liable only for the negligence of his servants while in the performance of his duties. It has never been held that the master is liable for the torts of his servant committed

without the course of his employment. It needs no argument to show that the servant, in his act of thievery, is not in the performance of his duty to his master, and therefore the master cannot be made liable for his acts. Any other rule would make the bailee an insurer of the honesty of his servant. There are a few early cases which held that under such circumstances the bailee was liable, but such doctrine has long since been abandoned, even by most of those courts which originally held to it, and the rule is now almost universal that the bailee is not liable for the theft by his servant, unless he was guilty of some negligence in connection with the theft.

"But this does not dispose of the question of the burden of proof, which is the exact question before us. In all negligence cases the rule is that the plaintiff must allege and prove want of care on the part of the defendant. A defendant is never called on to defend himself against a charge of negligence until there is some proof by the plaintiff tending to show want of care. It has always been held that there is a presumption that the master has exercised due care in the selection of his servant. What is there then, peculiar in a bailment case, which should change this rule and require us to hold that the master is presumed to have been guilty of negligence in engaging his employees? We can see nothing."

"We hold that the mere fact that appellant's servants stole the bailed good does not place on it the burden of showing want of negligence in selecting and keeping the servants, but that the burden was on the respondent to show such negligence and that it has failed to do."

"And where the question was as to the liability of a bank for the theft of bonds deposited with it as collateral, an instruction was approved, in Third Nat. Bank v. Boyd (1876) 44 Md. 47, 22 Am. Rep. 35, that the bank would be responsible if the jury found that the bonds had been stolen 'in consequence of the failure on the part of the defendant to exercise such care and diligence in the custody or keeping of them as, at the time, banks of common prudence in like situation and business usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as were properly adapted to the preservation and protection of said property, and to have been proportioned to the consequences likely to arise from any improvidence on the part of the defendant.' "

"The court said that what amounts to due care must, as a rule, depend upon the circumstances of each case, and that whether the bailee has exercised due care is a question for the jury, except in cases where but one reasonable inference can be drawn from the undisputed facts. That a situation may arise where it would be the duty of the Court to declare as a matter of law that due care had or had not been exercised."

"Erie Bank v. Smith (1871) 3 Brewst, (Pa.) 9. In this case, where bonds were stolen from a bank, the court in instructing the jury, said: 'It is undoubtedly true that, in the case of a pledge of this character, it is not enough to say that the pawnee took the same care of the thing pledged as he did of his own goods, nor is it any answer to the demand of the pawnor, or debtor, to show

that his own property, to an equal or greater amount, was lost at the same time and by the same alleged negligence. He must go further than that, and satisfy the jury that there was ordinary diligence in keeping his own property. If it appears that he was not diligent in keeping his own property, that would be no excuse for negligence in keeping the property of others intrusted to him. Yet, neverthless, as every man is presumed to exercise ordinary care of his own property until the contrary is shown, where the bailee's own goods or property are lost by the same occurrence, the same theft, the same fire, or whatever it may be that destroys it, in the absence of evidence there is a presumption in his favor, a presumption that he used ordinary diligence as to his own goods.' "

"The mere fact that a watchman, who was employed to guard the defendant bank, left duty at four o'clock in the morning, which at the season of the robbery was several hours before daylight, and that at the time the robbery occurred in the morning there was no watchman present, was held in Fleming v. Northampton Nat. Bank (1881) 62 How. Pr. 177, Ded. Case, No. 4 862a, insufficient to warrant an inference of negligence on the part of the bank, so as to permit recovery against it for loss by theft of bonds deposited by the plaintiff with the bank as collateral security; and it was held that on this evidence merely a verdict should be directed for the defendant."

I am aware, of course, that the Supreme Court of this state, in the case of Fountain vs. the First National Bank of Wrightstown, decided July 26, 1926, and reported in 134 Atlantic, page 188, in a per cur-

iam, that the question of insurance by a gratuitous bailee was a factor to be considered by the jury in determining whether or not the defendant had discharged itself of the obligation to use the degree of care that was necessary for the protection of the plaintiff's property.

For the convenience of this court, I have printed in the brief the full text of that opinion, which is as follows:—

"PER CURIAM:

This suit was brought to recover the value of a government bond deposited by the plaintiff in the defendant's bank and stolen therefrom by the bank's cashier. The trial resulted in a verdict in favor of the plaintiff, and the defendant was thereupon allowed the present rule.

"The facts disclosed by the proofs were as follows: While the plaintiff, who was a captain in the Army, was stationed at Camp Dix, in the years 1921 and 1922, he purchased this bond through the bank, paid part of the money down, and left the bond with the bank as security for the payment of a promissory note which he gave for the balance of the purchase money. In due course he paid off the note, but left the bond in the bank for safe keeping. Subsequently, he borrowed more money from the bank on another note, and, as he testified at the trial, pledged this bond as collateral for the payment of the latter note. The defendant controverted this statement, claiming that the bond was merely left with it for safe keeping and not as collateral to the second note, and called the cashier who had stolen it to prove the fact. He testified that

the transaction with relation to the second note was made between him, as cashier, and the plaintiff; that the bond was not pledged for the payment of the latter note and that the transaction with relation to the second note was entered by him in the books of the company. In support of this testimony by the cashier the defendant offered its books, and they did not disclose that the bond had been pledged as collateral for the payment of this second note.

"The verdict of the jury in favor of the plaintiff carries with it, by necessary inference, a finding that the bond had been pledged as collateral to secure the payment of the second note, for the court in its charge instructed them that unless they so found, their verdict must be for the defendant bank; and the first ground upon which a new trial is asked is that this finding was against the weight of the evidence. We think not. The jury considered that the testimony of the plaintiff was entitled to belief as against that of an admitted thief; and the fact that the books of the bank failed to disclose that a pledge of the bond had been made they very properly considered of little importance, in view of the fact that the entry was made by the man who afterwards stole the bond.

"It is further contended that, even if it be concluded that the bond was pledged to secure this note, the plaintiff was not entitled to recover its value from the bank, for the reason that there was nothing in the evidence to justify a finding by the jury that the bank was guilty of negligence in failing to use proper precautions to protect the plaintiff against its loss by theft or oth-

erwise. This matter was concededly one to be determined by the jury; and we think their determination that negligence on the part of the defendant bank existed, was justified by the proof. The obligation of the bank as obligee was to exercise reasonable care in the safe keeping of this bond; and reasonable care is that degree of care which a prudent business man would exercise in regard to his own property of a similar kind under similar circumstances. In the present case the testimony shows that the defendant bank insured all of its own securities against loss by theft or fire or otherwise; and this was a factor to be considered by the jury in determining whether the defendant had discharged itself of the obligation to use the degree of care that we have indicated for the protection of the plaintiff's property. They found that such care had not been used, and we think they were justified in that finding.

"The rule to show cause will be discharged."

It will be noted that in the Fountain case there was a question as to whether or not the bonds in question had been left with the bank as collateral for loan. And this question was left to the jury, and in view of the testimony in the case, was probably properly so left to the jury.

And the Supreme Court in the Fountain case found that there was sufficient testimony in the case to make the matter of whether or not the bonds had been left as collateral for the loan a question for the jury, and refused to disturb the verdict on that account.

The Court, however, went on to say that the question of insurance was also a proper question for the

jury. It was clearly unnecessary to determine this question in the Fountain case in order to discharge the rule to show cause, as the Court had found sufficient testimony in the case to warrant its consideration by the jury before he reached the question of insurance.

It is, therefore, respectfully submitted that the part of the opinion of the Supreme Court, insofar as it relates to the question of insurance, was obiter dicta, and was entirely unnecessary for the decision of that case.

The history of the litigation in the Holmes case is interesting, and important. Shortly after the defalcation of Harry M. Titus, the former cashier of the First National Bank of Wrightstown, it was discovered that there were a number of people who had left bonds at the bank for safe keeping, under receipts similar to the one in this case, and in some instances suits were brought by the owners of the bonds to recover the value of those bonds. As these cases came on for trial, the plaintiffs were non-suited. Among those cases was the same William Holmes that is involved in this suit. No appeal was ever taken from those non-suits.

When the Fountain case came on for trial in 1926 it had been conceived by some one that the question of the failure of the bank to carry insurance on securities left with it as gratuitous bailee might be a question in determining whether or not the bank had exercised due and proper care in safe guarding the securities. Of course, in the Fountain case there was also the important question of whether or not the bonds had been left as collateral for a loan. The verdict in the Fountain case was against the defendant, and the rule to show cause allowed, which resulted in the opinion quoted in this brief.

And it is this opinion in the Fountain case that

formed the basis of the trial of this present Holmes suit. And the Circuit Court Judge seemed to think that he was obliged to follow that part of the opinion in the Fountain case which dealt with the question of insurance, and his charge to the jury was along that line. But, it has been heretofore said, the question of insurance was not necessary for a decision in the Fountain case.

It is, therefore, most respectfully urged that any rule which makes a gratuitous bailee responsible for property left with it to the extent of requiring the gratuitous bailee to pay for insurance on property left with it, is an erroneous rule, and that the verdict in this case should be set aside.

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