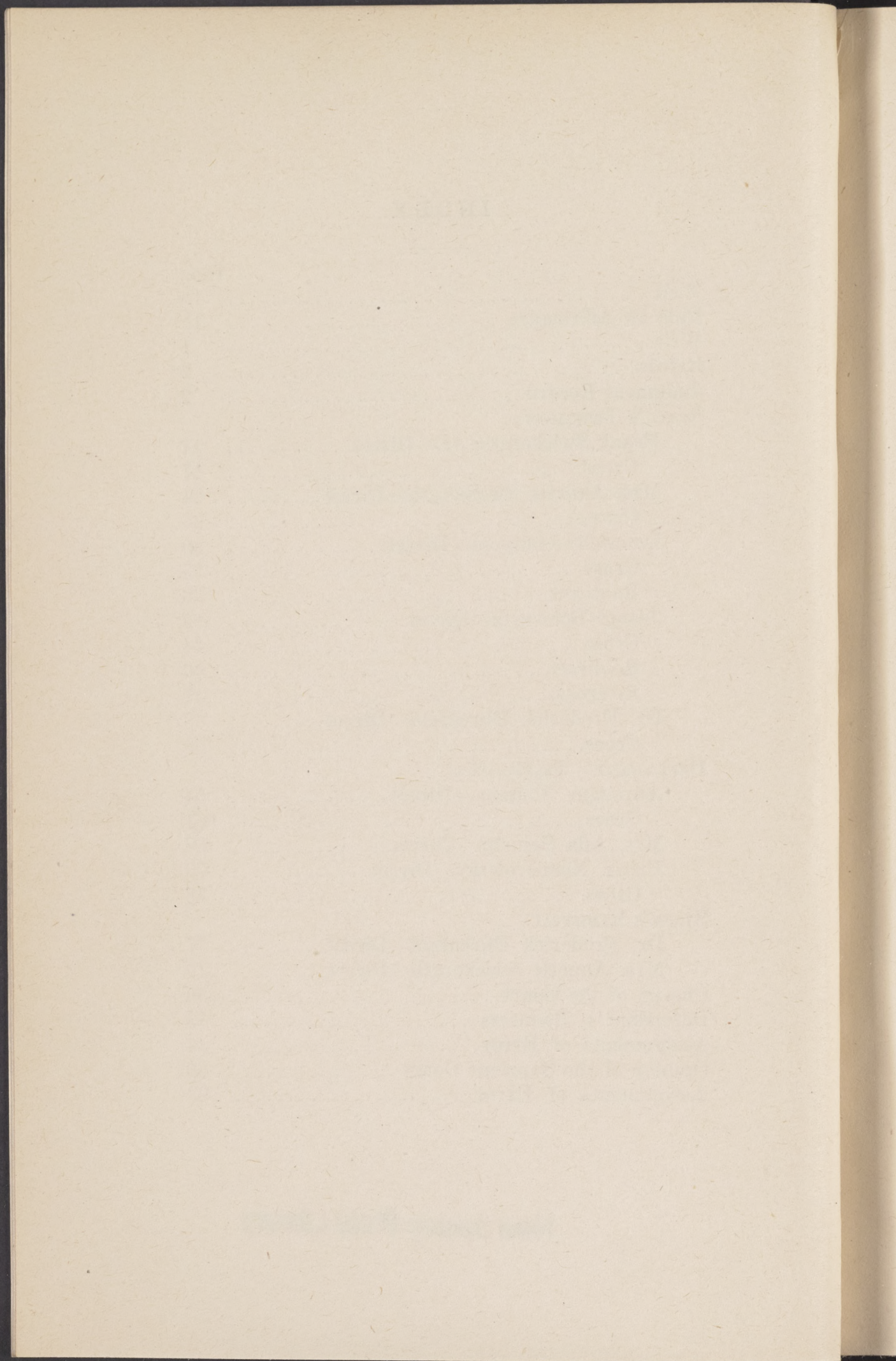


INDEX

	PAGE
Writ	1a
Rule on Affirmance	1b
Writ.	1
Return.	2
Judgment Record.	2
STATE'S TESTIMONY:	
Frank Swickerath, Jr.—Direct.	11
Cross.	17
Mrs. Annette Swickerath—Direct.	24
Cross.	26
Donatello Lamponi—Direct.	30
Cross.	33
Re-direct.	36
Joseph Schwartz—Direct.	39
Cross.	44
Re-direct.	46
Re-cross.	46
Dr. Frederick Ehrenfeld—Direct.	48
Cross.	50
DEFENDANT'S TESTIMONY:	
Abraham Samaha—Direct.	54
Cross.	61
Mrs. Ada Samaha—Direct.	68
Usher Nemisrowsky—Direct.	73
Cross.	76
STATE'S REBUTTAL:	
Dr. Frederick Ehrenfeld—Direct.	77
Mrs. Annette Swickerath—Direct.	79
Charge of the Court.	80
Defendant's Requests.	83
Assignments of Error.	84
Opinion of the Supreme Court	86
Assignments of Error	93



WRIT.

STATE OF NEW JERSEY, ss.

The State of New Jersey, to Hon. W. S. Gummere, Chief Justice of our Supreme Court, and Robert Ingersoll, Judge of the Court of Common Pleas, constituting the Court of Oyer and Terminer for the County of Atlantic of the Term of February last past.

GREETING :

Because in the record and proceedings, and also in giving judgment upon a certain indictment which was in our said Supreme Court, before you between the State of New Jersey, prosecutor, and Abraham Samaha, defendant, in a plea of obtaining goods under false pretences manifest error hath intervened, to the great damage of said defendant as it is said.

10

We being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, said Abraham Samaha, command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals to be holden at Trenton on the 31st day of August next, and this writ, that the records and proceedings aforesaid being inspected, we may further cause to be done thereupon, for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

20

30

Witness, Hon. Edwin Robert Walker, Chancellor at Trenton, this 12th day of August, A. D. 1918.

THOMAS L. MARTIN,
Clerk.

PARSONS AND PARSONS,
Attorneys,
JOHN J. CRANDALL,
Of Counsel.

RULE ON AFFIRMANCE.

NEW JERSEY SUPREME COURT.

10	STATE, <i>Defendant in Error,</i> vs. ABRAHAM SAMAHA, <i>Plaintiff in Error.</i>	}	In Error to Atlantic Quarter Sessions Court. Rule on Affirmance.
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This cause having been duly argued at the February Term, 1918, of this Court by John J. Crandall, of counsel for the plaintiff in error, and Edmund C. Gaskill, Jr., of counsel for the defendant in error, and the Court having considered the same and finding no error in the record or proceedings of the Atlantic County Quarter Sessions Court,

It is thereupon ordered and adjudged that the judgment of the Atlantic County Quarter Sessions Court, removed by the writ of error in this cause, be affirmed with costs.

Rule entered August 17, 1918,

On motion of

30 EDMUND C. GASKILL, JR.,
Attorney of Defendant in Error.

A true copy,

ENOCH L. JOHNSON,
Clerk.

I, Enoch L. Johnson, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the Court in the above-stated cause.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-third day of August, A. D., nineteen hundred and eighteen.

ENOCH L. JOHNSON,
Clerk.

(Seal)

A true copy,

ENOCH L. JOHNSON,
Clerk.

10

20

30

WRIT.

STATE OF NEW JERSEY, ss.

*The State Of New Jersey, To Hon. C. C.
Shinn, Judge of the Court of Quarter
Sessions for the County of Atlantic,*

GREETING:

Because in the record and proceedings, and also in giving judgment upon a certain plaint which was in our said Quarter Sessions Court, before you between the State of New Jersey and Abraham Samaha, defendant, in a criminal trial on indictment for obtaining money under false pretenses manifest error hath intervened, to the great damage of said defendant, Abraham Samaha, as it is said. 10

We being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, said Abraham Samaha, command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Supreme Court on October twenty-ninth, A. D. nineteen hundred and seventeen, to be holden at State House, Trenton, on the first Tuesday of November, next, and this writ, that the records and proceedings aforesaid being inspected, we may further cause to be done thereupon, for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done. 20

Witness, Hon. William S. Gummere, Chief Justice 30
at Trenton, this twelfth day of October, A. D. 1917.

WM. C. GEBHARDT,
Clerk.

JOHN J. CRANDALL and
PARSONS and PARSONS,
Attorneys.
Atlantic City, N. J.

RETURN.

The answer of C. C. Shinn, Esquire, Judge of the Court of Quarter Sessions of the County of Atlantic within named, the record and proceedings whereof mention is within made, with all things touching the same, I certify to the Justices of our Supreme Court of the State of New Jersey at the day and year within contained, in a certain schedule to this writ annexed, as I am commanded.

C. C. SHINN,
Judge.

JUDGMENT RECORD.

ATLANTIC COUNTY, to wit:

20 Be It Remembered, that a Court of Quarter Sessions, holden at Mays Landing, in and for the County of Atlantic, on the twenty-third day of April, in the year of our Lord one thousand nine hundred and seventeen, before the Honorable Clifton C. Shinn, a Judge of the said Court, and of the Court of Common Pleas, in and for the said county, no Justice of the Supreme Court of the State of New Jersey being present in the Court House, and the Grand Jury being desirous of making presentments
30 of the sundry bills of indictment according to the form of the statute in such case made and provided, by the oath of Alfred B. Smith, Ernest Dyer, Sherman F. Bowen, Edward C. Doughty, Arthur C. Ryan, Somers Woolbert, John G. Galinge, John H. Moore, Ezra A. Lake, H. G. Black, S. H. Roseberry, W. R. Seely, R. R. Albertson, Charles J. Williams, T. H.

Smith, R. A. Cale, Walter K. Cavileer, James G. Scull, Louis S. Corsiglia, Mortimore P. Shoemaker, John M. Austin, Stanley C. Van Sant and Walter W. Clark, good and lawful men of the said County of Atlantic, duly summoned and then and there sworn and charged to inquire for the State of New Jersey, in and for the body of the County of Atlantic.

It Is Presented in manner and form following, that is to say:

State of New Jersey vs. Abraham Samaha, False Pretenses. 10

State of New Jersey vs. Robert Lambert, Disorderly House.

State of New Jersey vs. Harry Howard, Desertion.

State of New Jersey vs. Antonio Baratta, Atro. A. & B.

State of New Jersey vs. Frederick E. Watson, Desertion.

State of New Jersey vs. John Brown, Sr., Assault with Intent to Kill. 20

State of New Jersey vs. William Dennis, Oyster-ing on Leased Oyster Grounds.

State of New Jersey vs. Mae Abrams, Obstructing the service of a subpoena.

State of New Jersey vs. Kathryn Abrams, Obstructing the service of a subpoena.

State of New Jersey vs. George Herbert, Perjury.

State of New Jersey vs. Frank Wade, Perjury.

State of New Jersey vs. William I. Garrison, George Herbert, Helen Knittel, Mae Abrams, Kathryn Abrams, Conspiracy. 30

The bills herewith presented are true bills,

ALFRED B. SMITH,
Foreman.

[ENDORSED]

Charles S. Moore,
 Prosecutor of the Pleas.
 County of Atlantic, N. J.
 Filed Apr. 23, 1917.
 Edwin A. Parker, Clerk.

08 *In the Court of Oyer and Terminer of Atlantic
 County, January Term, in the Year of our Lord One
 Thousand Nine Hundred and Seventeen.*

ATLANTIC COUNTY, to wit:

02 The Grand Inquest of the State of New Jersey,
 their respective oath and affirmation, those who
 and for the body of the County of Atlantic, upon
 affirmed having first alleged themselves to be con-
 scientiously scrupulous against taking an oath,
 Present, That Abraham Samaha, late of the City of
 Atlantic City, in the said County of Atlantic, on the
 twenty-sixth day of November, in the year of our
 Lord one thousand nine hundred and sixteen, at the
 City of Atlantic City aforesaid, in the county afore-
 said, and within the jurisdiction of this Court, un-
 lawfully and knowingly devising and intending to
 cheat and defraud one Frank A. Schwickerath, Jr.,
 of his goods, moneys, chattels and property, and by
 01 means of divers false pretenses to be hereinafter
 more particularly described, to sell and dispose of,
 as a genuine "Kunzite" gem, to the said Frank A.
 Schwickerath, Jr., a certain variety of glass, com-
 monly known as paste, which is usually sold for
 imitation diamonds, did then and there unlawfully,

knowingly, designedly and falsely pretend and represent to the said Frank A. Schwickerath, Jr., that the said article which he, the said Abraham Samaha, then and there had was a genuine "Kunzite" gem and he, the said Abraham Samaha, did then and there also unlawfully, knowingly, designedly and falsely pretend and represent to the said Frank A. Schwickerath, Jr., that a certain paper writing, or circular, which he, the said Abraham Samaha, then and there had and produced to the said Frank A. Schwickerath, Jr., and which was of tenor following, to wit: 10

"Copied from Prof. Kunz's Book on Mineralogy.

KUNZITE

in addition to the historically famous stones of California is a new gem. The Kunzite is a queen among gem-stones, as the diamond is a king, and a stone that in some ways out-diamonds the diamond. It is so rare that an absolutely new gem is brought into light that the sudden appearance of this stone of transcendent beauty has attracted the attention of all lovers of jewels and gems throughout the world, not alone because it is artistically beautiful, but also for the reason that scientifically it is unique. 20

Kunzite is a San Diego Stone, while San Diego County produces the finest Tourmalines in the world, exquisite Hyacinths, beautiful Beryl and brilliant Topaz, these gems are also found in other parts of the earth, but the Kunzite named as a graceful compliment in honor of America's celebrated mineralogist has been found only in San Diego County. 30

It has been reduced to \$2.00 per Carat up to Christmas, to be tested to prove the everlasting

Brilliance before buying, to be set to order 14 Carat gold, as a rule of the Company.

A. Samaha
Gem Cutter and Demonstrator Agents
515 Boardwalk

Branch Store
St. Augustine, Florida Atlantic City, N. J.”

10 was then and there a true and correct extract from
a book or volume on “Mineralogy,” written and published by one Prof. George F. Kunz, which purports to describe and set forth the features and qualities of the Kunzite gem; and he, the said Abraham Samaha, did then and there also unlawfully, knowingly, designedly and falsely pretend and represent to the said Frank A. Schwickerath, Jr., that said paper writing or circular hereinbefore set forth,
20 which he, the said Abraham Samaha, then and there had and produced, to the said Frank A. Schwickerath, Jr.; was a true and correct description of the features and qualities of the article which he, the said Abraham Samaha, offered to sell and dispose of to the said Frank A. Schwickerath, Jr., as a genuine “Kunzite” gem; and he, the said Abraham Samaha, did thereupon effect a sale of the said article to the said Frank A. Schwickerath, Jr., for the sum of Three Dollars, lawful money of the United States,
30 of the money and property of the said Frank A. Schwickerath, Jr., he, the said Frank A. Schwickerath, Jr., being induced to purchase said article by the false pretenses above mentioned; by means whereof, said Abraham Samaha then and there unlawfully, knowingly and designedly did obtain from said Frank A. Schwickerath, Jr., the said sum of

Three Dollars, lawful money of the United States, of the money and property of him, the said Frank A. Schwickerath, Jr., as aforesaid, with intent to cheat and defraud him, the said Frank A. Schwickerath, Jr., then and there of the same; whereas in truth and in fact, said article which he, the said Abraham Samaha, offered to sell and dispose of to said Frank A. Schwickerath, Jr., was not a "Kunzite" gem, but was a variety of glass, commonly known as paste, and usually sold for imitation diamonds, and the paper writing or circular, hereinbefore set forth, which he, the said Abraham Samaha, had and produced to the said Frank A. Schwickerath, Jr., was not then and there a true and correct extract from a book or volume on "Mineralogy" written and published by one Prof. George F. Kunz purporting to describe and set forth the features and qualities of the "Kunzite" gem, and said paper writing or circular was not a true and correct description of the features and qualities of the article which he, the said Abraham Samaha, offered to sell and dispose of to the said Frank A. Schwickerath, Jr., as a "Kunzite" gem; all of which he, the said Abraham Samaha, then and there well knew, to the great damage and deception of him, the said Frank A. Schwickerath, Jr., to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

CHARLES S. MOORE,
Prosecutor of the Pleas.

[ENDORSED]

Charles S. Moore,
 Prosecutor of the Pleas.
 A True Bill
 Alfred B. Smith,
 Foreman.
 County of Atlantic, N. J.
 Filed Apr. 23, 1917.
 10 Edwin A. Parker, Clerk
 Filed, entered and impounded 4/23/1917
 Edwin A. Parker, Clerk
 Plea of Not Guilty entered 6/1/1917.
 Edwin A. Parker, Clerk.

ATLANTIC QUARTER SESSIONS,

20 May Term, 1917.
 Sept. 27th.

3140 White. State	vs.	Abraham Samaha	}	Hon. C. C. Shinn, Presid- ing. Charles S. Moore, for State. John J. Crandall, for Defdt. Charge False Pretenses. Plea Not Guilty.
30				

The above-named defendant being brought into court charged pleaded Not Guilty of the crime as laid to his charge.

Whereupon on motion of Charles S. Moore, Prosecutor on the part of the State it was ordered by the Court that the sheriff return a panel of the jury to try the issue joined in the aforesaid plea.

Whereupon the sheriff returned the following named persons to serve as jurors, who were sworn as follows, to wit:

- | | | |
|------------------------|----------------------|----|
| 1. Charles H. Harrison | 7. William C. Walker | |
| 2. A. H. Bond | 8. Daniel Knauer | |
| 3. William T. Leak | 9. Harry D. Garton | 10 |
| 4. Albert L. Coryell | 10. Harry Barrett | |
| 5. Anton Piez | 11. Michael Capizola | |
| 6. Charles K. Nelson | 12. George E. Brown | |

the following named persons who were sworn, Frank A. Schwickerath, Annete Schwickerath, Donato Lamponi, Joseph Schwartz and Frederick Ehrenfeld having been called for the State and Abraham Samaha and Ida Samaha having been called for the defendant and the evidence being closed and the counsel having summed up the case and the Court having charged the jury they retired at 4.11 P. M. with Constable Edward Bailey sworn to attend them and being absent until 4.25 P. M. they returned again into court and being called all appear and being asked say they have agreed upon a verdict and by their foreman further say they find the defendant Abraham Samaha guilty and so say they all. 20

Whereupon it is on this 9th day of October, A. D. 1917, ordered that the defendant be placed at the bar and he being accordingly set at the bar the Court doth order and adjudge that the defendant Abraham Samaha be committed to the care and custody of the Probation Officer for a period of three years and pay the sum of \$1.00 per week during that period, also pay the sum of \$200.00 within one week. 30

(Quarter Sessions Judgment Book #9, page 409.)

TESTIMONY.ATLANTIC COUNTY COURT OF QUARTER
SESSIONS.

10	STATE, vs. ABRAHAM SAMAHA.	}	ON INDICTMENT FOR FALSE PRETENSE.
----	----------------------------------	---	--------------------------------------

Mays Landing, N. J., September 27th, 1917.

TESTIMONY

20 Before HON. CLIFTON C. SHINN, Judge, and jury.

APPEARANCES:

CHARLES S. MOORE, Esq., Prosecutor, for the State.
JOHN J. CRANDALL, Esq., for the defendant.

30 The Prosecutor: The State moves the trial of the
indictment against Abraham Samaha, charge false
pretenses, clerk's file number 3740.

Jury impaneled and sworn.

FRANK SWICKERATH, JR., SWORN.

Direct examination.

By the Prosecutor:

Q. What is your name?

A. Swickerath.

Q. Swickerath?

A. Yes. 10

Q. And where do you reside?

A. 321 Drexel Avenue.

Q. In what place?

A. What did you say?

Q. In what city?

A. Atlantic City.

Q. Did you ever see this defendant, Abraham Samaha?

A. I have.

Q. And were you ever in his place of business on the Boardwalk? 20

A. I was.

Q. And about last fall, in November, I believe?

A. Why, the latter part of November, I don't know just—it was on a Sunday.

Q. Latter part of November?

A. Yes.

Q. And did you purchase anything from him while you were there?

A. I purchased a stone from Mr. Samaha that he was selling. 30

Mr. Crandall: Perhaps it may be important to make an objection here, inasmuch as he said that the false pretense, that the trade was on Sunday.

The Court: What about that, Mr. Moore?

The Prosecutor: Why, a crime can be committed on any day in the week.

Mr. Crandall: No, it can't. A crime that consists of a cheat, in getting property under false pretense of a criminal bargain, you can't make a bargain on Sunday that is worth anything.

10

The Prosecutor: You are talking about the civil law.

Mr. Crandall: I am talking about the criminal law.

20

The Court: I think, Mr. Crandall, that you could not recover the value, perhaps, where the sale or the contract was on Sunday, but, as Mr. Moore suggests, this is a criminal action, and the crime may be committed on Sunday as readily as any other day.

Mr. Crandall: I mean the crime of getting property under false pretenses.

The Court: If that were true, Mr. Crandall, that would open the door pretty wide, wouldn't it?

30

Mr. Crandall: It would learn people to obey the Gospel and go to church on Sunday. It would be better on one side than the other. You note my objection to any further testimony to a bargain on Sunday.

(Whereupon the defendant, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

(Seal)

C. C. SHINN.

Q. Did you see any sign on the window of this man's store on that occasion, if you recollect?

A. Why, I recollect that there was an awful lot of stones in the window, I don't know just exactly, there was a sign on the window something to that effect, I don't just exactly remember what it was. I know something about the Kunzite stone.

Q. Were you handed anything that was printed, any printed announcement by this defendant on that occasion as to this Kunzite? 10

A. I was handed a pamphlet something similar to this in the store.

Q. Please read that and look it over and see if that is the same?

A. Yes, that is the same pamphlet that was handed to me.

Q. By whom?

A. By Mr. Samaha.

Q. Was that before or after you made the purchase of the alleged Kunzite stone? 20

A. I could not say whether it was before or after, but it was as I was purchasing.

Q. As you were purchasing the stone?

A. Somewheres within that time that the stone was bought.

Q. Witness is shown stone and asked to carefully examine.

A. That looks very much like the stone.

Q. Well, is that the same stone?

A. Well, that is the stone from what I can see of the mark that Mr. Lamponi put on it. 30

Q. Was that put on in your presence?

A. Yes, sir, it was in my presence.

Q. And where is the mark?

A. On the back of the stone, a file mark.

Q. Right across?

A. Right across over one of the cuts there.

Q. And that is the same stone that you purchased?

A. The same stone.

Q. How much did you give him for it?

A. Two dollars a carat, which it was supposed to be sold for, and it is supposed to be a carat and a half stone, \$3.00.

Q. You paid him \$3.00?

A. Yes, sir.

Q. In what, in cash or check or note?

10 A. In cash.

Q. Did you give it to Samaha personally, the \$3.00?

A. Yes, I think Mr. Samaha took the money, yes, he took the money, I am sure, because he was in back of the counter.

Q. Did you have any talk with him as to what this stone was before you purchased it?

A. Only that he said that it was a Kunzite stone and he tested it in some kind of an acid there, or
20 something in a bottle that he tested it with.

Q. Now, explain what the test was that he did?

A. He took and put some acid on some kind of a piece of bronze tray that he had there, and naturally it turned it green, and then he put some acid on the stone, and he said, "You see, it does not have any effect on the stone at all." That is the test.

Q. You say this was handed to you at the same time that you purchased this?

A. At the same time.

30

Mr. Crandall: If your Honor please, wait a minute. I don't want him to repeat.

The Court: No, I think that is already in evidence.

The Prosecutor: I offer these in evidence.

(Stone referred to in a pasteboard box offered and admitted in evidence and marked Exhibit S1.)

(Pamphlet referred to offered and admitted in evidence and marked Exhibit S2.)

(Same printed in Copy of Indictment, p. 3.)

Q. Was anyone with you when you made this purchase?

A. My wife was with me when I purchased this stone. 10

Q. What did you do with it after you made the purchase, that is what did you do with the stone?

A. Why, we walked on up the Boardwalk and went in to Mr. Lamponi's store and we asked ——

Q. You can't tell what you asked, but what did you undertake to have done with it?

A. Why, we went in to see about getting it set.

Q. Whom did you take that matter up with in there? 20

A. Through Mr. Lamponi. He was in there himself.

Q. Did you show him the stone at that time?

A. Yes, sir.

Q. Was that the occasion in which the stone was marked, as you have described here on the back?

A. Yes, sir.

Q. Across one of the ——

A. That was the occasion, file mark across the back. 30

Q. He put that ——

Mr. Crandall: What Mr. Lamponi said?

The Court: He isn't testifying to anything that was said by Mr. Lamponi.

The Prosecutor: What was done?

Q. Who did you say put that on, that mark?

A. Mr. Lamponi put that mark on.

Q. Was that done in your presence?

A. In my presence.

Q. And that was after you had taken up this matter of mounting it?

A. Yes, that is in the store.

10 Q. Now, when you purchased that stone from Mr. Samaha and gave him your three dollars, did you believe —

Mr. Crandall: Not what he believed.

Q. —did you believe Samaha was telling you the truth about what it was?

A. I did.

20 Q. Was anyone else present other than you and your wife and Mr. Samaha in the store when you made this purchase?

A. There was Mr. Samaha and his wife and my wife, and I don't know, I think another gentleman came in. I don't know whether the stone was purchased before he came in or after he came in, but he was in there at the ending of it. I don't know who he is, even.

30 Q. Well, was anything further said in relation to this stone by Mr. Samaha other than what you have related already?

A. That is all that he said to me. He simply claimed that we had a Kunzite stone, and showed that pamphlet, and tested it, and I purchased it and walked out. That is all there was to it.

Cross-examination.

By Mr. Crandall:

Q. Now, the stone was among other stones there in the window, in the show window?

A. The stone that I purchased, you mean?

Q. Yes.

A. I couldn't exactly state just where it was located in the store. 10

Q. You went to the store and looked from the outside and saw the stones, didn't you?

A. Yes, there was lots of stones in the store.

Q. What?

A. Yes, there was lots of stones in the store. You can see from the outside.

Q. What did you say to him when you first went in?

A. Why, I don't remember just exactly the first words that I said, but I asked to look — 20

Q. That is all right, if you don't remember. Isn't it a fact that you picked that stone up in your own hand and asked him what he would take for it?

A. No, that is not a fact.

Q. How is that?

A. No.

Q. Well, there wasn't any preliminary talk before you looked at the stone, was there?

A. Why, I don't know as there was any preliminary talk, or the only thing that he showed it to me and tested it and showed that pamphlet before I bought it. 30

Q. Well, didn't you ask him to show you this particular stone?

A. I didn't ask him to show me any particular stone, only a Kunzite stone.

Q. You asked for a Chrysite stone?

A. Yes, Kunzite stone.

Q. Did you ever see a Chrysite stone?

A. I don't know as I ever saw it.

Q. How came you to inquire for a Kunzite stone?

A. Because Kunzite was advertised out front on the window.

Q. Out front on the window?

A. There was a large sign out front.

10 Q. How big was the sign?

A. Oh, I don't exactly remember the dimension of it, may have been two by three foot, or three by five foot sign on the front of the place there.

Q. Was it on a metal plate, on a piece of tin?

A. I don't know. I think that it was on canvas. I am not sure.

Q. Aren't sure?

A. No.

Q. Is that it? (Showing a sign to witness.)

20 A. I think that that is the sign. I don't know. I think that there was another sign also in the window, a larger sign than that.

Q. You don't know that that was not the sign?

A. I am not sure whether that sign was in the window or not.

Q. Well, did you ever see that sign before?

A. I don't know I could say I ever seen it before. I don't remember exactly seeing that sign.

Q. Well, you couldn't tell exactly what was on the other sign, could you?

30 A. I know that it advertised the Kunzite gem as being a new discovery, and that they were selling it at two dollars a carat, and that is simply what I went in to purchase.

Q. How do you spell Kunzite?

A. Well, that is pretty hard to determine.

Q. How?

A. Spell it maybe two or three different ways. It is according to how *yōū* use it.

Q. Spell it according to how you use it.

A. You can spell it two or three different ways, I suppose.

Q. You don't know anything about it.

A. What do you mean?

Q. Well, did you ever study a book on chemistry to find out what ———

10

A. No, I did not.

Q. ——— a Kunzite stone was?

A. No.

Q. Did anybody ever show you one?

A. Who ———

Q. Did they ever show you one? Did you ever see one?

A. Never seen one.

Q. How came you to fall in love with a Kunzite stone, that you wanted a Kunzite stone?

20

A. Well, I didn't just exactly fall in love with the Kunzite stone. I happened to be on the Boardwalk and seen the advertisement, that is all.

Q. Advertisement in his store?

A. Advertisement in his window, yes.

Q. In his window?

A. It was in his window, yes.

Q. And that is the only advertisement you saw?

A. That is the only advertisement I saw.

Q. Then when you went there you inquired for a Kunzite stone?

30

A. Inquired for the stone—I don't exactly know that, won't exactly say that we inquired for the Kunzite stone. We inquired for the stone that he was selling, and it was advertised on the front of the place.

Q. Well, then you had never heard of a Kunzite stone before?

A. I don't think that I had before that time.

Q. You say that you went back to a certain gentleman and you had this stone marked?

A. I didn't go back. I came up the Boardwalk and we stopped in to see about getting it mounted.

Q. You didn't go back?

A. What?

Q. You didn't go back?

08

A. I didn't go back where? You said I went back.

Q. Yes.

A. Where do you mean that I went back?

Q. Who marked that stone?

A. Mr. Lamponi.

Q. Didn't you go from Mr. Lamponi's up to this place to buy this stone?

A. I did not.

Q. You did not?

20

A. I certainly did not.

Q. Didn't Mr. Lamponi tell you to go up there and buy this stone?

A. Mr. Lamponi did not.

Q. Well, how came you to go back to Mr. Lamponi's?

A. Because I knew Mr. Lamponi and Mr. Lamponi is related to me, and I don't see any reason why I should not —

Q. Never mind about the reason.

A. All right.

01

Q. He is your stepfather?

A. He is.

Q. Is he in the jewelry business?

A. Yes.

Q. He is, eh?

A. Yes.

Q. Does he sell Kunzite stones?

A. I couldn't tell you whether he does or not. I don't know.

Q. Well, he is the first one that told you this was a fraud?

A. He is the first one that told me it was a fraud.

Q. And the only one?

A. Well, what do you mean, since that time?

Q. He is the only one you have shown this to, ain't it, that you have shown it to? 10

A. That I have shown it to? Yes.

Q. He took charge of the stone?

A. Yes.

Q. He took it?

A. Let's see, Mr. Schwartz took the stone.

Q. How is that?

A. Mr. Schwartz.

Q. Well, Lamponi took it from you?

A. Yes.

Q. What he done with it you don't know? 20

A. No.

Q. That is what I thought. Well, then, the only thing that influenced you to part with your three dollars for that stone was the representation that it was a Kunzite stone?

A. Yes, and that —

Q. That was the only reason that you had to part with your money?

A. Well, the reason was that we thought that we was buying something that was worth something. 30

Q. It didn't turn out to be as good as you thought it was?

A. Didn't turn out to be anything.

Q. Well, wait a minute. Then there was no other reason that you had at all that influenced you except that you thought you was buying a valuable Kunzite stone?

A. I don't want to say it is a valuable Kunzite stone.

Q. Well, a Kunzite stone?

A. Yes, I thought that I was buying something out of the ordinary.

Q. And that is the only thing that influenced you?

A. That is the only thing, yes.

Re-direct examination.

10

By the Prosecutor:

Q. Mr. Swickerath, I forgot to ask you, what is your business?

A. Electrical business.

Q. Your wife here in the court room?

A. Yes.

20

Mr. Crandall: If your Honor please, under the indictment it shows that the thing that influenced him was the reason that the advertisement was not fulfilled, that the stone did not fulfil the description in the advertisement. Now the witness himself says that he was not influenced by it at all.

The Court: Why, he says that he thought that he was buying a Kunzite stone.

30

Mr. Crandall: Yes, that is all right, but he said he was not influenced by this.

The Court: Well, suppose he was not influenced by that?

Mr. Crandall: That is it, if he was not then we have got so far on the trial. He has sworn he was not, and we have made so much progress in the trial.

The Court: Let's go on and complete the trial, if we have got that far.

The Prosecutor: I didn't understand him to say he was not influenced at all by this.

10

Mr. Crandall: He says he was not.

The Court: He didn't say that, Mr. Crandall. He said he saw the Kunzite advertised from the outside, that he went in and purchased what he thought was a Kunzite stone, and, as the purchase was completed, or sometime during the purchase, this or something similar was handed to him.

Mr. Crandall: You wouldn't, in the face of that indictment, where it is set out in haec verba, where that thing is set out specifically, allow any other outside to be —

20

The Court: Yes. Isn't your motion about twenty minutes late in that, Mr. Crandall? Shouldn't your objection to the indictment have been before the jury was sworn?

Mr. Crandall: No, you can't make an indictment good because you don't object to it.

30

The Court: No, that is true enough.

Mr. Crandall: You can't make it good and this Court is just as good, or ought to be just as good judge of an indictment as the Supreme Court.

The Court: I think, Mr. Crandall, that the testimony so far is in accord with the indictment. I can't see that there is any difference.

Mr. Crandall: But he don't say he was influenced by this at all and the indictment says that was his sole influence.

(Motion overruled.)

10

(Whereupon the defendant, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

C. C. SHINN. (Seal)

MRS. ANNETTE SWICKERATH, SWORN.

20

Direct examination.

By the Prosecutor:

Q. You are the wife of the gentleman who was just on the stand?

A. Yes.

Q. Were you with your husband on this occasion that he has testified to when he went in this defendant's store?

30

A. I was.

Q. And purchased this so-called gem?

A. I was.

Q. What, if you can recollect, was said when you first went in the store with your husband?

A. We were walking on the Boardwalk and I noticed the sign on the window, "Genuine Kunzite"

and we were looking at that, and I said I would like to have one of those. He said, "Well, let's go in and look at them." So we went in, and we asked to see the stone, the Kunzite, that is how we came to get it.

Q. Who did you ask to see it?

A. Mr. Samaha.

Q. Then what happened?

A. He brought out the stone and explained to us what it was, a genuine Kunzite.

Q. Were you shown this pamphlet called Exhibit 10 S2?

A. Yes, we were given that pamphlet, yes, that is the one.

Q. What did Mr. Samaha himself say about this stone?

A. Mr. Samaha himself said it was a genuine Kunzite.

Q. What kind of a stone did he say it was, was it a new stone to you?

A. Well, I have heard of it before, that is heard 20 the name before, but I didn't know its value.

Q. Didn't know what kind of a stone it was or its value?

A. No, I did not.

Q. How much was paid, if you can recollect, for this stone?

A. Three dollars.

Q. And by whom?

A. By my husband.

Q. To whom?

30

A. To Mr. Samaha.

Q. Now, do you know what was done with this stone after your husband had purchased it?

A. Yes, I was with him at the time.

Q. Well, where did you go, if anywhere?

A. We went to Mr. Lamponi's store on the Boardwalk and wanted to have it mounted.

Q. Now, is Mr. Lamponi some relation to you?

A. Mr. Lamponi is my stepfather.

Q. And were you present when anything was done to the stone there that day by Mr. Lamponi?

A. Yes, I was.

Q. What was done?

A. We asked Mr. Lamponi about mounting it and he said it was worth ——

Q. Can't tell what he said.

10 A. He filed the stone.

Q. Just look at that, please?

A. Yes, that is it.

Q. That is the mark?

A. Yes.

Q. You saw a sign on the window outside there?

A. Genuine Kunzite. This board was in the center.

Q. Was that the sign?

A. No.

20

Cross-examination.

By Mr. Crandall:

Q. How long after your husband paid the money was it, how long a time elapsed after he paid the money before he give you this bulletin?

A. He gave it to us at the time of purchasing.

Q. How is that?

A. At the time of purchasing.

30 Q. Well, at the time you was purchasing?

A. Yes.

Q. Did you read it over?

A. I read part of it, as much as I could while standing in the store.

Q. And you didn't read it all over until you got out of the store?

A. Well ——

Q. Never read it all over?

A. Oh, yes, yes, indeed.

Q. When did you first read it all over?

A. Well, I read the most important part before going out of the store.

Q. How is that?

A. I read the most important part before leaving the store.

Q. Most of it?

A. Yes, while he was wrapping up the package. 10

Q. Well, while you was where?

A. While he was wrapping the stone.

Q. But he had bought it before Mr. Samaha wrapped the stone, hadn't he?

A. No.

Q. Did he wrap it and then sell it to him or did he sell it to him first and then Mr. Samaha wrap it up?

A. Well, Mr. Samaha tested it with this acid and then wrapped it. 20

Q. How is that?

A. Mr. Samaha tested the stone, supposed to have tested it before we bought it.

Q. Did you see this before he tested it?

A. Yes, he gave us that during the sale.

Q. What is that?

A. He gave us that while he was selling us the stone.

Q. While he was selling it?

A. Yes, sir.

Q. How did the stone differ from this advertisement? 30

A. Well, to my knowledge at that time, I didn't know the difference.

Q. How?

A. To my knowledge at that time I didn't know the difference.

Q. Well, do you know the difference now?

A. Yes.

Q. What?

A. Yes.

Q. What is the difference?

A. It is nothing but a piece of glass or some substance or something, it is not a genuine Kunzite.

Q. Piece of glass?

A. Well, whatever it may be, it is not genuine
10 Kunzite.

Q. What is the chemical composition of Kunzite?

A. Well, the Kunzite is a mined stone, as I understand.

Q. Is what?

A. Is a mined stone.

Q. A man's stone?

A. Is a mined stone.

Q. Spell it?

A. M-i-n-e-d.

20 Q. Mined?

A. Yes.

Q. Like coal out of the ground?

A. Yes.

Q. Is that all the difference?

A. Well, I think that is a lot of difference.

Q. What?

A. I think that is a lot of difference.

Q. Well, that is all you, all the difference you know?

30 A. Well, I know it is not a genuine Kunzite. We bought it to be a genuine Kunzite.

Q. Did you ever buy a genuine Kunzite?

A. Not before, no.

Q. Well, have you bought any since?

A. No.

Q. Well, how do you know it ain't a genuine Kunzite, because Mr. What's-his-name told you?

A. Mr. who?

Q. What is your father-in-law's name?

A. Lamponi.

Q. Because Mr. Lamponi told you so?

A. Well, Mr. Lamponi happens to have genuine Kunzite.

Q. To have it, eh?

A. Yes, sir.

Q. And he told you, Mr. Lamponi told you this was not a genuine Kunzite? 10

A. Yes.

Q. Then why didn't you take it back?

A. Well, I didn't think I would get my money back.

Q. What?

A. I didn't think I would get the money back, so I asked Mr. Lamponi what to do.

Q. You didn't think you would get your money back?

A. No. 20

Q. Well, if you had thought you could have got your money back would you have gone back there?

A. I don't know. I took the man's word for what he told me.

Q. Well, Mr. Lamponi wanted the stone, didn't he, to have him prosecuted?

A. No, he did not. I didn't give Mr. Lamponi the stone.

Q. What?

A. I didn't give Mr. Lamponi the stone. 30

Q. Well, you left it there with him, didn't you?

A. Not that I know, we didn't leave it there. I didn't.

Q. Who did?

A. No one that I know of.

Q. Well, did you go back and see this man and tell him?

A. No, I did not.

Q. Why didn't you go back and see this man and tell him?

A. No, I did not.

Q. Why didn't you go back and tell him?

A. Because I had no more faith in him.

Q. What?

10 A. Because if he had told me such a story before, I was done with him. I didn't bother going back.

Q. Well, you don't know what a Kunzite stone is at all, do you?

A. Well, I am not an expert on stones, no.

DONATELLO LAMPONI, SWORN.

20 Direct-examination.

By the Prosecutor:

Q. What is your business?

A. Jeweler.

Q. And where is your place of business?

A. 1217 Boardwalk.

Q. In what city?

A. Atlantic City, New Jersey.

30 Q. How long have you been in the jewelry business?

A. Thirty-three years.

Q. How long have you been in business, in the jewelry business in Atlantic City?

A. Seventeen years.

Q. And where were you in the jewelry business before you came to Atlantic City?

A. Florence, Italy.

Q. That would be sixteen years over there?

A. Yes.

Q. You are the one referred to by the two preceding witnesses as the stepfather of Mrs. Swickerath?

A. Correct.

Q. In the course of your business as a jeweler do you handle stones, precious stones and semi-precious stones?

10

A. Yes, sir.

Q. Stones that are put in jewelry to sell?

A. Yes, sir.

Q. And does your business require you to know the genuine stones, semi-precious and precious, and otherwise, from those that are not genuine?

A. Yes, sir.

Q. Have you ever, in the course of your business as a jeweler, heard of a stone called Kunzite?

A. Yes, sir.

20

Q. Do you know or could you tell how you would identify a stone called Kunzite?

A. Yes, sir.

Q. How?

A. By the hardness, by the color and the different lustre. Now, technically must go by specific gravity and so on, but I don't recognize that either.

Q. Now witness is shown Exhibit S1 and asked to look at it and see whether on the back of the same there is a mark, whether you see a mark there across the face of one of the octagons?

30

A. Yes, sir, a file mark. There are two marks.

Q. The file mark, that is straight across?

A. Yes, sir.

The Court: Mr. Crandall, are you satisfied with the qualification of this witness as an expert?

Mr. Crandall: No. You ask him of the chemical quality of the stone and he could not tell you any more than the man in the moon.

The Court: I am not going to ask him, but I am going to permit you.

Recess taken until 1.30 o'clock P. M.

10

AFTERNOON SESSION.

Trial of the cause resumed at 1.30 P. M.

DONATELLO LAMPONI, resumed.

The Prosecutor: I had concluded my qualification of Mr. Lamponi as an expert. Do you want to cross-
20 examine him before I go any further?

Mr. Crandall: No. Go on and let's see what your question is.

Direct examination, resumed.

By the Prosecutor:

Q. What, in your opinion —

30

Mr. Crandall: Wait a minute. What in his opinion? All right, go on.

Q. What in your opinion, is this stone marked Exhibit S1?

A. A plain common manufactured glass, an artificial stone, not a Kunzite stone, an artificial piece.

Cross-examination.

By Mr. Crandall:

Q. Did you subject that to any acid?

A. No, sir.

Q. Well, why didn't you?

A. I don't need it.

Q. It is too plain a fraud?

A. I don't call it fraud, too plain glass. 10

Q. You didn't subject it to any acid, any chemical test at all?

A. No, sir.

Q. Don't have to?

A. Don't have to, that is right.

Q. What is the composition of glass, chemically?

A. Chemically you ask an expert on chemistry. I am not a chemist.

Q. You ain't, eh?

A. No.

Q. What right have you to have an opinion, then? 20

A. Because I have a brain to give an opinion.

Q. Same as any other man?

A. That is right.

Q. That is what I thought. That is all right.

By the Court:

Q. What is the value, per carat, of a genuine Kunzite?

A. Now, even Kunzite, the value ranks according to color, or brilliancy. Now, something from ten dollars up to maybe forty. 30

Q. Ten to forty?

A. Yes.

By Mr. Crandall:

Q. What did you say the value per carat was of Kunzite?

A. From ten up to forty.

Q. Twenty dollars a carat?

A. More than that, forty, even fifty.

Q. Fifty?

A. Yes.

10 Q. Tremendous value?

A. No, I don't call tremendous, fifty.

Q. Well, how does it stand related to genuine diamonds?

A. More than some, same relation.

Q. And the same value?

A. Same value, correct.

Q. And you, if you went to buy a Kunzite stone, you would expect to pay the same as you would a diamond?

20 A. No, sir.

Q. Well, how much less?

A. Much less.

Q. What?

A. Much less, very much less.

Q. If you were going to buy it?

A. Yes.

Q. Well, if you was going to sell it you would sell it for the same as a diamond, wouldn't you?

A. No, sir.

30 Q. Well, how much less?

A. I told you the value of the Kunzite. Now, you want to know the value of diamonds? You could make the subtraction yourself. Now, the value of Kunzite is from ten to fifty dollars a carat, and maybe still more. The diamond you can start forty dollars a carat, stop at twelve hundred a carat.

Q. And so it depends upon the grade of phosphorescence, I suppose?

A. All right, call phosphorescence.

Q. Well, what is the meaning of the word Kunzite?

A. The meaning of the word Kunzite is a pet name for that category of stone.

Q. Patent right?

A. Pet name.

Q. What makes you think it is a patent name?

A. Don't make me think. I know it. 10

Q. Did you ever see the patent?

A. He didn't understand me, pet.

Q. A pet name?

A. That is it. Kunzite is not —

Q. In other words there is nothing in Kunzite to indicate the standard of carbons at all, not in the word Kunzite?

A. Not in the word Kunzite, no.

Q. Nothing at all?

A. No, Kunzite belong to the Beryl family. 20

The Court: Isn't that a trade name rather than a pet name?

A. Pet name.

Q. Where did you find that out?

A. I asked my minister in the church.

Q. You asked your minister in church?

A. Yes.

The Court: Now, you must answer the question. 30
It is a very proper question for Mr. Crandall to ask you and don't give smart answers, give true answers.

A. No, sir, I studied it. Listen, Judge, for thirty-three years you handle a stone —

Q. Oh, never mind about thirty-three years. A man may be a fool a thousand years without knowing anything.

A. That is correct.

Q. Now, you have no means of knowing whether that is plain glass, and you don't know what plain glass is made of, how much carbon and how much

A. No, I couldn't give that definition.

08 Q. And you couldn't look at the sand and say whether the sand was glass sand or not, could you?

A. I don't know that.

Q. Could you take the sand and say whether it is glass sand?

A. I could if I had it.

Q. And could you tell how much glass sand and how much potash would make window glass?

A. Through an experiment, maybe, yes, but I don't work —

Q. You never did?

20 A. Never did.

Q. Never studied the book on it?

A. Not a book, you mean chemistry, no, not chemistry.

Q. In other words you don't know anything about it?

A. Taken in that way, no.

Q. That is what I thought.

Re-direct examination.

01

By the Prosecutor:

Q. You don't mean to imply by that—did you mean to imply by that that you knew nothing about stones and what they are?

A. No.

Q. The fact that you didn't know anything about chemistry?

A. Not about chemistry and about technique.

Mr. Crandall: That is not proper re-direct examination.

The Court: Yes, he has a right to let the witness correct himself if he sees fit.

10

Mr. Crandall: Then why not ask him to correct himself, not correct him out of his mouth? He is operating the cavity in his face the way he wants him to talk.

The Court: No, that was not a leading question, Mr. Crandall.

Q. Are you certain in your opinion as to what that stone is?

20

A. Yes, sir.

Q. And that is based, that certainly is based upon what?

A. Upon my experience.

Q. An experience of thirty-three years in handling stones?

A. Yes.

Q. By the way, is that classified as a precious stone or a semi-precious stone or what kind?

A. It is glass.

30

Q. I mean to say Kunzite?

A. Pardon me. Kunzite belongs to semi-precious.

Q. Diamond belongs to what?

A. Gems.

Q. The precious stones?

A. Precious stones.

By Mr. Crandall:

Q. Well, isn't a diamond transparent like window glass?

A. Well, is different, translucent.

Q. Well, isn't it transparent like window glass?

A. No.

Q. You can't see through a diamond?

A. No.

10 Q. If it was sawed down thin like window glass you couldn't see through it?

A. Probably, yes.

Q. Probably? Don't you know whether you can or not?

A. According to thickness.

Q. What element is it in the diamond that makes it reflect the light this way and that way and all around? What is it?

A. The cutting.

20 Q. What cutting? The way the diamond is cut?

A. The way the diamond is cut, prismatic point.

Q. In other words, if it is cut into eight surfaces

A. Yes.

Q. —ten surfaces, it is a decagon?

A. All right.

Q. Decagon, and it is the surfaces that reflect the rays; don't window glass do the same thing?

A. Different —

30 Q. Well, does it do the same thing?

A. Not exactly the same thing.

Q. Not exactly?

A. No.

Q. Well, I thought you didn't know. That is all.

A. All right.

By the Prosecutor:

Q. Is there any difference between what is reflected in the way of light from a diamond and window glass?

A. Is strength, yes.

JOSEPH SCHWARTZ, SWORN.

10

Direct-examination.

By the Prosecutor:

Q. What is your business?

A. My present business is kimonos.

Q. Have you ever been in the jewelry business?

A. I have.

Q. Where?

20

A. On the Boardwalk, at above St. James Place and the Boardwalk and 1421 Boardwalk.

Q. For how long?

A. For about ten years.

Q. During that time did you handle stones and gems of various kinds that went into the jewelry you sold?

A. I did.

Q. Did your business require that you be able to determine what the various stones that you handled were, what they were and what kind of stones?

30

A. Very rarely. Occasionally it would.

Q. Only occasionally? Well, why weren't you required, when you bought stones, to know what they were?

A. In the first place I usually bought them of

people whom we positively knew we were buying the proper merchandise from.

Q. Now, did you ——

Mr. Crandall: He has answered that in the negative. He said he didn't depend on his own judgment, but depends on the judgment of the ——

The Prosecutor: I understand that, Mr. Crandall.
10 I haven't asked any expert opinion.

Q. Witness is shown Exhibit S1 and asked to look on the back of same particularly and say whether you have ever seen that stone before?

A. I did.

Q. Where?

A. The first time I saw it was on a Sunday afternoon when I was called up by Mr. Lamponi to come and see a stone that had been purchased on the
20 Boardwalk. I came over to the store and this was shown me as supposed to have been Kunzite. Mr. Lamponi then took a file, in the presence of myself, the gentleman that bought it, and filed this mark on it. I do know enough about stones to know ——

Q. How do you know that?

A. Know what?

Q. You are about to give an opinion, which I have not asked you. You will have to stop. You said a while ago that you took the word of the people from
30 whom you bought stones as to their quality.

A. Because, as a usual thing that we never bought, unless, as a usual thing we never bought it unless in this way, when we bought imitation diamonds, so-called diamonds, they were usually mounted, and didn't need testing. We knew what we were buying.

Q. Now, by the way, did you make the complaint

in this case or did Mr. Swickerath? I have forgotten.

A. Mr. Swickerath made the complaint.

Q. You didn't make it?

A. I didn't make nothing at all.

Mr. Crandall: He make the complaint?

The Prosecutor: Mr. Swickerath.

Q. Witness is shown Exhibit S2 and asked to look at it and state whether you have ever seen that before.

10

A. This was given to me —

Mr. Crandall: Well, if it were —

The Court: Answer that question yes or no.

(Question repeated.)

20

A. I have.

Q. Where was the first time you saw it?

A. I saw it in Mr. Lamponi's store.

Q. Was that at the same time you saw the stone?

A. At the same time.

Q. And who had this article about Kunzite, the pamphlet?

A. Mr. Swickerath had both the stone and the pamphlet.

30

Q. That, I understand, is before any complaint was made about this matter?

A. Before any complaint.

Q. At that time did you know where Mr. Samaha, the defendant's, store was on the Boardwalk?

A. I did.

Q. Did you see any sign that was on his window at the time?

A. I did.

Q. What was it?

A. He had a large sign in the window on white canvas, I judge to be between about three by four foot in size, and I took an identical copy of the wording of that sign.

Q. Have you got it with you?

10 A. I have a copy of that. (Producing paper.)

Q. What was on it?

A. The sign read: "The Kunzite stone, discovered in San Diego, California, belonged to the white diamond family, match blue white diamond correct. To be tested before buying. Reduced to two dollars per carat."

Q. During your experience as a jeweler did you ever hear of a stone called Kunzite?

A. I did.

20 Q. Do you know how that name "Kunzite" for that gem originated?

A. I do.

Q. How?

A. The stone was found in California and apparently appeared to be a new specimen of stone. It was sent to Professor Kunz of New York for analysis. Mr. Kunz gave the analysis of that stone, and in honor of his analysis it has been given the name of Kunzite, which is a registered name for that stone.

30 Q. Have you ever seen Kunzite?

A. I have seen Kunzite.

Q. Have you ever sold Kunzite in your experience as a jeweler?

A. I have not.

Q. Did you read this pamphlet called Exhibit S2 at that time when it was called to your attention?

Mr. Crandall: Wait a minute. That was way after the transaction, you know.

The Court: Oh, no, it was the same day, Mr. Crandall.

Mr. Crandall: Agreed, but it was after the transaction. It didn't go to induce the man to buy it.

The Prosecutor: He doesn't know what I am going to lead up to. 10

The Court: Let's see what Mr. Moore wants to show by this line of examination, and then, if it is irrelevant, we will strike it out.

A. I read it then.

Mr. Crandall: I object, if your Honor please.

The Court: Objection overruled. 20

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

C. C. SHINN. (Seal)

A. I did read it.

Q. At that time?

A. At that time.

Q. Did you ever attempt to buy a book on mineralogy by Professor Kunz? 30

A. I made an inquiry of Professor Kunz for that book.

Q. Did you get it?

A. He wrote back stating —

Q. Wait. Did you get it?

A. I did not.

Q. You can't state what he stated.

Cross-examination.

By Mr. Crandall:

Q. When did you write to him, before this or after
10 this transaction?

A. I wrote to him before this transaction.

Q. What did you write to him for?

A. Wanted to know, this man had been selling these stones on the Boardwalk for some time.

Q. You wanted to suppress it, if possible?

A. I can't say that I wanted to suppress it. I couldn't suppress it unless there was a complaint.

Q. Well, you proposed to make a complaint and have him arrested and tried as he is here now?

20 A. I beg pardon. I didn't propose to do any such thing.

Q. What use were you going to make of your opinion if you got it out of the book?

A. I had my doubts as to the authenticity of that pamphlet, that Professor Kunz would write such a history of the stone.

Q. Well, you never found out then whether he wrote such a history or not, did you?

A. I did.

30 Q. Where, in this book?

A. I found out that he did not write such a history.

Q. Where did you find it out, in that book?

A. From the letter from Mr. Kunz.

Q. Let's see, is there the book?

A. No.

Q. You never saw the book?

A. Never saw the book.

Q. And all you know is the letter from Mr. Kunz?

A. And his personal word.

Q. Have you got that letter?

A. I have a letter, yes.

Q. Where is the letter?

A. Do you wish that?

The Prosecutor: Yes.

10

(Letter produced.)

Mr. Crandall: That is not introducible in evidence anyhow.

Q. So you corresponded with him, did you?

A. I did.

Q. Well, is that his book?

A. Can't be. It has somebody else's name on there. 20

Q. That is his book?

A. I suppose so. It has his name.

Q. Did you ever examine it?

A. No.

Q. And you have no means of knowing, from the book, whether that bulletin corresponds with what is said in this book at all, no means of knowing at all?

A. No means of knowing that it was not in that book.

Q. You have no means of knowing that it was not in this book? 30

A. None at all.

Re-direct examination.

By the Prosecutor:

Q. What is the title of this book, according to the title page?

A. "Curious Lore of precious stones."

Q. And who is it by according to its title page?

A. By George Frederick Kunz.

10 Re-cross examination.

By Mr. Crandall:

Q. Kuntz put on the stone would not indicate the chemical qualities of the stone at all, would it?

A. Why —

Q. Would it indicate the chemical qualities of the stone?

20 The Court: Answer that yes or no.

A. I don't know.

Q. Well, if you wanted to have the amount of carbon was in it, you wouldn't use any of the letters in Kuntz, would you?

A. I don't know.

Q. Don't you read chemical analysis?

A. I do not.

Q. Don't know anything about it?

30 A. Not a thing.

Q. Well, you are too much for me.

The Prosecutor: If the Court please, all that testimony is objectionable. I didn't ask him to qualify as an expert at all.

Mr. Crandall: No, you couldn't do it. It would take a year's education. You and I would have to have our salaries raised to qualify him.

The Prosecutor: Can you show me in here where this is copied from?

Mr. Crandall: Can who?

The Prosecutor: You.

10

Mr. Crandall: Yes, sir.

The Prosecutor: Where?

Mr. Crandall: When the time comes I will try and wait upon you. It is satisfactory to introduce this in evidence, isn't it, when the time comes?

The Prosecutor: I don't know. I will offer this letter and affidavit. 20

Mr. Crandall: Extraneous, between other parties: introduce that stuff?

The Court: I don't believe that is admissible, Mr. Moore.

The Prosecutor: Then I guess I will have to object to your book, then. This is Kunz's writing and that is his book. 30

Mr. Crandall: Well, we will see how we make out.

DR. FREDERICK EHRENFELD, SWORN.

Direct-examination.

By the Prosecutor:

- Q. Where do you reside?
 A. Philadelphia.
- 10 Q. Have you a profession?
 A. I have.
 Q. What is it?
 A. Why, geologist and mineralogist, and also professor in University of Pennsylvania, teacher.
 Q. What department do you teach in the University of Pennsylvania?
 A. Geology and mineralogy.
 Q. How long have you been studying and teaching mineralogy?
 20 A. I have been teaching since 1897. I began to study about eight or ten years before that.
 Q. Is it a part of your profession to be familiar with—in mineralogy, to be familiar with the different kinds of semi-precious stones?
 A. Yes, sir.
 Q. What are the methods of determining the kind of stone a particular stone is by physical tests?
 A. There are many methods, one is by, simplest one is by having a sufficient experience that you can
 30 apply the tests scientists use, that is color, the hardness, the way it feels, the way it looks, what we call appearance, lustre, and then there are certain physical tests that we apply, microscopical, and by means of blow pipe tests, acid tests, and all sorts of chemical tests, depends upon chemical analysis; possible to use physical tests, possible to use chemi-

cal tests, physical tests are color, lustre, hardness, weight and transparency or not transparency and so on.

Q. Can you definitely determine—can you determine the kind of a stone a particular gem is by physical tests?

A. I teach my students to do that.

Q. And you can do that yourself?

A. I can, yes.

Q. How long did you say you had been doing that? 10

A. Well, I have been a mineralogist since for, I suppose, twenty-five or thirty years.

Q. Witness is shown the stone marked Exhibit S1 and asked to look at that on the front and back and say whether you have made any examination, physical examination of that stone?

A. I have.

Q. How do you identify it?

A. I identify it by marks on it which I recognized when I was given the stone, one is a straight mark across the face. I also identify it by a mark I put on it myself. 20

Q. Where is that, if you can tell? Can it be seen by the naked eye?

A. I don't think so. You have to use a microscope. It is upon the opposite side of the scratch.

Q. On the opposite side of the scratch?

A. Yes, I made it on the edge between two of the facets.

Q. Just small? 30

A. Just a small rough mark on it.

Q. Now, you were asked to make a physical examination of that for what purpose?

A. Telling what it was.

Q. As a result of that physical examination can you say in your opinion what that stone is?

A. I would state more than my opinion. I would say without any qualification whatever that it is glass, paste, a paste gem, artificial.

Q. Is that Kunzite?

A. No, positively no. It is not a natural stone at all. It is an artificial preparation.

Q. How do you know it is not Kunzite?

A. It has none of the mineralogical qualities of Kunzite.

10 Q. What are the mineralogical qualities of Kunzite?

A. Well, hardness, Kunzite is very much as hard as a quartz. It is very much less hard than quartz, very much like flint. That is one. Next one, Kunzite is a stone which possesses a lilac color, that is not lilac color. In the next place it has none of the qualities that is obtained by microscopical examination, that under the microscope produce like qualities.

20 Q. You made an examination under the microscope?

A. I did.

Cross-examination.

By Mr. Crandall:

Q. Did you bring a specimen of Kunzite here?

A. I did not.

30 Q. Why didn't you bring one?

A. I didn't see any call for bringing it. I was not asked to.

Q. How is that?

A. I was not asked to do so.

Q. Well, couldn't you have made your testimony more conspicuous?

A. I don't see that I could.

Q. Compare it right here and ask the jury to compare the Kunzite with that under this glass, or do you expect them to take your word for it?

A. I do.

Q. Expect them to take your word?

A. I do.

Q. Even if they never saw any Kunzite?

A. I do. Yes, sir, I do.

Q. Well, I am glad you have confidence in yourself.

10

A. I have just exactly that confidence, yes, sir.

Q. You say that stone is paste?

A. What is commonly called among mineralogists paste, an artificial preparation.

Q. Well, isn't all glass in the first place paste?

A. What is glass?

Q. What?

A. What do you mean by glass?

Q. Window glass.

A. I didn't say that was window glass.

20

Q. You didn't?

A. I did not.

Q. No? Well, it is artificially made, isn't it?

A. That?

Q. Yes, is it or not?

A. Yes, sir.

Q. Well, is it made out of sand?

A. I don't know.

Q. Silica?

A. I don't know. I didn't make it.

30

Q. Well—that is all.

The Prosecutor: I desire to read this to the jury.

Mr. Crandall: Wait a minute, your Honor. I don't think that has been proven.

The Court: Oh, yes, that is in evidence, and you didn't make any objection to it.

08 Mr. Crandall: The indictment says that that differs from the book. The indictment says that is different from the book. Now, the witness swears that this is the book.

The Prosecutor: No, he didn't.

07 Mr. Crandall: Now, in order to show that there is no difference between that and the book I want to introduce the book in evidence, when the time comes. If I can introduce the book in evidence to contradict that, that they have said this is the book, then I don't care how much they read that.

The Court: I know, but isn't this a part of the State's case, this very document here?

Mr. Crandall: Wait a minute, if your Honor please. Isn't this book part of the State's case?

01 The Court: I presume so, if that is the book from which this is copied.

Mr. Crandall: That is what they say and that is what the indictment says.

The Prosecutor: No, indeed, doesn't say that at all. The indictment says: "And the said Abraham

Samaha did then and there unlawfully, knowingly, designedly and falsely pretend and represent to the said Frank A. Swickerath, Junior, that a certain paper writing which he then and there produced to the said Frank A. Swickerath," and so forth, then follows a copy, "Was then and there a true extract from the book or volume on mineralogy."

Mr. Crandall: But your witness said that is the fellow. 10

The Court: No, he said he supposed so. He didn't say it.

Mr. Crandall: He said that was the fellow.

The Prosecutor: He said he couldn't get the book on mineralogy.

The Court: This paper, Mr. Crandall, being in evidence, may be properly read by Mr. Moore to the jury. That has already been marked as an exhibit and the jury is entitled to know what it is. 20

Mr. Crandall: Now, can I introduce this to contradict it?

The Court: Well, we will see when the proper time comes.

Mr. Crandall: I only want to get there in time. I don't want to be said to have sat around and gone to sleep. 30

(Prosecutor then read Exhibit S2 to the jury.)

STATE RESTS.

DEFENDANT'S TESTIMONY.

ABRAHAM SAMAHA, SWORN.

Direct-examination.

By Mr. Crandall:

- 10 Q. What is your name?
 A. Abraham Samaha.
 Q. You are the defendant here?
 A. No, sir.
 Q. You are the defendant here?
 A. Yes, sir.
 Q. Do you know this complaining witness?
 A. The complaining witness, saw him, I don't remember, I think I may know them by the face, but not acquainted with them.
- 20 Q. How is that?
 A. I am not acquainted with them, but I could see them by the face, I see them once, I believe.
 Q. Well, do you remember the transaction on September twenty-sixth?
 A. September twenty-sixth, that is right.

The Prosecutor: November, wasn't it?

- 30 A. November, not September, don't make a mistake.
 Q. You keep a store down there on the Boardwalk?
 A. Yes, I keep a store down 1421.
 Q. 1421?
 A. If it don't make a mistake.
 Q. There is where the stone was bought?
 A. Yes, sir.

Q. 1421?

A. Yes, sir.

Q. What day of the week was it?

A. It was on Sunday.

Q. Do you have a sign there in your place of business?

A. We have a sign in the window there.

Q. This one?

A. Yes.

Q. This sign?

A. Yes.

Q. Have any other sign?

A. No.

Q. That is the only sign?

A. That is the sign was on the stones, we have rugs there, we have sign for rugs, and we have different goods, but everything have a sign belong to it, this belong to the stones, what we sold.

Q. Well, was this sign there that day?

A. Yes, that is the one was in the window.

Q. Well, is that the only sign that was there to the window?

A. That is belonged to the stones what we sell.

Q. Related to the stones?

A. Yes, that is the signs relating to the stones what I sold. That is all the advertisement we have.

Q. Well, you heard them say that there was some canvas lettering there?

A. Well, the canvas letters was different kinds of signs altogether.

Q. How is that?

A. Was different signs, was the same name on this here, and all different kinds of stones, every stone got different names, and different signs.

Q. And how many different names was there on that sign?

A. Oh, was about three.

10

20

30

Q. Three?

A. Yes.

Q. Where is that —

A. I can't see without glasses.

Q. Take mine.

A. I can't use it.

Q. I guess you can see, can't you?

A. I can't see without the glasses. What is this?

What is it, tell me what it is.

10 Q. How?

A. Could you tell me what it is? I can't read it. I can't see it.

Q. Well, I want you to tell the jury.

A. Well, I will tell the jury. I will explain, gentlemen of the jury, this —

Q. You musn't talk too much. The jury wants something besides talk.

A. I can't see there this—either, I never use glasses, my wife tell me this.

20 Q. No, read it. Can't you read it?

A. No, I can't see to read it. I can't see the letters. Yes, I know what it is now.

Q. Did you have any such sign as that there?

A. Well, the signs was—now, that is being mixed up, the name between Kunzite and Kuntsite is two different names, that is what being mixed up on the case here, and tell all kind of stuff about it. The Kuntsite is a highly manufactured stones, what you call high grade gems, high grade imitation gems.

30 Q. Talk to the jury.

A. Now, I want, gentlemen of the jury, to understand me what I mean, that is being mixed up, this case now talking about gentlemen, all the time, I have not sold this man any Kunzite at all. You see different spelling there. That is what being mixed up, and they say the same name, just the same, you

say Jennie and Johnny. Now, you understand that, gentlemen, Jennie and Johnny is different persons and different sexes. Now, that is what being mixed up, and it has got me in this trouble without investigation. They don't investigate to see, to represent to them. Now, I want you, gentlemen of the jury, to understand I did not ——

Q. I wish you would answer my questions, take a week.

A. Gentlemen of the jury, I wanted them, to make them understand, mixed up because —— 10

Q. It will take a week.

A. Yes.

The Court: The lawyer will endeavor to make the jury understand. You just answer questions.

A. What do you want me to answer?

Q. Now, was that sign up there anywhere else?

A. Well, the sign was up there all the difference, 20 mistake in the spelling, this is my sign on there.

Q. Well, was there any other sign there except that?

A. That is what applied to the stones, what I say.

Q. What?

A. That is the only sign, every article, different sign on it, know what it is, that was on the stones what I sold.

The Court: Listen; was that sign in your window, 30 a sign similar to that?

A. Different spell here, it is not the right name.

Q. Well, did you have two signs there that went on those?

A. No, we haven't got that sign in the window.

Q. Well, you heard that witness say that this was up in, it was lettered on a piece of canvas; was there any such thing there?

A. Well, I told you, signs belonging to rugs and different kind of stones.

The Court: Answer the question yes or no. That is a plain question.

10 Q. Well, was just that there?

A. Yes, they were signs telling about tourmalines, beryl, and different kinds of stones.

Q. Well, this don't say anything about beryl or anything else, does it?

A. No.

Q. What I want to know is was this specific sign, these words, up there?

A. Yes, those words, same use, but different name.

20 By the Court:

Q. Mr. Samaha, now that is a perfectly plain question, and one being capable of being answered yes or no. Now, answer yes or no.

A. Well, was a sign up there —

Q. Mr. Samaha, was that sign a sign similar to that wording in your window? Answer that yes or no.

A. Yes.

30 By Mr. Crandall:

Q. It was?

A. But it was not spelled like that there.

Q. Did you ever have any dealing with that young man before you sold him that stone?

A. I don't know nothing about him, never.

Q. You don't remember to have ever seen him before?

A. No.

Q. Now, what were the steps orderly in the selling of that stone? What was the first step?

A. First step, well, that man came right inside there, and he told me he wanted a carat and a half of those white stones in the window, and that was the kind, white stones.

Q. He pointed out that stone?

10

A. Yes, wanted a carat and a half of that stone in the window. Well, I take the stones, and I told him this is the best imitation in the market, the highest grade, will stand the acid, and will keep the brilliancy, and I show him the kind, that has the brilliancy there, and don't sell it to him as real stone come from the ground, anything like that, I explained to him this is that way, and I examine them before I sell them to the people, and I never misrepresented anything at all. I tell him that will stand the acid test and won't fade, where some other imitation as soon as you wet them they get dim. This is high grade imitation as I being told by people what sell it to me, is composed what you call a secret process, is composed from mineral quartz, and manufactured stone, not real stone. I ain't sell you any real stone at all, and I explained to him plainly and I have witnesses who understand been there.

20

Q. I know, but I want to get your questions in order. He came in and wanted to buy that stone?

30

A. Yes, he point to the window and wanted one of those stone, that is all what he said.

Q. Well, what was the next step?

A. Well, the next step I took the stone and I explain about it, the highest grade imitation, is to keep the brilliancy, tested.

Q. Did you test it then?

A. I test in the acid to show him won't, where the other imitation will fade from the water even, this the acid won't fade it.

Q. Then what was done?

A. Well, after I test it, he give me three dollars for it. I tell him worth three dollars for to keep the brilliancy, not because real stone, I will not sell them real stones at all, I sell them as high grade imita-
10 tions.

Q. Now —

A. That is what we call them.

Q. Was there anything said about if it was not satisfactory to bring it back?

A. Yes, sir, there is the sign says there to match the blue white diamond and keep brilliancy or the money will be refunded.

Q. Refunded?

A. Yes, any payment, that says frankly the
20 money will be refunded, you don't see exactly if that is reasonable or not.

Q. Then he took the stone and you took the money?

A. He took the stone and I took the money.

Q. Was there anything said about an advertisement here, a bulletin, was anything said about that?

A. No, this is the circulars.

Q. Was there anything said about that?

A. Nothing at all, nothing at all.

30 Q. Was there such an advertisement there?

A. Not at all, not in the store.

Q. Not in the store at all?

A. No, that is 515, I was 1422, and I will show you, this was from the old store, advertising two years ago, up on the Boardwalk between Massachusetts and Connecticut.

Q. And you haven't used this down where you are?

A. Not at all, I haven't got the circulars.

Q. And there wasn't any such paper there?

A. None at all.

Q. Wasn't any at all?

A. No, I got no circulars, that is all the advertising I had there, money to be refunded if not satisfactory. I think they ought to read this here.

10

The Court: Mr. Samaha, there is no question.

Cross-examination.

By the Prosecutor:

Q. Was this sign in the window when Mr. Swickrath and his wife came in to buy this gem?

A. Yes, sir, it was right with the stones.

Q. Did they point this sign out and they say they wanted that gem? 20

A. Didn't say the gems or anything else.

Q. Did they say they wanted the stones that was under this sign?

A. They never said anything about any sign at all, told me to give them one of those white stones.

Q. How do you know that the sign was in the window when they came in your store that day?

A. Well, because I put it there, it was there before, it was since.

30

Q. When did you have this sign made?

A. That sign was made between 1914 and 1915.

Q. Did you have this sign when you had your store up at 515 Boardwalk?

A. No, sir, not this sign.

The Court: When did you move from 515 Boardwalk?

A. Well, that 515 Boardwalk was two years ago.

Q. When did you move from there to 1421 Boardwalk?

A. I didn't move from there, I went to Florida, and I came back, and when I was there, in 515, understand, I was only agent, demonstrator, for some
10 people that have that circular.

Q. Where is that store in Florida?

A. Florida, St. Augustine, Florida.

Q. Whereabouts?

A. Between Williamson and the Ponce De Leon.

Q. You still have it there?

A. Yes.

Q. Did you have it there last winter?

A. I have a lease for it.

Q. Did you have it there last winter?

20 A. Yes, I have.

The Court: Was that sign on the stones, the one on which you sold to this man?

A. Yes, sir, this is the sign, that is all the advertisement we have. We haven't got anything else to those stones.

Q. You said a while ago that this sign was in there on canvas, didn't you?

30 A. Oh, they make a mistake.

Q. How was it spelled?

A. Spelled just like that.

Q. Just like this?

A. Yes.

Q. Kuntsite?

Mr. Crandall: Kuntsite instead of Kunz——

The Prosecutor: Ite.

Q. You never saw any of these pamphlets since you left 515 Boardwalk?

A. No.

Q. Haven't seen any of them since?

A. No, this has been made by parties advertising the history of the California gems, I was the demonstrator only for them. You see my name, "Demonstrator"?" 10

Q. Yes. They hired you to demonstrate this?

A. That is it, got it now, make a great mistake about that, I was demonstrator for them parties, history of the California gems. You cannot use that at all.

The Court: Mr. Samaha, stop talking so much answer the question Mr. Moore asks you. 20

Q. You know the genuine Kunzite gem, don't you, very well?

A. I know, yes.

Q. Very well?

A. Yes.

Q. You know for whom it is named, don't you?

A. I know very well.

Q. Who?

A. That word Kunzite is named for Professor Kunz. 30

Q. Now, where did you get this from, this little pamphlet you have here, printed?

A. I tell you this is printed by a party there, and I was the agent for it.

Q. Well, where was it gotten from?

A. Well, this is supposed to be from a book, but I tell you ——

Q. Book on what?

A. What?

Q. Book on what?

A. This I think is a magazine.

Q. Oh, just a magazine.

A. A magazine, understand, I don't know exactly, but the party told me so.

Q. This is your name as the originator of the pamphlet, wasn't it?

10 A. Demonstrator, yes, demonstrator and agent.

Q. And this is your place of business?

A. Yes. I mean the word of this circular, on these stones, this was belonged to somebody, and I demonstrator only.

Q. But you put it out under your name, didn't you?

A. Yes, demonstrator.

Q. And you were selling Kunzite then?

A. Yes.

20 Q. Genuine Kunzite?

A. Yes, was genuine Kunzite.

Q. Now, when did you stop selling genuine Kunzite and start to sell the Kuntsite?

A. Well, this is the company at that time.

Q. When?

A. A long time, two years ago.

Q. You stopped selling Kunzite two years ago?

A. Yes.

30 Q. And you have only sold then, you have sold only this since then, is that it?

A. Yes.

Q. So then you have had this sign two years?

A. Yes, sir.

Q. Who made it for you?

A. Two years? No, I don't say this is two years. I say this is going about fourteen or fifteenth of November, I have the certificate for it there.

Q. Where did you have that sign made?

A. Where? Why, on the Boardwalk, the man in the Exposition, he make that sign.

Q. Where is he now?

A. I don't know exactly where, perhaps I could find him; I don't know.

Q. When did he make this certificate for you?

A. Well, he make the certificate sometime in November, I don't know when.

Q. That is when he made the sign, you mean, the same time he made the sign he made the certificate? 10

A. No, after he made the sign.

Q. After he made the sign?

A. Yes, sir.

Q. Right away afterwards?

A. No, not right away, I don't remember when they accused me for selling real articles, and I went to that man and I told him, "You make a sign, and you remember what time you make it?" He said, "Yes, I remember it." He has in his book. 20

Q. You don't know where he is now?

A. Well, I don't know.

Q. Have you tried to get him?

A. I may have to get him, I don't know, he was on the Boardwalk, in the Exposition.

The Court: Have you tried to get him? Did you try to find him?

A. Well, I looking last night there, and I haven't seen his sign. 30

Q. Can you read?

A. What?

Q. Can you read English?

A. Well, I could read very little.

Q. And you say that the difference between Kunt-

site and Kunzite is the difference between Jennie and Johnny?

A. That is right.

Q. Now, where did you get these Kuntsite gems from?

A. This is the name of the manufacturer. We don't sell them by the name at all.

Q. Kuntsite is the name of the manufacturer?

A. Is the names of the manufacturer, what they
10 tell me.

Q. Where does he live?

A. Well, wherever I find out, when he was on the Boardwalk, his wife ——

Q. You knew him?

A. I know him and I bought the exclusive privilege not to sell to anybody on the Boardwalk.

Q. You had the exclusive privilege of selling the Kuntsite?

A. Yes.

20 Q. What was his first name?

A. His first name was Samuel Kunts.

Q. I thought you said it was Kuntsite?

A. I can't pronounce the words, Kunts.

By the Court:

Q. How do you spell it?

A. I can't spell.

Q. Try to spell it?

30 A. I can't spell his name.

By the Prosecutor:

Q. What was his full name?

A. What?

Q. Tell what his full name was, Samuel?

A. Samuel Kunts.

Q. Kunts?

A. Yes, Kunts.

Q. And this was his stone?

A. That is what he told me.

Q. He gave it that name, did he?

A. He gave me that name.

Q. And where was his place of business?

A. Well, he says came from San Diego, California.

Q. Well, did he have a place of business on the Boardwalk? 10

A. No, he didn't say so, he bring the stones from California, explain about them, when I found out this stone.

Q. Just a minute. I haven't asked you anything. He is the one that told you that was the name of it?

A. That is the name he gave me.

Q. It was his stone?

A. Yes, sir.

Q. And he didn't tell you it was just an ordinary glass or paste? 20

A. He told me it was ——

Q. Answer that question. Did he tell you it was ordinary glass or paste?

A. No.

Q. What did he tell you it was?

A. He told me he had manufactured stone composed from mineral quartz. Well, I thought that I am not the manufacturer, but I believe what he said, that is all, and I examine it.

Q. You say that you guarantee to test these before you sold them? 30

A. Sure, I guarantee to test them.

Q. You put that on this sign, didn't you?

A. Yes.

Q. Did you also put it on this sign when you sold?

A. I didn't put that sign, that is not my circular.

The Court: Mr. Samaha, wait until Mr. Moore asks you the question.

Q. Doesn't it read so on this sign, "To be tested to prove the everlasting brilliance before buying?" Was that also done when you sold the Kunzite?

The Court: Answer that yes or no.

A. Yes, but being done by the party.

08 Q. You didn't sell the Kunzite yourself?

A. I was the demonstrator, agent, my name there.

Q. You didn't sell it?

A. I sold them, I demonstrated.

Q. And you demonstrated before you sold them?

A. I sold them for the party.

The Court: What did you charge for them, Mr. Samaha?

07 A. Well, they was very poor quality, pink and lilac, and reduced to two dollars a carat, but never sold to make anything with them, very poor quality.

MRS. IDA SAMAHA, SWORN.

Direct examination.

01 By Mr. Crandall:

Q. What is your name?

A. Ida.

Q. Talk a little louder. Wife of the defendant here?

A. Yes.

Q. Were you in his store at the time this gem was sold?

A. Yes, sir.

Q. What day of the week was it?

A. It was on Sunday morning.

Q. What—who else was in there?

A. There was Mr. Samaha and another lady and gentleman, and the young man and young lady.

Q. You can talk a little louder, you know. Now, you remember the circumstances of this fellow's buying a gem there? 10

A. Yes, sir, I remember it.

Q. Well, you commence at the first of it, the first move that was made, and give consecutively all movements until the trade was complete.

A. Well, the young man came into the store and said, "Give me one of those white stones, you have in the window, about a carat and a half." Mr. Samaha took the stone and said, "This stone matches the diamond and guaranteed to hold its brilliancy," 20 and tested the stone and also said, "It is the finest imitation stone on the market." That was all, there was very little conversation besides, just came in and asked for it.

Q. That is all the talk there was?

A. That is about all there was, yes, sir, that I can remember.

Q. Well, was this bulletin, there, that the Prosecutor flashes around, was that there at all?

A. The circular? No, sir, there was no circulars 30 in the store.

Q. How?

A. There was no circulars in the store.

Q. None at all?

A. No, sir.

Q. Where were those used?

A. Used at 515 Boardwalk.

Q. None of them was down here at all?

A. No, sir.

Q. It was not referred to at all?

A. No, sir.

Q. Did you look for that book on mineralogy that gives an account of the Kunzite stone?

A. I looked for it, sir, and that was the book that I found, these parties claimed that Professor Kunz never wrote a book of any kind.

10 Q. How is that?

A. Those parties claimed that Professor Kunz never wrote a book of any kind on any subject of stones.

Q. Kunz himself never wrote a book?

A. Yes, they claimed that.

Q. Didn't he write that?

A. Not that one, this one.

Q. Look at this.

20 A. That is by somebody else, that one gives an explanation of different precious stones.

Q. That is the book?

A. That is the book, wrote by Professor Kunz, yes, on stones, different kinds of stones.

Q. The indictment says, "A correct extract from a book was then and there true;" what book is that?

A. Well, I don't know, that was left there by the parties that left the Kunzite stones, 515 Boardwalk.

Q. Well, if there is any book at all it is this?

A. I don't know, this is wrote by Professor Kunz.

30 Q. This book?

A. I think so.

Mr. Crandall: I want to introduce it in evidence.

The Court: Well, is that a copy in the indictment? Is it truly copied from this book?

Mr. Crandall: That is what they say.

The Prosecutor: I would like you to show it to me.

The Court: They say that you alleged that that was copied from the book.

Mr. Crandall: Yes. Now, we are going to show that it is. 10

The Court: Give us the page.

A. I don't think, sir, that this was copied from the book.

Mr. Crandall: Wait a minute, not down to that.

A. I want to explain exactly as it is.

Mr. Crandall: I will give the Judge a chance. That is my business. Where does this begin here? 20

The Prosecutor: 171.

Mr. Crandall: If your Honor please, 171, and five other places besides this.

The Court: Yes. Well, now, then, this purports to be an exact copy from a book written by —— 30

Mr. Crandall: No, it is not an exact copy, but it is condensed. Everything that is there is here in a more diluted form.

The Prosecutor: Show it to us.

The Court: I want to see this wording in this book, or some book, before you can introduce the book in evidence, Mr. Crandall. This is alleged to have been copied from a work on mineralogy. Now, this does not purport to be a work on mineralogy.

Mr. Crandall: If you say stones, you say mineralogy.

10 The Court: I know, but this is sort of a folklore book. I think you will have to show me, Mr. Crandall, these exact words before your book is competent. Now then, you show me in that book this wording, and I will admit your book in evidence.

Mr. Crandall: And you will throw it out if the wording is not exactly as it is there.

The Court: You offer the book, do you, Mr. Crandall?
20

Mr. Crandall: If the wording is not exactly as it is in the text he excludes it.

The Court: The book is objectionable—your offer is objectionable on two grounds, first that it is not a work on mineralogy as this alleges it to have been the book from which this was copied, and second, because there is no such matter in the book as is
30 contained on the circular.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

C. C. SHINN, (Seal.)

Q. Well, you say that that bulletin there was not used at all?

A. Not in that store, no, sir.

Q. It was not there?

A. No, sir.

Q. Was there anything said about the stone being a Kunzite?

A. No, sir, nothing at all.

Q. Not a word?

A. A white stone, he asked for, came in and asked 10
for it.

Q. How is that?

A. He came in and asked for one of those white stones in the window, about a carat and a half, same as he would go for a loaf of bread.

Q. And he pointed out the stone he wanted?

A. He said those in the window, he didn't specify any particular one.

Q. Was this sign here in plain sight?

A. That was in the window, yes, sir.

20

No cross-examination.

USHER NEMISROWSKY, SWORN.

Direct examination.

By Mr. Crandall:

30

Q. What is your business?

A. Jeweler.

Q. Where is your place of business? Are you a jeweler in Atlantic City?

A. Yes, sir.

- Q. Where is your place?
A. 131 South Kentucky.
Q. 131 South Kentucky?
A. South Kentucky Avenue.
Q. How long have you been there?
A. About seven years.
Q. Do you know the defendant, Mr. Samaha?
A. I know him, yes, sir.
Q. Were you present when this stone was sold?
10 A. Yes, sir.
Q. You was in there that morning?
A. I was that morning in the store.
Q. Did you hear all that was said?
A. Well, I was in the store when that lady and that man was in that store, and she bought that stone there.
Q. State just what occurred to the jury over there, just what occurred.
- 20 The Court: What was said and done?
A. I was at that time, that lady was in the store, and I was standing there on the case when Mr. Samaha sold that stone for three dollars.
Q. Well, what was the first word that was said?
A. I know hear, I hear him tell him imitation, that is imitation stone.
Q. How is that?
A. Imitation stone, white stone, imitation.
- 30 Q. Well, did the man call Mr. Samaha's attention to it first?
A. Well, I don't know that, I see when he tested that stone yet in the acid, and he test that stone.
Q. He said it was an imitation?
A. He told him it is a good imitation, that will stand the acid, keeps the brilliancy.

Q. Did he say anything about its being a Kunzite?

A. No, I didn't hear it.

Q. Didn't say a word about it?

A. I didn't hear nothing, there was some lady was in the store, and I was talking to that lady something about a job.

Q. Where is that lady that was there?

A. I don't know, was some lady in the store, I don't know where that lady is.

By the Court:

10

Q. What was her name?

A. I don't know no name.

Q. Why were you talking to her?

A. She called me in the store, I was inside, she had a job there, she had a brooch, cameo brooch.

Q. Did she know you were a jeweler?

A. Yes.

Q. How did she know that?

A. She was lots of times in that store, Mr. Samaha. 20

Q. I thought your place of business was on Kentucky Avenue?

A. Kentucky Avenue.

By Mr. Crandall:

Q. Do you know about Kunzite stones?

A. No, I don't know.

Q. You don't deal in them?

A. No.

Q. Have you seen this stone here? 30

A. Yes, sir.

Q. What have you got to say about this stone, what is it?

A. Well, that is imitation, imitation grass, good imitation.

Q. Well, it is —

The Court: Good imitation of what?

A. Imitation stone, white stone, imitation.

The Court: Well, what kind of white stone?

Q. It is an imitation but it is not a fused product, is it, like glass?

A. No.

10 Q. It was taken out of the ground the way it is?

A. I don't know at all about them stones, how it comes.

Q. Well, it was not melted into its present shape, was it?

A. I don't know how comes them stones.

Q. You are not acquainted with those stones?

A. No.

Cross-examination.

20 By the Prosecutor:

Q. You don't know anything about this stone, then?

A. No.

Q. Don't know what it is?

A. I know that is imitation stone, that is all, no more.

Q. Have you ever been in Mr. Samaha's store when he sold that stone to anybody else?

30 A. I was, yes.

Q. Many times before, haven't you?

A. I was many times there.

Q. How is it, then, that you can remember this particular man and wife that were here on the stand this morning, when you have been in there many times when he sold that stone to other people?

A. This was Sunday morning.

Q. How is it you can remember them?

A. I remember them.

Q. Well, why?

A. I remember that, was Sunday morning, I was in the store at that time when was that lady there and that man.

Q. When did you first talk with anybody about this case?

A. Well, nobody talk.

Q. Never talked to anybody about it?

10

A. No.

DEFENDANT RESTS.

STATE'S REBUTTAL.

DR. FREDERICK EHRENFELD, recalled.

Direct examination.

20

By the Prosecutor:

Q. What is the value of Kunzite?

A. Market value, you mean?

Q. Yes, commercial value.

The Court: Such as diamonds and so forth. I have requested the Prosecutor to show by this witness the value of Kunzite. Mr. Samaha said that he sold Kunzite for two dollars a carat. Now, I want to ascertain from this witness the value, if he knows.

30

Mr. Crandall: What did he say?

The Court: Mr. Samaha said that he sold Kunzite for two dollars a carat.

A. May it please the Court, may I ask a question? Did Mr. Samaha say that he meant the genuine Kunzite?

By the Court:

Q. Oh, yes.

A. At two dollars a carat?

Q. Yes. He said that they were off color, pink
10 and some other color, I have forgotten.

A. Of course, it is possible he may, but I never heard of Kunzite being sold at that figure. The man might sell a thing for any price, but that is not the market price.

Q. I understand that, but what I am after is the market price, if you know it?

A. Judge, I have never sold any myself.

Mr. Crandall: Well, if he didn't then he can't
20 answer, don't know anything about it.

The Court: If he knows the value he may say it.

Mr. Crandall: No, he don't know it.

A. Kunzite is classed among stones, they are next door, not as valuable as diamonds, rubies and sapphires, but they come next to them, they are among the precious stones, they would sell for ——

30 Mr. Crandall: If he never handled any ——

The Court: Well, I want to find out what he knows about the value of these stones.

Mr. Crandall: Well, if it ain't relevant testimony you don't want any. He has already said he don't know anything about it.

Q. Do you know, Professor, what the value of Kunzite is per carat, approximately?

A. I have never sold any, Judge. My impression, I will have to tell you —

Mr. Crandall: I will have to object to it, your Honor.

A. Mr. Crandall, if you will allow me to express myself, the Judge can rule me out if he wants to. 10

Q. Are you prepared to say two dollars a carat is an adequate price?

A. I am prepared to say that that is not an adequate price.

Q. Would ten dollars a carat be nearer the price?

A. Yes, sir.

Q. And certainly not two dollars?

A. Not two dollars, no, sir.

20

MRS. ANNETTE SWICKERATH, recalled.

Direct examination.

By the Prosecutor:

Q. That day that you were in the store with your husband did you see any such sign as this?

A. No, I didn't see that sign.

Q. Did you see a sign about Kunzite there? 30

A. Yes, sir, I did.

By the Court:

Q. Do you know how it was spelled, the name of the stone, do you know how that was spelled?

A. Yes, Kunzite.

Q. Is that the same spelling that was on the paper marked Exhibit S2?

A. Yes, same spelling exactly.

The Court: You recall Mr. Samaha said that it was spelled Kuntsite. He says that this is the correct spelling.

Mr. Crandall: Yes, but it is not the original. We
10 have got the original. You have got a copy. You can spell it just the way you please.

STATE RESTS.

TESTIMONY CLOSED.

CHARGE OF THE COURT.

20

SHINN, J.:

Gentlemen, briefly, the defendant in this case has been indicted by the Grand Jury of this county for having, by false pretense, sold to the complaining witness, Mr. Swickerath, an imitation stone which he, according to the allegation of the State, would have had the complaining witness believe, and which the complaining witness has told you he did believe
30 was a genuine Kunzite stone. The charge is false pretenses, and is thus defined by our legislature: "Any person who knowingly, or designedly, by color of any false token, counterfeit letter or writing, or false pretense or pretenses, shall obtain from any person money, wares, merchandise, goods or chattels, or other valuable things, with intent to cheat or de-

fraud any person, body politic or corporate of the same, shall be guilty of a misdemeanor.”

Now, the amount of money involved, gentlemen, is but three dollars. This prosecution is instituted by the State. The State is not interested in the amount of money involved. It is whether or not a crime has been committed. Three dollars is but a small sum of money. If three dollars are obtained from a sufficient number of persons, you can readily see that it goes into a considerable sum of money, so that the State is interested, not in the amount of money, as I said, but in protecting the public from a repetition of this offense, if you believe that an offense has been committed. 10

Now, the State has endeavored to show you, by witnesses, that Mr. and Mrs. Swickerath visited the store of the defendant and that the defendant made certain false representations to him with respect to the genuineness of this stone; that their attention was called to the stone in the store by a sign, a copy of which has been presented to you; that while in the store Mr. Samaha represented this stone to be a genuine Kunzite stone, and in addition to that gave them the circular which you have heard read, and which you will take to the jury room with you. The State has also shown that Kunzite is of such value that it could not be sold for two dollars a carat. Now, if you believe the testimony of the witnesses and of the documentary evidence adduced on the part of the State, then your verdict should be that of guilty. If, on the other hand, you believe the story of the defendant, his wife, and the jeweler who say that there were no such representations made, then, of course, your verdict must be that of not guilty. 20 30

You have a right, and it is your duty, to take into consideration the interest of the various witnesses.

You have a right to ask yourselves, in making up your verdict, whether or not Mr. and Mrs. Swickerath, and the others, have sufficient interest in this case to come and deliberately falsify their evidence. You have a right, on the other hand, to take into consideration the interest which the defendant, and his wife, have in this matter, and judge whether or not they have, through their zeal to be acquitted, falsely testified.

08 With respect to the offer to refund the money if for any reason the purchaser isn't satisfied, I charge you as a matter of law that that is not sufficient. It is the holding out of the article to be something that it really is not that constitutes the offense, if any offense has been committed.

07 You have a right also, in making up your verdict, to ask yourselves why the canvas sign was not produced here. It was in the possession of the defendant, and, according to his own testimony, instead of producing that sign they produced the other sign which they say was also displayed in the window.

I am unable to grant the request of my friend, Mr. Crandall, to charge as he has requested because I have not the book alluded to in the circular which was produced here today, and for that reason I am unable to grant this request.

Now, are there any other matters upon which you would like to be charged, gentlemen? If not you may retire to your deliberations. Those exhibits should be taken by the jurors to the jury room.

01 The clerk is directed to take the verdict of the jury in the absence of the Court, if the Court is not present.

(Jury retires.)

The Court: I have overlooked charging the jury on reasonable doubt. Shall I have the jury brought back or go to the jury room?

Mr. Crandall: You better go to the jury room, I guess.

(The Court goes to the jury room and recharges 10 the jury as follows:

I overlooked reasonable doubt which it is very necessary to charge. At the outset of this, as well as other criminal proceedings in this State, the defendant is presumed by law to be innocent until the State, by a preponderance of evidence, shows to your satisfaction beyond a reasonable doubt that he is guilty. Should you entertain such a doubt it is your duty to resolve it in favor of the defendant.)

20

DEFENDANT'S REQUESTS.

Mr. Crandall: The Court is asked to instruct the jury that it is important for the State to show that the bulletin in the indictment does not correspond with the text of the authority of the book that it was taken from. They have especially alleged that that is not like what the author authorized them to put in, and they have not introduced any evidence on that subject at all, therefore I ask that the Court will instruct the jury to that effect. Instruction refused and exception sealed. 30

C. C. SHINN. (Seal)

ASSIGNMENTS OF ERROR.

NEW JERSEY SUPREME COURT.

10	STATE,	}	On Appeal from Atlantic
	vs.	}	County Court of Quarter
	ABRAHAM SAMAHA.	}	Sessions.

First.

The Court committed error in ruling that the contract of obtaining the gems on Sunday was of sufficient force in law as to sustain a criminal prosecution for obtaining money under false pretenses.

Second.

The Court erred in ruling that the evidence of the complaining witness supported the indictment for two reasons.

(a)

He did not depose that he relied in the statements of defendant that the stone was Kunzite in his payment of the three dollars.

(b)

He did not depose that he relied upon the verity of the correspondence of the terms used in Exhibit S1 with the language of any book whatever.

Third.

The Court erred in its instructions to the jury. That if three dollars are obtained from a sufficient number of persons you can readily see that it goes into a considerable sum money, so that the State is interested not in the amount of money as I said but in protecting the public from a repetition of this offense. It introduced an element for the consideration of the jury unauthorized any law and tended to the injury of the defendant. 10

Fourth.

In refusing the instruction prayed by defendant the Court committed manifest error because there was an entire absence of evidence tending to negative the correspondence of the bulletin with the book on Mineralogy mentioned in the indictment and evidence educed at the trial. 20

Fifth.

The verdict is in no sense authorized by the evidence. There is an entire want of evidence that the stone was not worth more than the money paid for it. There is an entire want of evidence that the term Kunzite imported any intrinsic merit or value to the stone sold. And on the whole evidence of the State even after eliminating the evidence of the witnesses of the defendant. The defendant should have been acquitted as matter of law. 30

J. J. CRANDALL,
PARSONS & PARSONS,
Attorneys for Appellant.

OPINION OF THE SUPREME COURT.

NEW JERSEY SUPREME COURT.

10	THE STATE, <i>Defendant in Error,</i> vs. ABRAHAM SAMAHA, <i>Plaintiff in Error.</i>	}	February Term, 1918. Opinion of the Supreme Court.
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On error to Atlantic County Court of Quarter Sessions.

Argued February 19, 1918. Decided 1918.

20 Before Gummere, Chief Justice, and Justices Parker and Kalisch.

For the plaintiff in error: John J. Crandall.

For the defendant in error: Charles S. Moore.

The opinion of the Court was delivered by Kalisch, J.

30 The judgment of the Court below is before us on a strict writ of error and bills of exceptions. The defendant below was convicted of obtaining money under false pretenses upon an indictment based on Section 186 of the Crimes Act, 2 Comp. Stats. p. 1800, which statute provides, as follows: "Any person who knowingly or designedly by color of any false token, counterfeit letter or writing, or false pretense

or pretenses, shall obtain from any person money, wares, merchandise, goods or chattels, or other valuable thing, with intent to cheat or defraud any person, body politic or corporate of the same shall be guilty of a misdemeanor."

The transaction in which the alleged false pretense was made, by the defendant, occurred on a Sunday. The defendant kept posted a placard in the show window of his store, situate on the Boardwalk, in Atlantic City, advertising the sale of Kunzite stones. According to the testimony a Kunzite is a natural stone, lilac in color, and is classed among the semi-precious stones. Its value varies in proportion to its brilliancy, ranging from two to fifty dollars a carat. The prosecutor entered the defendant's store to make a purchase and asked for a Kunzite stone. The defendant showed him a stone and represented it to be a genuine Kunzite worth two dollars a carat and during the negotiations of sale handed the prosecutor a printed description of its qualities. The stone weighed one carat and a half, and the prosecutor relying upon the defendant's representations that it was genuine Kunzite and of the value of two dollars a carat, bought it and paid the defendant three dollars therefor. The stone, subsequently, proved, upon test, to be common glass artificially made to represent Kunzite and was worth only a few cents.

First, it is argued that the transaction between the parties having taken place on Sunday "the defendant did not obtain title and proprietary right to the three dollars, and the complainant did not become the owner of the gem; and that in order to constitute the offense of obtaining money or goods under false pretenses it must appear that the complainant

was induced to part with property-actual ownership," and that this does not appear. The fallacy of this proposition is manifest. "Actual ownership" of the money or goods by the person upon whom the cheat is practised is not essential. It is sufficient if he had lawful possession and dominion of the same. If the cheat had occurred on Monday the legal title to the money or goods parted with would not have passed. The fact, therefore, of the cheat
10 being perpetrated on Sunday adds no force to the situation.

The unsoundness of the position taken by counsel of plaintiff in error, on the legal effect of the Sunday transaction upon the cheat which was the inducement to the sale, is due first, to the attempt to apply in a criminal prosecution legal rules, governing contracts made and completed on a Sunday, which are only applicable to civil actions *inter partes*; secondly,
20 in assuming that the unlawful contract is the basis of the indictment, whereas the underlying foundation is the false pretense, with intent to cheat, and the carrying of that intent into execution which the legislature has denounced as a misdemeanor, regardless of the day on which it takes place; thirdly, in utterly ignoring the prime fact that the offense committed is against the public, in the prosecution of which, the state is the sole party in interest.

The second assignment of error is, that the Court ruled that the evidence of the complaining witness supported the indictment. The legal propriety of
30 this ruling is assailed by counsel of defendant upon two grounds: (1), that the complaining witness did not testify that he relied on the statements of defendant that the stone was Kunzite. (2), That the witness did not testify that he relied upon the verity of the correspondence of the terms used in Exhibit S2,

hereinafter referred to, with the language of any book whatever.

An examination of the record shows that this assignment is not well founded. It appears from the record that, after the complaining witness had finished his testimony, counsel of defendant made the following statement: "If your Honor please, under the indictment, it shows that the thing that influenced him was the reason that the advertisement was no fulfilled, that the stone did not fulfill the description in the advertisement. Now the witness himself says that he was not influenced by it at all. "A colloquy then ensued between Court and counsel, but it nowhere appears that any motion was pending before the Court calling for a ruling." "The Court: I think, Mr. Crandall, that the testimony so far is in accord with the indictment, I can't see that there is any difference." "Mr. Crandall: But he don't say he was influenced by this at all and the indictment says that was his sole influence. (Motion overruled.)"

To this an exception was sealed by the Court. What the overruled motion was does not appear, except from the language used by the Court that the objection to the indictment came too late. If it was the overruling of a motion directed against the validity of the indictment, the action of the trial Judge in disposing of the motion was proper. The Criminal Procedure Act directs that such a motion must be made before the jury is sworn. If on the other hand the object of the motion was to take advantage of a variance between the proof and the allegations in the indictment, or because of the insufficiency of the proof to sustain the indictment, then the proper course to pursue was to move for a direction of a

verdict for the defendant at the close of the State's or the entire case, upon the grounds specified. But assuming that what was said by counsel during the colloquy with the Court properly raised the question of the sufficiency and variance of the proof to sustain the indictment, an examination of the testimony shows that the motion was without merit, and, hence, was properly overruled.

10 The indictment sets out three separate and distinct false pretenses, with intent to cheat, the proof of any one of which with the intent specified was sufficient to sustain the indictment and conviction thereon. The complaining witness testified that the defendant represented the stone to be Kunzite and of the value of two dollars a carat and tested the stone with acid in the presence of the witness, and, immediately after the test, made a remark to the witness to the effect that the stone showed the proper acid test; and when on cross-examination the witness
20 was asked: "Well, then, the only thing that influenced you to part with your three dollars was the representation that it was a Kunzite stone?", he replied: "Yes and that——". In addition to the testimony of the complaining witness the State introduced ample testimony tending to establish a cheat perpetrated by the defendant.

The third assignment of error challenges the legal propriety of a comment made by the trial Judge in
30 his charge to the jury, but, as there was no general exception taken to the charge, nor any exception taken to the portion of the charge complained of, as erroneous, the matter is not properly before us. We have, however, examined the portion of the charge complained of and find no legal impropriety in what the Court said regarding the interest the

State had in prosecuting offenses of the kind alleged against the defendant. The fourth assignment of error is based upon the refusal of the Court to charge the following request: "The Court is asked to instruct the jury that it is important for the State to show that the bulletin in the indictment does not correspond with the text of the authority of the book that it was taken from. They have especially alleged that that is not like what the author authorized them to put in, and they have not introduced any evidence on that subject at all, therefore I ask that the Court will instruct the jury to that effect." 10

The bulletin referred to is the exhibit designated Exhibit S2, and was the circular handed to the complaining witness while purchasing the stone. This circular contained a caption, as follows: "Copied from Prof. Kunz's book on Mineralogy." Then followed a florid description of the qualities of the Kunzite. A witness for the State testified that there was no work on mineralogy by Professor Kunz. 20 There appears to be a work by Professor Kunz on "Curious Lore of Precious Stones." Counsel for defendant claimed to have such a book in his possession at the trial, but when challenged by the prosecutor of the pleas to point out the page in the book from which the bulletin was copied, he conceded that the circular was not an exact copy but was condensed and diluted. All this took place while the defendant's wife was on the witness stand, and she testified that she did not think the circular was copied from the book. It further appears, that the Court refused to receive the book in evidence upon two grounds; 30 first, that it was not a work on mineralogy, and, therefore, not the book from which the circular alleges it was copied; and second, because there is no

such matter in the book as is contained in the circular. Although counsel of defendant took an exception to the ruling of the Court, no error was assigned upon this exception.

10 In this situation the defendant was not legally entitled to an instruction to the jury that there was no evidence at all before the Court on the subject of the circular. Nor does it appear that the defendant sustained any harm from the refusal of the Court to tell the jury "that it was important for the State to show that the bulletin in the indictment does not correspond with the text of the authority of the book it was taken from" in face of the admission of counsel that it did not correspond with the text of the book he had in his possession, and the testimony on part of the State that Professor Kunz never wrote any book on mineralogy.

20 The fifth assignment of error has no exception to support it. There was no motion made to direct a verdict of acquittal upon the ground that the evidence did not tend to establish the offense charged in the indictment. The matter argued under this assignment, in the brief of counsel for defendant, relates to the following episode. After the jury retired from the bar, the Court said: "I have overlooked charging the jury on reasonable doubt. Shall I have the jury brought back or go to the jury room?"

30 "Mr. Crandall: You better go to the jury room, I guess." Whereupon the Judge went to the jury room and charged the jury that the defendant was entitled to the benefit of a reasonable doubt. This irregularity is not properly before the Court for review, under this assignment, as it is not embraced within the scope of the error alleged therein. If advantage of the irregularity complained of was in-

tended to be taken, by counsel of defendant, it should have been made the subject of an assignment of error, which was not done. But since it appears on the face of the record that the Judge did go into the jury room after the jury had retired thereto, to deliberate upon their verdict, it seems well for us to state here, that the action of the Court was highly improper and irregular and is not palliated by the fact that what he said to the jury was favorable to the defendant; and were it not for the circumstance 10 that the act of the Court in going into the jury room was at the suggestion and with the consent of counsel of defendant, it might have resulted in vitiating the verdict of the jury.

The judgment is affirmed.

ASSIGNMENTS OF ERROR.

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COURT OF ERRORS AND APPEALS OF NEW JERSEY.

THE STATE,
Respondent,
 vs.
 ABRAHAM SAMAHA,
Plaintiff in Error.

} Error to The Supreme Court.

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Parsons and Parsons, and J. J. Crandall, of counsel for plaintiff in error.

Edmund Gaskill, prosecutor and of counsel for the State.

The Supreme Court committed error in assuming that the prosecutor prosecuted a case under Section 185 of Criminal Procedure instead of 136 of the Act; that is they assume that the error prosecuted is under a strict bill of exceptions which does not authorize the Court to examine the whole record for error as in Sec. 136.

Second.

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To the first assignment of error in the Supreme Court, page 84 of the case, "The Supreme Court ruled, see opinion, that 'actual ownership of the money or goods by the person upon whom the cheat is practiced is not essential. It is sufficient if he had lawful possession and dominion of the same.' If the cheat had occurred on Monday, the legal title to the money or goods parted with would not have passed." The fact therefore that the cheat being perpetrated on Sunday adds no force to the situation. This is flagrant error.

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Third.

The Court erred in overruling the second assignment of error to the Supreme Court, p. 40. Plaintiff reaffirms in this Court the error assigned in the Supreme Court both under "A" and "B" therein specified.

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Fourth.

The third assignment of error to the Supreme Court, p. 85, is abandoned.

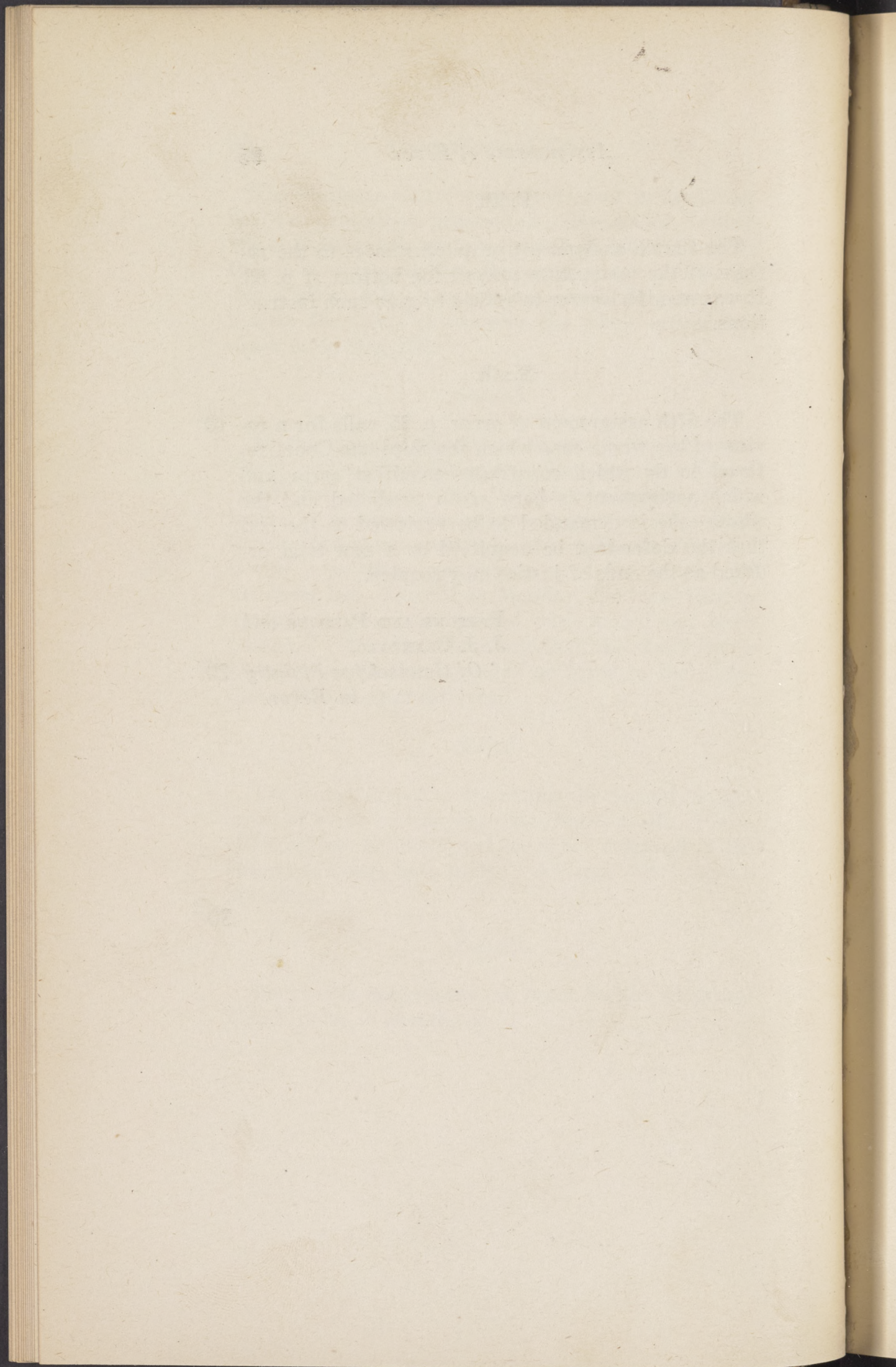
Fifth.

The fourth assignment on p. 85 relates to the refusal of the instruction prayed for bottom of p. 83. It was manifest error to refuse to give such instructions.

Sixth.

The fifth assignment of error, p. 85, calls for a re- 10
view of the whole case which the Supreme Court refused to do which constitutes manifest error and which assignment is here again predicted and the whole case is demanded to be reviewed to the end that the defendant be acquitted or a new trial ordered as the ends of justice may require.

PARSONS AND PARSONS and
J. J. CRANDALL,
Of Counsel for Plaintiff 20
in Error.



NEW JERSEY COURT OF ERRORS AND APPEALS

June Term, 1919.

STATE OF NEW JERSEY,
Defendant in Error,

vs.

ABRAHAM SAMAHA,
Plaintiff in Error.

} On Writ of Error to New
Jersey Supreme Court.

} On Indictment for Ob-
taining Money under
False Pretense.

F A C T S

The defendant, Abraham Samaha, was indicted in Atlantic County for obtaining money under false pretenses. The indictment is found pp. 4 to 7, State of the Case. The statute on which this indictment is based is Section 186 of the Crimes Act, Vol. 2, Compiled Statutes of New Jersey, p. 1800, and reads as follows:

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“Any person who, knowingly or designedly, by color of any false token, counterfeit letter or writing, or false pretense or pretenses, shall obtain from any person money, wares, merchandise, goods or chattels, or other valuable thing, with intent to cheat or defraud any person, body politic or corporate of the same, shall be guilty of a misdemeanor.”

20

The indictment consists of only one count. There are three false pretenses, however, alleged in the in-

dictment. First, it is alleged that the defendant falsely pretended and represented to Frank A. Schwickerath, Jr., that the stone in question was a genuine "Kunzite" gem. Second, it is alleged that the defendant falsely pretended to said Schwickerath that the circular or paper writing marked Exhibit S 2, and an exact copy of which is in the indictment on pp. 5 and 6 was a true and correct extract from a book or volume on "Mineralogy", written and published by one Professor George F. Kunz. Third, it is also alleged that the said defendant falsely pretended to said Schwickerath that said paper writing or circular known as Exhibit S 2 was a true and correct description of the features and qualities of the stone which the defendant offered to sell and did sell to said Schwickerath as a genuine "Kunzite" gem. The stone itself was introduced in evidence and marked Exhibit S 1. The circular that alleged itself to be copied from Professor Kunz's book on "Mineralogy" that described "Kunzite" was in evidence and marked Exhibit S 2. This Exhibit S 2 was printed in the State of the Case in the Supreme Court but has been omitted from the State of the Case in the Court of Errors and Appeals. Counsel on the other side, however, has consented that we print it verbatim in the brief, and that it may be considered in this Court as though it had been printed in the State of the Case. The original circular has a black hand on it at the top of the page, the index finger of which points toward the words, "Copied from Prof. Kunz's book on Mineralogy". An exact copy of Exhibit S 2 is as follows:

☛ Copied from Prof. Kunz's book on Mineralogy

K U N Z I T E

in addition to the historically famous stones of California is a new gem. The KUNZITE is a queen among gem stones, as the diamond is a king, and a stone that in some ways out-diamonds the diamond. It is so rare that an absolutely new gem is brought into light that the sudden appearance of this stone of transcendent beauty has attracted the attention of all lovers of jewels and gems throughout the

world, not alone because it is artistically beautiful, but also for the reason that scientifically it is unique.

KUNZITE is a San Diego Stone, while San Diego County produces the finest Tourmalines in the world, exquisite Hyacinths, beautiful Beryl and brilliant Topaz, these gems are also found in other parts of the earth, but the Kunzite named as graceful compliment in honor of America's celebrated mineralogist has been found only in San Diego County.

It has been reduced to \$2.00 per Carat up to Christmas, to be tested to prove the everlasting Brilliance before buying, to be set to order 14 Carat gold, as a rule of the Company. 10

A . S A M A H A

Gem Cutter and Demonstrator Agents

515 BOARDWALK

Branch Store

Atlantic City, N. J."

St. Augustine, Florida

Plaintiff in error has elected to rely upon a strict bill of exceptions and has assigned error thereon, State of the Case, pp. 93—95. The assignments of error that were relied upon in the Supreme Court are printed in the State of the Case in the Court of Errors and Appeals, pp. 84—85. 20

The defendant was a merchant on the Boardwalk in Atlantic City. He at one time had a store at 515 on said Boardwalk. At the time of the transaction that is the subject of this indictment, his store was at 1421 Boardwalk. He also had another store in St. Augustine, Florida. Schwickerath and his wife were walking along the Boardwalk and saw in the defendant Samaha's window a large canvas sign advertising the sale of stones called "Kunzite". A witness named Schwartz produced in behalf of the State testified to the words on this sign. It is found in his testimony, State of the Case, p. 42, line 12. "A. The sign read: The Kunzite stone, discovered in San Diego, California, belonged to the white diamond family, match blue white diamond correct. To be tested before buying. Reduced to two dollars per carat." Schwickerath and his wife had never seen 30

“Kunzite” and were attracted by this advertisement. This transaction occurred on Sunday, November 26, 1916. They asked the defendant, Samaha, for a “Kunzite” stone. He showed them the stone in evidence as Exhibit S 1. He tested it for them by first putting some acid on some metal and then taking the same kind of acid and applying it to the stone, Exhibit S 1. According to the State’s evidence, there was some controversy had concerning the qualities of the stone and during the course of this conversation, or while they were engaged in the transaction of buying and selling, the defendant handed them the circular known as Exhibit S 2. Schwickerath finally paid Samaha \$3.00 for the stone and was given the stone by Samaha. That same day Mr. and Mrs. Schwickerath stopped in the store of Mr. Lamponi, who was the step-father of Mrs. Schwickerath, and asked that he mount the stone for them. Mr. Lamponi looked at the stone and told them that it was nothing but cheap paste or glass and was not worth mounting. Mr. Lamponi sent for Mr. Schwartz, who was president of the Boardwalk Merchants’ Association, and the stone was then file marked by Mr. Lamponi with a file mark across one of the octagons, and subsequently a complaint was made by Mr. Schwickerath charging the defendant, Samaha, with obtaining money under false pretenses. Defendant was convicted and sentenced to be committed to the Probation Officer for a period of three years, to pay the sum of one dollar per week during that period and a fine of two hundred dollars within one week after his sentence.

It appears from the testimony of Professor Ehrenfeld, the professor of Mineralogy at the University of Pennsylvania, that the Exhibit S 1, the stone in question, is glass, paste, a paste gem, artificial. P. 50 State of the Case, lines 1 to 3. On the same page he also testified that it was not “Kunzite” and told why it was not “Kunzite”. This same testimony was given by Mr. Lamponi, another expert called for the State, p. 32 State of the Case, bottom of page, line 34 to 38.

There are six assignments of error. They will all be considered in their order.

ARGUMENT.

I.

THE SUPREME COURT COMMITTED ERROR IN ASSUMING THAT THE PROSECUTOR PROSECUTED A CASE UNDER SECTION 185 OF CRIMINAL PROCEDURE INSTEAD OF 136 OF THE ACT; THAT IS THEY ASSUME THAT THE ERROR PROSECUTED IS UNDER A STRICT BILL OF EXCEPTIONS WHICH DOES NOT AUTHORIZE THE COURT TO EXAMINE THE WHOLE RECORD FOR ERROR AS IN SEC. 136. 10

There is a clerical error in the above assignment, where it refers to Section 185 of the Criminal Procedure Act. It evidently refers to Section 135, which is the section dealing with assignments of error upon a strict bill of exceptions. Notwithstanding the contention of counsel on the other side, they are not entitled to the benefit of the liberal review provided for in Section 136 of the Criminal Procedure Act. It has been well settled in the criminal practice of our State that where a convicted defendant below intends to take advantage of the liberal review provided for in Section 136, they must separately specify causes of reversal under that section. That has not been done in the case at bar. On p. 93, State of the Case, line 19, it appears as follows: "Assignments of Error". Counsel on the other side has seen fit to label his legal complaint in this Court as assignments of error. That means, of course, that he has assigned error upon a strict bill of exceptions as provided for in Section 135 of the Criminal Procedure Act. If counsel intended to seek the advantages of the liberal review of Section 136, they should have separately specified causes for reversal under that section. This they have not done in the case at bar and, therefore, they are here solely on a strict bill of exceptions, with error assigned thereon. This method of procedure is so well settled in this State that citation of authority to support the same is not necessary. 20 30

II.

TO THE FIRST ASSIGNMENT OF ERROR IN

THE SUPREME COURT, PAGE 84 OF THE CASE, "THE SUPREME COURT RULED, SEE OPINION, THAT 'ACTUAL OWNERSHIP OF THE MONEY OR GOODS BY THE PERSON UPON WHOM THE CHEAT IS PRACTICED IS NOT ESSENTIAL. IT IS SUFFICIENT IF HE HAD LAWFUL POSSESSION AND DOMINION OF THE SAME.' IF THE CHEAT HAD OCCURRED ON MONDAY, THE LEGAL TITLE TO THE MONEY OR GOODS PARTED WITH WOULD NOT HAVE PASSED." THE FACT THEREFORE THAT THE CHEAT BEING PERPETRATED ON SUNDAY ADDS NO FORCE TO THE SITUATION. THIS IS FLAGRANT ERROR.

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20 This is the second assignment of error and is the first one alleged in the Supreme Court. It is first contended that this assignment of error is not sufficiently specific to be of any advantage in this Court. No doubt what counsel intended to say was that the Supreme Court committed error in over-ruling the first assignment of error in the Supreme Court. That is not the language, however, of the second assignment in this Court. Counsel for the State, however, not wishing to be technical, is going to argue the question as though error had been properly assigned thereon.

30 We first call to the attention of this Court the opinion rendered by Mr. Justice Kalisch for the Supreme Court, which is found in the State of the Case in this Court, beginning p. 86 and ending p. 93. We think that this opinion of the Supreme Court fully and adequately deals with all the questions that are raised in this Court, and we presume this Court will read that opinion so that it will not be necessary to quote it at length in this brief.

In the Supreme Court, counsel for defendant stoutly contended that because the transaction in question took place on Sunday, and therefore being void as a civil transaction of contract of sale, that it followed as a conclusion of law that the defendant could not be guilty of committing the crime of obtaining money under false pretenses. Counsel for the defendant in their brief in this Court, however, are

going beyond the proposition raised and decided in the Supreme Court. They contend in their brief in this Court that the complaining witness, Schwickerath, in legal effect committed a crime when he bought this stone on Sunday instead of on a weekday, and that, therefore, the defendant, Samaha, could not be guilty of the crime of obtaining money under false pretenses. Counsel on the other side say, on p. 7 of the brief in this Court, near the bottom of the page as follows: "Hence the crime enacted by the Vice and Immorality Act imposes a complete barrier to the commercial crime of obtaining goods by false pretenses." The legal effect of the Vice and Immorality Act upon the transaction in question will be considered later on. It is contended by counsel for the State that no advantage can be taken of this point in this Court because it was not raised in the Supreme Court. The full extent of the contention of counsel on the other side in the Supreme Court with respect to this point was that the transaction was void because the contract of sale was consummated on Sunday. It was further argued there that because the civil contract itself was void that, therefore, no crime could be predicated upon it, or particularly the crime of obtaining money under false pretenses because there was no valid civil sale to support it. From pp. 4 to 7 inclusive, however, of the brief in this Court, of counsel on the other side they undertake to argue a new principle of law that was not before the Supreme Court. They say that the complaining witness, Schwickerath, committed, virtually, a criminal offense when he bought the stone on Sunday because the Vice and Immorality Act prohibits such a sale. Now, it is well settled that this Court will not consider an assignment of error or a point that was not raised in the Court below. It is not necessary to argue the justice and necessity of such a ruling. It is axiomatic. Justice could never be done properly unless the Court below had called to its attention and properly raised before it the matters which the reviewing Court is called to pass upon. This principle is well settled in this State by authorities. *Montclair vs. Amend*, 76 N. J. L. 625 (E. & A. 1909). Opinion by Chief Justice Gummere. *State vs. Brown*, 76 N. J. L. 479 (E. &

A. 1908). Opinion by Chancellor Pitney. Delaware, Lackawanna & Western Railroad Company vs. Dailley, 37 N. J. L. 526 (E. & A. 1874).

Counsel for the State, however, are perfectly willing to argue this question upon the merits and we proceed first to discuss the question that was really raised and decided in the Supreme Court.

10 Learned counsel for plaintiff in error claimed at the trial and argues in his brief that because the trade occurred on Sunday, and the contract of sale being void because of the fact that it was made on Sunday, that therefore the criminal prosecution is a nullity because the false pretense is based upon an illegal contract. The State answered at the trial and answers here now by saying that a crime can be committed upon any day of the week. It makes no difference whether it is Sunday or Monday. There is some common and statute law which prohibits the serving of certain kinds of warrants on Sunday. The
20 reason for this was the fear that the peace of the Sabbath might be disturbed by so doing. There isn't a single case, however, nor a line of statutory law that we have been able to find which says that a crime may not be prosecuted because of the fact that it was committed on Sunday. There are certain kinds of crimes that are only crimes because they are committed on Sunday. An illustration of this is the selling of liquor on Sunday. A person who has a license to sell liquor may sell it on weekdays but not on Sundays, but a person who sells liquor without any licenses at all would be guilty of the crime of selling liquor without a license no matter whether he sold it on Sunday or a weekday. If he sold it on Sunday it would be just the same charge, to wit, selling liquor without a license. There were many things which the common law prohibited being done on Sunday. These prohibitions, however, do not mean that crimes that might be committed on Sunday could not be prosecuted. In fact, learned counsel would not go so far as to say that. His argument merely goes to the point that those crimes which are contractual in their origin cannot be prosecuted if they are committed on Sunday. The crime of ob-
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taining money under false pretenses does not have a contract for its basis. Its basis are the evil acts and criminal intent of the defendant. The crime itself is not in any way dependent upon the contract. It is true that the contractual situation between Schwickerath and Samaha is cognizable in the civil courts and that the contract would therefore be void for that reason. This criminal prosecution, however, is as separate from the civil matter as day is from night. They have nothing whatever to do with each other. The civil transaction is between two individuals, to wit, Samaha and Schwickerath. The criminal matter is between the State, the sovereign power, and the defendant Samaha. The State is not prosecuting Samaha on the contract. The State is prosecuting him for committing this crime of obtaining money under false pretenses. It is a crime because the Legislature has made it so by statute. It had its origin in the common law offense of cheat. The statute, of course, has enlarged the offense as it existed in the common law. There is nothing in the essential ingredients of this offense which requires the State to sustain the contract as it might be determined according to the civil law. This proposition is adequately dealt with in an opinion of Mr. Justice Kalisch in the Supreme Court already referred to.

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Now, as to the new proposition that learned counsel have raised in this Court, that Schwickerath, the complaining witness, committed a crime when he bought the stone on Sunday. A careful reading of Section 1 of the Vice and Immorality Act, found in Volume 4 of the Compiled Statutes of New Jersey, p. 5712, and following does not make it clear that Schwickerath, the purchaser, could be prosecuted under this statute. No doubt Samaha, the seller, could have been prosecuted for making the sale on Sunday. The language of the act is "no person shall sell or barter the same". It does not say that no person shall purchase. But even assuming that Schwickerath committed an offense against the Vice and Immorality Act when he purchased the stone on Sunday, it is contended by counsel for the State that this is not a criminal offense. The old Vice and Immorality Act is a penal statute. This Court has

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repeatedly held that violations of our Disorderly Persons Act were not a criminal offense. Violations of city ordinances are not criminal offenses and violations of penal statutes are not criminal offenses.

10 But even assuming that Schwickerath, the complaining witness, committed a criminal offense when he bought the alleged gem on Sunday, that is no bar to the prosecution of the defendant, Samaha, in this case. It is true that counsel on the other side have
20 quoted and cited some authority for their proposition. All of the cases they have cited will be found to a foot-note in 19 Cyc., 418, article 7, Defenses, Section B, Contributory Guilt. The text in Cyc. in this paragraph is as follows: "A crime being an act directed against the state, the state cannot be estopped from prosecuting it by the act of any individual, and hence the fact that *the party defrauded by the false pretense was himself guilty of some fraud in the transaction is no defense to the accused.*" This text in Cyc. under note 86 of same cites authority in the States of California, Colorado, Illinois, Indiana, Michigan, Massachusetts and in our own state of New Jersey. Contra in the note are the States of New York, Wisconsin and an anonymous decision from Ohio. This proposition of law is also fully and adequately dealt with and the authorities cited in 17 L. R. A. New Series, 276, in a note beginning at the bottom of the page and continuing to page 279. The opening sentence of this
30 note in L. R. A. is as follows:

"According to the weight of authority, it is no defense to a criminal prosecution for obtaining property by false pretenses or confidence game, that the prosecuting witness himself, in the very transaction of which he complains, was guilty of an intent to defraud the defendant or another, or to violate some law." The learned commentator in this note further comments as follows: "The cases so holding, though admitting that it is ordinarily a defense to a civil action by the prosecutor, contend that the rule has no application to criminal actions in which the state is plaintiff, and conducted, not for the benefit of the prosecutor, but for the protection

of the public, and over which the prosecutor has no control, and that therefore the doctrine of estoppel is not applicable, as the state is not *particeps criminis*; that the public good is better served by punishing both the guilty parties than by letting either escape."

The authority principally relied upon by counsel on the other side in this proposition is the McCord case in New York and the Crowley case in Wisconsin, 41 Wis. 271, 22 Am. Rep. 719. The leading case in New York State cited by counsel on the other side is McCord vs. People, 46 N. Y. 470. The learned commentator in the note in L. R. A., cited *supra*, p. 278, has this to say about the New York decisions:

"There is, however, a line of cases, notably those from New York, which hold that the illegal intent of the prosecutor is a defense. This holding is, in part, based upon the language of the preamble of the English statute of 30 Geo. II., chap. 24, of which the New York statute is substantially a transcript, which recites that ill-disposed persons had, by various subtle stratagems, etc., fraudulently obtained divers sums of money, etc., to the great injury of industrious families, and to the manifest prejudice of trade and credit, etc. From this they conclude that the design of the law is to protect those who, for some honest purpose, are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those, who, for unworthy or illegal purposes, part with their goods."

It will thus be seen that even in New York the Courts of that State have based their decisions upon the ground that the statute was evidently only intended to protect those persons who had an honest intent so far as the transaction was concerned. In addition to the States above referred to in the note in 19 Cyc., cited *supra*, the State of Pennsylvania is also against the contention of counsel for the defendant, *Com. vs. Henry*, 22 Pa. 253. We need not, however, go beyond the confines of our own State

to find authority which adequately disposes of the contention of learned counsel on the other side. This question has been dealt with in our Supreme Court in *Cunningham vs. State*, 61 N. J. L. 67 (Sup. 1897). On page 70 of this opinion by Mr. Justice Van Syckel in the Supreme Court, he speaks as follows:

10 “It is also alleged that there was error in the refusal of the court to charge that ‘if the money was advanced for the purpose of prosecuting a claim which Mrs. Burke then knew or believed to be fictitious, the transaction was contrary to public policy, and not within the statute, hence the defendant must be acquitted’.”
(Mrs. Burke was the complaining witness).

20 “The case of *McCord v. People*, 46 N. Y. 470, gives support to this contention on the part of the defendant, but I think the New York court failed to observe the distinction which exists between suits inter parties, and an indictment for breach of the criminal law. In the former case both parties participated in the illegal act, and neither is entitled to the aid of the court. In the latter case public justice alone is concerned, and so far as the public is interested, one party cannot excuse or defend his criminal conduct because the other is equally guilty with him.”

30 (This is one of the principal authorities relied upon by counsel on the other side).

 “That is the view taken by the Massachusetts Supreme Court in *Commonwealth v. Morrill*, 8 Cush. 571, and in my opinion it is a correct exposition of the law.

 “A common instance of its application is where two persons agree to engage in a fight, and in pursuance thereof commit a breach of the peace; both parties may be convicted of criminal assault.”

 This decision of the Supreme Court was affirmed by the Court of Errors and Appeals in this State in

61 N. J. L. 666. It will thus be seen that it is the settled law of this State that even where the complaining witness is guilty as *particeps criminis* in the prosecution for which the defendant has been convicted that the defendant is not entitled to any benefit because of the alleged criminal conduct of the complaining witness. It is not necessary to cite further authority. If this Court wishes to read any of the opinions that are favorable to the principle of law here contended for by the State, the authorities will be found amply cited in the foot-note above referred to in 19 Cyc. and in the note of the learned commentator in 17 L. R. A., New Series. Whatever may be the brand of law and criminal justice that is meted out in other States, it has certainly never been a rule of law in New Jersey that a defendant could claim immunity from crime because of the fact that some other person had committed a crime that was the basis or cause of the defendant's crime. This State does not excuse criminals upon any such flimsy pretext. It is certainly a kind of a proposition that ought not to be encouraged if justice is to be done in the criminal law. In the Cunningham case, *supra*, Cunningham was a lawyer. He sought to evade or to set aside his conviction for obtaining Mrs. Burke's money by false pretense in the Supreme Court on the ground that Mrs. Burke, the complaining witness, had been guilty together with himself, of a virtual conspiracy to bring a false or fraudulent suit against someone. It can readily be seen to what serious consequences such a principle of law would lead. Cunningham, a lawyer, would have escaped prosecution because his client, Mrs. Burke, was *particeps criminis* with him in a transaction for which he had been indicted. To state the matter is to show its utter viciousness and how perfectly ridiculous it is as a defense. It is certainly of no avail to Samaha in the State of New Jersey. Besides, it is not even contended in the case at bar that Schwickerath, the complaining witness, was a co-conspirator or *particeps criminis* with Samaha in the transaction in question. Counsel on the other side do not even go as far as that. Their only claim is that Schwickerath himself committed a crime when he bought the stone on Sunday. In conclusion

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in this point, it is sufficient to say that in the first place, Schwickerath did not commit a crime when he bought the alleged gem on Sunday, and in the second place, even if what he did amounted to a crime, such a defense is not available for Samaha.

III.

10 THE COURT ERRED IN OVERRULING THE SECOND ASSIGNMENT OF ERROR TO THE SUPREME COURT, P. 40. PLAINTIFF REAFFIRMS IN THIS COURT THE ERROR ASSIGNED IN THE SUPREME COURT BOTH UNDER "A" AND "B" THEREIN SPECIFIED.

20 This is the third assignment of error in the Court of Errors and was the second one assigned in the Supreme Court. Where the Exhibit S-1 is referred to in the assignment in the Supreme Court it means S-2, being the circular already set forth in this brief. This exception was allowed Page 24 State of the Case, line 10 and following. As already pointed out by Mr. Justice Kalisch in his opinion in the Supreme Court, beginning at bottom of page 88 State of the Case and going to near the bottom of page 90, no motion was made by counsel for defendant at the trial as a basis for this exception. He evidently intended to make a motion and, as pointed out by Mr. Justice Kalisch, the colloquy between Court and counsel could have been either one of two motions. The first motion might have been an objection to the validity of the indictment. We quote from the opinion of Mr. Justice Kalisch:

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"If it was the overruling of a motion directed against the validity of the indictment, the action of the trial Judge in disposing of the motion was proper. The Criminal Procedure Act directs that such a motion must be made before the jury is sworn. If on the other hand the object of the motion was to take advantage of a variance between the proof and the allegations in the indictment, or because of the insufficiency of the proof to sustain the indictment, then the proper course to pursue was to move

for a direction of a verdict for the defendant at the close of the State's or the entire case, upon the grounds specified."

Justice Kalisch then goes on to consider the proposition on its merits, as though Mr. Crandall had properly moved for a direction of a verdict at either the close of the State's case or the entire case for the reasons given. He says:

"The indictment sets out three separate and distinct false pretenses, with intent to cheat, the proof of any one of which with the intent specified was sufficient to sustain the indictment and conviction thereon. The complaining witness testified that the defendant represented the stone to be Kunzite and of the value of two dollars a carat and tested the stone with acid in the presence of the witness, and, immediately after the test, made a remark to the witness to the effect that the stone showed the proper acid test; and when, on cross-examination the witness was asked: 'Well, then, the only thing that influenced you to part with your three dollars was the representation that it was a Kunzite stone?' he replied: 'Yes and that—'. In addition to the testimony of the complaining witness the State introduced ample testimony tending to establish a cheat perpetrated by the defendant."

Answering the elaborate argument of counsel on the other side in their brief in this Court, if Mr. Schwickerath's testimony, beginning on p. 11 State of the Case, and ending p. 22, is read as a whole instead of taking out certain portions of it, as counsel for the defendant have done, it will appear that he relied on the defendant's statement that the stone was "Kunzite", that the "Kunzite" was advertised out front in the window, that defendant told him that the stone was "Kunzite", that he handed him the circular marked Exhibit S 2, that he tested the stone with acid, first on metal and then on the stone, that he sold him the stone and that they relied upon his word that it was "Kunzite" when they paid him

the three dollars. He was asked, p. 16 State of the Case, "Q. Now, when you purchased that stone from Mr. Samaha and gave him your three dollars, did you believe Samaha was telling you the truth about what it was? A. I did." Then on p. 17, State of the Case, "Q. Well, there wasn't any preliminary talk before you looked at the stone, was there? A. Why, I don't know as there was any preliminary talk, or the only thing that he showed it to me and tested it and showed that pamphlet before I bought it. Q. Well, didn't you ask him to show you this particular stone? A. I didn't ask him to show me any particular stone, only a Kunzite stone." Then again on page 18, "Q. How came you to inquire for a Kunzite stone? A. Because Kunzite was advertised out front on the window. Q. Out front on the window? A. There was a large sign out front." Mrs. Schwickerath accompanied her husband and he was really buying the stone for her. She participated in the transaction as appears from her testimony beginning on p. 24 and ending p. 30, State of the Case. It is perfectly apparent from her testimony and that of Mr. Schwickerath that the Exhibit S 2 was handed by Samaha to them while the purchase of the stone was being discussed. There is no doubt whatever from the evidence but that Samaha intended the circular S 2 to assist him in inducing Schwickerath and his wife to buy the stone. Mrs. Schwickerath says they read the thing while they were in the store and it is perfectly apparent from their testimony that this circular, along with the verbal representations of Samaha, were what induced them to part with their money. The whole thing was a fake from beginning to end. The stone itself is nothing but white paste, ordinary common glass. "Kunzite" is an entirely different kind of a stone from that in evidence as Exhibit S 1. Both Mr. and Mrs. Schwickerath say that they went in to purchase "Kunzite" because that was the advertisement in the window, which Schwartz testified to. They asked for "Kunzite". Samaha gave them this stone for that, first testing it with the acid and handing them the circular, S 2. Now it certainly appeared that they relied

upon the verbal and written representations that the stone was a "Kunzite". It was not necessary for Mr. and Mrs. Schwickerath to swear that they relied upon the verity of the correspondence of the terms used in Exhibit S 2 with the language of any book whatever. What the State charged in the indictment was that the alleged copy from the book, in Exhibit S 2, was not a copy from any work on "Mineralogy" by Professor Kunz. That this was not a copy from any work on "Mineralogy" by Professor Kunz appears from the testimony of the witness Schwartz, p. 43 State of the Case, line 30. "Q. Did you ever attempt to buy a book on mineralogy by Professor Kunz. A. I made an inquiry of Professor Kunz for that book. Q. Did you get it? A. He wrote back stating—. Q. Wait. Did you get it? A. I did not. Q. You can't state what he stated. By Mr. Crandall: Q. When did you write to him, before this or after this transaction? A. I wrote to him before this transaction. Q. What did you write to him for? A. Wanted to know, this man had been selling these stones on the Boardwalk for some time. Q. You wanted to suppress it, if possible. A. I can't say that I wanted to suppress it. I couldn't suppress it unless there was a complaint. Q. Well, you proposed to make a complaint and have him arrested and tried as he is here now? A. I beg pardon. I didn't propose to do any such thing. Q. What use were you going to make of your opinion if you got it out of the book? A. I had my doubts as to the authenticity of that pamphlet, that Professor Kunz would write such a history of the stone. Q. Well, you never found out then whether he wrote such a history or not, did you? A. I did. Q. Where, in this book? A. I found out that he did not write such a history. Q. Where did you find it out, in that book? A. From the letter from Mr. Kunz. Q. Let's see, is there the book? A. No. Q. You never saw the book? A. Never saw the book. Q. And all you know is the letter from Mr. Kunz? A. And his personal word. Q. Have you got that letter? A. I have a letter, yes. Q. Where is the letter? A. Do you wish that? The Prosecutor: Yes. (Letter produced). Mr. Cran-

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dall: That is not introducible in evidence anyhow.
Q. So you corresponded with him, did you? A. I
did. Q. Well, is that his book? A. Can't be. It
has somebody else's name on there. Q. That is his
book? A. I suppose so. It has his name. Q. Did
you ever examine it? A. No. Q. And you have
no means of knowing, from the book, whether that
bulletin corresponds with what is said in this book
10 at all, no means of knowing at all? A. No means
of knowing that it was not in that book. Q. You
have no means of knowing that it was not in this
book? A. None at all. Redirect examination
By the Prosecutor: Q. What is the title of this
book, according to the title page? A. 'Curious
Lore of Precious Stones.' Q. And who is it by,
according to its title page? A. By George Freder-
ick Kunz." Then on page 47 line 4. "The Prosec-
utor: Can you show me in here where this is copied
from? Mr. Crandall: Can who? The Prosecu-
20 tor: You. Mr. Crandall: Yes, sir. The Prosecu-
tor: Where? Mr. Crandall: When the time comes
I will try and wait upon you. It is satisfactory
to introduce this in evidence, isn't it, when the
times comes? The Prosecutor: I don't know. I
will offer this letter and affidavit. Mr. Crandall:
Extraneous, between other parties introduce that
stuff? The Court: I don't believe that is admissi-
ble, Mr. Moore. The Prosecutor: Then I guess I
will have to object to your book, then. This is
30 Kunz's writing and that is his book. Mr. Crandall:
Well, we will see how we make out." It thus ap-
pears from the evidence that Professor Kunz never
wrote any work on "Mineralogy". He did write
some book on the "Curious Lore of Precious Stones"
but apparently Mr. Crandall was unable to show
where Exhibit S 2 was copied from that book. There
is further reference to this matter, State of the Case,
p. 52. "The Prosecutor: I desire to read this to the
jury, (Referring to Exhibit S 2). Mr. Crandall:
Wait a minute, your Honor. I don't think that has
been proven. The Court: Oh, yes, that is in evi-
dence, and you didn't make any objection to it. Mr.
Crandall: The indictment says that that differs from
the book. The indictment says that is different

from the book. Now, the witness swears that this is the book. The Prosecutor: No, he didn't. Mr. Crandall: Now, in order to show that there is no difference between that and the book I want to introduce the book in evidence, when the time comes. If I can introduce the book in evidence to contradict that, that they have said this is the book, then I don't care how much they read that. The Court: I know, but isn't this a part of the State's case, this very document here? Mr. Crandall: Wait a minute, if your Honor please. Isn't this book part of the State's case? The Court: I presume so, if that is the book from which this is copied. Mr. Crandall: That is what they say and that is what the indictment says. The Prosecutor: No, indeed, doesn't say that at all. The indictment says: 'And the said Abraham Samaha did then and there unlawfully, knowingly, designedly and falsely pretend and represent to the said Frank A. Schwickerath, Junior, that a certain paper writing which he then and there produced to the said Frank A. Schwickerath,' and so forth, then follows a copy, 'Was then and there a true extract from the book or volume on mineralogy.' Mr. Crandall: But your witness said that is the fellow. The Court: No, he said he supposed so. He didn't say it. Mr. Crandall: He said that was the fellow. The Prosecutor: He said he couldn't get the book on mineralogy. The Court: This paper, Mr. Crandall, being in evidence, may be properly read by Mr. Moore to the jury. That has already been marked as an exhibit and the jury is entitled to know what it is. Mr. Crandall: Now, can I introduce this to contradict it? The Court: Well, we will see when the proper time comes. Mr. Crandall: I only want to get there in time. I don't want to be said to have sat around and gone to sleep. (Prosecutor then read Exhibit S 2 to the jury.)"

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It appears on p. 71 State of the Case, where Mrs. Samaha, the wife of the defendant, was testifying that she says, about line 13, on that page, "I don't think, sir, that this was copied from the book." Mrs. Samaha was referring to Exhibit S 2 and also the book that Mr. Crandall had brought there, referred to in Mr. Schwartz testimony as "Curious Lore of

Precious Stones" by Professor Kunz. On p. 70, at the bottom and pp. 71 and 72, Mr. Crandall was challenged to show where in the book Exhibit S 2 was copied from. He was unable to do this and therefore the State objected and the Court ruled out the book. It therefore clearly appears from the evidence that the charge made in the indictment by the State, to wit, that Exhibit S 2 was not copied from a work on "Mineralogy" by Professor Kunz, was established. 10 But it was not necessary to prove all three of the alleged false pretenses. Any one was sufficient to support the charge. Mr. Wharton, in Vol. 1, Wharton's Criminal Evidence, 10th edition, p. 356, Sec. 131, says, "So, in false pretenses, anyone of the alleged false pretenses being itself within the statute, and shown to be the inducing cause through which the prosecutor parted with his property, relying upon the same, and believing them to be true, will be sufficient to support a conviction." It is perfectly clear 20 that the defendant falsely represented the stone to be "Kunzite", verbally and with the writing, Exhibit S 2. It is perfectly clear that Mr. and Mrs. Schwickerath relied upon this false representation and believed it to be true when they gave up their three dollars.

IV.

THE THIRD ASSIGNMENT OF ERROR TO THE SUPREME COURT, P. 85, IS ABANDONED.

30 This was the third assignment of error in the Supreme Court and as it is abandoned by counsel on the other side it will not be considered in this argument.

V.

THE FOURTH ASSIGNMENT ON P. 85 RELATES TO THE REFUSAL OF THE INSTRUCTION PRAYED FOR BOTTOM OF P. 83. IT WAS MANIFEST ERROR TO REFUSE TO GIVE SUCH INSTRUCTIONS.

This assignment is number 4 in the Supreme Court and relates to an oral request to charge by counsel on the other side; found in State of the Case

bottom of page 83. This assignment is completely and fully dealt with in the opinion of Mr. Justice Kalisch beginning just below the top of page 91 and ending in the middle of page 92.

The best answer to this exception is that it does appear as heretofore set forth under the second assignment of error that Exhibit S 2 did not correspond or was not copied from a work on "Mineralogy" by Professor Kunz. Mr. Schwartz testified as already quoted that there was no work on "Mineralogy" by Professor Kunz. It likewise appears from the testimony of Mr. Crandall's own witness, Mrs. Samaha, p. 71, as already quoted under the second assignment that this writing, Exhibit S 2, was not copied from the book entitled "Curious Lore of Precious Stones," by Professor Kunz, which Mr. Crandall himself produced. She said, "I don't think, sir, that this was copied from the book." It would therefore have been highly improper for the Court to tell the jury that there was no evidence to show that the paper writing, Exhibit S 2 was not copied from Professor Kunz's book on "Mineralogy". It does appear from the evidence that he never wrote a work on "Mineralogy" and it was likewise not copied from the work entitled, "Curious Lore of Precious Stones", which Mr. Crandall himself produced. It was therefore entirely proper for the Court to refuse this instruction. Then again, even if the evidence did not show this fact, there was plenty of evidence to establish the other false pretenses alleged in the indictment. This exception, therefore, falls, and is worthless.

VI.

THE FIFTH ASSIGNMENT OF ERROR, P. 85, CALLS FOR A REVIEW OF THE WHOLE CASE WHICH THE SUPREME COURT REFUSED TO DO WHICH CONSTITUTES MANIFEST ERROR AND WHICH ASSIGNMENT IS HERE AGAIN PREDICTED AND THE WHOLE CASE IS DEMANDED TO BE REVIEWED TO THE END THAT THE DEFENDANT BE ACQUITTED OR A NEW TRIAL ORDERED AS THE ENDS OF JUSTICE MAY REQUIRE.

This assignment in this Court relates to the fifth assignment in the Supreme Court. The fifth assignment in the Supreme Court is as follows: "The verdict is in no sense authorized by the evidence. There is an entire want of evidence that the stone was not worth more than the money paid for it. There is an entire want of evidence that the term Kunzite imparted any intrinsic merit or value to the stone sold. And on the whole evidence of the State even after
10 eliminating the evidence of the witnesses of the defendant. The defendant should have been acquitted as matter of law."

This exception is of no value to the defendant, because it is not directed to any specific part of the evidence or rulings of the Trial Court excepted to. Where a reversal is sought upon a strict bill of exceptions, it must be based upon exceptions duly allowed during the course of the trial. As already
20 pointed out under the first heading in this brief, defendant below is here upon error assigned upon a strict bill of exceptions. He is, therefore, confined to his exceptions taken at the trial upon the alleged error committed by the Trial Court. As a matter of fact, counsel for the State thought that the defendant had a very fair trial on the merits and that the evidence fully and amply warranted his conviction. It is not true, as counsel on the other side say, that there is an entire want of evidence that the
30 stone was not worth more than the money paid for it. The testimony of Professor Ehrenfeld was to the effect that it was cheap glass and only worth a few cents. The defendant at the trial sought to show that he had advertised a stone known as Kunt-site instead of Kunzite. It was perfectly palpable, however, to everyone in the courtroom that he was not telling the truth on this point and that he had advertised a stone called Kunzite, but which in truth and in fact was nothing but common glass or paste. It is also not true to say that there is no evidence that the term Kunzite imparted any intrinsic merit or value to the stone sold. Both Professor Ehrenfeld and Mr. Lamponi testified that it had. Mr. Lamponi testified that Kunzite is a very valuable stone; that it was named after Professor Kunz, a

mineralogist, who discovered it, and that the value of a stone the size of the one in question in this suit, would range from \$10.00 to \$50.00. It will be recalled, however, that the defendant claimed in his circular and in the advertisement on his window that the price was reduced before Christmas. Even if the whole case were considered, it will appear that defendant suffered no manifest wrong or injury in the trial below.

Counsel on the other side have not raised in their brief a question which they raised in the Supreme Court and which is dealt with at the conclusion of Justice Kalisch's opinion in the Supreme Court. It related to the Court's conduct at the time of the trial in going to the jury room. We assume from the fact that counsel on the other side has not presented this matter in their brief to this Court, that they are satisfied with the disposition of it made by Mr. Justice Kalisch in his opinion in the Supreme Court. In order, however, that the Court may have the benefit of what was before the Supreme Court in this matter in case this Court decides to consider it, we repeat the substance of the argument there made. This matter appears on Page 83, State of the Case, at the top of the page. We quote the entire record in this respect.

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"The Court: I have overlooked charging the jury on reasonable doubt. Shall I have the jury brought back or go to the jury room?"

Mr. Crandall: You better go to the jury room, I guess.

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(The Court goes to the jury room and recharges the jury as follows:

I overlooked reasonable doubt which it is very necessary to charge. At the outset of this, as well as other criminal proceedings in this State, the defendant is presumed by law to be innocent until the State, by a preponderance of evidence, shows to your satisfaction beyond a reasonable doubt that he is guilty. Should you entertain such a doubt it is your duty to resolve it in favor of the defendant.)"

It seems that the Court forgot to charge as to reasonable doubt. Court was reconvened and the colloquy took place between the Court and Mr. Crandall above quoted. The Court asked, "Shall I have the jury brought back or go to the jury room?" Mr. Crandall suggested, "You better go to the jury room, I guess." The Court then took the Court stenographer and went to the jury room and charged them as to reasonable doubt, and the stenographer has returned that portion of the Court's charge in the record. No exception was taken to this by Mr. Crandall. In fact, Mr. Crandall not only acquiesced in it, but advised that as the proper course. It is certainly poor taste for him to now suggest that he was joking when he acquiesced in that course of action. He was there to look after the interests of his client. If he thought there was anything improper in the Court going to the jury room he should have objected immediately. It certainly does not lie in the defendant's mouth now to challenge such conduct on the part of the trial Judge after a public acquiescence in the same and a total failure at that time to object and except thereto. Of course, if Mr. Crandall had made the slightest objection to such a course of action, the Court would have brought the jury back to the court room and charged them in open court as to reasonable doubt. It would certainly be very wrong to permit plaintiff in error to take advantage of this point now after having acquiesced in it. Besides, they cannot raise it in law because of their failure to object and take an exception.

Defendant has not shown where he suffered any harmful error in the trial below. The judgment of conviction, therefore, should be affirmed.

Respectfully submitted,

EDMUND C. GASKILL, JR.

NEW JERSEY COURT OF ERRORS AND
APPEALS

STATE,	}	Error to the Supreme Court on Case from the Atlan- tic County Court of Quarter Sessions.
<i>Respondent,</i>		
vs.		
ABRAHAM SAMAHA, <i>Defendant- Appellant.</i>		

BRIEF FOR APPELLANT

FIRST.

The first assignment of error of the Supreme Court, page 86—that this appeal is limited to strict review of the exceptions sealed by the trial Court requires only a glance at the fifth assignment of error to the Supreme Court: “It is expressly averred that the verdict is in no sense authorized by the evidence. * * * The defendant should have been acquitted as matter of law.” Counsel expects this Court to review the whole case and use the exceptions to simply aid in their deliberations.

SECOND.

The Supreme Court in responding to the first assignment of error to the Supreme Court, p. 84, as

to the significance of the occurrence of the deal between the parties on Sunday states the law to be that in order to constitute the offense of obtaining goods under false pretenses "Actual ownership of the money or goods by the person upon whom the cheat was practiced is not essential; it is sufficient if he have possession and lawful dominion of the same. If the cheat had occurred on Monday, the legal title to the money or goods parted with would not have passed."

Then the deduction is announced: "The fact therefore of the cheat being perpetrated on Sunday adds no force to the deduction

(a)

"If the cheat had occurred on Monday."

The contract as a mercantile transaction affected by the virus of cheat or fraud is not void—it is only voidable.

It is said Benjamin on Sales—452:

"If after the discovery of the fraud he acquiesces in the sale by express words or by any unequivocal act, such as treating the property as his own, his election will be determined, and he cannot afterwards reject the property."

So it is laid down in *Cooley on Torts*, p. 589, "It is a general rule that a party defrauded in a bargain may on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain and sue and recover the damages for the fraud. If he elects the former course he must not sleep on his rights, but must move promptly."

Citing many Court examples.

2 *Addison on Torts*, 398.

So that if the Court's hypothesis—*i. e.*, that if the cheat had occurred on Monday the sale would have been void—is dispelled. The defrauded vendee had the title with right of rescission—or an action for the deceit at his election added

(b)

The denial by the Court of the necessity of actual ownership—or proprietorship by the defrauded vendee is obviously illusory except it can be maintained upon the next hypothesis.

(c)

The Court say "The unsoundness of the position
"taken by counsel of the plaintiff in error * * * in
"assuming that the unlawful contract is the basis
"of the indictment; whereas the underlying founda-
"tion is the false pretense, with intent to cheat, and
"the carrying of that intent into execution which
"the legislation has denounced as a misdemeanor re-
"gardless of the day on which it takes place; thirdly,
"in utterly ignoring the prime fact that the offense
"committed is against the public, in the prosecution
"of which, the State is the sole party in interest."

The Supreme Court has stated their position squarely. It is either correct or false. They flatly affirm "foundation is the false pretense wholly independent of any and all commutative contractual, commodity bargaining. That is false prophecy, false phrenological examination, lying about the count in a throw of dice are each made criminal by this act its possession or control after money or goods are obtained by the cheat or trick.

It is laid down in 11 *Bish. Crim. Procedure*, 6

“To aver what is neither legally nor physically possible is of course not good.”

The law is well expressed in *Cardoze vs. Swift*, 113 Mass. 251.

If a contract of sale was made and completed on the Lord's Day it was unlawful and neither party was entitled to sue the other either on the contract itself or for any deceit practiced in procuring it.

Rob. vs. French, 12 Met. 24;

Hall vs. Ceocoran, 107 Mass. 251-253;

Cramen vs. Goss, 107 Mass. 439.

The transaction was void—*i. e.*, it had no significance whatever. Being wholly void and incapable of ratification on weekday; *Reeves vs. Butcher*, 2 Vr. 224; 49 N. J. L. 316; 52 N. J. L. 171; 18 At. 222.

Causa lucri—The pretences must be exercised for the cause of gain by the defendant and commercial loss of the complainant. The objective of the statute is to protect trade—commercial dealing.

If the maneuvers and tricks of the defendant could not result in pecuniary loss to anybody—no crime has been committed under any of our statutes.

The language of Beasley, Chief Justice, in *Marley vs. State*, 29 Vr., page 209, is “It has already been stated that the defendants were indicted for incurring an obligation in behalf of the county in excess of the legal limits”—Then on the following page the Court says, “It would seem to be self-evident that “if the case made by the record was wholly established by the evidence, and the latter in a legal “point of view was nugatory, it necessarily follows “that the case presented by the record is equally “nugatory.”

Robinson vs. State, 53 N. J. 141; In *People vs. Stetson*, 4 Barb. 141,

The indictment stated

“That the defendant on the first day of August,
“A. D. 1847, at Rochester with felonious intent to
“cheat and defraud one Royal Barlow, feloniously,
“unlawfully and knowingly and designedly and
“falsely pretended and represented to said Barlow
“that he the said defendant was a constable and had
“a warrant issued by Butler Bardwell, Esq., a jus-
“tice of the peace of said county against said Bar-
“low for a rape and produced a false and fraudu-
“lent instrument to be such a warrant and repre-
“sented and pretended to said Barlow that said pre-
“tended warrant had been issued by said justice,
“and then and there proposed if said Barlow would
“pay him seventy-five dollars and further offered to
“settle the same if said Barlow would deliver to him
“a certain silver watch, the property of the said
“Barlow, and that said Barlow believing said false
“pretense and representations and being deceived
“thereby was induced to deliver and did deliver to
“said Stetson one silver watch of the proper moneys
“and valuable things, goods and chattels, personal
“property and effects of the said Royal Barlow
“which Stetson received and obtained by means of
“color of pretences false taken and representations
“aforesaid and with intent to cheat and defraud the
“said Barlow of the said watch.

“Whereas said Stetson was not a constable or any
“other officer and had no warrant against said Bar-
“low nor had any warrant been issued by said Jus-
“tice Bardwell against Barlow, and the instrument
“produced and represented to be a warrant was
“false and forged which Stetson well knew and that
“the said pretenses and representations were in all
“respects false and untrue which was known to said
“Stetson.”

Defendant demurred to the indictment and the demurrer was sustained. The statute was not intended for any such unlawful bargains. In the opinion there is reference to *People vs. Clough*, 17 Went. 351, in which the indictment reads: "That by means of artful, false, feigned, deceitful, signs and gestures, the defendant gave out, represented and pretended to one A.B. that he was deaf and dumb and also that he exhibited to the said A.B. a false and counterfeit certificate stating that he was deaf and dumb and destitute of property and desirous of collecting money for the purpose of procuring an education at an institution of the deaf and dumb and that by such false pretenses he unlawfully and fraudulently obtained money from the said A.B."

There was a demurrer to this indictment which was held to be well taken and the case made by the indictment not within the statute. The Court say

"We all agree that the pretense, had it been exercised in a case of trade and credit, would have fallen within the statute."

The syllabus reads, "An indictment will not lie for obtaining money under false pretenses when the money is parted with as a charitable donation although the pretense moving to the gift was false and fraudulent."

The *State vs. Crowell, et als.*, 41 Wis. 273, the syllabus is

"A statute to punish those who obtain money or property by false pretenses is for the protection of lawful trade, and is not to be invoked to protect those engaged in criminal enterprises."

The facts stated by the reporter are as follows:

"The testimony on the trial to which the question relates—showed that the money obtained was under a contract to sell counterfeit money at ten cents on the dollar, the same to be used as good money.

The counterfeit money was not sent but various cheats and devices in the matter of sending the counterfeit were resorted to procure the \$110,

The Court say

“The ground is taken that all the money obtained “by Burke was paid by him in furtherance of criminal motives and intentions on his part, and the “statute is not intended to cover such cases, but to “protect those who for some honest purpose are induced upon fraudulent representations to give credit or part with their property to another.” Citing *McCord vs. People*, 46 N. Y. 470; *The People vs. Stetson*, 4 Bart. 151; *The People vs. Gough*, 17 Wend. 351; *Rex. vs. Stratton*, 1 Camp. 549; *Jacob Law Dictionary*.

Hence the terms used in the opinion of the Supreme Court “underlying foundation is the false pretense” * * * “utterly ignoring the prime fact that the offense committed is against the public” are illusory, vague, imagery.

Justice Dickson says—*Robinson vs. State*, 53 N. J. L. 41,

“The wrong attempted by the false pretender is usually a mere private wrong, and, in the case above defined the probability that it can be successfully perpetrated appears to be so slight as not to call for public prosecution and punishment.”

Hence the crime enacted by the Vice and Immorality Act imposes a complete barrier to the commercial crime of obtaining goods by false pretenses. The conviction should be reversed.

THIRD.

This exception is the second exception signed by the trial Court, p. 24.

The Supreme Court say "upon examination of the record shows that this assignment is not well founded."

To fully appreciate the situation of counsel for the defendant in his colloquy with the prosecutor and the Court, it will help to notice that the terms of the indictment pp. 6, 27 & 32. "*Effect* a sale of said "article." That is the defendant effected a sale. The next the witness being "*induced to purchase* * * * by the false pretense." Notice that the indictment does not in terms aver that the witness relied voluntarily upon the representations of the defendant as a mercantile consideration for the purchase of the gem. The passive verb "was induced" is not equivalent to the active verb "relied" upon the representations of the defendant as a consideration for the three dollars paid him.

Counsel for the defendant was chary about suggesting to the Court the defect of the indictment in this respect lest the Court in its apparent mood to penalize the defendant would spontaneously order the indictment amended.

But the Supreme Court opinion controverts the contention of the counsel for defendant—"that the State's witness at all times refused to testify that he relied upon the representation of defendant that the gem bought was sought and obtained definitively as Kunzite Stone,"—that he utterly refused to testify that he sought or intended to buy a Kunzite Stone.

The opinion quotes as a complete answer—the words line 26, page 21, to wit, "Yes and that" —

Just how any substantive thing can be made out these words is past finding out. These words are in response to the question "Well, then, the only thing "that influenced you to part with your three dollars

“for that stone was the representation that it was a “Kunzite Stone?” “Yes and that” —

Now, an examination of the whole testimony of this witness on these points will disclose the legal farce of the prosecution.

Page 14, line 15,

Q. “Did you have any talk with him as to what this stone was before you purchased it?

A. “Only that he said it was a Kunzite stone and he tested it in some kind of an acid there or something in a bottle that he tested it with.

Q. “Now explain what the test was that he did?

A. “He took and put some acid in some kind of piece of bronze tray that he had there and naturally it turned it green; and then he put some acid on the stone and he said you see it does not have any effect on the stone at all. That is the test.”

Then he introduced the pamphlet, p. 5, in the indictment Ex. S2, p. 15.

Then, p. 16, l. 28: Q. “Well, was anything further said in relation to this stone by Mr. Samatha other than what you have said already?

A. “That is all he said to me. He simply claimed they had a Kunzite Stone and showed that pamphlet (in the indictment) and tested it and I purchased it and walked out. That is all there was to it.”

Before cross-examination—it may help to explain that there are two displays in the State’s case, first the “Bulletin” as exhibited in the indictment and the one displayed verbatim page 10 which reads, “The Kunzite Stone, discovered in San Diego, California, belonged to the whole diamond family; match blue white diamond direct; to be tested before buying; reduced to two dollars per carat.” This is conceded to be the sign over the store door or window which the complaining witness refers to in all his

testimony. He nowhere in his evidence states that he read the bulletin that was displayed in the store and particularly is it true that this is not mentioned in the indictment.

Cross-examination:

Q. p. 17, l. 21 "Well, there wasn't any preliminary talk before you looked at the stone, was there?"

A. "Why, I don't know as there was any preliminary talk, or the only thing that he showed it to me and tested it and showed that pamphlet before I bought it." (N. B. He does not say he read it.)

Q. "Well, didn't you ask him to show you this particular stone?"

A. "I didn't ask him to show me any particular stone, only a Kunzite stone."

p. 18, l. 5, "How came you to inquire for a Kunzite stone?"

A. "Because Kunzite was advertised out front on the window."

Q. "Out front on the window?"

A. "There was a large sign out front."

Same page, l. 28:

Q. "Well, you could not tell exactly what was on that sign, could you?"

A. "I know that it advertised the Kunzite gem as being a new discovery, and that they were selling it at two dollars a carat and that is simply what I wanted to purchase."

Page 19, l. 18. This sign over the door must be kept in mind—to contradistinguish it from the pamphlet.

Q. "How came you to fall in love with the Kunzite stone, that you wanted a Kunzite stone?"

A. "Well, I didn't just exactly fall in love with the Kunzite stone. I happened to be on the Boardwalk and seen the advertisement, that is all."

Q. "Advertisement in his store?"

A. "Advertisement in his window."

Q. "And that is the only advertisement that you saw?"

A. "That is the only advertisement I saw."

Q. "Then when you went there you inquired for a Kunzite stone?"

A. "Inquired for the stone; I won't exactly know that we inquired for the Kunzite stone; we inquired for the stone that he was selling, and it was advertised on the front of the place."

Repetition—p. 21, l. 22. Q. "Well, then the only thing that influenced you to part with your three dollars for that stone was the representation that it was a Kunzite stone?"

A. "Yes, and that —" N. B. This is the quotation in the open case of the Supreme Court.

Q. "That was the only reason that you had to part with your money?"

A. "Well, the reason was that we thought we was buying something that was worth something."

Q. "It didn't turn out to be as good as you thought it was?"

A. "Didn't turn out to be anything."

Q. "Then there was no other reason that you had at all that influenced you except that you thought you were buying a valuable Kunzite stone?"

A. "I don't want to say it is a valuable Kunzite stone."

Q. "Well, a Kunzite stone."

A. "Yes, I thought I was buying something out of the ordinary."

Q. "And that is the only thing that influenced you?"

A. "That is the only thing, yes."

Then the colloquy upon which the exception under review was predicated, pp. 22 & 23.

Now, if the allegations of the indictment as to pretenses are separable into two or three classes—

the first is certainly that on the bottom of page 4 to wit, "diverse false pretense to be hereinafter "more particularly described to sell and dispose of "as genuine Kunzite gem the said Frank W. "Schwickerath, Jr., a certain variety of glass, com- "monly known as paste which is usually sold as imi- "tation diamonds."

Now, the complaining witness of the State has persistently avowed that he relied upon the advertisement over the door and has just as persistently disclaimed reading the bulletin set forth in the indictment—so this bulletin in the indictment must be considered as out of the case for the purpose of this exception.

Now, as the indictment did not contain a charge of the false statements in the sign over the door or window, the contents of which was the controlling force of the bargain, the evidence was irrelevant and wholly incompetent and the force and foundation of the motion clearly inferred from the colloquy was to eliminate the whole evidence as not supporting the allegations in the indictment.

The Court admits, line 13, p. 23—"He said he saw the Kunzite advertised from the outside, &c."

Then counsel undertakes to explain the lack of averment in the indictment—that the pretenses were not set out in the indictment—that is, the content of the advertisement over the door was not contained in the indictment or *haec verba* or in any way relied on. The Court interrupted with a shot in the air and counsel retorted the best he could. But on the top of page 24 the Court makes a ruling of actual harmony between the testimony and the indictment. The motion to overrule evidence for want of coincidence between the allegations and evidence was overruled and exception taken and allowed which was great error to the injury of the defendant.

FOURTH.

This assignment is based upon assignment to the Supreme Court, p. 85, which is in turn based on the request to charge, p. 83, which request was made before the Court charged the jury and its appearance in the book after the charge is a mistake.

If the content of the big bulletin in the indictment was to be relied on at all—there was a necessity imposed by the indictment and the case as it stood—that the State should introduce evidence to show that the statements contained in it were untrue when compared with the book mentioned as Kuntz's book on mineralogy.

In Joseph Swartz's testimony, p. 45, l. 17:

Q. "So you corresponded with him, did you?"

A. "I did.

Q. "Well, is that his book?"

A. "Can't be; it has somebody else name on there.

Q. "That is his book?"

A. "I suppose so, it has his name.

Q. "Did you ever examine it?"

A. "No.

Q. "And you have no means of knowing from the book whether that bulletin corresponds with what is said in this book at all. No means of knowing at all?"

A. "No means of knowing that it was not in that book.

Q. "You have no means of knowing that it was not in that book?"

A. "Not at all.

p. 46, by Prosecutor:

Q. "What is the title of this book according to the title page?"

A. "Curious Lore of Precious Stones.

Q. "And who is it by according to the title page?"

A. "By George Frederick Kuntz.

Then colloquy between counsel, p. 47:

"By Prosecutor:

Q. "Can you show me in here where this is copied from?"

Mr. Crandall: "Can who?"

The Prosecutor: "You.

Mr. Crandall: "Yes, sir.

Prosecutor: "Where?"

Mr. Crandall: "When the time comes I will try and wait upon you. It is satisfactory to introduce this in evidence, isn't it, when the time comes?"

The Prosecutor: "I don't know. I will offer this letter and affidavit.

Mr. Crandall: "Extraneous between other parties, introduce that stuff?"

The Court: "I don't believe that is admissible, Mr. Moore.

The Prosecutor: "Then I guess I will have to object to your book then. This is Kuntz's writing and that is his book. That is, the book of Kuntz's on 'Curious Lore of Precious Stones.' "

Then on page 70, l. 6. Evidence of Mrs. Ira Samaha:

Q. "Did you look for that book on mineralogy that gives an account of the Kunzite Stone?"

A. "I looked for it, sir, and that was the book that I found; those parties claimed that Prof. Kuntz never wrote a book of any kind.

Q. "How is that?"

A. "Those parties claimed that Prof. Kuntz never wrote a book of any kind on the subject of stones.

Q. "Kuntz himself never wrote a book?"

A. "Yes, they claimed that.

Q. "Didn't he write that?"

A. "Not that one, but *this* one.

Q. "Look at *this*."

A. "That is by somebody else—that one gives an explanation of different precious stones.

Q. "That is the book?"

A. "That is the book wrote by Prof. Kuntz,—yes, on stones, different kinds of stones.

Q. "This indictment says, 'A correct extract from a book was then and there true,' what book is that?"

A. "Well, I don't know, this is wrote by Prof. Kuntz.

Q. "This book?"

A. "I think so.

Mr. Crandall: "I want to introduce this book in evidence.

The Court: "Well, is that a copy in the indictment? It is truly copied from this book?"

Mr. Crandall: "That is what they say.

The Prosecutor: "I would like you to show it to me.

The Court: "They say that you alleged that that was copied from the book.

Mr. Crandall: "Yes, how we are going to show that it is?"

The Court: "Give us the page. (The witness on the stand interjects.)

A. "I don't think, sir, that this was copied from the book.

Mr. Crandall: "Wait a minute, not down to that.

Witness again interjects: "I want to explain exactly as it is.

Mr. Crandall: "I will give the Judge a chance. That is my business, where does this begin here?"

The Prosecutor, 171.

Mr. Crandall: "If your Honor please 171 and five other places besides this.

The Court: "Yes, well, now, then, this purports to be an exact copy from the book written by——

Mr. Crandall: "No, it is not an exact copy; but is condensed. Everything that is there is here in a more diluted form.

The Prosecutor: "Show it to us.

(The Court without giving counsel a chance.)

The Court: "I want to see this wording in this book or some book, before you can introduce the book in evidence.

Mr. Crandall: "This is alleged to be a work on mineralogy. Now this does not purport to be a work on mineralogy.

Mr. Crandall: "If you say stones, you say mineralogy.

The Court: "I know, but this is a sort of folk lore book. I think you will have to show me, Mr. Crandall, these exact words before your book is competent. Now then you show me in that book this wording, and I will admit your book in evidence.

Mr. Crandall: "And you will throw it out if the wording is not exactly as it is there?"

The Court: "You offer the book, do you, Mr. Crandall?"

Mr. Crandall: "If the wording is not exactly as it is in the text it excludes it.

The Court: "The book is objectionable—your offer is objectionable on two grounds, first, it is not a work on mineralogy as this alleges it to have been the book from which this was copied and second because there is no such matter in the book as is contained in the circular.

The exception by defendant.

Argument.

The exception was not exhibited and argued for the reason that it was not offered by the defendant. The colloquy discloses that the Court did not wait for its offer—but in advance excluded it.

The language top of the bulletin is “Copied from Prof. Kuntz’s book on mineralogy.”

“Copied” does not mean “transcribed.” Now suppose one line of the bulletin was found on p. 171 (see prosecutor’s admission, p. 71), in the book in question (“Curious Lore of Precious Stones”) p. 46—and another line on page 240 and another 282, &c., and by examination the contents of the bulletin were all found substantially, would not such a display negative the allegation of falsity alleged in the indictment? If it was in fact in the book though not “en bloc” as required by the Court—would not the defendant have washed his hands of this element of cheat?

Again if the prosecution wanted to make criminal material out of the bulletin at all—was it not imperatively important that they should have introduced some evidence negating the pretences of its coincidence as the State had alleged? If the State as said before expected to make anything out of the bulletin it was just as important for them to show its falsity as to show its existence. It would have been sufficient probably if they had shown that Kuntz never wrote a book on mineralogy. But instead of that the prosecutor showed and admitted that Kuntz wrote a book on “Curious Lore of Precious Stones” but refused to show that the bulletin was not copied from it.

And to say the defendant was not injured is grave error.

And the true reason was that upon inspection of the circular, last two lines p. 5 and the first two on page 6, and the sign over the door p. 42, l. 12, could not in the nature of things be in any book, it was the language of the advertiser. This the prosecutor knew and dextrously evaded introducing any book for the reason that the book would disclose the substance of the circular except these last four lines and at the same time knew that the vendor would be expected to depend on their "test" rather than any verbal representations.

So defendant was injured by the refusal of this instruction.

The Supreme Court by their opinion seems to find that by the evidence that there was no such book written by Kuntz. This is predicated no doubt upon the voluntary of the witness, p. 71, l. 12, which is error injurious to defendant.

But the Supreme Court seems to find that there was ample evidence of false pretenses outside of the sign on the door p. 42 and the bulletin in the indictment. This is grave error. The psychic effect of the whole evidence on this point must be confined to the first witness who parted with his three dollars. The pretense must be confined to the contracting party.

His evidence demonstrates that he was affected solely by the terms of the sign over the door. To ignore this fact is grave error to the prejudice of the defendant.

But another grave error was committed by ignoring the phrase "to be tested before buying" in the sign over the door as well as in the bulletin in the indictment. Now if he relied on this sign and bulletin he relied on all their terms including "to be

tested before buying." Now this phrase turns the contract into a conditional sale. The condition was the "test." The State's witness seems not to have been satisfied with the test so he took the gem to another jeweler, Lamponi. See his wife's testimony, p. 29:

Q. "Because Mr. Lamponi told you so?"

A. "Well, Mr. Lamponi happens to have genuine Kunzite.

Q. "To have it, eh?"

A. "Yes, sir.

Q. "Then he told you Mr. Lamponi told you this was not a genuine Kunzite?"

A. "Yes.

Q. "Why didn't you take it back?"

A. "Well, I didn't think I would get my money back.

Q. "What?"

A. "I didn't think I would get the money back so I asked Mr. Lamponi what to do.

Q. "Well, if you had thought you could have got your money back, would you have gone back there?"

A. "I don't know; I took the man's word for what he told me.

So on p. 30, l. 4:

Q. "Why didn't you go back and see this man and tell him?"

A. "No, I did not.

Q. "Why didn't you go back and tell him?"

A. "Because I had no more faith in him.

Under the condition "to be tested before buying" and immediate knowledge that the test was false—the sale was then and there ratified—and nobody had any basis of complaint. This is too obvious for citation of *jural* examples. This renders the whole trial nugatory to the injury of defendant.

Fifth.

This assignment is based upon the refusal of the Supreme Court to reverse the judgment against the defendant for the reasons in the fifth assignment to the Supreme Court, bottom of p. 85. The verdict is not authorized by the evidence.

PARSONS and PARSONS and
J. J. CRANDALL,
For Appellant.

Southern Bond

CHAPTER

The history of the world is a long and tedious story, but it is one that is full of interest and variety. It is a story that has been told in many different ways, and it is one that has been told in many different languages. It is a story that has been told in many different times, and it is one that has been told in many different places. It is a story that has been told in many different ways, and it is one that has been told in many different languages. It is a story that has been told in many different times, and it is one that has been told in many different places.

By the author of the

History of the World

THE HISTORY OF THE WORLD