INDEX

	Page
Writ of Error	1
Return to Writ	2
Caption to Indictment	3
Indictment	4
Plea	8
Verdict	10
Clerk's Certificate	11
Challenge to the Array	12
Substitution of Attorney	15
Notice of Argument	16
Testimony	17
Motion to Quash Indictment	21
Motions for Direction of Verdict	167, 276
Charge of the Court	276
Exceptions to Charge	280
Defendant's Requests to Charge which the Court Refused to Charge	280
Certificate of Judge	284
Assignments of Error	291
Specifications and Causes for Reversal	311
Opinion of Supreme Court	313
Rule of Affirmance	316
Clerk's Return	317
Writ of Error	317
Return to Writ	319
Assignment of Error	320

WITNESSES FOR THE STATE.

Patrick J. Cunningham:

Direct	34, 36
Cross	35, 38
Redirect	38

New Jersey State Library

Page

Ralph E. Cooper:
Direct 39
Cross 41
Redirect 43
Recross 44
John F. Lee, Jr.:
Direct 46
M. Thomas Finn:
Direct 58
Cross 62
Redirect 81, 85
Recross 84
Florio Corsetta:
Direct 86
Cross 90
Redirect 101
John Hickling:
Direct 102
Cross 107
Redirect 127
Michael La Conti:
Direct 128
Cross 136
Redirect 158
James Smith:
Direct 163
Cross 165
Redirect 166

WITNESSES FOR DEFENDANT.

Charlotte Serlinsky:
Direct 181
Cross 181
Max Zucker:
Direct 182
Cross 182
Garret Roosma, Jr.:
Direct 183

Page

Thomas A. Hopkins:
Direct 184
Cross 184
Norman E. Darmstatter:
Direct 184
Philip Goldman:
Direct 185
Fred Goldstein:
Direct 186
Raymond C. Shulman:
Direct 187
Cross 190
Jack Rinzler:
Direct 208
Cross 209
Joseph A. Feder:
Direct 209
Joseph F. A. Rubacky:
Direct 210
Joseph L. Weiss:
Direct 211
Cross 211
Ivan H. Reese:
Direct 212
Cross 215
Saul Lippman:
Direct 234
Cross 236
Irving Simon:
Direct 236
Cross 238

H. Thomas Serlinsky:
Direct 246
Cross 250
Thomas E. Duffy:
Direct 274

STATE'S EXHIBITS.

	Off'd Page	P't'd Page
S-1—Indictment No. 454.....	34	285
S-2—Transcript of Testimony	48	48

Writ of Error.

New Jersey, ss.:

(Seal) To Joseph A. Delaney, Esq., Judge of the Court of Quarter Sessions of the County of Passaic.

Because in the record and proceedings, and also in giving of judgment upon a certain indictment against Thomas Serlinsky for knowingly, falsely, and untruly having committed wilfull, deliberate, corrupt, malicious, unnecessary perjury,

Pro ut the said indictment and the several counts therein, whereof, before you, he hath been indicted, and is thereof convicted by a certain jury of the County, taken between the State of New Jersey, and the said Thomas Serlinsky, as it is said, manifest error hath intervened to the great damage of the said Thomas Serlinsky, as from his complaint we have received information, we being willing in his behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Thomas Serlinsky, 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 Justices of our Supreme Court of the State of New Jersey, on the 7th day of April, 1934, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to law ought to be done.

Witness, Thomas J. Brogan, Esquire, Chief

Justice of our Supreme Court at Trenton, aforesaid, the 19th day of March, 1934.

(Signed) FRED L. BLOODGOOD,
Clerk.

(Signed) BERNARD L. STAFFORD,
Attorney for Thomas Serlinsky.

Writ presented in open Court on March 20, 1934. Let return be made.

(Signed) JOS. A. DELANEY,
Judge.

Return to Writ.

State of New Jersey }
County of Passaic } ss.:

I, Joseph A. Delaney, Judge of the Court of Quarter Sessions, in and for the County of Passaic, do hereby in the schedule hereto annexed send to our Justice of our Supreme Court of Judicature, of the State of New Jersey, at Trenton, the record and proceedings mentioned in the within Writ of Error, with all things touching the same, as I am within commanded.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, at Paterson, this Twenty-eighth day of March, A. D. Nineteen Hundred and Thirty-four.

(Seal)

(Signed) JOS. A. DELANEY,
Judge.

Caption to Indictment.

Filed December 22, 1933

STATE OF NEW JERSEY

Passaic County, to wit: Be it Remembered, That at a Court of Quarter Sessions, held at Paterson, in and for the said County of Passaic, on the Twenty second day of December, in the year of our Lord one thousand nine hundred and thirty three, being the day on which the Grand Jury heretofore summoned to come before the Court of Oyer and Terminer and now sitting in and for said County, desires to present Bills, and no Justice of the Supreme Court being present at the Court House in said County, before the Honorable Joseph A. Delaney, Judge of the said Court of Quarter Sessions in and for the said County of Passaic, according to the form of the statute in that case made and provided by the oath of

1. Frank A. McBride, Foreman; 2. William M. Janes; 3. Marian Sturtevant; 4. Garry Faber; 5. William B. Gould; 6. Daisy Hindle; 7. Joseph A. Seymour; 8. Abram Vreeland; 9. Eliza C. Kearney; 10. Obediah Davenport; 11. Claude J. Conkleton; 12. Helen Butler; 13. James E. Hogan; 14. William J. Nelson; 15. Max Raisin; 16. Frank W. Furrey; 17. Emma Mahoney; 18. Blanche Gordon; 19. Julius H. Schwartz; 20. John J. Condon; 21. John R. Van Blarcom; 22. Joseph F. Britt; 23. Meyer Kanter, good and lawful men and women of the said County of Passaic, duly summoned and then and there sworn and charged to inquire in behalf of the State of New Jersey in and

for the said County of Passaic; it is presented in manner and form following, to wit:

The Bills herewith presented are true Bills.

JAMES D. CARPENTER, JR.,
Assistant Attorney General.

FRANK A. MCBRIDE,
Foreman.

Indictment.

Filed December 22, 1933.

COURT OF OYER AND TERMINER IN AND FOR THE COUNTY OF PASSAIC.

SEPTEMBER TERM

A. D. Nineteen Hundred and Thirty Three

Passaic County, to wit:—The Grand Jury of the State of New Jersey, in and for the body of the County of Passaic, upon their oath, Present that Thomas Serlinsky, late of the City of Paterson, in the County of Passaic aforesaid, on the Twentieth day of December in the year of our Lord Nineteen hundred and thirty three, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, before the Passaic County Quarter Sessions, the Honorable Joseph A. Delaney, presiding, a certain criminal judicial proceeding between the State of New Jersey, and Aaron L. Simon, Irving Simon, William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as Hop Decker, Albert Durgett, Michael La Conti and John Hickling, on Indictment for Conspiracy, of

which said judicial criminal proceeding in the said Court as aforesaid, the said Court had full jurisdiction to try and determine, came on for trial in due form of law, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which trial the said Thomas Serlinsky then and there appeared as a witness for the said defendants Aaron L. Simon, Irving Simon, William Conlon, otherwise known as Wild Bill Conlon, otherwise known as Irish Willie Conlon, Charles Decker, otherwise known as Hop Decker, Albert Durgett, Michael La Conti and John Hickling, in the proceedings as aforesaid, and was then and there duly sworn as a witness before the Honorable Joseph A. Delaney, Judge of the said Passaic County Court of Quarter Sessions as aforesaid, that the evidence which he, the said Thomas Serlinsky, should give to the Court there, and to the jury so sworn as aforesaid, touching the matter and matters then in question between the said parties should be the truth, the whole truth, and nothing but the truth (the said Court by the Clerk thereof then and there having sufficient and competent authority by law to administer the said oath to the said Thomas Serlinsky in that behalf.)

And the Jury first aforesaid, upon their oath aforesaid, do further Present, that at and upon the trial of the said judicial criminal proceeding and issue so joined as aforesaid between the said parties as aforesaid, it then became and was a material question, and material to the issue whether the said Irving Simon as aforesaid, on the Twelfth day of May, nineteen hundred and thirty three, at six o'clock in the evening, had left the Court House in the City of Paterson aforesaid, in the company of and with the said Thomas Serlinsky,

and whether he, the said Irving Simon had in front of the said Court House aforesaid spoken to one Michael La Conti then and there a petit juror, and one of the defendants aforesaid; and then and there on the trial, hearing and judicial criminal proceeding and Indictment for Conspiracy as aforesaid, the said Thomas Serlinsky, knowing the same to be untrue, did falsely, corruptly, knowingly, wilfully, unnecessarily, maliciously and unlawfully before the said jury as aforesaid and before the Honorable Joseph A. Delaney, Judge of the Passaic County Court of Quarter Sessions as aforesaid, depose, swear, testify, state and say in substance and effect amongst other things following, that is to say: that on the twelfth day of May, nineteen hundred and thirty three he was in the court room (meaning the court room in the Passaic County Court House, Paterson, N. J.) with Mr. Irving Simon and Mr. Ralph Cooper the representative for the Erie Railroad Company; that he, the said Thomas Serlinsky was in the said court room when the jury came out with a disagreement; that it was six o'clock (meaning P. M.) that he, the said Thomas Serlinsky, was present when they (the jury) was discharged by Mr. Lippman; that he, the said Thomas Serlinsky went out of the court room with Irving Simon; that he, the said Thomas Serlinsky did not recall whether some of the jurors were standing around there in a crowd; that he, the said Thomas Serlinsky left Judge Mackay's court and walked out of court with Irving Simon and Mr. Cooper, walked down the steps—that he could not recall where Mr. Cooper left them, the said Thomas Serlinsky and Irving Simon, that he, the said Thomas Serlinsky and Irving Simon walked down the steps to the first floor, as he, the said Thomas Serlin-

sky, recalled in a general manner discussing the case and there was a question asked by one of the jurors, who said something—; that he, the said Thomas Serlinsky left the said Court House with Irving Simon; that he, the said Thomas Serlinsky left a group of jurors and that he, the said Thomas Serlinsky and Irving Simon went out the front way, turned to the left on Hamilton Avenue, went to the car of the said Thomas Serlinsky, which was parked on Grand Street, and that at no time did Irving Simon talk to anyone of the jurors aside from this general conversation: whereas in truth and in fact, the said Irving Simon and Thomas Serlinsky upon leaving the Court House in the City of Paterson aforesaid, on the Twelfth day of May, nineteen hundred and thirty three at six o'clock P. M. did recall and well knew that some of the petit jurors were standing around the said Court House aforesaid in a crowd; and he, the said Thomas Serlinsky well knew and did recall that Michael La Conti, one of the petit jurors then and there drawn, empanelled and sworn in the Passaic County Courts, and then and there one of the petit jury panel was standing in front of the said Passaic County Court House, Paterson, New Jersey, on the twelfth day of May, nineteen hundred and thirty three at six o'clock P. M.; and that the said Irving Simon did speak to, talk and converse with the said Michael La Conti, petit juror as aforesaid, at six o'clock P. M. on May twelfth, nineteen hundred and thirty three in front of the said Passaic County Court House; and that he, the said Thomas Serlinsky and Irving Simon did not go to the car of the said Thomas Serlinsky, which was parked on Grand Street, Paterson, New Jersey, on the said twelfth day of May, nineteen hundred and thirty three, at six

o'clock P. M. without the said Irving Simon talking to anyone of the jurors aforesaid aside from the general conversation held between him the said Thomas Serlinsky and Irving Simon and divers other petit jurors, before leaving the said court house aforesaid;

And so the Grand Jury first aforesaid, upon their oath aforesaid, do say, that the said Thomas Serlinsky, knowing the same to be false and untrue, did commit wilful, deliberate, corrupt, malicious, unnecessary perjury, contrary to the form of the statutes in such case made and provided, and against the peace of this State, the government and dignity of the same.

JAMES D. CARPENTER, JR.,
Assistant Attorney General.

Witnesses:
Thomas Finn,
John F. Lee, Jr.

Plea.

Thereupon the said Court of Quarter Sessions did receive such Indictment and the Clerk of the said Court of Quarter Sessions did file the same in the said Court, and also did thereupon make entry thereof in the Minutes of said Court at the then session of said Court, and afterwards, to wit, at the same term of said Court of Quarter Sessions, holden at Paterson, in and for the County of Passaic aforesaid, to wit: on the Twenty-sixth day of December, A. D. Nineteen Hundred and Thirty-three, at a session thereof before the Honorable Joseph A. Delaney, Judge of said Court, in and for said County of Passaic, according to the statute in such case made and provided, comes the said Thomas Serlinsky, in his own proper per-

son, and now touching the premises in said Indictment above specified and charged against him, being him, being asked in what manner he will acquit himself, says, he is not guilty and of this he puts himself upon the country, etc., and James D. Carpenter, Jr., Assistant Attorney General, who prosecutes for the State of New Jersey, in this behalf, doth the like.

Therefore, let a jury come here before the Judge aforesaid, at Paterson aforesaid, in the County of Passaic aforesaid, at the next term of the Court of Quarter Sessions aforesaid, on the Twelfth day of March, next ensuing, being of the term of January, A. D. Nineteen Hundred and Thirty-four, of twelve good and lawful persons, each of whom shall be a citizen of this State, and a resident within the County of Passaic aforesaid, above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are not of kin to the said Thomas Serlinsky, to recognize upon their oaths whether the said Thomas Serlinsky be guilty as in the said Indictment specified, or not guilty, because as well the said James D. Carpenter, Jr., Assistant Attorney General aforesaid, who prosecutes for the State of New Jersey aforesaid, in this behalf, as the said Thomas Serlinsky have put themselves upon the said jury, and the same day is given to the parties aforesaid, at the same place.

And the jurors of the jury whereof mention is within made are respited from day to day, until the Fourteenth day of March, A. D. Nineteen Hundred and Thirty-four, being of the term of January, of said Court, at which day before the Court of Quarter Sessions aforesaid, holden by the Honorable Joseph A. Delaney, Judge as aforesaid,

come as well the said James D. Carpenter, Jr., Assistant Attorney General aforesaid, who prosecutes as aforesaid, as the said Thomas Serlinsky in his own proper person, and the jurors of the jury, by the Sheriff of the County of Passaic aforesaid, for this purpose empanelled and returned, to wit:

1. William Erbe; 2. Carl E. Saxer; 3. Jacob Barkalow; 4. Frank Gaffney; 5. Abram Levi, Jr.; 6. Frank Van Orden; 7. Harold Schofield; 8. Raymond Gormley; 9. Einar A. Pettersen; 10. Marinus Van Valkenburg; 11. James Threlfell; 12. Robert A. Ferguson

also come, who to speak the truth of the matters within contained, being chosen, tried and sworn upon their oaths, say that the said Thomas Serlinsky is guilty of the premises in the within indictment named and specified, in manner and form as by the indictment is charged against him.

And thereupon, on the Sixteenth day of March, A. D. Nineteen Hundred and Thirty-four, it was demanded of the said Thomas Serlinsky if he hath or knoweth anything to say wherefore the Court here ought not upon the premises and verdict proceed to judgment against him, who nothing further says, unless as he has before said.

Verdict.

Wherefore, all and singular, the premises being seen and by the Court here fully understood, it is considered by the Court, and the sentence of the law is, that the said Thomas Serlinsky do pay a fine of One Thousand Dollars, and that he be confined in the County Jail for the term of six months.

JOS. A. DELANEY,
Judge.

Clerk's Certificate.

State of New Jersey }
County of Passaic } ss.:

I, Lloyd B. Marsh, Clerk of said County, and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the record and proceedings in the case of Thomas Serlinsky, convicted of Perjury, in our Court of Quarter Sessions, on the Fourteenth day of March, A. D. Nineteen Hundred and Thirty-four, as the same is taken from and compared with the original record now remaining on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal
(L.S.) of the said Courts and County, at Paterson, this Twenty-eighth day of March, A. D. Nineteen Hundred and Thirty-four.

LLOYD B. MARSH,
Clerk.

By Floyd E. Jones,
Deputy Clerk.

Challenge to the Array.

PASSAIC COUNTY COURT OF QUARTER SESSIONS.

STATE OF NEW JERSEY, vs. THOMAS SERLINSKY.	On Indictment No. 526.

And now on this day, to wit, on the day of March, 1934, comes as well the State of New Jersey as the defendant Thomas Serlinsky by his respective attorney aforesaid, and the jurors of the jury impanelled and heard, the defendant challenges the array of the said panel because he says: that the said jurors were drawn by Joseph Samworth and James L. Prescott assuming to act by appointment under an order of the Honorable Harry Heher, a Justice of the Supreme Court holding the Circuit in and for the County of Passaic, made on or about the 12th day of December, 1933, and under an order of the court of the said Justice made upon the 23rd day of December, 1933, and the defendant says that the said jurors were improperly and illegally drawn and summoned for the reason that the said Justice of the Supreme Court had no power or authority to make the order appointing the said Joseph Samworth and James L. Prescott as elisors, and authorizing them to draw and summon said jury and the venire issued to them was altogether void and of no effect in that, at the time the said orders heretofore mentioned were made and at all times after the making of the first order to the present time Thomas E. Manley was

and is the duly elected and qualified Democratic sheriff in and for the County of Passaic and was at all times hereinbefore mentioned present and not in any wise disqualified from summoning a panel of petit jurors or assisting in the drawing and summoning of said panel in accordance with the provisions of the statute in such case made and provided, no vacancy existing in the office of Sheriff of the Passaic County at any time; and in that the vacancy which existed in the office of Jury Commissioner was one which should have been filled by the Governor of the State of New Jersey by the appointment of someone to take the place of Randall Hogan, a Jury Commissioner who had been duly appointed by the Governor of the State of New Jersey, confirmed by the Senate, and who had qualified as Commissioner of Juries and whose terms had expired; and in that the Statutes of the State of New Jersey provided for the appointment of a Jury Commissioner to fill the vacancy by the Governor of the State of New Jersey who could have filled such vacancy irrespective of the fact that at the time of the making of the said order of December 12, 1933 the Senate of the State of New Jersey was in recess; the statement contained in said order of December 12, 1933 that because of such recess said office could not be presently filled being erroneous; and also the defendant challenges the array for the reason that if the said Justice had power to make any order with reference to the designation of a person to draw the jury he should have appointed a Jury Commissioner *pro tempore* to act with the Sheriff.

(signed) BERNARD L. STAFFORD,
Attorney for Thomas Serlinsky.

Challenge to the Array.

State of New Jersey, }
County of Passaic, } ss.:

Thomas Serlinsky, of full age being duly sworn according to law upon his oath deposes and says:

I am the defendant named in the foregoing challenge to the array. The statements contained in the said statements are true. The said challenge is not interposed for the purpose of delay but in truth and good faith for the reasons therein set forth.

THOMAS SERLINSKY.

Sworn and subscribed to before me
this day of March, 1934.
Elinor B. See,
A Notary Public
of N. J.

Substitution of Attorney.

PASSAIC COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY,

vs.

THOMAS SERLINSKY,
Defendant.

I hereby consent to the substitution of Joseph Grossman in my place and stead, to act as attorney for the defendant in the above entitled matter.

(signed) BERNARD L. STAFFORD,
Attorney of Defendant.

Dated: April 6th, 1934.

Notice of Argument.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, Defendant-in-Error, vs. THOMAS SERLINSKY, Plaintiff-in-Error.	Sur Indictment for Perjury.

Sir:

PLEASE TAKE NOTICE that the argument of the issue joined in this cause will be moved before said Court, in the presence of such Justices thereof, as shall then be holding said Court, on the first Tuesday of October, A. D. 1934, at the State House, in Trenton, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated: July 10, A. D. 1934.

(Signed) JOSEPH GROSSMAN,
Attorney for Plaintiff-in-error,
Thomas Serlinsky.

(Signed) BERNARD L. STAFFORD,
Of Counsel.

To: JAMES D. CARPENTER, JR., ESQ.,
Assistant Attorney General,
Attorney for Defendant-in-error.

Service acknowledged.

JAMES D. CARPENTER, JR,.
By MICHAEL SHERSHIN.

Testimony.

PASSAIC COUNTY QUARTER SESSIONS.

THE STATE OF NEW JERSEY vs. H. THOMAS SERLINSKY, Defendant.	Sur Indictment for Perjury.

Paterson, N. J., March 12, 1934.

Before—Hon. JOSEPH A. DELANEY, Judge and a jury.

APPEARANCES:

MICHAEL SHERSHIN, Assistant Prosecutor, for the State.

BERNARD L. STAFFORD, ESQ., for the Defendant.

Mr. Stafford: May I have my name entered on the record as attorney for the defendant Thomas Serlinsky and may I ask the Court if the forty-eight names of the jurors which were served upon the defendant in this indictment are in the box and if they are ready to serve?

The Court: Sheriff, will you answer that?

Sheriff McCann: Yes, sir.

Mr. Stafford: I understood some might be excused and may not be in court and I would like the Court Minutes to show I made the request before the jury was drawn.

The Court: What is the situation, Mr. Prosecutor?

Mr. Shershin: I understand the entire forty-eight names the Sheriff drew on the special panel are in the box.

Mr. Stafford: My question goes further, your Honor. My question is are they in court?

The Court: The question is are they in court.

Mr. Shershin: I didn't check that up. I think under the statute with respect to the drawing of a special panel it is incumbent upon the Sheriff to draw a panel of forty-eight and if thereafter for some valid reason someone has been excused the Court then can draw from the general panel but at the time this panel was drawn the forty-eight chosen had not been excused by any judge. I believe Mr. Stafford was present at the drawing of the special panel and the Sheriff so stated to him at the time.

Mr. Stafford: I would like it noted on the record however whether the forty-eight names served upon the defendant are here and ready to serve in the event their names are called.

The Court: I must assume that they are. I have no knowledge to the contrary.

Sheriff McCann: Some of these jurors that were on the Simon trial were excused for the rest of the panel and I think one or two are not here although we sent for all of them to come in.

The Court: So I understand there are one or two from the last panel who may not be here but the rest are all here.

Mr. Stafford: If they are not here then the defendant has not been accorded the rights he is entitled to. He is entitled to have forty-eight names served on him and to have the forty-eight persons here in the event they are called.

Mr. Shershin: I know of no provision in the Criminal Procedure Act that states the panel of forty-eight must actually be present in court. The statute says a special panel of forty-eight, where the defendant is entitled to a special panel, shall be drawn by the Sheriff and the same served upon the defendant but there is nothing stating the forty-eight must actually be present. The forty-eight as of the time it was drawn were in court and were serving as jurors. I may say, however, it has been the custom in the past if some other judge selected the jurors in the meantime in some other trial the trial proceeded—

The Court: All right. Counsel's objection is noted.

Mr. Stafford: If it subsequently develops they are not here, I reserve the right to make a challenge then.

The Court: All right.

Mr. Stafford: Now, may I, with your Honor's permission, withdraw the plea of "not guilty" for the purpose of making a motion?

The Court: Yes.

Mr. Stafford: We want to challenge the array drawn for this case. I will read my challenge and ask that it be incorporated in the record of the case. "Passaic County Court of Quarter Sessions. On Indictment No. 526. Challenge to the Array. State of New Jersey versus Thomas Serlinsky. And now on this day, to wit, on the twelfth day of March, 1934, comes as well the State of New Jersey as the defendant Thomas Serlinsky by his respective attorney aforesaid, and the jurors of the jury impanelled and heard, the defendant challenges the array of said panel because he says: that the said jurors were drawn

by Joseph Samworth and James L. Prescott assuming to act by appointment under an order of the Honorable Harry Heher, a Justice of the Supreme Court holding the Circuit in and for the County of Passaic, made on or about the twelfth day of December, 1933, and under an order of the court of the said Justice made upon the twenty-third day of December, 1933, and the defendant says that the said jurors were improperly and illegally drawn and summoned for the reason that the said Justice of the Supreme Court had no power or authority to make the order appointing the said Joseph Samworth and James L. Prescott as elisors, and authorizing them to draw and summon said jury and the venire issued to them was altogether void and of no effect in that, at the time the said orders heretofore mentioned were made and at all times after the making of the first order to the present time Thomas E. Manley was and is the duly elected and qualified Democratic sheriff in and for the County of Passaic and was at all times hereinbefore mentioned present and not in any wise disqualified from summoning a panel of petit jurors or assisting in the drawing and summoning of said panel in accordance with the provisions of the statute in such case made and provided, no vacancy existing in the office of Sheriff of the Passaic County at any time; and in that the vacancy which existed in the office of Jury Commissioner was one which should have been filled by the Governor of the State of New Jersey by the appointment of someone to take the place of Randall Hogan, a Jury Commissioner who had been duly appointed by the Governor of the State of New Jersey, confirmed by the Senate, and who had qualified as Commissioner of Juries and whose term had expired;

and in that the Statutes of the State of New Jersey provided for the appointment of a Jury Commissioner to fill the vacancy by the Governor of the State of New Jersey who could have filled such vacancy irrespective of the fact that at the time of the making of the said order of December twelfth, 1933, the Senate of the State of New Jersey was in recess; the statement contained in said order of December twelfth, 1933, that because of such recess said office could not be presently filled being erroneous; and also the defendant challenges the array for the reason that if the said Justice had power to make any order with reference to the designation of a person to draw the jury he should have appointed a Jury Commissioner pro tempore to act with the Sheriff." Signed, "Bernard L. Stafford, Attorney for Thomas Serlinsky." There is an affidavit attached which reads as follows: "State of New Jersey, County of Passaic, ss. Thomas Serlinsky, of full age being duly sworn according to law upon his oath deposes and says: I am the defendant named in the foregoing challenge to the array. The statements contained in the said statement are true. The said challenge is not interposed for the purpose of delay but in truth and in good faith for the reasons therein set forth. Sworn and subscribed to before me this twelfth day of March, 1934, Eleanor B. See, a Notary Public of New Jersey," and signed, "Thomas Serlinsky." I ask that this be incorporated in the record of this case, your Honor.

The Court: Yes.

Mr. Stafford: I also move you, sir, to quash this indictment against the defendant charging him with perjury on the following grounds: first,

the indictment fails to charge a crime within the law of the State of New Jersey.

Second, the indictment is fatally defective because it fails, either on its face or by express averment, to charge the defendant with having falsely and wilfully testified under oath to a matter material to the issue.

Third, the indictment is fatally defective because it charges the defendant with having falsely and wilfully testified under oath, in a certain judicial proceeding, before this court on the twentieth day of December, 1933, without specifically reciting or stating what the issue was under the certain judicial proceeding referred to as is required by law, and therefore fails, upon its face, to show that the alleged false testimony recited was upon a matter material to the issue.

Fourth, the indictment is fatally defective because its recital that certain testimony recited to be allegedly false "became and was material" pleads merely a conclusion of law, thus failing to show on its face by conclusions of fact that the alleged false testimony was upon a matter material to the issue, as is required by law.

Fifth, the indictment is fatally defective because it appears from the Bill of Particulars filed by the State that the testimony recited in the instant indictment, was given under the trial of indictment #454, which charged certain defendants, Aaron L. Simon, Irving Simon, and others with having committed the crime of conspiracy to commit the crime of embracery on the eighth day of May, 1933, in pursuance of which certain overt acts were charged with having been committed on May ninth, 1933, by reason of which the testimony of the defendant alleged to have been wilfully, falsely and corruptly given pertaining to

an incident or incidents that occurred on May 12th, 1933, clearly did not relate to a matter material to the issue. I will go into the details of that in a moment, your Honor.

Six, the indictment is fatally defective because, in the Bill of Particulars filed by the State, the testimony recited in the instant indictment was given under the trial of indictment #454, which is a matter of record having been filed in this court, and which said indictment #454 failed to charge a crime within the laws of the State of New Jersey, by reason whereof there was no legal judicial proceeding, and all proceedings thereunder being illegal, the defendant at bar, was not legally sworn and did not give legal testimony at a legal proceeding.

Seventh, the indictment fails to charge with sufficient particularity, and with such particularity as is required by law, the commission of a crime within the laws of the State of New Jersey.

Eight, the indictment is fatally defective because of duplicity; it charges that upon the issue joined at the judicial proceeding held on December twentieth, 1933, at which time it is alleged that perjury was committed, "It then became and was a material question, and material to the issue whether the said Irving Simon as aforesaid, on the twelfth day of May, 1933, at six o'clock in the evening, had left the Court House in the City of Paterson, aforesaid, in the company of and with the said Thomas Serlinsky, and whether he, the said Irving Simon had in front of the said Court House aforesaid spoken to one Michael La Conti then and there a petit juror and one of the defendants aforesaid," thus raising two distinct issues upon which it is alleged perjury was com-

mitted, without setting up each issue singly in a separate count as is required by law, and which in effect will compel the jury by its verdict to pass jointly upon the two separate issues upon which it is alleged perjury was committed, viz., one, whether or not the said Irving Simon had on May twelfth, 1933, left the Court House in the City of Paterson in the company of and with Thomas Serlinsky, the defendant herein, and two, whether the said Irving Simon, had, in front of the Court House, aforesaid, spoken to one Michael La Conti, then and there a petit juror and one of the defendants aforesaid.

Nine, the indictment is fatally defective, because as a pleading it is repugnant on its face.

Now, your Honor, with regard to the materiality, which I don't think any of us can disagree is one of the fundamentals which must be pleaded and proved in this case, indictment #454, which I have in my hand, entitled conspiracy, sets out that Doctor Aaron L. Simon, Irving Simon and several others conspired on the eighth day of May, 1933, in a certain case—I believe it was Veit versus Miller—the evidence showed that they were to bring in a verdict of ten thousand dollars. The jury on the eighth was impanelled and sworn and the case was tried and the jury came in on the ninth of May, 1933, with a verdict of twenty thousand dollars and on the tenth of May—this is the last averment in this indictment, La Conti and Hickling received fifty dollars apiece as their share of the conspiracy. We must agree that every conspiracy must have a beginning and an end. There, according to the State's own pleadings the conspiracy ended on May tenth, 1933, when the conspirators, or alleged conspirators re-

ceived fifty dollars apiece. That was the end. That is the last overt act charged in the indictment.

The present indictment, your Honor, against this defendant, recites the conspiracy indictment on page one, line sixteen. They said—the State pleads it was an indictment for conspiracy that was being tried before the court. The State also, on line nine, page two, refers to the hearing and judicial criminal proceeding and indictment for Conspiracy as aforesaid.

This indictment, your Honor, under an allegation of materiality says on page two, "It then became and was a material question, and material to the issue whether the said Irving Simon as aforesaid, on the twelfth day of May, 1933, at six o'clock in the evening, had left the Court House in the City of Paterson aforesaid, in the company of and with the said Thomas Serlinsky." That is the first allegation of materiality. And second, "And whether he, the said Irving Simon had in front of the said Court House aforesaid spoken to Michael La Conti, then and there a petit juror and one of the defendants aforesaid.

Those are the two allegations of the materiality of the testimony in the case wherein this defendant acted as a witness for Irving Simon, the defendant. I say to your Honor that under the pleading—and the State is bound by this pleading, under a pleading that shows on its face it is defective on the question of the averment of materiality, the indictment should be quashed.

The cases hold where there is an averment of materiality in a perjury case and facts are set up alleging materiality, yet as a matter of law if the fact set up alleging the materiality of the evi-

dence is not as a matter of law material, the indictment must fail.

The point I raise is this. We have in the present indictment being tried, we have the indictment of the conspiracy trial which the Prosecutor was kind enough to answer in the Bill of Particulars and I say on the evidence it shows that legally and lawfully the evidence given by the defendant on that trial was not material for this reason. What part of—and this is an argument on the law because your Honor is going to pass on the law, what part or what connection with the issue raised under Indictment No. 454 was it that two days after the end of a conspiracy Michael La Conti and Irving Simon, two of the defendants, spoke together on the front steps of the Court House. Such evidence surely wasn't admissible on the State's direct case because the conspiracy had ended. The money had been divided up and there was nothing further to be done under that conspiracy. The indictment says so. That was the last averment of an overt act on the tenth of May, 1933, the money was paid to Hickling and La Conti and the conspiracy having ended, anything that happened after that was collateral.

The Court: It would effect the testimony of the person who was testifying, that is as to credibility only. Now if the testimony be rebutted then it would be material, wouldn't it, to show—

Mr. Stafford: I can't agree with the Court and I know the Court will extend to me the courtesy of demonstrating why I can't.

The Court: I take it that is the situation in the case you refer to. My memory is not quite clear.

Mr. Stafford: I am very clear on it because

your Honor not only asked once but twice of the Prosecutor, "was this gone into on direct-examination?" And the Prosecutor said on page 1338 it was not gone into. And again on page 1200, "Was that gone into on direct-examination?" And the Prosecutor said "no." I say this matter was not gone into on the State's case and it is a collateral matter and all of our cases hold in the State of New Jersey that where the matter is collateral, the State having asked the question they are bound by the answer unless it goes to show, system, habit, bad intention, personal bias or prejudice. But when simply to lay a foundation for contradiction to effect the credibility of a witness, when they receive an answer on cross-examination as the State did the answer is conclusive when it is a collateral matter. I say—and I submit to the Court that that is the law and if that is the law whatever Thomas Serlinsky testified to on a collateral matter in a perjury case is not material and I ask the indictment be quashed on those grounds.

The Court: What about this, Mr. Shershin?

Mr. Shershin: Before proceeding as to the legal argument as to whether or not the testimony of the defendant Serlinsky was material to the issue in the indictment and trial of the State versus Aaron L. Simon and other defendants, I say in 23 Law on page 49 in the State against Dayton the Court said, "on an application to quash an indictment for perjury, if technical should not be allowed. Proceeding from there the State in this indictment states that the testimony of the defendant was material. In this State and in practically every state of the United States and under the common law of England as modified by stat-

ute, the State need not in drawing an indictment allege or prove how the materiality came about but an averment of materiality and an averment that he did wilfully, corruptly and falsely commit the crime of perjury is sufficient. The State further must show by specific testimony not in the exact language of the defendant at the trial, or if it is an affidavit, but show the substance. We have put in a specific averment that he testified falsely and then give the antithesis to show he committed perjury by showing the truth in the indictment.

As to the materiality, Irving Simon in both his direct testimony and in cross-examination—in his direct testimony at page 1095 he stated that he had met La Conti on August twenty-ninth or thirty-first in Newark. Then on the next page, 1096, he stated he had never met him before. In cross-examination on page 1136 he said he saw La Conti for the first time in August. If your Honor will remember in that indictment La Conti was charged jointly with this conspiracy to commit embracery or "jury fixing." The testimony of La Conti, briefly, was, that he had met him prior to May twelfth upon one occasion when Conlon introduced Irving Simon to La Conti. That Irving Simon at that time was sitting in an atuomobile and if I remember his testimony, it was, "Meet the boss." Subsequently to that time La Conti, in his direct-examination didn't say he had met him thereafter because it was not pertinent to the issue with respect to the dates but upon rebuttal by La Conti he testified that on May twelfth he had a conversation with Irving Simon after a disagreement in the case of Demarest vs. the Erie Railroad. Irving Simon previously had said he never met him until August, a difference of al-

most several months. Then to substantiate Irving Simon, Serlinsky was put upon the stand to say that on May twelfth the day that La Conti says he spoke with Simon in front of the Court House steps, Simon at that time having a jury list—And La Conti's testimony was supported by Thomas Finn one of the jurors who said he saw them together. Then Serlinsky is put upon the stand and says that at no time after leaving the jury room and after speaking to a group of jurors inside the building, did La Conti speak with Irving Simon but that he and Irving Simon went alone—went to his automobile and drove to Passaic. Surely your Honor, the materiality to the issue becomes very apparent because if he never met La Conti at any time before August, 1933, there was no conspiracy in the State versus Simon and the jury hearing the issue could then say La Conti is not telling the truth. Irving Simon never knew La Conti so how could they enter into a conspiracy and the jury then could rightly determine and say there was no conspiracy to commit embracery if they accepted Serlinsky's testimony as the truth. The materiality to the issue is very apparent. The State respectfully says that show the materiality to the issue and the State doesn't have to go any further in the indictment except a general averment of materiality under Corpus Juris, Wharton's Criminal Law and in 53 Law page 34, the State vs. Haase, it is clearly stated.

Mr. Stafford: I think Mr. Shershin misses my point. I am making a motion to quash not a motion for a direction of a verdict. We are concerned with this indictment. I am willing to agree under the case of the State versus Dayton that the pleader may make a general averment of ma-

teriality or he may even go so far as to not make a general averment of materiality providing he sets up sufficient facts as a matter of law to show materiality. The point I make is this. He makes a general averment of materiality but the facts he sets up show they are not material, because it happens two days after the termination of the alleged conspiracy. Two days after.

With regard to whether or not it is a collateral issue I would like to refer to Wharton on Criminal Evidence. He gives us the test. It was on cross-examination, it wasn't brought out on La Conti's direct. He said he never met him before April 29th in his direct. On cross-examination of Irving Simon when Mr. Carpenter brought out this testimony as he said to lay a foundation for contradiction I say legally he had no right to do it. In Volume 1, 10th Edition, page 1001, "Whenever a witness is cross-examined on any irrelevant matter or on any matters collateral to the issue his answers are conclusive and cannot be subsequently contradicted on those matters by the parties seeking to impeach him." The test of whether or not the fact inquired into on cross-examination is relevant is this. Would the cross-examining party be entitled to prove it as part of his case to establish his plea? If he cannot it is collateral. Now I say he couldn't because he is bound by his pleadings and the last averment of an overt act was on May tenth. He may go into some prior to show interest, the future course of business or the intention of the conspiracy, I think is perfectly proper but when the conspiracy terminated—and the pleadings said it was terminated—and two days after the end of the alleged conspiracy this happening—this meeting and talk took place on the court house steps, I submit to the court it is

not a material matter to that conspiracy. It is not relevant. It is wholly collateral and could not in any wise help the court or jury to determine the guilt or innocence or prove the facts under the conspiracy indictment because it had ended. I say the indictment is fatally defective because it sets up facts which of themselves prove the very evidence was inadmissible and if that is so on the question of law the pleading is defective.

The Court: This motion is specifically made with reference to the indictment.

Mr. Shershin: May I say this much? Counsel says that Mr. Carpenter who conducted the cross-examination, if my thought is correct as to his reasoning, conducted his cross-examination of Mr. Serlinsky and because of the fact that his question or his testimony was collateral therefore Mr. Carpenter was bound by his testimony.

Mr. Stafford: I don't say that at all.

Mr. Shershin: Counsel, however, to take the other premise, says that the testimony of Mr. Serlinsky being it was subsequent to the overt act alleged in the indictment was collateral and therefore the testimony on a collateral issue being it didn't occur prior to the overt act was not perjury. The law as stated in Wharton's Criminal law says that, "When apparently superfluous matter goes to give circumstantiality to the narrative and to form therefore a link in the chain of proof, it becomes material as contributing largely to the witness' credibility. Also it has been held that perjury may be committed by falsely swearing to a collateral matter. He contends that because it is a collateral matter and this indictment shows it was material on its very face.

Mr. Stafford: The point I raise is that Serlin-

sky's testimony was brought out on the cross-examination of Irving Simon and Serlinsky's testimony was then introduced as a result of Irving Simon's testimony. I say he cannot commit perjury because the testimony given by Irving Simon on cross-examination was on a collateral matter and irrelevant and immaterial to the issue being tried before the Court and it must be material before there can be any perjury and this indictment sets up facts they say constituted materiality but I say on the face of it it shows it is not material because the last overt act was committed on May tenth.

The Court: I shall take care of the situation by denying the motion and noting an exception to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

The Court: Now the plea of "not guilty" will be re-entered.

Mr. Stafford: The defendant will renew his plea of not guilty.

The Court: The sheriff will proceed with the drawing of the jury.

(The Sheriff proceeds to draw the jury.)

Sheriff McCann: Your Honor, the panel is exhausted.

The Court: Are any of the general panel on the other side not busy?

Sheriff McCann: No, but I have some here not on the special panel that are not in the box.

The Court: All right, they may be put in the box.

Motion to Quash Indictment.

Mr. Stafford: Of course, if the Court please, I would like to raise an objection to the further drawing of the jury on the grounds that the forty-eight names served upon the defendant have not been exhausted. This defendant has not as yet had the right to challenge—

The Court: As I understand it they have been exhausted.

Mr. Stafford: The forty-eight names? There are twelve names on the Special Panel that were drawn out of the box but the jurors are engaged in other cases and other courts and are not here to give the defendant the right to select or challenge.

The Court: The objection is noted and the Sheriff will put the balance of the names on the General Panel in the box.

Mr. Stafford: I ask the Court for an exception.

The Court: An exception to the Court's ruling is noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

(The Sheriff then continued to draw the jury.)

Sheriff McCann: Now, it is entirely exhausted.

The Court: The General Panel is entirely exhausted?

Sheriff McCann: Yes, your Honor.

The Court: Well, I take it we will have to go out then and see if we cannot secure sufficient jurors to make up this panel and you are so directed by the Court.

Mr. Stafford: May I have an exception to that?
The Court: It is noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
(President Judge.

(A jury being empanelled and found satisfactory, they were sworn.)

(Mr. Shershin then opened to the jury on behalf of the State.)

PATRICK J. CUNNINGHAM, a witness produced on behalf of the State being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Shershin:

Q. Have you indictment No. 454, Mr. Cunningham? A. Yes.

Q. May I have it? A. Yes.

Mr. Shershin: The State offers indictment No. 454, The State versus Aaron L. Simon, Irving Simon, William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker otherwise known as "Hop" Decker, Albert Durgett, Michael La Conti and John Hickling in evidence.

Mr. Stafford: No objection.

The Court: All right.

(Indictment No. 454 is designated Exhibit S-1 in evidence for the State.)

Q. Mr. Cunningham are you employed in any

capacity? A. I am a clerk in the County Clerk's Office assigned to attend the sessions of such courts as Judge Delaney presides over.

Q. Have you the record there of the proceedings of the State versus Aaron L. Simon and others—of the trial held in December 1933? A. Yes.

Q. Before Judge— A. Judge Delaney.

Q. Have you a record there with a record of the proceedings on December twentieth of that year? A. Yes.

Q. Was the defendant Thomas Serlinsky sworn as a witness on that day? A. I have it H. Thomas Serlinsky.

Q. Did you administer the oath to him? A. I did.

Q. What was the oath you administered to him? A. You do solemnly swear that the testimony you shall give in this case shall be the truth, the whole truth and nothing but the truth, so help you God.

Q. What was that? Speak louder please? A. You do solemnly swear that the testimony you shall give in this case shall be the truth, the whole truth and nothing but the truth, so help you God.

Q. Does it appear that he took the witness stand? A. It doesn't appear but he did. There is nothing to show he took the stand. It just shows he was sworn.

Q. This trial was held in the Passaic County Court of Oyer and Terminer? A. Passaic County Quarter Sessions.

Cross-examination by Mr. Stafford:

Q. What is your official title in the County Clerk's Office? A. I am a special deputy clerk.

Q. Have you been designated such in writing? A. Yes, sir.

Q. Have you taken an oath? A. Yes, sir.

Q. Is it on file? A. Yes, sir.

Mr. Stafford: Was this witness sworn?

The Reporter: He was sworn by me.

Mr. Stafford: I don't know whether Mr. Lee has the power to administer an oath.

The Court: All right. We will have no question about that. Mr. Cunningham, you solemnly swear the testimony you shall give in this matter will be the truth, the whole truth and nothing but the truth, so help you God.

The Witness: I do.

The Court: All right now. Repeat the testimony you have given.

Direct-examination by Mr. Shershin:

Q. Have you the record of the proceedings of the trial of Indictment No. 454, the State against Aaron L. Simon, Irving Simon, William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as "Hop" Decker, Albert Durgett, Michael La Conti and John Hickling? A. Yes.

Q. And this trial was held where? A. Held in this courtroom in the Court of Quarter Sessions.

Q. Before whom? A. Before Judge Delaney.

Q. Who? A. Judge Joseph A. Delaney, the Judge who presides now.

Q. On what day did the trial commence? A. On December 13th, 1933.

Q. Have you the records of the proceedings on the day of December twentieth? A. Yes.

Q. Have you a record of the swearing of one H. Thomas Serlinsky? A. H. Thomas Serlinsky sworn as a witness for the defendant—defendants.

Q. Did you administer the oath to him? A. I did.

Q. What is the form of oath you administered to him? A. You do solemnly swear that the testimony you shall give in this case shall be the truth, the whole truth and nothing but the truth, so help you God.

Q. Did Mr. Serlinsky thereupon take the stand as a witness? A. Mr. Serlinsky was sworn and he testified.

Q. Was a verdict rendered in that case? A. Yes.

Q. The record shows what? A. Yes.

Q. The record shows what?

Mr. Stafford: I don't see what bearing that has upon the present issue, just what the verdict was in that particular criminal trial. I object to it.

The Court: Where is that material?

Mr. Shershin: Except the record itself of the proceedings in which the State alleges the defendant committed perjury is evidential to show the state of the record.

The Court: Where is the verdict material?

Mr. Shershin: Except that it is part of the record of the proceedings as produced by Mr. Cunningham.

The Court: Well, of course only such part of the record as is material is evidential.

Mr. Shershin: I will withdraw the question. That is all.

Cross-examination by Mr. Stafford:

Q. On what authority do you have the power to administer an oath?

Mr. Shershin: I object to it on the ground that any person in the presence of the court who administers an oath is deemed to have the power to administer the oath.

Mr. Stafford: That may be true but I want to find out.

The Court: Mr. Cunningham may answer the question.

A. I administer the oath in the presence of the court.

Q. What is your authority? Is there a statutory authority? A. I can't give you the section but I can find it.

Q. There is statutory authority giving you power to administer an oath? A. Yes.

Q. As what officer? A. As clerk of the court in the presence of the court. I can show you the act but I can't tell you the section.

Mr. Stafford: That is all.

Mr. Shershin: May I ask one omitted question?

The Court: All right.

Redirect-examination by Mr. Shershin:

Q. Have you indictment No. 454? A. Yes.

Q. Is this indictment 454? A. Yes.

Mr. Shershin: I now offer this indictment in evidence as an exhibit in behalf of the State. The State against Aaron L. Simon, Irving Simon, William Conlon, otherwise

known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker otherwise known as "Hop" Decker, Albert Durgett, Michael La Conti and John Hickling, for conspiracy.

(Indictment #454 again designated Exhibit S-1 in evidence on behalf of the State.)

RALPH E. COOPER, a witness produced on behalf of the State, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Shershin:

Q. Mr. Cooper, you are an attorney at law of the State of New Jersey? A. Yes.

Q. And licensed to practice as such? A. Yes.

Q. And have been for how long? A. Since 1917.

Q. Do you recall the day of May twelfth of 1933? A. I think that was the date the case of Terhune and Demarest against the Erie Railroad was tried.

Q. Where was that case tried? A. Before Judge Mackay across the hall.

Q. Do you recall when the jury came in after its deliberation that day? A. About six o'clock.

Q. And the jury rendered what type of verdict? A. Disagree—

Mr. Stafford: I object to it as immaterial.

Mr. Shershin: It is material in this respect. That La Conti later on as the State will show, discussed with Irving Simon in that conversation for fifteen or twenty minutes how the jury acted upon the disagree-

ment and that conversation thereafter took place. And if your Honor will remember it was alleged in Indictment 454 that he and La Conti were conspirators, not in that case, but in Veit versus Miller, and it was therefore material to the extent of what their conversation was because Finn will later testify it was for fifteen minutes.

Mr. Stafford: That is the very point I make in this case. It had nothing to do with the conspiracy charged in No. 454. It had to do with Demarest versus the Erie Railroad. That is the point I make. Counsel now tells the Court it is another case entirely.

Mr. Shershin: No, I don't.

Mr. Stafford: Whatever they did in this case of Demarest versus the Erie Railroad had nothing whatsoever to do with Veit versus Miller.

Mr. Shershin: I may say this. Irving Simon stated that up until August thirtieth he never knew La Conti and therefore—

The Court: The question that disturbs me is whether it is material just what the conversation was about if we have evidence that they were there and had a conversation. Isn't that as far as you need go? The substances of the conversation is not material as I get it.

Mr. Shershin: I withdraw it then.

Mr. Stafford: I object to counsel withdrawing his statement to the Court. I may want to use it.

The Court: The question I understand was withdrawn. That is correct, is it?

Mr. Shershin: Yes, sir.

Q. Do you recall leaving the courtroom on that day, Mr. Cooper? A. I recall leaving the courtroom after the jury had been dismissed. That was before I finally left the court house if that is what you mean.

Q. Do you recall leaving the courtroom? A. Yes.

Q. The first time? A. Yes.

Q. When you left the court room the first time when the jury came in, who did you walk out with? A. I walked out in back of the twelve jurors after they had been excused and when I got outside of Judge Mackey's door—about between his door and the telephone booth, and I there spoke to two jurymen, one of them is the gentleman, Mr. Shulman, who sits over there and with him was another—with him or near him stood another of the jurors. A tall man and heavier and much older.

Q. Do you recall distinctly who was in the group when they left the courtroom? A. The twelve jurors filed out practically in a bunch and I followed immediately behind them as far as I know.

Q. Was Irving Simon with you? A. I don't think so.

Q. Was Thomas Serlinsky, the defendant with you? A. I don't think so.

Cross-examination by Mr. Stafford:

Q. Mr. Cooper, why did you answer the Prosecutor's last two questions by saying "I don't think so."? A. I have no recollection of those two gentlemen following me out or going along with me and I am sure they did not enter into

any conversation I had outside of Judge Mackay's door. I think if they had been with me I would recall it.

Q. Do you deny they were there? A. No.

Q. They may have been there and you not see them? A. It is possible.

Q. What? A. Yes.

Q. When the jurors walked out of the court room there was some sort of a conversation taking place? A. Not on the way out.

Q. When they were out of the courtroom proper? A. That is what I am talking about.

Q. They filed out into the corridor? A. Yes.

Q. And you talked to some of them? A. Yes.

Q. How many jurors? A. One juror was talking.

Q. Where were the other jurors? A. Another juror as I have said was standing alongside or near Mr. Shulman and myself.

Q. Mr. Shulman is this young man here? A. That is right.

Q. You spoke to him? A. Yes.

Q. You are sure you saw him there? A. Yes.

Q. What about the other ten? Did you see them? A. They continued away.

Q. Did you notice whether there were any persons with them other than jurors? A. I did not. I don't know.

Q. Will you say Mr. Serlinsky was not there? A. I don't know.

Q. Will you say he was not there with the jurors? A. I don't know.

Q. You won't say he was there? A. I won't say he was there and I won't say he wasn't. I have no recollection of seeing him at all.

Q. He may have been there? A. It is quite possible.

Q. When you answered the Prosecutor's question about Thomas Serlinsky being there and you said, "I don't think so", you meant "I don't know"? A. I don't think that was just the question—"was he there". I think the question was did I enter into a conversation with him.

Q. Well, whatever the question was, your answer was "I don't think so". You were not positive were you? A. That is right. I don't know.

Q. You are not positive now, are you? A. That is true.

Q. After you had talked to Mr. Shulman and another juror, didn't you start on out? A. I went back in Judge Mackey's court for my things.

Q. Yes. A. The next conscious recollection I have in being on my way home in the automobile.

Q. Which door did you leave by? A. I can't tell you. Where ever my car was—

Q. Can't you recall where your car was parked? A. I am up here a great many times and sometimes I park on one street and sometimes another. I can't tell you where it was that day.

Q. Did you leave the building alone? A. I don't know.

Q. You don't know whether someone walked down the corridor with you or not, do you? A. No.

Q. Someone may have? A. It is possible.

Q. It may have been Serlinsky? A. Walking along with me?

Q. Yes. A. If anyone did it might just as well have been him as anyone.

Redirect-examination by Mr. Shershin:

Q. Mr. Cooper, as you left Judge Mackey's

court, did you walk out with Irving Simon and Mr.—

Mr. Stafford: I object. He has gone over that, on direct-examination. This is repetition. The witness has answered this.

Mr. Shershin: May I finish?

The Court: Finish your question.

Q. (Continued) Did you walk out with Mr. Irving Simon or Mr. Serlinsky?

Mr. Stafford: I object to it as being a repetition.

The Court: He has already said he doesn't recall whether they were in the party.

Mr. Shershin: Except on direct-examination I asked him who walked out and then I couldn't lead the witness, but upon cross-examination counsel said, "was Serlinsky there."

The Court: All right, I will allow it.

A. If you mean from the counsel table or thereabouts down the center aisle of the courtroom, no, I did not.

Q. And I mean further as you left the jury-room in Judge Mackey's court, did you leave with Irving Simon or Mr. Serlinsky? A. No.

Recross-examination by Mr. Stafford:

Q. Positive of that, Mr. Cooper? A. Yes, I am.

Q. But there your honest recollection stops? A. That is true.

Q. You don't know with certainty after that? A. Except for the conversation which I had.

Q. You can't tell the jury anything with certainty or positiveness after that? A. I may say

it would be much simpler—you probably prefer it your way.

Q. No, I don't prefer it my way. A. It would be much simpler—for me anyway, if I could relate the things I recall and tell you when my memory stops and when it starts again.

Mr. Stafford: If the Prosecutor is willing, I am willing.

Mr. Shershin: I am willing.

Q. Tell us what took place at the counsel table before the jury came in? A. I didn't mean that.

Q. I mean that. A. I will be glad to start wherever you want me to.

Q. What took place at the counsel table there before the jury came in? A. Well, a lot of things. I sat there from twelve thirty to six o'clock.

Q. Did anyone play cards? A. Saul Lippman, Irving Simon and one of the court attendants of Judge Mackey's court.

Q. Ivan Reese? A. A young fellow with black hair. I played I know for a few hands and others played too.

Q. Didn't you see Thomas Serlinsky? A. I have no recollection of ever seeing him until he came to my office about six weeks ago.

Q. He came to your office and asked you if you could remember things that happened that afternoon? A. That is true.

Q. And he told you what had happened? A. He knew many, many details of things that happened that afternoon.

Q. He refreshed your recollection? A. He didn't refresh my recollection, I remembered them too.

Q. Everything he said you agreed with him? A. Yes.

Q. Even down to the minutest detail? A. Well, he would say do you remember this and I said "yes." And I would say "do you remember that" and he would say yes he did. From twelve thirty to six o'clock we remembered a number of details mutually. We didn't disagree to any great extent and I don't think we do yet. He asked me did I remember his being there and I told Mr. Serlinsky, "I never saw you before so far as I know, you may or may not have been there."

Q. You don't deny he was there? A. Not at all. No, I don't.

The Court: At this point may I suggest a recess until two o'clock.

(At this point a recess was taken until 2:00 P. M., March 12th, 1934.)

JOHN F. LEE, JR., being duly sworn, according to law upon his oath, testifies as follows:

Direct-examination by Mr. Shershin:

Q. Mr. Lee, you are the official court stenographer of this court, the Court of Quarter Sessions, before Judge Delaney? A. Yes, sir; I am.

Q. And on December 19th, were you the stenographer in that capacity taking testimony in the trial of the State vs. Aaron L. Simon and others, defendants? A. I was.

Q. And in which case Mr. Thomas Serlinski appeared as a witness?

Mr. Stafford: I think the date is the 20th, not the 19th.

Mr. Shershin: Yes, the 20th; that is correct. I thank you, Mr. Stafford.

A. Yes, I was. Mr. Serlinsky appeared as a witness on the 20th, as I understand the question.

Q. And have you the transcript here of the testimony given by Mr. Serlinski at that trial? A. I have.

Q. And is that a true and correct transcript of your shorthand notes taken upon that day? A. It is.

Q. And will you read to us the testimony of Mr. Serlinsky in its entirety there? A. His whole testimony?

Q. Yes, and just read loud so that the jury can hear you.

Mr. Stafford: Of course, the document itself is evidential, as far as I understand, but I don't see how it can go to the jury without being offered as an exhibit.

Mr. Shershin: I'll offer it after it is read.

Mr. Stafford: It cannot be read until offered as an exhibit.

The Court: That is true; if you want the witness to refresh his recollection from the transcript, all right—or if you want him to read it, all right.

Mr. Stafford: I have no objection to the transcript of the testimony going into the record, but I think it should be offered first as an exhibit.

Q. Will you read that testimony given by Mr. Serlinsky at that time, Colonel Lee? A. Yes.

Q. I'll ask you this first. Is that a correct and true transcript of your shorthand notes? A. It is.

Mr. Shershin: I now offer the transcript

of Mr. Serlinsky's testimony in evidence, your Honor.

Mr. Stafford: May I just look at it, your Honor, please?

Mr. Shershin: Yes, certainly.

Mr. Stafford: I have no objections, your Honor, to it being marked.

The Court: Let it be marked.

(Said exhibit referred to is admitted in evidence and marked Exhibit S-2.)

(Mr. Shershin reading to the ury):

"H. Thomas Serlinski, a witness produced on behalf of the defendants, being first duly sworn according to law, testifies as follows: Direct-examination by Mr. Weinberger.

Q. What is your business? A. Lawyer.

Q. Practicing how long now? A. In the fifth year now.

Q. On May twelfth, 1933, were you in the court room with Mr. Irving Simon and Mr. Ralph Cooper the representative for the Erie Railroad Company? A. I was, sir.

Q. Were you there when the jury came out with a disagreement? A. I was. At six o'clock.

Q. Were you present when they were discharged by Mr. Lippman? A. That is right, sir.

Q. Did you go out of the court room with Irving Simon? A. I did, sir.

Q. Some of the jurors were standing around there in a crowd? A. I don't recall.

Q. As a matter of fact did you go out with Mr. Simon and a group of jurors?

Mr. Carpenter: I object to it as leading, this is Mr. Weinberger's witness.

The Court: Objection sustained.

Q. Were you with a group of jurors and Mr. Simon in front of the Court House?

Mr. Carpenter: I object to it as leading and suggestive. Whether or not he was there is—

Mr. Weinberger: I withdraw it.

Q. When you left the court room just tell us what you did in your own way? A. I left the court with Irving Simon, left Judge Mackay's court and walked out of court with Irving Simon and Mr. Cooper, walked down the steps—I can't just recall where Mr. Cooper left us—walked down the steps to the first floor, as I recall in a general manner discussing the case and there was a question asked by one of the jurors, he said something—

The Court: No, no, we are not interested in what the jurors said.

Q. What happened? A. The general conversation there was—

Mr. Carpenter: I object to that.

Q. There was a talk? A. There was.

Q. Now, did you leave with a group of jurors with Irving Simon?

Mr. Carpenter: I object. The question is leading. We want the fact, not the suggestion of counsel.

The Court: That is true.

Q. Did you leave with anyone? A. I left with Irving Simon.

Q. Where did you go and with whom did you leave? A. I left this group of jurors and we went out the front way, turned to the left on Hamilton Avenue, went to my car which was parked on Grand Street. At no time did Irving Simon talk to any one of the jurors aside from this general conversation.

Cross-examination by Mr. Carpenter:

Q. Where is your office? A. 223 Central Avenue, Passaic.

Q. You have been here with a group of the Simons for the last five days, haven't you? A. I have.

Q. Sitting back there in the court room with them? A. Not exactly.

Q. You are a great friend of Irving Simon's? A. I am a friend of his, yes.

Q. What were you doing in that court that day? A. The best I can say is that I checked my diary and my diary shows that I had to see Mr. Addison Rosenkrans about the Passaic Park Washing Co. against Pasternack and others.

Q. When did you start to check your diary? A. I checked that the other night and I looked again this morning.

Q. Mr. Rosenkrans was here during that trial—up here in this court? A. No, I say my diary shows I saw Mr. Rosenkrans at least three or four—

Q. Wait a minute. I didn't ask you that.

I asked you whether Mr. Rosenkrans was in that court room from four to six o'clock that afternoon? A. He was not. Not that I know of.

Q. Did you have any interest in that case of Terhune and Demarest against the Erie Railroad? A. None whatsoever.

Q. Yet you say you stayed around this court room all that afternoon until six o'clock? A. I didn't say that.

Q. What time did you come there? A. My best recollection is I came there about three thirty in the afternoon.

Q. And you waited until six o'clock? A. I said that.

Q. Did you say the group of jurors and Mr. Irving Simon went down those steps? A. I was with Irving Simon until we got outside and he got in my car. I was with him every inch of the way.

Q. He didn't go back to Passaic in your car? A. He did. I drove him back.

Q. Didn't he have his car here? A. He came back in my car, sir.

Q. When did you first talk with him about this matter? A. I spoke to him, I believe, sometime in September or October, and then it was definitely he spoke to me about it yesterday that I was to be called to the stand.

Q. In September or October you talked about what jurors? A. He asked me sometime in September or October—

Q. Didn't you walk down the steps with La Conti, Hickling and Irving? A. I positively did not. Irving Simon was with me and I—

Q. Hold on. I didn't ask you to make a speech. What were the names of the jurors with whom you walked down the steps? A. I walked down with Irving Simon.

(At this time 1:00 P. M. Recess was taken until 2:00 P. M.)

After Recess.

"Q. What were the names of the jurors you said walked down the steps? A. You mean the steps inside the court house or the steps outside?

Q. Outside. A. I don't know the names of any jurors.

Q. Did you see Finn there? A. I saw him on the stand. I can't remember and of them.

Q. Did you see Mr. Finn and Mr. Corsetta, two of the jurors standing on the top of the steps out there? A. I know there was a group of jurors—

Q. Would you please answer the question? Are you afraid to answer the question? A. I am not afraid to answer any question.

The Court: The answer is yes or no. Repeat the question, Mr. Stenographer. (Question as repeated by the reporter).

Q. Did you see Mr. Finn and Mr. Corsetta, two of the jurors standing on the top of the steps out there? A. No.

Q. Did you see Irving Simon standing near the foot of those steps with a jury list in his hand? Yes or no. A. I can't answer that yes or no.

The Court: Yes, you can. You are a lawyer. Answer it yes or no.

A. Did I see Irving Simon with a jury list in his hand?

Mr. Weinberger: I submit that can't be answered yes or no.

The Court: He will answer it yes or no.

A. No, sir.

Q. Did he have a list of jurors in his hands as he was leaving the court room? A. No, sir.

Q. Was he asking in your presence what jurors voted for him and what against him? A. He certainly did not.

Q. Did you see La Conti after that trial? A. That I cannot recall. There were a group of jurors but I can't recall the gentleman.

Q. I am not asking about the group of jurors, I am asking about La Conti. Was he in the group?

The Court: The witness says he doesn't recall. Isn't that an answer?

Q. Did not Irving Simon go, that afternoon, to an automobile alone and not in your company? A. He positively did not. He walked to my car and rode home in my car.

Q. Are you related to the Simons? A. I am related to Irwin Simon by marriage.

Q. Do you do any business with the Simons or for them? A. For them?

Q. Yes. A. Not that I can recall.

Q. You are not in their office? A. No, sir, I have my own.

Q. Did you serve your clerkship in that office? A. I served my clerkship in Feder and Rinzler's.

Q. When were you in the office of Irving Simon last?

Mr. Weinberger: I object to that. That is not proper cross-examination.

The Court: He may answer.

Mr. Weinberger: It is just a question of time.

A. Last night.

Cross-examination by Mr. Ward:

Q. How are you connected by marriage with Irving Simon? A. Irwin?

Q. Not Irving—Irwin. A. Irwin's wife and my wife are sisters.

Mr. Weinberger: We rest."

Q. Colonel Lee, you were the stenographer during most of the trial? A. Most of it, yes.

Q. And were you the stenographer taking the record of the testimony of Irving Simon when he was sworn as a witness and testified? A. I believe I was. Yes, I took Irving Simon's testimony.

Q. And do you recall Irving Simon's testimony or do you need the transcript to refresh your recollection? A. I need the transcript.

Q. And is that your transcript (handing the same to the witness)? A. It is.

Q. Do you remember this question being asked of Irving Simon and—

Mr. Stafford: I object to counsel proceeding to prove the transcript that way.

The Court: As I understand, the question is not permitted—

Mr. Shershin: I will withdraw the question. I'll read the testimony of the witness Irving Simon.

(Mr. Shershin reads as follows):

"Q. Did you meet Mr. La Conti in August?"

Mr. Shershin: I'll withdraw that question.

Q. Do you recall this question being propounded to Mr. Irving Simon and his answer to said question as follows:

"Q. Did you meet Mr. LaConti in August? A. I did."

Mr. Stafford: I object. That is not the proper way to prove it. The proper way to prove it is by the record alone. The record must go into the case. It must be offered as an exhibit.

The Court: I see no serious objection, Mr. Prosecutor, to offering the entire record in evidence.

Mr. Shershin: The entire record.

The Court: The entire record but you may read only that part of the record which is material to this issue.

Mr. Stafford: The testimony of Irving Simon on cross-examination by Mr. Carpenter, I presume, is what the Prosecutor wants.

Mr. Shershin: On direct examination when Irving Simon was asked questions by his own counsel, relative to when, for the first time in his life, or when he met La Conti for the first time.

The Court: You may use the record for

the purpose of refreshing his recollection, but if you want it to go in evidence, as an exhibit, I see no serious objection. I think the examination should be confined to that part of the record which is pertinent to the issue.

Mr. Stafford: Then, the record containing this particular indictment, goes into the evidence.

The Court: Yes, it may be marked.

(Said transcript referred to is admitted in evidence and marked S-3, on behalf of the State.)

Mr. Stafford: I am willing to stipulate that pages 1095, 1096, 1136 and 1137 be read right into the record.

Mr. Shershin: That is what the State wants to prove, your Honor.

Mr. Stafford: May I have it noted on the record just when this examination took place, direct and cross-examination?

The Court: Yes.

Mr. Shershin: Pages 1095 and 1096, for the purpose of the record, are parts of the direct-examination of Irving Simon, and page 1136 and 1137 are part of the cross-examination of Irving Simon.

I offer it in evidence.

Reading examination at bottom of page 1095—

Mr. Stafford: I haven't a copy of the evidence, but I will take counsel's word for it.

Mr. Shershin: Questions asked of Irving Simon, on direct-examination:

"Q. Did you meet Mr. La Conti in August? A. I did.

Q. When was it? A. It was the twenty-ninth or thirtieth—the latter part of August.

Q. Where was it? A. The Hotel Riviera, Newark.

Q. You were introduced there to him, were you? A. I was.

Q. Now, as a matter of fact, had you ever met him up to that time before? A. I have seen him in Court.

Q. I said, 'met him'? A. No.

Q. What time did you meet him that night, about? A. About eleven-thirty."

Mr. Shershin: Thereafter and following, to the bottom of the page, refers to dictographs, and I'll omit that.

Then on page 1136, on cross-examination by the State, of Irving Simon—the bottom of page 1136. (Reading):

"Q. When was the first time you ever talked with Michael La Conti in your life? A. The latter part of August. I can't recall the day in the room at the Hotel Riviera.

Q. That was the first time you ever spoke to the man in your life? A. That I can recall.

Q. Did you ever speak to him in the month of May, 1933? A. I never talked to him directly, except for one occasion, when the jury walked out of the courtroom and the jurors all combined were talking to the attorneys and the clerk of the court.

Q. Where was that? A. Out in the corridor.

Q. Why, you stood and talked with Mich-

ael La Conti for fifteen or twenty minutes alone, on the front steps of the Court House after the case of Terhune and Demarest against the Erie Railroad? A. That is not true.

Q. And you had a jury list in your hand? A. That is not true.

Q. Didn't you ask him then who the jurors were that voted in your favor and who against you? A. That is not true.

Q. Do you know that two of the jurors in that case were watching the two of you?

Mr. Raff: I object to that.

The Court: Objection sustained.

Mr. Raff: I ask that it be stricken from the record.

The Court: Strike it out."

M. THOMAS FINN, a witness produced on behalf of the State, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Shershin:

Q. Your name is what? A. M. Thomas Finn.

Q. Where do you live? A. 116 Ryerson Avenue, Paterson.

Q. In Paterson? A. Yes.

Q. Do you recall May the twelfth of 1933? A. I do.

Q. And on that day were you a juror in any case in this court house? A. I was.

Q. Talk a little louder? A. I was.

Q. On that day in what case were you sitting as a juror if you can remember? A. Demarest and Terhune versus the Erie Railroad.

Q. Was Michael La Conti a juror on that case? A. Yes.

Q. Was Mr. John Hickling a juror or not in that case? A. He was.

Q. Do you recall when the jury came in after its deliberations? A. Yes, sir.

Q. When was that about, Mr. Finn? Do you remember? A. About six o'clock.

Q. That is— A. In the afternoon.

Q. Do you recall leaving the court room? A. Yes.

Q. Tell us what happened? A. I was the last juror leaving the courtroom as we filed out.

Q. As you were leaving the courtroom what persons did you leaving? A. Mr. Corsetto was directly in front of me and I paid no attention to any one else and Mr. Cooper followed in back of me.

Q. Who was with Mr. Cooper, if you can remember? A. I don't remember noticing anyone with him.

Q. You didn't notice anyone? A. No.

Q. By that you mean he was alone? A. Well he was right in back of me. I don't know who was in back of him.

Q. Did you see Irving Simon leaving the courtroom? A. No, I didn't.

Q. Did you see Mr. Serlinsky? A. I never remember seeing Mr. Serlinsky at all until just this morning.

Q. Thereafter, after you left the courtroom did you see Irving Simon? A. After leaving the courtroom?

Q. Yes. A. Yes.

Q. Where, after that, did you see Irving Simon for the first time? A. On the courthouse steps.

Q. On the steps? A. Not on the steps. Just off the steps in front of the court house.

Q. At which door of this court house, Mr. Finn? A. Front.

Q. That is straight in front of you? A. That is right.

Q. Where were you with reference to the doorway right out in front of this court house when you saw Irving Simon? A. I came directly out the front door.

Q. How far did you walk before you saw Irving Simon? A. Oh, I just took enough steps to see past the columns, about four or five steps.

Q. Then you saw Irving Simon? A. Yes.

Q. Did you see anybody with him, if you remember? A. He and Mr. La Conti.

Q. What is La Conti's first name? A. Michael.

Q. Do you see Mr. La Conti here in the court room? A. He was here this morning. I don't know whether he is now.

Q. Can you see him? Point him out? A. The third from the end the first row back of the rail.

Mr. Shershin: Pointing to Mr. La Conti for the purpose of the record.

Mr. Stafford: All right.

Q. Do you see Irving Simon here in court? A. Irving Simon?

Q. Yes. A. I didn't see him this morning.

Q. Did you see him this morning? A. No, I didn't see him this morning.

Q. You know Irving Simon? A. Yes.

Q. Did you see him that afternoon before you saw him on the steps or not? A. Yes, he was in the court room at six o'clock.

M. Thomas Finn—Direct.

Q. Who was with you at the time you saw Irving Simon and Mr. La Conti? A. Mr. Corsetta.

Q. How close was Mr. Corsetta standing to you at that time? A. About two feet away. We were talking.

Q. Two feet away? A. Yes.

Q. Then when you saw Mr. Irving Simon and La Conti talking as you stated, what did you do? A. We stood watching them.

Mr. Stafford: I object to that as being immaterial, what this witness did.

The Court: I understand he has answered, "He stood and watched them."

Q. You what? A. We stood and watched them.

Q. For how long a period of time did you watch them? A. Between fifteen and twenty minutes.

Q. Did you notice anything about Irving Simon and La Conti—or Michael La Conti at that time? A. Mr. Simon had a paper in his hand but I couldn't tell you what it was.

Q. During this fifteen or twenty minutes did they confer?

Mr. Stafford: I object to counsel leading the witness and ask that it be stricken out.

The Court: Don't lead.

Q. What did they do during this fifteen or twenty minutes? A. Stood talking together.

Q. Was it light or dark at this time? A. Very light.

Q. After you watched them as you stated for fifteen or twenty minutes, what did you do yourself? A. As I recall it my car was in back of the courthouse and I walked back into the courthouse and out the other door.

Q. What made you go to the front door?

Mr. Stafford: I object to that.
The Court: That is not material.
Mr. Shershin: I withdraw it.

Q. Did Mr. Corsetta go with you or not? A. I don't think he went with me back into the court house.

Cross-examination by Mr. Stafford:

Q. Is your memory very clear as to these facts, Mr. Finn? A. On all of the facts I have answered to, it is.

Q. Do you remember with such distinction all the facts that happened after the jury came out of their room in the Demarest versus Erie Railroad case as well as you do the facts you have testified to?

Mr. Shershin: I object to the question the witness has testified to certain facts and this is an attempt to qualify or characterize his evidence. The witness is here to testify to facts.

The Court: Yes, I am inclined to think you are right. I shall sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. You say you saw Irving Simon in the court room when you came out? A. Yes, I don't remember it distinctly but—

Q. Well, why did you say it? A. I remember

him but I don't remember it distinctly. I don't remember where he stood.

Q. There are some things you don't remember distinctly then? A. Yes.

Q. Do you remember seeing anybody else in the court room besides this indistinct recollection of Irving Simon when you came out of the jury-room? A. Several people interested in the case, Mr. Cooper and Mr. Lippman.

Q. Did you see Mr. Reese the court attendant? A. I wouldn't know the names of any court attendants.

Q. You saw Mr. Lippman there?

The Court: Don't shake your head. The stenographer must get your testimony.

The Witness: I answered yes.

Q. Did you see Mr. Serlinsky there. A. I mentioned before I never knew him until this morning and not knowing him I don't remember him.

Q. You won't say he wasn't there? A. No, I won't say he wasn't there.

Q. Did Mr. Serlinsky walk out with a juror preceeding you and Mr. Corsetta? A. Not knowing him I wouldn't remember whether he did or not.

Q. He might have been there and you not know it? A. That is right.

Q. Did you see him walk out the front door with Irving Simon? A. I didn't see Mr. Simon walk out the front door.

Q. You don't know whether he walked out with someone or alone? A. No.

Q. He may have walked out with someone and it may have been Mr. Serlinsky.

Mr. Shershin: I object the witness has said he didn't see him.

The Court: The witness said he didn't know as I understood it, however I shall sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. So as a matter of fact, Mr. Finn, aside from this indistinct recollection of seeing Irving Simon in the court room, you didn't see him again that evening until you got downstairs on the steps?

Mr. Shershin: I object to the form of the question "indistinct recollection".

Mr. Stafford: He used the term indistinct to characterize it.

Mr. Shershin: No, he didn't.

Mr. Stafford: I will withdraw it if you like.

Q. Didn't you say Mr. Finn, your recollection was indistinct as to seeing Mr. Simon in the courtroom?

Mr. Shershin: I object to the question as calling for a conclusion upon this witness' testimony.

The Court: Let us ascertain what the facts are.

Q. Didn't you tell me in answer to one of my questions you remember Irving Simon being in the court room but only indistinctly? Didn't you say that? A. Yes, sir.

Mr. Stafford: I accept your apology.

Mr. Shershin: He is not apologizing.

Mr. Stafford: Who?
Mr. Shershin: The witness.
Mr. Stafford: No, yours.
Mr. Shershin: Oh.

Q. From May twelfth, 1933 until the date of this trial December twentieth, 1933, did you ever think of what took place that day between those dates? A. You mean in reference to the testimony I have given?

Q. Yes. A. I knew— No.

Q. You never did? A. No.

Q. Did you have any occasion to think about it in the month of June, 1933? A. I was called to the Prosecutor's Office—I don't know whether it was June or July, and Mr. Masterton took my statement. I don't think I said anything to him about the incident on the front steps.

Q. You never mentioned that, did you? A. I don't know. I don't think I did because—

Q. That was the last— Wait a moment. That was less than a month after it was supposed to have happened, isn't that true? A. That is right.

Q. In the month of July did you mention this fact about seeing him talking on the front steps to anybody? A. July?

Q. 1933. That is the second month after that? A. I don't remember.

Q. Did you mention any of the facts about which you have testified in the month of August, 1933? A. I don't remember speaking about it until—it was just before the trial started.

Q. That was in December, wasn't it, Mr. Finn? A. I suppose so. Yes.

Q. So from May until December, just before the trial of the conspiracy indictment, you spoke to nobody about what transpired on the front

steps between Irving Simon and Michael La Conti? A. Yes, that is right.

Q. You mean— A. I don't recall speaking to anyone about it.

Q. Even though you had been called into the Prosecutor's Office to give a statement, you never mentioned it? A. You didn't ask me what I was questioned about by the Prosecutor.

Q. No. Even though you were called into the Prosecutor's Office to be questioned you never mentioned the fact that La Conti and Irving Simon had been speaking together on the court house steps? A. No, because all I did was answer the Prosecutor's questions.

Q. No. Wait a minute. You didn't, did you? A. No.

Q. So then, nobody really knew from your say so what you had actually seen until immediately prior to the conspiracy trial, isn't that true?

Mr. Shershin: I object to the question.

Mr. Stafford: I press it.

Mr. Shershin: How could he know what anyone else knew?

Mr. Stafford: From his say so.

The Court: Reframe the question.

Mr. Stafford: All right.

Q. As a matter of fact, Mr. Finn, you had talked to nobody from May twelfth, 1933 until the month of December, 1933, about what had transpired on the front steps of the court house between La Conti and Irving Simon? A. I answered that before by saying that I didn't recall it.

Q. How did you happen to speak to somebody about it in the month of December, 1933? A. I was questioned about it.

M. Thomas Finn—Cross.

Q. Where? A. At my home.

Q. For how long? A. Oh, I didn't pay any attention to how long. The entire questioning didn't take more than five minutes I suppose.

Q. Did you have to refresh your recollection? A. I didn't have to for the simple reason the detective came—let me finish, the detectives came to the house—had been there for an hour and a half, but I was only there for a short time. They are acquainted with my family, and they questioned me for about five minutes.

Q. You mean the detectives were in your house an hour and a half in December? Did this five minutes conversation take place with the detectives before they were there or after they were there—. A. Before. The first five minutes they were there.

Q. They spoke to you for five minutes and then spent an hour and a half in your house? A. That is right.

Q. Did you talk to the detectives an hour and a half about this matter? A. About five minutes and then the subject was dropped altogether.

Q. Was your memory refreshed during the five minute conversation? A. My memory didn't have to be refreshed.

Q. Why?

Mr. Shershin: I object to "why".

The Court: He may answer.

Q. Why didn't it? A. Because I remembered everything they questioned me about.

Q. For six months you had not spoken to anybody about this thing, had you? A. That is right.

Q. Yet when the question was put to you by the detectives you recalled everything very clear-

ly and very distinctly? A. That is, the facts I answered to I did recall.

Q. How long before the trial was that? A. Oh, I don't know, about a week or so. Maybe a week or two weeks, I don't know.

Q. You had not told the detectives you knew anything about it prior to this visit? A. No.

Q. You had not conferred with any persons about what you had known prior to their visit, had you? A. No.

Q. Well, on this evening when the jury came in in the Demarest versus Erie Railroad case, you say you walked out last of all the jurors? A. I was the last juror to leave this courtroom—or Judge Mackay's courtroom.

Q. When you left Mr. Lippman was still in the courtroom? A. I don't know what happened to him. I remember seeing him in the courtroom because he was the court clerk.

Q. Do you remember where Mr. Reese the court constable was who had charge of the jury? A. No, I don't.

Q. Do you remember Mr. Shulman—where he was? A. I remember him on the case but I don't remember him after I left the courtroom.

Q. When you left the courtroom and got into the corridor, did you walk down the steps to the first floor? A. Yes.

Q. Alone? A. No.

Q. With whom? A. Mr. Corsetta.

Q. Was anybody in front of you? A. We were talking together and I really didn't notice anyone.

Q. Did you see anybody in front of you when you were walking down? A. There may have been and may not have been, I don't recall.

M. Thomas Finn—Cross.

Q. Do you say Mr. Serlinsky was not walking down there? A. How can I when I told you before I didn't know him until today.

Q. He may have been there? A. He may have been.

Q. In fact you don't say he was not there. That is what I mean?

Mr. Shershin: I object to counsel arguing with the witness.

Mr. Stafford: I press it.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. When you got down on the floor leading to the steps did you see anybody at all? A. I don't recall. You mean on the main floor of the court house?

Q. Yes. A. I don't remember anybody on the main floor.

Q. When you walked down the corridor to the front entrance did you see anybody there? A. I don't recall.

Q. But you did when you got out the front door? A. I was practically five steps past the front door—, just enough so I could see past the columns and then I saw La Conti and Mr. Simon talking together.

Q. Was anyone else around there that you saw? A. I don't recall.

Q. Did you see any of the other jurors? A. No.

Q. Didn't you see Mr. Shulman, the lawyer? A. I didn't know Mr. Shulman was a lawyer.

Q. Stand up Mr. Shulman? A. I know him but I didn't know he was a lawyer.

Q. Did you see him there? A. I don't recall.

Q. Did you see Mr. Reese, the court constable leaving the building? A. No, I didn't.

Q. What delayed you in the court room so that you were the last one to leave?

Mr. Shershin: I object—, he didn't say he was delayed.

Mr. Stafford: I am asking him.

Mr. Shershin: I object to the question.

Mr. Stafford: I press it.

The Court: He may answer it.

A. I was in no hurry. I just took my time.

Q. Did you have any reason for staying until the last one? A. No reason in the world.

Q. Did you stop and talk to anybody? A. No, I just walked slowly.

Q. Tell the jury about how long you stayed in the courtroom after the rest of the jurors left? A. After the first juror left. We were all filing out—, maybe two or three minutes after the first one had left, that is all the time it would take.

Q. Where was your hat and coat? A. I don't recall whether it was still in the jury room or whether I had it on my arm. Wait just a moment. Last May?

Q. Yes. May twelfth? A. I very seldom wear a hat in the summer time and I don't wear a top coat in the summer time, so I don't think I had either coat or hat.

Q. You did not? A. I don't recall.

Q. Isn't it a fact all the jurors left in a body?

A. We all left in a body but we couldn't all get out the door at once.

Q. The door is hardly big enough for that Mr. Finn, I presume. Isn't it a fact practically all of the jurors left the room after the clerk had taken the verdict? A. I would say we all left—

Q. One didn't go out and then another one. You all went out approximately at the same time? A. Yes.

Q. You and Mr. Corsetta with you? A. Yes.

Q. When you say you were the last to leave you mean you were the last of the collection of jurors to leave the court room? A. Yes.

Q. But approximately you all left at the same time? A. That is right.

Q. And you all got into the corridor at the same time? A. Approximately the same time.

Q. You all approximately reached the first floor at the same time? A. I wouldn't say that.

Q. Is there any reason—, or can you recall if you stopped on the way down? A. Mr. Corsetta and I were talking. I can't say for certain whether we moved steadily along or whether we stopped for a few minutes, but I know we moved very slowly. It might have taken almost as long as ten minutes for us to reach the front door.

Q. Ten minutes from where? A. From the time we left the court room.

Q. Ten minutes from the door leading to the corridor? A. As I said I don't know whether we stopped to talk or whether we kept moving slowly but I know we were talking all the time.

Q. You remember walking out of the court-room in back of the jurors? A. That is right.

Q. Don't you remember walking down the corridor in back of the jurors? A. No, I don't recall that.

Q. Don't you remember walking down the steps in back of the jurors? A. I answered that no.

Q. Well, I am asking you again? A. I said I didn't recall anything about the other jurors after I left the courtroom.

Q. You mean by that they might have been in front of you not recall it?

Mr. Shershin: I object to it as speculative and not a fact.

The Court: I shall sustain the objection.

Mr. Stafford: I ask for an exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Well, in your answer to the Prosecutor with regard to not seeing any of the jurors preceeding you, was it your intention to convey by your answer that they were not there or they might have been there and you not see them?

Mr. Shershin: I object to what his intention was. He testified to a fact and the jury has that fact.

The Court: The jury has the facts.

Mr. Stafford: I press the question.

The Court: I shall sustain the objection and an exception is noted to the Court's ruling.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. How long did you talk to Corsetta in the corridor or downstairs? A. A few minutes ago I estimated about ten minutes between the time we left the courtroom to the time we reached the front steps of the court house.

Q. Can you tell us how long after this verdict came in you started for your home in your car which you had parked? A. Oh, I should say I started for home about half past six, twenty-five minutes to seven, something like that.

Q. The jury came in at six o'clock? A. That is right.

Q. You were here approximately a half hour or more then? A. Approximately a half hour.

Q. Where was your car parked? A. I don't recall whether it was on the side of the court house or back of the court house, or on Ward Street. It was somewhere in back of the building. I recall coming back in the court house but I don't recall just where it was.

Q. And you don't recall whether you had a coat or hat? A. No, I don't recall.

Q. So your recollection is indistinct about some of those things? A. As far as I recall—

Q. Is it indistinct about your car? Where it was parked? A. I don't know. How do I know whether it was on Lee Place or Clark Street or where it was?

Q. Your recollection is indistinct about whether Corsetta came back into the court house with you? A. Yes, that is indistinct. But I know I didn't drive him home. I know he didn't get into the car with me. That is the reason it is indistinct as far as him coming back into the court house with me.

Q. Why did you walk out the front door and

then turn around and go out the side door? A. We were talking—we had quite a conversation and we came out the front door. I paid no attention to which entrance it was, it made no difference which entrance I left by. I told you I was in no hurry before.

Q. If it made no difference why did you change from the front to the side? A. I was out the front door with Mr. Corsetta and I stood talking with him on the steps for fifteen or twenty minutes and saw Mr. Simon and Mr. La Conti talking just off the sidewalk and what difference did it make whether I went down the steps or went through the court house again?

Q. Where was your car? A. Somewhere in back of the court house.

Q. On what street? A. I don't know.

Q. On De Grasse Street? A. Why guess at it. I told you I didn't know.

Mr. Shershin: I object. He said he didn't recall.

Q. Why did you use the side door of the court house if it was in the back?

Mr. Shershin: I object to the question. He said he couldn't recall.

The Court: He said he didn't know where it was.

Q. What door did you use today? A. The side, because it is on De Grasse Street today.

Q. Are you sure of that? A. Yes, I am sure of that because I only left it there two o'clock.

Q. Well, when you walked out through the front door you were going out to get your car and go home? A. Eventually I would get to my automobile but I was not in a hurry.

M. Thomas Finn—Cross.

Q. I say that was your intention in walking out the front door—to get your automobile and go home? A. Not necessarily.

Q. Where did you stand outside of the court house, Mr. Finn? A. Just at the top of the steps.

Q. Were La Conti and Simon to your right or left? A. They would be to my right.

Q. How far from you? A. Oh, a distance from the foot of the steps in front of the building, I would say about fifteen yards.

Q. Did you walk down the steps? A. No, I don't remember walking down the steps. I know I didn't walk down the steps for that matter.

Q. Where did you stand? A. At the head of the steps. The top.

Q. With reference to the entrance where did you stand? A. The entrance to the court house?

Q. Yes. A. Just in front of the columns. Just in front of the door.

Q. Fifteen feet to the right? A. Fifteen feet straight ahead from the door.

Q. Oh, fifteen feet straight ahead from the door? A. Yes.

Q. You were on top of the steps then, were you? A. Yes.

Q. You say you saw Simon with a paper in his hand. Was it a file? A. I couldn't tell from that distance what it was.

Q. It might have been a court file? A. No, it was a small paper.

Q. Yellow? A. I can't remember the color of it. I know it was just a small sheet of paper.

Q. Did you see anything done with the paper? A. Mr. Simon also had a pencil in his hand checking or marking whatever it was.

Mr. Stafford: I ask that that be stricken out.

The Court: All right.

Q. Was anything done with the paper? A. Mr. Simon had it in his hand.

Q. Was anything done with it besides Mr. Simon having it in his hand? A. I have a faint recollection of him marking something on the paper. I saw him with the paper—he had the paper in his left hand and he would naturally have the pencil in his right hand.

Q. And he would naturally write something? A. Not naturally. He might have written something.

Q. You don't say he wrote something? A. No, I don't say he wrote something.

Q. Was this conversation loud or low? A. At forty-five feet away I couldn't tell whether it was loud or not. I know they were talking.

Q. How do you know? They were facing— A. I could see their lips move.

Q. Who was facing you? A. About three quarters of each one facing me.

Q. How do you mean? A. I could see Mr. La Conti's lips and when Mr. Simon moved his head a little bit I could see his lips.

Q. You stood there twenty minutes not hearing a conversation but just watching lips move? A. If you want me to tell you why I was standing there—

Q. No. Just answer the question? A. Not watching lips move but seeing them move. I didn't watch particularly for them.

Q. Seeing lips move? A. Yes.

Q. Were you there when they separated? A. I don't recall. I don't think so.

M. Thomas Finn—Cross.

Q. You were talking for fifteen or twenty minutes and then you left—left Corsetta and went back in the court house building? A. I went back into the court house.

Q. Where did Corsetta go? A. I can't recall whether he went back in the building or whether he went down the steps.

Q. You don't know where he went? A. No.

Q. Will you say you are positively certain you saw them talking there for fifteen or twenty minutes? A. I am positive of that.

Q. Mr. Finn, had you seen Irving Simon prior to this date, May twelfth?

Mr. Shershin: I object to it as being immaterial.

The Court: He may answer.

A. I seen him May eleventh and May twelfth—that is Thursday and Friday while that case was on. At least two days.

Q. You were in the second jury room, were you not, during the recess this morning?

Mr. Shershin: I object to it as not proper cross-examination.

The Court: He may answer yes or no.

A. Which recess was that this morning?

Q. Weren't you in this second juryroom while Irving Simon was in there this morning? A. Yes, I walked in that jury room.

Q. You walked in with whom? A. I followed Mr. La Conti in.

Q. Who else? A. Who else?

Q. Who else? A. Mr. Corsetta followed me in.

Q. Oh, yes, your fellow juror. Did you have to think so long about that? A. I was trying to see what you were driving at—

Mr. Shershin: I object to the question. Counsel asks something and then asks did he have to think a long time.

The Court: Yes, I shall sustain the objection.

Q. Why did you hesitate before making that answer?

Mr. Shershin: I object to it. He didn't—

The Court: Oh, he may answer.

A. Why did I hesitate?

Q. Yes. A. Every time I come into this court house and walk into a room counsel want to know if I went in—who else went in and why.

Q. Did I ever ask you? A. Every time I come in this court room they all want to know and I wanted to know by that question what you were driving at.

Q. Well, I will tell you. Why did you go in that room with Corsetta and La Conti? A. For no particular reason.

Q. Didn't you go into that room to try and identify a man? A. I did not.

Q. Didn't you bring Corsetta in there to try and make him identify a man? A. I did not.

Q. Did you talk it over with La Conti? A. I did not.

Q. Didn't you go in there for the purpose of trying to identify Irving Simon? A. I attempted to identify nobody.

Q. Corsetta said he didn't know him, didn't he? A. He said nothing about it.

Q. How long were you in there? A. Not more than three or four minutes.

Q. Who brought you in? A. I said I followed La Conti.

M. Thomas Finn—Cross.

Q. Did La Conti talk to you before you went in? A. He spoke to me in the back of the court room.

Q. You spoke to Corsetta, didn't you?

Mr. Shershin: I object to this.

Mr. Stafford: I press the question.

Mr. Shershin: The only purpose as I understand it, legally, of asking this question is the laying of a foundation to contradict by the defendant because this is not cross-examination on anything illicited on direct-examination.

The Court: That is true.

Mr. Shershin: Therefore I press the objection, your Honor.

The Court: I think the objection is good.

Mr. Stafford: I am going to agree with the court in sustaining the objection because I expect to raise the same point later on.

Q. Why did you go in there? A. Do you want to know just why?

Mr. Shershin: I object. He said—

The Court: Proceed.

Q. Yes, I want to know why you went in there when Irving Simon was in there?

Mr. Shershin: I object to the question—to the form of the question "why he went in there when Irving Simon was in there." This witness has not testified when he went into the room did he know Irving was in there. It gives the impression to this jury that this man only went in there because

Irving was there and that isn't the fact or the truth as adduced from this witness.

A. Mr. La Conti offered me a cigarette in the back of the court room here and I was willing to accept it and I knowing that you couldn't smoke in the courtroom followed him in and accepted one of his cigarettes.

Q. Did he offer one to Corsetta too? A. I don't know whether he did or not but I know I took one.

Q. Now, isn't it a fact Mr. Finn, that the jury in the Demarest versus Erie Railroad case had been out since ten o'clock in the morning? A. Ten o'clock?

Q. You had been in court and you couldn't get out after the judge charged the jury and you had no lunch? A. That is right. I remember that.

Q. You had had no supper up to that time, had you?

Mr. Shershin: I object. I wasn't able to go into on direct as to whether they even discussed anything.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Mr. Stafford: I ask an exception. The witness said he was in no hurry to get home.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

The Witness: I can answer that if the Court will allow me.

Q. With distinction or indistinction? A. With

distinction. Knowing my physical constitution when I get so hungry it just passes off and then I don't care whether I eat or not after a certain time.

Q. Is it the same with your memory? A. No, that is not the same.

Redirect-examination by Mr. Shershin:

Q. Do you see Irving Simon in the courtroom now? Just stand up and look—or go down and look if you need to. A. I can see from here.

Q. Mr. Irving Simon, will you stand up? Is that the man that was there or not? A. Yes, that is him.

Q. When the Prosecutor—Mr. Masterton questioned you in June, what questions did he ask?

Mr. Stafford: I object to that if the Court please.

The Court: I shall sustain the objection.

Q. The Prosecutor didn't ask you whether or not you had seen La Conti and Simon together?

Mr. Stafford: I object to it as wholly improper and leading.

The Court: I will admit it and note an exception to the Court's ruling.

Mr. Stafford: I ask for an exception on the ground it is leading and not proper redirect.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

A. That is right. He didn't.

Q. And you remember the general line of questioning, don't you? A. Yes.

Q. That was whether or not you had been approached or not?

Mr. Stafford: Oh, I object to that.

The Court: We have gone far enough.

Q. Why do you remember distinctly seeing Irving Simon and La Conti in front of the Court house on Friday, May twelfth? A. The oddness of the situation.

Q. Will you explain what you call "oddness"?

Mr. Stafford: I object as to why. That is not redirect.

Mr. Shershin: He said this witness' testimony was indistinct, especially as to minor details and now I ask him why this is distinct to him and surely the jury ought to learn that.

The Court: I am inclined to think that is proper.

Mr. Stafford: I ask for an exception.

The Court: Exception is noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

A. Shall I answer?

Q. Yes. A. I have to go back to Mr. Masterton's questioning.

Q. No, as to my question. A. Repeat the question.

(Question as repeated by the reporter.) "Will you explain what you call "oddness"?

The Court: That is not the question I am permitting.

(Previous question and answer as repeated by the reporter.) "Q. Why do you remember distinctly seeing Irving Simon and La Conti in front of the court house on Friday, May twelfth? A. The oddness of the situation."

Mr. Shershin: Answer that question.

Mr. Stafford: I object to any conclusion or explanation on the part of this witness.

The Court: I will permit him to answer it.

A. I was on the jury with Mr. La Conti and Mr. Simon was counsel for the plaintiffs—

Q. Which Simon do you mean? A. Mr. Irving Simon—

Mr. Stafford: I object to that unless he is the attorney of record. His say so doesn't make it so. It is a conclusion on the part of the witness and I ask that it be stricken out.

Mr. Shershin: Counsel opened the door on cross-examination.

The Court: I will allow it to stand.

Mr. Stafford: I ask for an exception.

The Court: Noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

A. (Continued) And because of Mr. La Conti's conduct in the jury room, them being together was worthy of notice.

Recross-examination by Mr. Stafford:

Q. Tell the jury about La Conti's conduct in the jury room? A. You mean as to how he acted in the jury room?

Q. That is just what you said? A. He said very little all afternoon but I remember—

Q. Tell us what you saw of his conduct? A. I remember one remark he made in the course of the afternoon very distinctly because he said, "Ten thousand dollars apiece or I will keep you here all night."

Q. What else? A. That is the only statement of his I distinctly recall.

Q. Are you sure of that? A. Of that I am. I am positive.

Q. To whom did he make the statement? A. It was a general statement to the group of us.

Q. And you said "O. K."? A. I don't remember answering his remark.

Mr. Shershin: I object to that. He didn't say he said "O. K."

Mr. Stafford: I am asking him.

Q. What did you say? A. You mean what did I say in the jury room. I can't recall any remarks I made. I know I talked almost continually for almost three hours. I do remember that.

Q. You talked to Mr. Cooper after you came out of the jury room, didn't you? A. One remark.

Q. Who were present when you talked to Mr. Cooper, the attorney for the Erie Railroad? A. I told counsel before I was the last juror to leave the court room and Mr. Cooper was directly in back of me and he passed some remark, I don't remember what it was, and I remember answer-

ing him and then Corsetta and I went on about our business.

Redirect-examination by Mr. Shershin:

Q. What remarks did you have with Mr. Cooper? A. I don't remember.

Q. How did you vote in this Terhune versus the Erie Railroad?

Mr. Stafford: I object to it as being immaterial.

Mr. Shershin: Counsel asked him what La Conti said and the witness said "Ten thousand dollars each or I will stay here as long as you want," and then counsel said, "You said O. K." and the witness said, "no", and then he said, "What else did you do?" and then "What was said"—

Mr. Stafford: I object to that. I didn't say that.

Mr. Shershin: I am stating facts if you will let me finish. Wait until I get through. I think under the circumstances this witness ought to be entitled to show the jury his position in the matter and for that reason why he stood on the court house steps when he saw La Conti and Simon together.

The Court: I think we have gone into that sufficiently, Mr. Prosecutor.

FLORIO CORSETTA, a witness produced on behalf of the State, being first duly sworn according to law testified as follows:

Direct-examination by Mr. Shershin:

Q. Mr. Corsetta, where do you live at the present time? A. #57 Mill Street, Paterson.

The Court: Keep your voice up so the jury can hear what you say.

Q. What was that? A. #57 Mill Street, Paterson.

Q. Do you recall the day of May twelfth, 1933, Friday? A. Sure. Yes.

Q. What were you doing on that day, Mr. Corsetta? A. I was a juror.

Q. In what case? Do you recollect? A. The Demarest and Terhune case against the Erie Railroad.

Q. Do you recall when the jury came in with its verdict on that afternoon or night? A. I do. We had a disagreement.

Q. That was about what time? A. About six o'clock.

Q. After the jury came in did you see what occurred to the other jurors besides yourself? A. I did not. We just lined up in front of the clerk and he called our names and we answered present and that was all.

Q. After that what did you do? A. The clerk asked what was the verdict and we said a disagreement and he said "excused."

Q. Talk louder, please. A. The clerk asked us the verdict and we said we had a disagreement.

Q. What did you do thereafter? A. We were excused.

Q. What did you do? A. We walked out of the court house—court room rather, we walked out of the court room.

Q. By "we" who do you mean? A. The bunch of jurors.

Q. With reference to the jurors coming out where were you? In front? The middle or—? A. Right in front of Mr. Finn. Thomas Finn.

Q. How long did you stay in after you announced your verdict before you started to leave? A. As usual we usually hang around the court room until someone gets their coats on. I remember I didn't have any hat or coat on.

Q. You remember that? A. I never wear a hat.

Q. Did you see Irving Simon go out at that time or not? A. I don't know Irving Simon. I don't even know him today.

Q. Do you know Mr. Thomas Serlinsky the defendant, sitting next to Mr. Stafford, on the left hand side? A. I never saw him before until now.

Q. Did you see him going out of the court room? A. I says I never seen him before until now.

Q. Do you know how many minutes it took you to walk out after the jury announced its verdict? A. Out of the court room?

Q. Before you left the door? A. It must have been no more than three or four minutes.

Q. As you got in the corridor out there what did you do? A. I waited until Finn came out.

Q. Did Finn come out? A. Mr. Finn came out.

Q. Did it take him long to get out? A. I waited a few minutes. I don't know how long it was.

Q. What happened to the other jurors ahead of you? A. They started to walk downstairs. I guess they were going home.

Q. What did you do thereafter with Mr. Finn? A. Started walking downstairs to go outside. We were talking and we would stop—we were having a conversation that was very interesting, so I guess it took us quite a while before we got to the front stairs of the court house.

Q. Do you remember how long it took you to walk from the door of the court house to the outside door of the court house? A. The door of the court house, the outside door?

Q. Yes. A. Do you mean the court room?

Q. Yes. A. I don't know. It took us quite a while.

Q. Did you see any of the other jurors? A. I didn't pay any particular attention to anyone. I was just interested in the conversation with Mr. Finn and myself.

Q. When you got outside the court house with Mr. Finn, what did you do? A. As we got on the court house steps Mr. Finn offered to take me home and I told him, no, I only lived a little ways.

Q. After he offered to take you home, what happened? A. May I go on with what I was saying?

Q. Yes. A. We reached the court house steps and Mr. Finn says to me—

Mr. Stafford: I object to what he said to him.

Q. Just what you saw? A. I saw Mike La Conti and someone else talking to Mike La Conti down on the sidewalk near the court house steps.

Q. When you saw Mike La Conti talking with someone, you say you don't remember who, where were you? In front of the court house door? A. I had my back turned to them.

Q. Did you turn your back afterwards? A. Not until Mr. Finn said—

Mr. Stafford: No. No.

The Witness: How can I tell you if you won't let me talk?

The Court: Never mind now. You just answer the questions.

The Witness: I am trying to.

Q. As a result of what Mr. Finn said what did you do? A. I turned a little to see who was down there and saw Mike La Conti with another person.

Q. Where were they at that time? A. At the sidewalk of the court house.

Q. Did you watch them for any period of time? A. I just glanced at them and that is all. Until—Oh, I can't say it.

Q. Can't say what? A. I says—

Mr. Stafford: I object to any conversations.

Q. You can't tell us that. Just what you saw? A. What I saw was the person with whom Mike La Conti was talking to had a piece of paper in his hand.

Q. How long did they stay there? The two of these people, one of whom was Mike La Conti? A. On about ten or twelve minutes. Something like that.

Q. You know Michael La Conti, don't you? A. Very well.

Q. Is he here in the court room? A. Yes, sitting right over there by Hickling.

Mr. Shershin: Pointing to Mr. Michael La Conti for the purpose of the record.

Mr. Stafford: Where?

The Witness: The fifth man there in the first row.

Mr. Stafford: Oh, yes.

Q. What did you do afterwards? A. I went home.

Q. Did you go home with Mr. Finn? A. No, Thomas Finn offered to take me home but I says--

Q. No. No. You didn't go with him? A. No, sir.

Q. Thereafter when was the next time you told anybody that you saw Michael La Conti speaking with someone in front of the court house?

Mr. Stafford: I object to it as not part of the State's case and a self serving declaration.

The Court: That is true.

Mr. Shershin: Except counsel asked it on cross-examination.

Mr. Stafford: I will ask for it.

Mr. Shershin: All right. Go ahead.

Cross-examination by Mr. Stafford:

Q. Do you smoke, Mr. Corsetta? A. I do.

Q. Why did you go in the jury room over there while Irving Simon was in there? A. I was looking for Thomas Finn and I noticed him in the jury room.

Q. Weren't you invited to go in to have a smoke? A. I beg your pardon, I wasn't.

Q. Isn't it a fact you were brought in there and they wanted you to identify Irving Simon? A. That is a lie.

Q. Is it? A. I even told the Prosecutor here I don't know Irving Simon. I never knew him until you called him to stand up before and I saw him and I don't see him yet because I don't know him.

Q. How long were you in there? A. Where?

Q. In the jury room? A. When?

Q. This morning? A. How do I know which jury room you mean?

Q. Don't you know which one you were in? A. Certainly, the second one.

Q. How long were you in there? A. About a minute—because—all right, go ahead.

Q. When did you first talk to anybody about what you had seen in front—on the front steps of the court house after it took place as you related? A. Until I was interviewed.

Q. When? A. About December.

Q. What date? A. I don't remember the date. It was pretty hard to remember the month.

Q. How long before the Simon trial? A. I guess the Simon trial was going on.

Q. Hadn't you spoken to anybody from May 12th until December nineteenth? A. I never even dreamed about the incident that happened on the court house steps.

Q. You never gave it a thought? A. No, sir.

Q. And then six or seven months later you were interviewed by somebody? A. That is right.

Q. Was your recollection refreshed?

Mr. Shershin: I object. He asks for a conclusion on this witness' part.

Mr. Stafford: That is a fact not a conclusion.

Mr. Shershin: That is a conclusion. As to how it was refreshed would be a fact.

Mr. Stafford: That is a conclusion.

The Court: He may answer it to save time.

Q. Do you understand the question? A. Say it all over again.

Q. Was your recollection refreshed before they started to ask you about this incident? A. You mean while I was being interviewed?

Q. Did somebody remind you as to what had taken place in order to refresh your recollection? A. They asked me a few questions and I answered them.

Q. Somebody told you what had taken place first? A. No, sir. Just asked me questions.

Q. I am not asking you what you said. I am not asking you what you said—

Mr. Shershin: I think he has answered the question, your Honor.

The Court: I don't understand there is any question pending.

Mr. Shershin: Excepting counsel is instructing this witness for some reason or other.

Mr. Stafford: There is one reason for it and that is all and I will put it in the record, to keep out his conversation.

Mr. Shershin: I ask that it be stricken from the record.

The Court: It is not in the record.

Mr. Shershin: I think it is.

The Court: The reason?

Mr. Shershin: Counsel's reason.

The Court: The jury is going to decide this case on the evidence and not on the suggestions or reasons of counsel.

Q. How long did you talk to these persons who spoke to you about what you had seen seven months before? A. They were there about ten or fifteen minutes.

Q. Where? A. At my home.

Q. Then you came to court and testified, didn't you? A. I did?

Q. Did you testify at the trial? A. No, sir.

Q. But you were here in the court house when the trial was going on? A. I was?

Q. Yes. A. I am working.

Q. Were you? A. I was working.

Q. Then you were not here while the conspiracy trial was going on? Not here under subpoena? You didn't come here as a witness? A. I was subpoenaed.

Q. Did you come as a witness? A. No, sir, they says they will send for me and call for me at where I was working.

Q. So you did not testify? A. No, sir.

Q. Well now, when you came out of the jury room Mr. Corsetta, it was about what time? A. About six o'clock, a little after six.

Q. Do you remember seeing anybody in the court room? A. I didn't pay any particular attention to anyone.

Q. No? A. No, sir.

Q. Was the judge here? A. No, the judge was not here.

Q. Was the clerk here? A. The clerk was there.

Q. Any lawyers here? A. Any lawyers there, you mean?

Q. All right, have it your way. There. A. I remember Mr. Cooper being there in particular.

Q. Who? A. The Erie Railroad lawyer.

Q. You remember him particularly, do you? A. Yes, sir.

Q. How do you remember him particularly? A. Because as we were leaving the court room, I was looking for Finn and Finn was talking to him.

Q. Did you see the court officer here who had charge of the jury? A. What do you mean by "here"?

Q. In court. In court. A. I thought you were talking about the other court room over there.

Q. You are right. I beg your pardon. A. I didn't pay any attention.

Q. You didn't see any court attendant? A. Not unless when we left the jury room to appear before the clerk, some court attendant opened the door for us but I don't know who he was.

Q. The court attendant led you out into the big jury room? A. What do you mean "big jury room"?

Q. This is the big jury room and that is the small jury room? A. I see.

Q. Isn't that true? A. I don't know what you are driving at. I am sorry.

Q. What is it you don't understand? A. Just what you are saying.

Q. I will try and make it as plain as possible. A. Thank you.

Q. When you were out considering this case, you were in the small jury room? A. What case.

Q. What case were you on on May twelfth? A. I was on the Demarest and Terhune case.

Q. That is the case I am speaking about. You were in the small jury room considering it? A. In the jury room.

Q. When you arrived at a verdict you came out into the larger room? A. We didn't arrive at a verdict.

Q. You agreed to disagree? A. We had a disagreement.

Q. When you came out to make known your findings to the court and clerk you came out into the large room? A. The court room.

Q. When you arrived in this court room how many people were in there outside of the jury? A. What do you mean by this court room?

Q. Well, the other court room. The court room which you entered? A. On May twelfth?

Q. On May twelfth, yes. How many people were in that court room? A. I don't know.

Q. Did you see anybody? A. I didn't pay any particular attention to anyone.

Q. Did you notice the jurors leaving the court room in a body? A. Walking in front of me.

Q. How far ahead of you? A. I guess a few feet.

Q. How many were ahead of you? A. I don't know.

Q. How many in back of you? A. Thomas Finn was in back of me and I don't know who was in back of him.

Q. Were there any jurors in that court room when you left? A. I don't know.

Q. Are you friendly with Finn? A. I am not. I just know him as a juror.

Q. How long did you stay in that court room after the clerk discharged the jury? A. After the clerk—well, I started talking to Finn and then started walking out.

Q. Almost immediately. Isn't that so? A. No.

Q. How long did you stay around that court room? A. About three or four minutes in there.

Q. Were all of the jurors talking? A. I don't know. I guess some of them were gathering things they had. I guess they were leaving.

Q. Don't you remember them leaving? A. Sure I do.

Q. You and Finn left with them? A. They were in front of us.

Q. You all walked out of the court room together didn't you? A. Together?

Q. Out into the corridor? A. I guess so.

Q. And you all walked downstairs together? A. I beg your pardon, we stopped and talked to the Erie Railroad lawyer.

Q. Who stopped and talked? A. Mr. Finn and I waited for him.

Q. How long did he stop and talk to him? A. I don't know. I guess a few minutes.

Q. How many minutes? A. I don't know how long. I said a few.

Q. How many minutes by a "few" do you mean? A. Three or four minutes.

Q. Then you walked downstairs? A. Yes.

Q. Did you see the other jurors then? A. I didn't pay any attention to anyone.

Q. Did you see Mr. Shulman, a fellow juror of yours on the case? A. I saw him only in the jury room.

Q. Didn't you see him in the corridor? A. I says I didn't see anybody in the corridor.

Q. Did you see Mr. Serlinsky? A. I told you I never seen that man before until now.

Q. You had not had any lunch either had you? A. No, sir.

Q. You were hungry, weren't you? A. Sort of.

Q. When you got downstairs on the floor leading to the entrance, did you see anybody? A. Leading to the entrance? No, sir.

Q. You didn't see any court officer there going out? A. No, sir.

Q. Did you see any individuals whatsoever? A. A few passed us by but I don't know who they were.

Q. You don't know who they were? A. No, sir.

Q. It might have been Mr. Serlinsky?

Mr. Shershin: I object. He says he doesn't know.

The Court: Objection sustained.

Mr. Stafford: Exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Some people did pass you. That is right, isn't it? A. Right, sir.

Q. How many? A. How many people leave this room? Do you know? Do you count them?

Q. It would be a hard thing for me to remember seven months back, Mr. Corsetta.

Mr. Shershin: Who is testifying? Mr. Stafford or the witness?

The Court.: Evidently both counsel and the witness.

Q. Well, as you walked down the corridor towards the entrance were there any persons going ahead of you—going out ahead of you? A. I told you some passed by and some were coming in but I don't know who they were.

Q. As you got to the door these people in front of you were still in front of you? A. I didn't say anyone was in front of me, I said—

Q. Didn't you say some were going in? A. I said some were passing down, some going down. I didn't say in front of me.

Q. Some passing by at which entrance do you mean? A. Going down the court house steps and some coming in.

Q. Some people were going down the court

house steps as you got near the court house steps, that is true? A. That is right.

Q. The number, you don't know? A. No, sir.

Q. You said "I just glanced at him, that is all." What did you mean by that? In answer to the Prosecutor's question as to what you saw after you went out there? A. Well, as we reached the court house—

Q. Don't repeat conversation. What did you mean when you said, "I just glanced at him that is all"? A. I turned around and looked who was there.

Q. That is all you did, isn't it? A. Yes, sir.

Q. Glanced at him? A. I turned around and looked at them, surely.

Q. Didn't you say in answer to one of the Prosecutor's questions as to what you did— A. I did.

Q. You said, "I just glanced, that is all"? A. I turned around, certainly I turned around because my back was towards him.

Q. After you glanced at him, did you turn your back to him then? A. Certainly, I was talking to Thomas Finn.

Q. You had your back to these persons talking on the steps? A. Right.

Q. And you kept your back to them how long? A. Because I was interested in what Mr. Finn was saying.

Q. You never looked at the other two again? A. I never paid any particular attention to them because it didn't matter to me anything.

Q. So from the time you got to the court house steps and took a glance you never looked— A. Until the second time when I saw the other man had a piece of paper in his hand.

Q. When was that? A. A few minutes after that. Maybe five, six or seven minutes, I guess.

Q. Nobody knows? A. That is right.

Q. Then five, six or seven minutes after that you turned and glanced again, did you? A. Right.

Q. Then you saw a piece of paper? A. Right.

Q. Newspaper? A. It was a small piece of paper, I don't know what it was.

Q. It might have been a lawyer's file, might it not?

Mr. Shershin: It is not what it might have been, he has testified what it was.

The Court: I will sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Well then, you took a second glance, didn't you? A. Yes.

Q. Then you turned back again? A. Right.

Q. And never looked again, did you? A. No, sir.

Q. How did you go home? Through the court house again or out the front? A. I went straight down the court house steps and then went home.

Q. You were going home with Mr. Finn, weren't you? A. Who said that?

Q. I say so. A. How do you know? Were you there?

Q. I am asking you. A. You says I was going home with Mr. Finn.

Q. Weren't you? A. I was not.

Q. Didn't Mr. Finn offer to take you home in his automobile? A. Right.

Q. Then you were going home with him, weren't you? A. No. I answered that.

Q. No, you answered my question.

Mr. Stafford: May I ask the Court to instruct the Prosecutor to sit down?

Mr. Shershin: I think I have a right to stand if I want to.

The Court: Now, what is the question?

Q. Mr. Corsetta, you had been invited to go home with Mr. Finn, isn't that true? A. Right.

Q. In his automobile? A. Right.

Q. You lived on Mill Street? A. Right.

Q. He lived on Sheridan Avenue? A. I don't know where he lived.

Q. You walked out there to get in his car? A. I didn't get in any car.

Q. You walked out in front of the building having accepted Mr. Finn's invitation to take you home? A. Who said I accepted?

Q. Did you? A. I did not.

Q. Did Mr. Finn invite you to go home to your home in his car? A. I didn't say anything about that yet.

Q. I am asking you now? A. How do you know if he invited me or asked me?

Q. I don't know. I am asking you if he invited you. Did he? A. He asked me if I wanted to go home.

Q. In his automobile? A. Right.

Q. And you walked out the front entrance to go home with Mr. Finn, didn't you? A. Right.

Q. Why didn't you go home? A. I only live a few blocks away from here, I would rather walk.

Q. You would rather walk home? A. Right.

Q. Did you tell Mr. Finn that? A. I sure did.

Q. Mr. Finn didn't go down the front steps with you? A. I don't know which way he went.

I know he was going for his automobile which he said was in back of the court house.

Q. Did he tell you his car was in back of the court house? A. He says that.

Q. You and he walked out the front entrance didn't you? A. Right.

Q. Have you ever been convicted of a crime? A. No, sir.

Q. In this State or any other state? A. No, sir.

Q. Have you ever pleaded non vult to an indictment charging you with a crime?

Mr. Shershin: He has answered the question. Apparently he has not been convicted. If he pleaded non vult it wouldn't be a conviction.

The Court: He may answer.

Mr. Stafford: Have you?

A. No, sir.

Q. Are you sure? Why do you hesitate? A. I don't know what you mean.

Q. Don't you know what non vult means? A plea of non vult? A. I am sorry, I do not.

Q. How old are you? A. Twenty-one—twenty-two.

Q. Did you ever go to school? A. I sure did.

Redirect-examination by Mr. Shershin:

Q. What school did you go to? A. School twenty-three and High School.

Q. Did you graduate from high school? A. I sure did.

Q. Are you going to college now? A. No.

Mr. Stafford: I object to it as immaterial.

The Court: Objection sustained.

Q. Are you going to school now? A. No.

Mr. Shershin: It is material to this extent—as to the credibility of the witness.

The Court: He answered it, didn't he?

JOHN HICKLING, a witness produced on behalf of the State, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Shershin:

Q. Where do you live at the present time? A. Saint Joseph's Hospital.

Q. You are at Saint Joseph's Hospital? Just talk as loud as you can, Mr. Hickling? A. Yes, sir.

Q. Do you recall Friday, May twelfth, 1933? A. Yes, sir.

Q. I can't hear you? A. Yes, sir.

Q. Before that—you have pleaded non-vult, haven't you? A. Yes.

Q. I can't hear you.

A Juror: Talk louder, we can't hear you.

Q. You pleaded non vult to a conspiracy with Irving Simon and others, didn't you? A. Yes, sir.

Q. Do you recall Friday, May twelfth, 1933? A. Yes, sir.

Q. I don't know whether they can hear you? A. Yes, sir.

Q. Can you talk a little louder? A. Yes, sir.

Q. On that day what were you doing? A. I

was serving as a juror in a case in Judge Mackey's court.

The Court: You will have to, if it is possible talk louder for the jury to hear you. If not, you will have to get nearer or closer to the jury. Why not have the stenographer repeat the questions and answers.

Mr. Shershin: If that is acceptable to Mr. Stafford, I am willing.

Mr. Stafford: I want the right of cross-examination, he will have to speak to me.

The Court: We are not going to interfere with that right. Absolutely not. See if you can make yourself heard by the jury. Talk as loud as possible. Now the stenographer will repeat the last question and answer.

(Question and answer as repeated by reporter.)

"Q. On that day what were you doing? A. I was serving as a juror in Judge Mackey's court."

Q. Do you recall the jury coming in after deliberating, Mr. Hickling? A. Yes, sir.

Q. At what time was that? Do you recall, Mr. Hickling? A. Six o'clock.

Q. Do you recall leaving the court room? A. Yes, sir.

Q. How did you leave the court room and with whom did you leave the court room? A. I came out with a group of jurors.

Mr. Shershin: I think the stenographer ought to repeat that question and answer.

The Court: The stenographer will repeat it.

(Question and answer as repeated by reporter.)

"Q. How did you leave the court room and with whom did you leave the court room? A. I came out with a group of jurors."

Q. Who was in that group of jurors you came out with, Mr. Hickling? A. La Conti.

Q. And do you know Irving Simon? A. I know him since—I know him since serving on the jury that is all. I didn't know him previous to that.

Q. Do you know Thomas Serlinsky, the defendant? A. No, sir.

Q. Did you see him that afternoon after you came out? A. No, sir.

Q. Do you remember going through the door in Judge Mackey's court room? A. Yes, sir.

Q. What is the answer? A. Yes, sir.

Q. And as you left the door in Judge Mackey's court room with La Conti, where did you go? A. I went downstairs.

Q. Downstairs? A. Yes, sir.

Q. Who was with you besides La Conti, if anybody? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. When you got downstairs what did you do? A. I went down to the sidewalk level.

Q. Where is that? A. In front of the court house.

Q. Who was with you at the time? A. I was alone.

Q. Thereafter did you see Mr. La Conti? A. Yes, sir.

Q. How soon afterwards did you see Mr. La Conti? A. Quite a few minutes.

Q. Well, as you left the first floor and got to the sidewalk level, was Mr. La Conti with you at the time? A. Not going down the steps.

Q. Did you see where he was at that time? A. He was behind me. To the left and behind me.

Q. When you got down to the sidewalk level what did you do? A. I waited.

Q. For whom? A. La Conti.

Q. Did he come? A. Yes, sir.

Q. Was he alone or with somebody when he came? A. He was with someone.

Q. Who was he with? A. Irving Simon.

Q. Which Simon? A. Irving Simon.

Q. Was there anyone else beside La Conti and Irving together or not? A. Not that I remember.

Q. Not that you remember? A. No, sir.

Q. What did the two of them do as they left or came towards you? A. I was introduced to Irving Simon by La Conti.

Q. Then what happened? A. After a minute or two, we walked down the street to the left.

Q. Before you were introduced what happened? Before you left to go down the street what happened? A. Just the introduction, that is all.

Q. Where did you first see—between the court house door and the steps, when you were standing at the sidewalk—in between that distance where was the first time you saw La Conti and Simon? A. On the top of the steps.

Q. Which steps are those? A. On the outside of the court house.

Q. How far away from you? A. I was just on the bottom step so it is just the length of the steps.

Q. Were you walking or standing at the time? A. I was standing for a minute or two at that time.

Q. What was that? A. Standing.

Q. Before that was your back to them? A. Yes, sir.

Q. How long did you remain standing there before you saw La Conti and Hickling? A. La Conti and Simon?

Q. La Conti and Irving Simon? A. Quite a few minutes.

Q. Did you see anything in Irving's hands or not? A. He had a piece of paper.

Q. Did you see him do anything with this piece of paper or not? A. Just looking at it. That is all.

Mr. Stafford: What's that?

The Witness: Just looking at it. That is all.

Q. How close to you were they when they had the conversation? A. Well, I was the whole length of the steps away from them.

Q. Did you hear any of the conversation? A. No, sir.

Q. Do you know how long they had been there before you saw them?

Mr. Stafford: I object to that if the Court please. That is impossible.

The Court: Yes, that is true.

Q. Then you say they both walked towards you? A. Yes, sir.

Q. Then when they walked towards you after you were introduced, was anything else said? A. I didn't have any conversation after the introduction.

Mr. Stafford: Would you mind sitting down and then maybe I can hear the witness.

Q. After the introduction did La Conti and Si-

mon stay there or what did they do? A. We walked down the street to the left.

Q. How soon after the introduction? A. Oh, a minute or two.

Cross-examination by Mr. Stafford:

Q. Have you ever been convicted of a crime, Mr. Hickling? A. I pleaded guilty.

Q. How many times? A. Once.

Q. What? A. Once.

Q. The crime of conspiracy to fix juries, wasn't it? A. Yes, sir.

Q. You pleaded guilty to it? A. Yes, sir.

Q. And you have not been sentenced yet, have you? A. No, sir.

Q. Have you been promised a light sentence by the Prosecutor if you testified in this case in behalf of the State? A. No, sir.

Q. Do you know why you have not been sentenced? A. No, sir.

Q. How long ago is it since you have pleaded guilty to this indictment? A. I don't know how long it is. I guess it was the day of the trial, I don't remember.

Q. December? A. Yes, sir.

Q. The other defendants are in State Prison, are they not?

Mr. Shershin: Counsel said certain things I said were impossible. I repeat the objection to counsel.

The Court: Objection sustained.

Mr. Stafford: I ask for an exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Are you out on bail? A. No, sir.

Q. Is that the only crime you have been convicted of? A. Yes, sir.

Q. When did you first discuss this incident of May twelfth after May twelfth, Mr. Hickling? A. I don't remember anything about it until the trial I was called as a witness in.

Q. Who called it to your attention? A. I think I was up on the stand and ask one question, that is all I remember.

Q. Do you remember what the question was? A. I think I do.

Q. What? A. If I had seen Lawyer—Serlinsky, is it?

Q. Yes. A. That is all as I know.

Q. You never testified you were introduced to Irving Simon by La Conti in your testimony, did you?

Mr. Shershin: I object. I think the proper method is to ask the specific question and then give the specific answer.

The Court: That is true.

Mr. Stafford: I will ask it.

Mr. Shershin: And there is a further objection that this witness was a rebuttal witness and was limited to a specific question.

Q. In the trial wherein you testified, Mr. Hickling—page 1336 of the record—and in the examination of Mr. Carpenter, Special Attorney General, you didn't testify that La Conti called you

over and introduced you to Irving Simon, did you?

Mr. Shershin: I object, your Honor.
The Court: Objection sustained.
Mr. Stafford: I ask for an exception.
The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. You didn't testify in that examination that La Conti and Irving Simon walked down the street to the left, did you?

Mr. Shershin: I object to it. In testifying at that time this man was a rebuttal witness only, and further that is not the proper way to ask it.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Mr. Stafford: I ask for an exception.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. How long did you stay in the court room Mr. Hickling, after the jury came out of the little jury room across the hall into the big court room? A. Only long enough to get our clothes.

Q. How long? A. Two or three minutes, something like that.

Q. Did you all walk out together? A. Practically so.

Q. Did you see Mr. Finn walk out with them? A. I don't remember.

Q. Did you see Mr. Corsetta walk out with them? A. I don't remember.

Q. Do you remember anybody walking out with you? A. Yes, I went out with La Conti.

Q. La Conti? A. Yes, sir.

Q. Was anybody with you? A. Oh, no.

Q. None of the jurors? A. There was jurors there in back of us.

Q. La Conti was your pal, your friend? A. No. He was with me.

Q. He was your pal and your friend, wasn't he? A. I didn't say so.

Q. Well, I am asking you. Wasn't he? A. I said no.

Q. What is that? A. He was with me. That was all.

Q. Wasn't he your pal—, your friend? A. Well—, a friend.

Q. A co-conspirator, wasn't he?

Mr. Shershin: One moment, counsel is limited as I understand the law as to whether he was convicted of a crime.

The Court: What is the State's position?

Mr. Shershin: I object.

The Court: Objection sustained.

Q. You have discussed this case with La Conti, haven't you? A. No, sir.

Q. Didn't you ever discuss this case with anybody before you testified? A. I have only just come out. I haven't been with anyone.

Q. I beg your pardon? A. I haven't been with anyone.

Q. Have you talked this case over with anyone since May twelfth? A. I was asked to come out here as a witness.

Q. Did you tell anybody what you knew about it? A. I wasn't asked.

Q. You didn't did you? A. I didn't.

Q. Until the moment you got on the stand you never told a soul? A. I don't talk with everybody.

Q. I am asking you if you did? Did you or did you not? A. No, sir.

Q. So the testimony you are giving the jury is the first time you have considered it since May twelfth? A. That is right.

Q. You never talked with the Prosecutor about it? A. No, sir.

Q. Well, when you came out of the little jury room into the large courtroom, you saw some lawyers there? A. Yes. One or two lawyers there.

Q. Did you see Mr. Cooper there? A. Yes, sir.

Q Did you see Mr Simon there? A. Yes, sir.

Q. Did you see Mr. Serlinsky there? A. Yes, sir.

Q. Do you know Mr. Serlinsky? A. I didn't know him at that time.

Q. Did you see that man there? A. I did not.

Q. Didn't you see him in the crowd when the jurors were brought out into the court room? A. No, sir.

Q. Do you remember Mr. Shulman, a fellow juror walking out with you? A. I remember him being there.

Q. Did he walk out with you? A. Not eactly with me.

Q. In front of you or in back of you? A. That I can't say.

Q. How many jurors walked out in front of you down the hall? A. That I can't say.

Q. You and La Conti walked out of the court room together? A. Yes, sir.

Q. Where was Simon then? A. In the court room at that time.

Q. You left him behind you? A. Yes, in the court room.

Q. With some other men? A. I think he was talking.

Q. Talking with whom? A. I think he was talking with a lawyer.

Q. What lawyer? A. Mr. Cooper I think.

Q. You and La Conti walked right out of the building? A. No, out of the court room.

Q. Where did you and La Conti go after you left the court room? A. I went downstairs.

Q. Where did La Conti go? A. He stayed on the floor.

Q. He stayed upstairs? A. Yes, sir.

Q. When you went downstairs did you go out of the building? A. Yes, sir.

Q. Did you go directly home? A. No, sir.

Q. Where did you go? A. I stood at the bottom of the steps.

Q. How long? A. Quite a few minutes.

Q. Waiting for somebody? A. Yes, sir.

Q. For whom? A. La Conti.

Q What for? A. To take me home.

Q. For your fifty dollars?

Mr. Shershin: I object to that.

The Court: Objection sustained.

Mr. Shershin: He admits he committed an error before.

Mr. Stafford: I ask for an exception.

The Court: It is noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Why were you waiting for La Conti?

Mr. Shershin: I object as to why. The fact is he was waiting.

The Court: Objection sustained.

Mr. Stafford: I ask for an exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. What was your reason for waiting for La Conti?

Mr. Shershin: I object to it.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Mr. Stafford: I ask for an exception.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. How long did you wait for La Conti? A. Quite a few minutes.

Q. How long? A. Ten or fifteen minutes.

Q. Ten or fifteen minutes you waited outside of the building alone and he never put in an appearance did he? A. He was on the top of the steps the last I saw of him.

Q. The last you saw of him? A. Yes, at that time.

Q. How long did he stay on the top of the steps? A. I don't know exactly how long. I am talking about being alone.

Q. You were down at the bottom of the steps? A. Yes, sir.

Q. And the last time you saw La Conti was at the top of the steps? A. Yes, sir.

Q. Is that the truth? A. Yes, sir.

Q. Was he alone? A. No, sir.

Q. With whom? A. Irving Simon.

Q. Right near the door of the entrance? A. Yes, sir.

Q. How long was he there? A. About five or ten minutes maybe.

Q. When you left you left alone? A. I was leaving alone.

Q. When you left, you left them at the top of the steps? A. No, sir, I walked down to the bottom of the steps alone from the court room.

Q. I say, Mr. Hickling, when you saw La Conti and Irving Simon they were up at the top of the steps talking? A. Yes, sir.

Q. And they talked there for ten minutes? A. Yes, sir.

Q. Then you left—. You were down by the street. You were by the sidewalk? A. Yes, sir.

Q. Then you left and went home? A. No, I waited there.

Q. After they talked at the top of the steps for ten or twelve minutes, what happened? A. They came down the steps.

Q. Who came down? A. La Conti and Irving Simon.

Q. What happened? A. La Conti introduced me to Irving Simon.

Q. Where were you standing? A. On the bottom of the steps on the sidewalk.

Q. So that immediately after they came down the steps you were introduced? A. Yes, sir.

Q. How long did you stand there at the bottom of the steps talking? A. Oh, just a minute and we walked down the street.

Q. Who walked down? A. La Conti, Simon and myself.

Q. Which way did you go?

The Court: May I interrupt at this point to suggest that we adjourn until tomorrow morning ten o'clock. The Prosecutor has asked and the Court has agreed to the Prosecutor's request that the jury be separated until this matter is disposed of, which I hope will not be later than tomorrow noon. We will now adjourn until tomorrow morning ten o'clock.

(Sidebar conference between the Court and counsel)

The Court: The Court is going to rescind its former order with reference to the jury being detained over night and is going to permit you to go home. I desire to emphasize however as strongly as it is possible for the Court to emphasize it under the circumstances. You will discuss this matter with no one, not even among yourselves until you have taken it up for final deliberation in the jury room. If anyone should attempt to discuss it with you—, or should discuss it with you, may I ask that you give me the name of the person that discussed it with you. You are now excused until tomorrow morning ten o'clock.

(At this point an adjournment was taken until Tuesday morning, March 13th, 1934, at 10:00 A. M.)

SECOND DAY.

(Trial resumed on Tuesday, March 13th, 1933, court convening at 10:00 A. M.)

(Appearances the same as heretofore.)

JOHN HICKLING, recalled to the witness stand in behalf of the State.

Cross-examination (continued) by Mr. Stafford:

Q. Mr. Hickling, do you know what it meant when you raised your right hand in this case and took an oath to tell the truth and nothing but the truth? A. Yes, sir.

Q. What did it mean? A. To speak the truth.

Q. You took an oath in the presence of The Ever Living God? A. Yes, sir.

Q. Did you know what it meant when you took an oath as a juror in the Veit versus Miller case? A. Yes, sir.

Q. What did that mean?

Mr. Shershin: I object to it being as it has no material bearing in this issue even to effect the credibility of the witness if that reason is advanced.

The Court: Where is that material?

Mr. Stafford: This witness raised his right hand and took an oath to tell the truth in this case which this jury presumes

he is going to do. If he took an oath in another case as a juror to decide the case on the evidence and he knew he wasn't going to do that when he took that oath it would effect his credibility in this case.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Mr. Stafford: I ask for an exception.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

The Court: I understand he has already testified he has been convicted or rather pleaded to a crime—

Mr. Shershin: Yes, sir.

The Court: The crime of conspiracy to embrace.

Mr. Stafford: That wasn't the point of my question, your Honor.

Q. Well, there are times, even though you take an oath when you don't follow out your oath?

Mr. Shershin: I object to it as not being material to this issue.

The Court: Objection sustained.

Mr. Stafford: I ask for an exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. There are times when you raise your right

hand to take an oath knowing when you raise your right hand you are not going to follow that oath?

Mr. Shershin: I object to it as not being proper.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Mr. Stafford: I ask for an exception.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Now, Mr. Hickling, at the close of yesterdays testimony, you testified that you were standing down at the bottom of the steps in front of the court house looking up to Mr. La Conti and Irving Simon talking. Isn't that true? A. Yes, sir.

Q. You stood down at the bottom of the steps looking up at the top of the steps how long? A. Quite a few minutes.

Q. How long? A. Quite a few minutes. I don't know just how long.

Q. You said ten or twelve minutes—

Mr. Shershin: I object. He didn't say that.

Mr. Stafford: Will you permit me to finish my question?

Q. You said ten or twelve minutes yesterday didn't you? A. I don't recall the exact time.

Q. Don't you remember what you said yesterday? A. I may have said that. I don't remem-

ber what I said about the time. I said a few minutes.

Q. You didn't say ten minutes? A. I don't recall it. I may have said ten minutes.

Q. If you said ten minutes you meant ten minutes? A. I guess so.

Q. You guess so? A. If I said ten minutes it must have been ten minutes.

Q. Did anybody pass you while you were standing—, where were you near the sidewalk? A. By the end of the wall.

Q. By the end of the wall near the sidewalk? A. Yes, sir.

Q. Did anybody come out of the court house while you were there? A. Not to go down the street.

Q. Did anybody come down the steps? A. I guess there was other people.

Q. Were they members of the panel on which you had just served? A. Yes, sir.

Q. Were they also on the top of the steps where Mr. La Conti and Irving Simon were? A. They came down to the right.

Q. Did you see members of this panel on the top of the steps where La Conti and Simon were? A. I saw them coming down the steps.

Q. Did you see them start from the top? A. I don't recall. I only noticed them coming down the steps.

Q. You were very far ahead of them? A. Yes I would be far ahead of them.

Q. And when they came down the steps were they alone or were there other persons with them? A. Well, there was just a few of them. I don't know just how many.

The Court: Can you gentlemen hear this

witness? If not, draw the Court's attention to it.

Q. Did La Conti and Simon come down with the jurors? A. No, sir.

Q. Did the jurors come down before La Conti or after La Conti and Simon? A. I think it was just after.

Q. In other words La Conti and Simon came down and the jurors after them? A. No, I think the jury were first.

Q. And La Conti and Simon followed them? A. Yes, sir.

Q. How far back of the jurors were they? A. That I can't say.

Q. About how far? A. I can't recall how far they would be.

Q. Were they practically together coming down in one group? A. Well, I don't think so.

Q. Can you tell the jury where the jurors were when La Conti and Simon finally arrived where you were? A. Well, they was on their way home.

Q. The jurors? A. Yes, sir.

Q. But they practically came down about the same time? A. About the same time.

Q. As I understand you, you were down near the southeast corner of the building near the stone wall? A. Yes, sir.

Q. Simon and La Conti came down the steps and walked over to where you were? A. Yes, sir.

Q. Were they on the right hand side of the entrance while you were there? A. I seen them on the left.

Q. Were they over on the right hand side of the steps at anytime while you were there? A. Not that I know of.

Q. While you were standing did you see Mr.

Finn and Mr. Corsetta standing at the top of the steps? A. I didn't notice them they might have been with the rest.

Q. I beg your pardon? A. They might have been with the rest of the jurors.

Q. Did you see anybody standing at the top of the steps—, two persons—, only two persons at any time while Mr. La Conti and Simon were there when you were near the southeast corner of this building? A. I don't recall.

Q. You didn't see anybody? A. Well, people came down. I don't recall just who was there.

Q. Were you looking up toward the building from the sidewalk when La Conti and Hickling came down the steps? A. I did, yes.

Q. Did you see anybody up there besides La Conti and Hickling? A. I didn't notice.

Q. What time was that Mr. Hickling? A. After six o'clock.

Q. About what time? A. Between—, I guess around six fifteen, I wouldn't be sure.

Q. Do you recall what time you left the front of the building that night? A. No, I don't, sir.

Q. Can you approximate it? A. No, I can't.

Q. Well, when Irving Simon and La Conti came down to where you were standing at the southeast corner of this court house near the sidewalk, did you stand there? A. Just a minute or two.

Q. Then where did you go? A. Down to the left towards Grand Street.

Q. Where did you go on Grand Street? A. To the car.

Q. Whose car? A. La Conti's.

Q. Then where did you go? A. Went home.

Q. Where did Simon go?

Mr. Shershin: I object. It is impossible.

How would he know where he went, the man didn't go with Simon. He said he went home with La Conti.

Mr. Stafford: That is what I am trying to find out.

Q. Where did Simon leave you on that evening? A. The corner of Grand Street.

Q. Which corner? A. Following this street down. Hamilton Street or Hamilton Avenue, I don't know.

Q. The northeast corner? A. Well, the nearest corner we walked to on the left side.

Q. The left side going down? A. Yes. The northeast I think.

Q. You and La Conti went away then? A. The car was just around the corner to the left.

Q. You mean parked on Grand Street? A. Yes, sir.

Q. You say that La Conti introduced you to Simon? A. Yes, sir.

Q. Hadn't you ever met Simon before that? A. No, sir.

Q. Are you sure about the date, Mr. Hickling? A. I think that was the twelfth.

Q. You say "you think". Are you positive about the date? A. The day was Friday at the end of that particular trial.

Q. Are you positive about the date? A. It is the end of the trial. I think it is the twelfth.

Q. The twelfth of what? A. Twelfth of May.

Q. What year? A. 1933.

Q. That was the end of your service as a juror, wasn't it? A. Yes, sir.

Q. You didn't have to report to the court any more? A. No, sir.

Q. For jury service? A. No, sir.

Q. Did you talk to Irving Simon and La Conti? A. I was just introduced to him, that is all.

Q. No conversation? A. I had no conversation with him.

Q. Did they talk while you were with them? A. They conversed while walking down the street.

Q. What did they talk about? A. I was walking on the side of them.

Q. Did you hear the conversation? A. I didn't listen to it.

Q. Are you sure it was Irving Simon whom you were introduced to, Mr. Hickling? A. Yes, sir.

Q. You had never seen him before? A. I had saw him before, yes, sir.

Q. Where? A. In the court house.

Q. How did you go home that evening, Mr. Hickling? A. In a car.

Q. Whose car? A. La Conti's.

Q. You got home about what time?

Mr. Shershin: May I object to that as being immaterial, what time he got home.

The Court: Yes. Objection sustained.

Mr. Stafford: I ask for an exception.

The Court: Exception is noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Did you testify on direct-examination yesterday that after Irving Simon had been introduced to you they walked down the street to the left? A. I don't remember but that is what happened. We all walked down to the left.

Q. Altogether or were they in front and you in the rear? A. I was at the side.

Q. You were very close to Irving Simon, weren't you? A. I don't think so.

Q. How close to him were you when you met him? A. I shook hands with him.

Q. You say he had a piece of paper in his hand? A. Yes, sir.

Q. What hand? A. I don't recall but when he shook hands he shook hands with the left hand and he had no paper in that.

Q. He shook hands with the left hand? A. Yes, sir. Right hand I meant to say. Excuse me.

Q. Which is it? A. The right hand.

Q. Did you see a piece of paper? A. He had a paper in his hand.

Q. What color? A. White.

Q. Was it folded? A. I don't know.

Q. How long was it? A. I don't know just how long.

Q. Was it almost concealed in his hand or could you see the whole, piece of paper? A. I don't recall.

Q. Was it in his fist or did he hold it open? A. No, it was in his hand.

Q. Did he do anything with the paper? A. I don't remember.

Q. Did he have anything else in his hand besides the paper? A. Not that I noticed.

Q. Did he have a pencil in his hand? A. I don't remember seeing one.

Q. If he had one you would have seen it, wouldn't you?

Mr. Shershin: I object. He answered the question.

The Court: Objection sustained.

Mr. Stafford: I ask for an exception.

The Court: Exception is noted.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. He had nothing in his hand but a piece of paper? A. As far as I can recall.

Q. Your recollection is very clear, isn't it? A. I think so.

Q. Oh, you are not sure? A. I think so.

Q. I mean you are only thinking. You are not positive your recollection is clear?

Mr. Shershin: I object to the form of the question. This witness says he thinks his recollection is clear.

The Court: Well, he may answer.

A. I said I think so.

Q. You think your recollection is sure? A. Yes, sir.

Q. I believe, Mr. Hickling, you said yesterday you have never repeated this testimony you have just given to this jury to anybody until yesterday. That is true, isn't it? A. As far as I know it is true.

Q. Didn't you repeat it on the fifteenth of May when you were arrested? A. I don't recall.

Q. You were arrested on the fifteenth of May weren't you? A. Yes, sir.

Q. In the Ash case? A. Yes, sir.

Q. Didn't you give a statement to the Prosecutor then telling him what you knew about May twelfth? A. No, sir.

Q. That was three days after it happened, wasn't it? A. It was not on the fifteenth.

A Juror: Speak louder, we can't hear you.

Q. It was on the fifteenth and this, you say, happened on the twelfth, three days prior to the fifteenth and your recollection was clear and distinct then wasn't it? A. I think so.

Q. You didn't tell the Prosecutor or the police what happened three days before?

Mr. Shershin: I object. He answered that before.

The Court: I understood he did.

Mr. Stafford: I press the question.

The Court: I shall sustain the objection and note an exception to the Court's ruling. It has already been answered.

Mr. Stafford: I ask for an exception.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. You were interrogated by the Prosecutor's attaches, including the assistant prosecutor many times from May fifteenth down to yesterday?

Mr. Shershin: I object to it as not material and not proper cross-examination.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. You were interrogated before you got on the stand yesterday?

Mr. Shershin: I object to it as not proper cross-examination.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. Do you wish to change your testimony Mr. Hickling that you didn't speak to anybody about this testimony before you got on the stand yesterday?

Mr. Shershin: Objected to as not proper cross-examination.

The Court: Objection sustained and exception to the Court's ruling is noted.

Exception allowed and signed and sealed accordingly.

President Judge.

Redirect-examination by Mr. Shershin:

Q. When you came here yesterday, where did you come from? A. The hospital, sir.

The Court: He has already testified to that.

Q. At the hospital, who is there in this room besides yourself?

Mr. Stafford: I object to that.

The Court: Where is that material?

Mr. Shershin: Except that counsel in examining this witness asked him whether or not he was out on bail; whether or not he had been sentenced and the State desires

to prove this man has been in the hospital during this entire time and that there is a police guard in the hospital with this witness.

The Court: He has already testified he was confined to the hospital.

Mr. Shershin: He hasn't testified there is a police guard there to show he is confined to the hospital and not walking the streets without bail.

The Court: Oh, he may answer.

Mr. Stafford: I ask for an exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. Are there any police guards in the hospital with you? A. Yes, sir.

Q. You are ill at the present time? A. Yes, sir.

MICHAEL LA CONTI, a witness produced on behalf of the State, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Shershin:

Q. Where do you live, Mr. La Conti? A. 387 East Twenty-first Street, Paterson.

Q. Have you been convicted of a crime?

Mr. Stafford: I object to that as not being part of the State's case.

The Court: I will allow it.

Mr. Stafford: I ask for an exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

A. I was.

Q. Convicted of what? Just tell us? A. Jury fixing.

Q. Just talk loud? A. Jury fixing.

Mr. Stafford: Jury fixing? I see.

Q. Were you convicted on any other occasion prior to that? A. About ten years ago of breaking, enterings and larceny.

Q. Now, Mr. La Conti, do you recall Friday May twelfth of last year? A. I do.

Q. On that day will you tell us what you were doing? A. I served on a case, I think it was the Erie Railroad case.

Q. Before that—, before I continue—, in this jury fixing case that you say you were convicted of—, you pleaded non vault, didn't you? A. I did.

Q. And appeared as a witness for the State? A. I did.

Q. Are you out on bail in that case?

Mr. Stafford: I object to it as being immaterial.

The Court: It is very leading.

Q. Have you been sentenced yet?

Mr. Stafford: I object to it as immaterial.

The Court: It is not material.

Q. You say you were a juror. Do you recall what case? A. I think the Demarest and Erie Railroad case.

Q. Do you recall Thomas Finn? A. I do.

Q. Was he a juror or not? A. He was.

Q. Do you recall Mr Corsetta? Was he a juror or not? A. He was.

Q. Were they sitting with you on that case? A. They was.

Q. Do you recall what time that jury came in with a verdict or not? A. About six o'clock, it was a disagreement.

Q. In this court, did you report? A. In Judge Mackey's.

Q. Do you recall leaving the court room that night? A. I do.

Q. With whom did you leave the court room? A. I think I left the court room with Hickling.

Q. John Hickling? A. John Hickling.

Q. Is that the man who was just on the stand? A. Yes, sir.

Q. Do you know Irving Simon? A. I do.

Q. Do you see Irving Simon in the court room here? A. I do.

Q. Where is Irving Simon? A. The second man on the back seat.

Mr. Shershin: For the purpose of the record, pointing to Irving Simon.

Q. Do you know Mr. Thomas Serlinsky? A. I seen him here. There.

Mr. Shershin: Pointing to the defendant for the purpose of the record.

Q. Did you know him on May twelfth last year? A. No, sir.

Q. Do you recall seeing him in the court room if you didn't know him? A. No, I don't think so.

Q. Do you recall at the time you were leaving the court room on May twelfth seeing Irving Simon? A. I do.

Q. Just tell us how this group of jurors walked out of the court room? A. I didn't walk out with any group. I just hanged around here for about five minutes and went downstairs.

Q. What were you doing these five minutes? A. I went into the toilet and came out and I didn't see Hickling there and I walked downstairs and as I opened the door I met Irving Simon.

Q. Where? A. Down right near the door on the top of the steps.

Q. In whose court? A. In front of the court.

Q. Yes. Was anyone with Irving Simon at the time? A. Nobody.

Q. What happened? A. We talked about eight or ten minutes and kept on walking downstairs until we got by—

Q. As you were walking downstairs, did you see any other persons? A. I seen nobody then.

Q. As you got to the bottom floor of this building and walking with Irving Simon, did you see anybody on the first floor? A. No.

Q. Then as you were walking through the first floor, to what exit or entrance did you go? A. The front entrance.

Q. The entrance facing on Hamilton Avenue—Place? A. Yes, sir.

Q. When you opened the door did both of you go through the door?

Mr. Stafford: I object to counsel leading the witness.

The Court: Yes.

Q. Just tell us what happened when you reach-

ed the door? A. I don't know if I opened the door or if Simon opened the door but I know both of us went out of the building.

Q. At the time you both left the building was anybody else with you? A. Nobody but me and Simon.

Q. Tell us what happened? A. We stopped there a few minutes talking and walked down the steps until we came to the sidewalk and we got by a column there and he took a jury slip out of his pocket and says to me, "Who was those six voted against me?" I says, "Me, John Hickling and another man and the three women was for a verdict and the other six was against a verdict." And so he finally got the jury slip and was checking them off and I turned around and as I did there was Finn and the other fellow on the steps watching me.

Q. Do you remember seeing John Hickling there? A. Yes, I seen John Hickling. He was down there about fifteen or twenty feet away.

Q. Had you met Irving Simon before this day? A. I had.

Q. When did you meet him next? A. April twenty-ninth and August thirty-first, 1933.

Q. April twenty-ninth was the first time you saw him? A. Yes, sir.

Q. Where did you see him that day? A. Twenty-first Street and Twenty-second Avenue at ten o'clock in the morning.

Q. With whom did you see Irving Simon?

Mr. Stafford: I object to that as immaterial.

Mr. Shershin: Excepting it goes to show at the time this testimony was given in the conspiracy case to embrace a juror that

La Conti and Irving Simon knew one another and that they were engaged in a conspiracy and that when Serlinsky testified that he didn't see La Conti and Irving Simon together on the specific date alleged in this indictment and when thereafter we have the testimony of Irving Simon that he never met La Conti until August thirtieth, or twenty-ninth or twenty-eighth of last year, it would show the motive of the testimony of Mr. Serlinsky to commit as the indictment alleges wilful, corrupt and false perjury to show that they never knew one another, therefore there was no conspiracy and therefore it would consequently show what motive Serlinsky had in taking the stand and stating that La Conti and Irving Simon had not talked together on that occasion except that he might have been in a group of jurors, and motive is a proper thing to prove on the part of the State.

Mr. Stafford: I object to it on the ground it is a collateral matter. We didn't come in here to deny there was a conspiracy. We don't question the conspiracy. We say we are not guilty of perjury.

The Court: Yes, I get the reasoning. I don't think it is necessary to go any further than to prove what you have already proven which is a contradiction of his testimony.

Mr. Shershin: Except, Sir, Corpus Juris, Wharton's Criminal Law and the cases in this State—, I don't recall the cases off hand permit the State in proving the offence of perjury to show a motive.

The Court: There is something to that. I will allow it and note an exception in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

The Court: Repeat the question.

(Question as repeated by the reporter.) "With whom did you see Irving Simon?" A. Conlon, Decker and Durgett.

Q. And thereafter was the Veit versus Miller case tried? A. It was.

Q. Were you a juror on that case? A. I was.

Q. And was a verdict returned in favor of the plaintiff? A. Yes, sir.

Q. Who was counsel for the plaintiff?

Mr. Stafford: I object to that. It doesn't matter who the lawyer was and it must be proved by the record.

The Court: Of course, the best evidence would be the record.

Mr. Shershin: Yes, I grant that. I withdraw the question then unless counsel wants to stipulate it.

Mr. Stafford: I don't know. It may have been Dr. Aaron Simon. I am not interested.

The Court: Mr. Stafford takes the position, he doesn't know.

Q. Thereafter you were a juror, as you testified on the Demarest and Terhune case? A. I was.

Q. Prior to sitting as a juror on that case did you speak with any person concerning that case? A. I did.

Q. With who? A. Willie Conlon?

Mr. Stafford: I object and ask that that be stricken out.

The Court: Strike it out.

Mr. Shershin: Except if your Honor will permit me—

The Court: I know—. We have been all over that before.

Q. The next time you saw—after May twelfth—you saw Irving Simon was in August of last year? A. August thirty-first.

Q. When you held this conversation, how long did it take? A. Which conversation.

Q. With Irving Simon in front of the court house? A. Oh, about fifteen minutes.

Q. And during this period of time did you see any persons around at the time? A. Yes, there was Finn and the other fellow that was with him and Hickling, he was down about fifteen or twenty feet away from me.

Q. Do you know how long Finn and Corsetta remained there? A. Fifteen or twenty minutes.

Q. Thereafter when your conversation with Irving Simon concluded where did you go? A. I walked down and called Hickling over and introduced him to Simon.

Q. Talk a little louder? A. I introduced Hickling to Simon and the three of us walked down Hamilton to Grand Street.

Q. Did you see Mr. Serlinsky the defendant there? A. I did not.

Q. Did you see him as you walked down the court house steps? A. I did not.

Q. Did you see him at any time after you left the court house building? A. I don't know. There was about eight or ten there and I don't know if he was there or not. I didn't see him.

Q. As you left the front door of this building did you see Serlinsky there during your conversation with Irving Simon? A. No, sir.

Cross-examination by Mr. Stafford:

Q. Have you pleaded guilty to any indictments charging you with a crime? A. Yes, I did.

Q. How many times? A. Just once.

Q. What indictment was that? A. I don't recall.

Q. You don't know what you pleaded to? A. I don't recall the indictment. There is three indictments.

Q. What did it charge you with? A. Conspiracy and embracery I think.

Q. Embracing jurors? A. Embracing jurors, yes, sir.

Q. Do you know what that means?

Mr. Shershin: I object, he said he pleaded to it. Apparently he knows what it is about.

The Court: He said he pleaded to it.

Mr. Shershin: I object to the question.

The Court: I will sustain the objection and note an exception to the Court's ruling in behalf of the defendant.

Mr. Stafford: I ask for an exception.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. You pleaded guilty to that crime and you furthermore pleaded guilty to the crime of Breaking, Entering, Larceny and Receiving? A. That is about ten years ago.

Q. That is the time I met you for the first time? A. I pleaded in front of you, yes, sir.

Q. Michael, you testified on direct-examination you were a juror in the Veit-Miller case? A. I was.

Q. And before you started to hear that testimony you took an oath, didn't you? A. I did.

Q. An oath to try that case on the evidence? A. I did.

Q. On its merits? A. Yes, sir.

Q. When you took that oath you knew you were not going to do it, didn't you?

Mr. Shershin: I object. This witness testified he took an oath and he has pleaded guilty to the indictment.

The Court: Objection sustained and an exception is noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Mr. Stafford: I am referring to the conviction.

Q. There are occasions, Michael, when you take an oath and while you are taking the oath you don't intend to live up to it? Isn't that right?

Mr. Shershin: I object, your Honor, and may I say this question is not proper as to substance and further, this witness—if

it may be permitted, realizes he committed an error and is now trying to make amends.

Mr. Stafford: I object to the statement of the Prosecutor and ask that it be stricken.

The Court: We are not interested in that. There is an objection raised and I shall sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. As a matter of fact, Mr. La Conti, raising your right hand and swearing in the presence of The Ever Living God to do things or say things doesn't carry much weight with you at times does it?

Mr. Shershin: I object, your Honor.

The Court: Objection sustained and exception is noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Did you take the oath in this case with the same sincerity as you did in the Veit versus Miller case?

Mr. Shershin: I object to the question, your Honor.

The Court: Objection sustained and an exception is noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. You testified, Mr. La Conti, in the conspiracy trial wherein you were a co-defendant in answer to the following question—

Mr. Shershin: Page please, Mr. Stafford.

Mr. Stafford: It is on page eighty-eight. Middle of the page.

Q. (continued) "Question. When did you first meet Irving Simon?" "Answer, I met him on April twenty-ninth." Question, "Where did you meet him?" Answer, "On Twenty-first Avenue and Twenty-second Street." Did you give the answers to those questions as I read? A. I did.

Q. And in that testimony you said you first met Irving Simon on April twenty-ninth?

Mr. Shershin: I object. The question has been asked in proper form and now counsel is asking him again.

The Court: Objection sustained and an exception is noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Mr. Stafford: May I ask the Court's indulgence while I look this over?

The Court: All right.

Q. Well now, Mr. La Conti, this case that you heard—Terhune versus the Erie Railroad Company—you took an oath as a juror in that case, didn't you? A. I did.

Q. And you knew when you took that oath in that case of Demarest versus the Erie Railroad Company you were not going to abide by your oath?

Mr. Shershin: I object to it upon the grounds previously stated.

The Court: Objection sustained.

Mr. Stafford: There is no conviction in that case.

The Court: Let us see what the record shows.

The Reporter: "The Court: Objection sustained."

Mr. Stafford: But the previous grounds were that there was a conviction in that case.

The Court: Now as I understand it the objection was sustained and an exception is noted to the Court's ruling in order to protect the defendant's interests.

Mr. Stafford: Thank you very much.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. And the oath you took in the Terhune case versus the Erie Railroad Company didn't carry very much weight with you either, did it Mr. La Conti?

Mr. Shershin: I object to the question.

The Court: The objection is sustained

and an exception noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Have you ever taken an oath that you considered binding in your life?

Mr. Shershin: I object, your Honor.

The Court: Objection sustained and an exception to the Court's ruling is noted in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. When you came in with the jurors in the Veit versus—or Demarest versus the Erie Railroad case—you came into the big court room, didn't you? At about what time? A. About six o'clock.

Q. Did you notice anybody in the court room when you came in? A. About six or eight around the table.

Q. Around the large counsel table? A. Yes.

Q. Did you see Mr. Reese, the court attendant? A. I don't recall.

Q. Did you see Mr. Cooper of the Railroad Company? A. Yes, I seen him there.

Q. Did you see Mr. Simon? Irving Simon? A. I seen him there.

Q. Did you see Mr. Serlinsky, the defendant in this case? A. I don't know if he was there or not

to tell the truth. He might have been there. I don't know.

Q. Mr. Shulman, the lawyer, was on that jury was he not Mr. La Conti? A. He was.

Q. That was the last case that that particular panel was supposed to hear, was it not? A. Yes, sir.

Q. The jury was discharged? A. Yes, sir.

Q. By the way. Whatever conversation you had which you related on your direct-examination —that you had with Irving Simon, related to the case of Demarest versus the Erie Railroad Company? A. Yes, sir.

Q. And not Veit versus Miller? A. No, sir.

Q. You never spoke to Irving Simon about the case of Veit versus Miller, did you? A. Not that day.

Q. At any time? A. No, sir.

Q. Did you have a hat or cap that day? A. Where?

Q. Did you have a hat or coat on that day while you were talking to Irving Simon? A. I had a hat and no coat.

Q. A hat and no coat? A. Yes.

Q. Did you leave the large jury room across the hall immediately after the court discharged the jury? A. A few minutes after.

Q. Was there any delay in going out of the jury room? A. We all went in to get our hats and coats and came out.

Q. You all went out together? A. There was quite a bunch in front of me.

Q. You continued right with the bunch? A. Until I got near the elevator.

Q. Then where did the other jurors go at that time? A. I didn't know because I went into the bathroom.

Q. You stayed there how long? A. About a minute or so.

Q. And then came out? A. Came out.

Q. And then went downstairs? A. I went down.

Q. Alone? A. With Simon.

Q. Where did you meet Simon? A. Near the stairs here.

Q. Which stairs? A. Near the elevator.

Q. Near the men's lavatory, do you mean? A. Yes, sir.

Q. Did he go into the lavatory with you? A. No, sir.

Q. You and Irving walked right down the stairs then into the corridor? A. Yes, sir.

Q. Was anybody with you as you went downstairs besides Mr. Simon? A. Me and Irving.

Q. Was anybody in back of you? A. I don't know. I didn't look in the back.

Q. Did you notice Mr. Shulman near you as you went downstairs? A. Mr. Shulman wasn't there.

Q. Beg pardon? A. He wasn't there.

Q. Well, could you see the other jurors as you went downstairs with Mr. Simon? A. There was no one in front of us as we walked down.

Q. When you reached the ground floor could you see the other jurors? A. I don't think so.

Q. As you walked towards the door were there any persons coming in or going out of that building? A. No, sir.

Q. This conversation you had where? Inside the building or outside the building? A. In the front on the outside.

Q. Outside where? A. As soon as we opened the door we stopped there.

Mr. Stafford: I will withdraw that question if the Court please.

Q. On page two hundred and five, didn't you testify at the trial wherein you were a defendant charged with conspiracy to embrace, page two hundred and five as follows: "Question. Now let me understand you, the only time you ever spoke to Irving Simon was on what date? Answer. On the twenty-ninth of April." Do you remember that question being asked of you and you giving that answer? A. Yes, sir.

Q. Was it true or false? A. It was true.

Q. I will read it again.

Mr. Shershin: He has answered. If counsel will read part of the other testimony along with that, it will explain it.

Mr. Stafford: May I ask the Court to instruct the Prosecutor not to make speeches to the jury.

Mr. Shershin: I am not making a speech.

Q. That was the only time you ever spoke to Irving Simon? A. They asked me when I spoke to him and I told them on April twenty-ninth.

Q. Then you didn't understand my question when I asked it, did you? A. I don't think so.

Q. On page two hundred and five of the testimony. You understand that this trial took place a short time ago? A. Yes, sir.

Q. Question on page two hundred and five. "Now let me understand—" this is the question propounded to you—"the only time that you ever spoke to Irving Simon was on what date? Answer. On the twenty-ninth of April." Was that true? A. Yes, sir.

Q. Was it true? A. Yes, sir.

Q. No question about that? A. No, sir.

Q. Well, why do you now tell the jury you

spoke to him on May twelfth? A. I spoke to him on May twelfth and on August thirty-first.

Q. Then why did you give that answer before then? A. It was true, I did speak to him on April twenty-ninth.

Q. When the question was asked you if that were the only time you spoke to Irving Simon on April twenty-ninth, 1933, why did you answer April twenty-ninth, 1933 as I read?

Mr. Shershin.: I object. He has answered that question.

The Court: He may answer it although he has answered it.

Q. Why did you say that was the only time you ever spoke to Irving Simon? A. I thought maybe they asked me when was the first time I talked to Irving Simon.

Q. That answer was not correct then, was it? A. I don't think so.

Q. You were under oath, weren't you? A. Yes, sir.

Q. Well now, Mr. La Conti, as you walked out the front door, you pulled the door open, I presume? A. I don't know if I pulled it or if Irving Simon pulled it.

Q. When you got outside of the door you stood right in front of the door? A. Yes, for a few minutes.

Q. What? A. Yes, we did.

Q. How long? A. About six or eight minutes.

Q. Did anybody go in or out of that door while you were there? A. I didn't see them.

Q. After standing in front of the door you walked down the steps to the level where Hickling was standing? A. No, we walked straight down the steps and a little to the right.

Q. You walked down the steps and over to the right? A. Yes, near the sidewalk.

Q. What did you do there? A. Irving Simon took the jury slip out and asked who was the other six.

Q. Yes. A. And I told him.

Q. That is on the Demarest case, not the Veit versus Miller? A. No.

Q. How long did you stand there talking? A. I figure about fifteen minutes.

Q. You stood six or eight minutes in front of the door? A. Yes.

Q. And fifteen minutes down on the steps? A. Yes, sir.

Q. About twenty-one or twenty-three minutes altogether? A. About that.

Q. Did you go down the steps from the top over to where Mr. Hickling was waiting directly to him and introduce Irving Simon to him? A. No, sir, not then.

Q. Where did you see Mr. Finn and this other man standing, as you say? A. Well, when me and Irving was talking—

Q. Where did you see them please? A. I seen them on the steps.

Q. Was that while you were talking in front of the door? A. Down near the sidewalk. By the pole, the cement pole.

Q. Was Mr. Hickling present at that time? A. No, he wasn't present.

Q. He was there? A. He was down about fifteen or twenty feet away from us.

Q. Where? A. Going towards Grand Street.

Q. Where was he? On what street? A. On Hamilton.

Q. How far down Hamilton with reference to

the entrance to the court house? A. Fifteen or twenty feet.

Q. In what direction? A. Going down.

Q. He wasn't standing at the last step near the wall was he? A. No.

Q. Did you notice how long Mr. Finn and this other gentleman remained at the top of the steps? A. About fifteen minutes.

Q. You knew they were there for fifteen minutes? A. Yes, sir.

Q. You knew they were two of the jurors who opposed your machinations in the jury room?

Mr. Shershin: I object to the word "machinations."

The Court: I shall sustain the objection and note an exception to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. You knew that the two men looking at you were observing you because your conclusions or their conclusions were opposed in the jury room?

Mr. Shershin: I object. How would this witness know why Finn and Corsetta were watching them?

The Court: I shall sustain the objection and note an exception to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. When you looked up and saw Finn and this other man, did you attempt to conceal the fact that after you had worked hard for a verdict you were then talking to one of the attorneys in the case? A. Yes, I was talking to Simon.

Q. Did you attempt to conceal that fact? A. I did. And I says to Simon, "There is two of them up there now," and he wanted to know who they were.

Q. He asked you who were the other six? A. I says, "There is two on the steps now."

Q. What other six? A. The six against the verdict.

Q. Then you knew the two men standing on the steps were against the verdict you wanted brought in? A. Yes, I did.

Q. Didn't that have an influence on you to try and conceal the fact from them you were talking to the man in the case who was interested as a lawyer?

Mr. Shershin: I object; we are not interested in reasons, we are interested in facts.

The Court: Objection sustained.

Mr. Stafford: I ask for an exception.

The Court: Exception noted.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. In other words, Mr. La Conti, you had no qualms of conscience about you talking to a man who was interested in seeing you bring in a verdict?

Mr. Shershin: I object. This witness now desires to correct it.

The Court: Objection sustained and an exception to the Court's ruling is noted in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. You didn't care who saw you talking to Irving Simon?

Mr. Shershin: I object, your Honor.

The Court: Objection sustained and an exception to the Court's ruling is noted in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. Well, in this conversation that you had Mr. La Conti, with Mr. Simon, did you say Mr. Hickling was with you in fighting for a verdict? A. He knew about it.

Mr. Stafford: I ask that that be stricken out.

The Court: Strike it out.

Mr. Shershin: Except sir, he said he did before.

The Witness: Sure, I answered that before.

The Court: Proceed.

Q. Did you speak to Irving Simon about Hickling waiting for you? A. Yes, I did.

Q. What did you say? A. I told him there was Hickling down the street.

Q. Fifteen or twenty feet past the entrance? A. Yes, sir.

Q. Now, is it a fact, Mr. La Conti, you had observed Mr. Finn and this other man up on the steps?

Mr. Shershin: He has answered that twice, I think.

The Court: I understood him to say he did.

Mr. Stafford: I press it.

The Court: An exception will be noted to the Court's ruling sustaining the Prosecutor's objection.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. How do you figure the time you stayed there? A. When we got down to the corner of Grand and Hamilton I looked at Saint John's clock and it was just about between half past six and twenty five minutes to seven.

Q. And you figured you spent between twenty-one and twenty-three minutes talking to Irving Simon? That is how you figured it? A. About that.

Q. You were engaged in a conversation with Irving Simon for twenty-one or twenty-three minutes? A. About that.

Q. Can you tell the jury what the conversation was now? A. He just wanted to know the names of every one of them.

Q. Tell the jury what the conversation was for

twenty-one or twenty-three minutes? A. He asked about the case and wanted to know why the verdict didn't come in and I told him we were fighting for a verdict and there was six on one side and six on the other and we stuck that way for four hours and neither one wouldn't move. When we got downstairs he said, "All right, give me the names," and I says, "Me, Shulman and Hickling and the three women was for a verdict," and I says, "The other six was against us." He says, "Do you know them?" I says, "No, I don't know them. Check off on the jury slip and you will find out." He took out the jury slip and I says, "What do you want them six for?" And he says, "We keep a record of them for two years and we knock them off when they come on my brother's cases."

Q. Is that the end? A. That is the end.

Q. Have you told everything? A. Yes, sir.

Q. Nothing else was said? A. No, we started walking down—

Q. That took you twenty-one to twenty-three minutes to talk about that? A. Yes, sir.

Q. Just what you have told the jury? A. Yes, sir.

Q. You have nothing to add to it, have you? A. No, sir.

Q. Now, Mr. La Conti, have you spoken to any person since May twelfth, 1933, concerning the testimony you were going to give in this case? A. I think I have if I am not mistaken.

Q. With whom? A. I think the Prosecutor.

Q. Mr. Shershin? A. Yes, sir.

Q. Do you remember when that was? A. A couple of days ago. Saturday. I think yesterday.

Q. That is the first person you have spoken to since May twelfth, 1933? A. No, I have spoken to Detective Sergeant Smith about it.

Q. When? A. Down at Headquarters on May seventeenth.

Q. That was while you were under arrest in the Ash case, was it? A. Yes, sir.

Q. You were not on the jury in the Ash case, were you? A. No, sir.

Mr. Shershin: I object whether he was or not.

The Court: He has answered it.

Q. So you interest yourself in jury cases whether you are on them or not?

Mr. Shershin: I object to it as immaterial.

The Court: Objection sustained and an exception is noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Now, Mr. La Conti, there are occasions when you tell untruths under oath, isn't that right?

Mr. Shershin: I object, your Honor sustained that objection prior to this time.

The Court: Yes, and I will do it again and an exception is noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. Mr. La Conti, on page one forty-seven of the testimony in the Simon case we referred to before, were these questions asked you and did you give these answers? Page one forty-six. Question, "Where did you work?" Answer, "B. Friedman." Question, "How long were you working for Friedman?" Answer, "About two years." Question, "What Friedman?" Answer, "B. Friedman." Question, "B. or I." Answer, "B. I says "I" but it is "B." Question, "You said "I" didn't you?"—

The Court: I dont think this witness can remember so many consecutive questions and answers. If you ask a specific question and answer I think you will do better.

Mr. Stafford: I will try and do that your Honor, I think that is true.

Q. On page one forty-seven—"Haven't you changed your evidence since yesterday because you knew you had told an untruth?" Answer, "I did say that." Was that question asked you and did you give that answer? A. I don't recall.

Q. On page one fifty-three of the testimony. Question—at the bottom of the page, question, "One moment now. Didn't you answer just as I have read to you when you were asked 'where did you meet him,' and you answered, 'over on Clark Street in the lunch wagon' ". Answer, "I did." Question, "And hasn't that been brought to your attention since, and isn't it so you testified to that fact yesterday?" Answer, "I did." Question, "One moment now. You answer my question, don't you know at the time there was no lunch wagon on Clark Street? Did you know that or not?" Answer, "Yes, I know there is no lunch wagon there I said restaurant." Were those

questions asked you and did you give those answers? A. Yes, sir.

Q. Why did you say "lunch wagon"?

Mr. Shershin: I object to it as not material.

The Court: Objection sustained and exception noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. There are times also, Mr. Conlon, when you misrepresent facts for your own benefit—

Mr. Shershin: This is La Conti.

Mr. Stafford: I mean Mr. La Conti.

Mr. Shershin: I object to the question.

The Court: I shall sustain the objection and note an exception to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. You misrepresented facts to the City of Paterson when you were asking for relief, didn't you?

Mr. Shershin: I object, your Honor.

The Court: Objection sustained and exception noted to the Court's ruling.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. You made application to the Public Service for a position in Nineteen hundred and twenty-four or twenty-five, didn't you? A. I did.

Q. You signed an application when you applied for that position, didn't you? A. I did.

Q. In your own handwriting? A. I did.

Q. And one of the questions which was on the application was as follows: "Have you ever been accused or convicted of any crime or misdemeanor?"

Mr. Shershin: I object before counsel continues. This witness has testified he has been convicted and I think this question is improper and not the way to test the credibility of this witness.

Mr. Stafford: I don't see what the conviction has to do with my question which does effect the credibility of this witness.

The Court: What is the purpose of the question?

Mr. Stafford: To effect his credibility and to show he will lie.

The Court: He may answer it.

Q. The question which you answered on that application, which was dated March 28th, 1925, question number thirteen was—"Have you ever been accused or convicted of a crime or misdemeanor?" Answer in your own handwriting, "No". A. That is true.

Q. So you lied, didn't you? A. I did.

Q. There are times that you will lie for your own benefit?

Mr. Shershin: I object to the question.

Mr. Stafford: Well, if the witness can't answer it—

The Court: Objection sustained and ex-

ception is noted to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

President Judge.

Q. You worked for Eastwood—

Mr. Shershin: May I ask the time?

Q. (Continued) In January, nineteen hundred and twenty, January seventh, 1920. Did you work for Eastwood then? A. If you got the record I must have.

Q. Benjamin Eastwood? A. Yes, I worked for Eastwood.

Q. Were you married or single?

Mr. Shershin: I object to the question.

Mr. Stafford: I want to attack his credibility.

Mr. Shershin: That is not the proper way to do it.

The Court: Oh, he may answer.

A. When?

Q. In 1920? A. No, I wasn't married then.

Q. When were you married? A. 1921.

Q. 1921? A. Yes, sir.

Q. Were you married before that? A. No, sir.

Q. That was your only marriage? A. Yes, sir.

Q. Now, Mr. La Conti, you were married in 1921? A. Yes, sir.

Q. You made application for a position at the Benjamin Eastwood Company, didn't you? A. I did.

Q. On November 9th, 1916? A. I did.

Q. You were not married? A. No.

Q. But when you wrote that application you wrote down you were married, didn't you? A. No, I did not.

Q. Well, I will show you a document and ask you if that is the time you made your application?

Mr. Shershin: I object at this time unless they show a variance in this testimony. Counsel asked a question on a collateral matter and he is bound by the testimony of this witness.

Mr. Stafford: Oh, I am bound by it.

A. I never said I was married.

Mr. Shershin: The State presses its objection, your Honor.

The Court: I shall sustain the objection and note an exception to the Court's ruling.

Exception allowed and signed and sealed accordingly.

President Judge.

Mr. Stafford: I didn't hear the State's reason. Was it because it is collateral.

The Court: Yes.

Mr. Shershin: Collateral as to credibility, your Honor.

Q. You were in the Riviera Hotel on August twenty-ninth, were you not, Mr. La Conti? A. On August thirty-first, on Thursday night.

Q. Didn't you at that time—did you have a conference with somebody? A. I did.

Q. With whom? A. Irving Simon.

Q. Who else? A. My sister, Mr. Schillaci and his lady friend.

Q. Didn't you at that time say you had never met Irving Simon until you met him on August twenty-ninth, 1933? A. I did not.

Q. Beg pardon? A. I did not.

Mr. Stafford: That's all.

Redirect-examination by Mr. Shershin:

Q. Mr. La Conti, do you recall that in the case of the State against Aaron L. Simon when you were being cross-examined by Mr. Ward at page two hundred and six of the testimony, Mr. Stafford—about seven questions after Mr. Stafford—the question which he repeated to you, this question and answer. Question, "Now the only time then that you ever spoke to Irving Simon was on the twenty-ninth of April?" Answer, "I spoke to him on the twenty-ninth and I spoke to him on May the twelfth." A. Yes, sir.

Q. And on a previous question, "Now let me understand, the only time you ever spoke to Irving Simon was on what day?" Answer, "On the twenty-ninth day of April." You thought that question was what?

Mr. Stafford: I object to that if the Court please.

The Court: Objection sustained.

Q. Then in answer to one of Mr. Simon's—Mr. Stafford's questions you stated that you had not spoken at any time with Irving Simon about the Veit-Miller case. Will you tell us with whom you did speak?

Mr. Stafford: I object to that as immaterial in this issue.

The Court: Where is that material?

Mr. Shershin: In the indictment which is Exhibit S-1 in this case against Aaron L. Simon, Irving Simon, Willie Conlon, Decker and Durgett as conspirators and which La Conti was on that jury, counsel on cross-examination asked if he spoke with anyone about that case—Veit versus Miller and the witness testified he spoke to Irving Simon on April twenty-ninth. The basis of the perjury in this case is upon the Veit versus Miller case in which Irving Simon is one of the conspirators proving that on that day alleged in the indictment of Veit versus Miller, La Conti and Irving Simon together with other conspirators had conspired so therefore any testimony to show he spoke to someone about Veit versus Miller would be material to prove Serlinsky's testimony was wilful and corrupt to show that Irving Simon had not spoken to La Conti on the day alleged in this indictment.

Mr. Stafford: I object. This is not a conspiracy case where the State has broad and liberal powers. This is a specific offense.

Q. In that Riviera Hotel who asked you to go down there?

Mr. Stafford: I object to it as being immaterial.

The Court: Where is that material?

Mr. Shershin: Counsel asked this witness didn't he speak to Irving Simon in the Riviera Hotel and asked him who was there, asked him did he have a conversation, if I recall correctly, and then asked the specific question about what was said. If counsel

had not asked the specific question under the law of evidence I would have been precluded from going into what occurred at the Riviera Hotel but in his final question which he asked to lay a foundation he opened the door and therefore I am entitled to show the conversation which may or may not have led up to that question.

The Court: Your question is not what was asked.

Q. Tell us the conversation in the Riviera Hotel?

Mr. Stafford: I object to the form of the question. My question was directed to the fact as to whether or not the witness had told Irving Simon he had not met him prior to that date, August twenty-ninth.

Mr. Shershin: I withdraw the question.

Q. Tell us all of the conversation you had in the Riviera Hotel—

Mr. Stafford: I object to it as improper. It is not proper redirect.

Mr. Shershin: Will you allow me to finish first, Mr. Stafford?

Q. Will you tell me the entire conversation that you had in the Hotel Riviera concerning whether or not, or what times you had met Irving Simon prior to that day?

Mr. Stafford: I object—well, if it can help the jury let it go in but we are not trying a conspiracy case.

The Court: Is there an objection?

Mr. Stafford: No, let it go in.

A. Irving Simon asked me if I had a lawyer and I says, "No."—

Mr. Stafford: How is that material in this case?

The Court: I can't see it. We are only encumbering the record.

Mr. Shershin: I don't know what is in the witness' mind. It may lead up to this.

The Court: We only want testimony material to this issue.

Mr. Shershin: Repeat that question?

(Question as repeated by reporter.) "Will you tell me the entire conversation that you had in the Hotel Riviera concerning whether or not or what times you had met Irving Simon prior to that day?" A. I met him May twelfth and April twenty-ninth.

Q. Tell us the conversation that Irving Simon had with you or anybody in the presence of Irving Simon concerning the times he had met you or you had met Irving Simon in that hotel? A. In that hotel?

Q. Yes, just about that? A. Do you want the whole conversation?

Q. Just as to what I asked? A. Read it off to me again.

Mr. Shershin: Repeat the question.

(Question as repeated by reporter) "Will you tell me the entire conversation that you had in the Hotel Riviera concerning whether or not, or what times you had met Irving Simon prior to that day?" A. I don't know how to answer that.

Q. Well. Who, in this conversation at the Riviera Hotel first brought up the subject of when

you had first met Irving Simon, do you recall? A. Irving Simon himself.

Q. When he said that what was his conversation relative to that or what did he say? A. Well, he asked me about getting a lawyer and I told him I didn't have the money to pay for a lawyer—

Mr. Stafford: I object.

The Court: I don't see where that is material.

Mr. Shershin: I consent to that being stricken out.

Q. Just what he said to you about your meeting him, when you met him prior to August thirtieth and how he commenced the conversation? A. That is the way we started—about me getting a lawyer.

Mr. Shershin: May I then say he says that is the starting point.

The Court: Our difficulty is we are going off on a tangent.

Mr. Shershin: A tangent which the State didn't desire but one which it has to pursue because of the cross-examination.

The Court: See if you can't reframe your question and direct the witness' attention to the particular point.

Q. Tell us what Irving Simon said to you about when and on what dates he had met you prior to the occasion you were in the Riviera Hotel? A. He asked me if anyone asked me about seeing him on April twenty-ninth and May twelfth and I said I made a statement about it down at Police Headquarters.

Q. What did he say? A. He says, "You don't have to worry about that, I will get you a good

lawyer and when you take the stand and when they go to ask you them questions your lawyer will object—

Mr. Stafford: I object—

The Court: The conversation was with reference to dates. The stenographer will repeat it.

(Answer as repeated by reporter.) A. He says, "You don't have to worry about that, I will get you a good lawyer and when you take the stand and when they go to ask you them questions your lawyer will object."

The Court: That was with reference to this particular date.

Mr. Stafford: But now the conversation is going off into something else.

Mr. Shershin: Oh, no. I think the witness, if I may be permitted to say so was referring to these two dates.

Q. Will you continue, Mr. La Conti?

Mr. Stafford: I object to any further conversation on the further ground, your Honor, how can anything said there be binding on a defendant in this perjury case?

Mr. Shershin: If counsel insists, that is all.

JAMES SMITH, a witness produced on behalf of the State, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Shershin:

Q. You are connected with the Paterson Police Department? A. I am.

Q. In what capacity? A. Detective Sergeant.

Q. You have been a policeman and detective for how long a period of time? A. Twenty-one years.

Q. Do you recall the date that Mr. Serlinsky the defendant testified in this case in this court? A. I do.

Q. You know Mr. Serlinsky, the defendant? A. Yes, sir.

Q. What date was that, if you recall? A. May twentieth.

Q. Which trial was that? A. Pardon me. That was the last trial we had here.

Q. Of last year? A. No, this year.

Q. Did you see—prior to Mr. Serlinsky taking the stand, did you see him in this court room? A. I did.

Q. Where did you see him at the time you saw him? A. He was over on the extreme right of the court room talking to Irving Simon if I recall right.

Mr. Stafford: I object to that. What part has that got in this issue? Is that part of the State's case? I think it is entirely irrelevant and immaterial.

Mr. Shershin: He was talking to a defendant as this witness says. Mr. Serlinsky prior to Serlinsky taking the stand—talking for how long I don't know because I haven't asked the question—before he came on the stand talking to Irving Simon who was a defendant with his brother and others and held a conversation for how long a period of time I don't know. It is some evidence for the jury and it is for them to say whether or not it is anything to be inferred from that conversation held

just prior to a witness taking the stand for the witness and a defendant to be talking together. I think it is evidential as bearing upon the defendant's testimony as given to the jury and further upon motive.

The Court: I will allow it and note an exception to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Q. For how long a period of time did they talk together? A. About ten or fifteen minutes.

Q. Thereafter did Mr. Serlinsky take the stand?

Mr. Stafford: I object to the question as leading.

Mr. Shershin: I withdraw it.

Q. Thereafter what did Mr. Serlinsky do? A. He had taken the stand in rebuttal.

Q. You didn't hear the conversation? A. No, I did not.

Cross-examination by Mr. Stafford:

Q. That was on May twentieth? A. No, the last trial in which the defendant testified. I would have to look at my notes to get the proper date.

Q. This year? A. Yes, sir.

Q. Was that this year? A. I mean the case in which the gentleman testified in rebuttal.

Redirect-examination by Mr. Shershin:

Q. You mean when Mr. Serlinsky testified? A. Yes, sir.

Mr. Shershin: That is all. The State rests, your Honor.

Mr. Stafford: May I now request the Court to direct the prosecution to open up to the jury and state the facts upon which the prosecution expects the jury to bring in a verdict of guilty in this matter—in this case, particularly with reference to the question of facts which were material to the issue upon which this indictment is found.

The Court: The State has no objection to that I take it.

Mr. Stafford: It contains a double allegation and I think the defendant is entitled to it.

Mr. Shershin: It is a matter of pleading.

The Court: What is the position of the State with reference to the request of counsel for the defendant?

Mr. Shershin: The State has rested therefore the State remains silent upon the subject.

The Court: In other words the State's position in the matter, may I add or say is "*sub silencio*"

Mr. Stafford: Whatever that is.

The Court: I will sustain the position of the State and note an exception to the Court's ruling in behalf of the defendant.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Motion for Direction of a Verdict.

Mr. Stafford: May I now make a motion for a direction of a verdict. I don't know whether the Court wants it in the presence of the jury or in its absence.

The Court: The jury may retire to the jury room.

(The jury then retired to the jury room)

Mr. Stafford: May it please the Court, I move you, Sir, for a direction of not guilty in favor of this defendant.

Prior to the drawing of a special panel in this case the defendant, through his attorney, filed a demand for a Bill of Particulars upon the Deputy Attorney General with regard to the indictment referred to in the indictment charging this defendant with perjury. The questions referred particularly to the indictment for conspiracy mentioned in the instant indictment on line sixteen on the first page and also mentioned as an indictment for conspiracy on line nine of the second page. The State answered setting forth that the indictment referred to was indictment No. 454 of the September Term, 1933 and filed in November, 1933 with the County Clerk. This is the indictment and Court Record which I have in my hand.

The instant indictment, your Honor charges this defendant with the crime of perjury. It sets up that on or about the twentieth day of December there was a trial before your Honor wherein Aaron L. Simon and others were defendants under an indictment charging them with conspiracy. It further sets up that the defendant Thomas Serlinsky testified in this issue to certain facts concerning whether or not Irving Simon met La Conti on the front steps of the Court House and

walked out with him. The indictment says on page two, "whether the said Irving Simon as aforesaid, on the twelfth day of May, 1933, at six o'clock in the evening had left the court house in the City of Paterson aforesaid, in the company of and with the said Thomas Serlinsky. That particular part of the material allegation, your Honor, in my mind is abandoned entirely by the pleader because the pleadings must be strictly construed against the pleader and because on page three the State says in its pleadings, "Whereas in truth and in fact, the said Irving Simon and Thomas Serlinsky upon leaving the court house in the City of Paterson aforesaid, on the twelfth day of May, 1933, at six o'clock P. M. did recall and well knew * * *", and so forth. In other words while alleging it was material whether he had or had not—the State then assumes the position that Irving Simon and Thomas Serlinsky did leave the court house in the City of Paterson in their own pleadings. "Whereas in truth and in fact, the said Irving Simon and Thomas Serlinsky upon leaving the Court House"—in other words in their charging part they say they did actually leave.

And the second allegation of materiality is, "and whether he the said Irving Simon had in front of the said court house aforesaid spoken to one Michael La Conti then and there a petit juror and one of the defendants aforesaid, and then and there on the trial hearing and judicial criminal proceeding and indictment for conspiracy as aforesaid * * *."

Now, your Honor, the indictment No. 454, upon which this perjury indictment is based is an indictment for conspiracy which charges overt acts

commencing on the eighth day of May. It charges overt acts on the ninth and tenth of May and it charges as overt acts the division of the money and the payment of fifty dollars to La Conti and Hickling on the tenth day of May. I submit to the Court that the conspiracy—the alleged conspiracy terminated and ended on the tenth day of May.

I don't recall the case, your Honor probably will, but it was a case of conspiracy where the very question was raised before the Court of Errors as to just when the conspiracy ended and said it was not until the money had been distributed—

The Court: State versus Doherty.

Mr. Stafford: When the money was distributed among these men that was the last overt act and that terminated the conspiracy. I say, under the pleadings of the State in Indictment No. 454, under all the overt acts alleged, that that conspiracy terminated and ended on the tenth day of May when the money was divided.

The facts in this case on which the State expects the jury to bring in a verdict of guilty are these: They say that on May twelfth, two days after the termination of the alleged conspiracy set out in Indictment No. 454, that Irving Simon talked to La Conti; that they were co-defendants under indictment No. 454 and that Irving Simon had a paper in his hand; that Finn and Corsetta and Hickling saw them there. You will remember, if the Court please, the statement made by the Prosecutor that the conversation there was about the Demarest and Terhune versus Erie Railroad Company which was the case then being finished and which was finished on May twelfth

concerning which case the Court as a matter of judicial knowledge will take note that there is an indictment pending against the co-conspirators for that very case.

The State charges Serlinsky that he testified falsely, wilfully and corruptly and maliciously when he said; first—I have divided this up your Honor, they are probably the same thoughts but the pleader divided it by semi-colons to emphasize it I presume and I have done the same thing. In other words the State charges that these things were false, that the defendant knew they were false and therefore he should be convicted of perjury: that on the twelfth day of May, 1933 he was in the courtroom, meaning the court room in the Passaic County Court House, Paterson, New Jersey; with Mr. Irving Simon and Mr. Ralph Cooper who represented the Erie Railroad Company. What witness has the State produced to prove he wasn't in the court room? They say he wasn't there but that is not proving he wasn't there. None of them, Mr. Cooper, Mr. Finn, Mr. Corsetta, Mr. Hickling or Mr. La Conti, don't deny it. La Conti said he might have been here but I didn't see him.

Two: "that he the said Thomas Serlinsky was in the said court room when the jury came out with a disagreement." There is no proof he was not. Nobody takes the stand to deny it. They say he might have been in the court room. We don't know. We didn't see him. They say that is one of the false and corrupt things he testified to.

Three, "that it was six o'clock meaning P. M."

Four, "that he the said Thomas Serlinsky, was

present when they (the jury) was discharged by Mr. Lippman." There is no proof in the case that I can see that he wasn't here. No witness testified he wasn't here and that is part of the State's case, as part of their burden they have got to present at least a prima facia case to go to the jury. If their witnesses say they didn't see him, if there is a choice between guilt or innocence the Court must naturally lean towards innocence unless a prima facia case is established.

Five, "that he the said Thomas Serlinsky went out of the court room with Irving Simon."

Six, "that he the said Thomas Serlinsky did not recall whether some of the jurors were standing around there in a crowd."

Seven, "that he, the said Thomas Serlinsky left Judge Mackey's court and walked out of court with Irving Simon and Mr. Cooper and walked down the steps."

Eight, "that he could not recall where Mr. Cooper left them, the said Thomas Serlinsky and Irving Simon."

Nine, "that he the said Thomas Serlinsky and Irving Simon walked down the steps to the first floor, as he the said Thomas Serlinsky recalled in a general manner discussing the case and there was a question asked by one of the jurors, who said something."

Ten, "that he, the said Thomas Serlinsky left a group of the jurors and that he, the said Thomas Serlinsky and Irving Simon went out the front way, aurned to the left on Hamilton Avenue, and"

Twelve, "went to the car of the said Thomas Serlinsky which was parked on Grand Street."

And thirteen, "at no time did Irving Simon talk to any one of the jurors aside from this general conversation."

Those are the allegations charging this defendant with perjury.

I would like to raise the point first with regard to the materiality of the evidence which the State contends was material to the issue which was on trial at the time Serlinsky testified as a witness. That question is not for the jury under Berdan vs. the State in 48 Law.

The Court: That is for the Court.

Mr. Stafford: That is conceded is it, your Honor.

The Court: Oh, yes, that is conceded.

Mr. Stafford: With regard to the materiality of the evidence I would like to quote Wharton's Criminal Law—Criminal Evidence, Volume one, Tenth Edition, page 1001. Wharton holds with regard to this particular question—and I presume it is conceded upon this argument that Mr. Carpenter did not bring out on any of his direct-examination any of this evidence. Because if that is not conceded then I will have to ask that the rest of the state of the case, the whole record to go in because my notes made in going over the state of the case very thoroughly shows that not only once, but twice, the Court who was presiding—none other than your Honor, specifically asked Mr. Carpenter was this matter gone into on direct-examination, on page 1200 of the testimony and page 1338. Wharton holds that, "when a witness is cross-examined on any irrelevant mat-

ter or on any matters collateral to the issue, his answers are conclusive and he cannot be subsequently contradicted on those matters by the party seeking to impeach him. The test of whether or not a fact inquired of in cross-examination is collateral is this: would the cross-examining party—" that is Mr. Carpenter— "be entitled to prove it as part of his case tending to establish his plea,"—tending to establish the plea of the indictment No. 454. I say it would not be relevant. It would not be admissible. It is incompetent and it is collateral because if the conspiracy was terminated two days before, no further overt act being charged in the indictment against Irving Simon then whatever took place subsequent to that—two days after with reference to another conspiracy, Demarest versus the Erie Railroad Company, the record of which are part of the Court Records—and the testimony of La Conti on the stand where he said the conversation he had with Irving Simon on that day referred to how the jury stood in the Demarest versus Erie Railroad case, and he said "six to six." How could that be material to the issue being tried under No. 454?

Now, your Honor, as a general proposition that cross-examination of Irving Simon concerning the conversation with Michael La Conti on the steps of the court house on May twelfth, 1933 was improper and wholly collateral to the issues of that indictment, No. 454, and the State having made Irving Simon its own witness to bring out new matters—collateral matters, irrelevant matters—it was bound by those answers. A careful reading of the direct testimony makes it manifest these questions were not proper cross-examination but

were wholly collateral to the issue. An attempt to elicit from him something not evidential. It was clearly incompetent as evidence against the defendant concerning the matter set forth in the indictment upon which he was being tried. But even on cross-examination—but even if the cross-examination of Irving Simon was improper, nevertheless if the prosecution had not pursued the matter any further no mischief would have resulted, but the State in calling La Conti and Finn to rebut the answers constituted reversible error since it was irrelevant and collateral to the issue then being tried.

The law is firmly settled that where a party has the right for, the purpose of impairing the credit of a witness as to collateral matters, to ask questions as to those collateral matters, but having asked and obtained answers he must abide by the answers given and other witnesses cannot be called to prove such answers untrue. That is laid down in State versus Mor, 85 Law, and Materka versus Erie Railroad Company in 88 Law. "It is a well settled rule that a witness cannot be cross-examined as to any fact which is collateral or irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony. And if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question but it is conclusive against him."

In the State versus Ruttberg, I think some woman was involved in it and the defendant on cross-examination—the State was allowed over objection to ask the defendant with regard to some of his actions with that woman. The Court said, "It is further contended the court improperly

permitted the State to cross-examine the defendant over objection, with regard to alleged illicit relations between himself and one Mary V. And he having denied them, to call Mary V. as a witness and allow her to contradict him. It was error to permit this cross-examination. But as defendant denied such relations the error was harmless. The putting of Mary V. upon the witness stand, however, and allowing her to contradict the defendant upon this point was manifestly injurious, and it is equally plain that such testimony was incompetent.

In the case of the State versus Sprague, the Court said, "The defendant was called to testify in his own behalf. Upon cross-examination he was questioned whether he had ever met other women at other times at this place. It was not attempted to show that he had ever been guilty of any similar offense at this place by the cross-examination and the object of the evidence is not entirely apparent. He denied having met any women at this place. He was then confronted with some women, and asked in relation to them and as to their acts and conduct toward him, and his conduct toward them, without indicating by the question, save by insinuation, that anything criminally improper had occurred between them. This was evidence that could not have been presented by him on direct-examination. It is doubtful if it was legal upon cross-examination, but conceding it to be so, he answered the questions and the rule of evidence is that such facts being irrelevant and immaterial his answers must be conclusively accepted.

In Pullen versus Pullen, 43 New Jersey Equity, the Court held "the general rule is that when a

witness makes statements in the course of his evidence and as a part thereof, as to any fact or facts constituting the subject matter under investigation, he may be impeached by proof of statements or representations to the contrary but as regards statements of a witness drawn out on cross-examination collateral to the investigation, the same are to be taken as conclusive and it is not admissible to contradict him by showing declarations or statements inconsistent therewith."

I submit to the Court as a matter of law that the conspiracy having been terminated on May tenth, anything that this defendant Simon may have done on May twelfth could have had nothing to do with that conspiracy and it was not material to the issue. It was not brought out on direct-examination which was admitted by the Prosecutor twice and in this particular instant case we are hearing now it has been set forth that the conversation between Simon and La Conti pertained to the Demarest—Erie Railroad Company case.

On those grounds I submit the State has failed of its proof and has failed to show the materiality as set forth in the pleadings and I respectfully ask that the jury be directed to bring in a verdict of not guilty.

The Court: All right, Mr. Prosecutor.

Mr. Shershin: May it please your Honor, counsel stated that the matter brought out upon cross-examination by Mr. Carpenter was a question relative to a collateral matter and that therefore he was bound by the answer and that he couldn't introduce evidence subsequently to disprove the collateral matter. The fact is, however, and your Honor will take judicial notice that your Honor

did permit a witness thereafter to rebut Irving Simon and Serlinsky showing by inference that your Honor did not at that time believe this testimony to be of that nature, not collateral issues whereby the State was bound by the answer.

The testimony was not originally brought out by Mr. Carpenter on cross-examination. It was brought out in the direct-examination of Irving Simon upon page 1095, question, "Did you meet Mr. La Conti in August?" Answer, "I did." Question, "When was it?" Answer, "It was the twenty-ninth or thirtieth, the latter part of August." Question, "Where was it?" Answer, "Hotel Riviera, Newark." Question, "Now as a matter of fact had you ever met him up to that time before?" Answer, "I have seen him." Question "Not see him, I said meet him?" Answer, "No." There Irving Simon in his direct testimony states up until he met him in the Hotel Riviera he had never met Michael La Conti. The position of the State at that time was this—that it charged as your Honor will take notice that La Conti together with Irving Simon and others had conspired on a date prior to the Demarest case to bring in a verdict in the Veit versus Miller case. That La Conti and Irving Simon were co-conspirators with others and as the testimony shows that on April twenty-ninth, Irving Simon with others met La Conti, and further, as Mr. Stafford brought out in cross-examining Mr. La Conti, in his direct-examination or in the cross-examination, rather, of Michael La Conti by Mr. Ward who was counsel for Doctor Aaron L. Simon, the question was first asked, "That was the only time you ever met him," and the answer of Mr. La Conti was, "On April twenty-ninth," and

the question was repeated and Mr. La Conti then said, "April twenty-ninth and May twelfth." Then Irving Simon takes the stand and says he never met him at all, proving or attempting to prove that no conspiracy existed between Irving Simon and Michael La Conti because he had never met him, never seen him up until he met in the Hotel Riviera. So therefore, if you would accept Irving Simon's testimony there was no conspiracy and nothing for the jury to hear, because he never saw him. And if you believe Irving Simon it was very material to the issue in this respect—if Irving Simon and La Conti didn't meet until August thirtieth, or thirty-first as Mr. La Conti says, there was no conspiracy. Therefore the jury had a right to believe either Mr. Simon—Irving Simon or Michael La Conti and if they believed Irving Simon they would have acquitted him and if they believed Mr. La Conti they would have found him guilty. The jury, however, as your Honor will take judicial notice returned a verdict of guilty believing by inference Mr. La Conti's story.

Now, to bolster up Irving Simon's story that he never engaged in the conspiracy alleged in indictment No. 454, the Veit versus Miller case, which if you will remember was on his direct-examination, Serlinsky is brought in to prop that up—to prop up the circumstance that Irving Simon and La Conti never knew one another, never spoke to one another, whereas in truth and fact they did meet on May twelfth. Serlinsky was brought in for that one specific occasion.

To go back, however, after Irving Simon testified on his direct-examination, Mr. Carpenter in his cross laid a foundation for rebuttal by asking

the specific question. Then he introduced Mr. La Conti, Mr. Hickling and Mr. Finn as rebuttal witnesses. If Mr. Carpenter was bound at that time by a collateral answer as counsel wants to contend, and I say he couldn't be because the matter was originally brought out on direct-examination by Mr. Ward who was his counsel at that time and then Mr. Carpenter cross-examined him. So this was not a collateral issue, it was a direct issue from the standpoint of two reasons.

If it was collateral as being subsequent to the direct conspiracy in that Mr. Stafford alleges that the overt act was completed—if it was collateral the courts have held perjury may be assigned to a matter of that kind where the testimony which is perjurious is given to bolster up or strengthen the testimony which would effect other testimony bearing directly upon the main issue. I say for that reason, taking the other argument, that this testimony bore directly on the principal issues which were whether Michael La Conti and Irving Simon were co-conspirators. And as I gave the reason to your Honor before, perjury may be assigned on a collateral matter where it appears a person swore falsely to a collateral matter with intent to prop up the testimony on some other point. Counsel in citing his cases gave collateral questions to the issue which were far afield or which didn't bolster up the case at issue as whether he knew any other woman. How would that in that case—I suppose a sexual case of some kind—bear on the issue involved in that case whether he knew some other woman. But here whether or not Irving Simon knew Michael La Conti at any time prior to August thirtieth would tend to show that—if he did, to show that the con-

spiracy did exist and if he didn't know him it would show the conspiracy did not exist and would add credit or falsity to the testimony of Irving Simon and therefore becomes material to the general question, did a conspiracy exist?

Counsel argues upon each distinct assignment of perjury and upon the antithesis to that part, whereas in truth and fact it was otherwise. The cases have held and so does Wharton on Criminal Law that each specific assignment of perjury does not have to be proven where the State proves one assignment or any one of specific assignments which were material to the issue involved in which the defendant testified as a witness. If there is a substantial compliance to show perjury in the defendant's testimony it is sufficient and it does not require proof of each specific assignment of perjury. For those reasons the State respectfully opposes the motion for a directed verdict.

Mr. Stafford: Admitting for the purpose of argument that Simon did meet La Conti; did have a conversation; did talk about the Demarest and Hunter versus the Erie Railroad Company case on May twelfth, two days after the conspiracy ended in No. 454. What bearing would it have? How could it help the Court or jury to determine the issue?

The Court: I passed upon that motion when it was before me at the time. I shall deny counsel's motion and note an exception in behalf of the defendant. The jury will be returned to the box.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

(The jury then returned to the jury box.)

(Mr. Stafford then opened to the jury in behalf of the defendant.)

CHARLOTTE SERLINSKY, a witness produced in behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live? A. #356 Main Avenue, Passaic.

Q. Do you know the defendant Thomas Serlinsky? A. I do.

Q. How are you related to him? A. He is my husband.

Q. How long are you married? A. Three years.

Q. How long have you lived in Passaic? A. Three years.

Q. You don't live in the City of Paterson, do you? A. No.

Cross-examination by Mr. Shershin:

Q. You are the husband of Mr. Serlinsky?

Mr. Stafford: No, the wife.

A. I am his wife.

Q. You are related to Mrs. Irwin Simon, are you not?

Mr. Stafford: I object to that as being immaterial and not proper cross-examination.

The Court: I have some misgivings about that, Mr. Prosecutor.

Q. You are the sister of Mrs. Irwin Simon?

Mr. Stafford: I object to it as being immaterial.

The Court: Where is that proper cross-examination?

MAX ZUCKER, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you officiate, Rabbi? A. Temple Emanuel in Passaic.

Q. You have been there for how long? A. Approximately eight years.

Q. Do you know the defendant Thomas Serlinsky? A. Very well.

Q. How long have you known him? A. About five or six years.

Q. Has he attended your temple? A. With great regularity, yes, sir.

Q. How regular? A. Once a week.

Mr. Shershin: I object to that.

Q. Do you know the general reputation of the defendant, Thomas Serlinsky, for truth and veracity? A. I do.

Q. In the neighborhood where he resided prior to May twelfth, 1933? A. I do.

Q. What was it? A. Good.

Cross-examination by Mr. Shershin:

Q. Do you always answer so quick?

The Court: All right now. Proceed.

Q. Do you know where the defendant lives? A. He lives at the corner of Paulison and Main Avenue, the Harding Apartments.

Q. Where do you live? A. I live at Gregory and Pennington.

Q. That is how far away? A. That is two blocks.

Q. His apartment is in a large apartment building, isn't it? A. Yes, it is.

GARRET ROOSMA, JUNIOR, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. You are a little hard of hearing, Mr. Roosma? A. Yes, I am.

Q. I want you to talk out loud? A. I am.

Q. Do you know the defendant, Thomas Serlinsky? A. Yes, I do.

Q. Where do you live? A. Passaic.

Q. How long have you lived there? A. All my life.

Q. How long have you known the defendant? A. About fifteen years.

Q. Do you know where he lives? A. Yes.

Q. Where? A. The Harding Apartments in Passaic.

Q. Do you know what his general reputation was— A. Yes.

Q. In the neighborhood where he resided for truth and veracity prior to May twelfth, 1933? A. Very good.

Mr. Shershin: No questions.

THOMAS A. HOPKINS, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live, Mr. Hopkins? A. In Passaic.

Q. How long have you lived there? A. Almost thirty years.

Q. Do you know the defendant Thomas Serlinsky? A. I do and his family.

Q. How long have you known him? A. Approximately twenty-five years.

Q. Do you know what his general reputation was in the neighborhood where he resided? A. Good.

Q. Prior to May twelfth, 1933, for truth and veracity? A. Very good.

Cross-examination by Mr. Shershin:

Q. You don't work with him, do you? A. No, sir.

Q. You do go around with him? A. No, sir.

Q. You don't know whether he tells the truth all the time, do you? A. He has with me. The same as you.

NORMAN E. DARMSTATTER, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live? A. Passaic.

Q. How old are you? A. Thirty-five.

Q. Do you know the defendant Thomas Serlinsky? A. I do.

Q. How long have you known him? A. Twenty years.

Q. Do you know where he lives? A. He lived with his parents on Central Avenue up until the time he got married and since then he lived in the Harding Court Apartments.

Q. Do you know what Thomas Serlinsky's general reputation was prior to May twelfth, 1933 in the neighborhood where he resided for truth and veracity? A. Very good.

Mr. Shershin: No questions.

PHILIP GOLDMAN, a witness produced on behalf of the defendant being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you reside? A. Passaic.

Q. How long have you lived in Passaic? A. Twenty-nine years.

Q. Do you know the defendant Thomas Serlinsky? A. Yes, sir.

Q. How long have you known him? A. About twenty years.

Q. Do you know where he lived prior to May twelfth, 1933? A. Yes, sir.

Q. Where? A. The Harding Apartment.

Q. Do you know what the general reputation of Thomas Serlinsky was prior to May twelfth, 1933 in the neighborhood where he resided for truth and veracity? A. Yes, sir.

Q. What was it? A. Very good. I know him

since a boy of ten, he studied in my Sunday school and on his confirmation day I give him a bible—

Q. Religiously inclined, is that it? A. Yes, sir.

Mr. Stafford: I had some other character witnesses on the list but I suppose they have gone out to lunch. Does the Court wish to continue?

The Court: We have got five minutes yet.

Mr. Stafford: All right.

FRED GOLDSTEIN, a witness produced in behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Do you know the defendant Thomas Serlinsky? A. I do.

Q. How long have you known him? A. About eighteen years.

Q. Where do you live? A. In Passaic.

Q. How long have you lived there? A. All my life.

Q. Do you know where Mr. Serlinsky lived? A. At the Harding Apartments, corner of Main Avenue. He lives in Passaic.

Q. Do you know what his reputation was in the neighborhood where he resided prior to May twelfth, 1933, for truth and veracity? A. I would say it was excellent, gentlemen.

Raymond C. Shulman—Direct.

RAYMOND C. SHULMAN, a witness produced in behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live, Mr. Shulman? A. #509 Fifteenth Avenue, Paterson.

Q. How long have you lived in Paterson? A. About twenty years.

Q. What is your profession? A. I am a lawyer.

Q. You practice where? A. Paterson.

Q. Do you know Thomas Serlinsky, the defendant? A. I do now, yes, sir.

Q. When did you first meet him? A. I believe the first time I met Mr. Serlinsky was subsequent to the first trial in which I testified, sometime in January of this year.

Q. You were one of the jurors in the Demarest versus the Erie Railroad case, weren't you? A. Yes, sir.

Q. Do you remember just what time the jury came in with their disagreement? A. I believe around six. About six o'clock.

Q. When you came out into the court room whom did you see that night? A. Well, there was Mr. Irving Simon, also Mr. Cooper, Mr. Lippman, Mr. Serlinsky and I believe there were two court attendants here and there may have been some other people, I don't recall.

Q. Well, now, after the jury was discharged by the court, what did you do? A. I don't know whether I had my coat and hat with me or whether I went back into the jury room and got it. Then I walked out of the court room to the corridor, put on my hat and coat there and was talking to somebody there—I believe Mr. Cooper came out

after the jury and at the time I believe I may have said something to him about the disagreement and after that I, with most of the other jurors and possibly all started to walk down the steps to the floor below.

The Court: At this point, Mr. Stafford, may I suggest a recess until two o'clock.

(At this point a recess was taken until 2:00 P. M.)

(Court convened at 2:00 P. M.)
(Appearances the same as heretofore.)

RAYMOND C. SHULMAN, recalled in behalf of the defendant.

Direct-examination (continued) by Mr. Stafford:

Q. When you walked down the steps to the floor below, did you see anybody down there at all? A. Where? Down below?

Q. Yes. A. No, I don't recall seeing anybody down there. As we were walking down, somewhere between this floor and the floor below we were joined by Irving Simon and Mr. Serlinsky.

Q. Was there a conversation—? Don't repeat it but was there a conversation going on? A. Yes.

Q. How long did Irving Simon and Thomas Serlinsky stay with that body of jurors as they walked out to the best of your recollection? A. As I remember it we got down to the first floor and I don't remember whether we stood there and talked or I don't remember whether we immediately proceeded out, but we went out the front door of the court house and walked down the steps

and Mr. Simon and Mr. Serlinsky were with us to the bottom of the steps as I recall it and then I turned to the right and went down toward Market Street and I believe some of the jurors were with me or around me at the time. That was the last I saw of Mr. Simon or Mr. Serlinsky.

Q. Did you see Mr. La Conti talking to anybody on the steps outside? A. No.

Q. Did you see Mr. Hickling hanging around the street there on Hamilton Street? A. I did not.

Q. Did you see Mr. Finn or Mr. Corsetta, two members of that panel, around the front of the building at all? A. I did not.

Q. Did you see Mr. Reese as you walked out of the building, Mr. Shulman? A. I don't recall seeing him as I walked out of the building. I recall seeing him in the court room when the jury came out but after we left and after we walked downstairs I don't recall seeing him after that. I walked straight out of the court house and didn't look back or anything, just walked straight ahead.

Q. Did you see Mr. Irving Simon talking to Mr. La Conti at all while you were leaving the court house? A. No, sir.

Q. Did you see Mr. Serlinsky and Irving Simon leave the front of the court house? A. We was all together. Mr. Simon was with this group of jurors.

Q. How far had they gone when you last saw the jurors and Simon? A. At the foot of the court house steps opposite the High School.

Q. With reference to the sidewalk, how near to it? A. Practically at the bottom where the steps join the sidewalk.

Q. Did you notice at that time where Ser-

linsky was? A. I believe he was standing with Mr. Simon and this group as we walked down there.

Q. Can you tell the Court and jury what Mr. Simon and Mr. Serlinsky did as you walked away to go toward Market Street? A. No, I don't know what they did.

Q. What were they doing the last time you saw them after six o'clock? A. Walking out with this group of jurors to the sidewalk. The last I saw of them they were with this group of jurors as I turned away.

Cross-examination by Mr. Shershin:

Q. You were one of the jurors in that Erie Railroad case? A. Yes, sir.

Q. You were one of those that desired to bring in a verdict?

Mr. Stafford: I object to that as immaterial.

The Court: Objection sustained.

Q. Mr. La Conti was one of those that desired to bring in a verdict, is that correct?

Mr. Stafford: I object to that as entirely incompetent and immaterial.

The Court: Where is that proper cross-examination?

Mr. Shershin: Except as it effects the credibility of this witness.

The Court: How would that affect it?

Mr. Shershin: Irving Simon was at the counsel table when this Erie Railroad case was being tried and this witness was one of those who wanted a verdict in behalf of Simon.

Mr. Stafford: I object to that and ask that it be stricken out.

The Court: The jury will disregard any statement of counsel. The jury is going to decide this case on the evidence. I can't see that it is relevant, Mr. Prosecutor.

Q. Why you decided to bring in a verdict for Simon a moment after you were out, didn't you?

Mr. Stafford: I object to it as not proper cross-examination.

The Court: I can't see where it is.

Mr. Shershin: All right. If your Honor so rules.

Q. Is your memory distinct as to what happened after the jury came in? A. Oh, as to general happenings after that. Not as to minute details.

Q. It is indistinct as to some details? A. As to some of the smaller details, yes.

Q. You don't know whether you had your hat and coat at the time you were leaving the jury room, do you? A. I so testified.

Q. You don't know whether or not you went back in the jury room for it? A. I so testified.

Q. Your memory is indistinct with respect to that, isn't it? A. With respect to that, yes.

Q. You walked out into the corridor and put your hat and coat on? And then you talked to somebody there and then you believe Mr. Cooper came out after the jury. Is your memory distinct or indistinct as to that? A. I don't recall exactly when Mr. Cooper came out. I recall definitely seeing him in the corridor.

Q. You said on direct-examination, "I believe Mr. Cooper came out." Was your memory dis-

tinct then? A. I testified on direct-examination I believed he came out after the jury. My memory is indistinct as to whether that was with the jury or after but I do know and I am positive Mr. Cooper was in the corridor after the jury came out.

Q. You don't know when he came out? A. No.

Q. You believe he came out after the jury? A. That is right.

Q. Then you testified, "I believe I may have said something to him"? A. That is right.

Q. Your memory is indistinct as to that? A. As to whether I addressed my remarks to him or to somebody else who was there.

Q. "Then I and most of the jurors," as you testified on direct-examination, "possibly all started to walk down to the floor below"? A. That is right.

Q. Your memory is indistinct on that? A. No. I know a group of jurors walked down. I don't know whether there were twelve or not.

Q. You say, "I and most of the jurors, possibly all started down"? A. Right. There was a large group of jurors but whether all of us walked down stairs, I don't know.

Q. You don't know how long it took you to walk downstairs? A. We walked slowly. My best estimation would be a minute or a minute and a half, possibly two minutes.

Q. Do you recall testifying in the trial of December twentieth, 1933, between the State and Aaron L. Simon and other defendants? A. I do.

Q. You were a witness there at that time? A. Yes.

Mr. Stafford: What page?

Mr. Shershin: Page 1322.

Q. Question, "Do you recall when you were discharged that day as a juror?" Answer, "Sometime in the evening, around six o'clock." Do you remember that question being asked and giving that answer? A. I don't remember that question and answer but I presume it was asked and I made that answer.

Q. You don't remember? A. I don't remember distinctly that question and answer, but something to that effect was asked.

Q. That was on December twentieth? A. That is right.

Q. But you do recall certain distinct things of six months prior—on May twelfth—as to how far Irving Simon and Thomas Serlinsky walked with you? A. That is right.

Q. And you don't remember this on December twentieth? A. I don't remember that exact question. I remember something to that effect.

Q. Do you remember this question and answer? This is immediately after the other one. Question, "Did you walk out with several other jurors and Mr. Irving Simon?" Answer, "I did." Do you recall that question and answer? A. I believe I recall it.

Q. You gave that answer? A. If it is in the record.

Q. Do you recall it or don't you? A. I don't recall but if I did it is the truth. Whether I did or not, it is the truth.

Q. On December twentieth? A. That is right.

Q. You don't recall exactly whether you heard that question and gave that answer? A. No.

Q. Your memory is indistinct as to that? A. It is quite distinct as to testifying here and what I testified to but not as to specific questions and answers.

Q. Do you remember on direct-examination today you answered, "I don't know whether I had my coat and hat with me or whether I went back into the jury room and got it. Then I walked out of the court room to the corridor, put on my hat and coat there and was talking to somebody there —I believe Mr. Cooper came out after the jury and at the time I believe I may have said something to him about the disagreement and after that I, with most of the other jurors, possibly all started to walk down the steps to the floor below." That is correct? A. I believe so.

Q. Is your answer correct then when you said you walked out with several other jurors? A. Yes.

Q. Did you walk with Irving Simon out of the court room? A. Not out of the court room, I believe that question was

Q. I will read the question again to you—

Mr. Stafford: It doesn't say anything about that, your Honor, I am following it.

Mr. Shershin: Is there an objection? Or may I now finish?

Q. I will read the question previous and the question afterwards. Question, "Do you recall when you were discharged that day as a juror?" Answer, "Sometime in the evening around six o'clock." Question, "Did you walk out with several other jurors and Mr. Irving Simon?" Answer, "I did." Do you recall those questions and answers? A. Yes.

Q. And when you said you walked out with several other jurors and Mr. Irving Simon, you want us now to believe that was not out of the court room? A. No, I just walked out of the court room with the other jurors.

Q. You intend to convey the thought now that you walked out with him after meeting him when you were walking down the stairs from the second to the first floor? A. That is after he joined this group of jurors.

Q. You recall that now? A. I don't recall now whether I met him on the stairs or at the lower floor but somewheres between this floor and the floor below.

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

Q. You don't recall whether Mr. Simon walked out with the jury at the time, do you? A. Walked out of where?

Q. Out of the court room with the group of jurors? A. I don't know.

Q. Had you met Mr. Serlinsky at that time? A. No.

Q. Did you speak to him at that time? A. I didn't speak to him, no. I might have addressed my remarks to the jurors or whoever was standing around.

Q. You say you might have. Did you? A. I don't know.

Q. You don't know? A. We were all discussing what had happened and the fact that we had had a long session.

Q. Is all your testimony "I don't know"? A. No.

Q. Who was the person that you walked out with? The person next to you, do you recall? A. No, I don't.

Q. Who was the person in front of you, do you recall? A. I don't.

Q. Who was the person in back of you? A. When I say I don't know, I don't know the names of the persons but I believe they were jurors. Rather, I know they were jurors.

Q. Did you see Ralph Cooper walk out? A. No, I didn't see Ralph Cooper walk out of the court house. I saw him walk out of the court room.

Q. Did you turn your head back then? A. I turned my head back where? Leaving the court room or the court house?

Q. In that case your memory is indistinct? A. No, I am merely trying to understand the question. There seemed to be some doubt when the question was asked me at the last trial.

Q. There seems to be some doubt? A. You seem to have some doubt as to whether I meant the court room or the court house.

Q. I haven't any doubt, have you? A. No, not as to the general details as I have described them.

Q. When you came out with the jury after they had disagreed, you testified you remembered distinctly seeing Irving Simon, Mr. Cooper, Saul Lippman, Serlinsky and two court attendants? A. No, I believe I said I thought there were two court attendants. I say court attendants were there, whether one, two or three, I am not sure about that.

Q. You are not positive about that? A. No.

Q. But you remember distinctly seeing Irving Simon? A. Yes.

Q. And Cooper? A. Yes.

Q. And Lippman and Serlinsky? A. Yes.

Q. You don't recall seeing any other person in the court room whose name you know? A. No.

Q. You recall seeing the rest of the jurors in the court room, do you? A. Of course.

Q. Did you see any other lawyers in the court room at the time? A. No.

Q. Is it written up there? A. No, I look up

to think a minute before I answered the question. I want to answer them truthfully.

Q. You won't say there were two court attendants there or more than two? A. There may have been as many as three.

Q. Your memory is sort of faint about that? A. Not faint. These other people I knew by name except Serlinsky. I knew Mr. Simon was Irving Simon because he sat with Doctor Simon.

Q. You had not known Serlinsky before? A. No.

Q. That was the first time you had ever seen him? A. I may have seen him in the court house prior to that but I didn't know he was Mr. Serlinsky and I never spoke to him.

Q. Had you ever seen him in the court house before? You said you may have. A. I can't say.

Q. You won't say with respect to the number whether there were one, two, three, four or five court attendants? A. My best recollection is there were not as many as four or five. My best recollection is there was at least one and I think two.

Q. Do you recall in what manner the jury left the court room? A. Merely that we walked out after being discharged by the clerk.

Q. Do you know who first left the court room? You don't do you? A. No, I don't. I was going to say possibly the juror standing nearest the aisle going out but I don't know.

Q. When you got to the door of Judge Mackay's court, or to the corridor, who was out there at the time? Do you remember any person or persons? A. I believe there was a court attendant out there.

Q. You believe? A. Yes, that had opened the door for the jurors to leave.

Q. Are you sure about that or indistinct? A. I am quite sure about it now that I think about it I recall I—

Q. You want to change that—you are sure now? A. That I believe?

Q. You said you believed there was a court attendant? A. I am quite sure.

Q. Do you know who the court attendant was? A. No.

Q. Was he here in the court room? A. I don't know who was the particular court attendant that opened the door.

Q. Who else did you see out in the corridor as you got to the door besides this court attendant? A. Nobody. It was empty—that is outside of the jurors that had proceeded out before me.

Q. Outside of jurors? A. Other jurors that had passed through the door before I reached the corridor.

Q. How many jurors were out there in numbers? A. I don't know.

Q. Besides these jurors, yourself as a juror and the court attendant, there was nobody? A. Mr. Cooper later. After we were out there.

Q. Who else came there later, do you remember? A. I don't recall seeing anybody else.

Q. You don't recall? A. Seeing anybody else there.

Q. It is very difficult to remember? A. Yes, it is very difficult to remember who walked in and out of the court room at the time.

Q. How long did you stay out in the corridor before doing anything or going anywhere? A. I should say approximately two or three minutes. Just time enough to put on a coat and hat and pass a few remarks and walk down. We all walked down.

Q. By "we", who do you mean? A. The group of jurors and myself.

Q. How many? A. I said before a large part of the jurors, possibly all.

Q. You don't know whether they were all there or not? A. No, I didn't count them.

Q. Was Finn among them? A. I don't know.

Q. Was Corsetta among them? A. I don't know.

Q. Was La Conti among them? A. The only one I—

Q. Answer my question. Was La Conti in the group of jurors? A. I don't know.

Q. Was this woman juror in that group? A. I believe the three women jurors were.

Q. You believe? A. I am positive some were.

Q. You are positive about some but don't know whether all three were there? A. That is right.

Q. Did you talk with anybody else? A. Yes, I made some remarks. What they were, I don't know.

Q. Do you know who they were addressed to? A. I believe one of the women jurors was close to me and I believe one of the men jurors, which one I don't know.

Q. When you say you "believe", are you guessing? A. I know one male juror was somewhere near me and one female juror, all in one group together and all making some remarks.

Q. Did you talk with anybody else out in the corridor? A. In the corridor or on the way down?

Q. In the corridor as you left the court room? A. As I said before I may have said something to Mr. Cooper who was standing there when I said something about the disagreement.

Q. What you said to Mr. Cooper, if you said it, you don't know? A. Not the exact words, no.

Q. Do you know the substance? A. Yes.

Q. Tell us the substance?

Mr. Stafford: I object to that. The substance of a conversation between a juror and one of the attorneys.

Mr. Shershin: I will withdraw it.

Q. How long did Mr. Cooper stay with the group? A. I proceeded out. I don't know who long he stayed in the corridor.

Q. Did you see Mr. Cooper leave the court room? A. Yes. That is, I saw him come out in the corridor.

Q. Did you see him come out of the doorway into the corridor? A. Yes.

Q. Was Irving Simon with him at the time? A. No.

Q. Was Serlinsky with him at the time? A. No.

Q. You remember that distinctly, don't you? A. As my memory serves me, Mr. Cooper came out of the doorway alone.

Q. Do you remember Mr. Finn speaking with Mr. Cooper? A. He was in that group there. I remember Mr. Finn being in that group as all the jurors were. I don't remember Mr. Finn saying anything to Mr. Cooper, no.

Q. You don't know if he said anything? A. I don't know whether he did or not.

Q. You started to walk down? A. That is right.

Q. Were all these stops made by Irving Simon and Serlinsky? A. I don't know about that. Anyway Irving Simon and Serlinsky joined the group somewheres between the two floors. My impression is after we had gotten about half way down they joined us.

Q. Is there a difference in your mind as to meeting and joining? A. Yes, sure.

Q. You don't know exactly where, do you? A. No.

Q. Then you walked through the hallway down on the first floor? A. That is right.

Q. Do you recall what happened to any of the jurors? A. I recall what happened to some of them. That is the jurors with me. That is the group of jurors that walked out of the front of the court house.

Q. At any time did the group of jurors stop and hold a discussion or have Irving Simon ask them any questions and they respond to his questions? A. I don't recall our stopping at any place but on the way from the corridor, that is the bottom of the steps inside the court house to the front door there was a continued discussion.

Q. My question was did they stop at any time and Irving Simon discuss the case with one or more of the jurors? A. I do not recall them having stopped.

Q. Is your memory clear on that? A. Quite clear. It is possible we did stop somewhere. I am not positive but it is my impression—it is quite clear in my mind we did not stop.

Q. Are you sure of that? A. I am not positive, no.

Q. When you got to the front door, was this group still intact going out? A. There was a group of jurors and when one or two or three left that group I don't know. I didn't take notice of it.

Q. With reference to going out the doorway, were you among the first to go out or sort of on the tail end? A. I believe I was in the middle.

Q. Then you walked out. Going out of the

doorway was Irving Simon and Serlinsky in front or back of you at the time you left the door? A. As I recall it in back of me.

Q. Were you anxious to get home? A. Quite.

Q. It was supper hour wasn't it? A. Yes, we were hungry.

Q. You kept walking right along? A. Yes. Slowly—this whole group.

Q. You were in the middle? A. Yes.

Q. You saw Simon and Serlinsky in back of you? A. As we walked out of the doorway.

Q. And you were going down the steps, weren't you? A. Yes.

Q. Did you see La Conti with this group? A. It is my impression I saw La Conti with that group, I am not positive of that.

Q. Did you see Hickling with this group going out? A. It is my impression he was not.

Q. Are you sure of that or do you just believe that? A. To the best of my recollection.

Q. He was not? A. Yes, sir.

Q. Did you see Finn with this group going out? A. To the best of my recollection, no he was not.

Q. Did you see Corsetta with this group going out? A. To the best of my recollection, no.

Q. Then as you left the building you were anxious to get home, weren't you? A. Yes.

Q. You kept on walking, didn't you? A. The group was all walking at the same pace.

Q. You were in the middle? A. That is right.

Q. You kept on walking down the stairs? A. That is right.

Q. You didn't stop did you or tarry for a while? A. No.

Q. You walked to the sidewalk and turned right? A. That is right.

Q. And went on home? A. That is right.

Q. You didn't look back at any time did you? A. No, sir.

Q. What occurred with Irving Simon and Serlinsky in back of you or what they did you didn't know? A. I know they came down to the sidewalk with me.

Q. Did you see that? A. Yes, as I say when I came out of the court room—court house door they came out in back of me and then this group proceeded down the court house steps and at the time they were right with this group. We were not lined up but as we came out the door they were with us and until we got to the sidewalk and as I got to the sidewalk I turned right

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Q. Is your memory distinct as to that or don't you recall? A. My memory is distinct as to the group walking down to the sidewalk and—

Q. Is your memory distinct as to whether or not Serlinsky and Irving Simon were in that group on the sidewalk? A. Not on the sidewalk. At the foot of the steps.

Q. When you left this floor—when you were in the middle going out the door did they all cluster together again? A. Yes.

Q. Did you talk to Irving Simon yourself? A. Not directly to Irving Simon. I don't know whether I made any remarks after I left the court house but there was a discussion among us.

Q. Did this group go slowly? A. Yes, quite slowly.

Q. You remember this group walked slowly almost to the foot of the sidewalk and there you left the group? A. No, part of the group went with me.

Q. Who remained behind? A. I don't know.

Q. You don't know that but you remember the group breaking up? A. As I remember them there were two men in front of me and I walked down toward Market Street with one of the female jurors.

Q. You don't remember who remained behind after you left? A. I don't know whether they remained there talking or they may have proceeded in back of me.

Q. You do remember this group walked almost to the sidewalk and that Irving Simon and Serlinsky were there? A. That is right.

Q. But you don't remember La Conti or Hickling? A. My impression was that La Conti was there.

Q. Your impression before was that La Conti didn't walk down the steps with you? A. My impression was—I think I said La Conti walked down with this group.

Q. You don't remember Hickling being in the crowd? A. My impression is he was not.

Q. You left to go up the street? A. That is right.

Q. What happened afterwards you don't know? A. That is right.

Q. Who remained you don't know? A. That is right.

Q. When you left did you see Irving Simon go away? A. I did not.

Q. Did he stay there? A. I don't know.

Q. Did Serlinsky stay there? A. I don't know.

Q. Did you see him go away? A. I did not.

Q. Did you see Hickling approach there and come to the group before you left? A. I did not.

Q. Did you see Finn go out upon the steps? A. I did not.

Q. Did you see who else remained with Irving Simon and Serlinsky? A. I don't know what happened after I left.

Q. Do you know who went with you? A. These two men before me and one of the female jurors I believe walked alongside of me as—

Q. You don't know their names? A. I believe the female juror's name was Mrs. Conoscenti, I am not sure.

Q. Did you walk as far as Market Street with these three people? A. No, I don't know what happened to these two gentlemen but I know I was walking alongside of Mrs. Conoscenti, as far as Market Street.

Q. These two men left with you? A. No, they were not with us, they were in front of us as we walked down. I didn't take any notice of them.

Q. You took notice of the group going down to the sidewalk? A. That was a crowd of us.

Q. What happened thereafter you don't know except you walked up to Market Street? A. That is all I know.

Q. Tell us who was in this group—how many people—that got to the sidewalk? A. I can't, they were in a group.

Q. How many were in the group? A. My impression is there were about eight or nine. My impression was Hickling, Finn or Corsetta were not in the group.

Q. You don't get wrong impressions do you? A. Sometimes.

Q. Was this woman juror in the group? A. Yes, sir.

Q. And the other two men? A. Yes.

Q. Were the other two women jurors in the group? A. I believe so.

Q. You remember that after I told you? A. I knew before that. There must have been six people there.

Q. There must have been? Are you guessing when you say "there must have been"? A. No, I am not guessing.

Q. You didn't mean that "must have been"? A. I know there were a group of us—seven or eight jurors and my impression is Hickling, Finn and Corsetta was not there.

Q. Your impression was that Irving Simon and Serlinsky were there? A. I know they were there.

Q. What happened afterwards, you don't know? A. No.

Q. Whether Irving Simon remained there and talked to La Conti alone, you don't know?

Mr. Stafford: Oh, I object—

The Court: Objection sustained.

Q. Did you see Irving Simon with a paper in his hand at that time? A. Not with a paper, no, but he had a file in his hand.

Q. Didn't he have a small piece of paper? A. He may have had it. I didn't see it.

Q. You know what a jury list is? A. Yes.

Q. Did he have a jury list in his hand? A. I didn't see any paper in his hand outside of this file in which there were a group of papers in the file.

Q. Thereafter you testified on December 20th in the Simon trial, didn't you? A. That is right.

Q. During that time you didn't discuss the matter with anybody? A. No.

Q. When you got up on the stand had you talked with anybody about what you were going

to say? A. Before I got on the stand? I had been called that morning by Irving Simon and he asked me if I remembered leaving the court house that day.

Q. And he told you exactly what happened? A. All he asked me was if I recalled what happened and to the best of my ability I told him what I am telling this jury.

Q. Tell us what you did on the night of May seventeenth of that year?

Mr. Stafford: I object to it as being immaterial.

Mr. Shershin: Except to test his credibility.

The Court: He may answer.

A. Yes, I think I can.

Q. What? A. It was a Wednesday night, and I had a date.

Q. It was a Wednesday night? A. I believe so.

Q. Can you tell us on May twenty-ninth what you did, of last year? A. No.

Q. Can you tell us what you did on November fifth of that year? A. No.

Q. Can you tell us what you did on September ninth of that year? A. Not exactly. I can tell you about what I was doing during the day.

Q. That night I said? A. That I don't know.

Q. Can you tell us what you did on the night of January twelfth?

The Court: Why go on indefinitely.

A. No.

Q. Do you remember May eleventh when you left the jury room? A. May eleventh. That was the day previous.

Q. Yes. A. Yes.

Q. Do you recall what time you left the court room? A. To the best of my recollection about three o'clock, because there had been a motion at the time and I believe the judge had retired to his chambers and he excused the jury, if I recall correctly.

Q. Is that a guess or your recollection? A. That is my recollection.

Q. You believe that? A. That is my best belief, yes.

JACK RINZLER, a witness produced in behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. You are a licensed practitioner at law of New eJrsey? A. Yes, sir.

Q. And have been for how many years? A. I was admitted the November Term, 1919.

Q. Where do you practice? A. In the City of Passaic.

Q. Do you know the defendant Thomas Serlinsky? A. Very well.

Q. How long have you known him? A. I have known him quite a number of years. In fact he was a clerk at the office of Feder and Rinzler, of which I am one of the members.

Q. Was he a clerk there when he became a lawyer? A. Yes.

Q. Do you know his general reputation in the neighborhood where he resided for truth and veracity prior to May twelfth, 1933? A. I did.

Q. What was it? A. Excellent.

Cross-examination by Mr. Shershin:

Q. So far as you know? A. So far as I know and so far as I have heard anybody speak of him.

Mr. Shershin: That's all.

JOSEPH A. FEDER, a witness produced in behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. You are a licensed practitioner at law of the State of New Jersey? A. I am.

Q. And have been for how many years? A. I was admitted six months before my partner in June, 1919.

Q. You have your offices where? A. In Passaic.

Q. Where have you been practicing law since your admission to the bar? A. In Passaic and throughout the State of New Jersey.

Q. Do you know the defendant Thomas Serlinsky? A. Very well.

Q. How long have you known him? A. I guess I know Tom for twenty years. Since he was a boy.

Q. Do you know where he served his clerkship? A. My office—Feder and Rinzler.

Q. Do you know his general reputation in the neighborhood where he resided prior to May 12th, 1933, for truth and veracity? A. I do.

Q. For truth and veracity? A. I do.

Q. What was it? A. Very good.

Mr. Stafford: That is all.

Mr. Shershin: That is all. Very good.

JOSEPH F. A. RUBACKY, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live? A. Passaic.

Q. How long have you lived in Passaic? A. Since the date of my birth, thirty-seven years ago.

Q. You are a licensed medical practitioner of the State of New Jersey? A. Yes.

Q. And have been for how many years? A. In New Jersey about sixteen years.

Q. And also a licensed practitioner of law in New Jersey? A. Yes.

Q. For how many years? A. I think going on five or a little past five.

Q. Do you know the defendant Thomas Serlinsky? A. I do.

Q. How long have you known him? A. I knew Tom in a general way prior to the time I started the study of law at the office of Feder and Rinzler. I think I met Tom on several occasions on the streets of Passaic and became intimately acquainted with him as we progressed with our study of law. I went to New Jersey Law School with him I think for two whole years—

The Court: Oh, no, no.

Q. Alright. Just a moment now, Doctor. Do you know his general reputation in the neighborhood where he resided for truth and veracity prior to May twelfth, 1933? A. I do.

Q. What was it? A. I would say good.

Mr. Shershin: No questions.

JOSEPH L. WEISS, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do live? A. Clifton.

Q. What is your business? A. I am connected with the People's Bank.

Q. Where? A. Passaic.

Q. Your position at the bank is what? A. Assistant treasurer and assistant secretary.

Q. You have been connected with the bank for how many years? A. With the People's since 1931. Prior to that with the Mechanics' National Bank.

Q. In New York? A. Passaic.

Q. Do you know the defendant Thomas Serlinsky? A. I do.

Q. How long? A. About four and a half years.

Q. Do you know what his general reputation was in the neighborhood where he resided for truth and veracity prior to May twelfth, 1933? A. As far as I know it—

Mr. Shershin: Yes or no, please.

Q. Do you know what his reputation was? A. Good.

Cross-examination by Mr. Shershin:

Q. You live in Clifton, don't you? A. I do.

Q. Over in the Fourth Ward section? A. Fifth Ward.

Q. Do you know where Serlinsky lives? A. On Main Avenue in Passaic.

Q. Whereabouts on Main Avenue? A. I think

his address is—I think 365 Main Avenue, Passaic.

Q. Do you know where he lives exactly? A. Yes, the Harding Apartments.

Q. That is about a mile and a half or two miles from Clifton? A. Yes.

Q. It is pretty hard to know what they think of him in his neighborhood in Clifton? A. Well, you discuss things generally with friends and other people you know.

Q. Did you ever do business—you have had business relations with him? A. That is right.

IVAN H. REESE, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live? A. #36 West Thirty-sixth Street, West Paterson.

Q. How long have you lived in West Paterson? A. Since the first of last June.

Q. Prior to that where did you live? A. Hawthorne.

Q. You are an officer connected with the County Courts? A. Yes, sir.

Q. What is your title? A. Court attendant.

Q. You have been a Court Attendant in connection with the Passaic County Courts how long? A. Three years last October.

Q. On May twelfth, 1933, were you acting in capacity as a Court Attendant? A. I was.

Q. Did you have any special duties that day? A. I can't say. I know the day but I had no special duties.

Q. Do you remember you had a jury in the case of Demarest versus the Erie Railroad? A. I do.

Q. Did you have charge of the jury that day? A. I think Officer Bartholf and I had it. We were sworn to take care of that jury.

Q. Do you remember before the jury came in who were in the court room across the hall? A. Saul Lippman, the court clerk, Mr. Ralph Cooper the attorney for the Erie Railroad Company, Irv-

your capacity as a Court Attendant? A. I was.

ing Simon, the lawyer, Mr. Serlinsky, the defendant here now, Mr. Martholf, myself, and there were some of the plaintiff's people there—the two boys were sitting in the back—I recall them sitting there waiting for the jury to come in. Other than that I don't just recall anybody.

Q. After the jury came in and were discharged did you see the jury leave the room? A. I did not.

Q. What did you do after the Court discharged the jury? A. As soon as the Clerk discharged the jury I went down and opened the door and as soon as I did that I went down to the Sheriff's Office and changed my uniform.

Q. Then what did you do? A. As soon as I changed my uniform I came back upstairs.

Q. Where did you go? A. Out the front door.

Q. Can you tell the Court and jury whether or not you saw the jury going out the front door? A. I saw a group of people, I won't say they were jurymen.

Q. Can you identify any of them? A. No, sir.

Q. Did you see Irving Simon or Serlinsky? A. I saw Irving Simon.

Q. Where was he? A. Way out by the door when I came out by the corner.

Q. With whom? A. I wouldn't say with whom. I can't tell. I don't remember.

Q. Did you pass out through the open door? A. I did.

Q. When you got there was any of the jurymen going down the steps? A. I saw this group of people, probably eight or ten of them in the group, and they was going down the stairs.

Q. Did you see Mr. Serlinsky at that time? A. He was down on the sidewalk with Irving Simon.

Q. Where did you go? A. I went over—if I recall, I may be wrong, I went over to the lunch room. I do that every day—some day I miss but I have reason to believe I went over there.

Q. Did you see Mr. Shulman who is now a lawyer there?

Mr. Shershin: I don't think counsel should suggest everything, this is his witness.

The Court: It is a bit leading.

Mr. Stafford: All right, I will withdraw it.

A. I did.

Q. Where was he? A. Down on the sidewalk starting to go up Hamilton Street.

Q. Did you notice whether or not Irving Simon spoke to anybody? A. I didn't see him.

Q. What was the last you saw of Irving Simon or Thomas Serlinsky, Officer? A. When I got down to the sidewalk, I turned to go towards the Court Restaurant and the last I recall is seeing Irving Simon and Serlinsky some few feet below that granite square thing that sets off the sidewalk and that wall that holds up the lawn, some few feet below that and they was half turning and half walking I recall. I don't know whether

I said good-night or not but I remember waving. That is the last I saw of them.

Cross-examination by Mr. Shershin:

Q. What did you say your occupation was? A. Court Attendant.

Q. You have been a Court Attendant how long? A. Three years.

Q. Do you do anything else besides being a Court Attendant?

Mr. Stafford: I object to it as being immaterial.

Mr. Shershin: The fact is he says he is Court Attendant and that is all—

The Witness: I didn't say that. I was only asked what my connection was with the courts and I said—

The Court: All right. I shall sustain the objection.

Q. You were also part owner last year of the Black Cat Night Club?

Mr. Stafford: I object to that as being very immaterial.

The Court: Objection sustained.

Q. Do you recall what day this was you saw this? A. I can't say I recall but I believe it was on a Friday. I am not certain.

Q. Is it indistinct whether it was a Friday or not? A. It is.

Q. You don't know whether it was May twelfth or May eleventh, do you? A. No, I don't.

Q. What recalls this occasion to your mind? A. What particular occasion do you mean? The occasion in the court room.

Q. The occasion outside? A. Outside?

Q. Yes. A. Nothing other than I was asked by the defendant if I recalled the time that Mr. Cooper was up in the Terhune and Demarest versus the Erie Railroad case and about playing cards and I told him I did and then that brought back to my mind the rest that happened that day.

Q. The defendant didn't say do you remember seeing Irving Simon and I out on the sidewalk when you were walking up to the Court Restaurant? A. No, sir, he didn't say that.

Q. You have been on many cases, haven't you about this time? A. I have.

Mr. Stafford: I object to improper—immaterial and improper cross-examination.

Q. You were there when this was on the day before, weren't you? A. I was in court. I had not been sworn to take care of the jury on the day before.

Q. Just May twelfth? A. Whatever day it was.

Q. You remember you were sworn on May twelfth? A. I do.

Q. How do you remember that? A. Because while that jury was out Judge Mackay had left the court there leaving instructions with the clerk to take the verdict. They had gone out before lunch and in the course of the afternoon one of the jurymen or jurywomen knocked on the door and asked for something to eat and that was reported to Judge Mackay and we got instructions from Judge Mackay not to feed the jury, and one of the jurymen said, "You better get a cup of coffee in here, one of the women fainted," or "some woman fainted," but we disregarded

it and paid no attention to them. That is how I know I was on that jury.

Q. That is a distinct recollection? A. Yes.

Q. About this time you were a court attendant daily in Judge Mackay's court, weren't you? A. Yes.

Q. For how long a period of time prior to May twelfth? A. From the time right after Under Sheriff Reilley was laid off as Under-Sheriff.

Q. Can you tell us what took place every night after that? A. I won't attempt to.

Q. Can you tell us what took place after May twelfth almost every night? A. I won't attempt to.

Q. You don't remember any other case? A. I might if you cite the case to me.

Q. You will attempt to? A. I will tell you to the best of my recollection.

Q. Do you remember what happened on February eighth of this year? A. What day was it?

Q. Do you remember February eighth? A. I might if you tell me the day.

Q. You have to know the day? A. That will assist me.

Q. I have to assist you? A. Somebody would have to assist me.

Q. Did the defendant assist you in your recollection? A. He told me the day.

Q. That is why you remembered everything you testified to here? A. It brought it back to my mind, yes, sir.

Q. It was convenient for him to assist you? A. Convenient for him to assist me?

Q. Your memory became refreshed as a result? A. Yes, sir.

Q. You don't remember February eighth? A. No.

Q. Were you a Court Attendant on that day? A. This year?

Q. You haven't quit, have you? A. No, but it might be a Sunday. I was a Court Attendant on that day.

Q. Do you remember sitting on any case that day as a Court Attendant? A. No, because I have worked in Judge Mackay's court and in this court and I don't know just where I was. If you tell me some particular thing it might refresh my memory.

Q. Do you remember a case being tried on that day? A. I do not.

Q. Well, after May twelfth can you tell us a case in which you were Court Attendant? A. After May twelfth?

Q. Yes. A. I don't recall whether it was after or before. I was a Court attendant in Judge Mackay's court when the cases of—well, in all these big Simon cases I was over in Judge Mackay's court.

Q. Was that after or before? A. I can't tell you but I can give the testimony in all these cases. I heard it. I was there.

Q. If I assist you with the date can you tell us? A. I might.

Q. March twenty-ninth, 1933? A. What case was tried?

Q. Do I have to assist you on the case too? A. I don't know where I was working on March twenty-ninth.

Q. Of last year? A. I was very likely in Judge Mackay's court.

Q. Very likely, but you don't remember what case was heard, do you? A. No.

Q. Do you remember April eleventh of last year? A. No.

Q. Do you remember whether you were a Court Attendant on that day? A. I was.

Q. Can you tell us what took place on that day? A. No.

Q. Do you know what court room you were in? A. No.

Q. If I assist you, could you tell us? A. I might, if you tell me the case.

Q. Do you remember any case on February eighth of this year or after on which you were a Court Attendant? A. Since February eighth?

Q. Yes. A. Yes.

Q. What case? A. I was on the Spinella murder trial across in Judge Harley's court.

Q. You remember that don't you? A. Yes, it was an outstanding case.

Q. An outstanding case? A. There was a lot of interest—a bunch of people here. It wasn't just a common ordinary civil case—

Q. Like the Erie Railroad case? A. That was a very peculiar case.

Q. Peculiar because you are a witness today? A. No.

Q. Peculiar because the defendant recalled to you what happened that day? A. No.

Q. Can you tell us on July seventh what you did? A. No.

Q. If I assist you would you know? A. If you told me what case I might know where I was working.

Q. Can you tell us whether you were working or on vacation that day? A. If it was on a week day I was in the court house.

Q. Can you tell us what you did the night of that day? A. No.

Q. Can you tell us what time of day you left to go home? A. No.

Q. Can you tell us who you saw when you left the court house to go home? A. No.

Q. Can you tell us who you talked to on that day? A. No.

Q. If I assist you I suppose you could? A. If you tell me some particular thing, I will.

Q. Do you remember that after the Erie Railroad case you went downstairs to the Sheriff's Office? A. Yes. That is customary. The same thing I do every day.

Q. Did you tell us that before because it is customary or do you recollect that? A. I was asked what I did and that is what I did.

Q. Did you do it or was it just customary? A. I did it.

Q. You changed your clothes? A. Yes.

Q. The Sheriff's Office is on the basement floor of this building? A. That is right.

Q. Right near the entrance on the side too, isn't it? A. Yes.

Q. From there you walk right outside? A. From there, yes.

Q. But instead you walked upstairs? A. That is also customary.

Q. To walk upstairs? A. I did it.

Q. That makes extra work? A. Not necessarily, it is—

Q. You have to walk upstairs and then walk down the steps in front of the building to get to the sidewalk? A. That is it.

Q. You don't go out by the Sheriff's Office and around the sidewalk to go in front of the building? A. I do that too.

Q. Is it customary to go up the steps and down again? A. No.

Q. You are not physically weak that you want exercise? A. I don't think I am weak.

Q. Do you remember who was in the court room after the jury came in? A. After the jury came in?

Q. With the disagreement? A. No, I don't because I went right down and opened the door.

Q. Didn't you say you saw Lippman, Cooper, Irving Simon and Serlinsky? A. That was during the afternoon while the jury were deliberating.

Q. You don't remember who was in the court room before you came downstairs? Do you? A. No.

Q. You don't remember who went out of the court room first? A. After the verdict had been received I believe I was the first one out because I opened the doors, threw the doors open and left them in.

Q. Are you sure of that? A. That might be customary too.

Q. You are testifying from custom? A. No, I am testifying from what I usually do.

Q. I am asking you did you do it on that day? You don't know, do you? A. I won't say that I do.

Q. Tell us which steps you took to go downstairs—towards the south or the north of the building? A. That is another usual thing. I usually go down this side.

Q. Did you on that day? A. I don't know.

Q. Did you take the elevator or not? A. No, I didn't take the elevator.

Q. Sure about that? A. Maybe I did. That is not usually what I do but sometimes I do and sometimes I don't.

Q. When you went in the Sheriff's Office who was in there, do you remember? A. I don't recall anybody. I was alone.

Q. Are you certain about that? A. There was nobody around the building—nobody around the office.

Q. The door was open? A. I don't recall. There may even have been somebody in there.

Q. Do you know how long you stayed there? A. Not very long.

Q. Do you know if you talked to anybody in there? A. No.

Q. Because you don't know whether anybody was in there or not? A. Because I don't remember.

Q. Then you walked upstairs? A. I must have walked upstairs.

Q. Going back to the court room, had you met Serlinsky before this day? A. No, I think that was the first time I ever met him.

Q. In the course of your duties you meet thousands of people? A. I do.

Q. You remember distinctly that on May twelfth that Serlinsky was the man you saw, although you see thousands? A. I don't say May twelfth.

Q. You remember distinctly that it was him outside in front of the building? A. That same man was in that court room and had been there possibly two hours before the jury came in.

Q. That was the first time in your life you had ever met that man? A. The first time I had ever been introduced to him.

Q. You remember that today? A. I do.

Q. Because of the fact he was in there for two hours? A. No, because of the fact that I remember him.

Q. Because of what? A. Because Court Clerk Lippman was selling tickets and Irving Simon

bought two of those tickets and put this gentleman's name on them.

Q. Because of the sale of the ticket you remember he was present? A. I remember Simon putting that name on those stubs.

Q. On May thirteenth did anybody ask you what happened on May twelfth? A. No.

Q. When were you asked? A. Not until Mr. Serlinsky was indicted was I asked.

Q. This was just an ordinary incident in your days work as a Court Attendant? A. That is right.

Q. But you remember the sale of a ticket, don't you? A. I do.

Q. But you can't tell us what you did on any of the dates I have mentioned? A. No.

Q. Did he assist you on that? A. Who?

Q. Mr. Serlinsky, say don't you remember the name being put on? A. No.

Q. You are telling us the truth now, are you? A. I am.

Q. Thereafter when did you see Serlinsky again? A. As to the date I wouldn't tell you but I have seen him around the corridors.

Q. When was the next time you saw him after May twelfth? A. I don't remember.

Q. A month—two months—a week or a day after the incident? A. I don't remember when. I have seen him from time to time in the corridors.

Q. When is the next time? A. I wouldn't attempt to tell you because I wouldn't name the date.

Q. If Mr. Serlinsky told you would that refresh your recollection? A. If he called some thing to my mind, or you or anyone else it will.

Q. Can't you just sort of remember the next time you saw him? A. No more than I could the next time I saw you after that day unless you told me some particular reason or brought something to my mind.

Q. Did you see him on May twelfth? A. I don't recall.

Q. Serlinsky saw you after he was indicted didn't he? A. Yes.

Q. He came to see you where? A. Right out here in the corridor he stopped me.

Q. Then you remembered exactly what took place on the sidewalk? A. I remembered the whole thing.

Q. You didn't use a diary? A. There was no need for it.

Q. You didn't keep a diary? A. No.

Q. You remembered immediately what took place didn't you? A. I do.

Q. I mean that what you have told us? A. That is right.

Q. Then he asked you to be a witness for him? A. He gave me a subpoena.

Q. At that time? A. Yes, sir, the first time he spoke to me after he was indicted he gave me a subpoena.

Q. Have you got the subpoena with you? A. I have got two.

Q. What was the date upon the subpoena—the first subpoena he gave you? A. The first day of March this year.

Q. Don't you know he was indicted on December twenty-first? A. I don't know.

Q. When you said he told you the day he was indicted, you were wrong? A. I said after he was indicted. Sometime after he was indicted. I knew as everybody else did that he was indicted.

Q. You knew that he was indicted? A. I said I knew as well as everybody else did after he was indicted.

Q. After you told him the story he immediately gave you this subpoena, didn't he? A. He did on the first day of March.

Q. The time he spoke to you he didn't know what you were going to say? A. No.

Q. He filled out the subpoena in front of you? A. He did.

Q. And then gave it to you? A. He did.

Q. Did you meet him thereafter? A. Yes, I met him since. Between that day and this.

Q. Have you talked about what you were going to testify to? A. We didn't say any more.

Q. You just had a general conversation? A. Why he came to tell me the case was laid over—he called me on the phone on one occasion. I think the case was supposed to go on last Monday and he called me on the phone and told me it was laid over.

Q. Mr. Reese when you walked upstairs instead of going out the Sheriff's door, you came on the first floor of this building? A. I did.

Q. Did you see anybody in the corridor at this time? A. This group of people walking out.

Q. How long did it take you to change your clothes? A. I took my trousers off and put the others on, put my coat on and locked my locker and walked out.

Q. Were they walking slowly? A. Just strolling out.

Q. Did they stop at any time while you were there? A. What?

Q. Did they stop in your presence? A. Meaning who?

Q. This group of jurors? A. I didn't see them.

Q. Was the group of jurors with Irving Simon and Serlinsky? A. Irving Simon as I recall it was ahead of these people, walking out.

Q. He wasn't then with this group of jurors? A. They was all mixed together.

Q. Was he or wasn't he? A. Mixed in with them and ahead of them. There were some people with him.

Q. Was Serlinsky with him at the time? A. I didn't see him at the time.

Q. Or La Conti? A. I haven't seen him.

Q. Or Hickling? A. I didn't see him.

Q. Or Finn? A. I didn't see him.

Q. Or Corsetta? A. I can't tell you anybody was there only Irving Simon at that time.

Q. As they were going out, did this group stop at any time before they reached the door of the building? A. They were going out the first door, between the first and second door when I came around the corner and I didn't see them stop.

Q. You didn't see them stop and ask a question of Irving and Irving asking questions of them and answers going back and forth among the jurors? A. I didn't notice it.

Q. Did you see Serlinsky there? A. I didn't see him.

Q. Will you tell us whether he was there or not? A. I will not because I didn't see him at the time.

Q. The only man you remember seeing is Irving Simon? A. Yes.

Q. With the group walking out in front of you —or was it back of you? A. In front of me.

Q. When they got to the steps what did this

group do? A. They strolled on down the steps—that is I presume they did because I had not reached the top of the steps. Between the time the first door closed and when I got there I don't know what they did but when I saw them they were going down.

Q. Did you see Irving Simon at that time? A. I did when I got out in front.

Q. He was one of them? A. He was one I had seen.

Q. Did you see Serlinsky at that time when you got out the door? A. Yes.

Q. Where was he? A. Down on the sidewalk by that granite square post.

Q. When you first saw this group of jurors were you on the inside of the building? You first saw them inside the building? A. As I came around the corner from the stairway.

Q. The stairway? A. That is right.

Q. The stairway on this side of the building? A. Yes.

Q. That is the same side you came up from the Sheriff's Office on, isn't it? A. That is right.

Q. Well, you were walking fast then, you were in a hurry? A. Not necessarily.

Q. Was this group of jurors in front of you? A. They were.

Q. The door was behind them? A. They were going through the door, yes.

Q. The next thing after the door closed you saw Simon out on the sidewalk? A. No.

Q. Where did you see him? A. I didn't see him until I got out in front, ready to take the first step down.

Q. Where? A. I was ready to take the first step down.

Q. From where? A. The front steps right in front of the court house.

Q. You followed him out? A. There was other people between he and I at the time, I saw him go out.

Q. When you got to the door—you were behind this group of jurors? A. That is right.

Q. Didn't this door remain open for you to go along with them? A. The people passed the door along as they were through.

Q. Nobody held the door open for the whole bunch to go out? A. I don't remember, somebody might have.

Q. You don't remember that? A. I do not.

Q. Before you said you couldn't see because the door was closed but by the time you opened the door you saw Irving Simon down below. Were you mistaken then? A. I don't mean the door was shut.

Q. You were mistaken then? A. That is right.

Q. When you got out the door Irving Simon was on the first step going down? A. When I was out the door, he was on the first step going down?

Q. Yes. A. No. When I got out in front. I didn't see him during that interval from the time I left the front door until I got past those square posts, I didn't see Irving Simon.

Q. You were just in back of him? A. There were people between Irving Simon and I going through the door.

Q. When you got out of the door where was he? A. I didn't see him when I was out the door.

Q. Where was the first you saw him? A. When I had proceeded that twelve feet or more.

Q. Where was he then? A. He was then down on the sidewalk.

Q. Was Serlinsky with him at that time? A. He was.

Q. As Serlinsky was going out of the court house was he with him? A. I didn't see him.

Q. You didn't see Serlinsky walk down the steps? A. No, sir. I didn't see Simon walk down either.

Q. You were going towards the Court House Restaurant? A. That is right.

Q. It was still light at this time? A. Yes.

Q. You were just about going down the steps when you saw Irving and Serlinsky? A. That is right.

Q. What attracted your attention to them? A. Why knowing them—

Q. Were they on the left or right of you at that time? A. The left of me.

Q. By the way, who was the other Court Attendant? A. Jake Bartholf.

Q. Did he go out with you? A. No, he stayed in and closed the court room up.

Q. He stayed in? A. That is I presume he did. He didn't come out with me.

Q. When you were on the top of the court house steps you saw Irving Simon and Serlinsky? What were they doing at that time? A. Half turning and half walking to go down Hamilton Street towards Grand.

Q. Half turning and half walking? A. That is right.

Q. Did they stop? A. I won't say they stopped.

Q. You can't remember that, can you? A. No.

Q. Do you remember if any other jurors were there at the time? A. With them?

Q. Yes. A. I didn't notice any. They might

have been right there and I not notice them but I know Irving Simon and Mr. Serlinsky was there that day, I remember them.

Q. No one else was around Irving Simon or Serlinsky or in their immediate vicinity that day? A. At what time?

Q. When you were on top of the steps going down? A. I won't say there was and I won't say there wasn't.

Q. You do remember Irving Simon and Serlinsky? A. Yes.

Q. That is distinct? A. That is correct.

Q. Did you see any of the jurors anywhere from where you were standing to their position on the sidewalk? A. Not at the time I don't think.

Q. Were there any people in front of you outside of Serlinsky and Irving Simon? A. There were others walking down the stairs.

Q. How many? A. It is only a guess. I won't say definitely. I will say eight or ten.

Q. You aren't guessing all the time, are you? A. No.

Q. Do you remember La Conti being there in this group going down? A. I don't remember seeing him.

Q. You didn't see him? A. I didn't say I didn't. I said I don't remember.

Q. Do you remember seeing Shulman? A. Shulman was down on the sidewalk, walking up alone. All by himself.

Q. That is the only juror you remember? A. That is the only one.

Q. Were you assisted on that? A. No.

Q. After you first glanced at Irving Simon and Serlinsky, did you watch them to see what they

were going to do thereafter? A. I did not. I had no occasion to.

Q. You just glanced at them? A. As I testified I don't recall if I said good night or just waved my hand. I know there was some gesture. Either I waved my hand or said good night.

Q. When you first took this glance at them, did you look at them thereafter? A. I glanced at them either at the head of the steps or when I got on the sidewalk.

Q. At the head of the steps? A. I wouldn't testify I did.

Q. Then you waved your hand or said good night? A. That is my impression or recollection that I did. I won't say for sure but I believe I did.

Q. You don't know whether you waved your hand or said good night to them? A. I wouldn't say.

Q. You don't know, do you? A. I wouldn't say.

Q. At the time you waved your hand and said good night, which you don't know whether you did or not, where was Irving Simon and Serlinsky? On the sidewalk? A. I would say they were then between the post and a line twenty-five or thirty feet below that granite square walking towards Grand Street—in that general direction towards Grand Street.

Q. Were their backs to you? A. They were walking half turned and half looking back. That is a part I am clear on.

Q. Are you clear that they were there? A. Absolutely they were there.

Q. Was their backs toward you or were they walking sideways like that? You don't know do

you? A. I say that to the best of my recollection. I may not have said good night.

Q. You may not have said it at all? A. I may not have. I won't say I did for sure but it is in my mind I did.

Q. Seeing you are testifying from custom, do you usually say good night? A. I am not accustomed to testifying.

Q. I know. I can see that. Then you went over to the Court House Restaurant? A. I don't recall whether I did or not, I went in that direction.

Q. You don't recall that either? A. I said I went in that general direction.

Q. You don't know whether you went in or not? A. I don't recall.

Q. You don't know whether you had coffee or not? A. I might have had ice cream, I don't know.

Q. You didn't glance back afterwards at Irving Simon and Serlinsky again? A. No, not that I recall.

Q. You don't know what they did? A. No, I do not.

Q. At the time you waved— I withdraw that. You don't know whether you did that or not? A. That is right.

Q. At the time you saw Irving Simon and Serlinsky thirty or forty feet down the street, did you see La Conti? A. I didn't see La Conti at all that night.

Q. Wasn't La Conti walking down with him? A. I don't know. I didn't notice if he was.

Q. He might have been there? A. He might have, but I didn't see him.

Q. Did you see Hickling there? A. I did not.

Q. Are you sure about that? A. I don't recall seeing him there.

Q. You don't recall seeing him there? You can't tell us positively? A. I won't say he wasn't.

Q. Do you remember Finn being on the steps? A. I don't remember seeing Finn.

Q. You can't tell us whether he was there or not, can you? A. No.

Q. What is the answer? A. I said "no, sir".

Q. And you can't tell us why you looked again when they were thirty or forty feet down the street? A. Why I looked?

Q. Yes. A. No.

Q. Before they got out of the court house, inside the building and you say you saw Irving Simon, you aren't sure about that? A. When was that.

Q. When they were inside of the building did you see Irving Simon?

Mr. Stafford: I object to the question. It is a repetition of the testimony.

The Court: There is a great deal of repetition.

Mr. Shershin: I think it is quite necessary for the purpose of effecting this witness' credibility.

The Court: Of course, I want to give you all the latitude necessary but we don't want to go too much into it.

Q. The first time you saw Irving Simon was outside the building after you had changed your clothes? A. No.

Mr. Stafford: That is a misstatement of the evidence.

Q. You don't know where you went afterwards? A. I do not.

Q. Don't you whether you went home or where? A. I know I went home sometime that night, I don't know when.

SAUL LIPPMAN, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live? A. 354 Van Houten Street, Paterson.

Q. You have lived in Paterson how many years? A. Twenty-seven years.

Q. You hold an official position with the courts of the County of Passaic? A. I do.

Q. What is that position? A. Clerk to the Circuit Court.

Q. You have been clerk for how long? A. Six years.

Q. Were you clerk to the Circuit Court which heard the case of Demarest versus the Erie Railroad which was finished on May twelfth, 1933? A. I was.

Q. Do you recall while the jury were out discussing the case who were in the court room? A. Yes, I do.

Q. Who were there?

Mr. Shershin: I object to it as not being the issue here as to who was in the court room during that time or all afternoon.

The Court: No, but the question has been asked of several witnesses and no objection was raised.

A. Late in the afternoon?

Q. Before the jury came in? A. Ralph Cooper, Ivan Reese, Jake Bartholf, Thomas Serlinsky, Irving Simon and there might have been one or two others, it is not clear in my mind. I am not clear on that, there might have been some of the litigants waiting for that verdict.

Q. Do you recall the jury coming in? A. I do.

Q. After the jury came in do you recall whether or not you saw where they went? A. Well, when they were discharged, I walked out in the general direction of the door—this court room is an exact replica, out of the door in the general group.

Q. Did you see just who went out the door? A. Well, they all went out in a sort of a group. I think the court room was cleared in half a minute or less than that.

Q. Did you see Mr. Serlinsky—where he went? A. With the group. Irving Simon, Ralph Cooper and the jurors was just one group.

Q. Did you see them again after that? A. No, I didn't.

Q. Did you hear a conversation between Irving Simon and Mr. Serlinsky relative as to how they were going home?

Mr. Shershin: I object to it even though it requires a yes or no answer.

The Court: He may answer yes or no.

A. I did.

Q. How long before the jury came in did you hear that conversation? A. Right after three o'clock.

Cross-examination by Mr. Shershin:

Q. Do you remember it was right after three o'clock? A. Yes, sir.

Q. You have quite a good memory, Mr. Lippman? A. I don't know as it is.

Q. Can you tell us in what direction you went after you left the court room? A. No.

Q. You can't recall that though, can you? A. No, I can't.

IRVING SIMON, a witness produced on behalf of the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. You are the Irving Simon that has been mentioned in this case? A. The Irving Simon.

Q. On May twelfth, 1933, Mr. Simon, were you interested in a case then being tried in this County's Circuit Court? A. I was here, yes, trying the case of Demarest and Terhune versus the Erie Railroad.

Q. Can you tell the Court and jury whether or not you saw the defendant Thomas Serlinsky before the jury came in? A. Yes.

Q. Where was he? A. In the court house.

Q. What part of the court house? A. We were sitting around a table playing cards.

Q. Who were playing cards? A. Ralph Cooper, I think, Ivan Reese and myself. I think just the three of us.

Q. When the jury was discharged by the court will you tell the Court and jury what you did? A. I waited to gather up the exhibits, certain pictures that were offered in evidence. I collected

the pictures from Mr. Lippman and Mr. Serlinsky and I walked out and as we went downstairs there were a group of jurors and we walked over to the group of jurors and we were discussing the fact of how they arrived at their conclusion which was a six to six disagreement and as we got to the sidewalk I turned left with Mr. Serlinsky and went with Mr. Serlinsky to his car to drive home.

Q. Did you talk with Michael La Conti on the top of the steps for a period of six or eight minutes? A. No, sir.

Q. Did you talk with Michael La Conti at the bottom of the steps for fifteen or eighteen minutes? A. No, sir.

Q. Did you discuss this case with Michael La Conti at anytime on the evening of May twelfth?

Mr. Shershin: I object. He is not the defendant, he is a witness in behalf of the defendant.

Q. Did you have any conversation with Michael La Conti? A. I had a conversation with a group of jurors and of course I might have during that conversation, however I can't tell you who talked but it was a general conversation between the jurors and myself and Mr. Serlinsky took part in it too.

Q. Did you see Mr. Hickling that night? A. I don't recall.

Q. Was he introduced to you at the bottom of the steps? A. That is not true.

Q. Can you tell the Court and jury as you walked out of the court room what you had in your hand? A. I had a file similar to the one on the table there, a brown folder.

Q. When you walked out of the court room did you walk out alone or with others? A. I walked out of the court room with Mr. Serlinsky. The both of us together.

Q. Where did you go? A. We walked down stairs and towards the front entrance.

Q. Then where did you go? A. This group of jurors was going out the door at the time.

Q. Yes. A. I probably was in front and I intermingled with the group of jurors and Mr. Serlinsky was with me.

Q. Where did you and the jury separate? A. On the street. On the sidewalk.

Q. Where did you go? A. I turned left with Mr. Serlinsky, his car was parked down the street and we went into the car and he drove me home, or rather to the office.

Q. Did you see Mr. Finn or Mr. Corsetta standing on the steps that evening after six o'clock? A. I don't recall anyone standing on the steps.

Q. Did you see Mr. Hickling standing on the sidewalk that night? A. No.

Cross-examination by Mr. Shershin:

Q. Do you recall Mr. Simon what time Mr. Serlinsky came into the court room that afternoon while the jury was out deliberating? A. Yes, I do.

Q. What time? A. I should say about four o'clock or a little after four.

Q. Four o'clock? A. Somewhere around half past three or four o'clock.

Q. It wasn't three o'clock, was it? A. I should say not.

Q. Did he come in with someone or alone? A. He came in with Mr. Grossman as I recall it.

Q. Then he waited until six o'clock? A. I asked him to. I asked him to wait to drive me home.

Q. Did Grossman stay there at that time? A. He did not.

Q. Serlinsky remained? A. They both went to call on Mr. Rosenkrans and then he came back to the court room.

Q. You don't know of your own knowledge they went to Rosenkran's office? A. Except what they told me.

Q. They were in the court room at four o'clock? A. That is right.

Q. By the way, you are related to the defendant, aren't you? A. I am not.

Q. Your brother Irwin is related to him? A. He is not.

Mr. Stafford: I object to that if the Court please.

Q. Irwin's wife is related to the defendant's wife—

Mr. Stafford: I object to that. That is not relevant to the issue.

The Court: I will admit it.

A. My brother Irwin's wife is related to Serlinsky's wife, yes.

Mr. Stafford: I ask that that be stricken out, it doesn't show any relationship to this man at all.

The Court: It shows the relation of this man's wife.

Mr. Stafford: Not this man's wife.

The Court: Whose wife is it?

Mr. Stafford: His brother's wife.

The Court: Strike it out.

Q. What time did the jury come out with a disagreement? A. Six o'clock.

Q. Do you recall the time exactly? A. I should say about six o'clock.

Q. Who did you leave the court room with? A. Serlinsky.

Q. Did you go side by side out into the corridor of the court house? A. Yes, about side by side, there might have been a step in front or behind.

Q. Was anyone else with you at that time? A. As we walked out?

Q. Yes. A. No.

Q. Did you see Mr. Cooper? A. Ralph ran out, he actually ran.

Q. First? A. Yes.

Q. Before the jury or after? A. As the jurors left Ralph ran right out of the room. I waited to gather the exhibits.

Q. Did you see Ralph Cooper after that? A. Ralph Cooper ran out and then came back in the room while I was gathering up the exhibits.

Q. Did he stay there? A. I don't know whether he did or not. I took my hat and walked out of the room.

Q. Did he walk out with you? A. I believe I was in back of Serlinsky.

Q. He didn't walk out with you? A. No.

Q. Then he was ahead of you at the time? A. I should say so.

Q. The second time when he was going out of the court room were there any jurors in front of him? A. No.

Q. The jurors had gone many minutes before? A. Not many minutes. Probably half a minute. I know at the time the jurors had gone out, they were out of the court room.

Q. As Cooper left nobody else was in the court

room except yourself, Serlinsky and Mr. Lippman? A. Probably Jake Bartholf was also.

Q. You are not sure? A. I think he was.

Q. Was Reese there? A. No, Reese had gone.

Q. Did you see him again? A. No. Until Mr. Reese had testified I thought he had gone to open the door for the jury.

Q. You are not sure of what he did at all, are you? A. Not sure of what?

Q. Whether he was in the court room at the time you left, you don't know? A. I should say no, he was not in the court room at the time I left.

Q. Then you came outside and the first jurors you met were where? A. As I walked out of the door Mr. Cooper was talking to one or two of the jurors by the door.

Q. Do you know who he was talking to? A. I don't know.

Q. Was it Finn? A. I can't tell you.

Q. Was it Corsetta? A. I can't tell you.

Q. What did you do? A. I continued down stairs.

Q. Did Cooper remain there? A. Yes, Cooper remained behind.

Q. With these two jurors? A. Yes.

Q. Was there only two at the time? A. I think that is all.

Q. You continued downstairs? A. That is right.

Q. When you were downstairs you met the jurors? A. As they were going out the door I joined them.

Q. As you were going downstairs you didn't meet them? A. I was going down when I met them at the door.

Q. As you were walking down the steps you didn't meet Shulman? A. No.

Q. From the second to the first floor? A. No, I don't think so.

Q. You didn't meet him there? A. No.

Q. You met the group of jurors as you stood by the door leading out of the court house? A. Yes.

Q. Had they all stopped there? A. Yes, they stopped of course.

Q. Inside the building? A. Yes.

Q. Were you talking inside the building? A. I don't remember. I might have. I don't remember.

Q. How long were they stopped there? A. Well, they opened the door and as one juror walked out the door another one or two would go out.

Q. Before they walked out, did you—

Mr. Shershin: I withdraw that question.

Q. Could you see this group of jurors after you got to the hallway downstairs, at the landing at the foot of the steps, by the doorway? A. Yes.

Q. Were they still standing there when you got to the door? A. I walked towards them and as we reached there the door was opened and I joined the group.

Q. At that time you were not with Thomas Serlinsky? A. I was with him.

Q. Alone with Serlinsky? A. I don't think that would be proper English. I was with Serlinsky.

Q. No one else with you besides Serlinsky? A. No.

Q. Do you know who the jurors were? A. No.

Q. Do you recall any of their names? A. No.

Q. Did you see La Conti there? A. No, I did not.

Q. Did you see Hickling there? A. I can't say. I couldn't tell you the names of any of the jurors.

Q. You had this brown folder which contained your exhibits and papers? A. That is right.

Q. Did you stop and talk to the jurors just before they were leaving to go outside? A. I joined the group. As we all walked out I joined the group.

Q. Who did you talk with? A. It was a general conversation, not directed to any one person. A general conversation.

Q. Do you remember any of the jurors answering any of your statements or answering any questions? A. I don't think there were any questions, it was merely a general conversation.

Q. Do you remember any one juror stating anything? A. Yes.

Q. Do you remember who it was? A. I could have on May fifteenth or eighteenth but it is difficult now.

Q. It is very difficult to remember what actually happened that night? A. No. My recollection is very very definite as to that.

Q. As to what you and Serlinsky did? A. That is right, because I was indicted three weeks after that.

Q. Is that the reason your recollection is so distinct? A. Yes. I recalled it immediately afterwards and checked up the records and so forth.

Q. Were you indicted for that case—Terhune versus Demarest case? A. That is right.

Q. And you checked how you were going out of the court house? A. No, I didn't check—I didn't check, no.

Q. Did you go back and recollect how you left the court house? A. Is that right after the indictment? I went back over everything.

Q. When did you first speak to Serlinsky? A. A month or two after.

Q. In September? A. It may have been, I don't remember.

Q. You didn't go to him and ask him to remember leaving the court house with you and where you went? A. I never thought there was any necessity for it.

Q. You say La Conti wasn't in this group? A. I didn't say he wasn't in this group. I don't know. He might have been.

Q. You don't know whether Hickling was there? A. I don't know.

Q. He might have been? A. Yes.

Q. As you opened the door—

Mr. Shershin: I withdraw that.

Q. While going out did you see Ivan Reese? A. I don't recall whether I did or not.

Q. You went out on the steps and walked towards the sidewalk, didn't you? A. Yes.

Q. Did you stop there? A. On the sidewalk?

Q. Yes. A. No.

Q. Who was with you at the time? A. Serlinsky and I and the group of jurors.

Q. Who were in this group of jurors? A. I don't know.

Q. Didn't you ask La Conti about how the jury stood? A. I did not.

Q. And he told you the jury stood six to six and you checked your jury list? A. Again I say I did not talk to him directly.

Q. You didn't talk to him directly at any time after leaving that day? A. There was a group of

jurors I was talking to. If he was among that group something may have been said but not directly.

Q. You didn't talk to him alone and he asked you certain questions and you asked him certain questions? A. No, sir.

Q. He didn't introduce you to Hickling, did he? A. No, sir.

Q. You didn't walk down with La Conti to Grand Street and with Hickling? A. No.

Q. Did you see Ivan Reese walking down the steps of the court house? A. No, I don't recall that.

Q. Do you recall him waving or saying goodnight to you? A. I can't recall that.

Q. How many were in this group of jurors? Was it men and women? A. Men and women.

Q. Do you recall whether there were three, four or five? A. I should say between eight and ten —very likely ten.

Q. On the sidewalk and steps? A. That is right, there was quite a group of us as we walked down.

Q. And you stood there for how long? A. Stood where?

Q. On the sidewalk or steps? A. I didn't stand on the steps.

Q. Did you stand on the sidewalk? A. No.

Q. Where did this group of jurors start to disperse and start to leave you and Serlinsky? A. They didn't leave me. As we reached the sidewalk I turned left with Serlinsky.

Q. What happened to the group of jurors? A. I don't know.

Q. You didn't see? A. No.

Q. You immediately walked down to Grand Street? A. I was very anxious to get home.

Q. Do you remember the conversation you had with this group of jurors? A. A general conversation.

Q. On how the verdict stood? A. Yes.

Q. About who stood for the plaintiff's side and who stood for the defendant? A. No, I didn't ask that.

H. THOMAS SERLINSKY, the defendant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live? A. Harding Apartment Passaic, 365 Main Avenue.

Q. Are you married? A. Yes, sir, a little over three years now.

Q. What is your profession? A. Lawyer.

Q. How long have you been a lawyer? A. It is now five years. I was sworn in in September, 1929.

Q. Did you go to school in Passaic? A. I was born in Passaic and went to school there and Passaic High School and so on.

Q. Where do you have your offices in Passaic? A. My office now is at #223 Central Avenue.

Q. Your offices on May twelfth, 1933 were where? A. The Mechanic National Bank Building, Monroe—corner of Market Street, Passaic.

Q. Do you remember what happened on May twelfth 1933? A. Yes, sir. To the best of my recollection—

Q. Were you in Paterson on that date? A. Yes, sir.

Q. What time did you arrive in Paterson? A.

My best recollection. My honest recollection is I arrived somewhere around three o'clock.

Q. Where did you go? A. I went to the office of Mr. Addison Rosenkrans.

Q. Yes. A. I had consulted him with reference to the case of the Passaic Park Washing Company versus Pasternack and others and I was to go to see him at his office. I went to his office but I can't recall whether I found him in that day or not. I know I had at least three or four consultations with him on the case at his office and several here in the court room.

Q. Where did you go after leaving his office? A. My recollection is I came here to the court house. I had parked my car down on Grand Street. I didn't park it down around Mr. Rosenkran's office because I might have been kept there over an hour.

Q. Where—oh, you parked your car on Grand Street? A. Yes.

Q. Were you here when the jury in the case of Demarest versus the Erie Railroad Company came in? A. Yes.

Q. Who were in the court room? A. Mr. Cooper, Irving Simon, Ivan Reese, Saul Lippman and myself and then there was an elderly court attendant, his first name is Jake, I don't know his last name.

Q. And when the jury was discharged where did you go Mr. Serlinsky? A. You mean immediately after the jury was discharged?

Q. Yes. A. I waited around until Irving got certain papers into his file. Then we left. My honest recollection is Mr. Cooper left with Irving and myself, we all walked out of Judge Mackay's court room and went to the stairway and Irving

and myself went down the steps. I honestly cannot remember where Mr. Cooper left us but my recollection is he left Judge Mackay's court room with Irving Simon and myself.

Q. Did you see any of the other jurors in the corridor as you went along? A. On this same floor?

Q. Yes. A. I can't recall any. There may have been some but I don't recall any.

Q. Did you see any of the other jurors at all as you were going through the building? A. Yes.

Q. Where? A. My honest recollection of it is that Irving and myself got down on the first floor and we caught up to this group of jurors just about abreast of the Register's Office and kept up with them and there was a general conversation there to the effect that the jury stood six to six practically from the outset. That is my recollection of what was said. There was just a little more conversation but I can't recall what the conversation was. As we conversed we continued walking out towards the front of the building and walked out to the sidewalk, Irving and myself, there may have been some jurors abreast of us, some ahead of us and some behind us, but we continued walking out, Irving and myself, and turned to the left and walked to Grand Street to where my car was parked and I drove Irving back home to Passaic.

Q. Did you see La Conti there at all? A. He might have been in that group. I can't recall him.

Q. Did Irving Simon talk to any of the jurors individually? A. Only to that group as we were walking out.

Q. Did you see him talk to La Conti? A. If La Conti was in that group.

Q. Did you see him talk to La Conti up on top of the steps for six or eight minutes alone? A. No, sir.

Q. Did you see him talk to La Conti at the bottom of the steps for fifteen or eighteen minutes alone? A. My honest recollection is that never occurred.

Q. Did you see Hickling there? A. I don't recall seeing the gentleman.

Q. Did you see La Conti introduce Hickling to Irving at the bottom of the steps? A. No, sir.

Q. You are charged in this indictment, Mr. Serlinsky—that you falsely, corruptly, knowingly, wilfully, unnecessarily, maliciously and unlawfully testified knowing it to be false that on the twelfth day of May, 1933, you were in the court room, meaning the court room in the Passaic County Court House, Paterson, New Jersey, with Mr. Irving Simon and Mr. Ralph Cooper the representative for the Erie Railroad Company, and that you, Thomas Serlinsky, were in the court room when the jury came out with a disagreement; that it was six o'clock, meaning P. M., and that you were present when the jury was discharged by Mr. Lippman; that you went out of the court room with Irving Simon; that you did not recall whether there were some of the jurors standing around there in a crowd; that you left Judge Mackay's court room and walked out with Irving Simon and Mr. Cooper, walked down the steps; that you can't recall where Mr. Cooper left you and Irving Simon and that you and Irving Simon walked down the steps to the first floor and you recalled in a general manner discussing the case there and some question was asked by one of the jurors and then you left said court house with Irving Simon and left a group of jurors,

and that you and Irving Simon went out the front way, turned to the left on Hamilton Avenue and went to your car which was parked on Grand Street, and that at no time did Irving Simon talk to anyone of the jurors aside from this general conversation. Was that testimony given falsely and maliciously or to the best of your honest recollection? A. My honest recollection of what occurred that day.

The Court: At this point, members of the jury we will adjourn until tomorrow morning ten o'clock. You will recall the admonition I gave you yesterday when the jury started this case. I won't repeat it.

(At this point an adjournment was taken until Wednesday, March 14th, 1934, at 10:00 A. M.)

March 14, 1934; 10:00 A. M.

Court reconvened pursuant to adjournment.

Counsel present as heretofore noted.

THOMAS SERLINSKY, resumed the stand for continued cross-examination.

By Mr. Shershin:

Q. Mr. Serlinsky, what time that afternoon, which was May the 12th, did you arrive in the court room—Judge Mackay's court room? A. My recollection is, it was about three-thirty.

Q. Three-thirty? A. Yes, sir.

Q. It wasn't four o'clock? A. It may have been; that is my recollection, it was about around three-thirty in the afternoon.

Q. Was it three-thirty or four? A. That is my honest recollection, around three-thirty. It may have been closer to four.

Q. It may have been? A. Yes.

Q. You aren't sure of that? A. No, sir.

Q. How do you fix the time as three-thirty or closer to four, possibly? A. That is my honest recollection, that is the approximate time that I arrived.

Q. Did you check a diary? A. My diary doesn't show what time I arrived.

Q. It doesn't show that? A. No, it wouldn't show that, the time I arrived.

Q. It doesn't show that? A. No.

Q. That is how you base it, just from your honest recollection? A. Yes, sure.

Q. Do you remember, who was it who came with you? Or, were you alone? A. My recollection is that I came alone.

Q. Came alone? A. That is my honest recollection, sir.

Q. When you came into the court room, whom did you see there? A. You mean, Judge Mackay's court room?

Q. Yes. A. Irving Simon, Sol Lippman, the court attendants—Mr. Cooper was there, and I was subsequently introduced to him.

Q. You spoke to Irving Simon about taking him home? A. He asked me to wait and drive him home.

Q. Drive him home? A. Yes, sir.

Q. Then you waited from three-thirty until—or around that time or from closer to four o'clock

—until six o'clock? A. Until the Jury were brought in and discharged; that is right.

Q. And you fix the time about six o'clock? A. Yes, sir.

Q. That is your recollection. Don't you remember when the Jury came in? A. That is my honest recollection, when the Jury was brought in and discharged.

Q. During that period of time, you stayed in the court room? A. Yes.

Q. From the time you got in until the Jury came in with their verdict? A. Either in the court room or in the hall.

Q. Your only interest there was because Irving asked you to drive him home? A. Asked me to wait and drive him home.

Q. Yes? A. That is right.

Q. Then, when the Jury came in at six o'clock, did you see the Jury leave the room? A. After they were discharged?

Q. Yes. A. Yes.

Q. Tell us how they went out of the room, at the time of six o'clock? A. My recollection is that they were told they were discharged by the Clerk, after he took their verdict. They all turned around, headed out towards the exit or the entrance of the court room.

Q. The entire group of twelve jurors? A. Yes.

Q. Do you remember distinctly, it was the entire group that left? A. That is my honest recollection, that they turned around and went out of the room.

Q. Who remained back at the counsel table? A. Mr. Lippman and, I believe, this elderly court attendant.

Q. Do you believe or is that just a guess on your part? A. I believe he remained.

Q. You believe he remained? A. Yes, the one they called "Jake".

Q. Yes. Who else? A. Irving Simon, myself and Mr. Cooper was in the room—

Q. Mr. Cooper was in the room? A. —whether he followed them out, I can't remember.

Q. Don't you know? A. I honestly can't remember whether he followed them out; I can't remember.

Q. Do you— A. (Continuing) Then we went back to get our hat and coat—

Q. They went back to get their hats and coats? A. (Continuing)—which was on the counsel table, away at the back.

Q. When you got your coat and hat from the counsel table, who was in the room at the time? A. Mr. Lippman, Mr. Cooper, Irving Simon, and this elderly court attendant—I am not certain about this elderly court attendant being there at the time.

Q. Who was the first person that left the court room after the Jury came in with their verdict of disagreement? A. You mean, after the Jury filed out?

Q. Yes. A. I don't recall that.

Q. You recall seeing Mr. Reese there during the afternoon? A. Yes.

Q. You don't recall him being the first person to leave the court room, do you? A. I don't recall.

Q. You don't recollect that at all, do you? A. No, sir.

Q. After you got your hat and coat, what did you do? A. Waited for Irving Simon to put some papers in the file, and then we left. My recollection is, Mr. Cooper left with us.

Q. Three of you? A. Yes, sir.

Q. Were you the last three going out of the court room at the time? A. I remember, Sol Lippman was still there. He was making some entries in his book.

Q. Was he the only one left in the court room after— A. So far as I can recall.

Q. So far as you can recall? A. Yes, sir; that is my honest recollection.

Q. You cannot recall everything, can you? A. Oh, no, sir.

Q. But you recall walking out with Mr. Cooper, who was counsel for the Erie Railroad, don't you? A. And Irving Simon; yes, sir.

Q. Three of you walked to the door of Judge Mackay's court, which leads to the corridor— A. Yes, sir.

Q. —is that so? A. Yes, sir.

Q. Your memory is distinct about Mr. Cooper, isn't it? A. I recall—that is my best recollection —I recall Irving, Cooper—Mr. Cooper—and myself walking out of there.

Q. Is that a fact or not— A. That is my honest recollection.

Q. Your honest recollection? A. Yes, sir.

Q. Do you remember this question—

Mr. Shershin: Page 1327.

Q. (Continuing)—given when you testified in the conspiracy case between the State and Dr. Aaron L. Simon and other defendants:

> Q. When you left the court room, just tell us what you did, in your own way. A. I left the court with Irving Simon, left Judge Mackay's court, walked out of the court with Irving Simon and Mr. Cooper, walked down the steps. I can't just recall

where Mr. Cooper left us, walked down the steps to the first floor, as I recall, in a general manner, discussing the case. There was a question asked by one of the jurors, he said something.

Do you recall giving that answer? A. Yes, sir.

Q. You did not state at that time that you just recollect or your honest recollection was that Cooper left with you, did you? A. That is my honest recollection, that testimony.

Q. When you gave this answer, you gave it as a positive fact, didn't you? A. I gave it as my honest recollection.

Q. Your answer doesn't contain that. A. Doesn't contain what?

Q. I will read the answer again to you:

A. I left the court with Irving Simon, left Judge Mackay's court, walked out of the court with Irving Simon and Mr. Cooper, walked down the steps—I can't just recall where Mr. Cooper left us—walked down the steps to the first floor, as I recall, in a general manner, discussing the case. There was a question asked by one of the jurors, he said something.

Do you remember that answer? A. Yes, sir.

Q. When you gave that answer, you did not say, to your recollection, Mr. Cooper was with you, did you?

Mr. Stafford: I object to that, if the Court please.

The Court: He said he gave that answer.

Mr. Stafford: That was his answer.

By Mr. Shershin:

Q. You did not qualify your statement, at that time, that it was to the best of your recollection, did you, Mr. Serlinsky?

Mr. Stafford: I object to that, if the Court please, on the ground that all testimony is recollection, from memory.

Mr. Shershin: I object to this, your Honor, counsel—

The Court: I will say this, that the Jury has the testimony.

Mr. Shershin: Yes, sir.

By Mr. Shershin:

Q. Then, when you came out of the court room with, as you state, Mr. Cooper and Irving Simon, you then walked out in the corridor, didn't you? A. Yes, sir.

Q. Just talk louder, please. A. Yes, sir.

Q. When you got into the corridor, whom did you see, or can you remember? A. I cannot; no, sir.

Q. Well, were there any jurors out in front of the corridor—or, right in front of the door? A. You mean, on this floor?

Q. Yes. A. I can't recall that.

Q. Do you remember seeing any person in the corridor outside of the door of Judge Mackay's court? A. There may have been, but I don't recall that.

Q. What is your answer? A. I say: There may have been, but I can't recall that.

Q. Can't recall that? A. No, sir.

Q. Do you remember speaking to anybody out in the corridor? A. I know, I walked with Irving Simon and Mr. Cooper, and I believe they were

discussing something amongst themselves. I did very little talking, if any.

Q. You did afterwards, though, didn't you? A. When?

Q. Downstairs? A. To the group?

Q. Yes. A. I don't remember I said anything there.

Q. You talked on the conspiracy case, didn't you—

Mr. Shershin: Withdraw that.

Q. When you got outside of the jury room, in Judge Mackay's court, didn't you see Mr. Cooper talking to a juror? A. Not that I can recall.

Q. Please talk louder. A. Not that I can recall.

Q. Not that you can recall. Do you remember Mr. Cooper stopping and talking to a juror? A. When we walked out first?

Q. Yes, just outside of the door of Judge Mackay's court? A. No, sir; I don't.

Q. You don't remember that? A. No, sir.

Q. Do you remember Mr. Finn, one of the jurors, standing right outside of the door in Judge Mackay's court? A. No, I don't remember the gentleman at all.

Q. Then you walked to your left, didn't you—or to your right? You don't recall that, do you? A. You mean, out of Judge Mackay's court?

Q. Yes. A. My best recollection is, we walked through the—that would be left.

Q. To the left? A. That is my best recollection.

Q. That is, towards where the Prosecutor's office is, isn't it? A. Yes.

Q. Then you walked down the steps; is that right? A. That is right.

Q. Do you know where Mr. Cooper left you? A. That, I honestly cannot recall.

Q. Cannot recall? A. No.

Q. Walking down the steps, did you meet anybody? A. No, sir; not that I can recall.

Q. Where did you meet Mr. Schuman? A. If he was in that group downstairs, on the first floor.

Q. Did you meet Mr. Schuman as you were walking down the steps, somewheres between the second and first floor? A. My recollection is that we came up to the group as we were about abreast of the Register's office.

Q. Will you answer my question— A. All right.

Q. (Continuing) Did you meet Mr. Schuman anywhere as you were walking down the steps from the second to the first floor? A. My recollection is that we came up to this group, and if he were in that group, that is when we came up to them.

Q. That is your recollection? A. That is my best recollection.

Q. You cannot say whether you met him on the steps, or not, can you? A. My recollection is, when we came to that group.

Q. Came to that group? A. Yes.

Q. And the group was out in front of the Register's office, on the first floor? A. Alongside of it.

Q. You didn't meet this group right outside or right adjoining the doorway leading outside of the court house, did you? A. It is just before that, my recollection is.

Q. The Register's office is before the door, inside of the building, before you hit the door on the outside; isn't it? A. That is right.

Q. That is quite a number of feet from the door on the outside, isn't it? A. Yes.

Q. Ten or fifteen feet, isn't it? A. Approximately, I should say so.

Q. When you got there—

Mr. Shershin: Withdraw that.

Q. How many minutes after this group of jurors left the court room did you follow them out? A. I should judge, probably, maybe three—four—five minutes.

Q. Three? four? five minutes? A. Maybe a little longer or less.

Q. You aren't sure about the time, are you? A. No.

Q. You immediately then followed them outside? You left within three or four or five minutes? A. Yes.

Q. When you approached this group of jurors by the register's office, were they walking or were they stopped? A. They were walking very slowly, discussing something in the group.

Q. You didn't hear what they were discussing? A. No, sir.

Q. As you approached the group, was Mr. Cooper with you, or not? A. No; my honest recollection is that he left us somewhere on this floor. I cannot recall where.

Q. You do not know where? A. I cannot recall where.

Q. Then, did you stop with this group of jurors, or not? A. We slowed down to the pace they were walking out.

Q. And you began to talk to them? A. It was a small conversation with them.

Q. Did you talk to them? A. No, I said very little, if anything.

Q. Very little, if anything? A. I doubt if I said anything.

Q. Which was it? You said very little, if anything, or you doubt if you said anything at all? Which is it? A. I don't think I said anything.

Q. You don't think? A. No, sir.

Q. That is your best recollection? A. My honest recollection.

Q. Your honest recollection? A. Yes, sir.

Q. Irving Simon spoke to them? A. Yes, sir.

Q. Do you remember, if La Conti was there? A. I can't remember the gentleman.

Q. You saw him on the stand, didn't you? A. Yes, sir.

Q. You don't remember if he was in that group of jurors, do you? A. No, I can't remember.

Q. You would not say he was not there, would you? A. No, I wouldn't say he wasn't.

Q. Do you remember Mr. Hickling being in that group? A. I cannot remember anyone that was in that group of jurors.

Q. Do you remember Finn being in the group? A. I cannot remember.

Q. Do you remember being in that group? A. I cannot remember.

Q. Do you remember any of the jurors that were in that group? A. Not one, sir.

Q. What did you do with this group of jurors? Did you converse with them or what happened to Irving and yourself? A. We continued walking with the group—some may have been ahead of us, some may have been alongside of us, some may have been behind us—Irving and myself continued walking out to the front of the building. We were going to the sidewalk—

Q. Wait a minute. Did you walk with this

group of jurors to the front door, did you? that is, the door leaving right outside of the building? A. Yes, I judge, there may have been alongside with us, possibly some ahead of us.

Q. Did you walk out, as the door was being opened? Did somebody hold the door to let anyone out? A. I don't recall what happened about the opening of the door, whether it was open or closed.

Q. Do you remember a few jurors ahead of you, walking out of the doorway? A. There may have been; I can't say certain, or not.

Q. You can't say certain? A. Whether there were some ahead of us, or not.

Q. Then you went down the steps, didn't you? A. That is right.

Q. When you got down to the bottom of the steps, what did you do—both of you? A. Irving and myself continued walking to the sidewalk, turned left and walked to Grand Street where my car was parked.

Q. But, at no time, after you talked to the group of jurors inside of the building, did you talk to the jurors, either yourself or Irving Simon, outside of the court house building? A. Not that I can recall, sir.

Q. Not that you can recall? Will you try and recall, if that is so, or not? A. There may have been—

Q. (Interrupting) There may have been? A. (Continuing) Let me visualize this.

Q. Yes, surely. A. There may have been a word or two passed, but I cannot recall it.

Q. You cannot recall that? A. No, sir.

Q. Well, is it so, or not, that there was a conversation—

Mr. Stafford: Now, I object—

Q. (Continuing)—outside of your may—

Mr. Stafford: (Continuing)—to counsel's constant repetition. He said he does not know.

The Court: He said, he could not recall.

By Mr. Shershin:

Q. Do you remember this question in your testimony, what you stated—page 1328:

> Q. Where did you go? With whom did you leave?

And this answer:

> A. We left this group of jurors and we went out the front way, turned to the left on Hamilton Avenue, and went to my car, which was parked on Grand Street. At no time did Irving Simon talk to any one of the jurors, aside from this general conversation.

A. That is right.

Q. There you did not say anything about a "'may-have" conversation, on the outside, did you? A. With the group.

Q. On the outside? A. All of the conversation was with this group.

Q. With this group? A. Yes, sir.

Q. At no time did Irving Simon speak with La Conti alone, did he? A. Except that LaConti was in that group. Aside from that, I honestly cannot recall any conversation had with Irving and anyone else.

Q. You walked down in which direction? A. When?

Q. After you got down to the sidewalk? A. Down Hamilton Avenue or Hamilton Street, whatever it is called here, to Grand Street, where my car was parked.

Q. Outside of Irving Simon, can you tell us any other person or the name of any other person that you saw outside of the building? A. You mean, that were on the jury?

Q. Yes. A. I can't remember a soul.

Q. Can't remember a soul? A. No, sir.

Q. But you remember distinctly that Irving never spoke to La Conti, don't you? A. Except if it were in that group.

Q. Did you know La Conti at that time? A. No.

Q. Did you know La Conti at the time of December 20th, when you testified in the conspiracy case? A. I had seen him on the stand.

Q. Then, after seeing him on the stand, did you say that you never saw him, that person, La Conti, speak to Irving Simon at any time when you left the building with him? A. I honestly cannot recall the man.

Q. You honestly cannot recall the man? A. No, sir.

Q. Can you recall whether or not that person, La Conti, spoke alone with Irving Simon at any time? A. My honest recollection is that he did not.

Q. Your honest recollection is that he did not? A. That is my best recollection.

Q. You did not tell Mr. Cooper it was your honest recollection, by the way, did you?

Mr. Stafford: I object to that, if your Honor please. That is not proper cross-examination.

The Court: Objection sustained.

Q. Did you see any of the court attendants outside of the building? A. I recall Reese outside of the building.

Q. You recall Reese? A. Yes.

Q. Where did he come from, at the time you saw him? A. I recall, as we were partly down the street, he waved to us or said "So long"—words to that effect.

Q. Did you hear him? A. Yes.

Q. You had never seen him before, had you? A. I had also been introduced to him that day; I had seen him around the court house. I never met him or spoke to him before that, and I had been introduced to him there in the court.

Q. Before testifying—in which direction did Reese go, by the way? A. I only recall him just as he was getting to the sidewalk.

Q. You only recall that? A. Just as he was getting to the sidewalk is when the "Good bye" or "So long" was said or waved. My mind is a little hazy, whether it was a wave "Good bye" or he said "Good bye".

Q. Might not have said anything at all? A. It was something to indicate "Good bye".

Q. At that time you were walking down Hamilton Street, weren't you? A. Yes, sir.

Q. Your back was turned to Reese, wasn't it—

Mr. Shershin: Withdraw the last part.

Q. Your back was turned to walk downwards down Hamilton Street, weren't you? A. Naturally, I must have turned, at that time—

Q. You must have been turned. Did you turn, or not? A. I say, I must have turned at that time, to have seen him.

Q. Is your recollection distinct about that—is it honest about that? A. Yes, that is my honest recollection of having seen him.

Q. Before that, did you see him? A. Aside from in court—

Q. No, outside of the building? A. No, I cannot say that I did.

Q. You cannot say that you did? A. No.

Q. When you left the court house steps, before you started to walk down Hamilton Street, where was this group of jurors that came out of the building? A. Some may have been alongside of me.

Q. Some may have been alongside of you? A. Yes, sir.

Mr. Stafford: Now, if the Court please, may I ask the Prosecutor to permit the witness to answer his question fully, without being interrupted?

The Court: Yes.

Q. Speak a little louder so I can hear you.

The Court: He can answer the question.

Mr. Shershin: I will withdraw the last question.

Q. As you were leaving the building, where were the jurors? A. Some may have been alongside of me, a few may have been ahead of us; some might have been behind us.

Q. Did this entire group walk out to the sidewalk? A. I am not certain sure—

Q. You are not certain sure? A. —I can not recall that.

Q. Where did you get out of this group of jurors? Before you reached the sidewalk? A. We continued walking down the stairs, or the road;

some may have been alongside of us, some ahead of us, some behind us. We continued walking—

Q. On to the sidewalk? A. Yes, turned left.

Q. Was Schuman there at the time? A. I cannot recall Schuman or any other of the jurors.

Q. You cannot recall him? A. No; that was the first time I had seen him.

Q. Did any of the others go down Hamilton in the direction that you were going to go? A. Possibly.

Q. Possibly? A. Yes, sir.

Q. Did you see any going up Hamilton, in the direction of Market Street? A. No, I can't recall that.

Q. Can't recall? A. No.

Q. Did any of the jurors cross the street? A. I can't recall that.

Q. You can't recall that? A. No. I am giving you my honest recollection.

Q. You are giving me your honest recollection? A. I can only say what occurred or happened; I am only giving you my honest recollection. I don't recall what directions they took.

Q. La Conti, that person you saw, he didn't follow you down Hamilton Street, did he? A. I don't know where he went.

Q. You don't know where he went? A. No, sir; I don't.

Q. You didn't see Hickling following you down to Grand Street? A. No, sir.

Q. Or, don't you remember that? A. He may have; I don't remember him.

Q. Were you at all times alongside of Irving Simon? A. Yes.

Q. Never left him for any moment of time? A. I don't think so.

Q. Didn't have a white jury list in his hand? A. The only thing I can recall Irving having is that brown file—reddish brown.

Q. When you got down to the sidewalk, did you immediately start to proceed down Hamilton Street? A. Continued walking down Hamilton Street.

Q. Didn't stop at all? A. You mean, from the time we got to the sidewalk?

Q. Yes, or don't you recall? A. I can't recall stopping.

Q. Don't recall turning back and looking up at the court house steps, do you? A. Such a thing is possible, but I don't recall it.

Q. You don't recall seeing Juror Finn standing or talking with Juror LaConti up on the steps, do you? A. I can't recall that.

Q. You can't recall that? He may have been? A. No. Yes.

Q. How did you check your recollection as to how you were in the court house on May, the 12th? A. Only by my diary, which indicated I was to be in Paterson; I was to see Mr. Rosenkrans on a case which I had consulted him about to try for me.

Q. This May, the 12th, Demarest case, was just an ordinary case for you, wasn't it? A. I had nothing to do with it. I had nothing about the case.

Q. You didn't write in your diary what time the jury came in or what time you left— A. No.

Q. (Continuing)—in your diary? A. I was to see Mr. Rosenkrans that day.

Q. Did you see him? A. I can't recall whether I saw him that day or not, because I know we had three or four consultations at his office, and several here in the court house.

Q. You started to check your diary in order to refresh your recollection, didn't you? A. As to where I may have been.

Q. Where you may have been? A. I beg pardon?

Q. Yes, where you may have been? A. Why I was in Paterson on that day, whether my diary would show it.

Q. Did your diary show that Irving Simon asked you to stay from half past three or closer to four to six o'clock? A. That is my best recollection.

Q. That is your best recollection? A. Yes.

Q. Your diary doesn't show that? A. No.

Q. Does your diary show how you walked out of the court house? A. No; that is my recollection.

Q. When did you check your diary to find out where you had been that afternoon, for the first time? A. My recollection is that it was during the first case that was tried in December, that I checked my diary to see whether my diary would show why I happened to be in Paterson on that day.

Q. When was the day or night that you checked it? A. It was several days before I testified that I first checked it, as I recall.

Q. Before you testified on December 20th, in the conspiracy case? A. It was several days before, or, it may have been at night. Of course, I was in my office at several nights; it may have been at night that I first checked it.

Q. You spoke about this matter to Irving Simon before, didn't you? A. Yes, sir.

Q. Before you testified? A. Yes, sir.

Q. Before you checked your diary, didn't you? A. Yes, sir.

Q. Do you recall when you spoke to him before? A. It was several months before I—before the case was tried.

Q. Do you recall the month? A. It may have been in September or October. I know it was several—a few months before.

Q. When did you discuss it with him? A. That, I can't recall, where I may have discussed it with him.

Q. You cannot recall that? A. I am not certain where that occurred.

Q. That was about six months after May 12th, wasn't it? A. Four or five months.

Q. Four or five months. Did you discuss it in the offices of Dr. Aaron Simon with Irving? A. I don't think so.

Q. When you discussed it with him, did Irving recite the facts to you to refresh your memory? A. No, sir.

Q. Didn't assist you with it, did he? A. No, sir.

Q. You told him exactly what you are telling on the witness stand? A. I told him my honest recollection of what occurred.

Q. This had only been an ordinary day for you, May 12th, hadn't it? A. Except for the disagreement feature.

Q. Thereafter, you spoke to Irving Simon again, didn't you, after that first time, before taking the stand here, on the conspiracy case? A. Yes, sir.

Q. When did you speak with him again? A. The day before I testified.

Q. At night? A. No; right here in court.

Q. The day before yo[illegible]estified? A. Yes, sir.

Q. Where did you sp[illegible]k to him? A. My best recollection is I was seated in one of the back rows in court—

Q. Yes? A. —and he came back there and told me that they were going to call me as a witness.

Q. Irving Simon did? A. Yes.

Q. From September or October up until the day before you took the stand, you hadn't checked with it, with Irving Simon, had you? A. No, sir.

Q. Had you talked to anybody about that afternoon of May 12th outside of the two occasions that you spoke of, with Irving Simon? A. To no one.

Q. What is that? A. No, to no one.

Q. Why did you check up your diary several days before you testified? A. To find, if possible, if I was in Paterson on that day.

Q. You didn't know several days before that you were going to be a witness, did you? A. No, sir; I didn't.

Q. And you only knew the day before that you were going to be a witness? A. That is right.

Q. Just checked it as a matter of curiosity? A. No.

Q. Why? A. I will tell you.

Q. Yes. A. I checked that, I believe, it was the day or night, after one of the witnesses had testified, and he testified by his diary—

Q. Yes? A. (Continuing) I then, that night, in my office—I think it was at night, in my office—checked my diary to see whether that would show, because I knew that my only possible connection with the case would be with reference to May 12th. That was when I first checked my diary, as to the May 12th incident.

Q. You were not subpoenaed to come into court, were you? A. I was what, sir?

Q. The day that you testified in court? A. The day I testified?

Q. No, the day before, when Irving Simon spoke to you, about being a witness? A. I was here as a spectator.

Q. You had been here for five or six— A. I had been here most of the time, but whenever I had difficulty getting in, I wasn't here then.

Q. Weren't you in Dr. Aaron Simon's office the day before you testified? A. I was in that building.

Q. You mean, Dr. Aaron Simon's building? A. Yes.

Q. The night before you testified? A. I was in that building; yes, sir.

Q. You talked the matter of your testimony over at that time, too, didn't you? A. No, sir; they were too busy.

Q. They were too busy? A. (No audible response.)

Q. I will go back again, from September to October, up until the day before you testified, you did not know that the Simons were going to call you as a witness, did you? A. That is right.

Q. But, still, you checked your diary, didn't you?

Mr. Stafford: I object to that constant repetition, your Honor.

The Court: Yes, he has testified.

By Mr. Shershin:

Q. Your wife and Irving's wife are sisters, aren't they?

Mr. Stafford: I object to that, your Honor please; immaterial to this issue.

The Court: Where is that material, Mr. Prosecutor?

Mr. Shershin: Except it is in the testimony, in Exhibit S-2.

Mr. Stafford: I object to it.

The Court: It is not admissible, unless it is in evidence.

Mr. Shershin: It is in the evidence, your Honor.

The Court: It is in evidence?

Mr. Shershin: Yes.

The Court: It is?

Mr. Shershin: Yes.

The Court: I think it may be answered. I understand it is marked as an exhibit?

Mr. Shershin: Yes.

The Court: The Jury may take it with them.

Mr. Stafford: Will the Court instruct the Jury to disregard that part of the exhibit?

The Court: I have already done that; I think I struck it out.

Mr. Shershin: I will withdraw the question.

By Mr. Shershin:

Q. Tell us what you were doing in Aaron Simon's building the night before you testified? A. I had arranged to meet my wife at her sister's home—

Q. I see. A. —and her sister's home are the rooms upstairs.

Q. You didn't go downstairs and talk over with Irving Simon the day of May 12th, did you, that night? A. I was downstairs, but I didn't talk to him about the thing at all.

Q. At no time? A. They were too busy.

Q. Yes, at no time did you talk to them? A. In the office there?

Q. Yes. A. I might have said something to them, but we didn't discuss anything with reference to May 12th.

Q. The fact is that the next day you were a witness, weren't you? A. I was a subpoenaed witness.

Q. That is, the next day? A. Yes, sir.

Q. When did you get the subpoena? A. The night before.

Q. The night before. In the office of Dr. Aaron L. Simon? A. No, upstairs.

Q. Who brought the subpoena to you at the time? A. I think it was Mr. Scott.

Q. Mr. Scott? A. I think it was.

Q. Irving or Mr Aaron Simon didn't come up there to give you a subpoena, did they? A No.

Q. At the time you were given the subpoena, you didn't have a conversation as to what you were going to testify about, did you? A. No, sir.

Q. You didn't know, when you came into court, what they were going to ask you about, did you? A. No, sir.

Q. Until you took the stand, you didn't know? A. I want to hear that. (To stenographer) What was that last?

Q. (As repeated by stenographer) You didn't know, when you came into court, what they were going to ask you about, did you? A. (As repeated by stenographer) No, sir. Q. (As repeated by stenographer) Until you took the stand, you didn't know? A. (By witness) Except it was with reference to the May 12th occurrence.

Q. When was that? A. Afternoon of the day before which I testified.

Q. Irving Simon came to you in the back row—A. (Interrupting) That is right.

Q. (Continuing)—and spoke about it? A. That is right, told me—

Q. Who lead the conversation, you or he? A. Irving came to me, told me that they will have to call me as a witness, to give my honest recollection as to what occurred, tell the truth, nothing more than the truth.

Q. When you testified, you didn't use the words "honest recollection" at all, did you? A. But what I did testify was my—

Q. (Interrupting)—was your honest recollection? A. Yes, sir.

Mr. Shershin: That is all.

THOMAS E. DUFFY, produced as a witness on behalf of the Defendant, was duly sworn according to law and testified as follows:

Direct-examination by Mr. Stafford:

Q. Where do you live? A. 393 Terhune Avenue, Passaic.

Q. You have lived in Passaic how long? A. All of my life.

Q. Your profession is what? A. Lawyer.

Q. How long have you been a lawyer? A. Since 1916.

Q. Have you held any official position? A. Yes, I was District Court Judge in Passaic for five years.

Q. Do you hold any official position in the City of Passaic? A. I am Counsel for the City of Passaic, at the present time.

Q. Do you know the defendant, Thomas Serlinsky? A. Yes, I do.

Q. How long have you known him? A. Why, I have known him as a boy, when he lived on Central Avenue and I lived on Burgess place, which is right around the corner.

Q. Yes? A. And I would say that would be more, just prior to the work which I had done in through there, that I had seen him.

Q. Do you know what his general reputation was for truth and veracity prior to May 12, 1933, in the neighborhood where he resided? A. I always knew it to be good.

Mr. Stafford: That is all.

Mr. Shershin: That is all.

(No cross-examination.)

Mr. Stafford: The Defendant rests, your Honor.

(Defendant Rests.)

The Court: The State?

Mr. Shershin: The State has no rebuttal, your Honor.

(Both Sides Rest.)

The Court: How much time will be required?

Mr. Stafford: I do not know. Half an hour, your Honor?

The Court: All right.

DEFENDANT'S MOTION FOR DIRECTION OF A VERDICT.

Mr. Stafford: I wish at this time, your Honor, to repeat my motion for a direction of a verdict, your Honor, and have it recorded in the record, which I advanced, the same arguments which I advanced for quashing of the indictment, and the same reasons and arguments that I advanced for the direction of a verdict at the close of the State's case, without repeating them verbatim at this time. They will be noted as though I had done that?

The Court: Yes, sir. They will be noted, and the Court denies your motion, and you note an exception to the Court's ruling, on behalf of the defendant.

Mr. Stafford: Yes. Note the exception.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)
President Judge.

Mr. Stafford summed the case to the Jury on behalf of the Defendant.

Mr. Shershin summed the case to the Jury on behalf of the State.

The Court charged the Jury as follows:

DELANEY, *J.*

Members of the Jury:

The State charges Thomas Serlinsky with the commission of the crime of perjury. The crime is alleged to have been committed on the 20th day of December, 1933, in this County and within the jurisdiction of this Court.

You have heard the evidence, the testimony of

the witnesses for the State, the testimony of the Defendant and the witnesses produced on behalf of the Defendant; and from the evidence you have heard you are to determine this issue.

You are to weigh the testimony, the evidence, without sympathy, without prejudice, and without passion. You are the sole judges of the question of fact. For the reason indicated, I will not advert to the testimony in detail, but will lay down for your guidance the rules of law, which you will apply to the evidence, and which will aid you in coming to your conclusion.

As I have indicated, the charge against this Defendant is perjury. What is perjury? Our statute in substance, says that any person who shall wilfully and corruptly commit perjury or shall by any means procure or suborn any person to commit corrupt and wilful perjury on his oath or affirmation, in any action, plea, suit, bill, answer, complaint, indictment, controversy, matter or cause, depending or which may depend, in any of the courts of this State, shall be guilty of a high misdemeanor.

There are certain elements, you may have noticed while I have read the definition, that are constituent parts of the crime. The testimony that is alleged to have been false must have been wilful. If it was not wilful, then it was not malicious, and, of course, it is not perjury.

You may testify to a fact, give testimony, and after thinking the matter over, later determine that you made a mistake. If it is a mistake—an honest mistake—it is not perjury.

May I repeat, that perjury is a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears wil-

fully, corruptly, falsely to any matter material to the issue or point in question. That was the common law rule of perjury. Our statute has enlarged the common law rule, however, by adding subornation of perjury, that is, the procuring of one to commit perjury.

May I say to you at this point, that this Defendant being charged with crime, like all defendants charged with crime, is presumed to be innocent and that presumption continues until the State establishes his guilt beyond a reasonable doubt.

The law has defined reasonable doubt as not a mere possible doubt. It is that state of the case, which, after a comparison of all of the evidence leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

So if, after analyzing all of the evidence that has been adduced, you are satisfied beyond a reasonable doubt that this Defendant committed perjury, as I have defined perjury, and as it is more fully set forth in the indictment which you will take in the jury room with you for the purpose of perusal, it is your duty to convict him.

If you are not so satisfied, it is equally your duty to acquit him.

I have been requested by counsel for the Defendant to charge you specially in this matter.

9. If there is in the mind of the Jury one or any number of theories consistent with the Defendant's guilt fairly springing from the evidence in the case which the Jury believes and but one consistent with the Defendant's innocence, fairly arising from the evidence in the case, including

the defendant's testimony, which the Jury also believes, the Jury must disregard and put aside all these theories of his guilt and adopt that one theory of his innocence and render a verdict of not guilty. For in such condition of the case there would be a reasonable doubt of the Defendant's guilt and the Defendant should be acquitted, for to reasonably doubt the guilt of the Defendant is to require his acquittal.

11: It is the right of a person charged with crime to have all the relevant testimony, including that relating to his good character or reputation, considered by the Jury, and if, on such consideration, there exists a reasonable doubt of his guilt, even though that doubt may be engendered merely by his previous good reputation, the Defendant is entitled to an acquittal.

18. If the Defendant testified under oath on the witness stand in accordance with his belief and conviction, his negligence or carelessness in forming such belief or conviction does not render his oath corrupt within the statute, making it of the essence of perjury that it be committed wilfully and corruptly.

20: If the Defendant testified under an honest mistake or misapprehension, and believed what he testified to to be true, a conviction cannot be had though the statement be false.

I so charge you.

The Court declines to charge further Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 15, 16, 17, 19, and 21.

I will now leave this matter in your hands, for your determination.

Swear the officers.

(The Officers were duly sworn, and the Jury retired for its consideration of the case.)

The Court: An exception will be noted in behalf of the Defendant to the Court's refusal to charge Paragraphs 1, 2, 3, 4,—

Mr. Stafford: I think you charged No. 4, your Honor.

The Court: Did I? All right.

Mr. Stafford: Yes, that is State vs.

The Court: All right. (Continuing) —5, 6, 7, 8, 10, 12, 13, 15, 16, 17, 19, and 21. Right?

Mr. Stafford: 21, and also, No. 14, your Honor. I did not hear you charge No. 14.

The Court: All right. It is noted.

Mr. Stafford: All right, your Honor.

Exception allowed and signed and sealed accordingly.

JOS. A. DELANEY, (L.S.)

The Court: I might suggest that the Court remain open, and in the absence of the Court the clerk will take the verdict.

The Defendant's requests to charge, which the Court declined to charge, to which refusal an exception was noted, are in words and figures as follows:

The Defendant respectfully requests the Court to charge the following requests in his behalf:

1: The Jury, in considering the evidence, must

Defendant's Requests to Charge which the Court Refused to Charge.

start with the legal presumption of the Defendant's innocence, which presumption must continue throughout all their deliberations unless the evidence establishes the Defendant's guilt beyond all reasonable doubt.

2: When a Defendant is charged with perjury he comes into court enshrouded in a veil of innocence, with the stamp of innocence impressed upon his brow by the law of the State, and it becomes the duty of the State, in order to prove him guilty of the crime with which he is charged, to prove that guilt beyond a reasonable doubt. No mere surmise, no mere suspicion, no prejudice, no revenge, but proof beyond reasonable doubt, for proof, and proof alone, indubitable proof alone, can remove the veil of innocence with which the law surrounds a defendant.

3: The presumption of innocence attaches to the Defendant from the very beginning. Such presumption of innocence must be carried by the Jury into their final deliberations.

5: The Defendant is not required to satisfy the Jury of his innocence; on the contrary, the burden is always upon the State to prove the defendant's guilt, and to prove such guilt beyond all reasonable doubt. This burden of proof remains upon the State, here represented by the Prosecutor, throughout the entire trial and never shifts.

6: The State, here represented by the Prosecutor, must prove every essential element of the guilt of the Defendant beyond a reasonable doubt, and if there is an essential element of the guilt of the Defendant, which is not proven beyond a

reasonable doubt, the Defendant must be acquitted. The burden rests upon the State to prove the Defendant guilty, not only of the crime charged, that is, perjury, but before you could find him guilty of any lesser offence, the evidence must satisfy you beyond a reasonable doubt of the guilt of any such lesser offence.

7: While it is the duty of every juror to discuss the evidence and to deliberate with his fellows as to the guilt or innocence of the Defendant, and while every juror should consider the opinions of his fellows, if, in the last analysis, there is in the mind of any juror a reasonable doubt of the Defendant's guilt, fairly arising from the evidence in the case, such juror has no right to consent to a verdict of guilty in deference to or out of respect for the opinions of another or other jurors, or out of a desire to bring in a verdict or from motives of compromise, since each juror is in duty bound, under his oath, to arrive at his own conclusion and to be satisfied beyond a reasonable doubt of the guilt of the defendant before he joins in a verdict of guilt against the defendant.

8: Each juror must reach a conclusion. Eleven jurors are not competent to reach a verdict in the case. All must reach that conclusion. No juror is relieved from responsibility under his oath by letting any number of that body agree upon a verdict and then consent to it himself, because it happens to be the judgment of the majority. Each juror must reach his own judgment. Such juror may and should discuss the case with his fellow members.

10: In order to convict the Defendant of the

crime charged it is necessary not only that all the circumstances concur to show that he is guilty, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis, save the single one of guilt; otherwise, the Jury must acquit the Defendant.

12: To convict the Defendant of the crime of perjury the State must prove beyond a reasonable doubt that the Defendant had knowledge of the falsity of his testimony.

13. To convict the Defendant of the crime of perjury the State must prove beyond a reasonable doubt that the alleged false testimony was given wilfully and corruptly, since wilfullness and a corrupt intent are essential elements of the crime of perjury.

14: If the Defendant honestly believed in the truth of his statements when he made them, then he would not be guilty of perjury and the Jury should acquit him.

15: Before the Defendant can be convicted of the crime of perjury the Jury must be convinced beyond a reasonable doubt that not only was his testimony false, but that it was wilfull and corrupt, and was material to the issue then being tried.

16: The Defendant respectfully requests the Court to instruct the Jury what the material allegations of the indictment are, and also what facts must be established by the prosecution be-

Defendant's Requests to Charge which the Court Refused to Charge.

fore the Jury can convict the defendant of the crime of perjury.

17: Mistake of fact will excuse an honest swearing to what is not true. Perjury is committed only where there is an intent to testify falsely.

19: If the Defendant actually believed in the truth of his statements he is not guilty of perjury, if, as a matter of fact, his statements are false. This is true whether the statements are an unqualified declaration of fact or are expressly declared to be a matter of opinion or belief.

21: If the Defendant in his own mode or manner of reasoning, upon the facts occurring before him at the time, was of the opinion that Irving Simon did not speak to Michael La Conti upon the front steps of the Court House, Paterson, New Jersey, on May 12th, 1933, after six o'clock P. M., although he might reason or conclude very poorly concerning those facts, yet, if that was his honest opinion, his testimony would not be wilfully false.

Certificate of Judge.

I hereby certify that the foregoing record constitutes the entire record of the proceedings had upon the trial of the cause wherein the State of New Jersey is complainant, and Thomas Serlinsky, defendant.

In witness whereof, I have hereunto set my hand and seal this eleventh day of June, 1934.

JOS. A. DELANEY,
President Judge.

Exhibit S-1.

INDICTMENT.

Court of Oyer and Terminer in and for the County of Passaic—September Term A. D. Nineteen Hundred and Thirty Three.

Passaic County, to wit:—The Grand Jury of the State of New Jersey, in and for the body of the County of Passaic, upon their oath, Present that Aaron L. Simon, Irving Simon, William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as Hop Decker, Albert Durgett, Michael La Conti and John Hickling late of the City of Paterson in the County of Passaic aforesaid, on the eighth day of May in the year of our Lord nineteen hundred and thirty three with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, did wilfully, unlawfully, maliciously and corruptly combine, unite, confederate, conspire, agree and bind themselves by oath, covenant, agreement and other alliance to commit a crime and crimes, to wit; the crime of Embracery, and wilfully and unlawfully to attempt to corrupt and influence a juror and jurors, and to wilfully and unlawfully corrupt and influence a juror and jurors and to wilfully and unlawfully incline such juror and jurors to be more favorable to the one side than to the other in a certain civil suit, action, cause and issue joined in the New Jersey Supreme Court, Passaic County; and in certain civil suit, action, cause and issue joined in the said Court as aforesaid, and by wilful and unlawful promises, persuasions, entreaties, money and moneys, and by other sinister means and by direct and indirect, unfair and fraudulent practices,

arts and contrivances to obtain a verdict in favor of the plaintiff then and there represented by the said Aaron L. Simon and Irving Simon, as counsel and attorneys; and to attempt to instruct a juror and jurors beforehand in manner and manners, way and ways and means outside of open court and not at the trial of the said civil suit, action, cause and issue joined and not by the strength of the evidence, the arguments of the parties and their counsel and the opinion and opinions, charge and charges of the Court in said suit, action, cause and issue joined as aforesaid; and to hinder the due and lawful trial of the said suit, action, cause and issue joined aforesaid, well knowing the premises and being common embracers of jurors and devising and wickedly and unlawfully intending to hinder the due and lawful trial of the said issue joined by the jury and jurors empanelled, returned, drawn and sworn to try the said issue joined, cause, action and suit, and to wilfully, unlawfully, maliciously and corruptly to embrace and attempt to embrace, corrupt, influence and bias the mind and minds, and decision and decisions, and to incline such juror and jurors so empanelled, returned, drawn and sworn as aforesaid at the April Term, nineteen hundred and thirty three, of said Court as aforesaid, to be more favorable to the plaintiff and party then and there represented by the said Aaron L. Simon and Irving Simon, as counsel and attorneys, in said suit, action, cause and issue joined in the said Court as aforesaid, wherein Edward Veit was plaintiff, and Fred L. Miller and William Werner were defendants;

And in pursuance of and according to the said wilful, unlawful, malicious and corrupt combina-

tion, unity, confederation, conspiracy and agreement and binding themselves as aforesaid and to perfect, complete and promote the object and objects thereof by and between them, the said Aaron L. Simon, Irving Simon, William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as Hop Decker, Albert Durgett, Michael La Conti and John Hickling as aforesaid; the said Michael La Conti, on the eighth day of May, nineteen hundred and thirty three, was drawn, empanelled and sworn as a juror, with eleven other jurors, to try and determine an issue joined, action, suit and cause in the New Jersey Supreme Court, Passaic County, wherein Edward Veit was plaintiff and Fred L. Miller and William Werner were defendants, in the trial of this said issue joined, suit, action and cause the said Aaron L. Simon and Irving Simon appeared as counsel and attorneys for the said Edward Veit, and then and there the said Michael La Conti did meet with and tell, state, relate, and explain the plan, scope, plot, agreement and conspiracy as aforesaid to one John Hickling, who was then and there a petit juror drawn, selected and sworn, with eleven other jurors, as aforesaid, to hear, try and determine the said issue, action and cause as aforesaid, and then and there the said John Hickling did wilfully, unlawfully and corruptly agree, consent, pledge and bind himself to and with the said Michael La Conti to join the said conspiracy and the said conspirators as aforesaid, and to aid, abet, assist, promote, complete and perfect the same; and then and there the said Michael La Conti and John Hickling did proceed from a point and place in the City of Paterson

aforesaid, to the Grand Jury aforesaid unknown, to a point and place in the City of Passaic, in the County and State aforesaid, to the Grand Jury aforesaid unknown, and then and there the said Michael La Conti did then and there talk and converse with the said Aaron L. Simon, by means of the telephone, and agreed with the said Aaron L. Simon to meet the said William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as Hop Decker, Albert Durgett, and then and there the said Michael La Conti and John Hickling did meet and join with the said William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker otherwise known as Hop Decker, and Albert Durgett, and then and there the said Michael La Conti and John Hickling, petit jurors as aforesaid, did then and there agree with the said William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker otherwise known as Hop Decker, and Albert Durgett to return a verdict in the sum of Twenty Thousand Dollars in favor of the said Edward Veit and against the said Fred L. Miller and William Werner in the aforesaid suit, action, cause and issue joined as aforesaid; and then and there the said William Conlon otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker otherwise known as Hop Decker, and Albert Durgett did wilfully, unlawfully and corruptly agree to pay and deliver to the said Michael La Conti and John Hickling, petit jurors as aforesaid, money to the amount and value of Fifty Dollars each upon the return of said verdict by the said petit jury in said issue joined as aforesaid;

Exhibit S-1.

And in further pursuance of and according to the said wilful, unlawful, malicious and corrupt combination, unity, confederation, conspiracy, agreement and binding themselves as aforesaid, by and between them, the said Aaron L. Simon, Irving Simon, William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as Hop Decker, Albert Durgett, Michael La Conti and John Hickling as aforesaid, and to promote, complete and perfect the object and objects thereof as aforesaid; the said William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as Hop Decker, did on the tenth day of May, nineteen hundred and thirty three, proceed from a point and place in the City of Passaic aforesaid, to the Grand Jury aforesaid unknown, to a point and place in the City of Paterson aforesaid, to the Grand Jury aforesaid unknown, and did then and there meet with and join the said Michael La Conti, and then and there the said William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, and Charles Decker, otherwise known as Hop Decker, did wilfully, corruptly, maliciously and unlawfully pay and deliver to the said Michael La Conti as aforesaid, as a reward, payment and recompense for his wilful, corrupt and unlawful service as a petit juror as aforesaid in the issue joined, cause, suit and action as aforesaid, money to the amount and value of Fifty Dollars; and then and there the said William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, Charles Decker, otherwise known as Hop Decker, and Michael La Conti did proceed to the

home of the said John Hickling, in the City of Paterson aforesaid, and did then and there pay and deliver to the said John Hickling, as a reward, payment and recompense for his wilful, corrupt and unlawful service as a petit juror as aforesaid, money to the amount and value of Fifty Dollars, which said sums of Fifty Dollars paid to the said Michael La Conti and John Hickling had theretofore been agreed upon by and between the said conspirators as aforesaid, and which said sum of One Hundred Dollars the said William Conlon, otherwise known as Irish Willie Conlon, otherwise known as Wild Bill Conlon, and Charles Decker, otherwise known as Hop Decker, theretofore had received and obtained from the said Aaron L. Simon and Irving Simon to be paid out for the wilful, unlawful and corrupt design, intent and purpose as aforesaid, 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.

JAMES D. CARPENTER, JR.,
Assistant Attorney General.

Witness:
Michael La Conti
James J. Smith.

Assignments of Error.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, Defendant-in-Error, vs. THOMAS SERLINSKY, Plaintiff-in-Error.	In Error to Passaic Quarter Sessions.

Afterwards in the Supreme Court of Judicature of the State of New Jersey, comes the said Thomas Serlinsky, and says that in the record and proceedings aforesaid and also in the matters recited and contained in the Bill of Exceptions and also in the giving of the verdict and judgment aforesaid, there is manifest error in this respect, to wit:

1. Because the trial Court committed harmful and prejudicial error in refusing to quash the panel of jurors selected for the term, when so moved by counsel for the plaintiff-in-error in challenging the array.

2. Because the trial Court committed harmful and prejudicial error in refusing to quash the indictment against plaintiff-in-error, for the following reason:

> The indictment fails to charge the defendant with the commission of a crime within the law of the State of New Jersey.

3. Because the trial Court committed harmful

and prejudicial error in refusing to quash the indictment against the plaintiff-in-error, for the following reason:

> The indictment fails, either on its face or by express averment, to charge the defendant with having falsely and wilfully testified under oath to a matter material to the issue.

4. Because the trial Court committed harmful and prejudicial error in refusing to quash the indictment against the plaintiff-in-error, for the following reason:

> The indictment charges the defendant with having falsely and wilfully testified under oath, in a certain judicial proceeding, before this court (Passaic County Quarter Sessions) on the twentieth day of December, 1933, without specifically reciting or stating what the issue was under the certain judicial proceeding referred to as is required by law, and therefore fails, upon its face to show that the alleged false testimony recited was upon a matter material to the issue.

5. Because the trial Court committed harmful and prejudicial error in refusing to quash the indictment against the plaintiff-in-error, for the following reason:

> The recital in the indictment that certain testimony recited to be allegedly false "became and was material" pleads merely a conclusion of law, thus fails to show on its face by conclusions of fact that the alleged false testimony was upon a matter material to the issue, as is required by law.

6. Because the trial Court committed harmful and prejudicial error in refusing to quash the in-

dictment against the plaintiff-in-error, for the following reason:

> From the Bill of Particulars filed by the State, it was set forth that the testimony recited in the instant indictment was given under the trial of indictment #454, on file in the County Clerk's office, which charged certain defendants, Aaron L. Simon, Irving Simon, and others with having committed the crime of conspiracy to commit the crime of embracery on the eighth day of May, 1933, in pursuance of which certain overt acts were charged with having been committed on May ninth, 1933, by reason of which the testimony of the defendant alleged to have been wilfully, falsely and corruptly given pertaining to an incident or incidents that occurred on May 12th, 1933, clearly did not relate to a matter material to the issue.

7. Because the trial Court committed harmful and prejudicial error in refusing to quash the indictment against the plaintiff-in-error, for the following reason:

> From the Bill of Particulars filed by the State, the testimony recited in the instant indictment was given under the trial of indictment #454, which is a matter of record having been filed in this court, and which said indictment #454 failed to charge a crime within the laws of the State of New Jersey, by reason whereof there was no legal proceeding or judicial proceeding, and all proceedings thereunder being illegal, the defendant at bar, was not legally sworn and did not give legal testimony at a legal proceeding or judicial proceeding.

8. Because the trial Court committed harmful

and prejudicial error in refusing to quash the indictment against the plaintiff-in-error, for the following reason:

The indictment fails to charge with sufficient particularity, and with such particularity as is required by law, the commission of a crime within the laws of the State of New Jersey.

9. Because the trial Court committed harmful and prejudicial error in refusing to quash the indictment against the plaintiff-in-error, for the following reason:

The indictment is defective because of duplicity; it charges that upon the issue joined at the judicial proceeding held on December twentieth, 1933, at which time it is alleged that perjury was committed, "It then became and was a material question, and material to the issue whether the said Irving Simon as aforesaid, on the twelfth day of May, 1933, at six o'clock in the evening, had left the Court House in the City of Paterson, aforesaid, in the company of and with the said Thomas Serlinsky, and whether he, the said Irving Simon had in front of the said Court House aforesaid spoken to one Michael La Conti, then and there a petit juror and one of the defendants aforesaid," thus raising two distinct issues upon which it is alleged perjury was committed, without setting up each issue singly in a separate count as is required by law, and which in effect would compel, (and did compel) the jury by its verdict to pass jointly upon the two separate issues upon which it is alleged perjury was committed, viz., one, whether or not the said Irving Simon had on May twelfth, 1933, left the Court House in the City of Paterson in the company of and with

Thomas Serlinsky, the defendant herein, and, two, whether the said Irving Simon, had, in front of the Court House, aforesaid, spoken to one Michael La Conti, then and there a petit juror and one of the defendants aforesaid.

10. Because the trial Court committed harmful and prejudicial error in refusing to quash the indictment against the plaintiff-in-error, for the following reason:

As a pleading it is repugnant on its face.

11. Because the trial court committed harmful and prejudicial error in instructing and permitting the Sheriff, over objection of counsel of plaintiff-in-error, to place the balance of names of the general panel of jurors into the jury-box, without first exhausting the forty-eight names drawn as a special panel and served upon the plaintiff-in-error.

12. Because the trial court committed harmful and prejudicial error in permitting and instructing the Sheriff to secure additional jurors, outside of the panel of jurors selected by the jury-elisors, after the general panel of jurors selected by the said jury-elisors had been exhausted.

13. Because the trial court committed harmful and prejudicial error, in refusing to permit, on the cross-examination of Thomas Finn, a witness for the State, an answer to the following question:

"Do you remember with such distinction all the facts that happened after the jury came out of their room in the Demarest versus Erie Railroad case as well as you do the facts you have testified to?"

14. Because the trial court committed harmful and prejudicial error, in refusing to permit, on the cross-examination of Thomas Finn, a witness for the State, an answer to the following question:

> "He may have walked out with someone and it may have been Mr. Serlinsky."

15. Because the trial court committed harmful and prejudicial error in refusing to permit on the cross-examination of Thomas Finn, a witness for the state, an answer to the following question:

> "In fact you don't say he was not there. That is what I mean?"

16. Because the trial court committed harmful and prejudicial error in refusing to permit on the cross-examination of Thomas Finn, a witness for the state, an answer to the following question:

> "Well, in your answer to the Prosecutor with regard to not seeing any of the jurors preceeding you, was it your intention to convey by your answer that they might have been there, and you not see them?"

17. Because the trial court committed harmful and prejudicial error in refusing to permit on the cross-examination of Thomas Finn, a witness for the state, an answer to the following question:

> "You had had no supper up to that time, had you?"

18. Because the trial court committed harmful and prejudicial error in permitting on the redirect-examination of Thomas Finn, a witness for the State, the following question and answer over objection of plaintiff-in-error:

Q. "The Prosecutor didn't ask you whether or not you had seen La Conti and Simon together?"
A. "That is right. He didn't."

19. Because the trial court committed harmful and prejudicial error in permitting, on the redirect-examination of Thomas Finn, a witness for the State, the following question and answer, over objection of counsel:

Q. "Why do you remember distinctly seeing Irving Simon and La Conti in front of the court house on Friday, May twelfth?"
A. "The oddness of the situation."

and the further answer objected to, but allowed:

A. "I was on the jury with Mr. La Conti and Mr. Simon was counsel for the plaintiff" * * * "And because of Mr. La Conti's conduct in the jury room, them being together was worthy of notice."

20. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Florio Crosetta, a witness for the State, an answer to the following question:

"It might have been Mr. Serlinsky?"

21. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Florio Crosetta, a witness for the State, an answer to the following question:

"It might have been a lawyer's file, might it not?"

22. Because the trial court committed harmful and prejudicial error in refusing to permit, on

the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"The other defendants are in State Prison, are they not?"

23. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"In the trial wherein you testified, Mr. Hickling—page 1355 of the record—and in the examination of Mr. Carpenter, Special Attorney General, you didn't testify that La Conti called you over and introduced you to Irving Simon, did you?"

24. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"You didn't testify in that examination that La Conti and Irving Simon walked down the street to the left, did you?"

25. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"For your fifty dollars?"

26. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"Why were you waiting for La Conti?"

27. Because the trial court committed harmful

and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"What was your reason for waiting for La Conti?"

28. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"What did that mean?"

29. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following questions:

"Well, there are times, even though you take an oath when you don't follow out your oath?"

"There are times when you raise your right hand to take an oath knowing when you raise your right hand you are not going to follow that oath?"

30. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, an answer to the following question:

"You got home about what time?"

31. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of John Hickling, a witness for the State, answers to the following questions:

"You didn't tell the Prosecutor or the police what happened three days before?"

"You were interrogated by the Prosecu-

tor's attaches, including the assistant prosecutor many times from May fifteenth down to yesterday?''

"You were interrogated before you got on the stand yesterday?''

"Do you wish to change your testimony Mr. Hickling that you didn't speak to anybody about this testimony before you got on the stand yesterday?''

32. Because the trial court committed harmful and prejudicial error in permitting on the direct-examination of Michael La Conti, a witness for the State, the following question and answer over objection of counsel:

Q. "Have you been convicted of crime?''
A. "I was.''

33. Because the trial court committed harmful and prejudicial error in permitting on the direct-examination of Michael La Conti, a witness for the State, the following question and answer over objection of counsel:

Q. "With whom did you see Irving Simon?''
A. "Conlon, Decker and Durgett.''

34. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, an answer to the following question:

"Do you know what that means?'' referring to an answer given by the witness to a preceding question "Embracing jurors.''

35. Because the trial court committed harmful and prejudicial error in refusing to permit, on

the cross-examination of Michael La Conti, a witness for the State, answers to the following questions:

"When you took that oath you knew you were not going to do it, didn't you?"

"There are occasions, Michael, when you take an oath and while you are taking the oath you don't intend to live up to it? Isn't that right?"

"As a matter of fact, Mr. La Conti, raising your right hand and swearing in the presence of the ever living God to do things or say things doesn't carry much weight with you at times does it?"

"Did you take the oath in this case with the same sincerity as you did in the Veit versus Miller case?"

"And you knew when you took that oath in the case of Demarest versus the Erie Railroad Company you were not going to abide by your oath?"

"And the oath you took in the Terhune case versus the Erie Railroad Company didn't carry very much weight with you either, did it, Mr. La Conti?"

"Have you ever taken an oath that you considered binding in your life?"

36. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, answers to the following questions:

"You knew that they were two of the jurors who opposed your machinations in the jury room?"

"You knew that the two men looking at you were observing you because your conclusions or their conclusions were opposed in the jury room?"

"Didn't that have an influence on you to try and conceal the fact from them you were

talking to the man in the case who was interested as a lawyer?''

''In other words, Mr. La Conti, you had no qualms of conscience about you talking to a man who was interested in seeing you bring in a verdict?''

''You didn't care who saw you talking to Irving Simon?''

37. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, an answer to the following question:

''Now, is it a fact, Mr. La Conti, you had observed Mr. Finn and this other man up on the steps?''

38. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, an answer to the following question:

''So you interest yourself in jury cases whether you are on them or not?''

39. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, an answer to the following question:

''Now Mr. La Conti, there are occasions when you tell untruths under oath, isn't that right?''

41. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, an answer to the following question:

''Why did you say 'lunch wagon'?''

42. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, an answer to the following question:

> "There are times also, Mr. Conlon, when you misrepresent facts for your own benefit?", the name Conlon having been amended by correction of counsel to La Conti.

43. Because the trial court committed harmful and prejudicial error in refusing to permit, on the cross-examination of Michael La Conti, a witness for the State, an answer to the following question:

> "You misrepresented facts to the City of Paterson when you were asking for relief, didn't you?"

44. Because the trial court committed harmful and prejudicial error, in permitting on the direct-examination of James Smith, a witness for the State, the following question and answer over objection of counsel for plaintiff-in-error:

> Q. "Where did you see him at the time you saw him?"
>
> A. "He was over on the extreme right of the court room talking to Irving Simon, if I recall right."

45. Because the trial court committed harmful and prejudicial error in refusing to direct the Attorney for the State to make an election and state in open court to the jury upon which set of facts respecting the materiality of the issue set forth in the indictment, the State would rely on its case going to the jury, when so moved by counsel for the plaintiff-in-error.

46. Because the trial court committed harmful and prejudicial error in refusing to direct the Attorney for the State to make an election on which of its alternate set of facts set forth in the indictment the State intended to rely upon and request the jury to bring in a verdict, when so moved by counsel for the plaintiff-in-error.

47. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the plaintiff-in-error, when so moved at the close of the State's case, for the following reason:

> The State failed to prove that the defendant committed a crime within the law of the State of New Jersey.

48. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the plaintiff-in-error, Thomas Serlinsky, when so moved at the close of the State's case, for the following reason:

> The State failed to prove that the defendant committed Perjury, within the law of the State of New Jersey.

49. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the Plaintiff-in-error Thomas Serlinsky, when so moved at the close of the State's case, for the following reason:

> The State failed to prove that the defendant testified, falsely, wilfully and corruptly, with respect to a material matter at a judicial proceeding.

50. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the plaintiff-in-error Thomas Serlinsky, when so moved at the close of the State's case, for the following reason:

> It clearly appeared from the evidence submitted in behalf of the State, that the testimony alleged to have been given by Thomas Serlinsky, the plaintiff-in-error was not material to the issue, hence could not constitute perjury, even though the same were false and corrupt.

51. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the plaintiff-in-error Thomas Serlinsky, when so moved at the close of the State's case, for the following reason:

> It conclusively appeared from the evidence submitted in behalf of the State that the testimony alleged to have been given was on a collateral matter, not material to the issue.

52. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the plaintiff-in-error Thomas Serlinsky, when so moved at the close of the State's case because of a material variance between the proof and the allegations in the indictment.

53. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the plaintiff-in-error at the close of the entire case on all of the grounds urged at the close of the State's case, more spe-

cifically set forth in assignments of error 47 to 52 inclusive.

54. Because the trial court committed harmful and prejudicial error in refusing to direct a verdict of acquittal in favor of the plaintiff-in-error at the close of the entire case on all of the grounds urged in counsel's motion to quash the indictment, more specifically set forth in assignments of error 2 to 10 inclusive.

55. Because the trial court committed harmful and prejudicial error in refusing to charge plaintiff-in-error's first, second, third and fifth written requests to charge, which reads as follows:

> 1. The Jury, in considering the evidence, must start with the legal presumption of the Defendant's innocence, which presumption must continue throughout all their deliberations unless the evidence establishes the Defendant's guilt beyond all reasonable doubt.
>
> 2. When a Defendant is charged with perjury he comes into court enshrouded in a veil of innocence, with the stamp of innocence impressed upon his brow by the law of the State, and it becomes the duty of the State, in order to prove him guilty of the crime with which he is charged, to prove that guilt beyond a reasonable doubt. No mere surmise, no mere suspicion, no prejudice, no revenge, but proof beyond reasonable doubt, for proof, and proof alone, indubitable proof alone, can remove the veil of innocence with which the law surrounds a defendant.
>
> 3. The presumption of innocence attaches to the Defendant from the very beginning. Such presumption of innocence

must be carried by the Jury into their final deliberations.

5. The defendant is not required to satisfy the Jury of his innocence; on the contrary, the burden is always upon the State to prove the defendant's guilt, and to prove such guilt beyond all reasonable doubt. This burden of proof remains upon the State, here represented by the Prosecutor, throughout the entire trial, and never shifts.

56. Because the trial court committed harmful and prejudicial error in refusing to charge plaintiff-in-error's seventh and eighth written requests which reads as follows:

7. While it is the duty of every juror to discuss the evidence and to deliberate with his fellows as to the guilt or innocence of the Defendant, and while every juror should consider the opinions of his fellows, if, in the last analysis, there is in the mind of any juror a reasonable doubt of the Defendant's guilt, fairly arising from the evidence in the case, such juror has no right to consent to a verdict of guilty in deference to or out of respect for the opinions of another or other jurors, or out of a desire to bring in a verdict or from motives of compromise, since each juror is in duty bound, under his oath, to arrive at his own conclusion and to be satisfied beyond a reasonable doubt of the guilt of the defendant before he joins in a verdict of guilt against the defendant.

8. Each juror must reach a conclusion. Eleven jurors are not competent to reach a verdict in the case. All must reach that conclusion. No juror is relieved from responsibility under his oath by letting any number of that body agree upon a verdict

and then consent to it himself, because it happens to be the judgment of the majority. Each juror must reach his own judgment. Such juror may and should discuss the case with his fellow members.

57. Because the trial court committed harmful and prejudicial error in refusing to charge plaintiff-in-error's tenth written request which reads as follows:

> 10. In order to convict the Defendant of the crime charged it is necessary not only that all the circumstances concur to show that he is guilty, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis, save the single one of guilt; otherwise the Jury must acquit the Defendant.

58. Because the trial court committed harmful and prejudicial error in refusing to charge plaintiff-in-error's twelfth, thirteenth, fourteenth and fifteenth written requests which read as follows:

> 12. To convict the Defendant of the crime of perjury the State must prove beyond a reasonable doubt that the Defendant had knowledge of the falsity of his testimony.

> 13. To convict the Defendant of the crime of perjury the State must prove beyond a reasonable doubt that the alleged false testimony was given wilfully and corruptly, since wilfullness and a corrupt intent are essential elements of the crime of perjury.

14. If the Defendant honestly believed in the truth of his statements when he made them, then he would not be guilty of perjury and the Jury should acquit him.

15. Before the Defendant can be convicted of the crime of perjury the Jury must be convinced beyond a reasonable doubt that not only was his testimony false, but that it was wilful and corrupt, and was material to the issue then being tried.

59. Because the trial court committed harmful and prejudicial error in refusing to charge plaintiff-in-error's sixteenth written request which reads as follows:

16. The Defendant respectfully requests the Court to instruct the jury what the material allegations of the indictment are, and also what facts must be established by the prosecution before the Jury can convict the defendant of the crime of perjury.

60. Because the trial court committed harmful and prejudicial error in refusing to charge plaintiff-in-error's seventeenth and nineteenth written requests, which read as follows:

17. Mistake of fact will excuse an honest swearing to what is not true. Perjury is committed only where there is an intent to testify falsely.

19. If the Defendant actually believed in the truth of his statements he is not guilty of perjury, if, as a matter of fact, his statements are false. This is true whether the statements are an unqualified declaration of fact or are expressly declared to be a matter of opinion or belief.

61. Because the trial court committed harmful and prejudicial error in refusing to charge plaintiff-in-error's twenty-first written request, which reads as follows:

> 21. If the Defendant in his own mode or manner of reasoning upon the facts occurring before him at the time, was of the opinion that Irving Simon did not speak to Michael La Conti upon the front steps of the Court House, Paterson, New Jersey, on May 12th, 1933, after six o'clock P. M., although he might reason or conclude very poorly concerning those facts, yet, if that was his honest opinion, his testimony would not be wilfully false.

62. Because the trial court committed harmful and prejudicial error in refusing and declining to instruct the jury what the material allegations of the indictment were, in accordance with plaintiff-in-error's sixteenth written request.

63. Because the trial court committed harmful and prejudicial error in refusing and declining to instruct the jury with respect to what facts must be established by the prosecution before the jury could convict the defendant of the crime of perjury.

JOSEPH GROSSMAN,
Attorney for Plaintiff-in-Error,
Thomas Serlinsky.

Specifications and Causes for Reversal.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, Defendant-in-Error, vs. THOMAS SERLINSKY, Plaintiff-in-Error.	In Error to Passaic Quarter Sessions.

It is hereby agreed and stipulated by and between the attorneys for the above entitled parties that the Specifications and Causes for reversal in the above entitled cause be the same as the Assignments of Error heretofore served and filed in the said cause, together with the following additional assignments as specifications and causes for reversal:

1. The verdict was against the weight of the evidence.

2. The verdict was the result of bias, passion and prejudice.

3. The verdict was illegal and contrary to law.

(Signed) JOSEPH GROSSMAN,
Attorney for Plaintiff-in-Error.

JAMES D. CARPENTER, JR.,
Attorney for Defendant-in-Error.
By MICHAEL SHERSHIN.

Dated: July 10, 1934.

Opinion.

NEW JERSEY SUPREME COURT.

No. 1—October Term, 1934.

State of New Jersey,
Defendant-in-Error,

vs.

Thomas Serlinsky,
Plaintiff-in-Error.

Argued October Term 1934 Decided Feb. 21, 1935

In Error.

For Plaintiff-in-Error, Merritt Lane.
For Defendant-in-Error, James D. Carpenter, Jr.

Before—Brogan, Chief Justice, Justices Parker and Bodine.

Bodine, *J.* The defendant was convicted of perjury. He had given, as the jury found, materially false testimony as a witness in a criminal proceeding instituted against Aaron L. Simon and others. A young lawyer, he testified that he had left the court room with Simon after the trial of a case in the Passaic Circuit on May 12, 1933, and had gone directly to his automobile and that Simon had not talked alone with a juror named Michael LaConti and had not checked over the jury list with him. This testimony, which the evidence abundantly showed was false by the oath of more than one witness, was material to establish

Simon's position that he was innocent of the charge as made.

The Court charged the first, second and third requests in so far as the same embodied a correct principle of law saying: "May I say to you at this point, that this defendant being charged with crime, like all defendants charged with crime, is presumed to be innocent and that presumption continues until the State establishes his guilt beyond a reasonable doubt." This language was approved in *State* v. *Burke*, 81 N. J. L. 94. The jury could not fail to understand the import of this language in the light of the whole charge. The duty was clearly placed upon the state to establish guilt beyond a reasonable doubt. The court not only informed the jury of the presumption of innocence, but of the duty of the state to establish guilt beyond a reasonable doubt.

The fifth request was not entirely correct. However, in so far as it embodied a correct principle of law it was charged, the court saying: "So if, after analyzing all of the evidence that has been adduced, you are satisfied beyond a reasonable doubt that this defendant committed perjury, as I have defined perjury, and as it is more fully set forth in the indictment which you will take in the jury room with you for the purpose of perusal, it is your duty to convict him. If you are not satisfied, it is equally your duty to acquit him."

LaConti's testimony as to seeing Simon with Conlon, Decker and Durgett was irrelevant, but harmless even if the four were convicted of the conspiracy offense, because the defendant was not charged with that crime but merely with perjury at that trial.

There seems to be no special circumstance, if

any such circumstance could exist, to preclude the state from asking its witness, LaConti, if he had ever been convicted of crime.

Testimony that the defendant had been seen talking to Irving Simon before taking the witness stand at the conspiracy trial was a relevant fact. There was no reason to exclude such testimony.

The court did not improperly check the cross examination of the witness LaConti. It fully appears that he was a faithless witness and a perjured rascal. Argumentative questions could elicit no more than the proved facts. There was no breach of discretion in controlling a line of cross examination which could elicit nothing more.

The indictment was sufficient and not duplicitous. The jurors were properly drawn. *State* v. *Profita,* 113 N. J. L. 330. The special and general panel being exhausted, the sheriff properly summoned talesman. Sec. 83, 2 Comp. Stat. 1847. Trials must go on or courts must cease to function.

We find no error in refusing to quash the indictment, or in denying the motions to direct a verdict for the defendant. The charge, under the statute, appears in the indictment and the proofs adduced made the factual questions suitable for the determination of the jury.

Other matters suggested in the argument need no further discussion.

The judgment is affirmed with costs.

Rule of Affirmance.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

THOMAS SERLINSKY,
Plaintiff-in-Error.

On Writ.
Rule.

This matter having been presented to the Court, during the October Term, 1934, by JAMES D. CARPENTER, JR., Counsel for The State of New Jersey, Defendant-in-Error, and MERRIT LANE, Counsel for the Plaintiff-in-Error, and the Court having considered the same and found no error in the judgment below, it is therefore, on this 23rd day of April, 1935,

ORDERED that the judgment appealed from be affirmed and that the record be remitted to the Court of Quarter Sessions of Passaic County, to be proceeded with according to law and the practice of said Court.

J. L. BODINE,
For the Court.

Entered April 23rd, 1935,
On Motion of
JOSEPH GROSSMAN.

Clerk's Return.

I, F. L. Bloodgood, 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-fourth day of April, A. D. Nineteen Hundred and Thirty-five.

FRED L. BLOODGOOD,
(SEAL) Clerk.

Writ of Error.

New Jersey, ss.: The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature,
(L.S.)

GREETING. Because in the record and proceedings, and also in giving of judgment upon a certain indictment filed December 22, 1933, in the Court of Oyer and Terminer in and for the County of Passaic, against Thomas Serlinsky, defendant, charging perjury, which said indictment, the proceedings thereon and the judgment therein was brought before you by your writ of error directed to the Court of Quarter Sessions of the County of Passaic, to which court the said indictment was handed down for trial, as a result of which trial the said defendant Thomas Serlinsky was convicted and which said judgment of the said Passaic County Court of Common Pleas you by your judgment affirmed, manifest error hath intervened and in the said judgment of the Passaic County Court of

Common Pleas and in your judgment of affirmance to the great damage of the said Thomas Serlinsky, as from his complaint we have received information, we being willing, in his behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Thomas Serlinsky, 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 in the last resort in all causes, at Trenton, on the thirteenth day of May 1935, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereon for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS, our Chancellor and President Judge of our Court of Errors and Appeals at Trenton, aforesaid, the twenty-third day of April, 1935.

THOMAS A. MATHIS,
Clerk.

JOSEPH GROSSMAN.

Return to Writ.

In answer to the within writ of error the Justices of the Supreme Court of the State of New Jersey within named do certify and send to the Court of Errors and Appeals in the last resort in all causes the record and proceedings whereof mention is within made, with all things touching and concerning the same in a certain schedule to this writ annexed as within we are commanded.

THOMAS J. BROGAN,
Chief Justice.

The return consists of all the proceedings printed in the State of Case from page 1 to page 319.

Assignment of Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, vs. THOMAS SERLINSKY, Plaintiff-in-Error.	On Error.

New Jersey, ss.:

Afterwards, to wit, on the return of the writ of error before the New Jersey Court of Errors and Appeals at Trenton, comes the said Thomas Serlinsky, by Joseph Grossman, his attorney, and says that in the record and proceedings aforesaid and also the giving of judgment there are manifest errors, to wit:

1. The Supreme Court erred in giving judgment for the State of New Jersey and affirming the judgment of the Passaic County Court of Quarter Sessions instead of giving judgment for the plaintiff-in-error and reversing the judgment of the Passaic County Court of Quarter Sessions for one or more of the reasons set forth in the assignments of error and specifications of causes for reversal.

JOSEPH GROSSMAN,
Attorney for Plaintiff-in-Error.

89 MAY.7 1935

New Jersey Court of Errors and Appeals

No. 89. May Term—1935.

State of New Jersey,
Defendant-in-Error,

vs.

Thomas Serlinsky,
Plaintiff-in-Error.

On Writ of Error to the Supreme Court Affirming Conviction of Perjury.

Sat Below in Supreme Court: Brogan, C. J., Parker and Bodine, JJ.
Passaic Quarter Sessions: Delaney, J., and a Jury.

BRIEF FOR PLAINTIFF-IN-ERROR.

(Italics and the like mine, except where otherwise noted.)

Statement of the Record.

This case comes here by writ of error (p. 317) to the judgment of the Supreme Court (p. 316) upon the opinion of Bodine, J. (p. 313), affirming a judgment (p. 10) of the Passaic Quarter Sessions, sentencing plaintiff-in-error to a fine of $1,000 and confinement in the County Jail for six months, entered after a verdict of a jury finding him guilty of perjury as alleged in an indictment handed up December 22, 1933 (p. 4). The assignment of error is printed at page 320.

Statement.

This case was argued to the Supreme Court and briefed. A brief and a reply brief for plaintiff-in-error were filed in the Supreme Court. The case was fully covered in the briefs in the Supreme Court and plaintiff-in-error prays leave

to submit the printed briefs filed in the Supreme Court to this Court. Plaintiff-in-error has no money and was obliged to borrow the funds necessary to prosecute the writ of error in the Supreme Court and a reprinting of the briefs in the Supreme Court would be a hardship to him because of the expense involved. There is nothing which was argued in the Supreme Court that plaintiff-in-error does not desire to argue here.

The Opinion of the Supreme Court.

I.

The Supreme Court held (p. 313) that the testimony which plaintiff-in-error gave in the trial of December 20, 1933, of Simon, La Conti, Hickling and others for conspiracy to embrace jurors was shown to be false "upon oath of more than one witness, was material to establish Simon's position that he was innocent of the charge as made."

I have considered the evidence under Point I of the brief in the Supreme Court (p. 18), the materiality of the testimony claimed to be perjurous under subdivision A, Point X, page 52 of the original brief, and subdivision 2, page 4 of the reply brief, and have nothing further to add.

I direct attention to the fact that, from the opinion of the Supreme Court it might appear that the alleged conversation with respect to which plaintiff-in-error was interrogated at the trial on December 20, 1933, was between the witness and *Aaron* L. Simon. The fact is that it involved an alleged conversation between La Conti and *Irving* Simon alleged to have taken place on May 12, 1933, *but having nothing to do with the charge of conspiracy being tried on De-*

cember 20, 1933. The only purpose of the testimony of plaintiff-in-error was to indicate that *Irving* Simon and La Conti had not had a private conversation on May 12, 1933 at the Court House, the State claiming that the testimony which Irving Simon had previously given to the effect that he first met La Conti (in the sense of being introduced to him and talking with him directly) on August 29th or 30th, 1933, was false. I reiterate that it was not claimed by the State that anything which was said between the parties on May 12, 1933 had anything whatever to do with the conspiracy case being tried.

II.

The Supreme Court held that the charge with respect to reasonable doubt was sufficient. For the reasons stated under Point II, page 34 of the original brief in the Supreme Court, I urge that it was incomplete.

III.

The Supreme Court held that the testimony of La Conti, which was objected to, to the effect that he had seen Irving Simon with Conlon, Decker and Durgett, three of the alleged co-conspirators charged in the indictment for conspiracy on the trial of which plaintiff-in-error's perjury is alleged to have been committed, was *irrelevant* but harmless.

I submit that, because of the method pursued by the State in this case, this testimony was anything but harmless. The State started out by attempting to inject the verdict of the jury in the conspiracy case into this case (State of Case, pp. 37, 102, 128, 129). It apparently took the view

that anyone connected with the Simons in any way, or who aided in their defense, was guilty of something. *The prosecutor urged the admission of the testimony* (pp. 132, 133) *upon the ground that it would tend to show motive.* It was objected to and argument was had and, *after consideration,* the Trial Court admitted it.

Now, if its admission was *urged* by the prosecutor upon the ground that *it tended to show "motive"* and admitted by the Court, *upon the hypothesis that it was relevant,* it is obvious that it must have been used by the prosecutor for that purpose and how can it *now* be said that its admission was *harmless?* True, defendant was not charged with the crime of conspiracy "but merely with perjury at that trial" as indicated by the Supreme Court, and *that fact should have led the Trial Court to have excluded the testimony.* The effect, however, of the ruling of the Trial Court was to permit the jury to believe that, although plaintiff-in-error was only charged with perjury committed in a conspiracy case, nevertheless evidence which had to do with the conspiracy alone might be considered by them *as showing motive.*

It is respectfully submitted that the opinion of the Supreme Court to the effect that this testimony, although irrelevant was yet harmless, is based upon the hypothesis that *notwithstanding that the Trial Court had held the testimony to be relevant, the jury would disregard it as irrelevant.*

And this *irrelevant* testimony must be taken in connection with the fact that the Court permitted the State to ask its principal witness, La Conti, whether he had ever been convicted of a crime (Point V of original brief in Supreme Court, p. 38), the State following it up with the question as of what he had been convicted, with the answer "jury fixing." (This latter testimony was not objected to. The damage had been done.)

If the jury trial is to be preserved, I submit that we ought not to depart from the doctrine of this court as expressed in *Ryan* v. *State,* 60 N. J. L. 552 (1897), at page 555, in the following language:

> "We agree with the view expressed in the Supreme Court that it (certain evidence) was illegal, and we hold that its admission must work a reversal. It was said, obiter, in the Supreme Court, that the legitimate proofs established a case upon which the judgment could safely rest, and that it was difficult to believe that the 'irrelevant and inconsequential narrations' wrongly admitted in evidence could have harmed the defendant, but, on error, reversal is required if it appears that the illegal evidence may have been harmful. Ruckman *v.* Bergholz, 8 Vroom 437, 441.
>
> *We cannot be sure that the jury would have found the legitimate proof sufficient.*"

It is true that the *Ryan* case was here on strict bill, the court holding that the return was not in form sufficient to permit the court to review under the 136th section of the statute. But the rule cannot be different with respect to this matter whether the case is here on strict bill or under the statute, for the question must be the same—*may* the jury have been influenced by the improper testimony? I can conceive that in some cases irrelevant or immaterial testimony may creep into the record, after a more or less formal objection, and it may be said that it is harmless because it is fair to assume that the jury *could not have been* influenced by it. But how can that be said in a case like that at bar where the testimony was not only objected to but argument had upon the objection, the prosecutor urging its admission (pp. 132, 133), upon the ground that it tended to show *motive* which it did *not* show and the court admitted it upon the theory that it *did* show motive

and the prosecutor in his brief in the Supreme Court said (p. 19)—"we fail to see how this testimony harms Serlinsky. *He was not present.* The testimony *did* tend to show *motive* on the part of Serlinsky to help establish Irving Simon's alibi as to what took place on May 12."

In its first statement the State concedes that Serlinsky was not present and it then says that, not being present, he could not be harmed, and then it immediately indicates *how* he *could* be harmed, although, not being present, he *ought not* to be bound, because it tended to show *motive.* Motive on whose part? On the part of Serlinsky. But motive on his part shown by testimony by which he could not be bound. It is not necessary, I submit, to carry the discussion further.

It is significant that in the *Ryan* case the kind of testimony, because of the admission of which the judgment was reversed, is of the same general nature as that involved in the case at bar. In that case, the evidence was of the commission of other crimes of like nature to show a "tendency." In this case the evidence is to show *motive* apparently for the purpose of urging that the motive would supply the reason for the alleged perjurous testimony.

Ruckman v. *Bergholz,* 37 N. J. L. 437 was a civil case and this Court said (p. 441):

> "It is true the parties to a suit have the right to have the law truly declared, but it is also true that a judgment will not be reversed for an error, however manifest, which has done no injustice. But it should be *clear* that the party complaining has not been injured by the error, and if there *is reasonable doubt* on that point, it is the duty of the court to give him the benefit of it."

This language was used in the ordinary civil case. It has a stronger application in a criminal

case in which the liberty of a defendant is involved.

Moreover this case came to the Supreme Court under the 136th section of the statute and also on strict bill and plaintiff in error is entitled to the benefits of both methods of review. *State* v. *Merkle,* 83 N. J. L. 677; *State* v. *Lang,* 87 N. J. L. 508, at page 512, both in this court.

In *State* v. *Merkle,* 83 N. J. L. 677, the error alleged was the erroneous exclusion of testimony. The Supreme Court held that, while the ruling below was erroneous, nevertheless, the case being before the court under the 136th section of the statute, it was the burden of the plaintiff in error to show manifest "wrong or injury." It found that no "manifest wrong or injury" was suffered by plaintiff in error and therefore affirmed. This court disagreed and reversed and the rule stated by this court, which was then so firmly settled as that this court in *State* v. *Merkle,* 83 N. J. L. 677, at page 684 used the following language:

> "It would be entirely foreign to such policy and contrary to our established judicial habit as well as manifestly unfair to counsel and the clients whose litigation they direct, for us now to say that a proceeding taken in reliance upon our opinion had the opposite effect from that given to it by such opinion. Under such a vacillating policy no counsel however careful could safely advise a client or direct his litigation."

and which was again approved by this court in *State* v. *Lang,* 87 N. J. L. 508, at page 512, ought not now to be departed from.

State v. *Merkle* was mentioned with approval by this court in 1930 in *State* v. *Fischer,* 95 N. J. L. 419, at page 421.

This case being in the Supreme Court on strict bill as well as under the 136th section of the statute, the burden was upon the plaintiff in

error not to show "manifest wrong or injury," but merely "error." If error be shown where the case comes up on bill there is a presumption of injury.

In *Malynak* v. *State,* 61 N. J. L. 562, this Court, speaking by the Chancellor (Magie) after referring to the fact that the inquiry in cases brought to the Court under the 136th section is whether "manifest wrong and injury to the plaintiff-in-error appears" (p. 564) said:

> "The rule would be otherwise if counsel for the plaintiff in error had objected to the question below, and had duly excepted to their admission, and had brought here the bill of exceptions, *for in such case the fact that they and the answers to them may have misled the jury to the injury of the plaintiff in error, would control the consideration of the court, unless it should affirmatively appear that no injury was suffered.*"

This Court did not in a civil case, *MacWhinney* v. *Jacobson,* 109 N. J. L. 477, at page 484, agree with the Supreme Court, 9 N. J. Misc. 958, in its view that the exclusion of testimony was harmless. The admission of the testimony in the case at bar was certainly no less harmful to plaintiff-in-error than the exclusion of the testimony in *MacWhinney* v. *Jacobson* to the appellant in that case.

In the case at bar the objection made to the testimony was that it was immaterial (p. 132). As to this objection this court, speaking by Mr. Justice Swayze in *State* v. *Young,* 93 N. J. L. 396, reversing a conviction after re-argument, said (p. 405):

> "*It is, moreover, erroneous to say that immaterial evidence is necessarily harmless.* Probably, it was harmless in the cases referred to. But evidence entirely immaterial to the issue, which is what the objection

means, may be very harmful. It would hardly be said that a man on trial for larceny could be proved guilty of murder and the error passed over if the objection was put solely on the ground of immateriality. The fact is, objection on the ground of immateriality has a double aspect. It may mean that the evidence is a mere waste of time; it may mean that it is irrelevant. Which is the proper meaning depends on the case. The judge, in the present case, evidently took the objection in the latter sense, since he ruled that it was proper. The ruling was erroneous on the further ground that the question was leading, and a striking instance of the harm that may be done by so objectionable a question. The ruling that the evidence was proper was an approval by the judge of a mere suggestion of guilt by the state without any proof, and must have been understood by the jury as meaning that it was of value as bearing on the present indictment, when in fact it was of no value, but was immaterial and irrelevant. That the defendant suffered manifest wrong and injury is obvious. *The jury heard the judge say the testimony was proper.* If the defendant was guilty of abortion, his testimony about a dead foetus, for which he was not responsible, was a lie, and his credibility was injuriously affected, if not destroyed. That the witness was, if there was in fact an indictment and the charge therein was true, an accomplice, and that he was state's evidence, only emphasizes the error of the court in ruling that the evidence was proper."

The language of Mr. Justice Swayze can be applied to this case with propriety. The jury heard the Court, in effect, approve the suggestion of the prosecutor that this testimony, which the Supreme Court has now held to have been improperly admitted, *could properly be considered upon the matter of motive.* The Supreme Court

has held that the testimony was immaterial in the sense that it was not *relevant.*

In *State* v. *Hendrick and Stanton,* 70 N. J. L. 41 the Supreme Court (Gummere, C. J. and Dixon, Hendrickson and Pitney, J.J.) said with respect to an improper admission of testimony at page 47:

> "When the court of review can see that the error complained of may have harmed the plaintiff in error, it is the court's duty to reverse. Bell *v.* Samuels, 31 Vroom 370; Buckman *v.* Bergholz, 8 Id. 437, 441."

The argument of the prosecutor before the Trial Court (p. 132) and his argument to the Supreme Court in his brief, Point IV, page 18, demonstrates, I submit, that certainly the plaintiff in error *may have been* harmed and that is all sufficient, particularly as this case was in the Supreme Court, and now here, not only under the 136th section of the statute but on strict bill.

IV.

The Supreme Court held (p. 315) that the indictment was sufficient and not duplicitous. There were two distinct alleged perjurous statements charged in the indictment. There was no evidence to support one of the charges. Yet the Court declined to compel the State to elect with the result that the case went to the jury with the very short charge of the Court (p. 276) which permitted the jury to consider *both* statements. As I argued under Point VIII of the original brief in the Supreme Court, page 42, if the jury found that plaintiff-in-error had falsified with respect to the statement with respect to which there was no evidence to support such a charge, it could not well have escaped the conclusion that the falsification

was wilful, while with respect to the charge as to which there was *some evidence* plaintiff-in-error might well have been mistaken and the jury might well have so found.

V.

As to the objection that the State was permitted to ask the witness James Smith to testify as to the fact that, before plaintiff-in-error took the stand, he "was on the extreme right of the court-room talking to Irving Simon, if I recall right" (Point VI original brief in the Supreme Court, p. 39) the Supreme Court said that the evidence was as to "a relevant fact". I urge, and for the reasons stated under Point VI, page 39 of the original brief in the Supreme Court, that the *mere fact* that, before taking the stand, a witness speaks to a party is *not* a relevant fact. What does it prove? The purpose of the State was to associate plaintiff-in-error with the alleged co-conspirators with the inevitable result that the jury would consider that the result of the conspiracy case was of some weight in determining the perjury case. The State succeeded, I submit, in creating an atmosphere which almost made impossible cool and calm deliberation.

Conclusion.

I submit that for the reasons urged in the briefs in the Supreme Court the judgment of the Supreme Court affirming the judgment of the Passaic Quarter Sessions should be reversed. And I submit, as I did in the Supreme Court, that, if a conviction of this kind for perjury is permitted to stand based upon such testimony as was given in the Quarter Sessions, the course of justice will

be impeded for witnesses will not be willing to testify to what they may believe to be true. I submit that if perjury indictments and convictions can be had as in the case at bar, the power of the State is so great as that a fair trial of defendants will be practically impossible.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

The State of New Jersey, Defendant-in-Error, *vs.* Thomas Serlinsky, Plaintiff-in-Error.	On Error to Supreme Court. #89, May Term, 1935.

BRIEF FOR THE STATE.

The writ of error in this case brings under review the judgment of the Supreme Court affirming the conviction of plaintiff-in-error of the crime of perjury. He was convicted by verdict of a jury in the Passaic Quarter Sessions March 16, 1934. He was sentenced to pay a fine of $1,000, and be confined in the County Jail for six months (p. 10).

Plaintiff-in-error was a lawyer. During the trial of *State* vs. *Aaron L. Simon, Irving Simon, et al.,* in the Passaic Quarter Sessions in December, 1933, plaintiff was called as a rebuttal witness for the defendant Irving Simon, was sworn and testified.

Aaron L. Simon and the others were indicted for conspiracy to embrace jurors who were trying the civil case of *Veit* vs. *Miller and Werner.* The conviction of Simon, *et al.* was affirmed by this Court on May 17, 1935. It was alleged by the State that the defendants Aaron L. Simon and Irving Simon had engaged Conlon, Decker and Durgett to "fix the jury." Two jurors, Michael LaConti and John Hickling, testified that

they had been promised money to bring in a verdict in favor of Dr. Simon's client for $20,000, and that after such verdict was returned they had been paid the agreed price.

LaConti testified that on April 29, 1933, after Conlon had paid him $100.00 for "services" in the case of *Richmond* vs. *Orbe,* Conlon took him around the corner and in an automobile in the presence of Decker and Durgett, introduced him to Irving Simon, who said that he would be put on the rest of Dr. Simon's cases. He also testified during that trial that the next time he spoke to Irving Simon was in front of the court house following the disagreement of the jury in the case of Terhune and Demarest against the Erie Railroad, when Irving Simon asked him what jurors voted for the defendant and checked their names against the jury list.

The defendant Irving Simon on that trial interposed, among others, the defense that he had never spoken to the juror LaConti prior to August 27, 1933, the date he questioned him in the Riviera Hotel, Newark, and had the "conversation" taken down on a dictaphone. He attempted to prove an alibi as to the April 29th occurrence, and he denied that he had talked with LaConti alone following the disagreement in Terhune and Demarest against the Erie.

One of the last witnesses called on the trial was the plaintiff-in-error Serlinsky. Serlinsky's wife was the sister of the wife of Irwin Simon, brother of Aaron L. Simon and Irving Simon, defendants in the conspiracy case to embrace jurors. Serlinsky testified that he was in court when the jury disagreed and was discharged on May 12, 1933, following the trial of Terhune and Demarest *vs.* Erie Railroad. He said:

> "I left the court with Irving Simon, left Judge Mackay's court and walked out of

court with Irving Simon and Mr. Cooper, walked down the steps—I can't just recall where Mr. Cooper left us—walked down the steps to the first floor, as I recall in a general manner discussing the case and there was a question asked by one of the jurors, he said something——

The Court: No, no, we are not interested in what the jurors said'' (p. 49, ll. 15 to 30).

* * *

''Q. Where did you go and with whom did you leave? A. I left this group of jurors and we went out the front way, turned to the left on Hamilton Avenue, went to my car which was parked on Grand Street. At no time did Irving Simon talk to any one of the jurors aside from this general conversation'' (p. 50, ll. 1 to 15).

On cross-examination Serlinsky said:

''I was with Irving Simon until we got outside and he got in my car. I was with him every inch of the way'' (p. 51, l. 20).

''Q. Didn't you walk down the steps with LaConti, Hickling and Irving? A. I positively did not. Irving Simon was with me and I——'' (p. 51, ll. 35 to 40).

''Q. Did you see Irving Simon standing near the foot of those steps with a jury list in his hand? Yes or no. A. I can't answer that yes or no.

The Court: Yes, you can. You are a lawyer. Answer it yes or no.

A. Did I see Irving Simon with a jury list in his hand? No, sir.

Q. Did he have a list of jurors in his hands as he was leaving the court room? A. No, sir.

Q. Was he asking in your presence what jurors voted for him and what against him? A. He certainly did not'' (p. 52, l. 35 to p. 53, l. 20).

The indictment charged that said testimony was false and that the said Irving Simon did speak

to, talk and converse with the said Michael LaConti, a petit juror, as aforesaid, at 6 P. M. on May 12, 1933, in front of the Passaic County Court House; and that he, the said Thomas Serlinsky, and Irving Simon did not go to the car of the said Thomas Serlinsky, which was parked on Grand Street, Paterson, New Jersey, without the said Irving Simon talking to any one of the jurors aforesaid (see Indictment, p. 7).

The State contends that one of the issues in the trial of State *vs.* Aaron L. Simon, Irving Simon, *et al.*, tried in December, 1933, was whether or not Irving Simon did or did not talk with the juror LaConti after the jury in Terhune and Demarest *vs.* Erie Railroad had disagreed. If they did not so talk, as contended by Irving Simon, then LaConti was testifying falsely and Irving Simon's defense was good to that extent.

Not only was Serlinsky connected as above mentioned with the Simons, but he had shown great interest in the defense of the case of State *versus* the Simons, having been in court with a group of the Simons for five days during the trial, and having admitted he was a friend of Irving Simon (p. 50, ll. 20 to 25).

The Simons having been convicted, the Grand Jury indicted Serlinsky for perjury on December 22, 1933. The trial below consumed three days and Serlinsky was convicted.

POINT I.

The conviction below was amply supported by the evidence.

Four witnesses testified that following the trial of Terhune and Demarest *versus* Erie Railroad on May 12, 1933, Irving Simon did hold a conversation with LaConti outside the Court House.

(1) M. Thomas Finn, a juror who served during the trial of Terhune and Demarest against the Erie Railroad. Mr. Finn testified that he did not remember ever seeing Serlinsky until the morning of the perjury trial (p. 59, l. 32). He testified that he saw Irving Simon talking with Michael LaConti, who was also a juror in that trial, just off the steps in front of the Court House after said trial (p. 60).

> "Q. Who was with you at the time you saw Irving Simon and Mr. LaConti? A. Mr. Corsetta (another juror).
>
> Q. How close was Mr. Corsetta standing to you at that time? A. About two feet away. We were talking.
>
> Q. Two feet away? A. Yes.
>
> Q. Then when you saw Mr. Irving Simon and LaConti talking as you stated, what did you do? A. We stood watching them.
>
> Q. You what? A. We stood and watched them.
>
> Q. For how long a period of time did you watch them? A. Between fifteen and twenty minutes.
>
> Q. Did you notice anything about Irving Simon and LaConti—or Michael LaConti at that time? A. Mr. Simon had a paper in his hand but I couldn't tell you what it was" (p. 61, ll. 1 to 25).
>
> "Q. What did they do during this fifteen or twenty minutes? A. Stood talking together" (p. 61, l. 31).
>
> "Q. Did you see Mr. Serlinsky there? A. I mentioned before I never knew him until this morning and not knowing him I don't remember him" (p. 63, l. 20).

As a result of Finn's cross-examination he was asked on re-direct examination why he remembered distinctly seeing Irving Simon and LaConti in front of the Court House, and he answered:

> "The oddness of the situation" (p. 83, l. 10).

"A. I was on the jury with Mr. LaConti and Mr. Simon was counsel for the plaintiffs * * * and because of Mr. LaConti's conduct in the jury room, them being together was worthy of notice" (p. 83, ll. 10 to 40).

On re-cross-examination Mr. Finn was asked by counsel for Simon:

"Q. Tell the jury about LaConti's conduct in the jury room,"

and he replied:

"He said very little all afternoon but I remember—I remember one remark he made in the course of the afternoon very distinctly because he said, 'Ten thousand dollars apiece or I will keep you here all night' " (p. 84, ll. 1 to 15).

(2) Florio Corsetta, also a juror in the case of Terhune and Demarest *vs.* Erie Railroad, testified that after the disagreement in that case he went out the front door of the Court House and

"I saw Mike LaConti and someone else talking to Mike LaConti down on the sidewalk near the court house steps.

Q. When you saw Mike LaConti talking with someone, you say you don't remember who, where were you? In front of the court house door? A. I had my back turned to them.

Q. Did you turn your back afterwards? A. Not until Mr. Finn said— (Objection.)

Q. As a result of what Mr. Finn said what did you do? A. I turned a little to see who was down there and saw Mike LaConti with another person.

Q. Where were they at that time? A. At the sidewalk of the court house * * *

Q. You can't tell us that. Just what you saw? A. What I saw was the person with whom Mike LaConti was talking to had a piece of paper in his hand.

Q. How long did they stay there? The two of these people, one of whom was Mike LaConti? A. On or about ten or twelve minutes. Something like that'' (pp. 88 and 89).

This very significant testimony was given by Corsetta:

''Q. Do you know Mr. Thomas Serlinsky, the defendant, sitting next to Mr. Stafford, on the left hand side? A. I never saw him before until now.

Q. Did you see him going out of the court room? A. I says I never seen him before until now'' (p. 87, ll. 20 to 25).

(3) John Hickling, also a juror who served in Terhune and Demarest against the Erie Railroad, testified that he left the court room following the disagreement in that case; that he did not know the defendant, Thomas Serlinsky, and did not see him that afternoon following the disagreement in *Terhune and Demarest* vs. *Erie* (p. 104, ll. 15 to 20).

Hickling said that he went out of the court room ahead of LaConti and when he got to the sidewalk waited for LaConti.

''Q. Did he come? A. Yes, sir.

Q. Was he alone or with somebody when he came? A. He was with someone.

Q. Who was he with? A. Irving Simon.

Q. Was there anyone else besides LaConti and Irving Simon together or not? A. Not that I remember.

Q. What did the two of them do as they left or came towards you? A. I was introduced to Irving Simon by LaConti.

Q. Then what happened? A. After a minute or two, we walked down the street to the left'' (p. 105, ll. 5 to 20).

Hickling said that LaConti and Irving Simon talked together quite a few minutes and that

Irving Simon had a piece of paper in his hand (p. 106).

On cross-examination Hickling testified that he had never met Irving Simon before LaConti introduced them in front of the court house that afternoon (p. 122, l. 23); that he did not listen to the conversation between Irving Simon and LaConti (p. 123, l. 12), and that the piece of paper which was in Irving Simon's hand was white in color (p. 124, l. 18).

(4) Michael LaConti, also a juror in the case of Terhune and Demarest against the Erie Railroad, testified that following the disagreement in that case he went out in front of the court house. He said:

> "I walked downstairs and as I opened the door I met Irving Simon.
>
> Q. Where? A. Down right near the door on the top of the steps.
>
> Q. In whose court? A. In front of the court.
>
> Q. Yes. Was anyone with Irving Simon at the time? A. Nobody.
>
> Q. What happened? A. We talked about eight or ten minutes and kept on walking downstairs until we got by——
>
> Q. As you were walking downstairs, did you see any other persons? A. I seen nobody then.
>
> Q. As you got to the bottom floor of this building and walking with Irving Simon, did you see anybody on the first floor? A. No" (p. 131, ll. 10 to 30).
>
> "Q. At the time you both left the building was anybody else with you? A. Nobody but me and Simon.
>
> Q. Tell us what happened? A. We stopped there a few minutes talking and walked down the steps until we came to the sidewalk and we got by a column there and he took a jury slip out of his pocket and says to me, 'Who was those six voted against me?' I says, 'Me,

John Hickling and another man and the three women was for a verdict and the other six was against a verdict.' And so he finally got the jury slip and was checking them off and I turned around and as I did there was Finn and the other fellow on the steps watching me.

Q. Do you remember seeing John Hickling there? A. Yes, I seen John Hickling. He was down there about fifteen or twenty feet away.

Q. Had you met Irving Simon before this day? A. I had.

Q. When did you meet him next? A. April twenty-ninth and August thirty-first, 1933'' (p. 132, ll. 4 to 28).

Again LaConti testified:

''Q. When you held this conversation, how long did it take? A. Which conversation?

Q. With Irving Simon in front of the court house? A. Oh, about fifteen minutes.

Q. And during this period of time did you see any persons around at the time? A. Yes, there was Finn and the other fellow that was with him and Hickling, he was down about fifteen or twenty feet away from me.

Q. Do you know how long Finn and Corsetta remained there? A. Fifteen or twenty minutes.

Q. Thereafter when your conversation with Irving Simon concluded where did you go? A. I walked down and called Hickling over and introduced him to Simon.

Q. Talk a little louder. A. I introduced Hickling to Simon and the three of us walked down Hamilton to Grand Street.

Q. Did you see Mr. Serlinsky the defendant there? A. I did not.

Q. Did you see him as you walked down the court house steps? A. I did not.

Q. Did you see him at any time after you left the court house building? A. I don't know. There was about eight or ten there and I don't know if he was there or not. I didn't see him.

Q. As you left the front door of this building did you see Serlinsky there during your conversation with Irving Simon? A. No, sir" (p. 135, l. 18, to p. 136, l. 10).

On page 148 LaConti testified as follows:

"Q. When you looked up and saw Finn and this other man, did you attempt to conceal the fact that after you had worked hard for a verdict you were then talking to one of the attorneys in the case? A. Yes, I was talking to Simon.

Q. Did you attempt to conceal that fact? A. I did. And I says to Simon, 'There is two of them up there now,' and he wanted to know who they were.

Q. He asked you who were the other six? A. I says, 'There is two on the steps now.'

Q. What other six? A. The six against the verdict.

Q. Then you knew the two men standing on the steps were against the verdict you wanted brought in? A. Yes, I did" (ll. 1 to 20).

This bit of graphic testimony was given by LaConti on cross-examination. Speaking of Irving Simon's questions of him after this disagreement he said:

"A. He asked about the case and wanted to know why the verdict didn't come in and I told him we were fighting for a verdict and there was six on one side and six on the other and we stuck that way for four hours and neither one wouldn't move. When we got downstairs he said, 'All right, give me the names,' and I says, 'Me, Shulman and Hickling and the three women was for a verdict,' and I says, 'The other six was against us.' He says, 'Do you know them?' I says, 'No, I don't know them. Check off on the jury slip and you will find out.' He took out the jury slip and I says, 'What do you want them six for?' And he says, 'We keep a record of

them for two years and we knock them off when they come on my brother's cases' " (p. 151, ll. 1 to 20).

The Defense.

The defendant and three others who were present in court the afternoon of the disagreement in Terhune and Demarest against the Erie Railroad testified in denial of the State's case.

Raymond C. Shulman, a lawyer, was in court when the jury disagreed. He said that after the jury was discharged he walked out with the jury and spectators. He said:

"As we were walking down, somewhere between this floor and the floor below we were joined by Irving Simon and Mr. Serlinsky. * * * As I remember it we got down to the first floor and I don't remember whether we stood there and talked or I don't remember whether we immediately proceeded out, but we went out the front door of the court house and walked down the steps and Mr. Simon and Mr. Serlinsky were with us to the bottom of the steps as I recall it and then I turned to the right and went down toward Market Street and I believe some of the jurors were with me or around me at the time. That was the last I saw of Mr. Simon or Mr. Serlinsky.

Q. Did you see Mr. LaConti talking to anybody on the steps outside? A. No.

Q. Did you see Mr. Hickling hanging around the street there on Hamilton Street? A. I did not.

Q. Did you see Mr. Finn or Mr. Corsetta, two members of that panel, around the front of the building at all? A. I did not" (p. 188, l. 35, to p. 189, l. 17).

The testimony of this witness was purely negative, particularly in view of this testimony also given on direct examination:

"Q. Can you tell the Court and jury what Mr. Simon and Mr. Serlinsky did as you

walked away to go toward Market Street? A. No, I don't know what they did.

Q. What were they doing the last time you saw them after six o'clock? A. Walking out with this group of jurors to the sidewalk. The last I saw of them they were with this group of jurors as I turned away'' (p. 190, ll. 4 to 15).

This witness' testimony was all very hazy indeed.

Court Officer Reese, who was one of two who attended this jury, testified that after the jury was discharged he was the first one out of the jury room and then went to the Sheriff's office on the ground floor to change his clothes. Although there was a door leading from the Sheriff's office immediately outdoors, without going upstairs, Officer Reese testified that he nevertheless went upstairs in the building, then out the door on the Hamilton Street side and down a flight of steps to get to the ground, which he could have reached by merely turning to the right when he came out of the Sheriff's office (see cross-examination, p. 220, ll. 18 to 40). The way he said he went was not only unnecessary, but involved going up a flight of steps inside the building, walking past the Register's Office to the front door, and then down a flight of steps, making considerable of an extra walk. Reese said that when he got out in front of the building he saw Irving Simon, who was ''way out by the door when I came out by the corner'' (p. 213, ll. 35 to 40). He said he saw Mr. Serlinsky down on the sidewalk with Irving Simon (p. 214, l. 12):

''Q. Did you notice whether or not Irving Simon spoke to anybody? A. I didn't see him.

Q. What was the last you saw of Irving Simon or Thomas Serlinsky, Officer? A.

> When I got down to the sidewalk, I turned to go towards the Court Restaurant and the last I recall is seeing Irving Simon and Serlinsky some few feet below that granite square thing that sets off the sidewalk and that wall that holds up the lawn, some few feet below that and they was half turning and half walking I recall. I don't know whether I said goodnight or not but I remember waving. That is the last I saw of them'' (p. 214, l. 30 to p. 215, l. 2).

In the face of Mr. Reese's testimony that that evening he did not see LaConti, Hickling, Corsetta or Finn (p. 226, ll. 15 to 20), and the only ones he could recollect having seen that evening were Irving Simon and Serlinsky (pp. 226 and 227), the jury evidently paid little attention to his testimony. Reese evidently was in a great hurry to get away, because after the jury disagreed he was the first one out of the court room (p. 221, l. 15). His conduct in leaving the court room in such a hurry does not jibe with his conduct in walking up one flight of stairs to the first floor and then down the front steps, where it was much easier for him, and quicker, to have gone out the door adjoining the Sheriff's office leading to DeGrasse Street, and then take the walk on the ground level around the corner of the building to the very point that Reese said he reached by going up a flight of stairs in the building and then down a flight of steps to the front of the building. Reese's testimony was such that one familiar with the Court House would not believe it.

On cross-examination when Reese was asked, after changing his clothes,

> ''Q. Then you walked upstairs?''

he answered:

> ''I must have walked upstairs.

> Q. Going back to the court room, had you met Serlinsky before this day? A. No, I think that was the first time I ever met him" (p. 222, ll. 18 to 20).

Plaintiff-in-error in his brief argues that there was corroboration for plaintiff-in-error in the testimony given by Mr. Cooper.

Mr. Cooper, on the contrary, testified that he had no recollection of ever seeing Serlinsky "until he came to my office about six weeks ago" (p. 45, l. 26).

> "Q. He came to your office and asked you if you could remember things that happened that afternoon? A. That is true.
>
> Q. And he told you what had happened? A. He knew many, many details of things that happened that afternoon.
>
> Q. He refreshed your recollection? A. He didn't refresh my recollection, I remembered them, too.
>
> Q. Everything he said you agreed with him? A. Yes.
>
> Q. Even down to the minutest detail? A. Well, he would say do you remember this and I said, 'yes.' And I would say 'do you remember that' and he would say yes he did. From twelve thirty to six o'clock we remembered a number of details mutually. We didn't disagree to any great extent and I don't think we do yet. He asked me did I remember his being there and I told Mr. Serlinsky, 'I never saw you before so far as I know, you may or may not have been there'" (p. 45, l. 30 to p. 46, l. 12).

Mr. Cooper testified that he waited in the court room for the verdict from twelve-thirty until six o'clock, and there was a game of cards between Saul Lippman, Irving Simon and one of the court attendants. Cooper played a few hands and others played, too (p. 45, ll. 15 to 25).

Is it not strange that six weeks before the trial (which would be the latter part of January and

about a month after the indictment was returned) Serlinsky should have gone to Mr. Cooper's office and tried to persuade him that he was in fact at the Court House the afternoon the jury was debating and after the jury disagreed?

It is true that several witnesses testified they saw Serlinsky at Judge Mackay's court that afternoon. Nevertheless, Finn, Corsetta, LaConti and Hickling all testified that LaConti and Irving Simon had a long conversation on the steps and on the sidewalk in front of the Court House, and the only two who positively denied such a conversation were Serlinsky and Irving Simon. The other witnesses, Shulman and Reese, who testified to seeing Serlinsky and Simon in front of the Court House left immediately and did not see LaConti, Hickling, Finn and Corsetta at all; they did not see LaConti and Simon talking together; they did not see LaConti introduce Hickling to Irving Simon, probably because they had left.

Court Clerk Lippman identified Serlinsky as being in the court room that afternoon, but he did not go down to the front of the building, and did not testify at all on the question whether or not Simon and LaConti did or did not confer at that point, or whether Serlinsky left the building with Simon.

Mr. Lane's brief is a criticism of the State for prosecuting Serlinsky. Mr. Lane prefers to have witnesses who commit perjury punished as for a contempt of court (if punished at all), rather than indicted and tried for their crime.

It was the Legislature that passed the Crimes Act; it was the Grand Jury that voted the indictment and a petit jury that convicted. The testimony that perjury was committed was given by four witnesses, as against the defendant and Irving Simon—a lawyer who was convicted of using "jury-fixers" to buy verdicts for his clients.

It is possible, of course, to do as Mr. Lane does, set off the testimony of Serlinsky and Simon against the testimony of the jurors who were fixed, Hickling and LaConti. That still leaves as supporting the conviction the testimony of the jurors Finn and Corsetta, who stood on the Court House steps wondering at seeing Simon and LaConti conversing together after LaConti's unreasonable conduct in the jury room. He wanted to bring in a verdict for Simon's clients for $20,000, without advancing any reason. The conduct of Serlinsky in going to Ralph Cooper six weeks after the indictment was returned and trying to persuade Cooper that he was in fact in the court room, when Cooper told him to his face that he had never seen him before, is a further indication of guilt on Serlinsky's part in attempting to make evidence for himself.

Plaintiff-in-error was convicted by a jury of twelve citizens of his own county. There was a serious question of fact involved. The credibility of the witnesses necessarily was for the jury. They have settled that question. We submit that the credible evidence was overwhelmingly on the side of the State.

POINT II.

The Court did not err in failing to charge defendant's requests 1, 2 and 3, as made, having covered said requests in his charge.

The first request is manifestly improper, in that defendant asked the Court to charge the jury that the State must prove the defendant guilty "beyond *all* reasonable doubt." That is not the law.

State vs. *Linker*, 94 N. J. L., at p. 415;
State vs. *Burke*, 81 N. J. L., p. 94.

Requests 2 and 3 were substantially charged by the Court as follows:

> "May I say to you at this point, that this defendant being charged with crime, like all defendants charged with crime, is presumed to be innocent and that presumption continues until the State establishes his guilt beyond a reasonable doubt.
>
> The law has defined reasonable doubt as not a mere possible doubt. It is that state of the case, which, after a comparison of all of the evidence leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge" (p. 278, ll. 10 to 23).

POINT III.

The Court did not err in declining to charge defendant's fifth request to charge, as to the burden of the State, this having been covered in the Court's charge.

Judge Delaney in addition to the portions of his charge we have quoted under Point II, instructed the jury:

> "So if, after analyzing all of the evidence that has been adduced, you are satisfied beyond a reasonable doubt that this defendant committed perjury, as I have defined perjury, and as it is more fully set forth in the indictment which you will take in the jury room with you for the purpose of perusal, it is your duty to convict him.
>
> If you are not so satisfied, it is equally your duty to acquit him."

As to the burden of proof the Court in its charge said that the defendant

> "is presumed to be innocent and that presumption continues until the State establishes

his guilt beyond a reasonable doubt'' (p. 278, ll. 10 to 32).

State vs. *Burke,* 81 N. J. L. 94.

Also the Court charged the jury defendant's ninth request, which is:

> ''If there is in the mind of the jury one or any number of theories consistent with the defendant's guilt fairly springing from the evidence in the case which the jury believes and but one consistent with the defendant's innocence, fairly arising from the evidence in the case, including the defendant's testimony, which the jury believes, the jury must disregard and put aside all these theories of his guilt and adopt that one theory of his innocence and render a verdict of not guilty. For in such condition of the case there would be a reasonable doubt of the defendant's guilt and the defendant should be acquitted, for to reasonably doubt the guilt of the defendant is to require his acquittal'' (p. 278, l. 34, to p. 279, l. 10).

We submit that Judge Delaney's charge was eminently fair, strictly accurate, and that the questions involved were submitted to the jury in a manner that was simple and easy for laymen to understand. The Supreme Court was correct in affirming the conviction.

POINT IV.

The Court did not err in overruling the objection to the question put by the State to the witness LaConti, "With whom did you see Irving Simon," referring to April 29, 1933.

LaConti after testifying to the occurrences on May 12, had been permitted, without objection, to testify that he had met Irving Simon previously and on April 29 at Twenty-first Street and

Twenty-second Avenue. The objection was to the question: "With whom did you see Irving Simon?" This was objected to as immaterial (p. 132, l. 35).

> "Objection overruled, exception. A. Conlon, Decker and Durgett" (pp. 133, 134).

Mr. Lane devotes six and one-half pages of his brief, Point III, to a consideration of this question and answer. When the question was asked the Assistant Prosecutor sought to support it on the ground that it indicated motive on the part of Serlinsky wilfully to corroborate the alibi of Irving Simon by perjured testimony, and it was on that theory that the Court admitted it.

Mr. Justice Bodine in his opinion in the Supreme Court held that the answer was irrelevant, but harmless.

An examination of the record up to the point of the admission of that question, indicates that no possible harm could have come to Serlinsky from admitting the question, even though it were immaterial. The indictment charged that Serlinsky appeared as a witness for the defendants Aaron Simon, Irving Simon, Conlon, Decker and Durgett (p. 5). LaConti had been permitted to testify, quite properly, that he had met Irving Simon before the time concerning which Serlinsky had testified, and he said that the time he met him was on April 29, and he also was permitted to testify, without objection, that he met him that day at "Twenty-first Street and Twenty-second Avenue, at ten o'clock in the morning" (Record, p. 132, ll. 30 to 40). Then came the question as to who Simon was with, which brought the answer: "Conlon, Decker and Durgett." This testimony did no more than fix the time and place where LaConti had met Irving Simon, and gave the names of the persons who were present, who, of

course, could have been called by the defendant as witnesses to disprove LaConti's testimony, if it were false. Not a word was given by LaConti as to what transpired on that occasion. Not a thing harmful to the defendant Serlinsky was introduced. There was no contention that Serlinsky was present, and no juror could have had any such idea.

The jury may or may not have concluded that Serlinsky, who was present during the entire trial of the Simon case, was motivated by wilfullness. If the testimony did not establish wilfullness, and was not relevant on that point, it certainly was as harmless in this case as if LaConti had been asked the kind of day it was, or the kind of hat that Simon wore.

POINT V.

The Court did not err in permitting the State to ask the witness LaConti, "Have you been convicted of a crime."

We submit it is perfectly proper for the State in calling a witness to introduce him. The jury is entitled to know who the witnesses are. Certainly the defendant cannot contend that the State is unfair when it brought out on questioning LaConti and Hickling that they had previously confessed their guilt of a crime.

POINT VI.

The Court did not err in permitting the witness James Smith to testify that before Serlinsky took the stand he conferred in the court room with Irving Simon.

This testimony bears out the theory of the State's case, namely, that Serlinsky took the stand as a volunteer witness and gave perjured testimony in order to aid his friend Irving Simon to secure an acquittal in the conspiracy case. This testimony indicates that Serlinsky was a "pinch-hitter," called upon on the spur of the moment improperly to aid Simon to attempt to secure an acquittal, to which he was not entitled.

POINT VII.

The Court did not err in overruling the line of questions put to LaConti, which defendant contends were designed to show that LaConti had no regard for an oath.

It is submitted that Judge Delaney properly excluded the line of questions complained of. These questions merely called for conclusions. They were argumentative. LaConti had admitted pleading guilty to the crime of breaking and entry, larceny and receiving about ten years before (p. 137). He admitted that he pleaded guilty to the indictment accusing him of conspiracy (p. 136). He admitted that before he took his seat as a juror in the case of Veit *versus* Miller he had taken an oath to try the case on the merits.

With all of these facts before the jury the Court certainly did not commit error in overruling the

questions complained of. With these admitted facts before the jury, everything that was covered by the questions was permissible to be argued by counsel to the jury. There can be no question but what the jury fully knew that LaConti was a faithless juror. His rascality as a juror was induced by bribery committed by persons who took advantage of his necessities.

Justice Bodine, in his opinion for the Supreme Court, properly held that the trial judge was correct in controlling a line of cross-examination which could add nothing to what had already been elicited.

POINT VIII.

There was no error in the Court declining to quash the indictment upon the contention that it contained in one count two distinct charges of perjury.

The defendant is trying to make it appear that the indictment was duplicitous. It is not. Serlinsky testified to one occasion only which was false, that is, that he left the court with Irving Simon and went directly to his automobile, and that Simon did not talk alone with LaConti and check over the list of jurors who voted against Simon on a list of jurors. The defendant cannot by argument stretch this into a charge of two instances of perjury. Only one instance and one incident was involved.

POINT IX.

The Court did not err in sustaining the challenge to the array, and in directing the sheriff to place additional names in the box when the special panel was exhausted, or in directing the sheriff to secure additional talesmen.

We shall not burden the Court with repeating the argument made in the cases of *State* vs. *Simon* and *State* vs. *Profita, Kuller, et al.*, regarding the propriety of Mr. Justice Heher appointing elisors. His actions have been upheld by the decision of this Court in *State* vs. *Profita,* 114 N. J. L. 334.

The only new questions raised by Mr. Lane are whether it was necessary that all of the forty-eight jurors on the special panel must be in court when the case is moved, and whether the Court has the right, when this panel is exhausted, to direct the Sheriff to bring in talesmen.

The first objection is answered by the decision of the Supreme Court written by Mr. Justice Van Syckle in *Patterson* vs. *The State,* 48 N. J. L. 381.

Judge Delaney followed the practice laid down by the Supreme Court in that case.

Likewise the second objection is answered by Section 83 of the Criminal Procedure Act, which provides:

> "When the special panel or list of jurors served on a defendant in any case in which the defendant shall be entitled to twenty peremptory challenges shall be exhausted from any cause before a jury for the trial of the indictment shall be obtained, talesmen shall be taken from the general panel of jurors returned, for the term at which such defendant is to be tried, if any remain; and if more talesmen should be required than the number

> of jurors remaining on the general panel, the sheriff or other proper officer shall forthwith summon from among the by-standers or others such additional number of persons qualified to serve as jurors as may be ordered by the court, and make return thereof immediately, and place the names of the jurors so returned in the box and draw therefrom until the jury be completed; if the first order for talesmen shall prove insufficient, other and further orders may be made until the necessary number of jurors shall be obtained; the defendant shall not be entitled to the service of a list of the talesmen taken from the general panel after the special panel is exhausted, nor of the talesmen summoned by order of the court; unless the court specially so direct, in which case the court shall fix the length of time the list of talesmen shall be so served, before the drawing of the jurors shall proceed. (P. L. 1898, p. 897, as amended P. L. 1906, p. 569.)''
>
> 2 *Comp. Stat.*, pp. 1847-1848.

But counsel further contends that since the grand and petit jurors for this term of the Passaic Courts had been drawn by elisors, the Sheriff was thereby disqualified, and talesmen should have been called in by one or more elisors. The statute does not say so. The statute says:

> ''and if more talesmen should be required than the number of jurors remaining on the general panel, *the sheriff* or other proper officer shall forthwith summon,'' etc.

Elisors are not expected to do more than select the jurors and certify them to the Court. Section 83 of the Criminal Procedure Act is the authority relied upon by Judge Delaney for directing the Sheriff to summon the talesmen, and the Sheriff's authority in this case was given expressly by the statute. The words ''or other proper officer''

must refer to the coroner, in the event that the Sheriff is defendant and hence disqualified from drawing a jury in his own cause.

POINT X.

The Court below did not err in declining to quash the indictment, and in not granting defendant's motion for a direction at the close of the State's case, and at the close of the whole case.

We have shown in the introduction to this brief and under Point I that the perjured testimony of Serlinsky was highly material to an issue in the case of *State* vs. *Simon*. Serlinsky furnished corroboration to the defense of Irving Simon which, if true, entitled Irving Simon to a verdict of not guilty. His testimony was therefore highly material to the issue as between the State and Irving Simon in the conspiracy case.

Irving Simon said that he had never met LaConti until the instance at the Riviera Hotel, August 27. That was the nub of his defense. If that defense were true he was not a part of the conspiracy. The only overt acts on the part of Irving Simon proved by the State bringing him directly into the conspiracy was his conference with LaConti April 29, when he said, "Well done, LaConti, we will put you on the rest of Dr. Simon's cases," and his conference with him May 12, after the disagreement in Terhune and Demarest against the Erie, when he asked LaConti what jurors voted against Simon's client so that they could keep them off of any other cases of Dr. Simon.

The former instance proved the purpose of Irving Simon to form a conspiracy and embrace

jurors through the means of "jury-fixers," and the second instance showed the check-up made by Irving Simon on the jurors who did not vote the way LaConti testified he voted.

We have shown under Point I that there was ample evidence not only of the perjury, but also the testimony given in corroboration of that evidence, and it is unnecessary to repeat that recitation of the testimony to answer the arguments under Point X of plaintiff-in-error's brief.

POINT XI.

The Court did not err in declining to charge defendant's sixteenth request.

This alleged request was not such a request that the Court could charge.

Moreover, the Court complied with it by sending the indictment to the jury with these instructions:

> "So if, after analyzing all of the evidence that has been adduced, you are satisfied beyond a reasonable doubt that this defendant committed perjury, as I have defined perjury, and as it is more fully set forth in the indictment which you will take in the jury room with you for the purpose of perusal, it is your duty to convict him.
>
> If you are not so satisfied, it is equally your duty to acquit him" (p. 278).

The charge of Judge Delaney was so clear and so fair that no jury could be misled.

Answering the "Conclusion" in Mr. Lane's Brief.

It is apparent from reading the conclusion in Mr. Lane's brief and from his preliminary statement on page 9, that he does not favor the indictment, trial and conviction of witnesses who com-

mit perjury. He stands almost alone in his beliefs.

The Sub-Committee on Courts of the New York Crime Commission in 1928, declaring that "The persistent practice of perjury in public and private affairs presents a deplorable and lamentable moral turpitude in our people," urged that the evil should be combated by stirring "the conscience of the members * * * of the bench as well as the bar * * * (so) that the evil will be stayed in its destructive course and the banners of truth and straight dealing shall remain unfurled to the breeze of public opinion, unsullied and without stain." It denied the necessity for further legislation and protested vigorously against the suggestion that the punishment for perjury be decreased. It noted that there had not been five convictions for perjury in New York City for ten years, outside of persons who had signed false bail bonds. It urged further that the oath be administered with greater solemnity, that obvious cases of perjury be dealt with summarily pursuant to existing statutory provisions, and that the Bar Associations should lend their aid.

In 1929, the Commission recommended "the creation of a new crime to be known as 'false swearing' punishable as a misdemeanor, as distinguished from the more serious crime charged as perjury and punishable as a felony." The Sub-Committee on Courts pointed out that the element of materiality is eliminated, that the constitutional difficulty involved in the requirement that "infamous" crimes be tried by jury is met by the creation of a crime not known to the common law and that the proposed provision now exists in several jurisdictions. This recommendation was repeated by the Commission in 1931.

The Michigan Crime Commission in its Report for 1930 included the discussion of its Sub-

Commission on Trials, Courts and Appeals as follows:

> "* * * The courts and the prosecuting attorneys of the state should be much more eager to punish for perjury committed in the trial of criminal cases than they are at the present time. It is generally recognized that perjury is rampant in our courts. * * * Where perjury appears the remedy of punishment by contempt proceedings or by the bringing of criminal charges should be used * * * vigorously. If it should become generally understood that false swearing meant an immediate and severe punishment much of the difficulty along this line would be eliminated."

The Association of Grand Jurors of New York County urged in 12 The Panel, No. 1, p. 1 (Jan.-Feb., 1934), that a false swearing law be enacted which would make "false swearing a misdemeanor to be joined, if advisable, as a second count in a perjury indictment or to be prosecuted as an independent offense."

In a report of said Committee to the New York County Lawyers Association on "Proposed Criminal Law Enforcement Reforms" (published September, 1934), the Committee made this recommendation:

> "PERJURY
>
> Generally speaking, the reason for the prevalence of any particular crime is that many persons find it in their interest to commit it and that the probability of apprehension and punishment is relatively slight. The presence of both these factors, in abundant measure, in the case of perjury is undoubtedly responsible for the amazing frequency with which it is committed in most of the trial tribunals of the country. Since self-interest cannot be eliminated, a solution must be found in providing effective means of apprehension and

punishment. Creating the crime of 'false swearing' punishable with a lesser degree of severity, and without a requirement of materiality, will undoubtedly do much to stimulate prosecution for false testimony and thereby impress upon the minds of the public and of potential witnesses that it is criminal to testify falsely and that persons guilty thereof are quite likely to be apprehended and punished.''

It is respectfully submitted that the testimony given by the plaintiff-in-error Serlinsky at the trial of State vs. Irving Simon, was material to the issue; that it was proved to be false by four witnesses to the satisfaction of the jury below; that no harmful errors were committed by the Trial Court, and that the judgment of the Supreme Court affirming the conviction below should be affirmed.

James D. Carpenter, Jr.,
Assistant Attorney General.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

89 MAY.T 1935

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

THOMAS SERLINSKY,
Plaintiff-in-Error.

No. 89,
May Term, 1935.
On Writ of Error to Supreme Court.
Sat Below,
Brogan, C. J.
Parker and Bodine, JJ.

(Italics and the like mine, except where otherwise noted.)

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

The brief for the State in this Court is in substance the same as its brief in the Supreme Court, and the reply brief which I filed in the Supreme Court and which I have asked leave to submit to this Court, for the reasons indicated in my original brief, answers it. The only new matter seems to be on page 18 under Point IV, at which point the State considers the testimony which the Supreme Court conceived to be irrelevant but harmless.

It is interesting to compare the statements *now* made by the State, apparently in the light of the fact that the Supreme Court held the testimony to be irrelevant, and the statements which it made in its brief in the Supreme Court.

In its brief in the Supreme Court (p. 19) it said, "The testimony *did* tend to show motive on the part of Serlinsky to help establish Irving Simon's alibi as to what took place on May 12." In its brief in this Court (p. 19), the State contents itself with the statement, "When the ques-

tion was asked the Assistant Prosecutor sought to support it on the ground that it indicated motive on the part of Serlinsky *wilfully* to corroborate the alibi of Irving Simon by perjured testimony, and it was on *that theory* that the Court admitted it."

We find no statement *now* from the State that the testimony in fact tended to show "motive * * * *wilfully* to corroborate."

The State then proceeds to attempt to indicate (p. 19) that the testimony was harmless, and, so indicating, it says, "This testimony did no more than fix the time and place where LaConti had met Irving Simon, and gave the names of the persons who were present, who, of course, could have been called by the defendant as witnesses to disprove LaConti's testimony, if it were false."

And then the State (p. 20) makes this observation, "The jury may or may not have concluded that Serlinsky, who was present during the entire trial of the Simon case, was *motivated by wilfulness. If* the testimony did not establish wilfulness, and was not relevant on that point, it certainly was as harmless in this case as if LaConti had been asked the kind of day it was, or the kind of hat that Simon wore."

Does the State now say that the testimony was relevant to establish wilfulness or that it was not?

The jury was permitted to consider it upon the issue of wilfulness. When the testimony was offered (p. 132) the following occurred:

> "Mr. Stafford: I object to that as immaterial.
>
> Mr. Shershin: Excepting it goes to show at the time this testimony was given in the conspiracy case to embrace a juror that LaConti and Irving Simon knew one another and that they were engaged in a conspiracy and that when Serlinsky testified that he didn't see LaConti and Irving Simon together

on the specific date alleged in this indictment and when thereafter we have the testimony of Irving Simon that he never met LaConti until August thirtieth, or twenty-ninth or twenty-eighth of last year, *it would show the motive of the testimony of Mr. Serlinsky to commit as the indictment alleges wilful, corrupt and false perjury to show that they never knew one another, therefore there was no conspiracy and therefore it would consequently show what motive Serlinsky had in taking the stand and stating that LaConti and Irving Simon had not talked together on that occasion except that he might have been in a group of jurors, and motive is a proper thing to prove on the part of the State.*

Mr. Stafford: I object to it on the ground it is a collateral matter. We didn't come in here to deny there was a conspiracy. We don't question the conspiracy. We say we are not guilty of perjury.

The Court: *Yes, I get the reasoning. I don't think it is necessary to go any further than to prove what you have already proven which is a contradiction of his testimony.*

Mr. Shershin: Except, Sir, Corpus Juris, Wharton's Criminal Law and the cases in this State,—I don't recall the cases offhand permit the State in proving the offense of perjury to *show a motive.*

The Court: *There is something to that. I will allow it and note an exception in behalf of the defendant.''*

The State makes no attempt to argue that the language of the cases to which I have referred in my brief in this Court under Point III, page 8, and particularly that of this Court speaking by Mr. Justice Swayze in *State* v. *Young,* 93 N. J. L. 396, is not applicable.

Certainly the testimony was introduced for *a* purpose and was considered by the State and by the Court relevant for *that* purpose. The jury

was permitted to consider it for *that* purpose. Now the Supreme Court has said that it was *irrelevant* for that purpose. How can its improper admission have been harmless?

And I submit that this testimony must be taken in connection with the general theory of the State that, because of Serlinsky's testimony in favor of the alleged co-conspirators, he in fact was in some way connected with the conspiracy and that the conviction of the conspirators was to be considered by the jury as having some effect upon the charge of perjury against plaintiff-in-error. The State sedulously, if perhaps unintentionally, created that atmosphere from the opening of the case to the conclusion and it is obvious that the jury could not help but be influenced by it.

Respectfully submitted,

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(2769) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

89 MAY.7 1935

New Jersey Supreme Court

STATE OF NEW JERSEY, Defendant-in-Error, *vs.* THOMAS SERLINSKY, Plaintiff-in-Error.	On Writ of Error to Passaic Quarter Sessions. Conviction on Indictment for Perjury. Heard before Delaney, C. P. J., and a jury.

BRIEF FOR DEFENDANT, PLAINTIFF IN ERROR.

(Italics and the like mine, unless otherwise noted.)

Statement of the Record.

Defendant was indicted December 22nd, 1933 (p. 4) for perjury alleged to have been committed as a witness in a trial in Passaic Quarter Sessions on an indictment handed down against Aaron L. Simon, Michael La Conti, John Hickling and others (pp. 34, 285) for conspiracy to embrace jurors sitting in a case which was tried on May 8, 1933 in Supreme Circuit, Passaic, in which Viet was plaintiff and Miller and Warner defendants, and in which Aaron L. Simon and Irving Simon his brother appeared for the plaintiff.

Michael La Conti and John Hickling, two of the defendants charged with conspiracy, were two of the jurors to be embraced. The only witnesses who appeared before the Grand Jury, as indicated by the endorsement upon the indictment (p. 290) were *Michael La Conti,* one of the alleged conspirators, and James J. Smith, who is a detective (p. 163).

On the trial of that indictment the State's witness La Conti said that he had had a conversation with Irving Simon on *April 29, 1933*. The purpose of this testimony was to involve Irving Simon in the alleged conspiracy (pp. 144, 146). Irving Simon denied that he had had such a conversation with La Conti and stated that the first time that he had met La Conti (in the sense of being introduced to him and talking with him directly) was on August 29 or 30th (p. 57). On cross-examination by the State he said that the first time that he could "*recall*" talking with La Conti was in the latter part of August. He stated, however, that he remembered one occasion in May, 1933 when he was in court during the trial of a case (*Terhune and Demarest* v. *Erie Railroad, not Viet* vs. *Miller*) when he and the jurors, including La Conti, walked out of the court room and there was a general talk between jurors, attorneys and the clerk of the court (p. 57). He denied that he had spoken with La Conti for fifteen or twenty minutes alone on the front steps of the court house at that time or that he had had a jury list in his hands. It was not alleged by the State that anything said between Irving Simon and La Conti (if a conversation took place) tended in anywise to prove the commission of the crime charged in the indictment then on trial.

The indictment then on trial alleged a conspiracy formed on May 8, 1933, and concluded by the payment of the moneys promised on May 10, 1933, the trial of the civil case having commenced on May 8, 1933 (p. 285).

The State called La Conti in rebuttal, who testified to a meeting between Irving Simon and La Conti after the dismissal of the jury in the case of *Demarest and Terhune* against *Erie Railroad Co.*, the La Conti version of what took place appearing on page 132 of the record in this case. Neither the

alleged meeting nor the conversation had any relation to the conspiracy charged in the indictment being tried, nor was testimony with respect to the alleged occurrence probative evidence which could have been introduced by the State in the State's case. Its only purpose was to indicate that the statement made by Irving Simon, to the effect that he had *first* "met" La Conti on August 29th or 30th, 1933, was untrue. Irving Simon had not denied that he had *seen* La Conti on May 12, 1933. He denied *only* that he had had any private conversation with him on that date (p. 57).

It was immaterial whether Irving Simon had met La Conti on May 12th, a date after the conspiracy charged in the indictment had been concluded. The crucial date was April 29, 1933, at which time La Conti had stated that he had seen Irving Simon and that some words were spoken, which in some way involved Irving Simon (p. 28).

On sur-rebuttal Irving Simon produced witnesses to prove what took place on May 12, 1933. Among those witnesses was the defendant here, Serlinsky, who stated that he had been practicing law for five years and was present in the court room on May 12, 1933, with Irving Simon and Mr. Ralph Cooper, the representative of the Erie Railroad, which was the defendant in the Terhune case, when the jury left the court room after they had disagreed; he left the court room with Irving Simon and Mr. Cooper; a group of jurors was going out; there was a general conversation between jurors and lawyers present, including Irving Simon; he accompanied Irving Simon all the way out and took him home in his car; there was no private conversation between Irving Simon and La Conti although La Conti may have been in the group (pp. 47, 28, 177).

In considering what Serlinsky testified upon the trial on the indictment for conspiracy it is somewhat important, I submit, to keep in mind the strain under which all parties, including witnesses, appeared to labor. It is indicated by what occurred during Serlinsky's testimony. I quote (p. 52):

> "Q. Did you see Irving Simon standing near the foot of those steps with a jury list in his hand? *Yes or no.* A. I can't answer that yes or no.
>
> The Court: *Yes, you can. You are a lawyer. Answer it yes or no.*
>
> A. Did I see Irving Simon with a jury list in his hand?
>
> Mr. Weinberger: I submit that can't be answered yes or no.
>
> The Court: He *will* answer it yes or no.
>
> A. No, sir.
>
> Q. Did he have a list of jurors in his hands as he was leaving the court room? A. No, sir."

Now, it is obvious, I submit, that the prosecutor (Mr. Carpenter, Assistant Attorney General acting in his place) and likewise the Court was wrong. The witness was *not* obliged to answer the question put "yes" or "no." He might not have recalled. He might *believe* one way or the other but his recollection may have been indistinct. There is no law requiring a witness to answer "yes" or "no" and there never has been.

The fact that the witness was obliged, by command of the Court, to answer a crucial question of this kind "yes" or "no" is of extreme importance when taken in connection with the cross-examination of defendant, on the trial of the case at bar, by the Prosecutor (Mr. Shershin, Assistant Prosecutor acting for him) in the course of which, by several questions, he directed the jury's attention to the fact that defendant, upon the trial of

the indictment against Irving Simon, had not "qualified" his testimony by stating that what he said was his recollection or honest recollection, although he so "qualified" his testimony on his own trial on the indictment now here (pp. 254, 255).

When the attention of the Court was directed to the fact that *all* testimony given by a witness is but a narration of honest recollection and that defendant had not "qualified" his testimony when testifying in his own case all that the Court said was "I will say this that the jury has the testimony," which, I respectfully submit, could have no effect whatever in enlightening the jury.

I quote (p. 256):

> "Q. You did not qualify your statement, at that time, that it was to the best of your recollection, did you, Mr. Serlinsky?
>
> Mr. Stafford: I object to that, if the Court please, on the ground that all testimony is recollection, from memory.
>
> Mr. Shershin: I object to his, your Honor, counsel——
>
> The Court: I will say this, that the jury has the testimony.

Having been obliged, by the action of the court, upon the trial of the indictment against Irving Simon, to answer the questions put—"yes or no," defendant on his own trial, was criticised because he did not qualify his answers by the statement that they were made upon his "honest recollection," which led the jury to infer that, if a witness answered a question positively, he was guilty of perjury if the fact were otherwise than he had testified although his honest recollection, at the time he testified, was in accord with his testimony.

Two days after defendant had testified on the conspiracy trial this indictment for perjury was handed down against him, the only witnesses be-

fore the Grand Jury being, as indicated by the endorsement on the indictment (p. 8), Lee (p. 46) who was the stenographer and who could only have produced a record of the alleged perjurious testimony and Finn (p. 58), one of the jurors in the case of *Demarest and Terhune* against *Erie Railroad Company,* and who testified in the case now here (p. 58).

The case at bar was tried March 12, 1934 (p. 17).

Under the Criminal Procedure Act, section 54, 2 C. S. of N. J. p. 1837, defendant was entitled to have a list of the names of 48 jurors served upon him as a special panel. Such a list was served. The general panel, from which the names had been selected, were drawn by elisors appointed by the court. Defendant challenged the array (p. 12) upon the ground that, under the conditions then existing, the Court had no power to appoint elisors (pp. 12, 19). The Court overruled the challenge, which action is made the basis of the first assignment of error and specification of causes for reversal (pp. 291, 311).

Defendant moved to quash the indictment (p. 21), which motion was denied (p. 32), the action of the Court being made the basis of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th assignments of error and specification of causes of reversal (pp. 291, 311). These assignments amount to but one, to wit, that the Court erred in declining to quash the indictment.

Defendant attempted to ascertain whether all of the 48 talesmen whose names were on the special panel were in court (p. 18) but failed. The special panel, to the extent that its members were present, was exhausted (p. 33), but it appeared that members of the special panel were engaged in other cases in other courts; whereupon, over objection of defendant, the balance of the names

on the general panel were put in the box (p. 33), which action of the Court is made the basis of the 11th assignment of error and specification of causes for reversal (pp. 295, 311). The general panel having been exhausted, the Court directed the Sheriff to "go out" and "secure sufficient jurors to make up this panel and you are so directed by the Court" (p. 33). The Sheriff (without any jury commissioner acting with him), (and not the elisors appointed by the Court), selected the talesman from whom the balance of the jury was drawn, which action of the Court is made the basis of the 12th assignment of error and specification of causes for reversal (pp. 295, 311).

The indictment was general in form (p. 4) under Section 37 of the Criminal Procedure Act, 2 C. S. of N. J., p. 1833. It was supplemented by a bill of particulars not printed in the state of case which only identified the indictment for conspiracy mentioned in the indictment for perjury as indictment No. 454 filed November 24, 1933.

As considered by the Court below and by counsel the falsity of the testimony of defendant here in the *Simon Conspiracy Case* consisted in:

1. The statement of Serlinsky that he was present at the court house in Paterson on May 12, 1933, and had left the court house in the company of Irving Simon was false.

2. The statement of Serlinsky that, on the way out, Irving Simon had not talked privately with the witness La Conti for an appreciable space of time (pp. 23, 168) was false.

One of the reasons assigned for quashing the indictment was that it contained a charge of perjury with respect to two statements in a single count (p. 23). The State was wholly unable to prove, by any probative evidence, that Serlinsky was not present at the court house on May 12, 1933, and, at the close of the State's case, defend-

ant asked the Court to direct the State to elect. The Court declined to so direct (p. 166), which action of the Court is made the basis of the 45th assignment of error and specification of cause for reversal (pp. 303, 311).

A motion was made for a direction of a verdict for defendant (p. 167) and denied by the Court (p. 187) at the close of the State's case, which action of the Court is made the basis of the 46th, 47th, 48th, 49th, 50th, 51st and 52nd assignments of error and specification of causes for reversal (pp. 305, 311), which amount to but one.

A similar motion was made at the close of the whole case (p. 276) and denied, which action of the Court is made the basis of the 52nd, 53rd and 54th assignment of errors and specification of causes for reversal (pp. 306, 311), which amount to but one.

The Court charged the jury very generally (p. 276), denying most of the requests of defendant for specific instructions (p. 208), the action of the Court with respect to the charge being made the basis of the 55th, 56th, 57th, 58th, 59th, 60th 61st, 62nd, 63rd assignments of error and specification of causes for reversal (pp. 307, 311).

The jury found the defendant guilty and the Court imposed a sentence of $1,000 fine and confinement in the County Jail for the term of six months.

A writ of error went to this judgment (p. 1) and defendant assigned errors (p. 291) and specified causes for reversal under the statute, Section 137, 2 C. S. of N. J. p. 1866, p. 311.

There are sixty-three assignments of error and specification of causes for reversal due to the fact that the time for assigning error expires so shortly after the record can be completed (and sometimes before) as that counsel are unable to

determine what assignments and specifications will be argued and so assign error on any matters to which exceptions have been taken.

The assignment of errors and specification of causes for reversal not specifically in this brief considered are waived.

Preliminary.

This case has been termed "important" by the State in the Court below. It *is,* not only for the reasons advanced by the State but for others. Perjury, if demonstrated, is and should be punished as a contempt of Court. The penalties are severe. It is not only a high misdemeanor but a person convicted is thereafter rendered incapable of giving testimony in any court of this State (section 18, 2 C. S. of N. J., p. 1748). More important to the administration of justice, however, than punishment for perjury is that no person should be punished for perjury unless clearly guilty. A witness is subjected to cross-examination and, even if he shall testify falsely, the truth may usually be gotten at and justice in the individual case prevail. But the administration of justice is dependent for its operation upon the willingness of witnesses, in most instances not connected with the parties, to testify. If witnesses are to be subjected to prosecutions for perjury and conviction upon *slight* evidence, honest witnesses will no longer willingly appear and, when forced to appear under subpoena, will have forgotten all that is material to the issue. This will be particularly so in the case of a defendant under indictment, for all witnesses will realize the power of the State to, in *any* case, do what was done by the State in this case, *i. e.,* secure an indictment against a witness called by the defense within two days after he shall have testified.

It is common knowledge that not only did the State, in what has been known as the Passaic County Investigation, secure an indictment for perjury against the witness Sterlinsky but it likewise secured an indictment against some of the lawyers appearing for the defendants in the Simon conspiracy cases. A defendant at the bar is entitled to stand before the Court on an equality with the State. The effect of an indictment for perjury such as in the case at bar is to deprive defendants of honest witnesses and the effect of an indictment against counsel for defendants is to deprive them of legal assistance for many "honest lawyers" are timid.

The arbitrary exercise of the power of the State in a righteous cause is as detrimental to the public interest as connivance of those representing the State with the forces of evil.

The consequences of punishment of convictions for perjury are so great not only with respect to the individuals concerned but with respect to the public as to have led to the common law rule that there can be no conviction of perjury "except upon the direct testimony of two witnesses," 48 *Corpus Juris,* title "Perjury," section 167, page 900, which has only been modified in this State to the extent that we permit a conviction upon the testimony of one witness and corroborating circumstances.

> *State* v. *Ewen* (Supreme Court), Gummere, C. J. and Black and Lloyd, J. J., 6 N. J. Misc. 151, 140 Atl. 449.

In this case there were *no* corroborating circumstances, unless the fact that defendant's wife was the sister of the wife of Irwin Simon (not indicted in the conspiracy case), a brother of Irving Simon (indicted in the conspiracy case) is to be consid-

ered as so discrediting defendant as to amount to a corroborating circumstance.

The Prosecutor seemed to think it important, for he asked defendant, on page 271—"Your wife and *Irving's* wife are sisters, aren't they?" to which question objection was made (p. 271). When asked by the Court what the materiality of the alleged fact was, the Prosecutor answered: "Except it is in the testimony, in Exhibit S-2." Prosecutor was referring to the testimony of defendant in the conspiracy case, on cross-examination by counsel (p. 54). Upon further objection the Court stated that it would permit the question. Thereupon the Prosecutor withdrew it (p. 272). *"It"* was not in evidence in S-2 for the testimony marked as S-2 indicated that the witness's wife's sister was Irwin's, not Irving's wife.

Defendant's counsel asked the Court (p. 272) to instruct the "jury to disregard that part of the exhibit," to which the Court replied: "I have already done that; I think I struck it out." The Court had *not* stricken it out. What the Court must have referred to was the attempt of the Prosecutor to get the alleged relationship of Irwin Simon and defendant before the jury in the cross-examination of Irving Simon, a preceding witness (p. 239). The following colloquy took place (p. 239):

> "Mr. Stafford: I ask that that be stricken out, it doesn't show any relationship to this man at all.
>
> The Court: It shows the relation of this man's wife.
>
> Mr. Stafford: Not this man's wife.
>
> The Court: Whose wife is it?
>
> Mr. Stafford: His brother's wife.
>
> The Court: Strike it out."

Notwithstanding *this* action of the Court the prosecutor deemed it important to again get this

alleged relationship before the jury in the cross-examination of defendant (p. 271). Notwithstanding any action by the Court the jury got it.

I have already adverted to the line of questions the prosecutor put to defendant (p. 255) directing the jury's attention to the fact that when he had testified in the conspiracy case he had not "qualified" his answers with the statement that what he was saying was to his "honest recollection," which is no "qualification" at all, but the putting of which questions could not help but prejudice the jury.

The prosecutor did not content himself with directing the jury's attention to the fact that the record of the proceedings in the trial of the conspiracy indictment No. 454 offered in evidence would show the verdict (p. 36) (which was guilty), withdrawing the direct question which he put to the clerk who produced the record (p. 37) as to what the verdict was and by asking the witness Hickling, called by him (p. 102), on his direct examination as to whether he had not pleaded *non vult* to that indictment as well putting the same type of questions to the witness La Conti (pp. 128, 129), the last question being answered over the objection of defendant, the action of the Court in admitting it being made the basis of the 32nd assignment of error and specification of causes for reversal (pp. 300, 311), but he also asked the witness La Conti (p. 132) with respect to whether he had not seen Irving Simon on *April 29, 1933,* and as to with whom he had seen him. Over objection of defendant (p. 134) the witness was permitted to answer. He stated that he had seen Irving Simon with Conlon, Decker and Durgett, three of the alleged co-conspirators in the conspiracy indictment. The action of the Court is made the basis of the 33rd assignment of error

and specification of causes for reversal (pp. 300, 311).

The Court admitted this testimony apparently for the purpose of showing a "motive" (p. 133). How it could show a motive on the part of defendant, the only person involved in the indictment on trial, does not appear. It was not suggested that defendant was at the meeting or knew of the meeting, if it had taken place.

The matter of the guilt or innocence of Irving Simon of conspiracy was not before the jury. Defendant was not charged as a conspirator. The only effect of the testimony was to prejudice the jury.

I also direct attention to the fact that the State seemed to consider it important to show that, just before defendant took the stand in the conspiracy case, he was over "on the extreme right of the court room talking to Irving Simon *if I recall right.*" The Court, over objection, permitted *this* testimony to stand as "evidential as bearing upon the defendant's testimony as given to the jury and further upon motive" (p. 165), which action of the Court is made the basis of the 44th assignment of error and specification of causes for reversal (pp. 303, 311). The witness Smith, who was a detective sergeant, did not hear any conversation. The *mere* fact that, before taking the stand, defendant had spoken to one of the defendants in the case was permitted as probative evidence against defendant *upon the issue of perjury.*

Enough has been said to indicate the method employed by the State in the trial of the case and that this court is warranted in reviewing the testimony upon the claim that the verdict is against the weight of the evidence and in considering that subject I submit that the fact that the burden of proof is more strongly upon the State than in any

other type of case, and properly so, may be a determining factor.

In this case the State produced, as witnesses to prove the falsity of the statement of defendant in the conspiracy case to the effect that he was present in the court house on May 12, 1933, Mr. Ralph E. Cooper, a lawyer, the net effect of whose testimony was "I don't know" (p. 39).

Finn, one of the jurors in the case of Demarest & Terhune against the Erie Railroad, tried on May 12, 1933, the net effect of whose testimony, as to defendant's presence at the court house, being "I don't know." He testified to an alleged conversation between Irving Simon and La Conti, the taking place of which had been denied by defendant.

Corsetta (p. 86), whose testimony was to the same general effect as Finn's.

Hickling (p. 102), who was one of the alleged conspirators named in the conspiracy indictment and who pleaded *non vult*, he being one of the jurors alleged to have been embraced and who had not at the time of the trial in the present case, been sentenced (p. 107) and whose testimony was to the same general effect as that of Finn.

La Conti, another alleged conspirator, and who was one of the jurors alleged to have been embraced, who likewise had pleaded guilty (p. 136) and who had not been sentenced at the time of the trial in the present case and who likewise had pleaded guilty ten years ago to the crime of breaking, entry and larceny (pp. 129, 137).

The State wholly failed to prove that defendant was not present in the court house and did not leave the court room on May 12, 1933 as he had testified in the conspiracy case.

As against the testimony produced by the State defendant produced Mr. Shulman (p. 187) a lawyer, one of the jurors in the case of *Demarest &*

Terhune v. *Erie Railroad Co.*, who agreed substantially with the story as told by defendant on the trial for conspiracy.

Reese (p. 212), a court officer, whose story agreed substantially with that of defendant.

Lippman, Clerk of the Court (p. 234), who substantiated that portion of defendant's story, as told in the conspiracy case, to the effect that he was in the Court Room with Mr. Cooper, counsel for the Erie Railroad Company and others, including Irving Simon and had left with him.

Excluding, therefore, the testimony of Irving Simon (p. 234) and defendant (p. 246) we have, as against the story told by the State's witnesses, Finn and Corsetta (for Mr. Cooper's testimony is not harmful to the defense), and the thoroughly discredited witnesses Hickling and La Conti, the testimony of Mr. Shulmann, a lawyer, Reese, a court officer and with respect to part Lippman, a clerk of the Court.

Assuming Finn and Corsetta are not discredited, and I shall attempt to show by their own testimony that it is not to be relied upon, we have as against them the two unquestionable credible witnesses Mr. Shulman and Reese as to the whole transaction and, as to part, the unquestionably credible witness Lippman. The testimony of the thoroughly discredited witnesses Hickling and La Conta for the State is certainly met by the testimony of Irving Simon (p. 236) and defendant (p. 246).

If defendant is guilty of perjury then so is Mr. Shulmann and Reese and Lippman. If defendant can be convicted of perjury upon the kind of testimony offered by the State in this case, then these three witnesses also may be convicted for perjury upon the same evidence.

In addition to the evidence as to the facts defendant produced the Rabbi of his Temple (p.

182); another witness who had known him all his life (p. 93); four who had known him for from eighteen to twenty-five years (p. 183); his preceptors in the law (pp. 208, 209); a doctor and lawyer who had known him for some time (p. 210); a banker (p. 211); a lawyer, who had been Judge of the District Court in Passaic and was at the time he testified counsel for the City of Passaic and who had known defendant from the time he was a boy all of whom testified to defendant's good reputation for truth and veracity.

I submit that if a verdict of guilty of perjury in this case can be sustained, then no honest witness who takes the stand is safe. If defendant can be convicted of perjury, then any one of the three wholly disinterested witnesses who testified for him may be indicted and convicted of perjury upon the same kind of testimony as we have in this case from the State. The State's witnesses may likewise be indicted and convicted of perjury upon the testimony of defendant and the witnesses produced by him in his defense. The mere statement of this proposition indicates the power of that side which has charge of the prosecuting machinery and how carefully that power should be exercised, and why it should be kept in restraint by the Courts.

While it may be that this case does not come within the strict letter of the rule which forbids conviction of perjury except upon the direct testimony of one witness and corroborating circumstances (not present in the case at bar) it clearly comes within its spirit for the theory of the rule is that, if there be but one witness to prove the allegation of falsity, then oath is placed against oath and it remains doubtful where the truth lies, the oath of accused which is alleged to be false, being sufficient to counterpoise the testimony of a single witness. *48 Corpus Juris,* title "Perjury", sec. 170, p. 902.

In this case, true we have more than a single witness for the State, but we not only have oath against oath—Mr. Shulman against Finn, Reese against Corsetta (assuming all to be equally entitled to credit), Irving Simon against Hickling, defendant against La Conti (assuming the credibility of Hickling and La Conti and Irving Simon to be affected by their conviction of, or pleading guilty to, the crime of conspiracy and defendant's credibility to be affected by his interest, and, I submit, credibility is more affected by a plea of guilty than by a conviction, for there is no doubt but that, upon a plea of guilty, the defendant is guilty of the crime charged and there may be doubt of the guilt of a defendant convicted who still maintains his innocence, especially where a writ of error was, at the time of the trial of the case at bar and still is, pending, and that a witness' credibility is not so affected by reason of interest as by reason of conviction of a crime is clear, for if it were, then the oath of the defendant being tried on a perjury charge would not be considered equal to the oath of one witness even if disinterested). And we also have the testimony of the witness Lippman, whose credibility is not affected, as to one part of the transaction. Even if the witness Mr. Cooper can be considered as having testified to anything favorable to the State, which I contend is not so, we have that oath off-set by the oath of Lippman. The oaths of the witnesses in this case preponderate in favor of defendant and the case is within the spirit of the rule which has already been mentioned.

If there can be no conviction upon the testimony of one disinterested witness against the testimony of the defendant, interested as he may be, then certainly there should be no conviction upon the testimony of any number of witnesses where each witness is met by an oath of equal weight. In

this case the oaths are not equal put preponderate in favor of the defense.

Notwithstanding the fact that there was no probative evidence, or, if any, so weak as not to be worthy of consideration, that defendant was falsifying when he said that he had been at the court house on May 12, 1933, and had left the court room in the manner he described, the Court left the case to the jury in such a manner as that it is impossible to determine whether they found defendant guilty of falsification when he said that he was at the court house on the day stated or that he falsely testified in what he said with respect to the alleged conversation between La Conti and Irving Simon (p. 276).

This brings me to the

Statement of the Case.

The case has already been stated except in-so-far as a further statement may be necessary in discussing the assignment of errors and specification of causes for reversal relied upon.

POINT I.

The verdict was against the weight of the evidence.

(First specification of causes for reversal, page 311.)

This matter has in part been argued.

Further consideration of the testimony of the witnesses may be of some usefulness.

Mr. Ralph Cooper, an attorney and counsel for the Erie Railroad Company in the case of Terhune and Demarest against the Erie Railroad

Company, tried May 12, 1933, was called by the State to show that the testimony of defendant in the conspiracy case to the effect that he had been present in the court room on May 12, 1933, and that he had walked out of the court room with Irving Simon and Mr. Cooper, and either with or after a group of jurors, was false. Mr. Cooper remembered leaving the court room back of the jurors and speaking to two jurymen, one of whom was Mr. Shulman one of defendant's witnesses (p. 187). On his direct examination he stated that he did not think Irving Simon and defendant were with him and on cross that, while he had no recollection, it was possible that they were present (p. 42) and finally that he did not know whether they were there and that it was possible that defendant walked along with him (p. 43). He was positive on re-direct (p. 44) that he did not leave the court room with Irving Simon or defendant but he remembered that Irving Simon and defendant's witness Reese, a court officer (p. 212) and defendant's witness Lippman (p. 234), a court clerk, were playing cards in the court room as testified by defendant and by them.

The net effect of his testimony is that he had no recollection of seeing defendant. He testified to a conversation between himself and defendant about six weeks before the trial on the perjury indictment when defendant came to his office and asked him if he could remember things that had happened the afternoon of May 12, 1933, and he told of a conversation with defendant during the course of which defendant attempted to refresh his recollection by putting to him the minutest details of what had occurred, and he said (p. 46):

> "Q. Even down to the minutest detail? A. Well, he would say do you remember this and I said 'yes.' And I would say 'Do you remember that' and he would say yes he did.

> From twelve thirty to six o'clock *we remembered a number of details mutually. We didn't disagree to any great extent and I don't think we do yet.* He asked me did I remember his being there and I told Mr. Serlinsky, 'I never saw you before so far as I know, you may or may not have been there.'
>
> Q. *You don't deny he was there?* A. *Not at all. No, I don't.*''

Defendant, if he had not been present, could not have put to this witness, who unquestionably was present, all the details of what had occurred, with the correctness of which recital the witness agreed.

By reason of this, the net effect of Mr. Cooper's testimony is to corroborate defendant. The best that can be said of it, so far as the State is concerned, is that the witness did not know.

Finn (p. 58), was a juror in the *Demarest & Terhune* v. *Erie Railroad Company* case on May 12, 1933, and he stated that: as he left the Court Room with the jurors he saw Mr. Cooper following him and ''I don't remember noticing anyone with him;'' he did not see Irving Simon; he did not remember seeing defendant (p. 59); after leaving the Court Room he saw Irving Simon on the Court House steps in conversation with La Conti (p. 60); the State's witness Corsetta, another juror (p. 86) was with the witness; the conversation between Irving Simon and La Conti lasted for about fifteen or twenty minutes. On cross-examination the witness developed a defective memory (p. 62). He would not say that defendant was not present as defendant had testified. He said (p. 65) that: from May until December, just before the trial on the conspiracy case, he did not talk with anyone as to what had occurred on May 12 (p. 65); he did not tell the Prosecutor about it when he was called to the Prosecutor's Office for

interrogation in June, 1933, because he was not asked (p. 66). It is significant that, while he said nothing about it to anyone, when the matter appeared to be of importance detectives came to question him about it, although the Prosecutor could not have known anything of what he had seen and it was after these detectives interviewed him (p. 67) that he took the stand in the conspiracy case to rebut the testimony of defendant. He again, on page 68, displayed a lack of recollection as to whether he had seen Mr. Shulman after he left the Court room. He repeated (p. 69) that he would not say that defendant was not present. His lack of recollection is continued on pages 70 and 71, 72, 73. He said that, when he saw Irving Simon and La Conti in conversation, he (p. 76) himself was in conversation with the witness Corsetta. He stated that Irving Simon had a paper in his hands but that he could not tell what the paper was (p. 61). He was about forty-five feet away from where Irving Simon and La Conti were speaking. He again displays a lack of recollection on pages 77, 78, and irritation—"A. Every time I come into this court house and walk into a room counsel want to know if I went in—who else went in and why" and "Every time I come to this court room they all want to know and I wanted to know by that question what you were driving at."

The witness did not want to answer a question put to him as to whether he and the State's witnesses Corsetta and La Conti had not gone into the jury room, in which Irving Simon was sitting, during the recess on March 12, 1934, the day the present case was tried, the theory of the defense being that he was taken there by the others so that he might have Irving Simon pointed out to him to the end that he could identify Irving Simon from the stand. That this *was* the purpose

is indicated not by what the witness said but by his hesitancy in answering the question and his equivocation and finally the absurd excuse which he gave for going into the room as well as by the objections of the prosecutor (p. 79) to what, upon their face, would appear to be harmless questions. The reason he gave for remembering the incident, to wit, the "oddness" of the situation, stamps his testimony as false (83).

Corsetta, another juror in *Demarest & Terhune* v. *Erie Railroad Company* (p. 86), said: he left the court room ahead of the witness Finn; they hung around; when he was asked whether he had seen Irving Simon go out he said: "I don't know Irving Simon. I don't even know him today". He continued: he never saw defendant until the trial of this indictment; he waited until the juror Finn came out and walked downstairs with him and had a conversation that was very interesting; he paid no attention to anyone except Finn; when they got to the court house steps Finn offered to take him home, which offer he declined; when he reached the court house steps, "I saw Mike La Conti and someone else talking to Mike La Conti down on the sidewalk near the court house steps"; he had his back turned to them but, as a result of something Finn said, he turned and saw Mike La Conti with another person; he just glanced at them; the person with whom Mike La Conti was talking had a paper in his hands.

On cross-examination he said that he had never spoken to anyone about the matter and "never even dreamed about the incident that happened on the court house steps" on May 12, 1933, until December 19, 1933, when some people came to interview him about it (p. 91) as a result of which he came to the court house under subpoena for the trial of the conspiracy case *but* was not called by the State (p. 93).

He also displayed a lack of recollection on pages 94, 95. On the way out he and Finn stopped to talk to Mr. Cooper, the Erie Railroad lawyer. He did not see Mr. Shulman, a fellow juror. People passed him but he could not recollect who they were. His description of having his back to La Conti and the man with whom La Conti was talking and then taking just a glance and then another glance when he saw a small piece of paper in the hand of the man talking to La Conti (p. 99) is, I submit, absurd. The witness is twenty-two years old (p. 101).

These last two witnesses, Finn and Corsetta, are the only witnesses produced by the State who can be said to be disinterested, *if* they *were* disinterested. Assuming them to have been disinterested, their testimony is of such a nature as to indicate that but little reliance can be placed upon it.

Hickling, the next State's witness (p. 102) was immediately asked by the State whether he had pleaded *non vult* to a conspiracy with Irving Simon and others, the same case in which defendant is charged to have testified falsely. He said: he was a juror in the *Demarest and Terhune* v. *Erie Railroad Co.* case on May 12, 1933; he left the jury room with a group of jurors in which group was La Conti; he did not remember seeing defendant, whom he did not know, that afternoon; he went downstairs alone and after quite a few minutes saw La Conti and with him Irving Simon; he was introduced to Irving Simon by La Conti; he did not remember whether anyone else was with La Conti and Irving Simon.

The State was obliged to lead to get out what it wanted (p. 105). After the leading, the witness said that, before the introduction, La Conti and Irving Simon had been talking together but the witness had had his back to them.

His testimony is not at all clear (pp. 105, 106) with all the leading of the State. He said at one point (p. 106) that his back was to La Conti and Irving Simon but it is uncertain at what point of time he was in that position (pp. 105, 106); he was the whole length of the steps away from them and heard none of the conversation but saw a piece of paper in Irving Simon's hands; he did not see Irving Simon do anything with it.

On cross-examination it developed that he had pleaded guilty of the conspiracy charged in the indictment on the trial of which defendant was a witness, which conspiracy was to embrace jurors and that, up to the time of the trial of the indictment now here, he had not been sentenced (p. 107). He said that he had never told anyone of the occurrences on May 12, 1933 (p. 108), and the inference is that the Prosecutor asked him questions about it, when he was called as a rebuttal witness in the conspiracy case, without advance information that he knew anything about it. He even said that he had taken the stand in the instant case without having talked to the Prosecutor about his testimony (p. 111). The Court declined (pp. 126, 127) to permit counsel for defendant to press the witness on this point. It is fairly obvious that he *must* have talked to the Prosecutor or someone of the Prosecutor's office.

Defendant was prevented from showing that, when the witness had testified in the conspiracy case, he had said nothing about the alleged introduction to Irving Simon as to which he did testify in the present case (pp. 108, 109). He had no recollection of seeing Finn and Corsetta walk out (p. 110) together. *They* say that they did and, upon the theory of the State, they can be convicted of perjury because Finn, with some others, did not happen to see them. He went out with La Conti, who was his "friend" (p. 110). He

first said (p. 111) that he had seen defendant in the group with Mr. Cooper and Irving Simon and then apparently retracted (p. 111). Defendant was prevented (p. 113) from interrogating the witness as to why he had been waiting for La Conti.

It is difficult to reconcile his testimony on pages 111, 112, 113 as to what occurred with his testimony on page 105. The defense was prevented (p. 116) from interrogating the witness as to his regard for an oath, which inquiry the defense desired to make in the light of the fact that, not only was he one of the conspirators named in the indictment for conspiracy, the object being to embrace jurors generally, but he was one of the jurors who accepted money for his vote, which made him one of the embraced, and he taken an oath to a true verdict render (pp. 116, 117).

A witness may commit a crime and yet have regard for an oath but a juror who permits himself to be embraced, after taking an oath, indicates that he has no regard for an oath, and yet it is expected that he is to be believed when he testifies because he has taken an oath.

His testimony to the effect (pp. 124, 125) that he did not see any pencil in Irving Simon's hands is interesting in the light of the fact that the witness La Conti testifies that Irving Simon had a pencil and was checking the names of jurors on the list (p. 132). He was arrested on the 15th day of May, 1933, and interrogated by the prosecutor or the police but said nothing with respect to the occurrences on May 12, 1933 (p. 126). The defense was prevented from going further into this matter.

Not only was this witness discredited because of his plea of guilty to the crime of conspiracy and further discredited by reason of the fact that, although as a juror he had taken an oath to a true verdict render, he had accepted money to render a

false verdict, but his testimony is contradictory, some of it highly improbable, and it is apparent from the record that his testimony was given in such a way as that it should not have carried conviction for, upon at least two occasions (pp. 102, 125), a juror intervened and asked him to speak louder, and the Court was obliged to ask him to speak up (p. 103).

The next and last witness for the State as to the facts was Michael La Conti, the chief reliance of the State not only in this but likewise in the conspiracy cases. The State at the onset of this witness's testimony (pp. 128, 129) injected the fact, over objection of defendant, which is made the basis of the 32nd assignment of error and specification of causes for reversal (pp. 303, 311), that he had been convicted of crime and persisted in having him state that the crime was that of jury fixing and that he had pleaded *non vult* and appeared as a witness for the State. The State assuredly did not inject this circumstance to discredit its own witness.

As I have already indicated its effect, in connection with the insistence of the State in bringing to the attention of the jury the fact of a verdict of guilty in the conspiracy case and the nature of that case (p. 37), was to impress the jury with the view that the conviction in the conspiracy case showed the disbelief of the jury in *that* case in the testimony of defendant given upon the trial. It did *not* for the jury in the conspiracy case might have found the defendants there charged guilty *and still have believed the testimony of defendant for that testimony went to quite a collateral matter.*

The witness La Conti said: he was a juror in *Demarest and Terhune* v. *Erie Railroad Company* and saw Irving Simon after he went out of the court room after the discharge of the jury (p.

131) and walked with him, seeing no one, talking for about eight or ten minutes (p. 131), and then, after they left the court house, they stopped for a few minutes talking on the sidewalk and Irving Simon took a jury list out of his pocket and asked the witness as to who were the six jurors who voted against him; he checked the jury list and La Conti looked up and saw the witnesses Finn, Corsetta and Hickling; (p. 151) Simon told him, when asked why he wanted to know the names of the jurors, that "we keep a record of them for two years and we knock them off when they come on my brother's cases." It is not claimed that the alleged conversation between La Conti and Irving Simon was probative evidence against Irving Simon or anyone else on any charge of conspiracy to embrace for there is nothing improper in counsel endeavoring to ascertain how a jury voted, and, if counsel desires, it is within his right, in other cases, to peremptorily challenge such persons when called as jurors for the right of peremptory challenge may be exercised for any reason or for no reason. Indeed, the tenor of the alleged conversation between La Conti and Irving Simon, as related by La Conti, was opposed to any idea of the existence of a conspiracy to embrace.

The State then (p. 134) over the objection of defendant, which is made the basis of the 33rd assignment of error and specification of causes for reversal (pp. 300, 311) had the witness testify to having seen Irving Simon on April 29, 1933, in the presence of Conlon, Decker and Durgett, three of the alleged co-conspirators named in the conspiracy indictment and thereafter attempted to follow that up with testimony as to the case of *Viet* v. *Miller,* which was the case out of which arose the conspiracy indictment, and to the effect that a verdict had been rendered in favor of the

plaintiff in that case, and then the Prosecutor persisted with the question as to who was counsel for the plaintiff and withdrew the question only after the jury had been made fully aware of the fact that the counsel was Dr. Aaron Simon, and after withdrawing the question, the Prosecutor attempted to go into the conversation between the witness and Conlon before he sat as a juror in the *Viet* v. *Miller* case. The answer of the witness was stricken out (p. 135) but the damage had been done. The effect was to confuse the jury and to indicate to it that *the conviction of the defendants in the conspiracy case had something to do with the issue of the alleged perjury of defendant.*

The witness stated that he did not know defendant on May 12th and did not think that he had seen him in the court room and that he did *not see him when he* (the witness) *had the conversation with Irving Simon* (pp. 131, 136). There is no doubt upon the proofs but that defendant *was* in the court room, and the fact that the witness La Conti did not see him indicates that but little reliance can be placed upon La Conti's positive statements.

On the cross-examination of this witness (p. 137) as on the cross-examination of the witness Hickling (p. 117) defendant attempted to elicit their conception of the obligations of an oath but was prevented by the action of the Court, which action is made the basis of the 35th assignment of error and specification of causes for reversal (pp. 300, 311).

The witness said (p. 141) that he remembered seeing Irving Simon and Mr. Cooper, counsel for the Erie Railroad Company, and Mr. Shulman in the court room but did not remember defendant nor Reese, the Court attendant. Reese, of course, was present.

The witness displayed a lack of memory with respect to details (pp. 142, 143). His attention was brought to the fact (p. 144) that, on the conspiracy trial, when asked the question—"Now let me understand the only time that you *ever* spoke to Irving Simon was on what date?" he answered "On the twenty-ninth of April."

He persisted that his answer had been correct (pp. 144, 145) and when his attention was directed to the fact that it was inconsistent with his story, later told, that he had spoken to Irving Simon on May 12, 1933, his explanation was "A. I thought maybe they asked me when was the *first time* I talked to Irving Simon." And he had apparently made the same explanation on the conspiracy trial (p. 158). He translated the "*only* time," which was the language of the question, into "the *first* time" (pp. 144, 145).

The witness stated that he had spent twenty-*one* or twenty-*three* minutes talking to Irving Simon (pp. 146, 150), but the entire conversation which he can recollect (pp. 150, 151), could not possibly have taken more than approximately three to five minutes and that is allowing a wide margin, the two talking together in plain view of any number of persons, for the discharged jurors were walking out, as undoubtedly were the parties, without attempt at concealment. Defendant attempted (pp. 148, 149, 150) to elicit from the witness how it was that the conversation was so openly had, when at least the inference from La Conti's testimony is that it had to do with something which it would be natural to conceal, but was prevented by the Trial Court, which action is made the basis of the 36th and 37th assignments of error and specification of causes for reversal (pp. 302, 311). Although the witness's (p. 151) attention was directed to the fact that the conversation could not have possibly have ex-

tended over the length of time he said, he stated that he had nothing to add to it. If the event occurred, as this witness said, there would have been no difficulty on the part of the State in obtaining any number of witnesses.

On page 153 *et sequi* the defense attempted to show that the witness had made contradictory statements *under oath* in the conspiracy case and upon other occasions and, although in most instances the attempt was prevented by the action of the Court, which action is made the basis of the 39th, 41st, 42nd, 43rd assignments of error and specification of causes for reversal, it *did* appear, as the witness calmly conceded, that he had no hesitancy in falsifying in making an application for employment (p. 155).

On page 158 the State attempted to go into the details of the alleged conversation between Irving Simon and the witness on August 29th, 1933, at the Riviera Hotel. The conversation was wholly immaterial in the case being tried and the door had not been opened by the cross-examination of the witness by defense (p. 158) by the single question which it put to the witness—"Didn't you at that time say you had never met Irving Simon until you met him on August twenty-ninth, 1933? A. I did not."

The matter was collateral and the defense was bound by the answer of the witness.

The defense finally (p. 160) withdrew objection to the line of questioning obviously because, as a result of the questions and the argument of counsel, the matter had already gotten to the jury in such a way as that it could not help but be prejudicial.

The witness then testified to a conversation at the Riviera Hotel between himself and Irving Simon, which may have been material upon the conspiracy case but was wholly immaterial in the

case of perjury then being tried. The defense could not assign error in the admission of this testimony, but I point to it as one explanation as to why the jury brought in a verdict against the weight of the evidence, and also a verdict, the result of bias, passion and prejudice because the injection of this, as well as other extraneous matter, could not but excite the bias, passion and prejudice of the jury.

A critical examination of this witness's examination indicates, I submit, that it is evasive, contradictory and improbable, coming from a thoroughly discredited source, from a witness who has pleaded *non vult* in the conspiracy case but had not yet been sentenced, and so wholly unreliable as not to have any weight on the trial of an indictment for perjury. True, there is no evidence that either the witnesses Hickling or La Conti was promised consideration by the State but "hope springs eternal in the human breast".

As against this testimony of the State we have: Mr. Shulman (p. 188), a lawyer, who was one of the jurors in *Demarest & Terhune* v. *Erie Railroad Company* and who remembered: after he left the court room and was going down the steps to the floor below he was joined by Irving Simon and defendant; they accompanied him all the way out of the court house and down the court house steps to the sidewalk (p. 189); there was a group of jurors around them; Irving Simon did not stop to talk to La Conti.

This witness was subjected to a vigorous cross-examination by the State (p. 190), starting out by an obviously improper question, as I submit, to wit, whether he was one "of those that desired to bring in a verdict in *Demarest and Terhune* v. *Erie Railroad Company*" which question having been overruled, the State followed it up

(p. 191) with "Why you decided to bring in a verdict for Simon a moment after you were out, didn't you?" which question was overruled. Overruled as they were, the questions themselves had had their effect upon the jury.

The net effect of the cross-examination was to strengthen the direct testimony of the witness. He was calm, consistent and clear.

If defendant is guilty of perjury so is this witness.

Neither defendant nor Irving Simon in the conspiracy case denied that La Conti was in the group of jurors nor did they deny but that he may have entered into the conversation. The crucial point was whether La Conti and Irving Simon had a conversation alone, apart from the others.

Reese, a Court attendant (p. 212), who said that he remembered, that when the jury came out on May 12, 1933, he was in the court room with Mr. Cooper, attorney for the Erie Railroad Company, Irving Simon and Lippman, the Court Clerk, and defendant, and that, after the jury was discharged, he left, changed his clothes, and met a group of people, among whom was Irving Simon, and that he saw the group going down the stairs and saw Irving Simon with defendant on the sidewalk (p. 214); he also saw Mr. Shulman; he saw Irving Simon and defendant as they were leaving (p. 231).

His testimony is wholly inconsistent with any idea that Irving Simon and La Conti had the private conversation alleged (pp. 232, 233). The witness was subjected to a vigorous cross-examination but his testimony is wholly consistent.

This witness likewise is guilty of perjury if defendant is so guilty.

Saul Lippman (p. 234), a clerk of the Court, testified to the presence in the court room of Irving Simon and Mr. Cooper and defendant and to defendant and Irving Simon leaving the court room together in a sort of a group of jurors; he heard a conversation between Irving Simon and defendant "relative as to how they were going home" (p. 235).

If defendant is guilty of perjury because he stated that he was in the court room on May 12, 1933, then the witness Lippman is likewise guilty of perjury.

This testimony was certainly sufficient in and of itself to offset any testimony of the State's witnesses without calling upon defendant to go further.

Irving Simon took the stand (p. 236) and testified circumstantially as to what occurred on May 12, 1933, and was in no wise shaken on cross-examination.

Defendant took the stand (p. 246) and testified circumstantially as to what occurred on May 12, 1933, and he was not shaken on cross-examination.

The testimony of Irving Simon and defendant bears intrinsic evidence of its truth. They remembered details which could not have been remembered were the story made up, and again I direct the Court's attention to the significance of the fact that the State's witness Mr. Cooper, said that defendant had come to see him after the indictment and, in an attempt to refresh his, Mr. Cooper's, recollection, put to him details which led the State's witness to say "We didn't disagree to any great extent and I don't think we do yet" (p. 46). Defendant could not have put these details to Mr. Shulman had he not been present.

I do not intend to go into the details of defendant's testimony. He was not shaken on cross-examination.

In addition to all of this defendant produced a number of reputable witnesses to testify as to his good reputation.

I respectfully submit that the verdict was against the weight of the evidence and that it was the result of bias, passion and prejudice, the bias, passion and prejudice being injected into the case by the extraneous matter heretofore mentioned.

In the light of the nature of the case and of the testimony defendant, I submit, was entitled to a full and complete charge upon the presumption of innocence which, I submit, the Court failed to give although duly requested, which brings me to

POINT II.

The Court erred in failing to charge the requests of defendant, 1, 2 and 3, made the basis of the 55th assignment of error and specification of causes for reversal (pp. 306, 311), or one of them.

While the assignment of error may not be good as such for the reason that more than one alleged error is included in one assignment, the specification of causes for reversal is good. All that the Court charged upon the matter of the presumption of innocence was (p. 278):

> "May I say to you at this point, that this defendant being charged with crime, like all defendants charged with crime, is presumed to be innocent and that presumption continues until the State establishes his guilt beyond a reasonable doubt."

An important question arises as to what the Court meant by "until the State establishes his guilt beyond a reasonable doubt". To whose satisfaction must the guilt appear and when? The Court was asked in the first and third requests (p. 281) to charge (p. 280):

> "1. The Jury, in considering the evidence, must start with the legal presumption of the defendant's innocence, which presumption must continue throughout all their deliberations unless the evidence establishes the defendant's guilt beyond all reasonable doubt."

And the third (p. 281):

> "3. The presumption of innocence attaches to the defendant from the very beginning. Such presumption of innocence must be carried by the Jury into their final deliberations."

These requests were designed to indicate to the jury that the presumption of innocence went with them to the jury room and was to be considered by them in their deliberations.

Both requests to charge correctly stated the law.

State v. *Linker*, 94 N. J. L. 411 at 415, 416;
State v. *Kisik*, 99 N. J. L. 385 at 388.

The charge of the Court was incomplete.

Defendant was entitled to a specific charge as to the burden of proof which brings me to

POINT III.

The Court erred in declining to charge defendant's fifth request to charge made the basis of the 55th assignment of error and specification of causes for reversal.

What I have said under the last point upon the matter of the propriety of the assignment applies here.

The Court was asked in the fifth request to charge (p. 281) to tell the jury that:

> "The defendant is not required to satisfy the Jury of his innocence; on the contrary, the burden is always upon the State to prove the defendant's guilt, and to prove such guilt beyond all reasonable doubt. This burden of proof remains upon the State, here represented by the Prosecutor, throughout the entire trial and never shifts."

The request properly stated the law.

State v. *Lax and Stern,* 71 N. J. L. 386.

To refuse it was, I submit, error, unless the subject is otherwise covered in the charge. At no point in the charge did the Court expressly refer to the burden of proof (p. 276). True, the Court charged as to reasonable doubt, but what the Court said as to reasonable doubt was not equivalent to charging upon the burden of proof.

Defendant was entitled to have the jury instructed that no burden rested upon the defendant to prove innocence, the burden always resting upon the State to prove guilt.

POINT IV.

The Court erred in overruling the objection to the question put by the State to the witness, La Conti "With whom did you see Irving Simon," referring to April 29, 1933, page 132 (33rd assignment of error and specification of cause for reversal, pp. 300, 311).

The witness was permitted to answer and said that he had met Irving Simon with Conlon, Decker and Durgett (p. 132), who were three of the alleged co-conspirators in the indictment for conspiracy on the trial of which defendant's perjury is alleged to have been committed.

Neither the fact that Irving Simon and the witness La Conti met on April 29, 1933, nor the identity of anyone else present, had anything whatever to do with the perjury case on trial. When objection was made the Prosecutor stated that the testimony was admissible for the purpose of showing "motive." He endeavored to make his position clear (pp. 132, 133), but I submit that he indicated nothing which could possibly make the testimony relevant or material. The answer of defendant to the effect that he had seen Irving Simon with Conlon, Decker and Durgett was particularly harmful to defendant for Conlin, Decker and Durgett were three of the alleged co-conspirators convicted as a result of the trial of the conspiracy indictment.

I have already indicated how the State injected at several points in the case the proceedings in the conspiracy indictment and the action of the jury in that case. While not pressing the question it injected the verdict on page 37 and again on pages 102, 128 and 129.

The effect could only be to indicate to the jury that the facts that Irving Simon had been found guilty of conspiracy and that there had been a conviction in that case of others and that the witnesses Hickling and La Conti had pleaded *non vult* or guilty were indications that defendant must be guilty of perjury because he had testified in favor of Irving Simon.

The testimony of defendant in the conspiracy case being only with respect to a wholly collateral matter *could have been fully believed by the jury in that case and yet the defendants in that case could have been found guilty.*

I have further considered the admission of this testimony on page 12 of this brief and I submit that its admission was harmful error.

POINT V.

The Court erred in permitting the State to ask the witness La Conti, over the objection of defendant, the question: "Have you been convicted of a crime" (p. 128), (32nd assignment of error and specification of cause for reversal, pp. 300, 311).

After the witness had answered that he had been so convicted, the State followed up by asking if he had been convicted of jury fixing in the conspiracy case out of the trial of which the perjury alleged in the instant case arose. The question was not asked by the State for the purpose of impeaching its own witness. Under ordinary circumstances, the action of the Court in admitting the testimony would not have constituted harmful error. The witness Hickling under examination by the State (p. 102) had testified that he had pleaded *non vult* to the same conspiracy

indictment and the action of the State in putting the challenged question to the witness La Conti emphasized to the jury the conviction in the conspiracy case. The re-injection into the trial of the instant case of this conviction in the conspiracy case could not help but harm defendant.

POINT VI.

The Court erred when, over the objection of defendant, it permitted the witness James Smith to testify (p. 164) that prior to taking the stand in the conspiracy case, defendant "was on the extreme right of the court room talking to Irving Simon, if I recall right" (44th assignment of error and specification of cause for reversal, pp. 303, 311).

I have considered this testimony on page 13 of this brief, and submit that its admission was error.

The action of the Court must have led the jury to believe that the *mere* fact that defendant spoke with Irving Simon before he took the stand in the conspiracy case was evidence which could be considered by them as bearing upon the issue of perjury, either as corroborating the State's witnesses or otherwise, and permitted the jury to associate defendant with the alleged co-conspirators and to consider that the result of the conspiracy case was of some weight in determining the perjury case.

This question by the State was in line with the State's apparent theory that the fact that defendant's wife was the sister of the wife of Irwin Simon, a brother of Irving Simon, was of importance in determining whether defendant was guilty of perjury, a matter which I have considered on page 11 of this brief, and see the testimony, pages 271, 54, 272.

POINT VII.

The Court erred in overruling the line of questions put to the witness La Conti by defendant designed to show that the witness La Conti had no regard for an oath and would not hesitate to falsify (pp. 137, 138, 139, 140, 141, 52, 154, 155, 157 made the basis of the 35th, 39th, 42nd and 43rd assignment of error and specification of causes for reversal, pp. 300, 311).

All of these questions were asked for the purpose of discrediting the State's witness. The prosecutor apparently took the position that because the witness had been already discredited by his plea of guilty to the indictment for conspiracy he could not be further discredited by indicating that he had no regard for an oath. The Court seemed to concur in the view of the prosecutor for it overruled this line of questioning.

A witness may be discredited by the showing of a conviction of crime. That is not the only way, however, by which he may be discredited. He may be wholly excluded as a witness by showing that he does not know the nature of an oath or that he has no regard for the obligation of an oath. He may, I submit, be discredited by showing that he has *little* regard for the obligation of an oath.

The purpose of the defense was to direct attention to the fact that, not only had the witness been convicted of a crime, but he had so little regard for his oath as a juror as that he accepted money not only for his own vote but for his influence upon other jurors in inducing them to depart from their oaths.

The question which was put to him on page 138 was designed to elicit testimony from him so that

the jury might know that he had little regard for the obligations of an oath.

An oath is still required of a witness not only because it is a necessary prelude to an indictment for perjury but because of the obligation supposed to be placed upon the witness's conscience.

Wigmore, in stating that evidence of a witness's willingness to swear falsely is admissible, says (2 Wigmore Ev., 2nd Ed., Sec. 957, page 343):

> "General Principle. The theoretical place of this sort of impeachment is not easy to determine. It is related in one aspect to Interest, in another to Bias, in still another to Character (*i. e.*, involving a lack of moral integrity). It suffices to point out that the essential discrediting element is *a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony.*
>
> Distinguish, however, the use of subornation or other corrupt expedients by the party himself (or his friends or relatives); this amounts to an admission by conduct (*ante,* sec. 278), and may raise the question how far inferences may be drawn against the party by reason of the acts of third persons done on his behalf (*ante,* sec. 280). But in the present place we are concerned only with the witness as such, and the question is, what sorts of conduct on his part admit of inferences against the witness *a willingness to falsify.* The testimony of one who exhibits such a willingness must suffer the same doubts as that of one who is prejudiced.
>
> There are several distinct situations: (1) A prior expression by the witness of a general willingness to lie upon the stand; (2) an offer to give false testimony for money or other reward; (3) a statement, after testifying, that he has lied; (4) an attempt to bribe another witness; (5) the receipt of money for his testimony; (6) the rejection of money offered for his testimony; (7) habitual falsities, and sundry dishonorable conduct.

> Willingness to Swear Falsely. This, beyond any question, is admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence."

Ordinarily, the matter of how far a party may proceed in discrediting a witness is for the Trial Court, but I submit that in a case of perjury, where witnesses of the type of Hickling and La Conti have been produced by the State, the failure of the Court to permit the inquiry along the lines the defense attempted was an abuse of the Court's discretion, if the matter be one of discretion.

POINT VIII.

Two assignment of errors and specification of causes for reversal may be conveniently argued together.

1. The Court erred in declining to quash the indictment upon the ground that it contained in one count two distinct charges of perjury. (Motion to quash, p. 23; exception, p. 32), (9th assignment of error and specification of causes for reversal, pp. 294, 311.)

2. The Court declined at the close of the State's case to compel the State to elect upon which assignment of perjury the State rested (p. 166) (assignment of error and specification of causes for reversal 46, pp. 304, 311).

The indictment (p. 4) charged thirteen statements of fact made by defendant in the conspiracy trial to have been perjurious (p. 170).

For the purposes of this argument they may be grouped into two classes; those which asserted that defendant was in fact present at the Court

House on May 12, 1933; those which asserted that defendant and Irving Simon had performed certain acts at the Court House on that day and that there had been no conversation between Irving Simon and La Conti.

Defendant moved to quash the indictment upon the ground of duplicity (p. 23), which motion the Court denied and exception was duly taken (p. 32).

The State wholly failed to prove, as has been argued under Point I, that defendant was not present at the Court House on May 12, and that he had not left the Court Room with Irving Simon, as he had testified in the conspiracy case.

Defendant asked the Court (p. 166) to direct the State to elect upon which assignment or assignments it rested (p. 166), which was, in effect, a request that at least the assignment resting upon defendant's statement in the conspiracy case to the effect that he had been present in the Court Room on May 12, 1933, and had left the Court Room with Irving Simon, should be withdrawn from the consideration of the jury. The Court declined to so direct and an exception was duly taken (p. 166).

The result was that when the jury went to the jury room under the charge of the Court they might have found the defendant guilty of falsifying either (1) when he said that he had been at the Court Room on May 12, 1933, and had left with Irving Simon, or (2) when he said that there had been no conversation on the way out between Irving Simon and La Conti.

Which statement (and I am considering the case as if there were but the two statements made, although there were several, but they amount to two) did the jury find was false?

If they found that defendant falsified when he said that defendant had been at the Court Room

and had left with Irving Simon they not only found against the weight of the evidence but there is no evidence whatever to sustain the finding; certainly, no evidence which amounts to that of two witnesses or one witness and corroborating circumstances.

It may be argued that, if they so found, they must inevitably have found that the story of defendant to the effect that there had been no conversation between Irving Simon and La Conti at the time was false.

But it does not follow that, if they had found that defendant's story to the effect that he had been present in the Court Room and had left with Irving Simon was true, or if that statement should have gone to them unchallenged, as it should have, they would have *then* found that defendant was guilty of perjury when he said that there had been no conversation between Irving Simon and La Conti.

Whether a defendant is guilty of perjury depends not only upon the falsity of the statements made by him but upon the knowledge of the defendant that they were false. Mistaken testimony is not perjurious, nor is false testimony wilful, if defendant has no knowledge of its falseness, however poorly he might have reasoned or concluded that it expressed the fact, as the Court was asked to charge the jury in the 21st request of defendant (p. 284). The Court charged the jury (18th request, p. 279) upon the subject.

Defendant could not have been mistaken when he said that he had been in the Court Room and had left with Irving Simon. Assuming him to have been present in the Court Room and to have left with Irving Simon, he might *well* have been mistaken as to whether a conversation between Irving Simon and La Conti took place.

It is conceded by all of the witnesses that all of the parties went out of the court room and

down the court house steps more or less in a body and that there was confusion. It is obvious that the alleged conversation between Irving Simon and La Conti could not have taken the fifteen or twenty minutes as related by La Conti but it is equally obvious that some such conversation between Irving Simon and La Conti may possibly have taken place without making such an impression upon defendant's mind as not to leave him in the belief that in fact no such conversation had taken place.

The jury might *then* have found that the conversation did take place but that, although defendant stated that it had not, he was merely mistaken and did not wilfully testify falsely. But if it believed, as heretofore stated, that defendant had not been in the court room on May 12, 1933, it could not well have found that he was mistaken when he said that he had been. Defendant had gone too much into detail as to that event.

But the jury had no right to find that defendant had not been in the court room and had not left with Irving Simon, for there was no testimony to support the charge, yet by the action of the Trial Court, the jury was permitted so to find.

Had *that* assignment of perjury been taken from their consideration, the jury might have come to the conclusion that defendant, when he further said that there had been no conversation between Irving Simon and La Conti falsified but not wilfully. Defendant was, therefore, injured.

The general subject is discussed in *48 Corpus Juris,* title "Perjury", sec. 181, p. 908, the author stating:

> "Where there are several assignments, the jury should ordinarily be informed as to which assignment or assignments of false testimony are submitted to them as a basis

for their verdict. Where the assignments of perjury are severable, it is proper for the court to select some of them to the exclusion of the others, and submit them to the jury on which to predicate a conviction. When not severable, an instruction submitting all such predicates *in solido* is proper. It is error to instruct that, if the prosecution shall prove any of the alleged assignments of perjury in manner and form as charged in the indictment, then accused should be found guilty, since this instruction ignores entirely the materiality of the testimony, and it is reversible error for the court, upon its attention being specifically called thereto, to refuse to withdraw from the consideration of the jury defective or unsustained assignments."

In *Wood* v. *People of the State of New York*, 59 N. Y. 117, at p. 122, the Court said:

> "We have been referred to cases which hold that judgment will not be arrested upon a conviction for perjury where the indictment contains in one count several assignments, some of which are good and others defective (People *v.* Curling, 1 J. R. 320; Same *v.* Wiley, 3 Hill, 213; Comm. *v.* Johns, 6 Gray 274; State *v.* Hascall, 6 N. H. 352). It will be presumed in such a case that the jury disregarded the defective assignments and proceeded upon the substantial and sufficient averments in the indictment. *But when the attention of the court on the trial is specifically called to the question and the judge refuses to withdraw from the consideration of the jury those assignments which are defective in form, or which have not been sustained by proof, and exception is taken, the court cannot disregard the error.*"

In the case at bar, the matter *was* specifically directed to the attention of the Court when the defense requested that the State be compelled to elect (p. 166).

POINT IX.

Under this point the first, eleventh and twelfth assignments of error and specification of causes for reversal (pp. 294, 311) may be conveniently argued together.

1. The Court erred in declining to entertain the challenge of the defense to the array of petit jurors (pp. 12, 19, first assignment of error and specification of causes for reversal, p. 291).

2. The Court erred in directing the Sheriff to place the balance of the names of jurors in the jury box without first exhausting the 48 names drawn as a special panel (11th assignment of error and specification of cause for reversal, pp. 295, 311).

3. The Court erred in directing the Sheriff to secure additional jurors outside of the panel of jurors selected by the elisors (12th assignment of error and specification of cause for reversal, pp. 295, 311).

The jurors had been drawn by elisors appointed by the Court assuming to act under Section 8 of the Act Concerning Juries, 3 C. S. of N. J., page 2966. The State made no issue of fact upon the challenge to the array which was properly interposed (pp. 12, 19). The statements of fact contained in the challenge must, therefore, be assumed to be correct.

On December 12, 1933, and again on December 23rd the Court made an order appointing elisors to draw and summon juries, grand and petit, in Passaic County; at the time the order was made a sheriff was in office acting and was not and had not in any wise been disqualified; the term of the jury commissioner had expired; at the time of

the making of the orders by the Court the Senate of New Jersey was in recess.

The jury act then in effect with respect to the drawing of jurors, was Chapter 17 of the Laws of 1929, page 36, Supp. to C. S. of N. J., 1925-1930, sec. 104-49, p. 880. That act provided for the appointment of a jury commissioner by the Governor and is commonly called the "Governor Jury Act." It took the place of what is commonly called the "Chancellor Jury Act," Chapter 20 of the Laws of 1913, page 828, 1 Com. Supp. to C. S. of N. J., 1911-1924, sec. 104-49, p. 1652.

This Court held in *State* v. *Bolitho,* 103 N. J. L. 246, affirmed on the opinion below 104 N. J. L. 446, that, notwithstanding the Chancellor Jury Act, the Court still had the power to appoint elisors.

The only distinction between the Chancellor Jury Act and the Governor Jury Act is that in the latter there is a provision to the effect that if the citizen appointed as the commissioner of juries be absent or sick on the day fixed for the drawing of the jury, the Court shall make and sign an order appointing a temporary commissioner of juries who shall be a resident of the county and duly sworn and who shall act with the sheriff.

In the light of the decision of this Court in *State* v. *Bolitho,* 103 N. J. L. 246, affirmed on the opinion below, 104 N. J. E. 446, I do not feel justified in arguing the point now made in *extenso* unless the Court should otherwise direct. The point is made, however, and the assignment and specification of causes for reversal are not waived. I desire to point out that:

(a) The Chancellor Jury Act contains no provision for the appointment by the Court of a temporary elisor in the event that the elisor appointed by the Chancellor is absent or sick.

The Governor Jury Act, sec. 1, contains a specific provision with respect to the appointment of a temporary commissioner of juries, for his oath and the like, but the express language of the act only applies to cases in which the Commissioner, appointed by the Governor, "be absent or sick." The situation which was present at the time of the appointment by the Court of elisors in Passaic County, while not perhaps within the express language of this provision of the act, was within its spirit. This Court, in *State* v. *Bolitho,* 103 N. J. L. 246, affirmed 104 N. J. L. 446, in the course of its reasoning pointed out that the legislature had not assumed to deal with the subject of the situation which would be presented if no commissioner appointed could act and that it was, therefore, to be presumed that the legislature intended that the power of the Court to appoint elisors under section 8 of the act concerning juries (3 C. S. of N. J., p. 2966), should remain in effect. By the Governor Jury Act the legislature *did* assume to deal with that situation at least in part. It may have failed to fully cover it if the language "be absent or sick" be strictly construed but, having assumed to cover it, if the precise situation which was presented when the Court in the case at bar made its order appointing elisors made it impossible to get juries, the fault is with the legislature.

(b) Besides amending the Chancellor Jury Act the legislature, by the Governor Jury Act (laws of 1929, p. 36, 1925-30 Supp. to C. S. of N. J., p. 880), expressly repealed all acts or parts of acts inconsistent with its provisions, sec. 3; the Chancellor Jury Act (sec. 14, 1 Com. Supp. to C. S. of N. J., 1911-1924, p. 1656), contained a repealer but in section 13 provided that "nothing herein shall be held or construed in anywise to limit the powers of the Court or any justice or judge as heretofore

had or exercised in connection with the drawing or discharge of jurors or panels of jurors."

The Governor Jury Act (chapter 17 of the laws of 1929, 1925-30 Supp. to C. S. of N. J., p. 880), however, did not touch this section of the Chancellor Jury Act.

I submit that, taking the legislation as a whole, it is clear that the legislature *intended to cover the entire subject* as to what should happen if, for any reason, there was no commissioner acting at the time it became necessary to draw juries, and that, notwithstanding the fact that it may not have covered the precise situation which was presented, the legislative intent was to take away the power of the Court under section 8 of the act concerning juries (3 C. S. of N. J., p. 2966), and the effect is a legislative declaration that in any case of non-presence of a commissioner not specifically provided for by the legislature, nothing should be done.

Defendant, under section 54 of the Criminal Procedure Act (2 C. S. of N. J., p. 1837), was entitled to a special panel and to the service of a list of the jury. He was so served. All of the forty-eight did not respond (pp. 17, 32). Over objection, when the jurors who *did* respond had been exhausted (p. 32), the Court directed the sheriff to place the balance of the names on the general panel in the box, which action of the Court is made the basis of the eleventh assignment of error and specification of cause for reversal (pp. 295, 311). In the light of the decision of this Court in *Patterson* v. *State,* 48 N. J. L. 381, I do not further desire to argue upon this exception and specification of cause for reversal unless the Court shall otherwise direct. The point, however, is not waived.

Thereafter the general panel was exhausted (p. 33) and over objection of the defendant the sheriff

was directed by the Court to "go out then and see if we cannot secure sufficient jurors to make up this panel" (p. 33) which action of the sheriff is made the basis of the twelfth assignment of error and specification of cause for reversal (pp. 295, 311).

The statute provides, section 83, Criminal Procedure Act (2 C. S. of N. J., p. 1847), that if the special panel and the general panel be exhausted then "the sheriff *or other proper officer* shall forthwith summon from among the bystanders or others such additional number of persons qualified to serve as jurors as may be ordered by the court, and make return thereof immediately, and place the names of the jurors so returned in the box and draw therefrom until the jury be completed."

Who was the "proper officer" to select the talesmen in the situation which was presented to the Court? The power of the sheriff alone to select jurors had been taken away by the Commissioner Jury Acts. The Court, in the instant case, had directed elisors to draw the general panel. I submit that, under the circumstances, the sheriff was *not* a proper officer to select the talesmen and that the Court should have directed the elisors appointed by it to select the talesmen or at least should have directed the selection of the talesmen to be from among those whose names appeared upon the elisors' list of jurors.

I submit that either the Court erred in the first instance in appointment elisors or it erred when it directed the sheriff to select the talesmen. The right of a defendant entitled to a special panel is one of substance and a violation of such a right is cause for reversal. *Patterson* v. *State,* 48 N. J. L. 381.

POINT X.

1. The Court erred in declining to quash the indictment upon the ground that it did not appear therefrom that the testimony which was the basis of the charge of perjury was material to the issue in the case where given (p. 32, assignments of error and specifications of cause for reversal 2d, 3d, 4th, 5th, 6th, pp. 291, 311).

2. The Court erred in not granting the motion of defendant for a direction of a verdict at the close of the State's case (p. 180, assignments of errors and specifications of cause for reversal 47th, 48th, 49th, 50th, 51st, 52d, pp. 304, 311).

3. The Court erred in refusing to direct a verdict for defendant at the close of the whole case (p. 276, assignments of error and specifications of causes for reversal 53d, 54th, pp. 305, 311).

These assignments of error and specifications of causes for reversal will be argued together.

A.

It did not appear that the testimony of defendant alleged to constitute the basis of the perjury was material to the issue in the conspiracy case. This matter was fully argued to the Trial Court on the motion to quash under the 1st, 2d, 3d, 4th, 5th reasons for quashing (p. 21), and particularly at page 24, *et seq.*, and on the motion to direct a verdict at the close of the State's case (p. 167), and an extended argument here would be but to merely repeat what now appears in the record.

There are certain facts which demonstrate, I submit, the immateriality of the evidence given by defendant in the conspiracy case: the conspiracy charged was alleged to have been formed on May 8, 1933; it was consummated on May 10, 1933, by the delivery of the moneys, the rewards of the embracery; La Conti, a State's witness, had testified to a conversation which he alleged that he had had with a defendant, Irving Simon, on April 29, 1933, which it was said by the State involved Irving Simon in the conspiracy (to say the best for the State in the conspiracy case, there is grave doubt that this testimony did involve him); La Conti said nothing with respect to any alleged conversation with Irving Simon on May 12, 1933; Irving Simon took the stand in his own defense and on his direct examination stated that he had met La Conti on the 29th or 30th of August 1933, and then the following (p. 57): "Now, as a matter of fact, had you ever met him up to that time before? A. I have seen him in Court. Q. I said, 'met him'? A. No."; on cross examination (p. 57) he stated that he *could not recall* having had a conversation with La Conti before the date in August and, questioned as to the month of May, he said (p. 57): "I never talked to him directly, except for one occasion, when the jury walked out of the courtroom and the jurors all combined were talking to the attorneys and the clerk of the court"; he denied having a conversation with La Conti in May for fifteen or twenty minutes alone on the front steps of the Court House and that he had a jury list in his hands (p. 58); on rebuttal, La Conti and the State's witness Finn in the case now here (p. 58) were called and testified to the same effect as they testified in the case at bar; in surrebuttal, Serlinsky, the defendant here, Lippman, and Mr. Shulman, two of the witnesses who

testified in the case at bar, were called for Irving Simon and they gave testimony substantially as they did in the case at bar; the State then called the witness Hickling, who appeared as a witness for the State in the case at bar (p. 102) and who testified substantially as he did in the case at bar; no further testimony was offered," it was not, and is not claimed by the State that either the fact of the alleged meeting between Irving Simon and La Conti or what was said in the conversation was of any probative force in the conspiracy case being tried.

The subject matter of the inquiry was wholly immaterial to the issue being tried and the immateriality of the testimony appeared upon the face of the indictment in the case at bar and certainly appeared at the close of the State's case and at the close of the whole case.

Perjury cannot be predicated upon false testimony which is immaterial. The burden is on the State to show materiality and materiality cannot be left to presumption or inference. *48 Corpus Juris,* title "Perjury", sec. 10, p. 824; sec. 128, p. 878; sec. 129, p. 879; sec. 149, p. 889; sec. 150, p. 890; sec. 156, p. 894; sec. 164, p. 899.

Testimony in rebuttal of irrelevant testimony is immaterial and therefore perjury cannot be assigned upon it if false. *48 Corpus Juris,* sec. 41, p. 838.

In *People* v. *Barbuti* (App. Div.), 207 App. Div. 285, 289 (1923), 202 N. Y. S. 126, the Court discussed the meaning of materiality and said:

> "Having been admitted, the question still remains, was it material. If by 'material' is meant persuasive, there can be no doubt that it answers that test. I think something more is meant by the term 'material matter' as used in the statute. I can imagine a matter so trivial, so unsubstantial, as to have no

> probative force and, therefore, not a 'material matter.' *Evidence, to be material, must, in addition to having probative force or persuasive character, be relative to the issue or properly material.* The evidence must properly *tend to establish some fact at issue upon the trial, and not merely to disparage the defendant when the issue of his character is not presented.* In the discussion in some of the cases it is stated that if the evidence is admitted, although erroneously, if it might have influenced the jury, perjury may be predicated thereon, but the actual decisions, however, do not go so far. 'Material' and 'relevant' are interchangeable terms."

and on page 290 further:

> "In this case proof as to a separate and distinct crime was admitted. In the *Teal* case it was proposed to offer evidence of a charge separate and distinct from that alleged in the complaint. In neither case did the evidence have any legitimate tendency to prove any issue in the action. As the testimony upon which the alleged perjury is based was not material, the judgment should be reversed and the indictment dismissed."

In *State* v. *Hattaway* (S. Carolina), 2 Nott & McCord, 118, 10 American Decisions, page 580, the facts were (p. 580):

> "One Shackleford having been indicted for stealing a cow, and afterwards discharged, brought an action against the prosecutor for malicious prosecution. In this action Hattaway was called as a witness, and testified that Shackleford purchased the cow in question from one Carter, and that he was present at the time. Being asked where he lived at the time, he said, 'near Carter's, perhaps within a hundred yards,' whereas it was proved that he did not live in the state. The perjury assigned was his false testimony as

> to where he lived. Nott, J., instructed the jury that the testimony was not material so as to constitute perjury, but the jury thought otherwise, and found the defendant guilty. The prisoner then moved to set aside the verdict as contrary to law."

The Court said, in setting aside the verdict (p. 582):

> "It may sometimes be difficult to determine how far the evidence of a particular fact may go to strengthen the testimony of a witness, to a more material point in a case; and perhaps no precise and definite rule can be laid down on the subject. In all cases, therefore, so highly penal, where the question is of a doubtful character, I should incline to favor the side of the accused. In the case now under consideration, I cannot conceive that the testimony was either directly or indirectly material to the issue."

This case illustrates the tendency of jurors to disregard, in reaching a verdict, what are the essential elements of the crime and the importance of the control by the Court by binding and clear instructions. The jury is too apt to use a broad brush as it did in the case at bar, influenced, no doubt, by its thought that, in the light of the conviction in the conspiracy case, all witnesses who appeared for the defense in that case, and particularly those who were in any wise related to the Simons, *must* be guilty of something.

In *Commonwealth* v. *Pollard,* 53 Mass. 225, 12 Metcalf 228, the Massachusetts Supreme Court said, page 228:

> "The second exception relates to the materiality of the evidence offered by the government; and as to this, the presiding judge instructed the jury, that if the evidence al-

leged in the indictment was admitted to go to the jury, in the trial of the cause in which the perjury was alleged to have been committed, the jury might infer that it was material; and that if they were satisfied that the evidence alleged to be false was allowed to be given in the case then on trial, that was sufficient for them to infer that it was material; but that the degree of materiality was not material.

"The crime of perjury is the taking of a wilful false oath, by one who, being lawfully required to depose the truth in any judicial proceedings, swears absolutely in a matter material to the point in question. The oath must not only be wilfully false, but it must be material to the issue. For if it be of no importance and immaterial, though false, it is not perjury, because it does not affect the issue; and it lies on the prosecutor to prove that it is thus material. And it is also necessary that it should be alleged in the indictment that the matter sworn to was material, or that the facts set forth as sworn to, and upon which the perjury is assigned, should be sufficient in themselves to establish the materiality."

And, page 229:

"We are of opinion that the learned judge gave too much weight to the fact that the evidence was permitted to go to the jury, without other proof of its materiality. It often happens that testimony is admitted on the trial of a cause, either without objection, from its want of importance, or because there is no apparent legal objection to it, or for purposes of convenience, or through inadvertence, in the haste of the trial, much of which is immaterial to the issue."

I respectfully submit that the Trial Court permitted itself to be too much influenced by the action which it had taken in the conspiracy case in admitting this testimony (p. 180).

The matter of materiality is for the Court and not for the jury. *Gordon* v. *State* (Court of Errors and Appeals) 48 N. J. L. 611; *State* v. *Lupton* (Supreme Court) 102 N. J. L. 530, the burden resting upon the State to show materiality. Hence if materiality does not appear a direction for a verdict should be granted. The usual rule is that upon a collateral matter such as is here involved a party asking questions of the witness is bound by the answers. *State* v. *Mor,* 85 N. J. L. 558; *Materka* v. *Erie Railroad Co.,* 88 N. J. L. 372; *State* v. *Ruttberg,* 87 N. J. L. 5.

It was error, I submit, for the Trial Court in the conspiracy case to have permitted this see-sawing of witnesses on the quite immaterial matter as to whether La Conti had met Irving Simon on May 12, 1933 and whatever was said upon the subject was immaterial and cannot be made the basis of a charge of perjury.

B.

The Court should have directed a verdict of not guilty because there was not sufficient evidence to go to the jury. I have already referred to the rule which requires the evidence of two witnesses or one witness and corroborating circumstances before there can be a conviction for perjury (p. 10 of this brief) and to the fact that there were no corroborating circumstances present in the case at bar, although the Court apparently permitted the jury to consider the testimony of the witness Smith (p. 163) to the effect that, before defendant took the stand in the conspiracy case, he had been seen in conversation with Irving Simon, the admission of which testimony is considered under Point VI of this brief, p. 39. I have set forth the details of the evidence under the point having to do with the weight of the evidence (Point I, p. 18). I submit that the rule

requiring the testimony of more than one witness was not, if its real purpose is to be accomplished, complied with.

This Court recognized the importance of the rule in *State* v. *Lupton* (Gummere, C. J., Kalisch and Campbell, JJ.), 102 N. J. L. 530 at p. 534, and said at p. 536:

> "We are also of the opinion that the facts and circumstances adduced by the state to corroborate Swift's testimony, in order to establish the falsity of the defendant's oath, were insufficient in law to that end, for as the case stood the only testimony to the effect that the defendant below purchased liquor from Garton for beverage purposes came from the witness Swift, and as there was a lack of corroboration of that material allegation under the law, the crime of perjury was not proven, and, therefore, a verdict of acquittal should have been directed."

It is impossible to determine from the charge of the Court whether it considered the matter of materiality as left to the jury or no. It did not charge the jury that the testimony which was given by defendant in the conspiracy case was material, nor did it define perjury to the jury. Answering the question which it itself put "What is perjury?" (p. 277), it stated the substance of the statute which uses the term "perjury" and then it said (p. 277): "There are certain elements, *you may have noticed while I have read the definition,* that are constituent parts of the crime." But the "definition" did *not* contain the elements of the crime. Indeed, the definition did not indicate the fundamental fact that the testimony to be perjurious must have been false.

In concluding (p. 278) the Court informed the jury that if it was satisfied beyond a reasonable doubt that the defendant committed perjury "*as I have defined perjury,* and as is more fully set

forth in the indictment," it was the jury's duty to convict.

But I submit the Court had *not* defined perjury. Nor is it defined in the indictment, which brings me to

POINT XI.

The Court erred in not advising the jury as to the material allegations of the indictment and what facts must be established by the prosecution before the jury could convict, as requested by defendant in the 16th request to charge (p. 283, 62d and 63d assignment of errors and specifications of causes for reversal, pp. 310, 311).

I submit that the jury could not have been otherwise than uncertain after the deliverance of the Court's charge (p. 276), and I submit that in a case of this nature the defendant is entitled to a charge which will leave no doubt in the jury's mind as to the elements of the offense which they are to consider.

Conclusion.

I respectfully submit that this judgment should be reversed not only in the interest of defendant, but in the interest of the administration of justice. I submit that witnesses ought not to be subjected to prosecution for, and conviction of, perjury upon any such evidence as we have in the case at bar. Wigmore says that the most contradictory stories told on the stand are due to an unconscious mental bias and self interest, to which are added the imperfections of the perceptive element. "No perception is ever complete or

accurate. Always it is a mixture of perception, preperception, illusion and suggestion. To the inaccuracies and incompleteness of perception, those of memory are added. Memory involves not only knowledge, but also forgetting, illusion, suggestion and wrong conclusions." Realization of these fundamental facts is what has justifiably led to the rule which requires a greater degree of certainty before there can be a conviction for perjury than in any other case.

Respectfully submitted,

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New Jersey Supreme Court

State of New Jersey, Defendant-in-Error, *vs.* Thomas Serlinsky, Plaintiff-in-Error.	On Writ of Error to Passaic Quarter Sessions. Conviction on Indictment for Perjury. Heard below before Delaney, C. P. J. and a jury.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

(Italics and the like mine, unless otherwise noted.)

I.

On page 26 of his brief the Assistant Attorney General observes that it is apparent from the conclusion of my brief (p. 60) and my preliminary statement (p. 26) that I do not favor the indictment, trial and conviction of witnesses who commit perjury.

A "*fair*" reading of my brief would indicate the exact contrary. If my views generally upon the matter of punishment for perjury are of any importance, which they are not in this case, a reference to the opinions in *Edwards* vs. *Edwards*, 87 N. J. Eq. 546, at 547, and *Sachs* vs. *High Clothing*, 90 N. J. Eq. 545, will very clearly indicate what those views are, and they seem to be in accord with those expressed in that portion of the report of the Michigan Crime Commission, which is quoted on page 27 of the Assistant Attorney General's brief.

I am in accord with the idea that punishment for perjury should not be decreased. I can go

along with the idea of the creation of a new crime to be known as "false swearing", thus eliminating materiality, now an element of the crime of perjury; *but,* how about a case in which a defendant is called by plaintiff in an automobile accident case and asked how much his income is for the purpose of assessing damages? There are courts and courts and some court might direct that the question be answered. The defendant cannot refuse to answer. He would be guilty of contempt if he did. His divorced wife may be in the court room waiting for information upon which to predicate an application for increased alimony. Should he not on an indictment for false swearing be entitled to show the total immateriality of the question and answer. Instances may be multiplied and they are not fanciful. The element of materiality is an essential element of perjury because of the concept that a lie is an untruth told to one who has the *right* to know the truth for the purpose of deception. We do not live in Utopia and I am inclined to think the creation of the crime of false swearing would be dangerous.

I certainly can*not* go along with the ideas that

(a) Because the State is engaged in a crusade in the cause of righteousness all individuals who stand in its way are to be considered as outlaws.

(b) The State should use its position as the controller of the legal machinery to intimidate witnesses for the defense.

(c) The rule that it is better that ninety-nine criminals escape punishment than that one innocent person be punished should be obliterated.

(d) All witnesses produced for the State are truth tellers and all witnesses produced for the defense are falsifiers.

(e) The State may interrogate, keep in seclusion and the like, witnesses or prospective witnesses or those whom the State would like to have as witnesses, but that similar conduct on the part of the defense is not only evidence of guilt but criminal.

(f) All of those who testify for insurance companies in accident cases are truth tellers and the conduct of such companies and their agents is pure and undefiled while the conduct of all those on the other side is necessarily tinged with criminality.

(g) Because, in the judgment of the representatives of the State, there should be a crime of false swearing the Court may, in a perjury case, create it by ignoring materiality as an element of the crime of perjury.

(h) The State may rely upon the theory that the "the end justifies the means" but that no one else may.

(i) All counsel for alleged criminals are themselves criminals or mighty close to it.

I am as anxious as the Assistant Attorney General to prevent perjury but I cannot overlook that, in a case such as that at bar, where the claimed perjury is not demonstrated by confession, inconsistent writings, conduct or the like, the matter as to who is telling the truth depends upon oaths *alone* and that the greater number of witnesses may be the very witnesses who are falsifying and that, if every witness who takes the stand subjects himself to a prosecution and conviction of perjury where there is nothing except the oaths of witnesses, uncorroborated by circumstances, against him, no honest witness will desire to take the stand, and, if such a course of conduct is permitted, the result will be the defeat of the object

aimed at, and there will be no reduction in the crime of perjury but an increase, and we will have witnesses who are paid to take the chance.

Confronted with a situation such as here involved a defendant is helpless unless *some* regard is paid to the evidence which he may produce as to his reputation. I have referred to the testimony produced by Serlinsky as to his reputation on pages 15, 16, 34 of my original brief.

The difficulty with most crusaders is that they do not look to the end of the road or, if they do look, they decline to see, or, if they do see, they decline to appreciate.

So much for that.

II.

The State now for the first time (not having taken that position during the trial of the conspiracy case or in the trial of this case), suggests, on page 25, that there was *some* materiality going to the merits of the conspiracy case in the alleged conversation between Irving Simon and La Conti on May 12, 1933.

The inference which may be drawn from the statement of the State on page 2 of its brief that testimony with respect to this alleged conversation was offered in the State's main case is incorrect. It was offered in rebuttal and then solely for the purpose of indicating that, when Irving Simon had testified to the effect that he had first met La Conti on August 29 or 30, 1933, and that, although he had seen La Conti on May 12, 1933, he had had no private conversation with him on that date, was false (p. 3 of my Main Brief).

Not only was there no suggestion in the conspiracy case that the alleged meeting between Irving Simon and La Conti on May 12, 1933, and the conversation which La Conti says took place,

were material to the merits of the conspiracy charge but counsel for the State, on the motion to quash the indictment, at the bottom of page 28, conceded its lack of pertinency to that issue and again conceded it at pages 30, 177, 178, 179.

On pages 4 and 24 of the brief, particularly at page 4, the State leaves the impression that, if the testimony of Irving Simon and his witnesses, to the effect that he had not talked with La Conti on May 12, 1933, was true, then "Irving Simon's defense was good" (p. 4).

As I attempted to point out in my original brief that is *not* correct and the claim now made by the State illustrates the injury which was occasioned Serlinsky by the injection into the trial of the case at bar of, not only the proceedings in the conspiracy trial, but the verdict of guilty.

It is obvious that the jury in the conspiracy case might well have believed that Irving Simon did not have the conversation with La Conti on May 12, 1933, related by La Conti, and at the same time have believed that La Conti testified truly when he said that he had the conversation with Irving Simon which he related in April, 1933, and with respect to which he testified on his *direct* examination in the conspiracy case.

While I was not present I can hear counsel for the State telling the jury that, even if they believed that La Conti had falsified (the State not being responsible for the calibre of its witnesses but being obliged to use what came to its hand in the cases of this kind) still they might well believe that Irving Simon was a conspirator and that the story told by La Conti as to his conversation in April, 1933, correctly represented the fact, and I can conceive of counsel for the State pointing out to the jury that which he considered to be corroborating circumstances.

Those corroborating circumstances are well scheduled by the State's brief in the conspiracy

case in this Court under its Point XVIII (p. 45), and, among them, I do *not* find mentioned this alleged conversation between La Conti and Irving Simon on May 12, 1933.

But now, *for the purposes of this case,* the State is willing to take the position that, if Irving Simon did not have the conversation with La Conti which La Conti says he had on May 12, 1933, Irving Simon's defense "was good".

I have before me the brief of the same Assistant Attorney General who signed the brief in this case filed in the conspiracy case in this court. Under Point XVIII he argues the matter of the weight of the evidence in *that* case. Unless I have overlooked it, he does not refer, in any wise, to this alleged conversation between La Conti and Irving Simon on May 12, 1933, which he now deems of such importance as that, if it had not taken place, Irving Simon's defense "was good."

The only reference that I can find to the testimony of this meeting of May 12th, 1933, in the State's brief in the conspiracy case is on page 12, where it is mentioned in passing merely as going to the credit of Irving Simon.

I have considered the matter of materiality under Point X of the main brief (p. 52).

III.

The suggestion on page 16 of the State's brief that the conduct of Serlinsky in going to Mr. Cooper six weeks after the indictment was returned "and trying to persuade Cooper that he was, in fact, in the Court Room when Cooper told him to his face that he had never seen him before" is a further indication of guilt on Serlinsky's part in attempting to make evidence for himself, is but another indication of the attitude of the State that while it, through its detectives, may

approach witnesses, such as Finn and Corsetta, months after the event and get them to remember instances of passing nature which have occurred, but that neither defendant nor anyone for him can approach such a witness and attempt to refresh that witness's recollection. If the act is committed by a defendant it is proof of guilt. If the act is committed by the State it is proof of efficiency on the State's part.

What Serlinsky attempted to do as to Mr. Cooper was a perfectly natural thing for him to do if he were innocent and *were trying to prove his innocence,* a position the State forced him into. And, as I pointed out in the original brief (pp. 19 and 20), the fact that Serlinsky was able to put to Mr. Cooper in minute detail that which occurred in the Court Room and in the corridor on May 12, 1933, *is proof positive of Serlinsky's presence on the scene.*

Does the State *now* claim, in the face of the testimony of Mr. Shulman, Reese, Lippman, Irving Simon and Serlinsky, that Serlinsky was not even in the Court Room because Mr. Cooper says that he does not recollect that he was there, but adds (p. 46) that he does not deny that he was there?

IV.

In reply to what the State says (p. 11) in considering "the defense" I refer to my summary of the testimony (pp. 14, 15, 16, 17, 18) and what I have said under Point I under the caption "The verdict was against the weight of the evidence" (p. 18).

The state on page 11 disposes of the testimony of Mr. Shulman by stating that it was wholly negative in nature.

It was *not* negative in nature unless it be said that testimony coming from a person who was

present, when an act is alleged to have taken place, to the effect that it did not take place, is negative.

I have considered Mr. Shulman's testimony on page 31 of the original brief.

The testimony of Reese, a court attendant, which I considered on page 32 of the original brief, is disposed of by the State by a challenge to the integrity of Reese with nothing to support the challenge.

It is said that Mr. Shulman and Reese do not offset Finn and Corsetta.

But, if the State's view with respect to the iniquity of a defendant approaching a witness be correct, then the testimony of Finn and Corsetta is to be wholly excluded because they both say that they forgot all about what occurred in May until detectives from the Prosecutor's office came to see them.

I have considered the testimony of these two witnesses on pages 20, 21, 22 and 23 of my original brief.

The best that the State can possibly do is to match four oaths against four oaths.

But, in addition to that, as to the claim of the State, *persisted in to this moment,* that Serlinsky was not even present in the court house on May 12, 1933, we have Lippman, a court officer, considered on page 33 of my original brief, and it is perfectly obvious that Serlinsky *was* at the court house. If the same rule is to be applied to the State as is applied to ordinary plaintiffs in litigation, the insistence of the State on this matter throws a doubt upon the State's whole case.

And, when we are attempting to ascertain the truth, the *impossible* story told by La Conti as to this alleged conversation taking twenty-one or twenty-three minutes should not, I submit, be left out of consideration (p. 29 of my original brief).

In addition to all of this we have the reputation witnesses the testimony of whom is considered on pages 15, 16 and 34 of my original brief. In cases of *this* kind, oath against oath, all that a defendant can do is to prove his good reputation. This testimony alone is sufficient to tip the scales in favor of defendant. If it is to be lightly disregarded then *any* witness is at the mercy of a greater number for, as against the greater number, his reputation is his only shield.

V.

According to the State's view (p. 4) Serlinsky is to be convicted because "he had shown great interest in the defense of the case of *State* v. *Simon,* having been in court with a group of the Simons for five days during the trial, and having admitted that he was a *great* friend of Irving Simon." While not important, except as showing exaggeration by the State, Serlinsky did *not* say, at the point indicated by the State (p. 50, lines 20 to 25) that *he was a great friend of Irving Simon.* The Assistant Attorney General put the question to him in *that* form but the witness answered "I am *a friend* of his, yes."

He is likewise to be convicted, or at least discredited, because his wife was the sister of Irwin Simon, a brother of Irving Simon (p. 2 of State's brief).

He is likewise to be convicted, or at least discredited, because he took the stand "as a volunteer witness" and because, before taking the stand he was over on the extreme right of the court room talking to Irving Simon (p. 164).

The fact that the State now claims, under its Point VI (p. 20), that the evidence of the witness Smith, which was objected to and the admission of which I urge is error under my Point VI

(p. 30), indicates that Serlinsky was (p. 20) "'a pinchhitter' called on the spur of the moment *improperly* to aid Simon to attempt to secure an acquittal, *to which he was not entitled*" shows how the matter was put to the jury and how harmful it was notwithstanding that it did not indicate that which the Assistant Attorney General now says it did.

And, indeed, it would appear that the Assistant Attorney General conceives that all who aid a person in an "attempt to secure an acquittal, to which he was not entitled" are guilty of some crime, when all that they do is to tell the truth. The truth must not be told to secure an acquittal, to which a defendant is *not* entitled.

A prospective witness must determine whether a defendant is entitled to an acquittal and, if he determines that he is *not* entitled to an acquittal, he should avoid taking the stand.

VI.

If by what the State says on page 19 of its brief it means to infer that the State did not inject into the case the verdict of the jury in the conspiracy case, the State is not supported by the record. It is true that on page 37 the verdict of the jury is *not* disclosed. But it was injected into the record as I have pointed out on page 12 of my original brief.

Conclusion.

This Court did not hesitate in *State* v. *Ewen*, 6 N. J. Misc. 151, 140 Atl. 449, to reverse upon the evidence and I submit that it should not hesitate in the case at bar.

Respectfully submitted,

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INDEX