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New Jersey Supreme Court

WRIT OF ERROR

(*Filed Nov. 18, 1925*)

New Jersey, to wit:

The State of New Jersey to Charles M. Egan, President Judge of the Common Pleas of the (Seal) County of Hudson, constituting the Court of Quarter Sessions, in and for the County of Hudson, of the September Term, Nineteen Hundred and Twenty Five:

Because in the record and proceedings, and also in giving of judgment upon a certain indictment against May J. Bennett, of the City of Jersey City, in the County of Hudson, for obtaining money under false pretenses, whereof before you she has been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said May J. Bennett, as it is said, manifest error hath intervened to the great damage of the said May J. Bennett, as from her complaint we have received information, we being willing, in her behalf, to correct the error in due manner if any there shall be, and that speedy justice be done to her, the said May J. Bennett, command you that if judgment be thereon given, then that you distinctly and openly send under your seal, the record and proceedings aforesaid, and also the entire record of proceedings had upon the trial, with all things

touching the same, to our Justices of our Supreme Court of the State of New Jersey, on the 19th day of November, 1925, 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 the laws of New Jersey ought to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this 30th day of October, in the year of our Lord one thousand nine hundred and twenty-five.

Alex. Simpson, Attorney.

EDWARD J. KELLEHER, Clerk.

(Endorsed)

NEW JERSEY SUPREME COURT

The State,
Defendant in Error,
vs.
May J. Bennett,
Plaintiff in Error.

WRIT OF ERROR

Service of the within writ is hereby acknowledged this day of Nov., 1925.

JOHN MILTON, Pros.
Per Hayes.

RETURN.

The answer of Charles M. Egan, Esquire, Judge of the Court of Common Pleas of the County of Hudson, and within named the record and proceedings of the plaint whereof mention is within made, with all things touching the same, I send to the Justices of our Supreme Court of Judicature, at Trenton, New Jersey, at the day and year within contained in a certain schedule annexed as within I am commanded.

CHARLES M. EGAN, Judge.

Attest:
John J. McGovern,
Clerk.

State of New Jersey, Hudson County, to wit:

Be it remembered, that at a Court of Oyer & Terminer holden at Jersey Cty, in and for the said County of Hudson, on the Second Tuesday of December in the year of our Lord one thousand nine hundred and twenty-four, before Honorable James F. Minturn, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Honorable Robert V. Kinkead, and Honorable Charles M. Egan, and Honorable Daniel T. O'Regan, Judge of the Court of Common Pleas in and for the said County of Hudson, according to the forms of the Statute in such case made and provided by the oaths of

1. Alex. F. Gillis
2. Fred Schmitt

Indictments found by Grand Jury

3. Benjamin Lerner
4. James G. Murray
5. Frank Flynn
6. William Mayer, Jr.
7. Abraham A. Sarlett
8. Charles Borkholm
9. John S. Rath
10. John Campana
11. Daniel A. Schnebel
12. Joseph Schaeffer
13. Eugene Macchi
14. Morris J. Weiss
15. John J. Phelan
16. William Hill
17. Harry C. Greenfield
18. John Harris
19. Isaac A. Canning
20. Louis Lange
21. Jerry J. O'Halloran
22. Henry Garfunkel
23. George W. Knoll

good and lawful men of said County, duly empanelled, sworn and charged to inquire for the State in and for the body of the said County of Hudson, it is presented in manner and form following, that is to say, that the Bills following are true Bills.

A. F. GILLIS,
Foreman.

RETURN

And the foregoing being presented to the said Court on the Twentieth day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-Five with Bills of Indictment Nos. 391 to 414, inclusive, it is ordered by said Court that the said Bill of Indictment so as aforesaid included as Bill Number 391 for False Pretense, as charged upon May J. Bennett, be handed to the Court of Quarter Sessions for trial and disposal according to law, and said Bill is in words as follows:

INDICTMENT

Hudson Oyer and Terminer.
December Term, A. D., 1924.

Hudson County, to wit:

The Grand Inquest of the State of New Jersey, in and for the body of the County of Hudson, upon their respective oath

PRESENT, that May J. Bennett, late of the City of Jersey City, in the said County of Hudson, on the twenty-first day of January, in the year of our Lord One Thousand nine hundred and twenty-five, with force and arms, at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, did wilfully and unlawfully, designedly, falsely and fraudulently pretend to one Minnie Wharton, that she the said May J. Bennett, was about to purchase a certain restaurant and business known as the Village Kitchen, situate number One hundred and seventy-nine Varick Street,

in the City of New York, State of New York, and that she the said May J. Bennett, was then and there negotiating with the owners of said restaurant and business to purchase the same, and she the said May J. Bennett did falsely represent to the said Minnie Wharton that upon payment of certain moneys by the said Minnie Wharton to the said May J. Bennett, that she the said May J. Bennett would take the said Minnie Wharton as a partner or shareholder in said restaurant and business then and there situate and described as aforesaid.

Whereas in truth and in fact, as she the said May J. Bennett then and there well knew, that she was not about to purchase said restaurant and business known as the Village Kitchen, situate number One hundred and seventy-nine Varick Street, in the City of New York, State of New York; and that she the said May J. Bennett was not then and there negotiating with the owner of said restaurant and business to purchase the same; and that she the said May J. Bennett did not intend to take the said Minnie Wharton as a partner or shareholder in said restaurant and business, by color and means of which said false pretense and pretenses so made as aforesaid, by her the said May J. Bennett to the said Minnie Wharton, the said May J. Bennett did then and there unlawfully, knowingly, designedly and fraudulently obtain of and from the said Minnie Wharton a large sum of money, to wit: the sum of Fifteen hundred dollars in lawful money of the United States of America, the moneys and property of the said Minnie Wharton, with intent to cheat and defraud the said Minnie Wharton thereof, 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.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further PRESENT, that the said May J. Bennett, on the Twenty-first day of January, in the year of our Lord, One thousand nine hundred and twenty-five, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, Fifteen hundred dollars in lawful money of the United States of America, in all of the value of Fifteen hundred dollars, the goods, chattels and money of Minnie Wharton then and there being found, feloniously and unlawfully did steal, take and carry away, 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.

JOHN MILTON,
Prosecutor of the Pleas.

A TRUE BILL

A. F. Gillis,
Foreman.

Presented
March 20, 1925, and Handed Down to the Court of Quarter Sessions
John J. McGovern,
Clerk.

And afterwards to wit on the twenty-sixth day of March in the year of our Lord one thousand nine hundred and twenty-five at a Session of the Court of Quarter Sessions of the County of Hudson, aforesaid being now of the Term of December, One Thousand Nine Hundred and twenty-four in the

said year before the Honorable Daniel T. O'Regan, Judge of the Court of Common Pleas in and for the said County of Hudson, who doth constitute and hold the Court of Quarter Sessions, in and for the County of Hudson, here cometh the said May J. Bennett under the custody of the Sheriff of the County of Hudson in whose custody she had before been committed for the cause aforesaid, who being brought herein in her proper person by the Sheriff aforesaid, to whom she had been committed and having heard the indictment read and forthwith being demanded of and concerning the premises in the said indictment above specified, and charged upon her, how she will acquit herself thereof, she says she is not guilty thereof, and therefore for good and evil she puts herself upon the country, and John Milton, Prosecutor of the Pleas of said County who prosecutes for the State of New Jersey, in this behalf, doth the like.

Therefore, let said indictment be continued until October 29th, 1925 and let a jury come before the Honorable Charles M. Egan, Judge of the Court of Common Pleas in and for the County of Hudson, constituting and holding the Court of Quarter Sessions for said County, being now of the Term of April (1925) One thousand nine hundred and twenty-five of twelve good and lawful men of this State and residents in the County of Hudson, over 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 defendant to recognize on their oath whether the said May J. Bennett be guilty of false Pretense as in the indictment aforesaid is charged against her, or not guilty thereof, because as well the said John Milton, Prosecutor of the Pleas of the County of Hud-

son, aforesaid, who prosecutes for the State of New Jersey in this behalf, as in the said indictment have put themselves upon the same jury, and the same day is given to the parties aforesaid at the same time and place.

At which time, that is to say on the 28th day of October in the year of our Lord One thousand nine hundred and twenty-five, at Jersey City aforesaid in the County of Hudson, aforesaid, before the Honorable Charles M. Egan, Judge as aforesaid constituting and holding the Court of Quarter Sessions as aforesaid, here come as well the said John Milton, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid, as well the said defendant under the custody of the Sheriff of the County of Hudson to whose custody she had hitherto been committed and who being brought to the bar in her proper person by the Sheriff of the County of Hudson and the jurors of the Jury by the Sheriff of the County of Hudson, aforesaid, for the purpose, chosen, empanelled and returned, to wit: Louis W. Weiler, Frank Fastl, Chas. Wilson, W. G. Fowler, Frank Spernheimer, Lazarus Blumenthal, Oscar Barbacker, Jr., John I. Parma, Edw. Kananagh, Wm. Billings, John McComb, Harry A. Larsen, being called, come, who being chosen, tried and sworn to speak the truth and concerning the premises, and thereupon the trial of the said issue commenced before the said Court and Jury at which days the evidence of the parties is submitted and the Attorneys were heard thereupon and the said issue after a Charge from the Court was submitted to the said jury in charge of the said Officers of the Court, being duly sworn for that purpose, were taken to a private room to consider of their verdict, and afterwards to wit on October 28th, 1925, the last

aforesaid, at the City of Jersey City aforesaid, the said jury returned to the Court in charge of said Officers, sworn as aforesaid to keep them in charge and then and there in the presence of the said John Milton, Prosecutor of the Pleas as aforesaid and for the said Defendant, do say, that, the said defendant is guilty of False Pretense.

Whereupon all and singular the premises being seen and by the Court here fully understood the sentence of the law is and is by the Court here considered and adjudged, that the said defendant May J. Bennett be and is hereby sentenced to be confined in State Prison at hard labor for a Maximum Term of Three (3) years and a Minimum Term of Two (2) years and to pay a fine of One Thousand (1,000) Dollars, and thence until the said fine and costs of prosecution is paid.

Judgment entered and signed this Twenty-ninth day of October, A. D., 1925.

CHARLES M. EGAN,
Judge of the Court of Quarter Sessions
in and for the County of Hudson.

Attest:

JOHN J. McGOVERN,
Clerk.

J. George Landwehr,
Deputy County Clerk.

SENTENCE

State of New Jersey, County of Hudson, ss:

COURT OF QUARTER SESSIONS
Holden in and for said County.

THE STATE,
vs.
MAY J. BENNETT.

Sur Indictment No. 391, Term of December A. D. 1924, for False Pretense.

Mar. 26/25 The defendant being charged pleads Not Guilty and is remanded for trial. Bail $10,000.
Judge O'Regan.

Apr. 21/25 Case off. Judge Kinkead.

May 27/25 Case off. Judge Egan.

June 22/25 Case off. Judge Kinkead.

Sept. 21/25 Case off. Judge O'Regan.

Oct. 27/25 Case off. Oct. 28/25.

Oct. 28/25 The defendant being tried is found Guilty and is remanded for Sentence.
Judge Egan.

Oct. 29/25 Application for new trial by Attorney Alex. Simpson. Motion denied by Court.

Oct. 29/25 The Defendant being placed to the Bar is sentenced to be confined in State Prison at Hard Labor for a maximum ter of three (3) years and a minimum term of two (2) years and to pay a fine of One Thousand ($1,000) dollars and thence until said fine and costs of prosecution is paid.
Judge Egan.

TESTIMONY

HUDSON COUNTY COURT OF QUARTER SESSIONS

Before: Hon. Charles M. Egan, J., and a jury.

The State,
vs.
May J. Bennett,
Defendant.

Jersey City, N. J., October 28, 1925.

Appearances:

Aloysius J. McMahon, Esq., Assistant Prosecutor, for the State.

Alexander Simpson, Esq., for the Defendant.

Mr. Simpson: I move to quash the indictment on the ground that it does not state any false representation of existing fact. I do that to protect myself, because although most of the allegations are the promises, there is one allegation there which Your Honor probably would say was a false representation of existing fact, that is that she was then and there negotiating with somebody to do a certain thing, whereas she was not then and there negotiating. I simply make my motion to protect myself.

The Court: Motion denied.

Mr. Simpson: I ask an exception.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

A jury being empanelled and found satisfactory they were sworn.

Mr. McMahon opens for the State.

MINNIE WHARTON, sworn for the State:

Direct-examination by Mr. McMahon:

Q. Where do you live? A. Number 30 Prospect Street, Jersey City.

Q. Are you a married lady? A. Yes, sir.

Q. And you live with your husband? A. Yes, sir.

Q. Do you know the defendant, May Bennett? A. I met her through Miss Frazier, Miss Doris Frazier.

Q. Is she in the court room? A. Yes, sir.

Q. Where is she? Point her out? A. (Indicating) Right there.

Q. This lady sitting here? A. Yes.

The Court: Indicating the defendant.

Q. Tell the Court and jury how you happened to meet Mrs. Bennett or Miss Bennett? A. Miss Frazier first called me up and then Mr. Wharton and then Miss Frazier came to our house.

Q. Who is Miss Frazier? A. Miss Doris Frazier.

Q. A friend of yours? A. Yes, sir.

Q. How long have you known her? A. Around twenty-four years, or longer.

Q. Did she live in Jersey City at that time? A. Yes, she lived in Jersey City.

Q. Where does she live now? A. The Earlington Hotel, New York.

Q. Go ahead? A. That night, I guess, she came to the house, either that night or the next, and talked to us about this proposition—

Mr. Simpson: I object to relating the conversation with another person.

The Court: Yes, you cannot relate the conversation with Miss Frazier.

Q. Don't go into any conversation with Mrs. Frazier, unless Mrs. Bennett was there. When did you first meet Mrs. Bennett? Approximately? A. The twenty-fifth of November, 1924.

Q. Where was that? A. In the deMarco Hotel, New York City.

Q. How did you happen to meet her? A. Miss Frazier wanted an extra two thousand dollars and she was going to Washington—

Mr. Simpson: We object.

Q. You were introduced to her by Miss Frazier? A. I went to the hotel with the money for Mrs. Bennett.

Q. Is this lady here the lady you saw? A. Yes, sir.

Q. And you say you gave her some money? A. Yes, sir.

By Mr. Simpson: Q. Where?

The Witness: In New York.

Mr. Simpson: I object to anything done in New York. We are charged with obtaining money under false pretenses in New Jersey. Anything done in New York is incompetent under this indictment. This fifteen hundred dollars passed in New York, the money was obtained in New York. Therefore, this Court has no jurisdiction of it. I object to anything that occurred in New York between this defendant and the witness.

Mr. McMahon: I will consent to the striking out of any testimony of the moneys being paid in New York; but I have to lay a proper

foundation and get to the jury a proper perspective of this case. I think I have a right to show the development of the friendship and everything else that led up to the time when she paid the fifteen hundred dollars in New Jersey, and I did not understand the the witness to say anything about what occurred in any other place connected with this offence, and I will so instruct her.

Mr. Simpson: I object to any testimony in respect to what happened except what happened in New Jersey. I contend it is not competent to show the relationship or the story or the history of this transaction in New York, or the passing of money in New York. The pretense is made that the money passed here, and I object to any testimony in reference to any action or conduct on the part of the defendant in New York on the ground that it is incompetent.

Mr. McMahon: I am now addressing myself to the question, first, of the relations of this witness and defendant and I wish to question the witness in relation to any transaction between her and the defendant whether a money transaction or any other transaction.

The Court: I will allow you to show how the acquaintance was formed and the testimony of the specific transaction may be stricken out.

Defendant excepts.

Q. You say then, as I understand you, that you met for the first time Mrs. Bennett in this hotel in New York? A. Yes, sir, November twenty-fifth.

Q. On the introduction of Mrs. Frazier? A. Mrs.

Frazier was in Washington, and as I was going to New York she asked me to take this money to this defendant.

Q. Was Mrs. Frazier there? A. No, sir.

Q. How did you know Mrs. Bennett when you saw her? A. I went to the hotel.

Q. And inquired for her? A. Yes, sir.

Q. And is this defendant the lady who responded? A. Yes, sir.

Q. And that was the first time you saw her? A. Yes, sir.

Q. When did you see her again? A. I don't remember dates.

Q. Did you see her frequently? A. She came to the house after that.

Q. What house? A. Number 30 Prospect Street, Jersey City, my home.

Q. What happened at your house between you and Mrs. Bennett?

Mr. Simpson: Objected to unless the time is fixed.

The Court: Yes, you will have to fix the time.

Q. What time was it she came to your house? Was it after the introduction in November? A. Yes, sir.

Q. How long after? A. In January, the first of January.

Mr. Simpson: What year?

The Witness: 1925. I was away until January first and it was the second or the third of January that Mrs. Bennett came to my home.

Q. Did she come alone or was there anybody with her? A. She was alone, she was in an automobile, or she had a chauffeur.

Q. Was there anybody else in the house when she came in besides yourself? A. No, sir.

Q. You were alone? A. Yes, sir.

Q. And she was alone? A. I don't know, I mean that she came alone. I don't remember whether there was anyone else in the place or not. I was talking to her alone.

Q. Was your husband there? A. I don't remember whether he was in the house. He was not talking in the room.

Q. Did you have any conversation with her then? A. Yes, sir.

Q. What was the conversation? A. Money matters, I guess.

Q. Don't you know? A. Well, at the time she was going to take these restaurants over—

Mr. Simpson: I object. I do not object to the conversation between them, but I object to the conclusion of this witness on the conversation.

The Court: I think that is a proper conversation.

Q. Just tell the Court and jury what conversation you had with Miss Bennett at your house January second or third, don't preface it by something else, tell us what the conversation was? A. Mrs. Bennett wanted a thousand dollars—

Mr. Simpson: Objected to on the ground that it is a conclusion of this witness. If the witness states that Mrs. Bennett said she wanted a thousand dollars I cannot object to that, but I object to this witness giving her conclusions.

The Court: I think it is not responsive. She can give the conversation.

Mr. McMahon: I don't know how it could be made more responsive, myself.

The Court: I think she could state the conversation.

Mr. Simpson: If it is the fact she can say that Mrs. Bennett said so.

Q. Tell us what the conversation was as nearly as you can remember it? A. All along the business way that Mrs. Bennett was going to take over the restaurant and she wanted—

Mr. Simpson: I object to these conclusions.

Q. What did she say to you and what did you say to her when she came in? What did she say to you? A. Well, she wanted money to take over this restaurant.

The Court: You have said that several times. What did she say to you that conveyed that meaning to your mind?

The Witness: For restaurants.

Q. What did she say? Did she say, "I want a thousand dollars"? A. She was going to take over this place—

Mr. Simpson: I object.

The Court: You have not yet answered. Why don't you get right down to what she said.

Q. Did she say "Good morning" "Good evening." Or "How do you do"? A. Yes. I was surprised to see Mrs. Bennett in my home.

Q. Take up the conversation. What did she say and what did you say?

By the Court: Q. What were her words and what were yours? Did she say, "Give me a thousand dollars" Or, "Give me a million." Or what?

The Witness: She came in and spoke and she wanted this money.

By the Court: Q. You have said that several times. How did she say she wanted it?

The Witness: And I arranged it because she wanted it right away to take over this place.

Q. Were those her words, that she wanted a thousand dollars? A. Yes, sir.

Mr. Simpson: That is all right.

Q. She asked for it? A. She said could I raise a thousand dollars that she wanted to take over this place.

Mr. Simpson: That is all right, I have no objection to that.

Q. Continue the conversation, what did you say to that? A. Well. I don't remember just the words I answered.

Q. As nearly as you can remember the conversation. Did you make any reply to her statement that she wanted a thousand dollars for this restaurant? A. I did not have the money just then.

Q. Did you tell her that? A. Yes, sir.

Q. What was said by her in response to that? A. That I should try to get the money, that she was going to take those places and needed the money to invest in them and that it was a paying proposition and all the money she was going to make.

Q. Did she tell you who owned the restaurant? A. Not at that time, no, later, it was 179 Varick Street—

Mr. Simpson: I object.

Q. Stick to this one time when she said to you you ought to raise this money, what did you say? A. I don't remember just the words.

Q. Did you tell her you would or you would not? A. I would try.

Q. Was that the substance of your conversation on that occasion? A. Yes, as far as I know.

Q. When did you next see Mrs. Bennett and where? A. On the fifth of January I paid Mrs. Bennett the thousand dollars.

Q. In Jersey? A. No.

Mr. McMahon: I don't care about that. I consent to its being stricken out.

Q. When did you next see her in New Jersey? A. I don't recall the dates, it was after the fifth of January.

Q. At your house? A. Yes. She came to the house and I was in New York in the hotel different times.

Q. Getting down to this day when you gave her the fifteen hundred dollars, do you remember that date? A. Yes, I do, I remember it distinctly. It was the twenty-first of January, 1925.

Q. Where did you see Mrs. Bennett that day? A. She came to the house.

Q. In Jersey City? A. Yes. Mrs. Bennett came to our house the night before the twenty-first and wanted this money.

Q. Wanted what money? A. The fifteen hundred dollars and asked it of Mr. Wharton the first time we talked money over. Then the twenty-first Mrs. Bennett came back to the house and said she must have this money, she would lose the deposit of eight hundred dollars if she did not get the money.

Mr. Simpson: I object. There has been nothing yet of any deposit of eight hundred dollars. There is no such pretence made in the indictment. I do not object to the conversation, but I do object to the attempt to prove that this woman falsely obtained money by proving she would lose a deposit of

eight hundred dollars when she did not have it as no such charge is made in the indictment. The indictment is clear and distinctly laid on false pretence. This indictment is clear, first, that she was not negotiating with the owners of said restaurant, and second, that she represented that upon the payment of certain moneys, that she, the said Bennett, would take the witness into partnership. Those are the two pretences; whereas, in truth and in fact it is charged that she was not about to purchase the restaurant and charged that she was not negotiating with the owners of the restaurant and did not intend to take Minnie Wharton into partnership. That is the only false pretence. Now the witness comes along and pretends to say that she had eight hundred dollars up on deposit and while she claimed she had the eight hundred dollars up she in fact never had the eight hundred dollars upon deposit and that the witness gave her the money because she said she had the eight hundred dollars up on deposit and that she would lose that eight hundred dollars if she could not get the money advanced to her. There is no such charge in the indictment.

I object to any such testimony on the ground that it tends to vary the indictment and is to be used as a basis for varying the indictment.

Mr. McMahon: The charge in the indictment is that the defendant was negotiating I don't know of any clearer way to show what the negotiations were than to show what they were.

Mr. Simpson: I don't object to that. I am objecting to the effect of the testimony. I cannot be silent when it is going in.

The Court: I will allow it.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

Q. What business was she talking about? A. The business at 179 Varick Street, New York City.

Q. Did she say anything else? Did she tell you the name of the restaurant? A. Well, that is the one, I thought. I don't know that she mentioned it that day, but I had been over there and even clocked this place.

Q. I am trying now to get from you the conversation that took place between you and this defendant when you gave her the fifteen hundred dollars? A. Well, she just said she must have it and just what I have told you.

Q. Then the next day did she come over for it? A. Yes, sir.

Q. And you had raised it in the meantime? A. Well, it was that day, the twenty-first that she said all this, the night before she wanted the money and talk and talk and talk, money matters, she must have it.

Q. Did you give her the fifteen hundred dollars? A. Yes, the twenty-first.

Q. When you gave her the fifteen hundred dollars did she tell you what she was going to use it for? A. To take over this restaurant, she would lose it if she did not get the money, she must have it, that is what she said.

Q. And you understood from her that this fifteen

hundred dollars was to go toward the purchase of this Varick Street restaurant? A. Yes, number 179 Varick Street.

Mr. Simpson: I object to what the witness understood.

Q. Is that what she told you? A. To go towards this place and she came back after that and said she got it.

Mr. Simpson: I object to that statement on the ground that the witness is now talking about something else, she afterwards said she got it.

The Court: Just what really took place; whatever she said to you.

Mr. McMahon: This is a statement this defendant made, "She afterwards came back and told me she got it."

Mr. Simpson: I object. That is not laid as any pretence in this indictment, that the woman represented she had the restaurant. The pretence is the claim that she was negotiating and saying that she would take this woman into partnership and did not intend to, that is the pretence. There is no indictment that she at any time said she had the restaurant, and I object to any testimony of what she said after the money passed, because this charge is getting money by means of false pretences.

The Court: The point, as I understand it, is, that you are objecting to what she understood.

Mr. Simpson: Yes.

The Court: You can only relate the conversation that took place with her before the time of passing the money over. Not what

took place after. Now, if you will confine yourself to that I think we will get along.

Q. Did Mrs. Bennett give you any paper or receipt or note or anything else at the time that you gave her the fifteen hundred dollars? A. Yes, sir.

Q. What? A. She gave a promissory bank note.

Q. For how much? A. For twenty-five hundred dollars.

Q. (Showing witness paper) Is this the paper she gave you? A. Yes, sir.

Q. Is that her signature on the bottom of the note? A. Yes, sir.

Q. Did she sign that in your presence? A. Yes, sir.

Q. Why was this made out for twenty-five hundred dollars instead of fifteen hundred dollars, as the money you had loaned to her?

Mr. Simpson: Objected to unless the note is put in evidence. I object to her being examined on the note unless it is put in evidence. I do not object to its going in evidence but he certainly cannot get the contents of it before the jury if it is not offered in evidence.

Mr. McMahon: I think the State ought to be permitted to try this case according to its notion and theory of the case. I am not examining the witness on this note. She says this is the note which she got, for twenty-five hundred dollars, she said that before I showed her the note, and I asked her why it was for twenty-five hundred dollars instead of fifteen hundred dollars the amount she paid.

Mr. Simpson: I think it would be very convenient for the State to try the case without

objection, but I am here to make objection and I am going to make my objections. My objection now is that the State is getting the contents of written contents into the evidence without offering the document; the prosecutor is now reading to the witness and getting into evidence what is on the face of the document. That note is not yet offered in evidence, and the first year in Law School you are taught that you cannot get in the contents of written documents without producing the document and offering it, or accounting for its loss. My objection is this question attempts to get in the contents of a written document without offering the paper.

The Court: I think that is so.

Mr. McMahon: I am not examining her on the contents of this paper at all.

The Court: It seems that you are.

Mr. McMahon: Then I will offer the note in evidence.

Admitted and marked "State's Exhibit No. 1" of this date.

Q. Why was this note of October made for twenty-five hundred dollars instead of fifteen hundred dollars? A. Because Mrs. Bennett had to have the money, use the money and she said she would lose eight hundred dollars and the business and a thousand dollars did not mean anything to her.

Q. Was she paying the thousand dollars for the loan of this fifteen hundred dollars? A. Yes, a bonus.

Q. Was that to be paid in thirty days? A. One month that note was made out, the others were all three months and at the end of three months she expected she expected to get back some money.

Q. Did she ever pay this note? A. No, sir.

Q. Does she still owe you the fifteen hundred dollars as well as the amount of this note? A. Yes, sir.

Q. Did you present this note for payment? A. At the bank.

Q. Was it returned to you? A. Yes, sir.

Q. Is this paper which I show you the protest that came back? A. Yes, sir.

Mr. McMahon: We offer this protest in evidence.

Admitted and marked "State's Exhibit P-2" of this date.

CROSS-EXAMINATION by Mr. Simpson:

Q. On the twenty-first of January you gave this woman fifteen hundred dollars, is that right? A. The twenty-first of January.

Q. And she gave you back a promissory note for twenty-five hundred dollars payable in thirty days? A. Yes, sir.

Q. And that note you discounted at your bank? A. Yes, sir.

Q. And you got credit then for twenty-five hundred dollars on this note at your bank, less the discount, didn't you?

Mr. McMahon: I object to the question unless the witness understands what the word "discount" means.

Mr. Simpson: If she does not, perhaps Mr. McMahon will be sworn here or someone from the Prosecutor's office to tell what her brain operations are.

Mr. McMahon: I don't think the witness knows what "discount" means.

The Court: Counsel can make it plainer.

Q. What did you do with this piece of paper?

Did you take it and put it on a Christmas tree, or put it in your bank? A. I took it to the Franklin Bank.

Q. And deposited it? A. Yes, sir.

Q. And got a twenty-five hundred dollar credit? A. Yes, sir.

Q. Out of which the fifteen hundred dollars was taken, is that the fact? Or did you hand this woman the fifteen hundred dollars cash before you put the note in your bank? A. I gave Mrs. Bennett the fifteen hundred dollars.

Q. Cash in her hand before you got the credit at the bank for the twenty-five hundred dollars, is that right? A. I did not put in the note until after I had the cash.

Q. That is what I am trying to find out; did you get the cash you gave this Bennett woman out of the bank after you put in the note? Did you take the cash from somebody else and give it to her before you put the note in the bank? A. I gave it to her before I put the note in the bank I did not have the note until after I gave her the money.

Q. You gave her the money and she gave you the note and you went and got the twenty-five hundred dollar credit? A. I did not get a credit I put it in the bank and there was no funds there.

Q. For collection you put it in? A. Yes, sir.

Q. But you expected, at the end of thirty days, to have twenty-five hundred dollars for the fifteen hundred dollars which you gave her, didn't you? A. Yes, sir.

Q. The thousand dollars you were going to take for the use of the fifteen hundred dollars for thirty days? A. Yes, sir.

Q. And, as I understand she came to your house on the twentieth of January? A. On the night of the twentieth.

Q. And told you that she was going to buy a restaurant in New York, is that right? A. She wanted this place in New York.

Q. What did she tell you on the twentieth? A. She wanted the loan of this money to buy this place, she was buying one after another.

Q. I don't care about what she was doing. We are trying to find out what this woman told you on the twentieth? Did she tell you, "I want that fifteen hundred dollars to buy a restaurant. I only need it for thirty days. If you give it to me you can have twenty-five hundred dollars back in thirty days"? A. Yes, sir.

Q. And also "if I buy it I will take you in as a partner." Did she tell you that? A. Yes, half interest.

Q. She would give you a thousand dollars bonus on fifteen hundred dollars and a half interest in the restaurant she was going to buy? A. Yes, sir.

Q. When did she say she was going to buy it? A. She was to take it the twenty-first, she must have it that day.

Q. Have you taken judgment against her for twenty-five hundred dollars, on this note, your lawyers, has Mr. Broadhurst taken judgment against this woman for twenty-five hundred dollars on this note? That is the fact, is it not? You have got judgment against her? A. Yes.

Q. And you have got judgment against her on this note for twenty-five hundred dollars haven't you? A. I have not received any of the money.

Q. I know, you have not. That is what you are trying to get through this proceeding. You are trying to stick her in jail and get the money. But you have got a judgment against her for fifteen hundred dollars cash that you gave her and you have got

a judgment against her for twenty-five hundred dollars haven't you? A. Yes, sir.

Q. You have told us everything she said on the twentieth have you? A. On the twentieth she was talking to two of us.

Q. Have you told us everything she said on the night of the twentieth about getting the loan of this fifteen hundred dollars? A. Yes, she did not want to lose this restaurant, she must have it.

Q. Anything else she told you that you have not told us? A. I don't remember just anything else.

Q. The next day when she came how long was she there on the next day? A. She was there quite a while, she was there for lunch. Before lunch.

Q. Have you told us everything she told you before you handed her the fifteen hundred dollars? A. I don't know that I have said every word.

Q. Tell us everything you have forgotten she said to you on the twenty-first when she came over before you handed her the money? Tell us anything she said that you have not told us? A. Well, she just wanted this money.

Q. Not what she wanted, what she said? A. To take over this restaurant.

Q. Is that what she said? A. She came on the twenty-first and said, "I want fifteen hundred dollars to take over the restaurant, I must have it, I need it; so I will pay you twenty-five hundred dollars for it, and you will get your money back after thirty days and when I have the restaurant you will be taken in as half owner." It that what she said? A. Yes, sir.

Q. And is that all she said? A. Well, that was all concerning that case, of course there is lots of other things.

Q. I am not talking about other things. I am

talking about how you were induced to hand her over the fifteen hundred dollars. Is that all she told you? Is that all? A. She said she wanted the money to take over this restaurant.

Q. You have said that forty times. Is that all she told you? A. That is all she said while she was there.

Q. What else did she say which made you hand over fifteen hundred dollars, except that you would get a thousand dollars and the fifteen hundred dollars back? A. She said it was such a big business that would not be a circumstance.

Q. Anything else? A. As far as the thousand dollars is concerned.

Q. Anything else? A. That is enough, I guess.

RE-DIRECT-EXAMINATION by Mr. McMahon:

Q. When you got this note for twenty-five hundred dollars from this lady, did she tell you that it would be paid on its maturity? A. Yes, one month.

Q. And did she tell you where it would be paid? A. I was to put the note in and go to the bank, the Gotham Bank.

Q. She told you on the twenty-first of January that it would be paid at the Gotham National Bank, is that right? A. Yes, sir.

RE-CROSS-EXAMINATION by Mr. Simpson:

Q. She told you that in thirty days she promised you if you gave her fifteen hundred dollars, she made you the promise after thirty days this twenty-five hundred dollar note would be paid at the Gotham Bank in New York, and you placed it

in your bank and it came back unpaid, is that right? A. Yes, sir.

Q. And it was on her promise to pay you the twenty-five hundred dollars that you relied on and you gave her the fifteen hundred dollars? A. No. It was on this business.

Q. Then the promise to pay you back twenty-five hundred dollars in thirty days had no effect on you? A. Well, it was to take over this business.

Q. The promise to pay you twenty-five hundred dollars for fifteen hundred dollars, did that have any effect in inducing you to make the loan? A. I had confidence in the woman, in Mrs. Bennett.

Q. Did the promise to pay you twenty-five hundred dollars in thirty days at the Gotham Bank have any effect on your mind in making you part with the fifteen hundred dollars? Did it have any effect on you at all? A. I don't understand what you mean?

Q. Did the promise to pay you twenty-five hundred dollars in thirty days at the Gotham Bank have any effect on your mind in making you part with the fifteen hundred dollars? A. I don't understand that either. I don't know what way you mean.

Q. I mean, in making you let go, loosen up, let go of your fifteen hundred dollars? A. She wanted it for this business.

Q. When the woman told you, "After thirty days for fifteen hundred dollars I will make your fifteen hundred dollars grow into twenty-five hundred dollars." Did that have any effect on your mind? A. Well, I thought she knew what she was talking about.

Q. You cannot answer the question any better

than that? A. Well, I thought it was a big business she wanted the money for.

Q. And you thought that you would get twenty-five hundred dollars, you though you would get a profit of a thousand dollars in thirty days and a half interest in the business? A. I asked her how she could afford to do those things.

Q. Did you think that when you let her have the money? A. I did not ask Mrs. Bennett for money.

Q. We are not asking that. We are trying to get at the reason why you gave up your fifteen hundred dollars? A. Because she wanted to buy the restaurant and she would pay one thousand dollars bonus for the use of the money for that restaurant.

Q. Is that the only reason? A. That was the reason.

Q. Is that the only reason or were there other reasons? A. Well, that was the reason I gave it to her, because she wanted to have the money and was going to give a thousand dollars for it.

By Mr. McMahon: Q. Was there any other reason? Were you to be a partner in any way:

Mr. Simpson: I object to the Counsel leading the witness. He should not be allowed to lead the witness. She has already distinctly stated the reason she let the fifteen hundred dollars go was that she was to get a thousand dollars for it at the end of thirty days and I object to Counsel leading the witness.

Q. Was there any other reason besides this thousand dollars profit? A. She was to take over this place and she said I was to have an interest in it, that it would be a good paying proposition.

Q. Was it that, or the thousand dollars, or both, that caused you to give her the fifteen hundred dollars? A. Mrs. Bennett was giving a bonus anyway, I did not think so much about it, from the beginning to the end she was giving bonusses.

Q. Was that her proposition? A. Yes, sir.

Q. Did you talk to her over it? Did you ask her for it? A. No. I did not. I asked her how she could afford to do it.

Q. When you agreed to raise the fifteen hundred dollars and before this note was made and you got it together to give it to her, what was the reason you got the fifteen hundred dollars together for her? A. For the restaurant, this place she wanted to take.

Q. What made you pay the fifteen hundred dollars was the bonus, as you have said, the bonus is what made you pay? A. No. Mrs. Bennett had to have the fifteen hundred dollars?

Q. Not what she had to have. You have already told Mr. McMahon that you did not think so much about it. It was the bonus that got you to pay the money, is that the fact? A. No, I did not say it was the bonus that got me to pay it.

Q. What effect did the bonus have on you? Is that what made you part with your money to the defendant? A. Before, Mrs. Bennett was going to take over all these places and going to have a big business and wanted money to start this place.

Mr. Simpson: I object to that and ask that it be stricken out.

The Witness: She was talking about a whole string of restaurants, she was talking about a lot of places.

Q. Is that what made you part with your money, the bonus? A.—

Mr. Simpson: Yes or no.

Mr. McMahon: What effect did it have on your mind he is asking. Her answer was responsive.

Mr. Simpson: It is not responsive because she is not telling anything about the effect on her mind.

The Court: Either the bonus did or did not. That is yes or no.

Q. Did the bonus make you part with your fifteen hundred dollars or not? A. It did not make me part with it.

Q. Did it have any influence in making you part with it? Do you mean to say that a thousand dollars meant nothing at all to you? It did not mean anything at all to you, did it? A. Certainly it did mean something, but it was not that alone.

Q. What did it mean to you? What did the bonus mean to you? A. It meant a thousand dollars I guess.

Q. The thousand dollars did not make you part with your fifteen hundred dollars though? A. It was not that. I was not doing it for that. It was this business and all that Mrs. Bennett was speaking about.

Q. You have not told us anything about any business yet, except she was going to buy a restaurant and you were to be taken in as half partner. That is all you have told us. You have been on the stand almost an hour and that is all you ever told us, this woman said she was buying a restaurant and you were going to be put in as half owner, and were getting a bonus of a thousand dollars. Now, do you tell this jury that you did not care whether you got the thousand dollars or not? A. I don't say I did not care. I said Mrs. Bennett was going to give it because she had immediate use for the money.

Q. Did this bonus get your fifteen hundred dollars? A. I was not thinking of that.

Q. Were you thinking of it at all? Were you thinking of the bonus at all? A. Well, it is naturally some inducement to anyone.

Q. All right, it was to you, and you got a judgment, having only given fifteen hundred dollars in cash, you now hold a judgment against this woman for twenty-five hundred dollars, don't you, on this end? A. Yes, sir.

Q. Although you know in your own heart that you only turned over fifteen hundred dollars cash, you hold a judgment against her for twenty-five hundred dollars? A. When she had to have the money.

Q. And you got her indicted, didn't you, with the idea of sending her to States Prison unless you got your money back?

Mr. McMahon: We object to the question.

Mr. Simpson: I want to show this whole prosecution is founded on the endeavor to wring money out of this woman and this woman promised to have the indictment dismissed if she got back the twenty-five hundred dollars.

The Court: The State is not bound by what she might say or do, and, therefore, the objection will be sustained.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

Q. Is it not the fact that you have sent people to this defendant and promised her that you will have the indictment dismissed if she will pay you this twenty-five hundred dollars?

Mr. McMahon: Objected to. The State is

not bound by anything this witness did or said she would do.

Mr. Simpson: I do not want to show that the State is bound. I say I have a right to show the interest of this witness. She is trying to use this judge and this jury to collect a note and I have a right to show her interest, to show bias, so that the jury will know whether she is interested or disinterested. I am not trying to show the State is bound. She cannot tie up the State. But the jury certainly has the right to know anything that will affect her credibility.

Mr. McMahon: We withdraw the objection.

Q. Is it not the fact that you have sent people to her with the promise I have stated, or through your lawyers who got this judgment, is not that the fact, that if she will pay you the money you will let up on this criminal prosecution, is not that the fact?

Mr. Simpson: I object to the counsel for this witness in the civil case whispering to the prosecutor in the hearing of the jury so that the jury can hear what they say in this trial.

The Court: I don't know that the jury have heard what they said.

Mr. Simpson: If your Honor is observant you could actually overhear what counsel whispered to Mr. McMahon, and I could hear what Mr. McMahon's reply was, and I am three times as far away as the jurors are.

Mr. McMahon: I resent this imputation of Senator Simpson's that I am trying to do anything or say anything to influence the jury. He said I talked loud enough for him

three times as far away from the jury as I am to hear what I have to say.

Mr. Simpson: I object to a private lawyer doing it.

The Court: Proceed with the trial. Is there any objection to this question.

Q. (Question read as follows): Is it not the fact that you have sent people to her with the promise I have stated, or through your lawyers who got this judgment, is not that the fact, that if she will pay you the money you will let up on this criminal prosecution, is not that the fact? A. Yes.

Q. You were examined as a witness in the Police Court on this charge were you not? A. That was in Plainfield.

Q. No. Here in Oakland Avenue? A. Yes, sir.

Q. And Mr. Caruthers, the lawyer for Mrs. Bennett from New York, who sits there, he was in court wasn't he at the time? A. Yes, sir.

Q. Didn't you swear there that the only thing that occurred on this fifteen hundred dollar transaction was that she rushed in and said she must have the fifteen hundred dollars at once and would pay a thousand dollars for the use of it, and that you then let her have the fifteen hundred dollars. Is not that what occurred there? A. I said she came to the house.

Q. Listen to my question and answer it. You did or did not. Do you understand my question? Is it the fact or is it not? That is, that all that happened in the passing of this fifteen hundred dollars was that this woman came in in a hurry and said she must have the fifteen hundred dollars and she would pay a thousand dollars bonus for it, for thirty days and on that you let her have the money?

Did you so swear or not? A. She asked for this restaurant, she wanted.

Q. I am not asking that. Did you say that or did you not say it? You either said it or did not say it, under oath in the presence of the lawyer from New York? Did you say that or don't you remember what you said? A. I don't remember just what was said. I said all along she took this fifteen hundred dollars for the restaurant.

Q. I don't care what you said all along. You spoke about her saying something that she had made a deposit of eight hundred dollars. Didn't she tell you it was a deposit of three hundred dollars? A. She did not. She said eight hundred dollars in my own home.

Q. When was that? A. On the twenty-first.

Q. On the night, or the time she got the fifteen hundred dollars? A. When she got the fifteen hundred dollars, yes.

Q. She told you she had made a deposit on the restaurant of eight hundred dollars? A. Yes, and she would lose the deposit and the business.

Q. That is all she told you about the deposit? A. Well—

Q. Is that all or is that not all? A. That she made a deposit of eight hundred dollars.

Q. That is all she said about the deposit? A. And she would lose the place if she did not get the fifteen hundred dollars.

Q. And that is all she said about it. Is that all she said about it? A. That is what she did say.

Q. Is that all she said? A. I don't understand what you mean. She wanted to take over the business.

Q. You understand what I mean when I ask you if you have given the entire conversation. You

have or you have not. Now, I am asking you, is that all that was said about the deposit by Mrs. Bennett? Did Mrs. Bennett say, "I have made a deposit of eight hundred dollars on the restaurant and I will lose it if I do not get the fifteen hundred dollars today?" A. Yes, today.

Q. Is that all that was said about it? A. Yes, on the twenty-first.

Q. That is all that was said about the deposit and the restaurant? A. Yes, sir.

By Mr. McMahon: Q. Did she say where the restaurant was?

Mr. Simpson: Objected to as leading. This witness has already sworn under oath all she said about the deposit was that she had made a deposit of eight hundred dollars and she would lose it. On cross-examination this woman over and over again said that is all that was said, she never said anything further about where the restaurant was, or anything of the kind, because I have asked her over and over again is that all that was said and she said yes. If that is all that was said then this defendant, according to her, never said where the restaurant was. Four times she has told what was said and then I asked her repeatedly if that was all that was said and she repeatedly told me it was all and I submit she should not be allowed under leading questions to substitute something else for that. I submit counsel should not be allowed to lead the witness.

Mr. McMahon: I am not leading her.

Mr. Simpson: You are trying to have her supplement or add to her former answers.

The Court: I do not think it is leading. she may answer.

A. At 179 Varick Street. I told you that. I had been over there and clocked the place and that was the restaurant she talked about.

By Mr. Simpson: Q. You clocked the place? A. She wanted to see the number—

Q. I did not ask you what she wanted.

By Mr. Simpson: Q. She said it was 179 Varick Street, when did she say that? A. She had been talking about it for over a week.

Q. When? At the time you gave her the money? A. I don't remember the date.

Q. Then you don't remember whether she said it when you gave her the fifteen hundred dollars or not? A. It was to take that place.

Q. You don't know whether she mentioned 179 Varick Street on the twenty-first of January or not, do you? A. I don't remember that she did or that she did not, but that was what we had been talking about, the whole talk.

Q. For how long before? A. A week or so before.

Q. Did you let her have this money in cash or check? A. Twelve hundred and forty dollars in cash and two hundred and sixty dollars her own check she gave us the night before, on the twentieth.

Q. What do you mean her own check? A. Mrs. Bennett's check.

Q. Which you put through your bank? A. She gave me a check for two hundred and sixty dollars the night before on the twentieth and I gave her her check back for two hundred and sixty dollars and twelve hundred and forty dollars in cash, in small bills.

Q. Then you only gave her twelve hundred and forty dollars altogether for that note—

Mr. McMahon: That is argument with the witness.

Mr. Simpson: I want to understand this thing.

Q. This woman came to you on the twentieth and presented to you a check for two hundred and sixty dollars? A. Yes, sir.

Q. She goes back to New York and comes back the next day and you present her with her own check which she has given to you and with twelve hundred and forty dollars in cash? A. Yes, sir.

Q. How did you give her fifteen hundred dollars then?

Mr. McMahon: I think that is plain. That adds up fifteen hundred dollars.

Mr. Simpson: Yes, it adds up two hundred and sixty dollars of the defendant's money and twelve hundred and forty dollars of the witness's money.

The Witness: How could it be hers when it was her check she had given me. It was due me.

Q. What do you mean given to you? A. She owed the money to me.

Q. She owed you two hundred and sixty dollars and paid you? A. Yes, sir.

Q. And she came back the next day and you gave her back her check given to you the night before and twenty hundred and forty dollars and got a note for twenty-five hundred dollars? A. Yes, sir.

CHARLES WALTER WHARTON, sworn for the State.

Direct-examination by Mr. McMahon:

Q. You are the husband of the lady who was just on the stand? A. I am.

Q. Do you know this defendant May Bennett? A. I do.

Q. Where did you see her first? A. At number 30 Prospect Street, Jersey City.

Q. Is that your house? A. It is.

Q. At what date? A. On the night, the evening of January twentieth, 1925.

Q. Who was present at the time she was at your house? A. Mrs. Wharton, Mrs. Bennett, and myself were in the room.

Q. Can you tell the Court and jury what the conversation was with respect to the transaction that you had or your wife had with Mrs. Bennett? A. Mrs. Bennett said that she had to have fifteen hundred dollars, she was talking with Mrs. Wharton and asked Mrs. Wharton to call me in from the sitting room to see if I could not devise some means by which fifteen hundred dollars could be raised. After talking the matter over I arranged to get some money for her.

Q. Did she say what she wanted the money for? A. I am not sure that she did tell me right at that time what she wanted the money for.

Q. Did she at any time tell you what she wanted the money for? A. No. That was the first time and only time that I met Mrs. Bennett.

Q. Was that all the conversation that took place between your wife and Mrs. Bennett in your presence? A. Well, there was considerable talk about getting this money together, the exact conversation I cannot recall.

Q. Did she say anything about what the money was to be used for? A. No. I cannot say that she did tell me what she wanted the money for.

Q. She did not tell you? A. No, I don't think so.

Q. Did you assist your wife in getting this money together? A. I did.

Q. Do you know what purpose your wife was using it for? A. I know what my wife had told me, yes.

Q. But you did not know anything from what Mrs. Bennett told you? A. Mrs. Bennett did not tell me, I am quite positive she did not tell me what the money was to be used for that night.

CROSS-EXAMINATION by Mr. Simpson:

Q. You say you got the money together. Was it your money or your wife's money? A. Both. Whatever is hers is mine.

Q. Did you raise it? A. The twelve hundred dollars, yes, part of it.

Q. How long were you with Mrs. Bennett the night that she came to your house on the twentieth? A. Possibly an hour.

Q. And this thing was gone into in all its details was it, and Mrs. Bennett's complaint was that she had to have the money in a hurry, was it? A. That is it.

Q. So the understanding was made that night that she was to pay a bonus of a thousand dollars for it if she could get it, is that right? A. A thousand dollars for fifteen hundred dollars.

Q. And she only wanted it thirty days? A. Yes, sir.

Q. But she was pressed for it and had to have it in a hurry? A. Yes, sir.

Q. As far as you recall that is all that was said, she must have this money in a hurry and would pay a bonus of a thousand dollars for it? A. Yes, sir.

JOSEPH J. SMITH, sworn for the State.

Direct-examination by Mr. McMahon:

Q. Where do you live? A. Number 90 Orchard Street, Ridgefield Park, New Jersey.

Q. Are you connected with the Gotham National Bank? A. I am assistant cashier.

Q. Do you know the defendant May J. Bennett? A. I know her by sight.

Q. Did she have an account in your bank?

Mr. Simpson: Objected to. That is not the best evidence. It could not be the best evidence. The mere fact that this man works there. It may be a big bank and he may not be informed of the account.

Q. Is this card which I show you a signature card of a deposit account opened by May J. Bennett in your bank?

Mr. Simpson: I object to the whole line of examination. What difference does it make whether she had a deposit. There is no false pretense alleged that she said she had a deposit in this bank. There are two false pretenses alleged, one that she was negotiating for the purchase of a restaurant when she was not, second, when she purchased it in the future she would take this woman in partnership. We have already proof that the note she gave was not paid.

The Court: What do you want to prove?

Mr. McMahon: I want to prove that at the date she got this money from this woman, this fifteen hundred dollars, then her account was closed with the Gotham National Bank.

Mr. Simpson: She never said she had money in the Gotham National Bank. They say she said she was going to use the fifteen hundred dollars to buy a restaurant and not to put in the Gotham Bank, and even if that was so there is no false pretense alleged in the indictment that the pretense on which this money was obtained was that she would deposit it in the Gotham National Bank, because that would be a promise.

Mr. McMahon: I suppose if those pretenses are shown in every step in the procedure a promise will support them.

Mr. Simpson: A promise is never a false pretense. She did not make the pretense if it was a promise. I further object that this testimony is not relevant as to when the account was closed. Here is a note manifestly protested for non-payment, and a deposit slip and a card which does not prove anything, it is not a record of the bank. If they claim this woman had something the matter with her account they should have her whole account brought in here, not a card which means nothing or a deposit slip.

The Court: You propose to show that the account was closed at that time?

Mr. McMahon: Yes.

The Court: And that this note made payable there could not have been collected.

Mr. Simpson: We object to that on the ground that it could have been collected.

I could make a note on the First National Bank and the night before its becoming due I could deposit or give to the bank money with which to pay the note. That does not prove anything.

The Court: Why does not that follow.

Mr. McMahon: Yes. But she would have to put in the money.

Mr. Simpson: In other words, if her account was closed the first of December and she made a note payable on the thirtieth of December, it proved nothing.

The Court: That is what I would like to have made clear.

Mr. McMahon: Mrs. Wharton testified on the stand that after taking this note which itself is made payable to the Gotham National Bank this woman told her her money would be paid in the Gotham National Bank. I want to show that she had done no banking business in Gotham National Bank at that time.

Mr. Simpson: Is it necessary to have an account there? Cannot I make a note payable at any bank and then give the bank the money to pay it? Assume that he is allowed to prove that she had no account in the Gotham Bank, how does that show that the statement she would pay it at the Gotham Bank was false.

Mr. McMahon: I do not press it.

Now, if the Court please, there is one witness, a very important witness for the State, on her way from New York and I ask an adjournment at this time for luncheon to allow her to get here.

Mr. Simpson: What do you expect to prove by her?

Mr. McMahon: She is the owner of this restaurant and she will testify that she never had any negotiations with Mrs. Bennett for the purchase of the restaurant.

Mr. Simpson: Where is the restaurant located?

Mr. McMahon: Number 179 Varick Street, New York.

Mr. Simpson: We did have negotiations with those people for that purpose and paid money on account.

The Court: I will grant the motion for a recess at this time.

The Court thereupon ordered a recess until 12:45 this day.

After recess.

DORIS E. FRASER, sworn for the State.

Direct-examination by Mr. McMahon:

Q. Where do you live? A. Alpine Club, New York City.

Q. Did you previously live in Jersey City? A. Yes, sir.

Q. Where? A. 75 Queen Street.

Q. Did you live in Jersey City in 1924? A. Yes, sir.

Q. In November 1924? A. Yes, sir.

Q. Do you know the complaining witness, Mrs. Wharton? A. Yes, sir.

Q. How long have you known her? A. Twenty odd years.

Q. Do you know the defendant May J. Bennett? A. Yes, sir.

Q. How long have you known her? A. Since June 1924.

Q. Did you introduce this defendant to Mrs. Wharton, the complaining witness? A. Yes, sir.

Q. Were you ever at Mrs. Wharton's house with this defendant Mrs. Bennett? A. No, sir.

Q. Were you ever at any other place with this defendant Mrs. Bennett? A. I don't remember, I don't believe I was.

Q. Where did you meet Mrs. Bennett? A. I met Mrs. Bennett at number 124 West Eighty-second Street, New York City where we were both employed.

Q. Did you work with Mrs. Bennett? A. Yes, sir.

Q. What work did you do for her? A. I was to go into business with her as manager of her books and her accounts.

Q. Manager of her books? A. Her accounts yes, to take care of the accounts.

Q. What business did she have?

Mr. Simpson: I object to all this. The specific false pretense in this indictment attempted to be substantiated by the testimony of the complaining witness is certain regarding certain events happening on the twentieth and the twenty-first of January, 1925, so that all that this woman did in New York for Mrs. Bennett at any other time at another place had nothing to do with this indictment. We are trying an indictment for obtaining fifteen hundred dollars on the

twenty-first of January, 1925, under a false pretense under a false pretense that we were negotiating for the purchase of a restaurant and in the future some time the complaining witness would be employed there. Any testimony that this woman can give as to what she did for Mrs. Bennett in New York at any time before the twentieth or the twenty-first of January has nothing to do with this case.

The Court: The answer may be immaterial.

Mr. McMahon: I withdraw the question.

Q. Did you have anything to do with Mrs. Bennett in the matter of the purchase of a restaurant at 179 Varick Street, New York?

Mr. Simpson: I object to this witness telling the Court and jury whether she had anything to do with the purchasing of it arising out of an alleged conversation between her and Mrs. Bennett about the purchase of it. The allegation of the State is that we never were in negotiation for the purchase of this restaurant. That is the false pretense. This question asks this witness for her opinion as to whether she had anything to do. What she did at the request of Mrs. Bennett about number 179 Varick Street may or may not develop, but it certainly is not competent to ask the general question, did you have anything to do with the purchase.

The Court: I suppose that only calls for yes or no.

Mr. Simpson: But it very often means that we get a long answer.

The Court: If it is I will strike it out.

Either yes or no, did you have anything to do with the purchase?

The Witness: No, sir.

Q. Do you know whether Mrs. Bennett did negotiate to purchase the restaurant number 179 Varick Street?

Mr. Simpson: Objected to as calling for a conclusion. I do not object to whenever she was present what she saw or heard Mrs. Bennett say to people, but this is asking for a conclusion.

A. I know she did not.

Mr. Simpson: I object to that and ask that it be stricken out because that is a conclusion.

The Court: Yes. The question is whether or not you know. Do you know whether or not she had anything to do with negotiating the purchase, yes or no, either you know or you do not know.

The Witness: Not in my presence.

Q. What was your employment with Mrs. Bennett?

Mr. Simpson: Objected to unless the time is fixed which should be somewhere around this time.

Q. On January twenty-first or thereabouts, 1925? A. Early October 1924—

Mr. Simpson: I object to anything in October 1924.

The Court: Q. You are confined to the question. What was your occupation with Mrs. Bennett in January, 1925?

The Witness: I was looking up a hotel for her to purchase.

Q. Did you look up as a part of your duties the place, number 179 Varick Street, New York City? A. No, sir.

Q. Was that a hotel you were looking up? A. No, sir.

Q. Were you doing all the looking up of hotels for Mrs. Bennett? A. No, sir.

Q. Who else was doing it? A. Miss Grace Olsen. Mrs. Wharton.

Q. The complaining witness Mrs. Wharton? A. Yes, sir, and another lady, I forget her name.

Q. Do you know who the owners of the restaurant or business at number 179 Varick Street are or is? A. Yes, sir.

Q. Who are they? A. Mrs. von Wulf.

Q. Is Mrs. von Wulf the owner of any other business? A. Yes, sir.

Q. Where is that place of business? A. At number 155 Greenwich Avenue.

Q. Do you know whether there were any negotiations to purchase that other business from Mrs. von Wulf? A. Yes, sir.

Mr. Simpson: Objected to. What the State relies on is the question of 179 Verick Street. They say that is the false pretense. There is no claim that the defendant had any negotiations for the purchase of any other place and it is not concerned in this indictment.

Mr. McMahon: Here is a woman who happens to own two places, for one of which negotiations were had. I want to make it clear what the negotiations were about and not about this Varick Street place, as a part of my case, because I do not want any confusion about it.

The Court: I do not see that it will do the defence any harm.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

Q. Were you ever in the premises number 179 Varick Street representing Mrs. Bennett? A. No, sir.

Q. Did Mrs. Bennett ever speak to you about the purchase of number 179 Varick Street, New York? A. Yes, sir.

Q. When? A. Some time early in January.

Q. What did she say to you? A. She told me she was negotiating the purchase of both places.

Q. Owned by Mrs. von Wulf? A. Both of them, called the Greenwich Village Kitchen.

Q. What is the name of the restaurant at number 179 Varick Street? A. The Greenwich Village Kitchen.

The Court: Q. When did she tell you she was negotiating for the purchase of that place?

The Witness: Early in January 1925.

Q. What did she say to you? A. She said, "I have two places open in the Village that I want to take and I can obtain them very reasonably and they both have good business. I want to obtain those."

Q. Did she tell you whether she had a deposit on the Greenwich Village Kitchen? A. I don't remember that she did.

Q. Did she tell you that she had a deposit on the Village Kitchen and the other place owned by Mrs. von Wulf? A. Yes, sir.

Q. She did? A. She did.

Q. Did she show you any contract or paper with respect to the purchase of the Village Kitchen? A. No, sir.

Q. Did she say anything to you about Mrs. Wharton becoming a partner of hers in the Village Kitchen? A. No, sir.

Q. Did she tell you that she had given her fifteen hundred dollars toward the purchase of the Village Kitchen? A. No, sir.

Q. Was your conversation with Mrs. Bennett as late in January as January twenty-first? A. Yes, sir.

Q. Was it January twenty-first or later? A. I would say it was January twenty-third about.

Q. Were you at that time working for Mrs. Bennett? A. Yes, sir.

Q. Were you receiving a salary? A. Yes, sir.

Q. Where was Mrs. Bennett's place of business? A. Just her hotel where she lived.

Q. At the time that you met Mrs. Bennett what were you working at?

Mr. Simpson: Objected to as irrelevant and incompetent.

(Question withdrawn).

Q. You say her place of business was her room in the hotel? A. Yes, sir.

Q. What hotel was that? A. The Marquise on Thirty-first Street, New York.

Q. Is that the same hotel you live in now? A. No, sir.

No cross-examination.

EMMA VON WULF, sworn for the State.

Direct-examination by Mr. McMahon:

Q. Where do you live? A. Number 54 Charles Street, New York City.

Q. Are you the owner of or were you the owner of in January 1925 of a restaurant known as the Village Kitchen? A. Yes, sir.

Q. Where was that located? A. At number 53 Greenwich Avenue.

Q. Were you the owner of any other place? A. I was in partnership.

Q. In what business? A. Number 179 Varick Street.

Q. Did you ever have any dealings with May Bennett looking towards the purchase of number 179 Varick Street? A. No, sir.

Q. Did she ever give you or your partner a deposit of eight hundred dollars? A. No, sir.

Q. Was there any contract ever drawn between you and Mrs. Bennett for the purchase of number 179 Varick Street? A. No, sir.

Q. Did you ever require a fifteen hundred dollar deposit on the twenty-first of January from Mrs. Bennett to secure the purchase of number 179 Varick Street? A. No, sir.

Q. You never had any business dealings with Mrs. Bennett with regard to the purchase of number 179 Varick Street? A. No, sir.

CROSS-EXAMINATION by Mr. Simpson:

Q. Do you know Mrs. Bennett? A. Yes, sir.

Q. Have you had business dealings with her? A. At number 53 Greenwich Avenue, yes.

Q. What were they? A. She gave me a deposit of a hundred dollars.

Q. On what? A. On number 53 Greenwich Avenue.

Q. Was she discussing with you about the purchase of the other place on Varick Street? A. No. Nothing about it.

Q. Who knew nothing about it? A. I know nothing about it.

Q. Don't you know that you met Mr. Caruthers that man who sits alongside of you and you had a contract drawn for the purchase of number 179 Varick Street? A. We did not, no, it was number 53 Greenwich Avenue.

Q. What was she buying, number 53 Greenwich Avenue? A. She was to buy the restaurant.

Q. What? A. My business there.

Q. For how much? A. Eight thousand dollars.

Q. How was it to be paid? A. She was to pay me three thousand dollars. I have the papers here.

Q. Produce the papers? A. Drawn up by Mr. Caruthers and my lawyer, (producing).

Q. This is drawn up by who? A. One by Mr. Caruthers and one by my attorney.

Q. Which was drawn up by Mr. Caruthers? A. This one.

Q. These two sheets? A. This one here (indicating).

Q. This is the one you signed, is it? A. Yes, sir, the three signed it.

Q. The three of you signed it? A. Yes, sir.

Q. It is dated January twenty-first? A. That is right.

Q. That is the date it was signed? A. Yes, sir.

Q. Was there any other agreement drawn up besides this one? A. No, sir.

Q. How long was she negotiating with you about this? A. About a month before this occurred.

Q. How many times did she see you? A. I guess five or six times.

Q. Where did she see you every time? A. In my place of business.

Q. Where was your place of business? A. Number 53 Greenwich Avenue.

Q. What was this Varick Street? A. That is another place that I have an interest in.

Q. Was that for sale at all? A. No, it was not for sale.

Q. Was the sale of it discussed? A. Never.

Q. By you with anybody? A. By anyone.

Q. You never discussed the sale of it by you? A. No, never.

Q. You were discussing the sale of number 53 Greenwich Avenue? A. Yes, sir.

Q. Known as the Village Kitchen? A. The Village Kitchen.

Q. And 179 Varick Street is not the Village Kitchen, is it? A. It is the Village Kitchen, too.

Q. What, are both the Village Kitchen? A. Both of them.

Q. Both have the same name? A. Both have the same name.

Q. So that she was in negotiation with you for the purchase of a restaurant known as the Village Kitchen? A. Yes, number 53 Greenwich Avenue, that is.

Q. And it was owned by you and you alone? A. Yes, sir.

Q. The other Village Kitchen on Varick Street was owned by you and who? A. A partner, Mrs. Layton.

Q. When was the first interview you had with Mrs. Bennett about the purchase of the Village Kitchen? A. Some time in February.

Q. Some time in February 1925? A. No, I think it was around about the first.

Q. About the first of February, 1925? A. Yes, sir.

Q. Last February? A. Yes, sir.

Q. That is the first interview you had with her? A. Yes, sir.

Q. You are positive about that? A. Yes, sir.

Q. Just as positive as anything you have testified to? A. Yes, sir.

Q. How is it if the first of February is the first time you saw her your contract is dated the twenty-first of January, 1925? A. Before she gave me that.

Q. Just tell us how it is, you swear point blank under oath that the first time you saw this woman was the first of February last, and you have already produced a paper signed by you dated January twenty-first 1925, which is the true statement? A. She came there a month before and a deposit was made. She came there about the place five or six times.

Q. You have already sworn that the first time you ever saw her was the first of February, 1925, is that true? A. Well, all I can tell you it was a month before that she gave that deposit.

Q. Is it true the first time you ever saw her was the first of February 1925?

Mr. Simpson: I offer these three papers in evidence.

Mr. McMahon: We object to their offer during the State's case.

Mr. Simpson: Then I will have them marked for identification.

The said papers are marked "Defendant's D 1, D 2, and D 3" of this date, for identification.

Q. How long before the signing of these papers was the first time you saw Mrs. Bennett? A. I told you, about a month.

Q. Before these papers were signed? A. Yes, sir.

Q. That would be before Christmas, because this paper is dated January twenty-first, and a month before would be at least the twenty-first of December? A. Yes, sir.

Q. You saw her the twenty-first of December? A. Yes, sir.

Q. Did she come to your place of business or did you go to hers? A. She came to my place of business.

Q. What did she say to you? A. She came there with a woman by the name of Olsen and they came there and they eat there, and they were to buy the place in Miss Lawson's name, as it shows on that paper.

Q. What did Mrs. Bennett say to you? A. She said she was going to buy the place.

Q. That was the first time she came to your place? A. Yes, that was about a month.

Q. She did not buy it the first time? A. No, sir.

Q. And she came back again how long afterwards? A. She was there about every week.

Q. What was the second time? A. I cannot just remember the date.

A. About a week after the first time? A. Yes, sir.

Q. When was the price fixed? A. It was fixed by that paper when it was signed.

Q. Was there any negotiation about the price up to the time this paper was signed? A. No, sir.

Q. What were you talking about then if you were not talking about the price? A. Because she never was ready to buy it, that is what we was talking about, she was going to deposit all the time but was never able to do it.

Q. Was there a change in the price? A. No, there was no change in the price.

Q. The price was fixed when? A. By that contract. She gave a deposit then.

Q. The price was not fixed the first time then? A. That was my price I offered the place, the price was never changed.

Q. How much? A. Eight thousand dollars.

Q. Did she keep offering you less each time? A. No, she never did.

Q. She never offered you seven or less? A. No, she never did.

Q. There was a cash deposit? A. There was a cash deposit.

Q. That was a month afterwards? A. Yes, about that.

Q. Then she met you and your lawyer? A. The day the deposit was made.

Q. Where? A. In my place number 53 Greenwich Avenue.

Q. And she gave you a deposit of a hundred dollars? A. Yes, sir.

Q. And on that deposit you signed the papers and she signed the papers? A. Yes, sir.

Q. The sheet marked D-2 which I show you is written by your lawyer? A. That is marked by my lawyer.

Q. The sheet marked D-1 is written by your lawyer? A. Yes, sir.

Q. The sheet marked D-3 is written by her lawyer? A. Yes, sir.

Q. What was the name of your lawyer? Rosenblum, Louis Rosenblum.

Q. Where did you and she and her lawyer and your lawyer meet? A. At number 53 Greenwich Avenue.

Q. The Village Kitchen? A. Yes, I have met her in the place there too.

Q. How was this money to be paid, a hundred dollars down, what was the balance of the payments to be? A. She was to give me a hundred dollars deposit and when she got the lease she was to give me three thousand dollars.

Q. When was she to take the lease? How soon after all these papers were signed? A. She was to take it over in a couple of days after that.

Q. Where was she to take over the lease? A. In my store.

Q. What she was buying was the Village Kitchen is that it? A. Yes, number 53 Greenwich Avenue, only.

Q. And she saw you either five or six times? A. Yes, sir.

Q. Did she see you after the twenty-first of January? A. No, sir.

Q. The five or six times were up to the time of the signing of these papers? A. Yes, sir.

State rests.

Mr. Simpson: If it please the Court I ask for the direction of a verdict on the ground that there is no proof of false pretenses as alleged in the indictment.

Manifestly the State cannot rely upon the allegation that the defendant said she had eight hundred dollars up as a deposit, because the law is plain under *State v. Reily,* that every false pretence which they rely on must be set out in the indictment, *State v. Reily,* (65 L. 24). There are later cases in 98 L. to the same effect. Whether or not she deposited eight hundred dollars or one hundred dollars that means nothing, because that is not in the indictment.

The indictment says that she pretended to Minnie Wharton that she said Bennett was about to purchase a certain restaurant and business known as the Village Kitchen situated at number 179 Varick Street in the City of New York and State of New York and she said May J. Bennett was then and there negotiating with the owners of said restaurant business to purchase the same and she the said May J. Bennett did falsely represent to the said Minnie Wharton that upon the payment of the said moneys she the said May J. Bennett would take said Minnie Wharton in as a partner or shareholder.

They negative that and say she was not about to purchase the restaurant known as the Village Kitchen and that she did not intend to buy it.

I say, under those cases, that they have absolutely failed to prove any false pretences which led this complaining witness to part with her money.

The first case I can find is *Roper v. State*, 58 L., and then the *Reiley* case.

The complaining witness on the stand says that what induced her to part with her money was two things, first, that she was going to get a bonus of a thousand dollars, and, second, that she would be taken in as a partner. That is something in the future, not something in the past.

I say it is elementary with false pretences that they are never in the future. A promise can never be a false pretence. It must be a false representation of an existing fact. As far as this case goes they have absolutely failed to prove any false representation of any existing fact.

They certainly cannot rely upon the fact that the Village Kitchen is number 53 Greenwich Avenue instead of number 179 Varick Street, because this woman did not rely on that. She relied on the fact that she was to be taken into partnership in the future and she was to get the bonus of a thousand dollars.

So, I submit, on this proof the State has failed to prove that there was any false pretence on which this complaining witness relied when she parted with the fifteen hundred dollars.

Mr. McMahon: The allegation in the indictment it seems to me covers the proof which the State has submitted. The allegation is that this defendant said she was about to purchase a certain restaurant business known as the Village Kitchen, and the restaurant is identified by the street number

and that said May Bennett was then and there negotiating with the owners of said restaurant business to purchase the same, and upon that representation that she was then and there negotiating to purchase this restaurant that she parted with her money. We produce the owner of the restaurant who says there was no negotiation at that time or at any other time for the purchase of that particular business, and, I think on the proof that she said she was negotiating for the purchase of the business at number 179 Varick Street that when we prove she was not negotiating—

Mr. Simpson: That is not the point. My argument is the woman when asked "What did you rely on to part with your money?" She said, "The two things I mentioned, the bonus of one thousand dollars, and at the future time I was to be taken into partnership."

The Court: Have you got 98 Law there?

Mr. Simpson: Yes, sir (producing).

Motion denied.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

Mr. Simpson then opens for the defendant.

Mr. Simpson: I now offer in evidence the papers which have previously been marked for identification D-1, D-2 and D-3.

Admitted and marked "Defendant's Exhibits D-1, D-2 and D-3" of this date.

ALLAN CARUTHERS, sworn for the defendant:

Direct-examination by Mr. Simpson:

Q. You are a member of the New York Bar? A. Yes, sir.

Q. You were the attorney of Mrs. Bennett in the negotiations about the buying of the Village Kitchen? A. Yes.

Q. What part did you take in the negotiations? A. Well, I drew one of those memorandums of the contract, there, I attended at Greenwich Village on two or three occasions, and the parties all came to my office on one occasion or two occasions.

Q. Was Mrs. Wulf at your office? A. Yes, she came to my office.

Q. And there was a formal contract drawn up and entered into? A. There was to be a formal contract.

Q. This paper bears date the twenty-first of January, do you remember whether you saw Mrs. Wulf after this twenty-first of January about the formal contract? A. Yes, I did.

Q. About how long after? A. Well, I don't remember the exact date. The sitting for the closing of the contract was mentioned in the first paper and that was the date, and Mrs. Wulf was notified and Mr. Rosenblum was notified, and then at either the first or the second adjourned meeting the parties all appeared there except Mrs. Bennett and she had notified my office to procure a further adjournment, but I was out and did not get the message, and so when all the other parties came there I told them that while I was out, I think up in Westchester County or somewhere anyway, I did not get the message from Mrs. Bennett, and I told them, the parties appearing, Mrs. Olsen, Mrs. Wulf and her attorney, that Mrs. Bennett requested another adjournment and they went away.

Q. Who was Mrs. Olsen, was she to buy with Mrs. Bennett? A. Mrs. Olsen was interested in the transaction in some way, I believe was employed by Mrs. Bennett.

Q. As far as you know it was a bona fide attempt to buy this Village Kitchen? A. I suppose the whole transaction was bona fide.

Q. You had nothing to do with searching the title or advising your clients that the lease was not right, or that there was some defect whereby you did not think the transaction ought not to be consummated?

Mr. McMahon: Objected to as leading.

(Question withdrawn.)

Q. What happened, after this adjournment, in the way of consummating this deal? Anything? A. I don't know that anything else happened. Shortly after that—

Q. She was arrested? A. Yes. Mrs. Bennett got into some trouble and I think the matter just—

Q. I mean she was arrested on this very fifteen hundred dollar matter early in February wasn't she? A. I believe some time about then.

Q. When was this meeting at your office when she telephoned to you to get an adjournment and you did not get the message? Was that the first week in February? A. That was between either the date of the closing and the first adjournment or between the second adjournment and the third. I don't remember.

Q. You don't remember the exact date of her arrest over here, do you? A. No. I do not.

CROSS-EXAMINATION by Mr. McMahon:

Q. How long have you known Mrs. Bennett? A. I have known her about, well, about a year and a half, probably.

Q. Did you write to the Gotham Bank and tell them she was a client of yours for years? A. I probably did.

Q. Is it a fact that she was a client of yours for years?

Mr. Simpson: Objected to as not proper cross-examination, as immaterial and collateral matter.

Objection overruled.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

A. I don't know; whatever the letter speaks for. You have the letter.

Q. Was she a client of yours for years? A. I was doing business with her for several years.

Q. Then you knew her longer than a year? A. Personally I have known her longer than a year.

Q. You introduced her to the Gotham Bank didn't you? A. No, sir.

Q. Didn't they open an account for her on your recommendation? A. I don't know.

Q. Don't you know? A. I do not.

Mr. Simpson: I object to this. We are not indicted for attempting anything in connection with the Gotham Bank.

Objection overruled.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

Q. Were you Mrs. Bennett's attorney all of this time, from January twenty-first? A. I had attended to several legal matters during that time for her.

Q. The purchase of hotels or restaurants? A. Yes; she was purchasing another restaurant on Forty-seventh Street, I paid three thousand dollars down for her on that. I have the check there. I attended to that.

Q. Did you attend to the purchase of Number 53 Greenwich Avenue? A. She asked me to go down there.

Q. Are those the only two you attended to? A. No. She had one or two other matters.

Q. What were they? A. I don't know now what they were.

Q. But this date particularly you remember? A. I recall this date particularly, because I paid three hundred dollars or she did, and then I had to get that back when they did not turn over the lease to her for the premises, they promised the lease and they would not give us possession, we wanted immediate possession and then they claimed the people in possession—

Q. I am asking you what other transaction you had. A. I was negotiating one or two other matters for her, I do not recall just what they were.

Q. Nor where they were located? A. No, I do not.

Q. Do you know how much was involved? A. Well, I don't know that I can recall the details.

Q. Do you know what kind of business they were? A. I did not go to see them. She called on me and put up several propositions. I don't know but that one of them was over in New Jersey. I do not recall what it was.

Q. Elizabeth? A. I think it was Plainfield or Elizabeth.

Q. Did you prepare any papers in that? A. No, sir.

Q. You say that you took care of this transaction for her, the purchase of Number 53 Greenwich Avenue on the twenty-first of January, 1925? A. Whatever that paper says.

Q. You have no recollection outside of this paper? I have. I called there probably once before that paper and had a preliminary talk and then this woman wanted her lawyer there and we met there and drew this paper.

Q. So that if this paper bears date January twenty-first 1925 that was the date you were there? A. That was that date.

Q. What time of the day? A. I would say we got there around seven or eight o'clock.

Q. In the evening? A. In the evening.

Q. Did Mrs. Bennett tell you she had that day obtained fifteen hundred dollars from Mrs. Wharton for the purchase of the place?

Mr. Simpson: Objected to.

A. I don't know that she did. I was there to draw that contract.

Q. She did not tell you?

Mr. Simpson: Objected to. He does not say she did not tell him. He says he does not know whether she told him or not.

Q. And you were there to help her in her negotiations for the purchase of this property? A. Yes, I went there to see that her rights were protected as purchaser.

Q. And you knew how much money she had on her person so that she could put up to bind the contract didn't you? A. I did not.

Mr. Simpson: We object.

Q. You knew that she had a hundred dollars

didn't you? A. Well, I am sure. It was me handed Mrs. Wulf the hundred dollars.

Q. Was it in cash or check? A. Cash. I know that she had that money because I saw it with her.

Q. In cash? A. Yes, some in cash, I don't know how much it was.

Q. You never had heard of Mrs. Wharton at that time? A. I never had heard of her.

Q. Did you read over the paper that was drawn by the lawyer and signed by Mrs. vonWulf and Bennett and Olsen; being Exhibit D-3? A. I read all the papers that were drawn there that night.

Q. Did you read that one? A. Yes, I wrote that. That is my handwriting.

Q. And these other two letters, (indicating D-1 and D-2)? A. Yes, those two papers evidently in the other lawyer's handwriting, not in mine.

Q. Did you read them at that time? A. I certainly did.

Q. Was there any agreement binding Mrs. Bennett to put up fifteen hundred dollars on the twenty-first day of January 1924 that you know of, in connection with the purchase of Number 179 Greenwich Street? A. I never heard of Number 179 Greenwich Street, excepting incidentally; in the course of drawing these papers it came out that Mrs. Wulff owned some other place and that is the first I ever heard, as I understand. I don't particularly remember this. This which she was contemplating was Number 53 Greenwich Street and was known as Village Inn.

Q. Are you a member of the New York Bar? A. Yes, sir.

Q. Do you know of any transaction you handled as attorney for Mrs. Bennett wherein she was re-

quired to put up fifteen hundred dollars on the twenty-first of January 1925? A. No.

Q. You do not know of any? A. No, sir.

Q. Do you know of any transaction wherein if she did not put up fifteen hundred dollars she would lose eight hundred dollars? A. No, sir.

Q. Do you know of any transaction on or about the twentieth or twenty-first of January wherein Mrs. Bennett did put up a deposit of eight hundred dollars? A. No, sir.

Mr. Simpson: This is objected to on the ground that there is no pretence of such kind alleged in this indictment. If the *State v. Reily* means anything it means that you have got to allege it. Therefore, if she did or did not have a deposit up means nothing because the jury cannot consider it under *State v. Reiley.* They do not in this indictment allege as one of the pretences that she represented that she put up fifteen hundred dollars or eight hundred dollars and that it was false. I object to the testimony as incompetent, immaterial and irrelevant.

Objection overruled.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

The Witness: I do not recall any such transaction.

Q. You know of no transaction which you handled for her at any time in which she had to put up a deposit of eight hundred dollars? A. Well, I would not say as to that particular amount. There were several transactions that Mrs. Bennett had at about that time, but I don't remember just the amount that was to be put up. I think she was

to put up six hundred dollars on this Forty-seventh Street place.

Q. Six hundred dollars? A. Yes; she put up three hundred dollars, she gave a check for three hundred dollars I think which was required put up and she was required to put up two more months' rent, six hundred dollars at the time of closing that transaction.

Q. The papers marked D-1 and D-2 in evidence, was that ever consummated? A. That transaction never went through.

Q. Was this paper ever executed? A. Yes, the paper is signed by all the parties.

Q. That paper was executed? A. Yes, sir, absolutely, it is signed by all the parties.

Q. Does this paper D-1 and D-2 contain all the terms of agreement made the twenty-first of January for the purchase of number 53 Greenwich Street? A. Yes, so far as I know, it is a memorandum contract.

Q. You do not see any signatures on it, do you? A. No. I am speaking of the original. That is only a copy for the lawyer to copy from the executed paper.

Q. Have you got the original? A. I have seen it over in my bag. I think it is probably in there. It was signed by all the parties. Is that the one you are looking for?

Q. Yes? A. (Producing.)

Q. Where is the contract I was talking about, D-1 and D-2? This is a copy of D-3, is it not? A. Yes, sir.

Q. I asked you for the copy of D-1 and D-2? A. Here is a copy of this paper and here is the signed paper by Mrs. Wulff, on this receipt.

Q. Where was this typewritten? A. I think it was typewritten right at Greenwich Street. Somebody there said they could use a typewriter, I think. It was done there. I don't know who did it.

By the Court: Q. Where were those agreements drawn? A. At your office?

The Witness: They were drawn down in Greenwich Street. In the night time.

By the Court: Q. Did any transaction in relation to this particular agreement take place at your office?

The Witness: None whatever, excepting the people called there to close the transaction at the time I stated.

By the Court: Q. Was Mrs. von Wulff there?

The Witness: Mrs. vonWulff was there.

Q. That was at the time of the postponement caused by the absence of Mrs. Bennett? A. Yes, sir.

Q. Was that hundred dollars the only deposit that was ever made on that contract?

Mr. Simpson: Objected to. He does not show a knowledge of that.

Mr. McMahon: He may know.

The Court: I will allow it.

Objection overruled.

Defendant excepts.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

By the Court: Q. Do you know?

The Witness: So far as I know, I do not know that there was any other money paid.

Q. So far as you know? A. So far as I know. I may qualify that in this respect, that I heard some

conversation there that night and I learned through my being there that night that a Miss Olsen whose name I have heretofore mentioned in the matter, was actually in charge, as I understood it, of this restaurant for Mrs. Bennett and that she had been paid some several weeks' salary or was withdrawing her salary, I don't know. I heard that that night.

Q. Do you know whether this memorandum of agreement was ever carried out? A. I understand it was not.

Q. Did you ever bring any action or proceeding for Mrs. Bennett to enforce this being carried out? A. No. Mrs. Bennett was arrested and this matter fell through, as I understand.

Q. When was she arrested? A. I don't remember. Shortly after this, the first of February.

Q. This contract required her to do something on the twenty-seventh day of January 1925, was she arrested then? A. Well. as I have told you before, I don't know when she was arrested.

Q. Did she do the thing required under this contract on the twenty-seventh of January?

Mr. Simpson: Objected to. We are trying a civil case on this contract, going into all these details about this contract. The only thing in this criminal case is, was there a negotiation? Not whether the defendant carried them out or not or whether the woman who has the contract could sue her, or whether she could go in Chancery and get a Receiver. The only thing in issue is, were there any negotiations? I object to all this inquiry about the contract being carried out. I think we are going way outside of this case.

The Court: I think that is so.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. Mr. McMahon asked you something about a contract. This is simply a binder is it not? A. Yes, sir.

Q. There was to be a formal contract drawn up at your office? A. Yes, sir.

Q. And the people, as I understand you, were down there twice to execute it? A. Yes, sir, once or twice.

Q. The last time the people met, Mrs. Bennett did not come? A. Yes, sir.

Q. And Mrs. Bennett telephoned in asking for an adjournment? A. Yes, sir.

Q. And you did not get the message, did you? A. That is right.

Q. And the people all went away thinking Mrs. Bennett had made a default, didn't they? A. Yes. sir.

Q. They left your office? A. Yes, sir.

Mr. McMahon: I object to Mr. Simpson saying what they were thinking. He has no right to draw the conclusion.

Q. Did they leave your office? A. Yes, sir.

Q. Without knowing that Mrs. Bennett asked for an adjournment?

Mr. McMahon: Objected to unless it was proven.

A. No. I told them after they had got there that I was sorry. I did not get Mrs. Bennett's message so that I could pass it along to them.

Q. That is, to keep them from coming? A. Yes. I certainly told them I was sorry they had been put to the trouble, that during my absence Mrs. Bennett had 'phoned in she could not get there and they wanted to know when she would get there and I said, "I don't know, I have not seen her." I did

not even get the message, but I immediately 'phoned after they went down to Mrs. Bennett's hotel.

Q. I want to know what happened down at your office? A. Well, that is what happened there.

Q. Mrs. Bennett was arrested the twentieth of February, the complaint was made, the criminal complaint was made against her the twentieth of February, what date did you say she was arrested?

Mr. McMahon: I don't know what date.

Q. The criminal complaint was made the twentieth of February? A. Yes, sir.

Q. This paper signed the twenty-first of January, do you know about how long before the twentieth of February it was that all these people appeared at your office and you told them she wanted another postponement and you were sorry you could not tell them in time to keep them away, do you know how long that was? A. No, sir.

Q. You remember when the papers were signed the twenty-first of January don't you? A. Yes, sir.

Q. How long after that was this time that you told the people you were sorry that you did not get the message in time, how long after? A. I think it must have been seven or eight days. I don't know. There was one adjournment and possibly another adjournment.

Q. The first meeting, according to these papers was to be the twenty-seventh of January, that would be a week after? A. That was adjourned.

Q. For how long? A. I think the adjournment might be a week or a few days. I don't know how long.

Q. You were asked if you are a member of the New York Bar, how long have you been practicing law? A. Since 1887.

Q. Where is your office? A. Number 47 East Forty-second Street, New York City.

Q. Have you always practiced in New York City? A. I have practiced in New York City since August tenth 1897.

Q. Were you in the Police Court when this Mrs. Wharton was sworn as a witness? A. I was.

Q. Were you there when she described what happened when she paid the fifteen hundred dollars? A. I was.

Q. Did she state that all that happened was that Mrs. Bennett came into the house and said she must have the fifteen hundred dollars in a hurry and offered to give a bonus of a thousand dollars for it and that that was all that happened. Did she so state?

Mr. McMahon: Objected to. This witness can testify. He is a very competent witness and an intelligent witness and he can tell what happened without leading.

Mr. Simpson: I have always understood that if you want to contradict a witness you have got to use the exact language he used in Court. You cannot ask him what the witness said. You have got to use the exact words that were put to the witness in the question on cross-examination. That is what I am doing now.

Mr. McMahon: There is no written record here that any such thing did happen. He is trying to show what happened now by this witness.

Mr. Simpson: I don't have to do that. I asked Mrs. Wharton, "Did you say in the Police Court this and that."

The Court: I will allow the question.

A. I heard her say that in substance.

Q. Did the witness so testify in substance? A. Yes, she did.

Q. Did she say that? Did she say in Court what I asked her here in your presence and what I have asked you now, in the Police Court? A. Read that question again?

(Question read as follows: Did she say that? Did she say in Court what I asked her here in your presence and what I have asked you now, in the Police Court?)

A. Yes, she said that in Court. She said that.

RE-CROSS-EXAMINATION by Mr. McMahon:

Q. What date were you in Court? A. I don't remember the date.

Q. Who was there? A. I was there; Mrs. Bennett was there, I think Mr. Jiele was there, Mr. Garven was there, Miss Olsen was there, Miss Frazier was there, Mrs. Wharton was there, the Judge was there.

Q. Who was the Judge? A. I don't remember who the Judge was.

Q. Who else testified besides Mrs. Wharton? A. I think Miss Frazier testified.

Q. What did she testify? A. I do not recall what her testimony was.

Q. But you do recall what Mrs. Wharton testified? A. Yes, sir.

Q. And you say that is all that Mrs. Wharton testified? A. No, I do not say that.

Q. Yes, you do. That is the question that was asked you, was that all she said? A. No. I said she said that.

Q. She said other things too? A. Yes, she did.

It is admitted that the complaint in the Police Court against the defendant was the twentieth of February.

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By Mr. Simpson: Q. Mr. McMahon asked you about certain deposits you said Mrs. Bennett made, six hundred or eight hundred, you do not know the amount of deposits that was on every place she was buying do you? A. Yes, I do.

By Mr. McMahon: Q. You don't know the names of those places, you don't know where they are or anything about them? A. One of them I had in mind was the Forty-seventh Street place.

Q. Who was the owner of that? A. A Japanese. I don't know who the owner was.

Q. Where was it? A. On Forty-seventh Street. I believe number 127.

Q. Don't you know? A. 216 Seventh Avenue.

Q. Did you take care of that transaction for her? A. Yes, sir.

Q. How far did that proceed? A. That proceeded that Mrs. Bennett paid three hundred dollars down and was to pay two months in advance when the lease was signed, but when we met to sign the lease the owners of the place stated that the people in possession had paid the rent and I told them, "You said you had been dispossessed, we could not have possession." They said, "Well, we could not help it." They said we had to take the rent and we took it and that is why she did not get the place.

Q. That contract was not carried out? A. It was not carried out because the owner would not give us possession.

By Mr. Simpson: Q. That was no fault of hers at all? A. No, sir.

Q. This Village Kitchen did you ever draft a form of contract for that? Have you any draft of contract? A. No, sir.

Mr. Simpson: I want to re-call Mrs. Wharton for one question on cross-examination which I omitted.

MINNIE WHARTON, re-called for further cross- examination:

Cross-examination by Mr. Simpson:

Q. When you were examined as a witness in the Police Court didn't you say the only place that Mrs. Bennett took you by was the place on Forty-seventh Street? A. The only place she took me by?

Q. Yes, showed you, was the place on Forty-seventh Street? A. She said she had taken that place on Forty-seventh Street. It was not the only place she took me by.

Q. Did you say that? Did you say in the Police Court the only place she took you by was the place in Forty-seventh Street, the Japanese place? A. No. I understood Mrs. Bennett took over the place in Forty-seventh Street,

Mr. Simpson: I ask to have that answer stricken out as not responsive.

Q. I said, did you say in the Police Court, now, you either did say this or you did not say it, the only place Mrs. Bennett took you by was the place on Forty-seventh Street, did you say that in the Police Court? A. It was not took me by the place. It was took over. She said she took over the Forty-seventh Street place.

Q. I am asking you, did you say that. Did you say the only place she took you by was the place in Forty-seventh Street? A. No, she took me by, no, not that she took me by.

Q. Took you to, did you say the only place she took you to? A. No, I said the only place Mrs. Bennett said she had taken over was the Forty-seventh Street place.

Mr. Simpson: I object to that as not responsive and ask to have it stricken out.

The Court: The last part of the answer will be stricken out, the answer will be No. The other portion will be stricken out.

Q. I want to ask you the following question: Didn't you give the following answer in the Police Court: "Q. Did Mrs. Bennett ever take you by a restaurant which she said she owned and show it to you?" and did you answer: "A. The only place she took me by was the place in Forty-seventh Street." Was that question and answer asked and given?

The Court: That is either yes or no, that is all that calls for.

A. Well, it was not "by." She told me she took the place over on Forty-seventh Street.

Q. Don't you know what you testified to in the Police Court? Was this question asked you and did you make that answer? A. I don't remember.

Q. And, subsequent to that weren't you asked: "Q. Did Mrs. Bennett ever tell you she owned a restaurant or any place," and didn't you answer, "She took me by a place in Forty-seventh Street and she told me she was negotiating for that place, and that is the only place she took me by"? A. The Forty-seventh Street place is the place she spoke to me about she had taken over.

Q. Did you so swear in the Police Court? A. That is what I said, she had taken this place over.

Q. Did Mrs. Bennett ever tell you that she owned a restaurant and show you a restaurant she owned and did you answer, "No, she never said she owned a restaurant but she took me by a place in Forty-seventh Street she said she was negotiating for." Did you say that in the Police Court? A. There was no such question asked of me.

Q. Did you give such an answer? A. Well, I don't remember. I remember her saying she had taken over this Forty-seventh Street place, she did tell me that.

No cross-examination.

ALLAN CARUTHERS, re-called as a witness for the defendant:

Direct-examination by Mr. Simpson:

Q. Were you present in the Police Court and did you hear the following question asked of Mrs. Wharton and the answer given as follows: "Q. Did Mrs. Bennett ever take you by a restaurant which she said she owned and show it to you? A. The only place she took me by was the place in Forty-seventh Street"? A. Yes, sir.

Q. By Mrs. Wharton? A. Yes, sir.

Q. Were you present in the Police Court and did you hear the following question asked of Mrs. Wharton and the answer given as follows: "Q. Did Mrs. Bennett ever tell you she owned a restaurant or any place? A. She took me by a place in Forty-seventh Street and she told me she was negotiating for that place, and that is the only place she took me by"? A. Yes, sir.

Q. Were you present in the Police Court when those questions were asked and answers given by the last witness who was on the stand here, Mrs. Wharton? A. Yes, I was.

CROSS-EXAMINATION by Mr. McMahon:

Q. Do you remember the rest of the testimony in the Police Court? A. Most of the testimony.

Q. Give us some of the questions asked and the answers given? A. She was asked to state when she met Mrs. Bennett and she stated that Mrs. Bennett came over to her place and told her she needed fifteen hundred dollars right away.

Q. This was in question and answer form was it? A. Yes, sir.

Q. Who was doing the questioning? A. I don't know the gentleman who did the questioning.

Q. Was it a lawyer? A. It was the Clerk of the Court or the Judge or the District Attorney, I guess.

Q. The District Attorney? A. Yes.

Q. You are sure about that? A. Well, whoever takes charge of the prosecutions in that Court.

Q. Was there somebody in charge of this prosecution? A. Well, there was somebody there asked those questions. I don't know who asked them.

Q. Do you know whether it was the Judge or not? A. No, the Judge did not put the questions.

Q. Do you know whether it was Mrs. Bennett's attorney? A. Mrs. Bennett's attorney put the questions answered here.

Q. He put those questions? A. He put some, the preliminary questions had been put by the prosecuting officer, or police official whoever was there, I don't know who.

Q. Didn't you inquire the name of the prosecuting officer? A. No, sir.

Q. Was he a lawyer? A. I don't know that.

Q. But you are certain there was somebody there representing the State? A. I am certain there was somebody there putting in the evidence on behalf of the State.

Q. You are sure about that? A. Yes, sir.

By Mr. Simpson: Q. It might have been Mrs. Wharton's own lawyer who has been in Court here, Mr. Broadhurst might it not? A. I don't know who the gentleman was, there was somebody asked the questions and Mrs. Wharton gave the testimony.

Defendant rests.

Testimony closed.

It is stipulated that there was a criminal complaint made on the twentieth of February by Mrs. Minnie Wharton at the First Criminal Court.

Mr. Simpson: I renew my motion now for the direction of a verdict on the ground that there is absolutely no proof of any false pretences and that under the statute, I think the Statute of 1923, the Court where the evidence is such that it feels the jury should bring in a verdict Your Honor would be bound as matter of law, to set it aside, because the great weight of the evidence is that there was no false pretences made and the only thing said that they could possibly claim would be a pretence would be that the defendant said she was negotiating for a restaurant known as the Village Kitchen at number 179 Varick Street, whereas the fact appears she was negotiating for the Village Kitchen at number 53 Greenwich Avenue, and that chance is sufficient of a false pretence to send this case to the jury, the complaining witness never having been taken to the Varick Street restaurant, never having seen it, never having relied on it, but relying entirely on

the false pretence, whether it is true or not, that the defendant was in negotiation for the purchase of the Village Kitchen. It now appears as a matter of proof by the great weight of the evidence that she was.

The only other false pretence is a promise to hire her in the future, which, of course, is not a false pretence.

The matter about the deposit cannot be considered by Your Honor or by the jury because it is not in the indictment.

For all those reasons I ask for the direction of a verdict.

I would like to call Your Honor's attention to the fact also that the *Roper* case says that the pretence must be a reasonable pretence. (58 L. 420.)

The Court: I think I will let it go to the jury.

Motion denied.

Defendant excepts,

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

Mr. Simpson: Then I ask for the direction of a verdict on the other count for larceny. There is no proof of larceny. I ask for the direction of a verdict on that count.

Mr. McMahon: We consent to the direction of a verdict on the larceny count.

The Court: Then such a direction will be made on the larceny count.

Mr. Simpson then sums up for the defendant.

Mr. McMahon then sums up for the State.

Mr. McMahon, in summing up on behalf of the State said:

> "You recall that this May Bennett came to Jersey City, saw the plaintiff and her husband, and got the plaintiff to go out and raise money. There must have been other transactions between these people"—

Mr. Simpson: I object, and ask that a juror be withdrawn. We are trying this indictment. There were no other transactions; but if there were, they were under the other indictment. I ask that a juror be withdrawn.

The Court: I will deny that.

Mr. McMahon: I will speak only on the testimony. The testimony is that this woman gave a check to Mrs. Wharton for $200 and some odd dollars, which helped to make up the fifteen hundred dollars. I have a right to comment on it.

The Court: Absolutely. Confine yourself to that.

Mr. McMahon: Why should she give her a check for $200 if there were not other transactions between them?

Mr. Simpson: I renew my motion, and ask that a juror be withdrawn. There is no evidence of other transactions. There is no evidence as to what it was given for. Premising that on other transactions I submit is legal error, and I ask that Your Honor either direct him to cease and direct the jury to disregard what he says about other transactions, or that Your Honor direct the withdrawal of a juror and declare a mistrial.

The Court: Of course we only have under consideration the transaction mentioned in the indictment, and I think that that only can be considered.

Mr. McMahon: I am not asking the jury to consider anything else, but I am telling the jury how this $1500 was made up—

Mr. Simpson: May I have an exception to Your Honor allowing him to continue to refer to that transaction?

The Court: Yes.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

The Court thereupon charged the jury as follows:

CHARGE

The Court: Gentlemen of the Jury:

The defendant, May J. Bennett, was indicted by the Grand Jury of this County at the December Term, 1924, for the crime of obtaining money through false pretenses. The indictment charges that on the 21st day of January, 1925, in the City of Jersey City, the defendant did wilfully and unlawfully, designedly, falsely and fraudulently pretend to one Minnie Wharton that she, the said May J. Bennett, was about to purchase a certain restaurant and business known as The Village Kitchen, situated number 179 Varick Street in the City of New York, State of New York, and that she, the said May J. Bennett, was then and there negotiating with the owners of said restaurant and business to purchase the same, and she, the said May J. Bennett, did falsely represent to the said Minnie Wharton that upon payment of certain monies by the said Minnie Wharton to the said May J. Bennett that she, the said May J. Bennett, would take the said Minnie Wharton as a partner or shareholder in said restaurant or business then and there situate and described as aforesaid, whereas, in truth

and in fact, that she, the said May J. Bennett, then and there well knew that she was not about to purchase said restaurant and business known as The Village Kitchen, situated at number 179 Varick Street in the City of New York, State of New York, and that she, the said May J. Bennett, was not then and there negotiating with the owners of said restaurant and business to purchase the same, and that she, the said May J. Bennett, did not intend to take the said Minnie Wharton as a partner or shareholder in said restaurant or business. By color and means of said false pretense and pretenses so made as aforesaid by the said May J. Bennett to the said Minnie Wharton the said May J. Bennett did then and there unlawfully, knowningly, designedly and fraudulently obtain of and from the said Minnie Wharton a large sum of money, to wit: the sum of $1500 lawful money of the United States of America, the monies and property of the said Minnie Wharton, with intent to cheat and defraud the said Minnie Wharton thereof, 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.

That is the first count in the indictment. There are two counts in the indictment. The second count is a count for grand larceny. That count I have already indicated to you you are not to consider. because there is no evidence of grand larceny in the case. If there is any evidence at all it would be along the lines directed to the first count of the indictment.

You have heard the evidence in this case, gentlemen, and you are the sole judges of the credibility of the witnesses and you must determine this case from the evidence that has been submitted here to-

day. You have heard the several witnesses; you have noticed them and observed them on the stand. How did they impress you? Do you believe that they told the truth? Do you believe that they were inspired by any motive in testifying as they did?

The State produced several witnesses and the defense produced a witness. The State says that on the 21st of January, 1925, this defendant, May Bennett, represented to the complaining witness, Mrs. Minnie Wharton, that she was negotiating for the purchase of this place over on Varick Street—this is the evidence which has been submitted by the State—that there were some monies on deposit, and that if she did not raise the sum of $1500 she would lose the deposit. The State says that this woman represented that if she purchased this business she would take Mrs. Wharton as partner, give her as Mrs. Wharton said, a one half interest in the business.

Now, there is some evidence of negotiation on the part of Mrs. Bennett for the purchase of the Village Kitchen, and the defense contends that the Village Kitchen, which they intended to purchase, was not the Village Kitchen mentioned in the indictment and by the State's witnesses as number 179 Varick Street; that she was interested in two places, one 53 Greenwich Avenue, which is known as the Village Kitchen, and the premises 179 Varick Street, also known by the same name—the Village Kitchen; and some woman who said that she was interested in the ownership or in the title of those different businesses said that there was no negotiation whatever for the purchase of the business 179 Varick Street. Mrs. Wharton says that the defendant told her that she was negotiating for the purchase of it and that she needed the sum of $1500 to carry out

the transaction, that if she got it she would save a deposit which she had on account of the purchase of that business, 179 Varick Street, and that if she did not get this $1500 she would lose that money; that if she did get it she would get the business and take her in.

That substantially is the evidence that has been offered by the State.

Now, gentlemen of the jury, if my version of the testimony is not in accordance with what your recollection of the testimony sworn to in this case is, just disregard what I have said the evidence is, because after all, gentlemen of the jury, you are charged with the recollection of what the testimony is, and the obligation rests upon you to determine and to consider this case from the evidence, and if either counsel in the course of his summation to you has stated something to be a fact which is not in accord with your recollection of the testimony, also disregard what counsel has said is the testimony, if it differs from your recollection, because, as I told you a moment ago, you are charged with the recollection of the testimony, because when you took your oath in this case you said you would well and truly try this case according to the evidence and render a just and a true verdict in accordance with the evidence, so help you God.

Now, gentlemen of the jury, do you believe that May Bennett was negotiating for the purchase of this business, 179 Varick Street? That is one of the things that must be established beyond a reasonable doubt before you can find this defendant guilty. You must believe beyond a reasonable doubt that she was negotiating for the purchase of that business, that restaurant, and then if she were negotiating and you are satisfied beyond a doubt that

the State has sustained the burden of proof in this case and that she was not negotiating for the purchase of this business, why then she misrepresented to this complaining witness what she intended to do.

The State must show you that she represented to this woman that she was negotiating for the purchase of that business, whereas in fact that representation was false and untrue, if she represented to this woman that she was. The State must show and must prove to you beyond a reasonable doubt that she did say to this woman that she was going to purchase this business, whereas in fact that representation was false and untrue.

Now, the State must show you that and must prove that to you beyond a reasonable doubt before you can find a verdict of guilty against this defendant.

Now, there are three things that must be established by the State in this case; first, that the accused must have made representations, that the representations must have induced the person to whom they were made to part with their property, and, third, that the representations which so caused the owner to part with her property were untrue. Did she make representations to this woman that she was going to purchase this business? As a result of those representations did this Mrs. Wharton advance to the defendant the sum of $1500? And were those representations, if any were made, untrue? Those are the matters for you to consider, gentlemen of the jury. Now, this defendant, like any other defendant who comes to court, is presumed by the law to be innocent, and the burden of proof rests upon the State to prove each and all of the essential elements of the crime charged

against her, by evidence which clearly establishes her guilt beyond a reasonable doubt. The law aims to be just, it aims to be fair, it aims to be humane, and whenever a person charged with crime is placed upon trial, the law casts a shield about that person, a shield of innocence, and that shield is not removed, it is not penetrated, it is not destroyed until each and all of the essential elements of the crime charged against him, or her, has been established beyond a reasonable doubt.

Now, what is a reasonable doubt? A reasonable doubt is not a mere possible doubt, it is not a fanciful doubt, but it is rather that state of the case, which, after the entire comparison and consideration of all the testimony, 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. If, therefore, after you have carefully compared and considered all the testimony in this case your minds are in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge, you have what the law says is a reasonable doubt, and it is your duty, and I charge you to give the benefit of that doubt to the defendant. But you are not required to give her the benefit of anything except such reasonable doubt.

Now, there is a situation in this case to which I would call your attention. It is the fact that the defendant failed to offer herself as a witness in her own behalf. The accused is competent, but not compellable, to be a witness in her own behalf. The fact that the defendant, having an opportunity to take the stand if she saw fit, has elected not to do so, and that she has been here and heard the statements of these witnesses on the stand who testi-

fied against her would warrant you in inferring that she could not deny that the facts which they stated were true. Of course, you are not required to hold that inference. I am simply calling your attention to the significance which may be given to the defendant's failure to testify, should you feel warranted under the circumstances in doing that.

Now, gentlemen of the jury, I do not know that there is anything further that I can say to you about this case. You may consider what interest, if any, any of the persons who took the stand had in the case. That is a proper matter of inquiry by you. Has the complaining witness any particular interest in testifying as she does here today? Have any of the other witnesses who were produced by the State any particular interest in this case? Those are matters, gentlemen, for you to determine

There are three requests which have been handed to me by the counsel for the defense, Senator Simpson, and the first two of those requests I will not charge. The third I think I have already covered, but, in the event that I did not, I will read it and I will charge it as requested by the counsel for the defense:

> "You must be convinced that the defendant made a false representation"—

I think that I have covered that, but I will reiterate it again, gentlemen of the jury—

> "You must be convinced that the defendant made a false representation to the complaining witness, Mrs. Wharton."

Now, gentlemen the matter is in your hands.

(The jury thereupon retired to consider of their verdict.)

Mr. Simpson: I ask a general exception to the charge and an exception to Your Honor's refusal to charge as requested, and a special exception to that portion of Your Honor's charge in which you said that they might rely upon the promise of the defendant to take the woman into partnership, and a special exception to Your Honor's refusal to charge the jury that the jury could not rely upon the false statement that she had a deposit of $800.00 up, on the ground that that was not laid in the indictment.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

Jersey City, N. J., Oct. 29, 1925.

STATE VS. MAY J. BENNETT.

Appearances:
Mr. McMahon for the State.
Mr. Simpson for the defendant.

The jury having returned a verdict of guilty against the defendant in this cause, Mr. Simpson made the following motion:

Mr. Simpson: I want to move for a new trial on the ground the case was improperly submitted to the jury, that the verdict was against the weight of the evidence, that illegal testimony was admitted over the exception of the defendant, that legal testimony was excluded over the exception of the defendant, that the Court at the trial of the cause refused to withdraw a juror and declare a mistrial,

although the prosecutor continued to refer to facts not in evidence.

On all those grounds I ask for a new trial.

The Court: I will deny your motion.

Mr. Simpson: I ask for an exception, if it is subject to exception.

Exception allowed and sealed accordingly.

CHARLES M. EGAN,
Judge.

JUDGE'S CERTIFICATE

HUDSON COUNTY COURT OF QUARTER SESSIONS

THE STATE, Defendant in Error, vs. MAY J. BENNETT, Plaintiff in Error.	On Indictment.

I, Charles M. Egan, Judge of the Court of Quarter Sessions, in and for the County of Hudson, before whom the above entitled indictment was tried, do hereby certify that the foregoing is the entire record of the proceedings had upon the trial of the foregoing indictment of the above stated cause.

Dated, January 8th, 1926.

CHARLES M. EGAN,
Judge.

STENOGRAPHER'S CERTIFICATE

HUDSON COUNTY COURT OF QUARTER SESSIONS

THE STATE, Defendant in Error, vs. MAY J. BENNETT, Plaintiff in Error.	On Indictment.

I, the undersigned, do hereby certify that I was the stenographer who took the testimony and proceedings in the cause entitled "The State v. May J. Bennett" before Hon. Charles M. Egan, Judge, and a jury, on the 28th day of October, 1925, and that I transcribed the same and the same is full, complete and correct.

Dated, December 9th, 1925.

JOHN P. DENGLER,
Official Stenographer.

ASSIGNMENTS OF ERROR

(Filed, Feb. 9, 1926)

NEW JERSEY SUPREME COURT

THE STATE, Defendant in Error, vs. MAY J. BENNETT, Plaintiff in Error.	On writ of Error.

And now comes the said May J. Bennett, by Alex. Simpson, Esq., her attorney, and says that in the record and proceedings and also in giving judgment aforesaid, there is manifest error, and for error assigns the following causes:

1. Because the Trial Court, over the objection of the defendant, permitted Doris E. Fraser, a witness for the State, to be asked the following question:

> "Q. Do you know whether there were any negotiations to purchase that other business from Mrs. von Wulf?
> "A. Yes, sir."

2. Because the Trial Court refused to direct a verdict at the end of the State's case, on the ground of failure of proof and proof not mentioned in the indictment, although thereto moved by the defendant.

3. Because the Trial Court refused to direct a verdict in favor of the defendant, at the close of the entire case, although thereto moved by the defendant.

4. Because the Trial Court, refused the motion of the defendant for a new trial.

5. Because the Trial Court, refused to charge the Requests to Charge submitted by the defendant.

6. Because the Trial Court charged the jury as follows:

> "The State produced several witnesses and the defense produced a witness. The State says that on the 21st of January, 1925, this defendant, May Bennett, represented to the complaining witness, Mrs. Minnie Wharton, that she was negotiating for the purchase of this place over on Varick Street—this is the evidence which has been submitted by the State—that there were some monies on deposit, and that if she did not raise the sum of $1500 she would loss the deposit. The State says that this woman represented that if she purchased this business she would take Mrs. Wharton as partner, give her as Mrs. Wharton said, a one half interest in the business.
> "Now, there is some evidence of negotiations on the part of Mrs. Bennett for the purchase of the Village Kitchen, and the defense contends that the Village Kitchen, which they intended to purchase, was not the Village Kitchen mentioned in the indictment and by the State's witnesses as number 179 Varick Street; that she was interested in two places, one 53 Greenwich Avenue, which is

known as the Village Kitchen and the premises 179 Varick Street, also known by the same name—the Village Kitchen; and some woman who said that she was interested in the ownership or in the title of those different businesses said that there was no negotiation whatever for the purchase of the business 179 Varick Street. Mrs. Wharton says that the defendant told her that she was negotiating for the purchase of it and that she needed the sum of $1500 to carry out the transaction, that if she got it she would save a deposit which she had on account of the purchase of that business, 179 Varick Street, and that if she did not get this $1500 she would lose that money; that if she did get it she would get the business and take her in."

7. Because the Trial Court charged the jury as follows:

"Now, what is a reasonable doubt? A reasonable doubt is not a mere possible doubt, it is not a fanciful doubt, but it is rather that state of the case, which, after the entire comparison and consideration of all the testimony, leave 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. If, therefore, after you have carefully compared and considered all the testimony in this case your minds are in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge, you have what the law says is a reasonable

doubt, and it is your duty, and I charge you to give the benefit of that doubt to the defendant. But you are not required to give her the benefit of anything except such reasonable doubt."

8. Because the Trial Court charged the jury as follows:

"It is a fact that the defendant failed to offer herself as a witness in her own behalf. The accused is competent, but not compellable, to be a witness in her own behalf. The fact that the defendant, having an opportunity to take the stand if she saw fit, has elected not to do so, and that she has been here and heard the statements of these witnesses on the stand who testified against her would warrant you in inferring that she could not deny that the facts which they stated were true."

ALEX. SIMPSON,
Attorney for Plaintiff in Error.

SPECIFICATION OF CAUSES FOR REVERSAL

(Filed, Feb. 9, 1926)

NEW JERSEY SUPREME COURT

THE STATE, Defendant in Error, vs. MAY J. BENNETT, Plaintiff in Error.	On writ of Error.

And now comes the said May J. Bennett, by Alex-Simpson, Esq., her attorney, and says that in the record and proceedings and also in giving judgment aforesaid, there is manifest error, and for error assigns the following reasons:

1. Because the Trial Court, over the objection of the defendant, permitted Doris E. Fraser, a witness for the State, to be asked the following question:

> "Q. Do you know whether there were any negotiations to purchase that other business from Mrs. von Wulf?
> "A. Yes, sir."

2. Because the Trial Court refused to direct a verdict at the end of the State's case, on the ground of failure of proof and proof not mentioned in the indictment, although thereto moved by the defendant.

Specification of Causes for Reversal

3. Because the Trial Court refused to direct a verdict in favor of the defendant at the close of the entire case, although thereto moved by the defendant.

4. Because the Trial Court refused the motion of the defendant for a new trial.

5. Because the Trial Court refused to charge the Requests to Charge submitted by the defendant.

6. Because the Trial Court charged the jury as follows:

> "The State produced several witnesses and the defense produced a witness. The State says that on the 21st of January, 1925, this defendant, May Bennett, represented to the complaining witness, Mrs. Minnie Wharton, that she was negotiating for the purchase of this place over on Varick Street—this is the evidence which has been submitted by the State—that there were some monies on deposit, and that if she did not raise the sum of $1500 she would lose the deposit. The State says that this woman represented that if she purchased this business she would take Mrs. Wharton as partner, give her as Mrs. Wharton said, a one half interest in the business.
> "Now, there is some evidence of negotiations on the part of Mrs. Bennett for the purchase of the Village Kitchen, and the defense contends that the Village Kitchen, which they intended to purchase, was not the Village Kitchen mentioned in the indictment and by the State's witnesses as number 179 Varick Street; that she was interested in two places, one 53 Greenwich Avenue, which is

known as the Village Kitchen and the premises 179 Varick Street, also known by the same name—the Village Kitchen; and some woman who said that she was interested in the ownership or in the title of those different businesses said that there was no negotiation whatever for the purchase of the business 179 Varick Street. Mrs. Wharton says that the defendant told her that she was negotiating for the purchase of it and that she needed the sum of $1500 to carry out the transaction, that if she got it she would save a deposit which she had on account of the purchase of that business, 179 Varick Street, and that if she did not get this $1500 she would lose that money; that if she did get it she would get the business and take her in."

7. Because the Trial Court charged the jury as follows:

"Now, what is a reasonable doubt? A reasonable doubt is not a mere possible doubt, it is not a fanciful doubt, but it is rather that state of the case, which, after the entire comparison and consideration of all the testimony, leave 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. If, therefore, after you have carefully compared and considered all the testimony in this case your minds are in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge, you have what the law says is a reasonable doubt, and

it is your duty, and I charge you to give the benefit of that doubt to the defendant. But you are not required to give her the benefit of anything except such reasonable doubt."

8. Because the Trial Court charged the jury as follows:

"It is a fact that the defendant failed to offer herself as a witness in her own behalf. The accused is competent, but not compellable, to be a witness in her own behalf. The fact that the defendant, having an opportunity to take the stand if she saw fit, has elected not to do so, and that she has been here and heard the statements of these witnesses on the stand who testified against her would warrant you in inferring that she could not deny that the facts which they stated were true."

ALEX. SIMPSON,
Attorney for Plaintiff in Error.

Opinion.

(Filed, Feb. 28, 1927.)

NEW JERSEY SUPREME COURT.

No. 5, May T., 1926.

THE STATE
vs.
MAY J. BENNETT.
} Opinion.

ERROR TO HUDSON QUARTER SESSIONS.

Argued before GUMMERE, Chief Justice, and Justices TRENCHARD and MINTURN.

For plaintiff-in-error, ALEX. SIMPSON.
For the State, JOHN MILTON, Prosecutor of the Pleas.

PER CURIAM.

This case was submitted on briefs at the last May Term, of the court, but through the oversight of the Sergeant-at-Arms, neither the state of the case nor the briefs were sent to the members of the court until just before the opening of the present January term.

The defendant was convicted upon an indictment which charged that she did wilfully and unlawfully, falsely and fraudulently pretended to one Minnie Wharton, that she, the said May J. Bennett, was about to purchase a certain restaurant and business known as the Village Kitchen, situate at No. 179 Varick Street, in the City of New

York; that she was then and there negotiating with the owners of said restaurant and business to purchase the same, and did represent to the said Minnie Wharton that, upon the payment of certain moneys by her to the said May J. Bennett, she (the latter) would take the said Minnie Wharton as a partner in said restaurant and business after she had purchased it; that the defendant then and there well knew that she was not about to purchase the said restaurant and business; that she was not negotiating with the owners thereof for such purchase; that she did not intend to take the said Minnie Wharton in as a partner in the said business; and that, by color and means of the false pretenses and representations, she fraudulently obtained from the said Minnie Wharton the sum of $1,500, with intent to cheat and defraud her thereof.

The first ground upon which a reversal of the conviction is guarded is urged is that the proofs submitted on behalf of the State, instead of supporting the charge laid in the indictment, demonstrate that the plaintiff-in-error and Minnie Wharton were engaged in a purely business transaction, honestly entered into by each of them, and which the plaintiff-in-error honestly sought to have carried out for their joint benefit; and that, consequently, the trial court should have granted the motion made on behalf of the defendant to direct a verdict in her favor because of the entire failure of proof supporting the charge laid against her. We are not able to concur in the view of the proofs suggested by counsel. Our examination of them satisfies us that Mrs. Wharton was led to believe that she was entering into a business transaction with the plaintiff-in-error by reason of the representations made to her by the latter, whereas, in fact no such transaction was intended by the plaintiff-in-error, but was suggested merely for the purpose of fraudulently inducing Mrs. Wharton to part with her money. We conclude, therefore, that the mtoion to direct a verdict in favor of the defendant was properly denied.

It is next urged as a ground for reversal that the court improperly admitted evidence showing that the plaintiff-in-error had stated to Mrs. Wharton that she had deposited the sum of $800 as a part payment of the purchase price of the restaurant and business specified in the indictment, and would lose it unless she got $1,000 more in order to make good on her contract of purchase, when in fact she under the proofs submitted by the State she not only had not made any such deposit on account of such purchase price, but had never had any negotiations for the purchase of that restaurant and business, either with the owners thereof or with anyone representing the latter. The contention of counsel is that the testimony should have been excluded because the falsity of the statement exhibited therein is not set forth in the indictment. It seems to us that this contention rests upon a failure to distinguish between the allegations of an indictment and the proofs offered in support thereof. The allegations of the present indictment is that the plaintiff-in-error falsely and fraudulently pretended that she was about to purchase the restaurant and business specifically set forth therein, and was negotiating with the owners thereof for such purchase. The false statements made by the plaintiff-in-error to

Mrs. Wharton with relation to the details of the alleged negotiations, and made for the purpose of inducing her to part with her money, were offered as proof of the truth of that allegation, and were properly admitted for that purpose.

The only other ground upon which a reversal of this conviction is sought is that the court erroneously (as it is contended) charged the jury that it could consider the evidence just discussed. What we have already said with relation to the competency of this testimony is dispositive of this contention.

For the reasons stated, the conviction under review will be affirmed.

Rule on Affirmance of Judgment and Order of Remittitur.

(Filed March 21, 1927.)

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* vs. MAY J. BENNETT, *Plaintiff-in-Error.*	On Error to Hudson Quarter Sessions. Rule on Affirmance of Judgment and Order of Remittitur.

This cause having been duly argued before this Court at the May Term, A. D., 1926, by John

Milton, Prosecutor of the Pleas of the County of Hudson, counsel for the State of New Jersey, defendant-in-error, and Alexander Simpson, Esquire, counsel for May J. Bennett, plaintiff-in-error, and the Court having considered the same and having examined the records and proceedings of the Hudson Quarter Sessions, in the said cause, and finding no error therein:

IT IS HEREBY ORDERED AND ADJUDGED that the judgment of the Hudson Quarter Sessions in the above entitled cause be and the same is hereby affirmed with costs;

AND, IT IS FURTHER ORDERED that the record in the said cause be forthwith remitted to the said Hudson Quarter Sessions there to be proceeded with according to law.

Entered March 12, 1927.

On motion of

JOHN MILTON,
Prosecutor of the Pleas,
Counsel for State of New Jersey,
Defendant-in-Error.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Writ of Error.

New Jersey, to wit:

(Seal)

The State of New Jersey to the Chief Justice and Associate Justices of our Supreme Court of Judicature of the State of New Jersey, GREETING:

Because in the record and proceedings and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between May J. Bennett, plaintiff-in-error and The State, defendant-in-error, manifest error hath intervened to the damage of the said May J. Bennett, plaintiff-in-error, as is said, and we being willing in that behalf, that the error, if any there be, should in due manner be corrected and full and speedy justice be done to the plaintiff-in-error, do command you, that you distinctly and openly send under your hand and seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Judges of the Court of Errors and Appeals in the last resort in all causes, at Trenton, on the second day of April, next, together with this writ, that the record and proceedings aforesaid being inspected we may cause to be further done therein for correcting that error, what of right and according to the laws of the State of New Jersey ought to be done.

WITNESS, Edwin Robert Walker, Esquire, our Chancellor and President Judge of our said Court

of Errors and Appeals, at Trenton, this 14th day of March, nineteen hundred and twenty-seven.

JOSEPH F. S. FITZPATRICK,
Clerk.

ALEX. SIMPSON,
Attorney.

Return of Supreme Court.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GRUMMERE,
C. J.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Specification of Causes for Reversal.

(Filed Mar. 21, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* vs. MAY J. BENNETT, *Plaintiff-in-Error.*	On Writ of Error. Specification of Causes for Reversal.

And now comes the said May J. Bennett, plaintiff-in-error, by Alex. Simpson, Esq., her attorney, and says that in the record and proceedings and also in giving judgment aforesaid, there is manifest error, and for error assigns the following cause:

1. The Supreme Court gave judgment affirming the conviction of the plaintiff-in-error and of the judgment thereon, whereas, it should have reversed the judgment of the Hudson County Court of Quarter Sessions and set aside the conviction of that court.

ALEX. SIMPSON,
Attorney for Plaintiff-in-Error.

Assignment of Error.

(Filed Mar. 21, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* vs. MAY J. BENNETT, *Plaintiff-in-Error.*	On Writ of Error. Assignment of Error.

And now comes the said May J. Bennett, plaintiff-in-error, by Alex. Simpson, Esq., her attorney, and says that in the record and proceedings and also in giving judgment thereon, there is manifest error, and for error assigns the following cause:

1. The Supreme Court gave judgment affirming the conviction of the plaintiff-in-error and of the judgment thereon, whereas, it should have reversed the judgment of the Hudson County Court of Quarter Sessions and set aside the conviction of that court.

ALEX. SIMPSON,
Attorney for Plaintiff-in-Error.

New Jersey Court of Errors and Appeals

THE STATE, *Defendant-in-Error,* vs. MAY J. BENNETT, *Plaintiff-in-Error.*	On Writ of Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

The Plaintiff-in-Error was convicted under an indictment alleging that she did falsely and fraudulently pretend to one Minnie Wharton, that

> "she the said May J. Bennett, was about to purchase a certain restaurant and business known as the Village Kitchen, situate number One hundred and seventy-nine Varick Street, in the City of New York, State of New York, and that she the said May J. Bennett, was then and there negotiating with the owners of said restaurant and business to purchase the same,"

and she the said May J. Bennett,

"did falsely represent to the said Minnie Wharton that upon payment of certain moneys by the said Minnie Wharton to the said May J. Bennett, that she the said May J. Bennett would take the said Minnie Wharton as a partner or shareholder in said restaurant and business then and there situated and described as aforesaid."

These were the false pretenses. The Plaintiff-in-Error was convicted. The errors assigned are: failure of proof; refusal to direct a verdict; admission of illegal testimony concerning false pretenses not alleged in the indictment; refusal to charge as requested; and erroneous instructions.

POINT I.

There was entire failure of proof of the charge alleged in the indictment. The complainant, Minnie Wharton and the plaintiff-in-error were engaged in a business transaction. The testimony of the complaining witness shows (S. C., pp. 16-41), that there was no false pretense; that the plaintiff-in-error and the complaining witness were engaged in a business transaction. The plaintiff-in-error was trying to buy a restaurant and wanted a thousand dollars, which the complaining witness loaned her to buy the restaurant. On page 20 of the State of Case is another alleged pretense not alleged in the indictment about the eight hundred dollars having been deposited which testimony was objected to, and was admitted by the learned judge (S. C., p. 22). All that the plaintiff-in-error said was that according to the evidence, she must have the fifteen hundred dollars. At the bottom

of page 22, line 35, we have the conversation as given by the complaining witness:

"Q. When you gave her the fifteen hundred dollars, did she tell you what she was going to use it for? A. To take over this restaurant, that she would lose it if she did not get the money, she must have it, that is what she said."

A note was given for all the money loaned (S. C., pp. 30-31). The complaining witness, on page 32, line 15, says:

"Q. We are not asking that. We are trying to get at the reason why you gave up your fifteen hundred dollars? A. Because she wanted to buy the restaurant and she would pay one thousand dollars bonus for the use of the money for that restaurant.

"Q. Is that the only reason? A. That was the reason.

"Q. Is that the only reason or were there other reasons? A. Well, that was the reason I gave it to her, because she wanted to have the money and was going to give a thousand dollars for it."

So that all through the testimony we have that the money was given for a thousand dollar bonus and the promise that when the restaurant was bought, the complaining witness would be taken into partnership.

There is a dispute about where the restaurant was that she was about to purchase. It was admitted that she was negotiating for one restaurant known as the Village Inn, at No. 53 Greenwich

Avenue, but not the one of the same name at No. 179 Varick Street. There were two Village Kitchens, one No. 53 Greenwich Avenue, and one at No. 179 Varick Street, both owned by the same persons. It was admited that the defendant did negotiate for No. 53 Greenwich Avenue, but it was contended that she did not for No. 179 Varick Street. See the testimony on pages 55-59, inclusive, showing that the plaintiff-in-error was negotiating for the purchase of one restaurant known as the Village Inn.

ARGUMENT.

1. It is submitted that on this testimony there was no false pretense. There was a business transaction with the complaining witness in which she loaned fifteen hundred dollars to the plaintiff-in-error, with the promise of a bonus of a thousand dollars and took a note for twenty-five hundred dollars, and a promise to be taken into partnership. There was no allegation in the indictment of a false pretense that the plaintiff-in-error had eight hundred dollars on deposit which she would lose. It was error to admit this testimony as no such pretense was stated in the indictment and, therefore, there should have been a direction of a verdict on this ground, and refusal was error and the admission of the evidence was error. See the following case, *Ruper* vs. *State,* 58 N. J. L., 420.

It will thus be seen that the plaintiff-in-error was convicted without any testimony to support the false promises alleged in the indictment as she was negotiating for the Greenwich Village Inn. The mere change in the street number was not sufficient to charge her with a false pretense nor was

it relied upon by the complaining witness for the parting of the money. The complaining witness says that she was induced to part with her money by reason of the bonus and prospective partnership. She was lending the money on the promise to be taken into partnership in the restaurant. The case shows that the plaintiff-in-error was negotiating for the purchase of a restaurant, and also the complainant's testimony, hereinbefore referred to, shows that there is no testimony that she relied upon any false statement in order to part with her money. There should have been a direction on this ground.

IMPROPER EVIDENCE OFFERED OF OFFENSE NOT PLEADED.

The language of the Supreme Court is, in dealing with this point:

> "It seems to us that this contention rests upon a failure to distinguish between the allegations of an indictment and the proof offered in support thereof."

It is respectfully submitted that this begs the argument that it is improper to admit evidence of false pretenses not alleged in the indictment and rely on them for conviction. It is respectfully submitted it is rather hard to understand, for the argument in the opinion of the Supreme Court is rested upon false statements made to the complainant with relation to the details of the alleged negotiation, and made for the purpose of inducing her to part with her money, although not alleged in the indictment, and were admissible as evidence. This cannot be supported by any reasoning of

these cases before cited. The court does not deal at all with the assignment of error No. 8 covering the court's charge on page 88, line 38 to line 10 regarding the effect of the silence of the defendant. The opinion is absolutely silent on this point as if it was never considered or noticed. No allegation of falsity not named could be legally relied on for a conviction.

State vs. *Riley*, 65 L., 6241.

There was no misapprehension as is respectfully submitted in the mind of counsel as to what the point was. The point that counsel was endeavoring to make was that the jury could not rely on any false pretense to convict, which false pretense was not alleged in the indictment, and the jury were allowed to rest upon said false pretense as to the $800.00 which was not alleged in the indictment, nor was any pretense alleged in the indictment proven. The case cited is State vs. Riley and the other cases in this brief are authority for the proposition that in this class of crime any false pretense intended to be relied on must be set up in the indictment.

If it is taken that it was proved that the plaintiff-in-error had alleged that she had an eight hundred dollar deposit which she would lose unless she got the thousand dollars, that is that she did not in fact have any eight hundred dollars deposit. This cannot be relied on, because it was improper to admit this testimony under the following cases: *State* vs. *Riley*, 65 L., 624, which holds:

> "It is error to permit the jury to convict for falsity not alleged in the indictment";

also *State* vs. *Barone*, 98 L., page 10.

CHARGE OF COURT.

The Court erroneously charged the jury that they could consider the evidence,

> "that there were some monies on deposit and that if she did not raise the sum of fifteen hundred dollars she would lose the deposit" (S. C., p. 88, l. 18),

erroneously because this allegation was not presented in the indictment. The same is true of the Court's charge on page 88, line 38 to line 10 on page 89; also the Court erroneously charged the jury that the silence of the plaintiff-in-error could be taken to be evidence as to guilt, page 91, whereas if she did not contest the facts proved her silence was nugatory. It is true that if a defendant does not take the stand and deny facts in evidence, it is evident that he cannot deny them, but the facts in evidence in this case were such that the plaintiff-in-error could safely leave unchallenged, and, therefore, no instance of guilt could be found as the Court indicated in its charge.

It is respectfully submitted that the conviction should be reversed.

Respectfully submitted,

ALEX. SIMPSON,
Attorney of Plaintiff-in-Error.

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New Jersey Court of Errors and Appeals

The State of New Jersey, Defendant-in-Error, *vs.* May Bennett, Plaintiff-in-Error.	On Writ of Error

BRIEF FOR DEFENDANT-IN-ERROR.

The plaintiff-in-error was convicted of the crime of obtaining money by false pretense by a jury in the Hudson Quarter Sessions. The facts developed were that the plaintiff-in-error came to the plaintiff at her home in Jersey City and told her that she was about to purchase the restaurant business known as the Villiage Kitchen located at #179 Varick Street, New York City, and had paid a deposit of Eight hundred ($800) dollars which she would lose if she did not have another Fifteen hundred ($1,500) dollars the next day. The plaintiff-in-error never purchased or attempted to purchase the said restaurant business and never put up Eight hundred ($800) dollars to purchase that business or any other business, but took the complaining witness' Fifteen hundred ($1,500) dollars and promised that she would become a partner in the enterprise. The complaining witness did not take the stand in her own behalf although she offered another witness in her defense. While it is admitted that there are two Villiage Kitchens, one of which the plaintiff-in-

error had some negotiation about still there was never a deposit of Eight hundred ($800) dollars paid on account of the purchase of the kitchen and the plaintiff-in-error was in no danger of losing any such amount. The proprietor of the Villiage Kitchen testified that the plaintiff-in-error never gave her a deposit on #179 Varick Street; never attempted to purchase it and never required a deposit of Fifteen hundred ($1,500) dollars on January 21st, or at any other time on either restaurant.

POINT I.

The plaintiff-in-error and the complaining witness were not engaged in a business transaction.

It would have been had it been an honest transaction. The complaining witness was led to believe that she was becoming a partner in a restaurant business at #179 Varick Street, New York City. Complaining witness represented that she was negotiating for the purchase of that business, and the indictment so charges. The proof attempted to show how far the negotiations had gone—to the extent of depositing Eight hundred ($800) dollars which amount was in jeopardy if an additional Fifteen hundred ($1,500) dollars was not put up at once. The purpose of admitting proof of the Eight hundred ($800) dollar deposit was to substantiate the charge in the indictment that "the defendant was then and there negotiating with the owners of said restaurant to purchase the same". The payment of Eight hundred ($800) dollars was a step in the negotiations and was properly allowed in the testimony. The

money was obtained on the representation that plaintiff-in-error was purchasing #179 Varick Street which she was not buying or attempting to buy, and the money so obtained by the complaining witness was not put up on that purchase or any other purchases. The case of *Roper* v. *State*, 58 N. J. L. 420, merely holds a pretense must be such as to induce one to part with his property and not be absurd in itself. That the complaining witness was cajoled into believing she would be a partner in the restaurant business cannot be considered as absurd. The allegations laid in the indictment come within the rules laid down in *State* v. *Riley*, 65 N. J. L. 624.

Respectfully submitted,

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Prosecutor of the Pleas, Attorney
for Defendant-in-Error.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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