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Notice of Appeal.

(Filed May 3, 1917.)

New Jersey Supreme Court

PAUL SEGLIE, *Prosecutor,* VS. HENRY ACKERMAN, FRANCIS J. SWAYZE, ESQ., Justice of the Supreme Court, et als, *Defendants.*	Notice of Appeal.

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TO RICHARD DOHERTY, ESQ.,
Attorney for the Defendants.

SIR:

TAKE NOTICE that Paul Seglie, prosecutor in the above-named case, appeals to the Court of Errors and Appeals from the judgment rendered in this cause, on the following grounds:

1. Because the Supreme Court refused to find that the petition of Henry Ackerman for a recount failed to disclose that an error had been made sufficient to change the result of the election, or for reason for the belief on the part of the petitioner, Henry Ackerman, that such error had been made.

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2. Because the Supreme Court refused to find that the Justice of the Supreme Court to whom the application for a recount was made was without authority or jurisdiction to order a recount upon

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the petition as presented to him, because said petition did not show that an error had been made sufficient to change the result of the election, nor did it set forth a sufficient reason or any reason for the belief that such an error had been made;

3. That the order for a recount was made on December 1st, 1916, before the result of the election had been declared, in accordance with the statute;

4. That the term of office of the Justice of the Supreme Court to whom such application was made for a recount, and who made the order for such recount, expired on January 19th, 1917, and the votes cast in over 10 election districts of the County of Hudson, were recounted by said County Board of Elections, such recount not then being under the direction of the said Supreme Court justice;

5. Honorable Francis J. Swayze was, after January 22nd, 1917, appointed Justice of the Supreme Court, and thereafter, he passed upon and decided disputed ballots and caused the same to be recounted, said Justice not being then the Justice who ordered such recount;

6. Honorable Francis J. Swayze was, after January 22nd, 1917, appointed a Justice of the Supreme Court, and thereafter he passed upon and decided disputed ballots referred to him by the County Board of Elections of said County of Hudson, the said County Board of Elections then recounting said ballots, at a time when the Justice who had ordered said recount was no longer sitting, his term of office having expired;

7. The certificate of election issued to the prosecutor was revoked by a Justice of the Supreme

Court other than the Justice who had ordered the recount, contrary to statute;

8. The certificate of election issued to the respondent, Henry Ackerman, was issued by a Justice of the Supreme Court other than the Justice who ordered the recount, contrary to the statute;

9. The ballots recounted by the County Board of Elections under the order for a recount, were not the same ballots which were cast at the general election held on November 7th, 1916.

10. The ballots were fraudulently tampered with after the general election and before and during the recount, and no new certificate of election or revocation of the old certificate could be based upon a recount of such ballots;

11. There was conclusive evidence before the County Board of Elections and the Justice of the Supreme Court who revoked the certificate of election of the prosecutor and issued a certificate of election to the respondent, Henry Ackerman, that a part of the ballot boxes had not been preserved according to law, and had been exposed to unlawful and unauthorized tampering, and some had been tampered with; by reason whereof the ballots in said boxes could not be lawfully recounted, nor could a new certificate of election be based upon a recount of ballots in such boxes;

12. The exclusion from the recount of any such boxes so unlawfully tampered with, or exposed to unlawful and unauthorized tampering, invalidated the recount, as the prosecutor is entitled to a recount of all the ballots in the county, and not merely to a part of them, and no valid certificate of election could be issued nor could the certificate issued to the prosecutor be revoked upon a recount which

did not include all the ballots cast at the election;

13. There was no proof of error sufficient to change the result; whatever change there was, was due to fraud and to fraudulent tampering with the ballots, and the revocation of the certificate of the prosecutor and the issuance of a new certificate of election to the respondent, Henry Ackerman, was unlawful and without authority, except upon proof of error in the result;

14. There was no evidence before the Justice who revoked the prosecutor's certificate of election and issued a new certificate of election to the respondent, Henry Ackerman, upon which to base any finding of error, sufficient to change the result, without which said Justice had no jurisdiction;

15. Because the Supreme Court rendered judgment dismissing the writ of certiorari in this case without costs.

GEORGE J. McEWAN,
Attorney for Appellant.

Writ of Certiorari.

NEW JERSEY, ss: The State of New Jersey to Hon. Francis J. Swayze, Justice of the Supreme Court, Greeting:

(Seal)

We, being willing, for certain reasons, to be certified of a certain revocation of certificate of election and new certificate made and issued by you on the 13th day of February, A. D., one thousand nine hundred and seventeen, revoking a certificate of election theretofore made and issued to one Paul Seglie, by the County Clerk of the County of Hudson, on the 4th day of December, one thousand nine hundred and sixteen, certifying the election of the said Paul Seglie, to the office of Boulevard Commissioner of the County of Hudson, at the general election held in the County of Hudson on the 7th day of November, nineteen hundred and sixteen, and in place of said certificate of election issuing a certificate of election in favor of one Henry Ackerman for said office, and all proceedings had or taken leading up to the making of said revocation and certificate by you.

We do command you that you do send the said order and certificate so made by you on the 13th day of February, A. D. one thousand nine hundred and seventeen, together with all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature, at Trenton, on the 20th day of February, next, together with this our writ, that we may further cause to be done

thereupon what of right and according to the laws of this state ought to be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, this 13th day of February, A. D. one thousand nine hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

A. A. MELNIKER,
Attorney.

Endorsement.

I allow this writ. Let it be sealed. February 13, 1917. Conditioned upon the case being brought on and argued at February term 1917. Ackerman may take the oath and give the bond required by law but shall not take the office; and all other proceedings are stayed.

F. J. SWAYZE,
J. S. C.

Return.

The answer of Francis J. Swayze, Esquire, Judge of the Supreme Court holden in and for the County of Hudson, and John J. McGovern, Clerk of said county, within named, the record and proceedings of the plaint whereof mentioned is within made with all things touching the same, we certify and send to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained, in a certain schedule to this writ annexed as within we are commanded.

FRANCIS J. SWAYZE,
Judge.

Attest:

JOHN J. MCGOVERN,
Clerk.

Certificate to Determination of Board of Canvassers.

A FURTHER STATEMENT OF THE DETERMINATION of the Board of County Canvassers relative to an election held in the County of Hudson on the seventh day of November, 1916, for the election of three Boulevard Commissioners for said county:

The said Board do determine that at the said election Paul Seglie was duly elected a Boulevard Commissioner for said county;

I do hereby certify that the foregoing is a true, full and correct statement of the determination of the Board of County Canvassers therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of December, 1916.

JAMES TAYLOR,
Chairman of the Board
of County Canvassers.

Attest:
EDWIN W. GRITTEN,
Clerk.

Petition for Recount.

In the Matter

of

The Application of Henry Ackerman for a recount of votes cast at election November 7, 1916, for office of Boulevard Commissioner of Hudson County.

To the Honorable Francis J. Swayze, Justice of the Supreme Court of the State of New Jersey.

The petition of Henry Ackerman, residing at Jersey City, Hudson County, New Jersey, respectfully shows: that he is a citizen of the United States and a legal voter of said county, and was at the general election held therein November 7, 1916, a candidate for the office of Boulevard Commissioner of Hudson County.

Your petitioner further shows that he has reason to believe that an error has been made by various district Boards of Elections of said county in counting and declaring the vote of said election whereby the result of such election has been changed; and further shows that in the return of the elections filed by the Board of Registry and Election for the First District of the Second Ward of the City of Bayonne, according to the written return of the votes cast for one Paul Seglie, he received 127 votes, while according to the statement of said vote expressed in figures he received 147 votes.

Your petitioner therefore prays for an order directing, upon such terms as may be deemed proper, a recount of the whole, or such part of

the votes cast at said election for the office of Boulevard Commissioner as may be determined, be made under the directions of the County Board of Elections, according to the statute in such case made and provided.

Dated, November 17, 1916.

HENRY ACKERMAN,
Petitioner.

STATE OF NEW JERSEY,
County of Hudson, } ss.:

HENRY ACKERMAN, being duly sworn, according to law, on his oath, says that he is the petitioner named in the foregoing petition and who signed the same, and that the matters and things therein set forth are true to the best of his knowledge and belief.

HENRY ACKERMAN.

Subscribed and sworn to at Jersey City, N. J., this 17th day of November, 1916, before me:

Carl M. Herbert,
Master in Chancery of New Jersey.

Order for Recount.

In the Matter

of

The Application of Henry Ackerman for a recount of votes cast at election November 7, 1916, for office of Boulevard Commissioner of Hudson County.

Upon the presentation on November 17, 1916, of the verified petition of Henry Ackerman, it is, on this first day of December, 1916,

Ordered that the Hudson County Board of Elections proceed, not later than December 7, 1916 publicly to recount the votes cast for the office of Boulevard Commissioner of Hudson County at the election held therein November 7, 1916.

It is further ordered that the clerks of the several municipalities of Hudson County wherein the votes so to be recounted were cast, produce the ballot boxes containing said votes before said Hudson County Board of Elections on said date of December 7, 1916, and that the clerk of Hudson County at said time produce the keys thereof.

It is further ordered that the said applicant deposit with the Clerk of the County of Hudson as security for the payment of the expenses of such recount the sum of $8,000 or, in lieu thereof, that he file for the same purpose, with two sureties, a bond in the sum of eight thousand dollars ($8,000).

It is further ordered that a copy of this order, which need not be certified, be served within three days, that is on or before December 4, 1916 upon Paul Seglie, a candidate for the same office;

and upon the Hudson County Board of Elections, either personally or by leaving said copy with the clerk thereof at the office of said Board; and upon the Clerk of Hudson County either personally or by leaving same at his office; and upon the clerks of the several municipalities of Hudson County who may be required to produce the ballots and ballot boxes, either personally or by leaving same at their respective offices, not less than two days before said recount is held.

FRANCIS J. SWAYZE,
J. S. C.

Conclusions of Mr. Justice Swayze.

JUSTICE SWAYZE: In this case of the recount of the votes for Boulevard Commissioner I sit only as a part of the election machinery, and my only power is to recount the votes with the assistance of the board of election and to sign a certificate of the result.

It was decided in the Mathis case that where the judge who recounted—to use a common expression—was satisfied that the votes as they appeared on the recount were not the votes as cast at the election he might refuse to sign a certificate, and if I were satisfied in this case, as Justice Voorhees was satisfied in that case, that the ballots recounted were not the ballots as cast, I would follow the same course that he followed. I do not think I can go as far as that, that is as far as to say that I am satisfied that they are not the same votes. There are many suspicious circumstances about it, and if I were at liberty to draw inferences I probably should have to infer that there had been some alterations after election, but the farthest I can go is to say that I am

not satisfied that the ballots recounted are the same ballots that were cast. That, it seems to me, is not enough. I think that I must presume for the purpose of the certificate at any rate, that the ballots produced before me are the ballots that were cast, unless actual fraud is shown to my satisfaction, as it was shown to that of Justice Voorhees in the Mathis case.

Now I do not know that I can say anything more.

That makes it necessary, of course, for me to sign the certificate which Mr. Collins has presented to me.

I said that I would give Mr. Walscheid an opportunity to have a writ of certiorari, and I will allow that writ as soon as I sign the certificate.

(Argument.)

JUSTICE SWAYZE: I mean to preserve the status quo in this case, until this matter can be passed on by the Supreme Court. I will allow a writ of certiorari removing the order which I am about to sign, and all things touching and concerning the same, and that I suppose carries the original order; and I will make no order with reference to a stay. I will let the writ take its ordinary course, but the writ will be allowed upon condition that the matter be argued at the February term.

Revocation of Certificate of Election of Paul Seglie as Boulevard Commissioner of Hudson County and Certificate of Election to said office to Henry Ackerman.

IN THE MATTER

of

The votes cast for office of Boulevard Commissioner of Hudson County at election held November 7, 1916.

Application having been duly made to the undersigned, Francis J. Swayze, one of the Justices of the Supreme Court of the State of New Jersey, by Henry Ackerman, a candidate for the office of Boulevard Commissioner of Hudson County, for a recount of the votes cast for said office at the General Election, held in said county November seventh, nineteen hundred and sixteen, and an order having been made thereon, December first, nineteen hundred and sixteen, directing and requiring the Hudson County Board of Elections to recount the entire vote cast at said election for said office, and it appearing that due notice of said order was given to all the parties, as by the said order it was directed, and that the said recount has been duly and publicly made by the said Hudson County Board of Elections, as required under the direction of the undersigned, and it appearing upon such recount that an error sufficient to change the result of such election was made in the counting and declaring of vote of such election for the said position of Boulevard Commissioner of Hudson County, and that a cer-

tificate of elections has been heretofore issued to Paul Seglie as such Boulevard Commissioner of Hudson County, whereas by said recount it is manifest that Henry Ackerman received a majority of the votes cast for the said Paul Seglie and Henry Ackerman for said office and that the said Henry Ackerman was duly elected thereto;

Now, therefore, I, Francis J. Swayze, Justice of the Supreme Court of the State of New Jersey, by virtue of the power vested in me by the statute in such case made and provided, do this thirteenth day of February, nineteen hundred and seventeen, hereby revoke said certificate of election so issued to the said Paul Seglie, and do hereby issue in its place this certificate of election in favor of the said Henry Ackerman, who, by said recount, is found to have received a majority of the votes cast for him and the said Paul Seglie at such election, which certificate shall supersede said certificate of election issued to the said Paul Seglie, and entitle the said Henry Ackerman to the same rights and privileges as if the same had been originally issued to him by the Canvassing Board.

FRANCIS J. SWAYZE,
J. S. C.

Reasons.

NEW JERSEY SUPREME COURT.

PAUL SEGLIE, *Prosecutor,* *vs.* FRANCIS J. SWAYZE, ESQUIRE, Justice of the Supreme Court, *et als,* *Respondents.*	On Certiorari.

The following are the reasons upon which the prosecutor in the above entitled proceedings relies, on his application to have all of said proceedings set aside and for nothing holden:

1. That the petition of Henry Ackerman for a recount, fails to disclose that an error had been made sufficient to change the result of the election, or for any reason for a belief on the part of the petitioner that such error had been made;

2. That the Justice of the Supreme Court to whom the application for a recount was made, was without authority or jurisdiction to order a recount upon the petition as presented to him, because said petition did not show that an error had been made sufficient to change the result of the election, nor did it set forth a sufficient reason or any reason for the belief that such an error had been made;

3. That the order for a recount was made on December 1st, 1916, before the result of the election had been declared, in accordance with the statute;

4. That the term of office of the Justice of the Supreme Court to whom such application was made for a recount, and who made the order for

Reasons.

such recount, expired on January 19th, 1917, and the votes cast in over 10 election districts of the County of Hudson, were recounted by said County Board of Elections, such recount not then being under the direction of the said Supreme Court Justice;

5. Honorable Francis J. Swayze was, after January 22nd, 1917, appointed Justice of the Supreme Court, and thereafter, he passed upon and decided disputed ballots and caused the same to be recounted, said Justice not being then the Justice who ordered such recount;

6. Honorable Francis J. Swayze was, after January 22nd, 1917, appointed a Justice of the Supreme Court, and thereafter, he passed upon and decided disputed ballots referred to him by the County Board of Elections of said County of Hudson, the said County Board of Elections then recounting said ballots, at a time when the Justice who had ordered said recount was no longer sitting, his term of office having expired;

7. The certificate of election issued to the prosecutor was revoked by a Justice of the Supreme Court other than the Justice who had ordered the recount, contrary to statute;

8. The certificate of election issued to the respondent Henry Ackerman, was issued by a Justice of the Supreme Court other than the Justice who ordered the recount, contrary to the statute;

9. The ballots recounted by the County Board of Elections under the order for a recount, were not the same ballots which were cast at the general election held on November 7th, 1916;

10. The ballots were fraudulently tampered with after the general election and before and during the recount, and no new certificate of election or revocation of the old certificate could be based upon a recount of such ballots;

Reasons.

11. There was conclusive evidence before the County Board of Elections and the Justice of the Supreme Court who revoked the certificate of election of the prosecutor and issued a certificate of election to the respondent, Henry Ackerman, that a part of the ballot boxes had not been preserved according to law, and had been exposed to unlawful and unauthorized tampering, and some had been tampered with; by reason whereof the ballots in said boxes could not be lawfully recounted, nor could a new certificate of election be based upon a recount of ballots in such boxes;

12. The exclusion from the recount of any such boxes so unlawfully tampered with, or exposed to unlawful and unauthorized tampering, invalidated the recount, as the prosecutor is entitled to a recount of all the ballots in the county, and not merely to a part of them, and no valid certificate of election could be issued nor could the certificate issued to the prosecutor be revoked upon a recount which did not include all the ballots cast at the election;

13. There was no proof of error sufficient to change the result; whatever change there was was due to fraud and to fraudulent tampering with the ballots, and the revocation of the certificate of the prosecutor and the issuance of a new certificate of election to the respondent, Henry Ackerman, was unlawful and without authority, except upon proof of error in the result;

14. There was no evidence before the Justice who revoked the prosecutor's certificate of election and issued a new certificate of election to the respondent, Henry Ackerman, upon which to base any finding of error, sufficient to change the result, without which said Justice had no jurisdiction.

AARON A. MELNIKER,
Attorney of Prosecutor.

Order for Deposition.

NEW JERSEY SUPREME COURT.

PAUL SEGLIE, *Prosecutor,* *vs.* FRANCIS J. SWAYZE, *et als,* *Respondents.*	Certiorari.

On application of Aaron A. Melniker, Attorney of Prosecutor, it is on this thirteenth day of February, nineteen hundred and seventeen,

ORDERED that either of the parties in the above entitled cause may take depositions to be used upon the argument upon one day's notice.

F. J. SWAYZE.
Justice of the Supreme Court.

Notice of Taking Depositions.

NEW JERSEY SUPREME COURT.

PAUL SEGLIE, *Prosecutor,* *vs.* HONORABLE FRANCIS J. SWAYZE, *et als,* *Respondents.*	On Certiorari.

To Messrs. Collins & Corbin, Attorneys of Respondent, Henry Ackerman:

Sirs:

PLEASE TAKE NOTICE, that on Thursday, March 1st, 1917, at four o'clock in the afternoon, I shall take testimony in the above entitled matter, be-

fore Neale Ransome, Esquire, a Supreme Court Examiner of the State of New Jersey, at my office, No. 586 Newark Avenue, Jersey City, New Jersey.

Dated, February 28th, 1917.

Respectfully yours,

A. A. MELNIKER,
Attorney of Prosecutor.

Proceedings and Testimony.

NEW JERSEY SUPREME COURT.

In re,

PAUL SEGLIE,

Prosecutor,

vs.

FRANCIS J. SWAYZE, Esquire, and Justice of Supreme Court, HUDSON COUNTY BOARD OF CANVASSERS OF ELECTION, and JOHN J. McGOVERN, Clerk of the County of Hudson, and HENRY ACKERMAN,

Respondents.

APPEARANCES:

MESSRS. MELNIKER, WALSCHEID AND McEWAN, for Prosecutor;

MESSRS. COLLINS AND DOHERTY, for Respondents.

Above matter heard before Justice Francis J. Swayze, Tuesday, January 30, 1917.

Jersey City, January 30, 1917.

MR. JUSTICE SWAYZE: Now, Mr. Walscheid and Mr. McEwan and Mr. Melniker.

MR. COLLINS: I suppose the first thing is for the Board to present its certificate to your Honor, and then it will be in order for me to move—when I see the certificate presented showing the results it will be in order for me to move for the order of revocation.

MR. JUSTICE SWAYZE: I suppose that is the orderly way.

MR. COLLINS: They are on their way up here.

MR. JUSTICE SWAYZE: All right.

(Interruption.)

MR. JUSTICE SWAYZE: Where is the election board?

MR. BOWLY: Downstairs.

MR. JUSTICE SWAYZE: Mr. Collins wants a certificate of the result of this recount. Can't we go on in the absence of that certificate and assume that it shows—

MR. COLLINS: We might put it *nunc pro tunc* that the County Board presents a certificate showing the following results; thereupon counsel for Mr. Ackerman presents to his Honor that application. What have you to say about it?

MR. JUSTICE SWAYZE: Now, Mr. Walscheid.

MR. WALSCHEID: Now we object to your Honor revoking the certificate which has been issued and issuing a new certificate, first, on the ground that the proceedings have not been initiated in accordance with the provisions of Section 159 of the Election Law, in that the petition which was presented does not set forth any reasons to justify the Justice of the Supreme Court who then acted in setting the machinery provided by that sec-

tion in motion. That refers to the matters which we argued before your Honor at your Honor's home upon an application for a writ of certiorari. I do not know whether your Honor desires me to go into that point any further at this time.

THE COURT: No; just state the point.

MR. WALSCHEID: I merely wish to have it upon the record that we renew that objection.

THE COURT: I overrule it.

MR. WALSCHEID: And my second objection is that the County Board of Elections, together with the Justice of the Supreme Court, who undertook this recount, went out of office on or about the 18th or 19th day of January, 1917.

THE COURT: Might as well have it exact. The 19th of January.

MR. WALSCHEID: 19th of January; when your Honor's term expired, and that your Honor, sitting as a new Justice, has not the power to take part in that recount, has no power to issue a certificate, and the special statutory tribunal which had charge of this matter died upon that day, and that therefore this recount cannot proceed.

MR. JUSTICE SWAYZE: I overrule that objection. You may have the benefit of it.

MR. WALSCHEID: Our third objection—and that the actual counting of the ballots which took place while your Honor was not a Justice of the Supreme Court was illegal. Mr. McEwan suggests that as part of the other.

MR. JUSTICE SWAYZE: Yes, I overrule it.

MR. WALSCHEID: Our third objection is that the ballots which were counted on this recount were not the ballots which were in the boxes at the close of the election in last

November; were not the ballots which were cast on the last election day, and that the ballots which were counted have been tampered with, and that actual fraud has been committed, and that therefore there has been no recount of the ballots cast on last election day.

Our fourth reason is that the County Board of Elections and the Justice of the Supreme Court constituting the special tribunal, refused to count ballots upon which three candidates for member of the Board of Boulevard Commissioners, had been voted for. It being our contention that the provision in the law creating a Boulevard Commission, which provides that only two out of three shall be voted for, is unconstitutional; and that the County Board of Elections, together with the Justice taking part in the recount, or under whose direction the recount was held, should have counted those particular ballots; and that a sufficient number of those ballots on which Mr. Seglie's name appears had been rejected to change the result, in other words, if those ballots had been counted the result would not have been changed.

Now as to these propositions last urged, that is, the proposition of fraud and also the proposition in which we raise the constitutional question, we ask leave to submit such testimony as we have in order to substantiate them as allegations of fact.

MR. COLLINS: It is unnecessary for me to speak as to the first two. I will speak of the fourth one first. That is absolutely controlled, as far as this hearing is concerned, by the case of *Orpit vs. Watson,* involving the Walsh Act, and similar provisions, and the

Supreme Court decided that the acts were valid. The Court of Errors found it unnecessary to pass upon the question at all for the reason that they held that only the Attorney General could attack the new government constituted under the Walsh Act which had the minority representation feature. Your Honor is familiar with it. It is strictly analogous.

Now the Supreme Court's decision is binding upon your Honor, and Justice Bergen distinctly said that the act was valid. Judge Speer has recently followed that. *Daly vs. Garven* came up for trial on *quo warranto,* where they undertook to claim before Judge Speer that that provision of the act, the Walsh Act, should be exscinded, and they could not reach the ballots upon which a man had voted in his choice for more than—whatever the provision was. I appeared for the motion. Your Honor has it in mind. He evidently could not hold any other way. The law in this case distinctly states these shall be rejected. The theory is that there are three men to be elected, but no one can vote for more than two. That has been upheld. That is a far stronger case than the difficulty that was involved in the Walsh Act case. The decisions are uniform that you may have minority representation; that where three are so chosen the voters are limited to vote for two and may do so lawfully. That is the law. Your Honor follows that law. It can be justified by all the decisions. Whether so or not, if your Honor had in mind an argument which might be forcible to your Honor's own thought the other way, nevertheless that is the law, and your Honor is counting, that is

all your Honor is doing. You have to count according to law, and when you find ballots with three men voted for you have got to reject them. You have no judicial authority at all. This counting might as well be done by any one selected—the Attorney General or the County Clerk.

MR. JUSTICE SWAYZE: Let me see if I can shorten it. I am with you on that point. The question in my mind is whether I ought not to allow them to make some proof, so that they may review it if necessary. I do not know how they can review my actions.

MR. COLLINS: The decisions say it cannot be done.

MR. JUSTICE SWAYZE: Oh, well—

MR. COLLINS: I think that the data exists already. I wouldn't think you needed any proof on the subject.

MR. JUSTICE SWAYZE: Perhaps it does.

MR. COLLINS: The rejected ballots are before you. You need no proof.

MR. JUSTICE SWAYZE: I think I will let them put in some proof on that. It cannot be very long.

MR. COLLINS: I would like to be heard on the general subject of proof in a moment which will be applicable to the other, the third point, which I have reserved to the last.

My notion is that neither on the fourth nor the third is it competent for your Honor to take any proof. I am not aware of any provision, nothing in this act to that effect, which you may take any proof. You are not sitting really as a court. When there is presented to you, as there now has been, a certificate showing the County Board under your direction has counted the votes, the law-

ful votes, rejecting those that were properly to be rejected, and the result is changed, the majority by a hundred and upwards, of Mr. Ackerman,—when that is done, your Honor has no alternative except to grant the revocation, with the one exception which I will allude to in a moment.

You cannot take testimony to determine whether or not there has been any tampering with the ballots—whether or not the ballots that your Honor has counted with the aid of the County Board were the ones that were cast. There is no provision in the law to take testimony.

MR. JUSTICE SWAYZE: Wasn't it done in the Mathis, the Ocean County case?

MR. COLLINS: Not at all. I have the Mathis case here, and I have thoroughly studied it. Nothing but what came under the observation of the Judge. No testimony was taken whatever. I will read the syllabus:

"A recount of a part of the votes cast at an election for State Senator in the County of Ocean was ordered by a Justice of the Supreme Court who was present during the counting of the ballots by the County Board of Elections by which it appeared that an error had been made sufficient to change the result of such election, whereupon the relator moved the said justice to revoke the certificate of election already issued and to issue in its place a certificate in favor of the relator, as the party found to have received a majority of the votes cast at such election, which the said justice refused to do, upon the grounds that the ballots so counted in his presence were not the votes cast at such election. Upon an application for a writ of mandamus compelling the said justice to make such orders—HELD, that for the reasons stated in the opinion, the application should be denied."

Now if you will be patient with me, to carefully consider this, because it is quite important,—Justice Voorhees never attempted to take any testimony. He was guided entirely by his own observation of the recount, which he was a participant in. This is what he says, in a written statement that he filed, to show why he did not sign the order of revocation:

"At the general election held on November 8th, 1910, in the County of Ocean, George C. Low was the regularly nominated Democratic candidate for State Senator, and Thomas A. Mathis the regularly nominated Republican candidate for that office.

"Within the time limited by the Election Act after such election, a petition was presented to me by Mathis, who had, according to the canvass and statements of the result of the election made by the Boards of Registry and Election of said county, failed of election.

"This petition set forth that said returns showed that throughout the entire county George C. Low had received two thousand five hundred and seventy-two votes, and Thomas A. Mathis two thousand four hundred and ninety-one votes for the office of State Senator, resulting upon the face of such returns in the election of George C. Low by a majority of eighty-one votes.

"The petition then prayed for a recount of the ballots cast in the three above mentioned election districts. An order was made as prayed for, and the recount has been held. At it, the first district of Lakewood was first counted and the township of Dover secondly counted. The result at the termination of the examination of these two districts was practically unchanged, being a net loss of but one vote for Low.

"The second district of Lakewood was lastly taken up.

Colloquy.

"The statement of the result of the election for senator in this district gave Low two hundred and sixty votes, gave Mathis two hundred and fourteen votes. That is the original return.

"The whole number of votes on the poll list was four hundred and eighty-seven, rejected ballots ten, leaving four hundred and seventy-seven, and that is what they counted.

"Upon opening the box it was found that the ballots were upon two strings, the first string containing ballots numbered from one to three hundred consecutively; the second string from three hundred and one to four hundred and eighty-seven consecutively. The first two hundred ballots showed that there was a difference of but five votes between the senatorial candidates; of the third hundred Low received twenty-three and Mathis sixty-six. The first one hundred votes of the second string gave Low fifty-three votes and Mathis thirty-six, a difference of seventeen, while of the last eighty-seven votes of the string, only fifteen votes were counted for Low and sixty-five for Mathis. The apparent discrepancies in totals arise from rejected ballots and those otherwise not counted, but not varying the majorities more than three or four votes. The ballots last strung were mostly straight tickets without change by writing or paster, clean, and folded alike." No official ballots in that day. "The two tally sheets, which agree with each other, show one hundred straight Democratic tickets and sixty-two straight Republican tickets.

"From the contents of the box, the bunching of the Republican votes upon the latter part of each string, from the tally sheets, from the appearance of the ballots lastly strung upon each string, I am satisfied that the ballots counted under judicial direction were not the identical ballots cast at the election.

"I shall, therefore, withhold these certificates, on the ground that the votes counted under my order are not the votes cast at the election."

Now, said Garrison, J., going on:

"The essential function of the writ of mandamus is to incite to official action. It is not the appropriate writ upon which to review official action already taken, or by which to dictate in advance what such action shall be excepting in cases where the act to be performed is so purely ministerial in character or its performance in any event so specifically prescribed that the only action contemplated is that of blind obedience.

"The present case is within the former rather than the latter of these classes,"—that is *Kirchgessner vs. The Board of Health,* and *Mooney vs. Edwards*—they place the province of the writ in each of these respects upon its proper footing and show that in the one class of cases mandamus will not weigh the merits of official action that has already been taken, and that in the other it will arouse but will not direct official action, that is, it will start the pendulum going but will not set the hands.

"The present case is within the former rather than the latter of these classes."

MR. JUSTICE SWAYZE: Sounds like him.

MR. COLLINS: Sounds just like him. That is, when Mr. Justice Voorhees had refused to sign a certificate, mandamus would not compel him to do it.

"The carefully prepared statement of Mr. Justice Voorhees, which culminates in his refusal to make the orders demanded by the relator, completely negatives the notion of official inertia; while the fact that by this proceeding the relator seeks to overturn such decision and to attain the opposite result by the writ of this court smacks strongly of an Appellate review. This, however, is not the precise attitude of the relator, and does not place his real contention in its proper light. The substantial basis of the relator's contention, as I understand it, has already been re-

ferred to in the general definition of mandamus, and is, that under the statutory provision that is here involved, the Justice of the Supreme Court is required to make the orders for which the relator applied as an act of unquestioning obedience to a specific statutory mandate without regard to whether or not the said justice officially determined that the ballots counted in his presence were not the votes that had been cast at the election."

In other words, when he officially determined that those ballots were not counted, they cannot mandamus him and give a certificate. Now he goes on to state—giving the legal object of it:

"The second question clearly involves the entire merits, since no one contends, or ever will, I suppose, that the legislature has, by this statute, authorized the revocation of a valid certificate of election, and the substitution of another therefor, where the ballots cast at such election have not been recounted. The stultification of the legislature, implied by such a contention, is its all sufficient answer.

"Plain as this is with respect to the paramount legislative purpose, it is scarcely less plain that the legislature cannot be deemed to have intended that no new certificate should be made when the votes had not been recounted, and, at the same time, have intended that no one should, under any circumstances, have the power to determine whether the legislative will in this respect was being effectuated or whether it was being frustrated and turned into an instrument of public fraud. To be consistent we must assume that if the legislature had the one intention, it also had the other, which is thus essential to its effectuation. So, that the practical question is not so much whether such a power is to be implied, as where, upon such implication, does it reside. For, in

whomsoever this power resides, by him it is to be exercised, and not by this court either originally or by means of its compulsory writ.

"Upon a careful reading of Section 159 of the Election Law, as amended in 1909, which is the only statute involved, it seems to us to be reasonably clear, that, assuming the intention of the legislature to be as we have stated, the implied power necessary to render such intention effectual must reside in the Justice of the Supreme Court as incidental to the acts that he alone is called upon to perform after his contingent connection with the County Board of Election has entirely ceased. The recount of the votes cast at the election, which is ordered by such justice as a special legislative agent, is made by the County Board of Elections, of which such justice is, by force of the statute, *pro haec vice* a contingent member, the contingency being the failure of the Board to decide any disputed question by a majority vote. When this contingent relation to the board has come to an end with the completion of its functions, the justice, as the agent selected by the legislature, is required, in the furtherance of the legislative purpose disclosed by the statute, to perform a series of final acts which will carry out such legislative purpose if a recount has been had, and will, on the contrary, frustrate such purpose and perpetrate a public fraud if a recount has not been had. We have, therefore, but little difficulty in reaching the conclusion that the legislation in question discloses not only an intention that the legislative purpose should be effectuated rather than that it should be frustrated, but also that the legislature, in placing the agent selected by it to effectuate its purpose in a position where his effectuation of such purpose or his frustration of it may depend upon a determination by him of a fact within his official observation, has, by fair implication, clothed him, in such a juncture, with power

to make such determination as an incident of the performance of the duty upon which the effectuation or the frustration of the legislative purpose would, as a practical matter, wholly depend. In this connection, it is proper to add that while the Justice of the Supreme Court, when acting as such legislative agent, exerts none of the powers incident to his judicial office, but must derive his powers solely from the statutory scheme he is selected to direct and effectuate, still the mere fact of his selection by the legislature for such purpose is not without its significance upon the question of the character of the duties the legislature intended such agent to perform.

"We cannot, in the nature of things, be sure that the interpretation we thus place upon the legislative will is demonstrably correct; it certainly is permissible, and, upon this application for our prerogative writ, it seems to us to be the only view that at once comports with the intention that should be imputed to the legislature, and, at the same time, is consistent with the vital public interests that such legislation was intended honestly to subserve. Indeed, it is not essential that we should be sure that our construction of the legislative act is beyond all doubt correct; the relator, who is the moving party, bases his application for our writ upon the opposite construction which to us seems, if not wholly untenable, to be at least of extremely doubtful soundness, and it may well be that such a doubt as to the soundness of the construction upon which the application rests ought to lead us to the same result as that reached by our adherence to the construction that we ourselves placed upon the act in question.

"We have given due regard throughout to the presumptions appropriate to the case, with the result that we hold such presumptions to be of a rebuttable character. Beyond this we do not need to go. To go further and determine whether or not they were

in fact rebutted in the present instance, would be to turn this application into a species of review which cannot lawfully be done. The relator's application is technically defective, in that no preliminary demand upon the justice is shown to have been made—" we do make it here—"no point, however, is made of this," and the application therefore denied, "unless the recount ordered by him had been made—" that is, the recount of the ballots as cast—"that whether such recount had been made was a question that by the statute he was, under some circumstances, empowered to determine; that the circumstances of the present case, relied upon by him—" which I have read to you—"were not improper ones for such a purpose, and that the propriety of his determination from such circumstances is not open to review upon this application or under the writ applied for; and further, that the refusal of the justice to make the orders constituted official action by him, and that the reversal of such action * * * is not within the province of the writ of mandamus."

I have read it all.

Now I cannot see any escape from the conclusion that the justice is a member of the board. Ordinarily, for convenience, he does not trouble himself, unless counsel want to bring doubtful ballots before him, but in contemplation of law he is there. In this case there were only two boxes when Justice Voorhees was there. He based his refusal upon the evidence of the boxes themselves furnished to him, as a man that was a legislative agent counting them; he saw and was satisfied that the ballots that they counted were not the ones originally cast, and of course he would not. Suppose there are a lot of blank papers, sheets of blank paper, and not official ballots at all? Of course he would say, "Why, I am

not recounting what was voted." But where can my friends point me to any decision or to any act that will permit your Honor to take evidence on this subject, except the evidence of your own eyes that you are presumed to have had before you?

Let me add further that as I understood our friends the other day, when they were objecting to your Honor counting the ballots that were in certain boxes,—when they said that those ballots ought not to be counted because they could see on those ballots that there had been an X opposite the name and they had been erased with a rubber, and that perhaps—of course, your Honor well stated the voter may have done that—perfectly legitimate, but they said he may not, they may have been done by some tampering afterwards. They said one of these boxes was unlocked, or there were two in question. A number of them were more or less broken, for some reason; entirely consistent with innocence. Then they said your Honor cannot be sure that the ballots that were originally in there are the ones now being recounted, but your Honor nevertheless went ahead and recounted them, and if you take every one that they challenged of this character, if you took them and threw them out it would not change the result—the result has already been preserved; and furthermore, as I understand it, on information simply, that if the two boxes were entirely discarded it would not make any difference. So it is a pure waste of time to attempt to show that as to those two boxes there was a suspicious circumstance. The result would be no different, the result of the recount. There is no challenge on the other

boxes anywhere in the county, and these two would not change it.

I certainly think, if your honor please, that you are wasting your time to attempt to take evidence on either of these cases, because it would be no practical gain; but my fundamental point is that there is no power to take any evidence on the whole thing, and that when the Voorhees case was decided there was some misgiving—all they decided was that the judge, who was the legislative agent to recount with the aid of the board, could not be compelled to certify when he was satisfied by his official observation—remember the language that I read—that the ballots that were in the box that he was called upon to recount, and that varied so largely from the official return of the local board that he was satisfied they were not the ballots. But that is impossible, that that would be so in this case. There were changes all through this county, slight changes, but in no case was there enough to make any difference, and I submit your Honor has not any power to take testimony, and I have read the whole decision.

Oh, yes, I will call your Honor's attention to one or two other decisions:

"The duties of a Justice of the Supreme Court, under the act of March 11, 1880, in conducting a recount of votes cast for members of Assembly, are merely ministerial." This is under the act of 1880, which is almost identical—this has been copied from that old act. There your Honor counted,—that is to say the justice counted; he did not have the aid of the board. This was simply to save labor that the board of elections was called in. The actions are purely ministerial. "He has no right to take evidence to de-

termine if the ballot boxes have been tampered with, but has power only to count the votes that he finds in the boxes, to ascertain who received a majority of votes cast."

Direct. Positive. *Ruh vs. Frambach,* 18 Vroom, 85. It seems to me to be no different, except under the present act the justice alone does not recount, but the board does it under his direction.

"In a recount of ballots, March 25, 1885, the board of elections should count as many ballots as there are names." That is not very important.

State vs. Felton, 61 N. J. Law, upon a dispute the question is not, as might have been under the old law of *quo warranto,* for whom were the votes intended, but under the new law, for whom did they vote"—that is not it.

"Under the election act, paragraph 159, authorizing a recount of election returns, a candidate is given a right to a recount for the purpose of having a correct result of the voting declared, and not for the purpose of detecting fraud or crime, though they may be incidentally disclosed."

In *re Van Noort,* 85 Atlantic, 813, Justice Minturn said:

"While the existence of fraud may be developed as the result of such a recount, it is quite manifest from the language of the act that the object of the legislature in committing the recount to the county board of elections was not for the purpose of detecting fraud, or of demonstrating that fraud in fact existed, but of rectifying irregularities and miscalculations in the count, for the purpose of having a correct result of the voting declared. If fraud incidentally develops during the recount, the court and the grand jury will be expected to take notice of it. If it should not

develop, but be reasonably charged, the grand jury, as the conservators of law and order, may be expected to investigate it."

Then as your Honor just intimated—I do not need to cite authority for that, that that order which you are going to give cannot be reviewed by certiorari. *Kehoe vs. Stagmeier*, 70 and 71 New Jersey Law.

The Mathis case I have read, and I think that is all the cases there are, and they seem to me to be conclusive. Your Honor cannot —how can your Honor take up this question that gives rise to suspicion and say, "Here are a good many ballots where there has been some rubbing out." The voter may have done it, somebody else may have done it. May have been done by some one tampering with the boxes after they left the County Clerk. Your Honor cannot presume it. Your Honor has nothing before you but the ballots in the box; and if from them you can see by your own official observation they are not the ones that were cast, then you would not give the revocation, as an honorable man, Justice Voorhees, did with great courage; but you cannot in each particular case, as my friend says, try to take testimony as to what may have been the condition of a particular ballot at the time it was originally cast, and you cannot inquire by proof as to whether it was properly preserved during the interval before it was recounted, particularly when you remember that under the present law no ballot can be cast but an official one, certified to by the County Clerk, and issued to the voter. It is not a case of stuffing the ballot box, as in *Low vs. Mathis*, with straight tickets; but these ballots, each one

numbered and each one having a stub—why, all they could possibly contend was that somebody had gone in there and changed the marking upon some of the ballots, and that is so incredible that such a thing as that could happen that your Honor—your Honor could not tell it by official observation, and your Honor cannot take testimony as in a judicial proceeding, in order to satisfy your mind; and lastly, and conclusively, it would not make any difference, with a majority that Mr. Ackerman has, taking the whole county, if you attack these two boxes.

MR. JUSTICE SWAYZE: Well, I do not think I need trouble you, Mr. Walscheid, on this point. I agree that all I can do is to recount, but when I come to the question of making a certificate I think I am entitled to put myself in the same position that I would have been in had I been present during the whole of the recount. I do not suppose that the legislature contemplated that I should be present for if they did, they contemplated imposing me a burden which would prevent me from performing my judicial functions and render their whole legislation void. I doubt myself whether they had the right to put this burden upon us. Surely they had no right to put a burden upon us which would interfere with the performance of our strictly judicial duties. So the custom has grown up, and I believe under the older statute Judge Depue used to have a commissioner to conduct the recount, because he could not do it himself—the custom has grown up of having it done under this new statute by the county board of elections in the absence of

the judge, but I think the judge has a right —he is not sitting as a judge or as a court, to be sure; he is a mere person designated by the legislature—but I think he has the right to satisfy his conscience before he signs a certificate and to take evidence that will put him in the position he would have been in, so far as possible, if he had been present at the recount of every ballot. That may lead to a very long investigation, and it may be a ruling that I shall regret on that account, because I think we all regret we did not at the start resist this sort of legislation. We were so complacent as to allow the legislature to do what I think it had no right to do. So I shall proceed to take this testimony. Now is there any other point you desire to raise, Mr. Walscheid?

MR. WALSCHEID: I desire to add the further point, namely, that the statute does not contemplate a recount of these ballots in the manner in which it has been done in this case. That it contemplates a recount of the ballots under the immediate direction of the justice and in the presence of the justice so that he may view the ballots as they are produced from the box, so that he may view the condition of the box as it is produced, and so that he may from an actual, physical examination and in the performance of an official observation of the occurrence of the recount, determine whether or not the ballots which are then being produced in the recount are the identical ballots which were cast at the election and which the board and the justice are supposed to be recounting.

In making that point I do not wish to take any unfair advantage of the situation. I

wish to say that when this proceeding was initiated this question arose, and we then agreed that the ballots should be counted in the absence of the Supreme Court Justice, and all of the ballots about which any objection should be raised should be submitted to the justice. But in view of the attitude which Mr. Justice Collins has taken I think it my duty to interpose such an objection, and to interpose it on the point that it is a jurisdictional question, and that in the absence of the justice ordering the recount—in his absence from the recount there has been no legal recount, because the special statutory tribunal has not been constituted according to law.

MR. COLLINS: Through?

MR. WALSCHEID: Yes.

MR. COLLINS: If the point were well taken, it would afford a most cogent argument against the right of taking any testimony. If it were essential your Honor should review, of course, then, see—you can count and that ends it; but I think it fortifies my position that in any case no testimony could be taken, because it is those persons who are to recount that have to act, and if the board recounts, except in doubtful cases, and then you recount, why, it is the board's action, and your Honor hasn't any power to review that.

But Mr. Walscheid is altogether wrong. I never insisted nor claimed, nor did it rest upon any agreement, that the board should count and only submit disputed ballots to your Honor. Not at all. I always contended, and Judge Garrison states positively that the justice is only a contingent member of the board, and that he is only called upon to

count where the board cannot by a majority decide some disputed question. Your Honor was rather inclined to the other view—it was not important that you should decide it—your Honor was rather inclined to think the act was not restrictive, but perhaps enlarging.

So we all acquiesced in sending all disputed ballots, even though there wasn't any room for dispute, to your Honor, which made so much labor, unnecessary labor for you—instead of, as our legal right was and as I think and as I understand Judge Garrison to say, instead of having the board pass upon any bollot that came out, and only where having failed by a majority vote to decide it one way or the other, should it come to your Honor, but for convenience of your Honor I submitted to your Honor, and I cannot recall where any counsel raised any question, and I cannot complain, for the result of doing that has not been injurious to my client. If every ballot were produced the board might have given a majority vote, for all we know, one way or the other. Every ballot has been counted by your Honor, and the result has been, that could not have been any different, a very substantial majority in favor of Mr. Ackerman.

Now to say that your Honor must be present—your Honor may be present—but to say that your Honor must be present at the recounting of every box is to state an absurdity, and in defiance of the statute. The statute says that they shall be recounted by the board under the direction of the justice, and only in case they shall have not reached a result in any particular matter

that is before them by a majority vote is the justice required to act. In other words, as Judge Garrison puts it, he is a contingent member of the board. That being so, how can your Honor review the cases where the county board has counted the ballots? They have counted them without dispute. How can your Honor question as to whether the ballots that they counted ought or ought not to have been recounted? All your Honor can pass upon is as to those you counted, it seems to me, and it would come out the same place, no matter what road we take, and if we are going to have—it is rather absurd for me to suggest it, and I do not suggest it as a logical result of the statute, but it is a logical result of my friend's augument, that if you are going to decide this question the county board are just as much called upon as the justice. It is the whole subject. The county board counted the ballots, the county board would have to participate.

MR. JUSTICE SWAYZE: They do not have to make a certificate. We have recounted the ballots as we found them. The question is now whether I will sign a certificate. The county board has nothing to do with that.

I overrule Mr. Walscheid's last objection.

MR. WALSCHEID: Now I desire to offer a further objection, and that objection is this: That it is the duty of the applicant for the new certificate to show to your Honor that an error has been committed sufficient to change the result of such election, and that that error has been committed by the local boards. The local boards are public officers of this state. They come before your Honor wrapped in the presumption that they have

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fully and completely performed their duty. The mere fact, to my mind, that on this recount, in the manner in which it was conducted, a different count of the ballots has been found is not sufficient to overcome that presumption, nor is the mere presentation by the county board of a different result sufficient to establish the fact that an error was committed.

As has been well said in the case of *Mathis vs. Low,* if this is the result of fraud, why, then, you would not inquire into it, just as a question of fraud; but I think since the applicant comes into court and alleges as an affirmative proposition in his petition, first, that errors have been committed sufficient to change the result; that he must prove and point out what those errors are, or at least he must produce sufficient evidence to satisfy your Honor's mind by the appearance of the boxes, by all matters which were presented at the recount, that the identical ballots were counted, and that therefore an error must of necessity be at the base of the proceedings. In other words, I am trying to cast the burden of this case upon the parties who to my mind have the affirmative. Now take it, for instance, by way of argument—

MR. JUSTICE SWAYZE: Is it necessary to go further into this argument on the mere question of burden of proof? You have your objections on the record. Let me ask you now: When under the statute did Mr. Seglie take office, if he did take office? The first of January?

MR. WALSCHEID: I think it was the first of—what is the date—December 1st.

Colloquy.

MR. JUSTICE SWAYZE: December 1st he took office under the certificate issued by the Board of Canvassers?

MR. WALSCHEID: Yes, sir.

MR. JUSTICE SWAYZE: Well, have counsel thought of the effect of that? Whether I can make a certificate which will have the effect of ousting him from the office?

MR. COLLINS: The effect of it is another question. You have a right to revoke the certificate. The statute says so.

MR. JUSTICE SWAYZE: Judge Dixon took a different view in the Passaic County Sheriff's case.

MR. COLLINS: He is a constitutional officer.

MR. JUSTICE SWAYZE: I know, but I cannot see how the Governor's commission makes so much difference. I do not understand this proceeding is a substitute for quo warranto. Well, I suggest that because that is fundamental.

MR. WALSCHEID: We intend to present that.

MR. JUSTICE SWAYZE: I will hear you.

MR. COLLINS: My idea in regard to that is this. See what might happen? Might not be time enough between election and time of seating. A sheriff takes office right away, within two days. Don't make any difference what the result of your action is, you revoke this certificate. Now whether that seats the man or not, as I understand, that you have no concern with. These ballots have been counted as quickly as can be counted, and the result is if you find that the certificate that was granted by the canvassers was in error you can act. The purpose of the statute is

to correct error in counting. Now we make demonstrative proof that there were errors by our certificate presented this morning. Now you have no recourse, under Section 159, except to rovoke that certificate. You revoke the certificate. Note the effect of the revocation is an entirely different matter.

MR. WALSCHEID: We did intend to make that point which your Honor indicated.

MR. COLLINS: Mr. Doherty says with great force that the first certificate is defeatable. It is like any other act, it is defeatable, and the certificate fails and is revoked. Now the effect of that, your Honor is not concerned in. That comes later. We expect our friends are fertile in resources and we will have some more trouble with them.

MR JUSTICE SWAYZE: I will not pass on that now. I have some difficulty about it. Now the next thing, Mr. Walscheid, I suppose, is to take your evidence.

MR. WALSCHEID: Yes. I do not know whether the last point of ours is perfectly plain on the record. We might also have to give your Honor some evidence as to that fact, as to the fact that Mr. Seglie had—

MR. JUSTICE SWAYZE: Well, whatever you choose about that.

MR. WALSCHEID: On the record now I desire to object to the issuance of a certificate, on the ground that the power—

MR. COLLINS: Another objection?

MR. WALSCHEID: Yes. —that the power of your Honor to issue the certificate has passed, because the first certificate has served its purpose and Mr. Seglie has been inducted into his office, has been sworn in, and holds the same since the first day of December,

1916, and that even though your Honor did issue a new certificate, that that would not empty the office, and he would continue in the position all the same.

MR. COLLINS: Cross that bridge when we come to it.

MR. WALSCHEID: And the only way by which he can be removed from that office is by proceedings in quo warranto. That the object of that statute was merely to provide machinery for the making of a proper certificate, with the object of creating a credential for the individual, which he could present to the proper authorities for the purpose of being admitted to his seat in the proper body.

MR. COLLINS: They are all elected. There is nobody to elect them.

MR. WALSCHEID: And that if this statute does anything else—has any larger or broader scope—for instance, if it were contemplated or construed as a statute allowing the revocation of a certificate after an individual has been inducted into office and allowing the effect of that certificate to be that he thereby were removed from that office that that in turn would be an infringement of the Supreme Court's power, which is vested in the Supreme Court solely, to review the right to hold office by quo warranto. That it also in the same manner amounts to a denial of a right of a trial by jury upon the question of his right to hold that office in which he has lawfully taken position.

MR. JUSTICE SWAYZE: Well, if it is necessary for me to rule upon it, I overrule the present contention. It seems to me that under

the Convery case this is a mere recount, as I recollect that. You may proceed with your evidence.

In the first place, is it understood—I suppose the figures are in here, Mr. Collins? I don't know what they are.

MR. DOHERTY: I do not think your Honor has received the board's certificate.

MR. JUSTICE SWAYZE: No, I have not. This does not state the result in figures.

A VOICE: There are the returns.

MR. JUSTICE SWAYZE: We have here the official returns.

MR. WALSCHEID: Does Mr. Collins offer the official returns?

MR. COLLINS: By consent and with your Honor's suggestion Mr. Kelly began his notes with the certificate of the County Board being presented which is as follows—then he puts in this. We now move for the revocation. That is the foundation of this whole proceeding.

MR. JUSTICE SWAYZE: The certificate shows that Ackerman had 31,656 votes, and Seglie had 31,552, and that Ackerman was the third highest of those voted for for Boulevard Commissioner?

MR. COLLINS: Yes.

MR. WALSCHEID: You offer this?

MR. COLLINS: I present it. I do not offer it. This is no judicial hearing. I present to your Honor as legislative agent, this certificate, and ask your Honor to revoke it.

(Mr. Walscheid examines paper.)

MR. JUSTICE SWAYZE: Let us get along.

MR. WALSCHEID: Subject to the objections which I have generally raised, we agree that this certificate may be received.

MR. COLLINS: Well, it was presumably in at the very inception and foundation. It was that—

MR. JUSTICE SWAYZE: Yes. This is the first thing on the notes.

MR. COLLINS: That ought to be in Mr. Kelley's notes.

MR. JUSTICE SWAYZE: And then this certificate which Mr. Collins asks me to sign, and which I decline to sign until I have heard the evidence that Mr. Walscheid proposes to produce.

MR. WALSCHEID: Then our objections follow that?

MR. COLLINS: Yes.

MR. WALSCHEID: Then we are all ready.

MR. JUSTICE SWAYZE: Yes.

MR. WALSCHEID: I would like to call John Kane.

(The clerk calls the name of John Kane.)

MR. WALSCHEID: At this point, in relation to the witness John Kane, I desire to ask your Honor's assistance in obtaining the presence of this witness, if it becomes necessary. This witness was in court on Saturday last when your Honor made the direction to take testimony here to-day. Since then we have attempted to subpoena him. He is an employee of the County Clerk's office. He was present during the actual recounting of ballots taken before the county board, and we charge that he saw a certain individual taking part in that recount actually mark crosses upon the ballots which were then being recounted. We have, as I say, attempted to subpoena him, and we went to his home yesterday morning—he lives right around the corner from the Court House, and were told

that he was not in, and were told that he was excused for the day from the County Clerk's office, and was also excused for this day, and he would not return until Wednesday. In the afternoon I went there with a process server personally and was admitted to the apartment in which he lives, and I inquired of a lady who was in the apartment and who said her name was Howard, where he was, and she said he had left on the day before to visit a sick sister in New York, and would not return until Wednesday. On inquiring the address of the sick sister, it was refused me. I inquired the name of the sick sister and it was refused me. When I first went in there I asked the name of the lady, and she refused to give it to me, but later on she told me the name was Howard. Then later on also she told me the name of the sister was Higgins. She said that she is an aunt of this man and she lives there with him alone. I left the subpoena with the fifty cents—I left the subpoena with fifty cents in front of her, upon the dining room table. She refused to touch the thing. I asked her to bring the matter to his attention. Now it is plain—and she said I had not served her because I had not put the money and the subpoena in her hand, and when I attempted to do so she backed out of the room.

MR. JUSTICE SWAYZE: Is this very helpful?

MR. WALSCHEID: It is not very interesting, except I desire—

MR. JUSTICE SWAYZE: It would be quite objectionable before a jury.

MR. WALSCHEID: Oh, undoubtedly.

MR. COLLINS: Your Honor ought to in-

struct Mr. Kelley not to take that down as a part of the proceedings.

MR. JUSTICE SWAYZE: I think I will strike out this statement, Mr. Walscheid. You say that here is a witness that you have been unable to subpoena. That is proper. I suppose he is so devoted to his sister, he would be sufficiently devoted to his duty to come back to the Clerk's Office sooner or later, and there will be other opportunities to take his testimony. Any help I can give you—

MR. WALSCHEID: That is all. We want to show our diligence in attempting to produce him.

MR. JUSTICE SWAYZE: Well, gentlemen, let us get along.

MR. WALSCHEID: I call Mr. Ravino, and at this point I would ask—

MR. COLLINS: I object to any witness being sworn on the ground—

MR. JUSTICE SWAYZE: I overrule your objection. Your rights will be protected, whatever may be necessary for that purpose.

FRANK RAVINO, sworn.

MR. WALSCHEID: Now the box in the First District of the First Ward has been impounded—of West Hoboken—has been impounded by your Honor's order, and this is one of the election officers, and I would like to have that box produced in court at this time.

MR. JUSTICE SWAYZE: Well, let some one see if the Prosecutor can send some of his men up with it. I am not going to let that go out of the custody of the Prosecutor.

MR. WALSCHEID: I suppose the other boxes will remain in the custody—

MR. JUSTICE SWAYZE: One at a time. We cannot have those boxes in the court room.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Ravino, where do you live? A. Present? 523 John Street, West Hoboken.

Q. Are you or were you an election officer at the election, general election in the Town of West Hoboken? A. Yes.

Q. In what district? A. First Ward, First District.

Q. Of the Town of West Hoboken? A. Yes.

Q. What position did you occupy in the board? A. Inspector.

Q. Were you there throughout the whole counting of the ballots? A. Yes.

Q. Were all of the ballots which were cast in the First District of the First Ward at the last general election, counted in your presence? A. Yes.

MR. COLLINS: I object to it as irrelevant. I do not understand how there can be any inquiry into the conduct of the local board. Are we going to draw—

MR. JUSTICE SWAYZE: I do not see the bearing of this question. Why don't you go right to the point of showing what you think you can show—to show that the box was tampered with?

MR. WALSCHEID: I intended to show what was done by the election board—what they did with the box, and then after that I intend to show the condition of the box as it appeared at the—

MR. JUSTICE SWAYZE: Oh, you want to show it was in good condition when it left his hands?

MR. WALSCHEID: And how the ballots were strung.

MR. JUSTICE SWAYZE: I will let you show that. You have your objection. You have the benefit of your objection.

Q. What particular work did you do during the count?

MR. JUSTICE SWAYZE: Why do we go to that? Let us get right to the point. I won't let you prove by the witness that that count was right. All you can do is to show there has been some tampering with the ballots in the box.

Q. Were all the ballots strung?

MR. COLLINS: I object.

A. Yes.

MR. JUSTICE SWAYZE: I will permit that.

Q. How were they strung? A. On the string—three strings.

Q. On three strings? A. Yes.

Q. So that when your work was completed you had your ballots strung on three strings? A. Yes.

Q. What else was done after the ballots were counted with the box? A. What do you mean?

Q. Well, after the ballots were counted what was done? A. Put them in the box.

Q. Put them in the box? What else did you put into the box? A. American flag and books, tally sheet.

Q. Then did you lock the box? A. Yes.

Q. Who did the locking? A. The judge.

Q. Did you see him do the locking? A. Yes.

Q. After it was locked what was done with the box? A. Put a seal on it, a cord or tape.

Q. Tape on it. What color tape? A. I couldn't tell you exactly what color it was.

Q. Was it sealed? A. Yes.

Q. Then what happened to the box? A. Well, we took it up to the Town Hall.

Q. Who took it up? A. Four election officers and the police officer.

Q. Was it in that conditioin when you delivered it to the Town Hall? A. Yes, sir.

Q. Did you sign any papers up there? A. No, sir.

Q. Receive any receipts of any kind? A. No, sir.

Q. Now in stringing the ballots how did you hold the ballots together? A. What do you mean by that?

Q. Well when you commenced your string did you use any cardboards? A. No, had wooden buttons on the end of it.

Q. You had wooden buttons on the end of it? A. Yes.

Q. Sure there were no cardboards there? A. No, sir.

Q. Did you sign any book for the Town Clerk when you gave up the ballot box? A. I would sign nothing for the Town Clerk at all.

Q. Now you are sure, are you, that there were three strings of the ballots in the box? A. Yes.

Q. You are sure at the end of each one of those strings it had a wooden button?

MR. COLLINS: I object to it as a repetition.

MR. JUSTICE SWAYZE: I sustain the objection.

A. Yes, there was a wooden button and a needle.

Q. Wooden button and a needle? A. Yes.

Q. Were there any ballots unstrung? A. No, sir; unless the lose ones.

Q. I mean when you put them in the box? A. No; they were all put in rotation—the ones that were not used.

Q. But as far as used ballots were concerned. The ballots that had been polled were they on these strings? A. Yes, all strung.

Q. Do you remember what your last ballot was, or don't you? A. I think it was 365.

MR. COLLINS: I object to that on the ground it will show for itself.

MR. JUSTICE SWAYZE: Yes, I do not believe you can show it by his testimony.

MR. WALSCHEID: All right.

Q. Did you inspect all these ballots as they were counted? A. Yes.

Q. And do you remember whether or not there were any number of ballots with Mr. Seglie's name erased—

MR. COLLINS: I object.

Q. —where the cross instead— A. No, sir.

Q. Where a cross had been placed instead? A. No, sir; I examined every ballot.

MR. COLLINS: Please, when a question is asked and objection is made do not answer. I move to strike it out.

MR. JUSTICE SWAYZE: I will strike it out. I do not think I can let a witness testify as to the question of erasure from what he saw on election night on any of these cases. I found difficulty even with a magnifying glass, and this testimony would not be very valuable.

MR. COLLINS: What I was speaking of just now is injecting the answer before the question was finished, and I had a chance to object.

MR. JUSTICE SWAYZE: I strike out this last answer.

MR. COLLINS: If your Honor will caution him to wait until—

MR. JUSTICE SWAYZE: Yes, do not answer when there is objection until I have ruled.

MR. WALSCHEID: I think that is all. Of course I would like to submit to him the box.

MR. JUSTICE SWAYZE: I will give you the opportunity.

CROSS EXAMINATION BY MR. COLLINS:

Q. Can you describe that box? A. Oh, I couldn't tell you.

Q. Eh? A. Box?

Q. Yes. A. I don't know. I don't know what color it was.

Q. Can't describe it, eh? A. No, sir.

Q. Now isn't it a fact that the strings, three, were so thick you could not get them in the box without taking them apart? A. What did you say?

Q. Isn't it a fact that the ballots were so large that the three strings, when you had the three strings, you could not get them into the box without taking the strings apart? A. We don't take the strings apart. I put them strings on all the ballot boxes.

Q. Did what? A. Put them in the ballot boxes.

Q. Isn't it a fact that these three strings were so folded you could not get them all in that shape in the box? A. I don't know what you mean.

Q. Eh? A. I don't understand.

Q. Here are three strings of ballots? A. Yes.

Q. And the box is comparatively small. These big ballots strung on three strings had to go in

the box. Isn't it a fact that you could not get them in in that shape?

MR. WALSCHEID: I object.

MR. JUSTICE SWAYZE: Oh, that is permissible.

Q. Isn't it a fact that you could not get them in? A. Well, we got them in.

Q. I mean in the three strings without disturbing them? A. When the ballots was put in they were all right.

Q. That doesn't answer my question? A. I don't know what you mean.

BY MR. JUSTICE SWAYZE:

Q. Were these strings of ballots so large that you could not get them in the box without taking them apart? A. No.

Q. You got them in without taking them apart? A. Without the string breaking.

BY MR. WALSCHEID:

Q. How many boxes did you have there? A. One.

MR. JUSTICE SWAYZE: Well, gentlemen, that ought not to have been brought. We only asked for one.

BY MR. WALSCHEID:

Q. Do you know whether or not these strings upon which these ballots were strung were in turn tied together by the Board of Elections? A. I tied them with the needle and the button together.

Q. So that the three strings were tied together? A. Yes; and there was another string with the stubs on.

Q. You did that yourself? A. Yes.

MR. COLLINS: I don't know as I understand.

MR. JUSTICE SWAYZE: You interrupted Mr. Collins.

BY MR. COLLINS:

Q. You mean that three strings and another string of the stubs were all fastened? A. No, sir, separate.

Q. Eh? A. All separate.

Q. There were four strings, separate; that is, three strings of ballots and one string of stubs? A. Yes.

Q. And they were separate? A. Mr. Walscheid made the mistake, they were tied togetner.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Then while the three strings of voted ballots were separate, did you in turn do anything with those three strings? A. What do you mean?

Q. Did you bring them together and tie them together? A. Yes, I tied the needle and the button together.

Q. Oh, I understand. You tied the— A. The button on the end and the needle on the tape together.

Q. So that when you were through each string of ballots— A. Had the button and the needle on.

Q. —was on a cord ring; is that right? A. Yes.

BY MR. COLLINS:

Q. Not that the three strings were tied together? A. No, separate.

BY MR. WALSCHEID:

Q. Can you tell which is your box? Come down and look at it.

MR. JUSTICE SWAYZE: Can you tell without looking at anything except at a distance? Can you tell from there which is your ballot box?

THE WITNESS: No, sir,

MR. JUSTICE SWAYZE: All right. Now you can go down and look at it.

MR. COLLINS: Let him go himself.

MR. JUSTICE SWAYZE: Yes, do not interfere with him. Look at them as much as you please.

THE WITNESS: Pretty hard to tell. They look alike to me.

MR. COLLINS: Can't tell.

THE WITNESS: If I see the ballots inside I can tell.

MR. JUSTICE SWAYZE: You could tell by the ballots?

THE WITNESS: Yes.

MR. JUSTICE SWAYZE: But you cannot tell without it?

THE WITNESS: No, sir.

MR. JUSTICE SWAYZE: As it stands now you cannot tell?

THE WITNESS: No, sir.

MR. COLLINS: He says it could not be done because it would have been disturbed.

MR. JUSTICE SWAYZE: They look pretty much alike to me. I don't know. There may be something about it that the witness recognizes. For instance that paper pasted on one is—might be a distinguishing mark.

MR. COLLINS: He says he cannot tell. Go back to the stand.

MR. JUSTICE SWAYZE: All right.

BY MR. WALSCHEID:

Q. I show you a box marked, "First District, First Ward, West Hoboken."

MR. COLLINS: Marked on a tag.

A. Marked on the tag.

Q. And which is marked on the top of the box, "First District, First Ward, West Hoboken," and ask you whether it was a box of this class and kind which you were using during that election? A. It was about the size of that, yes.

Q. Like that? A. Yes.

Q. When you were counting the votes, what had you done in order to count the votes? You had opened the box, of course, to get them out, didn't you? A. One by one.

Q. You had opened the box by unlocking these locks? A. The judge did that.

Q. In your presence? A. Yes.

Q. After the ballots were strung how were they put back into the box; were they put back through this hole or were they put back before it was locked? A. What do you mean?

Q. Oh, listen to the question? A. I couldn't put them in there. I put them on the string after I strung them up.

Q. After they were strung up how did you get them back into this box; did you do it through

this hole? A. No; there is another cover under it.

Q. Well, you did not pass any of the ballots through this hole, did you? A. No, sir.

Q. And the lid was off when you put them back into the box? A. There was another lid under the box.

Q. The both lids were open? A. Yes, two lids was open.

Q. That's all.

By Mr. Collins:

Q. Two lids, and both open? A. Well, we put the ballots in—had to be.

Q. Two lids? A. Two covers, first and top.

Q. That's all.

Mr. Justice Swayze: Call your next.

Mr. Walscheid: Mr. Kates.

Mr. Justice Swayze: Through with this witness?

Mr. Walscheid: No.

Mr. Collins: No, not unless we need go further.

Mr. Justice Swayze: You may go. He is working night work and he has to take a little rest.

Charles F. Kates sworn.

Direct Examination by Mr. Walscheid:

Q. Mr. Kates, where do you reside? A. 427 De Mott Street in West Hoboken.

Q. Were you an election officer of the town of West Hoboken in the last general election? A. Yes, sir.

Q. What district and ward? A. First of the First.

Q. And in the town of West Hoboken? A. Yes.

Q. Did you take part in the counting and stringing of the ballots after the election? A. No, sir; I tallied.

Q. You tallied? Did you take part? Did you see the ballots when they were being put into the election box after they were counted? A. After they were counted and strung, yes.

Q. And how many strings were they strung on, if you remember?

MR. COLLINS: If the Court please, I suppose it is not necessary—I hate to bother your Honor at all—not necessary for me to object to every witness being sworn or every question that is asked?

MR. JUSTICE SWAYZE: Oh, no.

MR. COLLINS: It is understood that all testimony, of course, is objectionable, and also all testimony as to the conduct of the election and the way in which they treated the ballots is objectionable?

MR. JUSTICE SWAYZE: Yes, that will be understood.

MR. COLLINS: Consider it to be objected to.

MR. JUSTICE SWAYZE: I will preserve all your rights.

Q. Do you know how many strings the voted ballots were strung on at the conclusion of the election? A. No, sir. From where I was sitting and tallying I could not just see what they were being put on, but the strings were very long.

MR. COLLINS: Never mind. Do not reason. You say you do not know?

A. No, sir.

Q. Did you notice whether there were wooden

buttons on the ends of the strings? A. Yes, there were wooden buttons. You noticed they were being strung upon strings which had wooden buttons? A. Yes.

Q. How were the strings put into the box, did you notice that? A. Well, the cover was open—the cover of the box was open and everything was put right in together.

Q. Were there any unstrung ballots? A. No, sir.

Q. You don't remember any? A. No, sir.

MR. COLLINS: Why do you repeat what he says?

Q. You said there were not any? A. No, sir.

Q. After they were put into the box what was done with the box? A. We put the unused ballots, identification book, rest of the blanks and rest of the material in and locked the box up.

Q. Were the unused ballots strung? A. No, sir.

Q. Who locked the box? A. The judge.

Q. In what part of the box were the strings of ballots? Which did you put in first? A. The strung ballots.

Q. So that they went to the bottom of the box? A. Yes.

MR. COLLINS: Objected to as leading.

MR. JUSTICE SWAYZE: Do not lead.

Q. What next did you put in? A. That I couldn't say exactly.

Q. What did you put in the last? A. The books.

Q. After the box was locked—strike that out. Who actually locked the box? A. The judge.

Q. You saw him do it? A. Yes.

Q. How many locks did he lock? A. Three.

Q. What next did you see done or take part in doing? A. Tape it and seal it.

Q. Who did that? A. I guess, we all worked together on that.

Q. You all worked at that; then what did you do? A. We had the officer there and we saw an automobile and he hailed the automobile and took it down to the Town Hall in the automobile.

Q. Who went with you to the Town Hall? A. All four of us and the officer.

Q. Who was the officer? A. Mr. Wees.

Q. When you got down to the Town Hall what did you do with the box? A. Deposited it up in the clerk's room up there.

Q. To whom did you give it? A. Did not give it exactly to anybody.

Q. Who was there to receive it? A. Town clerk.

Q. Did you deliver it to the town clerk or put it down in his presence? A. Set it down with the rest of the boxes.

Q. How far was the town clerk away from you when it was thus set down? A. Probably twenty feet.

Q. When thus delivered in the town clerk's office with the rest of the boxes was it then sealed and taped and locked? A. Yes.

Q. As you have described it? A. Yes.

CROSS EXAMINATION BY MR. COLLINS:

Q. Was this the town clerk himself? You know the town clerk? A. Yes, sir.

Q. Himself? Was it in his assembly chamber? A. Yes.

Q. That is where it was. You said a little while ago there were no unstrung ballots, and then you said that the unused ballots were not strung.

Which do you mean? There were some unstrung ballots then, weren't there? A. Unused ballots are never strung.

Q. Then there was some unstrung ballots, were there? A. The question was put that way, yes, in their box.

MR. JUSTICE SWAYZE: You see his idea. He does not, perhaps, call it a ballot until it is voted. There were unstrung papers?

THE WITNESS: Yes, sir.

Q. What I want to get at—it might be argued there were no unused ballots there at all, no ballots that were not on the string? There were ballots that were not put on the strings? A. All voted ballots were strung; not voted were not strung.

Q. You mean all counted ballots, don't you? A. Yes.

Q. There were some other ballots that were not put on the strings? A. Yes.

Q. One lid or two lids to that box? A. I couldn't say. I didn't have the handling of the box.

Q. You didn't what? A. Have the handling of the box.

Q. There is only one lid, isn't there? Didn't you see the box? A. Yes, sir.

Q. Only one lid? A. Yes, sir.

Q. Is there, isn't it? A. As far as I know.

Q. Yes. That's all.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. The ballots which you say were unstrung had not been voted?

MR. COLLINS: Had not been counted.

Q. Had not been voted?

MR. COLLINS: I object. How can he tell.

MR. JUSTICE SWAYZE: Describe them. Describe the ballots which you say were unstrung, or were not strung.

A. After all the votes were cast we had counted all the strung ballots were put on strings and put in the box. The unused ballots were just rolled up and put in the box.

Q. In other words, the ballots which had not been handed to a voter? A. Yes, sir.

BY MR. COLLINS:

Q. Well, there were some ballots—were there more ballots in the box that you took out of the box to count than there were on the poll book? A. Yes, sir.

MR. JUSTICE SWAYZE: Well, let's see. Do not get into confusion about this.

BY MR. JUSTICE SWAYZE:

Q. You have when you start the election a lot of numbered ballots with coupons attached? A. Yes.

Q. I suppose you had more of those ballots with coupons attached than were required for the voters? A. Yes.

Q. But when you got through counting you put in—you numbered, of course, all the ballots that had been given to the voters and the coupons had been detached, and you put those on strings, didn't you? A. Yes.

Q. Now, that left you with the ballots that the county clerk had furnished you with coupons that had not been required? A. Yes.

Q. Is that what you mean by saying unused ballots? A. Yes.

By Mr. Collins:

Q. Then, I would like to ask you whether there were not some ballots which were in the box when you opened it, that had been voted, that were not counted—rejected ballots? A. Every ballot was counted.

Q. There was no rejected ballots? A. Rejected—they were numbered just the same.

Q. I don't hear you? A. Rejected ballots were numbered.

Q. Then they were not counted, but there were some rejected ballots, were there? A. About five.

Q. Well, were they put on a string or loose? A. Yes, sir.

Q. On one of the three strings or a separate string? A. They were put on the string as the number came up and we made a note there on the tally sheet.

Q. You mean to say that you put on the same string with the ballots which you counted, you put the rejected ballots that you did not count?

Mr. Justice Swayze: Well, Judge, I think I have had more experience in this than you have. A rejected ballot is a little bit ambiguous. What do you mean by a rejected ballot, a ballot which you did not count for some particular man, or a ballot which you threw out because it was marked, or something of that kind?

The Witness: Ballot that was marked.

Mr. Justice Swayze: All right.

By Mr. Collins:

Q. Did you put the ballots that were marked— A. I don't understand.

Q. Did the officers put the ballots that were

marked on the same string with the others? A. The inspector handled the ballots, I didn't.

Q. I know, but I want to know whether the ballots that were rejected because they were marked were put on the same string with the good ballots? A. Yes, sir.

Q. And had a number? A. Yes, sir.

Q. Just the same, but you rejected them? A. Yes, sir.

Q. Now, I understand you.

BY MR. WALSCHEID:

Q. And I understand you also—

MR. COLLINS: I object.

Q. Did you string the coupons? A. I did not string any coupons.

Q. Were they strung? A. Yes.

Q. They were strung.

BY MR. COLLINS:

Q. How do you know? You said your back was toward them and you were attending your tally, and you did not see what they did? A. The inspector was sitting almost directly in front of me.

Q. What did you mean a little while ago when you said that you couldn't see what was being done? A. Well, I couldn't see whether he tied the strings together or anything like that.

Q. You couldn't tell that he started the string with a button, a wooden button? A. Well, I saw the strings.

Q. You saw what? A. Saw the strings.

Q. Saw the string with the wooden button on it? A. Yes.

Q. You said you did not see how he strung the

ballots? A. I didn't say that I didn't see how he strung the ballots. I said I wasn't watching him all night; I was busy tallying.

Q. Yes, but you said that you did notice that he started his string, the first string, I suppose, with a wooden button? A. Yes.

Q. You didn't notice any other strings? I didn't hear you? A. I couldn't say.

Q. Couldn't say. That's all.

MR. WALSCHEID: Can we at this point have the keys to this box to open it?

MR. JUSTICE SWAYZE: Who has the keys?

MR. HENDRICKSON: County Clerk.

MR. JUSTICE SWAYZE: Somebody send word to the County Clerk and let him bring the keys to this ballot box, First Ward, First District of West Hoboken.

MR. GRITTEN: I will send for them.

AUGUST L. WACHLIN sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Wachlin, you are clerk of the Town of West Hoboken? A. Yes.

Q. You acted on the night of election, last general election, as clerk, and were clerk then? A. Yes.

Q. Did you on that night receive the box for the First District of the First Ward of the Town of West Hoboken? A. I did.

Q. Did you receive it from the election officers? A. I did.

Q. When you received it, was it locked? A. Apparently.

Q. Was it?

MR. COLLINS: I object and ask to have the answer stricken out.

Q. Did you test it to see whether it was locked? A. I did not. It was taped and it could not be tested.

Q. Was it sealed? A. Yes.

Q. Positive of that? A. Yes, sir.

Q. When you received it what did you do with the box? A. It was left in the Council Chamber where it was deposited at the time the officers brought it.

Q. Will you describe the Council Chamber? How large a room is it? A. About forty by twenty-five, I should judge.

Q. What floor? It is in the Town Hall, of course? A. Yes.

Q. On what floor of the Town Hall? A. The first floor—not the ground floor, the floor above.

Q. The floor above the ground floor. How many entrances are there to this room? A. There are three.

Q. How long did that box remain in this room? A. It remained there from Election Day until it was brought down here, I think it was the 8th of November—7th or 8th.

Q. The 7th or 8th of November? A. Of December.

Q. Of December. And these three entrances into this room, will you tell us where they lead from? A. The one leads from the main entrance on Clinton Avenue, that is the main entrance to the Council Chamber, and another leads from the Town Clerk's office, and still another up a rear stairway in the rear of the room.

Q. And that entrance leading, which you call the rear stairway, is from what street? A. From Charles Street.

Q. That is the side of the building, is it? A. Yes.

Q. Does that lead directly into the room upstairs? A. Yes.

Q. Is that door ever locked, do you know? A. I really don't know. I never used it—very seldom, except when I saw it open and I am passing that way and I want to get into the council—or into the Town Hall.

Q. And immediately behind the Council Chamber is there another room? A. Yes.

Q. What do you call that room? A. It is used as an office for the Board of Health, Plumbing Inspector.

Q. How did you get into that room? A. Through the Council Chamber or by way of the rear entrance.

Q. You can get into the Council Chamber, go into this room? A. Yes.

Q. That is one entrance to that room is from the Council Chamber? A. Yes, sir.

Q. Is that room upon the same floor level as the Council Chamber? A. No, sir, it is lower.

Q. How much lower? A. I think four or five steps—not more than five.

Q. Is there a door in that—is there an actual door in the hall leading from the Council Chamber to this room? A. Yes.

Q. During the time that this box was in the Town of West Hoboken, where was it kept? A. It was kept, it was standing on the—alongside of the north wall of the Council Chamber.

MR. COLLINS: I don't suppose you mean this one box—all of the boxes.

Q. Were all of the boxes of the town there during all that time? A. Yes.

Q. How many of them? A. Seventeen of them.

Q. Were all ranged alongside of this north wall as you call it? A. Yes.

Q. Were they all boxes like this? A. All alike.

Q. Apparently all locked? A. Yes.

MR. COLLINS: I object.

Q. And sealed with tape?

MR. COLLINS: I object to the question. May I not interrupt a moment here? A little while ago your Honor said, justly, I thought, you were entitled inasmuch as you could not be present in your judicial duties, with the entire count, and you have to have the help of the board—you are entitled to know what they saw. That did not authorize our friends to go into this question of how the boxes were dealt with on election night and where they were carried and where they were left and what was done with them. That is not the question that your Honor is going into at all. Your Honor is simply going to put yourself in the same position you would have been in if you sat at the table where this count was going on, and I speak in the interest of justice to us, and also to save time, because I don't know where this is going to end.

MR. JUSTICE SWAYZE: Yes, it seems to me that I am not trying a case, Mr. Walscheid, as if I were sitting here with a jury on quo warranto. I am trying it to see—rather, listening to testimony to see if the boxes were in such suspicious condition that I ought not to sign a certificate.

MR. WALSCHEID: Aren't you inquiring primarily into the identity of these ballots?

MR. JUSTICE SWAYZE: No, I think not. It

seems to me that if I found ballots in the boxes apparently all right, I ought to count them and stand by that count. You might show afterwards, on quo warranto, that the ballot boxes had been stuffed—like the case up here in Hudson; it was a case where the ballot box had evidently been stuffed after election and we held the man was not the incumbent.

MR. MCEWAN: That is *Darling vs. Murphy.*

MR. WALSCHEID: That is my case, which your Honor wrote me out of court.

MR. JUSTICE SWAYZE: Wasn't that right?

MR. WALSCHEID: I didn't think so.

MR. JUSTICE SWAYZE: You have my notion.

MR. WALSCHEID: Yes, I have got the notion. That case is reported in 73 Law.

MR. JUSTICE SWAYZE: Yes, but I do not sit here to determine any question of that kind.

BY MR. WALSCHEID:

Q. Well, Mr. Wachlin, did you actually, I mean physically, take part in the delivery of these boxes to the County Board of Elections?

MR. COLLINS: I object. It is entirely within his Honor's ruling.

MR. JUSTICE SWAYZE: I do not know about that. I will hear it.

Question repeated by stenographer.

MR. JUSTICE SWAYZE: I suppose the next question is what condition they were in. Did you take part?

A. Not of the actual delivery. I did see each box before it was sent out.

Q. You saw this box of the First District of the First Ward? A. I did, yes.

Q. Was it then apparently locked?

MR. COLLINS: I object.

Q. Did you test it?

MR. COLLINS: I object.

MR. WALSCHEID: Strike the question out.

MR. COLLINS: I do not suppose this witness can have an individual memory of each particular box and then ask him as to repairing the lock.

MR. WALSCHEID: I struck out the question.

MR. JUSTICE SWAYZE: Question withdrawn.

Q. Did you in any way test the boxes? A. The boxes were all opened by myself and an assistant, and we placed in those boxes certain supplies for the board; they were then relocked.

MR. COLLINS: He is speaking about the local board.

A. Later they were taken out and brought to the several polling places.

Q. Are you talking about before the election? A. Yes.

Q. I am talking about the time when the boxes were delivered to the County Board of Elections for the purpose of this recount. A. Oh; I misunderstood your question.

Q. Did you take part in the delivery of those boxes to the representatives of the County Board? A. No, I did not.

Q. Did you have anything to do with it? A. Nothing.

Q. Did you see the boxes taken? A. I saw two of them.

Q. What two did you see? A. I don't know what districts they were. I did not take note.

Q. Those are the only two you saw? A. Yes; the first two men took them down to the machine.

Q. How did they get those boxes? A. They got them through my assistant, under my direction.

Q. What is his name? A. Hubin.

Q. He is not here? A. I have not seen him.

Q. Do you know who brought them down? A. One Martinelli; I can't recall the other party's name, although I know him well enough.

Q. Who furnished those men to bring them down? A. I secured them myself.

Q. They are your representatives? A. Yes.

MR. COLLINS: I object to that as a question of law.

MR. JUSTICE SWAYZE: Yes.

MR. WALSCHEID: That is all.

CROSS EXAMINATION BY MR. COLLINS:

Q. Mr. Clerk, just a question. Sometimes a good many people get in there to a council meeting in this assembly chamber and council chamber, don't they? A. Yes.

Q. Pretty crowded? A. Sometimes.

Q. Have you noticed that citizens would be sitting around on these boxes? A. I don't recall during a council meeting that there would be anybody sitting on these boxes between Election day and December the 7th or 8th, because the meetings at that time were not very well attended.

Q. Well, haven't you seen people in the council chamber sitting on the boxes without regard to whether it was a meeting or not? A. No, sir; I don't think I did.

Q. Don't remember whether you did or not? A.

Not on those boxes. I have seen them sitting on boxes.

Q. You mean on other occasions, or what do you refer to, some other years? A. On some other boxes that were located in the rear of the council room.

Q. During this period? A. No, since then.

Q. Since then? A. Yes.

Q. Since these boxes were taken down to the County Board you have seen people around the council chamber sitting on other boxes that were there? A. Yes, sir.

MR. WALSCHEID: I object to it as immaterial.

MR. JUSTICE SWAYZE: It is cross examination.

MR. COLLINS: That is all.

CORNELIUS J. O'NEIL, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. O'Neil, did you take part in any way in the recount of these ballots, in this recount? A. Yes; I was present most of the time during the recount.

Q. Were you present when the box of the First District of the First Ward of West Hoboken was opened? A. I was.

Q. Did you at that time make any memorandum? A. I did.

Q. Can you tell without the use of that memorandum exactly what the condition of that box was?

MR. COLLINS: That is the condition of the box?

Q. Yes, of its contents?

MR. COLLINS: Number one.

MR. JUSTICE SWAYZE: First District, First Ward of West Hoboken.

Q. Can you without the use of this memorandum? A. I can tell some of the particulars.

Q. You can only tell some of them?

MR. COLLINS: At what time? When it was opened?

MR. WALSCHEID: Yes.

Q. You can't tell all of them, can you? A. No, sir.

Q. Is this a memorandum that you made at the time?

MR. COLLINS: I object. Do not show it to him yet. I am asking what time you are addressing your question to?

MR. WALSCHEID: To the time when the box was produced before the County Board of Elections for the purpose of the recount. To be opened and recounted. That is the time you have reference to, isn't it, Mr. Witness?

THE WITNESS: Yes.

Q. Now then—

MR. COLLINS: He cannot use this paper. If you want to state and ask a question as to the condition of this box, please do so. I am objecting.

Q. Well, tell us what you can from memory as to the condition of that box, in the first place?

MR. COLLINS: I object to it. I understand that the true rule is, and I believe that was your Honor's deliverance, that you are entitled to the same information that you would have had if you were sitting by as to any-

thing suspicious in these ballots. Now my notion is—your Honor may remember that there was one box which was broken; it was called to your attention by Mr. Stites, which you did see. You see, my friend Stites is not here.

MR. JUSTICE SWAYZE: They say I saw it. I suppose I saw it. I do not remember.

MR. COLLINS: Yes. Mr. Stites said so. I do not think what he is now asking him to tell about the condition of this box is in line with what your Honor says you are entitled to have brought to your knowledge.

MR. JUSTICE SWAYZE: Oh, I think so. It is presumed, if I had been there, I would have seen what this witness saw. I will allow it.

(Question repeated by stenographer.)

A. Why, the box—

MR. COLLINS: Are not the witnesses really those that should give information to you, your representaives, to wit, the County Board. It does seem to me it is going to fall outside of it—here was a man tallying for Mr. Seglie, and they call him to attempt to testify. What your Honor needs is the report of sworn public officials—two of each party—to inform you as to the situation. I do not think it is legitimate.

MR. JUSTICE SWAYZE: I will take this testimony.

(Question repeated by stenographer.)

A. The box as brought before the County Board of Elections was neither locked nor sealed, and the box—

Q. Was there any tape around it? A. No, sir. A box, when the lid was thrown back, there was a second covering, it was an insert cover within

the box, and that, when taken out of the box, was used as a sort of a foot for the lid. The lid was on hinges and this was used as a foot for the lid. It was placed under the lid so the hinges would not break through the box. After it was swung back this was used as a foot for the lid. There were several strings of ballots, I wouldn't say how many, and there were unused ballots in the box; that one of the strings was apparently broken, because there were certain ballots, as I recall, from numbers 268 to 300, unstrung in the box.

Q. Did you make a memorandum of the things that were taken from this box, in the order in which they were taken, and the conditions? A. Yes.

Q. At that time? A. Yes.

Q. Is this your memorandum? (Paper shown witness.) A. Yes, sir.

Q. Now— A. It has been added to since.

Q. But you have not added? A. No, sir.

Q. How far is it your memoranda? A. With the exception of this here, and this memorandum down here (indicating.)

Q. If you will use such portions as you can for the purpose of refreshing your memory, and tell us what you saw and observed in relation to that box?

MR. JUSTICE SWAYZE: Oh, no. Ask him questions, and he may refresh his recollection by looking at the memorandum if it is necessary.

Q. Now will you tell us how many strings of ballots came from the box?

MR. COLLINS: You must only look at the memorandum that you made.

MR. JUSTICE SWAYZE: Yes; only at your own memorandum.

A. Four strings of ballots—

Q. When you speak of ballots do you mean voted ballots? A. Yes.

Q. Can you tell how those ballots were numbered, on each string? A. The first string was one to one hundred, the second string one hundred and one to two hundred, the third string two hundred and one to two hundred and sixty seven, and the fourth string three hundred and one to three hundred and sixty-five.

Q. Were there any ballots in that box which were not strung when the box was opened? A. Yes.

Q. What were the ballots? A. Ballots were number 268 to 300.

Q. Were there any unused ballots in the box? By unused ballots I mean ballots which had not been voted.

MR. COLLINS: Had coupons on them, you mean?

MR. WALSCHEID: Which had not been voted.

A. Unused ballots from 373 to 500 were in the box.

MR. JUSTICE SWAYZE: Those are the numbers of the coupons?

THE WITNESS: Coupon ballots.

Q. Had they been strung, those ballots? A. No; folded up within the box.

Q. What else was in the ballot box; were there any tally sheets in the ballot box? A. Two tally sheets.

Q. An identification book? A. One identification book.

Q. Now do you remember whether there were any spoiled ballots or rejected ballots? A. Seven spoiled ballots on the string with stubs.

Q. On the strings with stubs. So that there was a string of stubs?

MR. JUSTICE SWAYZE: How is that?

A. Seven spoiled ballots on the string with stubs.

Q. There was a string of stubs? A. Yes, sir.

MR. COLLINS: Then the last witness was wrong.

Q. How many were there on the string of stubs, according to the numbers? A. Stubs were from one to 372.

BY MR. JUSTICE SWAYZE:

Q. And the numbers of the Election Board on the back, the pencil numbers, ran up to 365? A. 365.

BY MR. WALSCHEID:

Q. Did you notice anything about how—

MR. JUSTICE SWAYZE: That accounts for all the ballots, 1 to 365, and the seven rejected makes 372, and the coupons still attached—

A. 373 to 500.

MR. JUSTICE SWAYZE: The gap was from 268 to 300.

BY MR. WALSCHEID:

Q. Will you describe to us if you noticed how the ballots were held on these strings?

MR. COLLINS: I object to it as irrelevant.

A. I don't remember.

Q. Don't remember that? A. No, sir.

Q. Did you then watch the count of the ballots that were taken from that box? A. Yes.

Q. Did you make a record of the ballots which were objected to and which were sent to the court and the reasons why it was done? A. I did.

Q. What were the ballots which were sent to the court from this box, the numbers?

MR. COLLINS: I object. I think that is officially made known to you. I was not present when the question was raised, the difference between the official tally and the private tally. I do not think, when we know what the ballots were sent to you, we should waste time of the court to have him testify.

MR. JUSTICE SWAYZE: I suppose theoretically I may know, but I have forgotten.

MR. COLLINS: There is an official record of it.

MR. WALSCHEID: There is not.

MR. COLLINS: They certified all the ballots. They had them in envelopes and numbered.

MR. JUSTICE SWAYZE: Yes.

MR. COLLINS: That is all before you.

MR. JUSTICE SWAYZE: What is the object of this?

MR. WALSCHEID: The object of this is at this time to show to your Honor that out of this box the large number of ballots, of which we have the numbers, were sent to the court, and that upon all of those ballots the name of Seglie had been erased, and that they run in the batch from 268 to 300, and that they run practically consecutively.

MR. COLLINS: That cannot be proved by the memory of a witness.

MR. JUSTICE SWAYZE: That statement was made on the recount before me, wasn't it?

MR. WALSCHEID: Yes.

MR. JUSTICE SWAYZE: And ballots were produced before me?

MR. WALSCHEID: Yes.

MR. JUSTICE SWAYZE: And I came to the conclusion whether they were erasures or not?

MR. WALSCHEID: Yes, your Honor did say they were erasures, and your Honor then counted them, and said all that you could do at that time was physically to count them.

MR. JUSTICE SWAYZE: Yes.

MR. WALSCHEID: Noting what the appearance of the ballots were.

MR. JUSTICE SWAYZE: Now your point is that there were so many erasures that it is suspicious?

MR. WALSCHEID: Yes. It is a mere matter of refreshing your Honor's recollection.

MR. JUSTICE SWAYZE: I will allow this evidence.

MR. COLLINS: Puts us in a little awkward position. We haven't any way of testing it. We relied on your Honor's having them and dealing with them. You can see if—

MR. JUSTICE SWAYZE: Won't the work of the Election Board show those ballots? They kept them separate in an envelope?

MR. WALSCHEID: It would not. There is no official duty cast upon them.

MR. JUSTICE SWAYZE: Those ballots that you now desire to show had erasures to Seglie were produced before me?

MR. WALSCHEID: Every one of them.

MR. JUSTICE SWAYZE: I examined them.

MR. WALSCHEID: They ought to be in the envelope which the Election Board kept.

MR. COLLINS: They are. Not only so, but the tally sheet has all the data.

MR. WALSCHEID: All but four. There were four of them that the County Board said they would not go back of.

MR. JUSTICE SWAYZE: I will exclude this evidence.

MR. WALSCHEID: Even as to the four that were—

MR. COLLINS: The tally sheet shows everything.

MR. WALSCHEID: May it please the court, while the County Board of Elections did this, there is no duty cast upon them by law to keep this record, and so far as they have done it it is nothing more or less than a private memorandum kept by them for the purpose of facilitating their count. That evidence is undoubtedly good and proper and may be received, but it does not in any way discredit the work done by another individual along the same lines; in other words, my testimony of those facts would be just as probative as the record kept by the County Board of Elections. That is my view of this.

MR. JUSTICE SWAYZE: I have actually seen all but four of these ballots, so I do not need any testimony as to anything but the four ballots. Now you can identify those four ballots in any way and distinguish those from the others that I have seen.

MR. WALSCHEID: I will go to that now.

BY MR. WALSCHEID:

Q. Do you remember or not the County Board of Elections refused to send any ballots to the court at that time? A. I don't remember. I may have noted it.

Q. Have you noted it.

MR. COLLINS: You can have the County Board explain it to you.

MR. WALSCHEID: I object to any explanations by the County Board at this time.

MR. COLLINS: I happened to be present at that time. They said there were four that had not been accepted, and a gentlemen whose name I do not recall explained why it was, and that there was a mistake—misapprehension on the part of the Seglie's tallier, and when they took it off the string they saw there had been a mistake, and that was all right.

MR. JUSTICE SWAYZE: I have a sort of a recollection of that, but this witness would not help us, evidently he does not.

MR. WALSCHEID: He says he made a memorandum.

THE WITNESS: I say I may have.

Q. Will you look and see if you did.

MR. COLLINS: If he did have a memorandum with the numbers of those ballots your Honor can look at it?

MR. JUSTICE SWAYZE: Yes.

MR. COLLINS: That is all I want.

MR. JUSTICE SWAYZE: I am going to limit this to such testimony as enables me to see with the eyes of the Election Board.

MR. COLLINS: Yes. That is all I ask for, whether I reach the same result or not.

A. No, sir; I do not see it.

MR. COLLINS: He can't tell us what it was. I remember the County Board explaining it.

Q. For the purpose of refreshing your memory,

Mr. Witness, do you remember at which table these ballots were being counted? A. Yes, sir.

Q. At which table were they being counted? A. Well, at what I would term the outer room—the table at which Mr. Taylor and Mr. Hopkins were acting.

Q. Do you remember Mr. Houghton coming into that room from what you call the inner room? A. No, sir.

Q. Do you remember a controversy there as to four ballots? A. I remember that the gentlemen who was observing the ballots for Mr.—— in Mr. Seglie's interest, that is, examining the ballots, a Mr. Tess. He called the Board's attention to having passed several ballots, I wouldn't say how many, which were marked apparently the same, and he was objecting to it at the time.

Q. Were they objected to at the time? A. Those ballots had already been passed, were on the string at the time. They had been counted by the board at the time he interposed with his original objection.

Q. What request did he make of the board? A. I wouldn't say.

Q. Did he request them to take them off and certify them to the court?

MR. COLLINS: I object to it as leading.

A. There was a controversy, but I wouldn't say he made that request from the board.

Q. That is all.

'ROSS EXAMINATION BY MR. COLLINS:

Q. That is all—oh, yes, there is one thing. These ballots from number— I forget—268 to 300, that were not on the string, they had holes through them? A. I wouldn't say.

Q. What? A. I wouldn't say.

Q. You can't tell whether they had holes through them or not? They had numbers? A. Yes, sir.

Q. They looked like ballots that had gotten in some way from the string? A. They had been on the string at the time?

Q. Near the end of it, the top end of the string; they had slipped off the string? A. It looked as if the string might possibly have been broken.

Q. Oh, might possibly have been broken, but it might possibly have got untied and slipped off? A. It all depends on your point of view, I suppose. I could not judge that.

Q. All I really suppose I would like to ask is— A. I made notes of things.

Q. They were numbered and they had holes through them, as far as you know, and they were off the string? A. Yes, sir.

BY MR. WALSCHEID:

Q. Go back to the string. Take the string from 1 to 100 which you have identified. Was each end of that string fastened up so that the ballots could not get off? A. Well, I could not say positively how it was fastened. Apparently it was fastened.

MR. COLLINS: That is all.

Q. As to the other four strings? A. Well, practically the same.

Q. Any of them which happened to be in that condition?

MR. COLLINS: I object. There were not four strings.

Q. Three other strings? A. My recollection serves me about three of them were fastened intact, but I wouldn't say in what manner.

Q. What do you mean by fastened intact? A.

That is, that the ballots could not slip off of the end of the string from which they had been strung, and on the one string, why the strings had been broken, and I knew those ballots were loose.

Q. That's all.

BENJAMIN S. TEES, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Tees, did you take part in this recount? A. Yes, that day.

Q. Did you see this box of the first ward of the first district of the Town of West Hoboken? A. I did.

Q. Did you see it brought in? A. I did.

Q. Notice its condition when it came in? A. Yes.

MR. COLLINS: I object to it as immaterial.

MR. JUSTICE SWAYZE: No. This came to the County Board.

MR. WALSCHEID: Yes, when it came to the County Board.

MR. WALSCHEID: I will receive it, yes.

Q. Will you tell us what the condition of the box was? A. The box came up unsealed, no tape, and open, the lid open. As it came in I called the attention of Mr. Bouton. I said, "Take notice this box is unlocked and unsealed, and no tape."

MR. COLLINS: Called attention of who?

A. Mr. Bouton.

MR. COLLINS: Who is he?

A. Tallier on this table. On the same table I was.

Q. Who else at the time the box was counted? A. Commissioner Hopkins and Mr. Taylor.

Q. What came out of the box first? A. Why, I wouldn't say positively; I think a tally or books.

Q. Did you make a memorandum of it? A. No; I didn't keep any memorandum.

Q. How many strings of ballots came out of the box? A. There was four.

Q. Will you describe those strings? A. I can describe from 1 to 100, and from 101 to 200, because they lay right in front of me all the time they were fixing up the ballots that was off the string. When Commissioner Hopkins was fastening them together the two lay in front of me.

Q. Those particular strings, the two strings that you have just mentioned, was a string from 1 to 100 and 101 to 200, were they fastened up so the ballots could not get off? A. Yes, sir, and I took them and threw them down to the end of the table, to the man that was taking them off.

Q. What about the other strings? A. Then there came out a string with a lot of loose ballots, it was unfastened. There was a lot of ballots off the string; like a part of the string had ballots on, and part of the ballots was off.

Q. What string was it? A. That was the third string.

Q. From 201 on? A. Well, I didn't see those numbers. The only thing we were taking the numbers of the loose ballots.

Q. What about the fourth string? A. That was intact.

Q. That was intact? A. Yes.

Q. By intact you mean so fast that no ballots could get off? A. No, no loose ballots; no ballots could come off of it.

Q. Fastened on each end? A. Yes.

Q. How were they fastened on the end? A. I could not say that.

Q. Anything else that you remember came out

of the box? A. The tally sheets and the identification book, I believe.

Q. Where were the loose ballots that were unstrung in relation to the strings? A. Why, they were scattered in the box.

Q. Scattered throughout the box? A. They were taking them out, they had took out a few of them in front of Commissioner Hopkins and they were separating them and keeping them in rotation.

Q. Did you have any controversy or take part in any argument during the counting of this box, in relation to holding any of the ballots for the court? A. Yes, sir.

Q. Will you tell us about that, please? A. Well, I was examining the ballots. I might tell this whole thing, your Honor. We was examining the ballots, and I came to a ballot and I seen an erasure on Mr. Seglie's name, and I just passed it, and the next one came and an erasure, and I passed that, and when the next one came and the erasure I was suspicious, and when I looked at the fourth one I got up and beat it to Commissioner Hopkins and said, "There has been three or four ballots go on already with an erasure. Here is more, and I want to make a protest against those ballots counting."

MR. COLLINS: You mean erasure of the X?

A. Yes, and I said, I want—

Q. Rubbed out with a rubber so you could see there had been an X there? A. Yes, on Mr. Seglie's name there, and on the fourth I made a protest, but that went on the string just the same.

Q. Did you ask they be held? A. Yes, I asked them to have them taken off the string and submitted to Justice Swayze, and they wouldn't do it. Then I asked the four commissioners if they

would be put to a vote, to the four commissioners on that question, and I asked that question a half a dozen times, and the vote was never put before the full board. I also suggested the recount stop on that box, all the ballots go back and the box be counted in front of Justice Swayze, and they wouldn't agree to that.

Q. Do you remember the number of those ballots? A. Well, only this, that I called out the numbers to Mr. Bouton when they were loose, and asked him if they were taking the loose numbers, and each one I objected, and I called the number out and the number was put down, each one, and I objected.

Q. I am asking you about the four or five ballots? A. Prior to the first one they were going to send up to Justice Swayze—

Q. Prior to the one which was handed to Justice Swayze? A. Yes; because I believe there are about twelve in a row came out that way.

Q. If the first one of those in number, would be 287, it would be in—

MR. COLLINS: That is reasoning.

MR. JUSTICE SWAYZE: That is the first time I have heard that number, 287.

MR. COLLINS: It is the wrong number.

Q. If the first one of those ballots which was held for the court in number, would be ballot number 271, where would you find in the numbers of the ballots these four or five ballots you have indicated? A. 270, 269, 268, and that way down.

Q. That way down? A. Yes.

BY MR. JUSTICE SWAYZE:

Q. They all came along together? A. Yes, all came along, one right after the other, in rotation. I asked Commissioner Houghton to take the bal-

lots off, and they wouldn't take them off, and they wouldn't do it, and I believe he done it—took two of them off anyway.

CROSS EXAMINATION BY MR. COLLINS:

Q. You are a paid watcher in the interest of Mr. Seglie? A. No; no paid watcher.

Q. You were there for him? A. I came in that afternoon about two o'clock.

Q. For Seglie? A. Yes; came in to see and watch the recount and that is the first time I had anything to do with it.

Q. You were doing it for Seglie? A. I was there to see if I could do anything in the interest of Mr. Seglie, yes.

Q. The man who was on the witness stand just before you the same? A. I don't know nothing about that name.

Q. I forgot to ask him. You don't know? A. I am not even acquainted with him.

Q. Is he here yet? (To a man in the audience:) You were here for Seglie?

MR. O'NEIL: No sir, I was not.

MR. COLLINS: Was not?

MR. O'NEIL: No sir.

MR. COLLINS: Or for Mr. Melniker.

MR. O'NEIL: No, sir; I came here originally in the interest of the City of Bayonne.

MR. COLLINS: Who was it asked you to come?

MR. O'NEIL: I kept that memorandum for Mr. Melniker upon his request.

MR. COLLINS: That is all I want to know.

BY MR. COLLINS:

Q. You think there were three or four ballots that were, as you thought, of such a kind that the X

in front of Seglie's name had been erased, that were not sent to the judge? A. Not that I thought, Mr. Collins; that I knew. Not that I thought; I saw the cross erased from Mr. Seglie's name.

Q. You did think. You didn't do it without thinking. Do you mean to say you did not think so? A. I could see it, the cross erased.

THE COURT: He says it was not a question of thinking; it was a question of knowing.

A. I could see the cross erased.

Q. I meant to say there were four ballots, as to which, according to your eye, something had been erased; the X had been erased in front of Mr. Seglie's name and they were not sent to Mr. Swayze? A. No; they were not; they were on a string.

Q. And three of them you did not say anything, but when you came to the fourth you protested? A. I commenced to get suspicious.

Q. That fourth one was not sent up? A. That fourth one went on the string.

Q. You say those four were in order, one after the other? A. Yes.

Q. And the next one—find that number there—was the same, and was sent to Justice Swayze? A. The next eight or nine.

Q. Yes, but the next one is what I asked you about? A. Yes, sir; the next one.

Q. When we find out the first one of that kind that was sent to Justice Swayze, the four ahead of them are the ones you criticised? A. Yes, sir.

Q. At that time, Mr. Witness, the count showed Ackerman considerably ahead, didn't it? A. Well, I will tell you, Mr. Collins, I don't know; I had come up—I had not been up in a couple of days. I don't know how the count stood.

Q. How did you come to be here that week? A. That day?

Q. Yes. A. Why, I came up in the afternoon; I had finished my business in the morning, came up there in the afternoon to the recount.

Q. Why? A. To see if I could do anything for Mr. Seglie, in the interest—to watch out.

Q. What was your business? A. I am in the papering business—been a paper hanger.

Q. You came up to see if you could watch out for Seglie? A. Yes.

Q. Who asked you to? A. Nobody asked me to.

Q. Where do you live? A. 271 Fifth Street, Jersey City.

Q. What street? A. Fifth.

Q. I don't quite yet see why you wanted to interest yourself in the matter.

MR. WALSCHEID: I object to it as immaterial.

MR. JUSTICE SWAYZE: Argumentative, I think, Mr. Collins. You can ask him if he had any other reason.

Q. Had you any other reason— A. None whatever.

Q. In looking out on your own hook in the interest of Seglie? A. That is all.

Q. You were not paid anything? A. Not a penny.

Q. Never paid anything? A. Not paid a penny.

Q. Did you keep on after that day? A. That is the only time I was in it.

Q. Weren't you one of the watchmen that were employed by the County Board—by Seglie, to watch ballots down in the cellar? A No; I wasn't employed by Mr. Seglie at all.

Q. I thought you might have been? A. No, sir.

Q. That's all.

MR. WALSCHEID: Now I would like to have that box opened.

MR. DOHERTY: It is open.

MR. JUSTICE SWAYZE: Mr. Gritten went to get the key. I don't know whether he opened it.

MR. DOHERTY: It is wide open.

MR. JUSTICE SWAYZE: It has not been opened in our presence. I have not seen it opened.

MR. WALSCHEID: Mr. O'Neil, the representative of the County Clerk's office, will you kindly open that box?

MR. JUSTICE SWAYZE: Mr. Doherty says it cannot be locked and was not locked, merely taped.

MR. DOHERTY: That is a fact.

Mr. Walscheid breaks the tape on the box.

MR. WALSCHEID: I have torn the tape.

MR. JUSTICE SWAYZE: Broken the seal.

MR. WALSCHEID: Broken the seal on it and opened the box.

MR. MCEWAN: There is a piece just on the inside.

MR. WALSCHEID: And I have taken out what has been called the inside—inner lid.

MR. MELNIKER: The County Board has the other ballots.

MR. JUSTICE SWAYZE: Ballot 270, is it, or 268, to 300 are in the envelope.

MR. MCEWAN: Those are not in the condition they were in at the time.

MR. WALSCHEID: No.

MR. JUSTICE SWAYZE: Col. Vickers thinks the condition or the contents of this box ought to be entered on the record. You may put on the record, Col. Vickers, on behalf of the Prosecutor, anything that you want as to what is contained in the box.

MR. VICKERS: I am not perhaps familiar with it to describe it. One string of ballots.

MR. COLLINS: This is after it was recounted.

MR. JUSTICE SWAYZE: Yes, but Col. Vickers does not want it said hereafter it has not been in the custody of the Prosecutor.

MR. VICKERS: Two tally sheets, two identification statements, election day and registry day, respectively; one poll book, First District, First Ward; one American flag; one string of stubs; and one roll of unused ballots, I presume. The box is opened without unlocking, the hinges being loose.

MR. WALSCHEID: Now I desire to offer in evidence the two tally sheets.

MR. COLLINS: Objected to as irrelevant.

MR. WALSCHEID: Something which your Honor might have inspected.

MR. JUSTICE SWAYZE: How can that be of consequence?

MR. WALSCHEID: I desire to show your Honor the record kept of the vote as between Ackerman and Seglie, and ask your Honor to inspect the tally.

MR. JUSTICE SWAYZE: I will inspect. That is the original tally sheet.

MR. WALSCHEID: That is the original tally sheet. There are two of them. The total for Ackerman on this tally sheet being 120, the total for Seglie on this tally sheet being 106.

MR. COLLINS: Now you come to the tally sheet?

MR. WALSCHEID: Two people keeping?

MR. JUSTICE SWAYZE: Well, I won't run the tallies out. I will take it those figures are right, unless somebody questions them. All right.

MR. WALSCHEID: I ask you to look at the other tally sheet, which also shows Ackerman 120 and Seglie 176, and the method in which that tally was kept, and the general method of keeping the tally.

MR. JUSTICE SWAYZE: Well, what is there special about the way it was kept?

MR. WALSCHEID: Why, the very fact in this district it appears—

MR. MELNIKER: Change of the result afterwards was 133 to 160.

MR. WALSCHEID: Now I ask your Honor to examine in connection with that the tally sheet. It being my contention—the original—that two men in the performance of their duty, keeping independent tallies, while they might have made an error, would not have made so great an error without showing some indications of it.

THE COURT: What you want me to see is that these original tally sheets are all straight and regular?

MR. WALSCHEID: Yes.

MR. COLLINS: The error may not have been in the tallying. It may have been in the calling off.

MR. JUSTICE SWAYZE: I think I can guess that, too. I will take Mr. Walscheid's word. You have got your say afterwards.

MR. COLLINS: You want to look at those four ballots. Want to look at those four ballots, while you have it open.

MR. JUSTICE SWAYZE: Yes, we want to close it up as soon as we can.

MR. WALSCHEID: I desire to offer for inspection of the court ballot number—so that I may be sure that I get them. I am going to start at 265, 266, 267, 268, 269, 270—Now

the ballots which I am now reading have been offered to your Honor—which I am beginning to read—271, 272, 273, 274, 275, 276, 283, 284, 285, 286, 287 and 289; also 300 and 305, for the purpose—

MR. JUSTICE SWAYZE: How many have you got altogether?

MR. WALSCHEID: All the ballots which have been submitted to your Honor which we have—fourteen ballots already submitted, and we say there are four more.

MR. COLLINS: I might be allowed to interject here. He says he wants you to see the Seglie ballots, I take it. Then I ask your Honor to look at the number—there are quite a good many—in which the word Ackerman was erased—your Honor noticed it—quite a lot of them.

MR. JUSTICE SWAYZE: There were such ballots. These fourteen ballots are ballots on which the cross opposite Seglie's name was erased, you claim?

MR. WALSCHEID: Yes.

MR. COLLINS: I ask you to look at this.

MR. JUSTICE SWAYZE: I recall now that there were ballots there on which the cross seems to be erased by Ackerman's name. I don't know how many.

MR. WALSCHEID: Each one of these cases where the Seglie name was erased—where the cross was erased—if Seglie's cross had not been erased there would have been three votes upon the ticket for Boulevard Commissioner, one of the three in each instance being the name of Ackerman.

MR. COLLINS: I object to that, because I recall that there were some where it was not Ackerman; there were some where it was Asmus.

MR. WALSCHEID: One of the names being Ackerman.

MR. COLLINS: There was no cross in front of Ackerman.

MR. JUSTICE SWAYZE: If necessary I will look at those ballots again. Tell me what the result of this recount was.

MR. MELNIKER: A difference of 29.

MR. JUSTICE SWAYZE: 29 votes?

MR. MELNIKER: No; thirteen added to Ackerman, sixteen taken off Seglie.

MR. COLLINS: This one box?

MR. WALSCHEID: Yes.

MR. COLLINS: It wouldn't make any difference in the whole result.

MR. WALSCHEID: That in itself makes a difference of thirty-eight or so in the result.

MR. MCEWAN: It rather taints the thing with fraud.

MR. COLLINS: Taints that box with fraud.

MR. MCEWAN: We won't argue now.

MR. COLLINS: I thought you wanted to look at something.

MR. JUSTICE SWAYZE: I thought this gentleman had something.

MR. HENDRICKSON: These ballots on which we are taking testimony from the First Ward, First District of Hoboken, and which are sealed up now, and which Mr. Melniker objected to, on which Seglie's name had been erased, or the cross had been erased—fifteen votes for Ackerman and three for Seglie, from the record that was taken when they were sealed. Produce the ballots and show them.

MR. MELNIKER: Fourteen of those ballots had the cross alongside of Seglie's name erased. The best way to do would be to look at the ballots.

MR. JUSTICE SWAYZE: Now I think I have the situation. Now, Mr. Walscheid, you want to look at the four ballots?

MR. WALSCHEID: Does your Honor want to do that now?

MR. JUSTICE SWAYZE: Now is the time.

MR. WALSCHEID: The Prosecutor ought to help me.

MR. JUSTICE SWAYZE: Shall I come down there?

MR. VICKERS: I will just watch you.

MR. WALSCHEID: I think we will have to open the string.

MR. JUSTICE SWAYZE: I do not want to open the string if I can avoid it.

MR. WALSCHEID: Here they are, 266.

MR. MELNIKER: Now cut the string.

MR. JUSTICE SWAYZE: One minute. That is serious business.

MR. HENDRICKSON: Better send upstairs and get a new string and a needle.

MR. JUSTICE SWAYZE: Yes, you will have to do that.

MR. WALSCHEID: I might put another witness on the stand.

MR. JUSTICE SWAYZE: Yes. They are going to restring them.

JOHN B. BUNTON, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Bunton, where do you live? A. West Hoboken, 560 Ninth Street.

Q. Were you present during any part of the recount of the ballots in the Seglie-Ackerman recount? A. The greater part of it.

Q. Were you present when the box of the First

District of the First Ward of Hoboken was opened by the County Board of Elections? A. The box was open.

Q. The box was open when you came there? A. When the box was brought to the Board.

Q. Oh, I see, the box was open, but you saw the box brought there? A. Yes.

Q. When the box was brought there, right before the Board—

MR. COLLINS: I suppose he means unlocked.

Q. When the box was brought before the Board in what condition was it? A. It had no tape or showed no trace of sealing wax, and the box was unlocked, and Mr. Taylor called my attention to the fact that the box was unlocked.

Q. How many strings of ballots came from that box? A. Four.

Q. Do you from memory know the numbers of each string? A. The first string was from 1 to 100; the second string was from 101 to 200; the third string was 201 to 267; and the last string was from 301 to 365, I believe.

Q. How were these strings held together? How were the ballots held on these strings? A. In three instances there was a piece of cardboard at the bottom with a match tied to it. The match held the cardboard, the string was tied to the match, and then a cardboard slipped through and that set across the match, holding it.

Q. How was the other end of these strings, how were the ballots held? A. Why, they were knotted.

Q. They were knotted? A. Yes.

Q. And the fourth string? A. That fourth string was just simply knotted. I am speaking of the first three that came out.

Q. The first three were knotted? A. The first

three were strung, as I told you, with a cardboard and a match across it at the bottom.

Q. And fastened so that the ballots could not get off? A. Could not get off.

Q. Do you remember what the numbers were of the ballots on that? A. Oh, they were on the first three strings.

Q. You don't know? A. Why, yes, of course I do. They were from 1 to 100, and from 101 to 200, and from 201 to 267.

MR. COLLINS: You do not mean that was knotted?

THE WITNESS: They were strung in the manner that I have described.

Q. Were the ends of the strings fixed in such a way that the ballots could not get off? A. Could not get off.

Q. Now you said something about the cardboard. What color cardboard was it? A. A bluish.

Q. Bluish cardboard? A. Blue on one side and white on the other.

Q. And the fourth string, the string from 301 to 365, how was that? A. That was just simply fastened with a little stick on the bottom, but no cardboard on that.

Q. How at the other end? A. Just knotted up the same as the others had been.

Q. Knotted up so the ballots could not get off? A. Yes.

Q. Are you sure that it was a cardboard that you saw and not wooden buttons? A. Oh, cardboard, positively.

Q. Were there any unstrung ballots in the box? A. Yes.

Q. Which had been voted, of course? A. Yes, sir.

Q. When the box was opened do you remember

what was taken from the box first? A. Why, the tally sheets were on the top of the box.

Q. What came next? A. Why, the ballots.

Q. By the ballots you mean what? A. I mean the voted ballots—those ballots there.

Q. The strings, the four strings? A. Yes, four strings.

Q. That came right next to the tally sheets? A. Yes.

Q. You are sure that those four strings of ballots did not come from off the bottom of the box? A. No.

Q. What came out after— A. They took a roll of the unvoted ballots or unused ballots, and then the poll book and the canvass book.

Q. They came out last? A. Yes, they were drawn out and called off to those that were making the memorandums.

Q. So that the order in which the various papers came out of the box was first the tally sheets—

MR. COLLINS: Do not repeat. I object to this repeating.

MR. JUSTICE SWAYZE: What do you mean to repeat?

MR. WALSCHEID: All right. I will withdraw it.

Q. Do you know the number of the ballots that were unstrung? A. Yes.

Q. What were they? A. 268 to 300.

Q. Where were they found in the box? A. They were found in the box mixed up with the—between the other strings.

Q. Between the four? A. Other strings.

Q. Other strings that you have reference to? A. Yes.

Q. That is all.

CROSS EXAMINATION BY MR. COLLINS:

Q. 268 to what? A. 300.

Q. Now have holes through them? A. What's that?

Q. Holes through them? A. Yes, they did.

Q. And numbers on them? A. What's that?

Q. Numbers on them? A. Oh, yes.

Q. Same as the other numbers? A. Yes, sir.

Q. Now do you say that that particular string— A. Yes, sir.

Q. —had a piece of cardboard and a match at one end, and at the other end it was knotted or was it loose? A. There wasn't any string to these unstrung ballots.

Q. No; I am not speaking of the unstrung ballots, but I am speaking of the string off of which they must have come? A. No.

Q. They undertook to make them in strings of hundreds, didn't they, 1 to 100, 101 to 200, 201 to 300? A. That was apparently what the Board intended to do.

Q. 300 to 365? A. Exactly.

Q. This one which was 201 to 267, and then the loose ballots in the box going up to 300— A. Yes.

Q. I asked you whether those that were still in the string were fastened in some way at the end of the ballots that the string was loose? A. No; the ballots were fastened, the string was knotted.

Q. The string was knotted?

THE COURT: So it made a circle.

A. Knotted.

Q. It was knotted? A. In a very heavy knot.

Q. Suppose that the string had in some way gotten loose and forty-three ballots—if that is the number— A. Thirty-two.

Q. Thirty-two ballots had slipped off and then

the string could be caught again, to restring them? A. Oh, that could have been done. I don't know about that.

Q. Was there any needle on that string? A. No, sir, there was not.

Q. No needle on that string? A. No, sir, but the string was not long enough to contain the other thirty-two ballots.

Q. Wasn't long enough? A. No, sir.

Q. Well, then, if the string had originally had a cardboard and match at the beginning of it and a needle at the other end—let me pause to ask you: I think you said in the other two cases where the strings were fast there was a needle? A. No, sir, I did not.

Q. You did not? A. Oh, no.

Q. There was no needle anywhere? A. No.

Q. Wasn't there any needle on any of them? A. None at all.

Q. Well, now, supposing the string number 3 had originally been fastened at one end with cardboard and a match, a whole string, had continued down to 300, and had there been knotted there with a needle or some way and had got untied, and these thirty-two had slipped off; then the condition that you observed would have been possible if the string had been knotted and the loose end cut off?

MR. WALSCHEID: I object.

A. No, it would not have been possible.

THE COURT: He has answered it would not have been possible, so you are not hurt.

MR. WALSCHEID: All right.

Q. Would it? A. Would not have been possible.

Q. Then your notion is that they had never been strung? A. My notion is that they had originally

been strung and that they were taken off for some purpose or other.

Q. Couldn't they have fallen off? A. It is possible, but not probable.

Q. If it became untied—if the string became untied at the end they could have fallen off? A. Yes; but who fastened them after that?

Q. That is what I want to know. (Laughter.)

Q. Were these the last ballots—did you notice whether they were in their regular order? A. No; we straightened them out.

Q. They were not in regular order? A. No, sir; they were not.

Q. They had got shifted about? A. Oh, yes.

Q. You were there in the interest of Mr. Seglie? A. No, sir.

Q. Under pay? A. No, sir.

Q. Under pay? A. No, sir.

Q. Just as a friend? A. Just as a friend.

Q. And there all the time? A. All the time—very nearly all the time since the recount started.

MR. COLLINS: Now you said they were going to look at these?

MR. WALSCHEID: Yes.

MR. COLLINS: What are you doing now?

MR. MELNIKER: Restringing the ballots.

MR. COLLINS: Can't you find the ones you want?

MR. WALSCHEID: We can find it, but we must open that string.

MR. COLLINS: What have you to open it for?

MR. MELNIKER: In order to get at these four or five ballots right in the center of it.

MR. WALSCHEID: I will call Mr. Hilles.

WILLIAM HILLES, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Hilles, were you one of the election officers of the First District of the First Ward, in the Town of West Hoboken, this last general election? A. Yes, sir.

Q. What position did you hold on that board? A. Clerk.

Q. Did you take part in the stringing of the ballots? A. No, sir.

Q. Did you see the ballots after they were strung? A. Well, yes.

Q. Did you see how the end of the ballots, of the strings—were.

MR. COLLINS: I object to the question.

MR. WALSCHEID: Strike out the question.

MR. COLLINS: It is nothing you would have seen if you had been present there in the counting.

MR. WALSCHEID: I withdraw the question.

Q. In order to hold the ballots upon the string, and so as not to allow them to slip off, was there a cardboard used?

MR. COLLINS: I object.

A. I didn't see any.

MR. COLLINS: Why did you answer the question? It is not within your Honor's ruling.

MR. JUSTICE SWAYZE: I will let it stand. I do not think it is quite within the range.

MR. COLLINS: He says he did not see any.

Q. Did you have any strings furnished you by the town for the purpose of stringing your ballots? A. Yes, sir.

Q. I show you a string and ask you whether it was a string such as this that was furnished to you—whether the strings that were furnished to you were such as this?

MR. COLLINS: I object to it as irrelevant.

MR. JUSTICE SWAYZE: I will take it.

A. Yes, sir.

Q. Was there a wooden button atached to one end of it? A. Yes.

Q. And the strings which were used for the purpose of stringing these ballots, were they wooden buttons attached to the ends of them? A. Yes, sir.

Q. And a needle on the other? A. Yes.

Q. And the needle also was furnished by the town? A. Well, I know they were there.

Q. Well, they were there? That is all.

NO CROSS EXAMINATION.

HUGO SHUNK, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Shunk, were you one of the election officers of the First District of the First Ward of the Town of West Hoboken at the November election, 1916? A. Yes.

Q. Did you see the strings that were used for the purpose of stringing the ballots? A. Yes.

Q. I show you a string and ask you whether the strings were made up like this? A. Made up like that with a button.

Q. Wooden button? A. Yes.

Q. In stringing the ballots did you string them on strings with wooden buttons at the ends? A. I didn't string them; the inspector done that.

Q. You saw them strung? A. Yes.

Q. Were they strung upon the strings that had wooden buttons at the ends? A. Yes.

MR. COLLINS: Of course I cannot tell—it is so entirely foreign to my notion of what your Honor would go into that I am embarrassed. I understand there is not a single box from West Hoboken with a wooden button. Here we are—your Honor is misled and will be by testimony that I cannot meet.

MR. JUSTICE SWAYZE: Well, I do not think that this testimony is going to affect me very much.

MR. COLLINS: Well, I shouldn't suppose it would.

MR. JUSTICE SWAYZE: It does not seem to relate to anything that was before the election board or the condition when they came from there.

MR. WALSCHEID: May I refresh your Honor's recollection that one witness has distinctly testified that the strings which were produced upon—that is upon the strings of ballots were fastened together with a blue piece of cardboard set on the inside of a match.

MR. COLLINS: Just a little while ago he testified to that.

MR. WALSCHEID: Here every election officer has testified they used a string with a wooden button attached to it.

MR. COLLINS: No; he didn't do it.

CROSS EXAMINATION BY MR. COLLINS:

Q. You didn't do the stringing? A. No, sir.

Q. You don't know whether they used a button that was on the piece of string that was furnished or not, do you? A. I certainly do know

there was a buton on there after we got through.

Q. Do you know the button was used? A. What's that?

Q. Do you know whether the button was used or not? A. We put it in the box after we got through stringing them.

Q. Do you know whether the button was used on the end of the string in stringing? A. It was used, yes.

Q. You don't know whether they may have come off or been replaced with something else? A. I don't know whether it came off or not. I couldn't swear whether it did or not. I know it was put in the box there with a button on it.

MR. JUSTICE SWAYZE: What I am interested in just now is the scope of the inquiry. While I think that this evidence of Mr. Walscheid would be quite admissible on a trial of title to the office before a jury, it does not seem to me that it is anything that I can use on this question of a recount. That is my notion, Mr. Walscheid. I do not want to go into a trial of things that would not have affected me if I had been sitting wih the Election Board.

MR. WALSCHEID: I have presented this testimony—I have been presenting this testimony on the strength of *Mathis vs. Low*. I thought *Mathis vs. Low*—

MR. JUSTICE SWAYZE: There everything was considered. Everything that Judge Voorhees considered was something that he had seen or could see.

MR. COLLINS: What happened there happened at the election board.

MR. WALSCHEID: In dealing with that matter he speaks of the case of *Kehoe vs. Stagleier*, which says this:

"The law does not contemplate any certificate, unless some other person than the person holding the certificate of the canvassing board is shown to have received 'a majority of the votes cast.' The prima facie character of the certificate of the canvassing board cannot be defeated by any condition except by a new certificate, issued under the statute, to some other person who has received a majority of the votes cast."

"Indirectly this last case would seem rather to give countenance to the idea that the identity of the ballots must be determined as a preliminary question in order that the new certificate shall have a proper foundation to rest upon."

"So I am addressing myself to that thought there expressed, that indirectly this last case would seem rather to give countenance to the idea that the identity of the ballot must be determined as a preliminary to the question in order that the new certificate shall have proper foundation to rest upon." Of course if your Honor limits yourself—

MR. JUSTICE SWAYZE: That is the Low and Mathis case?

MR. WALSCHEID: Yes, that is his opinion, which was afterwards affirmed, which was then indirectly affirmed in the mandamus proceeding—of course I do not mean affirmed.

MR. JUSTICE SWAYZE: You must read the language of an opinion with reference to the facts before the court; and there the facts were visible facts, which were that Justice Voorhees determined that the ballots that had been counted were not the ballots which had been cast.

MR. WALSCHEID: He also says in this case,

that "I think it is manifest, if it were admittedly the fact, that the ballots voted had been abstracted and others substituted, the duty of the justice would be not to perpetrate a fraud by certifying to the changed result upon a fraudulent basis. If upon recounting the contents of a ballot box it was found all the votes had been cast for one candidate, the internal condition of the box would show the votes so counted were not the original ballots, and hence not a recount. These illustrations, unlikely as they are to occur, indicate that there is some duty in the recounting agency to determine that it is really a recount which is being made and not a count of ballots never before enumerated." Now I am presenting to your Honor the broad proposition that these ballots in this box which were recounted here were not the ballots which were counted on election night. That is what I am trying to present to your Honor. Of course if your Honor limits yourself to what you can see—

MR. JUSTICE SWAYZE: Well, it seems to me I must. I cannot do any more than the election board would do. The election board could do—if I choose to call it so—the clerical work of counting these ballots, and it could determine from inspection perhaps whether the ballots were the ballots cast on election day. For instance, in the Low and Mathis case there were certain Republican ballots which were folded all alike, and all came together in a certain place, and perfectly evident that they had not been voted. The chance was one in a million that the votes ever went into the box that way. It may happen that is so here. It may happen that you

will show such a case. That I will have to see or I cannot say that this was a recount. But I think it must be limited to what the election board can see—and they could not take evidence, you know, except the evidence of their senses.

MR. WALSCHEID: No, but we are appealing to your conscience here as a justice of the Supreme Court sitting in a ministerial capacity, we admit, for the performance of certain ministerial duties, and anything which appeals to your Honor's conscience, I think, on this question of fraud, is admissible.

MR. JUSTICE SWAYZE: The great trouble—

MR. WALSCHEID: May I read another excerpt from this case, which deals with the rule in *Ruh vs. Frambach*:

"If the design of the statute is to correct errors made in the original count (*Ruh vs. Frambach,* 18 Vr., 85), that design cannot be accomplished if doubt exists whether the same ballots are recounted. To correct the measurement of a line, we would not be certified of its length by a second measurement by means of a discredited tape. Nor would an untested scale be employed in proving a given weight."

Now that I think is broad enough to allow of this testimony; in other words, anything which will indicate to your Honor that this is not a recount, that this is not a proper test, that this is, as Mr. Justice Voorhees says, is a discredited tape, that it is an unproven scale —any such testimony, I submit, in this case, would be proper.

MR. COLLINS: May I ask—

MR. JUSTICE SWAYZE: But you see what you would open the door for? You open the door for all the evidence that would be adm's-

sible on quo warranto, and you make it possible—necessary, I suppose, to call every voter who voted in this election in Hudson County, to prove how they voted. Of course if you could call the voters, say thirty-five thousand voters, to prove they voted for Seglie, no doubt that would show a very strong case, if he had more votes than Ackerman. Yet would I sit here to listen to it? It doesn't seem to me that a mere recounting officer would do it.

MR. WALSCHEID: But I think anything which comes out of the box, anything which deals with the ballots, which deals with the condition of the box—

MR. JUSTICE SWAYZE: Yes. You show me these ballots are missing; you show me as you have shown me, or as I suppose you have shown me until I hear further, that there are thirty-two ballots loose from the strings where they ought to be found, and those ballots contain many erasures of Seglie's name, an unusual number of erasures, and you have made a very strong case against this count. But that is something which comes from mere inspection. Suppose the other side call—let us say there are thirty erasures, crosses erased opposite Seglie's name—and suppose they call thirty men to testify that they put a cross opposite Seglie's name and then erased it. If I admit your testimony I must admit that. I think you are going too far afield. I think you are mistaking the scope of this inquiry.

MR. WALSCHEID: Of course I doubt whether that would be proper, because that would go beyond the point of the identity of the ballots at the time of the conclusion of that election, as taken from the box.

MR. JUSTICE SWAYZE: I think it would be

very good evidence of the identity of the ballots.

MR. WALSCHEID: Of course it would be almost proof, so far as the fact goes, I can see that, but I mean in the inquiry as to what the identity of these papers were. I think that your Honor has the right to inquire into what went into the box, and that your inquiry should stop there. Of course, your Honor has my views on it.

MR. JUSTICE SWAYZE: Well, how long will we have to have this ballot box here?

MR. WALSCHEID: We are through with that as soon as we get these ballots.

MR. JUSTICE SWAYZE: Why cannot that be done during the recess?

MR. WALSCHEID: If the Prosecutor agrees.

MR. VICKERS: We haven't anything to say about it as long as the court safeguards the box. I am perfectly willing to stay here and do anything that the court directs.

MR. WALSCHEID: Might have some controversy as to what happened.

MR. COLLINS: I cannot see what trouble it is to loosen one end of it.

MR. JUSTICE SWAYZE: They can soon string them off on the other string.

A number of persons gather around the table with the ballot box, and the stenographer does not report what is said.

MR. HENDRICKSON: Justice Swayze—just a moment now. The ballots are not coming off of this string in the order in which their witnesses testified they were strung, and the question arises—the Board of Elections want to prove that they strung these ballots, and their acts were perfectly proper. Apparently they will have to search through these ballots

to get the numbers of the ballots which they want. They are not coming out just as they testified—three or four before that.

MR. JUSTICE SWAYZE: What is the trouble about that?

MR. MELNIKER: They are all numbered.

MR. JUSTICE SWAYZE: Are the ballots all numbered?

MR. MELNIKER: Yes.

MR. JUSTICE SWAYZE: Haven't they those blue marks on?

MR. HENDRICKSON: Yes.

MR. JUSTICE SWAYZE: What is the trouble with finding 267?

MR. MELNIKER: No trouble.

MR. HENDRICKSON: Here is 282 on this string, the next number is 288, showing that the ballots were mixed as they passed along.

MR. WALSCHEID: No, they were held out.

MR. JUSTICE SWAYZE: Were some held out?

MR. HENDRICKSON: No; those ballots did not go to the court.

MR. JUSTICE SWAYZE: There is not the slightest difficulty in finding those four ballots, is there?

MR. MCEWAN: Find those four ballots.

MR. JUSTICE SWAYZE: We will have to proceed in better order than this. Mr. Houghton, is there any difficulty in finding those four ballots?

MR. HOUGHTON: They are all numbered.

MR. JUSTICE SWAYZE: Never mind how mixed they are. Those four ballots can be distinguished?

MR. HOUGHTON: Yes.

MR. JUSTICE SWAYZE: Then go ahead and find them. That is all there is to it.

Colloquy.

MR. COLLINS: Your Honor will remember that they said—claimed that they came right along in order.

MR. JUSTICE SWAYZE: Yes, but 267, 268, 269, come right in order.

MR. COLLINS: Yes. That is the member of the local election board. The testimony of this witness is that they came in the order that they are being strung.

MR. JUSTICE SWAYZE: Oh, no.

MR. WALSCHEID: The testimony was that they were loosened in the box. Mr. Bouton testified to that.

MR. COLLINS: That they were loose in the box?

MR. WALSCHEID: Yes.

MR. COLLINS: Did you speak of that at all?

MR. WALSCHEID: That is the way our evidence stands.

MR. COLLINS: Yes. They did not attempt to string them in the recount or count them in the order that they were on the string. They could not have done it, because of these loose ones in the box, but this witness undertook to say that there were four coming right along in order before another lot came along in order; he referred to this string.

MR. JUSTICE SWAYZE: Oh, I didn't so understand it.

MR. COLLINS: He must have meant so.

MR. JUSTICE SWAYZE: These were never looked over after they were once strung.

MR. COLLINS: I meant to say he noticed as they were counting, that there appeared one with a cross off, next one with a cross off, the next one with a cross off, the next one he protested against, and as I understand it all

those four were right in order on this string. How are you going to help it any by finding the numbers as they were on the original?

MR. JUSTICE SWAYZE: Why, as I understand it, the trouble came when four ballots, 267, 268, 269 and 270—

MR. COLLINS: He didn't remember the numbers.

MR. JUSTICE SWAYZE: Of the original numbers. These were counted originally in just the rotation in which it stood on the local board's count. That is the way I understand. Three or four strings.

MR. COLLINS: I do not so understand it.

MR. JUSTICE SWAYZE: At any rate, whether they were or not, the numbers were in rotation.

MR. COLLINS: That is only argument of Mr. Walscheid.

MR. WALSCHEID: No, that is the testimony.

MR. COLLINS: The witness said he couldn't tell. All he said was there were four right after the other, as he strung them in the recounting, and then Mr. Walscheid said assuming that the first one of those that were put out was 281, or whatever it was 271, then the others would be 268, 269, 270.

MR. JUSTICE SWAYZE: Yes. You find the numbers you want and we will decide afterwards.

MR. WALSCHEID: Justice Collins is correct in that last statement that I suggested it was —if the first one was 271. He says it is just before that. He did not know the numbers.

MR. COLLINS: They must be on the string, and that would not help us by finding the original numbers.

MR. JUSTICE SWAYZE: Let Mr. Walscheid produce the ballots he wants.

MR. WALSCHEID: I have number 265, and I find it is a ballot Ackerman and Seglie.

MR. JUSTICE SWAYZE: He raises no question about it. 265.

MR. WALSCHEID: 266 appears to be an Asmus ballot.

MR. JUSTICE SWAYZE: He raises no question about 266.

MR. WALSCHEID: 267 appears to be a Seglie-Asmus ballot.

MR. JUSTICE SWAYZE: Any erasures there?

MR. WALSCHEID: No.

MR. JUSTICE SWAYZE: No question raised about 267.

MR. WALSCHEID: 268 appears to be an Asmus-Cahill ballot.

MR. JUSTICE SWAYZE: No questions there then.

MR. WALSCHEID: 269 appears to be a Seglie-Cahill ballot without any erasures.

MR. JUSTICE SWAYZE: No question about that.

MR. WALSCHEID: 270 appears to be or is a ballot with Ackerman and Cahill, without any erasures.

MR. JUSTICE SWAYZE: There is no question about that. 271 and so on are sealed in the envelope. That carries out that the ballots were presented to me, and then they looked back and found these four were all right.

MR. WALSCHEID: Oh, yes. Wait a minute. I made a misstatement. 270 has an erasure over Asmus, and a cross opposite Ackerman and Cahill. It reduces the result.

MR. COLLINS: They swore it was in front of Seglie.

MR. JUSTICE SWAYZE: Your suggestion is that the Ackerman cross might have been put there afterwards?

MR. WALSCHEID: Yes. I did not look at the Asmus name.

MR. COLLINS: The witness testified it was the erasure of the cross in front of Seglie that was complained of then.

MR. JUSTICE SWAYZE: I see this ballot now. Your theory is that the voter voted for Asmus and Cahill and then whoever tampered with it, granting that somebody did, fixed it up by erasing Asmus and putting a cross opposite Ackerman? Well, I have your point. We will put this ballot somewhere where I do not have it.

MR. WALSCHEID: I am going to call Mr. Houghton and ask him to tell us what he observed.

JAMES M. HOUGHTON, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Houghton, you are one of the county board of elections? A. Yes, sir.

Q. You remember the recount of the box of the first district of the first ward of the town of West Hoboken? A. I remember it in a way only. I was not counting at that box.

Q. You were counting another box while this box was being counted by Commissioners Hopkins and Taylor? A. Yes, in another room.

Q. Do you remember being called into the room where they were counting? A. I do not remember exactly if called. I heard an argument outside—

Q. Hearing the argument what did you hear

and what did you hear and what did you do? A. I heard some arguing out there about a number of ballots with the Seglie's name erased. I turned to Mr. Hartley, who was my partner at the table inside, and I said, "Fred, I must go out. You stay here and I will go out and see what the argument is. Seems to be some trouble out there." When I got out there Mr. Tees was declaring that there were something in the neighborhood of fifteen ballots that had passed with Seglie's name erased, and I was appealed to to insist upon the commissioners to recount what had already been passed, and I reached over, looked at the ballot before Mr. Taylor and I asked him was there an erasure on that one for Seglie, and he said yes, and I said, "How many are there of them, do you know?" Well, he said, "Now and again there is an erasure there. There may have been two or three just past." I said, "What do you think? Do you think you ought to go over the string," and he said, "Well, there is only two or three past, Jim, that is all I noticed, that is, in rotation." So I went over then to the man stringing the ballots, and I said to him, "Allow me," and I took the top ballot off there and I raised it off, opened it, and I saw an erasure at Seglie's name, and I took the second one off, and also an erasure after Seglie's name. I then called Mr. Seglie over. I put the second ballot I had taken off back on the string, and I laid the first one I had put in the lap of the stringer, and I said, "You hold your hand on that while I am looking at the second one." I called Mr. Seglie over and I said, "Paul, I want you to look at this." I had only then taken off two. I opened the first one and showed it to him, folded it up and put it back on the lap of the stringer. I took the second off and opened it and showed him that one and put it on

the lap of the stringer. I told him to hold that with the first one and I took the third ballot off and it was no ballot at all for Seglie, or no erasure and I said, "I guess that settles the argument, Paul. Here is only two here," because that one there broke the contention of Mr. Tees that there were a number of ballots there in rotation, and I then put it back. I turned to Mr. Taylor and I said, "Commissioner, I guess that settles it." I said, "I can't find ten or fifteen of them in rotation," and I went out into the other room.

Q. And those two ballots were not sent to the court? A. No, sir; they had been strung and no protest, as I understood it, made.

Q. You did not go beyond that third ballot to see whether—A. No, sir; I saw that Mr. Tees' argument was wrong.

Q. But a large number of ballots were then sent to the court? A. Yes, sir.

MR. COLLINS: After that.

A. I don't know whether it was before or after.

MR. COLLINS: Now you see—we cannot verify it, I assume.

MR. WALSCHEID: That is all.

MR. JUSTICE SWAYZE: Now have we the ballots restrung? Can't we put them back in the box?

THE WITNESS: Is that all?

MR. WALSCHEID: That's all.

MR. JUSTICE SWAYZE: Do not forget the tally sheets.

MR. VICKERS: Put them back in the box. Two tally sheets back in the box. Poll book.

MR. JUSTICE SWAYZE: Is there any need of my sitting here? This box better go back to

the prosecutor's office. I understand they are through with it as soon as they have packed it up.

Mr. Vickers places ballots in box.

MR. JUSTICE SWAYZE: It doesn't look like a very secure safe deposit box.

RECESS till 2:15 P. M.

T. BURTON COYLE, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you reside? A. 830 Pavonia avenue.

Q. Were you present during any part of the recount of the ballots before the county board of elections as between Seglie and Ackerman? A. I was.

Q. Were you present when the box from the third district of the first ward of West Hoboken was brought in? A. I was.

Q. Did you make any memorandum at that time of the condition of the box and its contents? A. I did.

Q. Are these the sheets constituting that memorandum? A. They are.

Q. When the box was brought into the room before what commissioner was it brought? A. Before Commissioner Houghton and, I believe, Commissioner Hartley.

Q. Houghton and Hartley? A. Yes, sir.

Q. Describe the condition of the box. A. Why, the box was unlocked, not taped, and the seal was broken.

MR. DOHERTY: I object to the witness testifying from his notes, if he is doing that.

The notes have been identified by him, and he was then asked a question based upon the subject matter of the notes.

THE COURT: He may testify from his notes if he says they refresh his recollection. Were they made at the time?

A. Yes, sir; but you see, your Honor, I examined a number of boxes; I was there at the count of a lot of boxes and I could not remember about a particular one.

THE COURT: I will let you use them.

Q. Now when the lid was taken off, what was found in the box? A. There were two tally sheets and one poll book and there were the unused ballots and two strings of ballots, stubs, and a number of ballots that were not on a string.

Q. By ballots you mean tickets which had been voted? A. Tickets that have been voted.

Q. Where were these tickets or ballots which had been voted and which you say were not strung in relation to the other papers in the box—at what portion of the box did they show first? A. If I remember, I believe they were under a number of unused ballots.

Q. Did you take any record of these ballots which had thus been voted and which were not strung, as to the numbers on them? A. Only in this way: I started to take a record of them and I was called to the 'phone and I left them in charge of one of the other persons who were looking it over, and when I returned they had been all straightened out I got as far as one bunch. They were being taken out and endeavoring to locate them according to number, getting them all ready according to number. I got as far as 2 to 25.

Q. The ballots from 2 to 25? A. Yes; they

were about in order. Then some of them were coming out not in order, and the commissioners—Commissioner Houghton, I believe, then was endeavoring to get them in numerical order.

Q. They were in part of another batch of unstrung voted tickets? A. Yes, sir.

Q. And that batch, you do not know how many were in them? A. I cannot testify to that.

Q. These tickets which were thus unstrung, did they have holes through them? A. They were punched.

Q. Indicating that they had been strung? A. Indicating that they had been on a string.

Q. And was there any difference in their numbering from the numbered ballots? A. You mean the appearance of the numbers?

Q. Yes. A. That I cannot say. I did not see many of those ballots in so far as the numbers were concerned.

Q. How about the stubs? A. You mean were there any stubs?

Q. Were there any stubs? A. Stubs, yes, running from 1 to 366.

Q. Were they strung? A. They were on a string, yes.

Q. And how many strings of ballots did you find? A. There were two strings of ballots.

Q. In what part of the box did you find the two strings of ballots? A. Now I think that they were—I cannot testify exactly where they were.

Q. You cannot testify to that. What kind of a box was this in which these ballots were presented to the county board? A. Just what do you mean?

Q. Describe it; what color was it; don't you remember that? A. I certainly do not.

Q. You do not? A. No.

MR. WALSCHEID: May we have the box of the third district of the first ward? I believe it was in the other room. I think that was the second box.

THE COURT: Third district of the first ward of West Hoboken. Will some officer go down to the prosecutor and get that?

Q. Who took part with you in watching the count of this particular box? A. Mr. Seglie and Mr. Rollins. You mean everybody that was there in the room, do you mean?

Q. No; I mean for Seglie. A. They were the only ones, and Mr. Jones, I do not know if he was there for that box or not; he was there for a number of them.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You are an attorney? A. I am.

Q. And you were there as a legal representative or adviser for Mr. Seglie? A. I was.

Q. You were not there throughout the recount. I understand you were not there from the first? A. Not the first two or three days, no.

Q. Do you recall whether this box—whether the lid of this box was entirely loosened from the box? A. Entirely loosened?

Q. Yes. A. Well, I remember that it was unlocked.

Q. Do you remember whether the hinges were fastened on that box? A. No; I do not.

Q. When you say unlocked do you mean that the bolts of the lock had been drawn back with a key or that the bolts had not caught to the part of the box where they should have been caught? A. Well, all I mean is that you could simply take the top off without unlocking it; that is what I mean.

Q. You do not know whether the lock had been disturbed by any process of unlocking, do you? A. No.

Q. You say that you participated in the arrangement of those ballots until you were called to the 'phone? A. Only watched them; did not participate in the arrangement of them.

Q. Did you take notice of the numbers? A. Up to that time I did; up to that time I was called.

Q. Were they numbers 2 to 25? A. 2 to 25; I made an entry of that.

Q. And you refer to the numbers that appeared on the back of the ballots? A. Exactly.

Q. The ballots that were loose were all the low numbered ballots of that string, so far as you observed? A. That is all that I did observe, that is the only numbers, the loosened ballots that I saw, 2 to 25.

Q. Apparently some of the ballots numbered from 1 on were off that one string? A. Naturally with conscience I cannot testify to what the rest of the ballots were, their numbers.

Q. But the numbers from 2 to 25 ran consecutively, did they? A. Yes, sir.

Q. Now this box was badly dilapidated in appearance, wasn't it? A. It seemed to.

Q. The sides were loosened from each other, were they not; did you notice that? A. That I do not remember.

Q. But it did show evidence of ill usage, did it? A. Yes.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Did you keep any record of the condition of the ballots as they came from this box? A. You mean as the count went on?

Q. Yes. A. I kept a record of those ballots

that we were naturally sending to the court, and naturally the ballots that the opposing party were sending to the court.

Q. Did you keep any record of the ballots of the first 25 on your memorandum? A. I did not.

Q. Have you a record there of ballot number 3? A. Ballot number 3?

Q. Yes. A. Yes.

Q. In your writing? (No answer.)

Q. And why was that ballot sent to the court?

MR. DOHERTY: I object to using the memorandum until he lays a proper foundation for the use of it.

Q. You made that memorandum at the time? A. I did.

Q. Can you testify to those facts without refreshing your memory by that memorandum? A. Well, ballot number 3 was an Ackerman-Seglie vote with the—I believe it was—

Q. I do not ask you for your belief. What is the fact? A. It was an Ackerman-Seglie vote with the Seglie erased.

Q. With Seglie erased. In the first 25 votes, that is up to ballot number 25, those 25 loose ballots, or 24 loose ballots, will you tell us how many you have records of on your memorandum? A. There are three.

Q. Oh, there were more than three. A. 2 to 25.

Q. Have you a record of ballot number 5? A. I have.

Q. What is the record as to ballot number 5?

MR. DOHERTY: I would like to ask a question by way of cross examination first.

BY MR. DOHERTY:

Q. Were those ballots you are now discussing sent to Justice Swayze? A. Oh, yes.

Q. And you know he has already passed on them? A. I presume he has. He has passed on most of them.

MR. DOHERTY: I think it is incompetent.

THE COURT: What is the object of the examination, Mr. Walscheid?

MR. WALSCHEID: I desire to show—here was an open box, and I believe the net change in the box was eight votes. There were 25 unstrung ballots in the box, 25 that were unstrung, that were loose and appeared to have been strung. Now out of that box seven ballots, as my records show, had erasures or bore marks which referred them to the court, and were ballots which according to our theory were tampered with so as to produce that change.

THE COURT: You may show that.

BY MR. WALSCHEID:

Q. Ballot number 5, what is your record as to that? A. An erasure over Seglie, the cross.

Q. You mean the Seglie cross erased? A. Yes.

Q. Ballot number 6, what is your record as to that, if you have a record? A. Ballot number 6 was a void ballot.

Q. Ballot number 9? A. Seglie erasure.

Q. You mean the cross? A. The cross alongside of Seglie's name was erased.

Q. And with that cross erased were there still two names on the ballot? A. One.

Q. Ballot number 17? A. Ballot 17, an erasure on the cross alongside of Seglie's name.

Q. Ballot number 24? A. The cross alongside of Seglie's name erased.

Q. Ballot number 16, have you any record of that? A. 16, a different marking.

MR. DOHERTY: I object to that.

Q. What do you mean by a different marking? Is that what you have there? A. That is the memorandum.

Q. Does that refresh your recollection as to what was actually on the ballot? A. Not on that one particularly, because there were a lot of them during the recount that were sent for not—

Q. You do not remember what that is then? A. Not on that particular vote.

Q. Now this ballot which was marked "Void," have you any memorandum as to what it showed as to the Seglie vote? A. I have not. I do not know whether that was a Seglie vote or not. If it was counted that it must be.

Q. Have you a record of ballot number 347? A. I have.

MR. DOHERTY: This witness has testified that he observed that ballots from 2 to 25 were off the string. Now it seems to me to ask him for his comment on ballot 347 is without the scope of the inquiry.

MR. WALSCHEID: There were two such piles of ballots. This goes into the other pile as I understand it.

A. An erasure over the cross alongside of Seglie's name.

Q. And 201? A. Well, ballot 201 was not sent to the court. There were three names on that. It was held.

Q. You mean three X's on it? A. Three crosses.

Q. Was Seglie one of those crosses? A. Yes.

Q. And 351? A. Did you say 351?

Q. Yes. A. Also three votes.

THE COURT: Three crosses.

Q. And was Seglie one of them? A. Yes.

Q. And ballot No. 254? A. Three crosses.

Q. Seglie one of them? A. Seglie was one.

Q. There was one ballot there, marked void, no number; have you a record of that? A. I have.

Q. What is the record? A. The record is that there was an erasure over the cross alongside of Seglie's name.

Q. And is that the only thing that appeared to be—that you could see in the ballot that was wrong with it?

MR. DOHERTY: I object to that.

A. That is the only thing I can remember; the only thing I have record of.

MR. WALSCHEID: Strike the question out.

Q. And what was done with that ballot by the county board? A. That ballot was sent to the court.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Do your notes serve to refresh your recollection at all as to what the fact was? A. Oh, yes.

Q. And looking at your notes you are now able to testify that such was the fact; is that true? A. Looking over these marks they bring back naturally things that occurred.

Q. During your service there as a watcher for Mr. Seglie erasures were of very common occurrence, weren't they? A. I saw a lot of erasures alongside of crosses of Seglie's name, and we sent the votes up.

Q. And did you see any erasures alongside of the names of anyone else? A. I did not pay particular attention. Sometimes the opposing counsel would send up votes; of course that was their discretion.

Q. Did you make a note of every erasure that you saw opposite Seglie's name? A. I made a note of every erasure of a vote that I sent up and if the erasure was apparent I sent it up, so I therefore had a note of it.

Q. That is you made a note of every erasure that appeared beside Seglie's name on every ballot that came within your observation? A. No, no; there were some erasures that looked as though they were not worth sending to the court.

Q. Isn't it true that you merely noted the erasures that were presented during the last few days of the recount? A. Oh, no; no; what do you mean by the last few days? Do you mean the last two weeks?

Q. The last week. A. Yes.

Q. Were they the only erasures that you noticed? A. Now, just a moment; the recount stopped what date? I can testify to what day this record was taken upon which there were some erasures. This was taken the 13th day of January.

Q. Did you take note of any erasures opposite Ackerman's name? A. I did not.

Q. And you cannot inform us how numerous those erasures were? A. Positively not.

PAUL SEGLIE, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Seglie, were you present at the recount of the box of the third district of the first ward of West Hoboken before the county board of elections? A. Yes.

Q. And did you see the box as it was brought up before the board for recount? A. Yes.

Q. What was its condition? A. The box half opened; it was unlocked and sealed.

Q. And no top upon it? A. No top.

Q. Did you see any loose ballots taken from it? A. There was two bundles of ballots, I figured about between fourteen and fifteen on each side of the box between the two tally sheets.

Q. And were those ballots which were thus loose punctured as if they had been strung? A. Yes; that ballot has been strung.

Q. And the rest of the ballots that had been voted—and I am speaking only of voted ballots—were they strung on strings? A. Which ballots do you mean?

Q. Outside of the two piles that you have just mentioned, of which you say one was on one side of the box and the other on the other, the other ballots, the voted ballots in the box, were they strung? A. Yes; the others were strung in two strings, sir.

Q. Where were they in the box? A. At the bottom of the box.

Q. In the bottom of the box? A. In the bottom of the box.

Q. And in relation to the bottom of the box where these strung ballots were, where were these two piles of unstrung ballots? In other words, what was in between the unstrung and the strung ballots? A. The used ballot—the used ballot; the two tally sheet, the poll book and the identification.

Q. And the two piles of unstrung ballots were on top of everything? A. Right on top of everything.

Q. And the strung ballots on the bottom? A. On the bottom.

CROSS EXAMINATION BY MR. WALSCHEID:

Q. The loose ballots were against the sides of the box? A. On the top of the box in two bundles, one on each side.

Q. Two bundles of loose ballots? A. Two bundles of loose ballot, fourteen or fifteen, something like that.

Q. You saw the unused ballots in the box, did you? A. Sure, the unused ballots I saw.

Q. They were in one bundle, were they? A. It was all there together, not in one bundle.

Q. And these loose ballots that had been voted, they were not under the unused ballots, were they? A. No; it was on top of them.

Q. They were on top of the unused ballots? A. On top; it was on the top of the box.

Q. Was Mr. Coyle present when this box was opened? A. Yes; Mr. Coyle was present.

Q. Was he standing nearby when the contents were examined? A. Yes; he was right next to me.

Q. Was he as near to the box as you were? A. Well, I don't think that—Coyle was right next to me.

MR. WALSCHEID: Now, are the keys here to this box?

MR. DOHERTY: The box is here. The hinges are off the box. Since it was taken downstairs this (indicating) has been pulled off the box.

Q. Do you know whether the hinges were off the box at the time?

THE COURT: Mr. Bowly tells me it was broken carrying it in.

MR. WALSCHEID: That handle, yes.

Q. But the hinges? A. I cannot remember that.

MR. WALSCHEID: I will now remove this tape.

Q. Were there any tally sheets in the box? A. Two.

MR. WALSCHEID: I desire to offer for your Honor's inspection two tally sheets in reference to the Boulevard Commissioners, showing a total vote for Seglie of 233. Does that check?

MR. MELNIKER: Those are not the figures I have. Ackerman 87; Seglie 138.

THE COURT: That is a big discrepancy.

MR. WALSCHEID: That comes out of that box.

THE COURT: Seglie 233?

MR. HENDRICKSON: Those are the official returns.

THE COURT: And Ackerman 157.

MR. MCEWAN: Is that the right box?

MR. WALSCHEID: I do not know. I have assumed it was the right box. It was handed to me.

MR. MELNIKER: Ackerman 87; Seglie 138.

MR. WALSCHEID: First District, Third Ward, West Hoboken.

MR. HENDRICKSON: Oh, you have broken open the wrong box.

THE COURT: What are you going to do about that? You will have to seal that up again.

MR. WALSCHEID: May it be entered on the record that by mistake the box of the First District of the Third Ward of West Hoboken was presented to counsel and has been opened?

THE COURT: All right. Are you going into

that district of that ward afterward?

MR. MELNIKER: Yes.

MR. WALSCHEID: I want the Third District of the First Ward of West Hoboken. Now, in that district, if your Honor will note the recount figures.

THE COURT: This is the Third District of the First Ward?

MR. WALSCHEID: Yes; the Third District of the First Ward of West Hoboken.

THE COURT: Now, you are going to read the figures of the Third District of the First Ward?

MR. WALSCHEID: I am going to read the figures of the Third District of the First Ward of West Hoboken, the recount figures. Ackerman 113; Seglie 124. Does that check, Mr. Melniker?

MR. MCEWAN: The recount, the Third District of the First Ward?

MR. MELNIKER: 113, 124.

MR. WALSCHEID: That checks, does it?

MR. MELNIKER: Yes.

THE COURT: Now, what is the original?

MR. WALSCHEID: The original figures were Ackerman 87 and Seglie 138, making a change of 40 in that box.

THE COURT: That is a change of 40 in 230 odd votes.

MR. WALSCHEID: Now, I would like to submit to your Honor the tally sheets for your inspection.

THE COURT: All right.

EDWARD C. GUENTHER sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you reside? A. 507 Traphagen Street, West Hoboken.

Q. Were you one of the election officers at the last general election in the Third District of the First Ward of West Hoboken? A. I was.

Q. What office did you hold? A. I was a clerk.

Q. And at the conclusion of the count were the ballots strung? A. They were.

Q. On how many strings? A. To my recollection they were strung on two strings.

Q. Were the strings fastened on each end so that the ballots could not get off? A. The first string was fastened at each end—

MR. DOHERTY: Objected to.

A. —and the second string was fastened at each end and then the two strings were joined together, I believe.

Q. You mean the two strings were joined together? A. That is the two separate—

Q. The two ends of each string? A. Let me explain it again; the first string was joined, its two ends.

Q. Its two ends were joined together? A. And then the next string, its two ends, and then the end of the first string was attached to a loop on the second string; in other words, to make them one.

Q. To make them one? A. M-m-m m-m-m.

Q. And in depositing those ballots into the box where were they put? A. I do not recall whether they were put in first or last.

Q. You do not remember that? A. No, I do not.

Q. Were there any unstrung ballots which had been voted, put into the box at the end of the election? A. There were none.

Q. How were the ballots put into the box, through any hole in the lid or was the lid up? A. No; we have two covers; the first cover is on a hinge, and the second cover is a set-in; and the set-in was taken out and the cover was standing up on the end and then put in.

Q. So that they were just deposited into the box? A. Deposited into the box.

Q. Without coming in contact with any part of the top, which might tear them or tear the strings? A. That is right.

Q. After the ballots were put into the box what did you do with the box? A. I did not do anything to the box.

Q. What did you see done to the box by the election officers? A. The judge locked the box and between the judge and the inspector they sealed it, and they put the red tape around it, and on the four edges of the box. On the red tape, I believe, we had red sealing wax—I am not certain whether it was on the edges or near the lock.

Q. And then having done that to the box what became of the box? A. The judge and the inspector, together with Officer Shunk, took it to the Town Hall.

Q. Did you go? A. I did not go with them.

Q. The last you saw of it was when it was leaving the election booth or polling place? A. On the corner of Johnston Street and Summit Avenue, within one hundred feet of the polls, and I went home.

Edward C. Guenther—Cross.
Reinhold R. Johns—Direct.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You were one of the clerks? A. Yes, sir.

Q. You tallied? A. Yes, sir.

Q. You had nothing to do with the stringing or numbering? A. No, sir.

Q. And you had nothing to do with the tying up of the ballots? A. No, sir.

REINHOLD R. JOHNS sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you reside? A. 227 Central Avenue.

Q. Were you a member of the Local Board of Election of the Third District of the First Ward of West Hoboken? A. Yes.

Q. At the last general election? A. Yes, sir.

Q. And did you take part in the counting of the ballots? A. No, sir; I was an inspector.

Q. What duties did you perform? A. I just glanced over them and numbered them and strung them.

Q. And strung them? A. Yes, sir.

Q. Into how many strings did you string them? A. The ballots were on two strings and the stubs made three.

Q. With the stubs, three? A. Yes, sir.

Q. Were there any ballots which had been voted left unstrung by you? A. No, sir.

Q. After you had strung the ballots on these two strings, what, if anything, did you do with the strings? A. Why, they were tied end to end.

Q. Each string was tied end to end? A. Each string tied separately, yes, sir.

Q. After that what did you do with the two

strings? A. They were placed on the top of the unused ballots in the ballot box.

Q. What went into the box first? A. The unused ballots.

Q. Then came the two strings? A. Yes, sir.

Q. Had you attached the string of stubs to them too? What had you done to the string of stubs? A. They were laid with those.

Q. Separate? A. Yes.

Q. And had you tied the string of stubs end to end, too? A. I do not think so.

Q. And having put in the voted ballots and string of stubs, what next did you put into the box? A. Why, after the sheets were all tallied we put the tally sheets in there and the books—the poll book and the identification.

Q. You did not put in two batches of unstrung ballots into that box, did you? A. No, sir; no, sir.

Q. Or did not put any such batches in on top of the other things you put into the box? A. No, sir.

MR. COLLINS: Why, do you lead him so? Can't help it, I suppose.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You did not see anybody tie those two strings of ballots together, did you? A. I did it myself.

Q. Did you after tying the individual strings end to end tie them together? A. Yes.

Q. You did that yourself? A. Yes, sir.

Q. Did you take the box down to the Town Hall? A. Yes.

Q. The box was not entirely filled by the contents of it? A. No, sir.

Q. They were all lying around? A. Yes.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Now, after you had put these ballots and other things into the box, what next did you do with the box? A. Why, I did not do anything with the box; the judge locked the box.

Q. Who was the judge? A. Judge Geiger.

Q. And did you see him lock it? A. Yes, sir.

Q. After the box was locked what next happened to the box? A. I took part in the sealing of the box.

Q. Who did that? A. Both of us.

Q. You and Geiger? A. Yes.

Q. After that what was done with the box? A. Why, together with Officer Shunk we delivered the box to the Town Hall.

Q. And to whom did you deliver it? A. To Mr. Wachman.

Q. Delivered it to him personally? A. Yes, sir.

Q. And did you put any tape around it in sealing it? A. Yes, sir; yes.

Q. Was it in the taped, sealed and locked condition when you delivered it to Mr. Wachman? A. Yes, sir.

RE-CROSS EXAMINATION BY MR. DOHERTY:

Q. The tape was tied so as to hold the cover on securely, was it? A. Yes.

Q. And in carrying it down, or at any time from the time you finished your duties until the time you delivered it to the city clerk, you could not tell whether that had been efficiently locked by the judge or whether the cover was held on by the tape, could you? A. Surely, it was locked, because I seen it locked; I tried it.

Q. Did you test it for that purpose? A. Yes; I tested it.

Q. Did you have any doubt in your mind as to the efficiency of those locks? A. I do not know.

Q. Then, why did you test it? A. Yes, sir. Those locks sometimes are not very secure, and I thought I had better try it.

Q. You had doubts as to whether it was secure or not? A. Yes, sir.

CHARLES GEIGER sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Geiger, you were the judge of election at the last general election in the Third District of the First Ward of the Town of West Hoboken? A. Yes, sir.

Q. Did you at the conclusion of the count of ballots deposit any ballots into the box? A. Well, it was me put them in; that is, the unused ballots.

Q. The unused ballots? A. Yes, sir.

Q. And what went into the box first? A. Unused ballots.

Q. What went in next? A. The ballots—voting ballots.

Q. Voted ballots? A. Yes.

Q. On how many strings? A. Two strings for voted ballots and one string for the stubs.

Q. And these two strings of voted ballots, how were they fixed up, how were they tied together? Describe them. A. Well, both ends.

Q. Both ends tied together? A. Yes.

Q. Of each string? A. Yes, sir.

Q. And after those ballots and the stubs had been put in what next was put into the box? A. A poll book, tally sheets and identification book.

Q. Were there any voted unstrung ballots put

into that box? A. Not to my knowledge, no.

Q. And after the ballot box was closed, what, if anything, did you do with it? A. After we closed it?

Q. Yes. A. Well, we locked it and sealed it.

Q. Who locked it? A. I locked it.

Q. Are you sure it was locked? A. Positive.

Q. Why, are you sure it was locked? A. Because, if it was not locked, we could not pull the key out.

Q. Did you test it? A. Well, I could not get the key out unless it was locked, certainly.

Q. You cannot take the key out if it is not locked? A. Unless it was locked; before I could pull out the key—you could turn it to open it; the cover would be open, the cover would lift with the key.

Q. After you pulled the keys out did you do anything to test it to see if the lock had taken hold or not? A. No.

Q. What next did you do? A. Sealed it.

Q. Anything else besides sealing it? A. No.

Q. Did you tape it? A. Yes, sir; that is what I mean; tape it and then sealing it.

Q. Then you took it to the Town Hall? A. Yes, sir.

Q. To whom did you deliver it? A. Mr. Wachelman.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You do not know whether the cover was held on by the tape or whether it was held on by the bolts of the lock, do you? A. Well, no; I would not say.

AN OFFICER: The Prosecutor says that box was never turned over to him.

THE COURT: That box you wanted, the Third District of the First ward, is not with the prosecutor.

MR. WALSCHEID: It is not with the prosecutor. We asked to have it impounded.

MR. MCEWAN: It was impounded on the 13th of January.

THE COURT: That is what Mr. Doherty tells the officer?

MR. WALSCHEID: Then it is in the possession of the County Board of Elections? Where would it be then?

MR. MELNIKER: It is in the vault downstairs.

THE COURT: The County Board of Elections will see if they have it.

MR. WALSCHEID: There were seventeen boxes in West Hoboken which came down from West Hoboken. We claim that fourteen of the seventeen boxes when they reached the counting table of the County Board of Elections were unlocked, unsealed and untaped. I do not know whether Judge Collins would be willing to admit that or not.

MR. COLLINS: I do not know anything about it.

MR. WALSCHEID: It would save considerable time in taking testimony. It is something that his Honor might observe.

THE COURT: I guess you would better put it in regularly, Mr. Walscheid.

George W. Forsyth—Direct.

GEORGE W. FORSYTH sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were you an election officer in the Fifth District of the First Ward in the Town of West Hoboken at the general election held November last? A. I was.

Q. What official position did you hold in the board? A. Judge of the board.

Q. At the conclusion of the count what was done with the ballots? A. They were put in the box.

Q. And after they were put in the box, what, if anything, was done with the box? A. Why, after all the paraphernalia that should have went into the box was put into it, the box was locked, taped and sealed.

Q. Who locked it? A. I did.

Q. And how do you know it was locked? A. Well, because I turned the keys in the lock and the keys would come out.

Q. Did you try to lift the lid afterward? A. I certainly did.

Q. And did it lift? A. No; it did not.

Q. Who did the taping? A. The inspector.

Q. And what was his name? A. Biroc. I helped him to do it.

Q. Who did the sealing? A. He did.

Q. And did you see him do it? A. I certainly did.

Q. After the box was thus locked, taped and sealed, what became of the box? A. We took it to the Town Hall.

Q. And who took it to the Town Hall? A. Why, there was four of us, and we spelled off carrying it up.

Q. And did you deliver it at the Town Hall? A. Delivered it to the Town Hall.

Q. To whom? A. To the town clerk.

Q. And was it then locked, taped and sealed? A. The same as it had been when it left the polling place.

DENIS B. BIROC sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were you a member of the Board of Elections of the Fifth District of the First Ward of the Town of West Hoboken at the last general election? A. Yes, sir.

Q. What official position did you hold? A. Inspector.

Q. After the votes were counted at that election and the ballots were put into the box, what, if anything, was done to the box? A. Well, nothing that was unusual that I know of, outside of sealing it.

Q. What do you remember was done? A. We put the unused ballots on the bottom and we put the strung ballots next to that, and the poll books.

Q. Well, after all that was done and the lid of the box was closed down, what, if anything, was done with the box? A. Outside of being locked and delivered to the town clerk.

Q. Well, did you see it locked? A. I did.

Q. Who did the locking of it? A. The judge.

Q. And did you see him do anything after he turned the keys to satisfy himself that it was locked? A. He tried to lift it with his finger nails.

Q. Tried to do what? A. Tried to lift it with his finger nails and it would not move.

Q. Tried to lift it with his finger nails, and after it was thus locked, what next was done to it? A. Sealed with a piece of red tape.

Q. How about taping—red tape around it? A. Red tape and sealing wax.

Q. Who did that? A. I did.

Q. After that was done, what was done with the box? A. Well, it was delivered to the town clerk.

Q. In the condition in which you had placed it immediately after the election? A. Of course, we took turns in carrying it up.

Q. Yes; but you went all the way with it? A. All the way.

Q. Was it delivered? A. It was delivered.

Q. Was the box then locked, taped and sealed? A. Yes, it was.

CROSS EXAMINATION BY MR. DOHERTY:

Q. With the finger nails of which hand did he try to lift it? A. Left hand.

Q. What was he doing then with his right hand? A. With his right hand he had a pen in it.

Q. What was the color of the pen? A. Black; fountain pen.

Q. What were you doing at that time? A. What was I doing? Nursing a burnt finger.

Q. What? A. Nursing a burnt finger after trying to seal the box up with the sealing wax.

Q. Oh! You had the tape on the box already, and it was sealed? A. I had the tape on the box and it was sealed.

Q. So, when Mr. Forsyth tried to lift the cover off the box it was already taped and sealed, was it? A. No; right after he had—

Q. No; just—

MR. WALSCHEID: Go ahead and answer the question.

A. Right after he had locked it then he tried it with his finger nail.

Q. And was the tape on then? A. No; the tape was not on then.

Q. Well, had you burned your finger at that time? A. Yes; I had the match in my hand waiting for him to get through trying to pick the lid off and the match burnt up to my finger and burnt it.

Q. The tape was not then on the box at the time when he tried to lift it? A. No.

Q. And you had not put the sealing wax on yet, at the time? A. Not yet; he wanted to—

Q. What you told us before about having the tape on and the sealing wax on was incorrect, wasn't it? A. Well, no. I think you have got me all twisted up on that; I don't know what I am saying.

Q. Did you burn your finger while you were putting wax on this box? A. I said I burnt my finger while I was waiting for him to try to pry the lid of the box up with his finger nails.

Q. Then what you told us before about burning your finger while you were putting the sealing wax on the box was not altogether accurate, was it? A. No.

EDWARD H. JONES sworn.

MR. WALSCHEID: I am now going to open another box which is marked "Third District, First Ward of West Hoboken." I open it merely by taking off the tape.

THE COURT: We do not want to have two boxes open at the same time.

MR. WALSCHEID: No. We close that other one. I desire to offer for your inspection the tally sheets taken from that box, showing a vote for Henry Ackerman of 87 and a vote for Paul Seglie of 138. Is that the right number? And ask your Honor to inspect the tally sheet erasures, changes or corrections.

THE COURT: The point being that it looks all right?

MR. WALSCHEID: It looks as though it were done in the usual way in the ordinary course of business.

THE COURT: Yes.

MR. WALSCHEID: I also show you the other tally sheet, covering the same, 87 for Ackerman and 138 for Seglie.

THE COURT: And that looks all right?

MR. WALSCHEID: That looks all right to me. That is, there are no corrections or erasures in it.

THE COURT: Well, that looks all right.

MR. WALSCHEID: And in that district the change was forty votes, I think.

MR. HENDRICKSON: The official sheets will show the change.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Now, Mr. Jones, did you attend at any of the recounting of the votes by the County Board of Elections? A. Part.

Q. On the Seglie-Ackerman recount? A. Yes, sir.

Q. I show you a memorandum marked First Ward, Second District, and ask you whether that is in your handwriting. A. Yes, sir.

Q. And were you present when that box was recounted? A. I was, yes.

Q. Can you tell at what table it was recounted? A. On the inside table.

Q. Before whom? Who were the commissioners at the inside table—Houghton and— A. A difference of—

Q. I am not asking you about the difference. Can you tell at this time what the condition of that box was when it was presented to the commissioners for the purpose of recounting? A. The box was open, also broken.

MR. DOUGHTY: What district?

MR. WALSCHEID: Second District, First Ward.

Q. Was there any tape around it? A. It was not sealed.

Q. That means there was no sealing wax or no tape on it? A. No.

MR. WALSCHEID: That is all as to that box.

Q. Were you also present at the recounting of the box from the Fifth District of the Second Ward? A. Yes, sir.

Q. And what was the condition of that box when it was presented? A. Unlocked and not sealed.

Q. I am talking about the boxes from West Hoboken. That is what you are talking about? A. Yes, Fifth District, Second Ward.

Q. Unlocked and not sealed? A. Yes, sir.

Q. Was there any tape on it or sealing wax? A. No.

Q. There was not? A. (No answer.)

Q. I now ask you whether you were present at the recounting of the Sixth District of the Second Ward of West Hoboken. A. Yes, sir.

Q. And what was the condition of that box when it was presented to the commissioners for recounting? A. Lock broken and top loose.

Q. The lock was broken and the top was loose? A. Yes, sir.

Q. Any tape on it or sealing? A. I have no record of the sealing—or tape.

CROSS EXAMINATION BY MR. DOHERTY:

Q. The fact was that nearly every box from West Hoboken came down with the lock off and the tape broken? A. A good many of them.

Q. That was due to malconstruction of the boxes? A. Malconstruction.

MR. WALSCHEID: I object as a conclusion.
THE COURT: I will let it stand.

Q. You were there working for Mr. Melniker? A. Not exactly working for Mr. Melniker.

Q. Tell us exactly who you were working for? A. I cannot exactly say who I was working for, any more than I was told to come down here.

Q. You were not employed by anybody at all to come down? A. No; I have not been employed.

Q. What is your business? A. Real estate and insurance and assistant tax assessor in Bayonne.

Q. And you were not doing either real estate work or any municipal work in Bayonne when you were here at this recount? A. No.

Q. You were there in the interest of Mr. Seglie, were you? A. Well, you can't say exactly Mr. Seglie. I was there as much in the interest of Mr. Ackerman, as I was Seglie. I was there on the recount to give each man a square deal. I think I gave Mr. Ackerman a square deal as much as I did Seglie.

Q. Under the spur of what obligation did you come there to give anybody a square deal? Why, did you deem your presence necessary in order that a square deal might be effected? A. I did not deem it was necessary. What I mean is, you said I was in the interest of Seglie. I was there watching the calling off of the ballots and if there was one called wrong for Ackerman I called the attention of the commissioner; if he was misquoted.

Q. What I want to know is why you turned aside from your real estate business and the assistant city clerkship of Bayonne to come up to this recount and remain there; why did you do it? A. I was only here part of the time when I could spare my time here.

Q. How many days were you here altogether? A. I could not say. I took no memorandum of it.

Q. Thirty? A. I was on and off here right along.

Q. Thirty days? A. I suppose I was.

AARON A. MELNIKER affirmed.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Did you represent Mr. Seglie in the recount of the ballots for Boulevard Commissioner? A. I did.

Q. And did you notice any boxes coming from the Town of West Hoboken which came in in bad condition? A. I did.

Q. And how many did you notice? A. I made a record of those that I—that came under my personal observation.

Q. Will you tell us from what districts and wards? A. I cannot without looking at the memorandum.

Q. Look at the memorandum, please. A. The Fourth District, Second Ward; the Seventh District, Second Ward; Third District, Third Ward, and the Fifth District of the Third Ward.

Q. Will you describe the condition of the box first mentioned? A. The fourth district of the second ward, the box was opened without any keys, simply lifting the lid off.

Q. Was it sealed or taped? A. No; no seal, no tape. The seventh district of the second ward, the box was unsealed; it was nailed on with a nail. The nail went right through the lid and held the lid down. That had no sealing or tape. The third district of the third ward, there was no catch on the box; that is, the catch which would hold the lock; the catch was either gone or it was loose and had broken away from its fastening.

Q. Was it sealed or taped? A. It was not sealed or taped. The fifth district of the third ward, the box was open that is unlocked, and no seals or no tape.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Those were the only boxes you noticed? A. Those were the only boxes I took any note of.

Q. You did not note the condition of this box now before us, the third district of the first ward, did you? A. That may have been counted in the other room; I have no record of it.

Q. You did not note the condition of the box that was just taken away, the first district of the third ward, with the cover off, did you? A. I do not understand your question.

Q. I say, did you note the condition of that box which has just been removed from here, the first district of the third ward, where the cover and hinges were both off? A. When you say "note" do you mean on paper?

Q. Yes. A. No, those were the only four I made any record of; there were times when I was there in the room and may have noted the box, but some one else was taking my record at that time. I often got some one else to help me, and I asked them to take the record while I would look on.

Q. The fact is from your observation then that there were few boxes from West Hoboken that were in good condition when they were brought up to the county board of election? A. Very few.

EDWARD H. JONES, recalled.

BY MR. WALSCHEID:

Q. You have testified to seeing three boxes produced before the county board of elections. Did you also see the box of the fifth district of the first ward produced? A. Yes, sir.

Q. And what was the condition of that?

MR. DOHERTY: He has testified to that.

MR. WALSCHEID: He has not testified to that one.

Q. What was the condition of that box? A. The box unlocked and unsealed.

Q. Taped? A. No.

JOSEPH J. LOORI, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were you present at any portion of the recount of votes cast for Boulevard Commissioner between Seglie and Ackerman? A. I was.

Q. And did you note the condition of any of the boxes which were presented for recount from the Town of West Hoboken? A. I think I did; if so my record will show.

Q. I show you two sheets of paper. Are they your memoranda? A. My writing, yes; my memorandum.

Q. Looking at memorandum under date of January 13, 1917, West Hoboken, first ward, fourth district, did you see the box from that ward and district presented to the commissioners for recount? A. I did.

Q. What was the condition of that box when it was presented for recount? A. First ward, fourth district, from my record not sealed and not taped —bad condition, and the box could be opened without the use of keys.

MR. DOHERTY: What district?

MR. WALSCHEID: Fourth district, first ward, West Hoboken.

Q. What was the condition of the box from the first district of the second ward, West Hoboken? A. The tapes were broken—that is the tape was broken and the seal was broken, the box was opened, not locked.

TIMOTHY J. CULLEN, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. You were an election officer of the third ward, third district of Hoboken at the last general election? A. I was.

Q. What position did you hold? A. Judge of the board.

Q. How many tally sheets did you use at that election? A. We used one, if I remember right, and we had put one on the board; we were putting one on—we put one on the board, and it seems we got a little busy and we come to look for the other one that night and we could not find it, so we only used the one.

Q. Are you sure of that? A. Yes, sir.

Q. When your work was over you strung your ballots? A. The inspector strung them.

Q. You saw him? A. Yes, sir.

Q. How many strings were they strung into? A. Two.

Q. What kind of string did you use? A. Why, this brown twine that we got with the needles.

Q. Brown twine and needle? A. Yes.

Q. Who kept the tally sheet that was kept? A. Mr. Buis, one of the clerks; he is here.

Q. Did he keep it with a pencil? A. Ink.

Q. Kept it with pen and ink? A. Yes, sir.

Q. You are sure the ballots were strung on two strings? A. Yes; that is the ballots were strung on a string and the stubs on another.

Q. So that they were all on one string, the ballots which had been voted? A. The ballots all on one string and the stubs on another.

Q. Was there a button on the end of the string? A. No, sir; if I remember right we tied a small stick of wood on the bottom of it.

Q. And was there a needle on it? A. I ain't sure; I can't say for sure whether we left the needle on or not.

Q. But you are sure about the stick of wood and you are sure about the string? A. Yes, sir.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You were the judge, you say? A. Yes, sir.

Q. You called off the ballots? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Who did the stringing? A. Mr. Joel; that is the gentlemen you excused, Mr. Walscheid.

Q. That is the man who was up all night? A. Yes, sir.

EDWARD BOHN, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were you one of the election officers at the last general election? A. Yes, sir.

Q. City of Hoboken? A. Yes, sir.

Q. Third district, third ward? A. Yes, sir.

Q. What office did you hold? A. I was clerk there.

Q. And did you see the tallying? A. Yes, sir.

Q. How many tally sheets were used? A. One.

Q. How was the tallying done, ink or pencil? A. I did not do the tallying; the other man did it.

Q. Did you see it? A. Yes, sir; I seen it done.

Q. Was it done in ink or pencil? A. Ink.

Q. Who strung the ballots? A. Mr. Joel.

Q. And did you see him string them? A. Yes.

Q. What kind of twine did he use? A. Brown twine.

Q. How many strings were in the box? A. We had two strings, one for the stubs and one for the ballots.

CROSS EXAMINATION BY MR. DOHERTY:

Q. When after election was your attention directed to the kind of a string that you used? A. What do you mean, Mr. Doherty?

Q. When was any inquiry made of you as to the kind of string that you used on election day? A. There was no inquiry as I know of.

Q. Nobody has ever asked you to rack your memory as to the kind of string that you used on election day? A. No, sir.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Nobody has spoken to you about this matter from election day until you went on the stand here? A. I didn't know a thing about it.

Q. You did not know what you were to be asked? A. No, sir.

RE-CROSS EXAMINATION BY MR. DOHERTY:

Q. Who furnished the twine? A. The City Clerk.

Q. The city authorities? A. The city authorities. They were on the needle as we received them.

RICHARD BUIST, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. You were a member of the election board of the third district, third ward of Hoboken last general election? A. I was.

Q. What office did you hold? A. I was inspector, but on general election day I acted as cleck.

Q. What work did you perform after the balloting? A. I tallied the ballots.

Q. You tallied? A. Yes, sir.

Q. And who else tallied? A. I did all the tallying.

Q. Nobody else tallied? A. Nobody else.

Q. Did you tally in lead pencil or ink? A. I used a fountain pen.

Q. Did you see the ballots strung? A. Yes, sir; I did.

Q. And who strung the ballots? A. Mr. Joel.

Q. How many strings were the ballots strung on? A. To the best of my recollection there was only one string used for the ballots and one for the stubs.

Q. Do you remember what kind of cord or twine was used to string them? A. I believe the ballots were strung on brown twine which came from the city clerk wrapped around the needle.

Q. And was there a wooden button on the end of that string? A. Not to my knowledge.

Q. Not to your knowledge? A. I am not particular about that.

Q. But you are sure the ballots were strung? A. Yes, sir.

Q. And after the ballots were thus strung and put into the box what was done to the box? A. After everything had been put into the box that should go into it it was taped.

Q. It what? A. I say after everything had been placed in it which should be placed in it it was taped and sealed—locked, taped and sealed.

Q. Did you see it locked? A. I did.

Q. Who locked it? A. The judge.

Q. After it was thus locked, taped and sealed what was done with the box? A. Took it down to the City Hall.

Q. Did you go down? A. I did.

Q. What was done with it at the City Hall? A. We delivered it to the assistant city clerk.

Q. What was his name? Or don't you know? A. I believe there were several of them behind the counter; there were three of them there.

Q. All right; you delivered it in the city clerk's office to one of the officials there? A. Yes, sir.

CROSS EXAMINATION BY MR. DOHERTY:

Q. What type of box was it with respect to the sort of top it had to cover—entirely off, or was there an aperture? A. I believe it was one of those that the cover came entirely off.

Q. Are you sure of that? A. I would not swear to it positively. I gave very little attention to that because my attention was taken up particularly in counting the ballots and writing up the different reports.

Q. Do you know whether the ballots when they were eventually put in the box were still on this string or was it necessary for any reason to take them off the string in order to get them into the box? A. We got all the ballots that were possible into the box.

Q. On the string? A. Yes, sir.

AARON A. MELNIKER, recalled.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were you present when the box of the third district of the third ward was presented to the county board of elections for recount? A. I was.

Q. Did you see it opened? A. I did.

Q. Tell us about the condition of that box when it was opened? A. My recollection is that the ballots were all unstrung, lying at the top of the box, they were perforated and folded; that box—

Q. Were they strung? A. They were unstrung.

Q. Was there any string in the box? A. There was no string in the box.

Q. What if anything was done to that box at that time? A. That box was afterwards impounded by the court.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Are you talking about a Hoboken or a Bayonne box? A. I thought I was talking about Hoboken.

Q. What do you think about it now; do you think you are still talking about Hoboken? A. Yes, sir.

Q. Didn't all this happen down in a Bayonne box? A. Not all of it, no.

Aaron A. Melniker—Cross.

Q. How many boxes did you see with the ballots off the string? A. Quite a few.

Q. Hey? A. There were a few.

Q. Well, tell us how many altogether. A. How many boxes did you say?

Q. Yes, how many boxes were presented to the county board for recount in which the ballots were not on the string? A. I could not tell you exactly but I should say there were probably, oh, ten or a dozen throughout the whole count.

Q. In which none of the ballots at all were on a string? A. I cannot say that there were quite that many, but that is my best recollection.

Q. Isn't it a fact that there was one from Bayonne and that was all? A. Only one from Bayonne? Oh, no.

Q. Was there more than one from Bayonne? A. I do not recall any from Bayonne. I might, if I went through my notes, but I do not recall any from Bayonne that were unstrung.

Q. The basis of your testimony now is notes that you made? A. My recollection of this particular box outside of my notes is to the effect that on my request that box was impounded either that same day or very soon after, a day or two after.

Q. Was the box smashed? A. I do not believe it was.

Q. Was there any object in the box that was foreign to election machinery? A. I do not recall any.

Q. Do you remember the date on which this box was presented to the county board? A. I do not, no.

Aaron A. Melniker—Re-Direct.
Joseph Commisal—Direct.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were there any other boxes in which there was no string in the box? A. Yes; there was one other box that I recall in which the ballots were very much in the same condition, folded, punched, with a hole, as though they had been strung but unstrung, and lying at the top of the box loose without any sign of any string in the box. I could give you that box by looking through my memorandum.

Q. What box was that? A. Tenth district, third ward, Hoboken.

Q. Now going back into that district while we are at it, you say there was no string in that box either? A. No string in that box, ballots unstrung, folded small, punched with a hole through them as though they had been on a string, lying loose, and unstrung, at the top of the box, filling the box right up to the top and all the way across. That box was one of the new boxes where the whole lid came off; it was not a box with a small hole at the top through which the ballots had to be forced, but the whole lid came off so that the ballots could simply have been laid in.

JOSEPH COMMISAL, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you live? A. 608 Jefferson Street, Hoboken City.

Q. Were you an election officer in the tenth district of the third ward of Hoboken at the last general election? A. I was.

Q. What office did you hold in the board? A. Inspector.

Q. What work did you perform after the election was over? A. After the election was over?

Q. After the voting was over, I mean? A. Stringing the ballots.

Q. Did you string the ballots? A. I strung the ballots.

Q. And what kind of string did you use? A. The string was furnished to me by the city clerk.

Q. What color was it, do you remember? A. Brown.

Q. A needle with it? A. Sir?

Q. A needle with it? A. Yes, sir.

Q. Button on it? A. No button.

Q. How many such strings were furnished to you? A. Three.

Q. And how many strings did you string the ballots on? A. I used one string for the ballots and one for the stubs, and one for the void ballots.

Q. So that there were three different strings in that box when you closed the box? A. There was.

Q. One containing voted ballots, another containing the stubs and the other containing the void ballots or ballots which you rejected, is that right? A. Correct.

Q. Were those strings fastened together or were they loose? A. Well, down at the bottom, when we started off stringing I left a piece of paper at the bottom, see, and kept working on as the returns were handed to me, I marked them and strung them.

Q. That is the big string with the ballots that were voted on? A. Yes.

Q. How did you fix the second string with the stubs? A. The same way.

Q. And the third string with the void ballots? A. There was only a few of them, just four. We just tied that together.

Q. After the ballots were put back in the box and you closed the box what was done to the box? A. After the box was closed?

Q. Yes, after the ballots were put back in the box, after they had been counted? A. It was locked and sealed.

Q. Who locked it? A. The judge of the board.

Q. Did you see him do it? A. I certainly did.

Q. How do you know it was locked? A. Because I tried it; I tried the slab.

Q. You tried it? A. I sure did.

Q. So that you are sure it was locked? A. I am.

Q. And did you see it taped? A. Yes, I taped it myself with the judge.

Q. And put seals on it? A. Sealing wax, yes.

Q. After that what did you do with the box? A. Brought it to the City Hall.

Q. Whom did you deliver it to? A. The city clerk was there, but I delivered it to the assistant clerk who waited on us, Mr. Sharkey.

Q. Now you are sure that those ballots were strung? A. They were strung by me.

Q. And you are sure that there was a string of voted ballots, a string of ballots marked "Void" and a string containing the stubs in that box when you sealed it? A. Exactly.

CROSS EXAMINATION BY MR. DOHERTY:

Q. What was the type of box, one similar to this one that is here before us from the third district of the first ward in West Hoboken? A. No, it was different, no hinges on it.

Q. That is the cover, the top of the box, did not slip up? A. It lifted up, but it had to be taken right up; it could not be swung over the hinges.

Q. How was it taken off, unscrewed? A. No, by locks with three keys, numbered.

BY MR. WALSCHEID:

Q. Who kept the tally in your district? A. Two clerks.

Q. What were their names? A. One's name was Antone Marone, and the other Anthony Pierrot.

Q. Kept them in lead pencil? (No answer.)

PAUL SEGLIE, recalled.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Do you remember the time when the votes in the town of West Hoboken were counted by the county board of elections? A. Yes.

Q. Do you remember any demonstrations at the counting of those votes in which the county board of elections took part? A. Yes.

MR. COLLINS: I object to demonstrations.

THE COURT: I do not think you can characterize it anyway, but whether you can go into that or not is another question.

MR. WALSCHEID: I intended to show by way of bias in this case that when the vote in West Hoboken was taken up and at no other time, the county board of elections, together with certain other officials who were working under them, appeared with whistles and as each vote was lost for Seglie there was a chorus, a shrill chorus from these whistles and remarks of approval; in other words I want to show that this matter—

THE COURT: Suppose you do show that they were very much prejudiced, how does that help us? That does not show they did not count straight.

MR. WALSCHEID: We will also show you instances where they did not count straight.

THE COURT: I will hear any testimony you

have to offer showing that the count of the county board was wrong, but I do not think I shall take testimony to show that they were biased and prejudiced and whistled or rejoiced at the time the thing was going on.

Q. Mr. Seglie, during the recount of these votes and while you were there, did you have occasion to watch the counting and the reading of the ballots? A. Yes.

Q. And did you have occasion to correct the county board of elections or any of its officers in the performance of their—

MR. COLLINS: I object.

Q. —duties in any way? Yes or no?

MR. COLLINS: I object to that as irrelevant.

THE COURT: I think I will allow that.

MR. COLLINS: To err is human. Anybody might err.

THE COURT: I will permit this, Mr. Walscheid.

Q. Answer that question yes or no. A. Yes, sir.

Q. Will you tell us what you did? A. Well, some time the judge while they were calling the name—

MR. COLLINS: I object.

Q. Whom have you reference to? A. Mr. Hartley. Once in a while they might happen to make a mistake and call Ackerman's name in place of my name, when I correct him he says "All right".

Q. How often do you think that happened?

MR. COLLINS: I object.

A. That happened quite some time.

MR. COLLINS: I object to what he thinks.

THE COURT: How often did it happen?

Q. How often did it happen? A. Oh, about at least a dozen times or more.

Q. While you were there watching? A. When I was there watching.

MR. COLLINS: That Ackerman's name was called?

(Testimony repeated.)

Q. And on these occasions you are speaking about was your name actually crossed or marked with a cross on the ballot? A. Yes, my name was crossed.

Q. And on these occasions that you are speaking of did Mr. Hartley call out the name of Ackerman instead of Seglie? A. Yes, certainly that happened, because it would be the first name. Mine sometimes was the first name on the top of the ballot.

Q. And on these occasions that you are speaking about you then called his attention to it? A. Called his attention and he corrected it.

THE COURT: Well, that happened a dozen times in how many times?

A. Oh, all along through the recount it happened, because I was there every day; just the time I was present.

THE COURT: Some thousands of ballots then?

A. Yes.

Q. Just during the time that you were present? A. On the time I was present.

Q. How often were you there; how often were you present? A. I was there pretty near every day for about two weeks; then I was sick.

Q. While you were there were you always watching the Hartley table? A. The biggest part of the time. Sometimes on the other, because Mr. Melniker was attending to the first room; I was then on the second.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Was there anybody present there in your behalf whose special duty it was to watch Mr. Hartley while he was calling those ballots? A. Well, sometimes I was there myself. When I was not there somebody else might was there. I had my brother-in-law a couples of times.

Q. Who was the person who was there taking your place when you would be absent? A. Well, I had my brother-in-law there quite some time.

Q. And you had Mr. Jones, didn't you? A. No, Jones was there to keep the tally. He was not there to watch Mr. Hartley or watch anybody.

Q. Wasn't Mr. Jones there to look over Mr. Hartley's shoulder and see that he accurately called out the name? A. No.

Q. Did he ever do that in your presence? A. Not that I can remember. He was keeping the tally.

Q. Mr. Hartley counted half of the boxes that were recounted, didn't he? A. I don't say he counted half, because sometimes it was Mr. Hartley; sometimes it was Mr. Kane—both.

Q. At times Mr. Hartley was very weary, wasn't he? A. What do you mean?

Q. Very tired? A. Yes, when he was tired the other member of the board used to take part.

Q. And he lost his voice calling off Seglie and Ackerman, didn't he? A. I do not know that he lost his voice about that; I don't know.

Q. And you say that he made the mistake of

leaving out your name a dozen times? A. Yes.

Q. It may have been considerably fewer than that, may it not? It may have been only three or four times? A. I can't state it exactly how many times it was.

Q. You would not swear positively that it was more than three or four times, would you? A. I swear it happened; I don't know how many times it happened.

ANTHONY BARBERIS, sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were you present during any of the time the recount took place at the county board of elections in reference to the office of Boulevard Commissioner? A. I was present for some time; not all the time.

Q. And how many days altogether do you think you spent there? A. About seventeen or eighteen days; something like that.

Q. Now, during those seventeen or eighteen days did you watch the reading of the ballots with Mr. Hartley? A. I did, sir.

Q. During those seventeen or eighteen days were there any occasions upon which Mr. Hartley misread the name of Ackerman for Seglie?

MR. COLLINS: I object to it—

A. Yes, sir.

MR. COLLINS: —as irrelevant, because it is entirely possible that there could be error. It may be frankly an error which should be corrected.

THE COURT: I do not think it would be possible for the best man to count seventy or eighty thousand votes without occasionally—

MR. WALSCHEID: Absolutely.

THE COURT: I would not trust myself to do it.

MR. COLLINS: What value has it?

THE COURT: Twelve votes, and here are seventy thousand.

MR. COLLINS: It might be a case where the ballots were counted where they were not cast, and any errors that were made should be corrected. Each side had abundant watchers; there was no question about it, except with Seglie's ballots. I think it is ridiculous.

MR. WALSCHEID: We have more than twelve—

THE COURT: I know; but if you had a hundred it would not be very significant in 70,000, unless you propose to show it was done intentionally; that it happened so often that it was intentional, or something of that kind.

MR. WALSCHEID: The significant fact about it is throughout the whole recount no such occurrence occurred on the other side.

THE COURT: You mean that you did not notice any such occurrence.

MR. WALSCHEID: We would have noticed it, because we would have been greatly surprised at the occurrence.

MR. COLLINS: Ackerman was the first name.

MR. WALSCHEID: Well, I will desist on that.

THE COURT: I am really not very much impressed with this.

WITNESS EXCUSED.

Edward H. Jones—Direct.

EDWARD H. JONES, recalled.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Were you present at the recount of the box which came to the county board of elections from the third district of the tenth ward of Jersey City? A. Yes, sir.

Q. And did you keep a tally of the votes which were cast, which were counted in that district? A. Yes, sir.

Q. And according to your tally what was the total for Ackerman? A. 91.

Q. And according to the official tally which was kept by the county board, what was the Ackerman tally? A. Well, now, that was the county board tally, 91. The original was 104.

Q. No, no, no; your tally of the vote—the Ackerman vote at the county board. A. 91.

Q. Did your figures agree with the county board's figures for Ackerman?

MR. COLLINS: I object to that.

A. No.

MR. COLLINS: One moment.

THE COURT: I will hear you, Mr. Collins. I am inclined to think this testimony is admissible.

MR. COLLINS: There are two official tallys, one for each side—carefully done, and the result was returned. Now, they had not attempted to challenge the count; it was made without correction. The fact that the ballots counted were the ones that were cast—why, where would your Honor come to if we could call in at any time some volunteer who makes a tally as against the official tallys by the persons who were employed for that purpose? Where would we be?

THE COURT: I expressed my opinion upon this as to the recount.

MR. COLLINS: I think you did.

THE COURT: I think, however, I will allow this testimony. I do not know how far Mr. Walscheid may go with it.

MR. WALSCHEID: I intend to show, so that your Honor may know what I am after, that Mr. Jones kept a tally and that in the ordinary course of his tally his tally ran up to 91; that his tally seemed to agree with the official tally all the way through; that during the course of the count there was a rumpus in the other room and most people left the room in which he was keeping tally; and when the tallys were finally counted up and compared, the Ackerman tally was increased in some way to 96. In other words, a bracket of five was added, and Mr. Jones at that time protested and spoke about it to the county board. Now, the details of that matter are what I would like Mr. Jones to tell. The box and the tally sheets were impounded by the court at that time upon the request of Mr. Seglie's representative.

MR. COLLINS: Then the only way to get at it is to do it again. You can not rely on his say-so. His tally agreed with the official tally, and afterwards he found the official tally was wrong. Why, your Honor has an absolute test; count them again.

MR. WALSCHEID: I will agree to that.

MR. COLLINS: It can not be that we can take the testimony of a witness—

THE COURT: I think you are right. Mr. Walscheid says that suits him.

MR. COLLINS: Well, if you want to do it, we are willing.

THE COURT: I want to reach a correct result in this matter.

MR. COLLINS: I mean to say you can not rely on an unofficial tally like this. A matter of five votes—it is not worth bothering with.

A VOICE: I think when your Honor decided this question about official tallys—you also decided the question in my presence one day in a little argument something like this one that is taking place, about this recounting of boxes.

THE COURT: Yes.

THE SAME VOICE: Now, there was a box counted on the afternoon of Saturday, January 20th—the Saturday, at least, before the recount closed, in which there was a question about the tallys, and the talliers in order to testify took Mr. Melniker's tally. As the result Seglie gained one vote; Ackerman lost one vote in that box. Now, I cite that only to show your Honor if we are going to, every time there is a question about the tally—if we are going to recount a box, I can go through my records and get dozens of boxes that I would like to have recounted. But it seems to me a grave question in this matter as to the advisability—and this matter has already been brought up before. I do not think that we should do it. I think we should rely on your Honor's decision before and not permit these boxes to be recounted, where the official talliers agree, and where the thing has already been passed upon before.

MR. COLLINS: Of course, if it has been done in one case it can be done in others. If they can challenge, we can, too.

THE COURT: That is true.

MR. WALSCHEID: The very fact that the official talliers did agree in this case and it should now turn out that there was an error of five votes—it would be a suspicious error in view of the fact that that did all agree. Now, here is a matter that was called to their attention immediately, and we were trying to keep an honest count, and we kept an honest count to the best of our ability; and yet, at the end of this count, after this row, when everybody left the room there, this bracket of five was added, unexplained, to this count. Now, I think we are entitled to an examination of that box. I think if your Honor had been present at that time, taking part in that recount, and the question had been then presented to your Honor for decision, your Honor would forthwith have decided "Please count that box again."

MR. COLLINS: It ought to have been done then.

MR. WALSCHEID: It ought to have been done then. We asked to have it done.

THE COURT: I am not going to open the door for the recount of all these boxes, and I doubt whether I have the power to do it after they have once been counted and passed. I have not a general power; I have merely the power the statute gives me; and it is quite questionable whether I have any right whatever to order a box recounted now. I will take this testimony and see how bad the case is.

Q. Now, Mr. Jones, that you know what we are talking about, tell us in your own way.

Q. Repeated by the stenographer: Did your figures agree with the county board's figures for Ackerman? A. No.

Q. Did you have any talk with the county board in relation to your figures and the Ackerman figures in question? A. Yes.

Q. Tell us what it was.

MR. COLLINS: I object to that.

THE COURT: I will permit it.

Q. (Repeated by the stenographer.) Tell us what it was. A. After the boxes had been counted my sheet differed with the official talliers five votes. Now, the order that we had been tallying down there, the ballot comes before the two commissioners, on our side of the corner of the table, and as they were called off I tallied one of the official talliers—tallied, 2, 3, 4, and then tallied.

Q. You mean you talked to each one like that? A. As they called off I tallied with mine. If they call off two and I have only one I call the attention of the board that I differ one. Now, the question in my mind—I am not perfect—but the question in my mind in 91 votes I could be off exactly five; because I can not account for how it could happen, as I tally with the original talliers up there; and the only way I can imagine in my mind was that there were five put on there and they were five ahead at the finish, unless they took an Asmus and Cahill vote and put it down for Ackerman and Seglie. That is the only way I can account for them being five ahead of me out of 91 votes. It does not seem possible—and they comparing with me right through the vote. As one would call I compared with them, and if they called two and I was one I called the board's attention right away, so we straightened out the matter. If we had one or two errors, where I just differed with them one, we straightened the thing out right away. But during the counting of this box, in the middle of it, there was a question

where the board was called out to the other room, and the two talliers were at one table, and I sat—I used an umbrella stand there, and I sat there during that time; but that is the only way I can account for the difference of five. It is not possible in 91 votes for a person to make a mistake of five where we are tallying together. There might be a difference of one at the finish, but it is not possible with five out of 91 votes.

Q. Did you agree with them on the Seglie votes? A. The Seglie vote was 73—yes, 73.

Q. You agreed with them on the Seglie votes? A. Yes.

Q. Did you at that time request that that box be recounted? A. Yes, yes.

Q. And what was the answer? A. Well, the commissioners wouldn't agree to having a count at that time. I believe somebody offered a twenty-five-dollar bet on the proposition, but I didn't have the money and I didn't take them up on the twenty-five-dollar proposition.

MR. WALSCHEID: That is all.

CROSS EXAMINATION BY MR. DOHERTY:

Q. That is, you can understand your own fallibility, but it mystifies you that the other two talliers should be mistaken? A. No, I think it might be possible to make a mistake, but not in 91 votes, as they are tallying with me right along.

Q. You say they are wrong because you are so sure that you are right? A. No, no; I don't say they are wrong.

Q. You might be wrong? A. I say I claim I may be wrong, but it is not possible in 91 votes for me to be five off, where I am checking with these men right along; and I will say of these two men on the board that they were very accu-

rate all the way through. We only had a few errors and that was straightened out right away.

Q. Now, you were sitting beside Mr. Hartley, weren't you? A. Mostly beside Mr. Hart; they changed off one way and the other.

Q. And when he called off a tally you would look over his shoulder as far as you could—A. Well, as far as I could.

Q. —to see that he was calling it off accurately? A. To see if there was two or three Ackerman—

Q. One minute. Then you would keep your tally? A. Yes.

Q. And then you would also give attention to what the official talliers were calling out, to see whether they agreed with your announcement? A. That is principally what I done.

Q. There were three things you were doing? A. Now, you are trying to make out three. But I say if there were three or four Ackerman and Seglie ballots coming, I kept mark on that ballot and checked it with the talliers, too; but if there were one or two for Seglie and I had a chance to look at it, I did the tally.

Q. Then you were trying to do those three things: look at the ballot in Hartley's hand, keep your own tally, and also harken to what the talliers were calling out? A. No; as the talliers called out I marked my own and say that I compared with them.

Q. Yes? A. Yes.

Q. Now was there also a row out in the other room that you were trying to give your attention to? A. I, I would not call it a row. There was some question in reference to one of the boxes and I think the commissioners went out to see what it was.

Q. It was not this rumpus that Mr. Walscheid has described that attracted everybody from your room out to the other room? A. I believe it was two official talliers and myself was the only three left in the room. They were in the doorway out there in the room.

Q. Do you remember myself being there? A. You were not there present at that time.

Q. I was not present during the recounting of that box? A. Not at the table.

Q. What? A. Not at the table.

Q. At what time? A. The time that the argument was out in the other room.

Q. Where was I? A. What?

Q. Where was I? A. I don't just remember, but I say you were not at our table at that time. I remember distinctly that two official talliers and myself were the only two right at the table.

Q. And this row was a dispute arising over a tally in the other room? A. I could not say what it was. I didn't go to see. I sat there with the two officials.

Q. You say the two officials at your table stood in the doorway? A. No; I didn't say that.

Q. Who stood in the doorway? A. Half the number of people who were in the room there. You know there are 12 or 14 or 16 in the room all the time mostly.

Q. And it is your conception what while the dozen of people were thus diverted, that these two talliers fraudulently put down five marks for Ackerman? A. I couldn't say whether it was just then or not when the change was made, or how the change was made. I would not accuse them of doing anything of the kind. I know they were five ahead of me at the final count.

Q. You don't know whether you left off five marks for Seglie or not, do you—or five marks

for Ackerman or not, do you? A. I believe that I did not.

Q. You know—A. I am positive I put them down as they were called. I am almost positive of that, because I would not question it otherwise.

Q. Did you ever raise a similar protest on other occasions about the accuracy of the talliers' count? A. In the matter of one.

Q. Didn't you do it twice? A. I would not be surprised. That is all I saw.

Q. On each occasion was there a recount for your benefit and you proven to be wrong? A. Not each time. It was not each time.

Q. On one occasion? A. On one occasion.

Q. You were absolutely wrong, weren't you? A. Yes; and they were wrong on another.

Q. At the time that you were wrong you had just the same opportunity to be right that you had on the occasion of these five, didn't you? A. Well, that was a matter of one, where this is a matter of five. It is possible to be wrong on one. The official talliers themselves had differences there of one at times—

Q. You admit, though, that you made errors in the course of your work? A. Certainly, certainly; I am not perfect.

Q. But you don't think you made them five in succession? A. No, not tallying as we done down there. You understand how that is done. And if there were any errors we called the attention of the commissioners. As far as I could see the commissioners was very fair on the matter, and they wanted to keep us straight.

Q. If the commissioners were fair and the talliers were accurate the presumption is all in favor of this box having been correctly counted, isn't it?

MR. WALSCHEID: I object to the presumption.

THE COURT: Do not ask it. I will draw the inference.

MR. DOHERTY: All right.

WITNESS EXCUSED.

MR. WALSCHEID: I now ask your Honor to recount this particular box.

THE COURT: I decline to recount.

RECESS to Saturday at 10:00 A. M.

Saturday, Feb. 3, 1917.

JOHN M. KANE, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Mr. Kane, where do you reside? A. 130 Chestnut avenue, Jersey City.

Q. Where are you employed? A. By the county clerk of this county.

Q. How long have you been thus employed? A. I have only been in his employ one year. I was transferred from the register's office a year ago last September.

Q. Do you know the election district and the ward in which you live? A. Yes; the second district of the tenth ward of the city of Jersey City.

Q. Did you have anything to do with the recount of the ballots in the Ackerman-Seglie recount? A. Not with the ballots. I had the keys. I was sent by the county clerk with the keys for all the ballot boxes of the county to produce them at the county election board when they were wanted.

Q. And did you remain in attendance upon the recount? A. Yes, sir; I was there every day, not all day, but I had been there every day.

Q. Were you there at the time when the box of your home district was being recounted? A. Yes, sir.

Q. And by whom was that box recounted, by what officers of the county board of elections? A. That was counted in the—there are two rooms, and the county board of election, the four members, were not always in the same rooms, but the majority of times they were. This particular box was counted in the room where Mr. Hopkins and Mr. Taylor were.

Q. When the recount of the boxes was started describe what was done with the ballots? A. The recount of that particular box?

Q. Yes; of this particular box. A. Well, I was not there when it was opened. I left the keys and I went in the other room. They wanted keys. I believe they were counting the third district, tenth ward, in the other room, where Mr. Houghton and Mr. Hartley were.

Q. Then you came back into the other room? A. Yes.

Q. Into the room where the box from your district was being counted? A. Yes.

Q. When you came back into the room had the ballots been taken from the box and had they been straightened out, flattened out and piled up? A. Yes, sir.

Q. While you were in that room did you notice anything being done to any of those ballots by anybody during the course of that recount? Just answer yes or no. A. Yes, sir.

Q. And by whom did you notice the things being done that you have reference to? A. Why, a man by the name of Dolan.

Q. What is his full name, do you know? A. Thomas, I believe.

MR. COLLINS: What is his last name?
MR. WALSCHEID: Thomas Dolan.

Q. Had he up to that time been taking part in the recount in any capacity that you could see? A. Yes; as a representative there of Mr. Ackerman, I believe.

Q. Up to that time what had he been doing? A. Passing on the ballots.

Q. Now when you saw this thing that you speak of, describe how many ballots he had before him, if any. A. Well, as I came in the room I immediately went over to my right, the table that they were counting them on was on my left, that is it ran paralled with Newark avenue here; I stood there over on the right like, and just being around like I always was there every day.

Q. Was Dolan seated at that table? A. He was seated at the table and the ballots were open and in front of him, piled one on top of another.

Q. About how many ballots approximately do you think he had in front of him that way? A. Well, I should judge may be—between about thirty and fifty probably; I cannot tell that; the paper was very thin.

Q. But they were all piled up on top of each other? A. Yes, sir.

Q. And he sat in front of the ballots? A. He sat in front of the ballots.

Q. What did you see him doing to those ballots at that time? A. Well, he had a pencil in his hand and he was going through them, lifting them up and looking at the ballots.

Q. Looking at the ballots underneath? A. At the ballots underneath, one on top of another. Just kept lifting them up. Some of the men on

the recount looked at them that way and others looked at them, at the top one and passed it along; but he was looking at one under another, and he had a pencil in his right hand and to me evidently made a mark.

MR. COLLINS: What was that?

(Repeated.)

Q. What kind of a mark did he make? A. I can't say whether it was an X or a plus; it was something on that order.

Q. How far away were you from him when you first noticed this? A. I should judge about six feet—seven feet.

Q. When you first noticed it. Did you say anything when you first noticed it? A. Yes.

Q. On how many ballots did you see him make this X or plus?

MR. COLLINS: I object to the question.

THE COURT: I think it is objectionable.

Q. Tell us what happened at that point in as detailed a manner as possible. A. When I saw him with the pencil starting to make, or as I—making the mark, I kind of cleared my throat (illustrating) and I just went like that (illustrating) to attract his attention, and he caught my eye and I shook my head. I said "Don't do that." So he made another effort after that. Then I went—

Q. What do you mean, he made another effort? A. He made another mark with the pencil.

Q. Go ahead. A. Then I immediately went about the table and grabbed ahold of him by the arm and I told him, I said "I don't want you to do that."

Q. What next happened? A. I immediately went around to my former position around the other side of the table.

Q. Did he continue to do anything? A. No, sir.

Q. What did you do then? A. I stood there for a while till his counsel—till Mr. Ackerman,—or Mr. Seglie's counsel rather—came in; they were out of the room at the time, and I did not see anything else; so I went downstairs and got my hat and coat and went home.

Q. Did you tell anybody about that? A. Yes; I did.

MR. COLLINS: I object to that.

THE COURT: That is objectionable.

Q. Was it called to the attention of the county board of elections, do you know, at that time? A. Not that I know of, officially, no. I understood it was—they—

MR. COLLINS: I object to that and ask that it be stricken out.

THE COURT: Not what you understood; only what you know.

MR. WALSCHEID: I desire to show, if possible, that this gentleman communicated these facts to Mr. Melniker immediately.

A. No; I did not do that.

MR. WALSCHEID: Well, within a short period of time, or communicated it to somebody, and that the attention of the county board of elections was called to it, and this man continued in the recount. That is what I hope to show.

MR. COLLINS: I do not see -

THE COURT: I do not see what the theory of that is.

MR. WALSCHEID: I will withdraw the question.

Q. After that did Mr. Dolan continue in the recount? A. Yes; he was there right after.

MR. COLLINS: He went away, he said.

Q. On the days following, counting other boxes? A. Yes; not every day; but he was there some days, yes, sir.

Q. Did he continue on throughout to the end of the recount? A. Yes, sir.

Q. Did you notice in what part of the ballot Mr. Dolan was marking these crosses or X's? A. I could not tell that from the position I was in, no.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Why can't you tell us on what portion of the ballots the mark was made? A. Because the ballots were piled one on top of another and I was to the right.

Q. Because you could not see his hand; isn't that the reason? A. Yes, I could see his hand.

Q. Could you see the mark he made? A. I did not see the mark.

Q. You did not see him make any mark? A. I saw his hand go through the motion of a mark; I did not see the mark upon the ballot.

Q. At that time were there any ballots obscuring his hand from your view? Were there any ballots up on top? A. Yes; there were ballots up on top.

Q. So you were the victim of your own imagination entirely, weren't you? A. No, sir.

Q. Your suspicions concerning Mr. Dolan's honesty were aroused as soon as you saw a pencil in his hand, isn't that true? A. As soon as I saw him make a mark or attempt to make a mark, go through the form of making a mark. I did not

see it on the paper. I saw his hand make the mark.

Q. You saw his hand make the mark? A. Yes —through the motions of a mark.

Q. You saw his hand make the motions of a mark? A. Yes, sir.

Q. But you did not see the pencil at that moment? A. Yes, sir; I saw the pencil.

Q. Did you? A. Yes.

Q. And did you see the mark imprinted on the ballot? A. No; I did not see that.

Q. So you knew from the motion of his hand merely that he was making a mark? A. Well, I went over and spoke to him and told him to stop it.

Q. Stop what? A. What he was doing.

Q. Did you tell him that he was marking the ballots? A. I think my exact words to him were this, I said: "Don't do this." I think I said, "This is my district ward; I know the ballots have been counted right here," or some such word as that.

Q. Did you ever accuse him of marking the ballots? A. No, sir, not personally I did not. You mean to himself?

Q. Yes. A. No, sir.

Q. And was the reason for your failure to do it the fact that you were not sure? A. No.

Q. You say you had charge of the keys of those ballot boxes? A. Yes, sir.

Q. And you were specially assigned to that messenger duty of bringing the keys back and forth? A. Yes, sir.

Q. From whom did you obtain the keys? A. I got the keys myself. The keys were in the vault and I got the key that opened the vault from the chief clerk in my office and went in and got the keys.

Q. Did anybody else in the employ of the county clerk have access to the keys but you? A. Yes.

Q. Were you held to any accountability for the returning of the keys or did you have to produce any order from the board requiring the keys before you could get them, or did you have liberty of your own in that respect? A. I think I had liberty alone. My orders were these: "We are going to have a recount; we have an order for the keys. You know where the keys are. As they are wanted bring them to them."

Q. So you could take any keys you wanted and bring them back at your own pleasure; is that true? A. Yes; oh, yes.

Q. In performing that work of course you realized that you were under a very sacred responsibility? A. Yes, sir.

Q. And that the honesty of this recount depended upon the fidelity with which you performed your duty; you realized that? A. Yes.

Q. Now with that realization did you at the time you saw Mr. Dolan do anything suspicious call the attention of the board to it? A. No, sir.

Q. Why didn't you? A. Well, I tell you; I did not want to say anything about it, but then I figured, well, may be I was doing wrong, and it was questionable to me who I should tell; so I knew one of Mr. Seglie's counsel, Mr. Clark, and—

MR. COLLINS: You are only asked whether you called the attention of the board.

A. I do not know why I didn't. That is all. I called attention of Mr. Clark to it.

Q. You called attention of Mr. Clark? A. Yes, sir.

Q. Who is Mr. Clark? A. Mr. Seglie's counsel.

Q. An intimate friend of yours? A. Very intimate.

Q. You live part of the year with him, don't you? A. Visit his home probably over a week end when he is away during the summer.

Q. Why did you select Mr. Clark for this communication? A. Just merely because he was a friend of mine, I guess.

Q. And because he was connected with this recount as Seglie's counsel? A. Yes.

Q. You say you live in the second district of the 10th ward? A. Yes, sir.

Q. Have you got any political status in that ward? A. Yes; I am the Democratic Committeeman.

Q. And did you bestow any particular attention or scrutiny upon the people engaged in this recount because that was your box, as it might be said? A. Well, yes, that might have had something to do with it after the rumors that had been around.

Q. Isn't it a fact when you came into the room and your box was being examined that you were possessed with strong suspicions as to what might be done affecting your own box? A. Why, after all the rumors that were around and the debates that they had there over this thing, and that thing, one man accusing the other of doing this and he denying it, I thought, yes, that it would be best that I should watch it.

Q. Now you say that after you coughed and shook your head that Dolan then repeated the same thing? A. Yes, sir.

Q. And at the time you coughed and shook your head was his hand then in your sight or was it concealed by ballots? A. His hand was never really concealed from my sight, because the pencil held the other ballots up, the ballots

that were on top of the pencil in his hand, on this style (illustrating), the pencil and the hand would have a tendency to hold them up. That showed his hand—

Q. I am not asking you about the general tendency of the pencil, but where was the pencil when you coughed and shook your head? A. In his hand.

Q. Was it in contact then with any ballot? A. Well, I guess it was raised from the ballot at that time after I coughed.

Q. Afterward it was raised? A. Yes.

Q. Then you tell us that after that he then in your sight put a mark on the ballot? A. He made a mark; I did not see it on the ballot.

MR. COLLINS: He made a motion, you said.

A. A motion.

Q. But you do not know whether that mark was to add a vote to anybody or not, do you? A. No, sir.

Q. Do you know William J. Clossey, Mr. Kane? A. Yes; William F. Clossey.

Q. He is the chief of the Boulevard police, isn't he? A. Yes.

Q. And he works under the jurisdiction of this board? A. The board of Boulevard Commissioners, yes.

Q. What is your relationship to Mr. Clossey? A. He is a half brother to my mother.

Q. Did you ever previous to this demonstration of Dolan's talk with Mr. Clossey about the progress of this recount? A. Previous to the Dolan incident?

Q. Yes. A. I think I might have said something that I was up working with the keys or something, had the keys up there, might have said something to him.

Q. Do you know anything of the details of the official relations between Mr. Clossey and Mr. Seglie? A. I guess they are friendly.

Q. Don't you know that Mr. Seglie by his vote has continuously stopped Mr. Clossey from having his job abolished? A. I do not know that; I do not think that is true.

Q. Was there ever any investigation made by the board of your insinuation? A. I was never summoned or asked to appear before the board; that is they never had me personally there, no.

Q. Were you ever questioned by any of the commissioners as to the reliability of your statement? A. I think one of the commissioners asked me what happened between Dolan and I this morning.

Q. Which commissioner? A. I think commissioner Hartley, if I am not mistaken.

MR. WALSCHEID: Asked you this morning?

A. No; the morning on which it happened; he was not in the room or anything, but he just said "What happened between you and Dolan this morning?" He asked me that that day.

Q. And what was your answer? A. I just told him I thought I saw him do something, or some words to that effect.

Q. You thought? A. Yes; called his attention to it.

Q. Then there was an investigation that was conducted by the election board, wasn't there? A. I believe there was.

Q. And you were brought before the commissioners in executive session? A. No, sir.

Q. Weren't you privately questioned by any of the commissioners? A. No, sir.

Q. Were you questioned by Commissioner Taylor or Commissioner Hopkins? A. No, sir;

the only conversation I had with any of the commissioners is the way I related.

Q. Isn't it true that you were interrogated by all of the board and that you distinctly and emphatically told them that you had observed Dolan do nothing? A. No, sir.

Q. I would like to ask you to tell us more definitely why you concealed this information from the board. A. Just because it was a question of whom I should tell, that was all.

Q. And you selected one of the counsel for Mr. Seglie to tell? A. Yes.

Q. And did you do that for the purpose of promoting the welfare of Mr. Seglie in the course of this recount? A. No, sir.

Q. And you cannot explain why you told Mr. Clark instead of anyone else? A. Merely that he was a friend of mine, I guess that is the main reason.

Q. You testified on your direct examination that at first Dolan "To me evidently made a mark"? A. Yes.

Q. That imports that you are not sure whether he made a mark or not. A. Of course I cannot tell whether he made a mark on the ballot; he made a mark—

Q. And you said the second time that he made another effort? A. Yes.

Q. That means you are not sure that time? A. Not that I saw the mark on the ballot; just that his hand made a motion. I could not see that particular ballot from where I was.

Q. The pencil that Dolan had was easily visible to you seven feet away, was it? A. Yes.

Q. It was not a small pencil? A. No, sir.

Q. Did you ever discuss this matter with Mr. Melniker? A. I think Mr. Clark told Mr. Mel-

niker and Mr. Melniker asked me something about making an affidavit or something.

Q. Did you describe the pencil to Mr. Melniker? A. No, sir.

Q. Didn't you say it was a small stub of a pencil? A. Positively not.

Q. It was a large pencil? A. Yes.

Q. So large that it would hold up the ballots? A. Yes, sir.

Q. While you had him under observation he made no effort at all to conceal that he had this pencil? A. No, sir.

Q. Did you wait to hear the result of the recount in that district? A. No, sir.

Q. During the time that you were there there were always present a number of watchers for both parties? A. Not all the time.

Q. What commissioners were present on that occasion when you were in the room? A. You mean when this incident was on?

Q. At the time when you saw Dolan making attempts to do things. A. I think there was only one.

Q. Who was it, do you know? A. Commissioner Hopkins; I think his back was turned, if I am not mistaken.

Q. Do you know anything about it? A. What is that?

Q. Do you know anything about it? A. He was in the same direction as Mr. Dolan; that is Mr. Dolan was here and Mr. Hopkins was up there, but I think Mr. Hopkins was looking—

Q. Do you know? A. No.

Q. Then why do you tell us what you think about it? A. He was there; that is positive.

Q. Were you ever present when anybody else were examining ballots in that same manner of looking, with the—A. Yes, sir.

Q. That was the customary and expeditious way of examining the ballots? A. Yes, sir.

MR. WALSCHEID: I object to that.

THE COURT: I think I will allow it.

A. Yes, sir; Mr. Stites always examined them in that way if I am not mistaken.

Q. And you say there were about thirty or fifty ballots in that pile at that time? A. I think so; there were about thirty or fifty. They were one on top of the other.

Q. And the manner of looking at ballots that way necessitated holding up a bunch of ballots while looking at the others? A. Yes.

Q. When a ballot was discovered that was questionable it was the usual thing for the inspectors there to make a note of it, wasn't it? A. Yes, sir.

Q. To take the number of the ballot? A. Yes, sir.

Q. And to note the objectionable feature? A. Yes.

Q. And in doing that they all used lead pencils, didn't they?

MR. WALSCHEID: I object to that as calling for a conclusion.

THE COURT: I will permit it.

A. No; they all did not use lead pencils.

Q. How did they make their notations, their memoranda? A. You mean lead pencils in the hand or lead pencils in the pocket?

Q. Yes. A. I think they made an amendment after this incident that nobody at the table was to have a lead pencil.

Q. You say you think; do you know? A. Only what I heard them say, that is all.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. What Seglie watchers, if any, were present when you saw Dolan do this? A. Not any.

Q. Had any been there just before that time? A. Yes, sir.

Q. Who had been? A. Mr. Melniker.

Q. And what had become of Mr. Melniker? A. He was in the hall.

Q. Stepped out of the room? A. Yes, sir.

MR. WALSCHEID: Now I would like to have the box of this second district of the tenth ward of Jersey City which has been impounded produced. I think it is in the custody of the prosecutor.

THE COURT: Is anybody here from the prosecutor's office?

MR. WALSCHEID: And ballots number 5 and 8 in this particular box which were held out of the box—

THE COURT: What district in the 10th ward?

MR. COLLINS: If those ballots they speak of were held out what do they want the box for? They say they were held out.

MR. WALSCHEID: We never did ask your Honor to examine the ballots in that box.

THE COURT: I think I will do so. You will have to say to the prosecutor that he will have to keep his vault open until one o'clock with somebody in attendance, because this box must go back in the vault. The second district of the tenth ward, Jersey City.

MR. WALSCHEID: The county board held out two ballots which were challenged immediately after I believe—ballots No. 8 and 5.

THE COURT: And those ballots are now where?

MR. WALSCHEID: In the possession of the county board, I understand.

THE COURT: Very well.

MR. WALSCHEID: I ask that they be produced.

THE COURT: I dare say Mr. Houghton or some one will get them for you.

MR. WALSCHEID: And in the meantime I will proceed with some other line.

THE COURT: All right.

MR. WALSCHEID: I also ask the county board to produce their tally sheet of the 6th district of the 6th ward of Jersey City.

A COMMISSIONER: That we cannot do. It has been impounded.

MR. WALSCHEID: Might we send for that too?

THE COURT: Is that in the prosecutor's possession?

A COMMISSIONER: Yes; we only have a copy of it.

MR. WALSCHEID: Sixth district of the Sixth ward of Jersey City.

THE COURT: Very well. I will not have more than one box opened at once. You may bring up the 6th district of the 6th ward of Jersey City, and then the county board will get these two ballots.

A COMMISSIONER: Your Honor, those sheets are all rolled up together and sealed.

THE COURT: But these two ballots, you have those?

THE COMMISSIONER: I think they are in there too, if I am not mistaken. I think they were—

THE COURT: Well, very likely.

JAMES F. MAHER, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you live? A. 1316 Washington street, Hoboken.

Q. Were you an election officer in the 7th district of the 2nd ward of Hoboken at the last general election? A. Yes, sir.

Q. And what position did you hold? A. Judge of the board.

Q. After the election was over what did you do with your box?

MR. COLLINS: I object to that. I understand that there are a good many election officers here and that he is going to call them. I understood your Honor's ruling to be that that was not within the scope of your inquiry.

THE COURT: What do you propose to prove, Mr. Walscheid?

MR. WALSCHEID: That certain things were missing from that box that could not have gotten out of that box unless somebody got in there—when it was opened.

THE COURT: That when it was opened things that ought to have been in the box were not there?

MR. WALSCHEID: Yes.

THE COURT: That is something that I would have seen.

MR. WALSCHEID: Your Honor allowed us in the West Hoboken cases to do this. We have produced evidence here that the boxes were opened and the ballots were found unstrung and no strings in the box.

MR. COLLINS: That is legitimate.

MR. WALSCHEID: And your Honor allowed

us to prove that these had been strung by the election officers. It is testimony along that same line.

THE COURT: What is it that you say was missing from the box?

MR. WALSCHEID: I do not want to say.

THE COURT: Very well. I think I will receive it, Mr. Collins.

MR. COLLINS: I object to it on the general ground that we have heretofore submitted to your Honor, and on the ground that this is not within the scope of the inquiry as indicated by your Honor—that you were trying to get the information that you would have had had you been present personally.

THE COURT: Well, it seems to me that it may be within that line; I cannot tell. If it goes beyond it I am going to stop it.

MR. COLLINS: That is the reason I did not interfere in these other cases. I did not want to be continually objecting and I thought that your Honor would catch it without counsel interfering.

THE COURT: If I don't do it, tell me.

Q. After the count was over in your district what was the next thing you did then? A. Started to put away the different paraphernalia that belonged there.

Q. And what did you put into your box? A. Well, all the ballots—

THE COURT: Now this is a little different. You are showing now what he put in the box. I thought you were going to show that something was missing from the box.

MR. WALSCHEID: I am going to show that

afterwards. I cannot show that it was missing unless I show that it was in there.

THE COURT: I do not care what he put in if it was not something that the statute requires to be put in.

MR. WALSCHEID: It was something that the statute required.

THE COURT: You may put that categorical question, whether he put a certain thing in, whatever it was.

MR. COLLINS: That is what I had in my mind; it is not to be presumed they were careless, but if they say when they opened the box that some things were not there it is not necessary to prove they were put in.

THE COURT: I will permit this. It is a little beyond the line, but I will permit it.

Q. Did you put in—

MR. COLLINS: Don't lead him.

MR. WALSCHEID: The court suggested that I ask him certain things.

MR. COLLINS: You could ask him what he put in.

THE COURT: Change the question. Mr. Collins' objection is well taken.

Q. Now what did you put into that box—of the things that you were supposed to put in as an election officer? A. I put in the ballots.

Q. What do you mean by the ballots? A. All the ballots—votes.

Q. All the ballots that had been voted? A. Yes, sir.

Q. Now what else did you put it? A. All the books; tally sheets.

Q. How many tally sheets? A. Two.

Q. And how many books? A. I can't just—er—

Q. You cannot remember that? A. —remember now, but I am sure all the books were put in, unusued ballots and coupons, on the top.

Q. And did you put in all of the unused ballots? A. All, yes.

Q. And did you know how many ballots had been supplied to you in the morning? A. Well, we had looked at the ballots in the morning. The first number was one and the last number 500.

Q. And then during the course of the day I suppose you voted them up from one on? A. From one right in rotation.

Q. And then you put the remaining ballots from the last number in this box, from the last number which had been voted? A. Yes.

Q. So that it would run on to 500? A. Yes, sir.

Q. Any unused ballots? A. Yes.

Q. And did you tape that box and lock it? A. Yes, sir.

Q. And deliver it to the clerk of the city? A. The city clerk.

Q. And you took part in all of this work yourself, did you? A. I practically took charge of the box.

Q. All right; you took charge of this particular work that you have told us of? A. Yes, two boxes.

Q. Is that what you are testifying about, what you are testifying about you are testifying from your own memory? A. From what I know of what I done myself that night—that morning.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Did you put in the unused ballot number 440? A. Well, that is something I could not tell. I could not attempt to look at—

Q. Did you put in unused ballot 483? A. That I could not say, sir.

THE COURT: That is not exactly a fair way to examine him, is it? You might ask him if he put in any unused ballot.

Q. You think you put in all the paraphernalia that was lying around? A. Everything that was laying around at the close of the count, looked around and put everything that I thought was there to go in.

Q. You put it in yourself personally? A. I did, yes, sir.

Q. And that was your intention, to restore to the box all of the paraphernalia which you had received from the county clerk? A. Positively.

Q. You do not know what might have been missing at that time, do you? A. Well, no; I—

Q. You do not even know how many books should have gone in, do you? A. Not just at the spur of the moment now. I could not just tell you.

RE-DIRECT EXAMINATION BY MR. WALSCHEID:

Q. These ballots during the day, the unused ballots, that is the ballots which had not been taken away by the voters into the polls for the purpose of voting, were before you all day, weren't they? A. All day long.

Q. Right in front of you? A. Yes.

Q. You are sure that during that time none of those unused ballots were taken away? A. Pretty sure, sir.

Q. And you did not give any of them away yourself, did you? A. Positively not.

Q. Except to the voters? A. Only to the voters that were entitled to them.

Q. You did not see anybody take any? A. No, sir.

James F. Maher—Re-Cross.
Charles H. Myers—Direct.

RE-CROSS EXAMINATION BY MR. DOHERTY:

Q. You say that the city clerk delivered ballots and coupons numbered from one to five hundred? A. I said that the first ballot that I looked at was number one and I turned around to the last one, turned the bundle over, and it was 500.

Q. Of course you did not count them over and compare them? A. Why, no; no.

CHARLES H. MYERS, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

THE COURT: Mr. Walscheid, you want keys of these two ballot boxes?

MR. WALSCHEID: I want the keys of the second district of the tenth ward, Jersey City, and the sixth of the sixth, Jersey City.

Q. Have you your tally sheet of the second district of the seventh ward? A. One of the clerks has that, Mr. Maxwell.

MR. WALSCHEID: I guess I can save some time by calling somebody else. I need the tally sheet.

THE COURT: All right. Save all the time you can.

JEREMIAH MCCARTHY, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you live? A. 208 Jefferson street, Hoboken.

Q. Were you an election officer of the 4th district of the 4th ward of the City of Hoboken at the last general election? A. Yes, sir.

Q. And what position did you hold in the board? A. Judge of the board.

Q. At the end of the election did you take charge of putting the things into the box? A. Yes.

Q. What things did you put in the box? A. The ballots and the poll book.

Q. What else? A. Nothing else.

Q. You did not put anything else in excepting the ballots and the poll book? A. The ballots and the poll book.

THE COURT: What did you do with the string of coupons?

A. Stringed them and put them all in.

Q. What did you do with the unused ballots? A. I put them in another box; we had two boxes, I put them all in another box.

MR. COLLINS: Put them in another box.

A. Yes; we had two boxes.

Q. What did you do with the tally sheets? A. I put the tally sheets in with the poll book and the ballots.

Q. And you put two tally sheets in there, did you? A. Yes, sir.

Q. You used two tally sheets? A. Yes, sir.

Q. And you put those two tally sheets in with the ballots? A. Yes, sir.

Q. The voted ballots? A. Yes, sir.

Q. And you did that personally? A. Yes, sir.

Q. And you are sure of that? A. Yes, sir.

Q. After you had done that what did you do to the box, did you tape it? A. Taped it and locked it and sealed it.

Q. Did you test it to see whether it was locked? A. Yes.

Q. And having done that what did you do with the box then? A. It was taken down to the city hall.

Q. Did you take it to the city hall? A. I helped to take it down, yes.

Q. And you saw it delivered to the city hall? A. Yes, sir.

Q. To the clerk in charge there? A. Yes, sir.

CHARLES H. MYERS, recalled.

BY MR. WALSCHEID:

Q. Mr. Myers, what position did you hold in this recount? A. Tallier.

Q. Official tallier? A. One of the official talliers.

Q. And did you keep a tally of the 7th district of the 2nd ward of Hoboken? A. Yes, sir, I did.

Q. And did you help make notes of the things that came out of the box when it was opened? A. Yes, sir, as the commissioners read it to us.

Q. And did you make any notes yourself? A. Yes; as the commissioners called them off to us we made notes of the contents—both talliers.

Q. Did you make any notes of the unused ballots that were taken from the box? A. Yes, sir.

Q. What was your memorandum as to that? A. Unused ballots from 440 to 483 missing.

Q. Unused ballots—what is that?

MR. COLLINS: 440 and 483 missing.

Q. Unused—what is that word there? A. That is not my sheet.

Q. Where is your sheet? A. My sheet is downstairs; they didn't bring it up.

THE COURT: You cannot testify to this sheet.

FRANK MAXWELL, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you reside? A. 909 Willow avenue.

Q. Did you hold any official position in the Ackerman-Seglie recount? A. Official tallier.

Q. Did you keep a tally of the 7th district of the 2nd ward of Hoboken? A. I did.

Q. Did you make notes of the contents of the box as it was counted? A. I did.

Q. Did you make any note in reference to the unused ballots? A. I did.

Q. What is the memorandum you then made? A. Package of unused ballots from 389 to 500, and unused ballots between 440 and 483 missing.

THE COURT: What district is this?

A. 7th.

MR. COLLINS: Does it mean between 440 and 483, the whole of them?

MR. WALSCHEID: The whole batch of ballots missing.

THE COURT: Now this is the 7th district of what ward?

A. The 2nd ward of Hoboken.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Have you a personal recollection of the fact that there were that group of ballots missing? A. Only what the commissioners called out.

Q. Do you remember whether you were in error when you put in the word "between" or not? A. Well, the commissioners called out "between" those numbers were missing.

Q. Are you sure they called out the word "between" or called out those separate ballots? A. Sure that they called out those, between 440 and 483.

Q. Who made the announcement?

MR. WALSCHEID: It is not the word "between" is it?

MR. DOHERTY: Yes.

Q. Who made the announcement? A. Why, Commissioner Houghton—I am not positive; they were both—

Q. The custom was to tabulate those unused ballots in every instance even though one was missing, wasn't it? A. Yes.

Q. It was a common thing to have ballots missing from the unused package, wasn't it? A. Oh, yes.

THE COURT: How could that happen?

MR. DOHERTY: Through the failure of the local board to return all the ballots.

MR. WALSCHEID: It was not any common thing to have a batch of 40 missing, was it, or anything like that?

THE WITNESS: I could not say; one or two; or three or four.

BY MR. WALSCHEID:

Q. Have you any other record—have you any record of any other district that you took part in the canvass of the votes of where you have a memorandum of unused ballots missing? A. Well, I could not say unless I went over my sheets.

Q. I wish you would do so before you go away and pick out every one on that.

THE COURT: Is there any explanation, do you suppose, of the reason why unused ballots should be frequently missing?

MR. DOHERTY: Careless handling by the local election board.

MR. MELNIKER: We deny that that is a fact. There were not a dozen—out of 327 districts I venture to say there were not a dozen districts where there were any unused ballots missing.

THE COURT: Then the fact is disputed that it was a common thing.

MR. MELNIKER: Yes; we ask the tallier now to pick out any districts where he has any record of missing ballots.

Q. What was the practice of the county board during this recount as to making any announcement of the condition of the boxes when they were produced? A. They would call out the conditions and we would have to put the notes down.

Q. What was the condition of the box from this district as announced? A. This box was sealed, waxed and taped, according to my note.

MR. COLLINS: Sealed, locked and taped?

A. And locked, yes, sir.

Q. I notice you have that memorandum about the unused ballots on there twice, haven't you; over here you have again, "Unused ballots missing 440 to 483"? A. Yes, sir.

Q. And the highest ballot voted was number 373, wasn't it? A. 388.

Q. And then the unused ballots began with 389? A. 389 to 500.

EDWARD C. MARCUS, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you live? A. 596 Newark avenue, Jersey City.

Q. Did you take part in the Ackerman-Seglie recount? A. Yes, sir.

Q. In what capacity? A. As official tallier.

Q. And did you make memoranda during the course of your tallies? A. I did.

Q. Of what came out of the box when it was opened? A. Yes, sir.

Q. Will you look at the tally sheet of the 4th district of the 4th ward of the city of Hoboken, please? Have you it? A. Yes, sir.

Q. This memorandum you made of the things that were called off to you by the commissioners as they were taken from the box? A. I did.

Q. Do you find that you made any memorandum of any tally sheets having been taken from that box? A. No.

Q. So that the result of that is that you were not in—

MR. COLLINS: There is not any need to comment on it.

Q. Get the 10th district of the 3rd ward of

Hoboken. Have you any record of that box? A. I have; on the bottom.

Q. From your record, how many strings of ballots were taken from the box? A. My record reads one bundle of ballots unstrung from one to one hundred and seventy-six.

MR. COLLINS: One bundle of ballots unstrung?

A. Unstrung from 1 to 176.

Q. That is all the record you have on that? (No answer.)

Q. And you have not any record of how they were in the box or anything like that, have you? A. No. Well, yes, that is my record.

Q. The condition in which they were in the box? A. Unstrung.

Q. Unstrung; that is the only record you have? A. That is all.

CROSS EXAMINATION BY MR. HENDRICKSON:

Q. Mr. Marcus, you were official tallier during the whole recount? A. Yes, sir.

Q. Did you notice whether many boxes that were opened had ballots in them that were unstrung? A. Comparatively few.

Q. Comparatively few; would you say that while you were there there were a dozen?

MR. WALSCHEID: I object. You have a record of it, haven't you?

A. I have a record, yes.

MR. COLLINS: He has a right to get his memory.

THE COURT: This is cross examination.

A. I could tell you by looking over my sheets just how many districts.

Q. From your memory about how many would you say—between—as nearly as you can remember? A. By that question do you mean whether all the ballots were not strung, or just part of them?

Q. No; just unstrung ballots in the box. A. There were perhaps five or six at my table.

Q. What was the condition of that box, do you know? A. Which box?

Q. This box which was opened here. A. Third ward, tenth district?

Q. Yes. A. My record reads "Box No. 48, two tally sheets, one poll book, one book of identification statements, one transfer, two ballots marked 'Void'; Box 334, one string of stubs 1 to 179, unused ballots 180 to 500; one bundle of ballots unstrung, 1 to 176, two ballots marked 'Spoiled' on stubs."

MR. COLLINS: He asked you the condition of the box.

Q. You have not any note as to the actual condition of the box then?

MR. COLLINS: Sealed, taped, locked, etc.

A. These two boxes were, according to my notes, in good shape.

MR. WALSCHEID: Where does it say that?

A. If the box was not in good condition I would have made a note of it.

Q. That was your custom? A. Yes, sir.

Q. Did you notice while you were present at this recount whether tally sheets were ever omitted from the boxes? A. In a few districts there were

—there was one—and I believe this is the only district, the third ward, 10th district, that there were no tally sheets at my table.

Q. That is the only one you can recollect? A. That is the only one I can recollect.

Q. You have recollection that frequently there was only one? A. Perhaps twice or three times.

By Mr. Walscheid:

Q. Will you also run through your lists to see what districts you have notes showing that there were unused ballots missing? Do it right away.

Mr. Hendrickson: What is the relevancy of that until they lay some foundation for it?

The Court: I do not know.

Mr. Collins: I do not see what value it would have upon this recount, the condition of the unused ballots.

The Court: I think some of it has had no bearing, or at any rate it has had no influence upon me, but the fact that unused ballots were missing is a pretty significant fact, and that I would have seen if I had been sitting there.

Mr. Collins: I do not see what value it has. The ballots were there, numbered by the local board, and they were all there, those that were voted.

The Court: I will permit this testimony.

Mr. Walscheid: Now I ask the County Board to produce the two ballots 8 and 5, I think were the numbers, from the second district of the 10th ward of Jersey City.

Mr. Houghton: I have here a package. I am not positive that they are in this package. I will open it and see.

Mr. Walscheid: That package comes from the prosecutor's office.

MR. HOUGHTON: No; that package comes from our office.

THE COURT: Mr. Houghton produces a package coming from the office of the county board of elections and is going to open it and see if he finds ballots 8 and 5 of the second district of the 10th ward of Jersey City.

MR. WALSCHEID: Mr. Houghton produces two ballots—he has not looked at them—in an envelope marked "10th ward, 2nd district, Number 5 X X X and Number 8 X X X."

THE COURT: What am I supposed to see?

MR. WALSCHEID: This is the box in which Mr. Dolan is supposed to have gone through these motions, and we desire to call your Honor's attention to this particular X on the last space in County Boulevard Commissioners, ballot No. 8.

THE COURT: I see it.

MR. WALSCHEID: Ballot number 5, a ballot with three X's, one for each, Asmus, Seglie and Ackerman, and the manner in which the Asmus is put in there.

THE COURT: I see it.

MR. COLLINS: That has been rubbed.

MR. WALSCHEID: This is ballot number 5.

THE COURT: I notice the sign.

MR. WALSCHEID: Now may we return those?

THE COURT: Yes. I do not want these ballots handled any more than is necessary.

MR. WALSCHEID: I desire now to return to Mr. Houghton the two ballots and the envelope.

THE COURT: Do you want anything else from this larger envelope?

MR. WALSCHEID: No.

THE COURT: Then let it be sealed.

JAMES F. CLARK, sworn.

DIRECT EXAMINATION BY MR. WALSCHEID:

Q. Where do you reside? A. 555 Pavonia avenue, Jersey City.

Q. Did you take part in the Ackerman-Seglie recount? A. I did.

Q. Representing Mr. Seglie? A. I did.

Q. And did you take part in the recount of the 6th district of the 6th ward of Jersey City? A. Yes, sir.

Q. Did you keep a tally? A. Yes, sir.

Q. And at the completion of the tally did you compare your tallies with the official figures? A. Yes, sir.

Q. Did they agree? A. Yes, sir.

Q. And what were your official figures for Seglie—what were your figures at that time for Seglie? A. As announced by the clerk and the talliers at the completion of the count—

MR. COLLINS: I cannot hear you.

A. —Seglie's count was 89, Ackerman's 126, at the completion of the count, there were several ballots referred to the court, and when the ballots were passed upon by the court and we returned to the board in order to add those ballots then there was a difference—a change from what I had noted of one vote.

Q. From the day before? A. From the day before.

Q. In whose favor was that change? A. Mr. Ackerman's.

Q. And when the figures were announced did they agree with the count as you had taken it? A. Yes, sir.

MR. WALSCHEID: Now might I have the

original sheet of the 6th district of the 6th ward of Jersey City?

MR. HOUGHTON: I have it here.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You were one of the counsel for Mr. Seglie, weren't you? A. Yes, sir.

Q. And of course familiar with the legal aspect of an election recount? A. Yes.

Q. And you realized throughout your activities the legal advantage to Mr. Seglie of a suggestion that there was fraud in the tallying of these votes? (No answer.)

THE COURT: Well, what do you say?

A. That never occurred to me during the tallying.

Q. Did you ever make any protest to the county election board about this matter that you say came under your observation? A. That was the first protest that I made.

Q. Was there any inspection made then of the tally sheet? A. Yes, sir.

Q. And did the tally sheet disclose that you were accurate in your surmise? A. The tally sheet disclosed by an examination both by myself and others that there was an alteration from the figures—that there had been an erasure, the 127 had been written over something else.

Q. In your tally sheet? A. In other words, the tally sheets differed from my memorandum as to the vote of Ackerman.

Q. One tally sheet comported with your idea and the other did not? A. No; both the tally sheets, the two tally sheets agreed as to the number of votes for Mr. Ackerman, but they both differed with my memorandum, and that memorandum was the memorandum which I took at the

time the announcement was made as to the vote actually counted for Mr. Ackerman.

Q. Then the situation was that you were right and the other talliers and their sheets were wrong? A. The point—I am afraid we misunderstand each other. If I may be pardoned: The point is that there was a difference. My memorandum showed—and my memorandum was concurred in by others who made that fact known at the time—that the count for Mr. Ackerman was 126. When we came back from the court the tally sheets showed 127, and I then made my protest to the board that there had been an alteration, that there had been one vote added to Mr. Ackerman; the board then examined the sheets and we discovered that there had been an alteration.

BY MR. WALSCHEID:

Q. And in what did that alteration consist?

MR. DOHERTY: I object. The papers will speak for themselves.

MR. WALSCHEID: That he remembers.

MR. DOHERTY: He says that an examination of the sheets disclosed an alteration.

THE COURT: I think we ought to see that by an inspection of the sheets, not by his testimony.

MR. WALSCHEID: You cannot tell that because since then the votes which were counted before your Honor have been added and that total has again been changed.

THE COURT: I do not think I will take this question.

A. At that time—speaking of the protest to the board—I asked that the board at that time impound those tally sheets, and the board refused to grant my request. Both Mr. Melniker and I

were present before they touched this or added to it or did anything. Because of what had appeared by an inspection both to the naked eye and under a magnifying glass we asked that they—

MR. COLLINS: I move that that volunteered statement be stricken out.

THE COURT: Yes.

MR. WALSCHEID: What I desire to show, so that we may have the offer appear on the record, is that at the time when the announcement was made this tally sheet showed 126 votes for Ackerman. On the next day, after your honor had passed upon the ballots, and when they started to add the ballots your honor had passed upon, the Ackerman tally stood 126 with the 6 partially erased and a "7" written over it, and that that appeared upon both of the tally sheets. Now that is what I am trying to establish, and that subsequently by the addition of two votes which Your Honor counted, it became 129; and a further change was made against the protest of Mr. Clark and others, by erasures further erasing the 6 and the 7 and putting a 9 in there.

THE COURT: I will exclude the evidence.

MR. WALSCHEID: All right, sir.

MR. MELNIKER: We have another witness who took a memorandum of this occurrence at the same time.

THE COURT: About the tally sheets?

MR. MELNIKER: Yes; and took a memorandum of what was called off and also notes about the change.

THE COURT: I will exclude the offer.

FRANK MAXWELL, recalled.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Will you tell us, please, referring to your records, what boxes were counted on the last day of the recount? A. The last day we did seven boxes at our table.

Q. Will you call them off district and ward and municipality? A. 2nd ward, 3rd district, West New York; 3rd ward, 1st district, West New York; 3rd ward, 5th district, West New York.

Q. The first was what—in West New York? A. 2nd ward, 3rd district; 3rd ward, 1st district; 3rd ward, 5th district; 3rd ward, 4th district. I made a mistake; we did four that day, and the other table did three.

Q. Those are what you did on the last day? A. Yes.

Q. What date was that? A. January 22nd.

Q. Now what boxes did you count the day before that? A. 1st ward, 3rd district, West New York.

Q. 1st ward, 3rd district? A. 1st ward, 5th district; 2nd ward, 1st district; that is all that day. I believe that was a Saturday.

Q. What date was that, the 20th? A. That was the 20th.

Q. The day before that, January 19th? A. 3rd ward, 3rd district, town of Union; 3rd ward, 5th district, Town of Union; 1st ward, 1st district, West New York; 2nd ward, 2nd district, Town of Union; 2nd ward, 4th district, Town of Union.

Q. What were those again? A. 2nd ward, 2nd district, Town of Union; 2nd ward, 4th district, Town of Union; that was the 19th.

MR. HENDRICKSON: What is the object of this? What is this testimony for?

MR. MELNIKER: Just to prove which boxes were counted on those three days.

MR. HENDRICKSON: I wanted to know whether I wanted to cross examine him or not.

MR. COLLINS: I move to strike it out as irrelevant.

THE COURT: I am inclined to strike it out.

MR. HENDRICKSON: I asked Mr. Melniker if he had any evidence at all, frankly and openly, of any of the election officers using any of these unused ballots, and he says he has not. Then what is the use of bothering with all this getting of this record of unused ballots?

MR. MELNIKER: I do not know what my friend is getting nervous about I did not say anything about unused ballots. I am merely getting a record of the boxes that were counted on these days.

THE COURT: The question now is as to the admissibility of this proof that the last boxes counted were those that have just been named. I do not at present see the materiality of it, and yet it may be material. I will let it stand.

EDWARD C. MARCUS, recalled.

BY MR. MELNIKER:

Q. Will you refer to your records and tell us the boxes counted at the table where you were tallier on the 19th of January?

MR. COLLINS: I object to it. I think counsel ought to tell us why. We are in the dark.

THE COURT: What is the object of the question?

MR. MELNIKER: I do not mind telling. We

want to show that the boxes that were counted on those days were counted before a court that was not legally constituted.

MR. WALSCHEID: He desires to show the boxes that were counted after your Honor ceased to be a justice of the supreme court.

THE COURT: Oh! That is what you are driving at.

MR. HENDRICKSON: Take it right from his record.

THE COURT: I supose they will take this gentleman's statement. I do not suppose there will be any trouble about it.

MR. COLLINS: What were those dates?

MR. MELNIKER: 19th, 20th and 22nd.

THE COURT: The 19th I will exclude evidence of. I was in office until midnight of the 19th.

MR. COLLINS: That was Friday.

THE COURT: Friday; I was in office until midnight that day.

MR. COLLINS: And the 20th and 22nd, that was Saturday and Monday.

THE COURT: That you may prove. Tell us what districts were counted on the 20th and 22nd.

A. I made no note of the districts that were counted on the 20th and 22nd of January.

Q. Will you tell us the boxes you counted on the last day of the recount? A. I cannot tell you the exact number.

Q. Then start at the last and go back and tell us the last you counted? A. The third of the third, West New York.

THE COURT: What difference does it make what special boxes were counted? The fact is conceded that certain boxes were counted when I was not in office.

MR. MELNIKER: I would like to get it in the record.

MR. COLLINS: If those boxes would not have any difference in this result it may be one thing; if they would, it might be another thing.

THE COURT: I do not see how that would affect it any.

MR. COLLINS: Suppose these were counted at a time when it would not make a difference—

THE COURT: Oh, in that way it might help you. I do not see how it would help the other side, aside from the mere fact that it went on at a time when I was out of office and there was a gap, so to speak.

Q. How many boxes did you count on the last day? A. I do not remember.

Q. Just tell us the last box that was counted? A. The last at the table I was working at was the third of the third, West New York.

THE COURT: We can be pretty sure, gentlemen, that for the purposes of this inquiry I am not going to let this matter interfere at all. I am going to assume that I have just as much power as I ever had, and I have had it continuously.

Q. What district did you count before that one? A. The second district, third ward, West New York.

Q. Before that? A. The second ward, fourth district, West New York.

Q. And before that? A. The second ward, second district, West New York.

Q. Were all those done on the same day? A. I don't know.

Q. Did you do more than one on that day? A. Yes.

Q. How many? A. I don't know how many we did on that day.

Q. Did you do two? A. Probably three; probably four.

Q. Now go back. What was the one before the last one you have mentioned that you counted?

THE COURT: Aren't we getting away from the time?

MR. MELNIKER: We would not be if this gentlemen would refresh his memory.

THE WITNESS: I am trying to help you as much as I can.

MR. MELNIKER: He knows what boxes were counted; be can tell us.

MR. HENDRICKSON: You do not see any dates on there, do you?

MR. MELNIKER: No, but I know, and he knows, how many were counted each day.

A. Yes; we counted seven one day and probably the next day.

Q. What was the one before the last one? A. Third ward, fourth district, West New York.

Q. The one before that? A. First ward, second district, West New York.

Q. This was on Saturday? A. This was on Saturday, you say?

Q. Yes. A. I don't know.

Q. What was the last day that you counted? A. The last day that we counted was Monday.

Q. And you say you counted three or four on that day? A. Three, and probably four.

Q. On the Saturday before that how many did you count? A. Well, we generally averaged on a Saturday three boxes.

Q. You did about three on that day? A. About three on that day, yes.

PAUL SEGLIE, recalled.

BY MR. WALSCHEID:

Q. Are you now holding the office of Boulevard Commissioner of the County of Hudson?

MR. COLLINS: I object to that.

THE COURT: It is perfectly immaterial.

MR. COLLINS: It has nothing to do with this controversy.

MR. WALSCHEID: What I desired to show was that he qualified and took office on December 6, and that he is now in office.

THE COURT: We will presume that he took office and qualified at the proper time. It has not anything to do with the case.

MR. WALSCHEID: I would like at this time to have this box of the second district, tenth ward of Jersey City opened.

THE COURT: How long are you going to take about it?

MR. WALSCHEID: I think we ought to examine those ballots. Those are the ballots which Dolan said—

THE COURT: You want to examine all those ballots?

MR. COLLINS: You could not look at every ballot and see if—

MR. WALSCHEID: See if there are any with three crosses—look at the condition of those crosses.

MR. COLLINS: Mr. Kane said that he saw him make motions twice, and of course he could not have had any object in making a motion that I can think of unless it was to give Ackerman a vote, or else to put three on so that it would be rejected, and they had two which were held for examination and

they are going to argue that those were the ones which he must have manipulated.

THE COURT: One of those impressed me very strongly as having been tampered with.

MR. COLLINS: What?

THE COURT: One of those ballots they showed me I am pretty sure had been tampered with. The other one I am inclined to think has been tampered with. I am willing to go through the process of examining these ballots and see if there are any other signs of this work, but I am not willing to open the ballot box unless it can be finished now, and I do not see any possibility of doing it before quarter of one. I am not going to have these ballot boxes open and closed in a hurry.

MR. WALSCHEID: No; it could not be done in that time.

THE COURT: Have you any further evidence to-day?

MR. WALSCHEID: I do not think so.

MR. COLLINS: Do I understand that that concludes your evidence except the opening of the boxes?

MR. WALSCHEID: Practically. There may be some little thing that I have forgotten, but it concludes the evidence.

MR. COLLINS: But I mean generally.

MR. WALSCHEID: Generally it concludes the evidence.

THE COURT: Let the ballot boxes be taken back to the prosecutor's office.

MR. WALSCHEID: How about those sheets? We got those out of the prosecutor's vault. This has been opened, you see; it is in evidence; it won't be necessary to seal this again?

THE COURT: No; that does not have to be sealed again.

Colloquy.

MR. COLLINS: This I presume should go—

THE COURT: They want me to see it because they think they can persuade me that the recount was not a recount of the ballots as they were on election night. That is the question. Now I am going to ask some of you to keep these for me. This I ought to keep myself; that order revoking the certificate that you handed me perhaps you would better keep until later. I have the statement of the result of the recount which somebody produced to me, and which I have kept.

We will stand adjourned until next Saturday (Feb. 10, 1917) at 10 o'clock.

THIRD SITTING.

Jersey City Court House, February 10, 1917.

MR. JUSTICE SWAYZE: Now, Mr. Walschied, did you have some further testimony?

MR. WALSCHEID: Yes, sir. We wanted to open that one box and it is not here yet.

MR. JUSTICE SWAYZE: I suppose the box is in the possession of the Prosecutor?

MR. WALSCHEID: Yes.

MR. JUSTICE SWAYZE: Mr. McCarthy, will you send an officer to get the box Mr. Walscheid wants?

MR. COLLINS: If the Court please, I haven't had much knowledge of the facts and Mr. Doherty has not come yet, and Mr. Hendrickson.

MR. JUSTICE SWAYZE: Yes; we would better wait a little while.

(Interruption.)

MR. WALSCHEID: Now so as to save pos-

sible objection and thus save time, the testimony which I would like to produce now is a sort of a tabulation of the results which I think your Honor would have been able to see upon inspection of these various ballots. The tabulation has been made, as I understand, by Mr. Melniker and deals largely with these three-cross ballots, the number of them which were cast, and it is—

MR. JUSTICE SWAYZE: Of course the tabulation is not evidence unless its accuracy is conceded. Mighty convenient for the court, but it surely is not evidence.

MR. WALSCHEID: Mr. Melniker, will you state to the court what you have done, so that we understand and thus save time?

MR. MELNIKER: Well, from about the time we started to count Jersey City—no, started to count Hoboken—it was after a question came up before your Honor one morning about the three-cross ballots and I started to keep a tabulation of them and there was also kept by the talliers, and I got a total of 146 for Ackerman and 193 for Seglie.

MR. JUSTICE SWAYZE: That is that were rejected because of three crosses?

MR. MELNIKER: Yes; not counted because of three crosses.

MR. WALSCHEID: It was those ballots that you wanted to get evidence on. You want to put in evidence a tabulation of those ballots?

MR. MELNIKER: Merely to get the result.

MR. COLLINS: I object.

MR. JUSTICE SWAYZE: Merely amounts to Mr. Melniker's interpretation of the thing.

MR. MELNIKER: Merely a result.

MR. WALSCHEID: Thus he has a ballot, No. 4, 5th District of the 3rd Ward of Bayonne.

If there was such a three-cross ballot—

MR. COLLINS: Could not possibly be legal to have his say-so, your Honor, instead of seeing the ballots; and furthermore, he didn't do it all himself.

MR. WALSCHEID: He did it himself.

MR. COLLINS: No, no; other people did it for him.

MR. JUSTICE SWAYZE: It doesn't seem we ought to do it. The only thing that would be evidence would be the ballots themselves, and I am not willing to go through this whole thing and pick out—

MR. MELNIKER: No, if the Court please, those ballots are not mixed up with the rest of them. They have been separated and they are all kept in separate envelopes. They were held out after that day under your directions, and what I have here is merely the calculation—a mathematical calculation.

MR. JUSTICE SWAYZE: For the convenience of the Court?

MR. MELNIKER: Just the calculation.

MR. COLLINS: I cannot concede it.

MR. JUSTICE SWAYZE: They will not concede the calculation. I overrule the offer.

MR. MELNIKER: We do not insist upon it as a legal offer. Merely a matter of convenience. We can do the same thing by producing the talliers to produce those ballots.

MR. HENDRICKSON: Is not the Court going to look over the ballot?

MR. JUSTICE SWAYZE: This is not a trial of quo warranto, you know.

MR. MELNIKER: No, but the question does arise as to whether or not these ballots should be counted.

MR. JUSTICE SWAYZE: I have seen those ballots.

MR. COLLINS: He has seen them all.

MR. WALSCHEID: That question would now properly arise upon application for certiorari, I suppose, and there your reference might be material, if we made such an application. I think upon the recount it would be merely a tabulation.

MR. JUSTICE SWAYZE: My present ruling is that I decline to receive this tabulation and I decline to re-examine these ballots.

MR. MELNIKER: Your Honor refuses to count them?

MR. JUSTICE SWAYZE: I won't do that. The only way to count ballots is to count what you see. That has been done. The question now is whether I am satisfied that the ballots which have been recounted, are the ballots cast at the election. If they were I am bound to certify. If they are not, I will not.

MR. MELNIKER: Isn't there a further point? The law requires in case of dispute that your Honor shall pass upon the ballots.

MR. JUSTICE SWAYZE: I have passed on every ballot that has been presented to me.

MR. MELNIKER: Take the case of the three-cross ballots, your Honor has to rule upon them.

MR. JUSTICE SWAYZE: Haven't I consistently refused to count them?

MR. MELNIKER: That is the position your Honor takes upon those three-cross ballots, they are not to be counted?

MR. JUSTICE SWAYZE: I do not see how I can count them under the statute. Whether the situation is such that I believe both ballots

have been tampered with is a very different question.

MR. MELNIKER: That is not the point I am raising now. The only point is whether your Honor has not the power, even though the law says that only two candidates shall be voted for, to count those ballots if it is apparent that the law is unconstitutional—

MR. JUSTICE SWAYZE: You are going to raise the point that the law is unconstitutional?

MR. MELNIKER: And that your Honor should disregard it and count those ballots.

MR. JUSTICE SWAYZE: I decline to entertain that on this proceeding. I do not think a mere election officer would be justified in declaring a law unconstitutional, and that is all I am. I might as well sit down there on the floor and make a judge of the election as be exalted here because I hold a commission which virtually makes me designated as this court.

MR. MELNIKER: That is the point.

MR. JUSTICE SWAYZE: I will decline to declare it unconstitutional.

MR. WALSCHEID: I think here are some other points that your Honor might rule on without putting the witness on the stand and thus save time.

MR. MELNIKER: Now, we reserved the right at various times during the recount to make application, should circumstances warrant it, to have certain boxes recounted where our tally disagreed with the official tally, and I intimated then that if the result would not be affected I would not press it. I think

now it would be, and I think your Honor ought to permit those boxes to be recounted.

MR. JUSTICE SWAYZE: I decline to recount any box.

MR. MELNIKER: That applies to those districts where we claim merely there was a difference. Now, there are two districts where I think your Honor might rule differently and I think the situation is different.

One is this box where Judge Clark testified that the tally sheet had been changed over night. Now, the best proof of that are the ballots themselves. That is something that would have been before your Honor, if your Honor had been participating and actually present in the recount; and whether or not that is so your Honor can satisfy himself beyond any question by counting those ballots—the best proof and the best corroboration. I think that that box ought to be recounted I think that clearly is outside of the reasoning on the others.

MR. JUSTICE SWAYZE: Made a difference of one vote, didn't it?

MR. MELNIKER: Yes.

MR. JUSTICE SWAYZE: I decline to recount that box.

MR. MELNIKER: In the 3rd District of the 10th Ward where Mr. Jones testified that there were a group of tallies of five added, making Ackerman 96 where our tally was 91—a rather extraordinary circumstance under which that occurred. We ask the box be recounted, because that will be the best evidence in the world as to whether our accusation there is true. Then, if it is true, then there clearly was a case of fraud—it could not be

a mistake—and that is a situation which your Honor would have had come under your personal supervision and notice if your Honor was present, and that is the box, which is itself evidence as to whether or not Mr. Jones was telling the truth, and we ask that box be recounted as a mute witness, whether this thing occurred or not.

MR. JUSTICE SWAYZE: I decline to recount that box.

MR. MELNIKER: Now, in the 5th District of the 1st Ward of Bayonne, your Honor may recall on the first day that we appeared, we disputed ballots and called attention to the fact that two members of the County Board had passed upon ballots, refused to count them —they were Seglie ballots—when they had been smudged. Your Honor had counted such ballots and ruled those were erasures. At that time Your Honor permitted me to reserve the right to have those recounted if it should become material. I think now that those ballots will become material and I think that box ought to be recounted.

MR. JUSTICE SWAYZE: I decline to recount that box.

MR. MELNIKER: That is all.

MR. WALSCHEID: Then the only thing we wish to do now is to open this particular box and go through that, and having done that, we will then rest.

MR. JUSTICE SWAYZE: Who has the keys?

MR. HENDRICKSON: These both are one district.

MR. JUSTICE SWAYZE: They are produced from the office of the prosecutor.

MR. HENDRICKSON: 2nd of the 10th. This is Kane's district, isn't it?

MR. MELNIKER: Yes.

MR. WALSCHEID: We might do that, if satisfactory to your Honor, out of your presence.

MR. JUSTICE SWAYZE: Oh, I guess as long as it will depend on me I will stay on and see it.

MR. MELNIKER: Only take a few minutes to do it.

MR. JUSTICE SWAYZE: Here are the keys produced by the County Clerk's office.

Two ballot boxes opened. Box marked No. 2 opened first.

MR. JUSTICE SWAYZE: Now, gentlemen, there is a bunch of ballots. What is it we are going to see here?

MR. MELNIKER: The three crosses.

MR. WALSCHEID: Mr. Melniker is going to look for three-cross ballots.

MR. JUSTICE SWAYZE: You are showing me that on the face they appear to be altered?

MR. MELNIKER: Yes.

MR. WALSCHEID: As I understand, where the three-cross ballots appear they were counted blank for Boulevard Commissioners and put back into the box.

MR. JUSTICE SWAYZE: Yes.

Mr. Melniker spreads out all the ballots on string.

Mr. Melniker takes ballots from box marked "No. 1" and spreads them out on table.

MR. WALSCHEID: We have a number of ballots.

MR. HENDRICKSON: He seems to want to separate them.

MR. MELNIKER: I only picked out those that I think were important.

Colloquy.

MR. JUSTICE SWAYZE: Mr. Melniker had the floor and he may offer anything he wants.

MR. WALSCHEID: Here is a ballot right here, which the other side say that these marks were made with an entirely different pencil, and if a man were marking those ballots as was described by those witnesses, when he could not exactly see where his markings would go, it would be only natural he might put in a lot of crosses so as to invalidate the ballot if he saw the name of Seglie on it. Your Honor will notice this pencil was a scratchy pencil, in that "Seglie" for instance. For instance, through the center of the line there is a white place, indicating that only two sides of the pencil were writing and the center was not writing.

This seems to have been made with the same pencil, and this was a hard pencil. When your Honor goes to look at these pencil marks, they were all made with a very soft pencil. That ballot has been tampered with, to my mind.

Now, I desire to show to your Honor—that is ballot No. 81.

MR. HENDRICKSON: I will call your Honor's attention first to the facts that were actually testified to. I picked this ballot out to show your Honor the careless voting.

Now this man did testify that this man Dolan, whom they charged with fraud, in this instance, in connection with this box, had a pile of ballots before him, some of them down and some of them keeping them up. It would be impossible for him with any kind of pencil, I hold, to make that kind of a mark and as many marks as that while he was

holding the one ballot. In other words, the sheets under him would make such a cushion it would be impossible for him to make as clean-cut marks as that, and in the second place, he would not have time.

Now, I will take Mr. Walscheid's same point, that he says that this man was doing it without half looking. I would like to see the man that could put five marks in this box as straight as that without half looking where he was putting his pencil.

MR. JUSTICE SWAYZE: I have your point.

MR. WALSCHEID: If your Honor will look at that—see, a pencil mark. Look at this ballot. Your Honor will see here there is a cross before Asmus, in under there in light pencil such as this pencil. Now, again in hard pencil. Then for some reason there is put over this Asmus a cross with a heavy black pencil, the lead in which is of the same consistency as in the ballot just referred to.

MR. COLLINS: What would be the object?

MR. WALSCHEID: This man is writing under a pile of ballots and he is attempting to invalidate ballots and he cannot see.

MR. COLLINS: He has not invalidated.

MR. WALSCHEID: I consider the fact that there are two crosses in Asmus, one in light lead pencil and the other a heavy lead pencil, the fact that this ballot has been tampered with—

MR. COLLINS: He didn't invalidate it.

MR. WALSCHEID: I don't care. He has successfully tampered with the ballot after it came out of the box.

MR. COLLINS: That is 116.

MR. MELNIKER: Those were a little bit off the issue.

Here is a ballot I claim is certainly marked for Ackerman by some one other than the one who marked the ballot.

MR. COLLINS: He wasn't trying to invalidate it.

MR. MELNIKER: There was a blank, I say. Commissioner had not been voted for, and there was a favorable opportunity to put the vote in for Ackerman. I want you to notice this No. 6 I will call your attention to in a minute.

There is another one. They were the kind of crosses this man made—small, narrow. See all of them. Look at that one—different color, shade of pencil, and different character, different size. Hasn't got another cross on his ballot like that. I call your attention to that number, 14. Here was another one that was clearly invalidated. See the cross he made. All these crosses are distinctive. You can hardly find between this man's crosses and the crosses he made—it is different. There are twelve more. Right down to the end one. All the same almost. There is not a hair's breadth difference between them. And look at that. Just turn it right around and take a good look at it. See the difference between them.

MR. COLLINS: Which one? I can't see it. It is imagination.

MR. MELNIKER: The number is 17.

This one is not for Ackerman and Seglie—a different class. What is there different—the shade and color and the crossing on the ballot. It is suggested that that takes the force out of our argument, but it doesn't, because this man had merely miscued. He

thought it was a Seglie ballot. He was working at a disadvantage. He was working under a lot of ballots. I do not have to assume it was a different cross.

MR. COLLINS: I can't see what the object was to vitiate that ballot. How can you possibly tell?

MR. MELNIKER: Here are three that I cannot see any difference between, I must admit that. Now, the point about those numbers. There was 6, 14, 17. Your Honor, those happened just after the boxes were opened; they were the first ballots that were laid out on the table and naturally they were the ballots that this gentleman was operating on. They are the last ballots on the string. They were the first strung, and the numbers indicate the very beginning of the count.

MR. HENDRICKSON: How many votes were on that string?

MR. JUSTICE SWAYZE: Wait.

MR. MELNIKER: 8 and 15 were the two that were so distinctively marked that your Honor took note of it, and that is before I pulled those ballots out, before I knew or had any intimation there had been any tampering with those ballots. They were clearly marked. So were 6, 8, 14, 15, 17.

MR. WALSCHEID: Those ballots that he produced here the other day were not ballots which this man was actually caught marking. He was caught marking much later.

MR. MELNIKER: He was caught marking these, but I didn't know he had been caught marking—I didn't know it until the day afterwards, and I pulled those two ballots out. I was out of the room when the argument was opened.

MR. COLLINS: This occasion when it was said he was marking there was a big mass of ballots on the table.

MR. MELNIKER: About fifty he said.

MR. HENDRICKSON: I want to call Mr. Melniker's attention and the Court's attention to the fact that if there were a hundred ballots on that first string of ballots what would be first counted would be ballots 100, 99, 98 and so forth; that they always pull the button off of the lower end and the counting began from the back end of the string.

MR. MELNIKER: I take issue with that.

MR. HENDRICKSON: I have two ballots here which the Court will see the marks on Seglie. I just happened to pick them out of the box, and that all these charges are ridiculous and wasting the Court's time. That one and this one is entirely different from the rest—out of this same box. In that case the Seglie mark is different from the rest of the ballot. I say it is different from the rest of the marking, just as much different as yours were.

MR. COLLINS: Those two are different.

MR. JUSTICE SWAYZE: Wait a minute. Let me look at this. This man didn't want to be voted. He voted for the electors and assemblymen. All right.

MR. HENDRICKSON: The ridiculous markings are Democratic marks.

They also had a ballot out of this box which was a very heavy mark for Ackerman, which they alluded to with great point and at great length. There is a heavy one.

MR. WALSCHEID: It is the same pencil. Here are some more. Just the same pencil as that.

MR. COLLINS: Those were the same color to my eye.

MR. JUSTICE SWAYZE: He evidently liked to abuse Fairbanks and Seglie, because he was more emphatic in the marking.

MR. HENDRICKSON: Shows the usual carelessness of the voters. You see one of these ballots going through and you refused to count. When there were two of them you counted. It shows there was carelessness, and if there was any carelessness it was towards favoring Seglie's side of the ballots.

MR. JUSTICE SWAYZE: Now, gentlemen, these ballots ought to be put away.

MR. COLLINS: I understand you gentlemen are through?

MR. WALSCHEID: Yes. We rest.

Ballots replaced in box.

MR. JUSTICE SWAYZE: Is it possible to go ahead with your argument while—

MR. COLLINS: We rest.

MR. JUSTICE SWAYZE: The matter is closed excepting you gentlemen want to say some thing. Do counsel want these ballots strung again or will it suffice to put them back in the box?

MR. WALSCHEID: I do not believe that it is of any consequence to us at this time, unless the prosecutor—

MR. JUSTICE SWAYZE: I don't know. There may be *quo warranto* for all I know.

MR. MELNIKER: I suppose it might be well to string them.

AN ELECTION OFFICER: We will seal the box just the same.

MR. JUSTICE SWAYZE: Then it is agreed they shall not be strung.

The officers return ballots to box.

MR. DOHERTY: I will recall Mr. Morrow.

JAMES F. MORROW, recalled.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Mr. Morrow, last Saturday you testified that you were a member of the election board of Hoboken; what ward and district? A. 7th district, second ward.

Q. You recall your testimony that you put in the box at the conclusion of the election all the paraphernalia; do you recall that testimony? A. Yes; all that I seen around.

Q. Did you afterwards make any investigation to ascertain whether you had as a matter of fact put all the paraphernalia into the box? A. Well, I didn't investigate that until last Saturday when I believe there was some ballots missing from the box.

Q. Then what did you do as the result of that information? A. I went down to the polling place and asked the man that owns the store if he had found any ballots and he said, "Why, yes," he says—I says, "Have you got them?" He says, "Yes," and handed me out the bundle.

Q. Where is that bundle? A. He said he had used some of them for packing purposes for packing of tobacco.

Q. How many are in that bundle? A. I think there is thirty-six.

Q. Have you counted them? A. Counted thirty-six.

MR. JUSTICE SWAYZE: Is that the district where the ballots were missing?

MR. DOHERTY: From 243 to 284. There were forty-one ballots missing and we now produce thirty-six of them. That is all.

MR. WALSCHEID: I ask that this evidence be stricken from the record, on the ground

your Honor could not have seen these at the time when the votes were being recounted.

MR. MELNIKER: Oh, no, let it in.

MR. COLLINS: If they prove—

MR. WALSCHEID: I will withdraw the objection.

MR. COLLINS: Only goes to show how many mare's nests there are.

MR. DOHERTY: If we knew how to direct our diligence we would go after the packages that the barber wrapped the stuff up in.

MR. JUSTICE SWAYZE: Is that all?

MR. WALSCHEID: No; I want to ask some questions. We want to see what he produced first.

BY MR. JUSTICE SWAYZE:

Q. Did you look at these ballots? A. Just to count them.

Q. Are there any marks on them? A. Just turned the corners over and counted them.

CROSS EXAMINATION BY MR. WALSCHEID:

Q. Now what district is yours? A. Seventh district, the second ward.

Q. Second ward of Hoboken; and when you testified here—you came in response to a subpoena, didn't you? A. Yes.

Q. And you went upon the stand here and you gave us what was then your best recollection, didn't you? A. Yes.

Q. How long had you been an election officer, for how many years? A. Well, about seven years.

Q. For about seven years you have acted as an election officer. During those seven years how long have you been judge of an election? A. I think about six times.

Q. Six years that makes; is that right? A. Yes.

Q. You knew, of course, that it was your duty at the conclusion of the count—

MR. DOHERTY: I object to it as not cross-examination.

MR. WALSCHEID: I have not finished the question.

MR. JUSTICE SWAYZE: I think it is cross-examination.

Q. —that it was your duty at the conclusion of the count to put the unused ballots back into the box before sealing? A. I understand that to be true.

Q. And you testified positively here upon your direct examination that you did put them in, didn't you?

MR. COLLINS: I object. The testimony is the best thing for your Honor to look at.

MR. JUSTICE SWAYZE: I will permit it. Cross examining counsel are not limited in that way.

A. I testified I put everything in the box that was around that I seen—should have gone in the box.

Q. You were specifically asked to refresh your memory. You were specifically asked in reference to the unused ballots and you said you put them into the box? A. All that was there, I said.

Q. All that was there? A. That I seen.

Q. And you also said that none of them had left your sight during that day? A. Yes.

Q. Is that right? A. Yes.

Q. And that is now still your recollection that you put them all into the box, isn't it? A. All that I seen; all that came within my reach; I might have mislaid thirty-six.

Q. You had not handled them? A. I was practically positive everything was in the box.

Q. You knew that they were all in one place as you testified? A. All in one place.

Q. All in one pile? A. One pile.

Q. And that batch of ballots at the conclusion of the count you are positive you put into the box, aren't you? A. All that I seen there.

Q. Well, that pile of unused ballots you put into the box, didn't you? A. I took—

Q. Yes? A. Well, I took them—

MR. JUSTICE SWAYZE: He says he put in all that he saw.

A. I couldn't—oh, yes, I says I had many different piles of them, packages of them, and go to the box and put them in and I was pretty sure that all the ballots that were in that pile went into the box.

Q. So you even have a recollection of picking up piles in the separate bundles and putting them in? A. Positively. I had to do it.

Q. After you left the stand here last Saturday who was the first person that you spoke to about these ballots? A. Well, I guess my colleagues on the board.

Q. They were sitting there with you, weren't they, in the court room? A. Yes.

Q. And they agreed with your testimony that you had put them in the box, didn't they?

MR. COLLINS: I object.

MR. JUSTICE SWAYZE: I will exclude that.

Q. Who was the next person after that that you spoke to about the ballots, these unused ballots? A. Well, after leaving the election officers and getting off the car in front of my door I walked into the place where they held the election, seventh district of the second ward.

Q. You went right to that place? A. Yes.

Q. Why did you go to that place? A. To find out if there were any ballots there, if he had found any.

Q. What made you go there? A. Well, you said you were forty-three ballots missing from the box; I went up to the barber, the only place to find out.

Q. And you found them there? A. Yes.

Q. What time of the day? A. Oh, one o'clock —about one o'clock.

Q. Whom did you inquire of? A. The barber himself, the boss.

Q. What is his name? A. His name is Tony Alesee.

Q. What address is that? A. 1312 Washington street.

Q. Where did he have these ballots? A. Well, I didn't just see where he took them out—of some show case he had there.

Q. Pulled them out of a show case? A. Somewheres underneath the show case.

Q. They were rolled up? A. Rolled up, yes.

Q. Were they tied up in brown wrapping paper? A. No, sir.

Q. Were they tied up with string? A. Nothing on them at all.

Q. All rolled up? A. Just the same you seen them there.

Q. And put away? A. Put away.

Q. In a show case or under the show case? A. Underneath the show case. Pulled them out of somewhere.

Q. Was there a door or drawer under the show case? A. I couldn't say. I was standing on this side of the counter and he was on the other side and took them out.

Q. You received the ballots then? A. Yes.

Q. Did you count them? A. Counted thirty-six.

Q. Did you notice the rotation of them? A. Didn't notice anything; turned the corners of the ballots over and counted them.

Q. Did you bring them here in the same rotation in which they were? A. Same way I got them.

Q. Same way you got them? A. Yes.

Q. Do you know which ballots were missing? A. No, sir; I do not.

Q. You do know that some were missing? A. Well, from forty-three. If there was forty-three ballots there must be nine missing.

Q. Who wrapped them up? A. I did.

Q. Where did you wrap them up? A. In my own house.

Q. Whom else did you see to talk to about these ballots before you brought them up here? A. I seen nobody practically.

Q. Nobody? What do you mean by practically nobody? A. Well, I didn't go running around to anybody to tell them about it.

Q. Did anybody come running around to you? A. No.

Q. Eh? A. Nobody.

Q. Did anybody come to visit you at your house? A. No; I went to see Mr. Verdon and I told him I had found the ballots.

Q. He the first man you went to? What Verdon is that? A. William P. Verdon.

Q. How soon after you found the ballots did you go to William P. Verdon?

MR. DOHERTY: I object to it at this time as not proper cross-examination.

MR. COLLINS: Can't see the motive.

MR. DOHERTY: Something that happened outside—

MR. WALSCHEID: Don't suggest when it happened.

MR. JUSTICE SWAYZE: Do not make any suggestions. I think I will take the testimony. I do not see the bearing, but it may have some.

A. On the Sunday.

Q. On the Sunday? A. Following.

Q. Why did you go to him?

MR. DOHERTY: I object.

MR. JUSTICE SWAYZE: Well, aren't we going rather far, Mr. Walscheid? I presume your idea is that he is a political leader and this gentleman is interested perhaps on that side.

MR. WALSCHEID: I withdraw the question, sir.

Q. Did you talk to anybody else on that Sunday about these ballots? A. No, your Honor, only I told—I was talking to one of my colleagues on the board and told him about it, that I had found the ballots.

Q. Which one was that? A. Millard.

Q. What is the name? A. William Villard.

Q. That is the only one of the election officers you did talk to in connection with this matter? A. Yes.

Q. Do you remember about what time it was when you left the stand here on last Saturday? A. I do not.

Q. You arrived at the barber shop by one o'clock Saturday, did you? A. Yes.

Q. You didn't think of going any place excepting that barber shop for these ballots? A. Then I was going home; it was right next door to me—two doors away from me.

Q. So you went in the barber shop? A. I stepped right in and asked him.

Q. Did you give the ballots to the barber? A. Beg pardon?

Q. Did you give the ballots to the barber? A. Did I give the ballots?

Q. Yes. These ballots? A. Why, no.

Q. Did you see him take them from the table during the election? A. No, sir.

Q. Did you see anybody take them from the table? A. No, sir.

Q. Do you know how he got them? A. Didn't; only he said he found them.

Q. Where did he say he found them? A. He said he found them on the floor. They have a box there he keeps tobacco; he found them between the box and sort of platform the window is on.

Q. Uh, huh! They were down there rolled up, did he say, or what did he say? A. I don't know how they were. He told me he found them. I don't know what condition he found them.

MR. WALSCHEID: I desire to call your Honor's attention in relation to these ballots, that they are the ballots that are missing: 440, 441, 442, then 445, then 450, then 461 and 462, and then 473, and that otherwise they seem to run in consecutive numbers. That is all.

RE-DIRECT EXAMINATION BY MR. DOHERTY:

Q. What time did they finish up the election work? A. On the election morning?

Q. Yes. A. Around two o'clock.

Q. In the morning? A. Yes.

Q. Where do you live, Mr. Murray? A. 1316 Washington street.

James F. Morrow—Re-Direct.

BY MR. WALSCHEID:

Q. What kind of business are you in? A. I am machinist helper, Tietjen & Lang Dry Dock Company.

MR. DOHERTY: Is Mr. Dolan here?

MR. WALSCHEID: I would ask these ballots be impounded.

MR. JUSTICE SWAYZE: Why should that be necessary? What are the facts you want to show; that certain ballots are missing and not in consecutive order?

MR. WALSCHEID: I think that might be of some value in future proceedings. Of course, I do not mean it for the purposes of this case, sir.

MR. JUSTICE SWAYZE: No.

MR. WALSCHEID: Or for the purposes of this hearing. I suppose as a matter of fact, therefore, I have no right to make the application.

THE COURT: I do not think I would do it. I suppose your suggestion is that perhaps it was a violation of law in not putting the ballots back in the box.

MR. WALSCHEID: If that is what happened.

MR. JUSTICE SWAYZE: Suppose it was a violation, an oversight, perhaps.

MR. WALSCHEID: Inadvertent violation.

MR. JUSTICE SWAYZE: I won't impound them.

MR. HENDRICKSON: Off the record I would like to call your attention to the fact that they were not in their regular order when found.

MR. WALSCHEID: They were in their regular order in which they were presented here.

THOMAS DOLAN, sworn.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Mr. Dolan, where do you live? A. City of Hoboken.

Q. Did you take any part at all in the recount of the Ackerman-Seglie vote? A. Yes, sir.

Q. What did you do? A. Well, I was there just—sent there by Mr. Verdon to watch out for the recount.

Q. To watch out in what particular? A. Well, just to look around, you know; to assist the counsel if I could.

Q. At any time were you engaged in the examination of the ballots there to inspect them? A. Yes, sir.

Q. In respect to that vote? A. Yes.

Q. Were you so engaged during the recount of the box of the Second District of the Tenth Ward of Jersey City? A. Yes, sir.

Q. During the recount of the ballots from that district did you have a pencil in your hand during the examination of the ballots? A. No, sir; I never carried a pencil.

Q. Did you at any time mark any ballots? A. No, sir.

Q. In that district? A. No, sir.

Q. Or any other district? A. No, sir.

Q. Did you see Mr. John Kane there during the progress of that recount? A. Well, Kane—the man with the keys for the box?

Q. Yes. A. Yes, sir.

MR. JUSTICE SWAYZE: Speak louder.

Q. During the recount of the votes in that district to which I have referred did Mr. Kane at any time come there to you and seize your hand and use the words, "I want you to stop that"? A. No, sir. No, sir.

Q. Did Mr. Kane at any time accuse you of having tampered with any ballots? A. No, sir.

Q. Or having marked any ballots? A. No, sir.

Q. Did you hear anything respecting an accusation of that kind by Mr. Kane against you elsewhere? A. Yes, sir.

Q. What did you do when that information came to you? A. Why, I—that was the next day and I went to Mr. Kane in the hall—he was coming through the hall and I was standing there with Mr. Coyle, the man that takes down the boxes down stairs, and I asked Mr. Kane, I said then to him, "Did you say that I marked any ballots or attempted to mark any ballots?" He says, "No, no, no. Who told you that? Who told you that?" I says, "That is what I heard." He says, "No, no; nothing to it."

Q. Who was present then? A. Mr. Coyle.

Q. During the counting of those ballots where were you sitting, what part of the table? A. There is where they were opening the ballots and I was sitting here and Mr. Melniker sits there.

Q. In respect to your position where did Mr. Melniker sit in front of you or back of you? A. Alongside of me.

Q. Which side? A. On the left-hand side.

Q. Who was on your right side? A. On my right side, the two men that opens the ballots.

Q. Who sat in front of you? A. The two clerks, Mr. Allen and the other man.

Q. Did you see any gentlemen there who were present in the interest of Mr. Seglie? A. Oh, yes.

Q. Supervising the recounting? A. They were always there.

Q. They were there during the recounting of this particular box? A. Yes; they were always there to my knowledge.

Q. How many of them, when they were there?

A. That I couldn't say exactly.

Q. More than one? A. That I couldn't say, how many was there. They were always there, all the time.

Q. That's all.

CROSS EXAMINATION BY MR. WALSCHEID:

Q. Where do you live? A. City of Hoboken.

Q. Where in the City of Hoboken? A. In 717 Clinton street.

Q. Are you married? A. Yes.

Q. Live there with your wife? A. Yes.

Q. What is your business? A. Park keeper.

Q. Park keeper of the City of Hoboken? A. Yes.

Q. How long have you been park keeper? A. Two years.

Q. Who asked you to take part in the recount? A. Mr. Verdon sent me there.

Q. Whose interest were you to look after. A. Mr. Ackerman.

Q. Did you start in on the recount? A. Yes.

Q. From the beginning? A. Yes.

Q. And stayed through to the end? A. Yes

Q. What did you do during the course of the recount? A. Well, just walked around and whenever a counsellor would leave the room or step out in the hall he asked me to take his place.

Q. And you took his place? A. Yes.

Q. Whenever a counsellor would leave the room; by that you mean an Ackerman counsellor, you took his place? A. Yes.

Q. At the table? A. Yes.

Q. And watched ballots? A. Yes.

Q. Objected to ballots? A. No; when I would object I would call the counsellor in from the other room all the time.

Q. You would object and call somebody in? A. Yes.

Q. So that you took part in a considerable portion of the actual counting of the ballots? A. Yes.

Q. And at other times you stood there or at the table watching the counting, didn't you? A. Oh, I stand around the table, yes.

Q. You would also sit at the table, wouldn't you, while the counsellors were there? A. No, sir.

Q. Didn't you ever help pile up any ballots? A. No, sir.

Q. Making them ready for counting? A. No, sir.

Q. Did you ever have any piles of ballots before you? A. Well, sometimes I would have some ballots before me, that is, when the counsellor would be out of the room.

Q. Then you would have a pile of ballots before you which under those circumstances it would be your duty to examine? A. Yes, sir.

Q. And that you did from the very beginning to the end of the recount? A. Only when the counsellor was absent.

Q. Yes, when the counsellor was absent. Do you remember the day on which Kane was there? A. Kane was always there.

Q. He was always there? A. That is, going in and out with the keys for the boxes.

Q. Do you remember what district he belongs to? A. No; I think I heard him tell one of the—the man that was opening the ballots that that was his district that day.

Q. What district was it? A. Second District of the Tenth Ward.

Q. You remember that, don't you? A. Yes.

Q. You remember he was there then? A. Well, he was standing talking to the man that opened up the ballots.

Q. You remember that Mr. Melniker was in the room on that occasion? A. When he was talking—

Q. No; on the occasion when that particular box was being counted? A. That I can't recall.

Q. You do not recall that Mr. Melniker was the representative of Seglie who was in the room when that particular box was counted? A. I don't recall that, no, sir.

Q. Now you want us to understand that when that particular box was counted that Mr. Kane did not say a word to you? A. No; he never said nothing to me.

Q. Never said a word? A. Except that he would bid me the time of day.

Q. He did not on that occasion walk up to you and say, "Don't do that"? A. No, sir.

Q. He did not on that occasion catch your eye and shake his head and say, "Don't do that"? A. No, sir.

Q. He did not walk over and catch your arm and say, "Don't do that", while you had a lead pencil in it? A. Lead pencil? I never carried a lead pencil.

Q. And you did not say to him, "If you had left me alone I would have had twenty-five more marked within the next half hour"? A. No, sir.

Q. Or words to that effect? A. No, sir; that is a lie, I never said anything like that.

Q. Did you say anything like that? A. No, sir; I never talked to Mr. Kane about it at all.

Q. Never occurred during the counting of that particular box, nothing between Kane and you? A. No, sir.

Q. If Kane testified to that it is taken out of the air?

MR. COLLINS: Testified to what?

Q. Testified to anything like that; it is taken out of the air?

MR. JUSTICE SWAYZE: If he said anything like that he is mistaken, is he?

A. Yes, sir.

Q. You are sure of that? A. Yes.

Q. Didn't you go before the County Board of Elections the next day in relation to this matter that Kane had talked about? A. Me?

Q. Yes. A. No, sir.

Q. Didn't the County Board of Elections ask you a question about it? A. No, sir.

Q. None of them? A. No, sir.

Q. Nobody did? A. No, sir. Mr. Stites, the counsellor—

Q. Nobody asked you anything about it as far as the County Board of Elections is concerned?

MR. COLLINS: Let him finish the answer.

MR. WALSCHEID: I don't want him to volunteer anything about Stites. I will withdraw the last question.

Q. What did Stites say to you? A. Mr. Stites said to me, "Did you hear that rumor going around about you marking ballots?" I said, "No." He says, "There is a rumor. You want to find out. You want to get hold of Kane and find out what he was talking about." He says, "I heard about it."

Q. That is one thing you knew about it? A. Yes.

Q. What Stites told you? A. Yes.

Q. Then you spoke to Kane? A. Yes.

Q. And Kane told you no, there is nothing to it? A. No; nothing to it, nothing to it.

Q. Just in those words? A. Yes.

Q. That's all.

ANTHONY MARONE, sworn.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Where do you live, Mr. Marone? A. 456 6th street, Hoboken.

Q. At the last election were you an election officer? A. Yes.

Q. In what ward and district? A. Tenth District of the Third Ward.

Q. Did you have an associate on that board a gentleman named Camershaw? A. Yes, sir.

Q. At the conclusion of the count there do you remember in what condition the ballots were put into the ballot box? A. Unstrung.

Q. Had they been strung during the counting? A. They were strung during the counting, yes.

Q. For what reason were they afterwards unstrung? A. We couldn't get them all in the box, so we had to unstring the ballots to put them in the box.

MR. DOHERTY: I might remind your Honor that the other election officer testified they were put in a string and they were strung and then Mr. Melniker, I think, testified when the box was opened they were unstrung.

Q. What kind of a box was it with reference to the opening or aperture that was on the top? A. Open.

Q. How large an opening was in that box? A. About that big (indicating).

Q. Can you tell us how large the opening on the top of the box was? A. Where you put your ballots in?

Q. Yes; the door in the top of the box, how large an opening was there? A. Well, it is only that large (indicating).

Q. That is all.

MR. JUSTICE SWAYZE: I wonder whether he understands the question.

Q. Was there a hole in the top of the box? A. Yes.

Q. Was it through that hole that you were trying to put the ballots? A. Yes.

Q. In the box on that string? A. Yes.

Q. And how large is the hole? A. On the box?

Q. How large is the hole? A. About that large (indicating).

Q. About seven inches? A. Well, six or seven, something like that.

Q. A square hole? A. Yes, sir.

CROSS EXAMINATION BY MR. WALSCHEID:

Q. Where do you live? A. 456 6th street.

Q. What district are you in? A. Tenth District of the Third Ward of Hoboken.

MR. WALSCHEID: Might I have the box of the Tenth District of the Third Ward? Has the Prosecutor got that box?

MR. JUSTICE SWAYZE: Better get word right away, because you will have to hurry if you are going to get it.

MR. WALSCHEID: Can we get the box of the Tenth District of the Third Ward?

MR. JUSTICE SWAYZE: What is the object?

MR. WALSCHEID: I understand it is not such a box. I have not seen it. I understand it is not such a box.

MR. JUSTICE SWAYZE: I do not think we ought to postpone or delay the examination on that ground.

MR. WALSCHEID: No; I can go ahead with my examination.

MR. JUSTICE SWAYZE: Go ahead and get the box. You do not need the keys?

MR. WALSCHEID: No.

Q. You say the reason why you unstrung the ballots was because you could not put them into the box? A. Yes.

Q. Because the hole was not big enough; is that right? A. Well, the box wasn't big enough.

Q. What? A. The box wasn't big enough.

Q. The box wasn't big enough? A. Yes.

Q. What did you have to unstring the ballots at that time for? A. We couldn't get them all in the box.

Q. You couldn't get them all through the top; isn't that it? A. Through the top.

Q. Yes. A. After the count was over.

Q. Was the top off while you put those ballots in? A. Was the top off?

Q. Yes. A. Yes.

Q. The top was off? A. Yes.

Q. So that you could put those ballots into the box although they were strung, couldn't you? A. Couldn't put them in.

Q. Why not? A. They wouldn't fit in. We couldn't get the lid in if we put them in that way.

Q. How would unstringing them give you more room? A. Because we distribute them all around the box, see, and push them down so we could—

Q. Then why did you testify here before upon your direct examination that the reason why you couldn't do it was because the hole on the top of the box was only six inches wide? A. I didn't understand it before.

MR. COLLINS: The witness didn't say that. Mr. Doherty said that.

MR. JUSTICE SWAYZE: He indicated the size of the hole and Mr. Doherty then said about seven inches, and he said yes, six or seven.

MR. WALSCHEID: As soon as we have indi-

cated to him it is a different kind of box the reason disappears.

MR. COLLINS: He didn't say he couldn't get it through that hole.

Q. Where do you work? A. I buy and sell jewelry.

Q. Where do you live? A. 456 6th street.

Q. How long have you been an election officer? A. Well, about three years.

Q. Republican or Democratic officer? A. Republican.

Q. What office do you hold on the board? A. Clerk.

Q. Who was the judge? A. Why, Roccio—I don't recall his name.

Q. Who were the other two members? A. Comiso and Anthony Perril.

Q. Were you here last Saturday? A. Yes, I was here.

Q. Which one of the officers was on the stand? A. There was no officer on the stand.

Q. Oh, yes, one of you four was called? A. No, sir.

Q. Cameshaw was called? A. Not last Saturday.

Q. Were you here when Camishaw was called? A. No, sir.

Q. You were under subpoena that day? A. I was not.

JOHN COYLE, sworn.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Mr. Coyle, were you concerned in the recount of the Ackerman-Seglie vote? A. Yes.

Q. What were your duties? A. Carrying the ballot boxes up and down the elevator.

Q. Do you know Thomas Dolan? A. Yes.

Q. Know John Kane? A. I met Mr. Kane for the first time during this recount.

Q. Were you present at any conversation between Dolan and Kane respecting the accusation on insinuations that Kane had made against Dolan? A. Yes.

Q. What was that conversation? A. Dolan called Kane over and he says, "There is a rumor going around I marked ballots and you say I done it; is that so?" Kane, "Nothing to it, nothing to it, nothing to it."

CROSS EXAMINATION BY MR. WALSCHEID:

Q. Where do you live? A. 125 Cambridge avenue, Jersey City.

Q. What do you do? A. I am a clerk.

Q. Where? A. Wherever I get work.

Q. You are not employed regularly in the County Board of Elections? A. Not as a regular clerk, no, sir. I have been employed, though, since last September for sixty days during the general election.

Box of the Sixth District of the Tenth Ward produced.

MR. WALSCHEID: I offer that in evidence and I ask your Honor to look at that hole, 6 x 7, on the top of that. The whole lid of that box comes off.

MR. JUSTICE SWAYZE: That is the box that Malone was asked about? Let him come back.

ANTHONY MARONE, recalled.

BY MR. JUSTICE SWAYZE:

Q. Is this the box used in that district? A. Yes.

Q. Where is the hole you spoke of? A. I don't know which one of the boxes it was.

MR. COLLINS: Are there two boxes? 10

Q. Did you have two boxes in that district? A. No, one box.

MR. COLLINS: That is the Third Ward, Tenth District.

MR. MCEWAN: Yes.

BY MR. WALSCHEID:

Q. Is that the kind of box you used? A. Yes, it was that kind. 20

BY MR. JUSTICE SWAYZE:

Q. Wasn't the other kind? A. Why, I don't remember which one of the two boxes.

Q. What kind of handles did the box you used have? Don't, eh, without looking? A. This is the box (indicating).

Q. This is the box? A. Yes.

MR. WALSCHEID: Pointing to the yellow box. That is all. 30

BY MR. DOHERTY:

Q. Do you think you understood that question when you were testifying about this box?

MR. WALSCHEID: I object.

MR. JUSTICE SWAYZE: I will permit it.

MR. WALSCHEID: I will withdraw the objection.

Q. Did you understand what I mean in my question? A. I didn't understand about— 40

Q. The hole we were describing was the hole in this box? A. The hole, the hole, yes.

Q. When you were putting the ballots in with difficulty—

MR. WALSCHEID: I object to it as leading.

MR. JUSTICE SWAYZE: Yes; you are leading very materially, Mr. Doherty.

Q. This is the box in which the ballots were put? A. Yes.

BY MR. JUSTICE SWAYZE:

Q. This box which is here on the railing with the brass handles at the side is the one that you used? A. Is the one I used.

Q. And the whole top opens? A. Yes.

Q. What was the trouble in putting the ballots in? A. So we wouldn't have no trouble, yes.

Q. How did you have trouble? A. When the ballots were strung, see, they come so high if we want to put them in we couldn't because we had to put the rest of the ballots in and they wouldn't fit in, so we had to unstring them and distribute them around the box.

Q. Then it didn't have anything to do with the size of the hole?

MR. COLLINS: He never said so.

A. I thought he meant that hole where he put the ballots in.

Q. You thought Mr. Doherty meant that hole, did you? A. Well, the election was going on.

Q. You thought he was referring to the hole that you put the ballots in when the box is closed? A. When the box was closed, yes.

Q. Why did you describe it as being that long? A. I thought he meant how did you get the bal-

lots in, did they have a hole in. I wanted to tell him while the election was going on we had to put them in through the top of the cover.

MR. COLLINS: He never said the reason he unstrung them he couldn't get them through that hole.

MR. JUSTICE SWAYZE: He didn't say that, but he said the hole was too small to put them in.

MR. COLLINS: Mr. Doherty got that impression.

MR. DOHERTY: I had in mind this box.

MR. WALSCHEID: You had that in mind. You led him into something bad.

MR. JUSTICE SWAYZE: All right.

BY MR. WALSCHEID:

Q. Mr. Marone, as a matter of fact, your brother has been one of the Ackerman watchers on this recount?

MR. COLLINS: I object to it as irrelevant, and not cross-examination. He doesn't know.

MR. JUSTICE SWAYZE: Well, I will exclude it.

ADOLF SCHUTTE, sworn.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Mr. Schutte, you were connected with the recount, weren't you? A. Yes.

Q. What did you do? A. Opened ballots.

Q. In which room were you employed with respect to the inner or outer room? A. The room right as you go in off the hall.

Q. The entrance room? A. Yes.

Q. In opening the ballots did you have any one

position all the time or did you shift about the table? A. Generally one position I had there.

Q. Did you open the ballots of the Second District of the Tenth Ward? A. I believe I did.

Q. Have you any recollection of that? A. Yes.

Q. Do you remember Thomas Dolan being present at that time? A. Yes, sir.

Q. You were present throughout the entire recount of that box? A. Yes.

Q. Now at any time while that box was being recounted did you see Mr. Kane? A. Yes, sir.

Q. Go over to where— A. Yes.

Q. —where Dolan was sitting? A. No, sir.

Q. Where was Dolan sitting with respect to you; how near to him? A. The table runs that way and I was standing this way, and there is a desk with all the ballots here, and this table runs that way, and Morris was over here and I opened them ballots and he turned them face down and he pushed them over.

Q. How near to you was Dolan sitting? A. Dolan was only about two and a half or three feet away from me, something like that.

Q. How near to the wall was that table placed? A. What table is that?

Q. The table at which Dolan and the Commissioners and talliers were sitting? A. Well, that is about three feet from the wall, I guess.

Q. Was the table and other furniture of that room so arranged that Mr. Kane could have gone over to where Dolan was without passing by you? A. No, sir.

Q. And did he pass you? A. No, sir; he didn't pass me.

Q. At any time during the recount of that box did he go over and converse with Dolan and seize him by the hand and say, "I want you to stop that"? A. I didnt' see nothing to that effect.

Q. What is your political inclination?

MR. JUSTICE SWAYZE: If you object to answering, of course—

A. Work on the recount.

MR. JUSTICE SWAYZE: You need not answer unless you want to.

CROSS EXAMINATION BY MR. WALSCHEID:

Q. Where do you usually work? A. I got a cafe.

Q. Got a cafe? A. Yes.

Q. Where did you have this cafe? A. Cortlandt street and the Boulevard.

Q. In West Hoboken? A. Yes.

Q. What do you do now? A. What do I do now?

Q. Yes. A. Come down here.

MR. JUSTICE SWAYZE: Oh, no; what do you do regularly for a living?

A. Take care of the place up there.

Q. The cafe? A. Yes.

Q. Still have the cafe? A. Yes.

Q. I asked you the question because you said, "I had a cafe." Still have it? A. Yes.

Q. Did you take care of the whole recount? A. Yes, sir.

Q. In what capacity? A. Opening up ballots.

Q. As a representative of the Board of Elections? A. I got there through Mr. Hopkins.

Q. Mr. Hopkins; you worked for the County Board? A. Yes.

Q. What you did was open ballots? A. Yes.

Q. Unfold them? A. Yes.

Q. After you had unfolded them you put them back? A. No; as we unfold them we turn them face downwards.

Q. In order they may be looked at they are

turned face up? A. When the counsels was sitting at the table we generally turned them over.

Q. Then he turned them over? A. Yes; turned them over to the counsel.

Q. After you had completely unfolded the ballots and had them turned face down then you performed the operation of turning them over? A. Yes, sir.

Q. Then you pushed that batch of ballots along to the man next to you? A. Yes.

Q. Who usually was counsel, wasn't he? A. Yes.

Q. But sometimes was Dolan? A. Well, we never turned them over unless there was somebody at the table with him.

Q. You pushed them along face up? A. No, we turned them right over in front of him.

Q. With face up? A. Yes; that is when they were ready to count.

Q. You turned a whole stack over that way? A. When they were ready to count.

Q. In that way that stack was passed away from you? A. Yes.

Q. Did you do that in the third district of the fifth ward of Hoboken? A. Third district of the fifth ward?

Q. Yes. A. I guess I done it in every ward.

Q. You haven't any personal recollection of having done it in that ward, have you? A. No.

Q. You haven't any specific recollection of having done it in the third district of the third ward of the Town of Union, have you? A. I can remember, though.

Q. Can remember that? A. All the wards.

Q. How do you remember that you did it in the second district of the tenth ward of Jersey City? A. Well, I only turned them when counsel was there.

Q. Counsel were there every day? A. Then I turned them when he was there.

Q. Then you have no specific recollection of having turned them in the second district of the tenth ward of Jersey City, do you? A. Only when counsel was there.

Q. Well, that is all you do remember? A. Yes.

Q. You haven't any recollection of when that second district of the tenth ward of Jersey City went through your hands, have you? A. Did I what?

(Question repeated by stenographer.)

A. No.

Q. And there was another room in which this work was being done, wasn't there? A. There was what?

Q. Another room in which this same work was being done? A. Yes.

Q. So far as you are concerned you don't know whether, of your own knowledge now, you don't know whether the second district of the tenth ward was counted in that room or in the other room? A. Well, I don't know if it was the second ward of the tenth ward or the tenth ward of the second district was counted in my room or not, but Mr. Kane came at the table there and he says to me, he says, "What ward or district is this;" he says, "Is this my district," and I says, "What is it," and I don't know whether it was the second of the tenth or the tenth of the second, but I lifted up the ballot and I told him it was, and he said, "That is my district," and the ballots was face down when he came in there and I told him that.

Q. That was before any of them was counted? A. It was before any of them was counted, but he was right there at the time talking there.

Q. What happened after that? A. I don't know what happened after that.

Q. You saw Kane there, though? A. He was there, yes. After he left me and went out of the room, that is where he went.

Q. Didn't come back again? A. Not that I know of.

Q. You didn't see him while his district was benig counted, did you? A. He stood at the table there talking to me and then he went out.

Q. While his district was being counted? A. No, not when the district was being counted.

Q. What was he talking to you about? A. He asked me what district was this, that is all he asked me.

Q. Having said that to you he did not stay with you then, did he? A. No, he went out of the room.

Q. You thought so? A. Yes, I am pretty sure.

Q. You did not pay any attention to what he did, did you? A. Well, I am pretty sure he went out of the room, because I see him go over towards the door, yes.

Q. That is the last you saw of him that day? A. No; I seen him there more times that day when he came up after every box.

Q. Did you see him after that time of the particular district and he inquired if it was being counted? A. No, sir; I don't remember.

Q. That is all you mean to say that you do not remember seeing him there on any other occasion while that particular district was being counted; isn't that so? A. That is about all.

Q. Certainly. A. I don't remember seeing him after that.

Q. Was Dolan there that day? A. Yes.

Q. Was he there at the time and sitting at the table when Kane came up to you and asked what district he was about to count? A. Yes.

Q. How far was he sitting away from you? A. About, not as far as that gentlemen there. (Indicating stenographer.)

Q. Was he the first man to whom that stack of ballots was handed? A. Yes.

Q. So he was the first man that received the stack from you, wasn't he? A. Yes; when counsel was at the table.

Q. That's all.

RE-DIRECT EXAMINATION BY MR. DOHERTY:

Q. On the day following the counting of that box was any investigation made by the commissioners or any inquiries made of you as to what happened at that time? A. Not on that day, no, sir.

Q. Well, the day following? A. The day following, yes.

Q. And the commissioners questioned you as to what transpired? A. Yes; the four commissioners asked me.

Q. That was while the matter was fresh in your mind as to what occurred? A. Yes.

RE-CROSS EXAMINATION BY MR. WALSCHEID:

Q. Who was there when you were being questioned by the commissioners? A. Mr. Hopkins, I think Mr. Coyle was there, if I ain't mistaken and Mr. Hartley.

Q. Wasn't the fourth commissioner there? A. I don't know. I think he was there, if I ain't mistaken.

Q. Was Mr. Dolan there? A. No; not in the room with me, no. I was in there all alone with the commissioners.

Q. You were in there with them alone? A. Yes.

Q. What did they ask you? A. They asked me did I see anybody mark any ballots and I said no, sir.

Q. Did they ask you did you see Dolan mark any ballots? A. No, they asked me did I see anybody mark any ballots.

Q. Did they tell you why they were asking you that? A. Well, somebody must have passed a rumor that there was some ballots marked.

Q. Didn't they tell you that Kane had said that somebody was marking ballots? A. No, sir.

Q. That is all they asked you? A. Yes, sir.

Q. Was Dolan in the outside room when you were in talking with them? A. I don't know where he was.

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

Q. Didn't see him there at that time? A. I don't remember if he was there or not.

By Mr. Doherty:

Q. Did Mr. Dolan afterwards participate in this recount? A. He was there every day, yes.

Percy A. Hopkins, sworn.

Direct Examination by Mr. Doherty:

Q. Mr. Hopkins, did you have any conversation with Mr. Kane relative to any accusation that he made against Dolan? A. Why, I spoke to him in the presence of Mr. Taylor after Mr. Clark had spoken to me telling me that there had been some rumor of some one marking a ballot or attempting to mark a ballot.

Q. What was your conversation with Kane? A. I asked him if he saw any one mark any ballots and he said he had not—right at the door of the election board.

Q. You are one of the Democratic members of the board, aren't you? A. Mr; Mr. Houghton and I are the Democratic members.

CROSS EXAMINATION BY MR. WALSCHEID:

Q. What Clark told you this? A. James Clark.

Q. What James Clark? A. The counsellor.

Q. The judge? A. The judge—former judge.

Q. What did he tell you? A. He told me that some rumor around about some one marking some ballots.

Q. Oh, he didn't tell you that, did he? A. He positively did.

Q. Didn't he tell you who was marking the ballots? A. He did not.

Q. Didn't he tell you that Kane had told him that Dolan was marking the ballots? A. He told me that there was a rumor that some one was marking ballots and I questioned every clerk at the table to find out whether or not it was so.

Q. Did you question Dolan? A. Dolan was not employed by us.

Q. You knew he was at the table? A. We knew he was at the table.

Q. You knew he looked at the ballots? A. Yes.

Q. You saw him looking at ballots? A. Yes.

Q. But you did not question Dolan? A. I was at the table all the time; there wasn't a single ballot—

Q. You didn't question Dolan? A. No.

Q. While at the table all the time you questioned everybody else at that table but Dolan? A. I only questioned those in our employ.

Q. That is not true either. You questioned Mr. Melniker? A. Yes.

Q. And asked him whether he had marked ballots? A. Oh, no, I didn't ask Mr. Melniker whe-

ther he marked a ballot or not. Mr. Melniker is telling you now he didn't say that.

Q. Didn't you question him? A. Not relative to him marking the ballots.

Q. What did you ask Mr. Melniker? A. I asked him if he saw any ballots being marked.

Q. You didn't ask Dolan anything? A. No; I didn't ask Dolan anything.

JAMES TAYLOR, sworn.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Mr. Taylor, you were employed on this table where the ballots of the second district of the tenth ward were recounted, were you? A. Yes.

MR. COLLINS: Prove he is one of the county board.

Q. You are one of the county board? A. Yes.

Q. During the recount of these ballots did Mr. Kane at any time go to the side of the table where Dolan was sitting? A. Not as I have taken notice of. I couldn't say, not positive, no.

Q. At any time during the recount of those ballots did you hear him say to Dolan, "Stop that"? A. No, I did not.

Q. Did you have a talk with Kane relative to any accusation he might make against the honesty of this recount? A. I had no talk, but Mr. Hopkins did.

Q. In your presence? A. Yes.

Q. What did Kane state? A. He said he saw nobody mark any ballots.

Q. You sat what part of the table? A. Well, as Mr. Hopkins was calling off I sat to his left.

Q. At the foot or side of the table? A. Right at the—well, I don't know who is the head or foot.

Q. Or the northern end of the table? A. Yes—no, the western end.

Q. The inspectors of the ballots were on one side of the table and the talliers were on the other side; is that true? A. Yes.

Q. While you were counting the box could Mr. Melniker have gone around the side—end of the table where you were sitting; was there room for him? A. Yes.

Q. Or Mr. Kane I am speaking of? A. Yes; he may have went around there because you can always get around to the toilet.

NO CROSS EXAMINATION.

JAMES M. HOUGHTON, recalled.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Did you receive any information as to an accusation that was made by Mr. Kane or anybody against the honesty of this recount? A. I couldn't positively say that it was the day that they claim that this occurred or the next day, that I am not positive, but the first information that I had was at noon or at the lunch hour, at recess, after coming back I met Mr. Melniker and I think Mr. Seglie, there was another gentleman standing at the door, at the entrance to our office and they called me over and they said to me, "Houghton, do you know that Dolan has been marking ballots in there?" and I asked him was he fooling and he said no, it is a positive fact, this is a serious matter. I said, "Well I should think it was too, if that is the case." They told me that it was a fact—

MR. WALSCHEID: I object.

Q. As the result of that information what did you do? A. I asked them if they could prove it if it was a fact, and they said yes, there was two of our clerks that was there that had seen it, so they said—I said, "Do you know who they are," and they said, "Yes," and I said, "I don't want you to tell me who it is," and Mr. Melniker insisted, and he said, "Yes, I will tell you," and he mentioned the two clerks' names, and I said, "I think this thing ought to be investigated and I will go right in and we will have an investigation before I start this recount to-day. There will be nothing done until we make the investigation." I went inside into the inner room where Mr. Hartley and I sat in the recount and ordered those who were in there out of the room and called the other three commissioners into the room and I told them that there was a man being accused of marking the ballots out there and I wanted an investigation made right away of every man in that room, brought in one at a time, that is, every man employed by our commission as clerks or helpers; and Mr. Hopkins, if I remember correctly, stood at the door and he called them in one at a time and we questioned every one of those men that we had employed there, and they all denied emphatically of seeing it or hearing anything about it until we had brought it up.

Q. Did you question the clerks whose names had been furnished by Mr. Melniker? A. Yes, sir; and they were—I think that they were like in the middle of the group that was brought in; we didn't bring them in first or last; I think, if I remember correctly, they were just as Mr. Hopkins opened the door and the first clerk he saw he called him in and told him to take it to anybody, and we threatened the clerks that if

they mentioned anything that was said inside when they went out of there we would discharge them before the recount started. That is all I know about it. I didn't speak to Mr. Kane or anyone else about it.

Q. That's all.

CROSS EXAMINATION BY MR. WALSCHEID:

Q. Did not call Dolan? A. No, sir.

Q. That's all.

PAUL SEGLIE, recalled.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Where do you live, Mr. Seglie? A. West Hoboken.

Q. How long have you lived there? A. About twenty years.

Q. You have held public office in West Hoboken, haven't you? A. Yes.

MR. WALSCHEID: Objected to as immaterial.

MR. JUSTICE SWAYZE: How is this material.

MR. DOHERTY: I want to show Mr. Seglie's familiarity with the topography of the town hall which has been expatiated upon.

MR. JUSTICE SWAYZE: Ask him.

Q. You have been in the town hall frequently?

MR. WALSCHEID: Been a member of council.

MR. JUSTICE SWAYZE: This is about the ballot box?

MR. WALSCHEID: It will be admitted that Mr. Seglie was a member of the board of

council up in West Hoboken for four years and is thoroughly familiar with every inch of that building.

Q. While you were in the council they met in the assembly chamber of Mr. Wachlin has testified to? A. What do you mean?

Q. The council while you were a member met in the assembly chamber of the town hall? A. Yes.

Q. Do you know what different passages led up to that assembly chamber? A. Yes.

Q. How many of them are there? A. Two.

Q. Are you acquainted with Mr. Wachlin, the town clerk? A. Yes.

Q. The assembly chamber is part of Mr. Wachlin's office, isn't it? A. No, sir.

Q. It is adjoining Mr. Wachlin's office? A. Yes.

Q. And were all the entrances to that assembly chamber through Mr. Wachlin's office? A. Yes.

Q. Was Mr. Wachlin town clerk during any part of the time that you were councilman up there? A. Yes.

Q. To what use is the first floor of the town hall put? A. Police station.

Q. You are acquainted with the policemen at that station are you? A. I know them.

Q. Chief of police down? A. Yes.

Q. Do you know who the janitor of the building is? A. Janitor?

Q. Yes. A. I don't know who is present janitor. At this time, I think, last year was a young fellow by the name of Goldberg.

Q. You knew him, did you?- A. Yes, I knew him.

Q. I think that is all. Oh, are you acquainted with the election board of the first district of

the first ward of West Hoboken? A. I know one member or two.

Q. Two; are they friends of yours? A. Friend of mine; simply I know them because I—

Q. How about the board in the second district of the first ward, know them? A. I know just by sight.

Q. And the third district of the first ward, are you acquainted with the board in that district? A. Of the third of the first?

Q. Yes. A. I know one or two of those members.

Q. That's all.

No Cross Examination.

Mr. Doherty: I think that is as far as we would care to go. We rest.

Mr. Walscheid: Recall Mr. Kane.

Mr. Kane, recalled.

Direct Examination by Mr. Walscheid:

Q. Mr. Kane, do you know Mr. Coyle, John Coyle? A. You mean the gentleman that was on the stand this morning.

Q. Yes. A. Yes.

Q. Did you have any conversation with Mr. Coyle and Dolan on the day after the occurrence you have testified to? A. Probably to say "Hello" or something.

Q. Did either Dolan or Coyle on the day after the occurrence ask you whether you had said that Dolan had marked or had attempted to mark ballots, and did you at that time say to them or either one of them, "No, no; there is nothing to

it," or anything of that effect? A. No, sir I didn't say that to anybody.

Q. Did you have any such conversation with them? A. I didn't use that language to anybody.

Q. Did you have that conversation with them on that day? A. No, sir.

Q. What's that? A. Not that conversation, no.

Q. Did you have any conversation with them afterwards? A. Might have bid them the time of day or something.

Q. Nothing at all of the incidents as to which you have testified? A. No, sir.

Q. Did you have any talk with Commissioner Hopkins in relation to this occurrence? A. Why, he asked me a question and I passed him by on my way out as I have testified in my direct examination.

Q. What do you mean he asked you a question? A. When I went around the table to stop him, to grab his hand, on my way back Mr. Hopkins was there and I guess he turned around, because my back had been to him, and on my way back again I had to pass him again, he was facing me and he laughed and said, "What's the matter?" and I didn't say anything.

Q. Did you subsequent to that ever have any conversation with Hopkins in which he asked you whether you had accused anybody of having marked or attempted to mark ballots? A. The only conversation was this morning in the court room here.

Q. This morning in the court room? A. Yes.

Q. Any other conversation with Hopkins? A. Not in relation to marking ballots, no.

Q. Did you have any conversation with Hopkins at any time since the occurrence that you have testified to and before to-day in relation to

this accusation—in relation to the testimony which you have given as to the marking of the ballots? A. No, sir.

Q. Or in relation to the marking of ballots? A. The only commissioner that I remembered having any conversation with was with Commissioner Hartley, when he asked me what happened between you and Dolan this morning, or what was the matter with you and Dolan.

Q. That was on the day of the occurrence? A. That is out during the recess.

Q. What did you tell him then?

MR. DOHERTY: I object.

MR. JUSTICE SWAYZE: That is objectionable, I think I will exclude it.

MR. WALSCHEID: I suppose that has not been offered so it is not by way of contradiction. I will withdraw it.

Q. Did Mr. Dolan say to you at the time when you pushed his hands or stopped him from doing what you thought he was doing "If you had left me alone I would have marked twenty-five of these," or words to that effect?

MR. COLLINS: I object.

MR. WALSCHEID: I asked Dolan that.

MR. COLLINS: Yes; I know you did but you cannot do that. You are bound by it. Mr. Kane was never asked about it when he was called at all.

MR. JUSTICE SWAYZE: I am with you, Mr. Collins. I will exclude it.

MR. WALSCHEID: That is all then.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Your special interest in the recount of this box was based upon a desire to see that the

election officers of that district did not get into trouble, wasn't it?

MR. WALSCHEID: I object.

MR. JUSTICE SWAYZE: That is permissible.

MR. WALSCHEID: He has been all through this.

A. That was one of the reasons, Mr. Doherty, yes.

Q. Isn't that the only reason? A. Well, yes, I should say that is it.

Q. Wasn't that based upon the fact that the election officers on election night in counting that box cheated Ackerman and you knew it? A. Oh, no.

Q. As a matter of fact, on the recount wasn't it shown that Ackerman was given five less than he was entitled to and Seglie given five more? A. No, sir; I don't think the recount shows that; in fact, it doesn't show that.

MR. JUSTICE SWAYZE: Anything further?

MR. DOHERTY: No.

MR. WALSCHEID: We have nothing further.

MR. JUSTICE SWAYZE: Do you desire to be heard?

MR. WALSCHEID: Yes, we desire to be heard. I suppose the procedure will be that we have the right to close?

MR. COLLINS: I do not see how that is so.

MR. JUSTICE SWAYZE: Mr. Collins presents an order and asks me to sign it. I think he has the benefit of closing.

MR. WALSCHEID: Then I will ask him to open.

MR. COLLINS: There is nothing to open on. Prima facie our case is complete, and then they have to show any reason why it is not,

then we will meet it. We cannot attempt to set up something and knock it down and then say what they have to show. I submit it is just like proving of a will.

MR. COLLINS: You have opened the case. Mr. Walscheid may proceed.

MR. WALSCHEID: I take the view of this matter, sir, the way this case has turned, that we have been asked to establish a prima facie case of fraud, or that we have been asked to establish the fact that the ballots which were counted by the county board of elections are not the ballots which were in the boxes on election night, and on that issue if we have the affirmative, and I think we have, we are entitled to the right to open and close. It would be rather a hardship to ask us to present our case and then force us to sit down without having a chance to reply to what may be said in opposition thereto; and the result will naturally be that we don't know what the answer is going to be, even though we make our argument, and we are foreclosed from answering that argument.

MR. JUSTICE SWAYZE: Well, but don't you take too narrow a view of the case. This is a recount. Mr. Ackerman comes to me and says, "I ought to have a recount. On that recount I will prove to have a larger number of votes." I give him the recount, but it is up to him to prove that he had a larger vote; and he comes in and says, "We counted, and there is the certificate of the county board, showing I have more votes than Mr. Seglie." So it appears to be. Now on that alone he would be entitled to my certificate. Now you come to me and say, "Don't give him that certificate, because of fraud." Well, of course,

on the issue of fraud the burden is upon you; but upon the whole case it seems to me the opening and closing is with them. I do not believe that merely by raising an issue of fraud you can shift the burden of proof.

MR. WALSCHEID: I take it from reading this statute that it is a little bit more than what your Honor has indicated. The statute say that you as a justice of the supreme court shall be authorized to hear and cause a recount of the whole or such part of the votes as you may determine, to be publicly made under your determination by the county board, and if it shall appear upon such a recount that an error has been made sufficient to change the result, then you shall revoke the certificate and issue a certificate in favor of the person who received a majority of the votes cast at such election. Now your Honor must make a specific finding as to two things —a specific finding of fact: First, that error has been made sufficient to change the result —that there was an actual error. Fraud is not error. Secondly, that Ackerman received a majority of the votes cast at such election. Now, of course, the other side present a prima facie case by the presentation of the figures. Then in the ordinary course of a trial we would present our case. On the whole case as then made the issue still remains, was there an error committed sufficient to change the result; second, did Ackerman receive a majority of the votes cast at the election.

MR. JUSTICE SWAYZE: That is my view.

MR. WALSCHEID: They have the affirmative on that issue, and that issue is not merely upon their side of the case which they presented. They presented their side. When they

presented their certificate that was prima facie. Then we presented our side by way of defense, and then they put in testimony by way of rebuttal, but on the whole case they must now I take it open to the extent of showing to your Honor that on the whole case —not on the certificate—there is error, that Ackerman received the majority of the votes cost at the election.

MR. JUSTICE SWAYZE: Isn't it just what Mr. Collins said?

MR. WALSCHEID: I think not. I think he rests upon his certificate.

MR. COLLINS: No; but on the counting taking place.

MR. WALSCHEID: On the result?

MR. COLLINS: On the result.

MR. JUSTICE SWAYZE: He says, "The affirmative is on me. My case is that I have had a recount and there is the certificate of the county board, and I say that is an honest recount and a recount of the ballots cast at the election," and you say, "No, it is not. It is a recount of a lot of ballots—"

MR. WALSCHEID: I think it will make very little difference.

MR. JUSTICE SWAYZE: Oh, very well.

(Mr. Walscheid argued and Mr. Collins replied.)

MR. JUSTICE SWAYZE: Well, I will dispose of this on Tuesday afternoon. You may give me authorities.

MR. COLLINS: Now your Honor says that you will decide it Tuesday afternoon at four o'clock?

MR. JUSTICE SWAYZE: Yes.

MR. COLLINS: Shall your Honor take the certificate or shall I keep it and have it here?

MR. JUSTICE SWAYZE: Perhaps I would better have it now.

Jersey City, N. J. February 13, 1917.

JUSTICE SWAYZE: In this case of the recount of the votes for Boulevard Commissioner I sit only as a part of the election machinery, and my only power is to recount the votes with the assistance of the board of election and to sign a certificate of the result.

It was decided in the Mathis case that where the judge who recounted—to use a common expression—was satisfied that the votes as they appear on the recount were not the votes as cast at the election he might refuse to sign a certificate, and if I were satisfied in this case, as Justice Voorhees was satisfied in that case, that the ballots recounted were not the ballots as cast, I would follow the same course that he followed. I do not think I can go as far as that, that is as far as to say that I am satisfied that they are not the same votes. There are many suspicious circumstances about it, and if I were at liberty to draw inferences I probably should have to infer that there had been some alterations after election, but the farthest I can go is to say that I am not satisfied that the ballots recounted are the same ballots that were cast. That, it seems to me, is not enough. I think that I must presume for the purpose of the certificate at any rate, that the ballots produced before me are the ballots that were cast, unless actual fraud is shown to my satisfaction, as it was shown to that of Justice Voorhees in the Mathis case.

Now I do not know that I can say anything more. That makes it necessary, of course, for me to sign the certificate which Mr. Collins has presented to me.

I said that I would give Mr. Walscheid an opportunity to have a writ of certiorari, and I will allow that writ as soon as I sign the certificate. Now, Mr. Walscheid, have you your writ ready?

MR. WALSCHEID: I have a writ drawn but it was not put into my bag this morning. I had the papers ready for an application, and I can present it to you—

THE COURT: Yes; you can present it at any time.

MR. COLLINS: You could draw it in five minutes.

THE COURT: You could draw it in five minutes.

MR. COLLINS: I suggest that this is not a case where there ought to be a stay. The short term offices ought not to be kept at the mercy of the courts by being months before they can finally be decided. The courts are not concerned about the individual holder of an office, and I had expected—I perhaps misunderstood, but I had expected that your Honor would hear argument as to whether there should be a writ at all. I understood your Honor to say that you would give him opportunity to apply for one. I have some suggestions to make—

THE COURT: It is still not too late.

MR. COLLINS: I have some suggestions to make that I think may be worthy of consideration, that there should be no writ; but the important thing is that there should be no stay.

THE COURT: I won't promise that.

MR. COLLINS: The decision to which your Honor's attention was directed last week said that a certiorari would not go to review a

certificate of this kind if there was jurisdiction. The only possible doubt of jurisdiction is the interval that existed between the time your Honor's commission expired and the new one was issued. I cannot see any other possible suggestion of lack of jurisdiction.

MR. WALSCHEID: We have hertofore, if your Honor will remember, made application to your Honor for a writ of certiorari on the ground of jurisdiction.

THE COURT: Yes; at the very beginning.

MR. WALSCHEID: Yes; right from the beginning; and at that time, after a very extensive argument, your Honor indicated that if a certificate were to be issued you would allow the writ upon the argument then made, and so indicated to the gentleman who came on to make the argument for Mr. Collins' office; I think it was Mr. Markley. Since then there have of course additional reasons for a writ arisen, and one of those reasons is the fact that this interregnum intervened.

THE COURT: Yes.

MR. COLLINS: I do not understand that this is an application, or your Honor is willing to entertain an application for a certiorari of the original order for a recount. This is an application, and can only be that—because the recount has been had—it would be idle to grant a certiorari now when it was refused at the outset of the order for a recount—this is an application for the final step that has now been taken, your Honor having signed, or presumably signed, the new certificate revoking the old one and issuing the new one. That is being reviewed. I do not say that in a review of that certificate they cannot go to any fundamentals that underlie it, but I do say

that no court, after there has been a recount and the great expense has been incurred that has been incurred in this case, and a recount has been had, that they would look at the original order. The only question is with regard to the certificate itself. The certiorari of a certificate is distinctly held by the supreme court never to be allowed except where there is lack of jurisdiction.

Now the only ground of lack of jurisdiction that I can conceive of and the only point that has been stated as to this certificate is this interregnum.

Now let us see what the act says, the 159th section. In other words, your Honor would not now, if they came—even though they had applied at the outset for a certiorari of the original order, your Honor would not now say "Oh, well, I have had the recount and we did all this labor and have gone to all this expense, but I'll give you a certiorari of the original order." Your Honor would not do that, unless there was some absolute ground of illegality which would have been sufficient to have warranted the writ in the first place. Now all that was alleged with regard to that was that the application had to be made within ten days, and was made within ten days, but the order was taken before the final return of the board of county canvassers. It seems to me that on the general doctrine the order goes subject to the judgment being entered. If you take a writ of error you may issue the writ of error before the judgment; the only important thing is that before the return of your writ the judgment be entered. Here the application being made within ten days I take it the court can give

the order for the recount at once without waiting for the formality of the board of canvassers—who might adjourn indefinitely, nobody knows how long—provided that before the recount is finished, or before the final return of the board of canvassers, the order is taken. So that I take it there is nothing at all that is even arguable with regard to the original order. And I might say in the act itself it intimates that there cannot be an order to recount before the return of the canvassers. I refer to the 159th section. I do not see any requirement there that this order must be delayed until the board of canvassers has declared the result. So it seems to me that after the thing is done the court wouldn't even consider it.

Now let us see if there is anything in the other feature of the case, namely, that when your Honor's term expired before the count was finished, the order fell and although your Honor was then re-appointed you could not take it up, finished the recount and give the certificate. I do not find that in the statute. It is said that there were two or three boxes counted by the board during the few days that you were out of office; but that was by mutual consent. If there was going to be any claim that they should not go on counting while we were waiting for your Honor to be renominated and confirmed, which everyone knew was to happen, they should have refused to go on, but they went on and participated in it, had their watchers, and everything was done; and here is the important thing: if you take those boxes—you do not have to count the whole county, only such as the justice thinks best—now if you take those boxes that

were recounted there was not any substantial change in any of those boxes on the last two days, the Saturday and Monday. If you throw them out and consider them as not recounted it would not make any difference, or if you take the recount as certified it would not make any difference. So that you can ignore them if you please, and those that were actually counted by your Honor while you were still judge under your original appointment would be enough to show that the result of the election was changed, and then it becomes your duty, if you are still a justice of the supreme court, when the certificate is presented to you to sign it.

Now this is the language:

"* * * may apply to any justice"—mark the words—"to *any* justice of the supreme court, who shall be authorized to order and cause, upon such terms as he may deem proper, a recount of the whole or such part of the votes as he may determine, to be publicly made under his direction by the county board of elections, after due notice by such candidate to the parties interested of the time and place of such recount; and, if it shall appear upon such recount that an error has been made sufficient to change the result of such election, then such justice"—*any* justice; why it is utterly impossible to me to think, it is unthinkable that if it happened that during the progress of a recount the justice who had originally ordered it died or his term expired that the proceeding would fall, there could not be any new application made if the ten days had not expired; any justice could take up the proceeding, perhaps by some supplemental order that he might make, but

that would not be necessary where the same justice is re-appointed. So that a justice of the supreme court who is the same one who made the original order may give the certificate. "Such justice may revoke the certificate."

Now that is all I have to say about the merits of the application; but assuming your Honor to have thought of these things and considered them and determined to grant the writ, then I say there ought not to be any stay. For what reason should there be any stay? How is the public interest to be hurt by permitting Your Honor's certificate to stand? Either Mr. Ackerman can get in possession of the office or cannot. If he can get in possession then the public interest will be served; if he cannot no harm is done; but if it is your duty to grant the certificate even though you wish to give the other side an opportunity to review it, I should think that on general principles of giving to the person who has prima facie title to the office the indicia of the office, which Ackerman has under your certificate, there should be no stay while this is being prolonged.

MR. WALSCHEID: I do not know whether your Honor remembers in detail the original application which was made. It was made practically immediately after the order was signed, and it was made primarily upon the point that the order had been improvidently made and that there was no jurisdiction in you as a justice to make it upon the petition as presented.

THE COURT: Mr. Walscheid, I may say that I have not changed my view as to allowing the certiorari. I will allow it.

MR. COLLINS: It is a question of the stay.

THE COURT: I will hear you on the question of the stay.

MR. WALSCHEID: On the question of the stay, what Mr. Collins says in relation to these short term offices works two ways. If now your Honor should issue the certificate and give it to Mr. Ackerman and he is, through this certificate, put into possession of that office, and in a year from now, or nine months from now, we finally succeed in oversetting it, he would be actually in possession of an office, and the only way in which we could oust him from it would be by quo warranto proceedings which in turn would take another year.

MR. COLLINS: I do not concede that.

MR. WALSCHEID: You know so. During which time the term would have expired and we in turn would be fiighting over principles without achieving any results.

MR. COLLINS: I do not think so.

MR. WALSCHEID: Mr. Collins, I did not interrupt you.

THE COURT: One at a time. Then I can understand you.

MR. WALSCHEID: This matter goes to the question of the jurisdiction of the justice to issue this certificate. The very jurisdiction is a debatable question. According to the view which your Honor has taken of this matter, and in view of the fact—

THE COURT: I did not know that I had suggested that it was debatable.

MR. WALSCHEID: You have not suggested it, no, sir; but the fact that you have granted the writ.

THE COURT: Why, it is arguable.

MR. WALSCHEID: I said debatable.

THE COURT: Perhaps, it has the same effect.

MR. WALSCHEID: I meant it is an arguable proposition, so that we are entitled to argue that proposition before the Supreme Court, and if we are to have the benefit of argument at all we can only obtain it through a stay. The public interest will be just as well served by issuing a stay, by issuing this writ with a stay, as by issuing it without stay. In other words, the public interest will be just as well served with the present board, who are in office at the present moment. And it would be of absolutely no value whatsoever to us to obtain a writ without stay in the premises, because the certificate which your Honor issues and which is contested because of lack of jurisdiction in itself becomes prima facie evidence of the right to possession of that office and within a very short period of time, if the members of this board should refuse to allow Mr. Ackerman to take his seat upon quo warranto proceedings he might in all probability be seated, and then we would have to oust him. He might be in office tomorrow if the two remaining commissioners agree to recognize him; he will be practically in office then, and the result would be that the writ is of absolutely no value. I do not see that I can say anything more upon that topic.

MR. COLLINS: Why, your Honor's revocation certificate and the granting of the new one puts Mr. Ackerman in a position to assert his right to the office and to be recognized by his colleagues; he enters in possession of the office. Now, if you grant a stay upon the effect of your writ, the stay operates to keep

Seglie in, which is not right. The very reason that lets an incumbent stay in an office pending a contest applies with equal force to a certificate of this character. Your Honor ought to assume that it is legal. There may be an arguable question. There must be, as your Honor has decided to allow the writ; but it does not follow that you would overturn the normal effect with regard to the possession of an office pending its contest, overturn the normal effect by letting your certiorari operate as a stay. I can say no more—as Mr. Walscheid says.

MR. WALSCHEID: We asked your Honor for this writ at the opening of these proceedings and at that time your Honor indicated to us that you would in all probability grant the writ, as you have now done.

MR. COLLINS: I do not understand it.

MR. WALSCHEID: And said that it might not be necessary after a recount to issue the writ, and that was the only reason why we were deprived of our rights at that time. Now, if the writ had been allowed at that time—we made application with all due diligence, and if the writ had been allowed at that time we would undoubtedly be through or practically through the courts on the arguments of that writ; so that without our fault and against our protest this recount has proceeded to this point, and I think that your Honor ought at this time to place this back to the position in which we were at the time when the original application was made. I think in justice to the applicant for this writ, that that ought to be done and that this writ ought to go in the ordinary course with stay at this time.

MR. COLLINS: My information is not the same as Mr. Walscheid recites. I did not understand—I was not present—I do not understand your Honor said any such thing. Your Honor said you would not grant a writ; let the recount proceed.

MR. WALSCHEID: That was the language which your Honor used at that time.

MR. COLLINS: And I do not think your Honor meant to grant a writ now; and I think the application must be to certiorari your certificate; I do not think your Honor would after permitting the recount grant a certiorari of the original order. That may be involved in the certiorari of the certificate; and if Mr. Walscheid hasn't got it here to present, now to be signed, I want to see it to see that it is proper in tenor; at least, I make that suggestion to your Honor, that the writ should be addressed to the certificate. As to the effect of a stay, I say nothing further.

THE COURT: I mean to preserve the status quo in this case until this matter can be passed on by the Supreme Court and allow a writ of certiorari removing the order which I am about to sign, and all things touching and concerning the same, and that I suppose carries the original order; and I will make no order with reference to a stay. I will let the writ take its ordinary course, but the writ will be allowed on condition that the matter be argued at the February term.

MR. WALSCHEID: That gives us until next week.

THE COURT: That gives you one week.

MR. COLLINS: You can get it ready if you are diligent.

MR. WALSCHEID: We are usually diligent.

THE COURT: Now, Mr. Walscheid, you can draw that writ in five minutes. I might as well do the two things simultaneously. I do not want either side to get any advantage of the other that I can help.

THE COURT: Now, the Election Board are interested very much, I suppose, in one phase of this matter. Mr. Gritten I imagine can tax the costs. Now, you want to be a little easy on the county, that is all. Tell Mr. Gritten to figure up the costs and be as easy on the county as you can.

MR. COLLINS: What will your Honor do with regard to an order for expenses and costs; will that wait?

THE COURT: I will make the order now. I do not know what the effect of it will be. I determine that the result is changed. I suppose the county has to pay the expense.

MR. COLLINS: The only question is the fixing of the amount.

THE COURT: Mr. Gritten usually figures that. We have a sort of a rule by which it is done.

MR. COLLINS: What is your Honor's custom in such cases with regard to counsel fees?

THE COURT: I won't allow any counsel fees. Just tell Mr. Gritten that the thing is disposed of and he may draw an order fixing up the costs and ordering the county to pay them according to the statute.

Depositions.

NEW JERSEY SUPREME COURT.

PAUL SEGLIE, Prosecutor, *vs.* FRANCIS J. SWAYZE, Justice of the Supreme Court, et al.	On Certiorari.

Depositions taken before Neale Ransom, Supreme Court Examiner, March 1st, 1917, at 4 p. m. at the office of Aaron A. Melniker, 586 Newark avenue, Jersey City, in the presence of Aaron A. Melniker and George A. McEwan, counsel for the Prosecutor, and Gilbert Collins and G. Ralph Hendrickson of counsel with Henry Ackerman.

Signatures to depositions waived.

Counsel offer in evidence statement of the result of the election held in Hudson County on November 7, 1916, for the election of surrogate, county supervisor, three members of the board of chosen freeholders and three boulevard commissioners.

As to the surrogate and supervisor and chosen freeholders the statement bears date November 24th, 1916, and was filed that day.

As to all candidates for the office of boulevard commissioner except Paul Seglie and Henry Ackerman the declaration of the votes cast bears date the 28th of November, 1916, and was filed that day.

As to Asmus and Cahill, declared elected boulevard commissioners, the statement bears date November 28, 1916, and was filed on that day.

As to Paul Seglie, declared elected boulevard commissioner, it is dated December 4, 1916, and was filed that day.

Deposition of Paul Seglie.

It is stipulated that this statement of result need not be printed, but may be produced before the court at the hearing and either party may refer to anything therein contained.

It appears from this statement filed with the county clerk by the county board of canvassers that Ackerman received 31321 votes and Paul Seglie received 31343 votes.

It appears from this statement that in the first district, second ward, Bayonne, the vote cast was as follows:

For Ackerman, 67.

For Seglie, 148.

It is admitted that Mr. Seglie took oath of office on the 6th day of December, 1916, before Judge Sullivan, and his oath of office was filed in the county clerk's office on December 6th, 1916, at 10:32 a. m.

The official bond of said Paul Seglie, qualifying him as boulevard commissioner, was dated the 4th day of December, 1916, and approved by Judge Sullivan on December 6, 1916, and filed with the county clerk December 6, 1916, at 10:32 a. m.

PAUL SEGLIE, sworn.

BY MR. MELNIKER:

Q. What date did you receive from the county clerk your certificate of election? A. December the 4th, 1916.

Q. And you qualified on what date? A. On the 6th of December.

BY MR. COLLINS:

Q. The newly elected commissioners organized on what date? A. It was on the first Wednesday in December.

BY MR. MELNIKER:

Q. It was on the same day that you qualified, wasn't it—that same afternoon? A. At 11 o'clock in the morning.

MR. COLLINS: The newly elected commissioners, including Mr. Seglie, organized on December 6, at 11 a. m.

It is admitted that the term of office as Justice of the Supreme Court of Honorable Francis J. Swayze expired at midnight on January 19, 1917, and that he was re-commissioned and qualified as Justice of the Supreme Court on January 23, 1917.

It is admitted that the county board of elections sat on Saturday, January 20 and Monday, January 22, and counted, on the 20th, ballots cast in 5 districts in the county, and counted, on the 22nd, ballots cast in 8 districts in the county, in the presence of Mr. Seglie and of counsel for Mr. Ackerman and Mr. Seglie, without objection, and that the result of the recount in those boxes was as follows:

The original count in those districts was Ackerman 1147; Seglie 1179.

The recount in those districts was Ackerman 1138; Seglie 1176.

It is admitted that Justice Swayze sat at the court house in Jersey City on January the 27th, 1917, to pass upon disputed ballots that had accumulated since his previous appearance some time prior to January 13th; that on January 27th there was submitted to him approximately 150 ballots for his decision. Of this number 15 ballots were from the districts counted on January 20 and January 22; that at that time, on

Deposition of William Wilkie.

January 27, counsel for Seglie objected to Justice Swayze passing upon these disputed ballots on the ground that he had no jurisdiction, that his term had expired on January 19 and his new term had begun on January 23, and that he was not the justice who had ordered the recount, and that he therefore had no right to pass upon the ballots that had been reserved for him during the time since his last preceding appearance, and that the county board of elections which had recounted the ballots on January 19 and 22nd, 1917, was not a properly constituted board because he was not on those days a member of the board.

WILLIAM WILKIE, sworn.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. You are an attache of the county clerk's office? A. Yes.

Q. And you appear here with the records from the county clerk's office relating to the election for Boulevard Commissioner at the general election November, 1916, and the recount of the votes cast for Boulevard Commissioners at that election? A. I do.

Q. Was there filed with the county clerk a statement of the result of the recount by the county board of election? A. No, sir.

Q. Have you made search for such a statement or certificate showing the result of the recount as between Seglie and Ackerman in your office? A. I have.

Q. As certified to by the county board of elections? A. I have.

Q. And it could not be found? A. No, sir.

Deposition of Aaron A. Melniker.

AARON A. MELNIKER, sworn.

THE WITNESS: I was one of the counsel for Paul Seglie during the recount. At the conclusion of the recount and after all disputed ballots had been disposed of by Justice Swayze, I made up a tabulation of the result from the sheets of the official talliers, making a true and correct copy of their figures, district by district, and a copy of the recapitulation, which recapitulation contains all the totals. I have made diligent inquiry for the original statement of the result of the recount which was signed by the county board of elections and presented to Justice Swayze, which showed that Ackerman had received 31,656 votes and Seglie 31,552 votes, and have been unable to find it. I have been informed that Justice Swayze has no knowledge of its whereabouts; neither can it be found in the office of the county clerk.

I produce a copy of these figures, made by myself I offer in evidence, and which shows that there were 31,656 votes counted for Ackerman on the recount and 31,552 votes counted for Seglie.

MR. COLLINS: Counsel for Ackerman objects to this document on the ground that the original statement of the county board of elections referred to by the witness, if it were produced and proved, would not be legal, competent evidence in this case, there being no statute providing for such a statement, and that therefore secondary evidence of its contents is not permissible.

It is admitted that the bond given by Ackerman under Justice Swayze's order for recount was dated and filed December 6, 1917.

Opinion.

(Filed April 2, 1917.)

NEW JERSEY SUPREME COURT,
FEBRUARY TERM, 1917.

PAUL SEGLIE,
Prosecutor,
vs.
HENRY ACKERMAN, et a'.,
Defendants.
On Certiorari.

Argued March 10th, 1917.
Decided March , 1917.

At a general election held in Hudson County, on November 7, 1916, the prosecutor and Henry Ackerman, the defendant, were opposing candidates for the office of Boulevard commissioner.

The County Board of Elections having canvassed the vote, declared on December 4, 1916, that the prosecutor had a majority of twenty-two votes over the defendant Ackerman and issued to the prosecutor a certificate of election as Boulevard commissioner.

It appears that within ten days after election, to wit, on the 17th day of November, the defendant Ackerman presented a verified petition to Mr. Justice Swayze, the presiding Justice of the Hudson County Circuit, for a recount of the votes cast for Boulevard commissioner in whole or in part, as such Justice may determine. The basis of the petitioner's application is set out, as follows: "Your petitioner further shows that he

has reason to believe that an error has been made by various district boards of election of said county in counting and declaring the vote of said election whereby the result of such election has been changed; and further shows that in the return of the elections filed by the Board of Registry and Election of the First District of the Second Ward of the City of Bayonne, according to the written return of the votes cast for one Paul Seglie, he received 127 votes, while according to the statement of said vote expressed in figures, he received 147 votes."

Upon this petition the Supreme Court Justice, on December 1st, 1916, made an order for a recount. The counting of the ballots occupied a long time and extended beyond the 19th day of January, 1917. The term of Justice Swayze expired on January 19, 1917. He was reappointed on January 22, 1917. Several sessions of the board of elections were held after January 19, 1917, at which a considerable number of ballots were counted by the board. The Justice, subsequent to his appointment, also passed upon disputed ballots held by the board for his decision. On the recount Ackerman, the defendant, appeared to have a majority of 104 votes over the vote received by the prosecutor. This result was certified by the board of elections to Justice Swayze, whereupon the Justice, on February 13, 1917, made an order revoking the prosecutor's certificate of election, and issued in place thereof, a certificate of election to the defendant Ackerman. The prosecutor, on this certiorari, challenges the jurisdiction of the Supreme Court Justice to revoke his certificate of election.

Opinion.

Before JUSTICES SWAYZE, MINTURN and KALISCH.

For the Prosecutor, A. A. MELNIKER, J. E. WALSCHEID and GEORGE MCEWAN.

For the Defendant, GILBERT COLLINS and RICHARD DOHERTY.

The opinion of the Court was delivered by KALISCH, J.:

The first ground advanced by the prosecutor and upon which he bases the assertion that the Justice of the Supreme Court lacked jurisdiction to entertain the application for a recount, is that the petition upon which the order for a recount was made did not comply with section 159 of the election law, in that it failed to set out sufficient reasons for a recount, within the meaning of that section. The alleged particular defect in the petition pointed out by the prosecutor is that the petition contains no facts upon which the petitioner based his belief. A similar objection was taken on a petition for a recount in Kerns v. Edwards, 28 Atl. Rep. 723. In that case the petition set out that the petitioner had good reason to believe, and did believe, that errors had been made in several boards of election, within the district, in counting the votes whereby the result of the election had been changed, etc. The defendant objected that the petition stated no facts upon which the petitioner based his belief and showed no grounds for believing any error had been made. Depue, J: held the petition to be sufficient. The like objection was made against the petitioner for a recount under section 159 of the election law, in Carson v. Scully, et al., 99 At. Rep. p. 199, and the court following the ruling, in Kearns v. Edwards, held the petition to be sufficient. The court in Car-

son v. Scully, et al., *supra,* on p. 203, makes the observation that the legislature made no provision in section 159 as to the manner in which an application for a recount shall be presented. The invariable practice has been to make the application for a recount, in writing, in the form of a petition addressed and presented to a Justice of the Supreme Court, which we deem this good practice and should be adhered to. We are also of the view that in the present case, the facts set out in the petition were sufficient to properly invoke the jurisdiction of the Supreme Court Justice to make the order for a recount under section 159.

Next, the prosecutor attacks the validity of the order for the recount upon the ground that the order was made before any result of the election had been officially declared.

The statute permits an application for a recount to be made at any time within ten days after the election. Such application may be made the very next day. For it is to be observed that section 159 permits an application for a recount by any candidate at any election who has reason to believe that an error has been made by any board of elections or of convassers in counting the votes or declaring the vote of such election, etc.

It is, therefore, plain that section 159 provides for four classes of cases in which such recount may be applied for, viz: (1) Where the error has been made by the district board of election in counting the vote. (2) Where the error has been made by such board in declaring the result. (3) Where the error has been made by the county board of elections, which constitutes the board of county canvassers in counting the vote. (4)

Where the error has been made by such board in declaring the result.

The wisdom of this classification becomes strikingly apparent in the light of other provisions of the election law to which we now turn for consideration. Section 103 provides that the county board of canvassers shall convene "on the Monday next after any such election," which is the sixth day after election. Section 105 provides that if a major part of such board shall not attend on that day, or if at that time the statements of the result of such election from every election district in such county shall not be produced, the board shall adjourn to some convenient hour the next day; and at the hour to which such adjournment shall have been ordered the member or members of the board then present may proceed to canvass the vote, or may again adjourn for a period not exceeding three days, at which time the member or members of the board then present shall proceed to canvass the vote. Thus, it is observable that a situation might arise where a board of canvassers meet on the Monday next after the election, adjourn to Tuesday, and adjourn again to Friday, full ten days after election. It is also within the range of probability that the board might declare the result of the election on that day too late for an application for a recount to be made under section 159, which section requires that the application shall be made within ten days after the election, which limitation as to the time in which to make such application has been held to be mandatory by Mr. Justice Minturn, in the Van Moort case, 85 Atl. 813.

The legislature, in order to make an application for a recount efficacious and to prevent the prime

object of the act from being circumvented by improper motives, very wisely refrained from making the granting of such application dependent upon the final result as declared by the board of county canvassers.

These views lead to the conclusion that the application for a recount and the order thereon were properly made.

Another objection urged by counsel for the prosecutor against the validity of the proceedings, under review, is that the ballots were not recounted under the direction of the Supreme Court Justice, in that the Justice was not present, presiding at the recount. This objection is obviously the offspring of a misapprehension of what is meant by the statutory authorization of a Justice of the Supreme Court to order and cause a recount to be publicly made under this direction by the county board of elections. Counsel for the prosecutor argue that this language implies that the recount should be made in the presence of the Justice of the Supreme Court. But that is clearly not the general sense of the language used. What the language imports, obviously, is, that the board in making the recount shall be subject to the direction of the Justice. The statutory mandate that the recount shall be under the direction of the Justice, simply puts a recount under his judicial control or direction. This direction may be properly exercised by the Justice out of the presence of the board by an order, in writing, or verbally, in the presence of the board. The statute does not require the presence of the Justice during the progress of the recount. The settled practice is for the board of elections, in the absence of the Justice, to count the ballots that they can agree

upon by a majority vote, and as to those ballots that they cannot agree upon to count, by a majority vote, to lay them aside and refer them to the Justice for his decision. This was the practice pursued in the present case and was proper.

Lastly, it is claimed by counsel for the prosecutor, that the Justice was without any jurisdiction to revoke the certificate of election, granted by the county board of election to the prosecutor, and to issue in its place and stead a certificate of election to the defendant, Ackerman, because of the fact that during the progress of the recount the term of office of the Justice had expired and an interval of two or three days had elapsed before the Justice was reappointed, and it is on this situation that counsel bases the argument that the recount had during that interval was not, by force of the circumstances mentioned, under the direction of a Justice of the Supreme Court, as required by the statute, and that the vitality of the recount was extinguished simultaneously with the expiration of the term of office of the Justice.

The fallacy of this position, which is apparent, arises from an unwarranted assumption, by counsel for prosecutor, that the power conferred upon the Justice of the Supreme Court by the statute, vests in him in his individual and not official capacity, and that, therefore, the life of the order and directions given under it, became extinct when the official term of the Justice, who made the order, expires.

Carrying out this assumption to its legitimate conclusion, it follows that where such Justice resigns or dies during a recount, or after it is concluded, and before any further action is taken to give proper effect to the recount, the entire pro-

ceedings taken become a nullity. As the applicant for a recount is barred from making a new application, under the statute, by reason of the limitation of time within which such application must be made, the applicant not only loses the benefit of the statute by having a recount of the votes, in which the general public has also an interest, in that the votes cast for a candidate shall be given their proper effect, but he is also saddled with the expense of such recount, which, in largely populated counties like Essex and Hudson, is very great, and, therefore, is more or less a factor to be considered in giving a reasonable construction to the act.

The duties conferred upon the Justice by the statute are both of a judicial and ministerial nature. The order that he makes for a recount is a judicial order and has the like force and effect as any other judicial order, made by a court of competent jurisdiction, and that is, that the life of the order remains intact, unless the order be revoked or reversed by competent authority, until the purpose of the order has been fully achieved. The order, in this case, therefore, was in force during the recount made by the board on the days intervening between the expiration of the official term of the Justice and his reappointment.

We are unable to perceive any force to the contention of counsel for the prosecutor that the power conferred by statute upon the Justice to grant a recount to be had under the direction of the Justice, is limited in its exercise by him in his individual capacity as such justice. Besides, we think to uphold such a contention would be productive of incalculable mischief and chaos in the

administration of justice. Moreover, we find nothing in the statute that countenances the construction contended for.

The legislative intent was not to confer the powers designated by the statute upon the individual, independent of the judicial office with which he is clothed, but, clearly, upon the judicial office, irrespective of the individual invested therewith.

The statute provides, that the application for a recount may be made to any Justice of the Suremep Court. The words, "such justice," which appear in subsequent clauses of the act, do not necessarily limit the carrying out, with effect, the provision of the act to the Justice of the Supreme Court who in the first instance granted the order for a recount.

The provisions of the act may be effectuated by any Justice of the Supreme Court, whenever the Justice who originally made the order for a recount has become incapacitated, resigned or died.

It is the duty of the court to construe legislative acts so that they are workable, whenever that can be properly done, for the purpose of effectuating their intent and spirit.

In the present case the order for a recount was made by the Justice presiding in the Hudson Circuit; he gave directions for making the recount; his term of office expired while the recount was going on and thousands of ballots had already been counted with great labor, patience and expense. After an interval of two or three days the Justice was reappointed and heard counsel engaged in the recount on disputed ballots which had been laid aside by the board and referred to him, as Justice, for decision. His decision resulted in favor of the applicant for a recount and thereupon he revoked

the prosecutor's certificate of election and issued a certificate of election to the defendant Ackerman. The fact of a temporary vacancy in the office of Justice of the Supreme Court, in the Hudson Circuit, according to the views above expressed, did not operate to nullify the recount, nor did it prevent the members of the board of election from pursuing the count which had not yet been completed. It is not disputed that the board had full power to count the votes and refer all disputed ballots upon which they could not agree to the Justice for decision. The Justice who ordered the recount was reappointed and therefore it cannot be justly said that the prosecutor was in any manner prejudiced by having the matter heard and determined by a Justice who was a stranger to the earlier proceedings. Even if we adopt the view urged that the reappointment of the Justice was the appointment of a new Justice, as we regard the situation, it is of no importance whatever, for that may be truthfully said, in a certain sense, of a Justice who is reappointed immediately upon the expiration of his term.

The reasons we have given lead to the result that the certiorari must be dismissed, with costs.

Rule for Judgment

(Filed April 3, 1917)

NEW JERSEY SUPREME COURT.

PAUL SEGLIE, *Prosecutor,* vs. FRANCIS J. SWAYZE, Justice of the Supreme Court, Hudson County Board of Canvassers of Elections, JOHN J. McGOVERN, Clerk of the County of Hudson and HENRY ACKERMAN, *Defendants.*	On Certiorari. Rule for Judgment.

A writ of certiorari having been allowed in the above matter on the thirteenth day of February, Nineteen Hundred and Seventeen, and a rule thereon having been entered for the taking of depositions by all of the parties hereto, and the argument of said writ coming on to be heard before the Court in the presence of Aaron A. Melnicker, J. Emil Walscheid and George McEwan, of counsel, with the prosecutors, and in the presence of Gilbert Collins and Richard Doherty, of counsel, with the defendants, and the Court having considered of the depositions taken under the rule aforesaid and having heard the argument of counsel and considered the same, it is thereupon

Rule for Judgment.

ORDERED that the writ of certiorari heretofore allowed herein be dismissed with costs.

Entered April 3, 1917.

By the Court,
F. J. SWAYZE, *Judge.*

On motion of
RICHARD DOHERTY,
Attorneys of Defendants.

New Jersey Court of Errors and Appeals.

PAUL SEGLIE, *Prosecutor,* *vs.* HENRY ACKERMAN, et als., *Respondents.*	On Certiorari.

BRIEF FOR PROSECUTOR.

The writ of certiorari in this case brings up for review an order of the Honorable Francis J. Swayze, a Justice of the Supreme Court, directing a recount of the ballots cast for the office of Boulevard Commissioner of Hudson County, at a general election held therein on November 7th, 1916, and the proceedings in such recount subequent thereto, and culminating finally in an order revoking a certificate of election theretofore issued to Paul Seglie, prosecutor, and issuing, in place thereof, a certificate of election to Henry Ackerman. Ackerman and Seglie were both candidates for Boulevard Commissioner at such election.

The order for the recount was made upon the petition of Henry Ackerman (Case, p. 4). A certificate of election to Paul Seglie, to the office of Boulevard Commissioner, was issued December 4th, 1916 (Case, p. 3). The order for the recount on Ackerman's petition was made on December 1st, 1916 (Case, p. 6). The official state-

ment of the result of the election was made and filed by the County Board of Canvassers on December 4th, 1916, and showed that Seglie had a majority of 22 votes over Ackerman (Case, pp. 286 and 287). On the recount, Ackerman appeared to have a majority over Seglie of 104 votes (Case, p. 290). This result on the recount having been certified by the County Board of Election to Justice Swayze, he did, on February 13th, 1917, make the order revoking the prosecutor's certificate of election, and issuing in place thereof, a certificate of election to the said Ackerman (Case, p. 9).

Objection was made to the issuance of a certificate on the ground that there was no jurisdiction to issue it, for the reasons:

1. That the petition upon which the order for a recount was made, did not comply with Section 159 of the Election Law, in that it failed to set out sufficient reasons for a recount, within the meaning of that section (Case, p. 16);

2. That the order for a recount was made on December 1st, 1916, before the result of the election had been declared in accordance with the Election Law;

3. That the term of office of Justice Swayze as a justice of the Supreme Court, expired on January 19th, and everything done by the County Board of Elections after that date and by Justice Swayze after that date, was illegal. The County Board of Elections recounted a considerable number of ballots after the expiration of the term of the justice. The justice, after the expiration of his term, passed upon a large number of ballots, and, also after the expiration of his term, revoked the prosecutor's certificate, and issued a new one to the respondent, Ackerman, and that all this was contrary to the plain provisions of Section 159 (Case, p. 19);

4. That the ballots which were recounted were not the identical ballots which were cast at the election; that the ballots had been tampered with; that actual fraud had been committed, and that there was no recount of the ballots cast at the election within the contemplation of Section 159 (Case, p. 18);

5. That the ballots were not recounted under the direction of the Justice of the Supreme Court who ordered the recount (Case, p. 34);

6. That there was no proof that error had been made by any Board of Elections or of Canvassers, in counting or declaring the vote of such election; that the returns of the election officers were presumptively correct, until overcome by proof of the commission of error, and the burden of proof is upon the contestant, to show that the identical ballots were counted.

These objections were overruled, and the certificate (p. 9) was issued.

The reasons upon which the prosecutor relies to have all these proceedings set aside (Case, p. 11) embody substantially the foregoing objections, and may be summarized generally in the following manner:

1. That Justice Swayze was without jurisdiction to make the order for the recount because

a. The petition for the recount was insufficient;

b. The order for the recount was made before any result of the election had been officially declared;

2. That after the term of office of Justice Swayze expired on January 19th, 1917,

a. The County Board of Elections had no power to continue the recount and the ballots

recounted by such Board after that time were not legally recounted;

b. The ex-Justice had no power to pass on disputed ballots after such expiration of his term;

c. The ex-Justice had no power after such expiration of his term, to pass upon ballots submitted to him by the County Board of Elections, sitting as a recounting board, after the term of the Justice had expired;

d. The ex-Justice had no power to revoke the prosecutor's certificate of election, and issue a new one to the respondent, Ackerman;

3. That the Prosecutor's Certificate of Election could not be revoked and a new one issued to the respondent Ackerman because

a. The recount was not held under the direction of the Justice of the Supreme Court who had ordered it;

b. There was no proof of the identity of the ballots recounted with those cast at the election, sufficient to overcome the presumptive correctness of the original returns made by the County Board of Canvassers;

c. There was proof of fraudulent tampering with the ballots, and of reasonable opportunity for unlawfully tampering therewith, sufficient to destroy the value of the ballots as evidence of the result of the election, and rendering such ballots impotent to impeach the original returns.

This entire proceeding is based upon Section 159 of the Election Law, which provides as follows:

"Whenever any candidate at any election shall have reason to believe that an error had been made in counting the vote or declaring

the vote of such election, * * * whereby the result of such election has been changed, such candidate * * * may, within ten days after such election, apply to any Justice of the Supreme Court, who shall be authorized to order and cause, upon such terms as he may deem proper, a recount of the whole or such part of the votes as he may determine, to be publicly made under his direction by the County Board of Elections, * * * and, if it shall appear upon such recount, that an error has been made, sufficient to change the result of such election, then such justice, in case of candidates, shall revoke the certificate already issued to any person, and shall issue in its place another certificate, in favor of the party found to have received a majority of the votes cast at such election * * *."

POINT I.

Justice Swayze was without jurisdiction to make the order for the recount because

a. The petition for the recount was insufficient;

b. The order for the recount was made before any result of the election had been officially declared.

This entire proceeding is based upon Section 159 above quoted. Whatever jurisdiction exists, exists by virtue of the provisions of that section, and the requirements of that section must be strictly complied with, in order to confer jurisdiction. It provides that whenever any candidate "shall have reason to believe" that an error has been made, whereby the result of any election has been changed, such candidate may apply for a recount.

The petition in this case merely states that the petitioner "has reason to believe that an error

has been made by various district boards of election, in counting and declaring the vote of said election, whereby the result of such election has been changed, and further shows that in the return of the election filed by the Board of Registry and Election of the First District of the Second Ward of the City of Bayonne according to the written return of the votes cast for one Paul Segli, he received 127 votes, while according to the statement of such votes, expressed in figures, he received 147 votes."

In the first place, this statement is untrue, as the return clearly showed that Seglie had received 148 votes. But, assuming that said statement was true, it is insufficient. The petition fails to show how many votes were cast for the petitioner and how many votes were cast for Seglie. It fails to show what Seglie's majority was, and it fails to make specific allegations which would show that the errors complained of were sufficient to change that majority. In fact, it shows no reason at all for the belief expressed by the petitioner, that an error had been made sufficient to change the result of the election. The truth of the matter is that Seglie's majority was 22 and if that fact had been stated, as it should have been, it would have been manifest then, that the single instance of an error alleged in the petition, was insufficient to change that majority. The alleged discrepancy in the First District of the Second Ward of Bayonne, which is the only specific allegation in the petition, would, if true, make a difference of 20 votes. This would not have been sufficient to overcome Seglie's majority. And this is the only "reason" which petitioner gives for the belief that an error had been made by the Board of Elections.

A petition for a recount cannot be based upon mere conjecture.

In re Van Noort, 85 Atl. 813.

Proceedings for a recount are purely statutory and the statutory requirements must be observed.

15 Cyc. 429, 430.

A petition to contest an election was quashed which averred that many illegal ballots were cast, and counted against the contesting candidate, and if they had not been counted the contestant would have been elected; the petition, however, failed to aver expressly that said illegal votes were cast for the candidate who was declared elected, and also omitted to state the number of such illegal votes or the whole number of votes cast.

Zerby vs. Snare, 167 Pa. St. 183.

A petition in an election contest which fails to set out with required certainty that the petitioner was deprived of a sufficient number of votes to change the result of the election is insufficient.

Johnson vs. Brice, 83 S. W., 791 (Tenn.)

If the petition in an election contest does not show that by reason of the illegal casting or rejection of ballots, the result is different from what it would otherwise have been, it is insufficient.

Todd vs. Stewart, 14 Colo. 286.

A petition for an election contest is insufficient where it shows on its face that, after adding to contestants total all of the votes of which he specifically claims he was deprived and deducting from contestee's total all of the votes which the petition specifically claims were illegally counted for him, there yet remains a majority of votes in favor of the contestee.

Maloney vs. Collier, 83 S. W. 667 (Tenn.).

An election contest authorized by statute being a special proceeding, the jurisdictional facts must appear on the face of the proceedings and failure thereof is fatal. A statement which failed to show that the mistakes complained of affected the result was declared insufficient.

Gillespie vs. Dion, 18 Mon. 183.

A recount must be applied for in a fixed statutory method, and not by a mere oral request.

McCoy vs. Boyle, 51 N. J. L. 53.

Unless it appears upon the face of the petition, notice and specifications that the result of said election will be so changed by proof of said allegations, as to overcome the majority of the person who has been declared duly elected, or to show that it is impossible to ascertain the true result, it will be the duty of the Court to quash the petition.

Loomis vs. Jackson, 6 W. Va. 613.

It will be observed that this statute provides that whenever a candidate at any election shall have reason to believe that an error has been made *"whereby the result of such election has been changed"*, such candidate may apply for a recount. This clearly means that there must be a "result" before there can be any allegation of an error, whereby such result had been changed. The result here referred to can be no other than the official result, as declared by those charged under the law, with the duty of declaring the result. There can be no result, within the contemplation of this section, until the Board of Canvassers has declared the result. The result referred to here is that provided for in Section 108 of the Election Law, which prescribes the manner in which the result of an election is to be officially ascertained. There can be no other re-

sult except the result contemplated by the statute. In this case, there was no result until it was officially declared by the County Board of Canvassers on December 4th, 1916. When the order for the recount was made on December 1st, 1916, there was no result, officially declared or authentically know. There was at best a conjecture as to what the probable result would be. But this result is not the result contemplated by Section 159. It follows, therefore, that the order for the recount, made on December 1st, 4 days before there was an official result, was premature and was improvidently made.

Until the result of an election has been certified by the proper officers there can arise no case of a contested election.

Barnes vs. Gottschalk, 3 Mo. App. 111.

A party cannot maintain an action to contest an election until after the votes are canvassed by the canvassing board.

Nichols vs. Barrick, 62 Pac. 204 (Colo.).

POINT II.

After the term of office of Honorable Francis J. Swayze, as Justice of the Supreme Court, expired on January 19th, 1917,

a. The County Board of Elections had no power to continue the recount, and the ballots recounted by such board after that time were not legally recounted.

b. The Ex-Justice had no power to pass upon disputed ballots;

c. The Ex-Justice had no power to pass upon ballots upon which a dispute had arisen at a time when he was no longer sitting as a member of the Board of Elections;

d. The Ex-Justice had no power to revoke the prosecutor's certificate of election and to issue a new one to the respondent, Ackerman.

Attention is again directed to the provisions of Section 159, which state that a candidate may apply to any justice of the Supreme Court "who shall be authorized to order and cause, upon such terms as he may deem proper, a recount of the whole or such part of the votes as he may determine, *to be publicly made, under* HIS *direction,* by the County Board of Elections" * * * "And if it shall appear, upon such recount, that an error has been made, sufficient to change the result of such election, then SUCH Justice shall revoke, etc., * * * SAID *justice* shall have power to decide all disputed questions which the Board shall fail to determine by a majority vote thereof."

From a reading of this section, it is obvious that the justice who ordered the recount is the one under whose direction the recount is to be made, and that *"such justice"* alone has power to revoke the certificate of election already issued and issue a new one, and that "SAID justice" alone has the power to decide disputed questions, which the election board fails to decide.

In the case before the Court, the recount commenced on December 7th, 1916, and continued up to and including January 22nd, 1917. On January 19th, 1917, the term of office of Justice Swayze, as a justice of the Supreme Court, expired. The term is fixed by the constitution. There is no provision for a justice of the Supreme Court continuing to act until his successor is appointed. At the end of seven years the term of office of a Justice of the Supreme Court comes to a close. For two days after Justice Swayze's term expired, to wit, on January 20th and January 22nd, the County Board of Elections continued the re-

count, counting on those two days the ballots from 13 districts in the county. On those two days, there was no Supreme Court Justice in existence, under whose direction the recount was being made. During those two days, the recounting board was improperly constituted. It had no power to recount. During those two days, approximately 15 ballots were disputed. Justice Swayze was reappointed and qualified on January 23rd, and thereafter, on January 27th, he again sat at the Court House. At that time, these 15 disputed ballots with about 135 others, which had accumulated during the last week or two of the recount, were submitted to him for decision Justice Swayze at that time was not the Justice who had ordered the recount and under whose direction it was required that the recount be made, and who was the justice by whom disputed questions were to be decided.

The mere fact that Justice Swayze was re-appointed is so far as it relates to the legal aspects of this situation, an irrelevant coincidence. The statute confines all the power which it confers upon the justice, to the justice who ordered the recount. It conferred no power upon any other justice. If Justice Swayze had not been re-appointed—if John Smith had been appointed a Justice of the Supreme Court upon the expiration of Justice Swayze's term—then it could hardly be argued that John Smith was vested with any power in this matter under this statute. He would have been a total stranger to the proceedings. Whatever authority there is upon the subject is absolutely opposed to the notion of a successor exercising these powers, and if another person, appointed in Justice Swayze's place, could not have exercised these powers, then the mere fact that Justice Swayze was himself appointed, to the place, does not and cannot confer any power upon him, as such new justice.

The situation would have been different if these powers had been conferred upon a court, for a court has continuous existence, and its jurisdiction goes on forever, regardless of the personnel of its members But the power here was not conferred upon a court, but upon a justice, and when his term expired, his powers ceased to exist.

At common law where a statute specifies the duration of a term of office and the officer elected or appointed thereto served out such term, his power and authority, as such officer, thereupon ipso facto cease, unless by law he be authorized to hold over.

State vs. Perkins, 139 Mo. 114;
People vs. Tieman, 8 Abb. Prac. 359;
30 Barb. 193;
Bodger vs. U. S., 93 U. S. 599;
Coopwood vs. Prewett, 30 Miss. 206.

In the Perkins case, motion for a new trial was made before a judge who had tried the case but whose term had expired. It was held that he had no authority to pass on the motion.

It appeared that the Board of Canvassers provided by law for ascertaining and determining the result of the election was not organized as expressly required by statute. Court held, that the result of the election had never been legally determined and ascertained.

White v. Brim, 48 Mo. App., 111.

Where a Board of Canvassers met and adjourned sine die before completing its work and then the time within which it was required to complete the same expired, it was powerless thereafter to act. The Court said:

"To permit or require them to do any act after that time, as such Board, would be wholly unauthorized by law.

"The board is then functus officio and the Court cannot now revive its powers, or exercise legal control over it. The act which the complainant asks to be performed must be performed if at all, as a Board of Canvassers, and not by them or any one of them as individuals."

Clark vs. Buchanan, 2 Minn. 346.

There was a petition to the Court that a rule may issue, that the Governor and Council and Secretary of State may show cause, why a writ of mandamus should not issue commanding the Governor and Council to declare the petitioner elected to the office of County Commissioner.

An act provided that the

"Governor and Council shall open and compare the votes returned as specified in the first section of this act."

The Court (Chief Justice Shepley) said:

"The act of opening and comparing the votes returned for County Commissioners cannot be performed by the persons holding the offices of Governor and Councillors, unless they act in their official capacities for it is only in that capacity that the power is conferred upon them. The duty is to be performed upon the responsibility of their official stations and under the sanctity of their official oaths. The Governor and Council and not certain persons, that may be ascertained to hold those offices, must determine the number of votes returned for each person as County Commissioner and ascertain that some one has or has not a sufficient number to elect him.

* * * * *

"If the individuals constituting the Governor and Council could be considered as acting, while opening and comparing the votes returned, in their individual and not their official capacities, the rule prayed for should not be made, for an election of Governor and

of Councillors has been declared since the act complained of was performed and all the individuals comprising the Council are not the same as they were when the act was performed."

In Re Dennett, 32 Me. 508.

A statute provided that contested election cases shall be tried by the County Judge or County Court. A contest was commenced and the evidence heard by a County Judge whose term expired during the trial. It was held that the trial should be held de novo before the new judge.

Clanton vs. Ryan, 14 Colo., 419.

Where after the commencement of the proceedings for the sale of premises under a loan office mortgage, the term of office of one of the Commissioners of Loans expires, and no successor is appointed and qualified, the remaining Commissioners had no power to proceed alone.

Where powers are conferred upon a number to act collectively, and especially in matters involving any discretion, it is an indication that the association, if not the concurrence, of all is essential.

Pell vs. Ulmar, 21 Barber, 500.

One who has been a probate judge cannot after he has ceased to hold the office, authenticate a sale made by him when in office.

Bradford vs. Cook, 4 La. Ann., 229.

A bill of exceptions settled by the Circuit judge who tried the cause, under the permission of a stipulation between counsel for the respective parties, after the judge had retired from office is a nullity. A stipulation of the parties could confer no such jurisdiction.

Crittenden vs. Schermerhorn, 35 Mich., 370.

See also

Coopwood vs. Prewett, 30 Miss., 206.

When the term of office of the judge who tried the case expires after an order for judgment has been entered, but before the findings have been filed, no valid judgment can be entered in the action without a new trial being had.

Mace vs. O'Reilly, 70 Cal., 231.

A former County Judge has no power to attach his signature to an order in a case heard by him, after the term at which it was heard had adjourned and his term had expired, even though it was done pursuant to an order of the Court.

Waite vs. Poe, 81 N. E., 837 (Ill.).

In addition to the cases cited above, we have, in this state, the case of *Van Riper vs. Dubron,* 82 N. J. L., p. 25, in which the question of the power of a district court judge after the expiration of his term of office, arose. In holding that the judge had power to dispose of a matter which had come before him, during his term, the Court relied upon statutory authority, clearly indicating that, in the absence of such authority, the judge could not continue to exercise any power after his term of office expired.

That this interpretation of the law might create a hardship or a condition in which parties were left without remedy, might be unfortunate, but, as Mr. Justice Swayze pointed out in the case of *Darling vs. Murphy,* 70 N. J. L., 435, the remedy was with the legislature, and not with the Court.

In that case, the Court held that a person who had been originally declared elected, but whose

certificate was after a recount revoked could not institute a contest under Section 162, because he was himself the incumbent, "incumbent" there meaning the person declared to be elected by the Board of Canvassers.

The Court said:

> "It is true that this construction deprives a person who is originally declared elected and whose certificate is revoked upon a recount of the right to resort to the statutory proceedings to contest the election, but as the remedy by quo warranto is open to him, we cannot say that the legislature intended to give him the statutory remedy. If it is a casus omissus, the remedy rests with the legislature.
>
> "An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed. * * * It is manifest that an act of the legislative department cannot be enforced, when its meaning cannot be determined by any known rules of construction. The courts cannot venture upon the dangerous part of judicial legislation to supply the omissions, or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers."
>
> *State, etc., vs. West Side Ry. Co.*, 146 Mo., 155.

> "It is not allowable to interpret what has no need of interpretation."
>
> Vattel (Law of Nations, Book 2, Sec. 263).

> "I really cannot doubt what the legislature intended to do; but they have not carried it into effect. * * * It is better that we

should adhere to the words they have used than that we should strive to amend it."

Lord Campbell in Coe vs. Lawrence (1 El. & B., 516).

In *State vs. State Board of Canvassers,* 150 N. W., (542 (Wis.), the law required the Board of Canvassers to canvass and declare results within a certain time. An act was passed providing for a recount under which the canvass could be delayed beyond the statutory time within which it had to be made. The Supreme Court of Wisconsin held that such act could not be enforced. It was either unconstitutional or void for uncertainty.

It follows, therefore:

That Justice Swayze, on February 13th, 1917, not being the justice who ordered the recount in this case, had no power to revoke the prosecutor's certificate of election, and to issue another in favor of the respondent, Ackerman, and consequently, said certificate issued to him, is void;

That the County Board of Elections, when it continued this recount on January 20th and 22nd, was acting contrary to the statute, as the recount on those days was not made under the direction of the justice who had ordered the recount, nor, in fact, under the direction of any justice;

That on January 27th, when Justice Swayze was in his new term, he had no power to pass upon 150 disputed ballots which had arisen during the recount, as he was not then, on January 27th, the justice who had ordered the recount and under whose direction it had to be made, and who was vested with the power to decide disputed ballots;

That Justice Swayze, on January 27th, had

no power to pass upon the ballots over which a dispute had arisen, on January 20th and January 22nd, as his term of office had expired on January 19th, and the recount having proceeded on January 20th and 22nd, without the direction of the justice, who had ordered it, and there being no justice then, as provided by the act, who had the power to decide disputed questions.

POINT III.

That the Prosecutor's Certificate of Election could not be revoked and a new one issued to the respondent, Ackerman, because

a. The recount was not held under the direction of the Justice of the Supreme Court who had ordered it;

b. There was no proof of the identity of the ballots recounted as those cast at the election, sufficient to overcome the presumptive correctness of the original returns made by the County Board of Canvassers;

c. There was proof of fraudulent tampering with ballots and of reasonable opportuntiy for unlawful tampering with the ballots, sufficient to destroy the value of the ballots as evidence of the result of the election, and render such ballots impotent to impeach the original returns.

The first objection under this point is that the recount was not held under the direction of the justice of the Supreme Court who had ordered it, as required by the statute. The Court is called upon to construe what this means. Justice Swayze, who ordered the recount, attended at the Court House on several occasions, during the progress of the recount, on which occasions, by

arrangement with counsel, disputed ballots were submitted to him for decision. Except for these occasions, the justice was not present during the actual counting of the ballots. Whether this is a compliance with the law, is a question to be determined. Whether, in the absence of the justice from the recount, he can be satisfied of the identity of the ballots recounted as those cast at the general election, to permit him to certify thereto, is one of the questions involved in this inquiry. It seems unreasonable that such justice should be required to actually participate in the recount, but the question is, What does the statute require?

The other objections under this point go to the question of the identity of the ballots. There can be no doubt that the basis of the action of the justice in revoking one certificate and issuing a new one to another person, is that the votes recounted are those cast at the general election. That not only is self-evident, but is clearly laid down in the case of *Law vs. Mathis.* It is our contention in this case, not only that the burden is upon the contestant to establish that the ballots recounted were the identical ballots cast at the election, which burden he has failed to sustain, but that it has actually been proved that the ballots recounted were not the identical ballots cast at the election; that not only was there conclusive evidence that ballots had been so preserved as to afford an opportunity to unauthorized persons to tamper with such ballots, but that ballots cast at the election had actually been fraudulently tampered with.

Proof on this subject may be summarized in a general way, as follows:

West Hoboken.

August L. Wachlin, the Town Clerk of West Hoboken, testified (p. 63) that all the ballot boxes in that municipality were deposited in the Council Chamber in the Town Hall on the night of election and stayed there until delivered to the County Board for the recount (Dec. 7 and 8). The boxes were all locked. There are three entrances to the Council Chamber. One leads from the main entrance on the street; one leads from the Town Clerk's office and another is up a stairway in the rear of the room, from the street on the side of the building. There is also a doorway from the Council Chamber into the office of the Board of Health. The Council Chamber sometimes gets pretty crowded, at Council meetings, where these boxes were stored.

First District, First Ward.

Frank Ravino, a member of the election board, testified (p. 45) that all the ballots were strung on 3 strings, and the strings were put into the box. Also the flag, books and tally sheet. The box was locked, taped and sealed. That in stringing the ballots, strings with wooden buttons on the ends were used. All used ballots were strung. The ballots on the strings were put in the box without breaking the string. That he tied the ends of each string together, so as to make a ring.

Charles P. Kates, corroborates Ravino (p. 55) and adds that the strings of ballots were put at the bottom of the box, the other things were put in after, books last. The box was delivered to the Town Clerk, locked, taped and sealed.

Cornelius O'Neill (p. 76) testified that when the box from this district was brought before the County Board, it was neither locked nor

sealed. One of the strings of ballots was broken and ballots from No. 268 to 300 were unstrung, in box. There were 4 strings of ballots.

Benjamin Tees (p. 82) corroborates Mr. O'Neill. He testified to there being 3 intact strings of ballots and one broken string, with a number of ballots off the string, scattered in the box; on about 12 of this lot, numbered consecutively, the cross alongside Seglie's name had been erased.

John Bunton testified to the same effect. Bunton and Tees testified that the ends of the strings were held by pieces of cardboard and not by wooden buttons, as the election officers testified they were when put in the box. Bunton testified that the string containing ballots from 201-267 was not long enough to hold ballots from 268-300, and that there were no needles in the box.

William Hiles (p. 101) and Hugo Schunk (p. 102) the other two election officers, testified that the strings had wooden buttons on ends.

The original tally sheets put in evidence showed 176 votes for Seglie and 120 for Ackerman. The recount was Seglie 160, Ackerman 133, a gain for Ackerman of 29. The following ballots, upon which the cross alongside Seglie's name had been erased and which were voted for Ackerman (with the possible exception of 1 to 2) were offered in evidence, Nos. 271, 272, 273, 274, 275, 276, 283, 284, 285, 286, 287, 289, 300 and 305.

Third District, First Ward.

Mr. Coyle (p. 117) testified that the box from this district came to the County Board unlocked, unstaped and seal broken; that there were a number of voted ballots loose, unstrung, lying under the unused ballots. These voted ballots had holes punched through them, indicating that they had been strung. There were two strings of ballots. Part of the unstrung ballots were numbered from

2-25. Of these ballots No. 5, 9, 17 and 24 had the cross alongside of Seglie's named erased. There was similar erasures on the ballots in the other batch of unstrung ballots.

Seglie testified (p. 129) that this box was unlocked and unsealed. There were 2 bundles of unstrung ballots, between 14 and 15, on each side of the box, between tally sheets. The rest of the ballots were strung on 2 strings. These were on the bottom of the box. The two bundles of loose ballots were on top.

The election officers in this district, Guenther (p. 131), Johns (p. 133) and Geiger (p. 136), testified that all the ballots had been strung on the two strings and the ends tied together and then the two strings tied together. There were no unstrung ballots. The box was locked and taped and sealed and delivered to the Town Clerk.

The original tally sheet here shows Seglie 138, Ackerman 87. The recount figures are: Seglie 123, Ackerman 113, a net gain to Ackerman of 40.

Edward Jones testified (p. 142) that the boxes from the 2nd District, 1st Ward; 5th District, 2nd Ward; 5th District, 1st Ward; 6th District, 2nd Ward; when they were brought before the County Board of Elections, were all unlocked, unsealed and untaped.

Aaron A. Melniker (p. 146) testified that the boxes from the 4th District, 2nd Ward; 7th District 2nd Ward; 3rd District, 3rd Ward, and 5th District, 3rd Ward; when brought before the County Board of Elections, were all unlocked, unsealed and untaped.

Hoboken.

Seventh District, Second Ward.

Maher, election officer in this district, testified (p. 190) that all unused ballots had been put into the box at the close of the election and the box locked, sealed and taped.

Maxwell and Meyers, official talliers, testified (p. 197-198) that unused ballots number 440-483 were not in the box when it was opened by the County Board of Elections. A few days later Maher took the stand and said that after he had testified he had gone to the barber shop where the polling place was and found the unused ballots there. This was more than two months after the election.

Third District, Third Ward.

Cullen (p. 149) Bohn (p. 151) and Buist (p. 152) election officers in this district, all testified that the ballots were all strung on one string and the box locked, taped and sealed. When the box was opened by the County Board of Elections (p. 154), all the ballots in this box were unstrung and lying at the top of the box. There was no string in the box.

First District, Third Ward.

When this box was opened by the County Board (p. 156) all ballots were unstrung, lying at the top of the box. There was no string in the box.

Commisal, election officer, testified (p. 156 and p. 70) that all the ballots were strung by him. The box was locked and sealed.

Marone, election officer (p. 246), testified that the ballots were unstrung when put into the box and gave as his explanation that the hole in the top of the box was too small to put the string of ballots in. He described the hole as being

about 6 or 7 inches wide. It developed that in this particular box, the whole top of the box came off.

Fourth District, Fourth Ward.

McCarthy, election officer (p. 196), testified that he put 2 tally sheets in the box.

Markus, official tallier (p. 201), testified that when the box was opened, by the County Board, there was no tally sheet in the box.

JERSEY CITY.

Second District, Tenth Ward.

John M. Kane (p. 174) testified that during the recount of this box, one Thomas Dolan, representing Ackerman, while examining ballots about to be recounted, marked two ballots. Two ballots with marks evidently made by someone other than the voter, were produced before the Court (p. 205).

Dolan (p. 240) denied marking any ballots. There is considerable testimony about this incident, which strongly corroborates Kane's story, aside from the fact that Kane had no interest whatever in fabricating such a story. His every impulse would naturally be against putting himself in the position which he was forced to occupy. The strongest evidence against Dolan is that of the ballots themselves.

Third District, Tenth Ward.

Jones testified (p. 165) that he was keeping tally and that at the conclusion of the recount of that box, the official tally gave Ackerman 96, while Jones' tally gave him only 91. He tallied every vote as it was called off. His tally was in agreement with the official tally all through the recounting of this box until the end and then the official talliers had one group of five tallies more

than Jones did. Jones states positively that he did not make any mistakes. It was a curious coincidence that during the recount of this box, there was a considerable rumpus in an adjoining room, which distracted the attention of most of the participants in the recount. The strange thing about this incident is that there is no attempt made to deny, contradict or impeach Jones' testimony.

From this brief summary of the testimony, it is certain that not only did the contestant fail to establish the identity of the ballots recounted as those cast at the election, but that the ballots were not, in fact, the same ballots, that there was positive proof that fraud had been committed; that the ballots had been tampered with and had been exposed to being tampered with by unauthorized persons.

> "Where the whole proceeding is so tainted with fraud to an extent that cannot be ascertained, with reasonable certainty, the entire return should be rejected."
>
> Cyc. Vo. 17, p. 368.
>
> "When the result, if shown to be so tainted with fraud that truth cannot be deducible therefrom, then it should never be permitted to form part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristices here shown."
>
> McCrary on Elections, 4th Ed. Sec. 569.

At page 426, this learned author says:

> "That where the return is clearly shown to be wilfully and corruptly false, in material part, the whole of it becomes worthless as proof, for if false and corrupt in one part, it may be in others and all faith in its reliability is destroyed."

And again he says:

"The rule is that if a return be impeached for fraud, it is good for nothing as evidence."

In *McKenzie vs. Hatfield* (W. Va., 1916), S. E., 79, evidence held to show that ballots had been tampered with. The Court said:

"Inspection of the ballots shows that many of them have actually been altered, and the discrepancy between the certified result and the result of the recount *substantially* corresponds and agrees with the number of alterations found. * * *

"If the ballots had not been discredited, they would have been the primary and highest evidence, 'but in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statutes, and that while in such custody, they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with. If there has been an opportunity for tampering with ballots, they lose their character as primary evidence. Not having the ballots, the certificate of the election officers is conclusive.' "

In *Roland vs. Walker,* 244 Ill., 129; 91 N. E., 80, the Court said:

"Where ballots were not carefully preserved and bear evidence of having been tampered with, the official returns are entitled to more weight than the ballots."

In *Rohde vs. Steinmetz* (Colo.), 55 Pac., 814, the Court said:

"The fact that some of the ballots in a box have been tampered with, impeaches the integrity of all in that box on a recount."

In *Graham vs. Peters,* 93 N. E. (Ill.), 315, the Court said:

"The question whether they (the ballots)

shall prevail in a contest over the return is to be determined by considering whether they have been preserved in substantial compliance with these requirements, or have been so exposed to the reach of unauthorized persons that they may have been changed or tampered with. *If there is no evidence which would cast discredit upon the return and the ballots have not been properly preserved, but have been so kept that they might have been reached by unauthorized persons, they will not be regarded as better than the return.*

* * * * * * *

"It is not incumbent upon the defendant to show that they have been changed, and unless the contestant shows that they have been kept in such a way that there was no reasonable opportunity for tampering with them, they cannot overcome the result."

There was no evidence of fraud, but the Court said:

"We are of the opinion that the ballots were not kept in such a way as to authorize the Court to order a recount and to base a decision on the result of such a recount contrary to the return of the judges of election."

In *Rothner vs. Buchner,* 103 N. E., 454 (Ill.), the Court said:

"In this case, the ballots were not sealed up and protected in the manner required by law, but were for several weeks kept in a place where unauthorized persons might readily gain access to them. It is not necessary that an unlawful interference with the ballots should be known; but it is enough to invalidate them as evidence that the opportunity for the interference of unauthorized persons existed. The evidence in regard to the care of the ballots did not justify a decision based upon a recount of them, contrary to the returns of the judges."

In *Doak vs. Briggs,* 116 N. W., 114 (Iowa), the Court said:

"The duty of preserving the ballots is not a negative one of non-interference, but a positive requirement to do whatever may be necessary in order to accomplish the purpose of the law in keeping them inviolate.

"Where ballots cast at an election have been exposed to fraudulent alteration or changes, or have been exposed to the public, or handled by unauthorized persons, it renders them incompetent as evidence to overthrow the official count and return."

Citing many cases.

In this case, no evidence of alterations of ballots, only changes in condition of boxes and discrepancies in results. The Court said:

"It is not sought here to convict any person of having tampered with the ballots. We need not even find as a matter of fact that they were tampered with. If exposed to unauthorized manipulation, the result must be the same as though there was proof of the actual manipulation; in either event, the evidentiary value thereof was destroyed."

In *Hackney vs. Justice* (Ky. 1914) 166 S. W. 760, the Court said, quoting from *Edwards vs. Logan,* 114 Ky. 312, S. W., 852, as follows:

"The rule may be stated to be that, where the ballots are preserved so that their identity is assured, they can be counted during the contest.

"But before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the ballots have not been tampered with since the election and that those offered in evidence are the identical ones cast."

Edwards vs. Logan, likewise held that:

"Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine.

> "It is not sufficient that the mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence, but, if not, they are not only the weakest, but the most dangerous evidence."

In *Thomas vs. Marshall,* 169 S. W., 615, the evidence was very much like that relating to West Hoboken boxes. The Court held that the ballots had been tampered with and would not count them. The contestant was not implicated in the fraud but the Court said it was immaterial; that he could not be beneficiary of fraud, no matter by whom committed.

In *Ottley vs. Herriford,* 170 S. W. 205, the Court held that the evidence was sufficient to prove that the ballots had been tampered with, and said:

> "For the purposes of this case, it is not material how or by whom the alterations of the ballots were accomplished. The fact that it was done so disqualified the ballots from the West Columbia Precinct, that they could not be accepted in evidence to discredit the returns of the election officers of that precinct; hence, appellant, though innocent of participation therein, cannot be benefitted by the fraud."

Where ballots were not preserved as required by law, and unauthorized persons had reasonable opportunity to tamper with them, their competency as evidence is destroyed.

> *Stokely vs. Burke* (Tenn.), 169 S. W. 763.

When it appears that ballot boxes have not been kept by the person legally charged with their custody, and that they may have been exposed to the reach of unauthorized persons for a considerable time, the ballots lose their character as

the best evidence and cannot be allowed to impeach the official canvass.

Howser v. Pepper, 79 N. W., 1018 (N. D.).

Before ballots cast in an election can be received in evidence in a contested election case, or considered, it must affirmatively appear that they have been preserved with that jealous care which precludes the opportunity of being tampered with, and the suspicion of change, abstraction or substitution.

In a contested election case, the onus is on him who would discredit the official count, before resorting to the ballots as the best evidence of who has been elected, to show that these have been preserved with that care which precludes the suspicion of having been tampered with, and the opportunity of alteration or change.

Davenport vs. Olerich, 73 N. W., 603 (Iowa).

Only an opportunity for interference by unauthorized persons is essential to exclude the ballots—and when it appears that ballots were not properly preserved, the returns govern.

Farrell vs. Herberg (262 Ill. 407) (104 N. E. 83).

Before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the ballots have not been tampered with since the election, and that those offered in evidence are the identical ones cast.

Newhouse vs. Alexander (Okla) 110 Pac. 1121.

A contestant in an election contest has the burden of proving that the ballots offered in evi-

dence are those cast at the election and that they are in the same condition as when cast, and unless their preservation is shown to have been such that there has been no reasonable opportunity of tampering with them, they cannot overcome the returns.

West vs. Sloan (238 Ill. 330) (87 N. E. 323).

Where, in an election contest, the evidence shows that the ballots were kept in such a manner that, with little difficulty, any person could obtain access to them and readly mark enough of them to change the result, with little fear of detection, and the judges of the election testified that ballots had been changed, the probative force of the ballots was destroyed and they could not overcome the returns.

West vs. Sloan (supra).

The evidence showed that the bags tied and sealed, containing the ballots, after being returned to the county clerk, were thrown in a back room of the county clerk's office near two outside windows and remained there about a week or ten days, when they were put in a cupboard, the door of which would not remain closed. The room was used for keeping records, files, etc., and was also occupied by the deputy clerk, and the public were admitted without restraint. There was not positive evidence that the doors and windows were kept locked at night, or that the bags had not been tampered with.

HELD—that the ballots were so insecurely kept that a recount would not prevail over the return of the canvassing board.

The Court said:

"As shown by the authorities cited, it is not a question as to whether actual changes or interference in any way with the ballots

has been proved, but whether the opportunity to do so has been afforded. In a case of this character, the public interest is so far involved that rules must be adhered to and enforced which will tend to secure the rights of parties in the future and to hold in this case that the ballots were safely kept, within the meaning of the statute, would certainly be to encourage carelessness and indifference in their preservation, and to greatly imperil the rights of candidates as well as to dis-franchise the voters at any election."

Bonney vs. Finch, 54 N. E. 318 (Ill.).

To render the ballots admissible in evidence to disprove the returns of the officers, contestant must show with a reasonable degree of certainty, that they have not been tampered with since the election.

In the case of *Fishbock vs. Bramel,* 44 Pac. 840, the Court,quotes from *Peo vs. Livingston,* 79 N. Y., 279:

"The returns are the primary evidence of the result of an election. They may be impeached for fraud or mistake, but in attempting to remedy one evil we should be cautious not to open the door to another and far greater evil. After the election, it is known just how many votes are required to change the result. The ballots themselves cannot be identified; they have no earmarks. Everything depends upon keeping the ballot boxes secure, and the difficulty of doing this for several months in the face of temptation and opportunity, requires that the utmost scrutiny and care should be exercised in receiving the evidence."

Also:

"If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but, if not, they are not only the weakest, but the most dangerous."

Citing many other cases.

The Court said further:

> "It is unfortunate, if, in any case, there has been such a disregard of the requirements touching the security of ballots, that they have become tainted with suspicion, or that it is impossible to show that they have not been disturbed and thus the privilege of appealing to them destroyed and perhaps the very will of the people defeated; but the manifest danger which would lurk in any relaxation of the rule concerning this class of evidence, demands its strict enforcement."

In an election contest, because of irregularities in certain wards and precincts, where there were enough votes polled in such wards and precincts to change the result of the election in the county, if all were counted as voting one way, a decision that the election was void, would render void the election in the entire county.

Maloney v. Collier, 83 S. W., 667 (Tenn.).

The statement of the result of the recount, as presented to the justice by the County Board of Elections, is to be treated the same as the statement of the canvass of votes by a district election board. The whole number of ballots counted by the County Board is to be treated as a unit for consideration, just as the whole number of ballots counted by a district board. And where it is shown, as it has been here, that there is fraud in any part of the recount, then the whole of the recount must be set aside and it must be held that the prima facie character of the original return has not been destroyed and that, while the ballots, if proven to have been kept inviolate, would destroy the presumption of regularity made by the original returns, that presumption cannot be overcome by the recount, where the character of the ballots on the recount is questioned. They have then lost all their evidential value. The

fraud vitiates the entire count. It is fair to assume that not all the fraud which was committed was detected and it would put an unfair burden upon the victim of fraud to require ihm to prove all the fraud which was committed.

The cases all hold that where ballot boxes have been tampered with or exposed to unlawful tampering, that they cannot be recounted in a contest. The application of this rule would certainly bar out the ballot boxes in West Hoboken and Hoboken. The result of this would be that there would be no recount of the whole county. A result cannot be predicated upon a partial recount. A candidate is entitled to the benefit of all possible gains in the districts rejected. He would be deprived of that possible benefit if boxes are rejected. He would not then be getting a recount of all the boxes in the county.

For this reason, therefore, if any of the boxes are rejected, the recount cannot stand as overcoming the original returns.

For all these reasons, it is respectfully submitted that the original certificate to the prosecutor should stand and that the order for a recount and the order revoking the prosecutor's certificate of election and directing a new certificate of election to issue to the respondent, Ackerman, be set aside and for nothing holden. GEORGE J. McEWAN

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NEW JERSEY

Court of Errors and Appeals.

PAUL SEGLIE, *Prosecutor Appellant,* *v.* HENRY ACKERMAN, *Defendant-Respondent.*	*On Appeal from Supreme Court from judgment dismissing Writ of Certiorari.*

Brief for Respondent.

At the conclusion of a recount of the votes cast for Boulevard Commissioners at the election held in Hudson County, in November, 1916 — which changed the result so as to supplant Paul Seglie, originally declared elected, by Henry Ackerman, who applied for the recount—Mr. Justice Swayze, following the precedent set in *Mathis v. Low*, *34 N. J. L. J.*, *50*, took cognizance of a claim by the incumbent that some of the votes tallied on the recount were not the ones cast, and with considerable misgiving (case, p. 29, *et seq.*,) permitted testimony on that question. He decided to revoke Seglie's certificate and grant a certificate to Ackerman See his conclusions, page 7. This he did. See the revocation and new certificate (p. 9). He then allowed certiorari thereof (p. 1), with a rule for depositions (p. 14). Under this rule some depositions were taken (p. 286). We will assume for the purposes of argument that the testimony taken before Justice Swayze formed part of the return to the writ, though this is more than doubtful.

The cause was heard before Justices Swayze, Kalisch and Minturn, and judgment of dismissal was rendered (p. 301), on an opinion read for the Court by Mr. Justice Kalisch (p. 291). From this judgment the present appeal has been taken by Paul Seglie.

ARGUMENT.

The Justice of the Supreme Court who grants a revocation and new certificate in case of a recount acts merely as part of the election machinery, as Mr. Justice Swayze said (p. 7). The adjudged cases on the subject are collated in the note to section 159 of the Election Act in Compiled Statutes, page 2126, and it is unnecessary to cite them in this brief. We will refer, however, to *In re Margarum*, 55 N. J. L., 12, where it was held that under an analogous earlier statute reference to a Justice of the Supreme Court to act in the premises was a mere *designatio personae*, and that he did not sit as a Court. It may be doubted, therefore, whether certiorari will lie. The only case dealing with the subject is *Kehoe v. Stagmeier*, 70 N. J. L., 175, in which it was held by the Supreme Court that the revocation and new certificate (miscalled an order) made by a Justice of the Supreme Court after a recount under the statute *sub judice* cannot be reviewed by certiorari, unless in the proceedings the Justice has exceeded his jurisdiction, as we contend he did not in the case in hand.

We are content to stand in this Court on the opinion of Mr. Justice Kalisch in the Court below. His interpretation vitalizes the statute, while the attenuated interpretation for which appellant contends would render it futile.

In so far as the certiorari attempted to review

matters of fact on the weight or sufficiency of evidence, Justice Swayze's decision was binding even on the Supreme Court. See the cases cited in Parker's Digest, page 1655, sec. 79—too numerous for profitable citation here.

In so far as the judgment of the Supreme Court now under review involves any question of fact properly before it, the decision of the Supreme Court is final and binding on this Court.

Davis v. Newark, 54 N. J. L., 144;

Moran v. Jersey City, 58 N. J. L., 653;

Vreeland v. Bayonne, 60 N. J. L., 168;

Morris & Cumings Dredging Co. v. Jersey City, 64 N. J. L., 587;

Suburban Land Improvement Co. v. Vailsburgh, 68 N. J. L., 311;

Yellow Pine Co. v. Assessors, 72 N. J. L., 182.

The judgment of the Supreme Court should be affirmed with costs.

GILBERT COLLINS,
RICHARD DOHERTY,
Of Counsel with Respondent.