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WRIT OF ERROR.

NEW JERSEY, to wit:

THE STATE OF NEW JERSEY, TO WILLIAM H. SMATHERS, ESQ., Judge of the Court of Quarter Sessions of the County of Atlantic, of the Term of January, in the year of our Lord, one thousand nine hundred and twenty-eight:

Because in the record and proceedings, and also in giving of judgment
(Seal) upon a certain indictment against Samuel Mandel of the City of Atlantic City, in the County of Atlantic, for that the said Samuel Mandel sometime between the first day of December, 1923, and October 1, 1924, in the City of Atlantic City, in the County of Atlantic and within the jurisdiction of this Court, being the agent of one Samuel Kean and as such agent entrusted with the collection and care of monies belonging to the said Samuel Kean, he, the said Samuel Mandel, did fraudulently take and convert of the same to the amount of five hundred twenty-five (\$525.00) dollars and upwards, and apply the same to his own use, whereof before you he has been indicted and was, on the first day of February, 1928, thereof convicted by a certain jury of the county taken between the State of New Jersey and the said Samuel Mandel, as it is said, manifest error hath intervened to the great damage of the said Samuel Mandel as from his complaint we have received information, we being willing, in his behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Samuel Mandel commands you that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same to our Jus-

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tice of our Supreme Court of the State of New Jersey, on the twenty-third day of February, nineteen hundred and twenty-eight, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon, for correcting that error what of right and according to the laws of New Jersey ought to be done.

10 Witness, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court, at Trenton, this 3rd day of February, in the year of our Lord one thousand nine hundred and twenty-eight.

EDWARD J. KELLEHER,
Clerk.

ELWOOD C. WEEKS,
Attorney.

RETURN.

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

WM. H. SMATHERS,
Judge.

INDICTMENT.

ATLANTIC COUNTY, to wit:

Be it remembered, that at a Court of Quarter Sessions holden at May's Landing, in and for the County of Atlantic on the eighteenth day of June in the year of our Lord one thousand nine hundred and twenty-five, before the Honorable William H. Smathers, a Judge of the said Court and of the Court of Common Pleas in and for the County of Atlantic, no Justice of the Supreme Court of the State of New Jersey being present at the Court House, and the Grand Jury being desirous of making presentments of sundry bills of indictment according to the form of the State in such case made and provided, by the oath of Thomas F. McGuigan, Mark Loveland, George H. Berke, Max Grossman, Anthony P. Colasurdo, Joseph Dowdell, Wm. S. Mead, Earnest Vogel, Mabel Lauer, Frank C. Fairbairn, R. G. Edwards, Charles S. Adams, Edwin Weil, W. Lindley Jeffers, Walter E. Yates, Howard H. Reed, Wm. F. Dittrich, Edward Grosseup, Wm. Parkhurst, Mrs. Laura Reske, Harry Dietz, Frank E. Dixon and Martin M. Harris, good and lawful men and women of said County of Atlantic, duly summoned and then and there charged to inquire for the State of New Jersey, in and for the body of the County of Atlantic.

It is presented in the manner and form following, that is to say: State of New Jersey v. Samuel Mandel—Unlawful Conversion.

The bills herewith presented are true bills.

MARTIN M. HARRIS,
Foreman.

Filed June 18, 1925.

WILLIAM A. BLAIR,
Clerk, County of Atlantic, N. J.

IN THE COURT OF OYER AND TERMINER
OF ATLANTIC COUNTY.

MAY TERM, A. D. 1925.

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ATLANTIC COUNTY, to wit:

The Grand Inquest of the State of New Jersey, in and for the body of the County of Atlantic, upon their respective oath and affirmation, those who affirmed having first alleged themselves to be conscientiously scrupulous against taking an oath, present that Samuel Mandel, late of the City of Atlantic City, in the said County of Atlantic, on the first day of December in the year of our Lord
20 one thousand nine hundred and twenty-four and thence afterward until the first day of October, nineteen hundred and twenty-four, at the City of Atlantic City aforesaid in the county aforesaid, and within the jurisdiction of this Court being the agent for one Samuel Kean and as such agent entrusted with the collection and care of moneys belonging to the said Samuel Kean, he, the said Samuel Mandel, did fraudulently take and convert
30 of the same to the amount of five hundred and twenty-five (\$525) dollars and upwards and apply the same to his own use, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and the dignity of the same.

LOUIS A. REPETTO,
Prosecutor of the Pleas.

[ENDORSED]

9401. Atlantic Court of Oyer and Terminer. May Term, 1925.

Indictment for Unlawful Conversion.

The State v. Samuel Mandel.

Louis A. Repetto, Prosecutor of the Pleas.

A True Bill. Martin M. Harris, Foreman.

Plea 7/21/25. Not Guilty.

Trial 2/1/28. Guilty.

2/1/28. Two years.

Filed, entered and impounded June 18, 1925. William A. Blair, Clerk.

2/1/28. Amended to read first day of December, 1923, to first day of October, 1924.

Wm. A. Blair, County Clerk,
By Henry McIntyre,
Sp. Dep. Co. Clerk.

,10

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JUDGMENT RECORD.

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STATE
v.
SAMUEL MANDEL.

Atlantic Quarter
Sessions Court.
January Term, 1928.
February 1, 1928.
Hon. Wm. H. Smath-
ers, presiding.
S. Cameron Hinkle,
for State;
Elwood C. Weeks,
for Defendant.
Charge: Unlawful
Conversion.
Plea: Not Guilty.

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The above-named defendant, Samuel Mandel, being brought into court, charged, pleaded not guilty to the crime as laid to his charge.

Whereupon, on the motion of S. Cameron Hinkle, Esq., Assistant Prosecutor on the part of the State, it was ordered that the sheriff return a panel of the jury to try the issue joined in the aforesaid plea.

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

- | | |
|-----------------------|-------|
| 1. Elizabeth Garrity | sworn |
| 2. Flora Wilson | " |
| 3. Christopher Rehman | " |
| 4. May Bell | " |

- 5. Mary Crawford “
- 6. Clara Birch “
- 7. Oscar Seder “
- 8. Paul Cope “
- 9. Watson Parker “
- 10. Mattie Hipkins “
- 11. Daniel Gray “
- 12. Philip Wescott “

The following named witnesses who were sworn, 10
Samuel Kean, Frances Schwartz, Howard Moredel,
Samuel Kean (recalled), George Thomas, Frances
Schwartz (recalled), having been called for the
State and Samuel Mandel being called for the de-
fendant and the evidence being closed, a motion was
made by Mr. Weeks for direction; said motion was
denied, and the counsel having summed up the case
and the Court having charged the jury, they retired
at 2.39 P. M., with Constable Rae Ripley and Mike
Abriola who were sworn to attend them and being 20
absent until 3.06 P. M., they returned again into the
Court and being called, all appear, and being asked,
say that they have agreed upon a verdict and by
their foreman further say that they find the defen-
dant, Samuel Mandel, guilty as charged and so say
they all.

Whereupon, it is, on this 1st day of February,
A. D. 1928, ordered that the defendant, Samuel Man-
del, be placed at the bar and he being accordingly
set at the bar the Court doth order and adjudge 30
that the defendant, Samuel Mandel, be confined in
State Prison at Trenton, N. J., for a term of two
years.

(Quarter Sessions Judgment Book No. 14, page
295.)

I, WILLIAM A. BLAIR, Clerk of the County of Atlantic, and also Clerk of the Common Pleas Court holden therein, said court being a court of record, having a common seal, do hereby certify, that the foregoing is a true copy of the presentment, indictment and judgment record in the case of State v. Samuel Mandel, as the same are filed in my said office.

In testimony whereof, I have hereunto set my hand and affixed my official seal at May's Landing, N. J., this 18th day of February, A. D. 1928.

WM. A. BLAIR,
Clerk.

(Seal)

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TESTIMONY.

QUARTER SESSIONS.

ATLANTIC COUNTY.

THE STATE OF NEW JERSEY,) 10
v.)
SAMUEL MANDEL,)
Defendant.)

Mays Landing, N. J.,
Wednesday, February 1, 1928.

Before HON. WILLIAM H. SMATHERS, J., and a jury.

APPEARANCES:

LOUIS A. REPETTO, Esq., Prosecutor of the Pleas,
by S. CAMERON HINKLE, Esq., Assistant
Prosecutor, for the State;

ELWOOD C. WEEKS, Esq., for the defendant. 30

(A jury was impaneled and sworn.)

Mr. Weeks: If your Honor please, I wish to
move touching the indictment in this case. It is

very vague and indefinite as to the time of the offense charged against us. We are charged with converting moneys between December—first of December, 1924, and the first day of October, 1924. I don't know what the indictment was meant to read in that respect. I assume that my copy is the same as yours, the same as the original, Mr. Hinkle?

10 Mr. Hinkle: Here is the original.

Mr. Weeks: Yes, December, 1924; between December, 1924, (first day of December, 1924, and the first day of October, 1924.

Mr. Hinkle: That should be, I suppose it should have—should amend that. It is purely an error. December, 1924, to October, 1924, would be an impossibility. Must be October, 1925. We ask to
20 amend.

Mr. Weeks: But you see, if your Honor please, we had no way under that indictment of telling what period we were confronted with in this case. And I think the matter of the time is a very essential matter. We could not, of course, be charged with some offense happening at one time and then when brought here have an allegation of a new time—a new time altogether.

30 The Court: I will permit the indictment to be amended. If you are surprised you can ask for a continuance.

Mr. Hinkle: Of course, your Honor realizes it is rather late after the jury is sworn, for a motion of any kind relating to the indictment.

Mr. Weeks: Allow me an exception on the amendment.

Mr. Hinkle: There is nothing to except to, your Honor.

The Court: All right, I will give him one. Proceed.

WM. H. SMATHERS, 10
J.

SAMUEL KEAN, called as a witness on behalf of the State, being sworn, was examined and testified as follows:

Direct examination. 20

By Mr. Hinkle:

Q. Mr. Kean, you are a tailor?

A. I am a merchant tailor; take orders and make them to order.

Q. And where are your stores?

A. At that time I had one store in 753 South 2nd; another store 132 South 52nd Street.

Mr. Weeks: South where? 30

The Witness: South 52nd. 132 South 52nd.

Q. 753 South 2nd, and 132 South 52nd?

A. Yes.

Q. Now, during the time from December, 1924, to October, 1925, were you in that business?

A. Yes; I am still in the same business.

Q. So you know Mr. Mandel, this defendant?

A. Yes; know Mandel for a number of years.

Q. He used to work in your shop, did he?

A. Yes, sir.

Q. What is his business? What is he?

A. Cutter.

10 Q. Now, during the time that I speak of, or—strike that out. And while he was working for you, did he live in Atlantic City?

A. He is a resident of Atlantic.

Q. And commuted every day?

A. Commuted every day, yes, sir.

Q. Did he have some arrangement with you by which he was to have clothes made and fill the orders and collect the money?

20 Mr. Weeks: I object as being suggestive, what the arrangement was.

Mr. Hinkle: I am only trying to save time. A man that works for another man—that saves time; there is a whole lot of things that we don't want to bother with. Do you object?

Mr. Weeks: It is leading and suggestive.

30 Mr. Hinkle: All right; strike it out.

Q. Did Mr. Mandel, when he lived in Atlantic City, take orders for suits?

A. We have a trade—we always had a trade in Atlantic City for a number of years; we still have a trade in Atlantic. While Mandel was a resident

of Atlantic many times he used to take orders, delivered to them or give them fittings, and collect some of the money and bring them into the store.

Q. Now, during the early part of 1925, did you go to Europe?

A. I left for Europe on the 5th of July, 1924.

Q. And while you were gone, did Mr. Mandel continue —

A. While I was gone Mandel was still in my employ. 10

Q. When you came back was he still in your employ?

A. Three days; then he disappeared.

Q. Three days after you returned?

A. After I returned.

Q. Yes. Was there any reason for his disappearance that you knew?

A. Well, I started to get suspicious, and start to look into the amounts that we had—rather, accounts in Atlantic, I went to check from him, I found that he collected the money. 20

Mr. Weeks: I object.

Q. Wait a minute. You found some things you didn't like?

A. Yes.

Q. Now, then, did you talk to Mandel about it?

A. I did. I handed him a statement.

Q. Now, I show you a statement —

A. That is correct. 30

Q. You gave him a copy of it?

A. Copy of that.

Q. And you showed him that statement?

A. Showed him the statement.

Mr. Hinkle: I offer it in evidence.

(The last question and answer was read by the stenographer.)

Q. And you gave him a copy of it?

A. I gave him a copy of it; correct.

Mr. Weeks: Well, I—of course, he cannot testify—I object to it on the ground that he has not shown this was the statement he showed him.

10

Mr. Hinkle: He says it was the statement he showed him. I don't know. That is what he says.

Mr. Weeks: He says he gave him a copy of the statement —

Mr. Hinkle: We will ask him again.

20 Q. Now, will you please look at this statement, and, having looked at it, tell me this question: Is that the statement that you showed Mr. Mandel?

A. I gave him a duplicate of that statement.

Q. And did you show him this one?

A. Yes, sir.

Mr. Hinkle: I offer it in evidence.

Mr. Weeks: I am not objecting to it.

30 Mr. Hinkle: All right. Thank you.

(Statement referred to received in evidence and marked Exhibit S1.)

Q. And what did Mr. Mandel say when you showed him that statement?

A. When I showed him the statement, or, rather,

I was to his house that time after I checked up that everything was collected. Couldn't find the addresses of the places, rather, where the orders was given to the manager that I left in charge with. He told me that he has got some of the money. Some of the money he didn't collect. In a couple weeks, or, rather, a couple of days later he made a promise he was going to make good. He never did.

Q. Now, I show you a letter and ask you where 10
you got that letter.

A. That letter was sent in to me by Mr. Mandel. There is the address right on top of it.

Q. That his writing?

A. Yes, sir.

Q. You got that in the mail?

A. Yes, sir.

Mr. Hinkle: I offer it in evidence.

20

(Letter referred to received in evidence and marked Exhibit S2.)

Mr. Hinkle: I desire to read this into the record, if your Honor please. This is on the printed letter-head, Samuel Mandel, 29 North Pennsylvania Avenue, Atlantic City, N. J.:

“September 23, 1924.

30

Mr. Samuel Kean,
753 South Second Street, Philadelphia, Pa.

Dear Sir:

I received your letter this morning. Mr. J. Megan's address is 225 Atlantic Avenue. You may send him a bill. Also send the four suits out here.

In regard to the account, I was promised some money to be paid to me in a day or two after which I will remit to you.

Yours truly,

Samuel Mandel.

Per somebody—R. B. M.”

Q. Have you ever talked with Mr. Mandel about this account since that time?

- 10 A. A number of times I have been to his house. In fact, I have been once to his house when his wife was present, and I asked him to give me the correct addresses of the people so I can locate them, because it was an awful mix-up, rather, in our books. I didn't know where or what. He told me that he measured a number of people in the Metropolitan Club. He doesn't know him but he met him over there. I went to the Metropolitan Club, the manager at that time was a customer of mine, a friend
- 20 of mine, and asked him —

Mr. Weeks: I object, what he asked over at the Metropolitan Club.

Q. Did you tell Mr. Mandel that?

- A. I went back to Mr. Mandel and told him the story. Then Mr. Mandel told me that the people who he measured are residents of Brooklyn, or something, New York. Could never locate them; could never find them.

- 30 Q. Well, now, did you make some effort to find out some of these addresses? For instance, did you try to find the address of one P. Doyle, 42 North Pennsylvania Avenue?

A. Yes, I was over there and couldn't find such an address.

Q. Such an address?

A. Went over to J. Silver, 108 Kentucky Avenue.

Q. Did you find such an address?

A. There is no such address.

Q. It is just marked 108, it doesn't say north or south?

Mr. Weeks: I object to this witness reading some paper he holds in his hand.

Mr. Hinkle: I am reading from Exhibit 1. 10

Mr. Weeks: The witness I am speaking of, sir.

Mr. Hinkle: I think I have a right to read from an exhibit that is offered in evidence.

Mr. Weeks: I am talking about the witness and not you.

The Witness: I have the statement. 20

Mr. Weeks: I am objecting to his answering from some paper he holds in his hand. That is what I am objecting to.

Q. Never mind. Put them under your coat for a minute.

A. I went over to a number of —

Q. Wait.

(The last question was read by the stenographer as follows: "Q. It is just marked 108, it doesn't say north or south?") 30

Q. Now, did you—reading from Exhibit S1—did you look for the address, 108 Kentucky Avenue?

A. I did.

Q. Did you find such an address?

A. No, sir, there is not such an address.

Q. There is another address, South Massachusetts Avenue. Do you recall what that is, 126 South Massachusetts, one George Collins? I am reading again from S1. Did you find such a person at that address?

A. No, I did not. There is no such address, no such a man.

10 Q. Did you tell Mandel that?

A. I did.

Q. What did he say?

A. He said, well, he met him in the Metropolitan Club and measured him over there.

Q. Now, this statement shows a balance due you of —

Mr. Weeks: I object to what the statement shows.

20 Q. Reading from Exhibit S1 this statement shows a balance —

Mr. Weeks: I object.

Mr. Hinkle: Will you wait until I finish my question and then you can make your objection. Don't answer now until the gentleman objects.

30 Q. This statement shows a balance that you claim is due you of \$525, and did you so point that out to Mandel?

A. Well, he knows that.

Q. Did you ever get any of that money?

A. I did not.

Mr. Hinkle: Cross-examine.

Cross-examination.

By Mr. Weeks:

Q. Mr. Kean, Mr. Mandel had been in your employ for how many years before he quit?

A. He has been in my employ three different times. The first time he was employed within a year, maybe a year and a half, that was—maybe I am not correct in this, maybe '17 or '18. Then a few years later he was in my employ again. 10

Q. When did he secondly go in your employ?

A. The second employ, I think it was in the year, but maybe I am not correct, I think it was '20 or '21.

Q. And how long did he continue then in your employ?

A. He was in my employ and then quit from me; can I explain the reason?

Q. No, I am just asking you ——

A. I must give the reason. 20

Mr. Hinkle: He didn't ask for that.

The Witness: He was in my employ and I sent him away.

Q. How long was he in your employ the second time?

A. A year or a year and a half. 30

Q. The second time?

A. Yes, sir; something like that.

Q. A year or a year and a half.

A. Something like it.

Q. And then was he again a third time in your employ?

A. The third time he was in my employ then that happened.

Q. When did he begin his employment the third time?

A. I think about a year. He met me here in Atlantic.

Q. When did he begin the employment?

A. In 1923 to '24.

Q. '23 until '24.

10 A. Till September, till I come back from Europe.

Q. When did he actually leave your employment the last time?

A. The last time he left three days after I arrived from Europe.

Q. When was that?

A. About the 8th or 9th of September. I arrived Labor Day, and three days later —

Q. That is, 1924?

A. '24; correct.

20 Q. Now, calling your attention to the statement

Mr. Weeks: May I have that?

Mr. Hinkle: Surely. Both exhibits are there.

Q. —to the statement marked S1, you say you had that statement, this particular statement and showed it to Mr. Mandel?

30 A. Yes, sir.

Q. And when was that?

A. That was in September.

Q. What year?

A. 1924.

Q. September, 1924?

A. And the same month of September, that is

when the thing happened, when I arrived from Europe.

Q. Who made up this account?

A. My bookkeeper is right here now.

Q. It was made up in your office?

A. Made up in my office.

Q. And these names about which you have testified were made up in your office?

A. The names, have a book of that, that shows that. 10

Q. Is that taken from your office and made up into this statement?

A. That is correct.

Q. And Mr. Mandel did not make this statement up, did he?

A. My bookkeeper made it.

Q. And you think she got the names from the books?

A. That is right.

Q. Now, you testified that there was one by the name of Mangan—Maigen? 20

A. Maigen, yes, that is right.

Q. Was he a customer of yours?

A. Maigen was a customer of Mandel. That is, in the orders that he sold while I left for Europe, or, rather, he is the one that brought in his order.

Q. Didn't you send —

Mr. Hinkle: May I interrupt counsel just a minute, to make a correction? I don't want to go on under any misapprehension. I amended this indictment and amended it wrong, and I am going to ask to correct that so that there will be no confusion about anything. This should read from December, '23, until October, '24, instead of December, '24. Mr. Kean was in Europe in the summer 30

of '24, and this indictment should read from the first of December, '23, until October, '24. I ask that be amended. I don't suppose it makes very much difference.

The Court: It may be amended. I don't suppose it makes any very great difference when the thing is alleged to have happened, unless, of course, it is a surprise to the defendant and his counsel.

10

Mr. Weeks: Of course, I am in the position where I want to object to such an amendment. I pointed out in the beginning the vagueness of the period involved, and now he moves us up another year ahead by this indictment, and, of course, if the Court makes the ruling, I cannot—my objection, however, is made.

20

The Court: All right. I will permit it.

Mr. Weeks: Exception.

WM. H. SMATHERS,
J.

Q. Now, who gave you the name of—didn't you send Mr. Mandel to this man Maigen?

A. I was in Europe at the time.

30 Q. Did you give him the name in the first instance?

A. Maigen?

Q. Yes.

A. I did not.

Q. You did not?

A. I don't know him.

Q. When was it that you say Mr. Mandel told

you that he would pay you something on this alleged balance?

A. That was within ten or twelve days after I arrived from Europe. I had him at my attorney's office.

Q. You had him at your attorney's office?

A. Yes.

Q. You tried—you had him arrested in Philadelphia on this same account, didn't you?

A. I did not.

Q. You tried to take it before District Attorney Rotan, didn't you? 10

A. Never had him before any court.

Q. How about Mr. Fox?

A. Never had him there.

Q. Didn't try to have him indicted there?

A. No.

Q. You say that he said he would pay you something on this bill?

A. He made a number of arrangements. 20

Q. Did he at that time tell you that there was due him certain bonuses for his work?

A. Never did.

Q. You did pay him bonuses for other years, didn't you?

A. I paid them the night before I left for Europe, I gave a supper to all my store employes.

Q. I want you to answer, sir, the question whether you paid him the bonus of money?

A. I did.

Q. Paid —— 30

A. On the 5th of July.

Q. You did?

A. 5th of July I give \$300.

Q. There is no question, sir. You paid Mr. Mandel a salary while he was working for you and besides that you paid him a bonus, didn't you?

A. I give him a bonus as I give to everybody.

Q. Then you paid him for the year, 1922 or 1923 a bonus of one thousand dollars, didn't you, all together?

A. Never paid him a bonus of a thousand, but I gave him \$300 on the 5th of July.

Q. On account?

A. Not on account. I give to a number of other people and I give him at a certain banquet in Philadelphia.

Q. You said you held a banquet for your employes before you went to Europe and you gave them all the bonus?

A. I give him and the seven others, I give them each one three and some I give five.

Q. \$500?

A. That is right.

Q. Didn't you tell Mr. Mandel that you were giving him the \$300 on account of a bonus and you would give him more totaling a thousand dollars for the year, 1923?

A. I did not.

Q. Did not?

A. No, sir.

Q. He didn't tell you at the time you say he talked with you that while you claimed that he owed you something on these collections, that you owed him for a bonus? He didn't tell you that?

A. Did not.

Q. And you didn't have any agreement with him to pay him any further bonus after the \$300?

A. Not at all.

Q. Now, where do you live, Mr. —

A. I live 4933 Walnut, Philadelphia.

Q. Is that where you lived when this —

A. I lived there for eleven years. Eleven years I lived there.

Q. And you were so liberal as to give all your employes or various ones of them from three to five hundred dollars bonus besides their salary, and did you do that by agreement with them that they were to get a bonus?

A. I do this every year for a number of years, that I give for good faith and give them a bonus.

Q. And at the time they are employed with you, isn't it understood they are to get a salary and a bonus? 10

A. No, I don't make no understanding.

Q. You just out of the liberality of your heart give them three hundred, five hundred dollars bonus, whatever you choose to give them?

A. That is right; correct.

Q. Yes. How comes it that you were such a liberal fellow and gave these bonuses to your employes, and Mr. Mandel had been with you for so many years, and then you would proceed against him for an alleged \$525 which you say he had collected? 20

A. The previous years, when I was in the store he couldn't get away with that, because I examined my books every week. That happened while I went to Europe.

Q. I am asking you your motive. You were a very liberal man, and what purpose did you have in proceeding against Mr. Mandel, who had been a faithful employe all through these years?

A. He left me three days after I arrived from Europe. Starting to go over the books I found the 30 reason why he left, that the money was missing.

Q. That is your deduction, there was money missing and that that is why he left?

A. That is the statement, my books shows that.

Q. Now, you say there was some accounts paid to Mr. Mandel which he did not turn over to you; is that what you are claiming?

A. All the accounts, \$520, was paid direct to him.

Q. \$520. Now, who paid it?

A. I have been to see a man by the name ——

Q. Were you present when it was paid to him?

A. I was over to see them.

Q. Were you present when this money was paid to him?

A. I have been to Europe.

Q. You were not present?

10 A. No.

Q. Then you don't know who paid him money, do you?

A. Yes, I do.

Q. How do you know, when you weren't present?

A. I have been over to see a number of men, and each one ——

Mr. Weeks: I object to what they said.

20 Q. You don't know only what somebody told you?

A. They showed me their receipts that it was paid by them.

Mr. Hinkle: Just a minute. When counsel, under cross-examination, places a question of that kind before a witness, he does that at his peril, and in addition to that Mr. Kean has already said that he confronted Mandel in the end with this statement of these people. It is named on the list here, and
30 that is what their final argument was about. When counsel asks him, and he knows—even if it be hearsay he takes that answer at his peril.

Mr. Weeks: I am willing, of course, to stand any penalties that may be imposed upon me.

Mr. Hinkle: That seems to be one.

Mr. Weeks: —in my conduct in my client's case, but I have a right and I am asking this witness if he was present when this alleged money was paid, and if he knows except from hearsay. That is my question.

The Court: Proceed.

Q. You say you don't know except what somebody told you? 10

A. I have been over to see them, and each one—some of them have given me the receipts of the money. I have a number of letters here in evidence which he has received the money they paid him.

Q. And how do you know—how many accounts did Mr. Mandel have?

A. I can't tell because I haven't it —

Q. Haven't you any idea?

A. Fourteen or fifteen or sixteen.

Q. Forty or fifty or sixty? 20

A. Fourteen or fifteen or sixteen; I don't know how many there is.

Q. Do you mean to say, sir, that during the time that Mr. Mandel worked for you, that he only had fourteen or fifteen accounts from customers?

A. That happened in the months of July and August, everything which it shows up now.

Q. What year?

A. 1924.

Q. 1924? 30

A. Yes.

Q. And how many accounts at that time or customers did Mr. Mandel have for you?

A. We have a number of customers there and he used to collect —

Q. How many did he have?

A. I can't tell you, sir.

Q. Well, did he have a hundred?

A. No.

Q. You don't know how many he had?

A. No.

Q. How do you know, sir, that Mr. Maigen, for instance, when he paid money, that that money was not turned in to you with other moneys?

10 A. Mr. Maigen's order, rather, for a suit sold to him in the month of July, sometimes in July, and by coming back on July—by coming back, or rather, I went to see Maigen. The address was Atlantic Avenue, but he wasn't there. He sent me a letter.

Q. Had he moved?

A. I don't know. He sent me a letter —

Q. I didn't ask you what he sent you.

A. I must explain to you.

Q. All right. No question. That is all. Just a minute. That is all until I ask you another question.

20 Q. Did Mr. Mandel tell you when you presented that list of names which the Prosecutor has offered in evidence, that he didn't know the names, he didn't know anything about that.

A. He didn't? He knows every name of them.

Q. He admitted he knew all the names on that list?

A. He made the promise he was going to make good from those names that were on his list.

30 Q. I show you another list of names made on your stationery, S. Kean, and ask you if you saw that list before?

A. My bookkeeper can explain you that.

Q. Did you see it before?

A. I see it a number of times.

Q. Did you give this to Mr. Mandel?

A. I just give him one.

Q. What?

A. One.

Q. One. Gave him this list, didn't you?

A. That is right.

Mr. Weeks: I wish to have that marked for identification.

(Paper offered, consisting of two sheets, marked Exhibit D1 for identification.)

10

Q. When did you give him this list?

A. At the time when the money didn't come in.

Q. Well, that was right after you came from Europe, wasn't it?

A. Yes.

Q. Substantially the time that this list was made up. This was after you came from Europe, too?

A. Yes, sir.

Q. I want you to look at the two lists and ask you if they are at all alike with names?

20

A. I cannot explain to you this, but my bookkeeper—I employed two bookkeepers.

Q. You don't know whether after you came back from Europe you gave Mr. Mandel two different lists, do you?

A. I don't know.

Q. Different names?

A. That is the names that the money was not paid.

Q. And you could pick out, then, the names on the list that you gave the Prosecutor on that statement as being persons who had not paid?

30

A. That is right, correct. The amount was never received at the store. Mandel got it.

Mr. Weeks: I think that is all.

Mr. Hinkle: That is all, Mr. Kean.

FRANCES SCHWARTZ, called as a witness on behalf of the State, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Hinkle:

- 10 Q. Are you employed by Mr. Kean?
 A. Yes, sir.
 Q. As a bookkeeper?
 A. Yes.
 Q. And were you there in the latter part of the year, 1923 and 1924?
 A. Yes.
 Q. How long have you been with Mr. Mandel?
 A. With Mr. Kean?
 Q. Mr. Kean.
- 20 A. Five and a half years.
 Q. Five and a half years. As a bookkeeper, I think you said. Did you ever see that paper, S1, before?
 A. No. I wrote that.
 Q. You wrote that. And you took this memorandum from some accounts, did you?
 A. From my books.
 Q. And the memoranda that appeared on your books, were they given to you by Mr. Mandel?
- 30 Mr. Weeks: I object as leading and suggestive.
- Q. Where did you get the memorandums?
 A. From my books.
 Q. From your books; and why did you put them on your books?
 A. They were given by Mr. Mandel.

Q. And did you ever get any of these moneys from Mr. Mandel?

A. No.

Mr. Hinkle: Cross-examine.

Cross-examination.

By Mr. Weeks:

10

Q. Were you present when the statement, S1, was given to Mr. Mandel?

A. Yes.

Q. Now, you had a long list of names which represented Mr. Mandel's customers, didn't you, in the books?

A. Well, not a list, but I can pick them out from the books individually.

Q. Oh, you took them from the book which included all the customers? 20

A. All the customers.

Q. But this statement here did not include all of the customers, of course, which Mr. Mandel had for Mr. Kean's business, did it?

A. No, it was the unpaid.

Q. And you say that you took these names out of all the list in the books as being unpaid?

A. That is right.

Q. When did you take it from the list?

A. Why, after he left us in September, 1924. 30

Q. After he left you, you took this out of the books and made up this statement?

A. He got several statements before.

Q. And when you went through the books and took out, for instance, the name of P.—R. J. King, what made you take that name out of all the list?

A. Well, on his account it was always marked in care of Mandel.

Q. Who marked them in care of Mandel?

A. I did.

Q. And these accounts you say were not paid or shown paid on the books anyway?

A. That is right.

Q. How did Mr. Mandel turn in his money? He turned it in without taking any receipt usually?

10 A. Sometimes he did.

Q. Sometimes he would turn in cash to you as the clerk or receiving agent without taking any receipt for the money?

A. Most of the time he got a bill.

Q. But sometimes he paid you, turned over the money without taking any receipt? He trusted you and you trusted him; wasn't that so?

A. Yes.

20 Q. And I call your attention to a name, L. Walter, on this account, statement. What made you take that name from the book?

A. That is his account.

Q. Because it was marked Mandel on it?

A. Because he brought the order in.

Q. Because he brought the order in?

A. That is right.

Q. Was that—was there any—because he brought the order in didn't indicate that he had collected the money, did it?

30 A. That shows he is responsible for the account.

Q. Oh, it showed he was responsible for the account. Let me understand you, then as you made up this list you took the names that—where the payments did not appear to have been made and put them on here, where Mandel's name appeared in connection with them, because you considered that

he was responsible for the credit of the account; is that it?

A. That is right.

Q. I show you a paper marked for identification D1, and ask you if you made that up?

A. This writing is mine.

Q. It is your handwriting?

A. That is right.

Q. And that is your handwriting also, isn't it?

A. That is my writing. 10

Q. And this appears to have a different lot of names on it? It was made about the same time that you made this other statement?

A. No, it was not.

Q. It was not. When was this statement made up?

A. This was made after he left the employ.

Q. When was it made up, as near as you can tell?

A. The month of September, 1924. 20

Q. All right. That is statement marked S1. Now, D1 for identification, when was that made up?

Q. This could have been made in July, 1924, August, 1924. While he was commuting he was collecting money.

Q. Do you know? You think it was late in August or July?

A. It was previous to September.

Q. And what do the list of names there represent? In other words, why were they put on that statement? 30

A. Well, he was given a list to go out and collect. He used to get extra days out and stay in Atlantic City a full day and collect these accounts and see these customers.

Q. Was this other list, S1, given to him as a list to collect also?

A. A list to collect? That is a statement.

The Court: Mr. Weeks, what is the purpose of spending a great deal of testimony on questions of bookkeeping and other collateral propositions? Isn't it the State's case that this certain sum was admitted by this defendant as being short by him?

10

Mr. Weeks: I suppose so.

Mr. Hinkle: That is the State's case.

Mr. Weeks: That is all.

20 HARRY MORDELL, called as a witness on behalf of the State, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Hinkle:

Q. What is your business?

A. Why, tailoring business with Mr. Kean.

Q. With Mr. Kean?

A. Yes, sir.

30

Q. Were you with him in 1923 and 1924?

A. Yes, sir.

Q. Were you his manager while he was in Europe?

A. In fact, I had been in charge there for the last eighteen years.

Q. And was Mr. Mandel in the employ of your establishment at that time?

A. He was, yes, sir.

Q. You have seen this list, S1, haven't you? Did you ever see that before?

A. Yes, sir.

Q. You are somewhat familiar with those accounts?

A. I am familiar with all the accounts, in fact.

Q. They were given to Mandel?

A. Several times, yes, sir, to collect.

Q. And all of these several accounts were orders 10 that came in originally from Mandel, were they?

A. Were ordered, yes, sir. In fact, Mr. Mandel sold them and fitted them and delivered the suits to them personally.

Q. Now, did he ever turn the money in?

A. Well, I don't recall exactly what you have there in full, but there was some moneys which he paid on account.

Q. Just look over and see if it was any of those, if you can tell. Anything you think that he—on 20 that he paid on account, tell us.

A. Well, this balance is still due which Mr. Mandel didn't turn in at the time.

Q. That balance is due?

A. Yes, sir.

Mr. Hinkle: Cross-examine.

Mr. Weeks: No questions.

30

Mr. Hinkle: State rests.

Mr. Weeks: Now, if your Honor please, I move for a direction in this case. Assuming, if you please, that the Prosecutor's contention is correct, that Mr. Mandel admitted that he had received certain

moneys from the customers, \$525, or any other sum, which he had not turned in, then that does not show, in the first place, a fraudulent intent to convert, and besides that there is no proof, if your Honor please, that this money or any sum that he collected was converted to his own use.

Under the case of the State versus Fitzgerald, it is a requisite of the State in such case that they must prove not only that the money was collected,
10 was in the possession of the defendant, but they must prove that it was converted to his own use. That case, I think, is very clear that that is a required element of the proof. Let me read, if you please, if you bear with me a moment, from that case:

“Assuming the act to be in force”—that is this same act, the act where the agent is charged for receiving and fraudulently converting to his own use moneys or goods, personal property which be-
20 long to his principal—“Assuming the act to be in force, it is obvious that one of the elements of the crime thereby created is the fraudulent conversion to his own use by the accused of personal property entrusted to him for sale, or of some part of the proceeds of such a sale.”

“On this subject the Court below instructed the jury that if they found that the accused retained in his hands, of several sums so received”—in other words, they found that “a total of the amount
30 stated in the indictment, and neglected to pay it over, this would be sufficient to justify a conviction. By this instruction, the mere neglect to pay over was made sufficient evidence of a fraudulent conversion of such proceeds. In this, I think there was error.”

In other words, that is this case. They have shown, assuming the State's proofs to be now con-

clusive upon that point, they have shown that this defendant received money. They have not shown, of course, with what intent he withheld it, haven't shown he converted the money to his own use, and this case says that the mere neglect to pay over the money that he received—and that is all there is in this case—was not enough to warrant a conviction under this act. Going on, if your Honor please:

“By the theory of the indictment the accused had become lawfully possessed of the proceeds of the sale.” 10

Now, that is our case.

The Court: The difference between that case and this case is that in that case there never was a demand made for the money and in this case there is testimony there was demand made for the money, and then it is not simply a question of neglect.

Mr. Weeks: Well —

20

The Court: That case, as I understand it, simply holds that where a man lawfully collects money as your agent, you cannot prosecute him criminally until you have made a demand and he has refused to turn the money over. If you collect a hundred dollars for me, I could not swear out a warrant and convict you of converting to your own use until I first gave you an opportunity to turn it over, and make a demand for it.

30

Mr. Weeks: This case does not hold that the element of demand was essential. It says they must prove what the Statute says, that he converted this money to his own use with a fraudulent intent. And I submit to your Honor they they have not shown

any fraudulent intent. All they have shown is that he held this money, and it was a civil obligation. If he held money that belonged to his principal, he owed it to him, but there was no fraudulent intent so far shown, and the appropriation to his own use is not proven.

The Court: I will deny your motion. Exception allowed.

10

WM. H. SMATHERS,
J.

(Mr. Weeks opened the defendant's case to the jury as follows):

20 SAMUEL MANDEL, the defendant, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Weeks:

Q. Mr. Mandel, you were employed for a long time with Mr. Kean, weren't you?

A. Since 1911.

30 Q. And how long did you really work for him beginning with 1911?

A. I worked for him till 1917, the war broke out.

Q. You mean from 1911 until 1917?

A. '17, and after —

Q. Then you heard him say that the first period of employment was a year, about a year and a half. You heard him say that, didn't you?

A. I worked from 1911 till 1917.

Q. And all that time did you sell goods to customers and accounts for the proceeds where you collected them?

A. I worked on a salary and besides the salary I been getting a bonus for my working, doing outside for Atlantic City and Philadelphia, and I used to get bonuses every year, every six months, July and January used to get it. The last employment I had with Mr. Kean he went to Europe, before he went to Europe. 10

Q. When did that last period of employment begin?

A. In 1923 and 1924.

Q. Do you know when in 1923 it began?

A. I don't remember exactly the date when I begin, but I been in there in 1924, too.

Q. I mean when in 1923, as near as you can tell, did this last employment begin?

A. Well, I started on January. 20

Q. January, 1923?

A. January or February.

Q. What arrangement for your compensation was made with Mr. Kean?

A. I been getting \$45 a week, and besides the \$45 I been getting a thousand dollars every year bonuses.

Q. He had paid you the thousand dollars bonuses each year for the years you worked, had he?

A. Yes. This I been getting for my work outside in Atlantic City and my expenses. I used to go home every night nine o'clock, because I used to work in the store until nine o'clock, and nine o'clock I used to go home to Atlantic City. 30

Q. What arrangement for the year 1923—you say you had been making a thousand dollars bonus up to that time—what arrangement was made with him

for your compensation on this last occasion of employment beginning 1923?

A. Why, promised me if I get good bonuses—by bringing up business, but I will—I wasn't responsible for any payments; the only thing, for me to turn in the names.

Q. You were not responsible to collect the money from the customers, you mean?

A. Not for the loss. I been only turn in every
10 man's name that I been doing business outside.

Q. How much bonus was he to give you for this year, 1923?

A. When he left to Europe he give me \$250 on account, and when he will come back he will give me the balance.

Q. He said he would give you the balance of how much?

A. The balance of a thousand dollars.

Q. Did he ever pay any after he came back?

20 A. When he come back I asked for the money and he says he can't give me any money because was lots of loss in business, because was another man in there and some people got some business away from the place and he couldn't pay me, and I got sore at him and I left the place.

Q. You left because he was not going to give you the bonus?

A. I left because he was not going to give me the bonus.

30 Q. That was when?

A. That was in 1924.

Q. Now, at that time or about that time, after he came back from Europe, did he show you that statement, S1?

A. I have some names here but they don't belong to me at all.

Mr. Hinkle: That is not the question.

Q. Answer the question. Look in the statement there and answer whether he gave you that statement or not, or a copy of it?

A. Well, I could mention the names I don't know, and I will mention the names I do business with.

Q. Do you know whether or not he gave you that statement? Can you say now?

A. Now, I have here the first name — 10

The Court: No, no. Listen to the question.

The Witness: Pardon me.

Q. Do you know whether he gave you that statement or a copy of it?

A. He didn't give me that statement.

Q. Will you look over that statement and tell us whether the names on it were your customers? 20

A. Now, Highland Park, I don't know that party.

Q. Let me have the statement. The first name on here is Philip Abrams. Was he your customer?

A. My customer.

Q. He was your customer?

A. Yes, sir, he was subpoenaed here, too.

Q. Did you collect—he was subpoenaed, you say?

A. Yes, Mr. Kean is subpoenaed, he told me, but I don't know why he didn't show up.

Q. Did you collect \$48, as the amount recited on this statement, from Philip Abrams? 30

Q. The Abrams money was turned in?

A. Yes, sir.

Q. Do you know when you turned it in?

A. Well, I turned it in in the—why, the time that the order—I haven't got exactly the order but

I was turned it in, about two months later he paid me.

Q. And you are sure you turned it in the office?

A. Yes.

Q. Did you turn it in with any other moneys, do you remember?

A. The statement was \$1309, and I owed the time I gave the money, I paid to the bookkeeper—was another bookkeeper, Miss Steinberg.

10 Q. Not the bookkeeper here.

A. Yes. She bulled up the books.

Q. Did what with the books?

A. She bulled up the whole—mixed up the whole account because she didn't know much about book-keeping.

Q. Did you take receipts when you turned in money to the cashier or bookkeeper on these accounts as you went along through this business?

20 A. I never take any receipts from this place because —

Q. All right. That is all. Will you look at this account and tell us whether there is any item on there that you owe for that you collected and did not turn in? Is there anything there?

A. I don't know George Collins.

Q. You don't know him?

A. No.

Q. Never knew him?

A. No.

30 Q. He wasn't your customer?

A. P. Doyle, I got an order from him, from 42 North Pennsylvania Avenue, and he paid a deposit on it.

Q. How much, do you remember?

A. Paid \$5 deposit on the suit.

Q. And the account was how much?

A. His account was \$40.

Q. According to that statement?

A. According to that statement.

Q. Is \$40?

A. Yes, \$40 balance, but he didn't pay. But I wasn't responsible for this order.

Q. You didn't collect the \$40?

A. No, I didn't get it. He was recommended to the store, and some people recommended him to the place of business, and been recommended from one man to another, they used to get the order. Wasn't 10 my customer. Now, Ed. Mousley been a customer, owing \$87.

Q. Is that what the statement shows?

A. No, \$38. And his check come back, and I made good his check.

Q. You made good his check?

A. Yes.

Q. Whom did you pay his check to?

A. I paid the money to the office.

Q. How much was it?

20

A. \$87.

Q. You paid the \$87?

A. Yes.

Q. And whom did you pay it to?

A. Miss Steinberg.

Q. Was she then the bookkeeper?

A. Yes, the writing, her statement.

Q. Do you know when you paid that?

A. Still that time, in 1924.

Q. You don't know what month?

30

A. No. Now, here is another man here —

Q. Do you know the month it was in 1924; can you tell?

A. Why, that was in June, May and June.

Q. Take the next one.

A. J. Silver. I never met that man and he isn't a customer of mine; on Kentucky Avenue.

Q. How much is the charge?

A. According to this statement is \$35, but I don't know.

Q. Don't know the man?

A. No.

Q. Had no dealings with him?

A. Because they used to give me statement to collect money from the place.

10 Q. In other words, if there is money due the firm from some customer somewhere where you were going, they would give you the bill to collect?

A. Yes.

Q. And look to you to collect it?

A. Yes. One man here I don't know, I never met him.

Q. What name is that?

A. His name is L. Walter. Isn't my customer. He used to be Charlie Sullivan's customer.

Q. Did you do any business with Walter?

20 A. I didn't do any business with Walter.

Q. Ever collect any money from him?

A. Charles Sullivan's customer.

Q. Did you ever collect any money from Walter?

A. No.

Q. Now, any others there that you had nothing to do with?

A. This fellow Doyle that been mentioned now, I got his receipt for \$5, he paid, but I wasn't responsible for his account.

30 Q. What did you do with the \$5?

A. I got a receipt from the office.

Q. Got a receipt for that, did you?

A. Yes.

By the Court:

Q. One of the witnesses testified you delivered the suits to all these people, is that right?

A. No, I never delivered the suit. Used to send by mail from the place. I never carried the clothes with me. The office used to deliver by parcel post. The only thing I been doing, I used to bring them down for fittings.

By Mr. Weeks:

Q. You didn't deliver them finally?

A. No, I didn't deliver them.

10

Q. Well, is there any other name on that statement, S1, that you don't—didn't have anything to do with, didn't do any business with?

A. I didn't do any business.

Q. Well, is there any other name that you have not mentioned?

A. The only one, I turned in what I collect, was \$1309, was the bill, but people that I had the other statement; it is not my people.

Q. You mean you turned in \$1309 when? For 20 what year, what time?

A. 1924.

Q. That is what you collected and that is what you turned in?

A. That is the bill I turned in.

Q. How do you know you turned in that much money? What leads you to say that sum?

A. Because, according to my statement I checked off, and everything I turned in.

Q. What statement?

30

A. This is not my statement.

Q. No, that is not your statement. That is the one you have been testifying to. Before I leave that statement, did Mr. Kean tell you that you owed on these accounts \$525?

A. Well, told me going to charge me in the account. I says the people that I—didn't pay me, I

am going to try to pay him, and I sent him a letter I am willing to help him out.

Q. You mean people that had not paid you?

A. I turned over to him, I says I will collect; and then I turned them in, the people's names to go and collect for it.

Q. I am asking you now, Mr. Mandel, if he told you that you owed him \$525 according to that statement? He did; that is what you said?

10 A. He said I owed him \$525.

Q. What did you tell him?

A. I told him I don't owe him anything.

Q. Don't owe him anything?

A. No.

Q. And was that the time when he gave you the copy of this statement?

A. This statement was given me right about two months later.

20 Q. Did you tell him when he gave you this statement you didn't know anything about these names, some of them?

A. Told him I didn't know them.

Q. You told him that?

A. Yes.

Q. At that same time when he said you owed him \$525, did you tell him anything about his agreement to pay you money that he had not paid you?

A. He didn't pay me at all. He says he is going to pay me, but he didn't pay me.

30 Q. Did he then say he was going to pay you?

A. He said he is going to pay me, and refused to pay me, and I took this case with the lawyer in Philadelphia, with Eddie Lang.

Q. Before he did anything against you?

A. I bring suit against him, and Lang come up and see him.

Q. And what was that suit you were going to sue him for; what for?

A. I been suing him for bonuses.

Q. For the bonus?

A. Yes.

Q. And at this time when he handed you a copy of the statement which you just had, showing apparently \$525, you did talk with him about this bonus?

A. I talked to him about the bonus, and in his lawyer's office, J. Weinstein.

10

Q. In his lawyer's office?

A. Yes, sir.

Q. Do you, as a matter of fact—strike that out. Have you, as a matter of fact, collected any money on his accounts that you did not turn in to his office?

A. All the money I collect I turn in and the money I didn't collect I give him a letter and told him to go ahead and collect.

Q. Now, this statement here that is marked D1, 20 where did you receive that?

A. That was given me in the office about two months later.

Q. Two months later than what?

A. When I left the place.

Q. Two months after you left the place?

A. Yes.

Q. And do you know what that statement was given to you for?

A. Well, give the name of people who didn't pay, 30 people that owed money. He says I am going out to collect and I give him all the names and I told him I am willing to help him the money to be collected.

Q. You are willing to help him collect it?

A. Yes.

Mr. Weeks: I want to offer this in evidence, Mr. Hinkle, this statement received afterwards.

Mr. Hinkle: Yes.

Mr. Weeks: Of the names.

Mr. Hinkle: No objection.

10 Mr. Weeks: As I understand it, this statement, then was supposed to contain all names of accounts which you had anything to do with where the accounts had not been collected.

(Paper previously marked Exhibit D1 for identification, now received and marked Exhibit D1 in evidence.)

20 Q. And that was given to you how long after the first statement that was offered?

A. I never been getting a statement. I used to get statements every month, but this statement of mine I got two months later when I left the place.

Q. And this one was given to you how long after you left?

A. I didn't get this. The statement —

Q. You say you are not sure you got a copy of this, though?

A. I haven't got a copy of this.

30 Q. But you did receive a copy from Mr. Kean after he came back from Europe besides this copy that you now offer in evidence?

A. Yes, that was two months later I got it.

Q. You are not able to say whether, in fact, you did receive a copy of this statement now. You spoke about a receipt for one account, \$5 paid on account,

where he charges you \$40 in that statement. Have you that receipt with you?

A. It is over there on the table I left it. Here you are.

Q. That is the Doyle account?

A. Register receipt. The register receipt.

Q. That is where it was put in the register?

A. Yes.

Q. Do you know how you happened to get this receipt? You didn't have any receipts for other 10 moneys?

A. I always throw them away. I had since 1923.

Q. The only receipt you had for anything was this for \$5?

A. That is the only thing that was left.

Mr. Weeks: I think you can cross-examine.

Cross-examination.

20

By Mr. Hinkle:

Q. How much money did you turn over in that one big lump sum that you talked about? How much did you actually turn over?

A. I been turning over—where is that statement? You got my statement.

Mr. Weeks: What?

30

Q. Don't you know how much you turned over?

A. Yes.

Mr. Weeks: This is what you mean?

The Witness: Yes. \$1309.

- Q. Thirteen hundred ——
A. And nine dollars.
Q. ——and nine dollars. And when did you turn that over?
A. In 1924.
Q. What time?
A. That was in April, May, June and July, August, September.
Q. What day did you turn the \$1309 over?
10 A. I been paying money every month.
Q. Well, did you turn it over all at one time?
A. No, not all at one time.
Q. At different times?
A. Yes.
Q. What was the date of the first payment of that sum?
A. I don't remember.
Q. What was the date of the second payment?
A. I don't remember.
20 Q. What was the date of the third payment?
A. I don't remember.
Q. Do you remember the date of any payment?
A. I remember only the months.
Q. What month do you remember?
A. Every month I been getting a statement and turn the money in.
Q. What was the first month?
A. I don't remember.
Q. Do you know the second month?
30 A. I don't remember.
Q. Do you remember the third month?
A. No.
Q. Do you remember how much money you turned over in the first month?
A. I don't remember because I didn't have all the statements.

Q. Do you remember how much money you turned over in the second month?

A. I don't remember only the last statement.

Q. Do you remember how much money you turned over in one month?

A. As much as I collect.

Q. Answer my questions. How much money did you turn over in any one month?

A. I turned over one month about \$250, \$80, \$40, \$90.

10

Q. About \$250?

A. Yes.

Q. Eighty. Ninety. What else?

A. I don't remember exactly every —

Q. Well, do you remember any other sum you turned over?

A. The only thing I turned over, shows \$1309.

Q. Answer my question. Will you please read it?

20

(The question was read by the stenographer as follows: "Q. Well, do you remember any other sum you turned over?")

A. Every time they been giving me a statement I used to bring money.

Q. Now, will you answer my question?

A. Can't answer your question. It happened four or five years ago.

Q. Don't you remember how much money you turned over in any one single month?

A. I don't remember.

Q. Do you remember how you got your balance of \$1309?

A. Yes, sir.

Q. How did you get it?

A. From the bookkeeper.

Q. What bookkeeper?

A. Miss Steinberg.

Q. Where is she?

A. I don't know where she is. She worked down there.

Q. Did you look for her?

A. I don't have to look for her.

Q. But my question is, did you look for her?

10 A. No.

Q. Make any effort to find her?

A. No.

Q. Knew this case was coming up?

A. Well, I didn't know the case is coming up.

Q. Oh, yes, you have had notice of this case, haven't you, it was going to be tried today?

A. This case is 1923.

Q. No, no. Haven't you had notice this case was going to be tried today?

20 A. Yes, sir.

Q. And you have not looked for Miss Steinberg?

A. No.

Q. Did you pay the money, the \$1309 in cash or check to Miss Steinberg?

A. Used to pay cash, used to pay checks.

Q. Did you pay the \$1309 in money or cash?

A. Cash and checks.

Q. Cash and checks?

A. Yes.

30

Mr. Hinkle: Cash and money I meant.

Q. And you paid some cash and some checks?

A. Yes, sir.

Q. Where are your checks?

A. It is not my checks; customers' checks. I could mention the names if you want me.

- Q. Yes, give them to us.
A. You mean the Atlantic City people?
Q. Well, now, you said you paid \$1309 over and you could give the names of the persons who gave you the checks. Now, give us the names.
A. I have two, \$128, Atlantic City.
Q. What was that \$128 for?
A. For clothes.
Q. Sold to whom?
A. To Philip Davis. 10
Q. Philip Davis?
A. Yes.
Q. That was \$128?
A. Yes.
Q. Now, is Philip Davis on this list marked S1?
A. Is on this list. (Indicating.)
Q. I am not asking you about that. I am asking you about this one.
A. Isn't in this, but is in mine.
Q. Then he isn't on this list, S1? 20
A. No.
Q. Well, now, what other man gave you a check for any sum that you turned over that made up this \$1309?
A. \$165 from A. West.
Q. A West?
A. Yes, in the Vermont Apartments.
Q. How much was his check?
A. \$165.
Q. And to whom was that check made payable? 30
A. Payable to Samuel Kean.
Q. Well, now, is that man's name on this list, S1?
A. On this list is only one man, a customer of mine.
Q. Answer my question. You can say yes or no. Is the man West that you spoke of on this list, S1?

- A. He is not.
- Q. Now, tell me the name of another man who gave you a check.
- A. Samuel Peckman.
- Q. Samuel Peckman?
- A. \$35.
- Q. How much?
- A. \$35.
- Q. And is his name on this list, S1?
- 10 A. I got him on the other list.
- Q. Oh, no, I am not going to look at that list for a long time.
- A. That is the wrong list to me.
- Q. This is the one I am asking about.
- A. I am going by this.
- Q. Answer my question.
- A. I am telling you I haven't anything to do with this list. This is no people I handle them.
- Q. Is his name on that list?
- 20 A. No.
- Q. Better say that first because we will keep on until we get the answer. Now, give me the name of another man who gave you a check.
- A. Epstein.
- Q. Epstein?
- A. Yes.
- Q. What is his first name?
- A. I. Epstein.
- Q. Where does he live?
- 30 A. Seaside Avenue.
- Q. Seaside. What is his number?
- A. 106.
- Q. 106. You know him pretty well, don't you?
- A. Yes, I know him.
- Q. What—how much was his check?
- A. Thirty-eight.

Q. Thirty-eight. Well, is Epstein's name on this list, S1?

A. He is on my list.

Q. Now, answer my question. Is he on this list, S1?

A. Not on that one.

Q. Do you know Epstein right well?

A. Yes, I know him.

Q. Did you try to get Epstein's check that was made, you say, to the order of S. Kean? 10

A. Order Samuel Kean.

Q. Did you get—try to get Epstein's check to bring here?

A. Why, that is Mr. Kean collected from this checks.

Q. No, did you try to get that check from Epstein?

A. No.

Q. You say it was Epstein's check?

A. Yes.

Q. Where is Epstein? 20

A. Atlantic City.

Q. Did you bring him here today?

A. No.

Q. You knew this case was coming up, didn't you?

A. Why, Mr. Kean don't deny he didn't collect the money.

Q. No, no; answer my question. Did you try to bring Mr. Epstein here today?

A. I don't know where Mr. Epstein is now.

Q. Oh, all right. Lord, be merciful unto me, a sinner. Who else gave you a check? 30

A. Samuel Burman.

Q. How much was his check?

A. One seventy-five.

Q. To whom was that check made payable?

A. Samuel Kean.

Q. Where does Mr. Burman live?

- A. Florida now.
 Q. Florida. When did he go to Florida?
 A. I don't know.
 Q. You know he is in Florida, though?
 A. Yes.
 Q. How did you find that out?
 A. You know him well, too. You know Mr. Burman very well.
 Q. I don't know. I don't know all your friends.
 10 A. That is your friend, not mine.
 Q. Where is Mr. Burman now?
 A. Florida.
 Q. When did he go, do you know?
 A. I don't know.
 Q. Now, you knew this case was coming up, didn't you?
 A. Yes, I know it.
 Q. Why didn't you get Mr. Burman to give you that check?
 20 A. I asked the Prosecutor to let the case off for another couple days and I bring ——

Mr. Weeks: When did you ask the Prosecutor?

The Witness: I asked the Prosecutor yesterday, and he turned me down.

- Q. The Prosecutor told you for some months that you had to go to trial?
 30 A. I am not acquainted with this case, 1923.
 Q. Why didn't you get ready?
 A. I always been ready.
 Q. Does Mr. Burman's name appear on this list?
 A. He is on my list.
 Q. Tell us if he is on S1?
 A. Only one man here I been handling on this statement. The other one don't belong to me.

Q. Mr. Burman's name is not on this list, then?

A. No, it is on my statement.

Q. What other person gave you a check?

A. J. Seidenbeck.

Q. Where does Mr. Seidenbeck live?

A. Used to live in Maswell Avenue.

Mr. Weeks: I object to any further questioning along this line. It is clear these items are not in the statement shown and therefore we have nothing to meet in that respect, and I don't see how going over the list of payments that he did collect helps in one way or the other. 10

Mr. Hinkle: Now, if counsel will agree that the component items of \$1309 are in no way connected with this transaction, of course, I will desist. But I understood he put this evidence in to show he was paying this man Kean this money. I understood that. I guess the jury got that impression. I was fearful they did. 20

Mr. Weeks: As I understand now it is clear the lists are entirely different.

Mr. Hinkle: We don't doubt that. Now, will counsel admit the \$1309 cuts no figure at all in a charge of this \$525?

Mr. Weeks: Well, I don't think there is a—but one name involved there, that my client says he only had one customer in that whole list. 30

The Witness: That is Phil Abrams.

Mr. Weeks: I can't make any admission on that

because that name may be in this list. I understand it is.

The Court: Well, the witness will admit that if you will ask him a question.

Q. Then, as I understand, the \$1309 has got nothing to do with any item on this list, S1?

- 10 A. One man.
Q. One man. Which is that?
A. Abrams.
Q. Abrams?
A. Yes.
Q. Philip Abrams?
A. Yes.
Q. In what way is Philip Abrams involved in that account of \$1309?
A. We made some clothes for him.
20 Q. And how much was his bill?
A. His bill was —
Q. How much was his bill?
A. \$48.
Q. Did he pay it?
A. I paid it.
Q. You paid it?
A. Yes.
Q. To whom?
A. The office.
Q. When?
30 A. The time—in the 4th month, 1924. I mean twenty-four.
Q. Fourth month?
A. Yes.
Q. Did you get a receipt for it?
A. Didn't get no receipts.
Q. Did Mr. Burman pay you in cash?

A. I paid Abrams' bill in two payments.

Q. In two payments?

A. Yes.

Q. How much did you pay the first time?

A. One time I—at one time I paid \$20, and I paid \$10—I paid in two payments, I remember.

Q. If you paid \$20 and \$10, that is only \$30. Where is the rest of it?

A. I paid that, too.

Q. Then that is three payments. When did you 10 pay it?

A. The fourth month, and the fifth month, 1924.

Q. Fourth month and the what?

A. Fourth and fifth.

Q. Fourth and fifth of 1924. How much did you pay in the fourth month?

A. I paid one payment, \$20 I collected, to the office, and one time I give about \$10, and then I bring some money to the office and there was balanced his account. 20

Q. And Phil Abrams' bill was \$48?

A. Yes.

Q. Where have you got the item of that? Let me see that. Where did you get that information? Point it out to me.

A. (Witness shows.)

Q. \$48. That was the balance, wasn't it?

A. No.

Q. That was the whole account?

A. That was the whole account. 30

Q. Now, look at that and see if you are mistaken.

A. I don't have to see that.

Q. Will you look at this, will you, please? Now, his whole bill was \$103, wasn't it?

A. Why, this is the oldest bill.

Q. His whole bill was \$103?

A. The last I handled there was \$48.

Q. You see that this bill calls for \$103?

A. He never had that for order.

Q. You see there is a cash credit given of \$55, leaving a balance of \$48, don't you?

A. This is the oldest bill.

Q. You see that, according to that statement, don't you?

A. Should have another statement.

10 Q. I ask that be marked for identification.

(Paper referred to marked Exhibit S3 for identification.)

Q. Do you know Mr. Philip Abrams' writing?

A. If I see it I would know it.

Q. Will you look at that signature and that letter, see whether that is correct?

A. Sure, he paid me and I paid to the office.

20 Q. Yes.

A. True.

Mr. Hinkle: I will mark this for identification.

(Paper referred to marked Exhibit S4 for identification.)

Mr. Hinkle: Do you want to see these?

30 Mr. Weeks: Yes, let me see it, please.

Mr. Hinkle: I am going to put them in evidence for awhile.

Q. And Mr. Burman did pay you the full amount, didn't he?

A. Yes, sir.

Q. Now, when—who is Mr. George Collins, 126 South Massachusetts Avenue?

A. I never heard of him.

Q. Never met him?

A. No. That used to be, Charlie Sullivan used to make clothes for him.

Q. You don't know anything about his account, then?

A. No.

Q. Who is Mr. P. Doyle, 42 North Pennsylvania 10 Avenue?

A. He ordered a suit of clothes, Charlie Sullivan's customer, and paid \$5 deposit.

Q. Paid how much?

A. \$5 deposit.

Q. Did you write Doyle?

A. I don't know him. That is Charlie Sullivan's customer.

Q. Did you know where he lived?

A. No.

Q. You say 42 North Pennsylvania Avenue?

A. I met him, lots times come up to the place and we fitted him at the store.

Q. In your direct examination you said you knew Doyle, friend of yours, 42 North Pennsylvania Avenue.

A. No, he is Charlie Sullivan's customer, and I met him through Sullivan.

Q. You said he lived 42 North Pennsylvania Avenue. What kind of a house is that?

A. 42 Pennsylvania—is it South Pennsylvania—South or North, which is it?

Q. Well, you know 42 North Pennsylvania Avenue, don't you? It is marked "N." I suppose that means north. You live 29, don't you?

A. Yes.

Q. What is 42 North Pennsylvania Avenue?

20

30

- A. It is a private house.
 Q. Isn't it a public school?
 A. It is —
 Q. It is the Pennsylvania Avenue Public School at the corner of Arctic and Pennsylvania Avenue, isn't it?
 A. It is next to the school.
 Q. Sure about that?
 A. Yes, sir.
 10 Q. And you got no receipts from Mr. Kean?
 A. I didn't need no receipts from him.
 A. No.
 Q. I say you got none?
 A. No.
 Q. And you have no receipts now?
 A. No.
 Q. That is all.
 A. I think I have checks, some checks I got.
 Q. Well, are they in payment of any of these
 20 accounts on this bill, \$1?
 A. I look them up and I will see.
 Q. Now, there is the statement. Anything on this statement that you have paid in, just say so.
 A. It is no statement of mine.
 Q. I don't care whose it is. It is a list charging you —

By the Court:

- 30 Q. Did I understand during the year of 1924 you did a total business for this man, what is his name?
 A. Kean.

Mr. Hinkle: Kean.

- Q. Of thirteen hundred and some odd dollars?
 A. In the summer months, 1924.

Q. And out of that thirteen hundred and some odd dollars you were to get a bonus of a thousand dollars?

A. No, I was to get a bonus for the year because I used to work inside. I used to work until nine o'clock night, and for my work up here I used to get bonus.

By Mr. Hinkle:

10

Q. Then you don't find any check of any of these people?

A. I haven't got any of those names.

Q. By the way, you have been convicted of some crime?

A. Yes, I took the rap for a couple of politicians in this town.

Re-direct examination.

20

By Mr. Weeks:

Q. Mr. Mandel, I call your attention to S2, and ask you if that is your signature to that letter?

A. With them four suits I haven't anything to do. He sent me to collect money for them four suits, and the four suits deliver at Missouri Avenue.

Q. What I am asking you, is that your letter?

A. It is my letter but it is not my handwriting.

Q. It is your letter. You sent that statement?

30

A. Yes.

Q. What account—this refers apparently to the Megan account.

A. Mr. Megan didn't pay. I told Mr. Kean, give him the address.

Q. This letter says here, "Also send the four

suits out here. In regard to the account, I was promised some money to be paid to me in a day or two."

A. Yes.

Q. In a day or two.

A. Yes.

Q. "I will remit to you." What did you mean when you said, "I will remit to you?" Did it refer to moneys you had collected?

10 A. He told me to go out and collect some money. I told him if I collected I would turn the money to him.

Q. When you said, "I will remit to you," it referred to the account and moneys on it if you collected it?

A. If I collected it. But I didn't collect it.

Q. In other words you didn't collect the money referred to in this letter?

A. He got paid for them suits.

20 Q. But not through you?

A. No, from Missouri and Pacific Avenue.

Q. And you didn't collect any money on this account?

A. No.

Q. And you didn't refer to any money that you had collected?

A. No.

30 The Court: What was that question back there about his being convicted?

(The question and answer were read by the stenographer as follows: "Q. By the way, you have been convicted of some crime? A. Yes, I took the rap for a couple of politicians in this town.")

The Court: What did you mean, you took the rap?

The Witness: I protected a couple of men in this town and I took the rap to go to serve four months; didn't want to give any information to the government.

The Court: You were charged with a crime and pled guilty? 10

The Witness: I been charged for the Eighteenth Amendment, before Judge Clark, and Judge Clark in court asked me if I would tell a certain people's name, and I told him I wouldn't, so he gave me four months.

By Mr. Weeks:

Q. That was in connection with the violation of the Eighteenth Amendment? 20

A. That was happen in 1926.

Q. Were you convicted of violating the Eighteenth Amendment?

A. I been in the case with twenty-seven men.

Q. Were you convicted of violating the Eighteenth Amendment?

A. I plead guilty.

Q. You pled guilty? 30

A. Yes.

Mr. Hinkle: United States Court.

The Witness: United States Court, before Judge—Honorable Judge Clark.

The Court: Well, when you said you took the rap for some politicians, that didn't mean you were not guilty, did it?

The Witness: Well, the Court wanted to let me out from this case if I would tell—mention certain people's names, and I refused and the —

The Court: I am not interested in that. Were
10 you guilty or weren't you guilty?

The Witness: I wasn't guilty, but I plead guilty.

By Mr. Weeks:

Q. You say there was some understanding, or out of some misunderstanding with some politicians in this town, you pled guilty?

20 A. Yes, I took the plea for them.

Q. When was that?

A. In 1926.

The Court: Who were the politicians?

The Witness: If your Honor please, I was sworn by the United States Government not to give any information.

30 The Court: Then I would quit talking about it, then.

The Witness: I could give it to you confidentially.

The Court: I don't want it confidentially. I

hear so much confidentially that I don't take any stock in it.

Mr. Weeks: I think that is all.

Mr. Hinkle: That is all.

(Recess to 1:14 o'clock P. M.)

10

AFTERNOON SESSION—(1:45 P. M.)

Mr. Hinkle: Do you rest?

Mr. Weeks: Yes, we rest.

Mr. Hinkle: I wish now, if your Honor please, to put in evidence Exhibit S4—S3 and S4—which were marked previously for identification.

20

Mr. Weeks: And I object to this, if your Honor please. The letter in question cannot be binding upon us. It has no probative force, therefore, and the statement has the same effect. We were not presented with that statement. We made no statement concerning it, and they can get up any statement they please. It has no probative effect.

Mr. Hinkle: There they are. My thought is that they have probative effect. They were put in here to show there was an account existing at this time.

30

Mr. Weeks: That could not prove the account.

Mr. Hinkle: Well, does your Honor feel they should not go in at this time?

The Court: The chief objection to the letter is the defense counsel would have a right under the testimony, or rules of evidence, to examine on the offer of the letter.

Mr. Hinkle: No question. But the man admitted the facts stated in the letter were true, so it is not so material. I withdraw the offer. Now, I do want the account to go in, and if that is ob-
10 jected to for the same reason I will withdraw that and put in different proof.

SAMUEL KEAN, recalled.

Direct examination.

20

By Mr. Hinkle:

Q. Will you please look at Exhibit S3, marked for identification. Does that show an account with one Abrams?

A. Philip Abrams, yes, sir.

Q. Of \$103?

A. \$103.

Q. Paid \$55?

30 A. Paid \$55.

Q. Is that correct?

A. Correct.

Mr. Hinkle: I now offer it in evidence.

Cross-examination.

By Mr. Weeks:

Q. How did you keep the books?

A. My bookkeeper.

Q. Did you keep the books?

A. My bookkeeper.

Q. Personally did you keep the books of that account?

10

A. If I kept the book?

Q. Yes. You have a bookkeeper, don't you?

A. That is right.

Q. You didn't make up that statement?

A. My bookkeeper did.

Mr. Weeks: I object to it.

Re-direct examination.

By Mr. Hinkle:

20

Q. Are you familiar with your books, sir?

A. I do.

Q. Do you know all about your accounts?

A. Yes, sir, I do.

Mr. Hinkle: Perfectly competent. The book-keeper don't have to be the only one.

Mr. Weeks: How can this witness—he has nothing to do with his books, he has a bookkeeper—how can he produce a statement here and say that shows an account? I don't think it is admissible, anyhow. The whole books of the account ought to be brought here if they are going to prove the account. 30

The Court: Yes, I sustain the objection.

Mr. Hinkle: That is all.

GEORGE JOSEPH THOMAS, called as a witness on behalf of the State, being sworn, was examined and testified as follows:

10

Direct examination.

By Mr. Hinkle:

Q. Mr. Thomas, you are a subpoena server attached to the Prosecutor's office?

A. Yes, sir.

Q. Did you try to serve a subpoena at 42 North Pennsylvania Avenue on one Doyle?

20

A. Yes, sir.

Q. What kind of a building is 42 Pennsylvania Avenue, North?

A. That is a school.

Q. Is there any 42 North Pennsylvania Avenue?

A. No, sir.

Q. Did you try to serve a subpoena on a man named J. Silver on 108 Kentucky Avenue, regardless of south or north?

30

A. Went to 108 South, and that is an electric company.

Q. That is the electric company?

A. Yes.

Q. Did you try to find the man at 108 North?

A. Yes, sir, and that is the Pennsylvania Railroad there.

Q. Did you try to find a man by the name of Collins, at 126 South Massachusetts Avenue?

A. Yes, sir; Mr. and Mrs. Franks live there, sir.

Q. Anyone by the name of Collins live there at any time?

A. No, sir.

Mr. Hinkle: Cross-examine.

Cross-examination.

By Mr. Weeks:

10

Q. You were serving subpoenas in the case, in this case, were you?

A. Yes, sir.

Q. Did you—you have testified that you tried to locate some two or three different parties?

A. Yes, sir.

Q. Whose names are called to the Prosecutor from this statement—called by the Prosecutor from this statement, S1?

20

A. Yes, sir.

Q. Did you try to subpoena Philip Abrams at Atlantic City for this case?

A. On this case?

Q. Yes.

A. No, sir, not on this case.

Q. Did you try to subpoena—the next is George Collins. You did try to subpoena him. Did you try to subpoena R. J. King of Atlantic City for this case?

30

A. No, sir.

Q. Did you try to subpoena anybody except those persons you mentioned?

A. No, sir, only those three persons.

Re-direct examination.

By Mr. Hinkle:

Q. That is all the names you were given?

A. Yes, sir, that is all the names I was given.

Q. By the Assistant Prosecutor?

A. By the Assistant Prosecutor.

10

Mr. Hinkle: That is all. State rests. Pardon me for a moment. The bookkeeper, come back for a moment.

FRANCES SCHWARTZ, recalled.

20

Direct examination.

By Mr. Hinkle:

Q. Showing you Exhibit S3, for identification, do you know anything about that statement?

A. It is my writing.

Q. Is it your writing?

A. Yes, sir.

Q. You copied it from the books?

A. I copied it from the books.

30

Q. Is that a correct statement of the account?

A. Correct.

Mr. Hinkle: I again make my offer, and while I am on my feet I say to your Honor we are not proving an account so therefore books are not in evidence, this bookkeeper having testified she made

this memorandum or this statement from the books in her office. I offer it.

Mr. Weeks: I still object on the ground it is a self-serving proposition. They don't bring the books here, the best proof would have been the books to show how the account actually stands, and that they are still not entitled to offer any statement that they may make up from the books showing the account of a certain person in this case. I don't think it is — 10

The Court: I will admit it.

Mr. Hinkle: That is all.

(Paper previously marked Exhibit S3 for identification now received and marked Exhibit S3 in evidence.)

20

Mr. Hinkle: State rests.

Mr. Weeks: We rest. I would like to have a bit of an opening from you, Mr. Hinkle, if you please.

(Mr. Hinkle opens the case to the jury.)

(Mr. Weeks sums up to the jury on behalf of the defendant.)

(Mr. Hinkle sums up to the jury on behalf of the State.) 30

COURT'S CHARGE TO THE JURY.

SMATHERS, J.:

Ladies and gentlemen of the jury: It now becomes your province to determine the guilt or innocence of this defendant who is charged in an indictment with the conversion or embezzlement of certain funds. The indictment which will be submitted to you for your consideration is predicated upon Section 184 of the Crimes Act of the State of New Jersey, which provides as follows:

10
20
“Any consignee, factor, bailee, agent or servant entrusted with the care or sale of any personal property or entrusted with the collection or care of any money, who shall fraudulently take and convert the same or the proceeds of the sale of the same or any part thereof to his own use or to the use of any other person or persons whatsoever except the rightful owner thereof, shall be guilty of a misdemeanor.”

Now, in the case at bar, of course, the defendant is presumed to be innocent, and that presumption of innocence follows and protects him until the State has produced testimony which overcomes that presumption of innocence and which satisfies you to a point where you have an abiding conviction to a moral certainty of the guilt of the defendant. If the State has so satisfied you then of course, it becomes your duty to find the defendant guilty as charged in the indictment. On the other hand, if there exists in your minds a reasonable doubt, that is, a doubt existing for a reason, as to whether or not he is guilty as charged, such reasonable doubt should be resolved in favor of the defendant and he

should be acquitted. On the other hand, you would not be justified in acquitting the defendant for some slight possible or imaginary doubt because, as our higher courts have said, everything relating to human affairs and depending upon moral evidence is susceptible to some slight possible or imaginary doubt. The real test is a reasonable doubt, a doubt existing for a reason. If you have it, then the law requires you to resolve it in favor of the defendant and acquit him. On the other hand, if the State has satisfied you beyond a reasonable doubt of his guilt, it then becomes your duty to find him guilty. You may retire. 10

Mr. Weeks: Your Honor, I understand, refuses to charge as requested by the defendant?

The Court: Yes.

Mr. Weeks: I except to the Court's refusal to charge that "The State must convince the jury beyond a reasonable doubt that: 20

(1) Defendant collected money for Mr. Kean which he did not pay to Mr. Kean or his agent at the office.

(2) That such money was collected from some of the persons named in the statement marked S1.

(3) That the money collected, if so collected, was converted to the use of the defendant. 30

(4) That there was an intent to defraud on the part of defendant.

(5) If defendant collected any such money belonging to said Kean and held it from Kean under

an honest belief that such money or a large sum belonged to him from said Kean, he is not guilty and the case is a civil one properly."

W.M. H. SMATHERS,
J.

STATE OF NEW JERSEY, }
ATLANTIC COUNTY, } ss.

10 I, EMMET J. VICTORY, the official stenographer of the Atlantic County Court of Quarter Sessions, do hereby certify that the foregoing transcript contains the entire record of the proceedings and the testimony taken at the trial of the cause of State of New Jersey v. Samuel Mandel, held before Hon. William H. Smathers, Judge of said Court, and a jury, on February 1, 1928, at May's Landing, N. J.

EMMET J. VICTORY,
Stenographer.

20

STATE OF NEW JERSEY, }
ATLANTIC COUNTY, } ss.

30 I, WILLIAM SMATHERS, President Judge of the Atlantic County Court of Quarter Sessions, who presided at the trial in the aforesaid cause, do certify that the foregoing contains the entire record of the proceedings had upon the trial of said cause; and that the same is returned by the plaintiff-in-error and brings up the bills of exceptions allowed in said cause; and that the defendant's requests to charge referred to by counsel for the defendant in his exception, now upon the record for refusal to charge the same, were presented to me in writing before either counsel began to sum up.

W.M. H. SMATHERS,
Judge.

EXHIBIT S1.

STATEMENT

Bell, Lombard 1853 West Philadelphia
 Keystone, Main 3451 Bell, Allegheny 2963
 Keystone, West 1882

PHILADELPHIA.....19.....

M S. MANDEL 10

IN ACCOUNT WITH

S. KEAN

IMPORTER AND TAILOR

TERMS:.....

753 S. 2nd Street

132 S. 52nd Street

1924

4/4	Philip Abrams, 5 S. Windsor Ave.	48.00	
9/7	Geo. Collin, 126 S. Mass. Ave.	40.00	
9/12	P. Doyle, 42 N. Penna. Ave.	40.00	20
May 1	R. J. King, Pacific & Missouri	40.00	
	Ed. W. Mousley, Pacific & Missouri	23.00	
April	Thos. Sweeney " " "	38.00	
7/26	J. Maigen, 225 Atlantic Ave.	55.00	
12/18/23	M. Owens, 1335 Pacific Ave.	50.00	
7/19/24	J. Silver, 108 Kentucky	35.00	
March	Ed Slattery, Georgia & Atlantic	30.00	
7/19	L. Walter, 219 Atlantic	30.00	
April	Frank Sanders, 251 S. 52nd St., Phila.	35.00	30
May 18	R. L. Quay, 5430 Angora Terrace, Phila.	30.00	
	E. L. Jones, N. E. Cor. 52nd & Walnut	8.00	
July	R. Vanella, Highland Park	23.00	
		<hr/>	
		525.00	

EXHIBIT S2.

10 SAMUEL MANDEL
29 N. Pennsylvania Ave.
Atlantic City, N. J.
September 23 1924

Mr. Samuel Kean
753 S. Second St.
Phila. Pa.

Dear Sir:

I received your letter this morning. Mr. J. Megan's address is 225 Atlantic Ave. You may send him a bill.

20 Also, send the four suits out here. In regard to the account, I was promised some money to be paid to me in a day or two after which I will remit to you.

Yours truly
Samuel Mandel
Per R. B. M.

30

EXHIBIT S3.

STATEMENT

Bell, Lombard 1853	West Philadelphia	
Keystone, Main 3451	Bell, Allegheny 2963	10
	Keystone, West 1882	

PHILADELPHIA.....19.....

M PHILIP ABRAMS, 5 S. WINDSOR

ATLANTIC CITY, N. J.

IN ACCOUNT WITH

S. KEAN

IMPORTER AND TAILOR

TERMS:.....

	753 S. 2nd Street	
	132 S. 52nd Street	20

1924

4/4 Suit—Tr.

48.00

“ “

55.00

103.00

Cash

55.00

48.00

Paid Mandel

30

ASSIGNMENTS OF ERROR.

Afterwards, to wit, on the third day of February, A. D. 1928, in the Supreme Judicature of the State of New Jersey, comes the said Samuel Mandel, by Elwood C. Weeks, his attorney, and says that in the record and proceedings aforesaid, and also in
10 the matters recited and contained in the bill of exceptions, and also in the giving of the verdict and judgment aforesaid there is manifest error in this respect, to wit:

1. Because the learned trial Judge, against the objection of defendant's counsel, ordered an amendment of the indictment to lay the offense as happening "On the first day of December in the year of our Lord one thousand nine hundred and twenty-
20 four and thence afterwards until the first day of October, 1925."

2. Because the learned trial Judge, against the objection of defendant's counsel, ordered an amendment of the indictment to lay the offense as happening "From the first day of December, 1923, until October, 1924."

3. Because at the close of the State's case the
30 learned trial Judge refused a motion by counsel for defendant for a direction of a verdict in favor of defendant.

4. Because the learned trial Judge, against the objection of defendant's counsel, admitted in evidence Exhibit S3.

5. Because the learned trial Judge, although requested by defendant's counsel, refused to charge, "The State must convince the jury beyond a reasonable doubt that:

(a) Defendant collected money for Mr. Kean which he did not pay to Mr. Kean or his agent at the office.

(b) That such money was collected from some of 10 the persons named in the statement marked S1.

(c) That the money collected, if so collected, was converted to the use of the defendant.

(d) That there was an intent to defraud on the part of defendant.

(e) If defendant collected any such money belonging to said Kean and held it from Kean under 20 an honest belief that such money or a large sum belonged to him from said Kean, he is not guilty and the case is a civil one properly."

ELWOOD C. WEEKS,
*Attorney for Plaintiff-
in-Error.*

Service of a copy of the within assignments of 30 error is hereby acknowledged this 29th day of February, A. D. 1928.

S. CAMERON HINKLE,
Assistant Prosecutor.

CAUSES FOR REVERSAL.

Afterwards, to wit, on the third day of February, A. D. 1928, in the Supreme Judicature of the State of New Jersey, comes the said Samuel Mandel, by Elwood C. Weeks, his attorney, and says that in the record and proceedings aforesaid, and also in
10 the matters recited and contained in the bill of exceptions, and also in the giving of the verdict and judgment aforesaid there is manifest error in this respect, to wit:

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20 four and thence afterwards until the first day of October, 1925."

2. Because the learned trial Judge, against the objection of defendant's counsel, ordered an amendment of the indictment to lay the offense as happening "From the first day of December, 1923, until October, 1924."

3. Because at the close of the State's case the
30 learned trial Judge refused a motion by counsel for defendant for a direction of a verdict in favor of defendant.

4. Because the learned trial Judge, against the objection of defendant's counsel, admitted in evidence Exhibit S3.

5. Because the learned trial Judge, although requested by defendant's counsel, refused to charge, "The State must convince the jury beyond a reasonable doubt that:

(a) Defendant collected money for Mr. Kean which he did not pay to Mr. Kean or his agent at the office.

(b) That such money was collected from some of 10 the persons named in the statement marked S1.

(c) That the money collected, if so collected, was converted to the use of the defendant.

(d) That there was an intent to defraud on the part of defendant.

(e) If defendant collected any such money belonging to said Kean and held it from Kean under 20 an honest belief that such money or a large sum belonged to him from said Kean, he is not guilty and the case is a civil one properly."

6. Because the learned trial Judge erroneously admitted in evidence Exhibit S1.

7. Because the learned trial Judge erroneously admitted in evidence Exhibit S2.

8. Because the learned trial Judge permitted the 30 witness, Kean, to be asked by the State, "Did you try to find the address of one, P. Doyle, 42 North Pennsylvania Avenue?"

9. Because the learned trial Judge permitted the witness, Kean, to be asked by the State, "Did you

find such an address?" meaning 108 Kentucky Avenue.

10. Because the learned trial Judge permitted the witness, Kean, to be asked by the State, "Did you ever get any of that money?" meaning \$525 shown in Exhibit S1.

10 11. Because the learned trial Judge permitted the witness, Thomas, to be asked by the State, "Did you try to serve a subpoena at 42 North Pennsylvania Avenue on one, Doyle?"

12. Because the verdict is contrary to the weight of the evidence.

13. Because manifest injustice was done to the defendant by the failure of the Court in his charge to the jury to review the facts and apply the law
20 thereto.

14. Because manifest injustice has resulted to the defendant in the verdict and judgment based thereon from the entire record of the case.

ELWOOD C. WEEKS,
*Attorney for Plaintiff-
in-Error.*

30 Service of a copy of the within causes for reversal is hereby acknowledged this 29th day of February, A. D. 1928.

S. CAMERON HINKLE,
Assistant Prosecutor.

1st day of December, 1924, and thereafter until the 1st day of October, 1924. When this obvious error was discovered the Prosecutor of the Pleas applied to the Court for leave to amend the indictment by making the last date read "October 1, 1925;" and this was done. Subsequently, when the case came on to be tried, the Prosecutor of the Pleas discovered that the indictment had been returned in June, 1925, and then applied to have the indictment again
10 amended by restoring the original date last set out therein and altering the first date so as to make the specified period of time read "December 1, 1923, to October 1, 1924," and this second application was also granted.

Both of these amendments were made notwithstanding objection thereto on the part of counsel for the defendant, and the first ground upon which a reversal of the conviction is sought is that the trial Court committed harmful error in permitting them
20 to be made. But this contention is in entire disregard of Sections 33 and 44 of our Criminal Procedure Act (Comp. Stat. p. 1831, *et seq.*). Section 33 provides that "No indictment for any offense shall be held insufficient * * * for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened;" and Section 44 declares that, where objection is made to any formal defect apparent on the face of the indictment, the
30 Court before which such objection is taken may forthwith cause the indictment to be so amended as to cure such defect. The defects contained in the present indictment were those specified in Section 33 of the statute. That they are merely formal has been declared by this Court in the case of *Ketline v. State*, 58 N. J. L. 462, where a similar question was presented for decision.

The next ground urged for reversal is that the Court erroneously refused to direct a verdict for the defendant. The basis of the request for a direction was that there was no evidence which would justify a jury in finding that the defendant had fraudulently appropriated to his own use moneys which he had collected as the agent of his employer; that the collection itself was legal, and that, consequently, it was necessary to prove that defendant's employer had demanded payment of the moneys collected, and that such demand had not been complied with, in order to show a fraudulent misappropriation of the moneys; and that there was no proof that any such demand had been made. But this is not true in fact. The testimony of Kean, the defendant's employer, was that, having become suspicious that the defendant had wrongfully appropriated money which he had collected, he had an interview with him; that, at this interview, he called his attention to a copy of a statement taken from his (Kean's) books of account, which showed collections by defendant which had not been turned over to Kean; that the defendant admitted that he had collected some of these moneys, but not all of them, and promised that he would "make good" within the next few days, but that he never did this, either within a few days or at any other time.

The next ground upon which a reversal of the conviction is sought is that the trial Court erroneously admitted in evidence, over the objection of defendant's counsel, a statement showing an account between the defendant's employer and a man named Abrams, the purpose of which was to show that the defendant had collected from Abrams moneys due to his employer, amounting to \$48. The argument is that the statement was not competent evidence of the collection of this sum by the defendant, because

there was no proof that he had ever seen it, or that he had supplied the data from which it was made up; and counsel asserts that its admission was harmful error. In view of the fact that the defendant offered himself as a witness at the trial, and, in response to a question put to him by his counsel, testified that he had collected from Abrams the very \$48 set out in the statement, we are unable to see how its admission was harmful error, even if it was erroneous.

- 10 The case comes before us under the broad review provided by Section 136 of the Criminal Procedure Act (Comp. Stat., p. 1863), and that section declares that no judgment of conviction which is sought to be reviewed under its provisions shall be reversed for any error occurring at the trial except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits. For the reason indicated, we find nothing of substance in this ground of reversal.
- 20 The only other reason for setting aside the conviction which is of sufficient importance to justify discussion is directed at the refusal of the trial Court to charge the jury that, in order to justify a conviction, the State was required to convince the members of that body beyond a reasonable doubt of the existence of each of five segregated facts, which are set out *seriatim* in the request. The Court refused to charge the request in the language in which it was submitted, but instructed the jury that the defendant
- 30 was presumed to be innocent, and that this presumption followed and protected him until the State produced testimony which overcame that presumption and which satisfied the jury to a point where it had an abiding conviction to a moral certainty of the guilt of the defendant. Having thus charged the law as to reasonable doubt, the trial Court was not required, though specially requested to do so, to ap-

ply the legal principal to conditions of fact postulated by defendant's counsel where such conditions did not include all of the circumstances which should influence the conclusion of the jury. Consolidated Traction Co. v. Chenowith, 61 N. J. L. 554; State v. Blaine, 137 Rep. p. 829.

For the reasons stated, the conviction under review will be affirmed.

10

WRIT.

NEW JERSEY, ss.

*The State of New Jersey to our Justices
of our Supreme Court:*

(Seal) Greeting: Because in the record and proceedings and also in the giving of the judgment upon a certain indictment, which was in our said Supreme Court before you, between the State, defendant-in-error, and Samuel Mandel, plaintiff-in-error, on a writ of error issued out of the Supreme Court, to the Judge constituting the Court of Quarter Sessions in and for the County of Atlantic as is said, manifest error hath intervened to the great damage of the said Samuel Mandel, as from his complaint we have received information, we being willing in his behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Samuel Mandel do command you that if judgment be given, then you send distinctly and openly under your seal, the entire record, proceedings and indictment aforesaid, with all things touching and concerning the same, to

our Court of Errors and Appeals, before the Judges thereof, on the fourteenth day of March, A. D. nineteen hundred and twenty-nine, and this writ, and that the record and proceedings aforesaid being inspected we may cause to be further done what of right and according to law ought to be done.

Witness HONORABLE EDWIN ROBERT WALKER,
Chancellor and President Judge of our Court of Errors and Appeals, at Trenton aforesaid, the twenty-
10 third day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

JOSEPH B. FITZPATRICK,
Clerk.

ELWOOD C. WEEKS,
Attorney.

[ENDORSED]

Service of a copy of the within writ
is acknowledged this February 25th,
1929.

Louis A. Repetto,
Prosecutor of the Pleas of
Atlantic County.

JOINDER-IN-ERROR.

And, hereupon, afterwards, to wit, on this thirteenth day of March, A. D. 1929, the said defendant, the State of New Jersey, by Louis A. Repetto, Prosecutor of the Pleas in and for the County of Atlantic, in said State, comes into court and says 10
that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the Court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed.

LOUIS A. REPETTO,
Prosecutor of the Pleas in and for
the County of Atlantic. 20

ASSIGNMENTS OF ERROR AND CAUSES
FOR REVERSAL.

Now comes the said Samuel Mandel, by Elwood C. Weeks, his attorney, and says that the record and proceedings aforesaid, and also in the giving the 30
verdict and judgment in this case, there is manifest error in these respects, to wit:

1. Because the trial Judge, against the objection of defendant's counsel, ordered an amendment of the indictment to lay the offense as happening "On

(e) If defendant collected any such money belonging to said Kean and held it from Kean under an honest belief that such money or a large sum belonged to him from said Kean, he is not guilty and the case is a civil one properly."

6. Because the trial Judge erroneously admitted in evidence Exhibit S1.

7. Because the trial Judge erroneously admitted in evidence Exhibit S2.

10

8. Because the trial Judge permitted the witness, Kean, to be asked by the State, "Did you try to find the address of one, P. Doyle, 42 North Pennsylvania Avenue?"

9. Because the trial Judge permitted the witness Kean, to be asked by the State, "Did you find such an address?" meaning 108 Kentucky Avenue.

20

10. Because the trial Judge permitted the witness, Kean, to be asked by the State, "Did you ever get any of that money?" meaning \$525 shown in Exhibit S1.

11. Because the trial Judge permitted the witness, Thomas, to be asked by the State, "Did you try to serve a subpoena at 42 North Pennsylvania Avenue on one Doyle?"

30

12. Because the verdict is contrary to the weight of the evidence.

13. Because manifest injustice was done to the defendant by the failure of the Court in his charge to

BRIEF FOR DEFENDANT-IN-ERROR

**NEW JERSEY COURT OF ERRORS
AND APPEALS**

THE STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

SAMUEL MANDEL,

Plaintiff-in-Error.

ON ERROR TO THE
ATLANTIC QUARTER
SESSIONS
ON ERROR TO THE
SUPREME COURT

BRIEF FOR DEFENDANT-IN-ERROR

STATEMENT OF FACTS

Samuel Kean, a tailor in Philadelphia, Pa., employed the defendant, Samuel Mandel, for a long period of time.

On July 5th, 1924, Kean went to Europe, and Mandel was still in his employ. It was part of Mandel's work to solicit orders in and about Atlantic City, and he made the measurements, delivered the clothing and collected.

After a few weeks in Europe, Kean returned, and three days later Mandel disappeared. (See page 13, lines 8 to 12.)

Kean later found Mandel and asked for an explanation of the Atlantic City accounts, and confronted him with a list of persons whom Mandel had measured and delivered the clothing to and kept the money. This list appears as Exhibit S1, and is printed on page 77 of the book, and a copy of which was given Mandel.

About ten or twelve days after Kean returned from Europe, and after he had talked with Mandel, he took Mandel to his lawyer's office in Philadelphia. (See page 23, lines 3 to 8, of the printed book.) From that time on, it seemed, that Mandel did not make any payments to Kean, although he promised to do so.

On the night of July 5, 1924, Kean gave a dinner to his employees, and gave each person present a bonus. The amount varied, according to their employment. Mandel received three hundred (\$300) dollars in cash. (See page 23, lines 28 to 34, and page 24, lines 5 and 6.)

Samuel Mandel was indicted and convicted of violating Section 184 of the Crimes Act. The charge briefly was that Mandel was the Agent of one Samuel Kean, and as such Agent was entrusted with the collection and care of the moneys belonging to said Kean, and that he, said

Mandel, did fraudulently take and convert the sum of five hundred and twenty-five (\$525) dollars and upwards, and apply the same to his own use.

The indictment is set out at length on page 4 of State of Case.

The indictment fixed the time as December 1, 1924, and thence afterward until October 1, 1924.

This indictment was found and filed June 18, 1925.

The defendant, Mandel, entered a plea of not guilty, July 21, 1925.

Mandel was tried February 1, 1928, and found guilty.

On February 1, 1928, he was sentenced to serve two years in State's Prison. (See page 5 of printed book.)

CRIMES ACT

SECTION 184, PAGE 1799.

The indictment was found under this section, and which reads as follows:

"Any consignee, factor, bailee, agent or servant, entrusted with the care or sale of any personal property, or entrusted with the collection or care of any moneys, who shall fraudulently take or convert the same, or the proceeds of the sale of the same, or any part thereof,

to his own use, or to the use of any other person or persons whatsoever, except the rightful owner thereof, shall be guilty of a misdemeanor. (P. L. 1898, page 844.)”

ON REFUSAL TO DIRECT VERDICT

On pages 35, 36, 37 and 38 of the printed book there appears the request of counsel for defendant to direct a verdict at the close of the State's case. In making the motion to dismiss, it was claimed that no demand had been made on Mandel to pay over the money.

That a demand for money was made appears on page 13 of the printed book. (See lines 25 to 35, where the complaining witness gave Mandel, the defendant, a copy of a statement showing how the five hundred and twenty-five (\$525) dollars Mandel was accused of keeping was made up.)

This statement was offered in evidence and marked Exhibit S1, and appears in full on page 76 of the book.

The testimony on page 13, particularly from lines 30 and afterward and on page 14, show that the complaining witness (Kean) was demanding from Mandel these moneys.

Again, on page 15, there appears on the entire page a record of a conversation that certainly makes plain that

Kean was demanding his money from Mandel.

Under cross-examination of Kean (page 23 of the book, lines 1 to 20) there appears a conversation showing that Mandel was promising to pay; and on page 23, line 18, there appears the question, "Q. You say that he said he would pay you something on this bill? A. He made a number of arrangements."

~~REFUSAL TO DIRECT VERDICT~~

Defendant complained because the Court refused to direct a verdict. While he admitted the receipt of the moneys, he claimed no demand had been made for them.

The proof is, that the moneys were collected and demand was made.

Mandel cites *Fitzgerald vs. State*, 50 N. J. L., page 475, wherein the Court stated (page 477) :

"Proof that the owner demanded goods and that the person in possession had refused to return them, is accepted as evidence of conversion. But, mere neglect to return, in the absence of a demand, has never been admitted as proof of conversion."

In the *Fitzgerald* case it seems no demand was made. But in the case at bar, there can be no question about demand having been made.

A copy of Exhibit S1 (page 77) was handed Mandel and discussed by Mandel and his employer (page 13, 1. 25 to 35.

Mandel disappeared within three days after the return of his employer from Europe, and when found, was given the copy of that statement, S1 (pages 13 and 14).

At the top of page 15, it appears that Kean, the employer, was at Mandel's house, and that Mandel promised to make good. And later, a letter was received by Kean from Mandel, wherein Mandel says he will remit.

On page 23, lines 3 to 10, Kean took Mandel to his lawyer's office for the purpose of getting Mandel to settle.

When this case was argued in the Supreme Court before the Chief Justice and Justices Parker and Katzenbach, at the May Term, 1928, this same question was discussed.

The Chief Justice wrote the opinion of the Court and in disposing of the question (see opinion of Chief Justice at the top of page 87 of the book), wherein his Honor says:

"The next ground urged for reversal is that the Court erroneously refused to direct a verdict for the defendant. The basis of the request for a direction was that there was no evidence which would justify a jury in finding that the defendant had fraudulently

appropriated to his own use moneys which he had collected as the agent of his employer; that the collection itself was legal, and that, consequently, it was necessary to prove that defendant's employer had demanded payment of the moneys collected, and that such demand had not been complied with, in order to show a fraudulent misappropriation of the moneys; and that there was no proof that any such demand had been made. But this is not true in fact. The testimony of Kean, the defendant's employer, was that, having become suspicious that the defendant had wrongfully appropriated money which he had collected, he had an interview with him; that, at this interview, he called his attention to a copy of a statement taken from his (Kean's) books of account, which showed collections by defendant which had not been turned over to Kean; that the defendant admitted that he had collected some of these moneys, but not all of them, and promised that he would 'make good' within the next few days, but that he never did this, either within a few days or at any other time."

AS TO COURT'S CHARGE

Following the Court's charge to the Jury, Mandel's counsel took exception to the Court's refusal to charge, as follows (page 75 of the printed book):

"MR. WEEKS: I except to the Court's refusal to charge that 'The State must convince the Jury beyond a reasonable doubt that:

(1) Defendant collected money for Mr. Kean which he did not pay to Mr. Kean or his agent at the office.

(2) That such money was collected from some of the persons named in the statement marked S1.

(3) That the money collected, if so collected, was converted to the use of the defendant.

(4) That there was an intent to defraud on the part of the defendant.

(5) If defendant collected any such money belonging to said Kean and held it from Kean under an honest belief that such money or a large sum belonged to him from said Kean, he is not guilty and the case is a civil one properly.' "

It will be noted that counsel for Mandel seemed to think the Court should charge that the State must convince. In disposing of this matter in the Supreme Court, the opinion of the Chief Justice, above quoted (found on page 88 of the book, line 20, etc.), says:

"The only other reason for setting aside the con-

viction which is of sufficient importance to justify discussion is directed at the refusal of the trial Court to charge the Jury that, in order to justify a conviction, the State was required to convince the members of that body beyond a reasonable doubt of the existence of each of five segregated facts, which are set out seriatim in the request. The Court refused to charge the request in the language in which it was submitted, but instructed the Jury that the defendant was presumed to be innocent, and that this presumption followed and protected him until the State produced testimony which overcame that presumption and which satisfied the Jury to a point where it had an abiding conviction to a moral certainty of the guilt of the defendant. Having thus charged the law as to reasonable doubt, the trial Court was not required, though specially requested to do so, to apply the legal principal to conditions of fact postulated by defendant's counsel where such conditions did not include all of the circumstances which should influence the conclusion of the jury.

Consolidated Traction Co. vs. Chenowith,

61 N. J. L. 554.

State vs. Blaine, 137 Rep. page 829."

"A party to an action has no right to have the Court

charge something which he conceives to be important to be shown. He has no right to have the particular matter charged unless it is legally essential either for or against him. A matter may be important in the judgment of the party without being legally essential."

State vs. Samaha, 93 N. J. L. 484.

In *State vs. Fischer*, 97 N. J. L. on page 35, Justice Trenchard, in delivering the opinion of the Supreme Court, said:

"It is contended that the trial Judge erred in refusing the defendant's request to charge. Not so. The request, in so far as it embodied any pertinent legal principal, had been charged in substance, *and the Judge was not bound* to repeat it in the language requested."

And the authorities in support of that view are:

Pavan vs. Worthen & Aldrick Co., 80 N. J. L. 567; affirmed 82 Id. 615.

In *Acker vs. State*, 52 N. J. L. 259, the syllabus of paragraph 2 is as follows:

"It is not error for a Court to refuse to charge that the defendant is entitled to 'a reasonable doubt upon every and any question of fact in the cause'."

And in the opinion by Chief Justice Beasley, the judgment was sustained, when he refused to charge upon every item immaterial, as well as that which was essential.

In the case at bar it will be noted that the trial Judge charged fully on the question of reasonable doubt, and there is no authority requiring a trial Judge to charge the Jury in the manner requested by Mandel's counsel.

LOUIS A. REPETTO,

Prosecutor of the Pleas,
Atlantic County.

ON ERROR TO THE SUPREME COURT

Brief for Plaintiff-in-Error

ELWOOD C. WEEKS,
Counsel for Plff. in Error.

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of growth and expansion. From a small collection of colonies on the eastern coast, it grew into a vast nation that stretched across the continent.

The early years were marked by struggle and conflict. The American Revolution was a pivotal moment in the nation's history, leading to the birth of a new republic. The years following were a period of rapid growth and development.

The United States has always been a land of opportunity and innovation. It has attracted people from all over the world, and its diverse population has helped to shape its unique character.

1A-66.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Defendant-in-Error,
v.
SAMUEL MANDEL,
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Brief for Plaintiff-in-Error

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

v.

SAMUEL MANDEL,
Plaintiff-in-Error.

ON ERROR TO THE SUPREME COURT.

BRIEF FOR PLAINTIFF-IN-ERROR.

FACTS

The plaintiff-in-error was convicted of violating Section 184 of the Crimes Act (2 C. S. 1799), which provides as follows:

“any consignee, factor, bailee, agent or servant entrusted with the care or sale of any personal property or entrusted with the collection or care of any monies, who shall fraudulently take or convert the same, or the proceeds of the sale of the same, or any part thereof, to his own use, or to the use of any other person or persons whatsoever, except the rightful owner thereof, shall be guilty of a misdemeanor.”

The complaining witness, a tailor who employed defendant, had showed the latter a list of some fifteen names of persons from whom, in 1923 or 1924, defendant was alleged to have collected \$525 in all (S-1, p. 77); and stated that thereupon the defendant had admitted that he had collected some money (p. 15, l. 6). There was no proof that any of the fifteen persons mentioned in said list, or any other persons, had paid defendant any sum of money whatever. None of said persons were produced at the trial.

REFUSAL TO DIRECT A VERDICT.

The trial Judge refused a motion in behalf of the plaintiff-in-error to direct a verdict for defendant (p. 38, l. 8).

One of the elements of the offense charged was the fraudulent conversion of money to defendant's own use. Neglect to pay over monies which were held by the defendant as belonging to his principal would not be sufficient for a finding that the monies were fraudulently converted to the use of the defendant.

In dealing with this element of the crime this Court in the case of *Fitzgerald v. State*, 50 N. J. L. p. 475, held:

“The mere neglect to pay over was made sufficient evidence of a fraudulent conversion of said proceeds. In this, I think there was error.”

The alleged monies came lawfully into the possession of the defendant and the offense charged could not be established for mere failure to pay over the monies. The Supreme Court held that the complaining witness had made a demand upon the defendant for the payment of the money; but there is not sufficient evidence in the case to warrant that conclusion. The complaining witness “*showed*” the defendant an alleged statement of what he thought to be accounts upon which the defendant had collected monies (p. 14, l. 36), and refers to a discussion of the collections; and states that a couple days later defendant promised to “make good.” The defendant had been in the employ of the complaining witness for a long time (p. 38, l. 28). The complaining witness was a man of means and paid de-

defendant a bonus for his services. He says defendant admitted having collected some money (p. 15, l. 6)—that he owed some money to his employer, but it does not follow that the complaining witness urged prompt accounting or demanded it. He does not say that he did. He was apparently satisfied at that time with the admission of debt by the defendant. A demand is a specific mandate from one person to another.

Furthermore, the statute deals only with monies "entrusted" to the defendant, and nowhere is there any proof that the complaining witness had entrusted monies to defendant. This feature dif-

Where A owes B \$1000, which he borrowed or otherwise came in possession of; A and B discuss it and A promises to pay at a future date, it would not be said that there was a demand for payment and a refusal. Wherein does the case at bar differ? We could hardly say that because Kean had no knowledge of the collection until sometime afterwards, that the rule of law is satisfied by that fact, nor does the continuing to retain the money after such knowledge meet the requirements of the rule.

REFUSAL OF REQUESTS OF PLAINTIFF-IN-ERROR
TO CHARGE.

The learned trial Judge made a very brief charge upon the case and, in spite of defendant's requests, he made no reference to any of the facts as presented by the proofs. In behalf of the plaintiff-in-error the Court was distinctly requested to instruct the jury and refused to do so (p. 75, l. 29). The requests were properly and duly presented in writing before either counsel began to sum up their cases (p. 76, l. 36). The first request was that the

defendant a bonus for his services. He says defendant admitted having collected some money (p. 15, l. 6)—that he owed some money to his employer, but it does not follow that the complaining witness urged prompt accounting or demanded it. He does not say that he did. He was apparently satisfied at that time with the admission of debt by the defendant. A demand is a specific mandate from one person to another.

Furthermore, the statute deals only with monies "entrusted" to the defendant, and nowhere is there any proof that the complaining witness had entrusted any monies to defendant. This feature differentiates this case from that of *Burnett v. State*, 60 N. J. L. 255, in that particular. By the terms of the act, in order to convict the defendant upon such indictment, it is essential that he had been first entrusted with the collection or care of monies belonging to his employer. The defendant may have assumed to collect money belonging to his employer, but he was not "entrusted" by his employer; and the offense does not lie within the said Section 184 of the Crimes Act.

REFUSAL OF REQUESTS OF PLAINTIFF-IN-ERROR
TO CHARGE.

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jury must find, beyond a reasonable doubt, that the defendant did collect money for the complaining witness which he did not pay to him. The *State's evidence* on this phase of the case was very meager. While the statement, Exhibit S1, contained the names and addresses as well as the various sums alleged to have been collected from some fifteen different persons, there was no proof by any one of the fifteen that they had paid any sum of monies to the defendant. These persons were not produced and, of course, the defendant on the indictment had no knowledge as to this portion of the State's claim. He was not informed before trial as to who was claimed to have paid him any money. Defendant claimed he paid in all money collected but had no record of accounts for the year 1923 (p. 56, l. 30). The refusal of the trial Judge to charge as requested in this particular tended to minimize the failure of the State to produce some of the persons who were alleged to have paid the monies to the defendant, the latter having made positive denial. Certainly the defendant was entitled to have the *law of reasonable doubt applied specifically*, upon request, touching this posture of the proofs. *State v. Temple*, 63 N. J. L. 375.

The exception to the Court's refusal to charge what is designated as "No. 5" in the exceptions (Case, p. 75, l. 36), was a refusal to charge a distinct proposition based upon a definite theory of defendant's case.

The request was, "If the defendant collected any such money belonging to said Kean, and held it from Kean under an honest belief that such money or a larger sum belonged to him from said Kean, he is not guilty and the case is a civil one properly."

It was testified by the defendant that he had been a long time employed by the complaining witness

(p. 38, l. 28) and had received a bonus besides his salary (p. 39, l. 25) and that defendant had been promised a bonus of \$1,000, upon which \$250.00 had been paid on account (p. 40, l. 13). The complaining witness held himself up as a very generous man and said he had paid the defendant a bonus of \$300 (p. 24, l. 5). The jury might have believed from the evidence, assuming they found some monies collected by the defendant, that the complaining witness had agreed to pay him as large a sum as that collected by way of a bonus for his efforts in his master's business as compensation; and in that case there would have existed no criminal offense because defendant honestly withheld payment of the monies collected. It became a question of civil rights, under such circumstances, instead of criminal liability.

The statutory offense rested upon a fraudulent conversion, while the theory of the defense was thus inconsistent with the existence of fraud. There being evidence to support this theory the defendant was entitled to have the jury instructed upon it. In the case of *State v. Temple, supra*, the same offense was under consideration and the Court held:

“It was the defendant's right to have the jury so instructed. The charge of the Court was silent as to *intent*, and the specific request upon this preferred by counsel for the defendant was denied.”

“The intent to convert the money was an essential element of the embezzlement charge. It was the specific element that made the retention fraudulent. Unless the jury was satisfied of its existence *beyond a reasonable doubt* the State had not legally established the defendant's guilt.”

“The intent to convert the money was the specific criminal element that made the reten-

tion fraudulent, unless the jury were satisfied of its existence beyond a reasonable doubt, the State had not legally established the defendant's guilt. It was the defendant's right to have the jury so instructed, and a specific request upon this point, preferred by the counsel for the defendant, was denied. This error which appears by the bill of exceptions is obviously injurious, and because of it judgment must be reversed."

The Supreme Court cites the case of *Consolidated Traction Co. v. Chenowith*, 61 N. J. L. 554, as authority for the refusal of the trial Court to charge requests by counsel. In that case (top p. 561) it is stated that the Court was not asked to declare a legal principle. It is respectfully contended in this respect, that on the contrary the request, *sub judice*, was a simple statement of a proposition of law; and there were proofs to justify its statement.

In *Franklin v. Freihofer Baking Company*, 71 N. J. L. 114, it was held:

"Where requests to charge upon points of law applicable to a case be made prior to the commencement of the summing up of counsel, it is the duty of the Court to charge or to refuse to charge such requests * * * It would be difficult to justify the course of the Court in refusing to charge on the requests presented in this record, and *such refusal was error*, and the judgment must be reversed."

Respectfully submitted,

ELWOOD C. WEEKS,
Counsel for Plaintiff-in-Error.

