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*Writ of Error to Supreme Court.*

**Writ of Error.**

Filed November 13th, 1916.

NEW JERSEY, ss.

The State of New Jersey to our  
Justices of our Supreme Court,  
GREETING:

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Because in the record and proceedings and also in the giving of judgment upon a certain indictment, which was in our said Supreme Court of Judicature, before you, between the State of New Jersey, Prosecutor and Defendant-in-Error, and Clarence P. Whitman, Defendant and Plaintiff-in-Error, on a writ of error issued out of our said Supreme Court to the Court of Oyer and Terminer of the County of Essex, manifest error hath intervened to the great damage of the said Clarence P. Whitman, as by his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal the record and proceedings and indictment aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the second day of December, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon for correcting that error, what of right and according to the law and custom of the State of New Jersey, ought to be done.

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*Return.*

WITNESS our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the thirteenth day of November, Nineteen hundred and sixteen.

THOMAS F. MARTIN,  
*Clerk.*

10

BORDEN D. WHITING,  
*Attorney.*

**Return.**

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The records and proceedings whereof mention  
20 is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,  
*C. J.*

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**Writ of Error.**

(Filed.)

NEW JERSEY, ss.

The State of New Jersey to the Judge 10  
[L. s.] of the Court of Oyer and Terminer of  
the County of Essex.

GREETING:

Because in the record and proceedings and also  
in the giving of judgment upon a certain indict-  
ment in the name of the State of New Jersey  
against Clarence P. Whitman, et al., for con-  
spiracy, heard and determined by our said Court  
of Oyer and Terminer in and for the County of  
Essex, manifest error hath intervened to the great  
damage of the said Clarence P. Whitman, as from  
his complaint we have received information; we  
being willing in this behalf to correct the error in  
due manner, if any shall be, and that speedily jus-  
tice be done to him, the said Charles P. Whitman,  
do command you that if judgment be thereon given,  
then that you do distinctly and openly send under  
your seal the record and proceedings aforesaid  
with all things touching the same, to our Supreme  
Court to be held at Trenton, on the nineteenth day  
of July, Nineteen hundred and fifteen, 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 and customs of New  
Jersey, ought to be done.

*Writ of Error.*

Witness, William S. Gummere, Chief Justice,  
of our said Supreme Court, at Trenton, the thir-  
tieth day of June, in the year Nineteen hundred  
and fifteen.

WILLIAM C. GEBHARDT,  
*Clerk.*

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BORDEN D. WHITING,  
*Attorney.*

Endorsed:

NEW JERSEY SUPREME COURT.

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

*vs.*

CLARENCE P. WHITMAN,  
*Plaintiff in Error.*

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WRIT OF ERROR.

Returnable July 19th, 1915.

BORDEN D. WHITING,  
*Attorney of Plaintiff in Error,*  
Essex Bldg., Newark, N. J.

Presented in open court this 30th day of June, 1915.

40

H. V. OSBORNE, J.

*Return.*

**Return.**

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss:

I, Harry V. Osborne, Judge of the Court of  
Quarter Sessions in and for Essex County, New  
Jersey, do hereby certify and return to the Su- 10  
preme Court of Judicature of the State of New  
Jersey the Judgment record and proceedings to-  
gether with all things touching and concerning the  
same and the entire record as by the within  
writ to me directed, I am commanded.

In Witness Whereof I have hereunto  
(SEAL) set my hand and the seal of said court  
and county this 27th day of September 20  
A. D., 1915.

H. V. OSBORNE,  
*Judge.*

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*Indictment.*

**Indictment.**

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss:

10 BE IT REMEMBERED, that at a Court of Oyer and  
Terminer holden at Newark, in and for the County  
of Essex, on the second day in December, in the  
year of our Lord one thousand nine hundred and  
thirteen, by the Honorable William S. Gummere,  
Chief Justice of the Supreme Court of Judicature  
of the State of New Jersey, and holding the said  
Court of Oyer and Terminer in and for the County  
of Essex, New Jersey, by the oath of Christian W.  
Feigenspan, John P. Fannan, John H. Ely, Joseph  
20 Horweitz, William Arthur, John A. Cohane, Jacob  
Meyer, John McCarthy, Ernest Hirschhoff, Thomas  
J. Kenny, Gustave Jay, James A. Wormley, James  
M. Beldon, John Enstice, William H. Roemer,  
Jacob Holle, Jr., John Harrold, David C. Seymour,  
Mortimer C. Newman, Henry Sternberger, Timo-  
thy J. Faughnan, Isaac Roth and James Maloney,  
good and lawful men of the said County of Essex,  
duly commissioned and then and there duly sworn  
and charged to enquire in behalf of the State of  
30 New Jersey, in and for the said County of Essex,  
it is presented in manner and form following, to  
wit:

INDICTMENT No. 248.

ESSEX OYER AND TERMINER.

December Term, A. D. 1913.

Essex County, to-wit: The Grand Jurors of the  
State of New Jersey, in and for the body of the  
County of Essex, upon their oath present; that  
40 At all times and days hereinafter mentioned,

*Indictment.*

Raymond E. Smith was the Treasurer of the Roseville Trust Company, a Trust Company organized and existing under the laws of the State of New Jersey, located and doing business in the City of Newark, County of Essex and State of New Jersey, had the custody of moneys, properties and securities of the said Roseville Trust Company and was charged with the keeping of its books of account and was authorized in the name of the said Roseville Trust Company to make certification and payment of checks and negotiable papers drawn upon it by the depositors of the said Roseville Trust Company whenever such depositors had funds to their credit to the amount named in such checks and negotiable papers; that Augustus R. Jennings was a Teller employed by the said Roseville Trust Company and was authorized in the name of the said Roseville Trust Company to make certification and payment of checks and negotiable paper drawn upon it by the depositors of said Roseville Trust Company whenever such depositors had funds to their credit to the amount named in such checks and negotiable paper; that William J. Thompson was a Teller employed by the said Roseville Trust Company and was authorized in the name of said Roseville Trust Company to make certification and payment of checks and negotiable paper drawn upon it by the depositors of said Roseville Trust Company whenever such depositors had funds to their credit to the amount named in such checks and negotiable paper; that the Inter-City Land and Securities Company was a depositor of and had an account with said Roseville Trust Company; that Clarence E. Whitman was the Treasurer of the Inter-City Land and Securities Company and was authorized to draw checks and promissory notes for and in the

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*Indictment.*

name of the Inter-City Land and Securities Company, drawn upon and made payable at the Roseville Trust Company by said Inter-City Land and Securities Company, and that John B. Faunce was President of the Inter-City Land and Securities Company, and as such was authorized to draw  
 10 checks and sign promissory notes for and in the name of the said Inter-City Land and Securities Company drawn upon and made payable at the said Roseville Trust Company by the said Inter-City Land and Securities Company, and that from the 31st day of July, 1913, until the 14th day of August, 1913, one Jesse S. Peters was Cashier of the said The Inter-City Land and Securities Company, and as such was authorized to countersign  
 20 checks for and in the name of the said The Inter-City Land and Securities Company drawn upon and made payable at the said Roseville Trust Company by said The Inter-City Land and Securities Company, and that the said The Inter-City Land and Securities Company was a corporation—

And the Grand Jurors of the State of New Jersey in and for the body of the County of Essex, upon their oath aforesaid do further present that the said Raymond E. Smith, Clarence B. Whitman, John B. Faunce, Augustus R. Jennings and  
 30 William J. Thompson, Jesse S. Peters and divers other persons to the Grand Jurors aforesaid unknown, late of the City of Newark, County of Essex aforesaid, on the 26th day of March, in the year of Our Lord, nineteen hundred and thirteen, and on all other days since and up to the taking of this inquisition, with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this court, did, amongst  
 40 themselves, conspire, combine and confederate and agree together fraudulently and falsely to cheat

*Indictment.*

and defraud said Roseville Trust Company, a corporation, aforesaid, of its moneys, goods, chattels and property and fraudulently and falsely to cheat and defraud the said Roseville Trust Company of divers large sums of money, to wit: \$28,487.73, the property of the said Roseville Trust Company, by procuring the fraudulent application of the funds of the said Roseville Trust Company to the payment of checks and promissory notes drawn by the said Inter-City Land and Securities Company in overdraft of funds standing to the credit of the said Inter-City Land and Securities Company with said Roseville Trust Company; and fraudulent and falsely to cheat and defraud the said Roseville Trust Company of its moneys and property by procuring a fraudulent application by the Treasurer of the said Roseville Trust Company of divers large sums of money, the property of the said Roseville Trust Company for use other than the use of the said Roseville Trust Company and willfully and corruptly concealing the said fraudulent application of said moneys and property by falsely keeping the accounts of the said Roseville Trust Company and fraudulently and falsely to cheat and defraud the said Roseville Trust Company, its stockholders and depositors of its moneys by fraudulently and corruptly procuring the taking and withdrawing of such moneys by the Inter-City Land and Securities Company, a depositor of said Roseville Trust Company by means of withdrawals in excess of moneys which the said The Inter-City Land and Securities Company had to its credit with the said Roseville Trust Company and willfully and corruptly concealing such taking and withdrawing of such moneys by falsely keeping the accounts of the said Roseville Trust Company and fraudulently and falsely to

*Indictment.*

cheat and defraud the said Roseville Trust Company of its moneys, property and securities by procuring the embezzlement by the said Raymond E. Smith, Treasurer as aforesaid, of the moneys, properties and securities of said Roseville Trust Company, committed to the keeping of the said  
10 Raymond E. Smith as its Treasurer; whereby the said Roseville Trust Company became and was cheated of large sums of money, to wit, the sum of \$28,487.73, the property of the said Roseville Trust Company.

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex aforesaid upon their oath aforesaid, do further present that in execution of and according to the  
20 said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid and to effect the object thereof afterwards, to wit, on the 26th day of March, 1913, at the City of Newark, in the County of Essex aforesaid, the Clarence P. Whitman, being then and there the Treasurer of The Inter-City Land and Securities Company, as Treasurer of said Company and against the account of the said Inter-City Land and Securities Company, did fraudulently and corruptly draw a  
30 certain check on the said Roseville Trust Company for the sum of \$323.93 to the order of Stitt & Phillips, and did fraudulently and corruptly cause and procure the same to be presented to the said Roseville Trust Company for payment. He, the said Clarence P. Whitman, then and there well knowing that the said Inter-City Land and Securities Company did not have to its credit with the said Roseville Trust Company moneys to the amount named in said check. That afterwards, on  
40 the 27th day of March, 1913, at the City and County aforesaid, the said Raymond E. Smith

*Indictment.*

being then and there Treasurer of the said Roseville Trust Company and then and there well knowing that the said Inter-City Land and Securities Company did not have to its credit with the said Roseville Trust Company moneys to the amount named in said check upon the presentation of said check did fraudulently and corruptly pay and cause the same to be paid with the moneys and funds of said Roseville Trust Company. And that afterwards, to wit, on the day and year last aforesaid and on all the other days since and up to the taking of this inquisition at the City and County aforesaid, the said Raymond E. Smith did fraudulently and corruptly omit to post and to cause to be posted the payment of said check in the books of account of the said Roseville Trust Company, and did fraudulently and corruptly omit to charge and omit to cause to be charged to said The Inter-City Land and Securities Company with the amount of said check on the books of account of the said Roseville Trust Company, and did fraudulently and corruptly retain in his own possession the said check, whereby the said Roseville Trust Company was then and there defrauded of a large sum of money, to wit, the sum of \$323.93.

The indictment then proceeds to set out in language similar to that used above in setting out as an over act the said check drawn by Clarence P. Whitman, Treasurer, etc., dated March 26, 1913, for the sum of three hundred and twenty-three dollars and ninety-three cents, to the order of Stitt & Phillips, as overt acts in the further execution of and according to the said conspiracy, etc., the following checks drawn by the said Clarence P. Whitman, Treasurer, etc., presented for payment, paid by Raymond E. Smith, Treasurer, etc., not posted and charged on the books of the Com-

*Indictment.*

pany by Raymond E. Smith, Treasurer, etc., and retained in his own possession, to wit:

|    | Date of Check. | Payee                  |          | Date of Payment. |
|----|----------------|------------------------|----------|------------------|
|    | April 12, 1913 | William Bell           | \$ 50.00 | May 3            |
|    | " 18, "        | Marie L. Winters       | 814.28   | April 19         |
| 10 | " 19, "        | Ests. Mtge. & Sec. Co. | 500.00   | " 23             |
|    | " 25, "        | Ests. Mtge. & Sec. Co. | 651.50   | " 29             |
|    | May 2, 1913    | Nathan Friedman        | 1.30     | May 6            |

and also to set out as overt acts in the further execution of and according to the said conspiracy, etc., in similar language and like manner, the following checks drawn by John B. Faunce, President, etc., presented for payment, paid by Raymond E. Smith, Treasurer, etc., not posted and charged on the books of the Company by Raymond E. Smith, Treasurer, etc., and retained in his own possession.

|    | Date of Check. | Payee                  |           | Date of Payment. |
|----|----------------|------------------------|-----------|------------------|
|    | May 5, 1913    | M. N. Natanson         | \$ 250.00 | May 7            |
|    | " 5, "         | Estates Mtge. Sec. Co. | 336.66    | " 7              |
|    | " 5, "         | Earle & Calhoun        | 98.13     | " 7              |
|    | " 6, "         | W. H. Winters          | 1,000.00  | " 8              |
|    | " 10, "        | Wolfe Goldberg         | 250.00    | " 10             |
|    | " 14, "        | Wolf Goldberg          | 500.00    | " 17             |
|    | " 14, "        | Brown Weiss Realities  | 500.00    | " 15             |
|    | " 16, "        | Gustave Wandler        | 255.00    | " 24             |
| 30 | " 17, "        | Joseph Bozzo & Bro.    | 160.00    | " 21             |
|    | " 14, "        | Wolfe Goldberg         | 500.00    | " 17             |
|    | " 19, "        | Olin J. Stephens       | 500.00    | " 21             |
|    | " 20, "        | Max L. Lefkowitz       | 400.00    | " 24             |
|    | " 22, "        | Jos. G. Deane          | 425.00    | " 24             |
|    | " 22, "        | Lese & Connelly        | 344.00    | " 24             |
|    | " 22, "        | Estates Mtg. Co.       | 37.50     | " 26             |
|    | " 22, "        | Lese & Connelly        | 8.00      | " 26             |
|    | " 23, "        | Chas. R. Bietsch       | 105.00    | " 27             |
|    | " 24, "        | Herman Sehlir          | 150.00    | " 26             |
|    | " 24, "        | Edw. Anderson          | 28.19     | " 27             |
|    | " 24, "        | Bromley & Co.          | 25.00     | " 28             |
|    | " 24, "        | T. A. Hutchins         | 9.10      | June 4           |
| 40 | " 24, "        | Wm. T. Bowe            | 8.00      | May 27           |
|    | " 24, "        | Jos. Bozzo & Bro.      | 160.00    | " 28             |

*Indictment.*

|      |          |                     |          |      |    |    |
|------|----------|---------------------|----------|------|----|----|
| May  | 26, 1913 | S. Sussman          | \$ 50.00 | May  | 26 |    |
| "    | 26, "    | Max N. Natanson     | 150.00   | "    | 26 |    |
| "    | 26, "    | Alvin G. Cavis      | 25.00    | "    | 30 |    |
| "    | 26, "    | Est. Mtg. Sec. Co.  | 166.00   | "    | 29 |    |
| "    | 26, "    | S. Rotman           | 10.00    | "    | 29 |    |
| "    | 27, "    | Carl Ernest         | 150.00   | "    | 28 |    |
| "    | 27, "    | Ests. Mtg. Sec. Co. | 502.50   | "    | 29 |    |
| "    | 28, "    | Kilroe & Swartz     | 20.00    | "    | 28 |    |
| "    | 28, "    | Frank R. Pentlarge  | 50.00    | "    | 31 | 10 |
| "    | 28, "    | Kohn Bros.          | 75.00    | June | 5  |    |
| "    | 29, "    | John C. Hessel      | 25.00    | May  | 31 |    |
| "    | 31, "    | Jos. Bozzo          | 180.00   |      |    |    |
| "    | 31, "    | Cash                | 12.50    | June | 5  |    |
| "    | 31, "    | Cash                | 28.00    | "    | 4  |    |
| "    | 31, "    | John Meisner        | 25.00    | "    | 7  |    |
| June | 2, "     | Berbara Wernsing    | 10.07    | "    | 5  |    |
| "    | 2, "     | Con. Gas. Co.       | 149.00   | "    | 6  |    |
| "    | 2, "     | Con. Gas. Co.       | 39.00    |      |    |    |

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex aforesaid, upon their oath aforesaid, do further present that in further execution of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid and to effect the object thereof, afterwards, to wit, on the 3rd day of June, 1913, at the City of Newark and the County of Essex aforesaid, the said John B. Faunce being then and there President of the Inter-City Land and Securities Company, as such President did fraudulently and corruptly draw a certain check on the Roseville Trust Company for the sum of \$300.00 to the order of Wolf Goldberg, and did fraudulently and corruptly cause and procure the same to be presented to the said Roseville Trust Company for payment, well knowing that the said The Inter-City Land and Securities Company did not have to its credit with said Roseville Trust Company moneys to the amount named in said check. That afterwards, to wit, on the day and year first aforesaid in the City and County aforesaid, the said Augustus

*Indictment.*

R. Jennings, being then and there Teller of the said Roseville Trust Company and then and there well knowing that the said The Inter-City Land and Securities Company did not have to their credit with the Roseville Trust Company moneys to the amount of \$300.00, upon the presentation  
 10 of the said check; and that afterwards, to wit, on the 4th day of June, 1913, at the City and County aforesaid, the said Raymond E. Smith, being then and there Treasurer of the said Roseville Trust Company, and the said Augustus R. Jennings, teller, as aforesaid, upon the presentation of the said check did fraudulently and corruptly pay and cause the same to be paid with the moneys and funds of the said Roseville Trust Company, and that afterwards, to wit, on the day and year last  
 20 aforesaid, and on the other days since, and up to the taking of this inquisition at the City and County aforesaid, the said Raymond E. Smith fraudulently and corruptly omitted to post and cause to be posted the payment of said check in the books of account of the said Roseville Trust Company, and did fraudulently and corruptly omit to charge and cause to be charged the said Inter-City Land and Securities Company with the payment of said check on the books of account of the  
 30 said Roseville Trust Company, and did fraudulently and corruptly retain in his own possession the said check, whereby the said Roseville Trust Company was then and there defrauded of a large sum of money, to wit, the sum of \$300.00.

The indictment in similar language then sets out as overt acts the following checks:

|             |      |         |                          |          |      |   |
|-------------|------|---------|--------------------------|----------|------|---|
| Mr. Faunce  | June | 3, 1913 | H. Heller                | \$ 25.00 | June | 6 |
|             | "    | 3, "    | Milton Mayer             | 50.00    | "    | 4 |
|             | "    | 3, "    | J. Newton Osorio         | 41.00    | "    | 4 |
|             | "    | 3, "    | Ests. Mtg. Sec. Co.      | 250.00   | "    | 6 |
|             | "    | 3, "    | H. W. Fairfax Adv. Agcy. | 100.00   | "    | 5 |
| Mr. Whitman | "    | 4, "    | Smith & Kelly Co.        | 30.00    | "    | 6 |

*Indictment.*

|            |              |                         |          |        |
|------------|--------------|-------------------------|----------|--------|
| Mr. Faunce | June 4, 1913 | Herman Seklir           | \$ 36.00 | June 6 |
| "          | " 4, "       | U. S. Realty & Imp. Co. | 83.34    | " 6    |
| "          | " 4, "       | Brown-Weiss Realities   | 500.00   | " 6    |
| "          | " 5, "       | Brown-Weiss Realities   | 500.00   | " 6    |
| "          | " 12, "      | A. J. Stern             | 157.50   | " 14   |
| "          | " 14, "      | Edw. Anderson           | 34.80    | " 17   |
| "          | " 14, "      | Harlem Wall Paper Co.   | 16.50    | " 17   |
| "          | " 16, "      | Max N. Natanson         | 125.00   | " 17   |
| "          | " 16, "      | Greenstein Bros.        | 17.00    | " 21   |

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, aforesaid, upon their oath aforesaid, do further present that in further execution of and according to the said conspiracy, combination, confederacy and agreement amongst themselves, had as aforesaid, and to effect the object thereof, afterwards, to wit, on the 17th day of June, 1913, at the City of Newark, in the County of Essex aforesaid, the said John B. Faunce, being then and there the President of Inter-City Land and Securities Company, as such President, did fraudulently and corruptly draw a certain check on the said Roseville Trust Company for the sum of \$15.00 to the order of W. H. Lewis, and did fraudulently and corruptly cause and procure the same to be presented to the Roseville Trust Company for payment, well knowing that the said The Inter-City Land and Securities Company did not have to its credit with said Roseville Trust Company moneys to the amount named in said check; and that afterwards, to wit, on the 19th day of June, 1913, at the city and county aforesaid, the said Augustus R. Jennings, being then and there Teller of the said Roseville Trust Company, upon the presentation of said check, well knowing that the said The Inter-City Land and Securities Company did not have to its credit with said Roseville Trust Company moneys to the amount named in said check, did fraudulently and corruptly certify the said check; and that afterwards, to wit, on the 21st

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*Indictment.*

day of June, 1913, at the City and County aforesaid, the said Augustus R. Jennings, being Teller as aforesaid, and the said Raymond E. Smith, being then and there Treasurer of the Roseville Trust Company, did fraudulently and corruptly  
 10 pay and cause the same to be paid with the moneys and funds of the said Roseville Trust Company; and that afterwards, to wit, on the day and year aforesaid, and on all the other days since and up to the taking of this inquisition at the city and county aforesaid, the said Raymond E. Smith did fraudulently and corruptly omit to post and to cause to be posted the payment of said check in the books of accounts of the said Roseville Trust Company, and did fraudulently and corruptly omit  
 20 to charge and to cause to be charged the said The Inter-City Land and Securities Company with the payment of said check on the books of account of the said Roseville Trust Company, and did fraudulently and corruptly retain in his own possession the said check, whereby the said Roseville Trust Company was then and there defrauded of a large sum of money, to wit, the sum of \$15.00.

The indictment in similar language then sets out as overt acts the following checks:

|    |             |               |                        |           |         |
|----|-------------|---------------|------------------------|-----------|---------|
| 30 | Mr. Faunce  | June 18, 1913 | Olin J. Stephens       | \$ 452.25 | June 20 |
|    |             | " 18, "       | E. B. Meeks            | 200.00    | " 20    |
|    |             | " 18, "       | N. Y. Telephone Co.    | 24.96     | " 24    |
|    |             | " 18, "       | N. Y. Telephone Co.    | 52.75     | " 24    |
|    |             | " 18, "       | N. Y. Telephone Co.    | 19.99     | " 21    |
|    | Mr. Whitman | " 20, "       | N. Y. Telephone Co.    | 55.00     | " 24    |
|    |             | " 20, "       | F. E. Scofield         | 916.67    | " 25    |
|    |             | " 21, "       | Greenbaum & Shapiro    | 100.00    | " 25    |
|    |             | " 21, "       | I. Yerkes              | 6.20      | " 26    |
|    |             | " 21, "       | Edw. Anderson          | 22.70     | " 25    |
|    |             | " 21, "       | L. A. Stern            | 19.85     | " 26    |
|    | Mr. Faunce  | " 21, "       | Jos. Bozzo             | 180.00    | " 25    |
|    | Mr. Whitman | " 23, "       | Morris Heller          | 70.00     | " 23    |
|    |             | " 23, "       | S. Sussman             | 95.00     | " 23    |
|    | Mr. Faunce  | " 23, "       | Brown-Weiss Realties   | 1,000.00  | " 24    |
|    |             | " 24, "       | Max N. Natanson        | 65.10     | " 24    |
| 40 |             | " 24, "       | Con. Gas. Co.          | 5.28      | " 26    |
|    |             | " 24, "       | Northern Union Gas Co. | 5.60      | " 28    |
|    |             | " 24, "       | Pocher & Co.           | 2.00      | " 25    |

*Indictment.*

|             |   |     |   |                       |        |      |    |    |
|-------------|---|-----|---|-----------------------|--------|------|----|----|
|             | “ | 24, | “ | Jos. J. Silver        | 2.00   | July | 1  |    |
|             | “ | 24, | “ | Marie R. Winters      | 583.33 | June | 26 |    |
|             | “ | 25, | “ | Thos. Griffin         | 100.00 | “    | 27 |    |
|             | “ | 25, | “ | Central Union Gas Co. | 3.52   | “    | 30 |    |
|             | “ | 25, | “ | Con. Gas Co.          | 6.56   | “    | 30 |    |
|             | “ | 25, | “ | Con. Gas Co.          | 8.40   | “    | 29 |    |
|             | “ | 25, | “ | N. Y. Telephone Co.   | 58.29  | “    | 28 |    |
|             | “ | 25, | “ | N. Y. Telephone Co.   | 9.80   | “    | 30 |    |
| Mr. Whitman | “ | 26, | “ | Ests. Mtg. Sec. Co.   | 500.00 | “    | 27 |    |
| Mr. Faunce  | “ | 26, | “ | Julius D. Tobias      | 100.00 | “    | 29 |    |
|             | “ | 26, | “ | Gimbel Bros           | 42.68  | July | 1  | 10 |
|             | “ | 26, | “ | Jos. Bozzo & Bro.     | 165.00 | June | 30 |    |
|             | “ | 27, | “ | Martin Gaulacher      | 64.00  | July | 2  |    |

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, aforesaid, upon their oath aforesaid, do further present that in further execution of and according to said conspiracy, combination, confederacy and agreement amongst themselves, had as aforesaid, and to effect the object thereof, afterwards, to wit, on the 27th day of June, 1913, at the City of Newark in the County of Essex aforesaid, the said John B. Faunce being then and there the President of Inter-City Land and Securities Company, and as such President, did fraudulently and corruptly draw a certain check on the said Roseville Trust Company for the sum of \$255.25 to the order of Kilore & Swartz, and did fraudulently and corruptly cause and procure the same to be presented to the Roseville Trust Company for payment, well knowing that the said The Inter-City Land and Securities Company did not have to its credit with the said Roseville Trust Company moneys to the amount of \$256.25; and that afterwards, to wit, on the 30th day of June, 1913, at the City and County aforesaid, the said Augustus R. Jennings, being then and there Teller of the said Roseville Trust Company, and then and there well know that the said Inter-City Land and Securities Company did not have to its credit with the said Roseville Trust Company moneys to amount of \$256.25 upon the presentation of said

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*Indictment.*

check, did fraudulently and corruptly certify the said check; and that afterwards, to wit, on July 1st, 1913, at the city and county aforesaid, the said Augustus R. Jennings, being Teller as aforesaid, and the said Raymond E. Smith being then and there Treasurer of the Roseville Trust Company, did fraudulently and corruptly pay and cause the same to be paid with the moneys and funds of the said Roseville Trust Company; and that afterwards, to wit, on the day and year aforesaid, and on all the other days since and up to the taking of this inquisition at the city and county aforesaid, the said Raymond E. Smith did fraudulently and corruptly omit to post and to cause to be posted the payment of said check in the books of account of the said Roseville Trust Company, and did fraudulently and corruptly omit to charge and to cause to be charged the said The Inter-City Land and Securities Company with the payment of said check on the books of account of the said Roseville Trust Company, and did fraudulently and corruptly retain in his own possession the said check, whereby the said Roseville Trust Company was then and there defrauded of a large sum of money, to wit, the sum of \$256.25.

The indictment in similar language then sets out as overt acts the following checks:

|             |                           |          |           |
|-------------|---------------------------|----------|-----------|
| Mr. Faunce  | June 28th—W. E. Preble    | \$ 10.00 | July 1st  |
|             | “ 28th—W. E. Preble       | 25.00    | “ 2nd     |
|             | “ 28th—A. G. Davis        | 12.00    | “ 2nd     |
|             | “ 28th—Edw. Anderson      | 24.68    | “ 2nd     |
| Mr. Whitman | “ 30th—Fidelity Trust Co. | 30.00    | June 30th |
| Mr. Faunce  | “ 30th—Est. Mtg. Sec. Co. | 777.17   | July 1st  |

July 1. Mr. Whitman drew check to Brown-Weiss Realty for \$3,000, well knowing, etc. Said check was certified July 3rd, 1913.

*Indictment.*

|             |      |                             |          |      |    |    |
|-------------|------|-----------------------------|----------|------|----|----|
| Mr. Faunce  | July | 1st—Marks & Marks           | \$ 55.65 | July | 1  |    |
|             | "    | 1st—Henry A. Benzley        | 14.08    | "    | 3  |    |
| Mr. Whitman | "    | 2nd—Man. Sav. Ins.          | 1,250.00 | "    | 5  |    |
|             | "    | 5th—Max Natanson            | 200.00   | "    | 5  |    |
|             | "    | 11th—Geo. W. Hoffman        | 13.00    | "    | 16 |    |
|             | "    | 11th—R. Handlson            | 6.05     | "    | 16 |    |
|             | "    | 12th—B. Kramer              | 4.75     | "    | 16 | 10 |
|             | "    | 12th—Louis A. Stern         | 18.47    | "    | 16 |    |
|             | "    | 12th—Kornel & Mandlebaus    | 57.00    | "    | 16 |    |
|             | "    | 12th—Greenbaum & Shapiro    | 150.00   | "    | 16 |    |
|             | "    | 12th—Wm. T. Bone            | 8.00     | "    | 16 |    |
| Mr. Faunce  | "    | 15th—Con. Gas Co.           | 87.46    | "    | 19 |    |
|             | "    | 15th—Con. Gas Co.           | 60.00    | "    | 19 |    |
|             | "    | 15th—Jos. Bozzo & Bro.      | 150.00   | "    | 18 |    |
| Mr. Whitman | "    | 17th—Clarence P. Whitman    | 125.00   | "    | 17 |    |
|             | "    | 18th—Olin J. Stephens, Inc. | 450.00   | "    | 21 |    |
|             | "    | 21st—Marie R. Winters       | 916.67   | "    | 27 |    |
|             | "    | 21st—Marie R. Winters       | 83.33    | "    | 23 |    |
| Mr. Faunce  | "    | 21st—Jos. Bozzo & Bro.      | 175.00   | "    | 25 |    |
|             | "    | 22nd—Frieda Blumenthal      | 261.83   | "    | 28 |    |

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, aforesaid, upon their oath aforesaid, do further present that in further execution of and according to the said conspiracy, combination, confederacy and agreement amongst themselves, had as aforesaid and to effect the object thereof, afterwards, on the first day of August, 1913, at the City of Newark, County of Essex, aforesaid, the said Clarence P. Whitman, being then and there Treasurer of The Inter-City Land and Securities Company, and the said Jesse S. Peters, being then and there Cashier of The Inter-City Land and Securities Company, the said Clarence P. Whitman, as Treasurer, did fraudulently and corruptly draw a certain check on the Roseville Trust Company for the sum of \$250.00 to the order of Jesse S. Peters, which said check was countersigned by the said Jesse S. Peters, as Cashier, and did fraudulently and corruptly cause and procure the same to be presented to the said Roseville Trust Company for payment, they the said Jesse S.

*Indictment.*

Peters and Clarence P. Whitman well knowing that the said Inter-City Land and Securities Company did not have to its credit at said Roseville Trust Company moneys to the amount named in said check; that afterwards, to wit, on the day and year last aforesaid at the city and county aforesaid the

10 said Raymond E. Smith, being then and there Treasurer of the said Roseville Trust Company, upon the presentation of said check, well knowing that the said The Inter-City did not have to its credit with the said Roseville Trust Company moneys to the amount named in said check, did fraudulently and corruptly pay and cause same to be paid with the moneys and funds of the said Roseville Trust Company; that afterwards, to wit,

20 on the day and year last aforesaid, and on all the other days since and up to the taking of inquisition at the city and county aforesaid, the said Raymond E. Smith did fraudulently and corruptly omit to post and cause to be posted the payment of said check in the books of account of said Roseville Trust Company, and did fraudulently and corruptly omit to charge and to cause to be charged the said The Inter-City with the payment of said check on the books of account of the said Roseville Trust Company, and did

30 fraudulently and corruptly retain in his own possession the said check, whereby the said Roseville Trust Company was then and there defrauded of a large sum of money, to wit, of the sum of \$250.00.

And the Grand Jurors of the State of New Jersey in and for the body of the County of Essex, aforesaid, upon their oath aforesaid, do further present that in further execution of and according to the said conspiracy, combination, confederacy and agreement amongst themselves, had as

40 aforesaid and to effect the object thereof, after-

*Indictment.*

wards, to wit, on the first day of August, 1913, at the City of Newark, in the County of Essex, aforesaid, the said Clarence P. Whitman being then and there Treasurer of the said Inter-City Land and Securities Company, and the said Jesse L. Peters being then and there Cashier of the Inter-City Land and Securities Company, the said Clarence P. Whitman, as Treasurer, did fraudulently and corruptly draw a certain check on the Roseville Trust Company for the sum of \$300.00 to the order of Wolf Goldberg, which said check was countersigned by the said Jesse S. Peters as Cashier; that the said Jesse S. Peters and Clarence P. Whitman; well knowing that the said Inter-City did not have to its credit with the said Roseville Trust Company moneys to the amount named in said check; that afterwards, to wit, on the 2nd day of August, 1913, at the city and county aforesaid, the said William J. Thompson, being then and there Teller of the said Roseville Trust Company, upon the presentation of said check, well knowing that the said The Inter-City did not have to its credit with the said Roseville Trust Company moneys to the amount named in said check, did fraudulently and corruptly certify the said check; that afterwards, to wit, on the 6th day of August, 1913, the said William J. Thompson being Teller as aforesaid, and the said Raymond E. Smith, being then and there the Treasurer of the said Roseville Trust Company, upon the presentation of the said check did fraudulently and corruptly pay and cause the same to be paid with the moneys and funds of the said Roseville Trust Company, and that afterwards, to wit, on the day and year last aforesaid, and on all the other days up to the taking of this inquisition at the city and county aforesaid, the said Raymond E. Smith did

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*Indictment.*

fraudulently and corruptly omit to post or cause to be posted the payment of said check in the books of account of the said Roseville Trust Company, and did fraudulently and corruptly omit to charge and to cause to be charged the said The Inter-City with the payment of said check on the  
 10 books of account of the said Roseville Trust Company, and did fraudulently and corruptly retain in his own possession the said check whereby the said Roseville Trust Company was then and there defrauded of a large sum of money, to wit, the sum of \$300.00.

August 8. Whitman and Peters drew check to order of Lawyers Mtg. Co., for \$523.73, both well knowing. Smith well knowing, etc., paid and failed to post, etc. August 11, 1913.

20 August 8. Whitman and Peters drew check to Receiver of Taxes in the sum of \$209.47, both well knowing, etc. Raymond Smith, well knowing, paid, etc., August 11, 1913.

August 9. Whitman and Peters drew check to order of M. & L. Jarmlowsky for \$800.00, both well knowing, etc. Smith, well knowing, etc., paid August 12, 1913.

30 August 9. Whitman and Peters drew check to Hale Desk Co., for \$100.00, well knowing, etc. Smith and Thompson, both knowing, etc., failed to post, etc., and paid same August 13th.

August 9. Whitman and Peters drew check in the sum of \$7.50 to order of Cash, well knowing, etc., and Thompson and Smith, well knowing, etc., paid same August 13th, and Smith failed to post.

40 August. 9. Whitman and Peters drew check to order of J. S. Peters for \$18.00, well knowing, etc., and Smith and Thompson, well knowing, etc., paid same August 13th, and failed to post.

*Plea.*

August 9. Whitman and Peters drew check to order of John Meisner for \$15.00, well knowing, etc., and Smith and Thompson, well knowing, etc., paid same August 13th and failed to post.

August 9. Whitman and Peters drew check to order of B. C. Campbell for \$12.00, well knowing, etc., and on August 12th Smith paid same and failed to post. 10

August 9. Whitman and Peters drew check to order of A. Setter for \$3.90, well knowing, etc., and on August 13th Smith and Thompson paid same, well knowing, and omitted to post.

Contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and of the same.

LOUIS HOOD, 20  
*Prosecutor of the Pleas.*

On the twenty-seventh day of January, A. D. nineteen hundred and fourteen, on which day the said indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and then and there the said indictment was duly delivered and duly filed by the clerk of said court, and an entry of such order and delivery and filing was then and there made in the minutes of said court at the same time pursuant to the statute in such case made and provided. 30

**Plea.**

And afterwards, that is to say, on the fourth day of February, nineteen hundred and fourteen, at the Court of Oyer and Terminer, holden in Newark, in and for the County of Essex, before the Honorable Harry V. Osborne, presiding Judge of the Court of Oyer and Terminer, Clarence B. Whitman, in the custody of John F. Monahan, 40

*Postea.*

Sheriff of the County of Essex, aforesaid, and the said Clarence B. Whitman being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that  
 10 he is not guilty thereof, and therefore for good and evil he puts himself upon his country, etc., and Louis Hood, Prosecutor of the Pleas of said state, for said County of Essex in this behalf doth the like.

And afterwards, that is to say, on the sixth day of October, A. D. nineteen hundred and fourteen, at the same Court of Oyer and Terminer, holden as aforesaid, in and for the County of Essex, before the Honorable Harry V. Osborne, presiding  
 20 Judge of the Court of Oyer and Terminer, John B. Faunce, in the custody of John F. Monahan, Sheriff of the County of Essex aforesaid, and the said John B. Faunce being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is not guilty thereof, and therefore for good and  
 30 evil he puts himself upon the country, etc., and Louis Hood, Prosecutor of the Pleas of said State, for said County of Essex, in this behalf doth the like.

Therefore, let a jury thereupon come before the Court of Oyer and Terminer, to be holden at Newark, in and for the County of Essex, on the sixteenth day of March, A. D. nineteen hundred and fifteen, then next ensuing twelve free and lawful  
 40 men, each of whom shall be a citizen of this state and resident within the County of Essex aforesaid,

*Postea.*

above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said John B. Faunce and Clarence B. Whitman, to recognize upon their oath whether the said John B. Faunce and Clarence B. Whitman are guilty of the premises in the said indictment 10  
speciefid or not guilty because the said Frederick F. Guild, Esq., prosecutor, as the said John B. Faunce and Clarence B. Whitman put themselves upon the jury and the same time is given to the parties aforesaid, at the same place.

And afterwards, that is to say, at the same session of the Court of Oyer and Terminer, holden before the Honorable Harry V. Osborne, presiding Judge of the Court of Oyer and Terminer, comes 20  
the said Frederick F. Guild, who prosecutes as aforesaid, and the said John B. Faunce and Clarence B. Whitman, and the jury, of whom mention is before made, and by Ralph B. Schmidt, Sheriff of the County of Essex, for this purpose empanelled and returned, to wit: (After the following challenges were exhausted—by the State, 4 jurors; by the defendant, 4 jurors), LeRoy Smith, Eben S. Parker, Harold M. Hirsch, Charles D. Lyons, Matthew Sherrill, James Mulligan, Fred Kern, 30  
John Sippell, John Wurster, Harry W. Hunt, August Wolf and William T. Shaw, being called were sworn upon that jury, who, to speak the truth of and concerning the premises, and thereupon the trial of said issue was commenced and continued from day to day until May 14th, A. D. nineteen hundred and fifteen, when the jury returned into court in charge of the officers sworn to attend them, and then and there in the presence of the prosecutor, defendants and court, do say upon 40  
their oath they find the said defendants, John B.

*Postea.*

Faunce and Clarence B. Whitman, guilty, and so they say all.

WHEREUPON, all and singular, the premises being seen and the court now here fully understood, it is, on this thirteenth day of June, A. D. nineteen hundred and fifteen.

10 ORDERED AND ADJUDGED that the said Clarence B. Whitman and John B. Faunce be committed to the county penitentiary for a term of one year, and stand committed until the costs are paid, which said costs are taxed by the clerk at the sum of sixty-four dollars and fifty cents.

And the defendants be in mercy, etc.

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*Motion to quash Indictment.*

## Essex County Oyer and Terminer.

Tuesday, May 11, 1915.

|  |   |   |    |
|--|---|---|----|
| STATE  | } | <i>Indictment<br/>No. 7,<br/>April Term,<br/>1915.<br/><br/>Conspiracy.</i> | 10 |
| <p style="text-align: center;"><i>vs.</i></p> CLARENCE B. WHITMAN AND JOHN<br>B. FAUNCE. |   |   |    |

Before HON. HARRY V. OSBORNE, Judge, and a Jury.

For the State appear Frederick F. Guild, Esq.,  
Prosecutor of the Pleas, and Wilbur A. Mott, Esq.,  
Assistant Prosecutor of the Pleas. 20

For the defendant Whitman appears Borden D. Whiting, Esq.

For the defendant Faunce appear A. P. Bachman, Esq., and George P. Holbert, Esq., (of the New York Bar).

(The defendants withdraw their pleas.)

*Mr. Bachman.* After withdrawing our pleas 30  
for the purpose of a motion, we move to quash  
the indictment on the ground that by its  
very terms it does not state a crime under the  
laws of the State of New Jersey, according to  
the case of State *vs.* Rickey, 9th Law, where it  
says that an overdraft can be in itself nothing  
improper, not even improper, because it is said  
there when it was made the basis of that suit  
to indict persons for drawing money out of a 40  
bank, when a man who puts an accommodation

*Motion to quash Indictment.*

note in the bank and withdraws the money from the bank, it is an innocent act in itself and cannot be made guilty by any combination doing it. If we apply the word "corrupt" to an innocent act, does not succeed in making that act corrupt in itself. We do not admit that there is  
 10 an overdrawing of the account; we only take the facts as properly alleged for the purpose of this motion—we don't admit it, of course—inasmuch as an overdraft is a matter of accommodation on the part of the bank to the party drawing it, it is altogether innocent and can not be made guilty simply because the man who grants the overdraft and the man who gets the overdraft should have agreed that the overdraft should have been granted, and the addition of so many words, cheat and corrupt, and  
 20 all those things, they are merely conclusions of law and made for the purpose of creating an atmosphere of duplicity, I might say, for an act which I say is an innocent one. Mr. Whitman joins me in that motion.

*The Court.* The application to quash the indictment is denied.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.  
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H. V. OSBORNE, [L. s.]  
*Judge.*

*Mr. Bachman.* We renew our pleas of not guilty.

(A jury is called and sworn.)

*The Court.* I understand that the defense is willing to admit a certified copy of the certificate of incorporation of the Roseville Trust Company, and a certified copy of the certificate  
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*Ray E. Mayham, direct.*

of authority of the Department of Banking & Insurance to the Roseville Trust Company authorizing it to do business. The exhibits in this case will be marked in green pencil.

Marked Exhibits S1 and 2.

*Mr. Guild.* I desire to offer in evidence also a certified copy of the certificate of incorporation of the Inter-City Land & Securities Company. 10

Marked Exhibit S3.

RAY E. MAYHAM, sworn in behalf of State.

*Direct examination* by Mr. Guild.

Q Mr. Mayham, what is your business? A State Bank Examiner. 20

Q How long have you occupied that position?

A About three years.

Q Did you have anything to do with looking into the affairs of the Roseville Trust Company after it closed its doors? A I did.

Q Do you know when it discontinued business?

A On the morning of the 14th of August, 1913.

Q When did you go there? A On that morning.

Q And by whom were you sent there? A I was summoned there by one of my fellow examiners. 30

Q What did you do in connection with the affairs of the institution? A When I got there I began to take charge of books and papers and other matters, anything related to the affairs of the bank.

Q Did you find any checks there? A Yes, sir.

Q Do you remember whether or not you found any checks of the Inter-City Land & Securities Company, A I did. 40

*Ray E. Mayham, direct.*

Q Where were they? A I found such checks in at least two places; I found some in deposit box 55 and I afterwards found some in the regular check files of the trust company.

10 Q Did you find any in the desk? A I can't remember off hand if I did or not. If I did I marked them for identification.

Q Those checks that you found in box 55, did you say? A Yes, sir.

Q Did you mark them in any way for the purpose of identifying them? A I had them marked O55.

Q If you found checks in the desk, whose desk was it? A Mr. Smith's desk.

20 Q That is the former treasurer of the company? A Yes sir.

Q And checks, how were they marked? A They were marked with three naughts.

Q Did you find any checks of the Inter-City Land & Securities Company in the regular check files? A Yes, sir.

Q Were they marked in any way? A Not by me; no, sir.

Q I show you a package of checks and I ask you where you found those checks?

30 *By the Court.*

Q You say you found checks in two places. Did you find those in one or the other? A I found some of those checks in box 55 and others in Mr. Smith's desk.

Q And those that you found in box 55 were marked as you stated, O55? A Yes, sir.

Q And those you found in Mr. Smith's desk you marked with three naughts? A Yes, sir.

40 Q I show you a package of checks and ask you where you found those checks?

*Ray E. Mayham, direct.*

*The Court.* How many checks are you handing him?

*Mr. Guild.* 136, according to my count.

A The paper on the check here says on it, "Roseville Trust Company, 6-22-13, charge Inter-City; left, initials, check, N. G., \$150, \$1.35 added, total \$151.35." I found that in box 55 and also caused that to be marked O55. 10

Q What did you do with that package of checks?

A I returned them to another safe deposit box there, the key to which I kept, and I finally brought them down to the court house and presented them to the Grand Jury and they were turned over to former Prosecutor Hood and Mr. Hargan of his office.

Q The gentleman who sits by me here, Mr. Hargan? A Yes, sir. 20

Q I show you an additional package of checks, eight in number, and ask you whether you have seen them before? A I believe that those are some of the checks that I took from the regular files, check files.

Q What did you do with them? A I think that I turned them over to either Mr. Vredenburg or Mr. Ferguson, bank examiners.

*By the Court.* 30

Q These have no distinguishing mark on them made by you?

*The Witness.* No, sir.

*Mr. Guild.* This first batch of checks, together with the paper on the back, I offer for identification.

Marked Ex. S4 for Identification.

Q This package of eight checks I hand you and I ask you if you didn't have those checks and produce them before the grand jury? A I had all of the 40

*Ray E. Mayham, direct.*

checks included in the indictment before the grand jury. If those checks were included in the indictment I had them before the grand jury.

Marked Ex. S5 for Identification.

10 Q I show you three additional checks and ask you if you have seen them before? A I think so, but I wouldn't want to be positive.

Q If the checks were among the checks produced before the grand jury would you say you produced them? A Yes, sir.

Marked Ex. S6 for Identification.

20 Q I show you another package—probably bundle would be a better characterization—of checks. Do you remember seeing them before, and if so, where did you get them? A I believe that these are the checks which I found in the check files of the Roseville Trust Company.

Q Do you know what you did with them? A I remember using them in connection—in attempting to prove up the account, and I either turned them over to bank examiners or perhaps brought them to the court house and left them in the prosecutor's office.

30 Q To whom did you deliver them in the prosecutor's office? A Everything that I delivered in the prosecutor's office I delivered to Mr. Hood and Mr. Hargan.

Marked Ex S7 for Identification.

Q I show you five promissory notes. Have you seen them before? A Yes, sir.

40 Q Where? A In the Roseville Trust Company. Note for \$2,500, dated December 10, 1912, signed Inter-City Land & Securities Company, I found that in box 55; I found notes for \$2,500, dated February 10, 1913, signed Inter-City Land & Securities Company; I found notes for \$2,500 dated

*Ray E. Mayham, direct.*

April 2, 1913, signed Inter-City Land & Securities Company, in Mr. Smith's desk; I found note for \$1,000, dated September 23, 1912, signed Inter-City Land & Securities Company, in safe deposit box No. 55; I found note for \$1,000, dated October—it was really dated 4th, but somebody has altered it to October 24, 1912, for \$1,000, signed Inter-City Land & Securities Company; I found that in safe deposit box No. 55. 10

Q And those you found in box 55 were marked O55? A Yes, sir.

Q And what you found in Mr. Smith's desk was marked with three naughts? A Yes, sir.

*By the Court.*

Q I see some memoranda pinned to these things. Was that on there when you found them? A Those memorandums were put on afterwards and not by me. 20

*The Court.* Then the notes themselves will be marked for identification.

*By Mr. Guild.*

Q I show you two more notes and ask you if you have ever seen them? A I have seen those notes before.

Q Where? A In the Roseville Trust Company. 30

Q Where did you find them? A I didn't find these notes; I handled them there; they were, when I found them, in the regular note file where the regular notes of the bank were kept, regular promissory notes.

Q Did you mark them in any way for identification? A I didn't mark them myself, but they were marked when I was working there, under my direction. 40

*Ray E. Mayham, cross.*

Q Well, they were marked by your direction?

A Yes, sir.

Q What is the mark? A One is marked 10,021 and the other is marked 10,711.

Q Why did you select those numbers? A Because we took, as I remember it, the July notes, the  
10 notes which were active in the bank, and showed on the books and began to number them from 10,000 up.

Q Well, at any rate, you marked those notes as you have stated? A Yes.

Marked Ex. S8 for Identification.

*Cross examination by Mr. Bachman.*

Q Did you also find these books in the bank? A I saw them there; I didn't find them.

20 Q Do you remember whether these are the identical ledgers that were in the bank at the time you got there? A They look like it to me.

Objected to.

*Mr. Bachman.* I am merely trying to use a public officer to identify the loose leaf ledger system.

*The Court.* Do you make him your own witness?

30 *Mr. Bachman.* Yes.

Q These ledgers that you found in the bank are known as the loose leaf ledger system, are they not?

A The two top books here and this one over here are loose leaf ledgers, yes, sir (indicating book).

Q Did you get the key for the purpose of unlocking that loose leaf book? A Yes, sir.

Q Have you ever seen it? A I don't think I have seen those particular keys.

40 *Mr. Bachman.* Will you admit for the purpose of this witness that the ledger containing

*Frank C. Ferguson, direct.*

the account of the Inter-City Land & Securities Company was a loose leaf ledger?

*The Court.* You are establishing the proof that this is a loose leaf ledger.

FRANK C. FERGUSON, sworn in behalf of State.

10

*Direct examination by Mr. Guild.*

Q Mr. Ferguson, are you connected with the State Banking & Insurance Department? A I am, yes, sir.

Q In what capacity? A As an examiner, State Bank Examiner.

Q And have been connected with them how long? A Six and a half years.

Q Were you assigned to the Roseville Trust Company after it failed? A I was; yes, sir.

20

Q When did you go there? A August 13, 1913.

Q How long did you remain? A I have been working off and on on the books of the Roseville Trust Company up to this time.

Q I show you Exhibit S6 for Identification, being three checks. Have you seen them before? A Yes, sir; I have.

Q Where? A In the Roseville Trust Company.

30

Q That is, for the first time? A For the first time; yes, sir.

Q And you found them in the course of your examining work there, did you? A I did.

Q Where were they? A These checks were in a part of the cash—that is, in order to make a proof of the cash I had to add these checks; they had been paid by the trust company and constituted part of their checks and check items.

Q You found them in that cash? A Yes, sir.

40

*Frank C. Ferguson, cross.*

Q What did you do with the checks eventually?

A I kept them and then handed them over to Mr. Mayham for use in criminal work.

*Cross examination by Mr. Bachman.*

10 Q How did you know these were part of the cash without making a proof of your own? A I did make a proof of my own.

Q From what did you get it? A From the cash, bills, silver and gold, and all cash on hand.

Q That is, you made a re-statement of the account, did you? A Yes, sir.

Q And how long did that take you? A Half an hour.

Q On August 13th? A August 14th.

20 Q So it was possible to prove the cash in half an hour from your observation at the time you called upon the Roseville Trust Company to take charge? A Yes, sir.

Q Where was the other cash, the real money? A That was the real money.

Q Was there no real money besides these three checks? A Yes, sir; that is only part of it.

30 Q You say, in order to make up the real difference between the real cash, the money, the currency, you had to put in these checks to make up the difference? A There is an item on the general ledger called checks and cashed items, and those checks are carried in cash. You can get proof of your cash separately, but in order to get a proof of your check and cash items you had to include these checks.

Q In doing this you had to use figures presented to you by books in the bank? A Yes, sir.

40 Q You didn't attempt to reconcile an account in doing it except the general account in the general ledger? A The cash agreed with that general ledger.

*Frank C. Ferguson, cross.*

*Mr. Guild.* I offer all the checks.

*The Court.* They will all be admitted in evidence.

Marked Exs. S4, 5, 6, 7 and 8 respectively.

*The Court.* Counsel have been present during other cases and have heard the proof of these books in question, that those are the books of the Roseville Trust Company. 10

*Mr. Bachman.* I will take the prosecutor's word for it.

*The Court.* I see no reason why you should not offer such parts of these books as are material to the case. Counsel may examine as to the correctness of them, of course, at any time when the witnesses come on the stand. 20

*Mr. Bachman.* There is another feature, and that is that I have had an opportunity to look at the ledger. The ledger is merely a transcript of another book, so far as I can see, and the party in charge of the ledger I wish to cross examine, so does Mr. Whiting; I don't believe the ledger standing alone is a book competent to pass as evidence. 20

*The Court.* It is offered in connection with all the other books of the bank. 30

*Mr. Bachman.* I will accept the offer of the prosecutor to such an extent, that these can be consulted for the purpose of refreshing recollection and subject to being connected.

*Mr. Whiting.* I would like to say for the record that we contend that these books are not proper evidence, that they are not safe guides to use as evidence, and for that reason we ought to preserve the privilege of cross examining before they go in. 40

*William J. Thompson, direct.*

*Mr. Guild.* Mr. Bachman says he is willing they should be admitted subject to their being connected with the case. Of course, if we do not do that, if they are not connected, they will not hurt anybody.

10 *The Court.* Probably what Mr. Bachman wishes to indicate is that he is willing to admit such parts of them as used.

WILLIAM J. THOMPSON, sworn in behalf of State.

*Direct examination by Mr. Guild.*

20 *Mr. Guild.* It has been suggested to me that at least one of the counsel is willing to admit that the checks named in the indictment have been paid by the Roseville Turst Company.

*Mr. Whiting.* Those are the checks covered by the indictment.

*The Court.* If you make such an admission and find during the progress of the trial that there has been an error made, such a check can be withdrawn.

30 *Mr. Bachman.* If they bear on their face the stamp of the Roseville Trust Company I am willing to admit that the Roseville Trust Company paid them.

Q Mr. Thompson, you were in the employ of the Roseville Trust Company? A Yes, sir.

Q At the time it closed? A Yes, sir.

Q And have been for how long? A From the time it was organized.

Q In what capacity? A Bookkeeper and teller; bookkeeper up to May, 1912; teller from then on.

40 Q Were you bookkeeper during the year 1913?

A No, sir; I was not.

*William J. Thompson, cross.*

Q Which part of the individual ledger would contain the account of the Inter-City Land & Securities Company? A The H to N ledger; I think that is the subdivision.

*Mr. Guild.* I offer that.

*Mr. Bachman.* It is not competent as indicating anything binding upon these defendants. 10  
If he wishes to use it as a memorandum and be connected thereafter, it will be admitted to go in that way. If it went in that way it would bind the defendant.

*The Court.* The question is whether it shows an account of the Inter-City Land & Securities Company. It is true that up to the present moment there has been no evidence showing that the defendants, or either of them, were 20  
connected with the Inter-City Land & Securities Company.

*Mr. Bachman.* We admit that they were president and treasurer.

*The Court.* You may cross examine on the book.

*Cross examination by Mr. Bachman.*

Q Who did the posting in July and August in that book? A Mr. Mindnich, for one, and Mr. Brennan, for the latter part of July and all of the month of August, that is, up to the 13th. 30

Q From what other book did you post it when you were writing that ledger? A These items in the individual ledger were posted from the checks themselves or from the deposit ticket themselves.

Q Are the deposit tickets in court? A I don't know.

Q What did you do with them after they were posted in the book? A They were filed in the Roseville Trust Company. 40

*William J. Thompson, cross.*

Q Is there no intermediary book between the deposit ticket and this book that you are testifying about? A No, sir.

Q This, therefore, is the book of original entry? A Yes, sir.

10 Q Where is your so-called receiving teller's proof? A That has nothing to do with the account of the individual depositor.

Q Was that receiving teller's proof made from the same deposit slips and the same checks? A No, it was made from the total of the deposits of a certain day, would appear in the receiving teller's proof book; in this book would appear each and every deposit ticket entered under the account, entered under individual's account or the com-  
20 pany's account that made the deposit.

Q Which entry was made first? A The entry in this book.

Q Were you receiving teller? A Yes, sir.

Q As soon as you posted the deposit slip in the pass book where did you send that, to another part of the bank? A Yes.

Q You made no record of it? A Yes, there was a machine list made of it.

30 Q Was there anything in your department which directly credited the Inter-City Land & Securities Company's deposit? A No, sir.

Q Was there anything in your department to enable you or anybody who came to your place, like a bank examiner, who came in there to trace a deposit of the Inter-City Land & Securities Company on the receiving teller's book? A Not on the receiving teller's book; no, sir.

40 Q Did you get any voucher showing the receipt by Mr. Mindnich to Mr. Jennings or any other person of the deposit slip that you passed to them? A No, sir; I got no receipt for them.

*William J. Thompson, cross.*

Q Are you certain therefore that all the deposit slips you received at your window were duly delivered to either Mr. Mindnich or Mr. Jennings at the bookkeeper's desk? A Yes, sir.

Q What method have you, independently of suggestion in that book before you, that you did so? A I know that I did so; I did it personally; I turned over all deposit tickets personally to the bookkeeper. 10

Q You are also aware that your actions were in attack in this trust company's affairs? A Yes, sir.

Q And also Mr. Mindnich and Mr. Jennings? A Yes, sir.

Q Have you any other recollection except the daily process which you daily pursued which would show that you did hand over the deposit slips from the receiving teller's desk to the bookkeeper? A Have I any record to show that? 20

Q Yes, record of recollection. A I have a very clear recollection.

Q Is it based on the single day's business or a process of mind that was developed every day? A A process of mind developed every day.

Q It is not an independent recollection? A It is not on every ticket, no, sir.

Q When you received checks drawn on the Roseville Trust Company what did you do with those? 30

A You mean that were included in the deposits or checks that came in the exchanges?

Q First, the deposits. A Those appeared on the receiving teller's proof, among other checks, which went to make up the total, which would appear on the proof book there each and every day.

Q Is there anything on your proof book to indicate that those checks were the checks of the Inter-City Land & Securities Company when such was the case? A No, sir. 40

*William J. Thompson, cross.*

Q In other words, you only entered an amount and no description? A No.

Q When you received from the exchanges did you make any record in your department that they were received simply by any description or simply by an amount? A Some of them, I made a record  
10 of them later.

Q When you received the exchanges from the Union National Bank each bank's checks were included in a separate envelope? A No, sir.

Q There was a list connected with them? A Yes, sir.

Q Did you as receiving teller check up these listings when you took up those checks that were drawn on the Roseville Trust Company? A Very  
20 often I did, yes, sir.

Q When you didn't, who did? A The book-keeper.

Q So far as you are concerned, after you checked off the amounts on the slips that came from the Union National Bank, did you make any entries descriptive of these various checks as far as the accounts themselves were concerned, beyond the amount? A I did on some, yes, and the assist-  
30 ant bookkeeper did on all others.

Q What kind of a description did he give? A  
30 The name and the amount.

Q Have you got that in court? A Yes, sir.

Q What is that called? A It is called the side book, the debit and credit side book kept by the assistant bookkeeper.

Q Did everybody have access to that? A Yes, sir.

Q Did Mr. Smith have access to it? A He did.

Q While you were receiving money and checks for deposit at your window was there anybody  
40 allowed in the cage with you? A Yes, sir.

*William J. Thompson, cross.*

Q The door was open, was it? A Yes, sir; very often.

Q No lock to it? A Yes, there was a lock to it.

Q Everybody was allowed in that knocked, Mr. Smith, Jennings or Mr. Mindnich and yourself? A Yes, any of those could come in. 10

Q In other words, comprehensively, anybody had access to your cage? A No; there were quite a number of other people in this office.

Q I mean those four? A Yes, those four.

Q And Mr. Smith was the treasurer? A Yes, sir.

Q And Mr. Jennings was receiving teller interchangeably? A No, I should say from June, 1912, to that time he was paying teller and I was receiving teller. 20

Q Did he not take deposits in the month of August? A Not in the month of August, 1913, no.

Q Do you know his initials? A I do, yes.

Q Do you know his handwriting when you see it? A Yes, sir.

Q (Showing witness paper.) Is that Mr. Jennings' initial on there?

Objected to as not cross examination.

*The Court.* You are supposed to be examining on this personal ledger. 30

*Mr. Bachman.* I am.

*The Court.* How does this paper get to the witness if that is a deposit slip. Where did it come from?

*Mr. Bachman.* I have produced it.

*The Court.* I see no objection to asking about that.

*Witness.* This initial is mine. 40

*William J. Thompson, cross.*

Q Do you find that deposit on the book? A  
No, sir.

*Mr. Bachman.* I object to the book, that it  
is not a correct transcript of the transaction  
of the bank.

Marked Ex. D1 for Identification.

10

Q Did you have in the receiving teller's cage a  
book which showed a receipt by the bookkeeper of  
checks that were presented to you through the ex-  
changes? A No, not a receipt by the bookkeeper,  
no, sir.

20

Q So, Mr. Thompson, there was a broad differ-  
ence between the way checks left your cage and the  
way there received by Mr. Mindnich or whoever  
had charge of the books which was not covered by  
a receipt between the two of you? A Why, there  
was no receipt, but there also was no broad differ-  
ence; there could be no difference, whether it be  
broad or not.

Q Who was supposed to look at the difference?  
A It was a question of the bookkeeper and I; who-  
ever made the mistake had to find it.

Q Didn't you have a good many differences  
from January, 1913, until the time the institution  
closed?

30

Objected to.

*Mr. Bachman.* I think that I have showed  
that this is not a correct transcript of the  
account of the Inter-City Land & Securities  
Company. Here is a large deposit initialed  
by Mr. Thompson himself that does not appear  
on the book.

40

*The Court.* Do you mean to say that a falsi-  
fied book in a charge of conspiracy would not  
be admissible for the reason that it was falsi-  
fied?

*William J. Thompson, cross.*

Q How many pages does that account take up in this book? A Well, I will count it.

Q You say that account was a part of the book-keeping system of the bank? A Yes, sir.

*The Court.* I will admit and you may both have an exception.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly. 10

H. V. OSBORNE, [L. s.]  
*Judge.*

Marked Ex. S9.

*Mr. Bachman.* Would your Honor ask the prosecutor to produce the deposit slips between January, 1913, down to the time of the closing of the bank? Is it essential to our case. 20

*The Court.* From what I have heard of the deposit slips it will be impossible to produce them within a reasonable length of time. My information is that they were found in the cellar of the Roseville Trust Company in such a confused mass—

*Mr. Bachman.* Then that is fatal.

*Mr. Mott.* I want to make the suggestion that they are just as accessible to the defense as to the State. 30

*The Court.* Are they in the possession of the prosecutor?

*Mr. Guild.* No, and never have been. If they are accessible they are at the Mutual Bank Building, and are just as accessible to the defendants as they are to the State.

*Mr. Bachman.* I would like to ask your Honor to ask the banking department to produce them. 40

*William J. Thompson, re-direct.*

*The Court.* I have no control over the banking department. The process of subpoena is retained by law to enforce the production of persons and papers.

10 *Mr. Bachman.* The essence of this entire suit must be made out of the original records. The deposit slip is the original matter; it is the first entry, and then those books are not competent because they are mere copies of the deposit slip.

*The Court.* We will dispose of that later. If the State has failed to prove its case you may move to direct a verdict.

*Re-direct examination by Mr. Guild.*

20 Q I show you check of Inter-City Land & Securities Company dated March 26, 1913, drawn on the Roseville Trust Company to the order of Stitz & Phillips, for \$323.93, signed C. P. Whitman, treasurer.

*Mr. Whiting.* We admit the signature.

Q I ask you whether that check was paid by the Roseville Trust Company? A It is one of the indictment checks, the first check mentioned in the indictment and came out of package S4.

30 *The Court.* I understood it was admitted that those checks had been paid by the Roseville Trust Company.

*Mr. Whiting.* We will admit the signatures if the bank officials say that it was paid; we are willing to admit it. That is as far as we can go.

Q Was that check paid by the Roseville Trust Company? A Yes, sir; it was.

40 Q On the day it was paid was it good, according to the ledger account?

*William J. Thompson, re-direct.*

*Mr. Bachman.* I object on the ground that it calls for the witness refreshing his memory from an entry he did not make himself.

*The Court.* He can refresh his memory by a reference to the book.

*Mr. Bachman.* Only after he has exhausted his own memory, and he cannot refresh his mind into another man's entry. 10

*The Court.* The witness can read anything into the record, from anything that is in evidence.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.] 20

*Judge.*

*Mr. Whiting.* I would like to make an objection, that it is immaterial as against the defendant Whitman, whether it appears in the record or not, that this check was good, inasmuch as the record so far is discredited and is not accurate.

*The Court.* Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly. 30

H. V. OSBORNE, [L. S.]

*Judge.*

*Mr. Bachman.* May I join in the same objection and get the same ruling and exception?

*The Court.* Yes.

A The check was apparently good on the ledger. 40

Q Was it charged on the ledger? A No, sir.

*William J. Thompson, re-direct.*

Q I show you check of the Inter-City Land & Securities Company drawn on the Roseville Trust Company, dated April 12, 1913, to the order of William Bell, signed C. P. Whitman, treasurer. Tell us, if you will, whether that check was paid by the Roseville Trust Company?

10        *Mr. Whiting.* I should like it to appear that we make the same objection to this entire line of evidence, to the use of the account, which we claim is not binding, so that we will not have to interrupt constantly.

*Mr. Bachman.* I join in that objection and exception.

*The Court.* You may have an exception to this entire line of testimony.

20        Exception allowed; let it be sealed, and it is signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

A The second check was good also.

Q According to the ledger? A According to the ledger; yes, sir.

30        Q Check of the same company, dated April 18, 1913, drawn to the order of W. L. Winters, \$814.28, signed C. P. Whitman, treasurer. A It was not good, according to the ledger.

Q How much of an overdraft is there?

Objected to.

Objection sustained.

Q What was the balance as shown by the ledger previous to the payment of this check, the day the check was paid? A \$184.80.

Q How much is this check? A \$814.20.

40        Q How much would that make the overdraft?

A Six hundred and thirty and odd dollars.

*William J. Thompson, re-direct.*

*Mr. Bachman.* I move to strike out the answer and object to the question. It calls for a conclusion of the witness. The word "overdraft" as shown by the book would be all right, but you say that it is an overdraft and that is a conclusion of the witness; he is testifying merely from what the books show and what he says applies to what the books show. I will withdraw my objection, however. 10

Q A check of the same company, dated April 19, 1913, to the Estates Mortgage & Securities Company, signed C. P. Whitman, treasurer. Was that check paid by the Roseville Trust Company? A Yes, sir, it was paid.

*Mr. Bachman.* What is the witness testifying from? 20

*The Court.* He is testifying from the books.

*By the Court.*

Q What book are you testifying from? A Return item book.

*By Mr. Guild.*

Q What is the book to which you have referred in addition to the individual ledger? A Twice, the return item book. 30

Q Is that part of the system of books and book-keep of the Roseville Trust Company? A Yes, sir.

Q Are you familiar with it? A Yes, sir.

*Mr. Guild.* I offer it in evidence.

Q Who kept it? A I did. There were five of them, all the same—six of them.

*Mr. Guild.* I offer them all in evidence. 40

*William J. Thompson, re-cross.*

*Re-cross examination* by Mr. Bachman.

Q Is this book kept by order of Mr. Smith, the treasurer? A No, that was in the regular course of business.

10 Q Who established the regular course of business? A That is too far back for me to remember; it is regular banking practice to keep a book of this kind.

Q Describe the book to the jury. A The exchanges, after they reach the bank, are listed in two different places—

*Mr. Guild.* Will you explain what the exchanges are?

20 *Witness.* The exchanges are all checks drawn, for instance, on the Roseville Trust Company, which have been deposited or cashed in other banks outside of the Roseville Trust Company, and in order for the bank that has either cashed or given credit, to recover their money they send them through the exchanges to another bank, to the Roseville Trust Company, the bank on which it is drawn, and we reimburse them, for the amount of the check. The checks that are regularly charged to the  
30 accounts of the customers appear in the individual ledger; the check which for any reason have been returned to the bank from which we had originally received them or were being held in the bank without having been charged on the individual ledger would appear in that book.

40 Q Can you tell from this book whether a check was returned unpaid or was held in the cash? A I can tell from that book in conjunction with the receiving teller's proof book.

*William J. Thompson, re-direct.*

Q Are those books all in your handwriting? A Yes, sir.

Q Who had access to this book besides yourself? A Any of the four men that you mentioned before.

Q Did you ever make an entry in this book by instructions of someone else? A No, sir. 10

Q Did you have the check when you made the entry? A Yes, sir.

Q What did you do with the check? A Either returned it or I put it in the receiving teller's cash.

Q Are those checks all in the receiving teller's cash? A Yes, sir—not all the checks that are listed there; some of the checks went back to the bank from which we received them.

Q Outside of the checks returned to the bank from which you received them or the checks of the Inter-City Land & Securities Company that are listed here in the receiving teller's proof at the time of the failure? A No, sir. 20

*Mr. Bachman.* I object to the book as not a correct entry to the transactions of the bank.

*The Court.* It will be admitted.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly. 30

H. V. OSBORNE, [L. s.]

*Judge.*

The six books referred to are marked Exs. S10 to 15 inclusive.

*Re-direct examination by Mr. Guild.*

Q You have two other books before you. What are they? A Receiving teller's proof books.

Q Kept by whom? A Kept by me.

Q Are they part of the system of the Roseville Trust Company's bookkeeping? A Yes. 40

*William J. Thompson, cross.*

Q Will you have occasion to refer to them in this examination? A Yes, sir.

*Mr. Guild.* I offer them in evidence.

*Cross examination* by Mr. Bachman.

10 Q Are those books in your own handwriting?  
A Yes, sir.

Q Were you receiving teller all the time the receiving teller's proof book was used? A No, sir; these particular ones, I was receiving teller most of the time, just as I have testified to before, from June, 1912; from that time on, all the entries, with very few exceptions, are in my handwriting.

20 *Mr. Bachman.* We object to this proof book on the same grounds as that alleged against the admission of the return item book previously mentioned.

*The Court.* Same ruling.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.]

*Judge.*

30 *Witness.* This check was paid by the Roseville Trust Company, yes, sir.

*By the Court.*

Q Was it good? A No, sir.

*By Mr. Guild.*

40 Q Does the ledger show an overdraft? A No, sir; the ledger shows a \$394 balance. This check has not been charged on the ledger. If it had been charged on the ledger it would have showed an overdraft.

*William J. Thompson, cross.*

Q The check wasn't charged in the account at all? A No, sir.

Q How about these other checks, were they charged? A No, sir.

Q How do you figure out an overdraft of \$630 if the check wasn't charged on that last item? A Because the balance on the ledger was that much less than the face of the check. 10

Q I understand that if the check had been charged there would have been an overdraft? A Yes, sir.

Q In regard to those checks, if they had been charged, there would have been an overdraft? A Yes, sir.

Q But none of the three that you have testified about were charged? A No, sir; none of them were charged. If those checks were charged, the overdraft would be larger than it is. I am only testifying as to the balance as shown that day and comparing it with the face of the check. 20

Q Were any of these checks that I have called to your attention charged on the ledger? A No, sir.

Q I am going to give you a batch of checks and ask you to keep tally of these. A \$1,688.21 is the total of these four checks that I have been handed. 30

Q If they had been charged on the ledger what would have been the overdraft at the time that the checks were paid? A \$1,293.23.

Q You say these checks were not charged up on the ledger. What did you do with them? A Held them in the cash.

Q Does your receiving teller's proof show that these checks were carried as cash? A Yes, sir, they were all carried as cash in the receiving teller's cash that one day. 40

*William J. Thompson, cross.*

Q I show you a check of the same company, dated April 25, 1913, to the order of the Estates Mortgage & Securities Company for \$651.50, signed C. P. Whitman, treasurer. Was that paid by the Roseville Trust Company? A Yes, sir.

Q Was it charged on the ledger? A No, sir.

10 Q If it had been would there have been an overdraft, and if so, how much? A There already was an overdraft on that day.

Q This would increase it, would it? A Yes, sir; this would increase it.

Q To what extent? A It would appear to make the overdraft appear to be \$799.32.

Q What I want to ask you to do is to carry the overdraft along which you have previously given? A \$2,092.55.

20 Q What did you do with that check? A This check was carried in the cash.

Q I show you check of the same company for \$1.30 May 2, 1913, to the order of Nathan Friedman, signed C. P. Whitman, treasurer. Was that paid by the Roseville Trust Company? A Yes, sir.

Q Charged? A No, sir.

Q Didn't it create an additional overdraft? A Yes, sir. The overdraft appeared to be \$2,093.25.

30 Q What became of the check? A Held in the cash.

Q I show you a check dated May 5, 1913, of the same company, \$250, drawn to the order of M. N. Nathanson. Was that paid by the Roseville Trust Company? A Yes, sir.

Q Was that charged? A No, sir; making the overdraft appear to be \$2,343.85.

Q What became of the check? A Held in cash.

40 Q I show you check of the same company, dated May 5, 1913, to the order of the Estates Mortgage

*William J. Thompson, cross.*

& Securities Company for \$336, signed John B. Faunce, president. Was that check paid by the Roseville Trust Company? A Yes, sir.

Q Was it charged? A No, sir.

Q Overdraft? A \$2,680.51.

Q How was it carried? A In cash.

Q I show you a check dated the same day, May 5th, \$98.13, to the order of Earl & Callahan, signed B. Faunce, president. A Yes, sir; held in the cash. \$2,778.64. 10

Q Was it charged? A No, sir.

Q How was it carried? A Held in the cash.

Q I show you check dated May 6, 1913, the same company, to the order of W. H. Winters for \$1,000, signed John B. Faunce, president. Was that paid by the Roseville Trust Company? A Yes, sir; carried in the cash; \$3,378.64. 20

Q Was it charged? A No, sir.

Q Check of the same company dated May 1, \$50, to the order of Wolf Goldberg, signed John B. Faunce, president. Was that paid by the trust company? A Yes, sir.

Q Charged? A No, sir. Makes the overdraft \$4,028.64.

Q How was it carried? A Carried in the cash.

Q Check of the same company, dated the 14th of May, 1913, for \$500, payable to the order of Brown-Weiss Realities, signed John B. Faunce, president. Was that paid by the trust company? A Yes, sir; it was. 30

Q Charged? A No, sir. \$4,528.64 appears to be the overdraft. Held in the cash.

Q And was carried in cash? A Yes, sir.

Adjourned until tomorrow, Wednesday, May 12, 1915, at ten o'clock A. M.

*William J. Thompson, cross.*

SECOND DAY

ESSEX COUNTY OYER AND TERMINER,

Wednesday, May 12, 1915.

10

STATE

*vs.*

CLARENCE B. WHITMAN AND JOHN  
B. FAUNCE.

Continued pursuant to adjournment.

20 Present, counsel as before stated.

*Mr. Guild.* I want to ask counsel for the defendants whether it is admitted that Mr. Whitman and Mr. Faunce were authorized to sign these respective checks and notes?

*Mr. Whiting.* As far as Mr. Whitman is concerned, we admit that he was authorized.

30 *Mr. Bachman.* We will admit that Mr. Faunce could sign as president and Mr. Whitman could sign as secretary.

*Mr. Guild.* I want to offer in evidence two books known as the receiving teller's proof book, to which he referred yesterday, and which it seems were inadvertently overlooked being put in.

Marked Exs. S16 and S17 respectively.

40 *Mr. Bachman.* I only wish the qualification that these do not bind the defendant. I have no objection to any of the books going in as constituting the books of the bank.

*William J. Thompson, re-direct.*

*The Court.* They cannot bind the defendants unless they are connected.

*Mr. Bachman.* We do not concede that the entries are correct.

WILLIAM J. THOMPSON resumes the stand.

*Re-direct examination* (continued) by Mr. Guild.

10

Q I show you deposit slip Roseville Trust Company, bearing the name of the Inter-City Land & Securities Company as the depositor under date of August 7, 1913, numerals being used in place of the written word, and marked Exhibit D1 for identification. This paper was shown to you yesterday, do you recollect? A Yes, sir.

Q Shown to you by counsel for the defense, and you were asked whether the individual ledger account of the Inter-City Land & Securities Company shows the deposits represented by that ticket or slip had been credited to the account of that depositor, and my recollection is that you answered it had not? A That is correct; it had not been credited.

20

Q I think you also testified that the deposit ticket bore your name or initials showing that it had passed through your hands? A Yes, sir.

30

Q Which means that you actually received the deposit? A I actually received the deposit.

Q After you received the deposit what did you do with the deposit slip? A Ran it up among the rest of the deposit tickets received that day over the window and turned it over to the bookkeeper to be posted to the credit of the Inter-City Land & Securities Company, among others.

Q So far as you are concerned that ended that particular transaction? A Yes, sir, so far as I was concerned.

40

*William J. Thompson, re-direct.*

Q Now, since yesterday's session have you made any investigation to see whether or not a credit should have gone to the account of this depositor?

A Yes, sir; I have made an investigation.

Q With what result? A With the result that I ascertained that the Inter-City Land & Securities Company are entitled to this credit of \$699.30 on August 7th, it having been a clerical error on the part of the bookkeeper that the ticket was not posted; it went through the receiving teller's department and it went to the assistant bookkeeper—

*Mr. Whiting.* May I ask to have that stricken out? The words "clerical error" is a conclusion; he characterizes it and it may be improper.

20 *The Court.* You can tell what happened to it, what the book shows the course was.

*Mr. Guild.* I will ask him why he says it was a clerical error.

*The Court.* That has been stricken out, so he has not said it, so far as the record is concerned.

Q What sort of an error do you say it was?

30 *The Court.* He has not said it was an error, because that would be a conclusion. If it was done intentionally it would not be an error.

Q You say that credit was not posted to the account of the depositor? A Yes, sir; it was not deposited.

Q Did you find any entry in the books concerning that credit item? A I did, yes, sir.

40 Q What did you find and in what book? A I found an entry in the bookkeeper's credit book showing the name of the Inter-City Land & Securities Company credited in amount \$699.30.

*William J. Thompson, re-direct.*

Q Will you point out that book on the table?

A (Indicating) I believe it is that book there. I have the book and the day (indicating).

Q What book is that? A The assistant bookkeeper's credit book.

Q Was that part of the system of bookkeeping of the Roseville Trust Company? A Yes, sir; part of the regular system. 10

Q Does it contain a record of all the deposits made from A to L on August 7th?

*Mr. Whiting.* I don't think it appears that this particular witness was the bookkeeper. I thought he was the receiving teller or paying teller.

*Mr. Guild.* That is right.

*Mr. Whiting.* Aren't we entitled to have the bookkeeper produced rather than somebody else? I make an objection on that ground. I also object to the question in its present form on the ground that it contains the word "all," does it contain "all" the deposits made in the bank. 20

*The Court.* I think the word "all" is objectionable.

*By the Court.*

Q Do you know whether it contains all? A It contains all the deposits— 30

Q I ask you whether you know? A Yes, I know it does not contain all on that one particular day, this particular book does not.

*By Mr. Guild.*

Q From A to L I ask you. A. It contains all the deposits made that day from A to L, all the accounts alphabetically from A to L. 40

*William J. Thompson, re-direct.*

*Mr. Bachman.* That is a conclusion of this witness not based upon knowledge, and fact. A statement of that nature to the jury would be prejudicial.

*By the Court.*

10 Q You didn't keep the book? A No, sir.

*The Court.* I think the objection is well taken. If the witness did not keep the book I do not see how he can testify that it contained all the entries.

*Mr. Bachman.* I move to strike out the answer.

*By the Court.*

20 Q Did you prove the book? A Not since that day.

Q Did you prove it on that day? A Yes, sir.

Q Did you check it up that day? A Checked up all the individual entries.

Q Yes. A No.

Q You couldn't say whether it contains all the entries on that particular day? A Yes, I think I could.

*Mr. Whiting.* I move to strike that out.

30 Q Do you say that because it should contain them all? A No, sir.

Q Do you say that from personal knowledge? A Yes, sir.

40 Q What is your personal knowledge? A The entries in the credit book A to L and M to Z are supposed to contain a list of all the deposits made on that day; there is also a list in the receiving teller's proof book—it gives the total of the deposits made on that day, these two books, the total of these two books when added together should prove with the total in the receiving teller's proof book, and if it does prove these books are correct.

*William J. Thompson, re-direct.*

*By Mr. Whiting.*

Q Isn't that simply a calculation which you make from the books themselves? A Yes, sir.

Q It is not based on your own knowledge, is it, because you kept the book at the time?

*By Mr. Guild.*

10

Q (Interrupting). Did you keep all the books referred to? A I kept the receiving teller's proof book and it must necessarily prove up on that day.

*By Mr. Whiting.*

Q But you don't know of your own knowledge that all the items went in there except by looking up the work of somebody else in another book? A That is the only way.

20

*Mr. Writing.* I move to strike that out.

*By Mr. Guild.*

Q Do you mean to compare this book with your own work? A Comparing this book, yes, sir, kept by somebody else with my own book, which was kept by me.

Q Did you do that at the end of that day's work? A Yes.

*Mr. Bachman.* That does not prove anything at all. One man might make an entry of \$500, one plus and one minus, and still prove up. It proves nothing as to the correctness of the entry there. I can make the figures tell what I wish when it comes to the total.

30

*By the Court.*

Q How is it proved in your proof? You cannot say whether the items here are correct? A No, I can't say that the individual items there in

40

*William J. Thompson, re-cross.*

name and amount are absolutely correct, no, but I can——

Q You cannot say whether a deposit has been omitted or not? A Why, I can say that if a deposit—I can say that a deposit has not been omitted; it would not prove.

10 Q Suppose there had been in another book, as has been suggested in the argument, a cross credit or a cross entry, it would still prove, wouldn't it, your proof then would come out all right? A No, these two checks are not entered up in that book at all, these two credit books are separate records in themselves, not affected by any other book whatsoever; a cross entry in any other book would not affect the total.

20 *Mr. Guild.* I offer that book in evidence.

*Mr. Bachman.* I object to it. It is not competent at this time, and it is not binding upon the defendant.

*The Court.* You may cross-examine the witness as to the competency of the book. Perhaps you can make it competent by cross examination.

*Re-cross examination by Mr. Bachman.*

30 Q Did you keep that book? A No, sir.

Q Did you make the entries on the date of August 7th? A No, sir.

Q Is that book kept by Mr. Mindnich? A No, sir.

Q By whom? A I don't know; one of possibly three or four assistants that we happened to have at that time.

40 *Mr. Bachman.* That is enough to keep it out, your Honor, so far as this witness is concerned. We cannot sound this witness.

*William J. Thompson.*

*By the Court.*

Q Did you have any charge or supervision of this book in any way? A I had supervision of it to the extent of seeing that it proved up with my total every day.

Q You had no supervision over it in keeping it?  
A No, sir. 10

Q All you had to do was to use it in connection with your other duties? A Yes, sir.

*The Court.* I do not think this witness can testify from this book.

*Mr. Guild.* What I desire to do is what they on the other side will attempt to prove later, prove that this credit should have gone to the account of this depositor.

*The Court.* He has testified that in his investigation the defendants should have been credited on the personal ledger with a certain sum of money, as I recall the testimony. You did not rest with that, but you attempted to prove that what he said was true by reference to the book. 20

*By the Court.*

Q You say they were entitled to have credit. How much was it? A \$636.90. 30

Q Will you credit that on your memorandum?  
A Yes, sir.

*By Mr. Guild.*

Q I show you check dated May 14, 1913, of the Inter-City Land & Securities Company signed John B. Faunce, president, payable to the order of Wolf Goldberg for \$500. Was that paid at the Roseville Trust Company? A Yes, paid by the Roseville Trust Company, not charged to the account, and increases the overdraft to \$4,329.34. 40

*William J. Thompson.*

10 *Mr. Whiting.* I don't know how the record stands, if there is subsequent explanation on the part of the defendant to show that these were not an overdraft. It seems quite unfair to keep characterizing it as an overdraft, to get it in the minds of the jury. This is not an overdraft. Wouldn't it be only right to state how his account stood?

*By the Court.*

Q What is the overdraft on that day? A \$4,329.34.

20 *Mr. Bachman.* It is an act of the drawer, not an act of the defendant. The word "overdraft" is not legally applicable to the situation. There is no foundation for such a term.

*By Mr. Guild.*

Q In reaching the amount of that overdraft, had you given credit for six hundred and some odd dollars deposit? A Yes, sir.

30 *Mr. Bachman.* I would like to have an exception. I object to this as calling for a conclusion of the witness and for using the term "overdraft," which is merely a term of law, and not one of fact, as far as this witness is concerned.

*The Court.* What word would you suggest using, where a man draws out more than he puts in?

*Mr. Bachman.* Debit balance as shown by book.

*The Court.* Is that not the same thing?

40 *Mr. Bachman.* A debit is what the books show; an overdraft is what the man does.

*William J. Thompson.*

*The Court.* Then if the books show a debit balance it does not necessarily follow that the books show an overdraft?

*Mr. Bachman.* An overdraft is an act, an affirmative act committed by a person who signs a check; he does all the drawing; these entries are not all made by a check. Here was a charge ticket made by the bank itself, and if Mr. Thompson is allowed to make his own statement from the standpoint of a banking officer he would say debit balance. The books all show "O. D.," but I don't know who made the figures. The word "overdraft" is going to be harped on this case to create a criminal act, whereas the courts have set down on that word. An outsider can overdraw an account and is innocent. The Rickey case says that an overdraft is just as innocent as discounting an accommodation note. 10 20

*The Court.* If an overdraft is an innocent act what is your objection to the use of the term? I don't think there is any real distinction, so far as the use of the term "overdraft" is concerned and a debit balance, as it is being applied and used. Overdraft is not only a technical term, but one of general common usage. It means that you have drawn from your bank more money than you have put in it. This witness is not asked for his conclusions, he is not asked, in this examination as it is being conducted, whether or not, as I understand, this corporation was drawing more money than it was entitled to, but he is asked what the books show. He is reading into the record for the benefit of the jury and counsel what the books show, and the use of the term "overdraft" in connection with this examination applies to that situation. 30 40

*William J. Thompson.*

*Mr. Whiting.* There is no objection at all about it. If it is merely a convenient term, that there was more money drawn out than it had in the bank, according to the books

10 Q I show you check Roseville Trust Company, signed by this same depositor, dated May 15, 1913, payable to the order of Gustav Wandler for \$255, signed John B. Faunce. Was that paid by the Roseville Trust Company? A Yes, sir; it was paid by the Roseville Trust Company.

Q Was it charged? A No, sir; it was not charged. and it makes the overdraft appear to be \$4,584.34.

20 Q I show you check of the same depositor drawn on the Roseville Trust Company, \$150, payable to the order of Joseph Bozzo & Brother, and signed by John B. Faunce, president. Was that paid by the trust company? A That check was paid, not charged to the account, and increased the apparent overdraft to the amount of \$4,744.34.

Q I ask you what became of the check you were just testifying about and the one previous? A The one previous was held in the cash and then this also was held in the cash.

30 Q Check dated May 17, 1913, the same depositor, to the order of Wolf Goldberg, for \$750, signed John B. Faunce, president. Was that paid by the Roseville Trust Company? A Yes, sir; it was paid by the trust company; not charged to the account, and increased the apparent overdraft to \$5,494.34, and was held in the cash of that day.

40 Q I show you a check of the same depositor, dated May 19, 1913, payable to the order of Olin J. Stevens for \$500, signed by John B. Faunce, president. Was that paid by the trust company? A That check was paid by the Roseville Trust Company and not charged to the account and in-

*William J. Thompson.*

creased the apparent overdraft to \$5,994.34, and was held in the cash on that day.

Q Check May 20, 1913, payable to the order of Max I. Leftkowitz, for \$400, signed John B. Faunce, president? A Paid by the trust company and not charged to the account and increases the overdraft to \$6,394.34, and was held in the cash May 24th. 10

Q Check dated the 22d of May, 1913, \$425, payable to the order of Joseph G. Dean, signed John B. Faunce, president. A Paid by the trust company, not charged to the account, increases the overdraft to \$6,819.34, and was held in the cash on that day.

Q Check dated the same day, \$344, payable to the order of Lese & Connelly for \$344, signed John B. Faunce, president. A Paid by the trust company, not charged to the account, and increases the apparent overdraft to \$7,163.34, and was held in the cash of May 24th. 20

Q Check dated May 22d, to the order of Estates, Mortgages & Securities Company, \$37.50, signed John B. Faunce, president. A Paid by the Roseville Trust Company, not charged to the account, and increases the overdraft to \$7,284, and was held in the cash of May 26th.

Q Check of the same date, payable to the order of Lese & Connelly, for \$800, signed John B. Faunce, president. A Paid by the trust company, and not charged to the account; increases the apparent overdraft to \$7,208.84, and was held in the cash of May 26th. 30

Q Check of May 23, 1913, to the order of Charles R. Bietsch, \$105, signed John B. Faunce, president. A Paid by the trust company, not charged to the account, and increases the overdraft to \$7,313.84, and was held in the cash of May 27th. 40

*William J. Thompson.*

Q Check May 24, 1913, to the order of Herman Siklin, \$150, signed John B. Faunce, president. A Paid by the trust company, not charged to the account, and increases the apparent overdraft \$7,463.-84, and was held in the cash on May 27th.

10 Q Check of May 24, 1913, to the order of Edward Anderson, \$28.19, signed John B. Faunce, president. A Paid by the trust company, charged to the account, increased the overdraft to \$7,492.03, and was held in the cash of May 27th.

Q Check May 24th, to the order of Bromley & Company, \$25, signed John B. Faunce, president. A Paid by the trust company, not charged to the account; increases the apparent overdraft \$7,517.03, and was held in the cash of May 28th.

20 Q Check May 24, 1913, to the order of T. A. Hutchins, \$9.10, signed John B. Faunce, president? A Paid by the trust company, not charged to the account, increases the overdraft \$7,526.13, and was held in the cash of June 4th.

*Mr. Whiting.* I feel in duty bound to ask this question: Does it appear that this witness kept the book from which he has testified to as to the overdrafts? I understand he did not.

30 *Witness.* I am not figuring on the ledger at all; this is just simply increasing the overdraft that we started with yesterday, back in June, 1913.

Q And you figured overdrafts by comparing with the Inter-City & Securities Land Company's account in the ledger? A On that day we did.

Q And you are carrying it all down from there and comparing it with the state of the account as it appears on the ledger? A No, sir.

40 Q What are you comparing it with? A Not comparing it with anything; just continuing.

*William J. Thompson.*

*By Mr. Whiting.*

Q At the place in the ledger? A Yes, sir.

Q You didn't keep the ledger, did you? A No, sir.

*Mr. Whiting.* It seems to me this is not a proper way to get this evidence in. Ultimately the defendant may be shut off from cross examination of the person who kept the book. We do not want to be shut off from cross examination on the account which they characterized as an overdraft. If we can only be protected in that matter— 10

*By the Court.*

Q Are you giving this company any credits as you go along when you recite, for instance, that there is an apparent overdraft? Are you giving them credits to which they have been entitled? A No. 20

Q They were entitled to credits during that period? A They got credit on the ledger for all the credit that I am aware of.

Q Are you taking those into consideration here? A No, sir, those are taken into consideration on the account; this is just simply an accumulation of checks that have not been charged to the account. 30

Q That have not been charged? A That have not been charged. I am not taking into consideration the condition of the account at all.

Q As evidenced by the ledger? A As evidenced by the ledger.

Q Showing debits and credits? A Showing debits and credits; that is a separate account altogether. This is just simply, just as I said before, an accumulation of checks which have not been charged to the account. 40

*Frank C. Ferguson, direct.*

*By the Court.*

Q Are you prepared to say what the total overdraft is? A No, sir, not without totalling the 133 checks.

10 *Mr. Guild.* I will withdraw the witness temporarily.

FRANK C. FERGUSON recalled in behalf of State.

*Direct examination by Mr. Guild.*

20 Q Mr. Ferguson, have you gone over the checks represented by the packages marked S4, 5 and 6 being checks of the Inter-City Land & Securities Company and which I now show you, being the checks mentioned in the indictment? A I have, yes, sir.

Q Do you know the total amount of those checks? A The total of those checks is the total amount mentioned in the indictment.

*By the Court.*

Q You are asked if you know the amount of the checks—yes or no. A I do not.

*By Mr. Guild.*

30 Q I thought before you went on the stand you said you did know? A No, I said I could tell the amount of the overdraft at the close of business.

*By the Court.*

40 Q These checks that have been referred to by the prosecutor, can you tell us what the amount of the apparent overdraft would have been had these checks been charged to the Inter-City Land & Securities Company's personal ledger account at the close of business on the 14th of August, 1913? A I can, yes, sir.

*Frank C. Ferguson, cross.*

Q Will you state what it was. A \$27,917.36 overdraft.

*By Mr. Guild.*

Q In giving that figure, have you given credit for a deposit of six hundred and some odd dollars that has been referred to here? A I have, yes, 10  
sir.

Q And eliminating that credit, what would be the amount? A \$28,616.66.

*By the Court.*

Q They were entitled to that credit? A Yes, sir.

Q So the first amount given is the correct amount? A Yes, sir.

Q Have you compared these checks with the indictment? A I have, yes, sir. 20

Q And these are the checks mentioned in the indictment? A They are, yes, sir.

Q And does each one of those checks, when taken separately, show an apparent overdraft? A Yes, sir.

Q The total of which goes up to make this amount of \$27,917.36? A That is right.

*Cross examination by Mr. Bachman.*

Q Did you reach this conclusion all alone? A 30  
Yes, sir.

Q Did you try to reconcile the books of the trust company in order to reach this conclusion? A Yes, sir.

Q When did you do it? A I have been working off and on, as I said before, for almost two years.

Q Did it take you a year to find out this result? A It did not.

Q How long did it take you to find out the result that you have testified to? A Two days. 40

*Frank C. Ferguson, cross.*

Q Did you compare the ledger with the books of the bank known as the receiving teller's proof and those three in front of you, return item books?

A I used all the records and books of the bank that were necessary in reconstructing this account.

10 Q Then you used other books besides the ledger before you? A Certainly.

*Mr. Bachman.* This brings in a conclusion intentionally to matters not presented to the Court, and I must admit that I can't cross-examine him until, at least, I have had an opportunity to ask him what the process of reconstruction is.

*The Court.* Ask him what his conclusion is. That is the only way to get at it.

20 Q How did you come to reach this conclusion as to which you have testified showing an apparent overdraft of the figures that you have mentioned?

A By a study of the books of the bank, including a study of the checks with the Inter-City Land & Securities Company and which we had on hand.

30 Q Did you at that time settle the question of a deposit of \$699.30 on August 7th? A Why, I well knew of the deposit, and in fact I know all the deposits which you claim credit for because I had the books of the Inter-City Land & Securities Company.

Q Did you make an allowance for them? A Where it was justifiable.

Q Wasn't the amount of \$699.30 allowed? A Yes, sir, I so stated.

Q Why didn't you allow it when the indictment was drawn? A I had nothing to do with the indictment any more than you had.

40 Q Didn't you furnish the information upon which the apparent overdraft was based? A No, sir, I did not.

*Frank C. Ferguson, cross.*

Q When did you first inform the prosecutor that you had this matter of the overdraft figured out?

A Just now; he knew nothing of what it showed.

Q You said nothing about the \$699.30 deposit until yesterday? A I certainly did.

Q Did you inform the prosecutor of the fact?

A No, he didn't ask me. 10

Q You are a sworn officer of the banking department? A I never was sworn.

Q Were you partially in charge of the affairs of the Roseville Trust Company? A I was assistant to the special deputy assistant.

Q Didn't you think it was necessary to tell the prosecutor something that was so material? A It is not a drop in the bucket.

Q It is a matter of figures. A It doesn't affect the crime at all. 20

Q It is not a matter of ethics that you didn't tell the prosecutor, is it? A You are getting it.

Q Why didn't you tell the prosecutor about it? A He is not a collecting agency.

Q Would he have allowed it if you hadn't proved it? A Certainly.

Q If we didn't know about it how would we receive any help from the banking department? A The prosecutor knew it; the prosecutor had in his possession a reconciled account of the Inter-City Land & Securities Company with the books of the Roseville Trust Company showing that \$699.30 deposit. 30

Q Did you see cross-examining this morning try to prove that deposit? A The present prosecutor didn't know it.

Q Did you know it? A I knew it, certainly.

Q And you didn't know that the present prosecutor didn't know it? A I don't know what he knows. 40

*Frank C. Ferguson, cross.*

Q Were you present yesterday? A I was.

Q Did you see any struggle to find out about that \$699.30?

*Mr. Mott.* I didn't see him struggle. I object to it.

*The Court.* Objection sustained.

10

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

Q Did you see me cross-examine for the purpose of testing the competency of the individual ledger, Mr. Thompson, as to a \$699.30 deposit? A I did.

20 Q Did you notice that I had to produce a deposit ticket initialed by Mr. Thompson? A I notice that you did produce a ticket initialed by him.

Q Did you tell Prosecutor Guild that that information was handed to Mr. Hood? A No, sir, but I told Mr. Guild at that time that there was such a deposit made.

Q When did you tell him? A I think I told him then.

30 Q At the close of the session? A I think so. There was no dispute about your deposit when you handed the ticket to Mr. Thompson; he said yes, that was a deposit made and if you could produce some more—if you can produce some deposit tickets, we will give you credit for them.

Q And if we can't produce the deposit tickets you won't give us credit for them? A No, we are not mind readers until you produce your deposit ticket. Nobody but a mind reader can tell what was put in.

40 Q Do you know that there was a fire in the Roseville Trust Company cellar in November, 1913? A I do.

*Frank C. Ferguson, cross.*

Q And you know at that time some very important papers were taken home by the janitor and burned up? A No, sir, I don't believe it is so; I know of no papers that were burned in the fire, and why they should have been burned is more than I can understand.

Q Do you know that the fire department came and put out the fire? A Yes, in another apartment. 10

Q Downstairs, where box 55 was? A That was upstairs.

Q There was a box downstairs that had a lot of rubbish in, there was a box down there with the deposit tickets in? A There was.

Q You say they were not burned? A No, they were not burned; they are there yet.

Q Where are they? A In the cellar of the Mutual Bank. 20

Q Owing to the fact that you reached this conclusion that you have spoken about, did you bear in mind that there were eight deposits in May that we didn't get credit for? A Yes, sir; I have them.

Q Did you give credit for them? A No, because you had deposits for them, had other deposits, \$150; you claim additional on May 8th; there was a deposit on May 9th which includes your deposit of \$150. 30

Q Will you give me the schedule so we can come to an issue? A It is up to the Court.

*Mr. Bachman.* I will ask the Court to direct you to give me that.

Q You were presented with a statement of the Inter-City Land & Securities Company, or somebody representing it, setting forth certain deposits that were not credited to us on the books of the company, the Roseville Trust Company, were you not? A No. 40

*Frank C. Ferguson, cross.*

Q How did you find out that we made such a claim? A One of the representatives of the Inter-City Land & Securities Company came to the Roseville Trust Company and wanted to find out the exact status of their account, so one of the men—

10 Q Who was it? A I think it was Jesse Peters; one of the men who was delegated to go over the account.

Q Mr. Mayham? A To go over the account with him; the two of them got together and made up the account showing what the Inter-City Land & Securities Company claimed and what the Roseville Trust Company claimed and reconciled them. Mr. Mayham's statement is what I had before me in making up my account.

20 Q Practically the amount that we claim to have on deposit with the trust company was about \$6,000, wasn't it? A Yes.

Q And we showed by Mr. Peter's reconciliation that there was no such thing as an overdraft on the books, from our contention, of the Roseville Trust Company? A From your contention, yes, there was a difference of \$35,000 in the account.

30 Q And this was the result of a co-operative search of records and carrying out the account between Mr. Mayham and Mr. Peters in the Inter-City Land & Securities Company? A Absolutely not.

Q What? A No, of course not.

Q Did you ever see the account that was drawn by Mr. Peters? A No, I saw the account drawn by Mr. Mayham.

40 Q Did you see the account that was drawn by Mr. Mayham's or Mr. Peters' suggestion? A I didn't know who suggested it; I saw a reconciliation of the account.

*Frank C. Ferguson, cross.*

Q Have you got that reconciliation? A Yes, it is in the possession of the prosecutor.

*Mr. Whiting.* We will give you notice to produce it. You don't want to suppress anything.

*Mr. Guild.* I don't like your language.

*Mr. Whiting.* I will withdraw it. Will you kindly produce that paper? 10

*Mr. Guild.* I don't know.

*Mr. Bachman.* We ask for the production of the paper.

*By the Court.*

Q You spoke a few moments ago of having made a reconstruction of this account. I don't know whether you used that exact expression or not. Is that true? A Yes, sir. 20

Q You said that you reconstructed the account and that a copy of that reconstructed account had been placed in the hands of the prosecutor; is that right? A No, sir; that is the reconstructed account that you have there.

Q Didn't I understand you to say that a copy of this had been given to the prosecutor? A I didn't so intend to state.

Q I thought you said that Mr. Hood had a copy of it? A No, he had a copy—you see, when Mr. Peters and Mr. Mayham got together and attempted to straighten out the account as shown on the books of the Inter-City Land & Securities Company as shown on the books of the Roseville Trust Company, a copy of that attempt to reconcile was given to Mr. Hood. 30

Q Then there was an attempted reconciliation of the two accounts? A Yes, sir.

Q You say that you reconstructed the account, and that is it? A That is it, yes, sir. 40

*Frank C. Ferguson, cross.*

Q And this shows the account, as I understand it? A Yes, sir.

Q As an expert accountant, as it should be or as it is, or how? A As it appears from the books and records of the Roseville Trust Company.

10 Q This shows the account as it appears from all the books and records of the Roseville Trust Company which pertains in any way to the account of the Inter-City Land & Securities Company? A Yes, sir.

Q And this is the account that you say shows an overdraft after having put on those figures from whatever source in the book of \$27,917.36? A Yes, sir.

20 *Cross-examination by Mr. Whiting.*

Q Mr. Mayham is one of the public officers of your department, is he not? A He is an examiner, yes.

Q And this suggestion of going over the books of the bank and of the company came from a representative of the company, did it not? A I can't tell you.

30 Q Didn't you so testify? A I didn't so mean, because I don't know whether it came from our side or their side.

Q You don't know? A No, sir.

Q Don't you know this, that every facility was offered you, so far as going over the accounts of the company is concerned; you had their records and their books? A I can't tell you, Mr. Whiting, what he had at all; I simply know he went over the accounts with Mr. Peters.

40 Q Mr. Mayham did that? A Yes, sir, with Mr. Peters.

*Frank C. Ferguson, re-direct.*

*Re-direct examination* by Mr. Guild.

Q Prior to going to the State Department what had been your business? A I had been engaged in the banking business.

Q Where? A In East Orange, in the Peoples Bank.

10

*The Court.* His capacity has not been attacked. Why should you go into that?

Q You have stated that you reconstructed the Inter-City Land & Securities Company's account. When did you start, what date? I am speaking of when you started to reconstruct this account, from what date? A From December 18, 1912.

Q Is that the date the account was opened? A No, sir; that is the date of the last balance of the pass book.

20

Q Did you have the original pass book? A No, sir; I never saw the pass book.

Q As shown by the ledger, where did you get that date? A When a book is balanced it is ruled off on the ledger.

Q It is shown by the personal ledger? A Yes, sir.

*Mr. Guild.* I do think that it is material that Mr. Ferguson's qualifications to do his work appear for the sake of the record.

30

*The Court.* You may examine him on that.

Q Now, you say that you were connected with the Peoples Bank in East Orange? A Yes, sir.

Q How long? A About eight years.

Q Were you connected with any other bank? A I was connected during that time with the Savings Investment & Trust Company of East Orange; they are affiliated institutions.

40

*Frank C. Ferguson, re-direct.*

Q What were your positions in those banks?

A I worked in various positions; I was check clerk, bookkeeper, individual bookkeeper, receiving teller, paying teller, worked on the general books, and was assistant to the cashier.

10 Q And you were connected with the State Banking Department how long? A For about six and a half years.

Q I think in answer to the Court's question you gave the date when your reconstructed account begins. A Yes, sir.

Q And that was at a point in the account when it had been balanced? A That was at a point in the account where the pass book has been balanced and the vouchers returned.

20 Q Did you see the pass book? A No, sir; I did not.

Q How do you know? A I can tell from the individual ledger.

Q In order to reconstruct this account what did you do, what did you have recourse to? A I had recourse to the individual ledger, A to L, credit book, to the bills purchased book to get the note credit, to the checks in the regular files and to the checks in the indictment.

30 Q Did you have recourse to any notes? A Yes, I had recourse to the notes also.

Q At the time did you have recourse to box 55 in making that reconstruction? A No, only inasmuch as the indictment check came out of box 55.

Q Or Mr. Smith's desk? A Only that some of the checks came out of the desk, as I recall it now.

40 Q And you say you had access to the contents of the desk and box in so far as they pertained to this account? A So far as they pertained to this account.

*Frank C. Ferguson, re-direct.*

*By the Court.*

Q The box had already been opened and the things taken out before you began work on this account? A Yes, sir.

*By Mr. Guild.*

Q Will you tell the Court what the account shows? 10

*The Court.* He has told us. He says it shows an apparent overdraft of \$27,000 and odd dollars, as reconstructed by him.

*Witness.* In addition to that there was a check of \$62.75 which had been deposited in the bank and which had come back protested after the bank closed, and therefore had to be added to the overdraft, making the apparent overdraft of \$27,981.41. 20

Q During the period covered by your examination was there any time when this account showed a credit balance?

*The Court.* This reconstructed account, you mean?

*Mr. Guild.* Yes.

A There were times, yes, sir; at the beginning of the account, at the beginning in the reconstructed account. 30

Q Will you turn to the date of the 26th of March, 1913, and say from that date on whether there was any time shown by your examination and reconstructed account a credit balance to this depositor? A Yes, sir, on the 15th day of April, 1913, on which date a \$6,000 note was placed to their credit; there was a credit balance consisting of \$280.12, and that stayed there a whole day, and on the 17th the overdraft started again and continued increasing to the close of the institution. 40

*Frank C. Ferguson, re-direct.*

Q In your restatement of this account did you give credit for the deposit of \$699.30, August 7th?

A I did, yes, sir.

Q When did you make up that account? A I made up this account, I think it was Saturday—yes, I know it was Saturday.

10 Q You mean you finished it that day? A I mean I finished it Saturday afternoon.

Q How long had your statement shown a credit of \$699.30 prior to last Saturday? A I hadn't made up a statement prior to last Saturday.

Q How long had you personally known of that credit item? A I am trying to think when I got hold of that reconciled account. It must be fully two weeks from this date; it must be fully two weeks that I knew of this credit prior to today.

20 Q And you used it in making up your re-statement of the account? A Yes, sir.

*By Mr. Bachman.*

Q Did you compile that reconstructed account from data that you had previously acquired in the examination of the Roseville Trust Company? A No, I told you what I had.

30 Q Tell me again. A Individual ledger, the credit and debit side book, bills purchased book showing the notes purchased, the notes, the checks, the teller's proof book, the return item book. I guess that covers it.

Q It is a fact that this account had not been balanced since December, 1912? A Yes, sir.

Q Is it a fact within your knowledge that the pass book of this company was in the Roseville Trust Company's office? A No, I don't think it was, although I am not sure about that.

40 Q Did you, in reaching your conclusion, take into consideration a note of \$11,165, made by Win-

*Frank C. Ferguson, re-direct.*

fred L. Smith, dated June 16, 1913, and protested by a notary public for a party in charge of the Roseville Trust Company on August 26, 1913? A I did not, no, sir.

Q That note was in the bank's possession wasn't it? A It was.

Q Did you at the time take into consideration a note of \$2,500 made by the Inter-City Land & Securities Company and dated May 15, 1913, and protested for the bank examiner in charge of the Roseville Trust Company on September 15, 1913? A I did, yes, sir. 10

Q Where is it credited? A On the 16th day of May.

Q Did you take into consideration a note of \$6,000 made by the Inter-City Land & Securities Company dated April 25, 1913, and protested on September 25, 1913? A I did, yes, sir. 20

Q Is that credited at that time? A I presume this is the note you refer to. There is a note of \$6,000 credited to their account on April 15th.

Q That wouldn't be a note dated April 25th, would it? A Hardly.

Q I appeal to you as an expert.

*The Court.* What is this you refer to?

*Mr. Bachman.* \$6,000. 30

*Witness.* There is no such note on April 25th.

Q Did you take into consideration a deposit of \$140.30 which was not credited, but was still made on May 8th or May 9th?

(Paper is handed witness.)

*Mr. Whiting.* Is that the paper the prosecutor is not willing to produce? Isn't that the reconciliation that I asked the prosecutor about? 40

*Frank C. Ferguson, re-direct.*

*Witness.* This is the reconciliation, yes, sir.

*The Court.* What are you calling for?

*Witness.* Now, let me have that item.

*Mr. Guild.* (To the witness) I prefer that you do not use that.

10 *Witness.* Now, Mr. Bachman, what is your amount?

*Mr. Bachman.* That deposit on or about May 8th or 9th of \$140.30.

*Mr. Whiting.* I asked that it go into record that the witness said he was about to refresh his memory from the paper and the prosecutor says he must not do that.

20 *Witness.* If you will give me the checks composing that deposit, because I find that some of the deposit tickets which you claim credit for was contained on other deposit tickets, that is, these individual items on these deposit tickets; it will facilitate matters greatly.

Q I will give it to you. For the purpose of saving time, please look among the papers that you have got. Have you got one of \$140.30? A No.

Q \$151, May 11th? A Do you want me to say if I have a deposit ticket showing that as a total?

30 Q I will answer the question by asking one. Are those deposit tickets some that you got out of the hands of the Roseville Trust Company? A These are, yes, sir.

*Mr. Bachman.* May I inspect them?

*Mr. Guild.* Certainly.

Q Did you find any papers in Mr. Smith's desk that you took into consideration as making up this reconstructed account, so-called? A Yes, I have so testified.

40 Q Are there papers in that desk or in box 55 pertaining to the business of the Inter-City Land &

*Frank C. Ferguson, re-direct.*

Securities Company that you did not take into consideration beside those you have already testified to? A I can't think of anything.

Q Were there notes there that you didn't give us credit for in the reconstructed account, so-called?

A No.

Q Outside of what you have testified to? A 10  
Well, you mean outside of that \$11,000 note?

Q In reaching that conclusion did you seek from Mr. Smith on his return information about the claim of \$7,000 cash and \$1,500 cash Mr. Peters claimed in his reconciliation should have been credited to the Inter-City Land & Securities Company? A Which the books of the Inter-City Securities & Land Company claim?

Q Yes, I ask about that. Did you make an investigation about that amount of money? A I 20  
did.

Q Of the claim? A Yes, sir.

Q Did you allow for that in reaching the conclusion of this so-called reconstruction account?

A I made allowance for it by disallowing it.

Q Did you put it in the figures of that reconstructed account? A No, sir, I did not.

Q Now, taking the note of \$11,165, \$2,500, \$6,000, and a claim of \$8,500 cash that I have just 30  
mentioned, what is the total? Will you figure them up? A Yes, but just a minute.

Q Answer my question. A I will figure those for you.

Q \$11,165, \$6,000, \$2,500— A What is the \$2,500?

Q That is one of the notes you said should be credited. A Oh, no. That makes \$25,665.

Q You knew as early as September, 1913, that the Inter-City Land & Securities Company claimed 40  
\$8,500 cash as a credit on the books of the Rose-

*Frank C. Ferguson, re-direct.*

ville Trust Company, handed to Raymond E. Smith personally? A No, sir.

Q In that reconciliation? A That attempted reconciliation.

*By the Court.*

10 Q Answer the question. A But when you ask me a thing which is obviously not so—

*Mr. Bachman.* That is not courteous to counsel.

*The Court.* You assume that it is a reconciliation, and he apparently does not agree with you; he therefore wants to make it clear by his injecting the word "attempted" reconciliation that he does not concede that  
20 it was in fact a reconciliation. He did not make it anyway.

*Mr. Whiting.* It is in the record on my suggestion that the witness attempted to refresh his recollection by that very paper which he attempts to discredit.

*The Court.* If his attempt had gone a step further on objection he would not have been submitted to refresh his recollection from a memorandum not made by himself.

30 Q Didn't you testify, when I previously asked you, that Mr. Peters and Mr. Mayham attempted to reach a reconciliation of the books of the Inter-City Land & Securities Company of the Roseville Trust Company? A That is just what I did say—attempted.

Q And did you say that a paper was drawn up and was in the possession of the prosecutor at the time which embodied what those two men called a reconciliation? A Oh, no, you misunderstood me. They drew up a paper showing  
40

*Frank C. Ferguson, re-direct.*

what each side contended, but there never was a reconciliation, because a reconciliation has to be an agreement.

Q As an expert, do you mean to tell me that an endeavor on my part as an officer of the bank to reconcile an account after I have once reached what I call my reconciliation is not a reconciliation? A That is an endeavor. 10

Q You have been questioned as to your ability as an expert, and we conceded it. Don't you know that a reconciliation is a contrasting claim account with another claim account, and the paper showing the differences as to what one claim should be credit or charged and what the other claims should have been credited or charged? A No, sir; I know no such thing.

Q Did you ever reconcile many accounts with other banks? A I have. 20

Q There are four places we credit and you don't charge and you charge and we don't credit? A Yes.

Q Is that the sort of a paper that Mr. Peters drew up and that you have seen? A No, Mr. Peters didn't draw that up.

Q Who drew that up? A I have some sort of a paper of that kind in Mr. Mayham's handwriting. 30

Q What is this paper that you had in your hand a moment ago that Mr. Hargan hurried to get out of my hands? A I didn't see him hurry at all.

Q Why were you going to put it in your pocket? A Because I wasn't going to use it.

Q What was the paper? A That was the attempted reconciliation of the account.

Q Accepting your characterization for the purpose of my further question, did you inspect that 40

*Frank C. Ferguson, re-direct.*

admitted reconciliation as early as the date of its making? A No, sir.

Q When did you first inspect it? A The first I saw that was about two weeks ago.

Q Was it before you reached your so-called reconstructed account? A Yes, sir.

10 Q And did you make any endeavor to find out what was the basis of a claim of \$8,500 cash? A Yes. I have said so.

Q You did? A Yes.

Q When was the first time you ever knew about that? A When I saw the reconciled account—wait a minute! I knew that the Inter-City Land & Securities Company had filed a claim with the special deputy assistant commissioner  
20 to an amount of six thousand odd dollars, and I assumed that included the \$8,500 deposit.

Q And that claim was sworn to by Jesse L. Peters as an officer of the company? A It must have been sworn to. I don't know whether it was sworn to by him or not.

Q And that was filed by the Inter-City Company with the commissioner? A Yes, sir, and rejected.

30 Q Mr. Morgan, of Pitney, Hardin & Skinner, were the attorneys in charge of the bank at that time? A They were the attorneys.

Q Was Mr. Morgan the individual in charge? A At times. We had other attorneys in Pitney, Hardin & Skinner's office busy on the case.

Q This was a sworn claim by the Inter-City Land & Securities Company of a balance to the credit of that company with the Roseville Trust Company at the time of its failure of over \$6,000 cash? A Yes, I have a claim sworn to, to  
40 the best of my knowledge and belief.

*Frank C. Ferguson, re-direct.*

Q You say it would have to be sworn to to be received? A Oh, yes, or it wouldn't be received.

Q Will you state whether you took into consideration all the deposits mentioned in the attempted reconciliation in reaching your so-called reconstructed account? A No, I didn't.

Q Did you endeavor to look through the records of the Roseville Trust Company to find whether there were deposit tickets corresponding to the deposits made in that attempted reconciliation made by Mr. Peters? A Yes, I did. 10

Q Did you call them to Mr. Peters' attention or the attention of the commission as reducing the amount of the claim of the Inter-City Land & Securities Company filed under oath with the commissioner? A No, because there are none such except the \$699.30. You haven't showed me any others. 20

*Mr. Bachman.* I move to strike out that answer as not responsive, because it is merely argumentative on the part of the witness. I move to strike out all but the no.

*The Court.* Your question is assuming a situation which is not justified by the previous question and answer. 30

*Mr. Bachman.* This witness has no right to volunteer, because I cannot be bound by it.

*The Court.* "You have not showed me any others" may be stricken out. The rest will stand.

Q Have you taken a list from the so-called attempted reconciliation for the purpose of comparing them with the records of the trust company? A I didn't take a list off. 40

Q Did you inspect it at all? A I inspected it.

*Frank C. Ferguson, re-direct.*

Q Have you made a memorandum as to the claims that were made in the attempted reconciliation? A No, I haven't any memorandum.

Q Are you speaking from memory at the present time? A Yes.

10 Q Would you mind refreshing your memory from the paper itself? A I will refresh it from that copy in your pocket.

Q You refuse to refresh your recollection?

*The Court.* If there is anything that you want to show this witness, show it to him.

20 *Mr. Bachman.* I want to show him that there were certain deposits that were claimed as early as October, 1913, not credited to us to which we were entitled, and the only original paper that I know of is in the possession of the prosecutor. I want this witness to use that paper to testify from it, if he can. If it does not refresh his recollection, then, of course, I am through.

*The Court.* But he has not said that he based his reconstruction on that attempted reconciliation. He says he made it from the books.

30 At one o'clock, P. M., the court took a recess until two o'clock, P. M.

After Recess.

FRANK C. FERGUSON resumes the stand.

*Re-direct examination* by Mr. Guild.

Q Mr. Ferguson, you were asked by counsel for defendants this morning whether you credited a note of April 15, 1913, at \$6,000, and your answer, I think, was no? A That was right.

40 Q Did you credit a note of that amount dated April 25, 1913? A Yes, sir, I did.

*Frank C. Ferguson, re-direct.*

Q I show you a note of the Inter-City Land & Securities Company signed C. P. Whitman, treasurer, dated April 25, 1913, \$6,000, four months, payable to the order of "ourselves" and endorsed "Inter-City Land & Securities Company," and endorsed "C. P. Whitman, treasurer, C. P. Whitman." Is that the note you gave them credit for? A Yes, sir it is. 10

Q Was that an original note? A No, sir, it was not.

*Mr. Whiting.* I object to that characterization. Is this man competent to testify to that?

*The Court.* By original you mean to distinguish it from a copy? Judge Guild means the original transaction or a subsequent renewal. 20

*Mr. Whiting.* Is this witness being asked the fact whether it is a renewal note? We should be allowed to cross-examine.

*By the Court.*

Q Can you tell from an examination of the books whether this is an original or not? A Yes, sir, it is the original.

*The Court.* It is not a mere assumption on his part. 30

*By Mr. Guild.*

Q Is that the original note transaction? A No, it is not.

Q What does it represent? A It represents the renewal of another note.

*Mr. Whiting.* I think we ought to cross-examine on that.

*The Court.* You can cross-examine when he is turned over to you for that purpose. 40

*Frank C. Ferguson, re-direct.*

Of course, it is understood that he is testifying not to an original knowledge on his part; he is testifying to what he finds these books disclose. He says the books disclose that.

10 *Mr. Whiting.* And his mind must work a conclusion, whether that is a new note or a renewal, because he couldn't know of his own knowledge unless he participated in the original transaction. He says there were two or three notes of \$6,000, different days. I know, and it must appeal to the mind of the Court, that this witness cannot know of his own knowledge whether this particular note is a separate obligation of the Inter-City Land & Securities Company except by assuming and  
20 guessing at it.

*The Court.* He takes it from the books of the bank.

*Mr. Whiting.* I will take an exception.

*Mr. Bachman.* I join in that, too.

Defendants' counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.]

30 *Judge.*

Q I show you a note dated Newark, N. J., April 15, 1913, for \$6,000, payable ten days after date, to the order of "ourselves," at Roseville Trust Company, signed "Inter-City Securities Land Company, C. P. Whitman, treasurer," endorsed "Inter-City Land & Securities Company, C. P. Whitman, treasurer, C. P. Whitman." What do you say in regard to that note, as to its being  
40 the original note of the prior \$6,000 note which you said was a renewal?

*Frank C. Ferguson, re-direct.*

*Mr. Whiting.* I don't understand the question.

*Mr. Guild.* Whether or not it is the original note of which the former \$6,000 note was a renewal.

*Mr. Bachman.* I join in that objection. 10

*The Court.* I think the question should be framed as to what the book says about it. That would meet the objection.

Q By referring to the books what do you say?

A I have already referred. I can speak from this record that I have here.

*Mr. Whiting.* I think this particular objection relates to a standing objection that we made as to this witness testifying from books which he himself did not make and that the books themselves will speak for themselves. 20

*Mr. Bachman.* I would like to know the book from which he refreshes his memory and from which he receives his knowledge.

*The Court.* He has been testifying some time without objection to a situation disclosed from an examination of the book, disclosed by the book, and of which he has made a tabulation and which he calls a reconstructed account. There has been no objection to that, and that is all this question does. 30

*Mr. Guild.* This is re-direct examination.

*Mr. Whiting.* I pray an exception.

*Mr. Bachman.* I join in that, too.

*The Court.* If there is anything to except to you may have it. 40

*Frank C. Ferguson, re-cross.*

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

H. V. OSBORNE, [L. s.]  
Judge.

(Question read.)

10 A This is the original of which the note dated April 25, 1913, for \$6,000 is the renewal.

Q Is the original note marked in any way as to whether or not it was paid? A It is marked Roseville Trust Company, paid May 21, 1913, Newark, N. J.

Mr. Bachman. I move to strike out his testimony on this point because the statement that it was paid May 21st is a contradiction that the note dated April 25th is contradictory of it.

20 The Court. Application denied.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]  
Judge.

Q Now, the stamp marked "paid May 21, 1913," is the same date which you say is the renewal note? A Yes, sir.

30 Q When did the renewal note fall due by its term? A By its terms, August 25th.

Q Was it paid? A It was not.

Q Why did you not give credit in your re-stated account for the renewal note? A I did.

Q You did give credit for it? A Yes, sir.

Q And charged them with— A With the original.

*Re-cross examination* by Mr. Bachman.

40 Q Will you refer to the ledger under date of May 21, 1913? A Yes, sir.

*Frank C. Ferguson, re-cross.*

Q And state if you find there a charge under that date of \$6,000. A I find a charge of \$6,033, which includes the \$6,000 note and the \$33 check, another charge of \$33; they are grouped on the ledger.

Q Is that \$33 interest on that? A No, I don't think so. I can tell you if you want to know. I think it is another item or two. 10

Q Isn't the time between April 15, 1913, and May 21, 1913, enough to make \$33 interest? A What do you mean? The discount is taken out in advance, you know.

Q Reckoning interest from April 15, 1913, to May 21, 1913. I will withdraw that question. On what do you base your statement that the note April 25, 1913, was a renewal of a note not already charged to the account of the company? 20

A On what do I base it?

Q Yes, on your experience as a banker? A Yes, sir.

Q Do you mean to say a note is accepted in renewal of one note and held nearly a month before the note that is supposed to be renewed is charged up? A Certainly. Why not?

Q Think a moment. A note dated April 15, or dated April 25, 1913, and not charged until May 21, 1913? A Yes, sir. 30

Q At the same time the Roseville Trust Company had in its hands, as shown affirmatively by the proof submitted, a note of \$6,000 payable four months after date, dated April 25, 1913? A Let me see the note.

Q It has therefore in its possession two notes. How can you say from your experience as a banker that one is a renewal of the other? A This note dated April 15th— 40

*Frank C. Ferguson, re-cross.*

Q You say this? A The note dated April 15, 1913, due ten days after, that is on April 25th, matured on April 25th, which is the date of this other \$6,000 note.

Q And that is the only way you conclude that it is a renewal? A I don't think there is any  
10 better evidence than that.

Q You have qualified as an expert. Do you mean to say that the note due April 25th was dead, even though it had not been charged up to the account—wasn't it a live note? A I don't know what you mean.

Q Wasn't it a live note after April 25th, 1913?

A It was a live note until it was paid.

Q It was paid May 21, 1913? A You want to bear in mind that the note dated April 22d  
20 was not used until May 21st; it wasn't alive until it was actually purchased by the company.

Q What do you know about one note being used for the other? A I know from the fact that the note which is due April 25th is not charged to that account until May 21st, on which day the note dated April 25th was purchased by the company; one is a renewal of the other.

Q Where do you find any basis for assumption, because you are concluding some things which the  
30 Court and jury don't know anything about.

Objected to.

Objection sustained.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

Q This is the point, a note dated April 25, 1913, was alive up until May 21, 1913; isn't that  
40 so? A Yes, sir.

*Frank C. Ferguson, re-cross.*

Q A note dated April 25, 1913, was alive on April 25, 1913? A It was not alive until purchased by the company.

Q What do you know about being purchased by the company? A The date it goes through the books.

Q Can you show me where that has gone through the books? A Yes, sir, May 21, 1913, \$5,970. 10

*The Court.* The witness refers to the account in the personal ledger of the Inter-City Land & Securities Company.

Q Who purchased the note for the Roseville Trust Company? A I don't know.

Q How do you know it was purchased? A It appears on the bills purchased register and they received credit for it. 20

Q Do you know who did do the purchasing? A No.

*The Court.* What does the record show? The witness says that it appears on the bills purchased book, to which he now refers.

*Witness.* From the note, \$9,686—

*Mr. Whiting.* I object to this testimony, it being merely what these records show. We don't need any experts. 30

*The Court.* This is in response to a question on cross examination where in the book there is any record of this note being purchased.

*Mr. Bachman.* Where, in the books so far admitted in evidence? I didn't wish him to go to any book which is not in evidence. This book has been rejected by the Court. 40

*The Court.* I do not recall the rejection.

*Frank C. Ferguson, re-cross.*

*Mr. Bachman.* It was offered in evidence by the prosecutor and rejected.

10 *The Court.* It was in answer to your question where he finds it in the book, and he points it out. Counsel for your co-defendant objects to an answer which is a proper answer to your question. The objection is overruled.

*Mr. Whiting.* I pray an exception.

20 *Mr. Bachman.* I will withdraw the question and reframe it. I interrupted, as he was reading from a book that was not in evidence. Your Honor saw it, and I interrupted him just as he mentioned one figure. I know nothing about what is in that book except I saw it just this moment and I don't want to be bound by something that I am not informed about.

*The Court.* He looks at the book. Your own question has produced the answer.

*Mr. Bachman.* The witness has testified from the ledger to a certain debit. Can't he say if there is a credit there?

*Witness.* I already said so.

30 Q Point out for me where there is a credit of this note? A \$5,970.

*The Court.* Just read it.

A May 21st, credit, \$5,970.

Q Where is the debit? A In that \$6,033 item there, which is a \$6,000 item, and I think a \$33 item, or it may be more than one item, \$33. I can tell in a minute by looking at another book.

40 *Mr. Bachman.* I move to strike that answer out as being founded on a naked entry of figures.

*Frank C. Ferguson, cross.*

*The Court.* You asked him to point out something and you cannot then ask to have it stricken out.

Defendants' counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

10

Q Did you have a conversation with Mr. Smith as to whether he purchased this note or not? A I did not.

Q Then your entire evidence as to this note being purchased is predicated upon what you have already testified to in response to my question? A It is, except to say that in making up my record I used all the books necessary.

20

Q Were you guided in using those books by anybody connected with the bank? A I was not.

Q Did you seek to be illumined by asking any questions of anybody connected with the bank? A I did not seek to be so illumined.

Q You took the books and testified to them as you are now doing? A I took the books in connection with the books of the defendant.

Q You didn't consult with anybody in the bank connected with the bank in a clerical capacity? A No, sir.

30

*Cross examination by Mr. Whiting.*

Q Your entire knowledge as to the note is based upon the information you find in the books of the bank and the checks signed by the defendants? A I don't want to confine myself to that. I say all the books which I enumerated this morning that I had to use, plus the notes, plus the

40

*Frank C. Ferguson, cross.*

checks and return item book, or anything of that kind, as I enumerated this morning.

Q Those records you did not keep yourself?

A I did not.

Q You don't know except by hearsay? A I suppose that was told me at the time.

10 Q You don't know whether the books which you have referred to are accurate or not? A Just tell me what you mean by accurate and I will tell you.

Q For example, can you tell by your own knowledge whether those books set forth the transactions of the bank which they purport to do and whether they do so accurately and truthfully? A Taking the books as a whole, the books are not  
20 correct, no.

Q Can you tell to what extent they are incorrect? A I can't tell you off hand.

Q How long will it take you to find out? A That is a matter that has taken two years to find out.

Q And you are not through yet, are you? A No, sir.

Q And you don't know how far these errors or omissions which would make the books incorrect extend, where to point to that now? A We  
30 have records that will help us.

Q Just point out to the jury where the records are that ought to be there.

*Mr. Guild.* I object, unless he refers to this account.

*Mr. Whiting.* I am referring to the testimony given by the witness that his answer with respect to this check of \$6,000 was based upon his investigation of the book, and I am  
40 asking him where the books are wrong.

*Frank C. Ferguson, further re-direct.*

*The Court.* You mean in connection with the Inter-City account?

*Mr. Whiting.* I don't think I am obliged to confine myself to this account. This goes to the heart of this case. Isn't it unreasonable to accuse people of criminal acts based on that testimony?

10

*Further re-direct examination by Mr. Guild.*

Q Mr. Ferguson, you say that renewal note of \$6,000 and the credit was how much on the ledger?

A \$59.70.

Q How do you account for it? A I account for it because the interest was taken off in advance.

*Mr. Whiting.* I object to this entire line of testimony. This witness is not competent to answer these questions. 20

*The Court.* If you wish to object to a line of examination you may do that, but you cannot object to another line of examination that has been pursued and have your objection relate back.

*Mr. Whiting.* I now make an objection specifically to this question, on the ground that the witness' testimony is incompetent, and that he is basing his testimony on records which he did not keep and which he admits are inaccurate, and he has still failed to point out where those inaccuracies are. 30

*Mr. Bachman.* I also join in that objection.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.]

*Judge.*

40

*Frank C. Ferguson, further re-direct.*

*By Mr. Bachman.*

Q Why is that credit of \$5,970 instead of \$6,000? A Interest taken off in advance.

Q You mean \$30 to cover \$6,000 and odd cents for three months' interest? A I don't account for any such thing.

10 Q How do you account for it? A I account for it as one month's interest.

Q What does the \$5,970 bear in relation to the \$6,000—\$30 discount? A \$30 discount.

Q For the interval between May 21, 1913, and four months after April 25th, 1913? A I didn't say so; I said distinctly that it was the interest for one month at six per cent. on \$6,000.

Q Where did you get that information? A  
20 Well, I got it from the record here and by figuring it out in my head; that is the way I got it.

*Mr. Bachman.* I move to strike out his answer previously given as pure guessing. Your Honor can take judicial notice of the fact that the interest for three months at six per cent. is \$90.

*The Court.* The witness has not said it was three months.

30 *By Mr. Bachman.*

Q What is the interest for \$6,000 on three months? A \$90.

Q What is the interest from May 21, 1913, to August 25, 1913, approximately? A Approximately \$120.

Q Do you see any debit of the sum of \$90 on the ledger of a discount on that \$6,000 note of May 21, 1913? A No; I told you that the discount was \$30, and that it was taken off in advance and the credit was \$5,970.

40

*Frank C. Ferguson, further re-direct.*

Q But you tell me that simply because you see \$5,970 on the ledger and the face of the note is \$6,000? A No, I told you that because I know that \$30 is one month's interest on \$6,000 at six per cent.

Q Why do you know this is \$30 interest; what is it gives you that information? A Because the credit is \$5,970. 10

Q And that is all? A Yes, \$30 less than \$6,000.

Q If it were \$1 you would say it was interest, too; suppose it was \$5,999, would you say the interest was \$1? A No, I would say it from the book.

Q Have you spoken to any clerk in regard to this transaction? A I have not. 20

*By Mr. Guild.*

Q Mr. Ferguson, have you examined this note to see whether or not there is any apparent change in the length of time—

*The Court.* The \$6,000 note?

*Mr. Guild.* Yes.

Q —that the note ran.

*Mr. Bachman.* That is objected to. The note speaks for itself and the witness is incompetent to testify. 30

*The Court.* Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

*The Court.* Yes or no.

A I did examine it. 40

*Frank C. Ferguson, further re-direct.*

Q Is there any indication of a change in that respect?

*Mr. Whiting.* I object. It does not appear that this witness is competent to testify as to matters of that kind.

*The Court.* The objection is well taken.

10

*By the Court.*

Q Mr. Ferguson, this note seems to be for four months? A Yes.

Q Why did you figure the interest for one month? A That was the question asked me.

Q No, that was not the question asked you at all. You were asked whether it showed any apparent change on its face. You have testified that you figure the interest for one month, didn't you? A Yes, sir.

20

Q An inspection of the note indicates that it was made for four on its face? A Yes, sir.

Q And I ask you, if the note was apparently for four months, why you figured the interest for one month?

*Mr. Whiting.* With all difference to the Court, I do not think the witness is competent to testify to this.

30

*The Court.* You may have an exception to the question of the Court.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

A The interest is figured on the books of the bank as \$30 and I used the books of the bank.

40 Q Is there anything to indicate on the books of the bank how long that note ran—in other

*Frank C. Ferguson, further re-direct.*

words, anything to indicate when it was purchased?

A Yes, sir.

Q How long before maturity do the books of the bank indicate that the note was purchased?

*Mr. Whiting.* I object to this entire line of examination.

*Mr. Bachman.* May I join in that objection? 10

*The Court.* Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.]

*Judge.*

A. The books of the bank show that the note was purchased on May 21st and the books of the bank also show that the note was due May 25th. 20

Q Four days? A Yes, sir.

Q If the books of the bank are correct in that they have charged twenty-six days' interest too much, haven't they? A Yes, sir, but the date of the maturity of the note as shown by the bills purchased register and the date shown by the note itself are at variance.

Q What date does the note show maturity? 30

A August.

*By Mr. Whiting.*

Q As I understand, the books and the notes are at variance? A They are at variance.

Q They are not right then, don't agree. Does that mean that the books are wrong? A I don't know.

Q Does it mean that the note is dated wrong? 40

A You asked me whether the date is wrong and

*Raymond E. Smith, direct.*

you objected to it. How do I know whether the note is wrong or the books are wrong?

Q One or the other is wrong? A Certainly.

RAYMOND E. SMITH, sworn in behalf of the State.

10 *Direct examination by Mr. Guild.*

Q Mr. Smith, you were formerly connected with the Roseville Trust Company? A Yes, sir, I was.

Q In what capacity? A Secretary and treasurer.

Q From what time? A From December, 1908, until it closed.

20 Q And the institution closed when? A I believe the 14th day of August, 1913.

Q The Inter-City Land & Securities Company was a depositor there? A Yes, sir.

Q Were you interested in that company personally? A I was, yes, sir.

Q In what way? A I was a director and the vice-president, I believe, for a time.

Q How long have you known the defendant Faunce? A When—up to now, do you mean?

30 Q Prior to the Roseville Trust Company? A Prior to opening the trust company?

Q Yes A I hadn't known him at all prior to the time of opening the trust company.

Q How did this company come to bring their account to the Roseville Trust Company—do you know? A Through Mr. Whitman.

Q Had you known Whitman prior to the opening of the trust company? A No, I think not, I think after the company was started.

40 Q Was he an individual depositor there? A Yes, sir.

*Raymond E. Smith, direct.*

Q How much stock, in fact, did you hold in the Inter-City Land & Securities Company? A I think 500 shares.

Q How much a share? A \$10 a share.

Q Was that paid in in cash? A No, sir, not entirely; a part of it was supposed to have been paid in cash. 10

Q How much? A \$1,500.

Q And the balance? A The balance was, I think, paid for by a deed that represented land in the west that Mr. Whitman and I owned together.

Q Was that land conveyed to the Inter-City Land & Securities Company? A I think so, yes, sir.

Q At any time after the Inter-City Land & Securities Company became a depositor do you know of their having been overdrafts of their account in the Roseville Trust Company? A Yes, sir. 20

Q Can you say when they began? A I think it was early in the year of 1913, the early part of the year 1913.

Q Were those overdrafts with your knowledge and consent as an officer of the trust company? A Yes, sir. 30

Q Do you know whether Faunce and Whitman knew of them? A Yes, sir.

Q Tell us the first instance of their knowledge of the account being overdrawn? A I don't know that I can tell you the first instance because I don't know just when that was, just what date it was, I mean.

Q Well, approximately. A I should say it was around April.

Q What year? A 1913—you mean both Mr. Faunce and Mr. Whitman? 40

*Raymond E. Smith, direct.*

Q Yes. A I don't know that Mr. Faunce knew at that time—that is, I don't remember having seen Mr. Faunce at that time.

Q In April, 1913? A I mean early in the year, when the first overdraft was made. I saw Mr. Whitman a great deal more than I did Mr. Faunce.

Q Do you know where Mr. Whitman lived? A He lived in East Orange.

Q Did you say you saw him more frequently than you saw Faunce? A Yes, sir.

Q Where did Mr. Faunce live? A New York City.

Q When did you tell Mr. Whitman of the overdraft? A I don't know just the date, but I know we had a talk about the Inter-City account being overdrawn—that is, checks would come in that were not good and that I had paid—that is, that the bank had honored, but I can't just tell you when it was. We had several talks.

Q Can you give us the approximate date of the first talk? A I should say it was around the 1st of April.

Q What did you say to him? A As I remember it, I told him that there were checks coming in that were not good on the ledger.

Q What did he say? A I think he said that he would make preparations for a note, or make a note out and bring it over.

Q Was that done? A Yes, that was done.

Q Can you say what the amount of the note was and how it was given? A There were several notes and there was one note of \$2,500, another of \$2,500, and a third one of \$2,600, but I can't tell you the dates of them without refreshing my memory.

*Raymond E. Smith, cross.*

Q How can you refresh your memory? A By looking at the account, bills purchased book and also the account on the individual ledger.

Q Will you refer to the books you say is the bills purchased book. What is that book, Mr. Smith? A This is called the bills purchased book. It is a book that is supposed to describe any notes that are purchased by the Roseville Trust Company. 10

Q And was it a book used in the regular course of business in that institution? A Yes, sir.

Q And is a part of your system of bookkeeping? A Yes, sir, it was.

Q Was it kept under your direction and supervision? A It was.

*Mr. Guild.* I offer the book in evidence. 20

*Mr. Bachman.* I would like to cross examine on that.

*Cross examination by Mr. Bachman.*

Q What was the character of the supervision that you speak of? A General supervision.

Q Did you write in the book? A Sometimes.

Q For the most part who did write in it? A One of the clerks. One of the tellers, Mr. Jennings, did most of the writing in it, I believe. 30

Q Covering the period from January 1, 1913, to August 13th? A Mr. Jennings did most of it.

Q Did he have the papers before him as he made the entries, do you think? A Yes, sir.

Q Were they made under your direct eyesight? A No, sir.

*Mr. Bachman.* I object to it as incompetent unless it is better connected. 40

*The Court.* The objection is overruled.

*Raymond E. Smith, cross.*

*Cross examination by Mr. Whiting.*

Q Mr. Smith, I understand this book, you said, was supposed to contain the bills purchased? A I said it was supposed to contain a description of all the notes used by the trust company.

10 Q Why do you use the word "supposed"? A That is what it was for; I meant to say that.

Q You had charge, in the first instance, of the purchase of notes, did you not? A Yes, sir.

Q I mean by that that you would see whether the bank would take them and subsequently the course was to refer the matter to your executive committee? A That was the regular course, yes.

Q All notes? A No, sir; notes of small amounts I usually acted on myself.

20 Q Did you, as a matter of fact, or is there entered in this book which you are referring to, a complete record of all the notes which you did purchase or description of those notes? A A complete record of all the notes that were purchased?

Q Yes. A There are some notes purchased at times that do not appear in this book.

Q They are not in there? A But every note that is in there, I believe, that is, the description of the note is there.

30 Q Everything there described was a note purchased, as described in the book? A. Yes, sir.

Q There were other notes? A There were notes that went through without going through the book. Sometimes it was a clerical error and sometimes not.

Q When that occurred who was responsible for that? A Well, I don't know of any case off hand where a note was not registered in this book.

40 Q What did you mean a minute ago by saying— A Before we started this system in Oc-

*Raymond E. Smith, cross.*

tober, I think it was, 1912, or November, sometimes notes would go through in the general work without being put on this book because all the entries at that time had to go to the individual bookkeeper, as it was when we closed, every entry on this book is posted directly from the book into the ledger.

10

*By the Court.*

Q Posted directly, you say? A I meant to say posted directly.

*By Mr. Whiting.*

Q Were there not some other notes than those described in those books that came into your possession as an active officer of the bank? A Yes, sir, I know there were some, some time ago.

20

*The Court.* You mean came into his possession or purchase?

*Witness.* Purchased by the Roseville Trust Company.

Q. I mean by that there were some, not all of them, there were some that were left with you and some that were actually purchased? A There were some that were left with me that have never been purchased by the Roseville Trust Company.

30

Q Who would be the ones to purchase them?

A The Roseville Trust Company.

Q You acted for them in the matter, didn't you? A Yes, I had authority to purchase notes for the institution up to a thousand dollars.

Q And some of those notes which you have been referring to which do not appear in the book exceed a thousand dollars, didn't they? A Which notes do you mean?

Q Notes which do not appear described in the book to which you refer, notes that came into

40

*Raymond E. Smith, cross.*

your possession which were not purchased by the bank? A Yes, sir.

Q Referring now in your mind to those notes—I know you don't recall them all—but referring to those notes, did you call those notes to the attention of your executive committee? A  
10 Which ones do you mean, the Inter-City notes?

Q No, I think my question is clear. You have not been able to say just what they were, for you didn't put them all in there—

*The Court.* Those that came to your possession and were not put in this book, were such notes called to the attention of the executive committee?

*Witness.* I can't tell that. They may have been and they may not have been.  
20

Q How did it happen? A There is no particular reason why they should be left out of this book, whether they went before this committee or not, that is what I mean.

Q In other words, to be perfectly frank between us, there were some note transactions which you put through as active officer individually which were not revealed by you to your executive committee? A Yes, there were some of those.

Q And some of those which I have just described would appear in this book and some would not; isn't that true? A Yes, sir, I guess that is so.  
30

Q You were the person in charge at the Roseville Trust Company who would put through transactions with respect to notes, are you not? A Yes, sir.

Q There was nobody else that would do that? A This transaction—what do you mean?

Q Well, the purchase of notes, the receiving of notes as collateral or as security? A Not the  
40

*Raymond E. Smith, cross.*

entries. I usually look after the notes as sanctioning the purchase of the notes or not.

Q It was your word that decided that they were to be received or not? A Yes, sir.

Q Speaking specifically of the Inter-City, were there not some of their notes which do not appear in the book which have been discussed in your present examination? A I don't know of any just at the present time, not of the Inter-City notes. 10

Q The notes that you received from the Inter-City officials were endorsed properly, weren't they? A Well, there has been one note mentioned here, an \$11,000 note—

Q Does that appear in the book? A No, sir; I didn't intend it to. 20

Q I ask that that be stricken out. I didn't ask you what your intention was. You had that note in your possession? A Yes, sir.

Q Fully endorsed, properly endorsed? A I don't know how it was endorsed.

*Mr. Guild.* I would like to know whether this line of examination as to this record has proceeded far enough?

*Mr. Whiting.* Before they go in, and before they are testified to, I think it my duty to show that these books are discredited by the very gentleman who kept them. 30

*The Court.* You have uninterruptedly gone into that matter, but when you leave that and go into the history of the notes the Prosecutor makes a very proper objection.

*Mr. Whiting.* I want to put in the record an objection to the use of the book. 40

*The Court.* The book will be admitted.

*Raymond E. Smith, further direct.*

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]  
*Judge.*

Book referred to is marked Ex. S18.

10

*Witness.* On April 15th there was a note of \$6,000 that went to the credit of the Inter-City Land & Securities Company; that was about the time when the first overdraft appeared; a little previous to that time, at the time of giving this note there was a smaller draft in the account, and as I remember the conversation between Mr. Whitman and myself, at that time this note was given to clean up some large notes that Mr. Whitman had at the bank and the balance to be used for helping the balance in the account, that is, strengthening the account.

20

*Re-direct examination* by Mr. Guild.

Q Did that note include any other overdraft check? A I can't tell.

Q At the time this \$6,000 was given was there an overdraft? A There had been just the previous day, about that same time.

30

Q Did you talk to Mr. Whitman about it? A Yes, sir; I did.

Q What did you say to him? A I told him there were some checks coming in that were not good on the account, and he suggested that the company give a note and that that note take up some old notes that he had in the bank. One of them was a demand note, I think—

40

Q You mean the Inter-City Land & Securities Company? A One that Mr. Whitman had had himself.

*Raymond E. Smith, further direct.*

Q Inter-City Company note? A I think not. I think Mr. Whitman and Mr. Faunce were both on one of the notes.

*By the Court.*

Q When you say "on it" you mean as maker or endorser? A I mean either one. 10

Q In some capacity? A I think one of them was maker and one was endorser, and the balance to go to the credit of the company—that is, for checking purposes, to take care of the checks.

*By Mr. Guild.*

Q Did that in fact take up any checks that represented overdrafts? A I would like the A to L debit book of that date. (Book handed witness.) No, sir, it did not. The notes that were discounted were purchased previous to that time. The notes I was thinking of, that took up other notes, were away back in December, December, 1912. 20

Q Wasn't the \$6,000 note on April 15, 1913, given to take up checks of this land company which had been paid and which were not good at the time they were paid, amounting to a large sum of money. A I think so, yes, sir, now that I have referred to the book. 30

Q And can you say how much the checks aggregated? A I can tell by looking at the ledger. (After examining book.) Nearly \$5,000 worth on two days.

Q That note was credited, was it not, under date of April 15th or about that date? A April 15th, yes, sir.

Q And what debits were there about that date? A \$1,167.08. That is the total on the ledger. Do you want them separately? 40

*Raymond E. Smith, further direct.*

Q No, I want the total. A \$384, \$146.30, \$113.05, \$2,816.44, That is 3,459.79—

Q Did you call Whitman's attention to the fact that you were carrying checks, overdraft checks of that amount? A I don't remember telling Mr. Whitman the amount of the checks, 10 telling him the exact amount, four thousand five hundred and odd dollars, and I did tell him we had quite a good many checks in and they amounted to quite a good deal of money. The note of \$6,000 was given for the purpose of taking up these checks, I know now.

*By the Court.*

Q That cleaned everything up to date. A Yes, sir. 20

*Mr. Whiting.* Did the witness say that that cleaned up everything to that date?

*The Court.* Cleaned up everything to the 15th of that month.

*Witness.* I didn't say that. The checks were paid against the proceeds of this note amounting to \$4,591.37. These are the charges on those two days.

Q Was there anything due the bank at that 30 time? A Yes, sir, three days; there were some notes that the company had given previous to that time.

Q But this cleaned up everything that was due at that time in the bank? A Checks.

Q I was speaking of everything that was due. If a note is due next month you couldn't call it due now? A I think it took up the checks that came that far and paid them, that is, up to that 40 time.

*Raymond E. Smith, further direct.*

*By Mr. Guild.*

Q I show you twelve checks and two charge slips taken from Exhibit 7 and ask you whether those are some of the checks and items shown on the charge slips that were taken up on April 15, 1913, when that note was given? A Yes, sir, they are. 10

Q When had they been paid by the bank? A They had been paid by the bank previous to the 15th.

Q How long had they been held? A April 11th, \$92.50; another one on the 10th for \$12.50; another one on the 11th for \$150; April 11th, \$500; April 12th, \$250; April 12th, \$50; April 12th, \$32.69; April 14th, \$505; April 15th, \$9.52, and April 15th again, \$37.53; April 14th, \$56; April 15th, \$50; also a charge ticket on the 10th \$146.30, and another charge ticket of the same date, April 11th, \$348. 20

Q What are those charge slips or ticket? A This \$145 and also \$1.30 represents a return check, returned protested, \$145, and he has added \$1.30, making 146.30.

Q You mean by that that the Inter-City Company had deposited such an item with the Roseville Trust Company and had been given credit for it and it came back "Not good?" A Yes, sir, it was returned protested. 30

Q And the check is returned to whom? A The Inter-City Land & Securities Company.

Q You have another charge slip. What is that? A That is marked "Inter-City Land & Securities Company," \$348, "Credit C. P. Whitman."

Q Can you explain that? A I think that was a transfer to Mr. Whitman's account, to make his account good for some transaction. 40

*Raymond E. Smith, further direct.*

Q By whose instruction? A I think I instructed the bookkeeper.

Q Who requested you to do it? A Mr. Whitman, I think.

Q In other words, asked you to charge the Inter-City—

10           Objected to as leading.

*By the Court.*

Q What did he instruct you to do? A Transfer from one to the other, to make his account good, transfer from the Inter-City Land & Securities Company \$348.

*By Mr. Guild.*

20           Q To make the account good. What do you mean by that? A To credit his account with \$348. I don't know just what it applied on that day, but I could tell you by looking at the ledger.

Q Look at the ledger.

*By the Court.*

Q To make his individual account good. A Yes, sir; it was for the benefit of his individual account.

*By Mr. Guild.*

30           Q Transferred from the Inter-City's account? A Yes, sir, that was placed to Mr. Whitman's account on the same date, \$348.

Q Without that credit what was the condition of his account? A The account would have showed an overdraft of about \$200.

40           Q Did you afterwards have any more conversations with Whitman about the condition of the Inter-City Land Company's account? A I had several conversations with Mr. Whitman regarding the account, yes, sir.

*Raymond E. Smith, further direct.*

Q Give us the date, if you can, and the conversation. A I can't tell you the dates. They were very numerous.

Q How frequently did you see Whitman? A Mr. Whitman came in the bank three or four times a week, I should say, on his way to New York, and he would stop in the trust company. 10

Q You say that Whitman came to the bank three or four times a week? A Yes, sir.

Q How often did you speak to him about the condition of the Inter-City's account? A Very often; at least twice a week, I should say, or more.

Q Twice a week? A Two or three times a week.

Q What would you say to him?

*Mr. Whiting.* What did you say to him? A 20  
I told him the checks kept coming in, and this, as I remember it was later, quite a little later.

Q A little later than what? A Than April. This was around July, I should say, that I am telling of now. The conversation I had with him at that time was to the effect—was practically this—that the account was getting worse—that is, the checks were coming in in large amounts, and they had placed—the paying of those checks had placed me in a very embarrassing position. I 30  
remember a conversation I had with Mr. Faunce and Mr. Whitman and Mr. W. L. Smith in New York.

Q When? A About the beginning of June, when I told them that I was in great need of money—that is, the bank was—and that I had come to New York to look up a new correspondent in order to raise some money for the institution, and I told them at that time they would have to do all they could to help me. 40

*Raymond E. Smith, further direct.*

Q With reference to what—what help did you expect from them? A That the Inter-City account had been drawing very heavily against us and we hadn't had the credits that we ought to have had; I told them that the time had approached now when they should help me out.

10

*By the Court.*

Q What was the date of that conversation? A About the 1st of June, I should say, one morning in New York.

*By Mr. Guild.*

Q Did you say anything to them about the condition of the account? A I talked of it several times. We had meetings and, of course, we talked those things over.

20

Q When you say "we had meetings" who were present at the meetings? A As a rule Mr. Whitman and Mr. Faunce and W. L. Smith and myself.

Q What did you talk about? A We talked mostly about selling property that the company owned—

Q I am speaking with reference to this account. A That is the only way I can tell it.

30

Q I do not care outside of anything what I am asking about. A Our meetings were held for the purpose of talking over the disposals of property that we owned in order to get money in the bank.

Q Why did you want money in the bank or why did the company want money in the bank? A Simply because we had drawn more money than we should have; the checks that had been drawn for interest and for payment were larger than we anticipated.

40

Q Than who had anticipated? A The company, the Inter-City. During the latter part of the

*Raymond E. Smith, further direct.*

spring of 1913 and the first part of the summer the money market was exceedingly tight and the properties that were owned by the Inter-City, a great many of them, had third mortgages, and it was impossible to raise money on third mortgages, almost impossible in that market, and oftentimes the mortgages would be called, and the only way the company could meet them would be by paying them, because it would be impossible to place them on account of the market; when we did place them there was always a large bonus paid for anything they placed. 10

Q Where did you get the money to pay those third mortgages? A The money came out of the Roseville Trust Company.

Q At a time when the Inter-City's account was good for the amount of the draft? A No, sir. 20

Q Did Mr. Faunce and Mr. Whitman know that? A I think they did. At times I know they knew they were away overdrawn.

*Mr. Bachman.* I move to strike ou this answer as giving a conclusion of the witness.

*The Court.* The first part of it may be stricken out, where he says he thinks. The last part may remain.

Defendants' counsel object to this ruling of the Court and the same is allowed and signed and sealed accordingly. 30

H. V. OSBORNE, [L. s.]

*Judge.*

Q You say you know that they knew the account was overdrawn? A Yes, sir, at times they did.

Q How do you know they knew? A Because we talked it over.

Q Who talked it over? A Mr. Whitman and I had talked it over several times and Mr. Faunce 40

*Raymond E. Smith, further direct.*

occasionally, when I saw him. It wasn't very often I saw Mr. Faunce.

Q What did you say to them or what did they say to you indicating that they knew? A Why, I think the way I remember it, was that we ought to do something to fix up that account, and they  
10 agreed with me and they said yes we ought to do it.

Q Fix up the account. Did you tell them what needed fixing up? A Build up the account so that we wouldn't show an overdraft, wouldn't be over-  
drawn.

Q Did you tell them that the account had been overdrawn in this conversation? A Yes, sir; I had many times.

20 *Mr. Whiting.* This is an important part of the testimony. I hope the Prosecutor will not lead the witness. The witness ought to state what he remembers, not what the Prosecutor suggests to his mind.

*Mr. Bachman.* I join with Mr. Whiting in that objection.

*The Court.* Yes, the witness should not be led.

30 Q What did you tell them, Mr. Smith? A I told them several times that the account was overdrawn.

Q Did you tell them how much it was overdrawn? A No, sir; I don't know; I knew it was several thousand dollars.

*Mr. Whiting.* I ask that the latter part be stricken out.

40 *The Court.* Strike out "I knew it was several thousand dollars." You are asked what you told them.

*Raymond E. Smith, further direct.*

Q Did you tell them how much the account was overdrawn?

*Mr. Whiting.* I object to that as leading. That has all been covered, and he is now suggesting the answer to the witness.

*The Court.* The witness's attention may be directed to a certain point when it becomes apparent that his memory has been exhausted. 10  
Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

A I don't remember ever telling Mr. Whitman or Mr. Faunce just exactly the amount of overdraft shown by paying the checks that we had paid—the Roseville Trust Company had paid from time to time, but I do remember speaking to Mr. Whitman very often about the fact that the checks were coming in very fast and there was nothing there to meet them, the checks had been honored, and never returned; I don't think we ever returned a check of the Inter-City Land & Securities Company. 20

*Mr. Whiting.* It does not appear that that is what he told Mr. Whitman or whether that is the fact. 30

*The Court.* Is that what you told him?

*Witness.* Not the last part.

*The Court.* Strike out the last part, that the checks had never been returned, had always been honored, because that is not responsive to any question propounded.

Q Did the Roseville Trust Company honor all the checks of the land company? A Yes, all that I know anything about. 40

*Raymond E. Smith, further direct.*

Q What did you do with them when you treated them in that way—when the account wasn't good to charge them? A The checks were paid by the teller, carried as cash items for a while and charged off to some other account and put away in Box 55 or some place—Box 55 usually.

10 Q Now, I should like to know, Mr. Smith, what conversation relating to these overdrafts, or conversations, that you had with Mr. Faunce and the dates of them, if you can give them more in detail.

*Mr. Whiting.* The witness has been asked on that line twice. Perhaps the Prosecutor cannot avoid suggesting things to the witness's mind after he has made two attempts.

*Mr. Bachman.* And he has answered fully?

20 *The Court.* How do you know he has answered fully? Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

A With Mr. Faunce?

30 Q Yes. A I didn't have many with Mr. Faunce. They were all at the time of some informal meeting or regular directors' meeting of the Inter-City Land & Securities Company, and I remember him saying to me at one meeting—I don't know just the date of it—that he thought we would be in shape pretty soon to have a good account with the Roseville Trust Company and would not be bothering me any longer.

Q Was it bothering you? A Yes, sir, it was bothering me a great deal.

*Mr. Bachman.* I object to that question.

40

*The Court.* Objection sustained.

*Raymond E. Smith, further direct.*

Q You have spoken about a meeting in New York; you said, I think, it was in June, 1913, when you said you went to New York for the purpose of finding another correspondent? A Yes, sir.

Q Did you meet either Mr. Faunce or Mr. Whitman in New York that day? A I met both of them there. That was not a meeting of the company's that day. 10

Q I merely ask you if you met them in New York? A There was no meeting.

Q I mean where did you meet? A Oh, I see. In the office of the Inter-City Land & Securities Company on Broadway. I have forgotten the number now. It was in New York City.

Q What was the occasion of your visit to the land company's office? A I went up there with the idea of talking over the matter that had brought me to New York with them and stating the fact that the Roseville Trust Company needed some money. I met Mr. Whitman there, if I remember, and then Mr. Faunce, and then they called in Mr. Smith. It was right near where I was going and very handy and I stopped up there. That is one reason I stopped there. The principal reason was I wanted to talk it over with them. I felt I had been doing them great favors, holding their checks and paying them, and so on, and I wanted to see if Mr. Smith, through his influence, could help me. I thought perhaps Mr. Faunce and Mr. Whitman could use their influence with him to get me some additional account, perhaps from his brother. That is what I had in mind. 20 30

*Mr. Bachman.* I move to strike out that part of the answer "I had been doing them favors" and whatever is connected with that context, on the ground that it is not responsive, but it is a statement of the witness not predi- 40

*Raymond E. Smith, further direct.*

cated upon a fact which is binding upon this defendant Faunce.

*The Court.* Strike out everything after "I was doing them favors."

10 Q You have spoken of W. L. Smith. Is he connected with this company? A Yes, sir; he was one of the vice presidents of the company.

Q Now, on the occasion of that meeting did you say anything to Faunce or Whitman, or either of them, about the condition of the Inter-City account?

Objected to as leading.

20 Q Was there any talk at that meeting about the Inter-City Land & Securities Company's account with the Roseville Trust Company?

20 *Mr. Whiting.* I object to that as leading. It suggests the subject of the conversation.

*Mr. Bachman.* I object also on the same ground, and the further ground that the witness has already answered, and the Prosecutor is trying to press something on him that has not appeared here.

30 *The Court.* The objection is overruled. I do not think it is leading. It simply directs the witness's attention to something. The only subject of inquiry with which we are concerned in this case is the relations of the Inter-City Company with the Roseville Trust Company. It excludes by its very terms any matters which might otherwise be incompetent.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

40

H. V. OSBORNE, [L. s.]

*Judge.*

*Raymond E. Smith, further direct.*

*The Court.* Was there anything said about the Inter-City account in that conversation? That is the question.

A As I remember it, there was a good deal along the same lines that we have had. I told them that the condition of the account was no better than it was at previous meetings and that something ought to be done in order to get some money and they assured me that something would be done. 10

Q Meaning by "they" whom? A Mr. Faunce and Mr. Whitman. That is about all I remember of the conversation regarding the account in the Roseville Trust Company so far as the Inter-City is concerned.

Q Was there ever anything done about making the account good? A No, sir—that is, nothing was done that was planned to be done. The rents were collected, and so forth, and deposited, I believe, the same as they had been done any month or any previous time, but no property had been sold and the proceeds placed in the hands of the Roseville Trust Company. 20

Q Was there an overdraft of this account at that time? A Yes, sir.

Q Do you know how much it was? A Around June, do you mean? 30

Q Yes. A I should say \$15,000 or so.

*By Mr. Bachman.*

Q June, did you say? A The first part of June, I think it was.

*By Mr. Guild.*

Q From that time on to the close of the bank was the amount of that overdraft decreased? A No, sir; it was increased. 40

*Raymond E. Smith, cross.*

Q To what extent? A Increased, until the close—until August 14th I think it increased to about \$28,000.

Q Was that amount paid up to the time the bank closed, or any part of it? A No, sir.

10 *Mr. Guild.* Will the defendant admit that Faunce and Whitman were directors in the land and securities company?

*Mr. Whiting.* I will admit that Whitman was a director.

*Mr. Bachman.* I will admit that Faunce was a director.

*By Mr. Guild*

20 Q You have been indicted in connection with the transactions of the Roseville Trust Company? A Yes, sir.

Q And plead *non vult* to a number of them? A Yes, sir.

Q And are serving a sentence in State's prison as the result of your plea? A I am.

*Cross examination by Mr. Bachman.*

30 Q When you pleaded *non vult contendere* in this case, Mr. Smith, had you been informed of all the legal aspects of the case? A I had not.

Q You pleaded it as the best way of getting out of a situation in which you were accused, is that it? A In this one particular case?

Q In this one particular case. A No, sir.

Q Were you told what the elements of conspiracy were when you pleaded that way? A I think I understood. (Witness pauses.)

40 Q Were you finished? A I mean to say, I think I practically understood what conspiracy meant at that time.

*Raymond E. Smith, cross.*

Q Did you ever inform Mr. Whitman or Mr. Faunce that you were taking money from the Roseville Trust Company? A What do you mean?

*Mr. Guild.* I object to that question.

*Witness.* I don't understand the question.

*Mr. Bachman.* It is the essence of the case, that is all. 10

*The Court.* Objection sustained.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

Q You stated on your direct, that you had charged these checks that were found in box 55 to other accounts. Would you inform the Court to what account you charged these checks? A I couldn't tell you, Mr. Bachman. 20

Q But, as a matter of fact, every check was charged, that was found in box 55, purporting to be signed by the Interstate Land & Securities Company—charged to some account before they were ever put in that box? A I think so.

*Mr. Guild.* I object to one word in that question, "purporting to be signed." I will admit that all checks that they offered— 30

*Mr. Bachman.* I meant nothing ulterior; I merely wish to differentiate these checks from the others.

*The Court.* What you mean is, you want to know whether all these Inter-City checks which are in evidence, that were not entered in the personal ledger to the account of the Inter-City Company, were charged to some other account?

*Witness.* They must have been charged to some account of some kind. 40

*Raymond E. Smith, cross.*

Q Were they carried in cash at the time that the institution closed? A There were a few that were carried in cash at the time the institution closed.

10 Q When was the last time the pass book of this company was balanced? A I had not finished my answer. You were talking about the checks in box 55. The checks that were in the cash were not in box 55, of course.

*By the Court.*

20 Q They might have been taken from cash and put in box 55, and ultimately got in box 55? A But the means the day the bank closed. The day the bank closed, as I understand, there were some checks in cash, as per the cash item.

Q Inter-City checks? A Yes. Of course, they had not been charged to any other account.

*By Mr. Bachman.*

Q Can you pick out those checks from the ones that you identified, or somebody identified, which are in evidence? A Well—

Q There were about three or four, weren't there? A Yes.

30 *The Court.* Show him the packages.

*Witness.* These three checks (indicating), I believe, were found in cash.

*Mr. Bachman.* The witness identifies check for \$800, one for \$209.47 and \$523.73.

Q When was the last month in which the pass book was balanced from the Inter-City Company? A I think December, 1912.

40 Q Was the pass book returned to the company meanwhile? A I think it was.

*Raymond E. Smith, cross.*

Q Were you asked by anybody, on behalf of the Inter-City Company, to balance the book and send them the cancelled vouchers? A After that time?

Q Yes. A I don't remember any time, no, sir.

Q Do you remember a man by the name of Reuck, who is an expert accountant? A Yes, sir; I remember him. 10

Q Didn't you ask him to go over the books of the Inter-City Company? Didn't he ask you to balance the pass book so that he might get the cancelled vouchers? A I remember Mr. Reuck being employed for the purpose of going over the books of the Inter-City Company.

Q Don't you also remember his asking for the pass book? A I don't recall his asking for the pass book, but I think he got a transcript of the account. 20

Q Did he get it? A I think he got some kind of a transcript.

Q Did he get the cancelled vouchers? A No, sir.

Q Were the cancelled vouchers between December, 1912, and the date of the closing, ever given to the Inter-City Company? A No, sir.

Q Well, was it possible—now, you are an experienced banker—was it possible to go over the books of the Inter-City Company with relation to its affairs with the Roseville Trust Company in June and July, 1913, without having the cancelled vouchers? A It was possible, by going up to the Roseville Trust Company and going over the vouchers there. 30

Q Did he go out to the Roseville Trust Company and go through the account and make a transcript of it? A I think he did. 40

Q Was he allowed to copy it? A I think so.

*Raymond E. Smith, cross.*

Q Well, if Mr. Reuck himself would say that he wasn't allowed to, would you say it was so? A I would believe Mr. Reuck; but I have a recollection of his going out there and talking to me about it. I don't remember just what he did.

10 Q Did you become a stockholder of the Inter-City Company for 700 shares more than you testified to on your direct? A I believe I took some more stock. I don't remember just the amount.

Q The certificates were handed to you, were they not? A The last certificates?

Q Yes. A The stock I agreed to take later?

Q Those 700 shares? A I don't remember ever having gotten that.

20 Q Did you state to Mr. Whitman or to Mr. Reuck that you had agreed to put \$1,500 on the balance of the 500 shares—\$7,000—as proceeds of the 700 shares, to the credit of the Inter-City Company? A I don't think so. I think I did agree to put \$1,500 to the credit of the company in November, 1912. Then I afterwards told him that I couldn't afford to at that time. I think it was understood between Mr. Whitman and myself that the money had never been paid over. The book was written up at that time.

30 Q As a matter of fact, this \$1,500 was never paid to the account? A No, sir.

Q As to the \$7,000 you are in doubt, are you? A No; there is no doubt in my mind—

Q As to your promise to pay \$7,000 as the proceeds of the 700 shares of the Inter-City stock into the account with the Roseville Trust Company and the Inter-City Company— A I never made such a promise to my knowledge.

40 Q Did Mr. Reuck ask you whether you had made such an agreement with the Inter-City Company? A I don't remember.

*Raymond E. Smith, cross.*

Q When you received the note for \$11,165, made by W. L. Smith, was it not for the purpose of discount, to credit the proceeds to the Inter-City Company? A That note was handed to me with that idea in mind; that is, they spoke of it as a note given for stock. I think Mr. Smith bought some stock—W. L. Smith, but I told them that the market was too tight to put a note on to their credit for that large amount. 10

Q To whom did you make that statement? A Both to Mr. Faunce and Whitman.

Q Where? A At the meeting.

Q New York? A New York, I believe.

Q You kept the note? A Yes, I took the note and told them I would try to get it discounted for them; didn't agree to discount it.

Q Had you not theretofore accepted notes for discount and informed them that it was necessary to go through a formula? A For small amounts. 20

*By the Court.*

Q How much was that note? A \$11,165.

*By Mr. Bachman.*

Q Was this note of Winfred L. Smith the note I have been asking you about? A I believe it is.

*Mr. Bachman.* I offer it in evidence. 30

*Mr. Guild.* I object.

*The Court.* It may be marked for identification.

(Marked D3 for identification).

Q Where was this Exhibit D3 for identification placed after you received it? A It was in my desk, I believe.

Q Was it there at the time the bank failed? A I so understood, yes, sir.

Q Do you know Winfred L. Smith? A I knew him, yes, sir. 40

*Raymond E. Smith, cross.*

Q Wasn't he a man of means? A I don't know.

Q Well, is he reputed to be a man of means, living in Orange, New Jersey? A I know he is a man who is connected with a good business; that is, he and his brother ran a good business in New  
10 York. I don't know how much his worth is; I don't know of his owning any real estate.

Q Doesn't he live in a very handsome house in Center street, in Orange? A He lives there, yes, sir.

Q Isn't he generally reputed to be a man of means? A Not that I know of. I don't know him well enough for that.

Q You were informed that he was a man of means? A I understood that he was well to do.  
20

Q Good for \$11,165? A I had not got that figure with the notes; I don't know whether he was good for that note or not.

Q When you took that note did you think he was good for \$11,165? A Only from what I had heard others say.

Q That is one method of determining credit, is it? A It depends upon who "others" are.

*The Court.* What was the date of that note?  
30 *Mr. Guild.* June 16, 1913.

Q Were you also called upon by one Bowe, a former employee of the Roseville Trust Company, with a request that you balance the pass book of the Inter-City Company and send it, with the vouchers, to the New York office? A I don't remember.

*Mr. Guild.* I think the date should be fixed. if the Court please.

40 *Mr. Bachman.* I will fix it after the identification, any time.

*Raymond E. Smith, cross.*

Q Any time between November, 1912, and the day of the failure, say about May, 1913? A I don't remember.

Q In June, 1913? A I never remember Mr. Bowe coming to me.

Q You remember him as a former employee of the bank, don't you? A I think he was there for a very short time, yes, sir, calling in once in awhile. 10

Q He afterwards became an employee of the Inter-City Company, a short time? A Yes, sir.

Q Assuming that you charged the checks that were found in box 55 to other accounts, was it in your power to balance the pass book in June, 1913, and deliver the book with the vouchers to the Inter-City Company? A Within my power?

Q Yes. A Yes, sir. 20

Q Would it not have been necessary to have made many entries different from what are now made in the ledger in order to make the pass book balance? A It would have been necessary to have made many entries on this one account.

Q Yes, I mean that. A In order to get all those debits in it would be impossible to rule the book off, if I put all those debits in.

Q It would have been a task, a great deal of labor, to have balanced the book in June or July, 1913, and returned it with the cancelled vouchers, to the Inter-City Company, wouldn't it? A It would not have been possible because of the debit balance that would have showed on the pass book. You cannot rule a book off showing an overdraft. It is against the rule of banks. 30

Q Why didn't you balance the book, then, and return it to the Inter-City Company with a statement showing how it stood, instead of relying upon a personal conversation? A With whom? 40

*Raymond E. Smith, cross.*

Q What? A With whom? I don't quite catch your meaning, at all? With whom?

Q Why didn't you balance the pass book which you had before, in your possession, in June, 1913, and send it to the officers of the Inter-City Company, showing how their account stood, instead of  
10 relying upon what you call a personal conversation? A I don't think I was asked to balance the book. I don't think I saw the book at all, in June, 1913.

Q The pass book, you have stated as thinking to be in the possession of the Roseville Trust Company after December, 1912. You so stated? A I stated not having remembered seeing it since that time.

Q Didn't you know it was in the possession of  
20 the Roseville Trust Company, delivered there between December, 1912, and March, 1913, for the purpose of being balanced? A No, sir; I don't know that.

Q To whom was it to be delivered, necessarily?  
A To the teller, probably.

Q Mr. Mindnich? A Probably to the teller, because the bookkeeper has no regular window at the Roseville Trust Company.

Q Did anybody in your bank know about box  
30 55 but yourself? A There were others there that knew box 55, yes, sir.

Q Did Mr. Thompson have access to that box?  
A He could have had; I don't think he ever did have.

Q Was it just an ordinary safe deposit box with a number of keys to it? A Yes, sir; there were two keys to the box, on one ring.

Q Who had the second key? A The keys were together on one ring.

Q In your desk. A No; because we kept no  
40 lock to the boxes, then, as a rule.

*Raymond E. Smith, cross.*

Q The box was not locked, then? A During the day, I mean.

Q When the bank closed on August 13th or 14th was the box closed? A Yes, sir; the box was locked.

Q Who had the keys? A I think the keys were in my possession at that time. 10

Q When you came back did you assist in straightening out the books? A What book?

Q Did you assist in straightening out the books? A I wanted to do all I could to help them straighten out the books.

Q Do you remember anything in November, 1913, connected with a fire that occurred in the basement of the Roseville Trust Company? A I heard something of that. 20

Q Did you hear of anything—of documents being destroyed at that time? A Only these last few weeks. I never have heard that anything of importance was destroyed.

Q You have heard that Mr. Ferguson testified that he heard the fire department was out there in November, that a fire must have necessitated such action. Do you recall anything about it? A No, sir. I have only heard that since I have been here in Newark. 30

Q You don't know whether any papers of importance were burnt up at that time? A I never heard of anything.

Q You don't know anything to the contrary there? A I don't know anything at all about it except what I heard.

Q Were any of those accounts to which you charged the Inter-City checks, that were reposing in the sarcophagus in box 55, charged to any accounts that Mr. Faunce or Mr. Whitman were connected with? A No, sir. 40

*Raymond E. Smith, cross.*

Q Were any of those accounts that those checks were charged to balanced before the bank closed?

A I cannot tell you, Mr. Bachman. Most of the charges, I think, were against general ledger accounts; that is, bank accounts.

Q Without any discrimination? A Yes.

10 Q Charged to the first account that came handy? A No, sir.

Q Would you please look at the ledger, the individual ledger, and give us the total of the Inter-City deposits for the month of May? A You mean the cash deposits, or deposits of checks used, or do you mean the total credits? What do you mean, the total credits, note credits and everything?

20 *Mr. Bachman.* No, I mean deposits. If your Honor please, I want to indicate that this was a going business.

Q Deposits in the regular order of business?

A Deposits in the regular order of business outside of accommodation notes? You don't include those?

*Mr. Bachman.* I don't want your characterization of the notes as accommodation notes. I move to strike that out.

30 *The Court.* He has not characterized anything. He simply asks you what you want.

Q I want just the deposits of checks and cash in the ordinary course of business for the month of May? A \$3,618.28.

Q What were the deposits for the month of June?

*The Court.* Would not the total deposits answer your purpose?

40 *Mr. Bachman.* No; he said there were some other moneys that might be deposits.

*Raymond E. Smith, cross.*

*The Court.* He just wants the check deposits. A \$4,570.69.

Q And for the month of July? A \$880.61.

Q Now, for August, up to the time of failure, plus \$699.30, which it is agreed should have been included? A \$6,597.08.

Q Does that include the \$699.30? A It does, yes, sir. 10

Q Were any of the checks of the Inter-City Company refused payment? A Because they were—

Q Weren't they? A On account of insufficient funds, you mean?

Q Yes. A I don't remember, no sir.

Q Don't you know, as a matter of fact, that the Inter-City Company was obliged to make good to upwards of \$6,000 of checks that were refused by the bank at the time of the failure? A I don't know anything about that. That was after the bank failed. 20

Q Don't you know whether they had to pay in cash all the dishonored checks that were drawn in August on account of the failure of the bank, with the exception of very few? A No, sir; I don't know that.

Q Were there any notes contained in box 55 which had not been discounted, which were made by the Inter-City Company and endorsed? A I don't know of any off-hand. 30

Q Were there any in your desk that were undiscouted? A Of the Inter-City?

Q Yes. A Not that I know of.

Q Do you know that the Inter-City was under contract to purchase the premises 103 to 109 West 141st street, in June, 1913? A I don't remember that, no. 40

*Raymond E. Smith, cross.*

Q The Inter-City Company was a going business, was it not? A It was going, yes, sir.

Q Collected a large amount of rents and handled a great deal of property? A Yes, sir. they were handling a lot of property.

10 Q Mr. Faunce, you knew only as a real estate expert, did you not? A He was reputed to be an expert, yes, sir.

Q No financial man at all? A I don't know. I didn't know Mr. Faunce very well.

Q But you did know, though, that Mr. Faunce was simply a real estate man and that was his business? A I understood he was a practical man in the real estate business.

20 Q My next question will be personal, but it is intended to be honest. Were you not reputed to be a man of wealth, previous to the failure of the bank? A I don't think so. That is saying a good deal in these times.

Q I know, but you have changed your opinion since. But what was your general reputation, as you meant it previous to August, 1913. Was it not that of a man of wealth? A I don't know what my own reputation was.

Q Nobody was ever kind enough to tell you? (No response).

30 Q Didn't you think that Mr. Faunce and Mr. Whitman, prior to August 14, 1914, regarded you as a man possessing large financial means? A I don't think so; no, not large financial means.

Q When you bargained for the purchase of 1,200 shares of stock did you have any reason to suppose that they thought you could not pay for the stock? A I think they thought I would pay for it finally.

40 Q Don't you think that they thought that you were going to put that money in the bank, \$1,500

*Raymond E. Smith, cross.*

at the outset and \$7,000 within six months of the 1913— A I didn't think so as to the latter amount, no, sir.

Q Didn't anybody inform you that they relied upon the \$7,000 and the \$1,500 to assist the credit for the Inter-City Company by providing for checks drawn on that account? A No, sir. 10

Q If they did say so would you differ with them?

*Mr. Guild.* I object.

*The Court.* He has denied it. You may contradict him in the regular way; you can inquire how certain he is; but whether he would contradict somebody else or not would depend on what somebody else would say.

*Witness.* I did not quite finish. 20

*Mr. Bachman.* Well, you don't have to answer that question; it is ruled out; they will not let you.

Q What was the process, in the Roseville Trust Company, with regard to crediting deposits. Was the entry made directly from the deposit slip? A The entry in the ledger, you mean?

Q Yes. A Yes, sir.

Q After the ledger entry was made what was done with the deposit slip? A The deposit slip, after the entry in the ledger, was turned over to the assistant bookkeeper; I believe he entered it in his cash book. 30

Q Is there a book in the receiving teller's cage which would show the detail deposits descriptively as to the depositor and the amount? A Not descriptively, no, sir; only in bulk.

Q Do you simply make a grand total for the purpose of making a proof? A It is listed, though, on the machine. 40

*Raymond E. Smith, cross.*

Q Isn't it within the limits of possibility, founded on your experience as a banker, that slips are often lost between the receiving teller's cage and the bookkeeper who is to post it? A I think that is a very rare occurrence.

10 Q It has occurred, in your experience, has it not? A Might have been lost, temporarily, and found again.

Q No; but haven't you been obliged to carry large differences caused by loss of deposit slips? A No, sir.

Q For what account was that \$669.30 credited? Can you tell for what account that \$669 was credited on August 7th? A I cannot tell, no, sir. I could probably find where it went.

20 Q Well, I just mean that. I mean, can you tell, as you are testifying now—can you find out to where that account went as a credit, \$699.30? A I probably could find it if I had time enough.

Q Would it take long? A I couldn't tell that.

Q Who had the key to the loose leaf ledger book? Any particular person? A The bookkeeper had it, but I had one also.

Q Did Mr. Thompson have one, too? A The teller?

30 Q Yes. A No, sir; I think not.

Q Was it within the power of almost any employee of the bank to unlock the book of each of these ledgers and extract a page? A No, sir.

Q In whose power was it? A It would have been their power, but not without the aid of somebody else.

40 Q No, not did they have the power, but did anybody else have the means of unlocking the book and extracting a leaf from the ledger? A The bookkeeper had that means; so did I.

Q Did Mr. Jennings have it? A No, sir.

*Raymond E. Smith, cross.*

Q Did the assistant bookkeeper have it? A No, sir, I think not.

Q Is it a difficult operation to extract that book? A It is necessary to have the key.

Q Just unlock the book and lift it up, extract it and put it back again? That is difficult, isn't it? A You use your key again to lock it. 10

Q It is not difficult, though, is it? A No, not difficult. It is necessary to have the key, through.

Q Didn't your bank, in the course of the first six months of 1913, have occasion to unlock the back of the individual ledger, to either extract pages or put in pages? A During what time?

Q Six months? A Certainly.

Q That could be done by either the bookkeeper or yourself without the knowledge of the other, could it? A Without the knowledge of the other, by either one of us, you mean? 20

Q Yes. A Yes, sir.

Q Will you state to the court why it was that you allowed this account to go so very long without reporting to Mr. Whitman, with whom you had a conversation, first, or to the directors of the Inter-City Land and Securities Company, exactly how the account stood? You allowed it to go for eight months, did you not? A That what? 30

Q Why didn't you report, in all that time, the exact standing of the account between the Roseville Trust Company and the Inter-City Land and Securities Company, with appropriate entries, in detail? A I wasn't asked to.

Q Didn't the situation, as it presented itself to you, demand that you should do a thing of that sort? A I had reported often times an overdraft.

Q But, Mr. Smith, the report of a so-called overdraft would carry nothing but an opinion. 40

*Raymond E. Smith, cross.*

Why didn't you render a statement of account in detail, showing by actual figures that there was such a thing as an overdraft? A It is not customary in banks that have pass books to depend upon to send out statements. It is not customary for banks to send out statements except where  
10 they make a business of it, unless, if a man wants to know how his account stands he leaves his book and has it written up. That is the statement he gets.

Q By whom were the entries made in the months of July and August for this account of the Inter-City Land and Securities Company? A Part of the time by Mindnich and part of the time by Brennan, I think, his successor.

20 Q Didn't Mr. Thompson make any of those entries? A In July and August?

Q Yes. A No, sir; I didn't see any entries made by Mr. Thompson at all.

Q What was the occasion of charging that \$2,500 item in the last part of August? A The occasion?

Q Yes. A It looks like a note.

30 Q Wasn't that note due on July 10th? A I couldn't tell you. It is not described here on the ledger. I couldn't tell you by just looking on the ledger alone.

Q They have been hanging on that. I thought you could tell us?

*Mr. Mott.* I object to these side remarks.

*Mr. Bachman.* That is perfectly proper.

*The Court.* No, it is not proper for you to do anything except to ask proper questions and make objections to the Court.

40 Q The witness Thompson testified from the individual ledger with respect to the details of

*Raymond E. Smith, cross.*

items. Is it possible for you to do the same thing, Mr. Smith? A Not all the items, no, sir.

Q Did you not have, on July 10th, a note for \$2,500 in renewal of the one maturing on that date? A This \$2,500 you asked me about, was it August or July?

Q What? A That was August you asked me about before, wasn't it? 10

Q Will you look at the book that was put in evidence last, right under your hand, under date of March 10, 1913, a note of \$2,500, that fell due on July 10th, did it not? A Yes, sir; July 10th was the due date on it.

Q Was any note of \$2,500 charged on July 10th, on the ledger? A No, sir; there is not.

Q Therefore, it is fair to presume that the note that was charged at the end of the account was the note that was due July 10th, is it not? A Well, you can presume so. 20

Q Don't you recall having been given a note of \$2,500, drawn payable four months after date, which was to be in renewal of a note falling due July 10, 1913? A When was it handed to me, do you know?

Q Just a few days before that, for the purpose of renewal? A I do not recall it, no sir. Renewal notes often came in the hands of the bank after the other notes were due; sometimes nearly a month after, and the notes would naturally be dated back, so as to correspond with the due date of the original note. 30

Q Don't you recall receiving a renewal note for that \$2,500 note that matured on July 10th? A No, sir.

Q Did box 55 have that renewal note in it? A I don't think so. 40

*Raymond E. Smith, cross.*

Q Do you recall that on May 16th, a note for \$2,600 was charged to the Inter-City Land and Securities Company? A I see no charge here for that amount.

10 Q Don't you recall having received a new note for renewal of that, payable four months after date, delivered to you either the first or second week of June? A The first or second week of June?

Q Yes. A That was after the note was due?

Q The first or second week of May, I mean. I did not mean June. A There is a note of \$2,600, I believe, charged up on the 16th of May.

20 Q Don't you remember receiving a renewal note of the same amount, before that note was charged up? A I think there was a renewal of that note for \$2,500 that went to their credit on that date, on the 16th, \$2,450. The old note was charged up against the proceeds of the new one.

30 Q Do you recall receiving, between the 1st of July and the 17th day of July, notes of the Inter-City Land and Securities Company, endorsed by Mr. Whitman and Mr. Faunce, aggregating about \$15,000, to be discounted and placed to the credit of the Inter-City Company, divided into two fives and four notes—two twenty-five hundreds, maturing at different times in the fall? A I never saw such notes, to my knowledge; I never remember seeing such notes at all.

Q Did you tell either Mr. Faunce or Mr. Whitman that you had not posted any of the checks of the Inter-City Land and Securities Company against the account of that company? A No, sir.

40 Q Did you tell either Mr. Faunce or Mr. Whitman that you had charged the checks of the Inter-City Land and Securities Company to any other account but that company's own? A I don't remember ever telling them that, no.

*Raymond E. Smith, cross.*

Q Did you tell either Mr. Faunce or Mr. Whitman, at any time between March 28, 1913, and August 14, 1913, that you were taking money from the trust company to keep the Inter-City Land and Securities Company in funds? A No, sir.

*Mr. Bachman.* If your Honor please, I would like to continue by cross examination in about ten minutes, if Mr. Whiting can take up my cross examination when I leave off. 10

*Cross examination by Mr. Whiting.*

Q Mr. Smith, when you did pay the checks of the Inter-City Land and Securities Company, which you say overdrew their account, you expected that those checks would subsequently be made good, did you not? A I thought they would be made good at some time, yes. 20

Q You never had any agreement with Faunce or Whitman that they should not be made good, did you? A No, sir.

Q On the contrary, the argument was that they should be made good, wasn't it? A The understanding was that they should be made good. ,

Q Your understanding, certainly was that? A That was the understanding, that they should be made good. 30

Q And did you have any understanding that the promisory notes of Faunce and Whitman, or of the Inter-City, should not be paid? On the contrary, was not your understanding that those notes would be paid? A Which notes do you mean, Mr. Whiting?

Q Well, the notes of the company, the notes signed by Whitman or Faunce, which you had? A You mean whatever notes were purchased by the company or to the credit of the company? 40

*Raymond E. Smith, cross.*

Q Yes. A There was not any agreement that the notes would be paid at all.

Q Was there any agreement that they should not be paid? A No, sir.

Q You expected them to be paid? A That is the usual expectation of taking notes, yes, sir.

10 Q And it prevailed in this case, did it not? A I expected them to be paid at some future time, yes.

Q This company was dealing largely in New York City real estate, was it not? A Yes, sir.

Q You were interested in the company? A Yes, sir; I was.

20 Q You were familiar with the state of affairs in the company with respect to the nature of its business, and its hopes and expectations, in a general way? A I was.

Q You were a director? A Yes, sir.

Q Now, the company had, subject to the mortgages that you have spoken about, title to some very handsome properties in New York City, did it not?

*Mr. Mott.* I object. What has that got to do with it?

30 *The Court.* Suppose he eliminates the word "handsome?"

*Mr. Whiting.* I will be glad to do that.

*Mr. Mott.* Then I will object to it. What difference does it make whether the company had property in New York or anywhere?

*The Court.* (After further argument.) I will hold that this is a matter of affirmative defense. You may put it in, if you wish to offer it, on your defense.

40 Q Were you interested in that company? A I think not, never as an officer.

*Raymond E. Smith, cross.*

Q I say were you interested? A I might have had a very small—I may have had a few shares of stock in that company; I don't remember whether I did or not.

Q How about the Dunellen Coal & Supply Company? A I was president of that concern.

Q And you were the acting managing officer of the Roseville Trust Company, were you not? 10

A Yes, sir.

Q Mr. Whitman had no interest or stock in any of those companies, had he? A No, sir, not to my—no, he didn't.

Q You were interested in the Inter-City Land & Securities Company, were you not? A I was a stockholder, yes, sir, and an officer.

Q And owned about a quarter of that stock, didn't you? A I don't remember just how much the stock, the capital stock, of the company was. I know I owned 500 shares at the beginning, I believe. 20

Q What? A That was the amount I took at first.

Q And it subsequently was increased to \$12,000 all told? A I think that was the number of shares that was allotted to me to take.

Q And the \$1,500 in cash, I understand you to say, you were to pay \$1,500 in cash at one time and part payment on this stock? A The 500 shares, yes, sir. 30

Q And then there was some western real estate in which you had an interest which was taken in as part payment for your stock? A Yes, sir.

Q When did you pay this \$1,500 to the company? A I never paid it; I agreed to pay it in the fall of 1912, but I didn't do it; I couldn't do it. 40

*Raymond E. Smith, cross.*

Q You had these various interests to which I have referred in these various companies? A Yes, sir.

Q Were you not looking and acting like a man that could easily pay the amount that you promised for your stock? A The \$5,000?

10 Q I say, the amount that you agreed to pay for your stock? A That was \$1,500 and real estate.

Q How about the note of \$7,000? A I don't know that I ever gave a note for \$7,000?

Q Do you swear that you did not? A I don't swear that I did not; I don't think there was ever any such note given; it was never brought to the Roseville Trust Company.

20 Q Will you swear that you didn't give the Inter-City Company afterwards to understand that you had given them this credit of \$7,000? A I never agreed to put a credit of \$7,000 to their account.

Q What was there about that? A As I remember it, I agreed to take that much stock; that was the amount allotted to me in the new stock issued of that company.

30 Q And you actually got it, didn't you? A I don't know whether I got the new lot or not; I got the first lot, I believe. Going back to the first lot, I agreed to give \$1,500 and this equity in this western property, and I afterwards told Mr. Whitman, and I think Mr. Faunce, too, that I never paid this \$1,500 in; their books showed that when it was written up in December, 19 I agreed at a meeting to take 700 shares of the new stock, but I didn't—

40 Q Did they ever get the cash for it? A But I did not agree to put up \$7,000 to the credit of the Inter-City Land & Securities Company.

*Raymond E. Smith, cross.*

*By the Court.*

Q How did you agree to pay for the stock? A I believe that the agreement was that I should pay for it when I could, but I never remember making a statement that I would put \$7,000 to the credit of the Inter-City Land & Securities Company account.

10

*By Mr. Whiting.*

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

Q Well, you did buy a number of notes for the bank for the Inter-City Company? A The bank bought several, yes, sir.

Q You did it for the bank? A Yes, we bought quite a few—that is, \$13,000, perhaps.

Q Some of these notes do not appear in the bills purchased ledger, do they? A As far as I know, all appear.

20

Q Were not some of those notes kept by you in box 55; notes signed by the Inter-City people? A Not that they didn't get credit for, not that I remember.

Q Some of them were kept in box 55? A Some of them were put there after they came due and never paid.

Q And then there were renewals? A I don't think so; I don't think those that were put in box 55 have ever been renewed.

30

Q Were never renewed? A I believe not.

Q Did you report that to the executive committee? A I did not.

Q Did you ever consult with the executive committee as to the state of affairs of the inter-City's account and go over that matter with them? A No, sir; I remember at one time that—

Q You have answered my question. A Well, I was going to—

40

*Raymond E. Smith, cross.*

*Mr. Mott.* You asked him if he ever did it and he says he remembers one time.

*Witness.* I remember one time the president spoke to me and thought the Inter-City had more notes in the bank than it should have.

10 Q Did he know all the facts at that time? A All the facts.

Q As to their account at that time? A No, sir; he was judging by the account we had on the ledger, as far as the account is concerned.

Q Isn't it true that you didn't explain to your executive committee the state of affairs as to the Inter-City account? A In what way, Mr. Whiting?

20 Q Any way at all. A You mean the way the checks had been coming in and paid?

Q You say you had a number of their notes and checks which you say were an overdraft; I want to know if you reported that matter to your executive committee? A I didn't report the matter of the overdraft to the committee.

30 Q If you had reported to the committee they would have told you not to have recognized any more of their checks? A They would probably have told me to send their checks back if more came in, yes.

Q This company, in making its realty operations, required ready money practically every time it bought new property? A Yes, sir.

Q Money for closing deals? A Yes, sir.

Q And they would have been unable to obtain ready money from time to time they would have lost their properties, wouldn't they? A Very likely would have.

40 Q If their account had been kept back by the bank through the instructions of the executive

*Raymond E. Smith, cross.*

committee, if they had lost their credit, perhaps the value of your stock would have been very much depreciated in the Inter-City Company, wouldn't it? (Witness pauses.)

Q That must be simple to answer yes or no.  
A I was trying to think of the value I put on the stock.

10

Q Wouldn't that have hurt the Inter-City Company, Mr. Smith? A Yes, it would have hurt the company.

Q I say, you were a stockholder and it would have hurt your holdings, wouldn't it? A Probably would have.

Q You never informed your executive committee that you were interested in the Inter-City Company, did you? A I don't know whether I ever told them or not; I had no reason for not telling them.

20

Q You don't remember ever telling them? A No.

Q Now, these various companies that you say you were interested in, there was no relation between the Inter-City and these other companies, was there? A No, sir.

Q In other words, you were the only officer of the Inter-City who was an officer or director in any one of these other companies? A Yes, sir; I was the only one.

30

Q You wanted those companies to succeed, didn't you, all of them? A Yes, sir.

Q You expected that they would succeed, didn't you? A Yes, I thought they would eventually.

Q You had some of your own money in there and you had every reason to do all you could to make them succeed? A Yes, sir.

Q You were the person who had the final word to say as to the disposition of the funds of the Roseville Trust Company, were you not? A Yes.

40

*Raymond E. Smith, cross.*

Q You were in charge of passing upon the making of loans and purchase of notes? A To a certain amount.

Q And you had control and did control a system of keeping books, the actual books kept in the bank? A Yes, sir, they were under my supervision.

Q Yes, under your supervision, they were kept as you instructed, were they not? A Yes, sir.

Q They were not kept honestly, were they, Mr. Smith? A I don't know what books you are referring to.

Q The books of the Roseville Trust Company. A All of the books?

Q Why, just as you say, the books of the Roseville Trust Company? A Why, as a whole, no, sir.

Q They were dishonest, and that was according to your instruction, was it not? A I couldn't say altogether.

Q Well, give us the best idea that you have of that—whom else would you implicate in the matter? Perhaps you do not wish to answer that. Let me ask you this: Did Mr. Whitman or Mr. Faunce ask you to keep those books dishonestly?

A They did not.

Q Did they know you were keeping them dishonestly? A Not to my knowledge.

Q You never told them so? A No, sir.

Q Isn't it a fact that there was no agreement between them and you that they should do so?

A Not that the books should be kept dishonestly, no, sir.

Q There was no agreement between them and you that any of their transactions should be kept from the executive committee, was there? A No agreement, no sir.

*Raymond E. Smith, cross.*

Q No understanding? A No understanding, no.

Q Well, you did keep those transactions from your executive committee, as I understand you to have said once or twice before, some of them?

A Some of these transactions I did keep from the executive committee, yes, sir. 10

Q Now, can you tell the jury how many instances there are of falsifications in the books of account of the trust company? A I can't tell that, no.

Q There were a good many, were there not? A There were several, yes, sir.

Q More than several. Take for example the account of Miele & Bruno, there were some thirty-three checks that were charged against the wrong people, weren't they, the wrong accounts? A I think there were that many, yes, sir, in the indictment against Bruno. 20

*The Court.* Read that question again.

(Question read.)

*Witness.* You don't mean the account of Miele & Bruno?

Q I mean just what the question said. A I didn't understand you had the word account there. There were lots of checks that did not appear in Bruno's account that were charged to other people's accounts. 30

Q And when the bank was closed in box 55 you had accumulated a great many checks that had not been charged in the account where they should have been, had you not? A There were a good many checks accumulated, yes, sir.

Q And in your desk there were a lot of accounts that had not been charged? A A lot of accounts? 40

*Raymond E. Smith, cross.*

Q A lot of items. A There were a few; I don't know—I don't remember in my desk.

Q Mr. Smith, there was trouble at the Roseville Trust Company? A There was.

Q And I don't understand you to say that the trouble was confined to the account of the Inter-  
10 City Company? A Not altogether, no, sir.

Q Wasn't it extending far beyond that account?  
A There were several accounts of that character that had a good deal to do with the closing of the Roseville Trust Company.

Q You don't want us to believe that you can carry in your mind all the instances in which you falsified the accounts with respect to these matters which you say had to do with bringing about the closing of the Roseville Trust Company? A No,  
20 sir.

Q You can't remember them, can you? A I cannot remember them all, no, sir.

Q You heard it testified this morning, did you not, by Mr. Ferguson that he had been working for two years and had not gotten them all straight in his mind? A I heard that.

Q That would give a fair indication of the state of affairs you left behind you, would it not?

A To some people it might.

30  
Adjourned until tomorrow, Thursday, May  
13, 1915, at 9:30 o'clock A. M.

*Ray E. Mayham, cross.*

THIRD DAY

ESSEX COUNTY OYER AND TERMINER,

Thursday, May 13, 1915.

STATE

*vs.*

CLARENCE P. WHITMAN AND  
JOHN B. FAUNCE.

10

Met pursuant to adjournment.

Present, counsel as before stated.

RAY E. MAYHAM, recalled.

20

*Further cross examination by Mr. Bachman.*

Q Mr. Mayham, do you remember Mr. Peters calling at the Roseville Trust Company some time in the fall of 1913? A Yes, sir.

Q Can you mention approximately the month? A I can't tell you the month, no, sir.

Q Was it about September? A I should say that it was last September—I should say that it was more likely to have been in November.

30

Q Did you and he co-operate in any way for the purpose of reconciling the accounts as he presented them to you and as the trust company's seemed to show it by their books? A He brought his books and I took certain books of the trust company and I made an attempt to find what was on the trust company's books which was not on his book, what had been paid by the trust company which his book did not show, what was on his book which was not on the books of the Roseville Trust Company.

40

*Ray E. Mayham, cross.*

Q At that time did Mr. Peters draw up what he claims to be a reconciliation of the account and leave it with you? A, No, sir.

Q Did you see a copy of the reconciliation of account that he drew up at that time? A Why, he took voluminous figures and had them there  
10 right before me. I don't recollect at this time just what they were. Of course, I took figures, too; both of us took our figures independently.

Q Didn't you see that his figures showed a balance claimed by the Inter-City Land & Securities Company of about \$6,800 on deposit with the Roseville Trust Company? A I can't remember that, Mr. Bachman.

Q Allusion was made in this trial to a paper characterized by one of the witnesses as an attempted reconciliation which was said to have been  
20 drawn by Peters when you were there, or different matters on which Mr. Peters and you co-operated; you can't recall a written paper on ordinary book-keeping sheets pasted together which was claimed to be a reconciliation drawn by Mr. Peters? A Not by Mr. Peters. I made a paper showing what appeared on their books and not on ours and vice versa; I made one up for my personal use and I assumed he made up one for his use.

30 Q You didn't see it? A I may have seen it, but I have no recollection of it.

Q Would you know it if you saw it? A I might.

Q Will you let me see it?

*Mr. Mott.* We have a paper with some figures on made by Mr. Mayham.

40 *Witness.* Mr. Bachman, Mr. Peters took with him all of the books that he brought over, and he left no memorandum with me or anybody else connected with the trust company.

*Raymond E. Smith, cross.*

*By the Court.*

Q Were you able to reconcile the account? A I was not able to reconcile it. I was able to show the differences, what appeared on our books that did not appear on theirs, and vice versa.

Q Did you reach any conclusion? A I reached no agreement whatever, no, sir. 10

*The Court.* It may be well to have Mr. Mayham identify the papers in case there is any question about it in the future.

Q Is this the paper you made up with Mr. Peters in the attempt to reconcile the account which you say was not successful? A This is the paper, yes, sir.

*By Mr. Mott.*

Q I call your attention to some pencil writing there. Is that yours or was it put there afterwards? A I recognize a lot of this as mine, but I recognized Mr. Ferguson's handwriting. 20

*The Court.* It is quite apparent that the paper is incompetent in this case.

Marked Ex. S19 for identification.

RAYMOND E. SMITH resumes the stand.

*Cross examination* by Mr. Bachman. 30

Q Mr. Smith, is that your signature at the bottom of that letter (showing witness paper)?

A Yes, sir, that is my signature.

Q Was that letter delivered by you to the Inter-City Company? A I think it was.

*Mr. Bachman.* I offer that letter in evidence.

*Mr. Guild.* I object, for the same reason I objected yesterday, that they cannot put in evidence on our case. 40

*Raymond E. Smith, cross.*

*The Court.* Objection sustained.

Defendants' counsel pray an exception to this ruling of the court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, (SEAL)

*Judge.*

10 Q Did the Commissioner of Banking & Insurance make an examination of the Roseville Trust Company between December, 1912, and August, 1913? A No, sir—

*Mr. Guild.* I don't know whether it is cross examination or whether it is material.

*The Court.* I do not think it is cross examination. Objection sustained.

20 *Mr. Bachman.* I would like to state with regard to that, that it is the purpose of showing that matters between December 12, and August, 1913, were of such a character that even if the commissioner had made such an examination, as to which I know nothing, they were in such a state of disorder that it would be impossible to bring about a reconciliation.

*The Court.* I will not permit it.

30 Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, (SEAL)

*Judge.*

Q Did Reuck ask you about your having given a note or giving a note of \$7,000 for 700 shares in the Inter-City Land & Securities Company some time in the month of June, 1913? A I don't remember.

40 Q Did he ask you whether you had deposited the \$1,500 due on the 500 shares of stock? A I don't remember that.

*Raymond E. Smith, cross.*

Q Did Reuck have any conference with you in the Roseville Trust Company in June, 1913? A He probably did. He was working off and on.

Q At that time was the question of the pass book of the Inter-City Company discussed? A I don't remember that.

Q Have you seen the pass book of the Inter-City Company since the failure? A I have not. 10

Q Have you been told by any of the representatives of the banking department that it was in the possession of the Roseville Trust Company? A No, sir.

Q Have you made any effort to find out information about the pass book? A The only information I found out was that it was balanced December, 1912. 20

Q And that information is shown by the ledger itself? A Yes, sir.

Q Were you familiar with the matter of check books of the Inter-City Company, whether they were located in New Jersey or New York? A No, sir.

Q Didn't you know as a fact that all of the checks of the Inter-City Company were drawn in the City of New York? A I don't know that I know. Their office was there; that is all I know. 30

Q Were not all these checks that came through the clearance of the exchange checks were drawn in the City of New York? A I can't tell that; I have no way of telling it.

Q You are willing to state that any checks that Mr. Faunce drew were all in the City of New York? A No, I can't state that.

Q Didn't you keep yourself informed as to the affairs of the Inter-City Company? A To what extent? 40

*Raymond E. Smith, cross.*

Q To the extent of knowing whether the check books were kept in New York and the checks were drawn at that point? A No, that didn't concern me at all.

Q Did Mr. Faunce ever present any checks personally at the bank? A Yes, I believe he did.

10 Q At what time? A You mean what time of the day?

Q No, approximately what month? A I can't tell that.

Q On what do you base your statement? A I know that he came out usually and drew some cash at one time, perhaps more than once, but I remember once.

20 Q That was somewhere in the beginning of the opening of the account in January, 1913? A The account was opened before that.

Q Before that. When it was opened he came out there and you said in your direct examination that Mr. Whitman, for the purpose of opening the account, came out there. Is that about the time the cash was drawn? A At the time the account was opened with the Roseville Trust Company?

Q Yes. A No, sir, I think not.

Q Was it soon after that Mr. Faunce called? A I don't remember; it was soon after.

30 Q When? A It was some time in the year 1913, I think.

Q Was it prior to March 1st? A I couldn't tell you.

Q Was he alone at the time? A I think he was.

Q When did you make your last report of the Roseville Trust Company to the banking department? A I think it was in June, 1913.

40 Q At that time did you report to the banking department that the Inter-City Company was over-

*Raymond E. Smith, cross.*

drawn on the books of the Roseville Trust Company? A I think not—in fact, I know I didn't.

Q That is to say, you wish to state that the report made to the commissioner of banking of this state made no mention whatever of an alleged overdraft in the account of the Inter-City Company with the Roseville Trust Company? A There was no such item in the report. 10

Q Through whom did most of the checks come to the Roseville Trust Company? A Most of the checks came through the exchanges, through the receiving teller's desk, Mr. Thompson, the teller.

Q Those that came in the exchanges in the order of business would go directly to the bookkeeper, would they? A Yes, sir.

Q And when he checked off the list that came with these checks how did you come in possession of the checks that disappeared in box 55? A I took them out later from the paying teller's cash. 20

Q How did the paying teller adjust his cash? A He got something from me in place of the check.

Q What did he get from you? A A charge of some kind, on some account.

Q Directing the charging of these checks to another account? A Yes, sir. 30

Q Which one of the tellers was it that you gave instructions to charge the Inter-City's check to another account? A I gave no instructions of that kind to any teller.

Q What were the instructions? I am trying to follow your previous answer. A I didn't say I gave any instructions; I gave him something in place of the checks.

Q What did you give him? A A charge of some kind. 40

*Raymond E. Smith, cross.*

Q Can you recall what sort of a charge you gave him in any specific instance? A No, sir.

Q Wouldn't that necessarily have had to have been a charge to some account? A Some bank account or some account.

10 Q And did he make the charge to the other account which would justify your taking these checks out of cash? A I don't think so.

Q Look at your receiving teller's proof. A It wouldn't show in the receiving teller's proof.

Q What I am trying to find out is, what did the receiving teller, or any other clerk of the bank, do with regard to making something else appear in place of checks which were already carried in cash as a sort of a suspended collection? A It would be the paying teller, not the receiving teller.

20 Q Assuming such. A I would give him a charge of some kind that would go through the book.

Q Do those charge tickets appear in any of the papers that were presented to you for identification? A No, sir.

Q Do those charge tickets appear in the papers which were left at the time of the failure of the trust company? A Probably they do; they ought to.

30 Q And handing a direction to make them, to the paying teller, and withdrawing from the paying teller's cash checks of the Inter-City Company to correspond—when did you begin that? A With the Inter-City?

Q Yes. A I think around the first of the year, 1913; perhaps a little later.

40 Q I understood from your direct testimony that you withdrew no checks of any kind until in May, 1913; was I right in so understanding? A I don't think I testified to that.

*Raymond E. Smith, cross.*

Q Would such a charge ticket appear in the proof of the paying teller of the day on which you put in such a charge? A Ought to, yes, sir.

Q Is the paying teller's proof in court?

*Mr. Guild.* Yes.

Q I show you what is known as a paying teller's proof book and ask you if you can, by inspecting that, refresh your recollection as to the first time that you placed with the paying teller a charge ticket and withdrew checks of the Inter-City Company? A No, sir; I cannot do that. 10

Q In that respect you are obliged to rely solely upon your recollection, are you? A Yes, sir.

Q The Inter-City Company was a going concern, was it not? I will withdraw that question. You appeared as vice president, did you not, of the Inter-City Company in its business affairs? A I was one of the vice presidents of the Inter-City Company, yes, sir. 20

Q I show you a paper and ask you if that is one of the letterheads of the Inter-City Company at the time you were the vice president? A Yes, sir.

Marked Ex. D5 for identification.

Q Did you know when the Inter-City Company considered purchase of real estate in the regular course of business of that company, or did you try to inform yourself with respect to the contemplated or actual purchase of real property? A Do you mean by that, did I look the properties over before they were bought? 30

Q Yes. You spoke about discussing it at the board meeting the business of the concern. Did you at that time discuss the proposition for the purchase of real estate? A Sometimes, yes, sir. 40

*Raymond E. Smith, cross.*

Q Was that not the principal business of the company, buying real estate and selling it again?

A That was the principal business, yes, sir.

10 Q Was that what you discussed at board meeting? A Most of the meetings that I attended I think the discussion was more as to the sale of the properties.

Q At those meetings was Mr. W. L. Swartz and W. L. Smith present as directors? A Sometimes; at times they were; I don't think Mr. Swartz was there at all meetings I attended.

Q Wasn't he the secretary of the company? A Mr. Whitman was secretary of the company, I believe.

20 Q Didn't Mr. Swartz act as secretary of the company when you were present as a director? A He may have, but not regularly.

Q Did you at these meetings receive such definite information with regard to the purchase and sale of real estate so that you were able to perceive a duty as a director and voting upon the advisability of either purchasing or selling? A A great many of the properties were bought before they were brought up before the directors, that is, at the regular meetings.

30 Q The acts of the company in buying and selling real estate were the acts of the board, were they? A They were not acts of the board directly, no, sir.

Q Wasn't every act for the purchase or sale of real estate, in the business of the company, authorized by the board of directors? A I don't think so, but I think they were sanctioned afterwards.

40 Q Do you wish to be understood by that that a tentative contract was made and submitted to the board of directors for revocation?

*Raymond E. Smith, cross.*

*Mr. Guild.* I have no desire to exclude any part of the case of the defense, but this is not cross examination.

*Mr. Bachman.* I wish to prove by this witness that the board of directors directed all purchases and all sales of real estate, and that these two defendants, as officers of the company, merely carried out the transactions of the board of directors. For that purpose I must use the only witness I have. 10

*The Court.* It is preposterous to say that the board of directors authorized, for instance, the overdrawing of the account, if it was illegal. Your offer is on the record and I will sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly. 20

H. V. OSBORNE, (SEAL)

*Judge.*

Q In the regular course of business of the Roseville Trust Company what evidence is there on the deposit slip of the company that an entry has been made on the ledger in an account to which the deposit refers? A There is no evidence on the deposit ticket. 30

Q No initials? A No, sir, not that it has been entered in the ledger.

Q After the entry was made in the ledger what was done with the deposit slip? A Why, the slip goes to the assistant bookkeeper.

Q After he got through with them what happened? A After the day's business they are filed away.

Q Were these all preserved in the Roseville Trust Company's files? A Yes, sir, always. 40

*Raymond E. Smith, cross.*

Q Suppose a difference arose with respect to an account, as to whether a deposit was posted or not, how could you tell from a deposit slip whether a posting had been made at all, whether to one account or to another? A From the deposit slip?

10 Q Yes. A Compare it with the ledger.

Q Suppose a man had credited a deposit to an account other than stated in the deposit slip and made no initial on the deposit slip, and the question arose as to the correct account, whether that had been credited or not, how would you be able to find that the credit had been made in any event to anybody? A You mean in the ledger?

20 Q Anywhere—yes, the ledger. A An examination of the account would show that, no doubt, an ordinary account; it is according to the size of the deposit. Your question is rather long. I kind of lost the true meaning of the question.

30 Q I will put it in another shape. Suppose a deposit ticket claiming to be for \$699.30 was placed with the receiving teller on August 7, 1913, for the credit of the Inter-City Land & Securities Company and that ticket was given to the bookkeeper and was credited to the wrong account, and suppose further inquiries were made by the Inter-City Company with respect to the lack of credit to them of that very deposit on August 7th, how could you find out to what account that credit did go instead of going to the proper account? A To search the record.

40 Q In other words, you would have to go through every account on your book for the purpose of finding, if you could, what account that credit had been given. A Not necessarily that account; I would naturally look in and around that account in the ledger.

*Raymond E. Smith, cross.*

Q By looking in and around the Inter-City Company's account on the ledger, can you tell us to what account the \$699.30 was credited? A This matter could be taken up at recess or some time and looked over.

*Mr. Bachman.* I object to that because I wish to show by this witness that the statement was a little bit too far from the fact, that he had to search the entire records of the trust company to find out where that deposit was instead of the Inter-City's. 10

*Mr. Guild.* In order to trace this \$699.30 deposit which was not credited to the Inter-City Company, Mr. Bachman wants to know if you can find out in the bank to whom it was credited.

*The Court.* What difference does it make to whom it was credited? 20

*Mr. Whiting.* May it not be possible that this money which should have gone to his account did not go there, but went to some account which Mr. Smith had some motive in covering up what he had taken out of that wrongfully?

*The Court.* The witness may be asked that.

Q Have you been able to find in your investigation now to what account the \$699.30 were credited on August 7, 1913? A Not as yet. 30

Q Have you been able to find it in the account in or around the Inter-City account? A Not on the ledger, but it appears on the cash book and shows by that it left the teller's hand and was in the hands of the assistant bookkeeper; it also shows that it is a clerical error in not being posted to the Inter-City's account; it may be posted; it may be an error of omission. These things happen in every institution. 40

*Raymond E. Smith, cross.*

Q In the matter of proof, you would have a difference of \$699.30 in your cash, wouldn't you?

A No, sir, it would not affect the cash; it would affect the ledger balance.

Q Are your ledger balances carried on your balance sheet? A Certainly.

10 Q You show a difference in your balance, a difference of \$699.30? A It would show on the bookkeeper's ledger if it had been posted to some other account.

Q Then you testified solely to a book known as the individual ledger? A Not entirely, no, sir.

Q Didn't you hear Mr. Thompson testify? A Yes, sir.

20 Q Isn't that the only book he had before him? Objected to.

*The Court.* Objection sustained. Mr. Thompson, as a matter of fact, had all the books before him, and the witness could have no knowledge of what Mr. Thompson had before him anyway.

Q When you were testifying to overdrafts you were not testifying from an individual ledger before you? A When?

30 Q Yesterday. A At one time I was, yes, sir.

Q And if you are testifying from the individual ledger that was before you as to alleged overdrafts and credits that were not made to the proper account, such testimony as to alleged overdrafts would be faulty, of course? A If the credits had been made previous to that time.

40 Q And if the credit had been omitted entirely it would be still faulty if the credits were not made previous to that time? A Yes, but the only overdraft I testified was away back in 1912 or early in 1913.

*Raymond E. Smith, cross.*

Q You testified that when the bank closed on August 13, 1913, you carried certain checks of the Inter-City Company in the cash, and it has been shown that a deposit of \$699.30 was entirely omitted from his account on August 7th; wouldn't that have removed to a considerable degree the necessity, if you wish to so call it, for carrying the checks of the Inter-City Company in cash? A No, sir, not in this case it would not, simply because there were a lot of checks held before that time that had not been charged against the account on the ledger. 10

Q I show you the checks that you testified to yesterday as having been the only checks carried in cash on August 14, 1913. Now, the question is addressed to this, bearing in mind that \$699.30 should have been credited on August 7th, and which was not credited, wouldn't that reduce the necessity, if you wish to so call it, for carrying all those checks in cash as of August 14th? A No, sir. 20

Q What result would a credit of \$699.30 on August 7th have had, in your judgment? A It would simply have reduced the alleged overdraft of \$27,728 by \$699.30.

Q But you have testified that there was no actual overdraft because you had charged these checks to another account? 30

*Mr. Guild.* He has not testified to any such thing. That does not remove the overdraft, because he charged them to other accounts.

*The Court.* Objection sustained.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, (L. S.) 40  
Judge.

*Raymond E. Smith, cross.*

Q Did you not testify yesterday that the checks of the Inter-City Company were charged to some account up to, we will say, August 14, 1913? A I testified the Roseville Trust Company had paid them and they were taken out of the cash by charging some other account.

10 Q And when they were taken out of the cash they were charged to an account? A To some account.

Q Another individual account in the same ledger? A No, sir, not necessarily.

Q To an account that represented a right to a credit as against the debit that you were making by these checks? A Probably a general account; most all those charges were against general account.

20 Q What general accounts were those charged to? A Those checks here have not been charged to any general account; they were carried in cash.

Q But these other checks were charged to some other account, weren't they? A Yes, sir.

Q To an individual account or joint account? A Joint account.

30 Q Then there was no overdraft, so far as your books were concerned, in the Inter-City account except such as actually appears in the individual ledger before you? A So far as the individual ledger is concerned, the overdraft did not show, but so far as the checks were concerned that had not been charged against the account the overdraft did show.

40 Q Turn to August 7, 1913, as it appears on the individual ledger and strike the balance for that day at the close of business. A So far as the ledger is concerned, the balance shows a credit of \$139.84.

*Raymond E. Smith, cross.*

Q Add to that this \$699.30; what would the credit balance be? A The credit balance just at that moment would be \$809.14.

Q Were there any checks being held in cash on August 7, 1913, of the Inter-City Company?

A I can't tell that from memory; I will have to see the book. 10

Q Any book that will enlighten you. A The return item book will enlighten me, but the checks would be better. (Book handed witness.) I don't think there were any at that time carried in cash.

Q Between August 14th and August 17th were there any checks carried in cash outside of the three that you have testified to? A There were a great many checks that came in on the 12th. 20

Q What? A There were several checks.

Q Came in on the 7th? A Came in on the 12th.

Q What did they amount to? A \$2,062.57.

Q Does that include the three checks which you have before you? A I think it does, yes, sir.

Q That \$2,000 difference is all the items therefore of Inter-City cash that were carried in cash from August 7th on? A Yes, sir, so far as I know. 30

Q And there were sums of money received by the Roseville Trust Company to the credit of that company, were there not? A Yes, sir.

Q How much money was received after August 7th to August 14th to the credit of the Inter-City Company. A \$4,340.64.

Q If you add to that credit balance at the close of business August 7th you have what? A \$4,480.53. 40

*Raymond E. Smith, re-direct.*

*By the Court.*

Q Is that the balance? A That would be all the credit since August 7th, plus the balance on the 7th.

Q There are charges against that, I presume?  
10 A Yes, sir, there are.

*Further cross examination by Mr. Whiting.*

Q I understand, you did not tell Mr. Faunce or Mr. Whitman that checks which you claim were overdrafts were being held in the cash and subsequently charged to the wrong account? A I never told him that, no, sir.

Q Of course, they never asked you to do that, did they? A They didn't ask me to do that,  
20 no.

*Re-direct examination by Mr. Guild.*

Q Were there any meetings of the Inter-City Company held in New Jersey? A Yes, sir, some of them.

Q Where? A At different places. We held some at the Roseville Trust Company and some downtown; sometimes at different restaurants where we could have supper at the same time.

30 Q You mean in Newark? A Yes, sir, and also once in a while in Hoboken.

Q Inquiry has been made about this deposit of \$699.30 which did not get on the books to the credit of the Inter-City Company. You have stated, I think, that it does appear as a cash item received by the bank from the Inter-City Company on one book? A It appears as a deposit received from the Inter-City Company, yes, sir.

40 Q On what book? A On what we call the credit book, credit cash book.

*Raymond E. Smith, re-direct.*

Q Under the date that it was received? A I think so, yes, sir.

Q Turn to it and see, so that we may be certain about that. A It appears in the A to L cash book, Inter-City Company, \$699.30, August 7, 1913.

Q How do those entries get there, from what source, if you know? A They were taken right from the deposit ticket and entered. 10

Q Is there anything alongside of that item, in the book in which you say this entry is indicating that it had been credited to some account, is it checked in any way? A It is; there is a check marked by it.

Q What does that, in the orderly course of business of the trust company indicate, what does that check indicate? A These marks indicate that the work in this book, the entries in this book, have been compared with those in the ledger. 20

Q How is that comparison made? A It is made by two boys or two clerks, one who takes care of this book and calls to the bookkeeper, and he calls back; they check them at the same time.

Q When it has been entered in the ledger, individual ledger, that check is made? A Yes, sir. 30

Q Did you give directions to anybody as to where that credit item should be credited? A No, sir, I did not.

Q How do you account for the fact that it was not credited to the Inter-City Company's account and still checked back? A Why, it is a clerical error; that is all I can account for. There is no question in my mind but that it is 40

*Raymond E. Smith, re-direct.*

posted to someone else's account, by the book-keeper, the amounts rather than names.

Q You stated that on the ledger, between August 7th, I think you said, and the close of the bank, the individual ledger account of the land company showed credits agregating \$4,480.53?

10 A That is, including the balance.

Q Previous balance? A Yes, sir, that is right.

Q During that time were there any charges against the account? A Yes, sir.

Q Have you taken that from the ledger? A \$5,168.11.

Q Did you hear it stated by counsel for the defense yesterday that checks agregating \$6,000 had been presented to the trust company after  
20 it failed? A Yes, sir.

Q So, that added to the amount of—

*Mr. Bachman.* I don't believe I made any such statement as that. If I made it I didn't know it. I asked him if there was such an amount, but I didn't know it. I am bound by a question, not by an answer.

*The Court.* If you make statements before the jury which you should not make and were  
30 not properly in evidence, if you get before the jury in any manner matter which requires explanation, of course the other side has a right to explain it.

*Mr. Bachman.* I move to strike out the answer and object to the question on the ground that no such statement was made affirmatively by counsel for the defense.

*The Court.* If it was not made the jury will  
40 disregard it; if it was made, the answer is proper. The objection is overruled.

*Raymond E. Smith, re-direct.*

Q Taking the charges against the account down to August 14th, what would be the condition of the account on that day as shown by the ledger?

*Mr. Whiting.* This is not the best evidence. The books speak for themselves, and I further object to the question on the ground that it is improper to answer this question from the books, they having been shown to be incorrect and dishonest. Those items do not appear on the ledger.

10

*The Court.* You may add those two figures together and state what the result is. Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

20

H. V. OSBORNE, [L. s.]

*Judge.*

A You want the sum total of all the checks.

*The Court.* No, you were asked to take the balance as it appeared as a balance and add to it the sum of \$6,000.

Q According to the ledger, Mr. Smith, what was the condition of the account on August 14th?

*Mr. Whiting.* I make the same objection to the question.

30

*The Court.* Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

A The ledger shows an overdraft of \$687.68.

Q Now, add to that the \$6,000 of checks which Mr. Bachman asked you about yesterday, whether

40

*Raymond E. Smith, re-direct.*

they had not come in to the bank after the bank closed, and if they had come in, what would be the amount of the overdraft? A \$6,687.68.

*Mr. Whiting.* My objection goes to the entire line of questioning.

10 *The Court.* Yes. Were those checks mentioned in the indictment?

*Mr. Guild.* No, sir.

*The Court.* Did they come in before the indictment was found?

20 *Mr. Guild.* Up to the date of taking the indictment, yes, sir, the checks are not mentioned in the indictment, but these checks to which Mr. Bachman referred, as I understood him, were checks that were drawn before the bank closed and were not presented until afterward.

*The Court.* We do want to get before the jury any matters that are not proper for their consideration.

*Mr. Guild.* Counsel having made the statement yesterday—

30 *The Court.* I am not quite sure that you can make your case on the statement of counsel on the other side unless it is an admission. I think there is some question whether such testimony ought to be received by the jury. The indictment specifically mentions certain dates between which the defendants were officers of this company. While checks may have come in, it does not appear they were officers then; the checks are not endorsed, and the whole testimony, in any event, is based on the mere statement of counsel, which it was not proper for the jury to hear, and I will state to the jury now that this testimony regarding these  
40 checks which came in, if they did come in after

*Raymond E. Smith, re-direct.*

the bank was closed, is to be disregarded by the jury, it having been based, in any event, on the statement of one of the counsel for the defendants, and that statement should also be disregarded by the jury and the jury should not consider this testimony to the prejudice of the defendants. I so instruct the jury.

10

Q I will ask you to turn to the ledger account under date of May 21st and see if you find a credit there of some \$5,900, I think was the amount. A Yes, sir, there is a credit here for that amount.

Q I show you note of the Inter-City Company dated April 25, 1913, for \$6,000. Can you say whether the credit of \$5,970 was the proceeds of that note? A By looking at the bills purchased, yes sir. Yes, sir, it is the proceeds of this note.

Q That note, on the face of it, is a four months' note A Yes, sir.

20

Q It would seem as if \$30 had been taken off before the credit was made, for interest, for discount? A Yes, sir.

Q Which would be one month's interest on a \$6,000 note at six per cent. interest? A Yes, sir.

Q Did that note, when it came to your possession at the bank, read four months' note? A It did not.

Q What did it read? A One month.

30

Q Who changed it to four months? A I did.

Q When was it that you charged the \$30 interest which represents one month's interest on the note? A On the 21st of May the interest was taken off the face of the note, that was the day on which this note came in my possession as a renewal of the note that was due on the 25th of April, and it was past due at that time, had been past due almost a month.

Q That is the former note? A Yes, sir.

40

*Raymond E. Smith, re-direct.*

Q At the time the credit was entered and the interest of \$30 deducted, how did the note read, one month or four months? A One month.

Q When did you change it to four months, so as to make it read four months? A I changed that after it became due, so as to keep it alive.

10 Q Why did you do it? A Because I had no renewal for this note when it became due. I did it to keep it alive.

Q You mean after the one month had expired?

A Yes, sir.

Q When the month expired was it renewed or any effort made to renew it? A No, sir.

Q Was the note protested when it came due?

A Yes, sir, it was protested on the 25th of August.

Q When it came due as originally drawn. A

20 It was not.

Q Was there any offer or attempt on the part of the company to pay the note? A There was none whatever.

Q Any communication with you regarding it?

A No, sir.

Q Did you hear from either Faunce or Whitman regarding the payment or the renewal of the note?

Objected to as leading.

30

Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.]

*Judge.*

A I remember no word from either one of them about it at all.

40 Q The note as originally drawn was a one month's note? and after it had matured it would have been what date in May? A May 25th.

*Raymond E. Smith, re-direct.*

Q Was it a word "one" or a figure one? A Figure one.

Q In whose handwriting is the body of the note? A Mr. Whitman's, I think; Mr. Whitman, I should say, yes, sir.

Q Did you ever tell Whitman or Faunce what you had done regarding the alteration of this note? 10

A I think not.

Q Besides changing the figure one to a four, did you make any other alteration in the note? A Yes, sir, I put an "s" on after the "th" in the word "month."

Q When that note fell due the 25th of May why was it not charged to the account of the Inter-City Company? A Because there were not funds enough to meet it; the account was not good for it.

*Mr. Whiting.* I ask that it be noted in the record that the witness is testifying by consulting the Inter-City account on the ledger, and I ask that the answer be stricken out as incompetent, inasmuch as we have already objected to the admission of the book. I merely want to preserve my line of objection on that point. 20

*Mr. Bachman.* I join in that, too.

*The Court.* It should appear whether the witness is testifying merely from the books or from memory. 30

Q On what do you base that answer? A From memory. I haven't turned the sheet over.

Q Why did you look at the book at all? A My first impulse was to look at the account, and then I remembered well enough they didn't have the money there.

Q Look at the ledger account and see what the condition was on May 25th. A The ledger shows an overdraft of \$399.74. 40

*Raymond E. Smith, re-cross.*

Q And if this note had been charged what would be the amount? A \$6,359.74.

*Re-cross examination by Mr. Bachman.*

10 Q On May 25th, 1913, if you had paid in the \$1,500 that you owed the Inter-City Company for the balance due on 500 shares, what would the balance have been?

*Mr. Guild.* They may have put the money somewhere else.

*The Court.* The objection is well taken.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

20

Q You stated on your re-direct examination if the note had been charged up on May 25, 1913, there would have been an overdraft shown of \$6,339.74. If you had paid into the account of the Inter-City Company the \$1,500 that you owed as the balance on your payment of 500 shares of stock, what would the alleged overdraft have been?

A When?

Q At that time. A \$1,500, when?

30

Q Before that date? A At the time it was agreed to pay it in?

Q You must not argue with me.

*The Court.* He has a right to ask you if he doesn't understand.

Q I asked you if you had paid it in prior to May 25, 1913, being a balance owing by you to the company for 500 shares of stock, what would the alleged overdraft have been?

40

*The Court.* Assuming the company had deposited it.

*Raymond E. Smith, re-cross.*

A You mean the alleged overdraft as shown on here?

Q Yes. A It would probably have been the same.

Q You know figures. Can't you subtract \$1,500 from \$6,339.40? A Yes, sir. I can do that, but that would not show the overdraft that would show on here. 10

Q Didn't you answer Mr. Guild's question that that was the overdraft shown by the ledger that you were testifying from? A Yes, sir, but there were a lot of checks ahead of these which had never been charged to the account, and if there had been \$1,500 put in the account it would have been checked out.

Q Did Mr. Guild ask you about checks? A No. 20

Q I am referring to the book. Answer the question.

*Mr. Bachman.* I move to strike that out as not responsive.

*The Court.* I think the answer is proper.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.]

*Judge.* 30

Q Suppose you had paid in the \$7,000 the amount that you were to pay for 700 shares of the Inter-City Company, delivered to you, what would have been the balance shown on the individual ledger as it stands at the close of business May 25, 1913, if you had charged that account with \$6,000? A I couldn't have paid in the \$7,000 at that time because the stock was not issued as early as that. If I remember correctly, it was issued after that time. 40

*Raymond E. Smith, re-cross.*

Q What is the name of this book? A That is the bills purchased register.

Q Where is the one you testified to as a tick, that \$699.30? A That is the credit cash book, we call it.

10 Q Is it not a fact that those ticks are all in this book because you had a difference on that day that you had to check back the entries to and the difference? A No, sir.

Q Look at August 7th and tell us why there are no checks on the half dozen or so items that day. A Why, simply it is put in pencil to be called, the rest of that work.

Q Was it ever called? A I can't tell you that.

20 Q Your book shows an entry made from a deposit slip? A Individual ledger.

Q And this book you have described is the second book in which is made the same entry from the same deposit slip? A Yes, sir.

Q Isn't it a fact that the individual credit book was checked back on the receiving teller's cash and not with the ledger? A No, sir, never been, that I know of at all.

30 Q And then tell us why \$699.30 would not have been deducted at the very first flush, if it had been read, as you say? A I explained that before. When a bookkeeper is calling to his assistant or his assistant is calling to him amounts from one book to another they pay more attention to amounts than they do to the name; the amounts are the things that go in to make up the proof and not the name.

40 Q How in the world would a man get \$699.30 in this unless he knew who the name was? A He calls the name, but the bookkeeper sometimes overlooks the name, that is, if he turns over a leaf and sees \$699.30 on somebody's account, he would natur-

*Raymond E. Smith, re-cross.*

ally check up without looking at the top of the page at all.

Q I suppose the only fault to find with that statement is that it is exceedingly impossible that a man would take an account at random and check off \$699.30? A It is not improbable when you deal with thousands of credit tickets and checks. 10

Q Then you must be understood to say that deposit tickets were checked back on that book, not the ledger? A No, sir.

Q Isn't it a fact that the ledger entries were called and checked on the individual credit book? A Sometimes the ledger man, the bookkeeper, calls to his assistant and sometimes the assistant calls to the bookkeeper.

Q Suppose the thing were reversed, would there be a mark on the ledger? A There is always a check here of some kind on items that have been compared; it is usually a small pencil mark. 20

Q But the total of the charge that you have testified to as \$5,168.11, includes a note of \$2,500 which should have been charged on July 10th, and for which we claim a renewal note was filed with the bank. A There is a \$2,500 charge on the 11th of August, yes, sir.

Q Does that \$5,166.11 include that \$2,500? A Yes, sir, it included that \$2,500; yes, sir. 30

*By Mr. Guild.*

Q Why wasn't it charged on the 11th of July? A It was not good; the account would not stand it at that time.

Q What enables you to make that charge on a cash due note of August 8th or later, if that is not the date; wasn't it because of the credit of August 8th of \$2,665.39?

Objected to as leading.

Objection overruled. 40

*Raymond E. Smith, re-cross.*

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [SEAL]

*Judge.*

10 A Yes, sir, there was a credit of \$2,665.39 on the 8th of August.

Q And that enabled you to charge up the other item? A Yes, sir.

*By Mr. Bachman.*

Q As a matter of fact, you didn't charge up the \$2,500 note until August 13th, did you? A I can't tell from this ledger what date it was; it was some time after the 11th.

20 Q Have you discussed the matter of this account with the prosecutor's office? A With whom?

Q The members of the prosecutor's staff, have you discussed this Inter-City account? A I have talked it over with Mr. Hargan some.

Q Isn't it a fact that you were enabled to charge the \$2,500 note to that account at any time between the time it was due and the time you actually charged it? A That is not true; no, sir.

30 Q You could have charged that \$2,500 note on July 10th, as far as the clerical charging is concerned, could you not? A I could have charged it any time, as far as the entry is concerned.

Q As a matter of fact, where was this note found after the bank failed? A I can't tell you from memory at all.

40 Q In box 55? A I will have to see the note first before I can answer that. That note was found in the files which contain the paid vouchers of the Inter-City Company, regularly filed and regularly charged.

*Raymond E. Smith, re-cross.*

Q Are you prepared to say, whether, if you had refused payment of the first checks of the Inter-City Company so that the same might have been protested, that all trouble about alleged overdraft would have been prevented and they would have been notified of the fact that they were drawing in excess of their balance. A No, sir.

10

Q Why didn't you refuse payment of those checks so they would be notified at once in a formal way that their balances were not sufficient, according to your reckoning, to take care of the check? A Because they were notified in an informal way.

*By Mr. Guild.*

Q By whom? A By me—by the trust company.

*By Mr. Bachman.*

20

Q Isn't it a fact that you didn't refuse to pay the checks because you hadn't made your deposits as agreed to the credit of the account? A Absolutely no.

Q Didn't you have in mind when you paid these checks at the time, and you now allege that there were not funds sufficient to take care of them, that you yourself were under obligations to pay \$1,500 cash and had agreed to buy 700 shares of the stock and did not want to upset matters? A I agreed—

30

Q Can't you answer that yes or no? A No, because there is a vast difference in the dates.

*Mr. Mott.* It relates to a \$1,500 transaction and a \$7,000 transaction.

*Mr. Bachman.* I withdraw the question.

Q Didn't you have in mind when you paid these checks at the time when you say that the account was not in funds to properly take care of the checks, the fact that it would interfere with your

40

*Raymond E. Smith, re-cross.*

arrangements with the company to buy 700 shares of its capital stock for \$7,000? A I had no such thing in mind at all.

Q As a matter of fact, you didn't refuse the payment of any checks of the Inter-City Company at all, did you? A Not to my knowledge.

10 *Further cross examination by Mr. Whiting.*

Q If you had not paid these checks that would have hurt the credit of the company, wouldn't it? A No doubt it would have.

Q In which you had a fourth interest, about? A I don't know just the capital stock of the company was.

Q About what proportion of interest did you have? A I couldn't say that, Mr. Whiting; I  
20 don't know exactly.

Q You promised to put in some pretty good money, didn't you, to that company? A I promised to put in \$1,500 in 1912.

Q How about the note for \$7,000? A I don't remember anything about the note at all.

Q Don't recall anything about it? A No, sir.

Q Not at all? A No, sir; not any note; no.

Q Do you recall about \$7,000? A Yes.

*The Court.* We have been all over that.

30 Q There was something about \$7,000, wasn't there? A I testified I had agreed to take that much stock, \$7,000, new issue of stock.

*The Court.* He said he actually subscribed for 1,500 shares and agreed to take 700 shares. That was the testimony yesterday.\*

Q How much were you to buy first? A 500 shares, and there was a balance of \$1,500 due on that.

40 Q That would make the par value of what? A \$10 a share.

*Raymond E. Smith, re-cross.*

Q Will you figure for me—that would make how much par value? A \$5,000, but I said—

Q Wait a moment. Then there were 700 shares in addition which you were to take, were you not?

A Later, about six or seven months later.

Q And the par value of that would be how much? A \$7,000. 10

Q Making a total par value of what? A \$12,000.

Q And you undertook to take as much as \$12,000 worth of stock in this company without knowing how much stock there was or knowing what proportion was? Do you want the jury to believe that? A Yes, sir.

*By Mr. Guild.*

Q You were interrupted in your answer; you were shut off in regard to the \$5,000? A There were 500 shares; the balance due on that stock was \$1,500. 20

Q Had you paid the \$3,500? A Paid the equivalent in cash.

Q And all that you owed was the \$1,500? A That is all.

Q You didn't pay the \$1,500? A No, sir.

Q You put in \$3,500? A Yes, sir. 30

Q And you owed \$1,500, and you had promised to take \$7,000 worth of stock more? A Yes, sir.

Q Did you say later on why you didn't take it, either to Faunce or Whitman? A I don't know that—I didn't tell them that I wouldn't take it or didn't take it, but the answer I gave yesterday and what counsel asked yesterday was regarding the payment of the \$7,000.

Q What about it? A There was no arrangement with me to put \$7,000 in money to the credit of the Inter-City Company. 40

*Frank C. Ferguson, direct.*

Q Because of that transaction? A Yes.

Q Was the stock ever issued to you? A I don't remember ever having received it.

Q Sometimes was said about this Inter-City Company having been a going concern. Do you know what happened to it after the failure of the  
10 Roseville Trust Company?

*Mr. Whiting.* I do not wish to technically exclude that from the case, but it is not in relation to any subject matter under the indictment.

*The Court.* The objection is sustained. The evidence was not admitted yesterday.

*By Mr. Whiting.*

20 Q Do I understand that you don't recall about getting your certificates of stock in this company or that you actually never got them? A I said, I don't recall getting this issue of 700 shares.

Q Do you swear that you didn't get your stock for the 700 shares, or is it that you just don't recall? A I never remember seeing it. That is the best answer I can give you.

30 FRANK C. FERGUSON, sworn in behalf of State.

*Direct examination by Mr. Mott.*

Q Mr. Ferguson, there is testimony in the case that the deposits during the month of May, 1913, were some \$3,618 and odd cents, if my figures are right. Are you able to state what the withdrawals were during the month of May? A I am, yes, sir.

Q What were they?

40 *Mr. Whiting.* May I ask what the witness is testifying from?

*Frank C. Ferguson, cross.*

Q You say you are able to do that. Upon what do you base your testimony? A On the checks themselves.

Q What is it you have in your hand? A I have an adding machine list of the checks drawn, added in May, 1913, drawn by the Inter-City Company on the Roseville Trust Company and paid by the Roseville Trust Company. 10

Q And is that work correct? A Yes, sir.

Q What were they? A \$10,944—

*Mr. Whiting.* I am not clear as to this proof. Is this witness stating what the books contain?

*Mr. Guild.* No, the checks in evidence.

*The Court.* He is asked for the total of the withdrawal checks in May.

*Witness.* \$10,944.49. 20

Q And what was the amount of the withdrawals during June?

*The Court.* As evidenced by paid checks which are in evidence.

*Mr. Guild.* Yes, sir, arrived at the same way.

A \$12,943.50.

Q July. A \$15,917.94.

Q And August, down to the time of the failure of the bank. A \$5,472.53. 30

*Cross examination by Mr. Bachman.*

Q Does that include notes?

*The Court.* He says it includes checks.

A It includes one note of \$150 which came through the exchanges, which was an order on the bank to pay just the same as a check.

Q Didn't the May charges include the May note? 40

A No, sir.

*William J. Thompson, cross.*

Q Are you giving your information from the number of checks in evidence? A From the checks.

*Mr. Bachman.* I would like to reserve my cross examination until I can offer those checks.

*The Court.* If the case is not closed.

10

WILLIAM J. THOMPSON resumes the stand.

*Further cross examination by Mr. Bachman.*

Q Is there anything in your so-called receiving teller's proof which indicates the account out of which you kept checks as a suspended cash item?

A You mean by that, the name of the checks which I held in the sundries?

Q Yes. A No, the name does not appear on that book.

Q You are not able to tell us on your cross examination that a certain check was that of the Inter-City Company? A The name appears in the return item book and the similarity in the amount appearing in the sundries would lead me to believe it was a check—in fact, would lead me to say it was a check.

Q Mr. Smith testified that he withdrew certain checks from the cash, and gave you, or whoever was in charge of the receiving teller's cash at that time, something to charge some account. Do you recall what accounts were charged with the Inter-City Company's checks that were taken out of cash?

*Mr. Mott.* I don't understand that Mr. Smith ever testified that he gave this witness any such direction. There is another objection to that question as not being cross examination.

(Question withdrawn.)

Q When the checks were withdrawn from the cash what was put in the place of the checks that

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*William J. Thompson, cross.*

were withdrawn? A No checks were withdrawn from my cash.

Q You carried them continuously from the time you were appointed receiving teller until the time you quit the place? A No, sir.

Q What did you do with them? A Turned them over to the paying teller at the end of each and every day. 10

Q You got a credit from the paying teller for those checks, did you? A Yes, sir.

Q Were they any longer suspended in the cash of your department after you had delivered them over to the paying teller? A They were only held in the receiving teller's cash for one day, the day on which the check reached the bank, and the evening of that day they were turned over to the paying teller and held in his cash. 20

Q Did you occupy the position of paying teller while you were there? A I did for about five days.

Q Were those five days between May 1st and August 14, 1913? A They were between possibly August 6th and August 13th.

Q Did you receive from the receiving teller in that period any checks of the Inter-City Company which were carried in your paying teller's cash as suspended items? A That I don't know. 30

Q Have you got your book here to show? A The return item book, yes, on August 12th, there were eleven checks of the Inter-City Company held in the receiving teller's cash, on August 12th, turned over to the paying teller on August 13th.

Q What did you get in place of those checks that were not in the receiving teller's or paying teller's cash August 13th? There were three found in the paying teller's cash when the bank suspended; what became of the other ten? I ask you 40

*William J. Thompson, cross.*

to refer to your paying teller's proof. A There is no information that I can receive from the paying teller's book.

Q Can you answer the question? A I am trying to figure it out.

10 *The Court.* Answer the question.  
(Question read.)

*Witness.* I don't know what became of ten of them or thirteen. If three appeared in the paying teller's cash I don't know what happened to the other ten.

Q You had the paying teller's cash on the 10th, didn't you? A I don't know whether I did or not.

20 Q I am only trying to find out if a charge ticket was given to you in place of those items, so that you, in your cash for the paying teller's department, made good? A I was nominally paying teller, but Mr. Smith ran the paying teller's cash at different times between August 1st and 13th; whether he ran it August 8th I can't tell; I could tell by looking at the proof book.

Q Didn't Mr. Smith run the paying teller's department every day that he was in the bank? A No, there were many days that he had nothing to do with the paying teller's cash or receiving teller's either.

30 Q When did you first learn that the Inter-City Company was alleged to have been overdrawn? Did you take any step to make inquiries of Mr. Smith for some possible information from that quarter? A No, sir.

40 Q Did you mark it as an alleged overdraft and let it go at that? A No, I referred the checks to Mr. Smith to find out what I would do with them, and he told me to hold them in the cash, in the receiving teller's cash of that day, and that practice was pursued from that time on.

*William J. Thompson, cross.*

Q Was that pursued pretty generally with at least half a dozen accounts of other people? A Yes, there were other accounts that were held in the same way.

Q Did you make it your business, when a check came through the exchanges, to personally see whether the account was good on the ledger? A 10  
No, sir; I did not, it wasn't part of my duty.

Q Who was the one that passed upon the signatures in the bank? A The paying teller.

Q Who was the one that passed upon the amount that could be paid on checks, either through the exchanges or over the counter, who was the one decided whether a check was good or bad? A The bookkeeper.

Q By whom was it referred to the bookkeeper? 20  
A The bookkeeper received all the exchanges.

Q Did he pass upon the question as to whether there was a debit balance or credit balance on a certain account before the check reached any other department? A He did, yes, sir.

Q Was that the final disposition of the matter?  
A Yes, sir.

Q Was that in the regular order of business, for the bookkeeper to throw those checks out? A 30  
Yes, sir.

Q To whom would he give them? A To me, to the receiving teller.

Q What would you do with them? A List them in the return item book.

Q And then what? A And then return them, if they were to be returned, and hold them, if they were to be held.

Q If they were to be held it was a matter for 40  
Mr. Smith to decide? A Yes, sir.

*William J. Thompson, cross.*

Q Was it the practice of the Roseville Trust Company to refuse overdrafts to everybody?

Objected to.

Objection sustained.

(Question withdrawn.)

10 Q Is it not a fact that in the Roseville Trust Company advances were made to open accounts in the shape of overdrafts to many customers?

Objected to.

Objection sustained.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

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*Judge.*

Q Tell me again approximately how many accounts were there in which you held checks in suspended cash, in the receiving teller's cash, on August 12th, or whatever date you are referring to, referring to your previous year.

*The Court.* He has not said there were any particular number of accounts.

30 Q Can you, by referring to your proof, tell me how many items were held in your receiving teller's cash on any particular day in July, 1912, suspended items, such as your return item book? A Yes, I can do it.

Q Tell us how many items you carried on July 15th.

*Mr. Guild.* I object to this question unless it applies to the checks of this company.

40 Q You are asked to answer that question with respect to the Inter-City Company only. A There were none on July 15th.

*William J. Thompson, cross.*

Q Did you have general instructions as to what disposition to make of the Inter-City Company's checks? A Yes, sir.

Q They were general instructions? A Yes, sir.

Q And they were to take them out of the receiving teller's cash at the end of the day and put them in the paying teller's? A Yes, sir. 10

Q When you were paying teller what sort of a substitute did you get for those items in the Inter-City Company? A I know that I never did receive a substitute for any Inter-City Company, while I was paying teller.

*By Mr. Guild.*

Q And that was how long? A Possibly five or six days. 20

Q Will you turn to the debit book and see what you did with such items? A What I did with such items?

Q Items that were carried as cash and taken out and anything was substituted on those days that you were acting. Take the 13th of August. A I find that those checks were charged regularly to the Inter-City Company, charged to their account.

Q Well, then, did you or not make a mistake in saying to Mr. Bachman that they were actually held in cash? A I don't know as I said that. 30

Q I understood you to say so. A He asked me about an accumulation of checks that were held in the paying teller's cash.

Q Was that right to say, that they were held in the paying teller's cash? A Well, I assume that there were checks other than these that were held in paying teller's cash.

Q We are talking about those. 40

*Jesse L. Conger, direct.*

*The Court.* I do not think his attention was directed to those specific checks by Mr. Bachman.

*Witness.* These checks that came in on August 12th.

10 Q What happened to them? A Were charged to the Inter-City Company's account on that day.

Q Now, the checks that came in on August 13th were held in the cash of that day. Were the checks of either of those dates charged on the ledger to the account of this depositor? A Yes, sir; they were charged against the account on the ledger.

State rests.

Mr. Whiting opened for defendant Whitman.

20 Mr. Bachman opened for defendant Faunce.

JESSE L. CONGER sworn in behalf of defendants.

*Direct examination by Mr. Bachman.*

Q What is your business? A Banker.

Q Are you cashier of the Mutual Bank of Roseville? A Yes, sir.

30 Q Were you served with a subpoena *duces tecum* to produce the deposit slips of the Inter-City Company, formerly in possession of the Roseville Trust Company, between the dates of January 1, 1913, and September 1, 1913? A I was.

Q And have you brought the deposit slips with you? A No, sir.

Q Why not? A I haven't any idea where they are. There are about five or six cases filled with deposit tickets, and I am sure I can't be expected to go through them.

40 Q I understood you to say that you couldn't find them. A I didn't say that. There are five

*Jesse L. Conger, cross.*

or six cases filled with deposit tickets since 1908. There are cases 4 feet square and we have been working on them at times. We have got possibly two years partly searched.

*Mr. Bachman.* I will give him a chance to produce them.

*The Court.* It is manifestly impossible for him. There are thousands— 10

*The Witness.* Yes, hundreds of thousands.

*The Court.* Hundreds of thousands of deposit slips and he cannot be expected to produce them in a few hours.

*Mr. Bachman.* All those matters should be properly labeled, so that—

*The Court.* They are not.

*Mr. Bachman.* They are essential to our case. 20

*The Court.* You should have realized that long ago.

*Mr. Bachman.* I made an effort at the beginning of the case, and Mr. Mott and I disagreed with each other. I want him to produce them.

*The Court.* He says he cannot do it.

*Mr. Bachman.* He has shown that he can, but it is too much trouble. 30

*By the Court.*

Q How long would it take you? A Three weeks, and I would have to hire extra men.

*Mr. Whiting.* Has he been asked to get them together by the prosecutor?

*Cross examination by Mr. Guild.*

Q When was this subpoena served upon you? 40

A About three-quarters of an hour ago.

*Clarence P. Whitman, direct.*

Q Were you ever asked to look for those slips?  
A No, sir; I was not. I heard last night about quarter after six there would be a possibility that I would be asked about it.

10 CLARENCE P. WHITMAN sworn in behalf of defendants.

*Direct examination* by Mr. Whiting.

Q Mr. Whitman, you reside in the Oranges? A East Orange.

Q And have, practically, all your life? A All my life.

Q How old are you? A Forty-two.

Q You know Mr. Raymond Smith, do you not?  
A I do.

20 Q And you were a depositor in the Roseville Trust Company at one time, were you not? A Yes.

Q Did you ever know Mr. Smith before you began to do business with the Roseville Trust Company? A I did not.

Q You have known him ever since? A I have.

Q Have your relationships been confined to business or not? A Entirely.

30 Q You say you were a depositor in the Roseville Trust Company. That was before you were interested in the Inter-City Company, wasn't it?

A It was.

40 Q And Mr. Smith was questioned as to some of the business which you did with him as an individual depositor and the question of negotiations of some promissory notes was brought into evidence. What was the fact as to that, if you recall it? A I negotiated a good many notes that were given to me by people who bought property from the people I represented, through the Roseville Trust Company.

*Clarence P. Whitman, direct.*

Q They made payment for their property in whole or in part in promissory notes? A Yes, sir; they were generally put through the Roseville Trust Company and they were paid; they were all paid.

Q For how long a period did this kind of business continue? A About two years. 10

Q If you know, will you give the jury approximately the amount of such promissory notes, if you recall it. A I couldn't tell exactly, but there were about twenty-five individuals who gave me those notes and those notes ran from \$750 to \$3,000 or \$4,000 and sometimes they were in two or three notes, different amounts, small amounts; some of them larger.

Q In response to a question Mr. Smith said that these notes would not amount to over \$5,000. What would you say as to your recollection of that? A I would say they ran somewhere between \$15,000 and \$40,000; I couldn't tell without figuring up. 20

Q Those transactions were in connection with the sale of some western land? A Yes, sir.

Q Were you in the real estate business before that? A I was not.

Q What business were you in before that? A I was a manufacturer here in Newark. 30

Q When did you become interested in the Inter-City Company? A I think it was in 1912, in April I think it was.

Q You were elected an officer and director, were you not? A Yes, after I had been in with Mr. Faunce for some time.

Q You didn't participate in the formation of the company, you mean? A I did not.

Q But you subsequently became an officer? A Yes, sir. 40

*Clarence P. Whitman, direct.*

Q What office were you elected to? A Secretary-treasurer.

Q You were so carried in the papers of the company, secretary-treasurer? A Yes, sir.

Q As a matter of fact, did you actually do the secretarial work? A Never did any of it.

10 Q Who was the secretary? A Our attorney, Mr. Swarts.

Q Are you a bookkeeper or accountant? A No sir, I don't know anything about books.

Q Never had any experience as an accountant? A No, sir.

Q Did you or did you not keep the books of the Inter-City Land & Securities Company? A Never kept any books of the company.

20 Q What was the nature of the business of the Inter-City Company? A We called ourselves real estate operators. We traded—

Q In what territory were you operating? A We were operating in New York City, particularly Manhattan and the Bronx.

30 Q Give the jury an idea how that business was conducted. A We acquired property through trading. I can't tell exactly because Mr. Faunce was the real estate head of the firm; he was the real estate expert and he did all of that kind of work, but I know we acquired property through trading and then improved their position, as we call it, trading for larger properties, gradually increasing the business that way, and always attempting to sell and in ordinary markets it would have been buying and selling, but in the market when I was connected with it was all trading.

*By the Court.*

40 Q There was no selling market? A There was no selling market.

*Clarence P. Whitman, direct.*

*By Mr. Whiting.*

Q You spoke of taking care of the property?

A I took care of the property; I took care of the houses, not being acquainted with the business, that is about all I could do at first; in fact, all the way through I took care of the houses.

10

Q What do you mean? A I took care of the repairs, which were very large, required someone to look after the repairs of the property and keep them up and improve their condition and improve the properties themselves so they would bring a higher price, and bring them up to sell them for more than we paid for them. We generally got run down property and brought them up to first class condition and then got a better trading market for them.

20

Q Do I understand that occupied your time? A Occupied it almost entirely.

Q While you were in the Inter-City Company you still carried your personal account in the Roseville Trust Company? A I did.

Q It has been mentioned that there was some transfer of a credit or deposit, I have forgotten which—it was from one account to the other—what did your account have to do with the Inter-City's account? A My account was used for the Inter-City's money up to January, 1913—I think about that time.

30

Q The company was doing business then for how many months before that? A About a year, when they opened an account themselves.

Q Who were the other directors of the company besides yourselves? A Mr. Faunce was president, Mr. W. L. Smith was vice-president, Mr. Raymond E. Smith was vice-president; Mr. Swarts was counsel, and myself, and we were all directors.

40

*Clarence P. Whitman, direct.*

Q Tell us the amount of stock that Mr. Smith held. A Mr. Faunce and myself held one or two shares over one-quarter of the capital stock. The capital stock was \$50,000. It was divided into four parts. We held practically one-half, a little over one-half, or among our relatives. The two Mr. Smiths each held—

10 Q Raymond E. Smith? A Yes, Raymond E. Smith and Mr. W. L. Smith each held \$12,000 worth of stock.

Q Of the fifty? A Yes, sir. Mr. Swarts only held one share—5 shares—I think it was—I have forgotten.

*By the Court.*

20 Q Did you hold a quarter and Mr. Faunce a quarter? A Yes, we held it between us and our relatives.

Q Mr. Raymond E. Smith had a quarter and the other Smith had approximately a quarter? A Yes, sir.

*By Mr. Whiting.*

30 Q How did your company come, if you know, to do business with the Roseville Trust Company? A I had an account there and the company had no account when I started with them and they carried their funds through my account until January, when they opened an account of their own. In other words, my account was the company's account; I had a small amount, not very large, a thousand dollars or so, in the bank at different times during that period, but it was all used for the company's purposes.

40 Q I don't know whether you stated to me or not, but do you know what the company opened its account with? A Well, I remember distinctly of

*Clarence P. Whitman, direct.*

opening the account myself and depositing a thousand dollars with Mr. Smith.

Q The Inter-City's account? A Yes, sir.

Q What was done with the rentals which accrued and which were collected by your company from the properties it was interested in? A As they were collected they were taken directly to the bank, generally the same day, and deposited. Sometimes there were two days— 10

Q I mean this: Did you put all your funds, cash and current funds, in the Roseville Trust Company or not? A Almost all of it; maybe kept \$15 or \$20 for cash that was needed in the office; outside of petty cash everything went there.

Q And your banking and financiering was done through the Roseville Trust Company? A Yes. 20

Q How did you happen to have Raymond Smith interested in your company? A Primarily, he owned a piece of real estate jointly with me and that real estate was not moving; that is, there wasn't any chance to develop it. It was bought for development along the same lines that I had previously done.

Q Is that some of these western lands? A Yes; that was bought for the purpose of developing it the same as some of the properties that I had previously done. 30

Q How did you happen to get into this deal, this western deal? A Mr. Smith suggested to me if I had any good property out there, after seeing the results of the other property I had sold, if I had anything good out there he would be very glad to go into it and he would finance it, and as a result of that we bought a piece of property out there.

Q Is that the property that was subsequently paid in part to the realty company for his first issue of stock? A It is, yes, sir. It was never 40

*Clarence P. Whitman, direct.*

turned over, although that was the agreement that he entered into; he never actually turned over any property to the company; he simply agreed to do it and it was neglected, the turning over of the title.

10 Q That was the first business dealing you had with Mr. Smith except from your contact with him, you being a depositor; am I right? A Yes, sir.

Q And the negotiation of some notes of your customers? A Yes, sir.

Q Then I think I asked you, how did it happen, or have you explained how it happened, that Mr. Smith then became interested, or why did you interest him, if you did, in the Inter-City Company?

20 A I didn't interest him except that he requested me to move that western property, and as there wasn't any opportunity of selling it, as I had done before, I offered him—told him I would put it up to the Board of Directors of the Inter-City and see if I couldn't get them to move it, for them to let him take stock for it if he choosed; he acquiesced in that, and there was an agreement made that he was to have \$5,000 worth of—

*By Mr. Guild.*

30 Q Was that agreement in writing? A That agreement was in writing.

Q Have you got that agreement? A No; if we have it, Mr. Faunce has it.

*Mr. Whiting.* If we have it I will produce it.

*The Court.* This was about some lands out west?

40 *Mr. Whiting.* This is about his getting the first \$5,000 worth of stock. The purpose of this is to show the relationship of the parties, and we don't need to go into detail. It has no

*Clarence P. Whitman, direct.*

direct connection with this case except to show the situation as to the relationship between the parties.

*By Mr. Whiting.*

Q I show you a letter dated November 12, 1912, marked Exhibit D4 for Identification, purporting to be signed "Raymond E. Smith," and ask you if you recognize his signature? 10

*Mr. Bachman.* Mr. Smith has identified his signature.

Q Is that what you refer to as the agreement?

A That is part of it. There was an acceptance to that from the company and—

Q This is Mr. Smith's part of it? A That is Mr. Smith's offer.

The letter referred to is offered in evidence and marked Ex. D4. 20

(Letter read to the jury.)

*By the Court.*

Q Was that property taken over by the company? A It was agreed to by the company.

Q Was the property conveyed? A It wasn't properly conveyed.

Q I say the property wasn't conveyed? A The property wasn't actually conveyed. The agreement was entered into, but the property wasn't conveyed. 30

*By Mr. Whiting.*

Q It ought to appear, if you know, why the property wasn't conveyed? A It wasn't conveyed principally because we didn't find any market for it. The company understood it between themselves, and they had absolute confidence in each other and they didn't see why they should take it up when 40

*Clarence P. Whitman, direct.*

they had something that was more pressing; it was simply put off day to day until there was no use for it.

Q You said that the company accepted this proposition of Mr. Smith's as set forth in his letter? A They did.

10 Q When was that, if you remember? A I don't remember exactly when it was, except it was early in 1912.

Q The letter is dated November 10, 1912? A That was the time it was conveyed.

Q Do you mean conveyed? A I mean accepted by the company. The deeds were kept in the box after we signed them, Smith and myself, but they were not recorded or anything of that kind.

20 *By the Court.*

Q Then the property was conveyed? A I did not mean that we made any conveyance; I mean the deeds that we had were turned over to the company, the title deeds.

Q You actually made no formal conveyance? A We made no conveyance.

Q Was it ever put up to you to actually convey, to sign any papers? A No.

30 Q Will you state what properties were operated by your company during the period of January, 1913, down to the time when the Roseville Trust Company closed its doors in August following? A The company owned during the year that I had the personal charge of them—

*By Mr. Mott.*

Q Which year was that? A That is 1912 and until August of 1913.

*Alfred P. W. Seaman, direct.*

*By Mr. Whiting.*

Q You may state the property that you looked after, repairs and tenants. A That I looked after, there was three twenty-five family houses up on Franklin avenue—I don't remember the number—in the Bronx, New York City; they are five-story apartment houses— 10

Q I have a bunch of photographs here. A No, those are just a few of what we had.

Q In connection with my question as to the property which you say you had charge of with respect to the tenants and repairs on behalf of the Inter-City Company, which your company was operating, I show you a group of photographs and ask you if you will or can identify those photographs? A Yes, sir, I can identify them all as owned by the company. 20

Recess.

ALFRED P. W. SEAMAN, sworn in behalf of defendants.

*Direct examination by Mr. Bachman.*

Q Where do you live? A 147 West 87th street. That is my private residence.

Q Do you know the defendant, John B. Faunce? A Yes, sir. 30

Q How long have you known him? A Ten or twelve years.

Q Do you know of other people who have known him and have conversed about him with them? A Numbers.

Q What is his reputation for veracity and good conduct as you have learned it in the community you live in?

*Mr. Mott.* I object. His conduct is not involved. If you mean honesty— 40

*George M. Reuck, direct.*

*Witness.* I can only say I never heard it questioned except as I heard it in this proceeding against him.

Q I would like to ask your position in New York City. Heretofore you have been one of the judges in New York City, have you not? A Yes, 10  
sir, up to about a year ago.

Q Manhattan and Bronx, before it was the Bronx? A Manhattan altogether. The jurisdiction of the Court is all that side.

Q For how many years? A Ten years.

GEORGE M. REUCK, sworn in behalf of defendants.

*Direct examination by Mr. Bachman.*

20 Q Are you a resident of New York? A I am.

Q What is your business? A Certified public accountant.

Q Do you know Mr. Raymond E. Smith? A I do.

Q Did you, at the instance of the Inter-City Company, call upon Raymond E. Smith in the beginning of the month of June, 1913? A I did.

30 *Mr. Guild.* He couldn't call on a corporation. Whom did he see?

Q At the office of— A Called on Mr. Whitman, the treasurer of the company.

Q For what purpose did you call? A For the purpose of seeing if I could get the work of writing up their books.

Q Did you take charge of the books of the Inter-City Company at that time? A Such books as there were, yes.

40 Q Did you find among the business matters the cancelled vouchers of the Roseville Trust

*George M. Reuck, direct.*

Company between January 1st and the time that you were assigned to this work? A I did not.

Q Did you have a conversation with Smith with regard to writing up the passbook and getting the cancelled vouchers? A I did.

*Mr. Mott.* When and where did this conversation take place? 10

Q When and where? A There were several times that I asked Mr. Smith for a transcript—

Q Where was this? A Once in New York and once in the Roseville Trust Company in Newark on my way to business. I was a resident of Roseville at the time and passed the trust company every morning.

*By Mr. Guild.*

Q I would like to have the date. A I couldn't give you that. 20

Q Approximately? A Some time in June or early in July.

*By Mr. Bachman.*

Q Go ahead. A I asked Mr. Smith for it and he said he would give it to me, the transcript of their ledger account of the bank.

Q Did you ask for the vouchers? A That would include it. I asked for a transcript of their ledger account, and that would include the vouchers. 30

*Mr. Mott.* I move to strike that out.

*The Court.* Strike it out.

Q Did you also ask for the cancelled vouchers? A I did.

Q Did you get the transcript of the account and cancelled vouchers? A I did not.

Q Did he say anything to you with regard to it? A Several times, when I asked him for it, 40

*George M. Reuck, direct.*

he said he had been too busy; he had been unable to get it up for me.

Q Did you offer to write it up? A I did one time.

10 Q Did you state so to him? A I did, and he said it was impossible for him to permit me to do it.

Q Was that in June? A I don't think it was; that was in July.

Q In any of these conversations with Raymond E. Smith did you ask him anything in regard to payments of \$7,000 and \$1,500?

Objected to as leading. (Objection withdrawn).

20 Q Did you have a conversation with Raymond E. Smith regarding any other subject, regarding the statement of the account and the cancelled vouchers? A There were several things that I talked with Mr. Smith about, yes.

Q I mean covering the Inter-City Company's affairs? A Regarding the Inter-City Company's affairs? One of them was, I remember—

*Mr. Mott.* I object to answering that question.

30 Q This was about the month of June or the early part of July, too? A It was during the time I was there. My work covered from the middle of June until after the 15th of July.

Q Where was the first conversation held? A About what?

40 Q Regarding other matters except what you have testified to? A I can't recall which was the first one. I do recall one over in New York when Mr. Smith came over there to attend a directors' meeting.

*George M. Reuck, direct.*

Q What did you say to him and what did he say to you? A One of the things I asked him—  
Objected to as incompetent.

*The Court.* Why do you not ask him for all the conversation between Mr. Smith and himself?

Q State the conversation that occurred between Mr. Smith and yourself during the period that you were examining into these matters of the Inter-City Company that you have not already testified to? A There was one important thing, important to me, was the fact that Mr. Smith had the contract to purchase stock of the company—

10

*The Court.* You are not asked about the things that were important; you are asked to state what you said to Mr. Smith in regard to this account. Mr. Smith says he does not remember your ever saying anything to him about the state of the account and the cancelled vouchers, and he was asked whether he did not have any conversation with you about it and he did not remember it. Did he have such conversations with you about it and you with him?

20

*Witness.* He did.

30.

*By the Court.*

Q What were they? A I asked him for a transcript of the account so I could reconcile the books of their company with the bank.

Q You told us about that. A The reason why I wanted—

Q We didn't ask you for the reason; we asked you for conversations between yourself and Mr. Smith. A I asked Mr. Smith—the statement

40

*George M. Reuck, cross.*

had been made to me that Mr. Smith had notes in his possession which were to be discounted at the bank.

Q You are not supposed to repeat statements that were made to you; the question does not call for that. Strike it out. Can you not fix  
10 your mind on the language used between Mr. Smith and yourself, leaving it for others to develop what it meant, or whether it meant anything or not. Can you not repeat a conversation? A I will as near as I can recall it.

Q That is all you are asked to do. A I asked Mr. Smith if he had in his possession notes which had been given in payment of stock and which he was to discount at the bank, and, as I recall it, he said he had, and I asked him if he  
20 could tell me the dates on which those notes went on the books of the bank, and he said he could not, and that was one of the things that I wanted a transcript of the ledger account for.

*The Court.* Strike out the last part.

*By Mr. Bachman.*

Q Any amounts mentioned? A As I recall it, there was an amount of \$7,000 and another one of \$10,000 or \$11,000, I am not sure which; one  
30 was Mr. Smith's own note and the other was a note of another party.

*By the Court.*

Q Is that all the conversation you had with Mr. Smith regarding this Inter-City account? A As I recollect, those are the essential points.

*Cross examination by Mr. Mott.*

40 Q Will you repeat what you said to Mr. Smith about what you testified to last, about the

*John C. Lyon, direct.*

notes you asked him. A I asked him if it was a fact that he had agreed to buy stock under certain conditions, and if those conditions had been complied with, as I recall it, and he said that they had, and I asked him if those notes had been discounted, and as I recall it, he said they had not because he hadn't had a favorable opportunity to present them to the directors of the bank. 10

Q And you reported that to Mr. Faunce? A I did; I told Mr. Faunce of the conversation I had had.

*By the Court.*

Q What was that date? A I don't recall it, Judge. It is some time in July, after the 1st of July; some time between the 1st and the 5th of July. 20

JOHN C. LYON, sworn in behalf of defendants.

*Direct examination by Mr. Whiting.*

Q Where do you reside? A East Orange.

Q How many years have you lived there? A Thirty-eight.

Q You have held public office there? A Yes, sir.

Q You may state what it was. A I was president of the Playground Commission and I was a police commissioner. 30

Q Are you now in public office? A No, sir, I resigned in January.

Q Do you know Clarence P. Whitman, one of the defendants in this case? A Yes, sir, very well.

Q How long have you known him? A I have known him intimately for ten years; I have known him as a boy about the town practically ever since I lived there. 40

*Clarence P. Whitman, direct.*

Q Do you know other friends of his in the same community? A Yes, sir.

*By the Court.*

Q Do you know where he lives? A Yes, sir, the third house from me.

10 Q In East Orange? A Yes, sir.

*By Mr. Whiting.*

Q Do you know his reputation for honesty and integrity? A He has borne, as far as I know, an excellent reputation up to this time.

Q Have you ever heard his reputation questioned? A No, I have not. I have had no business transactions with him. I know him as a citizen and as a friend and a neighbor.

20 *Cross examination by Mr. Guild.*

Q Prior to this indictment had you heard his character discussed in any way or his reputation? A No, sir.

Q Neither one way nor the other? A Not until this indictment.

*Re-direct examination by Mr. Whiting.*

30 Q Since the indictment, Mr. Lyon, have you heard his character discussed?

*Mr. Mott.* I object, because the character relates to the time prior to the finding of the indictment.

*The Court.* Objection sustained.

CLARENCE P. WHITMAN resumes the stand.

*Direct examination (continued) by Mr. Whiting.*

40 Q It has been testified to that you called at the Roseville Trust Company frequently. What is your recollection as to that? A I did call very

*Clarence P. Whitman, direct.*

frequently; sometimes two or three times a week; sometimes oftener than that; sometimes not at all during the week; whenever I had business there of the company's.

Q Whose work was it to bring the deposits to the trust company, the Inter-City Company's deposit? A At one time I did all of that. 10

Q What would be the occasion for your going to the Roseville Trust Company? You say you went there frequently? A I went there whenever I had any deposits to make, whenever I had any other business which the company required me to do, such as making loans or finding out whether we could make any loans.

Q Whom did you see in connection with the matter of the loan? A Mr. Raymond E. Smith, the treasurer of the bank, who made the loans. 20

Q Was there anybody else there you did see or could see? A I paid the deposits to the receiving teller.

Q With relation to the loans, who handled that matter? A Mr. Smith.

Q Did you see Mr. Smith every time you called at the bank? A I didn't see him any more than once in five times. I would see him, nod to him; that is, he had other business and I couldn't see him. 30

Q Did Mr. Smith ever tell you that the Inter-City's account was overdrawn? A Never, sir.

Q Did he ever discuss with you the condition of the company's relationship with the bank with respect to the credit which it was enjoying there?

A Yes; he asked me several times when we were going to pay in some of the loans that we had there, when we were going to bring some money in the bank; asked how we were going to do it; discussed the plans the company made to dispose of our property and raise money for operations. 40

*Clarence P. Whitman, direct.*

Q Did you ever discuss with him the properties which the company was operating? A I did, frequently, when I talked to him.

Q Did Mr. Smith ever ask you for a statement of the company's affairs? A Yes, several times, and they were furnished.

10 Q Did you make up the statement? A No, sir; they were statements of property only showing the equities owned by the company, their assessed valuation, what was against them.

Q That was part of your work to do that? A No, I didn't make that up; that was made up and carried in the company's affairs as a regular list that we gave out to brokers and real estate operators who were dealing with us.

20 Q Did Mr. Smith ever come to look over those properties or ever look over the properties of the company that you know of? A Once that I know that he went over those properties with Mr. Faunce—that is, went and inspected them—that is, all that we had at that time.

Q Do you remember when that was? A I should say it was in May or June—April, May or June of 1913.

30 Q You say Mr. Smith discussed the condition or credit of your account with the bank. What, if anything, did he ask you to do with respect to that? A He discussed the means that the president of the company was using in disposing of property and raising money, trying to get from me the information and getting from me what I knew regarding the working of the company's property, the financial handling of them, which was done at the office.

40 Q Did you ever have any understanding with Mr. Smith as to being allowed to overdraw your account?

*Clarence P. Whitman, direct.*

*Mr. Mott.* I object. I think we should have the conversation as to that matter.

(After discussion, objection withdrawn).

A No.

Q You seem to have signed and endorsed a number of checks in evidence, Mr. Whitman; I think you glanced over them at the time they were introduced on behalf of the State and admitted they were your signature. How did you happen to execute such paper of the company. Will you state whether or not you had authority so to do? 10

A The by-laws required me to sign the checks at one time alone, and at a future time in conjunction with the president, and a still later time in conjunction with the bookkeeper—I say the by-laws—they only require two, by resolution of the board of directors. 20

Q Did Mr. Smith ever ask you to execute any notes of the company and deposit them with the trust company? A He asked me to give a note two times that I remember for our account when I was there.

Q What was stated in that conversation as you recall it? A As I remember it, he said, "You had better put a note in here." I said, "Do you need Faunce's signature?" He said, "No, I can sign;" that was in one case. The other case, I simply remember he said that I had better have a note made out. I made it out right there on the public shelf or on the edge of his desk, which was in front of the office, and turned it over to him in regular form. What they were for I don't know; whether they were for renewals or what, I don't know. I trusted his knowledge of conditions entirely. 30

Q Did you keep track of the notes yourself—was that part of your work to keep track of the 40

*Clarence P. Whitman, direct.*

notes and renewals? A It was part of my duties, but I didn't do it; I should have done it without any question.

Q I understand you were treasurer of the company? A Yes, sir.

Q And that was part of the treasurer's duties?  
10 A Yes, sir.

Q You didn't actually perform that part of the work? A I did not.

Q Did you actually keep the books or accounts of the company? A I kept no accounts or no books.

Q Those that were kept were not kept by you?  
A Not by me.

Q Did Mr. Smith ever notify you that checks of the Inter-City Company were coming into the trust company and were not good or could not be paid? A Never.  
20

Q Did you ever know that to be true, that that state of affairs existed? A I did not.

Q Mention of the pass-book has been made. Did the company have such a book? A I suppose they did, but I haven't any recollection of it except when I was asked to get it at the bank, and I made several requests for it without obtaining it.  
30

Q Whom did you ask? A Mr. Smith.

Q What was said? A Simply said he was too busy to get it written up, and it was getting a good ways back; never gave any other reason, and sometimes said he would get it and have it at a certain time.

Q Did he ever get it for you? A He never got it.

Q Did he ever tell you you couldn't have it because of some rule of the bank? A He never did.  
40

*Clarence P. Whitman, direct.*

Q Did he ever tell you that this account was overdrawn and it couldn't be ruled off, as he expressed it? A No, sir.

Q Did you ever know that? A No, sir.

Q Mr. Whitman, did you know, prior to the closing of the Roseville Trust Company, that there was anything wrong with your account there or anything wrong being done in connection with your account? A In connection with our account, no, sir. 10

Q You seem to have qualified that. What have you in mind? A Why, I have in mind a condition away back in May or April when a friend of mine—

Q State the year. A 1913. —When a friend of mine went to Mr. Smith and questioned him about the condition of our account, and at that time I was very much disturbed over it because I couldn't get neither head nor tail from either at our office or at the bank, but he assured me it was all right, and I felt satisfied. 20

Q Aside from anything what you have just mentioned, is there anything you know of prior to the closing of the bank to put you on suspicion as to the condition of affairs there, or which led you to believe that there was anything wrong in connection with your account? 30

Objected to.

Q Was there anything that you knew before this bank closed its doors that made you think that things were wrong there? A No, sir.

Q Did you think anything was wrong there? A No, sir.

Q When was the last date you went to the bank to deposit money? A The day it was closed.

Q Did you leave it there that day? A I couldn't; it was locked. 40

*Clarence P. Whitman, direct.*

Q How much money did you have? A \$500—in the neighborhood of \$500 I had to deposit that morning.

Q For the Inter-City Company? A For the Inter-City Company.

10 Q When had you deposited money prior to that, if you can recall? A Within two days.

Q How much, about? A It was in that neighborhood, as that was generally our daily collections about that time of the month.

Q Mention has been made of a note of Winfred L. Smith for \$11,165. Do you know Winfred L. Smith? A Yes, sir.

Q He is the Mr. Smith who is one of the directors of the company? A Yes, sir.

20 Q Where does he live? A He lives on Center street and Central avenue, at the head of Central avenue on Center street.

Q What city? A Orange.

Q Is he a man of means? A I so understood that he was.

Q Do you know what business he is or was engaged in at the time this note was made, for example? A He was one of the firm of M. P. Smith & Company, shipmakers and stevedors. It was a very large concern of that kind.

30 Q Do you know about this note—have you ever seen it? A Yes, sir, I have seen it.

Q What was it given for? A It was given by Mr. Smith as a balance on his subscription to stock of the Inter-City Company. The rest of it was to be paid in cash.

40 Q I call your attention to the fact that it is produced from the prosecutor's files at my request, and I will ask you, if you know, what became of the note after you saw it for the first time? A I was given to Mr. Raymond E. Smith.

*Clarence P. Whitman, direct.*

Q Do you know who gave it to him? A I think I do.

Q State what you know about it and its history. A I don't know anything more than Mr. Smith agreed to take \$12,000 worth of stock and he put in some money, and this is the difference between the cash that he put in and the par value of the stock which he agreed to pay for. 10

Q When you say Mr. Smith, you mean Mr. W. L. Smith? A Yes, sir.

*By the Court.*

Q Then was this note given by Mr. W. L. Smith to the company in payment of stock which he held in the company? A It was given by Mr. Smith to the stockholders, who were Mrs. Whitman and Mrs. Faunce, and they turned it over to the company to use for the company's— 20

Q They held the stock in their names? A Yes, sir.

Q It really belonged to the company? A It really belonged to the members of the company, only it was in their name.

Q Did it belong to them as a corporation or as individuals? A It belonged to them as individuals because the stock belonged to the wives of Mr. Faunce and Mr. Whitman. 30

*By Mr. Whiting.*

Q You spoke of Mrs. Faunce and Mrs. Whitman. Were they active in the company? A No, sir.

Q Was Mrs. Whitman? A No, sir.

Q Was Mrs. Faunce active in the company? A Not at all.

Q You didn't participate in the forming of the company, did you? A I did not. 40

*Clarence P. Whitman, direct.*

Q It was an existing charter at the time you came in it? A Yes, sir.

Q Who had charge of that, who had the charter? A Mr. Faunce was president of it just previous to my coming into the company.

10 Q Had the stock been issued and fully paid at that time, do you know? A I don't know.

Q Who handled the legal end of it? A Mr. Faunce and Mr. Swarts. Mr. Swarts was the attorney at that time.

Q You say you hadn't actual knowledge as to that matter then? A No, sir—I can remember some of it.

Q Are you a lawyer? A No, sir.

20 Q Have you ever formed a corporation? A No, sir, not personally.

Q Well, any other way? A Well, I have participated in corporations previous to that; had a corporation of my own, where I owned the controlling interest previous to that.

Q The work of formation and organization was done by your attorney? A Yes, sir.

30 Q Why did you bring that note over to the trust company, the Winfred L. Smith note over to the trust company? A Because I wanted some money from the trust company.

Q Well, state what happened at that meeting. Whom did you see? A The note was presented to Mr. Smith and he told me, as he told me many times previously, that he couldn't put it through for me just then, but when the time was right he would put it through.

Q And you left it with him? A I left it with him, as I always had.

40 Q Will you state whether or not you had complete reliance on Mr. Smith and his integrity? A

*Clarence P. Whitman, direct.*

Absolutely, at all times while I was doing business with the bank.

Q Did you doubt his integrity down to the closing of the bank? A No, sir.

*By the Court.*

Q What did you say to Mr. Smith when you presented this note to him? A I don't remember exactly, but I took it out there to put it to the credit of the company. 10

Q Not what you took it out there for. What did you say to Mr. Smith when you gave it to him? A He knew it was coming. He had been to the directors' meeting where these notes were spoken of as being put in the bank that had been agreed upon previous to our presenting them there at the bank. 20

Q You say he had been present at a meeting? A He had agreed to purchase 700 shares of stock and those notes were to be given at that time, and at the time of the sale of the stock he agreed to put his note in and Mr. W. L. Smith's note in to the company.

Q Was there anything said at that time about the Roseville Trust Company discounting this note? A No, sir. 30

Q Then how do you know, if there was nothing said then and nothing said when you went there with the note, that Mr. Smith knew that this note was to be placed to the credit of the Inter-City Company? A Well, I don't know if Mr. Smith knew it was to be placed to the credit. I thought it would go through the regular process.

Q You said you knew it was to be placed to the credit of the Inter-City Company? A That is what I took it there for. 40

*Clarence P. Whitman, direct.*

*By Mr. Whiting.*

Q Do you know what become of it after that?

A No, sir.

10 Q Were you ever told it didn't go through? A I asked about it I think shortly afterward, a week or two after; I continued asking about it, whether it would be all right, and I was assured it would be, and that is all I cared about.

Q Do you recall testifying in bankruptcy proceedings in connection with Mr. Raymond E. Smith's affairs? A Yes, sir.

Q Do you remember being questioned as to some notes there? A Yes, sir.

Q Do you recall what you said at that time? A No, sir.

20 Objected to.

Objection sustained.

Q Prior to the noon recess you had been shown a set of photographs which I hand you again. Will you examine those pictures and say whether or not you recognize them? A Yes, sir.

Q Were those made in preparation or in connection with this trial or before? A Long before.

30 Q What do those pictures show? Where did you get them—how did they come to be made—what do you know about them?

Objected to.

Objection sustained.

Q I hand you a photograph. Do you know whether or not that correctly represents the buildings which appear therein?

Objected to.

40 *The Court.* What difference does it make? How is his testimony with relation to those photographs competent?

*Clarence P. Whitman, direct.*

*Mr. Whiting.* These are photographs in which the Inter-City was interested and which they were operating. I want him to identify them as being true representations of those properties.

*The Court.* I do not see how that is going to have any weight in this case. You cannot prove the worth of this company by photographs of buildings. They may be very valuable and still be mortgaged for more than they are worth. So far as the State is concerned, there has not been the slightest question raised that would make this proof necessary. They have not questioned the fact that this company was operating largely in real estate. You have already shown that to be the fact and the question has not been injected into the case by the State at all. 10  
20

*Mr. Mott.* We are willing to concede that they were operators and speculators and anything else that goes with real estate operations.

*The Court.* The offer of these photographs is rejected by the Court.

Defendants' counsel pray an exception to this ruling by the Court, and the same is allowed and signed and sealed accordingly. 30

H. V. OSBORNE, [L. s.]

*Judge.*

The note for \$11,165 is marked Ex. D. 3.

At this point the witness is temporarily withdrawn.

*Clarence P. Whitman, cross.*

JULIAN GREGORY sworn in behalf of defendants.

*Direct examination* by Mr. Whiting.

Q Where do you reside? A 84 Carlton street, East Orange.

10 Q How long have you lived in the City of East Orange? A All my life; forty-one years.

Q Do you know Clarence Whitman, who has just been on the stand? A Yes, sir.

Q How long have you known him? A Ever since boyhood, as far as I can remember.

Q And you are acquainted with his friends? A I have known his mother and father and family all my life.

20 Q Prior to the indictment which is under trial now did you ever hear the reputation for integrity or honesty of Mr. Whitman? A No, Mr. Whitman always bore the highest reputation in East Orange and was looked upon with the highest regard, I think, by every one that knew him.

Q Let me ask; you have held public office in the City of Orange for some years? A Yes.

Not cross examined.

30 CLARENCE P. WHITMAN resumes the stand.

*Cross examination* by Mr. Guild.

Q You say you kept no books of the Inter-City Land and Securities Company? A Yes, sir.

Q Did they keep the books? A I believe there were some books kept.

Q What kind of books? A Just what they were I don't know.

40 Q Did you ever see them? A Yes, I saw several books there that were kept at different times by different people.

*Clarence P. Whitman, cross.*

Q Did you ever examine them? A No, sir; I can't say that I did.

Q Who kept the check book? A Mr. Faunce.

Q Where are the books, do you know? A Yes, sir, I know where some of them are. I got them at some expense for my counsel some time ago. I believe they are here in the city. 10

Q Are they here in the court house? A I don't know. He had them some time ago.

Q How many check books were kept during your connection with that company? A I couldn't tell you that.

Q More than one? A Oh, yes, I should say so.

Q Did the company have any other bank account than the Roseville Trust Company? A No, sir. 20

Q Have you had anything to with the check book at all? A Signing the checks, that is all.

Q Who drew the checks ordinarily? A Toward the latter part of our business the bookkeeper drew all the checks, the latter part of our business with the bank.

Q And prior to the bookkeeper drawing them who prepared them? A Sometimes Mr. Faunce did and sometimes I did. 30

Q When Mr. Faunce drew the checks he would simply hand them to you and ask you to sign them? A Yes, sir.

Q When the bookkeeper drew them he would simply hand them to you and ask you to sign them? A Yes, sir.

Q Did you ever ask anybody what they for? A As far as my branch of the business, as far as payment of bills for repairs regarding the building.

Q That was to ascertain whether the amount was correct? A Yes, sir. 40

*Clarence P. Whitman, cross.*

Q Did you refer to the check book to see if the check was good? A No, sir.

Q In any instance? A No, sir, not that I know of.

Q Were you in the habit of carrying blank checks in your pocket? A No, sir.

10 Q When you said that the property owned by Mr. Smith and yourself in the west, which was traded in by him in part payment for stock that he took of the Inter-City Company had not actually been turned over to the company, you didn't intend to imply by that that was in bank? A No, sir.

Q You didn't sign any such deed yourself? A No, sir.

20 Q You say you frequently saw Mr. Smith at the bank about loans? A Yes, sir.

Q Of course, you and I both understand that means loans by the Inter-City Land and Securities Company? A From the bank.

Q Owned by the Roseville Trust Company? A Yes, sir.

Q Can you recollect any special instance? A No, sir.

30 Q Can you tell us what you said to him on those occasions when you would go in and ask for a loan for the company? A I generally tried to tell him what it was for and how much I wanted and asked when I could have it.

Q And what would you give him? A A note.

40 Q I ask you again if you can remember any special instance of a note, the amount and the date? A No, I don't remember; I know of a great many notes that I turned in to the bank at different times, but I don't remember any special conversation or special date or special instance except that I will say that I remember giving two notes out-

*Clarence P. Whitman, cross.*

side of his office, that is, in the public part of the bank, the part in front of the teller's window, if I remember correctly, one for \$4,000 and one for \$6,000 we gave out there, made out by me out there; I don't recollect whether Mr. Smith was outside of the cage or whether he was back of his desk, but I remember this, two notes being made out there. 10

Q Can you remember about when that was? A No, I can't remember the date.

Q Whose notes were they? A They were made out by me as treasurer for the Inter-City Land and Securities Company account.

Q How were they endorsed? A They were endorsed by me as treasurer of the Inter-City Land and Securities Company, and by me personally, as I recall it. 20

Q Did you have any financial responsibility? A Outside of the holdings of the company very little.

Q Who would determine how much the note would be made for? A The majority of the notes were determined in New York what they were to be, how much I was to ask for. I had very little to say about them.

Q Who did have the say about it? A Mr. Faunce knew what we needed and he would ask me to go to the bank and I would tell them just what he told me. 30

Q And you would go out and get the accommodation? A Yes, sir.

Q Did you usually get it? A No, sir, I wouldn't say that I usually got it; I didn't get it as often as I did.

Q That is contradictory. A Well, I mean sometimes I did and sometimes I didn't. 40

*Clarence P. Whitman, cross.*

Q When you got the accommodation what did you take back to New York with you as evidence of having gotten the credit? A Mr. Smith's word.

Q And your own recollection? A And my own recollection.

10 Q Who did you convey that to? A Mr. Faunce.

Q Do you know what he did with it? A Why, drew against it, I suppose.

Q He didn't wait very long? A I don't know. I didn't have anything to do with that end of it.

Q Do you know whether that discount or credit was put in the check book? A I do not.

20 Q Or any other book? A I don't, only I suppose that it was.

Q I am only asking you what you know? A I don't know.

Q Do you know what became of the notes when they matured? A I do not.

Q Did you keep track of how long the notes were to run or the amounts of them? A No, sir.

Q Do you know whether anybody else in the company did? A I suppose they were all taken care of.

30 Q No, I merely ask you if you know? A No, sir.

Q When you went out to the Roseville Trust Company on these note errands you wouldn't know in advance whether you were going to get the accommodation or not? A No, sir.

Q The notes in most instances would be prepared right there in the bank, would they not? A No, sir, on the contrary, they were generally prepared in the bank.

40 Q Some of them were? A Some of them were; two that I remember.

*Clarence P. Whitman, cross.*

Q Then those notes that were not prepared in the bank were dated and prepared in New York?

A They were prepared in New York.

Q So you yourself never knew as a matter of fact what the condition of your bank account with the Roseville Trust Company was, did you? A No, sir.

10

Q Now, you have stated that Mr. Smith asked you several times at the bank when you were going to bring in money for the bank? A Yes, sir.

Q Did he not tell you at that time that the account was overdrawn and that you were placing him in a very embarrassing position? A No, sir, he never used that term to my knowledge.

Q Why did he want you to bring money to the bank? A Because we owed money to the bank.

20

Q On what? A On notes.

Q Notes that had matured and had not been paid? A I don't know that.

Q But you say it was because the company owed the bank money? A Because the company owed the bank money.

Q That is what he wanted? A Yes, sir.

Q And that is what he spoke about? A Yes, sir.

Q And that is what he told you, the company did owe the bank money? A He told me the company did; I knew that.

30

Q You did know it? A Yes, sir.

Q Can you fix the date of that conversation or any of them? A No, sir; I can't fix that date.

Q Do you know how much your company did owe the bank when you had this conversation? A No, sir, I did not.

Q I understand you that you were a depositor of this bank, the Roseville Trust Company? A Yes, sir.

40

*Clarence P. Whitman, cross.*

Q And that the Inter-City Land and Securities Company used your account for their purposes?

A Yes, sir.

Q At the time that the other company opened its account how much money was due the bank?

A I don't know.

10 Q Well, as nearly as you can recollect? A I can't recollect that it owes them anything.

Q Don't you know that they owed it a thousand dollar note? A I don't know that they did, but I know that they had several notes in the bank previous to that, but I didn't understand you to mean that.

Q When I said owed, I meant on any character of indebtedness? A I know that they had several notes in the bank at the time the Inter-City opened its account there, opened it with cash.

Q They were passed due and unpaid? A No, sir, I don't know that.

Q You didn't know that? A No, sir.

Q Do you know what became of those notes? A No, sir, I do not; I supposed they were paid and taken up when they became due.

Q Don't you know, as a matter of fact, Mr. Whitman, that these notes were taken up by the Inter-City Land and Securities Company's notes?

30 A I know that all of the notes that were Inter-City Company's notes previous to that were taken up by the Inter-City Company when they changed their account, put it under their name.

Q The notes that I am referring to that were in the bank and unpaid at the time the land company opened this account were your notes with Faunce's name on them and not the land company's at all; you know that there were three or  
40 four notes of that character, do you? A No, sir, I don't, I don't know that there were notes of that

*Clarence P. Whitman, cross.*

character; there was only one Inter-City Company note there and that one was taken care of, as I remember, at the time that Mr. Smith bought his \$5,000 worth of stock; that is the only note that I know of; that was a note of mine.

Q You said that Mr. Smith had asked you for a statement, as I understood you, of the loan company's financial situation? A Yes, sir. 10

Q And what you gave him was a statement of the value of your company's properties such as you handed out to brokers or anyone else that you wanted to negotiate with for those properties? A I believe some figures were added to that by Mr. Faunce in the office at one time, figures of the company's assets and liabilities.

Q Do you know whether that reached Mr. Smith? A It was made out; I must have taken that out there. 20

Q Well, did you take it to him? A Well, I don't remember, but I do remember giving him several papers of that nature.

Q I want to know whether it is not true that the trust company held your notes, endorsed by yourself and T. H. Grossnip, dated December 10, 1912, for \$2,100? A Yes, sir.

Q What became of that note? A That note was the one that I spoke of that was taken care of in the transfer of the western property; that is what it was for; it was originally \$2,600; it was paid down to \$2,100 or \$2,000, and then was taken care of by the transfer of that property to the company; that is the way the transaction was to have occurred, when Mr. Smith got his \$5,000 worth of stock, the company assuming it at that time. 30

Q Here is a note of \$2,100 held by the Roseville Trust Company, or note with its endorsement, and 40

*Clarence P. Whitman, cross.*

you mean to say it was paid by the company issuing stock to Smith? A No, sir, I don't. I mean that the company took over that obligation; it was not paid that way; the company assumed that obligation because the company paid me for the shares that I had in the loan as it paid Mr. Smith for the share that he had in the loan, and the balance was \$1,500, which he was to pay in cash. It simply assumed the obligation.

Q Didn't the company give its own note to take up that obligation.

Q Was there no time agreed for the new note that they gave to the trust company for \$2,500? A For the \$2,100 note?

Q \$2,500? A No, sir; they took no credit for anything other than a \$2,100 note when that was taken care of.

Q I ask you whether if the company on December 10th, 13th and 15th did not take credit for notes of \$2,500, \$2,500 and \$2,600? A That I can't answer, because I don't remember the date of the note, but I know that there was a transaction where all of the company's notes were put on different terms, one, two, three and four months, the latter part of 1912 or the early part of 1913, and that was the time when the \$2,100 note was taken care of that way.

Q Did you charge your own company with the \$2,500 note? A I didn't charge any one because I didn't keep the books. I don't know how it was charged.

Q Did you ever tell your bookkeeper to charge your own company with that \$2,100 note that was taken up in that way? A I didn't; I never told any bookkeeper to charge it.

Q These were your personal notes? A There was only one personal note.

*Clarence P. Whitman, cross.*

Q The \$2,100 note? A Yes, sir.

Q Unless you told the bookkeeper how would he know it? A When that note was taken over by the company it was talked over by the board of directors and they made that agreement at that time; took the matter up with Mr. Smith and it was all arranged by the board of directors. 10

Q Winfred or Raymond. A I mean Mr. R. E. Smith. When Mr. R. E. Smith bought \$5,000 worth of stock, that is when that note was taken out of my account, which was really the company's account in my name, and put in the company's account.

Q Is there a resolution in the minutes of your company there? A The resolution was made. It should be there.

Q So what you endeavored to do was to discharge your obligation to the Roseville Trust Company for \$2,500 by a sale of stock to Smith? A No, sir, I turned over my share in the property. 20

Q Did you turn it over to the trust company? A No, sir, to the Inter-City Land & Securities Company.

*By the Court.*

Q As I understand it, you owed the trust company on the note which the Inter-City Company assumed and in consideration of that note you conveyed to them some property? A No, sir; this is the same property that we were talking about before, the western property. That property Mr. Smith agreed to finance; he took my note, endorsed by a New York business man for that, and that note was paid down to \$2100, and that note was transferred back to the company at the time the property was turned over to the company, at the time that Mr. Smith turned his undivided interest over to the company. 30 40

*Clarence P. Whitman, cross.*

Q I am trying to find out what consideration went to the company for assuming your note? A The undivided half interest that I had in the property went to the company for assuming that note.

*By Mr. Guild.*

10 Q What I am trying to find out is whether the land company ever charged itself with the \$2100 note?

*The Court.* He says he does not know because he did not keep the books. He is telling you about the transaction.

*Mr. Guild.* Because that goes to make up part of the difference between the trust company and the Inter-City Securities & Land Company.

20 *The Court.* He does not undertake to answer that question.

Q I ask you about another note, or note endorsed by yourself and J. B. Faunce for \$1000, wasn't that in the bank, the trust company?

*Mr. Whiting.* I don't think this is cross examination, and it is going into things which are not covered by the indictment.

30 *The Court.* As I recall, you asked Mr. Smith about a contract. This examination is directed to that. I do not think it is apparent yet that it is not cross examination. Objection overruled.

Defendants counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

*Clarence P. Whitman, cross.*

Q Was that note not owing at the time the company owned an account with the trust company?

A I don' know anything about that, sir.

Q Do you mean to say you didn't get credit for it on your account? A My account was the company's account.

Q I know, but it was carried in your name? 10  
A I know it was, but I didn't keep track of that note or of any other note except that one note at that time.

Q Are we to understand that you didn't keep any more strict account of your personal account with the trust company, although it may have been the land company's funds, than you did as treasurer of the land company?

*Mr. Whiting.* I object to that. 20

*The Court.* You mean the account in his name used by the Inter-City, that is what you are referring to?

*Mr. Guild.* Certainly.

*The Court.* I think the question is a proper one.

A Towards the last six months, I should say, that I had my account in the bank, I didn't keep any track of that account; it was kept in the office of the land company. 30

Q Which six months was that? A Six months previous to the opening of the Inter-City's account; I would say it is about six months.

Q Do you remember the date when the land company opened its account? A I don't remember the date, although I have heard it mentioned. I should say in January.

Q October. A I thought it was January.

Q October, 1912. A I thought it was later than that. 40

*Clarence P. Whitman, cross.*

Q Then from the April previous you paid no attention to this account carried in your name?

A I should say it wasn't that long; it may not have been; I know for a long time I had no interest in that account.

10 Q Didn't you draw personal checks? A Sometimes I did, but with Mr. Faunce's knowledge, my partner's knowledge.

Q Did you not on May 8, 1912, put through the bank your own note endorsed by yourself for \$1000, a demand note?

*Mr. Whiting.* I object. It does not appear to have any connection with the Inter-City Company.

20 *The Court.* Is this six months previous to the opening of the Inter-City account? If it had anything to do with the Inter-City account I think it is important.

Defendants' counsel pray an exception to this ruling of the court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. S.]

*Judge.*

A I don't remember any such note.

30 Q Do you mean to say that your account did not receive credit for it? A No, sir, I don't mean to say it because I don't remember my account at that time; I don't remember the note you speak of.

Q You know nothing about it at all? A I don't remember.

40 Q You don't know how it was taken up? A It was given to me this way—I don't remember—if I knew what it was in connection with I may know something about it.

*Clarence P. Whitman, cross.*

Q That I can't tell you. A Well, I can't recall it any other way.

Q I ask you again when the note of the Inter-City Company was given December 10, 1913, \$2,500, \$2,500 and \$2,600, it was not understood that your personal notes were to be charged against the Inter-City Company?

10

*Mr. Whiting.* Understood how?

Q That is what they were given for, to take up the personal notes? A No, sir, there were no personal notes of mine taken up by the Inter-City except that one I have explained.

Q Do you understand that you do still owe the \$2000 note and another note? A No, sir, I don't believe I owe the bank one dollar, that is, on my personal account.

20

Q I know, but notes that were placed in this account, carried in your name, which you say was really the land company's account? A If they are land company's notes they are not my personal notes.

Q Yes, they are personal notes. A Well, they must have been renewed by the company; that is possible.

Q Not taken up by these notes? A But if they were renewed and taken up by the company they were company's notes in the beginning.

30

Q In fact, but not on the face of them? A I say I have no recollection of them.

Q The company's note of \$2,500 and another of \$2,500, and another of \$2,600 given December 10th, 13th and 15th, were practically renewals of your own notes? A I can't tell you. You asked me dates and renewals. There were a good many notes put in there, but I don't have any recollection of them.

40

*Clarence P. Whitman, cross.*

Q Do you know what the first note was that was given to the Inter-City by the trust company?

A No, sir, I couldn't tell you that.

Q Do you know what the second one was? A No, sir.

10 Q Do you know what any of them was? A No, sir, unless you have more specific—

Q I call your attention to a note dated December 10th for \$2,500. A The only way I could recall a note would be in relation to some transaction, and that I could do because I was told what the transaction was for in some cases, what they were raised for.

20 Q The two notes of \$2,500 and the note of \$2,600 which I have called to your attention, Mr. Smith testified yesterday were given in part, at least, to take up notes that the bank held at that time made by you; is that true or isn't it? A I remember his testimony at that time of \$375, I believe he testified to, that was to my account—

Q He didn't use those figures at all? A There were no notes to take up, and notes of my own except that one of \$2,100 that I have any knowledge of at all that were not company's affairs.

30 Q You say then you do remember that a note of \$2,100 was taken up? A That note was taken up for the one-half undivided interest in the land—

Q I don't care anything about that—the fact it was taken up by the company's notes? A It was taken up with equivalent.

Q I ask you whether it was not taken up by the company's note? A That one note, I remember, was taken up, as I stated.

40 Q Do you know how much of the amount was used in taking it up? A No, sir, I do not; I suppose the same amount.

*Clarence P. Whitman, cross.*

Q Well, then, you say at that time your note of \$2,100 was charged up on the books of the company? A That I don't know. All I know is that obligation was assumed by the realty company.

Q It was assumed by the realty company? A It was assumed by the realty company. How it was assumed I don't know. 10

Q You say that Mr. Smith asked you twice to give the trust company a note. Did he tell you what for? A No, sir.

Q Did you ask him what for? A No, sir.

Q Did you give him the note when he asked for it? A Yes, sir.

Q Do you remember the amount of it? A One of them was for \$4,000 and one was for \$6,000.

Q And you asked no questions as to why he wanted it? A No, it was— 20

*Mr. Whiting.* Let him answer.

*Mr. Guild.* No.

Q Can you give us the date of those notes? A No, sir.

Q You have stated that in May or April, I take it it was 1913, you said you were very much disturbed about a report that came to you? A Yes, sir.

Q Was that 1913? A Yes, sir. 30

Q What was the report? A A friend of mine told me that things were being run carelessly at the bank.

Q At the Roseville Trust Company? A Yes, sir.

Q Who was your friend? A Mr. W. L. Smith.

Q That is the gentleman who made the \$11,000 note? A Yes, sir.

Q And was he a director in your company, the land company? A Yes, sir—I am not sure that he was at that time, and yet I think he was. 40

*Clarence P. Whitman, cross.*

Q Was he a director at the time he gave the note? A A director of our company? Yes, sir.

Q June 16, 1913? A Yes, sir.

Q That is the date of the note, is it not? Do you recollect that? A I don't recollect it. You have it there.

10 Q Will you look at it? A June 16, 1913, is what it reads. I don't remember the date.

Q And you were disturbed in May or April. What did you do? A I went away for two or three weeks.

20 Q On account of that? A I went away on account of that and the general nervous condition that I was in at that time. I wasn't disturbed then; that is the only time I had any doubt about the condition of the company or the condition of the bank; it may have been a nervous condition; I don't know.

Q Your nervous condition brought about by report you heard concerning the bank? A No, I only heard that one report, and that was not a—it was my condition that made that report serious to me.

*By the Court.*

30 Q It was not the report that made your condition serious, but it was your condition that made the report seem serious? A Yes, sir.

*By Mr. Guild.*

Q Mr. W. L. Smith said affairs were being run very loosely there? A Yes, sir, he is the same man that quoted me.

Q He quoted you? A Yes, sir.

40 Q You didn't go to R. E. Smith about it? A He did.

Q I ask you if you did? A No, sir.

*Clarence P. Whitman, cross.*

Q What was the information you got that disturbed you? A I was naturally disturbed when I thought it was the bank that he relied on.

Q You were afraid your source of supplies would be cut off? A Yes, sir.

Q And without the assistance you were getting from the Roseville Trust Company your land company would not have lasted long? A I think it would. 10

Q You do? A I think that that made it possible to do a bigger business than we would have done otherwise; I think we lasted about six months after the bank went up.

Q And then what happened to you? A We sold out the company at that time.

Objected to.

Objection sustained. 20

Q How much did your company owe the Roseville Trust Company at the time the Roseville Trust Company failed? A I don't know, sir.

Q Have you any idea? A Any more than the amount of the indictment.

Q And that is how much? A \$28,000, I believe.

Q Have you made any inquiry to find out whether that is correct? A I know there is considerable difference of opinion between our bookkeeper and the bookkeeper at the bank as to what we owed them. 30

Q What became of the check book of your land company? A I don't know. The last I saw of any of these books, they were turned over to a trust company in Philadelphia and I got some of them by buying them back.

Q Mr. Whitman, did I understand you to say the stock that Mr. Winfred L. Smith purchased was \$12,000? A Yes, sir, 40

*Clarence P. Whitman, cross.*

Q That is, stock of the land company? A Yes, sir.

Q And it was stock owned by Mrs. Whitman and Faunce? A Yes, sir.

Q Standing in their name, at least? A Yes, sir.

10 Q And that note was given to Mrs. Whitman and Mrs. Faunce? A I believe that is the way the note was made out; I am not certain.

Q If they owned the stock should it not have been made out that way? A They were holders of record on our books, but I wouldn't say they would do anything we didn't want them to do with the stock.

Q That was your statement, that the note was given to Mrs. Faunce and Mrs. Whitman? A  
20 Yes, sir.

Q I show you the note and ask you whether your statement is correct? A No, sir, it is made out to C. P. Whitman, and John B. Faunce.

Q And endorsed by them, isn't it? A And endorsed by them, yes, sir.

Q Did I understand you to say that this note was left with the Roseville Trust Company or Mr. Smith to be credited to the account of the Inter-City Company? A Yes, sir.

30 Q The Inter-City Company's name does not appear in the note in any way as an endorser? A I don't see it on there.

Q It is not there, is it? A No, sir.

Q You have testified, Mr. Whitman, that when you took this \$11,165 W. L. Smith note to Mr. Smith that he told you that the bank could not take it at that time? A Yes, sir.

Q Did you report that to Mr. Faunce? A Yes, sir.

40 Q Do you remember about when you took the note to Mr. Smith? A No, sir, I don't remember.

*Clarence P. Whitman, cross.*

Q Was it approximately the date of the note?

A I should say it must have been very close to the date of the note, as I remember it; I am not at all certain of that.

Q Did you give that information to your book-keeper? A That I can't remember. I remember reporting it in my office, or whether it was to Mr. Faunce or the bookkeeper that I couldn't tell you. 10

Q Do you know whether this note is entered on the books of the land company? A No, sir, I do not.

Q And you still owe that note? A My endorsement on there—

*Mr. Whiting.* I think that is immaterial to the inquiry.

*The Court.* I suppose it is a conclusion of law. 20

Q You haven't paid it?

Objected to as immaterial.

*Mr. Guild.* I will ask for a ruling on the first question.

*The Court.* On the first question the objection is sustained.

Q Have you paid that note?

Objected to. 30

*The Court.* Had he paid it up to the time the bank failed?

*Mr. Guild.* The question is whether the note has been paid.

*The Court.* Objection sustained.

Q Up to the time the bank closed had this note been paid? A No, sir, I don't think it was due.

Q Will you look at it and see how long the note is drawn for? A It doesn't give any date in there. 40

*Clarence P. Whitman, cross.*

Q That makes it a demand note, doesn't it?

Objected to.

A I don't know.

Q I ask you, does that make it a demand note?

A I don't know whether it makes it a demand note or not.

10 Q Did I understand you to say that you didn't carry a pocket check book? A No, sir.

Q Did the land company have a regular check book with its name on the end of the check and the word "treasurer" printed in its account with the Roseville Trust Company? A I think it did, always.

Q Did it limit itself in drawing checks taken from the check book? A That I couldn't say.

20 Q I show you check dated April 2, 1913, for \$2,000, drawn to the order of German Savings Bank, Inter-City Land & Securities Company, C. P. Whitman, treasurer. Did you draw that check?

*Mr. Whiting.* Is that check mentioned in the indictment?

*Mr. Guild.* It is not. It is in evidence.

*Mr. Whiting.* I object to it.

*The Court.* Objection overruled.

30 Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

A That is my signature.

40 Q I show you another check dated April 4, 1913, payable to the German Savings Bank for \$1,300, Inter-City Land & Securities Company, C. P. Whitman, treasurer. Is that your signature to that check? A Yes, sir.

*Clarence P. Whitman, cross.*

Q Did you write the body of it?

*Mr. Whiting.* My objection continues to that entire line.

*The Court.* Yes, and you may have an exception.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

10

H. V. OSBORNE, [L. S.]

*Judge.*

A I wrote the body of both checks.

Q And they didn't come out of your regular check book? A They didn't apparently. They are either checks handed me at the bank; they are not our checks out of the regular check book.

Q Do you know whether any of these checks or either of them credited to the Roseville Trust Company on the books of the land company? A No, sir; I do not.

20

Q Did you report to the bookkeeper that you had drawn those checks? A Yes, sir; I think I know what those checks were for.

Q You did report it, you think, to the bookkeeper? A Yes, sir.

Q Do you know that they don't appear there at all? A No, sir; I do not.

*The Court.* Appear where?

*Mr. Guild.* On the books of the Inter-City Land & Securities Company as credits to the Roseville Trust Company.

30

Q You were secretary of the land company? A Yes, sir.

Q What is this book I show you? A It is marked Inter-City Land & Securities Company. I suppose it is the minute book.

Q Is it? A Yes, sir.

Q I call your attention to minutes of meeting of the Inter-City Land & Securities Company held

40

*Clarence P. Whitman, cross.*

at the Lackawanna terminal, Hoboken, N. J., on the 22d day of July, 1913, at 12:30 P. M. There is a signature there, "C. P. Whitman, Secretary"? A Yes, sir.

Q Did you take and keep those minutes? A I don't take the minutes; no sir; I never took any  
10 of the minutes.

Q Your signature is there as secretary? A I sometimes signed—

Q Is that your signature? A That is my signature.

The book referred to is offered in evidence and market Ex. S20.

*Mr. Bachman.* I object to it as immaterial.

*The Court.* Why is it immaterial?

*Mr. Bachman.* On the ground that it is not  
20 binding upon the defendant Faunce.

*The Court.* If that is the only reason it will be admitted.

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

*Mr. Guild.* (Reading) "Minutes of said  
30 meeting of the Inter-City Land & Securities Company held at the Lackawanna terminal, Hoboken, N. J., on the 22d day of July, 1913, at 2:30 P. M. Present, John B. Faunce, in person; Raymond E. Smith, in person; Winfred L. Smith, in person; Clarence P. Whitman, in person. The meeting was called to order by the president John B. Faunce. It was resolved that beginning July 23, 1913, all checks and  
40 drafts of this corporation shall be signed by either the president or the treasurer, or

*Clarence P. Whitman, cross.*

by any other officer designated by the board of directors, all checks to be countersigned by the cashier. Resolved, that the cashier be bonded for \$5,000 and at the company's expense on or before August 1st. No other business appearing, the meeting was adjourned."

10

Q That resolution was adopted at that meeting?

A I suppose so.

Q Why was that resolution adopted, Mr. Whitman?

Objected to.

Q Do you know why that resolution was adopted? A Yes, sir; I suppose it was an added protection, and a business measure as a result of trying to get some system out of our organization.

20

Q Wasn't it because Mr. Faunce was drawing checks promiscuously and the company wanted to stop it? A I don't know that, sir.

Q You don't know it? A No, sir.

Q Do you say that it was not the reason? A No, sir; I don't know that it was the reason. It was only a matter of safety, as far as I know. I don't know that it was not the reason.

Q Is that the reason why you voted for it? A That I can't tell you. I can't even tell you why I did vote for it.

30

Q I call your attention to the by-laws, the minutes containing the by-laws adopted by the incorporators. A Held April 11th.

Q Were you present at that meeting? A I was not.

*Mr. Whiting.* It is already in evidence that this witness was not an incorporator.

Q Is this the regular minute book of the company? A Yes, sir; it is the last one we had. I

40

*John B. Faunce, direct.*

didn't see it until just previous to our going out of business.

Q Previous to your going out of business? A Previous to our going out of business and the Inter-City Company getting out of it.

Q This is the last regular minute book? A As  
10 far as I remember it.

Q And contains the by-laws? A Yes, sir; I suppose so.

Q Will you look and see? A Yes, sir.

*Mr. Guild.* I offer the by-laws in evidence.  
Marked Ex. S21.

*Cross examination by Mr. Bachman.*

Q July 22d was Mr. Faunce present at that meeting? A July 22d?

20 Q Yes. A I don't know; I don't remember that date.

Q Isn't it a fact that three of the directors had the meeting and the book was taken to Mr. Faunce in New York and he simply didn't object, or something like that? A I think that was the condition at one meeting, that you refresh my memory. I remember there was such a meeting.

Q Wasn't that the one recorded in the minutes under date of July 22, 1913? A I think that was  
30 the date, although I don't remember the exact date without looking it up in the minute book.

*Mr. Guild.* I will give you the minute book.

JOHN B. FAUNCE sworn in behalf of defendants.

*Direct examination by Mr. Bachman.*

Q Where do you reside? A 302 Central Park, West, New York City.

40 Q I show you Exhibit D5 for Identification and ask you if that is a copy of the letter head of the

*John B. Faunce, direct.*

Inter-City Land & Securities Company at the time of the date of the letter? A Yes, sir.

*Mr. Bachman.* I offer that in evidence only as showing the caption.

*Mr. Mott.* I object unless the body of the letter is torn off.

*The Court.* It should be torn off and made separate from the body of the letter. If you cannot do that the offer will be rejected. 10

*Mr. Bachman.* I will do that.

Marked Ex. D5.

(Paper referred to is shown to the jury.)

*Mr. Bachman.* Raymond E. Smith appears there in engraving as vice-president of the Inter-City Company.

Q Do you know Raymond E. Smith? A I do. 20

Q When did you first become acquainted with him? A Shortly after the Inter-City account was opened in the bank.

Q What business are you in? A Real estate.

Q Have you been in that business for any length of time? A Twenty years.

Q Have you been in any other business but that in the last twenty years? A For a short space of time, yes, in the electrical supply business, for a short space of time, when I left the city for my health and a line of electrical supplies for something to do. 30

Q Are you in the real estate business now? A Yes, sir.

Q Were you in the fall of 1912 in that business? A I was.

Q Were you an officer of the Inter-City Company? A I was.

Q What? A President. 40

*John B. Faunce, direct.*

Q What were your duties as such? A To have general charge of the properties, make contracts for the purchases and sales—

*Mr. Mott.* Are not his duties described in the by-laws?

10 *Mr. Bachman.* I will withdraw that question.

Q But you had charge of the purchase and sale of real estate, did you not? A Yes, sir.

Q During the year 1913, from January 1 to August 14th, did you have charge then actively of the purchase and sales of the real property of the company? A I did.

20 Q Did you have any part in the financial transactions with the Roseville Trust Company other than the drawing of checks? A No, sir; and endorsing of notes; I endorsed some notes.

Q Did you draw checks in any other place than New York City? A Never.

30 Q When you drew checks, did you have any knowledge, general or special, as to the moneys on deposit in the Roseville Trust Company? A Well, I had a statement from my collectors day by day of the money that was taken to the bank; I had no knowledge that it reached the bank, but I had no reason to suppose it didn't.

Q As to the discounts, from whom did you get your information? A From mathematical computation, I presume.

Q Through what person? A If at all, through Mr. Whitman.

Q Did you personally make any deposits in the Roseville Trust Company? A Never.

40 Q Did you at any time present a personal check at the Roseville Trust Company counter? A Never.

*John B. Faunce, direct.*

Q Did you have any conversation with Raymond E. Smith at the Roseville Trust Company at the time of the opening of the account? A Just an introduction.

Q When was that? A Some time in November, 1912.

Q Did you see him at the Roseville Trust Company— A I couldn't recall the date now; it was shortly after the opening of the account. I believe Mr. Smith wanted to know who I was, wanted to meet me.

10

Q Were there many meetings of the directors of the company? A There were regular meetings, as I recall the by-laws, every month, and then we called special meetings for several transactions which was put through. That is one of the requirements of the law in New York, that a resolution of the board of directors be attached to every application for every loan, mortgage on real estate, had to be filed with the county clerk, and therefore there had to be a meeting called and the signatures obtained, and the meetings were quite frequent in our business.

20

Q Did Raymond E. Smith at any of the meetings state to you or to your fellow directors in your hearing that the account of the Inter-City Company with the Roseville Trust Company was overdrawn? A No, sir.

30

Q Did he say at any of these meetings in your hearing that he had helped the Inter-City Company and now he wanted the Inter-City Company to help him? A I didn't hear it.

Q Had you ever been informed by Raymond E. Smith or by anybody professing to come from him that the account with the Roseville Trust Company was overdrawn? A No, sir.

40

*John B. Faunce, direct.*

Q Did you know that funds were being abstracted from the cash of the Roseville Trust Company and being applied to the checks and notes of the Inter-City Company? A I don't understand quite what you mean.

10 Q Did you have any knowledge—I am speaking outside of any allegations in the indictment which may perhaps be within your knowledge—I mean prior to August 14, 1913, did you personally have knowledge of any abstraction of the funds of the Roseville Trust Company to pay the checks and notes of the Inter-City Company? A Why, no, sir; any more than the checks were always paid, as I presumed.

20 Q Did you know that there was any unlawful abstraction of funds? A No, sir; I know nothing about banking business anyway.

Q Did you know that certain checks were paid by the Roseville Trust Company by neglecting to post same against the account of the Inter-City Company and were laid aside by Raymond E. Smith? A No, sir.

30 Q Has he ever informed you in his own behalf or in behalf of the Roseville Trust Company previous to August, 1913, that checks were being presented at the Roseville Trust Company in excess of the credit balances on the books of that company in the account of the Inter-City Company? A He never informed me, no, sir.

Q Were any checks of the Inter-City Company refused payment and protested prior to August 14, 1913? A Not to my knowledge.

Q Did you have any knowledge, directly or indirectly, prior to August 14, 1913, of the embezzlement of any funds by Raymond E. Smith from the trust company? A No, sir.

40 Q You have seen, have you not, a list of the checks mentioned in the indictment? A Yes, sir.

*John B. Faunce, direct.*

Q And are you able to state with more accuracy the application which was given to the checks at the time they were issued? A I think I am, absolutely.

Q What? A I think I am absolutely. I believe you have receipts for most of them.

*Mr. Bachman.* Will it help you if I admit that all these checks were given by Mr. Faunce or the company in New York in the ordinary course of business for value to people who were entitled to receive money? 10

*Mr. Mott.* I will take the stipulation.

*Mr. Bachman.* Except those of the checks that were given to Mr. Faunce personally, all other checks.

*Mr. Mott.* I find that I was mistaken as to the fact. I think there are a large number of those checks that were not given for the benefit of the Inter-City Company. 20

*The Court.* Does it make any difference what they were given for?

*Mr. Mott.* I, for myself, do not see that it does.

*The Court.* I do not see that it does, either. If they were checks of the company and drawn out of the Roseville Trust Company that is as far as it is necessary to go. We are not examining into the correctness of the accounts with the Inter-City people. 30

*Mr. Guild.* I am perfectly willing that counsel should ask Mr. Faunce one general question as to whether all the checks signed by him were given for bona fide consideration.

Q Were all the checks that were drawn by you in the Roseville Trust Company in the name of the Inter-City Company given for a bona fide consideration? A At all times? 40

*John B. Faunce, direct.*

Q Yes. A Well, what do you mean by consideration?

*By the Court.*

Q Were they proper checks to be drawn by the company of which you were president, so far as  
10 you know? A Yes, sir.

Q Were you present at a directors' meeting shown by the minutes marked Ex. S20? A No, sir; I was not in the city—Oh, yes; I was in the city. I went out of that meeting.

Q That was what meeting? A July 27th.

Q Did you have the fullest confidence in Raymond E. Smith, as to integrity in doing business with the Roseville Trust Company in the name of the Inter-City Company? A I certainly did.  
20

Q Did you have any idea whether he was or was not a man of wealth and standing? A I was told he was a man of considerable means. I had no personal knowledge.

Q Were you in town when the Roseville Trust Company failed? A No, sir.

Q Was it a matter of surprise to you that it did fail? A I should say so.

Q Do you remember any time when Mr. Reuck  
30 spoke to Mr. Raymond E. Smith in your New York office in the presence of yourself with regard to a statement of account? A I heard him speak several times over the telephone. I don't recall a conversation in the office, although there might have been one.

Q Did you hear Mr. Reuck make any such request of Mr. Raymond E. Smith? A Over the telephone?

Q I won't say anything about telephone? A I  
40 don't remember any, Mr. Bachman.

*John B. Faunce, direct.*

Q Did you have any telephone conversation with Raymond E. Smith yourself in which you discussed the question of pass-book and requested vouchers?

A Once, I believe.

Q Were you in New York at that time? A Yes, sir.

Q What did he say to you about the pass book and cancelled vouchers? A That we should have them when he could get them up. 10

Q Do you know about what time this conversation was had? A It was during the time the auditor was there.

Q Mr. Reuck? A Mr. Reuck. I think at his request I called Mr. Smith up.

Q Were the members of the board of directors informed by you of contemplated purchases or sales or exchanges of the property belonging to the Inter-City Company before the same were consummated? A They were. 20

Q Who were present as a rule at these board meetings? A Mr. Swartz, Mr. L. W. Smith, after he became a member of the board, and Mr. Raymond E. Smith, seldom.

Q And Mr. Whitman? A And Mr. Whitman and myself.

Q Do you remember the execution and delivery of the note of Winfred L. Smith, Exhibit D3? A Yes, sir. 30

Q What was your understanding with regard to that being delivered to the Roseville Trust Company? A That was the balance of purchase price on \$12,000 of stock.

Q What was your understanding of delivering it to the Roseville Trust Company? A I don't understand.

Q (Question read) A I don't understand what you mean by that. 40

*John B. Faunce, direct.*

Q Why was that sent to the Roseville Trust Company? A Because it was to be used as working capital of the Inter-City Company.

*The Court.* What note is that?

*Mr. Bachman.* \$11,165.

10 Q Were you present when Raymond E. Smith agreed to buy 700 shares of the Inter-City Company for \$7,000? A Yes, sir.

Q Do you know of your own knowledge whether the 700 shares were delivered to Mr. Smith? A I made out the stock certificate, made the transfer on the stock book and either gave the certificates to Mr. Smith or sent them to him for deposit. I have no recollection of how they got into his hands, when they left the office of the company to go to him.

20 Q What was the agreement with Raymond E. Smith with respect to that \$7,000, if any?

*Mr. Guild.* Tell us what was said.

A Mr. E. E. Smith was to place a note to our credit for \$7,000.

Q How soon? A I didn't hear anything about any time—upon the delivery of the stock Mr. Smith delivered his note, at the time of the delivery of the stock.

30 Q What time was the stock delivered? A On the 2d day of June, 1913.

Q Did you assume that that \$7,000 had been deposited in the trust company when you drew checks against the account? A I certainly did, when I delivered the stock belonging to myself.

Q Did you also assume when you drew checks in the trust company that \$1,500 cash had been deposited by Raymond E. Smith as the balance on the purchase of the 500 shares? A I did.

40 Q Did you receive any information, so called, from Raymond E. Smith or from anybody assum-

*Stephen B. Ayres, direct.*

ing to represent him or the Roseville Trust Company that an alleged overdraft or debit balance on the books of the Roseville Trust Company appeared? A No, sir.

(At this point the witness is temporarily withdrawn.)

10

STEPHEN B. AYRES sworn in behalf of defendants.

*Direct examination by Mr. Bachman.*

Q Where do you reside? A In the Bronx, New York City.

Q You have been a member of Congress for some time? A Some time, yes, sir.

Q Have you known John B. Faunce for any length of time? A Yes, I should think five or six years. 20

Q And have you had transactions with him of a friendly character or otherwise? A Yes.

Q Do you know many who also know him? A A good many, yes.

Q Have you had an opportunity in that way to find out his reputation in the community? A Yes, in our locality.

Q What is his reputation in the community, as you know it, for honesty and good behavior and veracity? A Well, I never heard a word against him. 30

Q Can you state of your own knowledge whether or not the defendant Faunce had not been recommended by many prominent people to be appointed assistant treasurer of the United States of the New York Port?

Objected to.

Objection sustained.

40

*Louis E. Swarts, direct-cross.*

LOUIS E. SWARTS sworn in behalf of defendants.

*Direct examination* by Mr. Bachman.

Q Where do you live? A 35 Vincent street, Bloomfield.

10 Q Were you a director of the Inter-City Land & Securities Company during some part of 1913?

A I was.

Q Did Raymond E. Smith state to the members of the board, in your presence, that the account of the Inter-City Land & Securities Company was overdrawn on the books of the Roseville Trust Company? A No.

20 Q Did he state it to the members of the board in your presence that he had done favors for the Inter-City Company and he thought it was about time now that the Inter-City Company should do favors for him? A No.

Q Did he state to the members of the board in your hearing that the officers of the company were drawing checks for more funds than were on deposit to the credit of the company in the account of the Roseville Trust Company A No.

30 *Cross examination* by Mr. Mott.

Q You seemed to hesitate before you answered the first and second question. Why did you? A I wanted to be sure, Mr. Prosecutor, that I was telling the correct truth, so far as my recollection would permit me.

Q Then there was some conversation about the subject involved in the question? A What was the subject of the question?

40 Q The first question.  
(Question read.)

*Louis E. Swarts, cross.*

A There was no reason for hesitating in my answer to that question except my desire to be right, that was all.

Q Then you knew that there had been no such conversation as that? A I now know that I have absolutely no recollection of any such thing having transpired at a meeting where I was present.

10

Q And yet you say you hesitated in order that you might be sure? A Exactly.

Q While you were hesitating, were you thinking about conversations that you had heard Mr. Smith say something? A I was trying to recall, so far as possible, anything like the question implied. I have heard several conversations at which Mr. Smith was present, and I wanted to review them. This is my first experience as a witness.

20

Q Was the account of the Inter-City Company with the Roseville Trust Company the subject of discussion at any time in the board of directors when Mr. Smith was there? A Well, if I may answer that question rather freely.

Q No, just answer the question yes or no, please. A That all depends. At the time when we were at the Roseville Trust Company, whether that was a meeting or not. If it was a meeting my answer to the question would be yes:

30

Q Did the board or the members of the board meet at the Roseville Trust Company? A The board did meet at the Roseville Trust Company once, yes.

Q When was that? A Well, as I recollect, Mr. Prosecutor, it was about a month before I went away on my vacation in 1913, about a month, and while I was away on my vacation a week, when I was away a week, I heard of the Roseville Trust Company—if you will tell me the date of the failure of the Roseville Trust Company or the date

40

*Louis E. Swarts, cross.*

of the disappearance of Mr. Smith I can fix the date for you within five weeks.

Q August 14, 1913. A I should say then it was about the 7th or 8th of July, something of that kind.

10 Q What was the occasion of the members of the board going out to the Roseville Trust Company? A We had had some discussion as to the status of the account of the Inter-City Land & Securities Company. I recall that Mr. W. L. Smith and I, Mr. W. L. Smith more particularly than I—Mr. Smith was one of the directors of the corporation—had insisted that an audit be had of the books, that we get the books all straightened out clearly; both of us had insisted on that for some  
20 time, and we went to the Roseville Trust Company; it was in the morning, I remember, because I remember I went directly from my home by the Lackawanna Railroad to Roseville, and I went there to go over these accounts with the auditor, who had prepared a statement of the books.

Q Is it not true that you had heard through Mr. W. L. Smith that the account was in bad shape? A No, not that the account was in bad shape; I heard from Mr. W. L. Smith and I knew of my own knowledge—

30 Q I didn't ask you what you had heard; I asked you of your own knowledge. A I certainly had not heard that. Might I ask what you mean, which account do you mean?

Q The account of the Inter-City Company. A The account of the Inter-City Company?

Q With the Roseville Trust Company. A My answer is the same, certainly not.

*Winfred L. Smith, direct-cross.*

WINFRED L. SMITH, sworn in behalf of defendants.

*Direct examination by Mr. Bachman.*

Q Where do you live? A 163 Center street, Orange, New Jersey.

Q Were you a director of the Inter-City Company in 1913? A Yes, sir. 10

Q Did Raymond E. Smith in your presence state to the members of the board of directors that the account of the Inter-City Land & Securities Company was overdrawn on the books of the Roseville Trust Company? A No, sir.

Q Did Mr. Raymond E. Smith state in your hearing in the members of the board that he had done many favors for the Inter-City Company and it was now time that the Inter-City Company did favors for him? A No, sir. 20

Q Did Raymond E. Smith in your presence say to the members of the board that checks were being drawn upon the account of the company in the Roseville Trust Company in excess of the credit balance in that account? A No, sir.

*Cross examination by Mr. Mott.*

Q How long were you a director? A I think about a year.

Q When did you cease to be a director? A I think it was in September. 30

Q What year? A September, 1913.

Q You had been a director for about a year previous to that time? A Yes, sir.

Q Were you active in the management of the affairs of the company? A No, sir.

Q Did you know anything about them? A Very little.

Q Did you attend all the meetings of the board of directors? A I don't think so, no, sir. 40

*Winfred L. Smith, cross.*

*By the Court.*

Q Do you recall a conversation about the 1st of June at which you and Mr. Whitman, Mr. Faunce and Mr. Smith were present, at which Mr. Smith said things were getting worse, checks were coming in, and that he was being placed in an embarrassing position and that you should help—  
10 addressing the three—him out, and at that time that he also spoke of the condition of the account?  
A I don't remember that conversation.

*By Mr. Mott.*

Q Would you say that there was no such conversation as that? A I wouldn't say that, no, sir, but I don't remember it.

Q You did hear some disquieting reports about  
20 the account of the Inter-City Company with the trust company? A No, sir; I don't recall that I did.

*By the Court.*

Q Did you hear any disquieting reports about the administration of the trust company's affairs? A No, sir.

Q Did you talk to Mr. Whitman about the situation? A Yes, sir, I have talked with Mr. Whitman about it.  
30

*By Mr. Mott.*

Q Well, do you recall at all what you said to Mr. Whitman about it? A No, sir.

Q Mr. Whitman testifies that in April or May, 1913, you told him some things about the Roseville Trust Company which disturbed him?

40 *Mr. Whiting.* That was perfectly clear in the evidence, that Mr. Whitman was tired and worn out.

*John B. Faunce, direct.*

Q Mr. Whitman says that in May, 1913, you told him certain things about the Roseville Trust Company which greatly disturbed him.

*Mr. Whiting.* I don't think it is fair. Mr. Whitman says that if it had not been for his nervous state it would not have disturbed him. That is not what Mr. Whitman testified to.

10

*The Court.* Objection overruled.

Q Do you recall such a conversation? A No, sir.

JOHN B. FAUNCE resumes the stand.

*Direct examination (continued) by Mr. Bachman.*

Q Mr. Faunce, did you have any transactions directly in person with the Roseville Trust Company in the City of Newark itself? A No, sir.

20

*By the Court.*

Q Mr. Smith stated on the stand, Mr. Raymond E. Smith, that on or about the 1st day of June, 1913, that he had a conversation with yourself, with Mr. Whitman and Mr. W. L. Smith at which he, Mr. Raymond E. Smith, said that the account of the Inter-City Company was getting worse, checks were coming in, and he was being placed in a very embarrassing position, and he further said "you," meaning you gentlemen, should help him out, and at that time he spoke about the condition of the account. Was there any such conversation and did Mr. Raymond E. Smith make any such statement to you? A Not in my presence, no, sir.

30

Q Were you present at a meeting of the members, not as a board, but the members of the board, at the Roseville Trust Company in the early part of July, 1913? A I came to such a gathering.

40

*John B. Faunce, cross.*

Q Were you present at the meeting? A No, sir.

Q State what you did do? A I got there just as they were apparently finished with their deliberations.

10 Q Did you stay? A No, everyone went away and I went away also; possibly two or three minutes I might have been there.

Q Did you hear any conversations at that time between Raymond E. Smith and any of the other members of the board? A I heard no conversation pertaining to the business at all, except that Reuck was going to bring his report up to the 15th of July; that is all I heard.

*Cross examination by Mr. Mott.*

20 Q Your company had offices in New York? A They did have, yes, sir.

Q Where were the offices? A 5 Beekman street first, and 150 Broadway afterwards.

Q How many rooms did you have? A We had three at 5 Beekman street and five rooms in the other place.

Q You had engraved letterheads for your correspondence, did you not? A Yes, sir.

30 Q You had a bookkeeper? A We had a bookkeeper after, I think it was, June 1st; I am not certain though—or July 1st.

Q July 1st of what year? A 1913.

Q Previous to that did you have any bookkeeper? A We had a young man, I believe, one of the assistant bookkeepers in the bank who afterwards took employment with us.

Q What was his name? A Mr. Bowe.

40 Q How long was he with you as bookkeeper?  
A He wasn't a bookkeeper.

*John B. Faunce, cross.*

Q What was he? A Accounts of the agents, the rent receipts.

Q Did the Inter-City Company have any books? A Memorandum books.

Q What do you mean by memorandum books? A Receipts and expenditures.

Q They had a check book? A Yes, sir. 10

Q Who kept that? A You mean the Inter-City?

Q Yes. Where? A It was either in Mr. Whitman's desk or mine; when we were at 5 Beekman street we had a safe, but at 115 Broadway we did not.

Q Where is your check book? A I couldn't tell you, sir.

Q Why not? A Because I haven't the custody of any of the Inter-City Company's matters. 20

Q When did you last see your check book? A December 4, 1914.

Q What became of it then? A It was turned over to the attorney along with all of the books of the Inter-City Company, to the attorney for the Inter-State Trust Company of Philadelphia.

Q What is his name? A Clarence F. Birdseye.

Q Did he live in Philadelphia? A I believe not. My understanding is he is a New York lawyer. 30

Q He is your personal counsel, is he not? A No, sir, he is not.

Q He has done business for you? A Not for me, no, sir.

Q For your company previous to this? A I don't believe for our company he has ever done anything.

Q How long had you known him? A About a month before that. 40

*John B. Faunce, cross.*

Q How did you come to turn your check book over to him at that time? A They bought the company.

Q Who? A The Inter-State Trust Company—that is, they agreed to buy it.

10 Q Did they buy it? A They never delivered the consideration, no, sir.

Q Did you turn over the assets of your company before you got the consideration? A They didn't take title to the property in their name; the title still remains, I believe.

Q Did you have any books besides your check book? A Yes, sir.

Q What books? A Cash book and the ledger.

Q Where are they? A In his possession.

20 Q Whose? A Mr. Birdseye or the trust company. I don't know what he did with them.

Q Have you been down there to get them? A I haven't made any personal demand, I think except at the start of this proceeding, and he declined to give them to me because he said we had no ownership in them.

Q I thought you said they— A Mr. Birdseye is a big man; he accepts ownership at both ends, we found out to our sorrow.

30 Q What do you mean by that? A He keeps what he gets generally and doesn't give anything.

Q Did you transfer any of your property to them? A No; I tendered deeds and they were not accepted.

Q Do you mean to say that you delivered up the books of your company to Mr. Birdseye and he refused to give them back to you notwithstanding that he had not paid the consideration? A He did refuse to give them to me, yes, sir.

40 Q When did you ask him for them? A After I heard of this indictment. I don't remember the date.

*John B. Faunce, cross.*

Q How did you ask him—did you see him personally? A Asked him point blank.

Q Where did you see him? A In his office.

Q Where? A 31 Rector street.

Q New York? A Yes, sir.

Q Have you made any application to the trust company for your books? A I made application 10  
to Mr. Ballou, the president of the trust company.

Q What did he say? A He said he didn't have them.

Q Did he tell you who did have them? A He told me that all business connected with our company was through his attorney, Mr. Birdseye.

Q Where is Mr. Birdseye now? A I couldn't tell you.

Q Is he around New York? A I understood he is around 82 Fulton street, but I have never 20  
been able to find him there.

Q Would your check book show the number of checks you drew and the balance of your account? A Presumably, as far as I know.

Q What? A I presume so. It was in the auditor's hands, of course, and after that in Mr. Peters's hands, who was the cashier.

Q Did you enter in your cash book the deposits you made in the Roseville Trust Company? A I didn't make any deposits. 30

Q Well, the deposits that were made on behalf of the company? A As they were given to me, yes, sir.

Q You entered them? A Anything that was given to me as a deposit I entered them in.

Q You paid some attention to the financial affairs of this company, didn't you? A I paid some attention to it, yes, sir, tried to.

Q You attempted to keep track of the finances, didn't you? A Yes, sir, to the best of my 40  
ability.

*John B. Faunce, cross.*

Q And did you have a record in your check book of substantially all the deposits that were made in the Roseville Trust Company? A Why, I couldn't tell you that, Mr. Mott; I don't remember whether I had entered most of the deposit or not. I presume I did.

10

*By the Court.*

Q If you didn't, who did? A Mr. Whitman or myself or Mr. Bowe or Mr. Peters had access to the check book, although there was two signatures allowed.

20

Q Whose business was it to enter deposits and deduct the amount of the stub when a check was drawn from the amount deposited in order to ascertain what the balance was? A I presume it was Mr. Whitman's business, but I think he seldom did it.

Q As a matter of fact, who did it, who made it their business? A I did it every time I had a chance. I was very busy and couldn't give very much time to it.

*By Mr. Mott.*

Q I understood you to say that the only information you had regarding your account with the Roseville Trust Company was what you got from Mr. Whitman. Am I mistaken, or is that what you said? A I had no information from the trust company itself. All the information I got from Mr. Whitman was at the director's meeting.

30

Q What information did you get from Mr. Whitman? A With reference to what?

Q With reference to your account in the Roseville Trust Company. A Nothing. I remember when notes were discounted he would satisfy me.

40

*John B. Faunce, cross.*

Q When deposits were made? A I didn't ask him after deposits. When deposits were made there was a slip put in my desk.

Q Did you have any idea the last year before the failure of the trust company how much money your corporation had there? A I don't understand what you mean. 10

Q (Question read). A We were depositing between \$7,000 or \$8,000 a month from rents and any other money that came from any other place, we immediately put in the bank.

Q Did you have any other knowledge than that as to the amount of money your company had in the Roseville Trust Company? A I don't know where I would get any other knowledge.

Q I ask you. A From the books. 20

Q Did the books show? A Yes, sir.

Q Were you in possession of the books that would show the balance of your company with the Roseville Trust Company? A I wouldn't say they were accurate.

Q Were they approximately accurate? A Yes, sir.

Q You say that you knew you were depositing \$5,000 or \$6,000 a month? A Yes, sir.

Q How did you know how much money to draw out of the Roseville Trust Company? A Why, from the deposits from day to day, as the money was sent over, I entered it in. 30

Q The evidence in this case is that during the month of June you deposited \$4,570.69 and drew out \$12,943.50. Will you account for that, please. A I can't at this time, because I don't know; I understand there was deposits which has not been credited to us. 40

Q For what? A What month was it?

*John B. Faunce, cross.*

Q This month I ask you about was June. A Well, I know of at least \$18,000 that was supposed to be there that was not there, as I understand it.

Q What? A Two notes.

10 Q What notes? A One for \$11,165 and one for \$7,000.

Q Did you get any information from Mr. Bowe regarding that? A No, sir.

Q Mr. Bowe says that he took that note out under your direction to the Roseville Trust Company, presented it to Mr. Smith and Mr. Smith told him he couldn't discount it. A There was no Bowe in this case.

20 Q Mr. Whitman says that he took that note out and asked Mr. Smith if he couldn't put it through and that he informed you of that fact; is that true? A I don't remember it.

*Mr. Bachman.* I objected to that as a partial statement of the evidence only, that he couldn't put it through right away.

*The Court.* Yes, he says he took it out and he told him he couldn't put it through at that time, but he would see that he could do later.

30 Q Mr. Reuck says he went out to see Mr. Smith in July and asked him about that note and Mr. Smith told him that he had not discounted it and that he went back and told you so; is that true? A No, sir, it is not; never told me anything.

Q You sent Mr. Reuck out to see Mr. Smith, didn't you? A I did not, no, sir.

Q Then have you any idea why Mr. Reuck went out there? A Went out there of his own accord.

40 Q What for? A He is a public accountant and was to put a bookkeeping system in there, and

*John B. Faunce, cross.*

I suppose he went out to get the evidence to found it on.

Q To do what? A The Inter-City Company, I suppose.

Q Were you installing a new system of book-keeping in July, 1913? A Yes, sir.

Q And you employed Mr. Reuck to do that? A 10  
Yes sir—not I personally.

Q And he was working on your existing books at that time? A Yes, sir.

Q What was the other item you mentioned besides this \$11,000 that you say you thought was put to your credit? A The \$7,000 note that Mr. Raymond E. Smith was to put to our credit.

Q That was for what? A Stock.

Q Whose stock? A Well, I have the stock 20  
book here.

Q Whose stock? A Either my own or Mr. Whitman's or both.

Q How does it happen that you have got the stock book here if you sold out this company? A I don't know anything about that. I have tendered the stock book and the deeds, and they declined it.

Q Why is it you have got the stock book and have not got the check book? A I am sure I couldn't tell you, Mr. Mott.

Q But you have got the stock book? A I had 30  
that all the time; I never gave it up.

Q How is it you gave up the check book and didn't give up the stock book? A I gave up all the books of account, intending to give all the books; the stock book was merely overlooked, I presume; I found it some time afterwards.

Q What was the amount of this note that you say was for stock? A A note of \$7,000.

Q Did you ever see that note? A No, sir.

Q Was there any such note in existence as far 40  
as you know? A They tell me not; I don't know.

*John B. Faunce, cross.*

Q Who told you that note was not in existence?

A Merely from hearing your case.

Q Here in court? A Yes, sir.

Q Why should you suppose that you had credit for \$7,000 on the note that as far as you knew was not in existence? A Well, I supposed it was in  
10 existence at the time I was drawing against it.

Q You thought that was a note for stock of the Inter-City Company? A I certainly did; I delivered my stock for it.

Q Your personal stock? A Mr. Whitman, and mine; personal stock, yes, sir.

Q Delivered that to him? A That would be \$7,000 for Raymond E. Smith and \$12,000 for Mr. W. L. Smith.

Q Did you deliver your stock to Raymond E. Smith? A It was sent out to him at the time  
20 one of the deposits was made, as far as I know.

Q You don't know of your own knowledge whether that stock reached Mr. Raymond E. Smith? A I wouldn't doubt that it did.

Q You don't know it did? A I didn't deliver it myself.

Q Did you ever inquire from Mr. Raymond Smith anything about the note? A No, sir.

Q To whose credit was this note of \$7,000 to be drawn? A To the corporation.  
30

Q It was for your stock, wasn't it? A Yes, sir.

Q You thought it would be drawn to your order, didn't you? A No, sir, I agreed to place that capital with the corporation.

Q That was to go to the corporation? A Yes, sir.

Q Well, you knew you hadn't endorsed any such note as that then, didn't you? A I didn't  
40 realize it was necessary.

*John B. Faunce, cross.*

Q You know now that you haven't endorsed any such note? A Yes, sir.

Q How did you think that a note drawn by Raymond E. Smith to the corporation, the Inter-City Company, was going to be endorsed? A It was to be made out to the Inter-City Company and endorsed Raymond E. Smith.

10

Q Did he have authority to endorse? A I presumed the note could be endorsed by anyone.

Q You would? A I should imagine so, yes, sir.

Q Mr. Raymond E. Smith didn't have any authority to sign checks or notes, did he? Did you understand that Raymond E. Smith, because he was a director, had authority to sign notes and checks? A I should think, as long as he was vice president, in the absence of the president, yes, sir.

20

Q Did you ever know him to sign one? A I haven't any knowledge of it, Mr. Mott.

Q What other information did you get from Mr. Whitman about this account? A No other information Mr. Mott, that I know of.

Q What was the information you say you got from him? A Nothing, except what I have told you.

Q What was that? A From time to time, that he discounted this note or that note.

30

Q Did he ever tell that the \$11,000 note was discounted? A I don't remember whether he mentioned that particular note or not.

Q Did he ever tell you that the \$7,000 note of Raymond E. Smith was discounted? A I don't believe so, but there was an agreement at the directors' meeting.

Q Was that in the minutes? A I don't know, I have never seen the minutes since the 2d of June.

40

Q Why don't you know that, you have signed

*John B. Faunce, cross.*

page after page of these minutes yourself? Why do you say you never saw them? A I saw them after the 2d of June.

Q That is a good deal this side of November. You say the 2d of June? A I wouldn't mention any date; I don't think I saw them since the 2d of  
10 June.

Q That is your signature? A Yes, sir.

Q Those are the minutes of the meeting held on August 12, 1913? A Yes, sir; it was loose leaf and was put in afterwards. It was not a minute.

Q Is that your signature? A Yes, sir.

Q Under date of October 13, 1914, is it not? A That is right.

Q Well, now, I ask you again the reason you  
20 had supposed when you were drawing checks in June, July and August on the Roseville Trust Company that you had any money there? A I got information when deposits and discounts were made.

Q Well, you have told us about the deposits and you have told us about the two notes. A I didn't go to the trust company and examine their books to find out whether I had it there, Mr. Mott.

Q So far as you know, all the deposits you re-  
30 ceived, had you made on the books of the company? A I have no knowledge until Mr. Peters made his report and then it appeared that we hadn't received credit.

Q Credit for what? A Deposits and discounts.

Q What deposits? A I can't tell you off-hand; it is a matter of the claim; I haven't the exact figures.

Q Have you got Mr. Peters's report? A I  
40 have not. I wish I had.

*John B. Faunce, cross.*

Q When did you last see it? A I don't remember.

Q Don't you know that Mr. Peters's report didn't claim any more deposits than you were given credit for on the books of the company? A No, sir.

Q And isn't that the reason you haven't got it here? A I know it did. 10

Q Where is it? A I don't know.

Q When did you last see it? A When Mr. Peters was in the office; I haven't seen it since.

Q Where is Mr. Peters? A I would like to know, Mr. Prosecutor.

Q How long since you have seen him? A Possibly last summer some time.

Q What time last summer? A I couldn't tell you—July, August, somewheres in there. I made no note of it particularly. 20

Q Well, now, in July it appears that you made deposits of \$8,088.61. A Possibly.

Q And you drew checks to the amount of \$15,917.94. What reason had you to suppose that that \$15,000 was in the bank? A I couldn't tell you, Mr. Mott; I am not in possession of the data to tell you.

Q What? A I haven't the data to tell you if the checks were drawn and drawn by me. I certainly supposed the money was there or I had reason to suppose it was there. 30

Q You didn't suppose there was any money there that your company had not deposited there or discounted? A No, sir.

Q You didn't think money grew to your account in the Roseville Trust Company out of the ground? A No, sir.

Q Well, then what reason did you have to suppose that you had that \$15,900 there? A By the 40

*John B. Faunce, cross.*

deposits that left the office and the information that I received about discounts.

Q Well, did you receive any information about discounts other than the two notes you have spoken of, the \$11,000 note and the \$7,000? A Did I?

Q Yes. A Yes, sir.

10 Q From whom did you receive that information? A Mr. Whitman.

Q In regard to what note? A The \$6,000 note, I believe, and the \$4,000 note. I am not entirely certain about that.

Q The \$6,000 note was back in April, wasn't it? A I couldn't tell you the date, Mr. Mott.

Q Well, now, I am asking you what reason you had for \$15,900 worth of checks? A Because  
20 we had the money there, I presumed.

Q I am asking you why you think you had the money there? A Because the account showed that we did.

Q Whose money? A Our money.

Q Will you produce that account? A I can't. I would very gladly.

Q Why can't you produce it? A Because I haven't it and I have been unable to get it.

Q It is in Philadelphia, you understand? A  
30 I understood it was. I went to Philadelphia to get it and I didn't succeed.

Q Don't you know that you could have taken testimony under commission and gotten that information from Philadelphia? A I got these things without the commission?

Q No, the testimony as to what your books showed? A I don't know; I wasn't advised so.

Q Did you ever talk with your counsel about getting those books? A I think I did.  
40

Q When? A I don't remember.

*John B. Faunce, cross.*

Q Did that make any impression on you? A Previous to this trial.

Q How long previous to this trial? A Possibly a couple of months, since you have told us to be ready.

Q And your counsel told you no way to get the information contained in those books? A Unless we found where they were. 10

Q I thought you said you knew where they were? A I didn't say I knew where they were.

Q You said you went down there? A I delivered them to the Inter-State Company.

Q Have you any reason to believe that the attorney for the Inter-State Trust Company of Philadelphia is not a responsible man? A His action in this case wouldn't lead me to believe he would. I understand he was disbarred in New York for practices of just this character. 20

Q Was he the attorney for the trust company? A He was.

Q What information did you get when you went to the trust company for your book? A I got the information that I couldn't find the trust company. I went to the president of the trust company, he is an attorney in Philadelphia, Mr. Ballou, and he told me the books were still in charge of his attorney, Mr. Birdseye, and if there were any he hadn't seen them. 30

Q Did you ask him to try to get them? A I understood he sent several communications to Mr. Birdseye—with what result I don't know.

Q Mr. Birdseye is a friend of yours? A No, sir.

Q Was there any trouble between you and Birdseye? A There has been considerable trouble over this very thing. 40

*John B. Faunce, cross.*

Q. Over what? A In relation to this. He has taken all books and accounts in this company and taking their assets and using them for his own purposes.

Q I thought you said that Peters gave you a transcript; didn't he? A I didn't say so. The last I saw was Mr. Peters have it in his hands. He has never given it to me or I would have had it.

Q When Peters went away what did he do with it? A I can't say. I would be very glad to have it.

Q Did he use you as badly as Birdseye? A No, sir.

Q Are you a friend of Peters? A He was an employee of mine, if that is what you mean.

Q Friendly relations existing between you? A No unfriendly relations.

Q And as far as you know, he has no unfriendly relations towards you? A I should say so, no, sir.

Q Well, he went over to the trust company for you to examine the books, didn't he? A Not to me personally.

Q I mean to your company. A No, sir.

Q He got a transcript of the books, didn't he? A No, sir.

Q And you saw that transcript? A I did.

Q Why didn't you keep it when you had it? A Because I wasn't the cashier and bookkeeper.

Q But you were the president of the company and you were largely interested, were you not? A Very much so, financially and otherwise.

Q Who was Mr. Peters? A He was an employee under bonds.

Q And you, having taken the trouble to go to Roseville to get this important information, and having gotten it, you left it in the hands of the employees instead of keeping it? A Mr. Peters

*John B. Faunce, cross.*

wanted it for his own purposes in his own books.

Q What books? A He was keeping the books; I was not.

*By the Court.*

Q When did you hire Peters? A Some time the latter part of June. 10

Q What did you hire him for, what was the work? A For cashier and bookkeeper, absolutely, in entire charge.

Q How long was he with you? A Until the 15th of December, I believe.

Q Where did he live? A 145 West 127th street, one of our houses. He was in charge of that house.

Q And you don't know where he is now? A I understand he is in New Haven. I haven't his home address. He was in New Haven last summer. 20

*By Mr. Guild.*

Q Did you live part of the time not far from New Haven? A For the last five years.

Q You have a summer place up there? A Very, very small.

Q You have a summer place where you and your wife go up on the shore there? A Yes, sir, that it correct. 30

Q How far is that from New Haven? A About forty-three miles, I should judge.

Q It is near New London? A Yes, sir.

Q The Inter-City account in the Roseville Trust Company was in Whitman's home personally? A Yes, sir.

Q Up to the time you opened the account in the name of the corporation? A Yes, sir, I believe November, 1912. 40

*John B. Faunce, cross.*

Q And the Inter-City discounted some notes in Mr. Whitman's name while the account stood in his name, did he not? A I am not certain about that, but if they show that way I presume that they did.

10 Q Do you remember Mr. Faunce, endorsing a note made by Mr. Whitman for \$1,000, the note being due on the 15th day of December, 1912? A I don't remember it. If my signature is there I won't deny it.

Q That is your signature, I think. Don't you remember that some time in December, 1912, you had a note for \$1,000 discounted? A I believe we had several notes in December, 1912.

20 Q Discounted at the Roseville Trust Company? A Yes, sir.

Q And you remember you had some that were falling due in December, 1912? A Well, I believed this, we posted the notes in Mr. Whitman's account, and at that time we took them up with the Inter-City account. That is my remembrance of it, but I really have no knowledge.

30 Q Mr. Faunce, I call your attention to three notes, one of December 10, 1912, for \$2,500 and one December 13th for \$2,500 and December 15th for \$2,600, and ask you if you recall those notes? A I recall there was three notes in that month, but I don't recall the dates.

Q The amounts of those notes? A Yes, sir, two twenty-fives and one twenty-six.

Q What were those notes given for? A That I don't recall.

40 Q Do you recall whether or not those three notes were given to take up Whitman notes that had previously been given for the benefit of the company and passed through his personal account?

*Frank C. Ferguson, direct.*

A I can't remember exactly which at this time. I didn't discount the paper, you know.

DEFENDANTS REST.

FRANK C. FERGUSON recalled in behalf of State in rebuttal.

10

*Direct examination* by Mr. Mott.

Q From your examination of this account, Mr. Ferguson, are you able to say what the condition of the account was on the 16th day of June, 1913?

A I am, yes, sir.

Q What was the condition of the account on that day?

*Mr. Whiting.* I object on the ground previously stated on the testimony of this same witness, it appearing that he did not keep the records from which he made his calculation.

20

*Mr. Bachman.* I join in that objection.

*The Court.* If it appears that Mr. Ferguson is testifying, as previously, from his reconstructed account, made from the books which have been offered in evidence pertaining to this company, and from the checks which were found there which do not appear on the personal ledger; he may answer the question.

30

Defendants' counsel pray an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

A Yes, sir; on June 16, 1913, the account of the Inter-City Land & Securities Company was overdrawn \$1,675.68.

40

*Motion to direct Verdict.*

*Cross examination by Mr. Whiting.*

Q When you say the account was overdrawn as per the individual ledger account— A Overdrawn; had all the checks which had been paid by the Roseville Trust Company been charged to the account.

10

*The Court.* Overdrawn in accordance with his reconstructed account. That is what he is testifying from.

STATE RESTS.

DEFENDANTS REST.

20 *Mr. Bachman.* Defendant Faunce moves the court to direct a verdict of acquittal for him, on the following grounds: 1. That it affirmatively appears on the State's case and on all the evidence that defendant, Faunce, was in New York City at the times when the conspiracy is alleged to have been entered into and that therefore in the extremest view of the case if he made an agreement upon which the conspiracy alleged is to be predicted it was without the jurisdiction of the State of New Jersey.

30 2. That all checks drawn by defendant Faunce and all acts charged against him were made or performed in the State of New York and not in the State of New Jersey and such acts cannot constitute a conspiracy in this State.

40 3. That the State has failed to show the meeting of minds required by the law of this State between defendant Faunce and another to constitute the basis of conspiracy as against this defendant.

*The Court.* Motion denied.

*Motion to direct Verdict.*

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed according.

H. V. OSBORNE, [L. s.]

*Judge.*

*Mr. Whiting.* I move for a direction of the verdict on behalf of the defendant Whitman upon two grounds: 10

First, that there is no evidence so far as Whitman is concerned, of any criminal intent, and

Second, no evidence so far as Whitman is concerned, of conspiracy as defined by our statute.

The principal witness for the State, Raymond E. Smith, himself testifies that he expected the Inter-City Company to pay back the money which it drew and says further that there was no understanding with Faunce and Whitman that the money should not be repaid. 20

Smith further admits that he never informed Whitman that there was any falsification of the books or any deception of the executive committee with respect to the Inter-City Company, and that so far as Smith knew, Whitman had no such knowledge. 30

Whitman himself denies any such knowledge.

I respectfully submit that the State has wholly failed to sustain the burden of proving beyond a reasonable doubt that Whitman had the criminal intent required to be shown in a case of this kind, and it has likewise failed to sustain its burden with respect to the proof of conspiracy as defined by our act. 40

*Charge to Jury.*

*The Court.* Motion denied.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [L. s.]

*Judge.*

10 Adjourned to Friday, May 14, 1915, at ten o'clock A. M.

## FOURTH DAY

ESSEX COUNTY OYER AND TERMINER,

Friday, May 14, 1915.

20

STATE

*vs.*

CLARENCE P. WHITMAN AND JOHN  
B. FAUNCE.

30

Met pursuant to adjournment.

Present, counsel as before stated.

Deposit slip dated 8-7-13 is marked Ex. D1.

Mr. Whiting sums up for defendant Whitman.

Mr. Bachman sums up for defendant Faunce.

Mr. Mott sums up in behalf of the State.

At one o'clock, P. M., the court took a recess of one hour.

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*Charge to Jury.*

## AFTER RECESS.

**Charge to Jury.**

The Court charges the jury as follows:

OSBORNE, J.

Gentlemen of the Jury. The indictment in this case charges the defendant Clarence P. Whitman and John B. Faunce, together with Raymond E. Smith, Augustus R. Jennings, William J. Thompson and Jesse L. Peters with conspiracy. Raymond E. Smith has pleaded guilty on *non vult*, which, as a matter of law, has the same effect. The indictment as to Jennings and Thompson has been *nolle prossed* by the State, and I am informed that Peters has not been apprehended. This proceeding, therefore, so far as the guilt or innocence of the parties named in the indictment is concerned, has only to do with the guilt or innocence of the defendants Whitman and Faunce.

The charge in the indictment grows out of the failure on the 14th day of August, 1913, of the Roseville Trust Company, a banking corporation, organized under the laws of this state and authorized to do business in this state.

A conspiracy, gentlemen, is a combination of persons to effect an unlawful object, or, a lawful object by unlawful means. A person cannot conspire with himself alone; there must be at least two or more persons involved, otherwise there can be no conspiracy. Our statute provides that where two or more persons combine, unite, confederate, conspire or bind themselves by agreement or other alliance to commit any crime or to cheat or defraud any person (and that would include a corporation) of any property by any means which are criminal, or which, if executed, would amount to a cheat,

*Charge to Jury.*

or to obtain money by false pretenses, they shall, upon conviction, be deemed guilty of conspiracy, provided that some act in execution or such agreement be done to effect the object thereof by one or more of the parties to such agreement. No formal agreement is necessary; it is sufficient if  
10 the minds of the alleged conspirators meet understandingly to bring about an intelligent and deliberate agreement to do the act; nor is it necessary to prove the conspiracy by direct evidence; it may be inferred from circumstances; in fact, from the very nature of the case proof of a conspiracy will generally be circumstantial, and it is seldom that any one act, taken by itself, can be seen as tending to prove a conspiracy, but when, taken in connection  
20 with other acts, its tendency to prove the fact may be more clearly discerned. We may be satisfied from circumstances attending a series of criminal or wrongful acts that they result from concerted and associated actions, although if each circumstance was considered separately it might not show confederation, but where, linked together, circumstances that in themselves are inconclusive, yet taken as a whole, show that apparently isolated acts spring from a common object and have in view the promotion of a common purpose. In other  
30 words, if it be proved that the defendants pursued by their acts the same unlawful object, one performing one part and one another part, so as to complete it with a view to the attainment of that object you will be justified in the conclusion that they were engaged in a conspiracy to effect that object, and all who, with the knowledge of the facts, concur therein and aid in execution thereof are fellow conspirators, and the act of one, pursuant to such conspiracy, becomes the act of all.  
40

*Charge to Jury.*

The Inter-City Land & Securities Company, it appears from the evidence, was a corporation engaged in the real estate business. The defendant Faunce was its president and the defendant Whitman its secretary and treasurer. Raymond E. Smith, secretary-treasurer of the Roseville Trust Company, was a stockholder and a member of its Board of Directors—that is to say, of the Board of Directors of the Inter-City Land & Securities Company. The Inter-City Company kept its bank account in the Roseville Trust Company, and the prosecution has produced evidence before you from which it claims that the land company, through the act of its president Faunce and its treasurer Whitman and Raymond E. Smith, succeeded in securing from the Roseville Trust Company something over twenty-five thousand dollars through overdrawing its account, that is to say, through drawing, and having paid by Smith, checks of the Inter-City Company in excess of its credits at that bank for something over \$25,000. Many of these items, in fact, a very large number of them, were not entered on the personal ledger account of the Inter-City Company on the books of the Roseville Trust Company, but are shown by the checks themselves which were found in the bank when it was closed by the State Examiner, and are here produced and offered in evidence for your inspection. The State says that the account, the personal ledger account, together with these checks and the other books of the bank, demonstrate beyond question the fact that the defendants Whitman and Faunce, with the aid of Smith, unlawfully secured large sums of money from the trust company. The State says it was done knowingly, pursuant to an agreement with Smith; it is claimed that arrangement between them is a conspiracy, and it points to the drawing of these checks and their payment by the

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*Charge to Jury.*

bank, through the orders of Smith, as the overt acts referred to in the statute and necessary to be proved before there can be a conviction for conspiracy. The State does not claim that the mere overdrawing of the account by these defendants is the crime for which it asks for a conviction  
10 at your hands, but it says that this overdraft is evidence of the conspiracy, which arose when Smith notified Whitman and Faunce of the condition of their account, and which continued after that, so long as they continued to draw checks knowing that they had no funds in the bank to meet them.

Smith testified that as far back as April, 1913, Whitman knew of the overdraft; that he had talked with him about it and told him that the checks were coming in and they were not good on the ledger, and  
20 as late as July 1st, Smith testified, he told Faunce, Whitman and W. L. Smith that the account was getting worse, that the checks were coming in and that he was being placed in an embarrassing position; that they should help him out, and that he, at that time, talked with them about the condition of the account. There is testimony in the case from which it would appear, according to the view which the State seems to take of the evidence, that  
30 during the month of May, June, July and August large sums of money, greatly in excess of the deposits, were being drawn from the bank by the checks of the Inter-City Company which were being honored by Smith.

As I have already indicated, even if this situation be true, even though the defendants did not make an arrangement with Smith to honor these checks specifically, if they knew the fact and concurred in the facts and aided in their execution, under the law they are fellow conspirators. This,  
40 I say, is the position taken by the State with rela-

*Charge to Jury.*

tion to these transactions and upon which they ask you for a conviction.

The defendants, on the other hand, deny absolutely that Smith ever told them that their account—that is, the account of the Inter-City Company with the Roseville Trust Company—was overdrawn; they say that no such conversations as testified to by Smith ever took place, and W. L. Smith is called and he says he does not remember and such conversations. The defendants say that they supposed that they had sufficient credits at the bank, derived from the discount of certain promissory notes, to take care of all these checks that were being drawn by them. One of those notes was this \$11,000 note which, it appears from an inspection of the books, was not credited on the books of the bank, but they say they supposed they had that credit for that note; in other words, they point to that note as one of the notes which they supposed gave them a credit at the bank, although Whitman says himself that when he took it there Smith told him he could not discount it at that time, but, I think, he said he would try to do so in the future. Reuck went out there at the request of the officers of the company—whether at their request or not I am not sure—to ascertain the condition of the account, and he says that Smith told him that that note had not been credited, and they say because of these supposed credits they had no knowledge of the fact, if the account was overdrawn, that it was overdrawn.

One of the questions you may ask yourselves in your deliberations upon the testimony in this case is whether it is possible or reasonable, that these defendants, in the ordinary course of business, could have drawn checks to such an amount as appears from the evidence before you without

*Charge to Jury.*

knowing that they were overdrawing their account.

10 The defendants come into court with the presumption of innocence in their favor. Every defendant placed upon trial for violation of the criminal law is presumed to be innocent, and such presumption continues until his guilt is established  
beyond a reasonable doubt, and the burden rests upon the State to satisfy you beyond a reasonable  
doubt of his guilt, and this burden never shifts. In other words, it does not become incumbent upon  
the defendants to satisfy you of their innocence; the burden is always upon the State to satisfy  
you of the guilt of a defendant. If, after a consideration of all of the evidence in the case, you  
cannot say that you feel an abiding conviction, to a moral certainty, of the guilt of these defend-  
20 ants it will be your duty to acquit them; but if, on the other hand, you are so satisfied, then you should convict.

You are the sole judges of the facts, the credibility of the witnesses and the weight of their testimony. You will remember that you are to be governed in your deliberations by your own recollection of the testimony, and not by the recollection of the Court or of counsel, and if the testimony conflicts it is your duty to reconcile it, where  
30 possible, and where it is not possible, you should consider the interest these witnesses have, if any, in the result of the issue on trial. You may consider the vital interest of the defendants in the outcome of these proceedings, and in this connection it is my duty to call your attention to the fact that Raymond E. Smih, one of the alleged conspirators, is a confessed criminal, having, it appears, pleaded guilty to this very indictment, and because of that fact is not entitled to full faith  
40 and credit; therefore his testimony should be satisfactorily corroborated. Our law provides that con-

*Charge to Jury.*

viction of crime may be shown for the purpose of affecting the credit of a witness; it is therefore a fact for your consideration in determining the weight you will attach to his testimony and the extent to which it affects his credibility.

The defendants have offered evidence of their good character. Such evidence, offered on behalf of an accused, is always competent upon the trial of an issue such as this and is entitled to consideration by you in making up your verdict, and if on such consideration there exists a reasonable doubt of their guilt, even though that doubt be engendered merely by their previous good repute, they are entitled to an acquittal. 10

You may convict or acquit one or both of the defendants. If you are not satisfied beyond a reasonable doubt that either of them is guilty you should acquit such one; if, on the other hand, you are satisfied that either is guilty, beyond a reasonable doubt, you should convict that one; or if you are satisfied as to both you should act accordingly. 20

I have said that an overdraft is not necessarily criminal, but it may become an element of the crime of conspiracy if it is shown that it was done pursuant to an unlawful agreement. The only question is whether the defendants knew what the real situation, as alleged by the State, was, either through the direct knowledge imparted by Smith or through such facts and circumstances as would charge them with guilty knowledge, that is, by acquiescing in those things which they knew were being done. It is largely a question of the credibility of Smith, and in testing his credibility you should look to the other facts and circumstances in the case in order to ascertain whether, in your opinion, he has been satisfactorily corroborated. If you are satisfied that they did know that they were, by means of these checks, taking 30 40

*Charge to Jury.*

money from the Roseville Trust Company for the benefit of the Inter-City Company, in which they were interested, and of which they were officers— if you are satisfied that they did know that they were taking such moneys unlawfully and that they were doing that pursuant to a conspiracy, as I  
 10 have defined it to you, you should find them guilty. If you are not so satisfied you should find them not guilty.

I have been requested by the defendants to charge the jury certain matters, and these requests to charge have been handed to me in duplicate and are on behalf of both defendants. I understand they are the same in each case, and therefore what I say with regard to them will apply to each defendant.  
 20

I am asked to charge, first, "That it is not permitted to the jury to speculate as to whether the crime charged was committed." That is true. You are not here for the purpose of speculation; you are here for the purpose, and it is your duty to deliberate upon the evidence before you. If that evidence satisfies you beyond a reasonable doubt of the guilt of the defendants you should so find.  
 30

Second: "That a finding of conspiracy cannot be made on an overdraft alone." I so charge you.

Third: "That an overdraft is not in itself an unlawful act on the part of the depositor of a bank unless the depositor be a director of the bank." I so charge you.

The fourth request I refuse to charge as requested.

40 The fifth, sixth and seventh requests have already been covered in my charge.

*Charge to Jury.*

The eighth request: "That no presumption against defendants Whitman and Faunce can be predicated upon the fact that Raymond E. Smith pleaded *non vult* to the indictment." I so charge you.

The ninth, tenth and eleventh requests I have already charged in substance.

10

The twelfth request is: "That no finding of conspiracy can be predicated upon a supposed loss to the Roseville Trust Company." I so charge you.

The thirteenth request I have charged.

The fourteenth request is denied in the form requested.

The fifteenth request I have charged, and the sixteenth I deem to be contradictory in its terms and is therefore refused.

20

Defendants' counsel pray an exception to the refusal of the Court to charge specifically as requested, and the same is allowed and signed and sealed accordingly.

H. V. OSBORNE, [SEAL]

*Judge.*

Defendants' counsel pray a general exception to the charge of the Court, and the same is allowed and signed and sealed accordingly.

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H. V. OSBORNE, [L. S.]

*Judge.*

40

*Requests to Charge.***Defendants' Requests.**

Defendants' counsel request the Court to charge the jury as follows

- 10 (1) That it is not permitted to the jury to speculate as to whether the crime charged was committed.
- (2) That a finding of conspiracy cannot be made on an overdraft alone.
- (3) That an overdraft is not in itself an unlawful act on the part of the depositor of a bank unless the depositor be a director of the bank.
- (4) That an act of the Inter-City Land & Securities Company cannot be imputed to the officer performing that act as an individual.
- 20 (5) That the State must prove beyond a reasonable doubt that a corrupt alliance was entered into between defendant Faunce and another to cheat the Roseville Trust Company in order to convict that defendant of the crime charged; and if the State does not do that the jury must acquit.
- (6) That the State must prove beyond a reasonable doubt that defendant Faunce entered into a corrupt alliance with another to have Raymond
- 30 E. Smith embezzle funds of the Roseville Trust Company in order to convict said Faunce of the crime charged, and if the State does not do that the jury must acquit.
- (7) That defendants are presumed to be innocent and the State must prove beyond a reasonable doubt that the acts alleged in the indictment were committed by defendants.
- 40 (8) That no presumption against defendants Whitman and Faunce can be predicated upon the

*Requests to Charge.*

fact that Raymond E. Smith pleaded *non vult* to the indictment.

(9) That the testimony of Raymond E. Smith, being that of an alleged accomplice, should be considered by the jury with caution and unless it be corroborated such testimony should not be given the weight accorded to that of a distinguished party. 10

(10) That in order to convict either Whitman or Faunce it must be shown by the State that they entered into a corrupt alliance with Raymond E. Smith to have him embezzle the funds of the company.

(11) That in order to create a conspiracy there must be a distinct meeting of the minds of the parties sought to be charged with the crime.

(12) That no finding of conspiracy can be predicated upon a supposed loss to the Roseville Trust Company. 20

(13) That there can be no finding of a conspiracy against these defendants unless there be first established beyond a reasonable doubt that there was a corrupt agreement.

(14) That in order to convict the jury must find, first a meeting of the minds of the defendants in the shape of an alliance or agreement, secondly such alliance or agreement must be corrupt and founded upon a purpose to defraud the Roseville Trust Company, and, thirdly, such alliance or agreement must have been intended to so defraud the Roseville Trust Company by having Raymond E. Smith embezzle the funds of that company and to cover such embezzlement by failing to post the checks drawn, all as charged in the indictment, and if the State fails to prove any one of these the jury must acquit. 30

(15) That the jury must give weight to what are called character witnesses. 40

*Defendant Whitman's Requests to Charge.*

(16) That the agreement forming the first element of a conspiracy must be an affirmative act and made with knowledge of the fact on the part of the parties charged that they had entered into such an agreement; that is, no agreement can be implied unless coupled with a finding of knowledge  
 10 on the part of defendants that they were agreeing to effectuate a purpose to defraud.

**Defendant Whitman's Requests to Charge.**

Defendant Whitman respectfully requests the Court to charge the jury as follows:

(1) That it is not permitted to the jury to speculate as to whether the crime charged was committed.

20 (2) That a finding of conspiracy cannot be made on an overdraft alone.

(3) That an overdraft is not in itself an unlawful act on the part of the depositor of a bank unless the depositor be a director of the bank.

(4) That an act of the Inter-City Land & Securities Company cannot be imputed to the officer performing this act as an individual.

30 (5) That the State must prove beyond a reasonable doubt that a corrupt alliance was entered into between defendant Whitman and another to cheat the Roseville Trust Company in order to convict that defendant of the crime charged; and if the State does not do that the jury must acquit.

40 (6) That the State must prove beyond a reasonable doubt that defendant Whitman entered into a corrupt alliance with another to have Raymond E. Smith embezzle funds of the Roseville Trust Company in order to convict said Whitman of the crime charged, and if the State does not do that the jury must acquit.

*Defendant Whitman's Requests to Charge.*

(7) That defendants are presumed to be innocent and the State must prove beyond a reasonable doubt that the acts alleged in the indictment were committed by defendants.

(8) That no presumption against defendants Whitman and Faunce can be predicated upon the fact that Raymond E. Smith pleaded *non vult* to the indictment. 10

(9) That the testimony of Raymond E. Smith, being that of an alleged accomplice, should be considered by the jury with caution and unless it be corroborated such testimony should not be given the weight accorded to that of a disinterested party.

(10) That in order to convict either Whitman or Faunce it must be shown by the State that they entered into a corrupt alliance with Raymond E. Smith to have him embezzle the funds of the trust company. 20

(11) That in order to create a conspiracy there must be a distinct meeting of the minds of the parties sought to be charged with the crime.

(12) That no finding of conspiracy can be predicated upon a supposed loss to the Roseville Trust Company.

(13) That there can be no finding of a conspiracy against these defendants unless there be first established beyond a reasonable doubt that there was a corrupt agreement. 30

(14) That in order to convict, the jury must find, first, a meeting of the minds of defendants in the shape of an alliance or agreement, secondly, such alliance or agreement must be corrupt and founded upon a purpose to defraud the Roseville Trust Company, and, thirdly, such alliance agreement must have been intended to so defraud the Roseville Trust Company by having Raymond 40

*Certificate of Judge Osborne.*

E. Smith embezzle the funds of that company and to cover such embezzlement by failing to post the checks drawn, all as charged in the indictment; and if the State fails to prove any one of these the jury must acquit.

10 (15) That the jury must give weight to what are called character witnesses.

(16) That the agreement forming the first element of a conspiracy must be an affirmative act and made with knowledge of the fact on the part of the parties charged that they had entered into such an agreement; that is, no agreement can be implied unless coupled with a finding of knowledge on the part of defendants that they were agreeing to effectuate a purpose to defraud.

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ESSEX COUNTY OYER AND TERMINER.

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THE STATE,

v.

JOHN B. FAUNCE.

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} *On Indictment  
for Conspiracy.*

} *Certificate.*

30 I, HARRY V. OSBORNE, one of the judges of the Court of Oyer and Terminer of the County of Essex, do hereby certify that the above record and proceedings hereby transmitted by me to the Supreme Court of the State of New Jersey, comprise the entire record of the proceedings had in the trial of the State against John B. Faunce and Clarence P. Wihlman.

H. V. OSBORNE,  
*Judge.*

40

*Assignment of Errors.***Assignment of Errors.**

Filed October 1915.

## NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,

*Defendant-in-Error,*

vs.

CLARENCE P. WHITMAN,

*Plaintiff-in-Error.**On Error.**Assignments**of Error.*

10

Afterwards, to wit, on the return day of the writ of error issued in this cause, comes the said Clarence P. Whitman, plaintiff-in-error, by Borden D. Whiting, his attorney, and says that in the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit:

20

1: In that upon the trial of said cause the said court before whom, etc., over the objection of the said defendant Whitman, admitted in evidence the "H to N" ledger, marked "Exhibit S.9."

2: In that upon the trial of said cause the said court permitted the witness, William J. Thompson, over the objection of the said defendant Whitman, to refresh his memory by a reference to said "H to N" ledger.

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3: In that upon said trial said court, over the objection of said defendant Whitman, ruled that said witness Thompson could read into the record from said "H to N" ledger, which book was not properly in evidence.

4: In that upon the trial said court, over the objection of said defendant Whitman, permitted

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*Assignment of Errors.*

said witness Thompson to answer the following question:

“On the day it was paid was it good, according to the ledger account?”

10 5: In that upon said trial said court, over the objection of said defendant Whitman, admitted in evidence an entire line of testimony based upon the account of Inter-City Realty Company in said “H to N” ledger, which testimony was to the effect that checks of said Realty Company, according to said ledger, were not good and created overdrafts.

20 6: In that upon said trial said court, over the objection of said defendant Whitman, permitted the witness Frank C. Ferguson to answer the following question:

“What have you to say in regard to that note as to its being the original note of the prior \$6,000 note which you said was a renewal? By referring to the books, what do you say?”

7: In that upon said trial said court, over the objection of said defendant Whitman, permitted said witness Ferguson, to answer the following question:

30 “And I ask you if the note was apparently for four months why you figured the interest for one month?”

8: In that upon said trial said court, over the objection of said defendant Whitman, permitted said witness Ferguson, to answer the following question, as well as the line of questioning continued by the court immediately thereafter:

“How long before maturity do the books of the bank indicate that the note was purchased?”

40 9: In that upon said trial said court, over the objection of said defendant Whitman, admitted in-

*Assignment of Errors.*

to evidence the "Bills purchased ledger" marked "Exhibit S.18."

10: In that upon said trial said court, over the objection of said defendant Whitman, sustained the objection of the State to the following question asked on cross-examination of the witness, Raymond E. Smith:

10

"Did you ever inform Mr. Whitman or Mr. Faunce that you were taking money from the Roseville Trust Company?"

11: In that upon said trial said court, over the objection of said defendant Whitman, permitted said witness Smith, to answer the following question:

"According to the ledger, Mr. Smith, what was the condition of the account on August 14th?"

20

And the entire line of questions following thereafter and requiring the witness to testify from the ledger account of the Inter-City Realty Company.

12: In that upon said trial said court, over the objection of said defendant Whitman, permitted said witness Smith, to answer the following question:

"What enables you to make that charge on a cash due note of August 8th or later, if that is not the date; wasn't it because of the credit of August 8th of \$2,665.39?"

30

13: In that upon said trial said court, over the objection of said defendant Whitman, sustained the State's objection to the following question asked in cross-examination of said witness Thompson:

"Is it not a fact that in the Roseville Trust Company advances were made to open accounts in the shape of overdrafts to many customers?"

14: In that upon said trial said court, over the objection of said defendant Whitman, rejected the

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*Assignment of Errors.*

offer of photographs of properties of said Inter-City Realty Company.

15: In that upon said trial said court, over the objection of said defendant Whitman, permitted said witness Ferguson to answer the following question:

10 "What was the condition of the account on that day?"

16: In that upon said trial said court denied the motion of said defendant Whitman, for a direction of the verdict in his behalf.

17: In that upon said trial said court charged the jury as follows:

20 "The State does not claim that the mere over-drawing of the account by these defendants is the crime for which it asks for a conviction at your hands, but it says that this overdraft is evidence of the conspiracy which arose when Smith notified Whitman and Faunce of the condition of their account and which continued after that so long as they continued to draw checks knowing that they had no funds in the bank to meet them."

18: In that upon said trial said court charged the jury as follows:

30 "As I have already indicated, even if this situation be true, even though the defendants did not make an arrangement with Smith to honor these checks specifically, if they knew the fact and concurred in the acts and aided in their execution, under the law they are fellow conspirators. This I say is the position taken by the State with relation to these transactions and upon which they ask for a conviction."

40 19: In that upon said trial said court charged the jury as follows:

*Specification of Causes.*

“One of the questions you may ask yourselves in your deliberations upon the testimony of this case, is whether it is possible or reasonable that these defendants in the ordinary course of business could have drawn checks to such an amount as appears from the evidence before you, without knowing that they were over-drawing their account.” 10

BORDEN D. WHITING,  
*Attorney of Plaintiff-in-Error.*

**Specification of Causes.**

Filed October 1915.

NEW JERSEY SUPREME COURT. 20

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|---|---|--|
| THE STATE OF NEW JERSEY,<br><i>Defendant-in-Error,</i><br>vs.<br>CLARENCE P. WHITMAN,<br><i>Plaintiff-in-Error.</i> | } | <i>On Error.</i><br><br><i>Specification<br/> of Causes.</i> |
|---|---|--|

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And the said plaintiff-in-error also specifies the following causes relied upon by him for relief or reversal pursuant to the statute in such case made and provided:

1: Because the court admitted in evidence the “H to N” ledger containing the account of the Inter-City Realty Company.

2: Because said “H to N” ledger was admitted in evidence and no opportunity, during the entire course of the trial, was allowed to the defendant 40

*Specification of Causes.*

Whitman to cross-examine the bookkeepers who kept said ledger.

3: Because said court permitted the witness Thompson to testify that the Inter-City Realty Company account was over-drawn, which testimony was based upon the account of said company in said "H to N" ledger.

4: Because the court permitted the witness Ferguson to testify that the Inter-City Realty Company account was over-drawn, which testimony was based upon the account of said company in said "H to N" ledger.

5: Because the court permitted the witness Raymond E. Smith, to testify that the Inter-City Realty Company account was over-drawn, which testimony was based upon the account of said company in said "H to N" ledger.

6: Because the court sustained the objection of the State to the following question asked of the witness, Raymond E. Smith, in cross-examination:

"Q Did you ever inform Mr. Whitman or Mr. Faunce that you were taking money from the Roseville Trust Company?"

7: Because the court prevented said witness, Raymond E. Smith, from answering the following question addressed to him in cross-examination:

"Q Now the company had, subject to the mortgaged that you have spoken about title to some very handsome properties in New York City, did it not?"

8: Because the court permitted said witness, Raymond E. Smith, over the objection of said defendant Whitman, to answer the following question:

"Q According to the ledger, Mr. Smith, what was the condition of the account of August 14th?"

*Specification of Causes.*

9: Because the court permitted said witness, Raymond E. Smith, over the objection of said defendant Whitman, to answer the following leading question:

“Q What enables you to make that charge on a cash due note of August 8th or later, if that is not the date; wasn't it because of the credit of August 8th of \$2,665.39?” 10

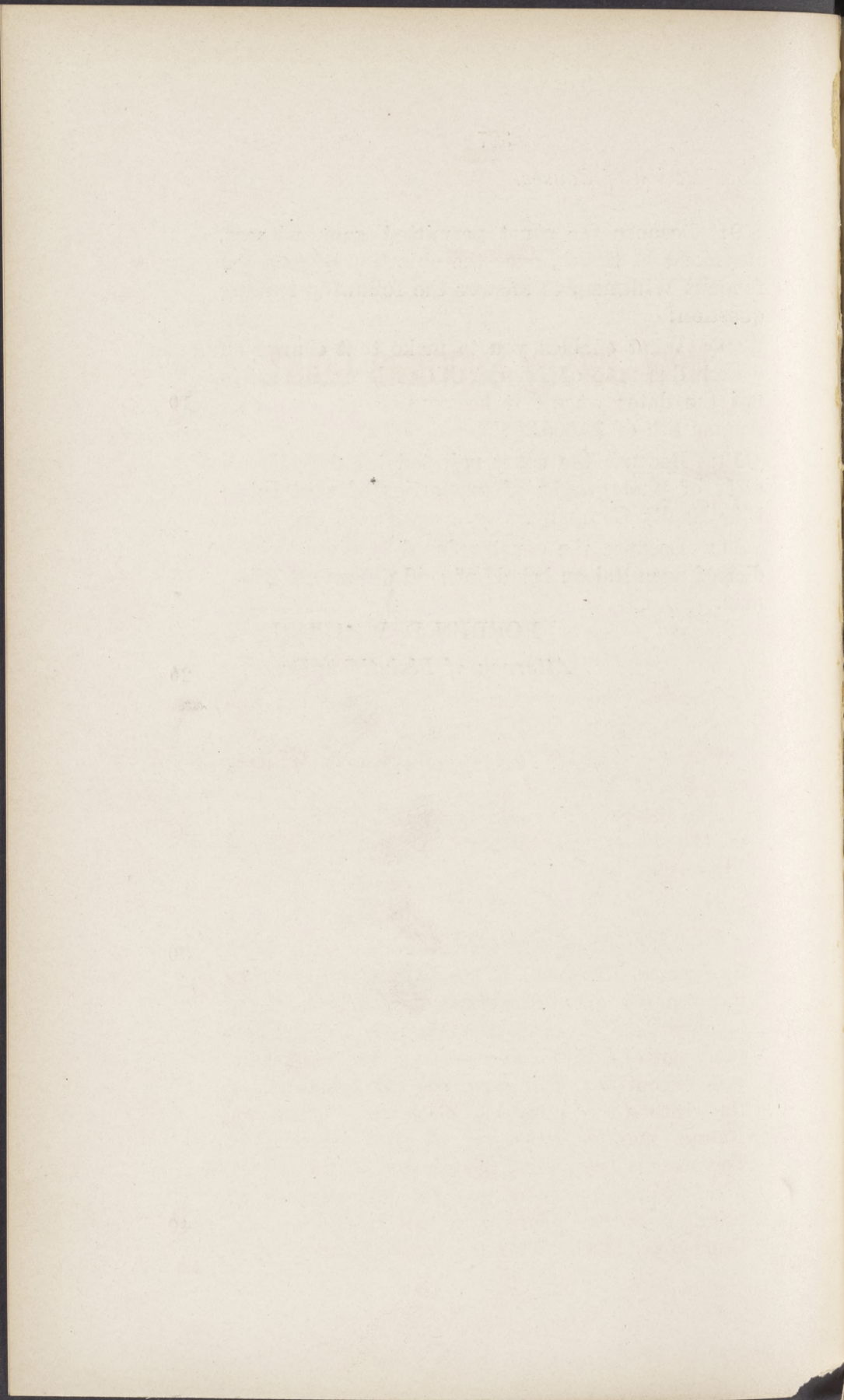
10: Because the court rejected the defendant's offer of photographs of properties of said Inter-City Realty Company.

11: Because the court refused to direct a verdict of acquittal on behalf of said defendant Whitman.

BORDEN D. WHITING,  
*Attorney of Plaintiff-in-Error.* 20

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*Opinion.***Opinion.**

Filed November 8, 1916.

**New Jersey Supreme Court.**

February Term, 1916.

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 THE STATE
*vs.*CLARENCE P. WHITMAN.  


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Error to the Essex Oyer and Terminer.

Argued before Gummere, Chief Justice, and 20  
Justices Swayze and Bergen.For the plaintiff in error, Borden D. Whiting  
and Ira C. Moore, Jr.For the State, Frederick F. Guild, Prosecutor  
of the Pleas, and Wilbur A. Mott, Assistant  
Prosecutor.*Per curiam.*

The defendant Whitman, together with John  
B. Faunce, Raymond E. Smith, and others, was 30  
indicted for conspiring fraudulently and falsely  
to cheat and defraud the Roseville Trust Com-  
pany out of \$28,487, and putting that conspiracy  
into execution. Whitman was the treasurer of  
the Inter-City Land & Securities Company.  
Faunce was the president of that corporation.  
The alleged fraudulent abstraction of the money  
of the trust company was for the purpose of  
using it in the affairs of the Inter-City, &c.  
Company. Both Whitman and Faunce were 40

*Opinion.*

convicted by the jury. The writ of error in the present case is sued out by Whitman alone.

10 The first ground of reversal is that the Court erred in refusing to direct a verdict in favor of the defendant, Whitman, upon the ground that there was no evidence to support his conviction. An examination of the proof sent up with the writ, under the 136th section of the Criminal Procedure Act, satisfies us that the Court properly refused to grant the motion for the reason indicated; that is to say, we find ample proof to go before the jury upon the question of his being engaged in the criminal conspiracy charged against him.

20 It is next contended that there should be a reversal, because the Court erroneously charged the jury that an intent to defraud could be inferred from the mere proof of intentional and repeated overdrafts. But no such instruction was given to the jury. What the Court did say was "The State does not claim that the mere overdrawing of the account by the defendants is a crime for which it seeks a conviction, but says that the overdraft is evidence of a conspiracy," etc. This statement by the Court is a mere recital of one of the claims advanced by the prosecution, and not the laying down of a legal principle for the guidance of the jury.

30 Next, it is objected that it was error for the trial court to refuse to admit evidence tending to prove the financial responsibility of the Inter-City Land & Securities Company. No argument is made in support of this contention, counsel being satisfied with the statement that "proof of its financial responsibility would have tended to rebut any evidence of intent to de-

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*Opinion.*

fraud the bank." We are unable to perceive that it would have the tendency claimed, and consider the offered testimony was immaterial and irrelevant. It was, therefore, properly excluded.

Next, it is claimed that the Court improperly excluded the following question, asked of Raymond E. Smith, one of the parties indicted, upon his cross examination, he having been called as a witness on behalf of the State—"Did you ever inform Mr. Whitman, or Mr. Faunce, that you were taking money from the Roseville Trust Company?" This question was properly excluded, for the fact that Smith was fraudulently abstracting money from the trust company for purposes with which Whitman and Faunce were unconnected, threw no light upon the charge made against these two men, and upon which they were then being tried.

Next, it is argued that the Court improperly admitted in evidence the books of the Roseville Trust Company. The State's claim was that the account of Whitman in those books was falsely kept for the apparent purpose of concealing the fraudulent abstraction of moneys from the bank in the carrying out of the conspiracy charged in the indictment. The argument is that the books should not have been admitted, unless the State first proved that Whitman knew of, and acquiesced in, the falsifications. But such knowledge on his part was not necessary in order to make the books evidential against him, if, in fact, the alterations and fraudulent entries were made for the purpose of more successfully carrying out the object of the conspiracy. The further claim that the books should have been excluded because

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*Opinion.*

they were not a true record of the transactions of the bank is, of course, without merit.

10 It is next argued that the Court improperly admitted in evidence a so-called "reconstructed account," prepared by a Mr. Ferguson, an accountant in the employ of the Commissioner of Banking of this state. We are not pointed by counsel to any offer of this account by the State, or any ruling by the Court admitting it in evidence. Nor does our own examination of the record disclose any such offer or ruling. Moreover, no assignment of error, or cause for reversal, raises this point. The plaintiff in error can, therefore, take nothing by it.

20 There are other grounds of reversal directed at rulings on evidence, but they are none of them of sufficient importance to justify specific comment; it is enough to say that we find each of them to be without merit.

The judgment under review will be affirmed.

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*Remittitur.***Remittitur.**

Filed November 10, 1916.

## NEW JERSEY SUPREME COURT.

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|--|---|--|----|
| THE STATE OF NEW JERSEY,<br><i>Defendant in Error,</i><br><br><i>vs.</i><br><br>CLARENCE P. WHITMAN,<br><i>Plaintiff in Error.</i> | } | <i>On Error.</i><br><br><i>Remittitur.</i> | 10 |
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The above stated cause having been duly argued at the February Term, Nineteen Hundred and Sixteen, in the New Jersey Supreme Court, by Wilbur A. Mott, attorney for the defendant in error, and Borden D. Whiting, attorney for Clarence P. Whitman, the plaintiff in error, and the Court having considered the matter and finding no error in the record and proceedings in the Essex County Court of Oyer and Terminer; 20

It is thereupon ordered and adjudged that the judgment of the Essex County Court of Oyer and Terminer, removed by the writ of error in this cause, be affirmed in all things with costs; and that the record be remitted to the Essex County Court of Oyer and Terminer to be proceeded with according to law and the practice of said Court. 30

Entered Nov. 10, 1916.

On motion of

JACOB L. NEWMAN,  
*Prosecutor of the Pleas.*

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*Assignment of Errors.***Assignment of Errors.**

Filed January 3rd, 1917.

**New Jersey Court of Errors and Appeals**

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|----|--|---|--|
| 10 | THE STATE OF NEW JERSEY,<br><i>Plaintiff-Defendant in Error,</i><br><br><i>vs.</i><br><br>CLARENCE P. WHITMAN,<br><i>Defendant-Plaintiff in Error.</i> | } | <i>On Error to<br/>         Supreme<br/>         Court.</i><br><br><i>Assignment<br/>         of Errors.</i> |
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20 Afterwards, to wit, on the return day of the writ of error issued in this cause, comes the said Clarence P. Whitman, plaintiff-in-error, by Borden D. Whiting, his attorney, and says that in the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit:

1. Because the Supreme Court decided that the Court of Oyer and Terminer properly admitted in evidence the "H to N" ledger, marked "Exhibit S. 9."

30 2. Because said Supreme Court decided that said Court of Oyer and Terminer properly permitted the witness, William J. Thompson, to refresh his memory by a reference to the "H to N" ledger.

3. Because the Supreme Court decided that the said Court of Oyer and Terminer properly ruled that said witness Thompson would read into the record from said "H to N" ledger, which book was not properly in evidence.

40 4. Because said Supreme Court decided that the Court of Oyer and Terminer properly per-

*Assignment of Errors.*

mitted said witness Thompson to answer the following question: "On the day it was paid was it good, according to the ledger account?"

5. Because said Supreme Court decided that the Court of Oyer and Terminer properly admitted in evidence an entire line of testimony based upon the account of Inter-City Realty Company in said "H to N" ledger, which testimony was to the effect that checks of said Realty Company, according to said ledger, were not good and created overdrafts. 10

6. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly permitted the witness Frank C. Ferguson to answer the following question: "What have you to say in regard to that note as to its being the original note of the prior \$6000. note which you said was a renewal? By referring to the books, what do you say?" 20

7. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly permitted said witness Ferguson to answer the following question: "And I ask you if the note was apparently for four months why you figured the interest for one month?"

8. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly permitted said witness Ferguson to answer the following question, as well as the line of questioning continued by the court immediately thereafter: "How long before maturity do the books of the bank indicate that the note was purchased?" 30

9. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly admitted in evidence the "Bills purchased ledger" marked "Exhibit S. 18." 40

*Assignment of Errors.*

10. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly sustained the objection of the State to the following question asked on cross-examination of the witness, Raymond E. Smith: "Did you ever inform Mr. Whitman or Mr. Faunce that you were taking money from the Roseville Trust Company?"

11. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly permitted said witness Smith to answer the following question: "According to the ledger, Mr. Smith, what was the condition of the account on August 14th?"

20 And the entire line of questions following thereafter and requiring the witness to testify from the ledger account of the Inter-City Realty Company.

12. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly permitted said witness Smith, to answer the following question: "What enables you to make that charge on a cash due note of August 8th or later, if that is not the date; wasn't it because of the credit of August 8th of \$2,665.39?"

30 13. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly sustained the State's objection to the following question asked in cross-examination of said witness Thompson: "Is it not a fact that in the Roseville Trust Company advances were made to open accounts in the shape of overdrafts to many customers?"

40 14. Because the said Supreme Court decided that the said Court of Oyer and Terminer

*Assignment of Errors.*

properly rejected the offer of photographs of properties of said Inter-City Realty Company.

15. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly permitted said witness Ferguson to answer the following question: "What was the condition of the account on that day?" 10

16. Because the said Supreme Court decided that the said Court of Oyer and Terminer properly denied the motion of said defendant Whitman for a direction of the verdict in his behalf.

17. Because the said Supreme Court decided that the said Court of Oyer and Terminer did not err in charging the jury as follows:

"The State does not claim that the mere overdrawing of the account by these defendants is the crime for which it asks for a conviction at your hands, but it says that this overdraft is evidence of the conspiracy which arose when Smith notified Whitman and Faunce of the condition of their account and which continued after that so long as they continued to draw checks knowing that they had no funds in the bank to meet them." 20

18. Because the said Supreme Court decided that the said Court of Oyer and Terminer did not err in charging the jury as follows: 30

"As I have already indicated, even if this situation be true, even though the defendants did not make an arrangement with Smith to honor these checks specifically, if they knew the fact and concurred in the acts and aided in their execution, under the law they are fellow conspirators. This I say is the position taken by the State with relation to these transactions and upon which they ask for a conviction." 40

*Assignment of Errors.*

19. Because the said Supreme Court decided that the said Court of Oyer and Terminer did not err in charging the jury as follows:

10 “One of the questions you may ask yourselves in your deliberations upon the testimony of this case, is whether it is possible or reasonable that these defendants in the ordinary course of business could have drawn checks to such an amount as appears from the evidence before you, without knowing that they were overdraw-  
ing their account.”

20. Because the said Supreme Court affirmed the judgment of the Court of Oyer and Terminer, whereas it should have reversed the same.

BORDEN D. WHITING,

*Attorney of Defendant-Plaintiff in Error.*

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Endorsement:

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

30

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

*vs.*

CLARENCE P. WHITMAN,  
*Defendant-Plaintiff in Error.*

*On Error to  
Supreme  
Court.*

*Assignment  
of Errors.*

Service of the within Assignment of Errors is hereby acknowledged this 21st day of December, 1916.

JACOB L. NEWMAN,

*Attorney of Plaintiff-Defendant in Error.*

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*Specification of Causes.***Specification of Causes.**

Filed January 3rd, 1917.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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|--|---|---|
| THE STATE OF NEW JERSEY,<br><i>Plaintiff-Defendant in Error,</i><br><br><i>vs.</i><br><br>CLARENCE P. WHITMAN,<br><i>Defendant-Plaintiff in Error.</i> | } | <i>On Error to<br/>         Supreme<br/>         Court.</i><br><br><i>Specification<br/>         of Causes.</i> |
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And the said plaintiff-in-error also specifies the following causes relied upon by him for relief or reversal, pursuant to statute in such case made and provided.

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1. Because the said Supreme Court decided that the Court of Oyer and Terminer properly admitted in evidence the "H to N" ledger containing the account of the Inter-City Realty Company.

2. Because said Supreme Court approved of the trial court admitting in evidence said "H to N" ledger although no opportunity, during the entire course of the trial, was allowed to the defendant Whitman to cross-examine the bookkeepers who kept said ledger.

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3. Because the said Supreme Court decided that said Court of Oyer and Terminer properly permitted the witness Thompson to testify that the Inter-City Realty Company account was overdrawn, which testimony was based upon the account of said company in said "H to N" ledger.

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*Specification of Causes.*

4. Because the said Supreme Court decided that said Court of Oyer and Terminer properly permitted the witness Ferguson to testify that the Inter-City Realty Company account was overdrawn, which testimony was based upon the account of said company in said "H to N" ledger.

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5. Because said Supreme Court decided that said Court of Oyer and Terminer properly permitted the witness Raymond E. Smith to testify that the Inter-City Realty Company account was overdrawn, which testimony was based upon the account of said company in said "H to N" ledger.

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6. Because said Supreme Court approved of the trial court sustaining the objection of the state to the following question asked of the witness, Raymond E. Smith, in cross examination: "Q. Did you ever inform Mr. Whitman or Mr. Faunce that you were taking money from the Roseville Trust Company?"

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7. Because said Supreme Court decided that said Court of Oyer and Terminer properly permitted said witness, Raymond E. Smith, from answering the following question addressed to him in cross examination: "Q. Now the company had, subject to the mortgages that you have spoken about, title to some very handsome properties in New York City, did it not?"

8. Because the said Supreme Court decided that the Court of Oyer and Terminer properly permitted said witness, Raymond E. Smith, over the objection of said defendant Whitman, to answer the following question: "Q. According to the ledger, Mr. Smith, what was the condition of the account of August 14th?"

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*Specification of Causes.*

9. Because the said Supreme Court decided that the Court of Oyer and Terminer properly permitted said witness, Raymond E. Smith, over the objection of said defendant Whitman, to answer the following leading question? “Q. What enables you to make that charge on a cash due note of August 8th or later, if that is not the date; wasn’t it because of the credit of August 8th of \$2,665.39?” 10

10. Because the said Supreme Court decided that said Court of Oyer and Terminer properly rejected the defendant’s offer of photographs of properties of said Inter-City Realty Company.

11. Because said Supreme Court decided that the Court of Oyer and Terminer properly refused to direct a verdict of acquittal on behalf of said defendant Whitman. 20

12. Because the said Supreme Court decided that they found no error in the record and proceedings of the trial court that should lead to a reversal of the judgment.

BORDEN D. WHITING,  
*Attorney of Defendant-Plaintiff in Error.*

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*Specification of Causes.*

Endorsement:

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

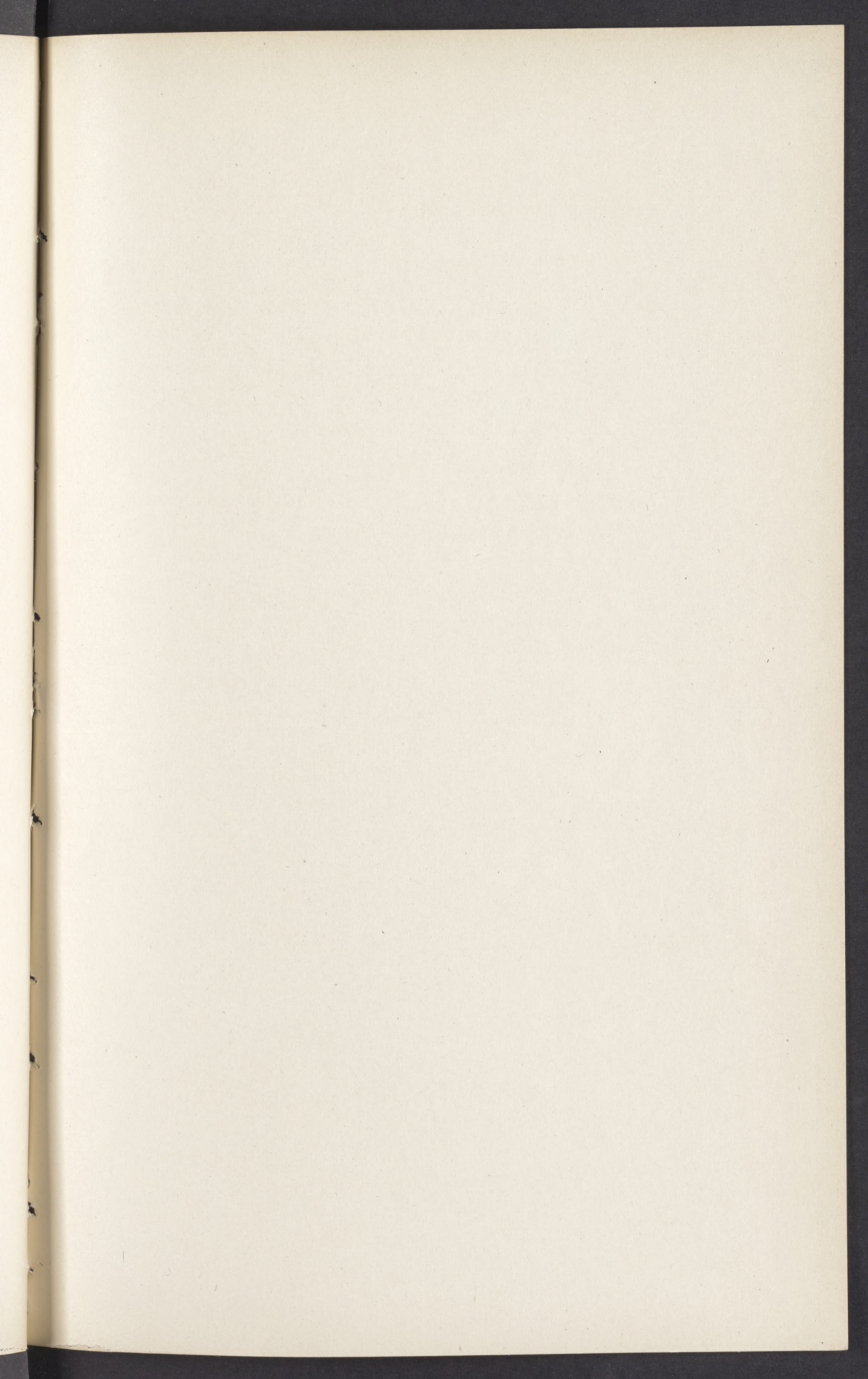
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|----|--|---|---|
| 10 | THE STATE OF NEW JERSEY,<br><i>Plaintiff-Defendant in Error,</i><br><br><i>vs.</i><br><br>CLARENCE P. WHITMAN,<br><i>Defendant-Plaintiff in Error.</i> | } | <i>On Error to<br/>         Supreme<br/>         Court.</i><br><br><i>Specification<br/>         of Causes.</i> |
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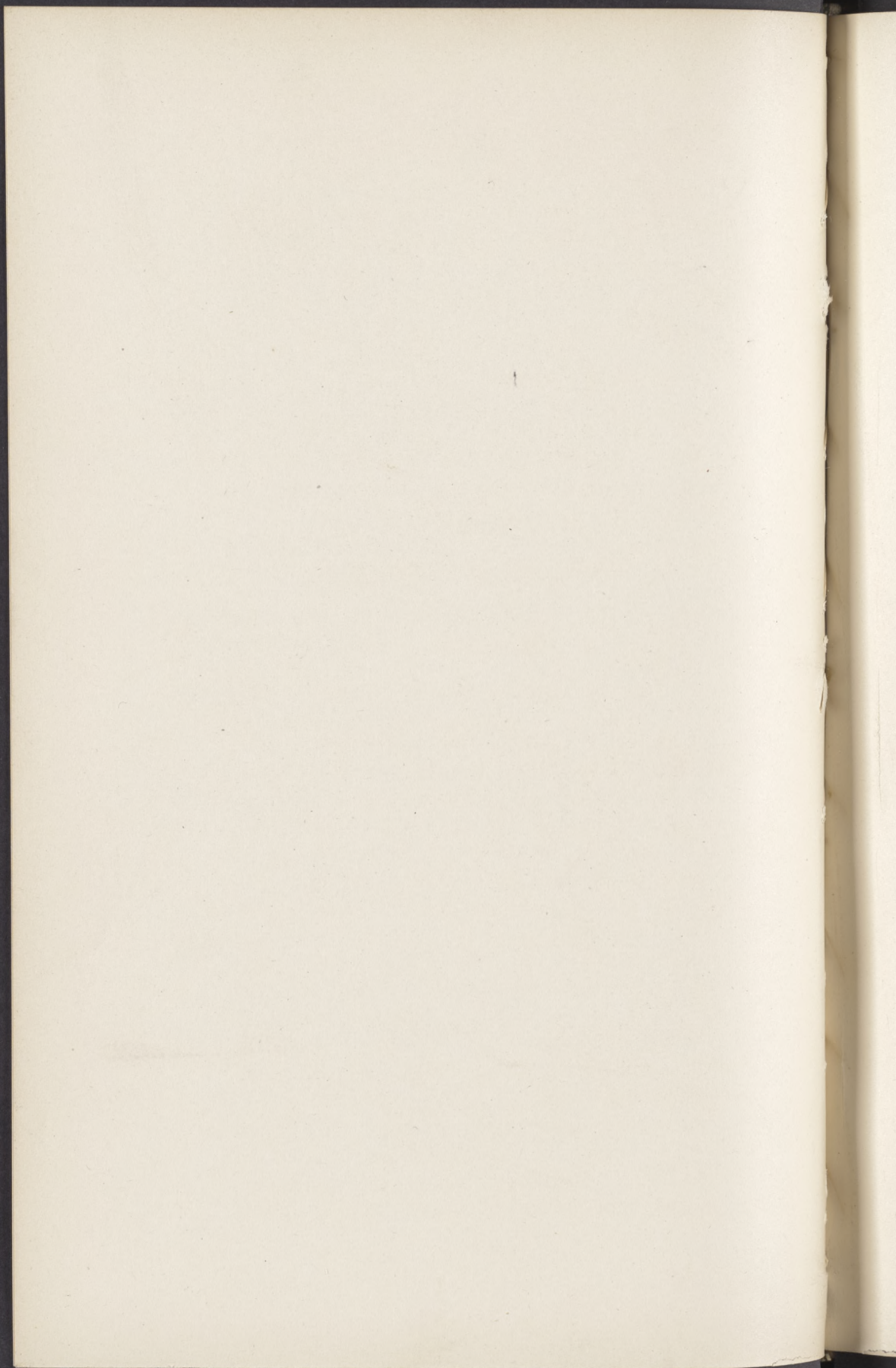
Service of the within Specification of Causes  
 is hereby acknowledged this 21st day of De-  
 cember, 1916.

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 JACOB L. NEWMAN,  
*Attorney of Plaintiff-Defendant in Error.*

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## New Jersey Court of Errors and Appeals

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| THE STATE OF NEW JERSEY,<br><i>Defendant-in-Error,</i><br><br><i>vs.</i><br><br>CLARENCE P. WHITMAN,<br><i>Plaintiff-in-Error.</i> | } | <i>On Writ<br/>of Error to<br/>Supreme<br/>Court.</i> |
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### Brief for Plaintiff in Error.

#### Statement of the Case

Raymond E. Smith, Clarence P. Whitman, John B. Faunce, Augustus R. Jennings, William J. Thompson and Jesse S. Peters were indicted for conspiring fraudulently and falsely to cheat and defraud the Roseville Trust Company of \$28,487.73 by procuring the fraudulent application of the funds of said Roseville Trust Company to the payment of checks and promissory notes drawn by the Inter-City Land and Securities Company in overdraft of funds standing to its credit with said Trust Company; and willfully and corruptly concealing the said fraudulent application of said moneys by falsely keeping the accounts of said Roseville Trust Company and fraudulently and falsely to cheat and defraud the said Roseville Trust Company by procuring the embezzlement by the said Raymond E. Smith of moneys of said Trust Company committed to his keeping.

Smith was secretary and treasurer of the Roseville Trust Company. He was also a director of the Inter-City Land and Securities Company and owned about one-fourth of the

stock of that company. Whitman and Faunce were respectively treasurer and president of the Inter-City Land and Securities Company. The indictment was *nolle prossed* by the State as to Jennings and Thompson. Peters was not apprehended. Smith pleaded either guilty or *non vult* to about twenty-four indictments for crimes which resulted in wrecking the Roseville Trust Company and was serving a term in the State prison at the time of the trial of this cause. He pleaded *non vult* to this particular indictment. Whitman and Faunce pleaded not guilty. They were tried and convicted. Separate writs of error were sued out and the entire record of the proceedings had upon the trial was brought up to the Supreme Court by the defendant Whitman by virtue of Sections 136 and 137 of the Criminal Procedure Act. The judgment of the trial court was affirmed by the Supreme Court and the case now comes before this court on a writ of error.

At the trial the State offered no direct evidence of a corrupt combination or agreement between the defendants, but relied enirely upon evidence of facts from which, it contended, such a combination could be inferred. The facts relied upon were, that the defendants, Whitman and Faunce, drew checks to the amount of \$28,616.66 against the account of the Inter-City Land and Securities Company in overdraft of funds standing to its credit with the Roseville Trust Company; that at the time they drew these checks they knew there were not sufficient funds to the credit of the Inter-City Land and Securities Company to pay them; and that these checks were paid by the Roseville Trust Company with the understanding that the money advanced on them would subsequently be repaid to the Trust Company (Case, p. 145).

The court in effect charged the jury that proof of these facts was sufficient to sustain a conviction for criminal conspiracy (Case, pp. 290 and 291, 1. 35).

It was also shown that Smith had concealed the overdrafts by falsely keeping the accounts of the Roseville Trust Company. But there was no proof that the defendant, Whitman, had any part in this deception. On the contrary, the State's own witness testified that there was no understanding that the books should be falsified, that he had never told Whitman that he was attempting to conceal the overdrafts and that, as far as he knew, Whitman did not know it (Case, pp. 152, 153).

The State attempted to prove the fact that the account of the Inter-City Land and Securities Company was overdrawn by the testimony of Raymond E. Smith aided and corroborated by the books of the Roseville Trust Company and testimony based upon those books. These books were admittedly inaccurate and some of them were put in evidence to prove that they were falsely kept. But the accuracy of these books was relied upon to prove that the account was overdrawn.

The defendants claimed that the account of the Inter-City Company was not overdrawn, but that they were entitled to credit for deposits and notes which did not appear on the books. Such books as were put in evidence showed the account to be overdrawn. But all of the books showing credits were not put in evidence. The A to L assistant book-keepers' credit book showed a credit of \$699.30 which did not appear in any book in evidence (Case, pp. 42, 46). Whether or not there were any other credits in this book not shown by the evidence, is not

known, for the book was not proved and was not admitted in evidence.

Of the books which were admitted in evidence, the most important were the H to N ledger, "Exhibit S 9," and the bills purchased book, "Exhibit S 18." The former contained the account of the Inter-City Land and Securities Company. The latter was supposed to contain a record of all notes purchased by the Roseville Trust Company.

It was not shown that the entries in these books were made contemporaneously with the transactions, nor that they were accurately made and contained all of the entries that should have been made. They were not proved by the men who made the entries. No opportunity was had to cross examine these witnesses at any time during the entire course of the trial.

The H to N ledger did not show at least one deposit which should have been entered in it (Case, p. 42). The bills purchased book did not show at least one note of \$11,000.00 which the defendants claim should have been credited to their account (Case, pp. 111, 223, 224, 225). Smith testified that the Roseville Trust Company's troubles were not confined to the account of the Inter-City Land and Securities Company, but that he had falsified the books of the trust company to such an extent that he did not know how many instances there were, and could not carry them all in his mind (Case, pp. 153, 154). Frank C. Ferguson, a State bank examiner, after working on the books for two years, was unable to tell to what extent the books were incorrect (Case, p. 98).

Such was the evidence upon which this plaintiff in error was convicted of criminal conspiracy.

### Specifications of the Errors Relied Upon.

In the Supreme Court this case came up on bill of exceptions with assignment of errors thereon, and the entire record was also brought up and specification of causes assigned thereon, by virtue of the 136th and 137th sections of the Criminal Procedure Act.

The plaintiff in error contends that the Supreme Court erred in that it affirmed the judgment of the trial court, whereas it should have reversed the same for the reason that the trial court erred and that he suffered manifest wrong and injury upon the trial of this case in the following particulars:

1. In that the trial court refused to direct a verdict of acquittal on behalf of the said defendant, Whitman (Case, pp. 285, 286; Assignment of Errors, 16; Specification of Causes, 11).

2. In that the court, over the objection of said defendant, Whitman, sustained the State's objection to the following question asked in cross-examination of the witness, Thompson:

"Is it not a fact that in the Roseville Trust Company advances were made to open accounts in the shape of overdrafts to many customers?" (Case, p. 194; Assignment of Errors, 13).

3. In that upon said trial said court charged the jury as follows:

"The state does not claim that the mere overdrawing of the account by these defendants is the crime for which it asks for a conviction at your hands, but it says that this overdraft is evidence of the conspiracy which arose when Smith notified Whitman and Faunce of the condition of their account and which continued after that so long as

they continued to draw checks knowing that they had no funds in the bank to meet them" (Case, p. 290; Assignment of Errors, 17).

4. In that upon said trial said court charged the jury as follows:

"As I have already indicated, even if this situation be true, even though the defendants did not make an arrangement with Smith to honor these checks specifically, if they knew the fact and concurred in the acts and aided in their executions, under the law, they are fellow conspirators. This, I say is the position taken by the state with relation to these transaction and upon which they ask for a conviction" (Case, p. 290; Assignment of Errors, 18).

5. In that upon said trial said court charged the jury as follows:

"One of the questions you may ask yourselves in your deliberations upon the testimony of this case, is whether it is possible or reasonable that these defendants in the ordinary course of business could have drawn checks to such an amount as appears from the evidence before you, without knowing that they were over-drawing their account" (Case, p. 291; Assignment of Errors, 19).

6. In that said court prevented the witness, Raymond E. Smith, from answering the following question addressed to him in cross-examination:

"Now the company (Inter-City Land and Securities Company) had, subject to the mortgages that you have spoken about, title to some very handsome properties in New

York City, did it not?" (Case, p. 146; Specification of Causes, 7).

7. In that said court rejected the defendant's offer of photographs of properties of the Inter-City Land and Securities Company (Case, pp. 224, 225; Assignment of Errors, 14; Specification of Causes, 10).

8. In that said court sustained the objection of the State to the following question asked on cross-examination of the witness, Raymond E. Smith:

"Did you ever inform Mr. Whitman or Mr. Faunce that you were taking money from the Roseville Trust Company?" (Case, p. 127; Assignment of Errors, 10; Specification of Causes, 6).

9. In that said court permitted the witness, Raymond E. Smith, over the objection of said defendant, Whitman, to answer the following leading question:

"What enables you to make that charge on a cash due note of August 8th or later, if that is not the date; wasn't it because of the credit of August 8th of \$2,665.39?" (Case, p. 183; Assignment of Errors, 12; Specification of Causes, 9).

10. In that said court admitted in evidence the H to N" ledger, marked "Exhibit S 9," containing the account of the Inter-City Land and Securities Company (Case, p. 43; Assignment of Errors, 1; Specification of Causes, 1).

11. In that said "H to N" ledger was admitted in evidence and no opportunity, during the entire course of the trial, was allowed to the defendant, Whitman, to cross-examine the bookkeepers who kept said ledger. (See case particularly at pp. 35, l. 35; 36, at l. 40; 37, at

l. 29; 43, at l. 8; 46, at l. 10; 47, at l. 21, and pp. 67, 91, 193, 283; Specification of Causes, 2.)

12. In that said court permitted the witness, William J. Thompson, over the objection of the said defendant, Whitman, to refresh his memory by a reference to said "H to N" ledger (Case, p. 45; Assignment of Errors, 2).

13. In that said court, over the objection of said defendant, Whitman, ruled that said witness, Thompson, could read into the record from said "H to N" ledger, which book was not properly in evidence (Case, pp. 45 and 46; Assignment of Errors, 3).

14. In that said court permitted the witness, Thompson, to testify that the Inter-City Land and Securities account was overdrawn, which testimony was based upon the account of said company in said "H to N" ledger (Case, pp. 44 to 47 incl.; 61, 62, 64 to 66 incl.; Assignment of Errors, 4 and 5; Specification of Causes, 3).

15. In that said court permitted the witness, Frank C. Ferguson, to testify that the Inter-City Land and Securities account was overdrawn, which testimony was based upon the account of said company in said "H to N" ledger (Case, pp. 69, 76, 79, 283; Specification of Causes, 4).

16. In that said court permitted the witness, Raymond E. Smith, to testify that the Inter-City Land and Securities account was overdrawn, which testimony was based upon the account of said company in said "H to N" ledger (Case, pp. 113, 175, 176, 177, 179, 180; Assignment of Errors, 11; Specification of Causes, 5).

17. In that said court permitted said witness, Smith, over the objection of said defendant, Whitman, to answer the following question:

“According to the ledger, Mr. Smith, what was the condition of the account on August 14th?” And the entire line of questions following thereafter (Case, pp. 175, 176, 177, 179, 180; Assignment of Errors, 11; Specification of Causes, 8).

18. In that said court, over the objection of said defendant, Whitman, admitted into evidence the “Bills purchased ledger,” marked “Exhibit S 18,” (Case, pp. 107, 110, 111; Assignment of Errors, 9).

19. In that said court, over the objection of said defendant, Whitman, permitted the said witness, Ferguson, to answer the following question:

“What have you to say in regard to that note as to its being the original note of the prior \$6,000. note which you said was a renewal? By referring to the books, what do you say?” (Case, pp. 89 to 92 incl.; Assignment of Errors, 6).

20. In that said court, over the objection of said defendant, Whitman, permitted said witness, Ferguson, to answer the following question:

“And I ask you if the note was apparently for four months, why you figured the interest for one month?” (Case, pp. 99 to 102 incl.; Assignment of Errors, 7).

21. In that said court, over the objection of said defendant, Whitman, permitted said witness, Ferguson, to answer the following ques-

tion, as well as the line of questioning continued immediately thereafter:

“How long before maturity do the books of the bank indicate that the note was purchased?” (Case, p, 103; Assignment of Errors, 8).

22. In that said court, over the objection of said defendant, Whitman, permitted said witness, Ferguson, to answer the following question:

“What was the condition of the account on that day?” (Case, p. 283; Assignment of Errors, 15).

## Points.

### I.

**In New Jersey conspiracy may be the crime defined by our statute or that recognized by the common law.**

*State v. Norton*, 23 N. J. L., 33.

### II.

**There was no evidence, so far the defendant Whitman is concerned, of conspiracy as defined by our statute.**

Section 37 of the Crimes Act (2 C. S., 1757) defines the crime of conspiracy as follows:

“37. Conspiracy.—Any two or more persons who shall combine, unite, confederate, conspire or bind themselves by oath, covenant, agreement or other alliance to commit any crime, or falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any

crime, or falsely to move and maintain any suit, or to cheat and defraud any person of any property by means which are in themselves criminal, or to cheat and defraud any person of any property by means which, if executed, would amount to a cheat, or to obtain money by false pretences, or to conceal or spread any contagious disease, or to commit any act for the perversion or obstruction of justice or the due administration of the laws, shall, on conviction, be deemed guilty of a conspiracy, and be liable to the same penalty as persons convicted of a misdemeanor; but no agreement to commit any crime other than arson, burglary, manslaughter, murder, rape, robbery, or sodomy shall be deemed a conspiracy unless some act in execution of such agreement be done to effect the object thereof by one or more of the parties to such agreement."

This statute amended the crimes act by substituting the word "crime" for the word "offense." *State v. Bienstock*, 78 N. J. L., 256.

The State's case against Whitman is strictly confined to proof of over-drafts. Not a word of the State's testimony connects Whitman in any way with the falsification of records or embezzlement of the bank's funds, or any other act of a criminal nature. (See entire case.)

It is not a crime for a depositor to over-draw his bank account. (See authorities cited under Point IV.)

Unless, therefore, there was sufficient evidence of a criminal intent to cheat and defraud, to support a conviction for the common law crime of conspiracy, the court erred in refusing to direct a verdict of acquittal (Case, p. 285).

## III.

**There was not sufficient evidence to support a conviction for the common law crime of conspiracy because there was no evidence of criminal intent on the part of the defendant Whitman.**

As in common law offenses generally, there must be an actual wrongful intent in order to render the conspiracy criminal. *May's Criminal Law*, Sec. 189.

The indictment charges the defendant with combining "fraudulently and falsely to cheat and defraud the Roseville Trust Company," and "to wilfully and corruptly conceal the said fraudulent application of said moneys, etc." These words used to indicate that the combination was corrupt and charging the defendants with a criminal intent are not superfluous verbiage, but are essential to the validity of the indictment. *Wood v. State*, 47 N. J. L., 461. And a conviction under this indictment cannot be sustained without proof of this corrupt motive. It is not enough to prove that the object of the combination was illegal. *Wood v. State, supra; State v. Donaldson*, 3 Vroom, 151, at 152. It will be noticed that in every case in this State where an indictment or conviction for criminal conspiracy was sustained, there was some element indicating moral turpitude on the part of the defendant, or of oppression to individuals or the public. (See New Jersey cases collected in *State v. Bienstock*, 78 N. J. L., 256.)

It will be noted that in the recent case of *State v. Armstrong*, 95 Atl. Rep., 997, there was strong and convincing evidence to prove that the defendant intended to cheat and defraud the bank and had conspired with Smith for that purpose.

In that case it was shown that Armstrong "knew that checks paid by order of Smith were not charged to his account, and that on one occasion he gave Smith a check for a large sum of money, to meet which both he and Smith knew he had no funds on deposit, for the purpose of taking up a number of smaller checks which Smith had directed be paid, and which both knew had never been charged to his account." It was to these corrupt and fraudulent acts on the part of Armstrong, that the Court of Errors and Appeals pointed as facts from which a jury might infer an agreement to cheat and defraud the bank. The court emphasized the significance of these corrupt acts by calling attention to them again in the next paragraph of the opinion as follows:

"A clearer case of a corrupt agreement to defraud by the joint act of two persons, neither of which could have carried it out without the assistance of the other, is not often disclosed, and the record kept of the acts leading to its consummation by one of the conspirators was competent evidence against all, especially in a case like this where both parties knew that one of the means of carrying out the agreement, viz., the checks, were not charged, as they should have been, to the account of the plaintiff in error, and that the omission to do so tended to prevent the discovery of the wrong doing."

In the case at bar there is no evidence whatever of any fraud or of any act from which a criminal intent can be inferred, as far as the defendant Whitman is concerned. It was the business of the Roseville Trust Company to grant loans to its customers. The very strongest

case against Whitman that can possibly be gathered from the evidence is that he obtained such loans by means of over-drafts. There was no evidence of fraud or deception on his part, nor was there any suggestion of an attempt or an intention to avoid the repayment of these loans.

There was never any agreement that these overdrafts should not be made good. The understanding was that they would be made good (Case, p. 145).

The defendant Smith did not report the matter of the over-drafts to his executive committee and falsified the books of the company so as to conceal the over-drafts. But Smith owned one-fourth of the stock of the Inter-City Company so that he had ample motive for concealing the over-drafts upon his own initiative without implicating the defendant Whitman (Case, pp. 150, 151, 186, 187, 202). The defendant Whitman never asked him to falsify the books or conceal these over-drafts in any way. There was no understanding between them that this should be done and Whitman did not know that it was being done.

If Smith and Whitman combined and agreed to defraud the Roseville Trust Company, upon proof of such an agreement, Whitman would be chargeable with the fraudulent acts of his co-conspirator Smith. But the existence of such a corrupt combination cannot be inferred from evidence of Smith's fraudulent acts without connecting them in some way with Whitman. In the crime of conspiracy, the unlawful agreement is the gist of the offense. *May's Criminal Law*, Sec. 188; 8 Cyc. 624. An unlawful agreement to defraud the Roseville Trust Company of moneys by means of over-drafts cannot be inferred from the evidence in this case. The

State's own witness testified that such an agreement did not exist (Case, pp. 145, 152, 153, 218, 219, 220, 227, 228).

The State failed to prove an essential element of its case and the court should have directed a verdict of acquittal as requested (Case, pp. 285, 286; Assignment of Errors 16; Specification of Causes 11).

#### IV.

#### **An intent to defraud cannot be inferred from the mere proof of intentional and repeated over-drafts.**

Banks are established to lend money. An over-draft is a form of lending. Money advanced on a check is as well secured as money loaned on an individual note. Each is a loan evidenced by the written obligation of the borrower. *1 Bolles Modern Law of Banking*, 199; *Tiffany on Banks and Banking*, page 82; *Dow v. U. S.*, 82 Fed., 904, at 908; *People v. Clements*, 42 Hun., 286; *Commercial Bank of Albany v. Ten Eyck*, 48 N. Y., 305, at 310; *Hubbard v. Charlestown Branch R. R. Co.*, 11 Metc. (Mass.), 124.

It is impossible for any one to obtain a loan from a bank except by an agreement or conspiracy with some officer or agent of the bank. If, therefore, it is not unlawful to obtain a loan by means of an over-draft, it cannot be unlawful *per se* to agree or conspire to obtain such a loan. *State v. Nugent*, 77 N. J. L., 157. The agreement or conspiracy does not render the legal act illegal.

The case of *State v. Rickey*, 9 N. J. L., 293, decided that it is not an indictable offense for several persons to conspire to obtain money from a bank by drawing their checks on the bank

when they have no funds there. There were certain *dicta* in this decision to the effect that an indictment will not lie for conspiracy to commit a civil injury of any description, that is not in itself an indictable offense. These *dicta* have been criticised and repudiated by later decisions but the decision of the principal point in this case has never been over-ruled.

There are statutes which specifically and in terms make it unlawful for a bank or trust company to permit any of its officers or employees to become liable to it by reason of overdrawn account. 1 *C. S.*, 169, Sec. 12; 4 *C. S.*, 5661, Sec. 15. But there is no statute making it unlawful for a depositor who is not an officer or employee to overdraw his account and it is therefore not unlawful *per se*. *Expressio unius exclusio alterius*.

The "Act concerning trust companies" (4 *C. S.*, 5658, Sec. 7) provides that no trust company shall have power to make loans upon bills, notes or other evidences of debt unless the same shall be secured by certain securities. There is, of course, a legal presumption that the defendant knew this to be the law. There is no presumption, however, that he knew that the Roseville Trust Company was incorporated under this law. There is no evidence to show that he knew this fact. He may have thought that it was incorporated under the "Act concerning banks and banking," (1 *C. S.*, 165), or that it had a special charter. It is more probable that he did not think about it at all, but simply put the determination up to Smith, the active officer in charge of the bank. At the trial for the purpose of showing lack of criminal intent an attempt was made on behalf of the defendant, to show that it was a common practice at the Rose-

ville Trust Company to loan money to customers by means of over-drafts, but the evidence was rejected by the court (Case, p. 194, see Assignment of Errors 13). In the absence of proof that Whitman knew that the bank had no authority to make these loans on over-drafts, there can be no inference of an intent to do an illegal act from the over-drafts alone.

## V.

**In order to prove that the defendant intended to defraud the Roseville Trust Company, it was necessary for the State to prove as a part of its case that his financial condition was such at the time of the over-drafts that he could not have hoped or intended to repay the loans. The State failed to produce any evidence to this effect.**

While an over-draft is not illegal *per se*, it may be surrounded by other facts and circumstances of such a nature as to support an inference of criminal intent on the part of the persons making and paying the over-draft. For example if a person in a hopelessly insolvent condition should overdraw his bank account many thousands of dollars, it might be permissible for a jury to presume that he never honestly intended to repay the loan, and to infer an intent to defraud, upon proof of the over-draft, plus proof of the depositor's financial condition. But if a person of undoubted wealth and integrity should overdraw his account, the over-draft alone would be no proof of an intent to cheat and defraud the bank. He would be good for the amount of the over-draft and could be called upon to repay it at any time. *Bolles Modern Law of Banking; Dow v. U. S.; People*

v. *Clements*; *Commercial Bank of Albany v. Ten-Eyck*; *Hubbard v. Charlestown Branch R. R. Co.*; *supra*. There was no proof of the financial irresponsibility of the Inter-City Land and Securities Co., and there could therefor be no inference of bad faith or criminal intent from the fact of the over-draft alone. (See Assignment of Errors 16, 17, 18, 19; Specification of Causes 11).

## VI.

**It was error for the Court to charge the Jury to the effect that a criminal conspiracy may be inferred from evidence of intentional and repeated over-drafts alone.**

The portions of the Court's charge to which special exception is taken are as follows: Case, p. 290, l. 4.

"The State does not claim that the mere overdrawing of the account by these defendants is the crime for which it asks for a conviction at your hands, but it says that this overdraft is evidence of the conspiracy which arose when Smith notified Whitman and Faunce of the condition of their account and which continued after that so long as they continued to draw checks knowing that they had no funds in the bank to meet them."

and Case, p. 290, l. 34.

"As I have already indicated, even if this situation be true, even though the defendants did not make an arrangement with Smith to honor these checks specifically, if they knew the fact and concurred in the acts and aided in their execution, under the law they are fellow conspirators. This I say is the

position taken by the State with relation to these transactions and upon which they ask for a conviction.”

The Supreme Court disposed of our objection to these portions of the charge by holding that “this statement by the Court is a mere recital of one of the claims advanced by the prosecution, and not the laying down of a legal principle for the guidance of the jury.” Case, p. 310.

It is true that in form these statements are a recital of the claims advanced by the prosecution. But they are not merely that. They are statements of the prosecution’s contention as to a question of law as well as to questions of fact. They are a recital of such contentions without adverse comment upon the erroneous proposition of law involved. And they are such a recital made by the Court whose duty it was to instruct the jury in the legal principles by which they should be guided, and made in the course of the performance of that duty.

We take it to be elementary that in determining the meaning of the Court’s statement and its probable effect upon the jury, consideration should be taken of the circumstances under which that statement was made. The Court was here engaged in the solemn duty of laying down legal principles for the guidance of the jury. The conclusion cannot be avoided that the jury, as reasonable men, must have believed that these statements were not mere idle conversation of the judge, but were the instructions of the Court; that when it stated the contention of the prosecution without disapproval or criticism and emphasized that contention by repetition, the Court was signifying its approval of that contention in so far as questions of law were involved; and that it intended to charge

the jury that such contention was legally sound, if the facts should be found to be as contended.

That such was in fact the intention of the Court appears even more clearly upon reading the paragraph immediately following that portion of the charge last above quoted. This paragraph is as follows:

Case, p. 291, l. 3. "The defendants, on the other hand, deny absolutely that Smith ever told them that their account—that is, the account of Inter-City Company with the Roseville Trust Company—was overdrawn; they say that no such conversation as testified to by Smith ever took place, and W. L. Smith is called and he says he does not remember any such conversations. The defendants say that they supposed that they had sufficient credits at the bank, derived from the discount of certain promissory notes, to take care of all these checks that were being drawn by them. One of these notes was this \$11,000 note which, it appears from an inspection of the books, was not credited on the books of the bank, but they say they supposed they had that credit for that note; in other words, they point to that note as one of the notes which they supposed gave them credit at the bank, although Whitman says himself that when he took it there Smith told him he could not discount it at that time, but, I think, he said he would try to do so in the future. Reuck went out there at the request of the officers of the company—whether at their request or not I am not sure—to ascertain the condition of the account, and he says that Smith told him that that note had not been credited, and they say because of these supposed

credits they had no knowledge of the fact, if the account was overdrawn, that it was overdrawn.”

It will be noted that the Court did not say that the defendants' contention was that they could not be convicted even though the jury should find that they did intentionally and repeatedly overdraw their account. But the Court stated the defense to be, first, that the account was not overdrawn and second, that if it was overdrawn the defendants did not know it. The issue of fact which the Court left for the jury to decide was whether or not the defendants knowingly and repeatedly overdrew their account. It clearly, by necessary inference, charged the jury that if they should find that the defendants did so overdraw their account as contended by the State, then, they would be legally justified in inferring that a criminal conspiracy existed as contended by the State. Any other construction would render the charge purposeless.

The Court further charged the jury as follows: Case, p. 291, l. 35.

“One of the questions you may ask yourselves in your deliberations upon the testimony of this case, is whether it is possible or reasonable that these defendants in the ordinary course of business could have drawn checks to such an amount as appears from the evidence before you, without knowing that they were overdrawing their account.”

Here again the Court assumed and inferentially instructed the jury, that, if the defendants knowingly overdrew their account, they might be found guilty as charged.

We respectfully submit that the portions of the charge to which exception is taken are incorrect statements of legal principles (see Points III, IV and V *supra*) and were so damaging to defendant's rights as to require a new trial. (See Assignments of Errors 17, 18 and 19).

### VII.

**It was error to reject evidence tending to prove the financial responsibility of the Inter-City Land and Securities Company.**

See Case, pp. 146, 224, 225.

As proof of financial responsibility would have tended to rebut any evidence of intent to defraud the bank, the rejection of this evidence was error of a very material nature. See Point V. (See Assignment of Errors 14, Specification of Causes 7 and 10).

### VIII.

**It was error to sustain the objection of the State to the following question asked on cross-examination of the witness, Raymond E. Smith.**

“Did you ever inform Mr. Whitman or Mr. Faunce that you were taking money from the Roseville Trust Company?” (Case, p. 127).

The purpose of this question was to show the lack of criminal intent on the part of the defendants, Whitman and Faunce. They were charged with having conspired with Smith to falsify the records of the Roseville Trust Company and to defraud said trust company by procuring the embezzlement by said Smith, of moneys committed to his keeping (Case, pp. 7. 8). Smith

did falsify the records and did embezzle moneys committed to his keeping. We submit that whether Whitman and Faunce, when they were dealing with Smith, knew that he was a criminal, and not the conscientious bank official which he appeared to be, bears very materially upon the question of the presence of a criminal intent on their part. For that reason the question was competent, relevant and material and it was reversible error to sustain the objection to it. (Assignment of Errors 10; Specification of Causes 6).

### IX.

**It was error for the Court to permit the witness, Raymond E. Smith, over the objection of the defendant, Whitman, to answer the following leading question:**

“What enables you to make that charge on a cash due note of August 8th or later, if that is not the date; wasn't it because of the credit of August 8th of \$2,665.39?” (Case, p. 183).

This question is clearly leading. The State relied largely upon the books of the trust company to convict the defendant. At this point the prosecutor was attempting to explain the reason for an obviously incorrect entry in one of these books. The witness should have been allowed to give his own explanation and not permitted to adopt an explanation suggested to him by the prosecutor. (See Assignment of Errors 12; Specification of Causes 9).

## X.

**The books of the Roseville Trust Company were not competent evidence, against the defendant, Whitman, to prove that he had conspired to falsify them or to defraud the trust company.**

In the crime of conspiracy, the unlawful agreement is the gist of the offense. *May's Criminal Law*, Sec. 188; 8 Cyc. 624. Upon proof of the corrupt combination, either by direct or circumstantial evidence, the act of one of the conspirators is competent evidence against all. But in the absence of any evidence of such a corrupt combination, no one can be charged with responsibility for the wrongful act of another done without his knowledge or consent.

In this case there was evidence from which the jury might conclude that the defendants knowingly and repeatedly overdrew the Inter-City Company's account with the Roseville Trust Company. To prove that these transactions were not loans, but that the intention of the parties was to defraud the trust company of the money so obtained, the State offered in evidence the books of the trust company showing that the account of the Inter-City Company was falsely kept so as to conceal the overdrafts.

The State's own witness testified to the effect that there was no agreement to defraud the trust company of the money obtained by these overdrafts, but that, on the contrary, the understanding was that the loans so obtained were to be repaid (Case, pp. 145, 218, 219, 220, 227, 228). This testimony is not contradicted. It was further shown, without contradiction, that this account was falsified by Smith, the officer in charge of the Trust Company and a stockholder and

director of the Inter-City Company, but that there was no agreement or understanding with Whitman that the account should be falsified and that he did not know that it was being falsified (Case, pp. 152, 153, 172). The evidence shows that, so far as Whitman knew or was concerned, the transaction was perfectly legitimate. The falsifications were not connected with him in any way. He did not authorize, consent to or know of them.

The Supreme Court in its opinion says that "such knowledge on his part was not necessary in order to make the books evidential against him, if, in fact, the alterations and fraudulent entries were made for the purpose of more successfully carrying out the object of the conspiracy." Case, p. 311. It will be noted that the Supreme Court fell into the error of assuming to be true the very fact in issue, namely, the existence of a conspiracy to defraud the Roseville Trust Company. There is no evidence that "the alterations and fraudulent entries were made for the purpose of more successfully carrying out the object of the conspiracy." For, except for evidence of over-drafts, these books themselves were the only evidence of such a conspiracy. It is not a crime to overdraw a bank account. (See Point IV.) The admission of these books in evidence, therefore, had the effect of charging an otherwise innocent man with fraudulent acts of which he had no knowledge and which he never either expressly or impliedly authorized or consented to.

It is conceded that if, at any time in the course of the trial, there had been evidence that Whitman knew of and acquiesced in the falsifications, these books would have been evidential against him. It is conceded that, if there had been any

evidence of a corrupt agreement between Whitman and Smith to defraud the trust company, then these fraudulent acts of Smith would have been evidential against Whitman as the acts of a co-conspirator. But it is earnestly submitted that, in the absence of proof of such knowledge of the falsifications, and in the absence of proof of such a corrupt agreement, Whitman should not be charged with responsibility for the wrongful acts of Smith done without Whitman's authority, knowledge or consent.

## XI.

**The H to N ledger, "Exhibit S 9," was not properly authenticated and should not have been admitted as evidence.**

The crime with which the defendant was charged was conspiring to defraud the Roseville Trust Company by overdrawing his bank account and by willfully and corruptly concealing the over-drafts by falsifying the books of the trust company. The State's witness, Raymond E. Smith, admitted that this defendant knew nothing about the falsification of accounts (Case, p. 152). The conviction must rest upon proof of conspiracy to defraud the bank by means of over-drafts. There is no evidence in the whole case of any conspiracy, unless it is held that the defendants knowingly and repeatedly overdrew their account and that a conspiracy can be inferred from such over-drafts. If the account was in fact not proved to be overdrawn, the State's case must fall. Proof of the over-drafts is an essential element of the State's case. The charge of conspiracy cannot possibly be sustained without such proof.

The State's witness, Raymond E. Smith, testified that the defendant overdrew his account. Raymond E. Smith is a confessed criminal. At the time of this trial he was serving a term in the State prison and was brought from Trenton for the purpose of testifying in this case. The only corroboration of his testimony was the books of the Roseville Trust Company and testimony based upon those books. The books were therefore of vital importance to the State's case. If it was error to admit them in evidence, such error was so material as to require a reversal of the conviction.

In this connection it will be noted that these books were used in evidence for two purposes; first, to prove that they were falsely kept, and second, to prove the truth of their contents. The indictment charges the defendants, among other things, with conspiring to conceal certain overdrafts by falsely keeping the accounts of the Roseville Trust Company. (Case, 7). The books were used in evidence to prove that they were falsely kept. The fact should not be overlooked, however, that they were also used to prove that the account of the Inter-City Company was overdrawn. The State admitted, and in fact proved, that this account was falsely kept in that it did not contain entries of certain debits which should have appeared upon it. *It did not admit, however, that the account of credits was also falsely kept. On the contrary, the State relied on the accuracy of the records of credits to prove that the account was overdrawn.* It was, therefore, the duty of the State to authenticate these records in accordance with the regular rules of evidence before they were so used to prove the truth of their contents. This was not done.

To prove that the Inter-City Land and Securities Company had not sufficient funds to its credit to meet the checks which the defendants from time to time drew against its account, the State put in evidence the "H to N" ledger of the trust company (Case, p. 43, Exhibit S. 9), showing the account of the Inter-City Company. This book was admitted in evidence during the examination of the witness, William J. Thompson, without being first authenticated in any way. Thompson was the receiving teller. He was not the bookkeeper, nor did he have any supervision over the bookkeeper. The entries in question were made by a Mr. Mindnich and a Mr. Brennan (Case, p. 37). No opportunity was had to cross-examine either of these bookkeepers at any time during the trial, in spite of the repeated objections of defendant's counsel (Case, pp. 35, 43, 45, 46, 67, 89, 90, 91, 99, 102, 103, 283).

This ledger showed that the account in question was overdrawn and was used as proof of that fact. But this was merely the written statement of third parties made without the sanction of an oath, with no proof that it was made in the regular course of business or that it was duly and accurately made. For aught that appears, the entries may have been false when made, to the knowledge of the persons making them. The record shows that one deposit of \$699.30 was never credited to this account (Case, pp. 42, 55, 56). How many others were never credited does not appear. The men who kept the book did not testify. Nor was any reason given to explain why they were not produced. It was error to admit this book without its first being proved. *Perry v. Lambert*, 2 Pennington, 543. The fact that it had been proved before the court on a former occasion, was not sufficient

to make it admissible. *Linberger v. Latourette*, 2 Southard, 932.

Entries made by third parties in the regular course of business are admissible in evidence as an exception to the rule against hearsay, but only after preliminary proof has been made that they are original entries, made contemporaneously with the transactions by a person in the ordinary course of his business with no motive to misrepresent, and that they were duly and properly made and in a book produced from the proper custody. It must also be shown that the one who made them is dead or beyond the reach of process; otherwise he must be called at a witness. 17 Cyc., 387; 53 L. R. A., at 544, also at 540, 541 and 542; 2 *Wigmore on Evidence*, Secs. 1521 and 1527; *Stephens Digest of the Law of Evidence*, Article 27 and *American Note by Beers* (New Jersey Edition); *Chenango Bridge Co. v. Lewis*, 63 Barb., 111; *State Bank of Pike v. Brown*, 165 N. Y., 216, 53 L. R. A., 513; *Insurance Co. v. Weide*, 9 Wall 677; *Chaffee and Co. v. U. S.*, 18 Wall 516; *Bates v. Preble*, 151 U. S., 149, at pages 155, 156 and 157; *Chicago Lumbering Co. v. Hewitt*, 64 Fed. Rep., 314; *Rosenthal v. McGraw*, 138 Fed., 721; *Phillips v. U. S.*, 201 Fed., 259; *Kerns v. McKean*, 76 Cal., 87, 18 Pac., 122; and *Id.*, 76 Cal., 555, 19 Pac., 817. This rule has been recognized by the Court of Errors and Appeals of this State. *Browning v. Flanagan*, 2 Zabriskie, 567; *Bayonne v. Standard Oil Co.*, 52 Vroom, 717. See also *Corona Kid Co. v. Lichtman*, 55 Vroom, 363. In the last mentioned case the court used language from which it may be inferred that it is requisite that accounts, to be admissible, should be proved by the man who made them. At page 368 it appears that the witness Elliot "had personal knowledge

of the consignments recorded in the ledger" and at the same page the court says, "as the yellow sheets were testified to by Elliot as being a true copy of the original itemized accounts, *both the original statements and the copy having been made by him*, the copy was admissible as secondary evidence."

Modern authorities seem to favor relaxing the strict rules against hearsay evidence, in civil cases, to the extent of dispensing with the requirement that the person making the entries should have personal knowledge of their truth. It has been held in this State that a book account was admissible in evidence although made up, in part, of entries based on written reports of employees. *Corkran & Meloney v. Rutter*, 47 Vroom, 375. The reason for this extension of the exception to the rule against hearsay is, necessity. In a business of any magnitude it is often impractical to take the testimony of all the men who furnished the information from which the book was made up. This exception should not be extended, however, to cases where the necessity is not shown to be present.

But while the courts do not always require the testimony of the men from whom the book-keeper obtained his information, they do require that the man who made the entries be produced if possible, so that an opportunity may be had to cross-examine him, and that there be sufficient proof of the substantial accuracy of the books.

In the case at bar the necessary preliminary proof was not made before the "H to N" ledger (Exhibit S. 9) was admitted in evidence. The receiving teller testified that he thought that the "H to N" individual ledger would contain the account of the Inter-City Land and Securities Company and the prosecutor thereupon offered

the book (Case, p. 37). It was not shown from whose custody the book was produced. The handwriting in the book was not examined, nor was it identified in any way as being one of the regular books of account of the Roseville Trust Company. It does not appear that the witness was competent to identify it. There is no proof that the entries were made contemporaneously with the transactions or that they were accurately made and comprised all of the entries which should have been made. It does appear that at least one credit (Case, p. 42) and numerous charges were not entered in this book (Case, pp. 64, *et seq.*). There is no proof that the entries were made in the regular course of business by some one authorized to make them. It does not even appear that the persons who made them were employees of the bank.

The State relied upon this book to corroborate the testimony of Raymond E. Smith. The book was not authenticated. It was hearsay evidence of the most dangerous character, and its admission was such manifest error as to require a new trial. (See Assignment of Errors 1, 2, 3, 4, 5, 6, 8, 11, 15; Specification of Causes 1, 2, 3, 4, 5, 8.)

## XII.

**The bills purchased book, "Exhibit S 18" was not properly authenticated and should not have been admitted in evidence.**

A record of all notes purchased by the Roseville Trust Company was supposed to be kept in the bills purchased book (Case, p. 107). The defendants testified that they believed that notes had been discounted sufficient in amount to make their account good for all checks drawn against

it (Case, pp. 218, 220, 223, 224, 258). The State, as part of its case, offered evidence to prove that this was not true. This evidence consisted of this bills purchased book (Case, p. 111), the testimony of Ferguson based in part upon this book (Case, pp. 76, 78, 80, 102, 103, 283), and the testimony of a confessed criminal who "refreshed his memory" by looking at this book (Case, pp. 106, 107, 177).

The book was admitted in evidence upon the testimony of the witness, Smith (Case, p. 111). Smith did not keep the book. Most of the entries were made by a Mr. Jennings (Case, p. 107). Mr. Jennings did not prove the book, and no explanation was made of the failure to produce him. It does not appear that the entries were made contemporaneously with the transactions. There was no proof that the book was substantially accurate or that it contained a record of all of the notes purchased by the Roseville Trust Company. (See authorities cited under Point XI.)

Smith testified that there were some note transactions which he put through as active officer which were not revealed by him to his executive committee, and that a record of some of these transactions did not appear in this book (Case, p. 110). He also testified that some of these notes may or may not have been notes of the Inter-City Company (Case, p. 110). He had falsified the accounts of the trust company to such an extent that he could not carry all the instances in his mind (Case, pp. 103, 153, 154).

As the State, to prove the over-drafts must necessarily have relied on the absence of entries in this book, of notes sufficient in amount to make the defendants' account good for the checks

drawn against it, the error in admitting it in evidence was a material one.

(See Assignment of Errors 6, 8, 9, 15).

### XIII.

**The books of the Roseville Trust Company were so variously and extensively falsified as to be incompetent evidence of the condition of any account contained in them.**

One reason for admitting in evidence entries made by a third party in the regular course of business is that there is usually no motive for falsifying such entries and there is a circumstantial guaranty of their accuracy and trustworthiness. It necessarily follows that if it is shown that the books, in which the entries appear, have been intentionally falsified, this presumption of trustworthiness is rebutted and the entries become inadmissible. It is true that a single erroneous entry could not destroy the character or impeach the credibility of a book, *Rodenbough v. Roseburg*, 4 Zabriskie, at 493, and that an erroneous charge goes to the weight and not to the competency of the evidence, *Corkran v. Rutter*, 76 N. J. L., at 377-8. But in this case there was not merely a single error. Nor were the inaccuracies inadvertant. They were dishonest, numerous and unidentified. One of the State's witnesses testified that he had falsified the accounts of the Roseville Trust Company to such an extent that he could not carry all the instances in his mind (Case, pp. 153, 154). The State bank examiner, Ferguson, after working on the books for two years, was not able to tell to what extent they were inaccurate (Case, p. 98). It was therefore error to allow witnesses to give testimony based upon

the assumption of the substantial accuracy of these accounts.

(See Assignment of Errors 1, 2, 3, 4, 5, 6, 8, 9, 11, 15; Specification of Causes 1, 2, 3, 4, 5, 8).

#### XIV.

**All testimony, including the witness Ferguson's reconstructed account, based upon the books of the Roseville Trust Company, was hearsay and inadmissible for that reason.**

(See Assignment of Errors 2, 3, 4, 5, 6, 8, 11, 15; Specification of Causes 3, 4, 5, 8.)

With the possible exception of Raymond E. Smith, none of the State's witnesses testified that they knew of their own knowledge that the account of the Inter-City Land and Securities Company was overdrawn. There are many pages of testimony to the effect that numerous checks were or were not good and that the account was overdrawn to a large amount. But all of this testimony is based primarily and exclusively upon the books of the Roseville Trust Company. (See particularly Case, pp. 45, 46, 47, 50, 51, 52, 53, 62 to 70 inclusive, 76, 78, 80, 89, 90, 91, 95, 99, 102, 103, 113, 168, 173, 175, 176, 177 and 283.) The "H to N" ledger, Exhibit S. 9, and the bills purchased book, Exhibit S. 18, were not properly in evidence (Points XI and XII). The "A to L" assistant bookkeepers' credit book was offered in evidence by the prosecutor (Case, p. 60, but it had not been properly authenticated and was not admitted (Case, p. 61, and see pp. 57, 76, 78, 80, 113, 168, 173). Testimony based upon these books was therefore but hearsay. A witness can no more be permitted to give evidence of his inference from what a third person has written, than from what

a third person has said. 1 *Greenleaf on Evidence*, Sec. 436.

In this connection attention is directed to the particularly damaging testimony of the witness, Frank C. Ferguson. Mr. Ferguson was a State bank examiner, who had been working on the books of the Roseville Trust Company since the time of its failure (Case, p. 33). He had no knowledge of the account in question except such as he obtained from the books of the trust company. He prepared what was termed a "reconstructed account" (Case, p. 75), showing the account as it appeared from all the books and records of the Roseville Trust Company which pertained in any way to the account of the Inter-City Land and Securities Company (Case, pp. 70, 76, 78, 80), and relying upon this reconstructed account, testified that the account of the Inter-City Land and Securities Company was overdrawn (Case, pp. 69, 76, 79, 283).

It was error to admit two of these books (Points XI and XII *supra*). The "A to L" credit book was never admitted in evidence, although it showed at least one credit which did not appear in any book in evidence (Case, pp. 42, 46). As far as the record shows, there may have been other books and records used in making up this reconstructed account which were not put in evidence. Computations by an expert made from the books of a bank are not admissible in evidence when the books themselves are not admissible. *State Bank of Pike v. Brown, supra.*; *Phillips v. U. S., supra.* It was therefore error for the Court to allow this witness to testify from his reconstructed account.

The Supreme Court disposed of our contention as to this "reconstructed account" in the following manner: (Case, p. 312.)

"It is next argued that the Court improperly admitted in evidence a so-called 'reconstructed account,' prepared by a Mr. Ferguson, an accountant in the employ of the Commissioner of Banking of this State. We are not pointed by counsel to any offer of this account by the State, or any ruling by the Court admitting it in evidence. Nor does our own examination of the record disclose any such offer or ruling. Moreover, no assignment of error, or cause for reversal, raises this point. The plaintiff in error can, therefore, take nothing by it."

The "reconstructed account" was not offered or admitted in evidence and we have never claimed that it was. The witness Ferguson, however, was allowed to read into the record facts and conclusions based solely upon this reconstructed account (Case, pp. 69, 76, 79 to 99 incl., 283 and 284) and objections were made to such testimony by defendant's counsel. (Case, pp. 91, 92 and 283, in connection with exception at page 92, see pages 45, 46, 67, 35, 43 and 57; see also Assignment of Errors 7, 8 and 15 and Specification of Causes 4). If the "reconstructed account" was not admissible in evidence, it was not proper to allow a witness to read parts of this account into evidence and to state conclusions based solely upon this account.

Mr. Ferguson was a State official and an expert accountant. The trial was closed with a statement from him, based upon his reconstructed account, to the effect that on June 16, 1913, the account of the Inter-City Land and Securities Company was overdrawn \$11,675.68

(Case, p. 183). It is natural to presume that this testimony made a deep and lasting impression upon the jury and its admission was error of a very material character.

## XV.

**The admission in evidence of books of the Roseville Trust Company and of evidence based upon books of said trust company without allowing the defendant an opportunity during the entire course of the trial, to cross-examine the book-keepers who kept said books, deprived the defendant of his constitutional right to be confronted with the witnesses against him.**

Article 1, Sec. 8, of the Constitution of the State of New Jersey, is as follows:

“8. In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.”

The purpose of granting to a person accused of a crime, the right to be confronted with the witnesses against him is obvious. It is that an opportunity may be had to test their credibility, and to explain or impeach their testimony by cross examination.

In the case at bar, the defendant was convicted of conspiring to defraud a bank by overdrawing his account, upon the testimony of a criminal, corroborated by the entries of debits and lack of entries of credits in the “H to N” ledger, “Exhibit S. 9,” the bills purchased book,

“Exhibit S. 18,” and the “A to L” assistant bookkeepers’ credit book; which last mentioned book was not admitted in evidence. The men who kept these books were the persons whose duty it was to know the condition of the defendant’s account, and to decide whether a check was good or bad (Case, p. 193). Their entries in these books were but the written statements of unsworn witnesses. Defendant’s counsel repeatedly requested the privilege of cross examining these witnesses, and objected to the admission of their testimony and of the testimony based upon their statements (Case, pp. 35, 43, 45, 46, 67, 89, 90, 91, 95, 96, 99, 102, 103, 175, 176, 283). But they were not produced, and no opportunity was had to cross examine them during the entire course of the trial. Whatever the rule may be in civil cases, to convict this defendant of a crime upon the testimony of these absent bookkeepers, was clearly a violation of his constitutional right to be confronted with the witnesses against him. *Motes v. U. S.*, 178 U. S., 458; *Kirby v. U. S.*, 174 U. S., 47; *People v. Bromwich*, 200 N. Y., 385, 93 N. E., 933; *U. S. v. Angell*, 11 Fed. Rep., 34, 43.

(See Assignment of Errors 1, 2, 3, 4, 5, 6, 8, 9, 11, 15; Specification of Causes 1, 2, 3, 4, 5, 8.)

## XVI.

**It was not proper to prove the overdrafts, by the absence of entries in the H to N ledger.**

There was no evidence in this case to prove that the “H to N” ledger contained a record of all of the credits to which the Inter-City Land and Securities Company was entitled. In the absence of such proof it was error to permit witnesses to testify that the account was over-

drawn or that checks were or were not good. A book of account, under certain circumstances, is evidence of matters which positively appear upon it, either of debit or credit, but it is never evidence of a negative character. It is not admissible to prove, from the absence of an entry in a book, that a deposit was not made or that a note was not discounted. *Riley v. Boehm*, 167 Mass., 183, 45 N. E., 84; *Boor v. Moschell*, 28 N. Y. S. R., 594, 8 N. Y. Sup., 583; *Mattocks v. Lyman*, 18 Vt., 98, 46 Am. Dec. 138; *Kerns v. McKean*, *supra*; *People v. Clements*, 42 Hun., 286.

(See Assignment of Errors 4, 5, 11, 15; Specification of Causes 3, 4, 5, 8.)

## XVII.

**An overdraft cannot be inferred from the absence of entries of credits when it does not appear affirmatively that all books showing entries of credits have been put in evidence.**

If it should be held that it is permissible to prove the lack of sufficient funds to pay checks drawn against them, by the absence of entries of credits in the books of a bank, it is certainly requiring but little to exact that all of the entries of credits, and all books showing entries of credits should be presented in court. *Bonnell v. Mawha*, 8 Vroom, 198. There is no proof that all of the books showing entries to the credit of the Inter-City Land and Securities Company were in evidence. The record does show that there was at least one such book which was not put in evidence. (Case, pp. 56, 57, 61, 76, 78, 80, 113, 168, 173), and that the pass book was not used (Case, pp. 78, 80). It was therefore

error to permit witnesses to testify that the account of the Inter-City Land and Securities Company was over-drawn and that numerous checks were not good.

(See Assignments of Error 4, 5, 11, 15; Specification of Causes 3, 4, 5, 8.)

Respectfully submitted,

BORDEN D. WHITING,  
*Attorney of Plaintiff in Error.*

IRA C. MOORE, JR.,  
*Of Counsel.*

