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WRIT OF ERROR.

NEW JERSEY, *ss.*

The State of New Jersey to the Chief Justice and other justices of our Supreme Court of Judicature, GREETING:

(SEAL)

Because in the record and proceedings, and also in giving of judgment upon a certain indictment against Joseph C. Caprio and Lawrence Ruglio, all late of the County of Essex, for conspiracy, manifest error hath intervened to the great damage of the said Lawrence Ruglio, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Lawrence Ruglio, command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings and judgment aforesaid, with all things touching the same, to our Court of Appeals in the last resort, in all causes of law, to be held at Trenton, on the eleventh day of January, next, and this writ, that the record and proceedings and judgment aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and cutsoms of New Jersey ought to be done.

WITNESS, Edwin Robert Walker, our Chancellor at Trenton, this twenty-sixth day of December, nineteen hundred and twenty-two.

THOS. F. MARTIN,
Clerk.

WILBUR A. HEISLEY,
Attorney.

Return to Writ.

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

WM. S. GUMMERE,
C. J.

WRIT OF ERROR.

NEW JERSEY, *ss.*

The State of New Jersey to our Supreme Court, (SEAL) GREETING:

Because in the record and proceeding and in the giving of judgment upon a certain cause before you between the State of New Jersey, defendant-in-error, and Joseph C. Caprio and Lawrence Ruglio, plaintiffs-in-error, manifest error has intervened to the great damage of the State of New Jersey, as by their complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected and that speedy justice be done, do command you that if judgment be thereupon given, then you distinctly and openly send under your seal the record, proceedings and judgment aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals at Trenton, on the twenty-seventh day of January, next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon what of right and according to law ought to be done.

WITNESS, his Honor Edwin Robert Walker, our Chancellor and President Judge of our Court of Errors and Appeals, at Trenton, the eighth day of January, nineteen hundred and twenty-three.

THOMAS F. MARTIN,
Clerk.

J. O. BIGELOW,
Prosecutor of the Pleas.

WRIT OF ERROR.

NEW JERSEY SUPREME COURT.

NEW JERSEY, *ss.*

(SEAL) The State of New Jersey to the Judge of the Court of Common Pleas constituting the Court of Quarter Sessions in and for the County of Essex, GREETING:

Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey against Joseph C. Caprio and Lawrence Ruglio, for conspiracy, manifest error hath intervened to the great damage of the said Joseph C. Caprio and Lawrence Ruglio, as from their complaint we have received information; we being willing in this behalf to correct the error in due manner if any shall be, and that speedy justice be done to them, the said Joseph C. Caprio and Lawrence Ruglio, DO COMMAND YOU that if judgment be thereon given, then that you do distinctly and openly and send under your seal, the record and proceedings aforesaid, with all things touching the same, together with the entire record of the proceedings had upon the trial of said indictment, and the record of the plea duly filed in said cause by said Joseph C. Caprio and Lawrence Ruglio, in bar of said indictment and proceedings upon said indictment, and the replication filed by the Prosecutor of the Pleas to said plea, and the record of all proceedings had and taken upon said plea and replication, and upon the hearing and trial of the issue joined or had thereon, to our Supreme Court, to be held at Trenton, on the fourth day of February, nineteen hundred and twenty-two, 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.

Return to Writ.

WITNESS, William S. Gummere, Chief Justice of our said Supreme Court at Trenton, the sixteenth day of January, nineteen hundred and twenty-two.

ENOCH L. JOHNSON,
Clerk.

WILBUR A. HEISLEY,
Attorney.

RETURN.

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

I, Fred G. Stickel, Jr., Judge of the Court of Quarter Sessions in and for Essex County, New Jersey, DO HEREBY CERTIFY and RETURN to the Supreme Court of Judicature of the State of New Jersey, the Indictment, Special Plea in Bar, Replication, Judgment Record and all things touching and concerning the same, together with the entire record of the proceedings had at the trials and all things touching and concerning the same as by the within writ to me directed, I am commanded.

IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of said Court at Newark, N. J., this sixth day of February, A. D. 1922.

(SEAL)

FRED G. STICKEL, JR.,
Judge of the Court of Quarter Sessions, Essex County, New Jersey.

Presented in open court this 16th day of January, 1922.

FRED G. STICKEL, JR.,
Judge.

$2,500 bail.

Indictment.

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

Be it remembered, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, on the second Tuesday of December, in the year of Our Lord, one thousand nine hundred and twenty, 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 Arthur Geery, Thomas F. Russell, John A. Lawrence, Job H. Lippincott, Alex. S. McNear, Ezra O. McDowell, Julius Sachs, Eugene A. Clancy, John Erb, Louis R. Hoffman, Paul Mertens, Harry J. Steinlein, Thos. A. Douglas, Cephas I. Shirley, Walter A. Morton, Geo. W. Roche, Chas. A. Huber, Thomas C. Colt, Wilbur C. Meier, Maurice Hagerstrom, David Stegman, Chas. R. Boyd, Jacob Roth, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charges to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner, and form following, to wit:

ESSEX OYER AND TERMINER.

December Term, A. D. 1920.

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 on the twenty-eighth day of September, in the year of our Lord, one thousand nine hundred and twenty, at the City of Newark, in the County of Essex aforesaid, there was a Primary Election in the Third Election District of the First Ward of the said City of Newark, by a certain political party of the State of New Jersey, to wit, the Republican Party, said Republican Party being then and there a political party, which, at the election for members of the General

Assembly, next preceding the holding of the Primary Election aforesaid, held pursuant to law, polled for members of the General Assembly at least ten percentum of the total vote cast in the State, duly and in due form of law had and held to nominate a candidate of the said Republican Party for member of the House of Representatives, in and for the Eighth Congressional District of the State of New Jersey; that at the Primary Election had and held as aforesaid, Herbert W. Taylor, Alfred Chapman, George G. Yarrow and Arthur V. Archibald were candidates for election as the candidate of the said Republican Party for member of the House of Representatives for the said Eighth Congressional District, to be voted for at an election to be held in said Congressional District on the second day of November, in the year aforesaid, pursuant to the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that Joseph C. Caprio and Lawrence Ruglio were duly appointed and qualified members of the Board of Registry and Election for the said Third Election District of the said First Ward, and that at the said Primary Election, held as aforesaid, they, the said Joseph C. Caprio and Lawrence Ruglio acted as such members of the Board of Registry and Election for said Election District.

And the Grand Jurors aforesaid, upon their oath aforesaid do further present that at a meeting of said Board of Registry and Election, duly held and had, pursuant to the statute in such case made and provided, the said Board of Registry and Election, did meet together and organize by the election of the said Joseph C. Caprio a member of said Board of Registry and Election, as aforesaid, as Judge of said Board of Registry and Election, and the said Lawrence Ruglio a member of said Board of Registry and Election as aforesaid, as Inspector of said Board of Registry and Election; and that at the said

Primary Election the said Joseph C. Caprio acted as Judge of the said Board of Registry and Election, and the said Lawrence Ruglio acted as Inspector of the said Board of Registry and Election.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that it became and was the duty of said Board of Registry and Election to proceed, as in the statute for that purpose made and provided, to count the votes for each candidate at said Primary Election, and that, in the actual procedure of counting the ballots, it became and was the duty of the said Joseph C. Caprio, as Judge of said Board of Registry and Election as aforesaid, to take the said ballots singly and separately from the ballot box, and, while each ballot remained in his hands, to audibly and publicly read the same in full view of the said Lawrence Ruglio, Inspector of said Board of Registry and Election, and that thereupon it became and was the duty of the said Lawrence Ruglio, Inspector of said Board of Registry and Election, as aforesaid, to be satisfied that the ballot was being correctly read by the Judge of said Board of Registry and Election, to wit, the said Joseph C. Caprio.

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 the said Joseph C. Caprio and Lawrence Ruglio, late of the City of Newark, in the County aforesaid, on the twenty-eighth day of September, in the year of our Lord, one thousand nine hundred and twenty, at the City of Newark, in the County of Essex aforesaid, with force and arms and within the jurisdiction of this Court, unlawfully and corruptly did, amongst themselves, conspire, combine, confederate and agree together to be guilty of a wilful fraud in the discharge of their duties as aforesaid, by falsely counting the said ballots cast at said primary election and by making false returns of the result of the said Primary Election, had and held as aforesaid.

Indictment.

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 said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, and to effect the object thereof, afterwards, to wit, on the twenty-eighth day of September, nineteen hundred and twenty, at the City of Newark, in the County of Essex aforesaid, the said Joseph C. Caprio and the said Lawrence Ruglio did unlawfully and corruptly sign his name to a false and fraudulent statement of the result of the said Primary Election in the said Third District of the First Ward of the City of Newark aforesaid, had and held as aforesaid, on the twenty-eighth day of September, nineteen hundred and twenty, as aforesaid.

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 said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, and to effect the object thereof, afterwards, to wit, on the twenty-eighth day of September, nineteen hundred and twenty, at the City of Newark, in the County of Essex aforesaid, the said Joseph C. Caprio and the said Lawrence Ruglio did unlawfully and corruptly sign his name to a false and fraudulent statement of the result of the said Primary Election in the said Third District of the First Ward of the City of Newark aforesaid, had and held as aforesaid, on the twenty-eighth day of September, nineteen hundred and twenty, as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

J. H. HARRISON,
Prosecutor of the Pleas.

Plea.

On the twenty-second day of January, A. D. nineteen hundred and twenty-one, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for said County of Essex, 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,

And afterwards, that is to say, on the twenty-seventh day of January, A. D. nineteen hundred and twenty-one, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable Fred G. Stickel, Jr., Presiding Judge of the Court of Common Pleas, Joseph C. Caprio and Lawrence Ruglio, in the custody of Samuel F. Wilson, Sheriff of the County of Essex aforesaid, and the said Joseph C. Caprio and Lawrence Ruglio being brought before the bar in their own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon them, how they would acquit themselves thereof say that they are Not Guilty thereof, and therefore for good and evil they put themselves upon the country, &c., and J. Henry Harrison, 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 twenty-fourth day of February, A. D. one thousand nine hundred and twenty-one, before Hon. William P. Martin, Judge of the Essex Quarter Sessions Court of Essex County, New Jersey, personally appeared Defendants, Joseph C. Caprio and Lawrence Ruglio in open Court, together with

their counsel, Wilbur A. Heisley, who requested the Court to allow the Defendants Joseph C. Caprio and Lawrence Ruglio to withdraw their plea so that he could make a motion to quash the Indictment which request was granted and after the Defendants, Joseph C. Caprio and Lawrence Ruglio withdrew their plea, their Counsel, Wilbur A. Heisley moved to quash the Indictment, and the Court after hearing the Motion and the Argument of Counsel reserved decision.

And on the same day, being the twenty-fourth day of February, A. D. one thousand nine hundred and twenty-one, the said Joseph C. Caprio and Lawrence Ruglio in their own proper person, come into court here, and by leave of the Court first had, and having heard the said indictment read, say that the said State of New Jersey, ought not further to prosecute the said indictment against them, the said Joseph C. Caprio and Lawrence Ruglio, because they say that on October 5th, 1920, the petition of William H. Parry, a registered voter of the City of Newark, was filed in the Essex County Court of Common Pleas, and that it was therein set forth that the said Joseph C. Caprio and Lawrence Ruglio with Samuel Verniero and Joseph Caputo, being members of the Election Board of the Third District of the First Ward of the City of Newark, acted in that capacity at the primary election held in said city on September 28th, 1920, and charged that the said members of said Election Board wilfully and illegally conducted said Election in said District in that the said Members gave to voters who appeared before them to vote official ballots which had already been prepared, with crosses or marks thereon placed opposite the names of certain candidates on said official Primary ballots; and it was also in said petition charged, that the said Members of said Board fraudulently prepared a list of ballots which they placed on the table used by said Board which were already prepared for voting and which ballots were handed out to various

voters whom said voters appeared before said Board to vote; and it was also charged in said petition that the said Board also illegally erased or attempted to erase marks upon official ballots which were voted in said Election; and that the said Board conducted said Election in a fraudulent and illegal manner; wherefore the said Court was requested to remove the said Election Board for the said illegal acts.

That the statements of said petition were verified by the petitioner's affidavit, attached thereto, and that the Honorable H. V. Osborne, Judge of the said Court of Common Pleas, having read the said petition and the affidavits thereto annexed, did, on October 5th, 1920, order that the said Joseph C. Caprio, Samuel C. Verniero, Lawrence Ruglio and Joseph Caputo, show cause before him on October 7th, 1920, why they should not be removed as Members of said Election Board.

These defendants, Joseph C. Caprio and Lawrence Ruglio, say that they were on said seventh day of October, 1920, called to testify in behalf of Samuel C. Verniero and Joseph Caputo as well as in behalf of themselves in the said proceedings which were then and there lawfully pending before said Judge of said Court of Common Pleas, pursuant to the statute of New Jersey in such case made and provided, entitled "An Act to Regulate Elections" (Revision of 1920), passed May 5th, 1920, and were both fully examined and cross examined with respect to the matters and causes specifically enumerated in the said petition; and the said Joseph C. Caprio and Lawrence Ruglio say that their respective testimony did relate to the identical things, matters and causes set forth in and for which they are presented by and in said indictment.

That afterwards on October 7th, 1920, the said Joseph C. Caprio, Samuel Verniero, Lawrence Ruglio and Joseph Caputo were removed for cause, pursuant to the prayer of the aforesaid petition and in accordance with statute in such case made and provided, as Members of the Board

of Registry and Election in the First Ward, Third District, City of Newark by the said Honorable H. V. Osborne, President Judge of the Court of Common Pleas, as by the record of the said Court more fully appears; And said Joseph C. Caprio and Lawrence Ruglio aver that by virtue of the 77th Section of said Act of the Legislature, it is expressly provided that by reason of said proceedings before said Judge as aforesaid, and of their being called to testify and of their testifying in said proceedings, they became, were and now are free and immune from liability for indictment, and the indictment aforesaid and from any prosecution or proceedings thereon.

All this the said Joseph C. Caprio and Lawrence Ruglio are ready to verify, therefore they pray judgment, and that by the Court here, they may be dismissed and discharged from the said premises in the said indictment above specified.

ANTHONY R. FINELLI,
Attorney for Defendants.

On the first day of July A. D. Nineteen hundred and twenty one, and hereupon, J. H. Harrison, Prosecutor of the Pleas of Essex County, who prosecutes for the said State in this behalf, says: by reason of anything in the said plea of the said Joseph C. Caprio and Lawrence Ruglio above pleaded in bar alleged, the said State ought not to be precluded from prosecuting the said indictment against the said Joseph C. Caprio and Lawrence Ruglio, because he says that the said Joseph C. Caprio and Lawrence Ruglio, on the seventh day of October, nineteen hundred and twenty, were not called to testify in behalf of Samuel C. Verniero and Joseph Caputo, as well as in behalf of themselves, in the said Proceedings before said Judge of said Court of Common Pleas, pursuant to the statute of New Jersey in such case made and provided, entitled, "An Act to Regulate Elections (Revision of

1920)," passed May 5, 1920, in respect to any matters or causes relating to or constituting the offense with which they are charged in said indictment, and that in said proceedings the testimony of the said Joseph C. Caprio and Lawrence Ruglio, respectively, did not relate to the identical things, matters and causes set forth in and for which they are presented by and in said indictment; and that by virtue of the 77th section of Article XXXI of an act of the Legislature of the State of New Jersey, entitled "An Act to Regulate Elections (Revision of 1920)," passed May 5, 1920, it is not expressly provided that, by reason of said proceedings before said Judge as aforesaid, and of their being called to testify, and of their testifying in said proceedings, they, the said Joseph C. Caprio and Lawrence Ruglio, became, were and now are free and immune from liability for indictment, and the indictment aforesaid and from any prosecution or proceedings thereon.

And this, he, the said J. H. Harrison, Prosecutor as aforesaid, prays may be inquired of by the country.

J. H. HARRISON,
Attorney for the State of New Jersey.

And afterwards, that is to say on the seventh and fourteenth days of March, A. D. Nineteen hundred and twenty one, to which days the trial of aforesaid indictment was postponed, at the same Court of Quarter Sessions holden before the Honorable William P. Martin, Judge of the Court of Common Pleas, and the said trial having been postponed to the eleventh day of April, second day of May, thirteenth, fifteenth and twentieth day of June A. D. Nineteen Hundred and twenty one, before the Hon. Fred G. Stuckel, Jr., Judge of the Court of Quarter Sessions of Essex County, New Jersey.

Judgment Record.

And afterwards, that is to say on the twenty sixth day of September A. D. Nineteen hundred and twenty one the trial of the aforesaid plea was had before the Hon. Fred G. Stickel, Jr. Judge of the Court of Quarter Sessions.

Therefore, let a Jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex on the twenty sixth day of September A. D. Nineteen hundred and twenty one, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty one years and under the age of sixty five years, by whom the truth of the matter may be better known and who are not of kin to the said Joseph C. Caprio and Lawrence Ruglio were sworn to inquire into the matters alleged in the said Plea in Bar filed by the Defendants, Joseph C. Caprio and Lawrence Ruglio and the Replication filed by J. Henry Harrison, who prosecutes for the State of New Jersey,

And afterwards, that is to say on the same day, at the same Court of Quarter Sessions, holden before the Honorable Fred G. Stickel, Jr, Judge of the Court of Common Pleas, comes the said J. Henry Harrison, who prosecutes as aforesaid, and the said Joseph C. Caprio and Lawrence Ruglio, and the jury of whom mention is before made, and Samuel F. Wilson, Sheriff of the County of Essex, for this purpose empanelled and returned after the following number of challenges each defendant challenged six, the State challenged two and the Court excused one, Fred Scheihing, John T. Gilbert, Robert B. Trivett, Paul Wildeck, Jacob O. Gless, Donald M. Miller, Karl J. Wolf, Thomas A. McCauley, Mahlon Apgar, Warren T. Frey, Eleazer A. Sherwood, William S. Grayton, and the Jury after hearing the evidence and the summing up of Counsel, Wilbur A. Heisley for Defendants Joseph C. Caprio and Lawrence Ruglio, and J. Henry Harrison

who prosecutes for the State of New Jersey, by the direction of Court rendered the following verdict in favor of the State of New Jersey and against the defendants Joseph C. Caprio and Lawrence Ruglio as follows, the Court directed the jury to return a verdict that the defendants were not called to testify in a proceeding under the Act (Election Law, Revision of 1920) and examined or gave testimony as to matters or causes now the subject matter of pending Indictment for Conspiracy, whereupon, the jury, without leaving the box, by their foreman say, we find that the defendants were not called to testify in a proceeding under the Act (Election Law, Revision of 1920) and examined or gave testimony as to matters or causes now the subject matter of the pending indictment for Conspiracy, and so they say all.

And the trial of the foregoing mentioned indictment having been set down for October third and seventeenth A. D. Nineteen hundred and twenty one and was postponed to November twenty third A. D. Nineteen hundred and twenty one when defendants Joseph C. Caprio and Lawrence Ruglio appeared in open Court and Wilbur A. Heisley, counsel for Defendants Joseph C. Caprio and Lawrence Ruglio again moved to have defendants' plea withdrawn for the purpose of making a motion to Quash the said Indictment, and after the defendants, Joseph C. Caprio and Lawrence Ruglio withdrew their plea of Not Guilty and Wilbur A. Heisley counsel for the defendants Joseph C. Caprio and Lawrence Ruglio moved to Quash the Indictment and the Court after hearing the argument of Counsel for the defendants Joseph C. Caprio and Lawrence Ruglio moved to Quash the Indictment and the Court after hearing the argument of Counsel denied the motion, and the defendants Joseph C. Caprio and Lawrence Ruglio were again placed to the Bar to plea, whereupon they plead Not Guilty to said Indictment which was re-entered by the Clerk and the trial was proceeded with.

Judgment Record.

And afterwards on the twenty-eighth day of November A. D. nineteen hundred and twenty one, being the same day and at the same Court of Quarter Sessions comes the said J. Henry Harrison, Prosecutor of the Pleas, who prosecutes as aforesaid, and the said Joseph C. Caprio and Lawrence Ruglio and the jury of whom mention is before made, and by Samuel F. Wilson, Sheriff of the County of Essex, for this purpose empanelled and returned to wit, after the following number of challenges were exhausted, by the State seven and by the defendants nine, Maxwell A. Freeman, Frank Moser, Matthew F. Hayes, Thomas Gilbert, Gordon R. Kyle, John Gaal, John J. Turner, George L. Hallock, Stanley F. Croker, Thomas R Pascall, John Herbstmier, Edward Holzer, 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 until the first day of December, A. D. Nineteen hundred and twenty one 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, defendant and Court do say upon their oath they find said defendants Joseph C. Caprio and Lawrence Ruglio Guilty in the manner and form as charged upon this indictment and both defendants, Joseph C. Caprio and Lawrence Ruglio recommended to the Mercy of the Court.

Judgment signed January 16, 1922.

FRED G. STICKEL, JR., *Judge.*

Whereupon all and singular, the premises being seen and the Court, Hon. Fred G. Stickel, Jr., now here fully understood it is on this sixteenth day of January A. D. Nineteen hundred and twenty two, ORDERED and adjudged that the said Joseph C. Caprio be committed to the State Prison of this State for a term of not less than eighteen months and not more than three years at hard labor upon this conviction and

from thence until the costs are paid which said costs are taxed by the Clerk at the sum of Forty two dollars and seventy three cents and the Defendant being in Mercy, etc. and the Court do further Order and adjudged that the said Lawrence Ruglio be committed to the Penitentiary of this County for a term of fifteen months at hard labor upon this conviction and from thence until the costs are paid which said costs are taxed by the Clerk at the sum of Forty two dollars and seventy three cents and the Defendant be in Mercy, etc.

EVIDENCE ON PLEA IN BAR.

State vs. *Caprio and Ruglio.*

J. VICTOR D'ALOIA, sworn in behalf of defendants.

Direct examination by Mr. Heisley.

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

Q And you also hold a judicial position in this city? A I do.

Q What is that? A Judge of the Second Criminal Court of the City of Newark.

Q How long have you been such judge? A About four years.

Q How long have you been a member of the Bar? A About fourteen years.

Q Where is your office? A 738 Broad street, Newark.

Q I believe in a matter pending in the Essex County Court of Common Pleas, in the matter of the removal of the Election Board of the Third District of the First Ward of the City of Newark, you appeared for the members of the Election Board, did you not? A I did.

Q As attorney and counsellor? A Yes, sir.

Q The hearing was had before his Honor, Judge Osborne, then judge? A Yes, sir.

Q Were any or were all of these defendants composing this Election Board called at witnesses in that proceeding?

(Objected to.)

Mr. Heisley. I withdraw the question.

Q Were these members of the Election Board sworn as witnesses in that proceeding before Judge Osborne? A They were.

Q How did they come to be sworn? A I think that at the end of the testimony of two ladies, which closed the case against them, there was a discussion between the Prosecutor, Mr. Harrison—

Mr. Harrison. I would object to the question and move that the part of the answer already made be stricken out on the ground that it calls for a conclusion and that it is immaterial and not within the issue.

The Court. Whether they were sworn?

Mr. Harrison. Oh, no. How did it come that they testified?

The Court. I understand he is going to tell us the facts as he remembers.

Mr. Harrison. Well, I misunderstood the purport of his question.

(Question and answer read.)

A (Continuing.) —and Judge Osborne as to the advisability of opening the ballot box for that district, and I remember Judge Osborne saying he did not think he had the power to order that to be done, that something should be done in the Supreme Court. It was following that talk between the Prosecutor and Judge Osborne that I recall Judge Osborne expressing a desire to hear Caprio and I recall his saying to me, "Tell Caprio to take the stand," and subsequent to that I called Caprio to the stand and he was properly sworn and examined.

Q Was Caprio called to the stand in compliance with the language which you just now have said Judge Osborne used?

Mr. Harrison. If the Court, please, I think Judge Heisley has no desire to confuse the issue here, but I do object to the term "called."

The Court. I guess Judge Heisley is willing to reframe the question.

Judge Heisley. Certainly.

Q Was Capiro sworn as a witness in that proceeding in compliance with and because of what Judge Osborne

said to you? A He was called to the stand immediately after that was said by Judge Osborne.

Q And did he testify? A He did.

Q In whose behalf did you call him? A I called him for the purpose of explaining the situation which had been created there.

Q Yes. In whose behalf, in his own alone or the others? A Well, in behalf of the whole board.

Q Now, were these other defendants sworn? A Yes, I remember Ruglio being sworn; I remember the four members being sworn.

Q How did they come to testify? How did you get them on the stand? A By calling them to the stand and pointing at the stand, and they approached it and put their hand on the Bible and were sworn.

Q Was this practice followed in connection with each defendant? A Yes.

Q Were their names called out? A Well, they were sitting in the jury-box upstairs, and as one left the stand I would call the next one to take the stand.

Q Well, were their names called out publicly before they went on the witness-stand? A By the court officer, after administering the oath, announced the name of the person who had been sworn.

Q And did they sit in the usual place in the chair of the court room where witnesses testify? A The regular chair was used in that room, the regular court chair.

Cross examination by Mr. Harrison.

Q Following this disussion you have referred to between Judge Osborne and the Prosecutor, did you or did you not hear Judge Osborne say, in effect, to Capiro, "You do not have to go on the stand unless you wish to"?

Mr. Heisley. I object. He is asking for a conclusion as to what the effect of Judge Osborne's language was.

The Court. I understand the question he is asking if Judge Osborne did not in effect warn the man.

Mr. Harrison. I will substitute the word substance for the phrase "in effect."

A I do not recall that, Mr. Harrison.

Q Did he not say, in substance, to all of the members of the board, that they need not go on the stand unless they wished to? A I do not recall that.

Q Do you or do you not recall his saying to all the defendants, in substance, that they need not go on the stand, but if they saw fit to make an explanation of the allegation brought against them they might do so? A No, I do not recall that language.

Q Who actually called these defendants Caprio and Ruglio to the stand? A I did.

Q And wasn't that the result of your talk or conference with them and reaching of the conclusion that you thought it would better serve their case if they were so called? A No, I do not remember having any conference with them. I remember leaving the table where I had overheard the conversation between the Prosecutor and the Judge and going to my seat and then calling them in turn. There wasn't any conference that I recall.

Q That was after the case in behalf of the petitioner had rested? A That was after those ladies had testified and the tally sheets had been offered in evidence, certain apparent discrepancies of the tally sheets had been put in evidence.

Re-direct examination by Mr. Heisley.

Q Judge, what is your best belief and remembrance as to whether or not Judge Osborne did say to these defendants that they were not required to go on the stand unless they wished to? Did it happen or didn't it? Your best remembrance. A I do not recall that as having been said by Judge Osborne at any time.

Q Or anything like it? A Or anything like it.

Re-cross examination by Mr. Harrison.

Q Do you recall any testimony having been given prior to Caprio's going on the stand relative to anything else besides the improper handing out of ballots? A Yes, I recall the testimony of one lady, a Mrs. Caruchi, who was put on the stand and who testified she had gone in a booth with another lady and that the ballot which was handed to the other lady, who was the voter, already bore a mark.

Q Well, I included that in my question, but do you recall the testimony of the alleged marking of ballots prior to their being voted? A Yes, I do recall.

Q Well, do you recall there being testimony up to the time of Caprio going on the stand relative to any discrepancies in the count or the statement filed, known as tally sheets? A I think that the tally sheets were looked over and scanned and handed to the Court; if I am not mistaken they were put in evidence before these men took the stand.

JOSEPH C. CAPRIO, sworn in behalf of defendants.

Direct examination by Mr. Heisley.

Q Mr. Caprio, you are one of these defendants who have filed this plea? A Yes.

Q Now, you were one of the election officers? A I was judge of the Election Board.

Q How long have you been judge of the Election Board? A Since I was appointed.

Q I know, but how long? A I have had six years' experience.

Q Do you hold at the present time any position? A Do I hold—

Q Yes. If you will listen to me; do you hold at the present time any position? A Yes, I am a court officer.

Q What court? A Second Judicial Court of Hudson County.

Q What is your position? A Sergeant-at-Arms of the court.

Q Were you present in court when they had this hearing before Judge Osborne? A I was summoned to court.

Q When you say you were summoned, was it a summons or a rule to show cause? A It was a rule, with the date on it for me to show—

Q I show you a certified copy of an order to show cause forming a part of Exhibit D. 1, and ask you if you can tell whether that is a copy of the order which was served on you?

Mr. Harrison. We will admit it.

A Yes, this was the one.

Q And did you appear before Judge Osborne in response to that order? A I did.

Q Did you testify in that proceeding? A I did.

Q How did you come to go—did you take the witness chair? A I did.

Q Where was the hearing held? A Upstairs in this building, Judge Osborne's court.

Q And how did you come to take the witness-stand? A Judge Osborne himself ordered me on the stand.

Q What did Judge Osborne say? A He was talking with the Prosecutor and the Prosecutor was telling the Judge that there was another angle to the case, that perhaps he would have to have that order amended in order to have the ballot boxes reopened, or something like that, and the Judge said, "Put Caprio on the stand."

Q Were you sworn? A I was sworn.

Q And were you interrogated, asked questions? A I certainly was.

Q And did you give the testimony which was read here in your presence this morning? A That was the testimony that I testified to.

Q Was there anything said by Judge Osborne in your presence, in substance, that you or your associates need

not go on the stand to testify unless you so elected? A Positively not.

Cross examination by Mr. Harrison.

Q You were seated in one of the chairs of the jury-box before you went on the stand, were you not? A Yes, all the board was.

Q Well, can't you answer? You are a sergeant-at-arms in a court. A Yes, sir.

Q And you know what it is to answer a question responsively? A Yes.

Q Who actually called you to the stand? A After Judge Osborne said—

Q No. Who actually called you to the stand? I ask that the witness answer the questions responsively. (Question read.) A Judge Harry V. Osborne.

Q Who was your counsel? A Judge D'Aloia was counsel for the board.

Q Was he also your personal counsel? A I was one of the board.

Q Was he also your personal counsel? A He was.

Q I think if you will answer the questions we will get along much better. A I will try to, Prosecutor.

Q Did or did not Judge D'Aloia say to you in substance, "Caprio, go on the stand"? A After the Judge had ordered me on the Judge did let me take the stand.

Mr. Harrison. I ask that the answer be stricken out as being non-responsive and request the witness to answer the question as I asked.

The Court. Strike out the answer.

Q (Question read.) A Yes.

Q You have referred to a conversation, I think, you term it, between Judge Osborne and the Prosecutor, following which, as you say, Judge Osborne ordered you on the stand. I now ask you if what I shall state is the conversation to which you referred: "Mr. Harrison:

There is another phase of this matter that is not set forth in the petition. My theory is that there is sufficient already introduced without going into the evidence as to the other phase of the matter, and which may necessarily be used in another application. The Court: It is a summary hearing and formalities are not going to interfere. Mr. Harrison: It is our purpose to present at a later time another phase of this, and it may be necessary to open the ballot boxes themselves, and I think such a proceeding without the ballot boxes might be avoided. With the ballot boxes opened we can put in evidence which is very definite." Now, I ask you if what I have just read is the conversation between the Court and Prosecutor to which you testified on your direct examination? A Yes, sir.

The following was admitted to be the evidence given by said Capiro before Judge Osborne on the trial of the said summary proceedings, and such evidence as shown by the stenographer's transcript was read to the Court and jury as follows:

JOSEPH C. CAPIRO, sworn.

Direct examination by Mr. D'Aloia.

Q Did you officiate as the judge of the Election Board, Third District, First Ward, last election? A Yes, sir.

Q Do you know who was giving out the ballots to the voters? A Most of the time, the young lady there was giving out the ballots.

Q Who appointed her to the board? A The County Board of Elections.

Q How long was she there? A She was there from the time we opened up until we got through.

Q Do you remember this incident where Mary Gidioli came in between nine and ten P. M.? A I do.

Q Who handed her the ballot? A I couldn't say as to that, just who handed her the ballot.

Q Do you remember when she came out of the booth and called your attention to something on the ballot? A Why, yes; I seen Mrs. Carlucci, and that woman started to holler a rumpus there, that is the first thing I noticed about it.

Q Where were they? A They were in front of one of the booths.

Q What happened? A So the election officer jumped up and said, "What right did you have to go into that booth? What right have you in here anyway?" And she took the ballot and tore it, and the election officer said, "I ought to send her to jail." I said, "Wait a minute, they are both women." I said, "Mrs. Carlucci, you have no right to go in the booth and you shouldn't tear the ballot." And Mrs. Carlucci said, "You don't do that to me." I said, "What do you mean?" She said, "That woman's ballot was marked." I said, "Why did you destroy it? Why didn't you show it to us?" She said, "Why, I done it, I felt that way, and I done it." I said "Mrs. Carlucci, you had no right to go into that booth, you had no right to destroy the ballot." I said, "I feel sorry for you. A lot of trouble can happen over this."

Q Did you ask her not to mention to anybody that there had been trouble in the board? A I said there would be a lot of trouble on herself because she had no right to go in the booth or tear up the ballot.

Q What became of that ballot? A The board got the pieces and we marked it "void."

Q Where is it, so far as you know? A In the box with the rest of the ballots.

Q During the time that you were there that day and until the polling place closed, was there any ballot marked, so far as you know? A Positively not.

Q How many district leaders were running? A There were three district leaders running for the same office

on the Republican ticket and there was one hundred and fifty workers there from morning until night.

Q Was there any time when one of these candidates for district leader wasn't there? A No; they didn't even eat their dinners and suppers. They kept their eyes on us all the time.

By Mr. Parry.

Q You have been a member of the Election Board before? A Yes; I did serve six years.

Q You were removed by the Court? A No.

Q Were not charges made against you once before? A I had lived out of the district at that time, and had to reside in the district in order to serve, and I moved out of the district, and I hadn't resigned to the County Board of Elections, and they found out that I had moved and they sent for me. I had no grounds, so I resigned.

Q Weren't there formal charges made against you and the matter was set down in court? A The charge was that I didn't live in the district.

Q (Question repeated.) A I was sent for to appear before—

Q Answer yes or no to that question.

Mr. D'Aloia. He has a right to tell what the charges were.

Q Are you the Sergeant-at-Arms in the District Court in Kearny? A Yes, sir.

Q In which Judge Archibold is the judge? A Yes, sir.

Q You are familiar with court procedure? A Yes, I am.

Q Answer this question yes or no, whether formal charges were not made relative to your serving on the Board of Elections before this. A I resigned, yes.

Q And you resigned from the board a few minutes before the hearing; isn't that true? A When I found

out what the charges were, I seen I had no right to be on that board and I resigned.

By the Court.

Q Where did you live? A 139 Eighth avenue; that used to be the Second District of the First Ward, and then I moved to Stone street.

Q How long before your service as election officer did you move? A Only a few days.

By Mr. Parry.

Q (Showing witness paper.) This is your tally sheet prepared by your board of the First Ward, Third District? A Well, it is signed by the board; I suppose that is the one.

Q That is your signature there? A That is the one.

Q That shows against the name of Arthur B. Archibold for Congress, 403 tallies; that is correct? A If the record says so, it is correct.

Q And it shows no votes for George B. Yarrow? A There is none there.

Q And it shows one vote for Albert Chapman? A Yes.

Q It shows five votes for Herbert W. Taylor for Congress? A Yes, sir.

Q For the office of senator it shows 342 votes for Joseph G. Wolber? A Yes.

Q Eleven votes for Benjamin F. Jones? A That is what it shows.

Q And four votes for Parry? A Yes.

Q For members of General Assembly, 364 votes for Margaret B. Laird, 355 votes for Philip D. Elliot, 395 for Joseph Serritella, 357 for Frederick C. Artopeous and the same number for Louis D. Messinger and the same for John G. Cheshire, and opposite the names of the other twelve, there are no votes? A They are prohibition candidates; there were no votes.

Q No votes for those candidates in this district? A No.

Mr. Parry. I would like to offer this tally sheet in evidence.

Q Mr. Caprio, you were there all day on the 28th? A Yes, sir.

Q Who was handing out the ballots as the voters came in? A Well, all of us were; but the young lady helped us out more than ony one else.

Q You all took a turn at it? A The one that was closest to the ballots. We all co-operated and done the best that we could. That is the biggest district in the First Ward.

Q How many were around the table? A There were three district leaders and they were all around the basement of the school.

Q How many around the table where you were sitting? A The district leaders and justice of the peace were all running with their workers, they were all there.

Q How many people all together were handing out ballots during the day? A The Election Board only.

Q The four members of the Election Board, with the two assistants? A Yes; they helped us out.

Q Who else? A That is the only one.

Q How many piles were the ballot arranged in on the table? A The ballots were a yard long. The ballots were placed no the table, Democratic and Republican tickets. The missus would fold up three or four ballots to have them ready; when the voters would come, we would give them one.

Q Who handed the ballot to Mary Gidioli before she voted? A I couldn't say because there was a lot of women that voted that day.

Q You remember Mary Gidioli, the one that testified here? A I remember her because there was a dispute because Mrs. Calucci tore her ballot.

Q Having your attention fastened on Mary Gidioli, don't you recall who it was that handed her her ballot? A No; I didn't speak to that woman until after she came out of the booth.

Q Who gave her the ballot the second time? You noticed this because it was after the dispute? A Yes; I might have given her the ballot myself.

Q Which pile? A We only had one pile.

Q Didn't you have two piles? A There was one pile lays this way; I know that there was two or three, five or six ballots waiting to be given to the voters.

Q Who put that mark opposite Mr. Archibold? A Mary Gidioli.

Q How do you account for the fact that Mr. Archibold received 403 votes in this ward, and he does not live in the district, while Herbert Taylor, who was running on the organization ticket, has received, out of an average of 350 to 395 votes, only five? A Judge Archibold made an Italian sergeant of his court, and the Italians feel proud of that, and he has the co-operation of all the Italians, 95 per cent.

Q You are the man that the Italians feel so proud of? A I happen to be the man that is holding that job.

Q Possibly because of the pride that they have in you, Judge Archibold received 403 votes? A Judge Archibold didn't received only the First District; he received them throughout the entire ward.

Q It is because of the great pride of the Italians in you that Judge Archibold received 403 votes while Mr. Yarrow received none and Mr. Taylor, the organization candidate, received five.

(Objected to.)

(Objection sustained.)

On Summary Proceedings—Joseph C. Caprio, direct.

By Mr. Harrison.

Q Are you familiar with the provisions of the election law requiring a statement to be made by the District Board of Registry and Election as to the result of the election? A We made the statement.

Q Are you familiar with the statute, Section 255, that is, issued in the compilation under direction of the Secretary of State? A I am not.

The Court. I think if you examined the statute in question, your recollection as to its contents may be refreshed. It is on page 107.

Witness. (After examining book.) We complied with that statute.

Q Appearing upon the top, on the tally sheet in evidence, is found this, among other matters, to be filled in under the statute by the local board: "The whole number of names on the registry list or signature copy book is." Why was there no number placed in the blank space provided for that question? A My explanation for that is that we did not get through until five o'clock the following day; we were all in; perhaps we overlooked that; not intentionally done at all.

Q I call your attention to a further provision of the statement, namely, "The whole number of names on the poll book is." Why wasn't the number filled in as required by that statement? A The same explanation; we didn't fill them there.

Q And does the same answer apply to the other questions? A Yes, the three of them are not filled.

The Court. Is the number of ballots rejected indicated?

Mr. Harrison. No, it is not, your Honor.

By the Court.

Q Why wasn't that done? A Just as I said.

Q The same reason that you have given? A Yes, we were all tired out that day.

Q Where did you make returns of the missing or destroyed ballots? A Well, we marked that destroyed ballot itself on the ballot, we marked it and gave the man another ballot and made an entry in the book.

Q I call your attention to the talley sheet and ask you whether there is any entry or missing, spoiled or destroyed ballots. A I wasn't handling these books. The other election officers will be able to tell you that.

Q Then your answer is that you do not know where the entries were made? A I marked the ballot void.

Q Please listen. I am not referring to the specific ballot of Mrs. Gidioli. I say, where did you, if at all, make returns of all missing, destroyed or spoiled ballots as required by the election law? A I don't know.

Q So you don't know whether the return was made or not? A At present, you mean? I don't.

RECESS.

Q Did you have any missing ballots? A Not that I know of.

Q Was there any return made of missing ballots, with their numbers on the official return or in any other way? A Missing ballots?

Q Yes. A No; not that I know of.

Q Were all the ballots handed out consecutively at that election? A As far as I know; yes.

Q Who had charge of handing out the ballots? A All of us.

Q Didn't you just testify, or testify on your direct examination, that Mrs. Brandalone had handed out some of the ballots? A I did. I said that she done more than any of us. She was near the ballots more than any of us.

Q Are you familiar with the provisions of the election law that only the members of the Board of Elections and

Registry should have the handling of the ballots? A The handling, I mean to say, she handed to the voters.

Q You are familiar with the provision of the law that only the members of the Board of Registry and Election shall handle ballots until they are received by the voter, are you not? A Yes.

Q Did you receive from the Essex County Board of Elections a communication in the matter of the conduct of the election, a copy of which I now bring to your attention? A I believe we did.

Q Did you read it? A Yes.

Q Did you read paragraph six, which among other things, contains this statement, that the two clerks who have been appointed "must not sign any statements, tally sheets or papers whatsoever, or handle any ballots?" A I believe I read that.

Q Why, then, did you permit Mrs. Brandalone and others to handle the ballots? A Because we didn't think there was any harm in any of us handling the ballots of any voters eligible to vote.

Mr. Harrison. I offer that in evidence.

Marked Exhibit S. 1.

Q Who handled and counted the Democratic ballots? A There was only about thirty or forty ballots cast.

Q Who did it? A And the two assistants that were sent up to us counted them.

Q Namely, Mrs. Brandalone and Mr. Capielli? A Yes.

Q Why did you permit them to do that? A It was already late at night; we had worked hard and there was such a few ballots that we thought that we would let them count them.

Q A matter of convenience of the board and regardless of the provisions of the election law with which you are familiar, is that true? A We didn't think there was any harm.

Q You knew what the law was, didn't you? A Yes.

Q So you let them count the ballots merely to serve the convenience of the Election Board and irrespective of what the election law provided? A They had been sent up to help us.

Q Can you answer the question? A I will answer; yes.

Q Can you answer it yes or no? A Yes.

Q Did your returns show that any assistance had been rendered to voters? A No.

Q Was any assistance requested by voters on primary election day? A No.

Q Was any assistance rendered the voters without request? A We assisted voters, to show them how they could vote; when they asked us how, we told them how.

Q You mean that you told them the names of specific candidates for whom they might or not vote? A We told them to vote—they could make a cross on the left-hand side on each space of the people that they wanted to vote for.

Q Did you or any other members of the Election Board go in the booths with voters on the day in question? A No.

Q Did you see anybody, to your knowledge, outside of the board itself or its assistants, go into any of the booths that day to assist voters? A Mrs. Calucci, unbeknownst to us, did.

Q And she, as far as you know, is the only person who assisted a voter in the preparation of a ballot, as you say? A To my knowledge; yes.

Cross examination by Mr. Parry.

Q Do you know what the duty of these two clerks was? A To help out.

Q What does that mean, help you out in what manner? A We had so many people there to vote, four wasn't enough and they sent us two more.

Q Your impression was that the two more had just as much to do as any of the board?

(Objected to as leading.)

Mr. Harrison. And calling for a conclusion.

Mr. Parry. This is Mr. D'Aloia's own witness.

The Court. I do not think so. He is a respondent here.

Mr. Harrison. My objection goes to the form of the question, "What was your impression?"

The Court. Supposing he said, "What did you think," don't you think that the witness in a matter of this kind is entitled to have the thought? Answer it.

A We were under the impression that they were to help us out.

Q In what way? A To conduct the election that day.

The Court. This question and answer does not change the effect of this letter which told them something.

Q And they helped all day long? A They certainly did.

Q And they helped in the count? A They certainly did.

Q And they helped in making the returns? A They did.

Q How many members of the County Election Board came up there during the day, officers or representatives of the board? A I couldn't say anything as to that.

Q Were there any there? A There was a man from the Prosecutor's office up there during the day.

Q Did anybody object to these persons participating in the work to be done there? A No.

On Summary Proceedings—Lawrence Ruglio, direct.

By Mr. Harrison.

Q Do you know Lieutenant Hargan of the Prosecutor's office? A I do.

Q Did you see him there about one o'clock in the morning following primary day? A Yes; Mr. Hargan came in some time around there, I guess.

Q At that time were not the assistants counting the ballots in the Democratic primary box? A They were finished when Mr. Hargan came.

Q And didn't Mr. Hargan or Mr. Linarducci object to the assistants counting the Democratic ballots? A Mr. Hargan did say that we shouldn't have done that, but when he had seen the situation in that district he seemed to be satisfied. He said we shouldn't have done it, but when we told him how we done it he said we shouldn't have done it.

By the Court.

Q Was that after it was all over? A He seemed to be satisfied, yes, sir, after it was all over.

LAWRENCE RUGLIO, sworn.

Direct examination by Mr. D'Aloia.

Q Who appointed you on this board of the Third District of the First Ward? A The County Board of Elections.

Q Have you ever served on the board before? A Yes, sir; registry.

Q Did you know anything about any marked ballots? A No, sir.

Q I mean marked alongside of the Republican candidate for Congress? A No, sir.

Q Do you remember when Mrs. Calucci came out of her booth on election night about half-past nine? A When I heard her hollering.

Q Did you say anything to her? A I said to her like this, "What are you doing with that ballot?" and she said, "The ballot is marked." And I said, "Let me look at it," and she got sore and tore it up.

Q Did you use the word erase or "I will erase the mark," or anything like that? A No, sir.

Q Simply said, "What are you doing with that ballot?" and she wouldn't give it to you and she tore it up? A Yes; I told her she had no business with the ballot because she wasn't a voter in that district.

Cross examination by Mr. Parry.

Q You were on the board last year in this district? A Yes, sir.

Q How many were there registered who asked for assistance? A I do not know.

Q About? A I don't know.

Q Fifty or sixty? A I don't know.

Q Can't you give us some idea? A No, sir.

Q This district of which you are a member of the board is entirely composed of Italians? A Yes, sir.

Q A good many of these people don't read or write? A Yes, sir.

Q Isn't it true that a good many can't read and write? A They couldn't write or read, but they came in with their sample ballots marked.

Q Wasn't it true that a good many who appeared before you couldn't read or write? A I know they could not read, but they could mark their name.

Q Didn't you hear anybody ask for assistance? A No, sir.

Q Didn't you hear the man that was on the board say that a good many had asked for assistance? A Not while I was there, nobody came up to me.

Q Didn't you hear anybody ask members of the board for assistance, how to vote? A No, sir.

On Summary Proceedings—Lawrence Ruglio, cross.

Q Do you mean to tell us that not a single person who came there did not ask for assistance how to vote? A No, sir.

Q You will swear to that? A Yes, sir.

Q Were you there when Lombardi came to vote? A Yes, sir.

Q You saw him on the stand today? A Yes, sir. I seen him.

Q Were you there when he came out and said his ballot was marked? A No, sir; I don't remember the man at all. I am an inspector.

Q What are your duties as an inspector? A I was taking care of the ballots when they was going out.

Q Then you were there when he came out? A Yes, but I don't remember his name.

Q You remember what he said? A No; he didn't come out and say anything to me.

Q You were there when he told the members of the board that his ballot had a mark on it? A No, sir; I didn't hear it; I didn't hear anybody make any complaint.

Q You didn't hear Mrs. Calucci? A Mrs. Calucci only.

Q You did hear that? A I did hear that.

Q Who was it said, "Here, we will erase that on the ballot"? A Nobody that I know of.

Q Who was talking to Mrs. Calucci? A I was talking to her.

Q And who else? A Me and Mr. Veniero.

Q Who made the grab for the ballot? A Nobody grabbed for the ballot; just asked her for it; she wouldn't give it up; she took and ripped it up and then she threw it on the table.

Q Are you the one that said, "It will make trouble for us?" A No, sir.

Q Did anybody say anything like that? A No, sir.

On Summary Proceedings—Lawrence Ruglio, cross.

Q Mr. Caprio didn't say that either? A No, sir.

Q You are sure of that? A Sure, positive.

Q What did Caprio say? A Caprio said, "It will make trouble for herself." I told her that myself. I said, "Mrs. Calucci, I can put you in jail for three days for doing that, you had no business monkeying around with that ballot. You are not a voter here." And she said, "All right, all right." That is all I heard.

By the Court.

Q Did you hear Mrs. Calucci speak of the marked ballot? A I heard her when she came out of the booth.

Q She called your attention to the fact that the ballot was marked? A Yes. She just hollered out, that this here ballot was marked and she had it in her hand.

Q You heard Mrs. Gifioli? A No, sir; I didn't hear her at all.

Q Mrs. Calucci showed it to you? A She didn't show it to anybody; she held it this way (illustrated); she said, "This ballot is marked," and she just ripped it up and threw it on the table. That is all I know.

Q (*By the Court.*) Did you see the mark? A No, sir.

Q Did you look at it? A No; I didn't look at it; she had torn the ballot up.

Q And the pieces were there? A Yes, sir.

By Mr. Harrison.

Q Did you see any more? A As far as I seen there was nothing there.

By Mr. Parry.

Q Did she rip it up before you looked at it? A Yes, sir.

On Summary Proceedings—Lawrence Ruglio, cross.

By Mr. Harrison.

Q Did you keep a list of those who asked for assistance? A We didn't keep any list at all, because we didn't go in with anybody, to my knowledge.

Q Do you remember that there wasn't a person that didn't ask for assistance of the board how to vote? A If they asked for assistance, we told them right outside.

Q You opened the ballot and just marked down? A No; we didn't specify any candidate at all.

Q When the people came along who could not read or write, what happened? A We just gave them an idea to tell them how to mark their ballot, on the left side in the square of the box there.

Q Were you the one that was telling how to do it to the ones who asked for assistance? A No, sir; when a person came up to me, "How would you mark your ballot?" I said, "mark it for the candidates you like on the left-hand side of the box."

Q Did they open up the ballot? A No; they didn't open up the ballot in front of me.

Q How many people voted there that day? A According to the ballots cast it was 415.

Q How many Democrats voted? A I think only six.

Q Who were the six people who voted and their names written on the roll of the primary book of the Republican party? A I don't know that; maybe a few ballots were lost when we made that change in the morning.

Q What was this change you made? A The change we made, we were on Seventh avenue and ten o'clock in the morning we were ordered to move.

Q You changed some ballots? A We didn't change the ballots; I said maybe the ballots got lost.

Q You say Mrs. Gidioli when she went in to vote, didn't you? A I saw her.

Q Who gave her the ballot when she went in? A I don't know who gave her the ballot; one of the four of us gave her the ballot.

Q Who voted after Mrs. Gidioli came out again? A Why, there was three or four more.

Q Who were they; what were their names? A That I don't know. I can't remember a person's name.

DIRECTION OF VERDICT ON PLEA IN BAR.

STATE OF NEW JERSEY,

vs.

JOSEPH D. CAPRIO and LAWRENCE RUGLIO.

The Court. The question at issue here is whether the defendants have been "called" to testify in a proceeding under this act and examined or gave testimony as to matters or causes now the subject matter of this criminal prosecution. If they were so called and examined, there must be a verdict for the defendants. If they were not so called and examined, there must be a verdict for the State, and the decision of this issue requires the determination of the meaning of the words "called to testify" read in the light of the whole act.

The defendants claim it covers any situation under which defendants take the stand, whether in defense of themselves or others, while the State contends that the phrase means "compelled to testify for the State," as a witness for the State. Carrying the contention of the defendants to a logical conclusion would mean this: If an election officer, while acting as an election officer, should assault a voter and, by reason of that fact, should be ordered to show cause before this court why he should not be removed, and should in any way succeed in testifying in that proceeding as to the assault, even though it was merely an explanation of his conduct, the State could not thereafter indict him for the assault, and the same might apply to a higher offense. I do not conceive that this was the intention of our legislators in incorporating this act in the election laws, and I am of the opinion that this statute must be limited to cases in which the defendants are compelled, by subpoena or compulsory proc-

ess, to testify, and that the statute applies to such cases alone; that it is only in such case that they may not be prosecuted by the State, and that the immunity only applies to such a situation.

The rule to show cause is process for appearance and that has been determined by the Chancellor recently in a decision in which he examined into the matter exhaustively. It is not process to testify. It is merely a process to appear and to explain the conduct of the defendants.

Under these circumstances, being of this opinion, I direct the jury to find that the defendants were not called to testify in a proceeding under this act and examined or gave testimony as to matters or causes now the subject matter of a criminal prosecution, under the indictment here introduced in evidence, and you will render such a verdict, Mr. Foreman.

Mr. Heisley. I respectfully ask an exception and an objection noted for the purpose of appeal on these grounds because regardless of the rule to show cause, the undisputed evidence shows that these witnesses were called—at least, Caprio was—by the presiding judge to testify.

Secondly, upon the ground that even if the evidence was in dispute as to whether or not they were so called to testify, that under the rules of procedure in civil cases, which I understand your Honor holds applies in this case, the Court has no power to direct a verdict. A verdict must be rendered by the jury, although the judge may eventually set it aside.

Third, on the ground that the question is a mixed question of fact and law and therefore should have been left to the jury.

Fourth, because it is not a question of law.

Fifth, because, if a verdict should have been granted, it should have been in favor of the defendants against the State.

Direction of Verdict on Plea in Bar.

The Court. So as to set the record clear as to what I have decided, I want it to appear on the record that the phrase, to my mind, "called to testify" means "compelled to testify," and that neither the rule to show cause, nor the direction of Judge Osborne, assuming it to be a fact, was such as to compel the defendants to testify, compel them in law to testify, and that even had the defendant taken the stand he could not have been compelled to testify to facts tending to incriminate or degrade him.

Exception allowed.

FRED G. STICKEL, JR.,
Judge.

Motion to Quash Indictment.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Monday, Nov. 28, 1921.

STATE OF NEW JERSEY, *vs.* JOSEPH D. CAPRIO and LAWRENCE RUGLIO,	*Indictment No. 1, September Term, 1921.* *Conspiracy.*

Before Hon. Fred G. Stickel, Jr., Judge, and a jury.

For the State appears J. Henry Harrison, Esq., Prosecutor of the Pleas.

For the defendants appear Wilbur A. Heisley, Esq., and Anthony R. Finelli, Esq.

Mr. Heisley. I move to quash this indictment, because the indictment does not apprise the defendants of the particulars of the offense with which they are sought to be tried and violates Article 1, Section 8, of the State Constitution and Article 6 of the Federal Constitution. I believe I have quoted them correctly. I refer to the clause that provides that the defendant in all such cases is to be advised of the nature and the cause of action against him.

Second, it does not specify how they were to be guilty of a wilful fraud, or of what such fraud was to consist in violation of these two constitutions, because Section 27 of the Election Act, page 833, of the laws of 1920, says that an officer guilty of any wilful fraud shall be punishable under the provisions of that statute, and this indictment, if these men are convicted under it, not having specified the particular fraud with which they are particularly charged, could not be pleaded in bar of any

further proceedings. The language of the Statute of 1920, page 883, Section 27, makes any official indictable for any wilful fraud in the discharge of his duty, or by doing any act or thing whatsoever. My point is that this indictment does not specify the particular act or thing and it is not sufficient in an indictment of this character, to follow the general statutory language. It may be just as intelligent to say that these defendants conspired to commit a forgery or other crime without describing the forgery or other crime.

Because the indictment is duplicitous and multifarious. It charges various offenses, each one of which is a crime under the 1920 statute. It charges false counting as well as making false returns, both being indictable offenses, and defendants cannot be indicted in one indictment for two offenses.

Seven. This is an indictment for conspiracy, but the alleged overt act could not be the means by which the conspiracy would be accomplished.

Eight. Because the indictment fails to disclose in what manner the counting and returns were false. It is simply an allegation that the counting was false and returns false, but does not specify. I, therefore, say that it is defective and in violation of these constitutional provisions.

Nine. The only act alleged done in the execution of the alleged conspiracy is corruptly signing a false statement. I hold it is physically impossible—of which the Court must take notice—that it is physically impossible that the signing of a false statement could be the means whereby the conspiracy to commit a fraud could have been perpetrated.

Ten. If it was the means, the indictment should specify the particulars of its falsity.

Eleven. Although the indictment charges an agreement to improperly take ballots from the boxes and incor-

rectly read them, it does not allege they did so take the ballots and read them.

Twelve. If the Court holds that this is an indictment for false counting and making false returns, then an indictment of that character is defective, because (a) it does not allege the duty of the defendant to count or return; it merely alleges a duty to read; (b) it does not specify the particulars of the falsity in violation of the State and Federal Constitutions; it fails to say in what respect it was false, whether it was forgery or false in whole or part, or as to the statement of candidates, the number of votes cast, or any other particulars.

(Decision reserved.)

(Jury drawn and sworn.)

Mr. Harrison opens for the State.

Mr. Harrison. Counsel for the defense, for the purpose of saving time for the Court and jury, has kindly consented to make an admission on the records that the members of the Local Board of Registry and Election of the Third Election District of the First Ward, in the City of Newark, were Joseph C. Capiro, Lawrence Ruglio, Samuel E. Veniero and Joseph Caputo, further, that in accordance with the statute, the board duly organized by electing Joseph C. Caprio as the Judge of Election and Lawrence Ruglio as Inspector, and that the Board as appointed conducted the primary election held on the twenty-eighth day of September, 1920, for the third election district of the first ward in the City of Newark.

Mr. Heisley. We so admit.

Mr. Harrison. And, a further admission that the assistants to the local Board of Election and Registry in that district were James V. Cappiello, and Margaret Brandalone.

John H. Scott, direct.

JOHN H. SCOTT, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You are County Clerk of Essex County? A Yes, sir.

Q And how long have you held that position? A Four years.

Q Did you, in the course of your duties as such clerk, receive the election returns for the primary election held on September 28, 1920? A I did.

Q I show you a sheet headed "Primary Election, 1920," purporting to be the returns of the Third District of the First Ward of the City of Newark, and ask you if you ever saw that sheet before? A Yes, I saw that before.

Q And you produced that in response to a subpoena on the part of the State? A Yes, sir.

Q What is that sheet? A That shows the return from the Ward of the number of votes cast for the different candidates.

Q For candidates for member of Congress in the Eighth Congressional District? A Yes, sir.

Q Do you know the signatures affixed to that return? A No, I do not.

Paper marked Exhibit S. 1.

Mr. Harrison. And by consent a duplicate of Exhibit S. 1, is received in evidence, this being a copy of the statement, which under the statute, is sent to the City Clerk.

Paper marked Exhibit S. 2.

(Mr. Harrison reads Exhibit S. 1 to the jury.)

Cross examination waived.

JOSEPH F. McCRUDDEN, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You are clerk in the election department of the City Clerk in the City of Newark? A Yes, sir.

Q What are your duties in that department so far as the receipt of ballot box returns and so forth are concerned? A Which way do you mean?

Q Ballot box? A Getting returns?

Q Yes. A I receive them election night and keep an account of the boxes that come in and the boxes that went out to the different districts and check them off as they come in.

Q I show you two boxes and ask you if you can identify those two boxes? A Yes, sir.

Q What boxes are they? A There is a tag missing from this one.

Q Step right down, if you cannot see from there, and tell the jury what they are. A There is a tag missing from the third district of the first ward, and this one here.

Q Referring to the larger light-colored box? A Yes.

Q What is that larger light-colored box which is before you? A It is used for the primaries, the Republican primaries.

Q When was it used?

Mr. Heisley. Do you know of your own knowledge?

The Witness. Yes; I supervise them and get them out.

Mr. Heisley. You mean you went to the election booth?

The Witness. Yes; I have charge of that department in the City Hall.

Q You say it was used for that primary; what primary do you refer to? A 1920.

Q Republican primary? A Yes, sir.

Q In what ward and district? A First ward, third district.

Q What is the smaller dark-colored box? A That is the regular Republican primary box, but we didn't have enough at that time, so we had to use extra boxes and tagged them.

Q Did you see those boxes after the primary election on September 28th? A Yes; they were returned to the City Hall.

Q And what was done with them there? A We took the ballot boxes and they were guarded by a policeman for fourteen days, night and day.

Q What later became of these two boxes? A I was subpoenaed to bring them to the Court House and brought them up here.

Q Do you know for what purpose that was, or to whom they were delivered? A To Mr. Hargan of the Prosecutor's office.

Q I do not want to lead the witness, but before they were delivered to the Grand Jury didn't you deliver them to someone else? A Yes; they were up here for re-count, the boxes were.

Q And after the re-count? A They were returned to the City Hall again.

Q And who had charge of these boxes during the re-count, if you know? A Oh, there was a policeman guarding the ballot box department night and day, and I come up here and watched the re-count myself.

Q And you took them back every night after the re-count was over? A Every night after the re-count was over.

Q And after the re-count and they were returned to the City Hall what was done with the boxes? A I was re-subpoenaed and brought them back here to the Grand Jury, I think it was.

Joseph F. McCrudden, cross.

Q But in the meantime they remained in your charge in the City Hall? A Yes.

Q And to whom did you deliver those boxes under the Grand Jury subpoena, if you recall? A The County Clerk.

Q And where did you deliver the boxes under the Grand Jury subpoena? A In the Court House.

Q Do you remember the particular room? A Right outside.

Q A large room, you mean, on the south side of this floor? A Yes; on the south side.

Q Do you know what that room is? A I do not.

Q Do you know to whom you delivered them? A To the County Clerk; the City Clerk was with me the day I delivered them; Mr. Egan was along with me.

Q Do you know whether the Grand Jury was in session at that time? A Yes, they were; because we had to wait quite a while before we could deliver the boxes inside.

Q And where have the boxes been since you delivered them to the Grand Jury? A In the Court House, I guess.

Q You don't know. They have not been returned to you? A No, sir.

Boxes marked Exhibit S. 3 and Exhibit S. 4.

Cross examination by Mr. Heisley.

Q When those boxes first came to you after the election were there any seals on them? A Yes.

Q What kind of a seal was there on the boxes? A Red tape and sealing wax, and pieces of cardboard with sealing wax put on it; we would not receive any box unless it was sealed.

Q Where was this red tape put on, or red sealing wax put on; was it put on where the tape was tied together? A Yes, sir.

Joseph F. McCrudden, re-direct.

Q The sealing wax put over that and the card? A The card in under.

Q There is no card on it now? A No, sir; it has been opened three times.

Q It has been opened by the Board of Election? A It was opened at the re-count and then sealed again with the county seal and then put back and opened by the Grand Jury.

Q What kind of seal—did the County Clerk seal that? A No, after the recount each election officer had to seal his own box again.

Q How did he seal it, just as you have described, with sealing wax? A Yes, sir.

Re-direct examination by Mr. Harrison.

Q Were the original seals that the Local Board of Registry and Election upon the boxes when you delivered them to the County Board for the recount? A The first recount?

Q Yes. A Yes. There is no seal put on; they just put the sealing wax on where the red tape is tied together; the sealing wax is dropped on, but after they were re-counted they put the red tape with the sealing wax with the county seal, and then they were brought back again for recount by the Grand Jury; after that I have not saw them since.

Q (*By the Court.*) Did those boxes come in to you after the primary election duly sealed? A Yes, sir.

Q (*By the Court.*) Who first broke the seals, or where were the seals first broken A At the recount.

Q (*By the Court.*) Up here in the Court House? A Yes, sir.

Q (*By the Court.*) What is done with the ballots after they are brought to the City Hall, kept there? A Unless there is a recount the boxes cannot be opened for three months.

Q (*By the Court.*) And when they were brought up here to the Court House, then the Local Board seal was for the first time broken? A Yes, sir.

Q (*By the Court.*) And after they had been recounted what then? A They were put back in the boxes again.

Q (*By the Court.*) And the boxes resealed? A With the County seal.

Q (*By the Court.*) The same way as was done by the Local Board? A The same manner, but they do not use any seal.

Q (*By the Court.*) How was it sealed by the county? A Tied up and the bit of cardboard put in under and sealing wax was put on.

Re-cross examination by Mr. Heisley.

Q Were you present at the County Board when the seals were first broken? A Yes, sir.

Q You know that of your own knowledge, that the County Board first broke the seals? A Yes, sir.

ALFRED HARGAN, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q Lieutenant Hargan, you are connected with the Prosecutor's office of this county? A I am.

Q And you have, acting for the Prosecutor, had charge of the Department of Election established in his bureau? A Yes, sir.

Q And do you know Mr. McCrudden, the man who preceded you, a deputy clerk in the City Clerk's office? A I do.

Q When did you first see him, if at all, in connection with Exhibits S. 3 and 4 for identification? A I saw him at the time of the recount, when the boxes were in his custody, and I again saw him deliver them to the Grand Jury on the subpoena here, and, after he delivered the boxes to the Grand Jury, I myself personally opened the

boxes in the Grand Jury room, in the presence of the Grand Jury and broke the seals that were on them at that time.

Q And were you a witness before the Grand Jury in connection with this matter? A I was.

Q Right there. Did you also attend the recount in this district held by the Local County Board of Election? A I did.

Q After the Grand Jury had finished with the boxes what became of them? A I took them in my custody and they have been under lock and key in my custody ever since.

Q What about their condition now as compared with their condition when you received them from the Grand Jury? A They are in the same condition now as they were when I took them out of the Grand Jury room the night they were through with them.

Boxes marked Exhibits S. 3 and S. 4.

Cross examination by Mr. Heisley.

Q When these boxes were before the County officers and opened the ballots were taken out and counted? A They were.

Q They were taken off of the string? A They were.

Q They are all strung, I think, and the same process was gone through before the Grand Jury, was it not? A No, sir.

Mr. Harrison. I object.

The Court. He said, "No, sir." Do you still object?

Mr. Harrison. No, I withdraw my objection.

Q What was the process of the examination before the Grand Jury?

Mr. Harrison. I object to this witness testifying as to what the process before the Grand Jury

was. It seems to me, certainly, that the question should not go any further than asking this witness what he did or said before the Grand Jury.

Mr. Heisley. I do not just understand whether he puts it on the ground he cannot disclose the proceedings of the Grand Jury.

Mr. Harrison. That is my objection.

Mr. Heisley. I think the question is competent and we are entitled to show what was done with the ballots there.

(Argument.)

Mr. Harrison. May I add another objection, that the testimony itself calls for hearsay testimony and the conclusion of the witness. My chief objection to the question is, it is entirely too broad when counsel asks what was done by the Grand Jury with reference to the particular boxes. In other words, this witness is not the Clerk of the Grand Jury. It is not within his power to testify what the Grand Jury does, and the form of proof, it occurs to me, is clearly improper.

The Court. I will sustain the objection to the form of the question.

(Question read.)

Defendant's counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

The Court. You may ask this witness, if you wish, or, at least, I shall so rule, what he did before the Grand Jury in connection with these ballots.

Mr. Heisley. May I not ask what the Grand Jury did with them?

The Court. I will pass upon that when the question arises. He has testified he broke the seals of the boxes before the Grand Jury, and he was a witness before the Grand Jury. I think you have a right to cross examine him on that point.

Q What did you do with the ballots before the Grand Jury? A At the direction of the Grand Jury I took some of the ballots out of the box and called their particular attention to certain of these ballots and the marking of these ballots; at that time I called the Grand Jury's attention to the particular ballots.

Q Where did you find those ballots? A In their proper rotation and numbers as they had been placed by the County Board of Election on the recount.

Q Where were these ballots when you first gave them to the Grand Jury, were they put on the string in orderly sequence, 1, 2, 3, 4, 5? A They were.

Q I understand there were over 400 ballots on this string? A Yes.

Q Where would the high number of the ballots be, at the top or bottom of the string? A Well, according to which end of the string you picked up.

Q Is there anyway of telling that? A No; the high one would naturally be on the top.

Q It would be if they started at the bottom? A Well, that is the way they start.

Q What I am trying to get at is, there is no way of telling on which end of the string the high or low number would be? A The number would tell the end of the string.

Q Were they all on one string? A No.

Q About how many strings were there? A I think there are two strings of ballots.

Q Well, then, they would approximate about two hundred ballots to a string? A Yes, sir.

Q And did you take ballots off of these strings at various places on the strings? A I took certain ballots off that I wanted to get a particular number of for the Grand Jury.

Q For instance, you took off the ballot on one end of the string, that was number 1; did you take off ballot 100, for instance, or in that neighborhood? A I might have gone that high; I do not recollect; I have a memorandum; I can refresh my recollection and can tell you which one was taken off.

Q These ballots were pretty well dissected in the Grand Jury room? A They were not.

Q How many ballots did you take off? A Probably in the neighborhood of fifty odd ballots.

Q Fifty out of, say four hundred and on the two strings? A No, I only disturbed one string.

Q Which string was it you disturbed? A I think the first string, from one to two hundred.

Q Do you recollect what was the lowest number of the ballots you took off, or the number of the lowest ballot? A I could not, without looking at the memorandum that I made at the time.

Q (*By Mr. Harrison.*) Did you make a memorandum at the time? A I did.

Q (*By Mr. Harrison.*) Which correctly stated the facts as they then were? A As to the ballots which I had referred to and which I took off.

Q Were these ballots passed around among the Grand Jurors? A They were.

Q Fifty of them? A I would not say as to the number; I would not say as there were as many as fifty ballots passed around.

Q Well, that is your approximation. That is all.

Mr. Heisley. I do not think the Court ruled as to the boxes and the contents.

The Court. Oh, yes. Have you any objections?

Mr. Heisley. Yes, sir. I object to their being offered in evidence, because the overt act alleged in this indictment is simply that they signed a false statement. There is no allegation that they falsely counted. The only overt act is that they signed a false statement.

Defendant's counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

The Court. That is one of the grounds of the motion to quash?

Mr. Heisley. Yes, it is, and that will crop up all through the case.

SAMUEL E. VENIERO, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You live in the City of Newark? A Yes, sir.

Q And you were one of the members of the Board of Registry and Election for 1920 in the Third District of the First Ward in this City? A Yes, sir.

Q Did you act with your associates, as such member, on the twenty-eighth day of September, 1920, in the conduct of the Primary Election held on that date? A Yes, sir.

Q Are the signatures, Samuel E. Veniero, on Exhibits S. 1 and S. 2—

Mr. Heisley. We admit that he signed the statement.

Q You were one of the clerks of the board? A Yes, sir.

Q And who was the other clerk? A Joseph Caputo.

Q Just tell the Court and jury just how you handled the counting of the votes of that election for member of

Congress for the Eighth Congressional District? A Why the Judge called the names out and I wrote them down.

Q Well, now, by the Judge, you mean who? A Joseph Caprio.

Q Where did he stand with reference to the ballot boxes? A He was alongside of the ballot boxes.

Q And just what did he do with the ballots? A He took them out and read them.

Q Did he take them out in bulk, or one by one? A No, sir; one by one.

Q Where was Ruglio? A Right next to him.

Q And what did Ruglio do, or appear to be doing? A Why, looking at the ballots, to see if Joseph Caprio read them right.

Q Was he stringing the ballots? A Yes, sir.

Q Now, as these ballots were read, as you say, by Caprio, in the presence of Ruglio, what did you and Caputo do? A Why, we put them down.

Q And what do you mean by putting them down? A Why, make a dash mark by the name.

Q By a dash mark you mean a perpendicular line? A Yes, sir.

Q For each vote? A Yes, sir.

Q In the space provided for that purpose? A Yes, sir.

Q I show you a large sheet and ask you if you can recognize that sheet? A Yes, sir.

Q What is it? A Why, that is the return; this is what we call the return sheet.

Q Known as a tally sheet, isn't it? A Yes.

Q And you and your three associates had signed that sheet, had you not? A Yes, sir.

Q Can you tell by an examination of the sheet who actually kept that particular sheet and made the marks on it? A No, sir.

Q Do you know whether that was one of the sheets kept at that time by you or Caputo? A Yes, sir.

Q And I think you have already testified that you and the others signed it at the bottom, did you not? A Yes, sir.

Q Well, now, as these ballots were being read off by Caprio what did you do as each name was read off?

The Court. He said he made a perpendicular mark.

Mr. Heisley. I think he merely said there was a place there for it.

The Court. He made a dash, and you had him say it was a perpendicular mark.

Q What did you do as each name was read off? A I made a line by the name, in the space.

Q Did you do that each time? A Yes.

Q And did Caprio do all of the reading? A Yes.

Q And did you keep the whole of these sheets which you turned in—which you kept and turned in? A Yes.

Q And do you know whether Caputo did the same with the sheet which he kept? A I couldn't say so.

Q (*By the Court.*) Well, was he keeping a sheet? A Yes, sir.

Q And one of those tally sheets was returned to the County Clerk and the other was put in the ballot box and returned to the City Clerk? A Yes, sir.

Q During this process did you have any check up with your associate Caputo? A Yes, sir.

Q How did you check up with him? A Why, every time we got probably five or ten votes, why we would check them up to see if they tallied.

Q So that after each five or ten votes you would call back to Caputo, or he to you, the number of votes which you each had on your tally sheet for the various candidates on the ticket? A Yes, sir.

Q Then did you do anything further, or anything more, about tallying with Caputo? A I don't get that question.

Q Well, I will withdraw the question. Besides this special check up which you said you made after each five or ten votes, did you do anything else? A Why, after all the votes were counted, why, we checked them up again.

Q And when you finally had your four perpendicular marks and your one cross mark opposite the name of the candidate, what, if anything, would you or Caputo say? A Why, I would probably say tally, or something else.

Q So that each time you filled a space with five votes you or he called out tally? A Yes.

Q Was there anybody there during the counting procedure from my office? A Yes, sir.

Q Who? A Lieutenant Hargan.

Q And Caprio and Ruglio were there while the Lieutenant was there? A Yes, sir.

Q And what was said by Lieutenant Hargan about counting?

(Objected to.)

(Objection withdrawn.)

A Why, I don't remember.

Q Well, now, at the conclusion of your tally, what comparison, if any, did you make between the two tally sheets? A I did not get that question.

Q I withdraw the question. After you finished counting— A Yes.

Q —what did you and Caputo do about comparing your sheets? A After we got through comparing them?

Q No, after you got through counting them and had your tally sheets before you, did you make any check up to see if the final count was the same on both sheets? A Yes, sir.

Q And what did you find? A We found they tallied.

Q Calling your attention to those tally sheets, I ask you to refer to the space for member of the House of Representatives, and ask you for the number of votes you tallied for the various candidates? A Five for Taylor; one for Chapman, and four hundred and three for Archibald, and Yarrow none.

Q Who prepared this paper which I showed you, Exhibit S. 1, which is the statement of the result of the election? A Why, you mean who wrote this?

Q Yes. Who filled in the writing and the figures? A Why, I filled in "5, 1, 403;" the figures I filled out.

Q And who filled in the names? A I couldn't say who filled the names; I don't know the writing.

Q I ask you who filled in the figures on Exhibit S. 2? A I did.

Q And did you also write in the words "5, 1, 403?" A Yes.

Q And who filled in the names? A I don't know, sir.

Q Where did you get these figures for this statement? A Why, the election officers called them out and I put them down.

Q You didn't get them from the tally sheet? A Well, I guess he did.

Q Which election officer called them out? A Why, I couldn't say; I don't remember.

Q (*By the Court.*) Well, when you put them in did you not check them up with the tally sheets to see if they compared? A I don't remember.

Q (*By the Court.*) You do not remember? A No, sir.

Q I show you Republican party primary poll book election, September 28, 1920, taken from Exhibit S. 3, and ask you if the certificate on the last sheet of that poll book was signed by you and your associate? A Yes, sir.

Samuel E. Veniero, cross.

Q That certificate shows, does it not, that there were 415 names registered? A Yes, sir.

Q Do you know how many names there were actually registered? A No, sir.

Mr. Heisley. I object.

Mr. Harrison. I asked him if he knows.

Mr. Heisley. Oh, all right.

Cross examination by Mr. Heisley.

Q Mr. Veniero, you are not indicted for your conduct in relation to the primaries, are you? A No, sir.

Q This tally sheet which you have before you has lead pencil marks, for instance, four marks and then a cross over it, to indicate five votes, I suppose? A Yes, sir.

Q Are all of those marks in your handwriting? A Well, I couldn't say.

Q Well, under the law and under your practise, you kept one of these and Mr. Caputo kept another one, didn't he? A Yes, sir.

Q You have not seen Mr. Caputo's tally sheet, have you? A No, sir.

Q Well, I want to be fair with you—can you tell whether this is the tally sheet you kept or whether it is the tally sheet Mr. Caputo kept? A Well, it is hard to tell, making a line up and down; he may have made a line the same.

Q Well, you cannot tell? A No.

Q Now, out to the right of these figures I see figures in circles, like, for instance, 5, 1, 403, 321, and so forth; they represent, do they not, the totals count of votes cast on each line opposite those figures, isn't that right? A Yes.

Mr. Heisley. May I just show that to the jury, your Honor?

The Court. Yes.

Q Who made those marks in the circles out there? A I probably did.

Q (*By the Court.*) That is, who ever kept the tally sheet? A Two of us kept the tally sheet.

Q (*By the Court.*) That is, who ever kept the tally sheet would make that total? A Yes, sir.

Q So, therefore, all the lead pencil marks on this tally sheet is in the handwriting of either one or the other of the clerks, either you or Mr. Caputo, is that right? A Yes, sir.

Q You got the number of the votes, because they were announced by Mr. Caprio in the presence of Mr. Ruglio, isn't that right? A Yes, sir.

Q When he was reading them off, were there many people present? A Why, the place was jammed—that is not exactly jammed.

Q And the polls opened at what time in the morning? A I think it was six.

Q And closed at seven? A I cannot recall that now.

Q Well, how long after the polls were closed—

Mr. Harrison. Pardon me. If you want that, I believe it is seven in the morning until nine at night.

Q Well, how soon after the polls closed in the evening did Mr. Caprio begin reading off these names? A Just as soon as we got prepared with the sheets.

Q And how far away did you sit from where Caprio was standing reading? A Well, I couldn't say.

Q I know, but give us an estimate; you were not a mile or you were not six inches; where were you; point to some place here in the room? A Well, from that ballot box to the seats.

Mr. Heisley. Well, about twelve to fourteen feet.

The Court. I guess that is close enough.

Q And you sat at the table? A Yes.

Q And how far away from you did Mr. Caputo sit? A Right next to me.

Q And where was this crowd of people you say were in the election place? A Well, they were all there listening to the returns.

Q You mean listening to Caprio reading them off? A Yes.

Q And were there any people watching Mr. Caprio and Mr. Ruglio as they read these names off? A Why, I don't think so, I didn't see any.

Q Well, you were busy, of course, taking down the figures? A Yes, sir.

Q Do you know of your own knowledge, or have you any reason to believe when you were writing down these figures that Caprio and Ruglio were reading the returns incorrectly? A I have not.

Mr. Harrison. I object, as not being proper cross examination and calling for the conclusion of the witness. He may testify as to the facts, but not as to his reason for believing this, that or the other thing.

The Court. I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Mr. Veniero, as Mr. Caprio read these off you endeavored to take them down correctly, didn't you? A Yes, sir.

Q You were in no conspiracy to misrepresent the will of the people up there, were you? A No.

Q Were you invited to go into any conspiracy with either Ruglio or Caprio? A No, sir.

Samuel E. Veniero, cross.

Q Did you have any reason to believe there was a conspiracy?

Mr. Harrison. I renew my objection.

Mr. Heisley. All right, I will withdraw it.

Q Now, you say that after you would take down the number of these ballots and then you and Caputo would compare notes, is that right? A Yes, sir.

Q So you would be sure to get the same record, if you could? A Yes.

Q Of course, that would be your object, to get the same record? A Yes, sir.

Q And would you correct it there at times? A Well, yes.

Q You had been an election officer before? A No, sir.

Q That was the first time? A Yes, sir.

Q This was when the ladies voted for the first time, wasn't it? A Yes, sir.

Q And I believe that district only had about forty Democratic votes in it, didn't it? A Well, I cannot recall that.

Q They were nearly all Republicans up there? A Yes.

Q And then when you found that you did not agree you would accept either his figures, or else he would accept yours, is that right? A Yes, sir.

Q So the result was that you did wind up in complete accord? A Yes, sir.

Q Now, is there anything on this—oh, how many votes does this show that Mr. Archibald got? A Four hundred and three.

Q And it shows that the members for Assembly, some of them got as high as 395, doesn't it? A Yes, sir.

Q Within eight votes of what Mr. Archibald got, is that right? A Yes, sir.

Q Within eight votes. Now, you signed this ballot sheet? A Yes, sir.

Q And all these other election officers signed it? A Yes, sir.

Q Now, Mr. Veniero, when you got these officers—other officers to sign it, did they merely put their names there or go over the whole sheet and add it up, or don't you know? A I don't know.

Q You told them it was right; you told them the sheet was right as far as you knew? A As far as I knew it was right.

Q Did you say anything to Caprio or Ruglio, anything to the effect you were uncertain as to whether this sheet was right or wrong? A No, sir.

Q You handed it to them for signatures? A Yes.

Q And you all signed it? A Yes, sir.

Q And you signed it honestly, as far as you are concerned? A Yes, sir.

Q Now, didn't you make out—you or Mr. Caputo make out these Exhibits 1 and 2, being the returns? A I just wrote the figures in this.

Q Now, you are speaking, Mr. Veniero, of Exhibit S. 2? A Yes, sir.

Q You simply put the figures in there? A Yes, sir.

Q Who wrote the word five opposite Herbert W. Taylor's name? A I did.

Q Who wrote the name Herbert W. Taylor? A I don't know.

Q Isn't that your handwriting? A No, sir.

Q Who wrote 403 opposite Archibald's name? A I did.

Q And who wrote 415 out here at the top? A I don't know.

Q Well, how is—I am not saying that you do know—but how is it you don't know if you were there? A Well, I don't know whose handwriting that is.

Q Well, you signed your name down here to it? A Yes.

Q And was it all completed and filled in when you signed it? A That I cannot recall.

Q Well, you wouldn't sign it in blank? A No.

Q Then your best belief is it was all filled in? Is that so? A Yes, sir.

Q And you know also, it says up there the total number of votes—Republican votes—was 415? A Yes, sir.

Q And the Republican names on the primary books was 415? A Yes, sir.

Q And it was written that way when you signed it? A Yes, sir.

Q And you signed it honestly believing there was 415 names on the Republican poll book? A Yes, sir.

Q You have no knowledge who put in the 415? A No, sir; I have not.

Q Now, take this Exhibit 1, who wrote the name Herbert W. Taylor? A I don't know.

Q Who wrote the number 5? A I did.

Q When you wrote these numbers were the names written in ahead of you or not? A I couldn't say; I am not sure whether they were.

Q Well, how is it that you wrote up a part of the returns and somebody else wrote up the other part; can you explain that; I am not critizing you, but can you explain it? A No, sir.

Q Was it Mr. Caputo that did it? A I don't know; I do not know that handwriting.

Q Will you be good enough to write the name of Herbert W. Taylor for me with pen and ink? A Yes, sir.

RECESS.

Q Mr. Veniero, at my request you have written on a paper in ink the name Herbert W. Taylor, is that right? A Yes, sir.

Samuel E. Veniero, cross.

Q And this is the name that you have written, is that right? A Yes, sir.

Paper marked Exhibit D. 1 for identification.

Q Mr. Veniero, can you tell us how it came in this certificate, statement return S. 2, and also S. 1, although it appears there are only 403 votes cast for members of the House of Representatives, Congressional candidates, the statement is found up above that the total number of Republican votes cast was 415; can you tell us how that discrepancy occurred? A No, sir.

Q You are aware of the fact that at the top it says 415 votes were cast, Republican ballots, cast, yet the total given is 403, isn't that so? A Yes, sir.

Q Now, I ask you if you know and if you can tell us how in one place it says 415 and yet right below it it says 403? A No, sir.

Q Do you know whether it was done purposely or by accident, or how it was done? A I couldn't say.

Q In whose handwriting are the words, "city, Newark, third, first," and the figures, "415," on S. 2? A No, sir; I don't know.

The Court. Well, were there not some more votes cast besides the candidates—besides Archibald?

Mr. Heisley. I do not think it would increase the number of votes over 405.

The Court. It makes 409 votes altogether.

Q Well, 409 instead of 403. You do not know how the difference of six votes is accounted for? A No, sir.

The Court. Are there any marked on there rejected?

Mr. Heisley. Not on this.

Mr. Harrison. Yes, one on the top.

Samuel E. Veniero, cross.

Mr. Heisley. Yes, total number of Republican ballots rejected are one.

Q What are your politics, Democratic or Republican?

Mr. Harrison. Objected to as being immaterial.

The Court. Objection sustained.

Q What is your business? A Clerk.

Q Where are you employed? A City Inspector, City Hall.

Q Mr. Veniero, after these ballot sheets were figured up they were put in the ballot boxes, weren't they? A Yes, sir.

Q The ballot box then was sealed, wasn't it? A Well, I couldn't say.

Q Well, they were locked, weren't they? A They were locked when they were taken down there, yes.

Q You had a key, didn't you? A No, sir.

Q Who had the key? A I think the Judge had a key.

Q Well, didn't each officer have a key? A No, sir.

Q There are three locks on the boxes, aren't there? A Yes, sir.

Q You do not know who had the key? You didn't have any? A No, sir.

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

Q Well, do you know whether or not the sheets were put in the ballot boxes? A I couldn't say.

Q You were pretty green at the business, anyway, weren't you— A Yes.

Q —being your first term. Now, at the conclusion of the counting, of the making out of these sheets was there a calculation made by you and Mr. Caputo to see whether these sheets were all right, whether they compared? A Yes.

Q And did you make them compare? A Why, if there were one or two of them out of the way, we would compare them.

Q I mean, after you had gotten all through and put them down and came to add up to see how many votes there were, did you compare them and make any corrections at that time? A I don't remember.

Q You may have and may not? A Yes.

Q What is the fact, did you or did you not correct these sheets after the election was over, that is by comparing with Caputo and agreeing upon the total votes cast for each candidate? A I don't remember whether I did or not.

Q You may have and you may have not; that is your answer, then? A Yes.

Q You did not falsely alter these sheets, did you? A No.

Re-direct examination by Mr. Harrison.

Q Then, the counting of the ballots, where were the members of the Board with reference to the people who came in from the outside to watch the counting? A Why, the members were in back of the table.

Q What do you mean by being in back of the table? A Why, this is the table (illustrating) here is the election officers, and facing me were the people in there.

Q So that the Election Board was separated from the outsiders? A Yes, sir.

Q By tables? A By tables.

Q So that the outsiders could not get or should not get behind the tables where the members of the Board were, is that true? A Yes.

Q Now, you have made some reference to Lieutenant Hargan being there during the counting. I now ask you when you, when checking up with Caputo, found that you had any of these checkings disagreed with his in your count— A I don't quite get you.

Q Well, did you find at any of these times when you compared your tally with Caputo that you did not agree

with him in his counting? A Well, sometimes we might be one out of the way—one or two out of the way.

Q Well, when you were one out of the way what did you do towards straightening that out, and verifying it? A (Witness pauses.)

Q In order to get your sheet to compare with and agree with Caputo's, when you had a difference, which you say might be one out of the way, what did you do? A Well, if I had one out of the way I would put it down, and, if he had one out of the way, he would put it down, so we tallied.

Q Did you check back with the ballots themselves? A Yes, sir.

Q Well, how many checks did you give Lieutenant Hargan, do you remember? A No, sir; I do not.

Q As a matter of fact, weren't there three? A I could not say; I do not remember.

Q Don't you remember, or do you remember that you checked up for Hargan on one or more occasions that night? A I do not remember, sir.

Q Do you remember Lieutenant Hargan stopped the count and requested the counting of the sheets? A I cannot say; I do not remember.

Q You understand my question, don't you? A Yes.

Re-cross examination by Mr. Heisley.

Q What time was Lieutenant Hargan there? A I cannot recollect the time.

Q I mean, was it before the polls closed and while the counting was going on, or before the counting was going on? A While the counting was going on.

Q And while Caprio was announcing the votes? A Yes.

Q And how long would you say Lieutenant Hargan was there? A I cannot say.

Q Can you tell us a single word or show us a single figure on either one of these two tally sheets that was made by either Caprio or Ruglio? A No, sir; I cannot.

Joseph Caputo, direct.

Q They were all, as far as you know, the figures of yourself and the other clerk, is that right? A Yes, sir.

Examined by the Court.

Q You said that when you and Caputo did not agree on your checking up that if you were out of the way, you would put one down, and, if he was out of the way he would put one down, and then you said after that that you checked back with the ballots. Now, what I am trying to get at is did you check back with the ballot when you disagreed? A Yes, sir.

Q When he disagreed and you had five and he four what did you do to see who was right? A Well, when the Judge called the number of the ballot, I looked at mine and if I was right then I would tell him to put the number down, so the number of the ballots compared with ours.

Q That is the numbers that were marked on the ballots in pencil? A Yes, sir.

JOSEPH CAPUTO, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You were a member of the Election Board of the Third District of the First Ward at the Primary Election, September 28, 1920? A Yes, sir.

Q And this is your signature to this tally sheet, which I show you? A Yes.

Q And did you keep the tally sheet which is now before you? A That I don't know; we had two and I cannot say that this one or the other one is mine.

Q But either you or Veniero kept the sheet which is before you? A Yes, sir.

Q Now, briefly tell us your method of keeping the tally? A Well, the Judge would call out and I would give a dash to the candidate he would call out.

Q What do you mean when he would call out, what would you do? A I would put a dash.

Q A dash here? A One of those lines.

Q One of those straight up and down lines? A Yes.

Q And was Veniero doing the same thing on his tally sheet? A Yes, sir.

Q You were working right next to each other? A Yes, sir.

Q You were working within the rail enclosure in behind the table? A Yes.

Q Where was the crowd? A The crowd was around us.

Q They were not inside of the booth? A No, sir.

Q They were outside of the booth or rail enclosure? A In back of us.

Q In back of the table? A Yes.

Q What did you do towards checking up your tally sheet with Veniero's? A Why, every five or ten we used to verify our tally sheets between I and the other clerk. If there was a difference of maybe one or two on my sheet or on his sheet we would put an extra dash to even the count on both tally sheets.

Q And you checked up the tally sheets with the ballots to find out which one of you were right? A Yes, sir.

Q And as the ballots indicated you would then change your sheet to correspond? A Well, if he had one more than me, I would put one more on my tally sheet for what candidate it may be. If there was a difference of one or two, if it was on my sheet, if I was one short on my sheet, I would put it on my tally sheet.

Q And would you check back those marks with the ballots? A Yes.

Q So that you would make your mark to correspond with the count on the ballot? A Yes.

Q Do you know Lieutenant Hargan? A Yes, sir.

Q Was he in your district that night? A Yes, just when he started to count up?

Q How long was he there? A Well, I should judge about a half an hour.

Q And what did you do with reference to checking up with him the count, if any, while he was there? A Well, while he was there he told us to check up, and, as far as I recall everything was all right.

Q Do you remember how many time you checked up at his request? A That I do not remember.

Q Do you remember whether it was more than once? A That I do not remember.

Q I show you Exhibits S. 1 and S. 2 and ask you if the name Joseph Caputo on each of those sheets is in your handwriting? A Yes, sir.

Q Who filled in the body of those two exhibits, Mr. Caputo? A This in Veniero's writing; I didn't fill in any one of these two sheets.

Q Well, now, when you say this is in Veniero's handwriting what do you mean? A That he wrote the names of the candidates in.

Q Do we understand you to mean that Veniero wrote in the names Taylor, Chapmen, Yarrow, Archibald and McGlennon? A Yes, sir.

Q Do we also understand you to mean that he wrote in the figures 415, 5, 1, 0, 403 and also the words five, one, four and three? A This here 415 is my handwriting, that figure there is my handwriting, 415.

Q What about these figures, 5, 1, 0 and 403? A That ain't my handwriting.

Q In whose handwriting is that? A That is Veniero's handwriting.

Q In whose handwriting are the names Taylor, Chapman, Yarrow, Archibald and McGlennon? A Well, Taylor, Chapman, Yarrow and Archibald is Veniero's handwriting; Cornelius A. McGlennon, that I couldn't say.

Q You have been referring to S. 1. I ask you now to refer to S. 2, and tell me in whose handwriting you find

that statement? A Well, that I don't know, whose handwriting is that.

Q Do you know in whose handwriting the figures are? A The 415 is my handwriting, 415 up here is my handwriting; 46 in the Democratic Party is my handwriting; 46 in the Democratic ballot cast and Democratic Primary Poll Book, 46, that is my handwriting.

Q I show you Republican Party Poll Book for that Primary Election and ask you if you signed the certificate on the last sheet? A Yes.

Q That certificate seems to set out that the total number of names registered was 415. Did you count the number of names on the registry book? A I do not remember it, if I counted them.

Cross examination by Mr. Heisley.

Q Mr. Caputo, when you signed your name to the back of the Poll Book, certifying that there were 415 ballots cast—Republican—that there were 415 registered persons at the Republican Primary, there was really, I think, only 409, isn't that right? A That I don't know.

Q Well, at any rate, when you signed, certifying there were 415, did you do that honestly, in the honest belief that there were 415? A Yes, sir.

Q Did you have any motive to misrepresent it?

Mr. Harrison. I object to that.

Mr. Heisley. I withdraw it.

Q Did you have anything brought to your attention at that time that the total number of registered persons should be 409 and not 415? A No; not to my knowledge.

Q Nobody suggested it to you? A No, sir; it may have been a clerical error.

Q Well, as a matter of fact, there were a good many clerical errors during that election?

Mr. Harrison. Objected to, as calling for a conclusion.

Mr. Heisley. No; that is a fact.

Mr. Harrison. I think we may take testimony as to what those errors were, if they are material or relevant.

Mr. Heisley. Well, I do not press it; I do not care.

Q In whose handwriting are these words 415, and followed by the figure 415? A Let us see it.

Q (Counsel hands paper to witness.) A I do not know whose handwriting it is.

Q It is yours? A No.

Q Did you see anybody write this? A Well, I don't remember.

Q Well, you did not see Caprio write it, did you? A No.

Q And you did not see Ruglio write it, did you? A No; I don't remember.

Q Did you see either Caprio or Ruglio write anything or make any marks other than the writing of their signatures on the tally sheet and on the return of the statements? A The only thing we asked them to do was to sign their names on the return of the tally sheet and the statement that evening.

Q And is that all they did, as far as you know? A As far as I know that is all they did do.

Q Now, you have been good enough to write the name Herbert W. Taylor in lead pencil for me on this sheet of legal cap? A Yes, sir.

Q You did write that, did you? A Yes.

Paper marked Exhibit D. 2 for identification.

Q Can you explain, in any way, of your own knowledge, why it was that this certificate is made on the back of the Poll Book certifying to 415 names, where that same

Poll Book shows but 409 registered persons; can you explain it in any way? A No, sir; I cannot explain it.

Q As far as you know was it done accidentally, or ignorantly, or was it done purposely by someone, as far as you know?

Mr. Harrison. I object; first, on the ground it is not proper cross examination; second, it is immaterial, and, third, calls for the conclusion of the witness.

The Court. Suppose he said it was done purposely. We have nothing to know what he bases it on.

Mr. Heisley. Well, then, I would ask him if he knew. I want to show that this miscount was the result of ignorance or neglect.

The Court. I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Can you tell us, of your own knowledge, why the certificate signed by the Election Board on the back of the Poll Book certifies to 415 registered persons, whereas that same registry book accounts for only 409?

The Court. No, wait a minute; is that so? No; the return itself says there were 410 cast. Is there any evidence that the book shows only 409 names?

Mr. Harrison. That is the point I was about to raise, your Honor. If Judge Heisley will stipulate that, as a matter of fact, it does contain that number of names, I have no objection. I am informed by Mr. Hargan and Doctor Rodemann that the

count which they made contains that number of names.

The Court. 409?

Mr. Harrison. 409.

The Court. I know, but the return shows 403 for Archibald, 5 for Taylor, and 1 for Chapman, and 1 rejected.

Mr. Harrison. That discrepancy will be later explained, your Honor.

The Court. Is it agreed that contains 409?

Mr. Heisley. I have not counted it up.

The Court. Then it is admitted that the Republican Primary Book contained 409 names, whereas the certificate shows it contained 415.

Mr. Heisley. Yes, sir.

The Court. Is that right?

Mr. Heisley. Yes, sir.

Q (Question read.) A We may have done that by mistake.

By Mr. Harrison.

Q Do you know? A No; I don't know.

Cross examination continued by Mr. Heisley.

Q It was not done purposely on your part, was it? A No, sir.

Q And as far as you know was it done purposely on the part of any one else?

Mr. Harrison. Objected to, as calling for a deduction or conclusion on the part of any other person.

The Court. Sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Joseph Caputo, cross.

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

Judge.

Q Was there any dispute or discussion as to whether there was 415, or was the 415 written in and you all signed? A There was no dispute at all.

Q No dispute at all? A No, sir.

Q Mr. Veniero wrote the 415? A That I don't know.

Q Was the words four hundred and fifteen filled in when you signed? A Yes.

Q And when you signed it you knew that you were certifying there were 415 persons registered, is that right? A Yes, sir.

Q You did that honestly, you say? A Yes, sir.

Q Now, you have said that while Mr. Hargan was there you were required to compare your ballots, is that right? A Yes.

Q Had some mistakes occurred while he was there? A No, sir.

Q Well, why did he require you to compare your tally if there were no mistakes? A That I do not know; I do not know why he requested the clerks to do that.

Q You say he went back to the ballots, what do you mean, you unstrung the ballots? A No; he just told us to tally up the two tally sheets between us, to see if they were O. K.

Q You say you went back and checked up the ballots? A Not while he was there; we checked up the count we had on the tally sheet.

Q And you didn't go back and actually take the ballots off the string and look at them? A No, sir.

Q You simply— A Compared the two tally sheets.

Q You did this between times? A Yes, sir.

Q Not while Mr. Hargan was there? A No, sir.

Q But you did afterwards? A Yes.

Q And did you have some difference between your count and the count of Veniero? A Yes.

Q And how did you satisfy him he was wrong, or how would you satisfy him that he was wrong or how would he satisfy you you were wrong? A Well, if I had three lines on one candidate and he had two, we would satisfy between ourselves; he would put one line down.

Q What do you say? A He would put that one line on that candidate that had one less than on my tally sheet.

Q You would say—if you had one more there than he had, you would stick out for it, and without any other proof he would put down another mark? A Yes.

Q And would you reciprocate at times and do the same thing? A Yes.

Q Well, how would you know which was right or which was wrong, or did you do that as a matter of making your count harmonize? A We just done that to make our counts even in both tally sheets.

Q Then there was no going back to the ballots at all, was there? A No.

Q How many times did that occur, do you suppose, during that evening? A That I don't remember.

Q Fifteen or twenty? A Well, I couldn't say.

Q It might have been that? A I couldn't say; quite a few times.

Q Wasn't there a big crowd of people there that night while the counting was going on? A Yes.

Q Had the Board of County Election sent two persons down there to assist you gentlemen in conducting the Primary? A Yes.

Q It was the first time that ladies had a chance to vote? A Yes.

Q There was a very big vote, wasn't there? A Yes.

Q And who was those two persons the County Board appointed to assist you? A James Cappiello and Mrs. Margaret Brandalone.

Q And they were there all the time, weren't they? A Yes.

Q And while the counting was going on, were they there? A Yes.

Q And where did they stand as regards Mr. Caprio and Mr. Ruglio? A Well, right behind them.

Q Keeping watch on them? A Yes.

Q Were they there all the time? A Yes.

Q You mean to say, Mr. Caputo, that during the entire counting and announcing of the votes by Caprio and Ruglio this man and this lady appointed by the Board were standing watching them, is that right? A Yes.

Q Isn't it also true that several of the candidates had challengers or watchers there who were keeping track of Ruglio or Caprio as they pulled the ballots from the boxes, and read them? A Yes.

Q Were they there all the time? A Well, most of the evening while the count was going on.

Q Do you know a single time when this counting was going on when there were not some people watching Caprio and Ruglio read the ballots? A Yes.

Q Was there somebody always watching? A Yes, sir.

Q Now, you have said that night the reports of the election stating the result of the election, that you wrote in the word four hundred and fifteen, that there were four hundred and fifteen votes cast? A Yes, sir.

The Court. Yes; he said that.

Q Yes; you said that on this— A Yes.

Q And when you wrote that in did you believe that you were writing the truth? A Yes, sir.

Q You are not indicted, are you? A No, sir.

Q And how did you come to write four hundred and fifteen; did you do it as a part of your duty; were you told to do it, or how did you do it? A As a part of my duty as a clerk of the Election Board.

Joseph Caputo, cross.

Q Nobody told you to do it? A No.

Q Caprio did not tell you to do it? A No.

Q Mr. Ruglio did not tell you? A No, sir.

Q You say that these names, Herbert W. Taylor, and Chapman, Yarrow and Archibald, are not in your handwriting on Exhibit 2; they are not in your handwriting? A No, sir.

Q What do you say about those same names on Exhibit 1? A No, sir; they are not in my handwriting.

Q Are you confident of that? A Well, I ain't sure.

Q Won't you look where you have written Herbert W. Taylor on Exhibit 2 for identification and then compare it with Herbert W. Taylor on Exhibits 1 and 2 and tell me if you don't think you wrote Herbert W. Taylor also on these Exhibits 1 and 2? A No, sir.

Q (*By the Court.*) When this Poll Book was presented to you for signature, were there any names on it before yours? A That I do not know.

Q (*By the Court.*) Had anyone signed before you signed? A I don't remember.

Q (*By the Court.*) Do you remember when you signed, what part of the day? A Why, I signed in the evening—no, I signed in the morning, the next morning.

Q (*By the Court.*) What do you mean, after election? A When we counted the votes; after we had counted the votes.

By the Court.

Q And you did not count up the number of names in the Poll Book, did you, to see whether there were 415? A That I don't remember, Judge.

By the Court.

Q Don't you remember whether or not you counted the number you registered to see whether the certificate you signed was correct? A Well, I don't remember whether I done it or the other clerk.

Joseph Caputo, cross.

By the Court.

Q On what did you rely in making the certification that there were 415 registered? A On what did I rely?

By the Court.

Q Yes. Did you rely upon a counting of the number that had registered or did you rely upon a statement made by somebody else? A No; I relied on the count.

By the Court.

Q On the count by whom? A Well, that I don't know.

By the Court.

Q You didn't count them? A I don't remember if I counted them.

By the Court.

Q Did someone tell you there were 415 and that they had counted them? A Well, that I don't remember.

By the Court.

Q You do not remember what it was that you based your signing of that certificate on, is that so? A Yes, sir.

By the Court.

Q Now, you said that in checking up the votes cast you had three votes and Veniero had two votes on his ballot sheet, that Veniero would automatically add 1 to his in order to make it agree with your sheet, is that so? A Yes.

By the Court.

Q Without knowing whether or not you were right or he was right? A Well, that I don't remember.

Joseph Caputo, re-direct.

By the Court.

Q You mean to say that without knowing whether you were right or whether Veniero was right, Veniero would take your count as being accurate and add one to it? A Yes, sir.

By the Court.

Q Didn't you go back to look at the numbers that had been marked on the back of the ballot that had been put on the string? A Yes, sir.

By the Court.

Q What did you go back to look at the number of the ballot that had been put on the string for? A To see if I was right or he was right.

By the Court.

Q Well, then, you did not simply rely upon one another's count; you checked up with the ballots? A We checked up with the ballots.

By the Court.

Q Well, suppose you had in your count we will say ten, and he had nine, and the lowest number on the back of the ballot that had been marked there by Ruglio was ten, agreeing with your count, what would Veniero do? A Well, he would put one down and put one dash down.

By the Court.

Q Well, suppose on the back of this ballot the number was nine, showing Veniero had nine and you had ten, what would you do? A Well, I would erase it off.

Re-direct examination by Mr. Harrison.

Q Who told you what papers to sign and when to sign them?

Mr. Heisley. I object. There is no evidence he was told by anybody. It is his own witness.

Mr. Harrison. Well, I will withdraw the question.

Q When did you sign the two statements, S. 1 and S. 2? A Why, in the morning when we got done counting—

Q That is, in the morning following the election? A Yes.

Q And when did you sign the certificate in the back of the Poll Book? A In the morning.

Q And do you remember in what order you signed? A Well, I don't remember in what order.

Q Do you remember whether anybody told you to sign or not? A No; I do not remember.

Q Who, if you do remember, put the numbers on the back of the ballots after they were counted? A After they were read?

Q (*By the Court.*) After they were read, yes. A Ruglio.

Q Yes, quite right; after they were read? A Ruglio.

Q I call your attention to four ballots with the numbers 412, 413, 414 and 415, taken from Exhibit S. 1 and ask you who put those numbers on, if you know? A I don't know.

Q Do you remember the last number placed upon the ballots cast in that Board by Ruglio? A No, sir.

Q Don't you know that the number 415, placed upon the certificate in the back of the Poll Book and in your statement of returns, is the same as the number of ballots actually counted? A I don't know.

Q Now, you spoke about Miss Brandalone and Cappiello being there as assistants; were they watching all the time? A Yes; most of the time.

Q Most of the time? A Yes.

Q Who counted the Democratic ballots? A Why, Cappiello and Brandalone.

Q (*By the Court.*) These two who were supposed to have been watching? A They were assistants.

Q Who counted the Democratic ballots? A Brandalone and Cappiello.

Q That is, Miss Brandalone and Mr. Cappiello? A Yes.

Q Do you know how long it took them to count those ballots? A I don't remember how long; there was only a little over forty ballots.

Q While they were counting these ballots were they watching Ruglio and Caprio? A Not while they were counting those ballots.

Q They assisted also in the making up of the returns, didn't they? A Well, I don't remember.

Q You don't remember that? A No.

Q Now, the watchers, these challengers that you referred to, were they inside of the railed enclosure? A Why, generally alongside of the Judge and the inspector.

Q No, please answer the question. Were they inside of the railed enclosure? A Not inside of the rail.

Q Now, where was Caprio seated? A Caprio was on this side.

Q Well, by this side you mean inside of the railed enclosure near the boxes, don't you? A Yes, sir.

Q And Ruglio stood alongside of him? A Yes.

Q And Caprio and Ruglio were inside of the enclosure, were they not? A Yes.

Q They were inside of the tables, weren't they? A Yes, sir.

Q And the crowd was outside, were they? A Yes, sir.

Q So that the watching that you speak of merely means the looking by these outsiders at Caprio and Ruglio while they were going through the counting? A Yes.

Joseph Caputo, re-direct.

Mr. Heisley. That is very leading.

Mr. Harrison. You brought out these very things and I am trying to confine myself to your cross examination.

Mr. Heisley. Well, I object to the putting of words into the witness' mouth.

Q Now, how far away from Ruglio and Caprio were these challengers and watchers? A Well, about a foot and a half or two——about a foot and a half or two.

By the Court.

Q Can he show us through the use of the jury box there as a railed enclosure?

By Mr. Harrison.

Q May I ask you to indicate by reference to some specific object in this Court room your conception of a foot and a half? A Yes; I can tell you how things were.

Q All right; we will take it. A Ruglio and Caprio was on this side of the table.

Mr. Heisley. And the witness stands between the large desk in the Court room and the Judge's bench and so faces the Court room.

A Ruglio and Caprio was on this side of the table; I and Veniero was on that side of the table.

Mr. Harrison. Witness indicating opposite side of the table.

A Tallying while he would read the ballots, and this here spot right around them there were challengers and candidates.

Mr. Heisley. Around whom?

The Witness. Around Caprio and Ruglio while they were counting.

Joseph Caputo, re-cross.

Q What were the challengers and others doing? A Why, they were watching, seeing if he counted the votes right.

Q And were they inside of the railed enclosure? A Well, there wasn't any rail there; there was just an ordinary table there.

Q Where was the wall with reference to Caprio and Ruglio? A Well, in back of them.

Q How near to the wall were Caprio and Ruglio? A Well, I should judge—

Q Well, you estimate the distance between Caprio and the watchers as a foot and a half; now, what was the distance between where Ruglio and Caprio stood to the wall? A I should judge three or four feet.

Q Weren't they almost directly against the wall or within a foot of it? A No, sir.

Q You say they were three feet? A Yes.

Q And you say all these watchers and workers were within that three feet behind Caprio; is that your statement? A Yes, sir. I don't mean ordinary citizens; I mean challengers; challengers and candidates.

Re-cross examination by Mr. Heisley.

Q Mr. Caputo, his Honor, Judge Stickel, asked you some questions about checking back. He asked you if when there was a dispute between you and Veniero as to the count, how you had marked them, that you would go back and look at the ballots and numbers; your tally sheet showed no numbers? A No.

Q Well, how did you prove to Veniero, for instance, that he was wrong in his count on his tally sheet by looking at the ballots, simply because there was a number on it? A Well, if there were ballot ten there and there were nine credits—

Q What? A If there were ten ballots counted and I had ten credits for one candidate and he had nine—

Q Oh, you would count the whole ten? Well, suppose you had a dispute when you got up around two hundred; you do not mean to say you would count the whole two hundred again? A No.

Q How would you convince him then he was wrong? A Well, on the figure of the last ballot.

Q What do you mean? A The figure of the last ballot the inspector marked.

Q Well, as a matter of fact, you could not prove it; he would just have to take your word for it; you could not prove it; kind of a love feast you two men had there?

Mr. Harrison. I object to this characterization.

Q You and Mr. Veniero kept the tally sheets, didn't you? A Yes.

Q And when the votes were being cast did Caprio and Ruglio stand there by the election ballot box? A Yes.

Q And they would announce that somebody, mentioning their names, offered a vote, and you would look at your register book to see if the person was entitled to vote, is that right? A Yes.

Q Did you hear Mr. Caprio or Mr. Ruglio call off a single name of a proposed voter that was not according to your registry book?

Mr. Harrison. If the Court please, I think this is hardly proper cross examination and I do not know if there has been any testimony as to the details or discrepancy in the actual casting of the ballots. I fail to see the materiality of this examination which the Judge is now starting.

Mr. Heisley. I want to see if I can account for why there were more votes cast than the registry book shows. There must have come a time when the excess must have been noticeable to somebody. I want to see when that time came and shed light on it.

Mr. Harrison. That is a matter of defense, I take it.

The Court. This is not exactly cross examination.

Mr. Heisley. No; it is within your Honor's discretion. We will not have to bring this man back.

The Court. Well, we will let him stay here.

Mr. Heisley. All right.

Mr. Harrison. I have no objection, if he wishes from this time on, having finished the cross examination, if he desires to adduce testimony from him—

Mr. Heisley. Well, let me ask this one question.

Q Can you point to a single figure, a single word on either the tally sheets or the statements of the results of that election that were made by Caprio or Veniero, excepting their own signatures——Caprio and Ruglio, excepting their own signatures? (Question read.) Do you understand the question? A Yes.

Q Do you point to a single word, I say, that was made by either one, excepting their signing? A The only thing I know their signing their names to the tally sheets and the books.

Q And all of the writing and figures on the sheets and on the statement of the result, with the exception of the names of Caprio and Ruglio, were in the handwriting of either yourself or Mr. Veniero, is that right? A Yes, sir.

Q Who kept the Poll Book? A I don't remember; it is quite a long time.

Q How long have you been an election officer? A Four years.

Q Well, don't you know that at the time of the casting of the votes that the clerks had the Poll Books generally before them? A Yes.

Joseph Caputo, re-direct.

Q Didn't you have the Poll Book that day? A Well, I and the other clerk.

Q And if there was any dispute whether a person had a right to vote, you would refer to the Poll Book and determine whether he had registered, is that right? A Yes.

Q Now, you say you signed your name the next morning; what time did you actually get through counting the ballots after election was over? A Well, 3:30 or 4 o'clock.

Re-direct examination by Mr. Harrison.

Q You said that you would refer to the Poll Book when the question of a party's voting was brought up; what do you mean by that? A I refer to the signatures copy book.

Q That is, you refer to what was know as the registry book? A That is what I meant.

Q And the names were placed in the Poll Book after the votes were cast? A Give me that plainly.

Q In the conduct of the election did you not place the names of the voters in the Poll Book as they cast their votes? A The Poll Book—we entered them in the party's designation book. First we look for them in the registry list; that is the list we make up on registration day. Now, if a man is in that book, why, he is carried over from the previous—

Q We don't care about carrying over of names, but what we are asking when you write in the Primary Poll Book the names of the voters— A In them books you mean?

Q You understand what I mean.

Mr. Heisley. His own witness.

Q I know, but I am trying to hurry along. Do you mean this here? The book which you now hold in your hand, on the outside, "Republican Party Primary Poll

Book, Election September 28, 1920," when were the names written in there? A When the voter would come in and vote.

Re-cross examination by Mr. Heisley.

Q Mr. Caputo, where did it show on this book that there were 409 ballots cast, for instance, this says, ballot number cast by Constantion 331; now, where does it show the difference between 331 and 415; there were 415 votes cast? A What do you mean, give it to me plainer.

Q Well, there were 415—

The Court. They are in alphabetical order.

Q I see your point. Now, in whose handwriting is on the first page of this Poll Book, Purilla, Pauline, ballot 413; whose handwriting is that? A That I don't know.

Q Is it yours? A I don't know if it is mine; I ain't sure if it is mine.

Q 413, De Cicco, Rosso, 414 Tortorello Domenick? A I don't know.

Q Well, won't you be good enough to write those two names for me before I let you go, and then I won't have to bring you back. Now, will you put the numbers down opposite Pauline, put 413, and out to the right put the figure 19, that street number. A 19?

Q Yes; and under Domenick put 409 and the street number out to the right, 23.

DOCTOR WATSON RODEMANN, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You are a clerk of the County Election Board of this County? A Yes, sir.

Q And were you present at a recount of the ballots cast at the last Primary Election of 1920, of the third

district of the first ward, of the City of Newark? A I was.

Q When was that recount held? A In October, 1920.

Q And briefly tell us the method that was followed in making the recount? A Upon receipt of the order of recount served upon me by the contestants in this case, it was our duty to subpoena the election officers at that time, and subpoena ballot boxes and the keys, which was done. The recount was conducted in the Court House, and—the day we reached the third district of the first ward ballot boxes the box was opened in our presence by the four members of the District Board and the ballots were taken out; I took the ballots out of the ballot box and placed them on the table in front of the members of the County Board of Election, and arranged them for the count to be taken, and from that point they were called by the chairman of the County Board of Election and I tallied them as they were called.

Q Was there anybody else who tallied them? A There was someone tallying on the opposite side of the table; just who it was I don't know.

Q A man by the name of McDowell; I ask Mr. McDowell to stand up and ask the witness if he was there tallying? A Yes; I believe he was there tallying at that time.

Q What did the other members of the County Board do? A It is the custom for the ballots to be opened by the chairman of the Board; the secretary generally sits alongside of him and watches the count as it is called by the chairman; the ballots were then passed down the table, and, if there were counsel for the contestant and contestee there, they examined these ballots for apparent defects, the other members of the Board scrutinizing the ballots until they reached the other end of the table, when they are folded and placed on the string and numbered.

Q Who was the other member of the Board? A Mr. Frank J. Duggunon.

Q Did he actually take out the ballots and read them? A He did not take them out; the ballots were placed in front of him by myself in batches of 25.

Q That is, he read them off, Mr. McDowell made the tally and you also made a tally? A Yes.

Q Then you prepared a schedule showing the results of that tally with reference to the votes cast for candidates for members of the House of Representatives in the district referred to? A I have the original tally sheet made at the time on the votes.

Q And does that correctly show the results of that tally? A It does.

Mr. Harrison. I ask you to produce it. I offer it in evidence.

Cross examination by Mr. Heisley.

Q In whose handwriting is that? A That is my handwriting, entirely.

Q And you got this from where, these figures? A Those figures are taken down on a sheet as the ballots are called.

Q That is to say, did you not pass upon the validity of the ballots, you simply kept tally of the number of ballots for each candidate as some person read them off to you? A Absolutely.

Q Just exactly like the election officers are supposed to do when they count up the votes?

Mr. Heisley. Well, if the doctor knows that is right, I do not object to it, excepting, of course, if your Honor please—I do not mean by consenting to anything that I waive my objection I made this morning about offering the ballot boxes in evidence. I want that objection to go to all these other things.

The Court. What do you mean?

Mr. Heisley. I mean, for instance, like these papers, and when these tally sheets are offered in evidence.

The Court. You specifically object to this on the same grounds as you stated this morning as to the ballot boxes?

Mr. Heisley. Yes, sir.

The Court. Overruled.

Defendant's counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

The Court. Well, then, when the question comes up you say, "Same objection," and I will say, "Same ruling."

Mr. Heisley. Yes, sir.

(Paper marked Exhibit S. 5.)

Re-direct examination by Mr. Harrison.

Q What does that schedule show? A This schedule shows the original count in that district, third district, first ward, in the City of Newark, at the Election held on September 28, 1920, the Primary Election for the 8th Congressional District. It shows in the upper left-hand corner, figures 409, which represent the number of names that County Board found in the Republican Primary Poll Book, which was subpoenaed from the City Clerk at the same time that the boxes were subpoenaed. The names in the books are actually counted by the members of the County Board of Election, and that is where I obtained these figures from, so that we knew when 409 ballots had been reached that we cannot go any further. That is the

object of obtaining the number of names in this book, which was done in this particular case, notwithstanding the fact that the statement which I have here, which I obtained from the County Clerk's office, shows that there were four hundred and fifteen, which is the statement in the back of the book, shows there were four hundred and fifteen names of persons voting this election, and the statement filed by the District Board was four hundred and fifteen. The actual number of names in the book showed four hundred and nine. That limits us to the number of ballots we can count in that recount.

Q How many ballots did you find in the boxes? A I cannot say how many ballots were in this box, except we counted up to 409; just how many were left there I have no recollection of at this time.

Q Can you from the ballots and ballot boxes offered in evidence in this case tell us? A I might from an examination of the ballots.

Q Well, right at this point, I ask you to do so, showing witness a package of four ballots numbered 412 to 415, inclusive? A I see now, this is a statement which I made on this group of ballots at that time, my signature on it, dated October 14, 1920, a statement that these four ballots in excess of the number of names on the republican Primary Poll Book; they were the four last ballots in the box after we reached 409. Of course, we do this each time, because we cannot count more names than there are in the Poll Book.

Re-cross examination by Mr. Heisley.

Q Do you mean to say the registry showed 409 persons were entitled to vote, but as a matter of fact, you counted 409 and found that four more votes had been cast than 409, is that right? A That is not quite correct, because you said 409 names in the registry book. The book we had before us showed only the ballots cast, the people eligible to vote in that election does not appear in

this Poll Book. We count here how many Republicans were entitled to register.

Q You found in the Poll Book, you found that it totalled with these four, four hundred and thirteen had been cast? A Four hundred and thirteen ballots were in the box.

The Court. Well, according to the book, which is supposed to show the number certified to vote, there were 409.

Mr. Heisley. Yes, sir.

Q As I understand it there were four more votes? A Yes, sir.

Re-direct examination by Mr. Harrison.

Q Did that tally of yours include or show the number of blank ballots found in the box? A Yes; this tally does here.

Q How many did you find? A We found thirty-one blank ballots of the 409 that we counted.

Q Well, were there any ballots which were entirely blank? A Of course, that is impossible to say at this time, except we have a record here of one blank ballot rejected by the County Board of Election. When we speak of blank ballots, thirty-one ballots, I mean ballots which contained no votes for Congressmen in that particular district, or which may have contained two votes for two Congressmen, or two or more than two, so that they could not be counted.

Q Well, I confuse you by my use of that term. What further does your schedule show as to the number of votes cast for the various candidates, number of votes referred and number of votes rejected? A Going back to the original count, it showed the total number of votes that were recorded on the statement of results filed with the County Clerk, my record shows that there were five for Taylor, one for Chapman, nothing for Yarrow and 403

for Archibald. After the County Board finished the recount the record was Taylor had received 6 votes, Chapman 3, Yarrow 4, and Archibald 344. There were 31 blank ballots. One ballot, which happened to be Yarrow's was referred to the Chief Justice. These were rejected during this count, 3 Taylor votes, 2 Yarrow, 14 Archibald and 1 blank, the entire total making 409 ballots, which was the number of names in the Poll Book and the number of ballots the County Board counted.

Q Well, with the rejected Archibald ballots how many votes would he have had? A With the rejected ballots he would have had 344 and 14, 358 ballots.

Re-cross examination by Mr. Heisley.

Q Doctor, you say the Board considered 31 of them as blank ballots? A Yes.

Q And I understand from what you have said that in reaching a determination as to whether a ballot was blank you considered the marking on the ballot which may render it void, isn't that right? A No; not in that case.

Q See if I get you right. By blank ballots you do not literally mean a blank ballot with nothing written on it at all? A No; I mean blank only so far as Congressmen in that district is concerned.

Q And the reason it is void for Congressmen would be because of some defect in the votes for the Congressmen, for instance, voting for two Congressmen or two candidates, or a marking of the Congressional candidates? A No; this would be limited to two things. The vast bulk would be because there were no vote on that ballot for Congressmen; there may have been two or three occasions where there were ballots which had two or more votes for Congressmen; we would call that a blank, too, but they are a very small percentage. This 31 represents a large number of ballots which had blank marks for Congressmen.

Dr. Watson Rodemann, re-cross.

Q But there were others who had been voted for, or voted for improperly, which made it a blank vote? A Improperly, where a person votes for more than one candidate where there are offices to be filled, but I have no recollection whether the 31 ballots would be of that type or not. My general impression is that they were absolutely blank.

Q You found that Archibald was really entitled, according to your count, to 358? A In other words, from the ballots taken from this box, the number of ballots with Archibald's name on it, with some sort of a cross, was two, the number of 358, of which the County Board considered 344 good and 14 bad.

Q You allowed him then 344 votes? A Counted?

Q Yes. A And fourteen rejected.

Q Now, as to those 14 rejected, which were rejected simply because you did not, in the exercise of your office —thought that they were not entitled to be counted, isn't that right? A Well, there is no doubt about that.

Q And there may have been varying circumstances which made you reach that conclusion, is that right? A Yes, sir.

Q Doctor, isn't it so that in determining whether a return of votes is correct, whether the counting of the votes is correct, you consider varying circumstances and conditions and simply exercise your own judgment in saying whether or not, as you understand the law and interpret the ballot, that that ballot should be counted? A Yes, they interpret it in accordance with the law regarding void ballots. It is not a mere matter of opinion on the part of the Board.

Q And at times there is an honest disagreement among the members whether a vote should be counted as recorded? A It may be occasionally.

Q Well, it does occur? A Yes.

Q You gentlemen are no more fallible than the Judges of other tribunals? A No, not at all.

Q (*By the Court.*) Of course, all this applies to the 14 rejected ballots and does not apply to the 31 blank ballots? A No, sir.

Q You said that these ballot boxes were opened to the Board by the Registry Board, is that right? A Yes, sir.

Q They each had a key? A I cannot say that.

Q But under the law— A Are you speaking of the recount, or the day the primary was held?

Q No, I am speaking of the day of the recount, when that Board was before you. I understood you to say the Board brought these boxes with their keys? A No, the Board did not bring the boxes. The boxes were subpoenaed from the City Clerk, he brought the boxes.

Q How did you get the boxes? A The keys were subpoenaed from the County Clerk. The keys are in the hands of the County Clerk and the boxes in the hands of the City Clerk.

Q Was there any recount of the Assembly? A No,

Q Well, there has been since? A No.

Q Was there any recount of the Freeholders? A No.

Q Well, was there a recount of any office in that election? A Not in that primary election according to my recollection.

CHARLES E. McDOWELL, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You attended a recount sometime in October, 1920? A I did.

Q That was before the Essex County Board of Elections? A Yes, sir.

Q In what capacity? A As an expert for Mr. Yarrow, a contestant, for the Congressional nomination.

Q Did you keep a tally of the ballots at that time? A I did.

Charles E. McDowell, cross.

Q Briefly tell us what the procedure was at that recount?

The Court. Well, do we have to go over that? Doctor Rodemann testified to that.

Q Well, did you make a schedule setting forth the results of that recount? A I did.

Q Have you it in such shape it states what the result was? A Based on a report made to Mr. Yarrow. This is my official report to Mr. Yarrow at the conclusion of the recount which was called for.

Q That contains the result of your tally and findings at that recount? A Yes, sir.

Q Now, referring to the—

Mr. Heisley. I do not see how that is in anyway binding on the defendant.

The Court. Excepting he was a tally clerk there at the recount and he is refreshing his recollection from that.

Mr. Heisley. Well, if he is using it for refreshing his recollection.

Q What was the result as far as the third district of the first ward was concerned? A The registry showing 409 was tallied with 5 for Taylor, 1 for Chapman, nothing for Yarrow and 403 for Archibald; at the conclusion of the tally, Taylor 6, Chapman 3, Yarrow 4, Archibald 344; three rejections for Taylor, two for Yarrow and I did not take the referred ballot, or the blank ballots, in my calculation, which would prove it,—the 35 would bring it within 1 of Doctor Rodemann's evidence just concluded.

Cross examination by Mr. Heisley.

Q Your man whom you represented got 2 votes out of 409, is that right? A Got 4 votes.

Q Four votes out of 409? A Mr. Yarrow, yes.

Q He is not very popular? A Yarrow was counted out.

The Court. Judge Heisley's remark and this remark will be stricken from the record.

FRANK J. DUGGUNON, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You are President of the Essex County Board of Elections, or Chairman? A I was Chairman at that time.

Q Yes, in October, 1920? A October, 1920.

Q Do you recall being at a recount of the votes cast in the third district of the first ward in the City of Newark for members of the House of Representatives? A Yes, sir.

Q Just what did you do in connection with the recount? A Well, in connection with the recount there were four members of the Board at different times relieved one another in calling off the votes and examining ballots.

Q But who called off the votes for the third district of the first ward? A Why, I don't remember whether I called them off, or whether some other member called them off; there was one of the four of us would relieve one another; I cannot tell now, whether I called off, the voters of the third district or not. I examined all the ballots of the district.

Q Whether you called them off or somebody else called them off, you heard them read, did you not? A Heard them read.

Q And then you examined each ballot, did you not? A Examined each ballot as it was read off.

Q For what purpose? A Why, for totaling the votes of the candidates and examined the markings.

Q And also see if the ballot had been correctly read? A And correctly read.

Q And Doctor Rodemann kept the tally? A Doctor Rodemann kept the tally. The man calling off, the member of the Board calling off, the member sitting alongside

of him always looked that he called the right number off, and when he would get through calling it off, the man calling it off would examine the ballot and pass it along.

Q And each member would pass it to his next member? A He would pass it along, but as the name of the ballot was called off two members looked at the ballot, a Democratic and Republican member of the Board.

Cross examination by Mr. Heisley.

Q How long were you chairman of the counting of these ballots? A How long a time it took.

The Court. Which ballots, of this particular district, or of the whole Congressional district?

Q I mean the votes for Congress in the third district of the first ward? A Why, I don't know how long it took to count them.

Q Well, you did it, of course, deliberately? A Oh, yes.

Q There was no rush or excitement about it? A No.

Q You were not in continuous session from six o'clock one morning until three or four the next morning? A No.

Q The count went on under entirely different circumstances than surrounds the counting of votes at an election?

Mr. Harrison. I think that clearly calls for a comparison.

The Court. Sustained.

Defendants counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Now, you believe your count is right, don't you? A Yes.

Q I say you believe it, but you are not absolutely sure it was right; you cannot be, can you? A Why, I don't know what you mean, absolutely.

Q I mean to say, considering ballots and counting them up, isn't there often a variance between intelligent and honest persons in making such counting, and may there not be such a mistake in your count, notwithstanding you exercised the very best of your judgment? A No mistake is possible; we go over the ballots.

Q You think, then, the Board of County Elections are not subject to the imperfections of mankind? A I thought you meant the general result on the counting of the votes.

Q I mean to say in the counting of these four hundred and some-odd votes while you believe your count is right and literally true, you cannot possibly be positive of it? A Yes.

Q Cannot some other person, equally an intelligent as you are, if he can be found, go over this count and not agree with you? A No.

Q You think when you figure it up and clear it that is the end of the whole business?

The Court. No, he does not say that. He says as far as he is concerned he is sure it is an accurate count.

Mr. Heisley. Well, that is all.

JAMES P. DALLEY, sworn in behalf of the State.

Mr. Heisley. I was just saying we would not dispute these figures at all.

Mr. Harrison. Well, if that will be a part of the record, if there is no possibility of dispute, I can do away with all these witnesses.

Mr. Heisley. As far as this count is correct, I am not certain; because I am not infallible.

MARGARET BRANDALONE, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You were one of the assistants to the local Board of Election for the third district of the first ward in this city on September 28th, 1920? A I was.

Q And were you there during the procedure of counting? A Yes, I was.

Q And what did you do during that time, Miss Brandalone? A During the time of the counting?

Q Yes. A Well, I was standing alongside of the Judge. I was counting the Democratic ballots when Lieutenant Hargan comes in and he told me I should not have done what I did, but I should stand next to the Judge and see that he counted the votes correct, so I let everything go and done just as he told me to do.

Q And how many votes in Democratic Primary had you counted when Lieutenant Hargan called you? A I was just near the end.

Q Do you know what time that was? A Well, it was not very late; it was just about half an hour after we had started.

Q How long did it take to count all the ballots cast at that primary election? A Which ballots?

Q Both Republican and Democratic, to complete the whole count? A Well, I could not just say.

Q Did you get through at ten o'clock, or go on until two or three o'clock? A Well, it was after midnight.

Q Well, after midnight, was it? A Yes.

Q Didn't you stop and go home before the completion of the count? A No, I did not.

Q Didn't you leave the election quarters before half-past eleven that night? A No, sir.

Margaret Brandalone, cross.

Q You say— A That was election night.

Q Well, I am now referring to the primary election held on September 28th, 1920? A No, sir; I did not; it was near three o'clock when I went home.

Q Had you ever done any work for an election—in connection with election matters before this? A No, sir.

Q Where did Caprio and Ruglio stand with reference to the wall? A Well, I should judge as far as this here wall and where I am sitting.

Q Witness indicates a distance of approximately four feet. A A little further back, I guess, about from here, I should judge; I do not really remember exactly.

Q Witness indicates a distance of approximately three feet. A And there was a space on the side, too.

Q And did you see any challengers or party workers there that night? A Yes, sir.

Q Where were they? A Standing right alongside of the ballot box.

Q And how many were there? A Oh, there were a good many of them.

Q Well, three, five, fifty? A More than that.

Q More than fifty? A Oh, I could not say more than fifty, but there were a good many of them.

Q Well, have you any idea as to how many? A No, I haven't; I didn't count them.

Q A large number of them? A Yes.

Q And they all stood there during the whole period, right alongside of the ballot boxes? A Yes, sir.

Cross examination by Mr. Heisley.

Q Miss Brandalone, do I understand you to say that you were watching Caprio and Ruglio while they counted every one of the Republican ballots? A No, not every one. I was just ending counting the Democratic ballots when Lieutenant Hargan comes in and he told me I should stand alongside—

Q And, of course, they were counting the Republican ballots at the same time? A Yes.

Q How long had they been counting when Mr. Hargan come in? A Well, not very long; it was not a half an hour, I am sure.

Q And then he told you to do what? A To stand alongside of Mr. Caprio and see that he counted the ballots correctly.

Q He told you to watch Caprio? A To watch the ballots, to see that he read them right.

Q That he took them out of the box and read them right? A Yes.

Q Now, did you stand there and follow Mr. Hargan's instructions until the last ballot was counted? A I did.

Q Did you see Caprio take the ballots out of the box? A Yes.

Q Did you read them yourself? A Yes, I did.

Q Did you hear him announce them? A Yes.

Q Did you hear him announce a single ballot contrary to what the ballot said itself? A No, sir; positively not.

Q I want you to tell us whether or not you are sure that he did not falsely or improperly read a single ballot? A Why, certainly I am sure; I am positive.

Q And other people were watching him the same as you? A Yes.

Q The agents and challengers of the other candidates were there? A Yes.

Q And did they have a good opportunity to watch that or not?

Mr. Harrison. Objected to.

The Court. Objection sustained.

Q Well, were they close to him or not? A Yes.

Q Was there anything you could see to prevent their watching Caprio and the ballots in his hand? A No, they were mostly on top of him.

Q Did you note any false reading or any false counting or false announcing of a ballot, either by Caprio or Ruglio at that election? A No.

Q How about Ruglio? A Neither one.

Q You were paid to do that very thing? A Yes, I was there to do that.

Q You are not subpoenaed by the defense? A No.

Q You are subpoenaed by the State? A Yes.

Adjourned until tomorrow, Tuesday, November 28, 1921.

SECOND DAY.

Tuesday, November 29, 1921.

Appearances: As before.

The Court. I am prepared to decide the motion to dismiss, do you want me to decide it in the presence of the jury or otherwise?

Mr. Heisley. It does not make any difference.

The Court. A motion is made to dismiss the indictment and several reasons are specified. I understand that the same application has heretofore been made to Judge Martin, my predecessor, and that the application was denied; that this motion is, therefore, made in order that there may be a record of such motion.

I have considered the grounds anew, and I do not think they present any reason for dismissing the indictment.

The indictment apparently charges a conspiracy to commit two crimes, one to falsely count and the other to falsely certify to the count, and, in the execution thereof, the actual certification of a false count. It does not seem to me that such an in-

dictment is duplicitious. There may be a conspiracy to commit one crime, or there may be a conspiracy to commit two crimes. The crime here is not the false counting or the false certification, but the conspiracy to falsely count and to falsely certify. As was stated in the case of State *v.* Spear, 63 N. J. L., in an indictment for an offense, whether created by statute or otherwise, the facts constituting such an offense must be set out with clearness and certainty sufficient for identification in order that the accused may meet the charge intelligently and may be able to plead a conviction or acquittal in bar of any subsequent proceedings. It seems to me that this indictment does just that. It sets forth that the defendants conspired and agreed to commit a wilful fraud in the discharge of their duty, by falsely counting and by falsely certifying the result of the count. That language, it seems to me, is entirely plain. It needs no further interpretation and the defendants should be able to meet the same.

I will deny the motion to dismiss.

Defendants' counsel prays an exception to this ruling by the Court.

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

FRED G. STICKEL, JR.,
Judge.

JOSEPH LINARDUCCI, sworn in behalf of the State.

Direct examination by Mr. Harrison.

Q You are a detective in the Prosecutor's office of this County? A I am.

Q And did you on September 28, 1920, assist Lieutenant Hargan in connection with the work relating to the enforcement of the election laws of this State? A I did.

Joseph Linarducci, direct.

Q And in the course of your duty did you have occasion to go to, and did you go to the Third District of the First Ward in the City of Newark? A I did.

Q Where was the polling place for that district? A In the Seventh Avenue School, corner of Factory street and Seventh avenue.

Q What time of the day or night did you go there? A Well, I went there several times during the day.

Q And will you briefly describe what we may term the layout of the polling place? A The polling place was in what is known as the school court, on the Seventh avenue side. We entered through the yard on Factory street, then you went down several steps through the door and walked the length of the court, I should say fifty or sixty feet. The booths were parallel with Factory street, close to the Seventh avenue wall. The table was parallel to Seventh avenue, running east and west. There were two tables there, one long table, about, oh, I should say twelve or thirteen feet long and about two and a half or three feet wide, and another small table on the eastern end of that table, I should say about three or three and a half feet, and about the same width.

Q Right up against the longer table? A Yes. The Board of Registry and Election, of course, was between the table and the Seventh avenue wall. The table, I should say, was about two feet from the wall; that is during the day.

Q You went there in the night, too? A Yes, during the count.

Q What time? A The first time about ten thirty; ten fifteen, or ten thirty.

Q With whom did you go? A Lieutenant Hargan.

Q What was going on when you got there about ten thirty that night? A The Republican ballots were being canvassed by Caprio, or by the regular Board, and the Democratic ballots were being canvassed by the two assistants.

Q By the two assistants you mean Miss Brandalone and Mr. Cappiello? A Yes, sir.

Q Briefly tell us where the persons you have mentioned stood with reference to the articles you have described and also with reference to one another? A Caprio was standing between the table and the wall with his back towards the wall, reading the Republican ballots which he took from the ballot box directly in front of him.

Q The ballot box being on the table? A Yes, on his right side Ruglio, the Inspector.

Q And pardon me right there. Was Caprio standing or seated? A He was standing. The two clerks were on the opposite side of the table facing the inspector and the Judge counting, and, back of them, looking over their shoulders watching the tallying, was the crowd, the challengers and leaders; there were several people with badges on; I should say there were twenty to twenty-five people very close up to the clerks who were tallying, and, on the extreme right—that is, the end of the smaller table, the two assistants were counting the Democratic ballots; Miss Brandalone was taking the ballots from the box and calling them off to Cappiello, who was seated and tallying.

Q How much space was there between where Caprio stood and the wall which you have mentioned? A Between him and the wall I should say about a foot and a half.

Q Was there anybody, election watchers, challengers, leaders, or others in a position where they would see Caprio reading the ballots? A No, sir.

Q How long did you remain there? A About fifteen minutes the first time.

Q Did the condition of things or the position of the persons mentioned change materially while you were there? A Yes, at the direction of Lieutenant Hargan.

Q In what respect? A The assistant was stopped from counting the Democratic ballots and they were ordered to stand behind Caprio and watch him. The Inspec-

tor was ordered to stand up and watch the ballots as Caprio read them by Lieutenant Hargan. These positions were taken when we left—these positions had been taken before Lieutenant Hargan and I left.

Q Did you return again to that particular polling place? A Yes, about an hour later.

Q What was the situation upon your return? A I did not see either one of the assistants when I returned the second time, but Caprio was in the same position and Ruglio was standing supposedly watching him read the ballots.

Q Who, if anybody, was near Caprio? A Ruglio.

Q Was there anybody else near him? A No.

Q Where were the rest of the people with reference to Caprio? A On the other side or the table.

Q How far removed from him? A Three or four feet.

Q What did they appear to be doing? A Watching the clerks' tally.

Q Did I understand you to say that the clerk was seated on the opposite side of the table tallying the votes as they were read? A Yes, sir.

Q How long did you remain there? A About ten minutes the second time.

Q Did the condition of things or the position of the persons you have mentioned change during that period? A No, sir.

Q Did you return again to that precinct? A Yes, sir.

Q What time? A In the neighborhood of one o'clock.

Q What did you find when you entered the third time? A The same as the second time; conditions were the very same.

Q Did Lieutenant Hargan return with you on the third occasion? A Yes, sir.

Q How long did you remain there? A About the same time, ten or fifteen minutes.

Joseph Linarducci, cross.

Q Did you see Miss Brandalone and Cappiello on the third visit? A No, sir.

Q What, if anything, do you know about any check up, as we have been terming it, being made during any of these visits of yours? A Why, the Lieutenant had a check up made on each visit; that is to say, he had one clerk call off the number of votes each candidate had received up to that point, the total number to tally with the other clerk, and the first time there was a little discrepancy of one vote.

Q Among what candidates? A The Assembly candidates; I do not remember which one, but one of the clerks had one more for one Assemblyman and one less than the other clerk, and it was apparently a clerical error; that is, the clerk who had supposedly made the error, had credited one Assemblyman instead of the other, and on the second and third occasion the check ups were perfect; they tallied.

Cross examination by Mr. Heisley.

Q How long did you stay there on your third visit at one o'clock? A About ten minutes.

Q What number of ballots had the Board reached approximately on the occasion of your third visit at one o'clock—

Mr. Harrison. Pardon me. There is one question I neglected to ask him.

Q (*By Mr. Harrison.*) On your third visit did you see Miss Brandalone or Cappiello? A No, sir; I did not.

Q (Question read.) A I do not remember.

Q Now, on the occasion of each visit that you made there you had them check up all the ballots they had counted before? A No, sir; on the tally sheets.

Q What was the process of checking up the tally sheet? A Calling off each candidate's name on the tally

sheet and giving the number of total votes received up to that time.

Q You mean to say that the men simply compared the marks which they had made opposite each candidate's name down to that time? A Yes, sir.

Q Now, you say they did find some discrepancy? A Yes, there was a discrepancy of one.

Q They did find a discrepancy. How did they correct that discrepancy and ascertain which clerk was right and which clerk was wrong? A Why, one clerk had say, for instance, 5 for Jones and 5 for Smith; the other clerk had 6 for Jones and 4 for Smith; the clerk having 6 for Jones and 4 for Smith erased one from Jones—deducted Jones' 1 and credited that one to Smith.

Q Well, how did that prove anything; how did it prove the other man was wrong?

Mr. Harrison. I think that calls for a conclusion of the witness, and I therefore, object; in other words, he may state facts, but as to an—

The Court. Well, he is asking what they did to make the other tally if he was wrong.

Mr. Heisley. Yes, sir.

The Court. I will allow it.

A The clerk who apparently had the right count—

Q How did he apparently have the right count? What was obvious there to you which would indicate that one clerk was right and one clerk was wrong? A There was nothing to me that indicated that one clerk was right or the other was wrong, just that they did not compare, and one clerk told the other that he had not credited one candidate when he should have done it, and the clerk who had made the error agreed with him; therefore, that discrepancy of one was repaired.

Q In other words, they settled the matter themselves without taking the ballots off the string, or anything else, isn't that so? A Yes.

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Q Now, you were there three different times? A After the polls were closed, yes.

Q And you were there as a detective? A I was there representing the Prosecutor's office.

Q Do not fence with me. You were there as a detective?

Mr. Harrison. I think the witness was quite right in determining what his authority was.

The Court. I think so; he may have been there to represent the Prosecutor's office.

Q Well, in what sense, then, were you there representing the Prosecutor? A As an agent for the Prosecutor.

Q What was your agency? A To see that the statute —that the election laws were enforced.

Q By the election officers? A Yes.

Q To see that the count was truly made? A Yes.

Q To see that Caprio and the rest of the crowd there did not perpetrate any fraud? A Yes.

Q That is what you were there for? A Yes.

Q And you saw no fraud perpetrated there on the three occasions? A No.

Q And you did not complain of anything being done or Mr. Hargan, excepting he made Mr. Ruglio stand up? A Well, that is one of the things.

Q Well, that is the only thing you have mentioned. A He stopped the two assistants who were counting the Democratic ballots and he ordered the assistants to stand behind the Judge while he was reading the ballots.

Q Did they do that? A They did, yes.

Q You found no difficulty in having Mr. Hargan's instructions obeyed there, did you? A No.

Q And when you went there on these occasions did you see anybody around the Judge and Inspector at all? A No, sir; I don't know what you mean, "around."

Q Well, near them? A Just the Inspector.

Q You say you saw nobody near the Judge or Inspector of election? A Well, Judge, I don't know what you mean by near.

Q Well, not far away? A Well, there was no one within four feet of the Judge and Inspector.

Q The crowd seemed to be around the clerk, is that right? A Yes, sir.

Q All the agents and the district leaders interested in the election were interested, apparently, in only watching the clerk and not watching the Judge and the Inspector, is that right? A Yes.

Q Did you watch the Judge and Inspector? A No.

Q Didn't it occur to you that if they wanted to perpetrate a fraud that would be a means whereby the fraud could be perpetrated, by the Judge and Inspector? A Yes, that is why Lieutenant Hargan ordered the assistants to stand behind the Judge as he read the ballots.

Q And didn't you and Mr. Hargan ask Mr. Capiro to show you a couple of ballots after he announced them? A I did not, I don't know whether—

Q Did Mr. Hargan? A Not to my knowledge.

Q Don't you recollect his showing Mr. Hargan two ballots? A I do not.

Q You do not say it did not occur? A Well, yes; I should say it did not occur, because I was with Mr. Hargan all the time.

Q Now, when you speak of Miss Brandalone, you mean the lady the Prosecutor called as his last witness yesterday afternoon, don't you? A Yes.

Q You say that on two occasions, at 11:15 and 1 A. M., you do not recall seeing either her or the other assistant standing by the Judge or Inspector? A I say I know they were not standing by the Judge or Inspector; I did done, didn't you? A Yes.

Joseph Linarducci, cross.

Q What did you do to find out where Miss Brandalone and this other assistant were? A I did nothing.

Q Well, why didn't you; you were there representing the Prosecutor? A I was there assisting Mr. Hargan, and Mr. Hargan was my superior and whatever he instructed me to do I did.

Q He was not there with you on the second visit? A Yes.

Q Was he there on all three visits? A Yes.

Q Well, did Mr. Hargan do anything that you could or should do for the purpose of finding out where the two assistants were? A No, sir; I do not think so.

Q Did he say anything to you about it? A No, sir; he did not.

Q Well, he seemed to be quite anxious on his first visit to have these two assistants watch Caprio and Ruglio?

Mr. Harrison. Objected to. I do not think it is a question whether Mr. Hargan displayed any commendable or splendid—

Q Well, he was desirous. On his first visit Mr. Hargan was desirous for these two assistants to watch Mr. Caprio and Ruglio? A He directed them to do so.

Q On the occasion of the other two visits there was nobody watching these two people; Mr. Hargan didn't say a word to anybody? A Not to my knowledge.

Q And you didn't say a word? A I didn't.

Q You must have thought everything was all right? A I don't know whether everything was all right or not.

Q You did not see anything to indicate it was all wrong? A No.

By the Court.

Q Do you remember the number of ballots that were counted at the time you got there the first time? A Yes, sir; they were in the eighties.

Alfred Hargan, direct.

By the Court.

Q Do you remember the number of the ballots counted the second time? A No, sir; I do not.

ALFRED HARGAN, recalled, in behalf of the State.

Direct examination by Mr. Harrison.

Q Lieutenant Hargan, you were in charge during the election of 1920 for the Prosecutor of this County of enforcing the Election Law? A I was.

Q And in the course of your work did you have occasion to—did you go to the polling place of the Third District of the First Ward of this City? A I did.

Q That was on September 28, 1920? A Yes, sir.

Q What time of the day or night? A In the neighborhood of quarter after ten when I got there the first time.

Q And your second time? A Practically an hour later.

Q And your third time? A About one o'clock in the morning.

Q And did Mr. Linarducci accompany you on each of these occasions? A He did.

Q And how long did you stay at each one of these trips? A Practically ten to fifteen minutes on each occasion.

Q Will you describe briefly the situation there so far as the arrangement of the tables is concerned, with particular reference to the walls and the position of the election officers? A The tables were on the Seventh avenue end of the court almost against the wall; it was practically—about, probably two and a half feet away from the wall. The table was about, all told—the two tables were about, fifteen feet in length; at one end of the table was the ballot boxes, which Caprio was standing behind and seated to the right of him, almost on the end of the table was Ruglio, the Inspector. In front of the table to Caprio's

left, was the two clerks tallying. At the other end of the table, quite some distance away from them, were the two assistants with the Democratic boxes in front of them when—that was the condition when I first went in the place. There was a large number of people standing in front of the table, and a number of crowds in different parts of the courts, two, three and four people together in different places. There was nobody behind the table except Caprio and Ruglio. There was nobody within four or five feet of them at the time I first entered the polling place. When I got there the—

Q Right there. Where did Caprio stand with reference to the wall? A Well, he was almost back up against the wall. There was a space, probably it may have been a foot between him and the wall and himself.

Q How was he holding and reading the ballots as he took them and read them from the box? A He was standing up with the box in front of him. He would take them out, straighten them out and read them and after he read them he would half fold them and pass them to Ruglio, who would continue the reading and put a mark on them with a pencil and pull them over a needle on the string on which he was stringing them.

Q What instructions did you give in Caprio's and Ruglio's presence? A The first thing I did was to instruct Ruglio to get up where he could see and watch the ballots were properly read, over Caprio's shoulder or alongside of him. I told him he was responsible for the reading of these tickets, just the same as the Judge was, and he was supposed to inspect and view each one of the tickets. I then had a check up of the tally sheets made at that time, and, after the check up of the tally sheets, I went over and instructed Miss Brandalone to go over behind the box where Caprio was counting and to watch and read the ballot; she was the only one I instructed to go there.

Q Did she go? A At that time she did.

Q Were there any other instructions you gave while there the first visit? A Well, I instructed them at the time I found the outsiders were assisting counting the Democratic box it was illegal, that they were responsible for the counting of that box, the full Board, and I advised them they better recount it before they signed and certified the sheet counting that box.

Q On the second trip what did you find? A The second trip the conditions were the same, except there were less people in the place, not quite as much of a crowd; Caprio was still in the same position behind the box reading the ballots and Ruglio was alongside of him properly inspecting the ballots; Miss Brandalone was not in the vicinity at all; she was behind the table way down at the far end of the table at that time and was not in any position to see—

Mr. Heisley. I object.

Q How far was she from Caprio? A Probably in the neighborhood of twelve—about twelve feet.

Q What was she doing? A Just standing down at the end of the table conversing with somebody.

Q On the occasion of your third visit, 1:30? A In the neighborhood of one o'clock.

Q What did you find then? A I found the conditions the same; Caprio was in the same position behind the box, reading the ballots and Ruglio was standing alongside of him, seemingly inspecting and viewing the ballots as they were read; there was nobody else in the vicinity at that time at all, and I did not see Miss Brandalone at that visit at all.

Q At that time was there anybody else near Caprio and Ruglio? A There was not.

Q Did you see Miss Brandalone on your third visit at all? A I did not see her the time I was there at one o'clock in the morning.

Alfred Hargan, cross.

Cross examination by Mr. Heisley.

Q You went there, for the purpose, among other things, I suppose of seeing there was no fraud or illegality perpetrated by any members of the Election Board? A I went there because I was informed there was fraud being committed.

Mr. Heisley. I object.

Mr. Harrison. He is asking his reason.

(Question read.)

The Court. I think that is susceptible of a yes or no answer.

The Witness. Yes.

Q You were not going to answer it yes or no?

Mr. Harrison. Objected to.

The Court. Objection sustained.

Q You are often called as a witness in this Court, aren't you? A No, sir.

Q And if you had seen any fraud, or any evidence of fraud, or any evidence of illegal conduct upon the part of any of those election officers, it was your duty to have it stopped, wasn't it? A No; I couldn't stop it.

Q If you saw them perpetrating a fraud, knew they were perpetrating a fraud, or committing some illegal act, you would make no effort to stop it? A I wouldn't be able to stop them.

The Court. He asked you if you would make an effort?

The Witness. I would make an effort, yes.

Q You understand the question? A No; I thought you asked me if I would stop them.

Q You answered you would not be able to and now you say you would stop them? A No, sir; I said I would make an effort.

Q And when you went there you saw these two assistants counting the Democratic votes and it occurred to your mind that that was not the thing for them to do; isn't that right? A I knew it was not.

Q They did it? A Yes.

Q And you immediately told them to watch Caprio and the Inspector? A Oh, I don't know as it was immediately; it was after they finished counting.

Q Well, sometime while you were there on that wonderful night you did tell them to watch Caprio and the Inspector? A No; I told Miss Brandalone but nobody else.

Q What did you tell the other assistant to do? A I didn't tell him to do anything.

Q Well, you told her to take her place, where? A Alongside of Caprio, where she could read and inspect the ballots.

Q You thought that was advisable to have her do that? A I did.

Q You thought that in an election the Judge of the election who would take the ballot from the box, that he should be watched; is that so? A Well, the condition as I found it—

Q Won't you be good enough to answer yes or no? (Question read.) A I cannot answer yes or no.

The Court. He cannot answer that yes or no.

Mr. Heisley. I withdraw the question.

Q Didn't you think that night that the Judge of election should be watched? A I did.

Q And you told Miss Brandalone to watch him? A I did. I did not tell her to watch him; I directed her to watch the ballots.

Q What you wanted to do was to see that the ballots were correctly read by the Judge and announced; isn't that right? A Yes.

Q How long did you stay there? A On the first occasion possibly ten or fifteen minutes.

Q Did you watch him read any of the ballots? A I heard him read them.

Q Did you watch him read them? A No; I didn't watch him read them.

Q You don't know of a single ballot that he read improperly? A I do not.

Q And when you went back there it eleven o'clock you saw Miss Brandalone about a dozen or thirteen feet away from him? A Yes.

Q Engaged in conversation? A Yes.

Q Was this officer with you, your assistant? A He was.

Q Did you hear him say he did not see her anywhere around? A I did.

Q Are you sure she was there? A I am.

Q Notwithstanding he did not see her? A Yes.

Q Do you know of any reason he did not see her? A Oh, there were a number of people there; possibly he might not have seen her.

Q What did you say to Miss Brandalone? A On the second occasion?

Q Yes. A Nothing at all.

Q You didn't think it was necessary at that time to have the Judge watched? A I thought the situation was hopeless, so far as she was concerned.

Q And seeing the situation was hopeless and smelling some fraud, or suspecting some fraud was being perpetrated, you stayed there ten minutes, and then peacefully wended your way homeward, or somewheres else? A That was not my reason for leaving.

Q Did you make any effort at that time to suppress any fraud? A I was doing that all the evening.

Q What was the fraud you were suppressing? A I was trying to get a proper and true count of the votes in several districts of the first ward on this one line.

Q Well, why didn't you tell Miss Brandalone—ask her why she did not obey your instructions that you had given her at nine o'clock, and to stand back of Caprio? A She was assistant of the Board and not responsible for the act of the Board, and, when she didn't stand there after I told her the first time, I didn't think it was necessary to go back.

Q And you didn't get anybody else to? A No.

Q You didn't get your friend to? A No.

Q Did you? A I had six districts to watch.

Q Did you and he go around together? A Yes, sir.

Q Why did you go together A He is an Italian and it was an Italian district and a good many election officers were Italians and I thought I needed him.

Q You suspected there was something crooked happening in this particular election precinct? A I had never been—

Q Well, did you suspect something wrong was happening at that particular election district? A That one and others.

Q I don't care about others. You did, didn't you? A I did.

Q And did you suspect that it was Caprio that was turning the trick? A I did.

Q You saw agents and representatives watching the clerks? A I did.

Q You knew they were being watched? A Well, I don't know as they were being watched; people were viewing the sheets.

Q Well, you knew the challengers were there? A I didn't see any challengers or anybody I knew to be a challenger in the place.

Q And you know that the parties or associations had detectives there watching them? A I did not.

Q Well, if you suspected that fraud was being perpetrated and Caprio was the man going to perpetrate

the fraud, I want you to tell why when you came back the second time and he was not being watched, why you didn't place somebody there to watch him? A I had placed a party there to watch him, whose duty it was to watch him, and I supposed the person whom the law put the duty on to do the work would do it, and that was the Inspector I instructed to view all the ballots.

Q That is the only reason you can give for not appointing somebody else to watch Caprio? A That was the only one I could; I had no appointive powers to appoint anyone to watch Caprio.

Q On other election days didn't you have other officers? A I did have, but at that time of night I had nobody I could get.

Q What more important election time or offense against the election law did you think was being perpetrated in this city on that night than the election fraud that you suspected Caprio perpetrated? A There wasn't any such thing.

Q Well, then, I ask you why if you had no more important—you suspected no more pronounced or important violation of the law than was taking place there why it was when you saw Miss Brandalone was not watching them you did not leave that officer to watch him? A Well, because there were other duties I wanted that officer for. I thought they would go on and canvass votes after they had been warned, and after the duty of the Inspector had been called to his attention, and, he was on the last two occasions carrying out the provisions of the law on his duties; I thought he was carrying them out.

Q Well, you know he was not? A I know now he was not.

Q How do you know? A By the ballots themselves.

Q How do you know which one of the six people, if any fraud was perpetrated, how do you know it was the Inspector rather than any of the other five? A Because it would have been impossible for the thing to have been

done without the Judge's connivance; no possible thing could be done by the clerk.

Q That is a matter of your judgment? A No; from the ballots.

Q And inference? A No matter of inference at all.

Re-direct examination by Mr. Harrison.

Q How do you say you know from the ballots themselves that this count was a false count? A There was 31 blank ballots came out of the box. Both the Judge and Inspector of election handled those ballots. When they certified to the returns of 415 ballots, in which there was no blanks except one, they could not have certified except knowing they were certifying to a false and fraudulent return.

Mr. Heisley. I move to have this evidence struck out. We are here to have his evidence and not his conclusion. He is not asking for the facts. He is asking for a conclusion.

Mr. Harrison. The learned counsel for the defense has made his bed and he must lie in it. He asked this witness, "How do you know this election was not being properly carried on," and the witness answered, "I know from the ballots themselves." It is an inference to be drawn from the inspection of the ballots and the—

The Court. I am afraid the door has been opened.

Mr. Heisley. I submit when I asked him how he knew it, he must give an answer how he knows it.

The Court. He has told us how he knows it and gives us the best of his knowledge.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Had you concluded your answer? A Yes, sir.

STATE RESTS.

Mr. Heisley. I desire to move for the direction of a verdict upon all the grounds which I urged for the purpose of quashing the indictment, and, in addition thereto, I respectfully ask your Honor to direct a verdict of acquittal as to both defendants, because the State has wholly failed to prove any facts susceptible of any fraudulent conduct upon the part of the defendants. The thing that the State has shown is that there were more votes counted or returned for certain candidates than were actually cast. There is not the slightest evidence showing which one of those people did that. There were six people concerned in the conduct of this election. The State has put upon the stand the man who kept the ballot sheet, the man who made the returns—who wrote the returns on one of them, neither of them ascertained that either of the defendants interfered with the ballot sheet in any way at all, or that they put a single mark upon the alleged false return excepting the signing of their own names. This result is susceptible of two inferences, either that the misstatement and miscounting were done by a bad method or by a good method, and I am going to assume just for the sake of this motion, that we may conclude it was done for a bad motive. Citizens of New Jersey can only be convicted by a verdict founded on facts and not merely upon suspicion, and I respectfully urge that no citizen ought to be put in peril where he happens

to be one of six people charged with doing—the performance of some duty that is not properly performed, when there is no evidence offered by the State itself to point him out as the one among all the six who did it. If this man it to be guessed into jail, of course, that is one thing, but he should have a fair trial.

The Court. What is your explanation of the blank ballots? Is not that a question of fact for the jury to determine whether or not the Inspector and Judge read these blank ballots, so far as the Congressional candidates are concerned as having been marked for one of these candidates?

Mr. Heisley. Let me see! You refer to the thirty-one ballots which were counted for a candidate for Congress.

The Court. Counted for Archibald.

Mr. Heisley. Those ought not to have been counted. Is there the slightest evidence, your Honor, that these men read those ballots off wrong?

The Court. No, except that they handled them, and that they were registered by the tally clerks who were some distance away, hearing what they presumably said.

Mr. Heisley. Unquestionably they heard what they said, but is it in evidence here? If you had witnesses who saw Ruglio or Caprio take a blank ballot out of the box and read it, that would be evidence against him, but there is not the slightest evidence here by the State that Caprio read one of them and the jury has got to guess whether or not he did it.

The Court. But he was the Judge of election charged with the reading of it. It seems to me it is quite clear for the jury to determine whether he did read them.

Mr. Heisley. Isn't it the presumption of the law that he read them truly?

The Court. The jury has got to determine from the evidence before them whether Ruglio or Caprio read them.

Mr. Heisley. Well, then, I suggest there is not the slightest evidence individualizing these people as to who did it.

The Court. Is there not a presumption that they performed their duty, and, if they performed their duty, that would be taking the ballots out of the ballot box and reading them, but the difficulty about the presumption is we found ballots which were not read correctly, and the presumption is that if these two men handled these ballots and no one else, if they alone handled these ballots, how could these ballots get in the box in the shape they were and be recorded in the shape they were, excepting they read them differently than they appeared? That is a question for the jury to determine. I will deny the motion.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

The Court. In denying the motion I am doing nothing more nor less than stating it is a fact for the jury, and not registering any opinion whatever.

Mr. Heisley. Will your Honor say the same thing about your motion—denying the motion to quash?

The Court. Yes. I am going to tell the jury that.

Mr. Heisley opens for the defendants.

JOHN VITTIELLO, sworn in behalf of the defendants.

Direct examination by Mr. Heisley.

Q Do you live in Newark? A Yes, sir.

Q And at this primary election we have been talking about so much were you employed in any office? A Yes; I was a candidate for County Committee.

Q Republican County Committee? A Yes, sir.

Q And were you elected? A I was.

Q And are you still a member? A No more—last year.

Q Where were you during the carrying on of this primary election of this precinct in question? A I was in the polling place.

Q What time did you go there in the morning? A Eight o'clock in the morning until four o'clock the next morning.

Q Did you leave there at all? A No.

Q Did you go home for dinner? A No.

Q What did you do for food? A My little boy brought me a little sandwich.

Q And you stayed there during all the morning? A Yes, sir.

Q What was your object in attending so strictly to the election? A Why, I was right alongside of the Judge.

Q You wanted to see what the result was? A I was going to see what the result was; to see the ballots was counted correctly.

Q And you were also then acting as a representative of the County Committee, were you not? A Yes, sir,

Q I mean by that you had been a member of the County Committee before that? A Yes, sir.

Q And you were running for re-election? A Yes, sir.

Q And when they began counting the votes where did you stand? A Right alongside of the Judge.

Q Of Caprio? A Yes, sir.

Q How close? A About a half a foot away from him, close enough to see if the ballot was counted correctly.

Q How much space was there between the table and the wall where Caprio was? A About three and a half feet—four feet.

Q Mr. Hargan and his associates say but a foot or a foot and a half? A It was more than four feet.

Q How long did you stand there? A Well, not long; until they finished counting the voting.

Q What did you do while you were standing there? A Looking at the ballots.

Q Where did you see the ballots? A Right in the Judge's hand.

Q Did you see every ballot? A Every one from the first to the last.

Q Did you see them read them off? A Yes.

Q Will you tell the jury whether during the whole process of that counting you saw Caprio read improperly a single ballot? A A single ballot? He pulled them out of the box and read to the public there was about a hundred people during the night, and he read every one.

Q Well, did he read them properly? A Properly.

Q What were the clerks doing? A The clerks was keeping track of their votes. Every once in a while they say to the Judge, "Give us a little time, we will fix it," and for about a minute or two minutes they say to the Judge, "All right, we are ready."

Q The State says that Mr. Caprio read Archibald's name thirty-one times on ballots that did not have his name on, is that so or not? A No; every vote that Archibald got was correctly on the ballot.

Q Well, did he call Archibald's name out a single time that you saw when Archibald's name was not on the ballot? A No.

Q Now, then, at the end of the counting was there a final tabulation made up by the clerk? A Well, about the end I went to one of the clerks and I said, "Give me my return to bring to the County Committee," and one of the clerks says, "Give us a little time, we are mixed up on our sheets." I stood there about fifteen minutes after that and they fixed it between them, one was calling to another.

Q Go ahead. A After they got through they said, "Here is your returns;" I took the returns and gave it to one of my workers and he took it down to the County Committee.

Q Were you there on the occasions of the three visits that Mr. Hargan and the other man made? A Yes, sir.

Q Did you see them direct Miss Brandalone to take her place by the Judge, by Caprio? A Yes.

Q Did she take her place there? A She did.

Q How long did she keep her place there? A She stayed there until three o'clock in the morning.

Q Did she go away at all? A No.

Q You saw Mr. Hargan and the other man come back about eleven and one o'clock? A Yes.

Q Where was Miss Brandalone at that time? A Right behind the Judge, where one of the Prosecutor's men put her.

Q You have been here and heard their evidence? A Yes.

Q Did you hear the detective say that he did not see her anywheres around at the eleven and one o'clock visits? A No.

Q This morning? A Yes.

Q Did you hear him say that this morning? A One of the detectives, yes; I heard him say it on the stand this morning.

Q Did you hear Mr. Hargan say that when he came there at eleven o'clock that Miss Brandalone was about twelve or fifteen feet away from Mr. Caprio? A No.

Q You didn't hear him say that? A Yes; I heard him say that, yes.

Q As a matter of fact, where was she when Mr. Hargan came there at eleven o'clock? A Right behind the Judge.

Q Are you sure about that? A Why, positive; I am sure.

Q Is there any doubt about it?

Mr. Harrison. Objected to, as to whether there is any doubt about it.

Q Where was Cappiello? A Right alongside of Miss Brandalone.

Q He was the other assistant, wasn't he? A Yes.

Q And what were they doing, if you know? A What were they doing?

Q Yes; Miss Brandalone and Cappiello? A Watching the Judge to see if the ballots were being read correctly.

Q Did you see them doing that? A Yes.

Q I am going to ask you if you will look at this tally sheet, which you saw there that night, and tell us whether it is in the same condition now, as it was when you saw it there that night. Now, look it over carefully? A Well, it is in the same condition as when I got my returns.

Q Did you see the last marks put on it?

Mr. Harrison. Referring to what marks?

Mr. Heisley. Ballot marks.

The Court. You mean the total?

Mr. Heisley. Final.

Q When you got your final returns and you say that the clerks arranged among themselves, was the total here 395 or 400; do you remember whether these marks were on this sheet? A Sure they were.

Q How long before you got your returns were these put on? A Well, I was waiting for about fifteen or

twenty minutes and they were talking to one another; they were calling to each other to fix their tally sheet.

Q When you say they were fixing their tally sheets, how were these two clerks fixing them? A Well, they were calling one to each other; they were saying tally, tally, tally; they were fixing up with each other; I don't know what they were doing, because I was waiting for my returns.

Q While one clerk was calling from his sheet what was the other clerk doing? A Putting on his other sheet.

Q At the time that one clerk was calling the tally, was making a comparison of one sheet with the other, was the Judge calling out the names from the ballots? A No.

Mr. Harrison. I think that question is clearly leading.

The Court. There is no question about that.

By the Court.

Q What was the Judge doing at the time the tally clerks were doing certain things? A The Judge was attending to some other thing.

Q How long after the Judge had called out the last ballot, as it came out of the box, were the clerks engaged in this operation of fixing up the tally sheets? A Yes.

Q How long after? A Well, right after the last ballot come out of the box I went right over to them and wanted my returns, and he said, "Wait a minute;" and after about fifteen or twenty minutes they gave me my returns.

Mr. Heisley. I do not think that the jury can get the benefit of these questions. It is my desire that the jury should now make an inspection of the tally sheets. What I wish to point out to the jury—

Mr. Harrison. This is not a summing up.

The Court. That is a matter for summing up to the jury. You can draw your inference from the testimony and get that to the jury. I do not think this is the time to do it.

Q You say that you saw Mr. Hargan and this officer, the detective, with him on these three visits? A Yes, sir.

Q What was their condition as to sobriety upon the occasion of their second and third visits?

Mr. Hargan. Objected to, if the Court please, as being entirely outside of the issue.

The Court. The sobriety of the tally clerk?

Mr. Heisley. No; of Mr. Hargan and Linarducci, on the occasion of their two visits when they saw Miss Brandalone and Mr. Cappiello was not watching them.

The Court. What is your objection to it?

Mr. Harrison. I withdraw the objection.

Q I do not know as this man will testify about it. I want you to tell us what their condition was, Mr. Hargan and his assistant, when they came there on the second and third visits.

The Court. You want to know whether Linarducci and Hargan were drunk or sober?

Mr. Heisley. Yes, sir.

Q (*By the Court.*) Well, were they drunk or sober? A Well, I do not know what kind of condition they were; I know they were talking too much when they come in there.

Q How do you know? A Well, they acted rough; they were telling one fellow to get out of here; they were doing it their own way.

Q Did you notice anything about them to indicate that they had been drinking liquor? A No.

John Vittiello, cross.

Cross examination by Mr. Harrison.

Q Can you point out where the office for which you were running and the candidates—and the other candidates who were running for that office in your district appear on this tally sheet? A The County Committeeman.

Q What were you running for? A For County Committee. Here is my name, the last one.

Q What does this say up here? A For member of the County Committee.

Q Where is the word "of"? A That is the way I read it in my own language, for member of County Committee.

Q You do not read it? A I can read it, not very good, but I can read it; maybe I do not pronounce it right, but I can read it.

Q I call your attention to this line, referring to the second line at the head of the ballot, and ask you what that is? A Do you want me to read that?

Q Yes. A "For member of the House for Representative."

Q What else? A Do you want to know the names?

Q Anything else there; what is this? A The 8th Congressional District.

Q Now, you were particularly interested in the votes you got, were you not; as member of the County Committee, were you not? A Yes; for mine and the rest of the ticket.

Q Well, what other part of the ticket were you particularly interested in? A Well, for myself and most of it; for Archibald and for—

Q Why were you interested in Archibald? A Because Archibald is a good friend of mine; I knew him for four years.

Q Had Caprio or Ruglio asked you to be interested in Archibald and to work for him? A No.

Q You had done some work for Archibald during that day? A Yes.

Q And on the day previous? A Yes.

Q And had the other leaders in the district also worked for Archibald? A I don't know that.

Q Had Caprio worked for Archibald? A I don't know.

Q Had Caprio asked you to do this work for Archibald? A No.

Q You know Caprio was Sergeant at Arms in Judge Archibald's Court in Kearny? A Yes.

Q Hadn't he asked you to use your efforts for Archibald? A No, sir.

Q Had you talked with him about it? A No, sir.

Q Didn't you have a meeting with him and the other leaders? A Never.

Q A short time before that? A No, sir.

Q Well, now, you have testified that you—is Caprio the leader for that ward? A Is he?

The Court. Was he then?

Q At that time? A No.

Q Was he the district leader? A No.

Q Who was? A Joseph C. Cordasco.

Q Now, you have testified that you and Miss Brandalone and Cappiello and others were behind Caprio, haven't you? A Yes.

Q How long were they there behind him? A Well, about—I don't know; I cannot tell you exactly; there were quite a few people there.

Q A dozen or more? A Well, I can't say correct the number; there were quite a lot of people back of him.

Q Would you say a dozen or two, or three dozen? A I can't say exactly the number.

Q You don't know the number? A Why, I can say there were people behind him.

Q Were they behind the table? A Not all; the rest were in front of the table.

Q You cannot say how many were behind Caprio? A No.

Q You stood on your feet from eight o'clock to four o'clock the next morning? A Yes.

Q And you say you watched every ballot? A Yes.

Q And you counted for every office on that ticket? A Yes, sir; for the whole night.

Q Didn't once take your eyes off the ballots? A No.

Q Didn't you notice a single mistake made? A I don't think so.

Q How near were your eyes to the ballots as they were taken out of the box by Caprio? A Well, if I can show you how near I was to the box.

The Court. All right. Here are the ballots.

A There is the Judge here and I was alongside of him on this side here while he take the ballots out; he was reading the ballots and I was right alongside of him and I think I can see it.

Mr. Harrison. Witness indicates by indicating his position immediately next to, and to the left of Caprio.

Q And why was it that you had such a good position; why were you so favored among those that were in that place? A Because there were three committee leaders running that year, so I want to see my name came out before everybody else's and I wanted to see every name come out of the box was correctly read by the Judge.

Q Where were these other two leaders? A They were right back of me.

Q Why was it that you stood next to Caprio and these other two candidates were some distance from him? A They were right behind me.

Q Well, did they stand right alongside of him? A They could not stand alongside of him when I was alongside.

Q You didn't give up your position during the evening? A No.

Q How far away were these other two district leaders? A Right behind me.

Q Against the wall? A No, sir; there was plenty of room behind me.

Q How near to Caprio were they? A Right behind me.

Q Did they line up right close up to you or did they stand one behind another? A No.

Q They stood behind you? A Yes.

Q Looking over your shoulder? A Yes.

Q You stood up straight? A No, sir; sometimes I would bend my head down.

Q Did you bend down so these other two candidates could look over your shoulders and see? A No; they could see themselves.

Q You held that position for eight hours while the ballots were being counted? A Well, from nine o'clock 'til four.

Q Where was Ruglio during this time? A Right on the right side of the Judge.

Q Was he seated? A Standing up.

Q Did you see him seated at any time? A No, sir.

Q Did he examine the ballots too, as they came out? A Yes.

Q How did Caprio take the ballots out of the box and how were they handed to Ruglio by him? A Well, the Judge was taking the ballots out of the box one by one; after he was through reading he would hand them to the Inspector.

Q How would he hand it to the Inspector? A What?

Q Throw it down open? A Yes.

Q What would the Inspector do? A The Inspector looked it over and see the ballot was O. K. and put it on the string.

Q After Hargan and Lindarducci came up there, and acted rough, what orders did you hear them give to Caprio or Ruglio, or any other person in the room? A Well, the first time they come in they find Miss Brandalone counting the Democratic ballots and they said, "Don't you know that is against the law," so they said, "You better stop that," and they stopped that, and there were only a few more to come out, and one of the officers said to Miss Brandalone, "You go behind the Judge and see if they read it correctly," and one of the Prosecutor's detectives said to the Judge, "Let me have one of them ballots," and after he seen it, he said, "All right."

Q After Miss Brandalone was told to stand alongside of or behind the Judge did you give up your position to her? A No, not to Miss Brandalone; she was standing right alongside of the Inspector; right behind the Judge.

Q Where were these other two candidates who also stood behind the Judge? A Why, the same place.

Q Did either one of them give up their position to Miss Brandalone? A No; Miss Brandalone passed to the other side.

Q So she did not stand next to Caprio? A Well, right close to the Inspector.

Q Well, so there were four or five people right against the others who stayed there from nine o'clock in the evening until four o'clock in the morning without changing their positions once; is it true they were close up against Caprio and stood there in the same position from nine o'clock until four o'clock? A Well, Miss Brandalone—

Q Is that so? Do you understand my question? A Maybe I do and maybe I don't.

Q Are we to understand you to say that you and your two companions for this particular office, and Miss

Brandalone, after taking your position alongside of or behind Caprio stood there from about nine o'clock in the evening until about four o'clock the next morning? A Yes.

Q Well, didn't you change your position once? A No.

Q And they all appeared constantly to be watching every ballot that came out? A Yes.

Q And there were others that stood there doing the same thing? A Yes.

Q How many others stood there behind or alongside of Caprio and Ruglio watching the counting of the ballots? A I don't know how many there were.

Q Well, can you give us an estimate? A I cannot give you any numbers; five or six; I cannot give you the number.

Q So, in addition to the four or five persons, you, your companions and Miss Brandalone, there were four or five others who stood behind or alongside of Caprio during that whole period watching him count, is that true? A I don't know how many there were; there were quite a few people there, but I cannot remember how many people; I did not count them.

Q Well, can't you give an estimate? A No; I wasn't interested to count the people in the hall.

Q I am asking you to confine your attention to the people who stood immediately alongside of or behind Caprio, and I ask you can you give us any estimate of the number of people that had that position? A No.

Q Can you say there were a dozen? A No.

Q Can you say there were twenty? A No.

Q Can you say there were five? A No.

Q So that you have no idea? A No.

Q But you know there were a large number? A Yes.

Q Did all those people keep the same position from nine o'clock in the evening until four o'clock in the morning? A Some of them did.

Q How many of them? A I don't know.

Q But you know there were a number? A Sure there were quite a number.

Q (*By the Court.*) Who was the County Committee candidates for Congress that year? A Taylor, I believe, Archibald; I don't know the other one.

Q (*By the Court.*) No; who was the candidates for the County Committee? A I think Taylor was the County Committee.

Q (*By the Court.*) Were you then a County Committeeman for the organization at that time? A No.

Q (*By the Court.*) You were not running for re-election? A No; I was running to have the first year.

Q (*By the Court.*) You had not been a County Committeeman before this? A No.

Q (*By the Court.*) I thought you said before you were running for re-election? A No, sir.

Q (*By the Court.*) Then you were not representing the County Committee in watching the ballots? A I was.

Q (*By the Court.*) You were? A Well, no; because I wasn't elected yet.

Q (*By the Court.*) You told Judge Heisley, my recollection is, that you were running for re-election and you were watching the ballots for yourself and also representing the County Committeemen? A Yes.

Q (*By the Court.*) But you were not a County Committeeman? A Not then.

Q (*By the Court.*) Then you were not at that time representing the County Committee, were you? A No, sir.

Q (*By the Court.*) Now, you were there watching these ballots—did you see any ballots taken out of the box

which did not have any cross marked opposite any of the Congressional candidates? A No, sir.

Q (*By the Court.*) You saw no ballots taken out of this box which did not have a cross opposite any of the Congressional candidates? A No, sir.

Cross examination continued by Mr. Harrison.

Q How long have you known Judge Archibald? A Four years; three or four years.

Q How well have you known him? A Well, I know him as a friend of mine.

Q How well have you known him? A Well, I know him to go and talk to as a friend.

Q How many times have you seen him during the last three or four years? A See him every week or every two weeks; every time I had a little time to spare I go down and see him.

Q And that usually happens once a week? A Sometimes in a week, maybe I will go down and see him five or six times; sometimes once a month.

Q You have no business or legal relations with him, have you? A Sometimes.

Q Legal business? A Sometimes when I need it, ask for a favor, for a case, he being a friend of mine, live in the county, he can do anything.

Q Oh, you mean give him the case? A Yes.

Q So you get cases for him? A I get cases for him; he is a friend of mine, and if anybody asks me I refer them to him.

Q Just refer the case to him so he can handle the case? A Maybe.

Q You said, I think, there was nothing happened in that election booth that day; do you happen to know Mrs. Gideoli? A Do I know her?

Q I ask Mrs. Gideoli to stand in the Court Room and ask the witness if he recognizes the woman who stands? A I see her around, not in the polling place.

Mr. Heisley. I want to object to this and I want to appraise the Court clearly of the situation before there is a ruling made. I presume your Honor is familiar with the evidence that was sworn to before Judge Osborne.

The Court. I cannot say I am.

Mr. Heisley. Well, then, I submit the Prosecutor should tell you in quiet what he proposes to prove in connection with this woman. It is a thing absolutely not the subject matter of the cross examination and it may be extremely prejudicial to these defendants, although they are not responsible for it.

The Court. How is it cross examination?

Mr. Harrison. Well, it is only I recall hearing the witness say nothing wrong happened in that election precinct that day.

The Court. Well, if he did say so I didn't hear it.

Mr. Harrison. Well, I am not going to press it, because I realize it may be prejudicial and may not be entirely competent.

Q Do you recall whether or not there were any ballots which had marked upon it more than the proper number of marks? A I did not get that.

Q I withdraw the question. Do you recall in watching the votes cast or the crosses made in front of those men who were running for Congress, whether there were any of them blank ballots, any blank ballots at all? A What do you mean blank?

Q Do you recall—do you understand my question? A What do you mean "blank"?

Q Where there were no marks at all on the ballot? A Plain?

Q Do you remember any ballots of that kind? A Some.

Q With no crosses on? A No crosses on.

John Vittiello, cross.

Q Do you remember there were some ballots of that sort there? A No.

Q You do not recall a single one? A No.

Q Do you recall whether or not there were any ballots which had more than one cross on them in front of a candidate for Congress? A No.

Q Would you say that there were or were not such ballots? A You mean marked?

Q No, with more than one mark opposite the names for candidate for Congress? A No.

Q That is, by no, you mean there were no such ballots? A No such ballots; every one had a single cross.

Q I call your attention to a ballot which I take from the box, which is identified by the figures 52 in red pencil, and ask you if you recall seeing that ballot? A I did see it.

Q How many crosses are there opposite the names of candidates for member of the House of Representatives? A Three; there are three crosses.

Q Three crosses. I thought you said that there were no such ballots? A Well, you do not understand what I talk about. You told me any marked ballots before go into the booth, and I said no.

Q You mean by the Election Board before they were handed out to the voter? A No.

Q Well, were there any such ballots? A No.

Q Well, on that ballot there appears to be three crosses? A Yes.

Q Opposite three of the four candidates running for Congress? A Yes.

Q Do you remember for whom that ballot was counted? A This ballot who they counted for; well, those three names, one was Herbert Taylor and Chapman and Archibald.

Q Do you recall how the Judge read that ballot? A Sure, he read this ballot.

Q How did he read it? A He called the name and then he left it to the Board to decide whether it was a good ballot or not.

Q Did he read that ballot for Archibald? A He read it for Taylor, Chapman and Archibald.

Q Did he read it for all three candidates? A I don't know whether—

Q How did he read it? Please answer my question. A He read it like this, Herbert W. Taylor, Alfred Chapman and Arthur B. Archibald.

Q And then went on reading the rest of the ballot? A Well, there was nothing else.

Q So he read all three names there as receiving a vote? A Yes.

Q And do you recall whether you watched the election clerk at that time tallying? A Well, I was not—I was watching the Judge and the clerks.

Q Did you see the clerks at that time put ballots down for Taylor, Chapman and Archibald? A Yes.

Q You thought that was the proper procedure?

Mr. Heisley. I object.

The Court. Objection sustained.

Q I call your attention to ballot number on the back in red, number 54, and ask you if you recall this particular ballot being read, taken from the box and read by the Judge? A Sure.

Q How was it read? A Read Arthur Archibald, that is all.

Q Oh, that vote was read for Archibald? A Yes.

Mr. Heisley. Mr. Harrison, who else was voted for there?

Mr. Harrison. The ballot appears to have eleven marks.

Mr. Heisley. No, I mean for Congress.

Mr. Harrison. No one else but Archibald.

The Court. But there is no mark opposite Archibald.

Mr. Harrison. But there is no mark except one, which has been erased.

Q I show you ballot identified on the back by figures in red pencil, number 40, taken from the box Exhibit S. 1, and ask you if you recall that ballot being taken from the box by the Judge and read? A It was.

Q How was it read? A Arthur B. Archibald; that was the only one on the ticket.

Q Did you raise any question about that ballot because it appeared to have two crosses on it? A No.

Q You are sure that was read for Arthur B. Archibald? A Yes.

Q Who put that cross there? A Well, I don't know who went in, who voted for it.

Q I show you ballot identified in red pencil on the back, number 91, and ask you if you remember this particular ballot being read? A It was.

Q That ballot appears to have a cross in front of and behind Archibald's name, does it not? A Well, they call it to Archibald's—they give it to Archibald.

Q You recall clearly they registered that vote for Archibald? A Yes.

Q You have a pretty good memory, haven't you? A I guess so.

Q Do you remember all these particular ballots that were read, as I show them to you? A Well, you show me the first one, the second one, you show me two.

Q Do you remember them being brought out of the box and read? A Except this one.

Q And you remember these ballots, the one with two crosses in front, the one with three markings opposite the name of candidates for the House of Representatives? A Yes.

Q And do you remember this particular ballot with the cross in front and the cross behind? A I don't get you.

Q Well, do you remember all these ballots? A Yes, I remember, but I don't know what you mean by front and back.

Q Showing you ballot number 91, I ask you if there is not a cross in front and in back of Archibald's name? A Yes, here is Archibald's name.

Q Now, please listen. Do you remember that particular ballot with a cross in front and behind Archibald's name? A Yes, I remember this one. All the ballots I remember, but this here is supposed to be a marked ballot.

Q Well, it was counted for Archibald? A No.

Q Well, it was counted for Archibald? A Well, his name is on there but it is supposed to be a marked ballot.

Q But it was counted for Archibald? A No.

Q How was it counted? A Marked ballot.

Q You remember that clearly? A Clearly. Every candidate is supposed to have one cross.

Q Do you remember clearly the Board announced this as a marked ballot? A Yes.

Q The whole Board? A Well, they passed it from one to another.

Q Well, were there any other marked ballots? A Thirty-one, as far as I know.

Q Well, don't you mean thirty-one blank ballots? A I don't get that question.

Q Thirty-one plain ballots, nothing on them? A No.

Q Where did you get this figure thirty-one marked ballots? A That is what they said.

Q Who said that? A Everybody says it in here; I seen quite a few marked ballots, not many.

Q So you are now repeating what you heard someone say on the stand? A No, I seen myself; I could see some of them.

Q Why did you say thirty-one marked ballots? A Because they said thirty-one blanks; I don't know what blanks mean.

Q So you inferred thirty-one blank ballots meant thirty-one marked? A Yes.

Q (*By the Court.*) And there were thirty-one? A I cannot remember exactly how many there were.

Q (*By the Court.*) You said they announced thirty-one marked ballots? A No, sir.

Q (*By the Court.*) Well, who was the marked ballots counted for? A Nobody.

Q Well, were all those marked ballots rejected that night? A Well, I don't know, when I seen them finish I went out; they remained there until six and I went out at four o'clock.

Q But you do recall there were thirty-one marked ballots? A I do not remember.

Q You remember there was quite a number? A Quite a number.

Q How many? A I cannot tell.

Q Would you say there were a dozen? A No.

Q Would you say there were five? A No.

Q Would you say there were twenty? A No.

Q Would you say there six? A I can't say exactly.

Q But you remember there were several? A I do not remember.

Q But you do remember there were some? A Yes, but I do not remember how many there were.

Q All counted for Archibald? A No.

Q I show you ballot number 17, as identified by the red mark on the back thereof.

The Court. May I ask a question at this time?

Q (*By the Court.*) I would like to know what they did with these marked ballots, whether they put them on a separate string and marked them void?

Q The Court requests me to ask, what do you recall the Board doing with these marked ballots? A Put on a separate string.

Q (*By the Court.*) Did they mark anything on the back of them? A I don't know.

John Vittiello, re-direct.

Q (*By the Court.*) Did they put them on the same string they put the ballots they counted on? A No, they had a separate string, two strings.

Q I ask you if you recollect ballot number 17? A Yes, I seen that.

Q How was that ballot counted? A For Yarrow.

Q At that time did you see what was left of the cross before Archibald's, which had apparently been erased? A No, there was nothing erased then.

Q Do you remember evidences of a cross before Archibald's name; do you remember that? A Well, I remember—I can't remember all the ballots how they were marked; I remember they called Yarrow or Archibald; I cannot remember exactly whether there was a cross there.

Q So you do not remember all the ballots? A Maybe no and maybe yes; I cannot recall all the ballots.

Q You do not remember that ballot? A I cannot say I do or not.

Q But you remember the others? A I remember the others and I see marked ballot.

Mr. Harrison. May I reserve the right at a later time to show the witness some of the so-called blank ballots in the bulk. I ask that because at noon time I can show them to him.

The Court. Yes. You remain here subject to the call of the Prosecutor.

Re-direct examination by Mr. Heisley.

Q Now, I would like to ask you about these ballots that you have been questioned about by the Prosecutor. There were over 405 ballots cast at that election, weren't there? A Yes.

Q Can you remember what was done with everyone of the 405 ballots, or not? A Sure I could; everyone—

Q Now, listen to me. I want to see if I understand you. 405 ballots, do you mean to say you can remember

what was on everyone of the 405 ballots? A No, I cannot remember.

Q Well, do you mean to say to us you can remember what was done with everyone of them? A Yes.

Q With every one of them? A No.

Q Well, now, don't answer until you understand my question. I ask you again, can you tell what was done with every one of over 405 ballots? A I can't tell you.

Q I don't want you to tell me what you think was done. I want you to tell what you do remember being done. If you do not remember, say so. Now, take this ballot marked 17. I am showing you ballot marked 17. Now, do you remember what the Board did about counting that for Congress? A Well, I do not know what they did; they called them out.

Q I want you to tell me whether you remember this particular ballot, not all the ballots, but this particular ballot; do you or don't you? A No.

Q You said a while ago it was counted for Yarrow? A Well, they called Yarrow; I don't know if they counted it for Yarrow.

Q I want you to tell me do you remember it is counted for Yarrow? A Yes.

Q But do you remember the Board actually taking that particular ballot, in its hands, or do you just think it took it in its hands the same as the other ballots? A No, all the ballots took in his hands.

Q But is there anything about that ballot that makes you remember it from any of the other 400 ballots? A No.

Q And when you say they marked it for Yarrow you say that because— A I see the cross.

Q Now, look at this ballot marked 52. Somebody tried to vote for three Congressmen, is that right? A Yes.

Q For Taylor, Chapman, Archibald? A Yes.

John Vittiello, re-direct.

Q Now, let me ask you do you remember seeing this particular ballot, or don't you remember it? A I cannot remember all the ballots.

Q Well, answer my question; do you remember seeing this particular ballot? A No.

Q Do you recall how that was counted, if it was counted at all for Congress? A I do not know if they counted it for anybody.

Q You don't know? A No.

Q Now, I show you number 40, a ballot with apparently two marks opposite or in front of Archibald's name. As you sit here in this chair now, do you remember seeing that particular ballot that night? A I might and I might not; I do not remember exactly.

Q Do you remember whether it was counted for Archibald? A No, I don't know whether it was counted for Archibald or any other candidate.

Q You say it ought to be counted for Archibald? A I don't know.

Q I show you 54. This is a ballot with a cross before Archibald which has been rubbed out. Do you remember —now, you remember seeing that ballot that night with that blur? A No, I don't remember; I might have seen this ballot, but I don't remember it was that one or another one.

Q Because there were so many of them? A Yes, because there were 405.

Q Well, have you any recollection as to whether or not that ballot was counted for anybody? A No.

Q You have no recollection? A No.

Q You don't know whether it was counted for anybody? A No.

Q Do you remember any discussion about it? A No.

Q When you say these ballots were counted for different people why did you say that; you told the Prosecutor that some of these ballots were counted for certain candidates for Congress; why did you say that? A Well,

I mean when I seen the cross on the candidate, I understood who the cross was for, I just read the name of the Congressman, but I don't know if they give it to that fellow or not when reading; I cannot remember everything; it is a year ago today; as far as I can remember I know it.

The Court. Well, of that is so, we have lost a good deal of time.

Q Now, here is this ballot number 91, with a cross in front of Archibald and a cross back of it; do you have any distinct recollection of what the officers did with that particular ballot? A No.

Q Do you recollect the officers counting for Congressmen any ballots when there were no names opposite any candidate for Congressmen? A No.

Q Were there any such ballots counted for Congressmen? A No.

Re-cross examination by Mr. Harrison.

Q Calling your attention to ballot 52, you were watching these crosses very closely, weren't you? A Yes.

Q Do you remember this ballot and was your attention called or did you notice the striking difference between the cross before Archibald's name and the other crosses on the tickets? A I might have seen the ticket, but I don't remember to whom they gave the vote.

Q Do you remember one cross was a large black pencil cross and all the other crosses were small light pencil crosses? A No, I do not remember.

Q Do you know a man by the name of Spatola? A No.

Q I call your attention to a number of ballots, eighteen in all, and all of them appearing to have the name Girardo Spatola under the title "Coroners" with a cross mark before each one of them, and ask you if you remember any or all of those ballots? A No.

Joseph Cordasco, direct.

Q Do you know in whose handwriting these ballots are? A No.

Q You don't know who wrote those in? A No.

Q Well, do you know Spatola being voted for? A I don't know who that fellow is.

Q You don't remember it at all? A I don't know him.

Q Do you remember his name being called? A I remember some name being called; I do not know the fellow.

JOSEPH CORDASCO, sworn in behalf of the defendants.

Direct examination by Mr. Heisley.

Q You attended this primary election? A Yes.

Q What is your business? A Jeweler.

Q And where were you located? A 38 Cutler street.

Q How long have you been in business in this city? A Fifteen years.

Q Are you a married man? A Yes.

Q And were you there at this primary as an official of any kind or representing any party? A Yes.

Q In what capacity? A County Committee.

Q Were you really a member of the County Committee? A Yes.

Q You were a member of the Republican County Committee? A Republican County Committee.

Q And how long were you there? A What do you mean, evening or the morning?

Q Well, during the whole of the election day until the ballots were counted the next morning? A I was there from eight o'clock until eight o'clock in the evening, before they started to count the ballots, then I went home half an hour and after I come back they opened the box and started to count the ballots.

Q How long did you stay there then? A Until that evening.

Q What time was that? A I don't know what time it was.

Q Well, three, four, five o'clock in the morning? A No, not five o'clock; I think I left the polling place at twelve o'clock.

Q Well, whether it was twelve or not, were you there at the finish of the count? A I went home.

Q I mean did you see the finish of the count? A Yes.

Q When the result was announced? A No, not the result, just when they finished.

Q You were beaten, weren't you, in that election? A Yes.

Q And when you found that out that was enough and you went home? A I went home because I was defeated.

Q You didn't stay to see the rest of it? A No.

Q Well, you think you were there until after twelve o'clock? A No, after I went home I come back and stayed there around the polls a while and went home again.

Q What was the last time you were there at the polling place? A Well, I went home a half an hour and came back about one o'clock.

Q How long did you stay there that time? A About a half an hour and went out.

Q You left the polls then about half past one? A About that hour.

Q Did you see Mr. Hargan there that evening? A I see him the night time.

Q How many times did you see him there? A I think a couple of times.

Q He says he went there about ten o'clock, I think? A I couldn't tell you the established hour, but I know he was there.

Q He says that he went there three times, a little after ten, a little after eleven and a little after one? A I don't know what hours.

Q Do you recollect seeing him there two times or three times? A About twice.

Q Was anybody with him? A Linarducci.

Q How many times was he there? A I think just as many times as Mr. Hargan was there.

Q Now, then, did you see where Caprio and Ruglio were standing? A Standing up—when they were counting?

Q Yes. A They were standing by the box.

Q They were on one side of the table and the tally clerks on the other side? A Well, they were all in line, yes.

Q Was there a table between the tally clerks and Ruglio and Caprio?

Mr. Harrison. I object. That is leading. I think this witness knows. He was there and I see no necessity for leading him.

Q Let me start over again. Were these men—these four men all on one side of the table or were they on different sides? A They were all on one side—on the inside of the table.

Q For instance, here is the wall, and here is this table and you mean they all sat here? A That is the inside, yes.

Q All four of them? A All four of them.

Q The Judge and the Inspector were not on the other side? A No, on this side.

Q Did you see Miss Brandalone? A Well, she was on the other side near the Democratic box.

Q Well, after Mr. Hargan came there did you see him direct her to go by Mr. Caprio? A I do not remember.

Q Well, while this counting was going on and while you were there until a quarter after one, did you see anybody there standing in back of Mr. Caprio and Mr. Ruglio, watching them? A Yes, there were quite a few people there standing up.

Joseph Cordasco, cross.

Q Do you remember there were any representatives of the parties there, challengers, agents or leaders? A Well, there were a lot of people there.

Q Well, did you see Caprio and Ruglio count? A Yes.

Q And how many people did you see watching them? A I don't know, six or seven.

Q All the time? A I cannot say all the time, as much as I seen.

Q Well, as a general thing how many people were there down to a quarter after one watching Ruglio and Caprio counting these ballots? A Well, sometimes six or seven and sometimes two left.

Q Did Miss Brandalone stay there all the time you were there? A I think she stayed there all the time.

Q When Mr. Hargan came there the second time where was she? A I do not remember.

Cross examination by Mr. Harrison.

Q How do you fix the time, Mr. Cordasco, as being 1:15 that you left the polling place? A I say I was there at twelve o'clock and went home and got back about that time.

Q And stayed about fifteen minutes more? A About that.

Q And then went home to bed? A I went down to the County Committee.

Q Now, you are very positive about that? A Well, I might make a mistake, fifteen or twenty minutes.

Q Outside of fifteen or twenty minutes you are certain you left at 1:15? A Yes.

Q Well, do you remember being a witness before Judge Osborne in October of 1920? A Yes.

Q Was your recollection then as good as it is now? A What do you mean?

Q That is, do you remember things now as well as you did then? A Well, I remember if it is the truth, and if it is the truth I will say it now, too.

Q Well, do you remember at that hearing before Judge Osborne in October, 1920, in the matter of the application for the removal of the Election Board of the third district of the first ward of the City of Newark being asked these questions, and making the following replies, page 72: *Question:* Were you there all the morning? *Answer:* Yes, sir. *Question:* And all the afternoon? *Answer:* Yes. *Question:* And there all night? *Answer:* Yes, until five o'clock the next morning. Do you remember being asked those questions? A That is, do you—

Q Pardon me! Do you remember being asked those questions and making the replies which I have read? A Yes.

Q How long were you there? A Well, as I say, after I got back one o'clock—I went home at twelve o'clock and coming back between one and a quarter after one; we went out and went down to the County Committee and come up again.

Q So you were not there until five o'clock? A Not steady. I was there five o'clock in the morning.

Q Oh, you went back again? A Yes.

Q So after going to the County Committee— A I come back again.

Q And how long did you remain at the County Committee? A I stayed there about three-quarters of an hour.

Q So you again went back to this Board? A Yes; I was supposed to see a particular party.

Q And you got there what time? A I don't know; three o'clock, I guess.

Q And you remained until five? A Yes; hung around the polls, in and out.

Q You were not paying very much attention to what was going on? A No.

Q You knew you had been beaten at that time? A Yes.

Q You could tell by the early count of the votes you were beaten? A Yes.

Q And when you found that out did you lose your interest? A Yes; I went out.

Q Your only interest was in whether you were elected? A That was all.

Q Were you Caprio's candidate? A No.

Q Who was? A I don't know who was Caprio's candidate.

Q Well, was Cappiello his candidate? A I don't know whether he was his candidate.

Q Who was he supporting?

Mr. Heisley. I object. Not cross examination.

The Court. Objection sustained.

Q Are we to understand you were in and out the election booth during the counting? A Yes.

Q At times you would stay there a few minutes and then go outside? A Yes.

Q And then come back for a few minutes? A Yes.

Q You did not watch the ballots? A I watched what they counted and took an interest in my name.

Q Until you found you had lost? A Yes.

Q You didn't go behind the table? A Yes; I was there.

Q They let everybody in behind the table? A Not everybody.

Q How many were there? A Six or seven as I remember.

Q How close were they to Caprio? A Pretty near him, from here to there.

Q And did all those people keep the same position during the whole time you were there? A The whole time I was there, I am teling you there were more or less; I couldn't keep track of how many.

Q Sometimes there were six or seven? A Yes.

Q And sometimes four or five? A Yes.

Q And sometimes only two left? A Yes.

Q Do you know who those two were? A I don't know.

Q You know Cappiello was there? A Yes.

Q Did Cappiello stay in the same place all the time? A I don't remember.

Q You don't remember seeing him there all the time? A No; I don't remember.

Q You didn't watch any of the ballots? A What did you say?

Q You didn't watch any of the ballots? A I was watching while they were counting up, but I didn't pay much attention to the ballots.

JAMES V. CAPPIELLO, sworn in behalf of defendants.

Direct examination by Mr. Heisley.

Q What is your business? A I am in the real estate and insurance business.

Q Where are you located? A 803 Essex Building.

Q How long have you lived in Newark? A Twenty-eight years; born here.

Q Are you a married man? A Married.

Q And were you connected with this—the conduct of this primary election? A I was one of the assistants.

Q You were appointed by the County Board of Elections, weren't you? A I was.

Q To go down there and assist? A Yes.

Q And did you go there and assist? A I did.

Q During what time were you present at the election reading? A I went there at seven A. M.

Q Seven A. M., and how long did you stay there? A I stayed there until the count was finished.

Q What time was that? A I think it was about four A. M.

Q The next morning? A The next morning

Q And who was the other assistant? A Miss Brandalone.

Q And do you recollect Mr. Hargan and his assistant coming to the polling place on the evening of the election? A I do.

Q How many times did they come there? A Several times.

Q Well, do you remember, how many, one, two, three, four, five, or how many? A No; I couldn't say.

Q Did they give you any instructions and Miss Brandalone any instructions? A They did.

Q What were the instructions they gave you? A They told Miss Brandalone to stand alongside of Caprio.

Q Did she do it? A She did.

Q How long did she stand there? A Why, she was there until late in the morning, the next morning.

Q Did you see a single time during that evening after Mr. Hargan had requested her to stand there when she was not standing there until she went away? A No, I didn't; she was there all the time.

Q Mr. Hargan says that when he came back on his second visit she was somewheres twelve, thirteen or fourteen feet away from Caprio, is that so or not? A It is not so.

Q Where were you standing at that time? A I was right around there.

Q Were you watching the votes or not? A At different times I was.

Q And what were the clerks doing? A Tallying.

Q How were those people seated, if you recall, or standing; were they all on one side of the table, or were they divided? A They were divided.

Q How much space was there back of where Caprio and Ruglio were standing between them and the wall? A Four or five feet.

Q What do you say? A From four to five feet.

Q Were there any people back of them? A A good number of them.

Q What were those people doing, if you know? A Watching.

Q Watching what? A The ballots.

Q The counting? A The counting, yes.

Q From the time the counting began until the close of the counting was there ever a time when there were not some people back of Caprio and Ruglio watching them besides Miss Brandalone? A Oh, they stayed there—people stayed there until late that morning.

Q Was there ever a time when these men were not being watched by some people? A No; there was not.

Q Didn't notice any disagreement of any kind between the two tallying sheet clerks as to their votes; did they do any comparing and so on? A Well, they did comparing, yes, after the votes, after the counting they compared.

Q Well, while the counting was going on was there any time they did any checking up, or anything like that? A Yes.

Q How many times? A Several times.

Q After it was over you said they compared? A They compared.

Q What happened then, you say they compared? A They tallied their sheets.

Q Well, was there a disagreement at the end of the counting? A No.

Q Who wrote these sheets, if you know, of your own knowledge? A The two clerks.

Q What? A The clerks.

Q What time—did you see them do the writing? A I did.

Q Now, I would like to ask you this; did you see Mr. Caprio or Mr. Ruglio make a single mark or letter upon this tally sheet which has been offered in evidence out-

side of their signing their names down here towards the bottom? A I did not.

Q Did you see them give any directions to the election clerks as to making marks on this? A I did not.

Q Now, did you see the returns written, the ballot returns?

Mr. Harrison, Referring to Exhibits S. 1 and 2?

Mr. Heisley. Yes.

A Yes, this is my writing here; I wrote the names in.

Q Now, then, let me see. We will take this Exhibit S. 1. What part of that did you write on that sheet. Start at the top. A I wrote, City, Newark, Third, First, Herbert W. Taylor.

Q No; what about the 415? What do you say about that? A No; I didn't write that.

Q What about the figure 1 on the same line? A That ain't my writing.

Q What about the names there? A I wrote the names Herbert W. Taylor, Alfred Chapman, George B. Yarrow, Arthur B. Archibald.

Q What about the votes at the side, 5, and so on? A That is not my writing.

Q Whose writing is it? A That writing is Veniero's.

Q Did you see him write it? A Yes, I did.

Q Well, now, you hesitate; did you see him write it or not? A I did.

Q Have you any doubt? A No doubt whatsoever.

Q Did you see him write the 415? A No, I didn't.

Q Did you see him write the figures, 5, 10 and 403 out to the right? A Yes.

Q Who wrote them? A Veniero.

Q Are you sure about that? A Yes.

Q Did Caprio or Ruglio give any instructions to Veniero or to the other clerk as to the writing of this S. 1? A Not to my knowledge.

Q I am not sure—did you hear them say anything? A No.

Q Is any of this writing on S. 1 in Caprio's or Ruglio's handwriting excepting their signatures? A No.

Q Now, I show you S. 2, and start at the top of that, if you will, and tell us about the handwriting there? A I wrote City, Newark, Third First.

Q What about the 415? A I didn't write that.

Q Who did write it? A I don't know.

Q This 415, a second time, do you know who wrote that? A I don't know.

Q Did you write it? A No, sir.

Q How about the names, Taylor, Chapman, Yarrow— A I wrote the names in.

Q What about the words five, one and four hundred and three out to the right? A That is Veniero's writing.

Q Did you see him write it? A I did.

Q Any doubt about it? A No.

Q How about the 510, 403? A He wrote the figures.

Q Did you see Caprio give him any instructions about the figures being filled in? A No.

Q Is there any writing on that paper other than the signatures of Caprio and Ruglio, their writing? A No.

Q You were subpoenaed by the State as a witness in this case? A I was.

Q You were not subpoenaed by the defendants? A No.

Cross examination by Mr. Harrison.

Q Did you have a talk with counsel for the defense, or either of the defendants before going on the stand? A I did not.

Q Never talked with them? A No.

Q Do you know Caprio? A I do.

Q Live in the same district with him? A Yes.

Q Who gave you the order to fill out S. 1 and S. 2, the statements which you have just testified about? A One of the clerks.

Q Who gave you the order about your other duties that you performed that day? A The Judge.

Q Well, didn't the Judge give you the orders about filling out these sheets, too? A No.

Q But on everything else, the performance of your duties around the election booth that day you received and took your orders from the Judge? A Yes.

Q And by the Judge you refer to Joseph C. Caprio? A Yes.

Q How long were you engaged in counting the Democratic ballots? A About twenty minutes.

Q How many ballots did you count? A I am not sure; I think there were forty-four or forty-six ballots.

Q And you counted forty-six ballots in twenty minutes? A I did, with the assistance of Miss Brandalone.

Q And you counted the ballots and also strung that number of ballots in that time? A Yes.

Q That is at the rate of over two ballots a minute, is it not? A Yes, about two ballots a minute.

Q How do you account for the fact, then, that it took the regular election officers seven or eight hours to count 400 ballots?

Mr. Heisley. I object—I withdraw the objection.

A They had in all over 400 ballots.

Q It took them until about four or five o'clock in the morning to count the ballots? A Yes, about four o'clock, I think it was about three-thirty or four o'clock.

Q Did you ever serve on an election board before? A I had.

Q Well, you counted ballots at the rate of two a minute? A Yes, I did.

Q During the rest of the evening and after the counting of the ballots, what did you do? A Occasionally I would stand near the judge and look at the ballots he read.

Q Other times you were doing what? A Standing around the polls.

Q Just killing time? A I had nothing else to do.

Q Under whose orders were you? A I do not get your question.

Q Did you do these things under orders from anybody? A No, I didn't.

Q What is the largest number of people that you recall behind or alongside of Caprio? A Well, I could not say just how many people were there, but the table was circled, people all around the table.

Q Coming in and out all the time? A Yes, sir.

Q Did you ever get as low as two? A Never.

Q You heard the testimony of Cordasco? A I did.

Q Were always the same people there, or did the persons standing there change in identity? A Some of the people stayed there all the time.

Q Plenty of room behind Caprio for seven or more people? A Yes, more than that.

Q And they all could and did stand looking over his shoulder while he read? A Yes.

Q Do you know Veniero's handwriting? A I do.

Q I ask you to look at this number of ballots, some eighteen or nineteen, taken form S. 3, under the head of "Votes for Coroner," and I want to know in whose handwriting the name Girardo Spatola is? A I don't know whose handwriting that is.

Q Look over all of them and tell us? A Some of these writings would look like Veniero's writing.

Q (*By the Court.*) Well, there are two sets of writing? A Yes, sir.

Q (*By the Court.*) Who wrote Girardo Spatola, and who wrote James Spatola? A The other looks like Caputo's writing.

Q (*By the Court.*) Well, there is another set of writing further down. A There is only two here, I see; that is the same as this, isn't it; it is the same as that.

Q (*By the Court.*) Further on, whose writing is that? A That looks like Veniero's writing.

Q (*By the Court.*) You think that is the same as Girardo? A I think so.

RECESS.

Q I think the last question I asked was with reference to the nineteen ballots with the name Spatola, in some cases Girardo, and in some cases James, and ask you if you recognize in whose handwriting those names were? A I think that is Veniero's writing.

MARGARET BRANDALONE, recalled in behalf of the defendants.

Direct examination by Mr. Heisley.

Q I want to just direct your attention to one feature of this case; I believe you testified as to Mr. Hargan and his assistant coming there three times? A Yes.

Q On the occasion of his second visit, is it true or not you were standing twelve or thirteen feet away from Mr. Caprio? A No, it is not.

Q How close were you to him? A I was close all the time, right alongside of him.

Cross examination by Mr. Harrison.

Q While you were close to him what were you doing? A I was watching them count the ballots.

Q Checking them with each count he made? A No, I was not checking, I was watching to see if he was counting the ballots correct.

Q Would you recall how he counted any particular ballot or class of ballot.

Mr. Heisley. One minute. I object as not being cross examination. I called her for one particular fact, as to where she was standing. That was all. Not what she was doing.

Q At what time of the evening did you take your position alongside of or behind Caprio? A I should judge it was near ten o'clock.

Q Did you change your position from that time until 4:30 o'clock in the morning? A Until what time?

Q Until you left, I think you said 4:30 in the morning? A No, I left at three.

Q How do you fix the time as three? A Well, I think it was three; I do not exactly remember the right time.

Q They had finished the counting at that time? A Yes.

Q I ask you again how you fix the time as three o'clock? A Well, I have an idea it was three o'clock; I am not sure.

Q You testified before Judge Osborne, did you not? A I did.

Q In October? A I did.

Q In the matter of the application for the removal of the election board of the third district of the first ward of this city? A I did.

Q Do you recall being asked on that hearing the following question and making the following reply: *Question:* What time did you leave? *Answer:* 4:30, the next morning. A I do not remember.

Q Were you or were you not asked that question, and did you or did you not make the reply? A I do not remember.

Q I am referring to page 80 of the transcript. Did you go home for supper? A No, I did not.

LAWRENCE RUGLIO, defendant, sworn in his own behalf.

Direct examination by Mr. Heisley.

Q Where do you live? A 129 Seventh avenue, Newark.

Q Are you a single man? A Yes, sir.

Q How long have you lived in Newark? A I should judge twenty-five or twenty-six years.

Q Where did you come from? A Italy.

Q You are a naturalized citizen? A My father's papers naturalized.

Q Served in the army, didn't you? A Yes.

Q Did you go abroad? A Yes.

Q Where did you go? A To France.

Mr. Harrison. I object as to what battle this man may or may not have participated in, when he left or when he came back.

The Court. Objection sustained.

Q And you were one of the—you were the inspector at this election? A I was.

Q I want to ask you generally and while I think of it, did you and Mr. Caprio agree together or conspire together in any way to misrepresent that election? A No, sir.

Q Did you agree or conspire in any way to neglect your duties as judges and inspectors of election? A No, sir.

Q Did you agree, or was it ever talked about that you should falsely count the votes or make a false return of the election? A No, sir.

Q Did you knowingly, improperly count any votes? A No, sir.

Q Or, did you knowingly sign any false statement? A No, sir.

Q It is true that these statements of results show that the total number of votes which were 415, while the votes cast were 409; you know that now, don't you? A Yes, sir.

Q How did you come to sign that statement with that discrepancy on it, if it was on it at the time you signed it? A After the clerks got done tallying up on the sheets they told us to sign the sheets and we signed them, the ballot sheets and all other kind of reports were to go down to the City Clerk's office and the County Offices and they told us to put our signatures on and we did.

Q In the counting of these votes do you recollect Mr. Hargan and his assistant coming there? A I do.

Q How many times were they there? A To me it looked as though they were there all the time.

Q Well, how many times do you recall their being there? A Well, four or five times.

Q Do you recollect Mr. Hargan speaking to Miss Brandalone? A I do.

Q What time in the evening was that? A Well, I should judge around ten o'clock or a quarter to ten.

Q Do you recall him saying to her, if the— A He said to get behind the judge and see that he reads the ballots out right.

Q And did Mr. Hargan speak to you? A He did.

Q What was the occasion of his speaking to you? A I was sitting on the chair, and he told me to get up off the chair.

Q Did you do so? A I did.

Q What did you do after you got up from the chair? A Watched the ballots, the way he was reading, and folded and strung them.

Q Did you watch the ballots all the time the counting was being done? A Yes.

Q Was the Election Board on two different sides of the table or on one side? A Two different sides.

Q How much space was there behind you and Mr. Caprio, back of you? A I should judge three or four feet.

Q Were there any people standing behind you, if you know or not, watching you count these ballots? A There was.

Q Can you recall the names of any such persons? A Yes.

Q Well, mention them, if you will? A There was Brandalone; there was Cappiello, there was the Cordasco brothers and quite a few others; there was Veniero, and a few more; I don't remember their names.

Q Well, Veniero was the clerk? A His father.

Q Oh, his father? A Yes.

Q How long did Miss Brandalone stand by you? A Ever since this Mr. Hargan put her there.

Q Is it true that at any time she was standing twelve or thirteen feet away from Mr. Caprio after Mr. Hargan had told her to take her place there? A No, sir.

Q Did you see every ballot or not that Mr. Caprio took from the box and read? A I did.

Q How did he take them, one at a time, or more than one at a time? A One at a time.

Q You swear that you saw and read every ballot he took? A Yes.

Q From start to finish? A Yes.

Q Did he read any ballot untruly? A No, not to my knowledge.

Q How did you see the ballots, were they handed to you? A Yes, they were handed to me; I was looking at them the same time he was and watching that he was calling them out, and he handed them to me.

Q What did you do with them? A Folded them up and strung them and he would take another ballot out of the box and I would see that he read the vote right or not.

Q Mr. Hargan said at the counting some of the ballots were handed to you partly folded? A Yes, after he got done he partly folded them up.

Q Did you read them? A Yes, I read them over his shoulder.

Q Were any of those ballots folded by Caprio so that you could not read them? A No, sir.

Q How did you know whether to receive the votes or not; how would you and Caprio know that night whether you should count the vote or not; did you keep a comparison, I mean, with the register? A We could not do that because they were on the other side of the table.

Q Well, now, let me see. Was there any dispute as to whether any votes were eligible to be counted or not? A Well, it was up to us.

Q Was there any question raised as to whether a certain—whether any votes were to be received or not? A Yes.

Q How would that be straightened out? A Amongst the Board, the four members of the Board.

Q Were there any votes—do you know that now on the registery book there are only 409 persons entitled to vote? A Yes.

Q As a matter of fact you received 415 votes? A Yes.

Q Isn't that so? A Yes.

Q How do you account for your receiving six more votes than actually registered? A That I could not tell.

Q Well, did you have any communication with the Election Clerk as to who was entitled to vote or not? A Well, in between they would tell us—we had one table on one side of the building and a man would come in there to vote and they would look them up over there and then they would holler he is all right to vote.

Q That is when the voting was going on? A Yes.

Q And those ballots, of course, were put by the officers in the election box, the ballot box? A Yes.

Q And after the election was over you would take these same ballots out of the box and count them? A Yes.

Q And did you put any ballots in the box that were not voted? A No, sir.

Q You know what stuffing the ballot box is? A Yes.

Q Did you put any blank ballots in that box? A No, sir.

Q Did you put anything in that box excepting what the law says you shall put in? A That was all.

Q Now, it is said that there were some thirty ballots counted for Archibald upon which no candidate for Congress was voted for; do you understand the question? A Yes.

Q Did you receive any such ballots and count them for Archibald? A Giving him credit for it?

Q Yes. A No, where any one was blank we let it go.

Q I understand that the State claims that there was thirty or thirty-one ballots which were received and put in the ballot box by you and Caprio that had no votes for Congressmen on it; did you count any of such ballots for any Congressmen? A No, sir.

Q Are you positive about that? A Positive. We could not count it if there was no cross there.

Q That is what I mean. Where there was no cross did you count it for any Congressman? A No, sir.

Q Do you know whether or not there was any checking up or any disputes between the two tally clerks as to the number of votes that had been counted? A Quite a number of times.

Q And what did you and Caprio do while that was being straightened out? A They would tell us to wait, one of the clerks would holler, "Wait a minute," and then they would go over the sheets; Archibald tallied so much; John Doe tallied, and this party and then they would tell us to go ahead.

Q Did you do any writing on either the tally sheets or on these two statements of results, excepting to sign your name? A No, sir.

Q Did you direct how those tally sheets or results of election were to be filled up? A No, sir; I did not know myself how to fill them up.

Lawrence Ruglio, direct.

Q Were you ever an election officer before? A I was one year; that was my second term, but I don't know much about the business.

Q I show you this tally sheet and ask you if you made any figures or letters anywhere on that sheet from start to finish, excepting signing your name down here with Caprio and others? A That is all.

Q Whose writing is this sheet in, if you know? A I cannot tell you.

Q Well, is this the sheet the clerk had? A Yes, that is one of the clerk's sheets.

Q But you don't know who made the marks? A No, sir.

Q What time in the morning did you sign the tally sheet, Mr. Caprio? A Oh, it must have been around half-past four or five o'clock, between those times; I couldn't just say, because we got out of the place at six o'clock, quarter after six.

Q And you also signed these two statements of results? A Yes.

Q And you also signed some other statements? A Yes; all they told me to sign I signed.

Q Did you sign them all at one time? A Yes.

Q I mean, did they hand you one at a time; were they all signed at the same time, or did you go in again ten or fifteen minutes later and sign another? A No.

Q Signed them all at once? A Yes.

Q Who asked you to sign? A Why, the clerk.

Q I show you these two sheets, 1 and 2, exhibits, and ask you if any figure or writing on either of those exhibits is yours excepting your name; just look at it before you answer it? A No, sir.

Q Now, look at this other one? A No, sir.

Q Do you know in whose handwriting the writing is outside of the figures? A I don't know who wrote it.

Q Well, did you see somebody do it? A Well, one of the clerks.

Q Well, did you see one of the clerks write on these two exhibits? A No; I did not.

Q Where did you sign all these two exhibits and tally sheets? A Right there on the table.

Q And after they were signed what did you do with the ballots and with these two exhibits and the tally sheets? A Why, the ballots we put them in the ballot box and we took them down to the City Hall.

Q What did you do with these two statements of results? A I don't know what I done, passed it on to another one to sign.

Q I mean, when you left did you all three go somewheres together? A Yes; the four of us went together and the officer with us.

Q One of the police officers went with you and the four men? A Yes.

Q And the election and tally boxes? A Yes.

Q And these two statements of results? A Yes.

Q Where was the tally sheet, inside of the box? A Yes; inside of the box.

Q And these were outside? A Yes; they were supposed to either go to the County Clerk or the City Clerk.

Q And you went to the City Clerk? A Yes; we stopped at the City Hall first.

Q And delivered what? A The ballot boxes and some of these reports, and then we come to the Court House to the County Clerk and we gave them what was coming to them.

Q Mr. Ruglio, do you know of anything that was done at that election by you or Mr. Caprio that was illegal or improper?

Mr. Harrison. Objected to.

The Court. Objection sustained.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Did you do anything that was illegal or criminal?
A No, sir.

Mr. Harrison. I object to that, too.

Mr. Heisley. Can he not assert his innocence?

The Court. Well, the trouble is that what he may conclude to be illegal or criminal other persons versed in the law might say it is not. He may do a certain act which he may think is perfectly innocent, but, under the election law, it may be criminal.

Objection sustained.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Did you knowingly or intentionally do anything that was wrong in the discharge of your duty as an inspector?
A No, sir.

Mr. Harrison. I renew the objection on the ground that it calls for a conclusion of the witness and not within the issues under this indictment.

The Court. Objection sustained.

Mr. Heisley. May I ask him if he is guilty or innocent? That might be a conclusion, too.

The Court. I think that is true. You may ask him if he did the specific act which the State charges him with.

Lawrence Ruglio, cross.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Are you innocent or guilty of the charge made against you by the State? A I am innocent.

Mr. Harrison. Wait a minute. I renew the objection on the same ground.

Mr. Heisley. He cannot say whether he is innocent or guilty?

Mr. Harrison. I will withdraw the objection.

Q Are you guilty or innocent? A Innocent.

The Court. I suppose in the last analysis it is for the jury to tell that.

Mr. Heisley. Of course, but they can only tell what is sworn to.

Cross examination by Mr. Harrison.

Q Mr. Ruglio, did you sign these statements and the other election reports that you had to make because the clerks told you to do so? A Yes, sir

Q You would not have signed them unless they had requested you or told you? A Well, they had more experience than I had on the Board.

Q Veniero was only serving his first year on the Board? A I believe he was.

Q You had served a previous term on the Board of Registry? A Yes.

Q And still you say Veniero had more experience than you did? A Well, there were two other members that had more experience than I had.

Q Who? A Caprio and Cappielo.

Lawrence Ruglio, cross.

Q And you signed these sheets because Caprio told you? A No.

Q Who? A Because Caputo told me, the clerk.

Q And you signed because Caputo told you to sign? A Yes; there is a rule there that told you to sign.

Q And you did it because the law compelled you to and not because Caputo told you? A Well, Caputo looked it up and told me it, and I signed.

Q You saw every ballot Caprio called by looking over his shoulder? A Yes.

Q How tall are you? A Five feet one inch.

Q Do you know how tall Caprio is? A Five feet ten or eleven.

Q You stood behind him? A Not behind, on the side.

Q I show you ballots number 40, 17, 91 and 54 and 52, and call your attention to the markings opposite the names of candidates for members of the House of Representatives, and ask you if you recall how those names were read by Caprio when he took the ballots out of the box? A This here one—

Q Referring to ballot 52? A —nobody got credit for it.

Q (*By Mr. Heisley.*) How is that marked?

Mr. Harrison. That is marked with three crosses, is it not?

A With Taylor, Chapman and Archibald.

Q Ballot number 91? A Nobody got credit for that.

Q Why? A Because there is a cross in the front and a cross in the rear.

Q Ballot number 54? A No one got credit for that.

Q Why? A No cross on it ; there was a cross there, but it was marked off.

Q That read with no credit for anybody? A Just for Archibald.

Q It was read for Archibald? A No, not read; I said nobody got credit for it in the Congressional district.

Q That shows a cross mark erased? A Yes.

Q Was that shown as a marked ballot? A Yes, for the three candidates.

Q But not a marked ballot generally? A No.

Q I show you ballot 17 and ask you the same question as to that? A That was credited to Yarrow.

Q Does that not also show an indistinct mark for Archibald? A No, but it was read off.

Q I show you ballot 40, and ask you the same question? A That was credited to Archibald.

Q And there was two crosses on that ballot? A It is —it was meant for the one man; that is what the Board claimed; we left it to the Board and that is the decision the Board gave.

Q So that ballot with two crosses before Archibald, you recall, was submitted to the Board? A I believe it was.

Q But do you remember anything about that particular ballot? A I do not.

Q Well, then, don't try to testify to it. So do you remember anything about the other particular ballots? A Yes, about the rest.

Q You remember about the particular ballots coming to your attention? A Yes.

Q And you remember the action taken by the Board on it? A Yes.

Q I call your attention to a bundle of seven ballots, all of which have two or more cross marks in front of the candidates for members of the House of Representatives, and I ask you if you recall how the votes were tallied for those ballots for that office? A Nobody got credit for this.

Q Well, just look over all of them and answer it in one answer? A Nobody got credit for them.

Q And now I ask you—I now call your attention to a bundle of five ballots in none of which does there appear to be any cross opposite any name of the candidates for

member of the House of Representatives, and ask you, how, if you recall, those ballots were called and tallied? A Nobody got credit for them.

Q Well, then, if these sixteen ballots, which I have just shown you, there was no credit given for any member of the House of Representatives, how, then, do you account for the fact that your statement of returns shows that there were 409 credits given to the candidate for the House of Representatives? A 409? That I do not know; we took the clerk's word for that.

Q Did you know at the end of the count how many ballots had been taken from the box and numbered? A 415, I believe.

Q You did the actual numbering yourself, didn't you? A Yes.

Q You knew that there had been a number of ballots where there had been no votes cast or where there had been no votes credited or to be credited to the members of the House of Representatives? A I did.

Q Did you know how many there were? A I couldn't say how many there were; I know there were quite a few.

Q Quite a few? A Yes.

Q You knew that there were—but did you have any impression as to how many there were? A No, sir.

Q Could you say there were twenty-five, thirty, forty, fifty? A No, sir.

Q But you knew there were quite a few? A Yes.

Q Didn't it strike you strange, if you only had 415 ballots marked, one of which had been rejected, and if there had been a large number of ballots where there had been no vote for members of Congress, that there should be nevertheless 409 votes returned in your statement? A Well, you see we signed at the bottom; we didn't look over here; the clerk told us to sign and we signed.

Q So you signed that paper not knowing what was on it? A Yes.

Q And you signed because the clerk told you to sign? A Yes.

Q Which clerk? A I don't know which one.

Q Would you have signed anything he told you to sign? A Yes; he was in the same business.

Q If he had put down a thousand votes and told you to sign, would you have signed? A Yes, I certainly would; I didn't look at what was cast, because I was tired—dead tired; you would be tired too if you had been there from six o'clock until six o'clock the next morning.

Q Did Caprio tell you to sign that? A No, sir.

Q Which clerk told you to sign? A Both clerks; they both had something to do with it.

Q Which clerk told you to sign that statement? A One clerk told me one time and another another time.

Q So you don't know which clerk told you to sign? A No; one fellow would pass me one thing and the other clerk another one and I would sign; there was a dozen signatures.

Q And you signed everything that was handed to you? A Yes; it was taken for granted those men knew what they were doing.

Q Did Caprio tell you to sign? A No, sir; Caprio did not have anything to do with it.

Q So your only explanation to that return is, you signed it because one or both of the clerks told you to sign? A Yes.

Q Referring to the five ballots where there are no crosses opposite the names candidate for members of the House of Representatives, have you any recollection of those blank ballots, those particular blank ballots? A Just what do you mean by that?

Q Well, do you remember any one or all of those ballots? A I could not say that I remember them; that was fourteen months ago.

Lawrence Ruglio, cross.

The Court. Are they all blank?

Q That is, so far as the members—the spaces within which are contained the names of the candidates for the House of Representatives. But you do remember that your action on that count of ballots was not to credit anybody? A Yes; that was the duty of the Election Board to do that.

Q The duty of the clerks? A Not the clerks, but the Inspector; that was my duty.

Q Now, I call your attention to eighteen ballots upon which the name of James Spatola, or Girardo Spatola appears under the heading for "Coroner" and ask you if you know in whose handwriting the word James or Girardo Spatola is? A All the same; I don't know.

Q When they were read do you know whether they were correctly read or not? A Yes.

Q In signing this sheet, referring to the tally sheet, there appears under the heading for "Coroner" the name of Girardo A. Spatola; I ask you if the name James Spatola appears on that tally sheet? A No; Girardo Spatola.

Q Were all the votes cast for James Spatola read and credited for Girardo? A I believe they were.

Q Why? A Why, that is something you will have to find out from the clerks.

Q You knew that the name James Spatola had been written in on some of these ballots, didn't you? A No, sir.

Q You were looking over Caprio's shoulder? A I was.

Q. Didn't you hear him read the name James Spatola? A Yes.

Q Didn't you check up with the clerk? A I didn't have nothing to do with the tally sheet.

Q Well, when you came to sign this tally sheet did you see the name James Spatola? A No; we sign on the back.

Q That is your signature? A Yes; down at the bottom.

Q Why did you sign that tally sheet? A I took it for granted it was O. K.

Q Didn't look at it? A No, sir.

Q Didn't see if the name James Spatola was there? A No.

Q Did you do it because the clerk told you to do it? A They told me it was O. K. and I signed

Q Who told you? A Both of them.

Q Which one? A Both of them. They had two tally sheets and they said come on and sign your name here and I signed.

Q Would you have signed your name to your own death warrant if it had been presented to you that night? A Well, that would have been foolish.

Q I don't know about that. A That is a different thing altogether.

Q How many people were there right next to you and Caprio? A What do you mean, right next to us?

Q Yes. A Well, I should judge about fifteen or twenty of them.

Q All crowded around him? A Yes.

Q All looking over his shoulder? A Yes; there was a ring around them; they had him right in the center.

Q Inside of the tables? A Yes.

Q You didn't object? A I couldn't object; there were too many of them.

Q They just forced their way in? A Yes.

Q Were they inside when Hargan and Lindarducci were there? A Yes.

Q What did they do? A Just let them stay there.

Q And they all stayed there during the whole time of the counting? A Yes.

Q All kept the same positions? A Well, some moved; others went away and others come in and tried to get reports and go to their district.

Joseph C. Caprio, direct.

Q Isn't this the situation, at times there were fifteen or twenty there, then some would go and come, and then it might go down to four or five, and then go down to two and three? A No, never; there was always a crowd there.

Q I mean right next to you and Caprio, watching the reading of the ballots? A There was always a big crowd there.

Q Fifteen or twenty? A About fifteen or twenty; a big number; we were surrounded with them.

JOSEPH C. CAPRIO, defendant, sworn in his own behalf.

Direct examination by Mr. Heisley.

Q Mr. Caprio, you are one of the defendants? A Yes, sir.

Q And you live in Newark? A Yes.

Q How long have you lived here? A All my life.

Q Are you a married man? A Yes.

Q And you are the Sergeant-at-Arms in Judge Archibald's court in Kearny, are you not? A Yes.

Q How long have you been or were you a Judge of Election? A That was the first year, but I was on the Board previous, years before that.

Q And you did act in this election? A I did.

Q Do you recollect Mr. Hargan coming to the election place? A I do.

Q With his assistant in the evening? A Yes.

Q How many times did he come there, if you recall? A He came there a few times; I do not recall the exact times, how many; he was there three or four times.

Q Did he talk with you at all ? A Yes.

Q Did he give you any instructions or make any complaint of any kind? A Well, I would not call them a complaint; he told me I should not allow Miss Brandalone and Cappiello to count the Democratic ballots, and I ex-

plained to him the conditions under which we were laboring and he seemed to be satisfied, but he took Miss Brandalone away from there and brought her near me, and he said you should watch those ballots are counted correctly.

Q How long were they counting the Democratic ballots? A Quite a few minutes.

Q How do you account for that? A There was no fight over nomination on the Democratic ticket; there was only one candidate for each office.

Q Was it smaller then the Republican ballots? A Yes; one quarter as small as the Republican ballots.

Q From start to finish in that election did you knowingly falsely count any vote? A Positively not.

Q Did you knowingly sign any false statement of the result of the election? A No, sir.

Q Did you and Mr. Ruglio at any time agree either between the two, or among you two and others that you would falsely count the votes and sign false returns of the election? A Positively not.

Q What is that? A No, sir.

Q Won't you just turn to the jury, without my having to ask all these questions, and describe how the Election Board was seated by, or around this table and who stood there watching you and when you got through what did you do, and so on; just tell it in your own way to them? A Well, I was sitting here, say, I was on this side of the table, the Inspector was on my right, the clerk was in front of me.

Q On the other side of the table? A Right opposite me, yes, and there were three district leaders running for office and they each had ten or twelve workers apiece and they were all around me; I don't know which one was in front or in back, but there was plenty of people around me all the time.

Q What were they doing? A Watching me count the ballots.

Q How were you counting the ballots? A I used to take a ballot out of the box, open it up so the Inspector and the rest of the people looking on could see it and I would read it; I would read every cross that was alongside of each name; if there was a dispute the Board would pass on it.

Q You mean the four of you? A The four of us and Mr. Hargan was there one time, too, and we asked him for advice.

Q Did you read purposely at any time consciously any ballots— A No, sir.

Q —or did you purposely consciously credit any person with a vote that in your judgment was not entitled with the vote? A No, sir.

Q How much space was there between you and the wall? A Five or six feet—four or five feet.

Q You have heard Mr. Hargan and his associates say there a foot behind you and the wall? A More than that.

Q How long did these watchers stay around you? A From the morning we opened the polling place until we got through.

Q The next morning? A The next morning.

Q Was there ever a time you were not being watched in the casting of ballots or counting of ballots? A Not a minute.

Q After Mr. Hargan took Miss Brandalone away from counting the Democratic ballots where was she? A Right by me.

Q All the time? A All the time.

Q Was there ever a time when Mr. Hargan was there and Miss Brandalone was twelve or thirteen feet away from you? A Not that I can remember; no, sir.

Q How did you come to count 415 ballots when the registry book shows only 409; did you know that? A I didn't know that until the other day.

Q What is that? A I didn't know how many names were in the book; I counted every ballot that was in the box.

Q You didn't keep the registry book, did you? A No; I kept no books at all.

Q Who kept the registry book? A The clerk done all the registry work.

Q All you done was read the ballots? A Yes.

Q Well, when a person came in to vote who would hand the person the ballot? A Well, the Inspector or myself.

Q The clerk would not? A Sometimes the clerk would.

Q Would the clerk call out whether he was entitled to vote? A We would not have let nobody vote unless the clerk would tell us he was eligible to vote.

Q What I am getting at is I want to know how you came to certify to 409—415 votes when there were only 409 cast? A The clerk prepared those certification sheets, and if the clerk had written a million on there we would have certified to that just as well, because we didn't take notice, we took for granted they took the returns from their sheets.

Q You don't mean literally if they had put a million— A Well, we had taken for granted they had kept the correct returns.

Q Well, they kept the count? A They kept the entire count.

Q You and the Inspector kept no count? A No; we would not have known if they didn't tell us.

Q There has been something said about there being thirty ballots without any votes on them for nomination for Congress being counted for Archibald. A If there was no cross alongside of Archibald's name he would get no credit for it; we would not call it out.

Q Did you from start to finish credit Archibald with a single vote that you did not honestly believe he was entitled to? A Positively not.

Q Did the fact that you were the Sergeant-at-Arms in his court prevent you from discharging your duty conscientiously? A No, sir.

Q You are familiar, I suppose, with the ballots generally that Mr. Harrison has examined the witnesses about; some of them have two marks in front of them, in some the voter undertook to vote for three, Congressional nomination, I don't suppose you remember those particular ballot, but take the case where a person tries to vote for three Congressional nominees? A In a case like that case of the three we gave it—

Q Would Archibald get it? A No, sir.

Q Did he get it? A No, sir.

Q Take in the case where there was a cross in front of Archibald's name and the cross in back, what would you do in the case of a Congressional nominee? A We would not count it.

Q Take the case where there was a cross originally in front of Archibald's name and it was erased off with an eraser, what would you do? A Perhaps we would count it and perhaps we would not.

Q Would you take a vote on it? A Yes.

Q Were there any ballots put in there and counted which was done, say, against the majority of that Board? A No, sir.

Q Did you make any writing or any mark or figures either upon the tally sheet or Exhibits 1 and 2, being the statement of the results excepting to sign your name? A None whatsoever.

Q Did you direct anybody to make the writing? A No; the clerk directed us where to sign.

Q Did you give them any orders what they should state on their tally sheet, or on these statements or anywheres else? A No.

Q I show you Exhibit 1; this is the statement of returns; is there any writing on there, yours? A Only my name.

Q On the first line at the bottom? A Yes.

Q Who wrote these words up here, 415; do you know? A No; I don't.

Q Did you do it? A No; I done no writing at all.

Q Who wrote the word about here, 403; do you know? A No; I couldn't tell you.

Q How many of these sheets did you sign that night? A I think there was four or five or six different sheets.

Q Well, the fact is, is it not true there was a statement for every candidate, for every office, one for Congress and one for Assembly? A Well, the County candidates had a sheet and the Congressional candidates have a sheet and there is a sheet that goes to Trenton.

Q Did you sign them? A Yes; I signed all of them after the clerk prepared them.

Q Did you sign them all at the same time? A Well, statements were passed around by the Board that we signed; I do not remember whether we signed them all at one time; they were all signed.

Q Mr. Caprio, from start to finish of that Primary did you consciously do anything which you thought was illegal, corrupt or criminal?

Mr. Harrison. I object to that question as calling for a conclusion on the part of this defendant.

The Court. Objection sustained.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q (Question read.)

Mr. Harrison. May I add the further ground it is incompetent.

(Argument.)

Question read.

Mr. Heisley. To show his attitude.

Mr. Harrison. Oh, I will withdraw the objection.

Mr. Heisley. I want a ruling.

Mr. Harrison. No; I will withdraw the objection. We do not insist upon strict requirement of the law.

The Court. The objection is withdrawn.

Q What is your answer? A I positively done nothing intentionally, corruptly, or otherwise that was contrary to law.

Q You had nothing to do with registering the votes on the tally sheets, did you? A Not a thing.

Q Then, I think you have said that you did correctly read the ballots, is that so? A I certainly did.

Cross examination by Mr. Harrison.

Q How long before 1920 had you been on a Local Board of Registry and Election? A I think 1916 was the last time, or 1915.

Q And how many years prior to that had you served on a Board? A About five.

Q Were you present before the County Board of Election at the recount of this district in October 1920? A I was.

Q Did you at that time learn the number of names on the poll book, Republican poll book? A I don't remember; I don't think I—I don't think I remember.

Q Weren't you asked to count them up at that time? A Positively not. The County Board of Elections counted them. If I remember correctly, I think they said there was a discrepancy, but I took no notice of it.

Q You remember, though, as a matter of fact, there was some discrepancy, but you do not recall what that

discrepancy was? A I believe they said something along those lines.

Q You knew at the close of this primary election, did you not, that there had been 415 ballots cast? A Why, yes.

Q Did you at that time think that it made any difference as to the number of names there were on the Republican poll book? A I did not know at the time how many names were in the book.

Q Why didn't you find out? A Why didn't I find out, why, I didn't think it was necessary for me to know.

Q Did you or did you not know that the election laws provided that all ballots still remaining in the ballot box after ballots equal in number as to the number of names of voters in the poll book, exclusive of void ballots, shall be deemed and be taken to be null and void? A Yes, I know that.

Q Well, then, why did you say so far as you knew it made no difference as to the number of names on the poll book?

Mr. Heisley. He did not say that. He was asked why he didn't know it, and he said he thought it was not his business to look at the book.

A Read me that question.

Q I do not want to mislead you. A Well, I did not mean that if I said that; I took for granted there were as many names in the book as ballots in the box, and had been working so hard we counted up all the ballots in the box.

Q So you did not, at that time, find out all the names, the number of names on the primary book? A No, I knew that when you counted as many names as in the book the remaining were void.

Q And still you continued to count them? A Because we counted likely the names in the book.

Q What do you mean by that? A Why, in the poll book, what we counted before we counted the ballots; had we counted the names in the book very likely we would have done like the County Board of Election and stopped at 409.

Q But you know what the law requires?

Mr. Heisley. I object.

Mr. Harrison. Yes, but, he said at the time he did not know at the time the number of names in the poll book, and I asked him why he didn't find out.

A Just because we had been working twenty hours about and we were all in.

Q I show you a certificate, the last sheet of the poll book, and ask you if you signed that certificate, setting forth that there were 415 names registered? A Yes, I signed.

Q Did you prepare the certificate itself, filling in the blank spaces? A No.

Q You signed that without checking it up at all? A I did.

Q And did you sign all these other papers, including the statements, without checking them up? A We took each other's word for everything.

Q Well, who gave you the word that those statements were correct? A Why, the clerk that made them up.

Q Oh, they prepared the statements and you just signed them? A Correct.

Q Did you look at any of the numbers set forth in the statement, or did you merely sign whatever was handed to you? A I signed the statements when they were handed to me.

Q Without checking them up at all? A I signed the statements the way they were handed to me.

Q And you did the same with the ballot sheets? A The same thing.

Joseph C. Caprio, cross.

Q I call your attention to a group of eighteen ballots, some of them containing the name James Spatola, and some containing the name Girardo Spatola, under the heading for "Coroner" and ask you if you know in whose handwriting those names are? A I don't know, sir.

Q All those ballots have crosses in front of Archibald's name, haven't they? A Yes.

Q You read off those ballots, didn't you? A I did.

Q Did the similarity of the writing of the names of James or Girardo Spatola impress you at that time? A It did not.

Q Did the fact that in all those ballots with the name Spatola on also contained a large heavy pencil cross in front of Arthur B. Archibald's name strike your attention at that time? A There is no difference between the cross on Judge Archibald's and the cross on the different candidates, they are all alike.

Q Calling your attention to ballot 217; did you notice any difference in the cross before Archibald's name and any other cross on that ballot? A On that ballot it appears to be a little heavier than any of the other crosses.

Q And perhaps a little larger? A Yes.

Q When you read the name James Spatola, or when you came to the ballot with the name James Spatola on it, how did you read it? A The way it was written.

Q Did you recall that James Spatola had received some votes at the time you had signed the tally sheets? A I did not.

Q When you signed the tally sheets did you find the name of James Spatola on it as candidate for "Coroner?" A I did not look at the names at all.

Q Did you look at the numbers on the tally sheets when you signed it? A I did not.

Q Why did you sign it? A I took the clerk's word for it.

Q So you signed this sheet when the clerk handed it to you without making any examination at all, is that true? A That is true.

Q I show you a bundle of 17 ballots, in all of which there are two or more crosses opposite the names of candidates for member of the House of Representatives, or no crosses at all, and ask you how you read those ballots? A Where the voter had voted for more than one, either one did not get it; where there was no cross at all, no one got a credit.

Q Do you remember coming across quite a number of ballots of that sort, which have been called blank ballots? A Why, if there was twenty-five or thirty ballots in four hundred there would not be many.

Q Well, you recall there were twenty-five or thirty? A Well, that is what I heard on the stand.

Q No. I mean as to your recollection at that time, when you were signing these returns, the statements and the tally sheets, did you then recall that there were a number of marked ballots for the position of members of the House of Representatives? A There were no marked ballots.

Q I misspoke. I meant blank ballots. I repeat that question. A I know that there were some.

Q You knew there were quite a number? A I knew there were a few.

Q Well, then, if you had 415 ballots cast and quite a few blank ballots, how do you then account for the return of 409 votes for these candidates for member of the House of Representatives? A Just as I explained before, I don't know what the clerk put on the returns, I signed the returns in good faith.

Q So that if there had been six or seven hundred names returned you would have signed it? A If there had been a million on there I would not have known that night, the way I felt.

Q Would you have signed anything that was handed to you by the clerk? A Pertaining to the election that night? Yes.

Q How do you account for the fact that all of the candidates, with the exception of Arthur B. Archibald, were entitled to more votes than your board gave them, and that Arthur B. Archibald received more votes on your count than he was entitled to? A Why, there was a lot of candidates that got almost as many as Archibald.

Q No, I am now referring to the candidates for the Member of the House of Representatives. A The people in that ward supported Archibald.

Q But why in your returns does the unusual situation arise that Archibald received more votes than he was subsequently determined to be entitled to, and all the other candidates received less votes than they were subsequently determined to be entitled to? A Who received less votes?

Q Arthur B. Archibald, according to your returns, as shown in Exhibits S. 1 and S. 2, received 403 votes; the returns of the County Board of Election showed that Archibald had 344 credit with 14 rejected, making in all 358 votes, your return for Taylor shows 5 votes, whereas the County Board gave him six and three rejected; your return for Chapman shows one vote, the County Board return shows three votes with none rejected; your return for Yarrow shows no votes and the County Board return shows Yarrow four votes, with two rejected, making six in all for Yarrow. A The clerks kept track of the entire count and they made up returns; very likely they can explain that situation better than I can.

Q Then you have no explanation to offer for that situation? A No, only that there is different methods of counting; perhaps we did not count some votes that the County Board of Election counted.

Q Didn't you think it unusual, as I asked you before, that with 409 votes returned for members of the House

of Representatives the large number of blank ballots and one rejected ballot, that there was only 415 ballots at the most that were cast? A I don't understand the question at all.

Q Your returns showed 409 credits for the four candidates for members of the House of Representatives? A Yes.

Q You have testified and the ballots show that there were a large number of blank ballots, and one or more rejected ballots; the total number of ballots found in the box is 415, and I ask you whether in view of those facts you didn't think it unusual that there were so many votes for member of the House of Representatives? A I didn't know how many the returns called for, the certificate of returns; I didn't know how many they called for.

Q In other words, you didn't pay any attention to the returns at all? A I read the ballots correctly and the clerks kept track of them and we signed them and brought them in.

Q Were you not sufficiently interested in Archibald's candidacy to see how many votes he had in your district? A I wanted to see him win because he was a candidate and a friend.

Q Didn't you want to know at the end of the election how many votes Archibald had? A Yes.

Q And you wanted to know how many Chapman and Yarrow had? A Yes.

Q Didn't you see it in the statement? A Yes.

Q So you did know what was on the statement when you signed it? A I didn't look at it until after I signed.

Q So after signing it you then looked and found out what the returns were? A Well, even if before I would have signed it.

Q Well, then, you did know either immediately before signing or after how many votes these candidates received? A I guess so.

Q Didn't you know, not only from what you were told, but also from an inspection of the figures put in by your clerk? A Well, I didn't pay close attention.

Q But you knew what those votes were? A Yes.

Q Now, I say, knowing what the number of votes that these men received, knowing that there were a large number of blanks and one or more rejected ballots, and knowing that there were the 415 ballots in the box, did you from that series of facts—did you not, rather, think there was something wrong in the returns? A I didn't think there was anything wrong in the returns.

Q Didn't that strike you as a little unusual? A No, because everybody was supporting Archibald; they would not support nobody else, as I remember; all the leaders that were fighting between themselves and everything, were all supporting Archibald; they were not supporting anybody else, and that was the first year the women voted, and we were working so hard, I was glad Archibald got that number of votes.

Q You were working for him? A For him in Court, yes.

Q Were not you working for him politically? A When I had a chance to say a good word; I spoke to a lot of my friends.

Q And when you read the ballots where there was any doubt and it could be read in favor of Archibald, didn't you so read it? A Absolutely not.

Q Well, then, how did you read Archibald got 415 votes out of 409 ballots when you knew there were twenty-five or thirty ballots blank? A I didn't know how many ballots there were blank; I know there were some.

Q According to your returns Archibald got all but 12 of the votes, didn't he? A Yes, and he should have got them all.

Q Well, that may be, but he got all but 12, according to your returns? A Yes, somebody double crossed us.

Q (*By the Court.*) Mr. Caprio, as I understand it, you did, in fact, count 415 ballots; now, will you tell me if you know how it was that the tally clerk tallied 409 votes for the Congressional candidates in view of the fact that you did not read out the blank ballots? A I cannot explain that—their actions.

Q (*By the Court.*) You did not read out the blank ballots? A I positively did not read out the blank ballots; if there was no cross alongside of the candidate's name I would not read it.

Q (*By the Court.*) And where there were double crosses? A We would not read it either.

Q (*By the Court.*) And yet it is true, is it not, that the tally clerk showed a total of 409 out of 415 votes on the Congressional nomination? A Yes, sir.

Q (*By the Court.*) Didn't you know at that time there were more than six votes in the Congressional contest upon which there were double crosses, or upon which no vote had been passed? A No, sir.

Q (*By the Court.*) You did not know? A No, I did not know at all.

Q I call your attention to ballot No. 140, where there appears to be a double cross before Archibald, and ask you how that ballot was read off? A A ballot like this would be—

Q No, how was that ballot read? A I cannot tell how; we would refer it to the Board.

Q And how did they pass on it? A I cannot remember how it was passed upon, whether we read it for Archibald or for anybody.

Q I call your attention to ballot 54, and ask you if you can recollect how that ballot was read for member of House of Representatives? A Well, a question like this we usually pass on.

Q Do you remember whether it was referred to the Board and passed on? A I will say yes.

Q Do you remember that ballot? A I do not exactly remember that ballot, but I am making a general statement, where there was a question I would have referred it to the Board.

Q Here is another ballot where Archibald is double crossed, both front and rear? A That was referred to the Board.

Q Do you know how it was counted? A I do not.

Q I call your attention to ballot 52, where there appears to be three crosses? A In that case no one would get a credit.

Q Did the fact that Archibald had a different cross before his name than the others strike your attention at that or any other time? A No.

Q You thought there was nothing significant that there was a different kind of cross before Archibald and before the others? A No, a little bigger cross would not make any difference; there were crosses just as big down further.

Q Would the similarity of that cross and size and shape of crosses upon other ballots strike you at that time? A Why, no, we wouldn't observe that close; we just called the names off where the crosses appeared.

Q In whose handwriting are those Spatola ballots, if you know? A I don't know.

Q Did you tell anybody to write that name in? A No.

Q Do you know whether men were sent in to the election booth to assist voters with directions that upon the ballots they should write in the name Spatola? A We didn't send anybody in the booths.

Q Did you write the name of James Spatola upon those ballots? A I done no writing at all, excepting sign my name.

Q You just signed what the clerks told you to sign? A Yes.

Q Just a question about the crowd around you. Did I understand you to say there were ten or twelve watchers for each district leader that were crowded around you? A They had plenty of workers, yes.

Q And those men were in behind the tables? A Some were in behind and some were in front.

Q Were any of them watching the tally? A Some people must have been watching the tally, yes.

Q But most of them were watching you? A The biggest part of them were watching to hear the ballots read.

Q Were they right alongside of you? A They were alongside of me and behind me.

Q Where was Ruglio? A He was right on my side.

Q Seated or standing? A He was standing.

Q All the time? A When we first started he was sitting down and Lieutenant Hargan made him stand up.

Q And then he got up and looked over your shoulder? A He didn't have to do that; he could see the ballots in front of him.

Q And this large number of people around you? A They could see it.

Q Did the same people stay there and watch you? A They would exchange with one another; sometimes they would move.

Q The people were coming in and out? A Yes.

Q Sometimes the number watching you would be reduced to how many? A There were never less than fifteen, or twelve.

Q You heard the testimony of Cordasco, that at times there would be as few as two people there? A He was angry because he lost.

Q You heard his testimony. A He does not remember, if he says there were two people, because there were always more.

Q Always a crowd there? A Yes.

Re-direct examination by Mr. Heisley.

Q As you took these ballots from the box and read them, I understand you to say you kept no account of how many votes you had taken out, is that right? A That is what I said.

Q Did you know when you had counted 409 votes? A No.

Q Had you no way of knowing unless you had gone to the books in the possession of the clerks and seen how many people were registered? A I had no way of knowing.

Q Well, when you came to 409, which I believe was the amount registered, did the clerk tell you and Ruglio that you had voted everybody that had been registered; did they make any announcement of that kind? A You have that wrong.

The Court. No, it is a perfectly proper question. Answer it.

Q Let me repeat it. When you came to 409 votes you say that you had no count and you did not know that you were to 409, but did these clerks tell you that you had voted a number equal to the number of persons who had registered? A They did not say anything. The people that were eligible to vote was about six hundred; we had other books there that show how many people could vote if they come.

Q But there is some book that showed there was 409?

The Court. That had voted that day.

Q Now, is that true? A Of course, it is true.

Q Well, at any time in the counting did these clerks say to you, "Mr. Caprio" or, "Mr. Ruglio" you have already received 409 votes, or a number equal to the persons registered in the books; did they say anything like that? A No.

Q You would have kept on counting for an hour yet, I suppose, if there had been more ballots? A Very likely I would, because I wouldn't know.

Q I mean, did you know at any time while you were counting up these ballots that you had exceeded the number of persons registered on the books? A No, I didn't; if I had I would not have counted them.

Q Now, you have been asked about these marks, and Mr. Harrison has asked you about 42 being in heavy marks; isn't it a fact that practically all these ballots are in lead pencil and this ballot he asked you about is in ink? A It appears to be in ink.

Q Now, I show you ballot 217, and you have been asked about the cross opposite Archibald's name being heavier than the cross opposite other people's names; well, suppose you had noticed it was heavier, would you have rejected it? A No.

Mr. Harrison. Objected to as being immaterial, what he would have done.

The Court. I will allow it.

A It would not have made any difference.

Re-cross examination by Mr. Harrison.

Q Ruglio was standing or seated alongside of you putting the marks upon the back of the ballots while you handed them to him, was he not? A Numbering them.

Q You knew the number he reached when you gave him the last ballot, did you not? A That is where we got the 415, I guess.

Re-direct examination by Mr. Heisley.

Q Mr. Caprio, when you reached 409 and counted the six following votes to 415 were there still at that time these watchers around you? A There was watchers there until we got through.

Q Well, you can say yes to that or no? A Yes.

Q I want to know if anybody told you you were counting more votes than had been voted? A No.

Re-cross examination by Mr. Harrison.

Q I call your attention to ballot 97 and ask you if you observed at that time any difference between the cross in front of Archibald's name and the other crosses on the tickets? A No, I would not observe that.

Q Did you notice that the cross was a flatter and larger cross than the other crosses? A I see that now.

Q Did you notice that that cross was made in plain pencil and that the other crosses are in indelible pencil? A Why, no, I didn't observe that.

Juror No. 1. May we ask why this ballot was rejected?

DOCTOR WATSON RODEMANN, recalled in behalf of the State.

Direct examination by Mr. Harrison.

Q Doctor, I am requested by the foreman of the jury to ask you with reference to ballot 97, to inform us if you can what action was taken by the County Board of Elections upon that ballot? A Ballot number 97 was rejected by the County Board of Elections.

Q Why? A On account of the color of the markings, on account of the color of the marking, it being found that it was marked in indelible pencil appearing purple.

Q Do all of the crosses appear to have been so marked? A We cannot tell all of the crosses; one was tested by the County Board and found to be indelible; they all have that appearance as if they were; of course, you cannot tell until you wet it absolutely.

Juror No. 1. An indelible pencil is not considered lead pencil marks?

A No, the act states it shall be marked with black pencil or black ink, and this is considered purple.

Dr. Joseph Rodemann, cross.

Examined by the Court.

Q Is this one of the 14 ballots which were rejected by the County Board of Elections? A Yes, sir.

Q Which brought the count down from 358 to 344 for Archibald? A No, sir.

Q This had nothing to do with bringing the count down from 358 to 354? A No, because the 344 ballots that were counted by the County Board of Elections and the 14 ballots of Archibald that were rejected makes the total number of the ballots for the entire group 409.

By Mr. Heisley.

Q The juror requests you to look at the first cross opposite Archibald? A Not on account of that cross, that has no relation to it whatever, on account of its being in lead pencil.

By the Court.

Q Would that enter into the rejection at all? A No, I don't think so. I presume the juror means as a distinguishing mark. No, I cannot say that. It was the indelible as far as my recollection goes. I do not recall any objections to the cross opposite Archibald's name being marked in lead pencil.

Cross examination by Mr. Heisley.

Q Isn't it true that the cross marked opposite all the candidates there appears to be just the same as the one marked opposite Mr. Archibald's? A Yes, from general inspection, yes, it appears that way. A close analysis of it might be different.

Q You make a close analysis and see if you can find the Archibald cross was made by a different pencil than the pencil which made the other marks? A Well, that would be in the nature of calling for expert testimony, but it appears that that cross on this particular ballot is different from the other crosses.

Q You mean in shape? A In shape.

Q Well, you don't know of any law that prescribes the exact shape of a cross? A No; you asked me if there was any difference.

Q And the only reason that you rejected this was because the mark was made by an indelible pencil? A That is my recollection.

Q Well, now, you are very familiar with the election statute? A Somewhat.

Q I have been trying to find in here the section that described how a ballot should be marked. I want to see if it says anything about an indelible pencil? A It does not; I can tell you that.

Q Oh, yes; here it is. May I read it?

The Court. Yes.

Mr. Heisley. To vote for any candidate whose names are printed in any column, the voter shall mark a cross or plus in black ink or black lead pencil in the space or square at the left of the name of each candidate in any column for whom he desires to vote the number to be elected for each office.

Now, there is nothing there that prohibits a person from using an indelible pencil, provided it makes a black mark, is there?

A No, not if he makes a black mark with indelible pencil.

Q Well, your notion, then, is this is not a black mark? A Well, on close inspection it has a purple sheen to it.

Q Well, if you were sitting as an election officer and that ballot was handed to you, do you think you would have found, as you now speak of, that it has a sheen to it?

Mr. Harrison. I object to that, asking this man if he were sitting as an election officer, does he think he would have found this, that or the other

thing. It strikes me as being clearly incompetent, and, I therefore, respectfully object to the question.

The Court. Objection sustained.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Q Doctor, in order to detect that there was a little difference in the shade from black you have now to hold it under that light, electric light to decipher it, isn't that so? A Yes.

Q Now, isn't there a section, doctor, that says a vote shall not be rejected because of a greenish appearance? A There is.

Q Have you got that? Just read it. A "Provided, further, that no ballot shall be declared invalid by reason of the fact that the mark made with ink appears bluish or the mark made with lead pencil appears grayish."

Adjourned until tomorrow, Wednesday, November 30, 1921, at 10 o'clock A. M.

THIRD DAY.

Wednesday, November 30, 1921.

Appearances same as before.

CHARGE TO THE JURY.

STICKEL, *J.*

Gentlemen of the jury, the function of the Court is to instruct the jury in reference to the principles of law governing the case, and the law of the case you must take from the Court. You, however, are the sole judges of the facts, weight of the testimony, credibility of the witnesses, inferences to be drawn from the evidence, and the ultimate conclusions to be reached upon all the facts. The Court, in referring to the evidence, is not to be understood as deciding any fact, but merely as attempting to elucidate the evidence for the convenience or the assistance of the jury, or to illustrate or explain the application of principles of law, and, so, if according to your recollection, the Court errs in its statement of any evidence, whether disputed or undisputed, or assumes or states the existence or presence in the case of evidence that is not actually before you, you should disregard the recollection of the Court and rely upon your own recollection. Again, if any part of the evidence is referred to, seemingly giving it particular emphasis, the jury are not to disregard other evidence, which they may deem of equal or greater importance, for it is the duty of the jury to consider and weigh all of the evidence bearing upon the questions involved in this matter before you, not only that which may be mentioned by the Court, but all that has been presented here before you.

The law presumes that the defendants are innocent, and this presumption continues until overcome by proof establishing their guilt beyond a reasonable doubt. The

burden of proving beyond a reasonable doubt the guilt of the defendants of the offense here charged against them is upon the State, represented by the Prosecutor, and that burden of proof remains upon the State, the Prosecutor, throughout the whole case, and never shifts.

Reasonable doubt is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt, but it is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

The Grand Jury of this county, for the December, 1920, term, presented an indictment for conspiracy against Joseph C. Caprio and Lawrence Ruglio, and the case is before you for your decision upon the issue framed by the pleas of not guilty made by said defendants to the said indictment.

The conspiracy alleged by the indictment is one to falsely count the ballots cast at the primary election held September 28, 1920, to nominate a candidate of the Republican party for member of the House of Representatives in and for the Eighth Congressional District of the State of New Jersey and to make false returns of the results of such primary election for the Republican nomination for membership of the House of Representatives from the said district.

Our statute, so far as this case is concerned, defines conspiracy as follows:

> "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 * * * shall, on conviction, be deemed guilty of a conspiracy * * * provided that (in a case such as is alleged by the indictment) some act in execution of such agreement must be done to effect the object thereof by one or more of the parties to such agreement."

Section 27 of Chapter 349 of the laws of 1920, being an act entitled "An Act to regulate elections" (Revision of 1920), at page 833, provides in part that if any judge, inspector, clerk or any other officer of a primary election shall be guilty of any willful fraud in the discharge of his duties, by false counting or by making false returns, he shall be deemed guilty of a crime.

You will readily see, therefore, that where two or more election officers combine and make an agreement to be guilty of a willful fraud in the discharge of their duties by falsely counting primary election ballots, or by making false returns of the result of such an election, that such persons are guilty of the crime of conspiracy, if one or more of those so combining do some act in execution of such an agreement to effect the object thereof.

Here the State charges a conspiracy to commit both of the said crimes, and the State must, therefore, prove, beyond a reasonable doubt, the existence of the unlawful combination, the corrupt agreement, namely the agreement to knowingly falsely count the ballots cast at such primary election and to knowingly make false returns of the results of such election, and, in addition, must so prove some act done in execution of this unlawful and corrupt agreement or combination by one or more of the conspirators to effect the object of the agreement.

And if you do not believe these defendants previously agreed and conspired, or, if you have a reasonable doubt thereof, you must acquit, even though you do believe that they corruptly made false returns and falsely counted, but you may consider the evidence bearing upon the alleged corruptly making of such false returns and false count on the question of the existence of the conspiracy.

But the agreement need not be a formal one. It need not be manifested by any formal words, written or spoken. It is sufficient if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts contemplated and whether the

minds of the parties have so met is a question of fact for you to determine from all the facts and circumstances in the case. Again, while the State must show the doing of an overt act, some act done in execution of the unlawful agreement, it need not show a full execution of the conspiracy, need not show that the conspirators succeeded, for it is sufficient if the proof exhibits a step taken in execution of the conspiracy and whether the crimes which the parties combined to commit were committed or not is wholly immaterial, although the contention of the State here seems to be that the conspiracy did, in fact, succeed and that the ballots were in fact falsely counted and a false certification made. You will observe from what I have already said that these defendants are not on trial for being guilty of a willful fraud in the discharge of their duties, by falsely counting the said primary election ballots, or for making a false return of such election result, or for doing both of these prohibited acts. Nor are they on trial for negligence in the performance of their duty, for carelessly, negligently, or mistakingly counting the ballots or certifying the result of the election, or for conspiracy so to do. The question presented for your decision under this indictment is, did these defendants unlawfully and corruptly combine, unite, confederate, conspire or agree to be guilty of a willful fraud in the discharge of their duties by knowingly falsely counting the said primary election ballots and by knowingly making a false return of the result of the said election and did they or one of them take some step in execution of the conspiracy and to effect the object thereof?

If you are satisfied beyond a reasonable doubt that they did you should bring in a verdict of guilty. If you are not so satisfied bring in a verdict of not guilty.

And in considering this question bear in mind that the statute which it is charged they conspired to violate and breach does not contemplate punishing a person who either honestly or through ignorance falsely counts or signs a

false return, so that even though you find that the counting and the returns were false, it would be your duty to acquit, if you had a reasonable doubt as to whether such acts were the result of negligence or of corruption.

The election law in force and governing this particular election provides as follows for the counting of the ballots and the certification of the result.

Section 359 of the 1920 Laws, page 145, says:

KEEPING OF PARTY PRIMARY POLL-BOOKS.

"In addition to the primary election registry book hereinbefore provided, there shall also be kept a primary party poll-book for each political party, which shall be called and labeled Primary Party Poll-Book, inserting the proper names of the political party. The district board of registry and elections shall cause the name of each voter at said primary election to be written in ink, in the primary party poll-book of the political party in whose ballot-box said vote is deposited. Each of these primary party poll-books shall be signed by the members of the district board of registry and elections at the close of said primary election and delivered by said board to the clerk of the municipality at the time of the delivery of the ballot-boxes."

Section 364, at page 147, of the same compilation, provides:

"At the close of the primary election for the general election each district board of registry and election shall immediately proceed to count the votes cast at such election and ascertain the results thereof for the candidates of each political party holding such elections, proceeding in the manner indicated by the statement hereinafter provided for, and as nearly as may be in the manner herein required for the counting by said district board of registry and election of votes cast at the general election."

Section 227 of the same compilation, at page 96, provides:

> "To vote for any candidates whose names are printed in any column, the voter shall mark a cross X or plus in black ink or black lead pencil in the space or square at the left of the name of each candidate in any column for whom he desires to vote to the number to be elected for each office."

Section 247-D of the same compilation, page 104, provides:

> "If a voter marks more names than there are persons to be elected to an office, or his choice cannot be determined, his ballot shall not be counted for such office but shall be counted for such other offices as are properly marked."

Section 248 provides:

> "In counting the ballots said board shall deem and take to be null and void all ballots which are wholly blank, or on which more names have been marked for every office than there are persons to be elected to such office and on which both 'Yes' and 'No' have been marked upon every public question. All ballots still remaining in the ballot-box after ballots equal in number to the number of names of voters in the poll-book, exclusive of void ballots, shall be deemed and taken to be null and void. Any ballot which shall have either on its face or back, any mark, sign, designation or device whatsoever, other than is permitted by this act, shall be null and void; provided, however, that no ballot shall be invalid by reason of the fact that the mark made in the square is not a perfect cross X or plus or is not entirely within the square, if said mark is substantially a cross X or plus and is substantially within said square; provided, further, that no ballot shall be declared invalid by reason of the fact that the marks made with ink appears bluish or the mark made with lead pencil appears greyish; and provided, further, that no ballot cast for any candidate shall be invalid by reason of the fact that the name of such candidate may be

misprinted, or his Christian name or initials may be omitted."

The balance of the section I do not think is material to this issue.

Section 349 provides:

"In every case in which a ballot shall be declared invalid, the same shall not be canvassed or counted but shall be marked 'void' on the outside thereof, and shall be numbered consecutively beginning with number one, and shall be preserved like other ballots and placed on a separate string. Ballots which shall be declared invalid with respect to a part of the officers to be voted for or public questions to be voted upon shall be canvassed, estimated and numbered with respect to the part which is not invalid and preserved as other ballots and placed in their proper order on the string with the valid ballots."

Section 251 provides:

"Such board in the actual procedure of counting the ballots shall thereupon unlock and open the ballot box; the ballots shall then be taken singly and separately therefrom by the judge of the election, and while each ballot shall remain in his hands, he shall audibly and publicly read the same in full view of the inspector. The inspector shall be satisfied that the ballot is being correctly read by the judge. After the reading of said ballot and before taking another ballot from the box the judge shall fold the ballot to a size about five inches square, and shall deliver the same so folded to the inspector, who shall write on the back thereof the number of such ballot from one onward, in the order in which the same shall have been taken from the box; and shall string the ballot as one ticket in the order in which the same shall be taken from the box and numbered, by means of a needle and string to be provided for that purpose. Void ballots shall be strung in the same manner as valid ballots but on a separate string."

Section 252 provides that:

"The clerks of such board, under the inspection and direction of such board, shall each, upon a tally sheet provided for that purpose, make a list of the names of all persons for whom one or more votes shall have been given, designating the office which such person shall be voted for or any public question voted upon, upon two sheets known as tally-sheets provided for that purpose; and as each ballot shall be read he shall write the figure '1' opposite the name of each person whose name shall be contained thereon, as designated for any office or in the proper column designating the vote upon the public question. One of said tally-sheets shall be placed in the ballot-box and the other shall be filed with the county clerk at the same time the statement of results are delivered."

Section 253 provides that:

"When all the votes which shall have been received shall have been read, examined, numbered and strung, as above directed, such board shall carefully and accurately add up the votes given for each person for any office to be filled at such election or any public question and note the same upon said tally-sheets."

Section 365, at page 147, provides that:

"The said district board of registry and election shall at the conclusion of such canvass make up and sign two statements of the result of such election. Said statement shall in words at length show the entire number of votes cast at such election, the whole number of ballots rejected, the whole number of ballots cast for each party as indicated by the party named at the head of the respective party tickets, and the number of votes received by each person as a candidate for nomination for office, or position."

The statements shall be in substantially the form as represented by Exhibits S. 1 and 2, which are here in evidence. There shall be a certificate attached as follows:

"We certify the foregoing to be a true and correct statement of the result of the primary elections held in such district at the time above stated; that the same truly and correctly exhibits the entire number of votes cast for each political party at such election, the whole number of ballots rejected and the number of said ballots rejected belonging to each party respectively; also the number of votes received by any person to be a candidate of any party for any office or position named on any ballot or ballots cast at such election.

In witness whereof, we have hereunto set our hands this .... day of ..... one thousand nine hundred and .....

District Board of
Registry and
Election.

Which statements shall be transmitted to the clerk of the municipality in which the said Primary Election is held.

There has been something said about the character of Lieutenant Hargan's attendance at the Polling Place. In case there be any question in your minds about it, I will read a short portion of chapter 210 of the laws of 1918, being a supplement to the election act.

"In counties of the first class in this State, in order to enforce the laws of this State, regarding the conduct of election, it shall be lawful for the Prosecutor of the Pleas and his Assistant to investigate all complaints relating to the registration of voters, and for that purpose the said Prosecutor of the Pleas or any Assistant Prosecutor, or any person or persons designated by him, shall have full power and authority to visit and inspect any house (and then follows a large number of places they may inspect) and also to inspect and copy any book records, papers or documents relating to or affecting

> the elections, either general, special or primary, or the registration of voters in the custody and control of district boards of registry and election, county boards of registry and election, or the clerks or other officers of municipalities."

And then follows the penalty for the person who refuses to comply with the demand of the Prosecutor or his assistant.

The contention of the Prosecutor seems to be that Caprio and Ruglio, Judge and Inspector, respectively, of this board, corruptly conspired and agreed together that Caprio should falsely read and announce the said primary ballots in the interest of the candidate Archibold, so that he would be credited by the tally clerks with more votes than he actually received, that Ruglio should approve such false reading and announcement, and both should certify such false result to the authorities, and that in execution of such conspiracy Caprio, with Ruglio's approval, did falsely read and announce the contents of such primary ballots so far as said Congressional contest was concerned, and that both did certify a result of such contest which was false and which they knew was false, and if Caprio did falsely read the contents of such ballots and announce to the tally clerks such false reading with Ruglio's knowledge and approval, with the intent, for instance, that Archibold should receive more credits than he was entitled to, it would constitute the false counting which the statute prohibits, just as much as if one of the tally clerks hearing a vote announced for one candidate should wilfully and deliberately credit another candidate with such vote. Each of the officers is participating in the counting of the ballots when he is performing the duty allotted to him by the statute and when he is false to his trust, wilfully violates his duty, fraudulently discharges his duty intending to and thereby producing a false record of the votes cast, he is guilty of falsely counting the ballots. Making a false statement, however,

under the election law, is not false counting, nor should it be made the substitute for false counting.

Is this contention of the State supported by the evidence? The State says it is; the defendants say it is not. Yours is the duty to decide.

The defendants contend that they did not knowingly or wilfully falsely read any ballots, say that where they were blank on the Congress vote they did not read a credit for any Congressional candidate, and the same where a vote was cast for all three; that they cannot account for the tally clerks having 409 votes for the Congress candidates, with 415 cast in all, and with 31 blank or double crossed, except as they intimate that the tally clerks may have made mistakes, miscounted; that they did not conspire to falsely count the ballots or falsely return the result of the election, and that they were surrounded by watchers, challengers, and so forth, and watched by a member of the Board all during the counting.

These contentions and the evidence offered in support of them create questions of fact which it is your peculiar province to decide, and as the evidence is probably as fresh in your minds as it is in mine, I shall not seek to review all the evidence, but to me (perhaps it may not seem so to you) the 31 ballots which were blank or double crossed, or crossed for all or more than one of the Congressional candidates, and which in some way seem to have been counted, when, if they were blank, or so marked as aforesaid, they should not have been counted for any Congressional candidate, furnish food for careful consideration and deliberation in the decision of this case, particularly as Caprio and Ruglio both testified that they knew, as I recall it, that such ballots should not be counted, and, in fact, that they did not count them. How is it then that they were counted? Was it the mistake of the tally clerks? Did they make errors in tabulation which would account for the counting of these votes, thir-

ty-one votes, as I recall it, or did they corruptly count them. If it was the mistake or the corrupt or other act of the tally clerks, of course the defendants could not be found guilty. The defendants do not say they called the ballots off and caused credits to be made for them honestly believing they should be counted or that they mistakenly and in good faith counted them; they say that they knew they should not be counted and that they as a consequence, did not announce the Congressional votes on such ballots. How was it, then, that they were counted? Did Caprio, with Ruglio's approval and to secure credits for Archibold to which he was not entitled, knowingly and wilfully read and audibly announce a vote for Archibold on these ballots and each knowing that such votes had been as a result credited to Archibold, both certify that result to the authorities? If they did and did it corruptly pursuant to a common agreement or understanding or conspiracy as charged, evidence would be before you sufficient to make out the crime with which these defendants are charged.

There is testimony that the tally clerks made mistakes and that they corrected them by reference to the numbers placed on the back of the counted ballots. Did they make mistakes which accounted for these thirty-one ballots which it is said were counted for Archibold? Did they make mistakes, sufficient mistakes, to account for these 31 ballots? These are questions which should be carefully considered by you.

And, of course, the fact that County Board rejected certain ballots, 14, I think there were, because they were in their judgment marked ballots, marked with indelible ink, for instance, when Caprio and Ruglio either not noticing the marks or not considering them as making the ballots, marked ballots, did not count them, would not bind or affect these defendants, but if you find from the evidence that there were these 31 other ballots which were blank or double crossed, or too much crossed, which in some way

were counted, you may and should consider them as bearing upon the guilt of these defendants. To be sure, if you find that these 14 ballots were counted by Caprio and Ruglio when they knew they should not have been counted, you may and should consider them as bearing upon the issues here. You will have the ballots before you for inspection. Yours will be the right and the duty to inspect them.

In the course of the trial a motion to quash the indictment was made and a motion to direct a verdict at the end of the State's case.

I denied both motions as you heard, but in so doing you should not understand that I decided any question, of fact. I merely decided in the first case that as a matter of law, in my judgment, the indictment was good, and in the second case, in my judgment, the case presented questions of fact which should be decided by you.

Gentlemen of the jury, it is for you to consider and weigh the evidence, to search the minds and the conscience of these witnesses, and to ascertain where the truth lies. You have a right to consider the manner and appearance of a witness on the stand, his or her means of observation, his or her accuracy of memory, his or her capacity to observe what was going on, and his or her power to state what he or she has seen, and all such other matters as may be helpful in determining the truthfulness or credibility or accuracy of the statement. One of the ways of ascertaining the truth of the statements of a witness on the witness stand is to ascertain the interest of the witness in the story he or she tells on the stand. Has this man Vittiello any interest to tell you a story that would deceive or mislead you; is his friendship for Archibold such as to cause him to tell you things which might not be accurate or truthful? Has Cardasco, Cappiello, Miss Brandalone, any interest to tell you a story which would deceive or mislead you? Has Caputo, or any of these other witnesses here? Has Lieutenant Hargan or detective Lin-

darducci any reason, any motive to tell you a story which is not true, to tell you a story which might deceive or mislead you into the conviction of the defendants? And you may apply the same test to the story of the defendants, and consider the fact of their interest in the verdict you may render in determining the importance and the weight you will attach to their testimony.

I have endeavored to direct your attention to the law governing the case and to ascertain features of the testimony. The issue will now be placed in your hands for determination. Give it your most careful consideration, for this is an important case, important to society, involving, as it does the purity of our elections and the charge that these defendants conspired to thwart the will of American citizens in the exercise of their priceless privilege of selection and election of those who govern them, important to the defendants, involving, as it does, their guilt or innocence of a serious charge. Therefore, give it your most careful consideration; give it the same painstaking consideration that you have given to the taking of the evidence, bearing in mind that your function is to determine the guilt or innocence of these defendants, and that you should not be swayed or affected by anything except the evidence before you and the inferences to be drawn therefrom.

If you are satisfied beyond a reasonable doubt of the guilt of the defendants, bring in such a verdict. If you are not so satisfied bring in a verdict of acquittal.

(The jury retires.)

The Court. I decline to charge request number one, except as I have already charged it; the same as to number two; number three I decline to charge; number four I have charged; number five I have charged; number six I have charged; number seven I decline to charge; number eight I decline to charge; number nine I decline to charge; number ten I have charged; number eleven I decline to

charge; number twelve I decline to charge; number thirteen I decline to charge, except as I have already charged; the same as to number fourteen, and the same as to number fifteen; the additional number fifteen in pencil—the second fifteen, which is the first request under defendants' additional requests, I decline to charge except as charged; number sixteen I decline to charge except as charged; number seventeen I decline to charge; number eighteen I decline to charge; number nineteen I decline to charge, and twenty I decline to charge, except as I have charged.

Defendants' counsel prays an exception to the refusal of the Court to charge certain requests.

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

FRED G. STICKEL, JR.,
Judge.

Defendants' counsel prays a general exception to the charge of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Mr. Heisley. I would be glad to have an exception to your Honor's charge, where you said in substance that the conspiracy is to falsely count the ballots and to make false returns, my contention being, without saying it at length, that the conspiracy charged was simply to falsely take the ballots from the box and to untruly read them.

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

FRED G. STICKEL, JR.,
Judge.

Mr. Heisley. Also, if you please, an exception to your Honor's charge where you said in effect the State charges these defendants attempting to commit two crimes, to wit, one of false counting and the other of signing a false statement.

The Court. That exception is being taken on the same ground as the last.

Mr. Heisley. Yes.

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

FRED G. STICKEL, JR.,
Judge.

Mr. Heisley. If your Honor please, to that portion of your charge where you said in substance that the State had to show not merely the agreement, but that there was some step taken; inasmuch as the indictment alleges the overt act which was performed to be the act of signing corruptly a false statement. I think the charge was erroneous in saying some step, the step to be taken must be the corrupt signing of the statement. While I conceive that another step may be considered by the jury, when the State alleges a particular act done in connection with conspiracy, that particular act must be proven.

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

FRED G. STICKEL, JR.,
Judge.

Mr. Heisley. An exception to the language of your Honor where you spoke about the thirty-one ballots, which have been spoken of through the case as being blank ballots, wherein your Honor used the expression, "Which seems to have been counted for someone;" you say that those thirty-one ballots furnished food for careful thought, my point being that there is no evidence from which the

jury can conclude that the thirty-one ballots were counted for anyone. The defendant denies it.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

Mr. Heisley. An exception to that portion of your charge where, in speaking of the thirty-one ballots, you asked the jury in your charge how was it that they were counted. I think, if you will pardon me, that you proceeded on the assumption they were counted, where there was no legal proof they had been counted.

Defendants' counsel prays an exception to this ruling of the Court.

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

FRED G. STICKEL, JR.,
Judge.

The Court. The jury has sent in a request for the sections of the law governing elections as read by the Judge, and upon inquiry of counsel for the defendant and for the Prosecutor, whethe rthey had any objections to acceding to the request of the jury to furnish these sections in typewritten or written form, counsel for the defendant and the State said they had no objection and would agree to the submission of these specific sections.

Note the presence in open court of both counsels.

(The jury returns into court.)

The Court. I have a request from the jury as follows: "Definition of conspiracy—as to intention, etc., as set forth in the Judge's charge."

I presume what you want is to have me read to you the definition of conspiracy as I charged it, is that it?

The Foreman. Yes, sir.

The Court. I will read to you the two portions that I presume you want to hear.

You will readily see, therefore, that where two or more election officers combine and make an agreement to be guilty of a wilful fraud in the discharge of their duties by falsely counting primary election ballots, or by making false returns of the result of such an election, that such persons are guilty of the crime of conspiracy if one or more of those so combining do some act in execution of such an agreement to effect the object thereof.

Then in another part I said this to you: The question presented to you under the indictment is did these defendants unlawfully and corruptly combine, unite, confederate, conspire or agree to be guilty of a wilful fraud in the discharge of their duties by knowingly falsely counting the said primary election ballots and by knowingly making a false return of the result of the said election and did they or one of them take some steps in execution of the conspiracy and to effect the object thereof. In this case the State contends that the step they took in execution thereof was the making out of this return which the State claims they knew was false. Does that give you the information you want?

The Foreman. Yes, sir.

The Court. If there are any other instructions you want, let me know and I will be glad to give them to you.

(Jury retires and returns.)

The Court. Gentlemen of the jury, you have asked these question: "Please let us have a resume of the individual duties and responsibilities of the members of a District Board of Election as defined in the election laws of 1920. Also is the Judge responsible for the actions of

members of his Board, and in what respect does the Inspector stand as regards authority in the absence of the Judge of Election? I cannot tell you any more about their duties, so far as they apply to this case, than I have in the charge, or than I have in the typewritten or written sections of the law which I have submitted to you execept to do this:

Section 58 of the election law provides that:

> "Each of the said boards shall, on Thursday next preceding the first day of registration for the general election, meet together and organize by the election of one of its members as judge, who shall be chairman of said board, and another of its members as inspector; such judge and inspector shall be members or favorers of different political parties. In case of failure to elect a judge as herein provided, after balloting or voting three times, the member of the board oldest in years shall become judge, and in case of failure to elect an inspector, after balloting or voting three times, the next oldest member of the board in years shall become the inspector; provided, that both chairman and inspector shall not be members or favorers of the same political party. The other two members of the board shall be clerks of election, and shall perform all the duties required by law of the clerks of district boards of registry and election.
>
> The members of said district boards of registry and election shall, before entering upon the performance of their duties, severally take and subscribe an oath or affirmation, in writing, before a duly qualified officer, faithfully and impartially to discharge all their duties as such officers, to the best of their skill and ability, which oaths and affirmations shall be forthwith forwarded to the county clerk, and by him filed in his office, and after qualifications as aforesaid, any member of either of said boards may, at any meeting thereof, administer any oath or affirmation required or permitted to be taken by this act."

As to the other questions which you have asked I cannot very well answer them, because I do not know just what the questions mean and I do not know what applicability these questions have to the issue at this time. If you can ask a more definite question, I shall try to answer it.

The Foreman. Was it the duty of the clerk to ask the judges of election if they found something wrong as to the number of the ballots in the poll-book as they come across them? Did they have any power?

The Court. Just repeat the question.

The Foreman. Did the clerk have any power to stop the reading of the ballots because the numbers were running wrong on the poll-book?

The Court. Any member of the board would have the right to call to the attention of any member of the board anything which he thought indicated that the election might not be going as it should be, or that indicated that he thought there was something wrong. This is not statutory, but the plain right and duty of an officer sworn to perform the duty of an election officer in a way and manner that would enable the will of the voters to be registered.

Have I made myself clear?

The Foreman. The jurors seem to think that the judge of election was the only one responsible, that the clerk had nothing to do except carry out his instructions, and it was not the duty of the clerk to rectify anything.

The Court. To rectify what?

The Foreman. Any wrong.

The Court. If any member of the Board of Election knew that there was a false counting of ballots, or any similar wrong, he had the right to call it to the attention of the judge, or any other member of the election board; he not only had that right, but it was his duty,

but I am wondering, gentlemen, whether the issue in this case is clearly before you. If there is any question about it and you want any light on any particular part of my charge, I will be very glad to read it. I know you are trying very hard to arrive at a conclusion and I want to help you, if that is possible, and if I can help you by reading any portion of my charge I shall be very glad so to do.

The Foreman. We request that the whole charge be reread.

The Court. Is it your desire that I read the sections of the election laws, which I supplied you with?

The Foreman. Except that.

The Court. The function of the Court is to instruct the jury in reference to the principles of law governing the case, and the law of the case you must take from the Court. You, however, are the sole judges of the facts, weight of the testimony, credibility of the witnesses, inferences to be drawn from the evidence, and the ultimate conclusion to be reached upon all the facts. The Court, in referring to the evidence, is not to be understood as deciding any fact, but merely as attempting to elucidate the evidence for the convenience or the assistance of the jury, or to illustrate or explain the application of principles of law, and, so, if according to your recollection, the Court errs in its statement of any evidence, whether disputed or undisputed, or assumes or states the existence or presence in the case of evidence that is not actually before you, you should disregard the recollection of the Court and rely upon your own recollection. Again, if any part of the evidence is referred to, seemingly giving it particular emphasis, the jury are not to disregard other evidence, which they may deem of equal or greater importance, for it is the duty of the jury to consider and weigh all of the evidence bearing upon the questions involved in this matter before you, not only that which may

be mentioned by the Court, but all that has been presented here before you.

The law presumes that the defendants are innocent, and this presumption continues until overcome by proof establishing their guilt beyond a reasonable doubt. The burden of proving beyond a reasonable doubt the guilt of the defendants of the offense here charged against them is upon the State, represented by the Prosecutor, and that burden of proof remains upon the State, the Prosecutor, throughout the whole case, and never shifts.

Reasonable doubt is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt, but it is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

The Grand Jury of this county, for the December, 1920, term, presented an indictment for conspiracy against Joseph C. Caprio and Lawrence Ruglio, and the case is before you for your decision upon the issue framed by the pleas of not guilty made by said defendants to the said indictment.

The conspiracy alleged by the indictment is one to falsely count the ballots cast at the primary election held September 28, 1920, to nominate a candidate of the Republican party for member of the House of Representatives in and for the Eighth Congressional District of the State of New Jersey and to make false returns of the results of such primary election for the Republican nomination for membership of the House of Representatives from the said district.

Our statute, so far as this case is concerned, defines conspiracy as follows:

> "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 * * * shall, on conviction, be deemed guilty of a conspiracy * * * provided that (in a case such as is alleged by the indictment) some act in execution of such agreement must be done to effect the object thereof by one or more of the parties to such agreement."

Section 27 of Chapter 349 of the Laws of 1920, being an act entitled "An Act to regulate elections" (Revision of 1920), at page 833, provides in part that if any judge, inspector, clerk or any other officer of a primary election shall be guilty of any willful fraud in the discharge of his duties, by false counting or by making false returns, he shall be deemed guilty of a crime.

You will readily see, therefore, that where two or more election officers combine and make an agreement to be guilty of a willful fraud in the discharge of their duties by falsely counting primary election ballots, or by making false returns of the result of such an election, that such persons are guilty of the crime of conspiracy, if one or more of those so combining do the act in execution of such an agreement to effect the object thereof, which the indictment against them alleges they did.

Here the State charges a conspiracy to commit both of the said crimes, and the State must, therefore, prove, beyond a reasonable doubt, the existence of the unlawful combination, the corrupt agreement, namely the agreement to knowingly falsely count the ballots cast at such primary election and to knowingly make false returns of the results of such election, and, in addition, must so prove some act done in execution of this unlawful and corrupt agreement or combination, by one or more of the conspirators to effect the object of the agreement, which act in this case is that alleged in the indictment, the false certification of the result of the Congressional election.

And if you do not believe these defendants previously agreed and conspired, or, if you have a reasonable doubt

thereof, you must acquit, even though you do believe that they corruptly made false returns and falsely counted, but you may consider the evidence bearing upon the alleged corruptly making of such false returns and false count on the question of the existence of the conspiracy.

But the agreement need not be a formal one. It need not be manifested by any formal words, written or spoken. It is sufficient if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts contemplated and whether the minds of the parties have so met is a question of fact for you to determine from all the facts and circumstances in the case. Again, while the State must show the doing of an overt act, some act done in execution of the unlawful agreement, must prove the doing of the overt act charged in the indictment it need not show a full execution of the conspiracy, need not show that the conspirators succeeded, for it is sufficient if the proof exhibits a step taken in execution of the conspiracy as alleged by the indictment and whether the crimes which the parties combined to commit were committed or not is wholly immaterial, although the contention of the State here seems to be that the conspiracy did, in fact, succeed and that the ballots were in fact falsely counted and a false certification made. You will observe from what I have already said that these defendants are not on trial for being guilty of a willful fraud in the discharge of their duties, by falsely counting the said primary election ballots, or for making a false return of such election result, or for doing both of these prohibited acts; nor are they on trial for negligence in the performance of their duty, for carelessly, negligently, or mistakingly counting the ballots or certifying the result of the election, or for conspiracy so to do. The question presented for your decision under this indictment is did these defendants unlawfully and corruptly combine, unite, confederate, conspire or agree to be guilty of a willful fraud in the dis-

charge of their duties by knowingly falsely counting the said primary election ballots and by knowingly making a false return of the result of the said election and did they or one of them take some step in execution of the conspiracy the State alleges by the indictment and to effect the object thereof?

If you are satisfied beyond a reasonable doubt that they did you should bring in a verdict of guilty If you are not so satisfied bring in a verdict of not guilty.

And in considering this question bear in mind that the statute which it is charged they conspired to violate and breach does not contemplate punishing a person who either honestly or through ignorance falsely counts or signs a false return, so that even though you find that the counting and the returns were false, it would be your duty to acquit, if you had a reasonable doubt as to whether such acts were the result of negligence or of corruption.

The election laws follow which you have asked me to leave out.

The contention of the Prosecutor seems to be that Caprio and Ruglio, judge and inspector, respectively, of this board, corruptly conspired and agreed together that Caprio should falsely read and announce the said primary ballots in the interest of the candidate Archibold, so that he would be credited by the tally clerks with more votes than he actually received, that Ruglio should approve such false reading and announcement, and both should certify such false result to the authorities, and that in execution of such conspiracy Caprio, with Ruglio's approval, did falsely read and announce the contents of such primary ballots so far as said Congressional contest was concerned, and that both did certify a result of such contest which was false and which they knew was false, and if Caprio did falsely read the contents of such ballots and announce to the tally clerks such false reading with Ruglio's knowledge and approval, with the intent, for instance, that Archibold should receive more credits than he was

entitled to, it would constitute the false counting which the statute prohibits, just as much as if one of the tally clerks hearing a vote announced for one candidate should wilfully and deliberately credit another candidate with such vote. Each of the officers is participating in the counting of the ballots when he is performing the duty allotted to him by statute and when he is false to his trust, wilfully violates his duty, fraudulently discharges his duty, intending to and thereby producing a false record of the votes cast, he is guilty of falsely counting the ballots. Making a false statement, however, under the election law, is not false counting, nor should it be made the substitute for false counting.

Is this contention of the State supported by the evidence? The State says it is; the defendants say it is not. Yours is the duty to decide.

The defendants contend that they did not knowingly or wilfully falsely read any ballots, say that where they were blank on the Congress vote they did not read a credit for any Congressional candidate, and the same where a vote was cast for all three; that they cannot account for the tally clerk having 409 votes for the Congress candidates, with 415 cast in all, and with 31 blank or double crossed, except as they intimate that the tally clerks may have made mistakes, miscounted; that they did not conspire to falsely count the ballots or falsely return the result of the election, and that they were surrounded by watchers, challengers, and so forth, and watched by a member of the board all during the counting.

These contentions and the evidence offered in support of them create questions of fact which it is your peculiar province to decide, and as the evidence is probably as fresh in your minds as it is in mine, I shall not seek to review all the evidence, but to me (perhaps it may not seem so to you) the 31 ballots which were blank or double crossed, or crossed for all or more than one of the Congressional candidates, and which in some way seems to

have been counted, when, if they were blank, or so marked as aforesaid, they should not have been counted for any Congressional candidate, furnish food for careful consideration and deliberation in the decision of this case, particularly as Caprio and Ruglio both testified that they knew, as I recall it, that such ballots should not be counted, and, in fact, that they did not count them. How is it then that they were counted? Was it the mistake of the tally clerks? Did they make errors in tabulation which would account for the counting of these votes, thirty-one votes, as I recall it, or did they corruptly count them? If it was the mistake, or the corrupt or other act of the tally clerks, of course the defendants could not be found guilty. The defendants do not say they called the ballots off and caused credits to be made for them, honestly believing they should be counted or that they mistakenly and in good faith counted them; they say that they knew they should not be counted and that they, as a consequence, did not announce the Congressional votes on such ballots. How was it, then, that they were counted? Did Caprio, with Ruglio's approval and to secure credits for Archibold to which he was not entitled, knowingly and wilfully read and audibly announce a vote for Archibold on these ballots and each knowing that such votes had been as a result credited to Archibold, both certify that result to the authorities? If they did and did it corruptly pursuant to a common agreement or understanding or conspiracy as charged, evidence would be before you sufficient to make out the crime with which these defendants are charged.

There is testimony that the tally clerks made mistakes and that they corrected them by reference to the numbers placed on the back of the counted ballots. Did they make mistakes which accounted for these thirty-one ballots which it is said were counted for Archibold? Did they make mistakes, sufficient mistakes, to account for these thirty-one ballots? These are questions which should be carefully considered by you.

And, of course, the fact that the County Board rejected certain ballots, fourteen, I think there were, because they were in their judgment marked ballots, marked with indelible ink, for instance, when Caprio and Ruglio either not noticing the marks or not considering them as making the ballots, marked ballots, did not count them, would not bind or affect these defendants, but if you find from the evidence that there were these thirty-one other ballots which were blank or double crossed, or too much crossed, which in some way were counted, you may and should consider them as bearing upon the guilt of these defendants. To be sure if you find that these fourteen ballots were counted by Caprio and Ruglio when they knew they should not have been counted, you may and should consider them as bearing upon the issues here. You will have the ballots before you for inspection. Yours will be the right and the duty to inspect them.

The balance of it is the formal charge. Do you want to hear it or have you sufficient? If there is any further information you desire after you retire, I will try to enlighten you.

The Foreman. Would the guilt of the two clerks bear upon the guilt of these two defendants?

The Court. Just what do you mean by that? Do you mean that if the tally clerks were guilty and these defendants were also guilty would the guilt of the two tally clerks eliminate the guilt of these two defendants? Is that what you mean? In other words, do you mean that if the two tally clerks were guilty and these two defendants were also guilty, whether you would have the right to take that into account in considering this verdict; is that what you want to know?

The Foreman. Yes, sir.

The Court. The only defendants on trial are the two defendants in this case and you have no concern with the guilt or innocence of the two tally clerks. If they are, in

fact, guilty, that is a matter for consideration by the proper authorities, but not by the jury at this time. Does that make it clear?

The Foreman. Yes, sir.

(The jury retires.)

FOURTH DAY.

Thursday, December 1, 1921.

(The jury returns into court.)

The Court. Gentlemen, you inquire of me as follows: "Can we recommend clemency in our verdict?" The answer is you may recommend clemency in your verdict. If you desire at this time to further consider the case, you may do so.

The Foreman. We have agreed to a verdict of guilty with a recommendation of clemency.

The Court. Is that the verdict of each one?

(Each juror being individually addressed, responds in the affirmative.)

DEFENDANTS' REQUESTS TO CHARGE.

1. The defendant respectfully requests the Court to charge that in order to justify a verdict of guilty you must have no reasonable doubt that the defendants did agree and conspire to corruptly and improperly perform their duties, as set forth in the indictment—the duty of the said Caprio to take the ballot from the box and to publicly read it and the duty of Ruglio to be satisfied that it was read correctly.

2. Even if these defendants acted carelessly and negligently or ignorantly in the discharge of their duties, or in the counting of the votes, or of the making of the return thereto, and that such return was false because of their negligence or ignorance, they must be acquitted, because negligence or carelessness cannot be substituted for a corrupt and improper motive contemplated by the statute.

3. The indictment charges them with corruption, not negligence, and the State must prove that they did act corruptly, and before you can convict them, you must have no reasonable doubt that they did so act.

4. If you find that the counting and returns were false, but you have a reasonable doubt as to whether such acts were the result of negligence or of corruption, your duty is to acquit.

5. The statute under which these defendants are indicted does not contemplate punishing a person who, either honestly or through ignorance, falsely counts or signs a false return.

6. Making a false statement, under the election law, is not false counting, nor can it be made the substitute for false counting.

7. If the evidence inclines you to believe that the election law was violated, or that these defendants were guilty of other violations, you cannot consider such facts for the purpose of convicting them therefor, but they can only be

convicted for corruptly agreeing to corruptly and improperly perform the duties specified in the indictment.

8. Even if you believe that one of these defendants acted corruptly, there can be no conviction under this indictment, and if you have any reasonable doubt that the two defendants had previously corruptly agreed to improperly perform their duties, you must acquit.

9. This is not an indictment for false counting or making false returns. It is an indictment for conspiracy in which these defendants are alleged to have corruptly agreed to improperly perform the statutory duties required of each of them, to wit, the duty of Caprio to take the ballot from the box and to publicly read it and the duty of Ruglio to be satisfied that it was correctly read. If you have a reasonable doubt as to their agreeing, as just described, you must acquit.

10. If you do not believe they previously agreed and conspired, or if you have a reasonable doubt thereof, but you do believe that they corruptly made false returns and falsely counted, nevertheless, they must be acquitted under this indictment.

11. The overt act is corruptly signing a statement which the State alleges must be proved beyond all reasonable doubt, and unless you believe beyond all reasonable doubt that such signing was the means whereby these defendants could carry out their alleged conspiracy, you must acquit.

12. It is the duty of the State to prove corruption in order to secure a conviction and such proof must be so clear and convincing that it will leave no reasonable doubt in your minds.

13. The law presumes these men to be innocent and the State is under the duty of overcoming that presumption by evidence so clear and convincing that no reasonable doubt may be left in your mind as to their guilt.

14. If you believe these defendants did corruptly and falsely count and made a false statement they may not be convicted of that because those acts are not the conspiracy charged.

15. Such acts should be considered only for the purpose of determining whether they proved or disprove the charge of conspiracy.

15. The determination of the County Board on the recount that Archibold was credited with 45 too many votes —or any number of votes—is not proof of that fact as against these defendants.

16. Before you can conclude that Archibold was credited with too many votes, you must be satisfied of that alleged fact by competent evidence satisfactory to you and you have no right to substitute the judgment of the County Board in place of your own judgment.

17. If you find it impossible to determine the alleged over-crediting excepting by an examination of all the ballots, then you should not pass upon the question of over-crediting.

18. There has been no sufficient proof offered of the alleged over-crediting to Archibold.

19. You should acquit defendants of corruptly false counting because of lack of evidence.

20. You may not convict them of making a false statement of results of the election unless you believe beyond reasonable doubt that at the time of signing they knew it was false and signed it corruptly.

STENOGRAPHER'S CERTIFICATE.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

STATE OF NEW JERSEY, *vs.* JOSEPH C. CAPRIO and LAWRENCE RUGLIO.	*On Indictment for Conspiracy.*

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

I, HAROLD T. COOK, official stenographer of the Essex County Court of General Quarter Sessions, Part I, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of the State of New Jersey *vs.* Joseph C. Caprio and Lawrence Ruglio, indictment for conspiracy, which trial was held before the Honorable Fred G. Stickel, Jr., Presiding Judge of the Essex County General Quarter Sessions Court, in and for the County of Essex, and a jury, on Monday, November 28, 1921; Tuesday, November 29, 1921; Wednesday, November 30, 1921, and Thursday, December 1, 1921, at Newark, New Jersey.

HAROLD T. COOK.

Dated February 3, 1922.

Certificate of Judge.

JUDGE'S CERTIFICATE.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

STATE OF NEW JERSEY, *vs.* JOSEPH C. CAPRIO and LAWRENCE RUGLIO.	*On Indictment for Conspiracy.*

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

I, FRED G. STICKEL, JR., Presiding Judge of the Essex County Court of General Quarter Sessions and the Judge who presided over the aforesaid cause, certify that the above printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiffs-in-error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

FRED G. STICKEL, JR.,
Presiding Judge of the Essex County Court of General Quarter Sessions.

Dated February 3, 1922.

ASSIGNMENTS OF ERROR.

Filed February 11, 1922.

NEW JERSEY SUPREME COURT.

THE STATE, *Plaintiff—Defendant-in-Error,* *and* JOSEPH C. CAPRIO, *et al.*, *Defendants—Plaintiffs-in-Error.*	*On Error to Essex Quarter Session.* *Assignments of Error.*

Afterwards, to wit, on the return day of the writ of error issued in this cause, comes the said Joseph C. Caprio and Lawrence Ruglio, plaintiffs-in-error, by Wilbur A. Heisley, their attorney, and say that in the record and proceedings aforesaid, and also in the giving of judgment, aforesaid, there is manifest error in this, to wit:

FIRST: Because the indictment was insufficient and the Court should have granted the motion to quash and the motion to direct a verdict for defendants. It being insufficient in the following respects:

A. It failed to apprise the defendants of the particular wilful fraud they conspired to commit.

B. It fails to specify or describe the alleged false statement or in what respect it was false.

C. It fails to show in what particulars the counting was false.

D. It fails to allege that there was any duty imposed upon the defendants to count.

E. It alleges an act done in execution of the conspiracy which could not be done in such execution.

SECOND: Because it refused to charge when requested by defendants' 11th request, as follows:

> 11. The overt act is corruptly signing a statement which the State alleges must be proved beyond all reasonable doubt, and unless you believe beyond all reasonable doubt that such signing was the means whereby these defendants could carry out their alleged conspiracy, you must acquit.

THIRD: Because it does not intelligently apprise the defendants of the "nature of the accusation" made against them, as required by the Federal and State Constitutions.

FOURTH: Because the defendants' PLEA IN BAR was supported and maintained by the evidence offered on the trial of the issue joined thereon and was in law and in fact a bar to this prosecution, and the Court erred in directing the jury to decide adversely to the defendants thereon.

FIFTH: Because the Court should as a matter of law have directed the jury to return a verdict on said plea in favor of defendants.

SIXTH: Because at page 47, the Court refused to permit the defendants to ask and have answered the following question: "Q Do you know of your own knowledge or have you any reason to believe when you were writing down these figures, that Caprio and Ruglio were reading the returns incorrectly?"

SEVENTH: Because the Court at page 60 unlawfully refused to permit the defendants to ask the following question: "Q As far as you know, was it done accidentally or ignorantly, or was it done purposely by some one, as far as you know?

EIGHTH: Because the Court at page 158 improperly refused to permit the defendants to ask the following question: "Q Mr. Ruglio, do you know of anything that was done at that election by you or Mr. Caprio that was illegal or improper?"

Assignments of Error.

NINTH: Because at page 159 the Court improperly refused to permit the defendants to be asked the following question: "Q Did you do anything that was illegal or criminal?"

TENTH: Because at page 159 the Court improperly refused to permit the defendant Ruglio to answer the following question: "Q Did you knowingly or intentionally do anything that was wrong in the discharge of your duty as an inspector?"

ELEVENTH: Because the Court at page 172 improperly refused to permit the defendant Caprio to be asked the following question: "Q Mr. Caprio, from start to finish of that primary, did you consciously do anything which you thought was illegal, corrupt or criminal?"

TWELFTH: Because at page 77 the Court improperly refused to permit the defendants to ask the following question: "Q Just exactly like the election of officers are supposed to do when they count up the votes?"

THIRTEENTH: Because the Court at page 86 improperly overruled the following question: "Q The count went on under entirely different circumstances than surrounds the counting of votes at an election?"

FOURTEENTH: Because the Court at page 188 improperly refused to allow the State's witness, Rodemann, to be asked the following question: "Q Well, if you were sitting as an election officer and that ballot was handed to you, do you think you would have found, as you now speak of, that it has a sheen to it?"

FIFTEENTH: Because the Court improperly admitted in evidence the conclusions of the County Board of Elections.

SIXTEENTH: Because the Court illegally and inferentially gave the jury to understand that such conclusions were evidential and conclusive against the defendants.

SEVENTEENTH: Because the Court at page 109 wrongfully refused to have the evidence struck out referred to on a motion made in behalf of the defendants.

EIGHTEENTH: Because the Court improperly refused to charge the following requests of the defendants:

9. This is not an indictment for false counting or making false returns. It is an indictment for conspiracy in which these defendants are alleged to have corruptly agreed to improperly perform the statutory duties required of each of them, to wit, the duty of Caprio to take the ballot from the box and to publicly read it and the duty of Ruglio to be satisfied that it was correctly read.

14. If you believe these defendants did corruptly and falsely count and made a false statement they may not be convicted of that because those acts are not the conspiracy charged.

15. Such acts should be considered only for the purpose of determining whether they proved or disproved the charge of conspiracy.

15. (Additional 15.) The determination of the County Board on the recount that Archibald was credited with 45 too many votes—or any number of votes—is not proof of that fact as against these defendants.

16. Before you can conclude that Archibald was credited with too many votes, you must be satisfied of that alleged fact by competent evidence satisfactory to you and you have no right to substitute the judgment of the County Board in place of your own judgment.

17. If you find it impossible to determine the alleged over-crediting excepting by an examination of all the ballots, then you should not pass upon the question of over-crediting.

Assignments of Error.

18. There has been no sufficient proof offered of the alleged over-crediting to Archibald.

NINETEENTH: Because the Court failed and refused to properly answer the jury's question asked by it of the Court, as follows:

"Is the Judge responsible for the actions of members of his Board?"

TWENTIETH: Because the verdict was against the weight of the evidence.

ANTHONY R. FINELLI,
WILBUR A. HEISLEY,
Attorneys of Defendants—Plaintiffs-in-Error.

SPECIFICATION OF CAUSES.

Filed February 11, 1922.

NEW JERSEY SUPREME COURT.

THE STATE, *Plaintiff—Defendant-in-Error,* *and* JOSEPH C. CAPRIO, *et al.*, *Defendants—Plaintiffs-in-Error.*	*On Error to Essex Quarter Session.* *Specification of Causes.*

And said plaintiffs-in-error also specify the following causes relied upon by them for relief or reversal, pursuant to the statutes in such case made and provided:

FIRST: Because the Court improperly admitted in evidence the findings of the County Board of Election upon its alleged recounting of the ballots cast at said primary election.

SECOND: Because the Court in its charge and in its rulings treated the findings of the said County Board as infallible and conclusive proof of improper or false counting or incorrect counting by the defendants.

THIRD: Because said evidence, conclusions and recounting by the said Board of Elections was in no sense evidential against these defendants, as they were not parties to the recounting and were not bound thereby and that such recounting or conclusions should not have been admitted in evidence.

FOURTH: Because the Court erroneously refused to strike out the evidence given as to the conclusions or findings of the said County Board, when so requested by the defendants.

FIFTH: Because the Court improperly told the jury, in effect, one Archibald was improperly credited with too many votes, basing such statement entirely upon the assumption that the conclusions of the County Board to that effect were evidential and conclusive against these defendants.

SIXTH: Because said Court, even after it had received the evidence of the counting by the County Board, should have distinctly told the jury that it should not have accepted the count of the said County Board unless it was satisfied from its own judgment and inspection of the ballots, that the County Board was accurate in finding that Archibald had been credited with too many votes.

SEVENTH: Because the Court improperly refused to answer the following question propounded to it by the jury:

> "Is the Judge responsible for the actions of members of his Board?"

EIGHTH: Because by reason of such refusal it left the jury's mind in doubt as to what its duty was in the premises.

NINTH: Because the verdict was against the weight of evidence.

ANTHONY R. FINELLI,
WILBUR A. HEISLEY,
Attorneys of Defendants—Plaintiffs-in-Error.

ADDITIONAL SPECIFICATION OF CAUSES.

Filed February 17, 1922.

And the said plaintiffs-in-error also specify the following additional cause relied upon by them for relief or reversement, pursuant to the statute in such case made and provided:

TENTH: Because the Court at the conclusion of the taking of evidence on the trial before it of the special plea in bar improperly and illegally directed the jury to render a verdict upon said plea adverse to the said plaintiffs-in-error.

ANTHONY R. FINELLI,
WILBUR A. HEISLEY,

Stipulation.

STIPULATION.

Filed.

NEW JERSEY SUPREME COURT.

THE STATE, *Plaintiff—Defendant-in-Error,* *vs.* JOSEPH C. CAPRIO, *et al.*, *Defendants—Plaintiffs-in-Error.*	*On Error.* *Stipulation.*

It is hereby agreed between the Prosecutor of the Pleas and the attorney of the defendants, that on the argument of the writ of error the following stipulation shall be considered as a part of the record of the cause:

FIRST: That Exhibit S. 2 is a duplicate copy of Exhibit S. 1, and reads as follows:

PRIMARY ELECTION, 1920.

A copy of this Statement to be sent to the County Clerk and Municipal Clerk.

STATEMENT of the Result of a Primary Election for the election of MEMBERS OF THE HOUSE OF REPRESENTATIVES FOR THE EIGHTH CONGRESSIONAL DISTRICT for the Republican, Democratic and Socialist Parties held in the City of Newark, County of Essex, New Jersey, September 28, 1920. 3rd Election District of the First Ward.

REPUBLICAN PARTY

The tital number of Republican Ballots cast was 415. The total number of Republican Ballots rejected was 1. The total number of names on Republican Primary Poll Book 415.

Stipulation.

For Member of the House of Representatives From the Eighth Congressional District.

(NAME OF CANDIDATE)

Herbert W. Taylor.....received....Five.....(5) votes
Alfred Chapman .....received.... One ....(1) votes
Geo. G. Yarrow.....received.....(0) votes
Arthur B. Archibald....received. Four hundred and three (403) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes

DEMOCRATIC PARTY

The total number of Democratic Ballots cast was 46. The total number of Democratic Ballots rejected was none. The total number of names on Democratic Primary Poll Book 46.

For Member of the House of Representatives From the Eighth Congressional District.

(NAME OF CANDIDATE)

Cornelius A. McGlennon.received..Forty-three (43) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes

Stipulation.

SOCIALIST PARTY

The total number of Socialist Ballots cast was.....
The total number of Socialist Ballots rejected was.....
The total number of names on Socialist Primary Poll Book.....

For Member of the House of Representatives From the Eighth Congressional District.

(NAME OF CANDIDATE)

.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes
.....received.....(...) votes

We certify the foregoing to be a true and correct statement of the result of the primary election held in such district at the time above stated; that the same truly and correctly exhibits the entire number of votes cast for each political party at such election, the whole number of ballots rejected and the number of said ballots rejected belonging to each party respectively; also the number of votes received by any person to be a candidate of any party for any office named on any ballot or ballots cast at such election, together with the total number of names on the Primary Poll Book of each party.

IN WITNESS WHEREOF, we have hereunto set our hands this 28th day of September, one thousand nine hundred and twenty.

JOSEPH C. CAPRIO,
SAMUEL E. VERNIERO,
LAWRENCE RUGLIO,
JOS. CAPUTO,
Board of Registry and Election.

Stipulation.

SECOND: That the official Republican Party Primary Election tally sheet—September 28, 1920—is a part of the contents of the ballot box (Exhibit S.) was signed in their own proper handwriting by all four of the members of the Election Board of the Third District of the First Ward of the City of Newark, including the two defendants, and showed the following tally for members of the House of Representatives from the Eighth Congressional District:

Herbert W. Taylor.....	5 ballots
Alfred Chapman	1 ballot
George G. Yarrow.....	0 ballots
Arthur B. Archibald.....	403 ballots

and that tally sheet also showed that there were a number of candidates voted for as members of the General Assembly, and that the number of ballots cast for such members are as low as 321, and as high as 395 ballots.

THIRD: That the following were candidates for member of the House of Representatives for the Eighth Congressional District:

Herbert W. Taylor,
Alfred Chapman,
George G. Yarrow,
Arthur B. Archibald.

JOHN O. BIGELOW,
Attorney for Plaintiff—
Defendant-in-Error.

WILBUR A. HEISLEY,
Attorney for Defendants—
Plaintiffs-in-Error.

Exhibit D. 1. Petition on Summary Proceedings.

Copy of the Petition of William H. Parry on the Summary Proceedings and the affidavits and order to show cause issued thereon were admitted in evidence and marked Exhibit D. 1.

ESSEX COUNTY COURT OF COMMON PLEAS.

In the matter of the removal of the Election Board of the Third District of the First Ward of the City of Newark.	*Petition.*

The petition of William H. Parry a registered voter of the City of Newark residing at 578 Summer Avenue, in said City, respectfully shows:

That Joseph C. Caprio, Samuel E. Verniero, Lawrence Ruglio and Joseph Caputo are members of the Election Board of the Third District of the First Ward of the City of Newark and acted in that capacity at the Primary Election held in said City on September 28, 1920; that the said Members of said Election Board wilfully and illegally conducted said Election in said District in that the said Members gave to voters who appeared before them to vote official ballots which had already been prepared, with crosses or marks thereon placed opposite the names of certain candidates on said official Primary ballots; that the said Members of said Board fraudulently prepared a list of ballots which they placed on the table used by said Board which were already prepared for voting and which ballots were handed out to various voters including Mary Gidioli of 109 Seventh Avenue, Newark, and Crescenzo Lombardi of 73 *Pl*ane Street, Newark, when the said persons appeared before said Board to vote, that the said Board also il-

legally erased or attempted to erase marks upon official ballots which were voted in said election; that the said Board conducted said Election in a fraudulent and illegal manner; that your petitioner who was a candidate for the nomination of State Senator, in the Republican Primaries was defrauded by their actions.

Your petitioner therefore, prays, that the said Election Board may be removed from office and that the Court may take such further action as may be necessary.

WILLIAM H. PARRY,
Petitioner.

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

William H. Parry, being duly sworn on his oath deposes and says, that he is the petitioner in the above petition and that the facts therein set forth are true to the best of his knowledge and belief.

WILLIAM H. PARRY.

Sworn and subscribed to before me
at Newark, N. J., this fifth day of
October, A. D. 1920.

W. E. CHRISTIAN,
Notary Public, N. J.

Exhibit D. 1. Petition on Summary Proceedings.

STATE OF NEW JERSEY
COUNTY OF ESSEX. } *ss.*

Mary Gidioli, being duly sworn upon her oath deposes and says that she resides at No. 109 Seventh Avenue, Newark, that on the 28th day of September, 1920 she went to the polling place of the 3d Election District in the First Ward of the city of Newark to vote in the republican primaries; that one of the members of the Board of Elections gave her a ballot which she took into the polling place; that deponent found upon opening said ballot that it had already been marked with crosses opposite the names of certain candidates; that deponent then called to Marie Carluccio who was assisting woman voters that something was wrong with ballot that it had marks on it; that deponent went outside and Marie Carlucci took the ballot; that one of the Election Board said: "I will change the marks on the ballot:" Miss Carlucci said "No"; the Board then gave me another ballot the first ballot was No. 399; the second was No. 406.

MARY GIDIOLI.

Sworn and subscribed to before me at
Newark this 5th day of October, 1920.

WILLIAM H. PARRY
Master in Chancery of N. J.
Witness: Sam Stelletello

Exhibit D. 1. Petition on Summary Proceedings.

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

Crescenzo Lombardi, of full age, being duly sworn upon his oath deposes and says that he resides at No. 73 Crane Street, Newark; that on September 28th, 1920, he went to vote in the Republican primaries in the Third Election District of the First Ward of the City of Newark; that he was handed a ballot by a member of the Board of Elections of said district; that when deponent opened said ballot he found that it had already been marked with marks or crosses opposite the names of certain candidates; that deponent took said ballot back to the said Board and objected to it; that thereupon one of the members of said Board erased the marks upon it and gave it back to deponent; that deponent then voted said ballot after having made his own marks thereon;

CRESCENZO LOMBARDI.

Sworn and subscribed before me
at Newark, this 5th day of October, 1920.

WILLIAM H. PARRY
Master in Chancery of New Jersey

Exhibit D. 1. Petition on Summary Proceedings.

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

Maria Carlucci, of full age, being duly sworn upon her oath deposes and says that she resides at No. 243 Mount Pleasant Avenue, Newark, New Jersey, that she is on the Advisory Board of the National League of Woman Voters; that on the 28th day of September, 1920, she was instructing the women voters of different election districts in said city; that between the hours of 9 P. M. and 10 P. M. (daylight saving time) of said day, she went to the Third Election District of the First Ward of the said city of Newark at the polling place in the school house at the corner of 7th Avenue and Factory Street; that while at said polling place, Mary Gidioli of No. 109 Seventh Avenue, who is personally known to deponent, presented herself before the Election Board of said District and asked for a Republican ballot; that she was given a folded ballot and then entered one of the booths; in a short time, she called out to deponent: "I want to show you something"; deponent then called to a member of said Board of Elections, one Joseph Caprio, and said to him that the woman wanted to see him; meaning Mary Gidioli, the said Caprio then said to deponent: "It is all right you can go and see what she wants"; the said Mary Gidioli then showed deponent the ballot, which was already marked, and the said Mary Gidioli said to deponent: "Look it is already marked"; deponent then took the ballot and showed it to the Election Board; deponent said to the Board: "See here! It is a marked ballot"; one of the members of said Election Board said to deponent, "Give me the ballot back. I will erase it"; the ballot was No. 399, to best of deponent's knowledge; deponent refused to give them the ballot and when an attempt was made to take it from deponent, deponent tore the ballot; the said Caprio asked deponent not to mention the affair as it would mean trouble for the Board; the Board then gave the said Mary

Gidioli, another ballot, which second ballot was numbered 406; only one person had voted from the time the said Mary Gidioli had been given the first ballot until she was given the second ballot; there were a large number of people inside the polling place while this was going on.

MARIA C. CARLUCCI.

Sworn and subscribed to before me
this 4th day of October, 1920.

DANIEL L. STRAUSS,
A Master in Chancery of N. J.

Filed October 5, 1920.

Exhibit D. 1. Petition on Summary Proceedings.

ESSEX COUNTY COURT OF COMMON PLEAS.

In the matter of the removal of the Election Board of the Third District of the First Ward of the City of Newark.	*Order to Show Cause.*

This matter being presented to the Court by William H. Parry, the petitioner therein named, and the Court having read the said petition and the affidavits thereto annexed alleging fraud in the conduct of the election held on September 28, 1920, which was a general primary election, by Joseph C. Caprio, Samuel C. Verniero, Lawrence Ruglio and Joseph Caputo, who were members of the Election Board of the 3rd Election District of the 1st Ward of the City of Newark. In accordance with the statute in such case made and provided; It is thereupon on this 5th day of October, 1920, ordered that the said Joseph C. Caprio, Samuel C. Verniero, Lawrence Ruglio and Joseph Caputo show cause before this court on the seventh day of October, 1920, at 10 A. M., or as soon thereafter as the matter may be heard why they should not be removed as members of said Election Board.

H. V. OSBORNE,
Judge.

Filed October 5, 1920.

Exhibit D. 1. Petition on Summary Proceedings.

ESSEX COUNTY COURT OF COMMON PLEAS.

In the matter of Joseph C. Caprio, Samuel E. Verniero, Lawrence Ruglio and Joseph Caputo, members of the Board of Registry and Election, 1st Ward, 3rd District, City of Newark.	*Order.*

It is, on this seventh day of October, A. D. 1920, ORDERED that John C. Caprio, Samuel E. Verniero, Lawrence Ruglio and Joseph Caputo, members of the Board of Registry and Election of the 1st Ward, 3rd District, City of Newark, be and they hereby are removed for cause as members of said Board in the ward, district and City as aforesaid, and that the certificates of appointment heretofore issued to the said Joseph Caprio, Samuel E. Verniero, Lawrence Ruglio and Joseph Caputo be revoked forthwith.

It is further ORDERED that a true, but uncertified copy of this order be served upon the Secretary of the County Board of Elections.

H. V. OSBORNE,
President Judge of the Court of Common Pleas.

Filed October 8, 1920.

Exhibit D. 1. Petition on Summary Proceedings.

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, DO HEREBY CERTIFY that the annexed instrument is a true and correct copy of all the records and proceedings in the matter of the removal of the Election Board of the Third District of the First Ward of the City of Newark and the same is taken from and compared with records on file in said office and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this seventh day of February, A. D. 1921.

(SEAL)

JOHN H. SCOTT,
Clerk.

OPINION OF SUPREME COURT.

Filed December 14, 1922.

NEW JERSEY SUPREME COURT.

June Term, 1922.

THE STATE,

vs.

JOSEPH C. CAPRIO and LAWRENCE RUGLIO.

Error to Essex Quarter Sessions.

Argued before Gummere, Chief Justice and Justices Swayze and Trenchard.

For plaintiffs-in-error, Wilbur A. Heisley.

For the State, John O. Bigelow, prosecutor of the pleas, and J. Henry Harrison.

The opinion of the court was delivered by

GUMMERE, *C. J.:*

The defendants were convicted upon an indictment charging them with a criminal conspiracy.

The revision of our Act to Regulate Elections (P. L. 1920, Art. XXXI, Sec. 27, p. 833) declares that, if any judge, inspector, clerk or any other officer of a primary election shall be guilty "of any wilful fraud in the discharge of his duties by destroying or defacing ballots, adding ballots to the poll, by false counting, by making false returns, or by any act or thing whatsoever, the person or persons so offending shall be deemed guilty of a misdemeanor."

The indictment, after reciting that the defendants were each of them members of the Board of Registry and Election in one of the districts of the City of Newark at a

primary election held on the 28th day of September, 1920, at which Caprio served as judge and Ruglio as inspector; that it was the duty of said board, under the statute, to count the votes for each candidate at such election; and specifying the particular duties to be performed by the judge and inspector in such counting; then avers that at such election the defendants "unlawfully and corruptly did amongst themselves conspire, combine, confederate and agree together to be guilty of a wilful fraud in the discharge of their duties, as aforesaid, by falsely counting the said ballots cast at said primary election and by making false returns of the result thereof; * * * and that in execution of the said conspiracy, and to effect the object thereof, the said Caprio and Ruglio did unlawfully and corruptly sign a false and fraudulent statement of the result of said election."

To this indictment the defendants filed a special plea, setting up that, pursuant to Article VI, Section 6, of the statute (P. L., p. 637), which confers upon the Common Pleas Judges power to dismiss members of election boards for cause—one William H. Parry, a candidate at said election, applied by petition to Judge Osborne, of the Court of Common Pleas of the County of Essex, to remove them from the Board of Registry and Election because of certain illegal acts, of which, as it was alleged, they had been guilty in the conduct of said election; that a rule to show cause directed to them was thereupon allowed; that upon the return of the rule a hearing was had upon the petition; that during the hearing each of the defendants was called to testify as a witness, and was then and there examined with relation to certain of the matters which constitute the basis of the charge laid against them in the indictment; and that, therefore, by virtue of Section 77 of Article XXXI of the statute (P. L., p. 855), they were immune from criminal prosecution.

The section to which they appealed declares that "No person called to testify in any proceedings under this act

shall be liable to a criminal prosecution, either under this act or otherwise, for any matters or causes in respect to which he shall be examined or to which his testimony shall relate."

The state joined issue on this plea, and that issue was tried out before the Court and jury, with the result that at the close of the testimony the trial judge directed a verdict against both of the defendants and in favor of the State. Thereupon the defendants interposed a plea of not guilty to the charge laid against them in the indictment, and the trial of the issue presented by this plea was proceeded with, the result being a verdict of guilty against each of the defendants.

The first assignment of error is based upon the action of the trial judge in directing a verdict in favor of the State upon the trial of the issue presented by the special plea, the contention being that, on the proofs then submitted, a verdict should have been directed in favor of the defendants. An examination of the record sent up with the writ discloses that the trial judge stated as the reason for his action in directing a verdict against the defendants that the proofs failed to disclose that either the one or the other of them had been "called to testify" within the meaning of the statute, at the hearing of the Parry petition; and that, therefore, they were not within the protection of that statutory provision.

The defendants on the trial of that issue submitted to the Court and jury, as a part of the evidence in support of their plea, a transcript of the proofs taken before the common pleas judge, from which it appeared that during the examination of witnesses, Judge Osborne, after expressing to counsel for the defendants a desire to hear Caprio, instructed him as follows: "Tell Caprio to take the stand;" and that thereupon Caprio did take the stand and was sworn and examined. The judicial action now complained of was induced by the argument of the prosecutor of the pleas, which was that the words "called

to testify" were the equivalent of compelled to testify. We cannot concur in this view as to the legislative intent expressed in the words of the statute. Ordinarily a witness is either a volunteer or else his presence on the witness-stand is due to the fact that he has been put there by one of the parties to a litigation to testify as to relevant matters concerning which he has personal knowledge. In the latter case he is called by the litigant to testify with relation to those matters. So, too, if he takes the stand, not as a volunteer, not in response to the call of a litigant, but because of the instruction of the trial court to do so, he is obeying a judicial command which cannot be disregarded, a call which must be obeyed, and so comes within the protection afforded him by the very words of the statute.

The fact being undisputed that Caprio took the witness stand in response to the order of the trial court, he was, we think, entitled to the direction of a verdict upon the issue then being tried, provided that the testimony which he then gave related to matters upon which the charge laid against him in the indictment was rested. Our examination of that testimony satisfies us that this was the fact; and we conclude, therefore, that a verdict should have been directed in his favor upon that issue.

We find, however, that the claim of Ruglio to immunity was not justified. His assertion that he also was called to testify on the hearing of the Parry petition is not sustained by the proofs submitted. The record discloses that Ruglio was a mere volunteer in giving his testimony on that hearing; and, this being so, he is, as we have already indicated, not entitled to the protection against criminal prosecution conferred by the statute.

The next assignment of error is based upon the refusal of the trial judge to direct a verdict at the close of the State's case upon the trial of the issue presented by the defendant's plea of not guilty. The argument before the trial court in support of the motion to direct, and

which is repeated before us, is that the specific duties resting upon Caprio as judge and Ruglio as inspector, and contained in the recitals of the indictment, necessarily preceded the counting of the ballots and the making of a return of the ballots cast; and that, therefore, the overt act set out in the indictment—namely, the corrupt signing of a false and fraudulent statement of the result of the election—could not possibly be in execution of a conspiracy such as that charged against them. The argument seems to us to rest upon a misconception of the language of the indictment. The averment is that it was the duty of the Board of Registry and Election (and, of course, of every member thereof) to proceed to count the vote of each candidate at said primary election, and that the two defendants conspired and agreed together to be guilty of a wilful fraud in the discharge of their duties also by falsely counting the ballots cast at the election and making false returns of the result thereof, and that this conspiracy was executed by the unlawful and corrupt signing by both of them of a false and fraudulent statement of the result of the election. It is true that the indictment sets out specific duties resting upon each of the two defendants in the making of the count, and it may be conceded that there is no averment of the violation of any of those specific duties; but the fundamental duty to honestly count is declared to rest upon each of the defendants, as well as upon other members of the board. Conspiracy to commit a fraud in the discharge of that fundamental duty is plainly charged in the indictment, as we read it; and the overt act is clearly one in execution of the fraudulent design. We conclude, therefore, that the motion to direct a verdict for the reasons discussed was properly refused.

Further assignments of error are based upon the refusal of the Court to charge certain requests submitted by counsel for the defendants, and upon alleged erroneous instructions to the jury which are said to be in opposition

to those requests. It is not necessary to recite either the requests or the charge, for none of these alleged errors have been pressed by counsel on the argument before us. It is enough to say in disposing of them that the requests were practically charged, so far as they were proper, and that we find nothing erroneous in the actual instructions given to the jury.

Lastly, it is said that the verdict is against the weight of the evidence. We have examined the testimony sent up with the writ of error for the purpose of discovering whether this contention is meritorious, and the conclusion we reach, after a consideration of the proofs submitted, is that the finding of the jury was entirely justified.

For the reasons indicated, we conclude that the conviction against Caprio must be set aside and that the conviction against Ruglio should be affirmed.

Judgment.

JUDGMENT.

Filed December 22, 1922.

NEW JERSEY SUPREME COURT.

THE STATE, *vs.* JOSEPH C. CAPRIO and LAWRENCE RUGLIO, *Defendants—Plaintiffs-in-Error.*	*On Error.* *Judgment.*

This cause being presented to the Court, and the Court having considered the same and having heard the argument of Wilbur A. Heisley, of counsel for the plaintiff-in-error, and of J. Henry Harrison, of counsel for the State, and being of opinion that the judgment of the Essex County Quarter Sessions should be reversed as against Joseph C. Caprio and that the said judgment should be affirmed as against Lawrence Ruglio,

It is on this twenty-second day of December, nineteen hundred and twenty-two, ORDERED, that the judgment of the Essex County Court of Quarter Sessions, in and so far as it concerns the said Joseph C. Caprio, be and the same is hereby reversed, and for nothing holden; it is further ordered that the judgment of said Court in so far as it concerns the said Lawrence Ruglio, be and the same is hereby in all respects affirmed, and the record remitted to the court below to be proceeded with according to law and practice of said court.

Entered December 22, 1922.

On motion of

WILBUR A. HEISLEY,
Attorney for Plaintiffs-in-Error.

CONSENT TO SEVERANCE.

Filed January 10, 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE, *Plaintiff—Defendant-in-Error,* *and* LAWRENCE RUGLIO and JOSEPH C. CAPRIO, *Defendants—Plaintiffs-in-Error.*	*Consent to Severance.*

To Wilbur A. Heisley, attorney of record of Lawrence Ruglio:

I hereby acknowledge the receipt of written notice from you as the attorney of said Ruglio, advising me of the issuance of the writ of errors in said cause and advising me that if I see fit to join with said Ruglio in prosecuting the said writ, that I am required to join with him in assigning error, or assign and file errors separately within thirty days after the return of the said writ of error, being January 11th, 1923, and which notice has attached thereto a certified copy of said writ.

I hereby advise you that I will not join in the prosecution of said writ, or assign any errors therein, and hereby consent that you may enter a rule for severance and proceed to prosecute said writ in behalf of said Ruglio alone.

Dated January 8, 1923.

Very truly yours,

JOSEPH C. CAPRIO,

RULE FOR SEVERANCE.

Filed January 10, 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE, *Plaintiff—Defendant-in-Error,* *and* LAWRENCE RUGLIO and JOSEPH C. CAPRIO, *Defendants—Plaintiffs-in-Error.*	*On Writ of Error.* *Rule.*

Upon reading the consent duly signed by said Joseph C. Caprio and filed in said cause,

It is on this tenth day of January, 1923, on motion of Wilbur A. Heisley, attorney of Lawrence Ruglio,

ORDERED, That the said Lawrence Ruglio be granted a severance in the prosecution of said writ and that he may assign and file errors and prosecute the said writ without joining the said Joseph C. Caprio therein.

On motion of

WILBUR A. HEISLEY,
Attorney of Ruglio.

Stipulation.

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE, *Plaintiff—Defendant-in-Error,* *vs.* LAWRENCE RUGLIO, *Defendant—Plaintiff-in-Error.*	*On Error.*
THE STATE, *Plaintiff—Plaintiff-in-Error,* *vs.* JOSEPH C. CAPRIO, *Defendant—Defendant-in-Error.*	*Stipulation.*

It is agreed that this State of the Case contains the record of the trial and of the proceedings in the Supreme Court; and is to be accepted as the State of the Case on both Writs of Error and that said writs are to be argued together.

WILBUR A. HEISLEY,
Attorney for Ruglio and Caprio.

J. O. BIGELOW,
Prosecutor of the Pleas.

ASSIGNMENT OF ERROR.

Filed January 10, 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE, *Plaintiff—Defendant-in-Error,* *and* LAWRENCE RUGLIO, *Defendant—Plaintiff-in-Error.*	*On Writ of Error.* *Assignment of Error.*

The defendant, plaintiff-in-error, Lawrence Ruglio, hereby assigns the following error:

That the Supreme Court erred in giving a judgment in favor of the State and against the said Lawrence Ruglio, but instead thereof should have given judgment in favor of the said Ruglio.

WILBUR A. HEISLEY,
Attorney for Lawrence Ruglio,
Defendant—Plaintiff-in-Error.

ASSIGNMENTS OF ERROR.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Plaintiff-in-Error,* *vs.* JOSEPH C. CAPRIO, *Defendant-in-Error.*	*On Writ of Error to New Jersey Supreme Court.* *Assignments of Error.*

Afterwards, to wit, on the return day of the said writ of error before the Court of Errors and Appeals, at Trenton, comes the said State of New Jersey, by John O. Bigelow, prosecutor of the pleas, and says: That in the record and proceedings aforesaid there is manifest error in this, to wit:

1. Because the Supreme Court reversed and set aside the conviction of the said Joseph C. Caprio, whereas it should have affirmed the same.

And the said plaintiff-in-error, the State of New Jersey, prays: That the judgment aforesaid, in so far as it concerns said Caprio, be reversed, and that the conviction of the said Joseph C. Caprio be in all things affirmed, and that the record and proceedings be remitted to the Supreme Court to be proceeded with according to law and the practice of said court.

J. O. BIGELOW,
Attorney of Plaintiff-in-Error.

The Essex Press, Printers, Newark, New Jersey

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Plaintiff-in-Error,* *vs.* JOSEPH C. CAPRIO, *Defendant-in-Error.*	*On Error.*
THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* LAWRENCE RUGLIO, *Plaintiff-in-Error.*	*On Error.*

BRIEF OF JOHN O. BIGELOW FOR THE STATE.

Joseph C. Caprio and Lawrence Ruglio were convicted in the Essex Quarter Sessions of conspiracy.

On writ of error, the Supreme Court reversed the judgment against Caprio and affirmed the judgment against Ruglio.

Thereupon Ruglio sued a writ of error out of this court; and the State did the like to review the judgment as to Caprio.

It has been stipulated that the two writs be argued together.

Ruglio and Caprio were two of the members of one of the boards of registry and election, in Newark, at the Primary Election, September 28, 1920.

They were indicted for conspiring "to be guilty of a willful fraud in the discharge of their duties as aforesaid, by falsely counting the said ballots cast at said Primary Election and by making false returns of the result of the said Primary Election."

To this indictment the defendants filed a plea (Cas., p. 8), alleging: That on October 5, 1920, Harry V. Osborne, one of the Judges of the Common Pleas, pursuant to Art. VI, section 6, of the Election Act, ordered the defendants and the two other members of the Election Board to show cause why they should not be removed as members of the Election Board; that they were called to testify in this proceeding in behalf of the other members of the Election Board "as well as in behalf of themselves," and did testify relating to the same matter set forth in the indictment, and that they thereby became immune from prosecution by force of Art. XXXI, section 77, of the Election Act.

This plea was tried before a jury, and a verdict was directed for the State.

Thereupon the defendants pleaded not guilty, and were tried on that issue and convicted.

At the Primary Election in 1920, there was a contest for the Republican nomination for Congress. One of the candidates was Judge Archibald. The defendant Caprio was the sergeant-at-arms of his court.

The evidence indicated that Caprio and Ruglio did the actual counting of the ballots while the other members of the Election Board kept the tally, in accordance with the defendants' count; that the defendants signed a return showing that Archibald received 403 votes against 6 votes for all other candidates; that in truth Archibald received not more than 358 votes.

The defendants relied for reversal on the alleged error of the Court on the trial of their special plea in directing a verdict against them, on the alleged insufficiency of the indictment and on several other grounds.

The Supreme Court decided that Ruglio was a volunteer witness before Judge Osborne and therefore had not earned immunity, but that Caprio had been "called to testify" within the meaning of the statute and so came within the protection of the statute.

The Supreme Court resolved the other questions in favor of the State.

In this brief italics are used freely in quotations.

I.

THE SPECIAL PLEA.

A

The proceeding before Judge Osborne was a judicial proceeding to enforce a forfeiture in which Caprio and Ruglio were defendants.

The proceeding before Judge Osborne was held pursuant to Art. VI, section 6, of the Election Act (P. L. 1920, p. 615): "The Judge of the Court of Common Pleas or the County Board of Elections shall have power to dismiss any member of a district board of registry and election from such board for any illegal act or for any cause, which shall be determined in a summary way, by such judge or county board of elections."

The order of Judge Osborne (Cas., p. 241) directed "that the said Joseph C. Caprio, Samuel C. Verniero, Lawrence Ruglio and Joseph Caputo show cause before this Court * * * why they should not be removed as members of said Election Board."

This proceeding was judicial and not administrative. *State* v. *Pritchard,* 36 N. J. L. 101. Here Beasley, *C. J.,* considered at length the character of a proceeding for the forfeiture of a public office on the ground of misconduct and found that it was a judicial and not an executive function. "It was a determination of the fact as well as the law and comprised at once the functions of the jury and the Judge, and it related to a right of property. The questions to be settled were whether the officer had misbehaved, and that was an issue of fact; and whether such misbehavior amounted to the forfeiture of

office, and that was an issue of law. The point of fact required the introduction of evidence. * * * Here was presented a rule of evidence to be passed upon. In all its parts the proceeding was one of ordinary judicature. And then, too, after the ascertainment of fact, it became necessary to apply the rule of law. The result was an announcement that the forfeiture had been incurred, and this clearly was an act of judicial discretion. Than the judgment of the Judge there is no other legal test of the effect a certain act of misconduct has upon the right to office. * * * *Every proceeding to remove an officer for official misconduct or neglect is essentially and thoroughly a judicial proceeding,* and has consequently and with the utmost propriety been confided to that branch of the State government."

Furthermore, this judicial proceeding was in the nature of, or rather, a statutory substitute for a writ of *quo warranto.*

> *Clark* v. *Ennis,* 45 N. J. L. 69 at 78;
> *Murphy* v. *Freeholders,* 92 N. J. L. 244 at 247, 17 Enc. of Pl. & Pr. 399.

In this summary proceeding, Caprio and Ruglio were parties defendant; they were two of the persons whose office it was sought to forfeit.

Cullen v. *Wolverton,* 65 N. J. L. 279. "The term parties is understood to include all persons who are directly interested in the subject matter in issue, who have a right to make defense, control the proceedings or appeal from judgment."

B

Caprio and Ruglio were not compellable witnesses in that proceeding.

By the common law Caprio and Ruglio, being parties to the proceeding, were disqualified as witnesses on their own behalf or for their co-defendants.

1 *Greenleaf on Evidence,* Section 329. "The general rule of the common law is that a party to the record, in a civil suit, cannot be a witness either for himself or for a co-suitor in the cause."

Little v. *Arrowsmith,* 16 N. J. L. 221.

The rule was the same in a criminal case.

State v. *Carr,* 1 N. J. L. 1.

Furthermore Caprio and Ruglio, being parties, could not at common law be compelled to testify for the State or the petitioner, whichever be regarded as the party plaintiff before Judge Osborne.

1 *Greenleaf on Evidence,* Section 353. "The rule which excludes a party to a suit from being admitted as a witness is also a rule of protection, no person who is a party to the record, being compellable to testify."

Lastly, Caprio and Ruglio could not at common law be compelled to testify because the proceeding had for its end the forfeiture of their estate—namely their offices as members of the Election Board.

Here let me remark that members of the election boards under P. L. 1920, p. 615, are appointed for a stated term of one year (Art. VI, Section 8), are sworn to the faithful performance of their duties (Section 11) and receive a fixed compensation for their services (Art. XXX, Section 6).

No rule is more strongly untrenched in our law than that no person shall be compelled to be a witness against himself in any criminal case, or in a suit brought to recover a penalty or to enforce a forfeiture.

So elementary and generally recognized is this rule, that there are few cases directly on the rule; almost all the reported cases deal with an outgrowth, namely, that a witness is privileged to refuse to answer when the answer would tend to incriminate him or to subject him to a penalty or forfeiture.

U. S. v. *Collins,* Fed. Cas. No. 14,837. Bradley, Circuit Justice, refused to compel a Marshall to testify for the following reasons (p. 549): "Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself. To compel him to be so would infringe the spirit if not the letter of the 5th amendment to the Constitution of the United States, which expressly declares that no person shall be compelled, in any criminal case, to be a witness against himself. An inquisitorial examination, under oath of a party charged with an offense is repugnant to the principles of personal liberty which are embodied in every fibre of the common law."

Boyd v. *U. S.* 116 U. S. 616, 29 L. Ed. 746. Bradley, *J.* "Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

Lees v. *U. S.,* 150 U. S. 476;
Blumensteil v. *State* (Ark.), 230 S. W. 262;
Bryan v. *State,* 40 Ga. 688;
Stewart v. *Turner,* 3 Ed. Ch. (N. Y.) 458;
In re Dickinson, 58 How. Pr. 260.

The common law rules relative to the testimony of parties has been greatly changed by statutes, which have however carefully preserved the privilege of a defendant to refuse to testify in a suit to enforce a forfeiture, as well as the privilege of a witness to refuse to answer when the answer could tend to make him liable to a forfeiture.

P. L. 1859, p. 490, now Section 3 of the Evidence Act, P. L. 1900, p. 362; 2 C. S. 2218. "No person shall be disqualified as a witness in any suit or proceedings at law or in equity by reason of his interest in the event of the same as a party or otherwise."

P. L. 1871, p. 12, now Section 57 of the Criminal Procedure Act. P. L. 1898, p. 866; 2 C. S. 1838. "Upon the trial of any indictment the defendant shall be admitted to testify if he shall offer himself as a witness."

It will be observed that these sections do not make a party a *compellable* witness, but only a *permissible* witness.

P. L. 1849, p. 264, now Section 2 of the Evidence Act. "In all *civil* actions in any court of record, the parties thereto may be called as witnesses by the adverse party in such action, * * * provided no party to the suit shall be compelled to be sworn or give evidence in any action brought to recover a penalty or *to enforce a forfeiture.*"

Evidence Act, Section 8. "A witness shall not be excused from answering any questions relevant and material to the issue; provided the answers will not expose him to a criminal prosecution or penalty or to a *forfeiture of his estate.*

Ruglio and Caprio contend, as I understand, that they were compelled to testify before Judge Osborne by virtue of Art. XXXI, Section 77 of the Elections Act. "Nor shall any person, when called to testify in any trial for a violation of this act, be privileged to refuse to answer any questions which may be asked him upon the ground that the same will tend to degrade or incriminate him."

The word *trial* in this sentence is broad enough to include not only a hearing in a proceeding to forfeit an office, but also a trial of an indictment.

Clearly this sentence does not apply to a defendant on trial and make him a *compellable* witness. Even if the Legislature has power to compel a defendant to take the stand and testify at his own trial, the most positive, un-

mistakable terms are necessary to indicate that the Legislature intended so to do.

1 *Greenleaf on Evidence,* Section 452. An English statute declaring that a witness could not refuse to testify on the ground that the answer might establish that he owes a debt, was held not to apply to a party so as to make him a compellable witness.

In re Birdsall, 96 N. Y. S. 462. A provision in a game law, similar to that under consideration was held not to apply to a party.

I submit that clearly Ruglio and Caprio were not compellable witnesses before Judge Osborne.

C

The immunity given by Section 77 is limited to witnesses who were not parties and who were compelled to testify.

> Art. XXXI, Section 77. "No person called to testify in any proceedings under this act shall be liable to a criminal prosecution, either under this act or otherwise, for any matters or causes in respect to which he shall be examined, or to which his testimony shall relate, except to a prosecution for bribery committed in such testimony; nor shall any person, when called to testify in any trial for a violation of this act, be privileged to refuse to answer any questions which may be asked him, upon the ground that the same will tend to degrade or incriminate him."

Election frauds are seldom committed by a single person acting alone, although frequently some of the parties involved are more guilty than the others, or their conviction is more important. But in order to convict these principal offenders it is often necessary to use the testimony of their confederates. These confederates could be compelled to testify as they were not being tried themselves, but they could under the common law, claim their privilege of refusing to answer incriminating questions, and so the principal offenders could not be convicted.

Such was the obstacle. The Legislature overcame it by enacting that the witness could not refuse to answer and further that he could not thereafter be prosecuted for the causes to which his testimony should relate.

The object sought was not the testimony of a defendant, but the testimony of his confederates.

The clear purpose of Section 77 was to make a guilty person a compellable witness against another defendant and to deprive the witness of his privilege. The immunity was given merely to make effective that purpose.

The section should be interpreted to mean that only the persons who are made compellable witnesses by virtue of the section, namely, persons who are not parties, are given immunity by the section.

The phrase in the first line of the section "person called to testify" and the phrase toward the end of the section "person, when called to testify" relate to the same person. The first phrase is limited by the second; neither refers to a party; both mean a witness compelled to take the stand.

This reasoning has been upheld in other jurisdictions in well considered opinions.

> *U. S.* v. *Price,* 96 Fed. 960 (Aff'd without consideration of this question, 165 U. S. 311);
>
> *Rudolph* v. *State* (Wis.), 107 N. W. 466;
>
> *State* v. *Murphy* (Wis.), 107 N. W. 470. Opinion of Marshall, *J.* "For the statute to operate (by giving immunity) there must be evidence under real compulsion, not mere right of compulsion. That is, there must be coercion to the extent of the witness being called to testify under such circumstances that he would be liable to punishment as standing in defiance of the Court if he refused to do so. In that situation only does the law relieve him from the necessity of expressly claiming his privilege. Until the law then lays its hand on the party so that resistance would be a defiance of the Court, the statute does not intervene."

The Supreme Court distinguished between a witness "compelled to testify" and one "called to testify." They

held that the latter class included Caprio, but did not include Ruglio, who was a volunteer witness. Caprio appears to have been regarded by the Court as one "obeying a judicial command which cannot be disregarded."

I am not clear as to just the distinction the Supreme Court intended between "compelled" and "called" to testify. I would say that one who testifies in response to a lawful judicial command is both compelled and called to testify.

"Called to testify" cannot mean called by one's own lawyer; such easy immunity would be an absurdity. It cannot mean called by any bystander, or a court attendant, or even a Judge acting unlawfully or erroneously.

One is called to testify within the meaning of the statute who is summoned by subpoena or other writ or by judicial command, disobedience to which will make him liable to a penalty for contempt or otherwise.

Called to testify means lawfully called.

To summarize: Section 77 does not make a defendant a compellable witness; the immunity is no broader than the compulsion, and does not apply to a defendant; Caprio and Ruglio were defendants, and were not lawfully "called to testify" and hence did not earn immunity.

D

The only time that Caprio and Ruglio were called to testify, they were called on their own behalf.

The trial of the special plea was limited to the matter alleged in that plea. That plea set forth that Caprio and Ruglio were "called to testify in behalf of Samuel C. Verniero and Joseph Caputo as well as in *behalf of themselves.*"

Verniero and Caputo were the other two members of the Election Board. All four were defendants before Judge Osborne and were represented by the same counsel. There

was no severance; all four were jointly tried in this summary proceeding. Each testified once only and was examined in chief by his own counsel.

So immunity is claimed solely on account of what they testified when called on their own behalf.

I respectfully submit that, as an interpretation of pleading, one who is called to testify on his own behalf is called by himself, and is a volunteer witness, and does not earn immunity under the statute.

E

The only testimony of Caprio and Ruglio was in response to questions of their own counsel and on cross examination relative thereto.

In whatever way, Caprio and Ruglio came to the stand before Judge Osborne, their testimony was limited to the questions of their own counsel and cross examination thereon.

The immunity given by Section 77 covers not only offenses against the Election Law, but against any other law—larceny or what not.

It would be a strained construction to apply this section to the case of a defendant examined by his own counsel, who might slip in a question relating to some entirely different matter.

F

The testimony of Ruglio did not relate to the same causes set forth in the indictment.

The charge of the indictment is conspiracy "to be guilty of a willful fraud in the discharge of their duties as aforesaid by falsely counting the said ballots cast at said Primary Election and by making false returns of the result of the said Primary Election" (Cas., p. 5).

This charge relates wholly to matters that occurred *after* the voting had ceased and the polls had been closed.

I concede that the testimony of Caprio related in part to these matters, but the testimony of Ruglio, before Judge Osborne (Cas., p. 23) related wholly to the matters occurring during the balloting and while the poles were still open and did not relate to the charge laid in the indictment.

G

The rule to show cause and the nature of the proceeding did not make Caprio and Ruglio involuntary witnesses.

Counsel contends that the order requiring Caprio and Ruglio to show cause, itself called them to testify within the meaning of the statute.

From ancient times, writs such as *scire facias* and the alternative writs of mandamus have required respondents to show cause. In equity an order to show cause is frequently the initial step where an injunction or a receiver is sought.

Such writs and orders are processes to bring the defendant into court and are never regarded as a means of calling a defendant to testify.

In re Martin, 86 N. J. Eq. 265.

Counsel further argues that the purpose of the proceeding, namely, to enforce a forfeiture operated to compel the defendants to testify, and relies on *State* v. *Parker,* 61 N. J. L. 312. This argument refutes itself. One accused of crime may forsee sure conviction if he does not testify, and yet he remains a volunteer and cannot be called to testify.

H

Section 77 does not relate to proceedings of the character mentioned in the special plea.

We have been assuming thus far that Section 77 grants immunity for testimony given in a proceeding under Art. VI, Section 6. We contend, however, that the contrary is the law.

The Election Act of 1920 is a consolidation and revision of several prior acts, among them "An Act to define the crime of bribery and to provide for the punishment therefor," P. L. 1906, p. 388.

Art XXXI, Section 77, of the Act of 1920, is Section 5 of the Act of 1906—even to the word *bribery* obviously used by mistake where *perjury* was intended.

Sections 2, 3 and 4 of the act of 1906, being the sections which define and prohibit bribery and provide its punishment are now known as Section 41 of the same Article, of the Act of 1920.

Section 5 of the Act of 1906, granted immunity to any person "called to testify in any proceedings under this act," that is, under the Act of 1906.

That act provided no special procedure of any kind—it merely defined a crime and its punishment. So the only proceedings under that act in which a person might testify, would be the ordinary criminal proceedings—an examination before a committing magistrate, an investigation by the Grand Jury and a trial of the indictment.

Obviously there could be no proceeding under that act, to summarily remove election officers for cause other than bribery and Article 5, as enacted in 1906, could not give immunity for testimony in such a proceeding.

Furthermore, it is clear that a defendant under the Act of 1906 could not be "called to testify" in a charge against himself, and hence that the words "any person" as used in Section 5 did not include a defendant.

The question now arises whether the Legislature by embodying, *without change,* the Act of 1906 in the Act of 1920, changed the clear meaning of Section 5, and extended its operation to the summary removal proceeding and enlarged the significance of the words "any person" so as to include a defendant in such a proceeding.

In re Murphy, 23 N. J. L. 180, Green, *C. J.* "I am strongly disposed to concur in the view expressed by the magistrate that where two or more statutes, whose meaning is plain or whose construction has been long settled, are consolidated into one, without any change of phraseology, the same construction ought to be put upon the consolidated statutes as was given to the original statutes. But without resting upon this point it is clear that a different construction ought not in such case to be adopted, if thereby the policy of the act is subverted or its material provisions defeated."

In that case the phrase "by virtue of this act" copied into the consolidated act was restricted by the Court to that part of the act which constituted the original statute from which it was derived.

State v. *Kingsland,* 23 N. J. L. 85. "The mere compilation of the several acts referred to cannot affect the construction already ascertained by judicial decision."

Pomeroy v. *Mills,* 37 N. J. Eq. 578, H. N. "The rearrangement of statutes, in a general revision of the laws, does not usually change their signification."

Smith v. *Regan,* 54 N. J. L. 167, 171. "In construing a statute which is a consolidation of two or more previous acts, the same meaning should be accorded to it that was accorded to the original statutes, unless a different legislative intent be plainly apparent."

Carter v. *Rahway,* 57 N. J. L. 196, held that the phrase in a consolidated statute "the term township made use of *in this act,* shall be construed, etc.," was not applicable to the whole act, but only to that part which constituted the old statute in which the phrase originated.

To extend the meaning of Section 77, in accordance with the contention of Ruglio and Caprio would in several respects subvert the policy of the Act of 1920 and defeat its material provisions.

The primary purposes of that act is to make effective the electoral franchise, and, as one of the means to this end, many offenses against the franchise are made crimes. How this policy may be subverted is well illustrated by the case at bar, for the guilt of Caprio and Ruglio is not even questioned.

Of course, another means provided by the act for securing clean elections is the removal, for cause, of election boards, under Art. VI, Section 6. But it cannot be maintained that giving immunity to members of the board who take the stand *in their own behalf,* to resist such removal, aids the execution of that part of the act. On the contrary, such immunity tends to defeat this provision of the act as well.

Lastly, the Legislative intent to facilitate the conviction of certain criminals by making compulsory the evidence of their confederates is secured by Art. XXXI, Sections 75, 76 and 78, so any extension of the meaning of Section 77 is unnecessary.

Section 77 should be given the same meaning which it had as Section 5 of the Statute of 1906, and should not be extended to protect Caprio and Ruglio.

The Trial Court properly directed a verdict for the State on the Special plea.

II.

THE INDICTMENT.

Counsel for Caprio and Ruglio (hereinafter called the defendants), contend that the indictment is defective because of lack of definiteness in description of the offense, and alleging an impossible overt act, and inadequate description of that act.

A

The description of the offense is sufficiently definite.

The indictment is based on Art. XXXI, Section 27, of the Elections Act: "If any Judge, inspector, clerk or any other officer of a Primary Election, as aforesaid, shall be guilty of any willful fraud in the discharge of his duties, * * * by false counting, by making false returns," he shall be guilty of a misdemeanor.

The indictment, by way of inducement discloses that the defendants were members of a dictrict board of elections, Caprio the judge, and Ruglio the inspector, at a primary election (Cas., p. 3, l. 30, to p. 5, l. 4), and then sets forth the duty of the board to count the votes (Cas., p. 5, l. 10), and certain other duties in the actual counting.

This particular description of duties may be disregarded as surplusage for the duties of the defendants were all statutory and followed as a matter of law the offices they held.

The indictment charges in the words of the statute that the defendants conspired "to be guilty of a willful fraud in the discharge of their duties as aforesaid by falsely counting the said ballots cast at said primary election and by making false returns of the result of the said primary election."

It might have been objected that the phrase "their duties as aforesaid" limited the fraud, and that as no duty to make a return was specified, the fraud could not be of the character of making a false return. But no such objection was made in the trial court. See motions to quash (Cas., p. 27) and to direct verdict (Cas., p. 110). So no attention is paid to this feature of the indictment except to remark that the duty to count implies a duty to make a return, or report of the count.

The only objection made to this part of the indictment is that it is not sufficiently specific; that it does not specify in what respects the count, and the return, were false.

This indictment is similar to one approved by this Court in *State* v. *Nixon,* 86 N. J. L. 371.

There an indictment for making a false, fraudulent and incorrect return and for falsely counting the ballots was held sufficiently to apprise the defendants of the charge against them.

B

The overt act is adequately described.

The overt act alleged is that the defendants signed their names "to a false and fraudulent statement of the result of the said primary election."

Clearly there is nothing *impossible* about this overt act. On the contrary, such a false statement was an essential step in the conspiracy alleged.

The further contention of the defendants is that the overt act is not adequately described, that is, that it does not state the particulars in which the statement was false.

Such particulars are unnecessary.

State v. *Nixon,* 86 N. J. L. 371. "The ground of the motion (to quash) was that the indictment charged the defendants with making a false return, and that this did not apprise them of what was alleged against them. We think both counts of the indictment are good."

III.

ALLEGED ERRORS ON THE TRIAL OF THE PLEA OF NOT GUILTY.

A

Refusal to charge as requested.

Dr. Rodemann, a witness called for the State, testified to a recount by the County Board of Elections. The ballot boxes were opened by the four members of the dis-

trict board, including the defendants (Cas., p. 76, l. 15) and, so far as appears, they remained present throughout the recount. Dr. Rodemann personally tallied the ballots as did another witness named McDowell (Cas., p. 76, ll. 20 to 30). He produced the original tally sheet which he had made, and it was put in evidence as Exhibit S. 5 (Cas., p. 77).

Dr. Rodemann testified to the number of ballots which were actually voted for each candidate for the congressional nomination as the same appeared from the ballots taken from the ballot boxes (Cas., pp. 80, 81).

Mr. McDowell and Mr. Duggunon, chairman of the County Board of Elections, corroborated this testimony (Cas., pp. 83 to 86).

The State was prepared to produce other witnesses, but counsel for the defendant said: "We would not dispute these figures at all (Cas., p. 87, l. 35), and thereupon the State did not call other witnesses in corroboration.

This testimony showed that there were 413 ballots in the ballot boxes but only 409 names on the poll book, and therefore only 409 votes were counted. They were distributed as follows:

Taylor	6
Chapman	3
Yarrow	4
Archibald	344
Blank	31
Yarrow referred	1
Yarrow rejected	2
Taylor rejected	3
Archibald rejected	14
Blank rejected	1
Total	409

A blank ballot was one on which no vote was marked for a congressional candidate or on which votes for more than one congressional candidate were marked.

The returns certified to by the defendants showed that 415 votes were cast but only 409 were counted. The difference, six votes, presumably being intended to represent blank or rejected ballots. Their certificate showed a distribution of the vote as follows:

Taylor	5
Chapman	1
Archibald	403
Total	409

It will be observed that the total in the two counts was the same, but that all the blank ballots, rejected ballots, Yarrow ballots, two of the Chapman ballots and one Taylor vote, as testified to by the witnesses for the State were credited by the defendants to the candidate Archibald.

All the ballots were offered in evidence (Cas. 36-39). The Court instructed the jury, "you will have the ballots before you for inspection; yours will be the right and the duty to inspect them" (Cas., p. 202, l. 9).

A large number of blank ballots were shown to the defendant Ruglio on the stand, and he admitted that no candidate was entitled to credit on them (Cas., pp. 161, 162). He was then asked how he reconciled the return showing 409 credits for the several candidates with the fact that out of 415 ballots the 16 shown to him were blank. He replied that he did not know (Cas., p. 163, l. 3).

Caprio made similar admissions on the stand (Cas., p. 177).

The assignment of error was based on the refusal of the Court to charge the following requests:

> "15. (Additional 15.) The determination of the County Board on the recount that Archibald was

credited with 45 too many votes—or any number of votes—is not proof of the fact as against these defendants.

16. Before you can conclude that Archibald was credited with too many votes, you must be satisfied of that alleged fact by competent evidence satistory to you and you have no right to substitute the judgment of the County Board in place of your own judgment.

17. If you find it impossible to determine the alleged over-crediting except by an examination of all the ballots, then you should not pass upon the question of over-crediting."

The only determination of the County Board in evidence was the tally proved by Dr. Rodemann. This was certainly proof, although not conclusive proof, of the number of votes cast for Archibald. Therefore, the fifteenth request was properly refused.

The sixteenth request was sufficiently charged in that part of the charge which dealt with the burden of proof and the facts which must be proved.

The seventeenth request was properly refused because there was no objection to the jury examining all the ballots in the jury room.

B

The verdict was not against the weight of the evidence.

The judgment should not be reversed on the ground that it is against the weight of the evidence, unless it is so clearly so as to raise a presumption that it is the result of mistake, passion, prejudice or partiality.

State v. *Karpowitz* (E. & A.), 120 Atl. 40.

The evidence shows that Caprio read the ballots after the polls were closed, and called off the names of the candidates voted for on each ballot; that Ruglio read each ballot, and so checked Caprio; that the other members of the Election Board correctly entered on their tally sheets the votes so called off.

There was further evidence that Archibald received only 344 good votes, and 14 more votes which were rejected by the County Board of Elections, making in all 358, and that Ruglio and Caprio credited him with an additional 45 votes, making 403, in all, and signed a return to that effect.

There was ample evidence from which the jury might conclude that this large discrepancy was not an innocent mistake on the part of the defendants, but was the result of their fraudulent conspiracy.

The judgment of the Supreme Court affirming the conviction of Ruglio should be affirmed, and the judgment reversing the conviction of Caprio should be reversed.

Respectfully submitted,

J. O. BIGELOW,
Prosecutor of the Pleas.

Cases 10 & 13

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant in Error,
vs.
LAWRENCE RUGLIO,
Plaintiff in Error.
} On Error.

Supplement to State's Brief.

The State relies largely as authority for the sufficiency of the indictment on *State* v. *Nixon,* 86 *N. J. L.* 371.

In the brief for Caprio and Rugglio the first count of the indictment in the *Nixon* case is quoted at length and stress is laid on the details in that count, which do not appear in the indictment now before the court.

The *Nixon* indictment contained two ~~indictments~~ counts; both counts were approved by this Court. The second Nixon count, after setting forth the holding of the election, alleges the crime as follows:

That the defendants "did then and there commit willful fraud in the discharge of their duties as such Board of Registry and Election as aforesaid by then and there falsely counting the ballots cast at the said primary election aforesaid in that they (the said defendants), unlawfully and fraudulently did falsely count divers ballots, the number of which is to the grand jury unknown, by making false returns in accord with said false count, they (the said defendants), then and there well knowing that the said count and the said returns were not then and there true, lawful, contrary to the form of the statute."

Respectfully submitted,

J. O. BIGELOW.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE,
Plaintiff—Plaintiff-in-Error,

and

JOSEPH C. CAPRIO,
Defendant—Defendant-in-Error.

THE STATE,
Plaintiff—Defendant-in-Error,

and

LAWRENCE RUGLIO,
Defendant—Plaintiff-in-Error.

On Error to Supreme Court.

BRIEF OF CAPRIO AND RUGLIO.

The defendants were two members, to wit: the Judge and Inspector of the Board of Registry and Election for the Third Election District of the First Ward of the City of Newark, and officiated as such at a primary held on September 28, 1920.

A candidate voted for at such primary, on the 5th day of October, 1920, filed a petition with the Judge of the Court of Common Pleas, pursuant to Section 6 of the Election Laws, P. L. 1920, p. 637, praying the Judge to remove the said Board from office. On said date a rule to show cause was granted requiring the defendants to show cause before the said Judge on the 7th day of October why they should not be removed. Upon the return of said order a hearing was had, witnesses were sworn, including the two defendants, and the Judge on said date made an order for their dismissal and removal.

At the hearing before the said Judge, the Judge ordered Caprio to testify and Ruglio was called in behalf of the defendants, and they were sworn, and did testify.

At the September term, 1921, of the Essex Oyer both defendants were indicted for conspiracy in relation to the performance of their duties as members of the said Election Board at said primary.

A plea was filed by both defendants setting up Section 77, P. L. 1920, p. 855 (which gives immunity from criminal prosecution to anyone called to testify in any proceedings under the Election Law as to anything to which he may testify), as a bar to any prosecution under the indictment. The State answered, issue was joined thereon, a trial by jury had, and, at the conclusion of the defendants' evidence, the Court directed a verdict on said plea in favor of the State. The trial of the indictment resulted in the conviction of both defendants.

The writ of error returned the entire record of all the proceedings had upon the trial, and upon the plea and the proceedings above referred to before the Common Pleas Judge, to the Supreme Court, which Court reversed the conviction of Caprio and affirmed that of Ruglio. The State sued a writ out of this Court to review the judgment of the Supreme Court in Caprio's favor and Ruglio sued out a writ to review the judgment of that Court against him, and by stipulation, p. 254, counsel for both sides have agreed that the state of the case shall be used on the argument of both sides and that they shall be argued together.

We will deal with matters thought to constitute error prejudicial to the defendants.

THE INDICTMENT IS DEFECTIVE

in the following respects:

A. Lack of definiteness in description of offense.

It describes (p. 5) the particular duties of defendants to be as follows: "The duty of said Joseph C. Caprio as judge * * *, to take said ballots, singly and separately from the ballot box, and, while each ballot remained in his hands, to audibly and publicly read the same in full view of the said Ruglio, inspector * * * and it is was the duty of the said Ruglio, inspector * * * to be satisfied that the ballot was being correctly read * * * by said Caprio," but it *does not allege a breach of that duty, but says:* "Defendants conspired to be guilty of a willful fraud by *falsely counting the ballots and making false returns,*" which is not a violation of *the described duty.*" It alleges it was the duty of the "Board * * * to count the votes" but it alleges no such duty on the part of the defendants.

It limits the defendants' duty solely to "taking ballots from the box and reading them."

It does not state in what manner the fraud was to be perpetrated or how the counting or returns are false.

B. It alleges as the "overt act" an act which is indefinite and which could not possibly be the overt act, to wit, the signing subsequently of a "false statement of the result of the election."

It does not particularize the falsity of the alleged overt act.

We will consider these alleged defects:

A. The specified duty is found in Section 7, p. 717, P. L. 1920.

Nowheres in the indictment is it charged expressly that "Caprio did not take and read the ballots" or

that he read them incorrectly. Nor were defendants convicted of that. *They were convicted of crediting the candidate Archibald with too many votes, and of nothing else* (p. 199, l. 12; p. 200, l. 21; p. 20). Although that was not the charge nor does the indictment even hint at that.

The Trial Court adopted the State's contention, that the indictment was for "false counting."

Assuming, but not admitting, the correctness of that construction the indictment does not specify in any respect how or in what manner the counting was false.

Counting may be false in one of many things, viz: "Unlock and open box;" "take ballots singly;" "read audibly;" "fold ballot to size of 5 inches;" "deliver to inspector;" "place number on back;" "string ballot."

The indictment must specify the item of falsity upon which conviction would be sought, and this indictment is no stronger than one would be for conspiring to "swindle," "steal," "defraud," "embezzle" or to "commit a crime" without specifying the *characteristics of the "swindle," &c., so it would be identified.*

This indictment seems to be absolutely without precedent in treatises on criminal pleadings or adjudicated cases.

This is not of that class of offenses in which it is sufficient to follow the statutory language.

State v. *Dtartup,* 39 N. J. Law 423;
State v. *Halsted,* 39 N. J. Law 402;
State v. *Simpson,* 24 N. J. Law 25-26.
State v. *Malloy,* 34 N. J. Law, 413.

While in *Polhamus, ads. The State,* 57 N. J. Law, at p. 349, it is declared that "in charging a statutory crime, unknown to the common law, every essential fact must be clearly stated," and this principle seems to be affirmed in the case of *State* v. *Nugent,* 79 N. J. Law, p. 84 (which was

an election case) for the Court said at p. 87, "It does charge specific acts which bring the defendants within the ban of the statutory language, and charges those facts *so as to inform them with absolute certainty of the character and nature of the specific charges*" * * *. *State* v. *Schmid,* 57 L. 627.

See also *State* v. *Shutts,* 69 N. J. Law, 209, and 22 Cyc. 295, 326, 341 and *McLain's Criminal Law,* Vol. 2, Sections 918 and 950.

"Keer's Adjudicated Criminal Forms and Precedents of Indictments and Informations," Nos. 700 and 702, prescribe forms in election cases, and these forms and those of Roscoe and other well-known authors on criminal practice clearly show that more definiteness is required in an indictment than is disclosed in the one we are now considering.

In *State* v. *Moore,* 27 N. J. Law, 105, the indictment charged "that the defendant at an election, etc., did willfully and unlawfully give in his vote for the officers aforesaid, being the officers to be chosen, he, the said defendant, then and there not being duly qualified to vote."

Chief Justice Green says, at p. 108: "But the indictment is fatally defective in not specifying the particular disability which is relied on as a disqualification of the defendant as a voter. It lacks, in this particular, the first essential of a valid indictment, inasmuch as it does not apprise the defendant of the precise nature of the offense with which he is charged, so as to enable him to prepare his defense. It charges, indeed, that the defendant was not duly qualified to vote; but that is tantamount to charging that he labors under one or more of numerous disabilities imposed by the constitution and the law. Under what disability does he labor? *That specific charge the State must establish upon the trial. That charge the defendant may repel by his evidence, and that, by every principle of*

good pleading, the defendant is entitled to know from the face of the indictment itself. But how can he know from this indictment the particular charge upon which the State means to rely, or the evidence necessary to make good his defense? Under this indictment, the State may prove that the defendant is not white, or that he is not a citizen of the United States, or not a resident of this State one year, or of the county in which his vote was cast five months before the election, or that he was a pauper, or a convict, or any other constitutional or legal disqualification. The defendant must come prepared to prove his color, his age, his citizenship, his residence, to rebut evidence of his being a pauper or a convict, or, if convicted, to prove a pardon. A charge so general and so indefinite is inconsistent and of necessity embarasses, if not fatally, prejudices the defendant in making his defense."

On page 110, the Chief Justice said: "but under the Election Law, if it be proved that the defendant labor under any one legal disability, he is guilty, though he possess every other qualification."

State v. *Schmid,* 57 E. 626;
State v. *Fruelli,* 119 At. 787 (April 5, 1923);
State v. *Solomon,* 117 At. 260, 262.

Under Section 27, page 833, 1920, the statute states that any officer guilty of *any fraud* in doing certain things, or in any act or thing whatsoever shall be guilty of a crime.

Under this indictment, therefore, as the indictment being discussed by the Chief Justice, *State* v. *Moore, supra,* defendants might be proved guilty of any one act of fraud, but be innocent of every other act.

The Court then proceeded to say "unless, therefore, the particular disability intended to be relied on be specified, the indictment furnishes the defendant no guide to the preparation of his defense."

I quote some authorities from text books *in re* indictments against election officers for fraud:

"The particular facts and circumstances constituting the fraud must be stated," 15 Cyc. 450.

"An indictment for making false returns without alleging the number in fact received, or in what respect or how the report was false, is uncertain and insufficient. Indictment for alteration of ballots must allege specifically what changes were made in the ballots," *id.*

"An indictment for voting, when not qualified, must specify the qualification lacking," 15 Cyc. 451.

"Indictment for receiving an illegal vote must state the name of the voter, from whom the illegal ballot was received," 15 Cyc. 449.

20 C. J., page 287: "It is not sufficient to allege generally that they were convicted of fraud in the discharge of their duties as officers; there should be a specific averment of the figures and circumstances constituting the fraud charged. For the alteration of returns it is sufficient to allege that defendants altered, erased or tampered with a word or figure contained in such poll book * * * setting forth the nature and character of the alteration."

20 C. J., 287: "an indictment charging 'a false return of the number of ballots cast at an election is an insufficient description of the offense; it is insufficient where it does not show the number of votes actually cast and wherein the return is false.' "

20 C. J., 289 says: "an indictment for voting when not a qualified elector, must specify the lacking qualification," citing *State* v. *Moore, supra.*

The indictment under consideration does not conform in the slightest degree with any of these precedents or adjudications.

The statute makes *any* fraud a crime:

This indictment says these defendants were guilty of a "fraud." It would be just as enlightening to them if the indictment had said that they were guilty of a "crime." The Supreme Court disposes of this matter by saying that the duty of the defendant to honestly count was "fundamental." So is the duty of all citizens to observe the crimes act, but an indictment for violating that act must specify the particular section violated. We insist it was the "fundamental" duty of the State, and the fundamental and constitutional right of the defendants to have the indictment point out not merely a "*fundamental* duty," but a *specific* duty, and allege its violation.

In analogy, we think, is the declaration of this Court in *State* v. *Thomas,* 65 N. J. L. 599, where it declared: "it is equally clear that he cannot be convicted of any offense which is not distinctly set forth in the indictment" and "a party indicted for a crime may be *convicted of any offense of a lower grade, provided* such lower offense is included within the *description in the indictment.*

(The Court used italics for the last four words.)

At page 600, it says: "the indictment charges an offense (manslaughter) of which assault and battery *may* or *may not* be an ingredient.

"Such an accusation does not distinctly and precisely inform the accused that he is charged with this lower misdemeanor. At best the charge is equivocal and inferential only." Is not that so in this case?

In the instant case it is manifest that fraud in counting and making false statements could have been perpetrated in one or more of many ways, and a false statement might be false in one or more of many things, and yet true as to other things.

Under the case just cited, were not the defendants entitled to be "distinctly and precisely informed" of the fraud for which they were to be tried?

Is it possible that this indictment can be construed as "distinctly and precisely informing" the defendants that they were to be tried for crediting too many votes to Archibald *when the indictment is absolutely silent on that point?* This fact is not denied by the State, nor can it be if reference is made to the evidence and to the Judge's charge at page 199, line 12; page 200, line 21, and page 201.

The Prosecutor in his brief says:

> "This indictment is similar to one approved by this Court in *State* v. *Nixon,* 86 N. J. L. 371."

He speaks inadvisedly, because we have examined the indictment on file in the County Clerk's office of Hudson, and find that it was returned in September term, A. D. 1911, and was against Nixon and others, charging that they

> "did make a false, fraudulent and corrupt return of the canvass and count of the votes cast at the said primary election; and that they, the said * * * as such Board of Registry and Election did not return the correct number of votes received by each person as candidate for nomination for the office, in the following particulars, to wit: that the said defendants did return and certify that Alexander J. Clements for the office of Sheriff of the County of Hudson received at the said primary in the said Seventh Election District in said First Ward in said City of Jersey City, 142 of the votes there cast, whereas in truth and in fact, as by the ballots then and there and at the said primary election cast, it appears that said Alexander J. Clements received a larger number of votes less than said 142 votes, to wit: 70 votes less than said 142 votes."

There follow similar allegations concerning a candidate for Sheriff and three other allegations for three candidates for Mayor of Jersey City.

We have a certified copy of this indictment and the above quotation is a literal one. Therefore *State* v. *Nixon* is an additional authority (and by this Court) for our proposition, that the indictment in the present case is lacking in the definiteness required by the Constitution and the Courts of this and other States.

The Grand Jury may have indicted because of *one* thing it thought was false in the counting, while the traverse jury convicted for *an entirely different matter.*

If so, the defendants were put in jeopardy, tried and convicted without a Grand Jury presentation.

Linden v. *State,* 55 N. J. L. 557;
State v. *Goodman,* 92 N. J. L. 14.

This defect in this indictment was particularly harmful, not because it *failed* to allege a duty, but because it did allege a duty, to wit: "taking and reading," *which the State did not attempt to prove.* It misled the defendants as to the real charge upon which the State demanded a conviction, to wit: overcrediting Archibald, and seems subject to the criticism of *State* v. *Smith,* at bottom of p. 54 of 89 N. J. L.

If, in the course of the trial, the evidence seemed weak on the Archibald feature, the State, if this indictment is good, could prove *some other thing not described in the indictment,* perhaps concerning one of the other candidates. Is the defendant to guess?

B. Indictment alleges an impossible "overt act" and fails to describe it.

Making statement is not counting. Counting precedes statement P. 719, Section 27: "after Board has counted the ballots they shall make statement of results."

If indictment is for false counting and making false statements as State claims, then it charges two distinct offenses and is duplicitous.

Section 27, p. 719, says: Statement shall show:

"Whole number of names" on Register.
"Whole number of names" on Poll Book.
"Whole number of names" rejected.
"Number of votes each candidate received."
"Certify the statement."

The overt act is an essential of the crime, but is not properly described.

12 C. J., 625 declares: "Where the jurisdiction of the Court depends on an overt act alleged in the indictment for conspiracy, it must be alleged, it is held, with all the definiteness and certainty of any other jurisdictional fact, and the connection between the overt act and the conspiracy charged must be made to appear specifically by necessary recital."

See also:

State v. *Nugent,* 77 N. J. L. 87;
State v. *Taylor,* 92 N. J. L. 138;
State v. *Gregory,* 93 N. J. L. 211.

But our legislature, Section 37 of the Crimes Act, says, that the agreement *shall not be a conspiracy* unless some act is done in execution * * *.

If, therefore, this overt act is a vital part of the indictment, it must, in all fairness to the defendant, be described with the same particularity as the agreement of conspiracy; but this statement is not described at all, it has no date, nor any specification whatsoever of its falsity.

If we are to conclude that the prosecutor had in mind the statutory election statement, we reply that the statute requires that statement to contain very many items, page 759, Sections 58, 59, 60 and for falsity *in any one* of those items these defendants could have been indicted and defendants were entitled to be apprised in the indictment itself of the particulars in which the

statement was false. Is not this the rule of criminal procedure where one is indicted for the improper making of a certain instrument or the forging of it?

It does not appear that the Supreme Court considered this point, although raised before it. See Assignment 1, Section B.

PLEA IN BAR.

THE PETITION, page 235, alleges as the misconduct of the defendants:

1. Willfully and illegally conducting the election by giving out marked ballots.

2. By fraudulently preparing a list of ballots.

3. By illegally erasing marks upon official ballots.

4. Conducting the election in a fraudulent and illegal manner.

At page 833, Section 27 of the Laws of 1920, it is declared that if any Judge, etc., "shall be guilty of any willful fraud in the discharge of his duties * * * or by any act or thing whatsoever * * * he shall be guilty * * *."

Under this petition, it is evident that "any willful fraud" could be proven under the fourth ground, including the fraud alleged in this indictment.

The defendants were both examined in detail (see their evidence at pages 20 to 23p) as to their conduct as officials in conducting that election, to ascertain "if they were conducting the election in a fraudulent or illegal manner."

The testimony before Osborne, *J.*, was given October 7, as the conduct under review in the petition and in the indictment was performed September 28. It was all relevant on both proceedings.

On the trial of election officials for conspiring to fraudulently perform their duties, any act, good or bad, is evidential to prove or disprove the charge of conspiracy.

At page 17, it appears that Judge Osborne, while hearing the petition for removal, said: "Tell Caprio to take the stand," and that Caprio was sworn and examined as to the subject matter of the petition and of this indictment (p. 21, l. 25).

Section 77 of page 855 of the Laws of 1920 says: "No person called to testify in any proceedings under this act shall be liable for criminal prosecution, either under this act or likewise, for any matters or causes in respect to which he shall be examined or to which the testimony shall relate * * *." The Supreme Court decided that their testimony did so relate.

The Statute speaks of "Person" not "witness"

The Election Act provides many "proceedings," and they may be found in the Laws of 1920, Section 6, page 637; Section 70, page 853; Section 71, page 853; Section 72, page 853; Section 73, page 853; Section 74, page 854. If this was not a "proceeding" before Judge Osborne what was it?

It seems impossible to reasonably conclude that when a defendant is in the actual physical presence of a Judge, and who directs him to be sworn, he is not "compelled to testify." We know of no more emphatic and potential way of "compelling" testimony. Who would disobey?

But the Supreme Court decided that Caprio was a "called" witness, while Ruglio was a "volunteer." It cites no adjudication for this construction. Are not all witnesses, volunteer or otherwise, in the general acceptation of the term "called to testify"? Did not the legislature use the term in that sense? In 1921, p. 615 "it *limited the immunity to witnesses for the State.*"

No other limitation has ever been placed upon it until the Supreme Court did so.

But may we assume that Ruglio was a "volunteer"?

It is true, page 19, that he was called by the attorney who represented the Election Board, page 17, and before

the Common Pleas Judge, he testified not only for himself, but for the other members page 23, line 23.

Can it be said that as to the other members, *when called in their behalf, that he was a volunteer?*

But he was not a volunteer, because failing to testify, meant the loss of his office.

He had been formally ordered, page 241, by the Judge to show cause why he should not be removed. In the prosecution of the rule, evidence was adduced which if unanswered, might have justified his removal by the Judge. He had no reason to believe the Judge would resolve anything in his favor because the Judge had said at page 23, "It is a summary hearing and formalities are not going to interfere." This defendant had every right to believe that with the Judge in that mental attitude, his failure to testify would result in his not only being disgraced, but in the forfeiture of his office. He was either to testify or lose his office, and we think the case of *State* v. *Parker,* 61 N. J. Law, 312, affirmed in this Court in 62 Law, 801, and approved by this Court in *State* v. *Twining,* 73 Law, are directly in point, and we take the liberty of quoting briefly from the Parker case at the bottom of page 313, 61 Law: "But when the accused is upon trial, and the evidence tends to establish facts which, if true, would be conclusive proof of his guilt of the charge against him, and he can disprove them by his own oath, as a witness, if the facts be not true, then his silence would justify a strong inference that he could not deny the charges. Such an inference is natural and irresistible. It will be drawn by honest jurymen, and no instructions will prevent it. Must a Court refrain from noticing that which is so plain and forcible an indication of guilt?"

It seems to us the principle is the same, whether it be a criminal or civil case, and that no one is a volunteer when he acts under compulsion, and that it would be just

as reasonable to say that the victim of a hold-up who surrenders his money rather than his life at the point of a gun, is a volunteer. It is also noticeable that the Legislature in 1921 at page 615 limited immunity to State's witnesses.

Suppose a rule is issued to require one to show cause why he should not be punished for contempt. Evidence is offered proving the contempt. If unanswered he will probably be imprisoned. To escape imprisonment he takes the stand. Is he a "volunteer" when he attempts to extricate himself from a position in which the Court placed him?

ERRORS OF TRIAL JUDGE.

The County Board reported that the voters' register showed 409 persons entitled to vote, but that 415 voted (p. 7, l. 10) that Archibald was credited with a total of 403, p. 80, but was actually allowed by defendants only 358, of which the County Board rejected 14—making his vote as they calculated it 344.

Election officers certified, p. 232, that Archibald received 344 votes. If the County Board is correct in allowing only 348, he was credited 55 too many. County Board rejected 14 and found what they thought 31 defective ballots.

But it all depends on whose counting was correct—the primary officers or the County Election Board.

We earnestly urge that the jury and it alone was to determine that fact.

The County Board's finding was not conclusive—no more so than that of the primary officers. Both were evidential, but it should have been left to the jury to determine which count is correct. It was not so left because the Trial Judge treated the County Board's count as conclusive. He assumed its infallibility, p. 201, l. 28, bottom of 204, 112, l. 17.

He refused, p. 204, to charge defendant's requests on the subject, p. 221—requests 15, 16 and 17.

The record nowheres show that the jury counted all the ballots—they simply accepted the County Board's account accompanied by a judicial commendation, which was manifestly harmful to defendants.

VERDICT AGAINST WEIGHT OF EVIDENCE.

There was no direct evidence of guilt. The only proof, if such it was, of false or corrupt counting was based solely upon the conclusions of the County Board, who reported that the register showed only 409 persons entitled to vote, while 415 had voted (p. 79, l. 10).

In the same return, someone—not the slightest evidence that it was the defendants—in plain language, certified Archibald had received 403. A statement easily proved false by the clerk's tally sheets.

It is hard to believe a fraud doer would purposely leave the evidence at hand to readily detect the fraud.

It is not contended by the State that these defendants made up or directed the making up of the statements—the uncontradicted evidence (pp. 145, 54, 59) is that the clerks made them up—none of the writing is the defendants', except their signatures (p. 171, l. 40).

Defendants had been on duty continuously from 6 A. M. Election Day (p. 175) until 5 A. M. the next day. It was the first time women voted. They trusted the clerks to write up the statements (p. 59). They did not inspect the statements to ascertain their correctness.

In *elections* the statute expressly requires them to so inspect, *vid.*, page 720, P. L. 1920, Section 2, but there is no such duty required of them at *primaries, vid.*, P. L. 1920, p. 760, Section 10.

The State stresses the fact that these defendants should have stopped counting ballots when 409 had been reached, being the number enrolled on the poll-book—they counted

six too many but the clerks were the ones who were keeping the tally—not the defendants.

Page 234 shows that assembly candidates received as high as 395 votes, or within 8 of those certified for Archibald.

The over-counting, if such it was, was done by either all or some of the four members of the Election Board and the jury guessed the two defendants guilty—without evidence that the defendants did it—perhaps because Caprio was the sergeant-at-arms in Judge Archibald's Court.

The clerks admit (p. 63) that they disagreed in their tallies.

The State produced only one witness on this point, Brandalone, who was placed by the prosecutor's direction to watch defendants read the ballots; she swears (p. 90, l. 20) *she saw every ballot read and they were read correctly. NO ONE CONTRADICTS HER.* See evidence of others, at p. . If the State is to be held to a violation of the duty "to take and read ballots," then *there is an utter failure of proof of that charge.* It is not a question of weight of evidence, *but of no evidence.*

The jury was out practically 24 hours, it came into court three times (pp. 206-207); it wanted to convict the clerks (p. 217), showing it thought them responsible. At page 208 they asked the Court: "Is the judge responsible for the actions of members of his board?" The Court did not answer or instruct the jury, but simply remarked: "I cannot tell you any more about their duties so far as they apply to this case than I have in the charge" (p. 208).

Should he not have answered that the judge was not responsible for the acts of his colleagues unless he assisted or acquiesced in their misconduct?

The jury finally agreed to convict, if the Judge would accept a recommendation for clemency (p. 218).

We don't believe American jurors recommend ballot box stuffers for mercy if they are confident of their guilt.

The evidence of guilt was not satisfying to the jury and we trust it is not satisfying to this Court.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Appellant and Respondent,* *vs.* JOSEPH C. CAPRIO, *Respondent,* *and* LAWRENCE RUGLIO, *Appellant.*	*On Error to Supreme Court.*

BRIEF OF ANTHONY R. FINELLI, of Counsel with Caprio and Ruglio.

The argument may be conveniently analyzed in the three following propositions: (1) that exemption from compulsory self-incrimination is not a natural right, nor a right secured by the Federal Constitution which an act of the Legislature of New Jersey cannot take away or abridge; (2) that in order for a citizen to get immunity under Article XXXI, Section 77 of the act entitled "An Act concerning elections" (Revision of 1920), P. L. 1920), p. 615, he must wait until he testifies under compulsion; and (3) that Section 77 aforesaid merely relates to proceedings had under an act entitled "An Act to define the crime of bribery, and to provide for the punishment therefor," P. L. 1906, p. 384.

In an effort to reach certain crimes which involved complicity of two or more persons, Congress had enacted that no such testimony "shall be given in evidence, or in any manner used against such party or witness," etc. Notwithstanding this statute, Counselman, a grain dealer, refused to answer to a grand jury whether he had obtained any rebates. The Supreme Court of the United States sustained him in such refusal by unanimous de-

cision, where was considered exhaustively, the true construction of the constitutional right of silence as to criminatory matters. It was held that this right is a highly favored one, the preservation of which is more important and sacred than any considerations of convenience of government in discovering or punishing crime; that it reaches not only disclosure of actual crime, but of any fact however apparently innocent in and of itself which might under any circumstances aid in supplying a link in a chain of circumstantial evidence of a crime, or even might constitute a source or means from which or by which evidence of its commission or of his connection with it may be obtained or made effectual for his conviction without using his answers as direct admissions against him. *Counselman* v. *Hitchcock,* 142 U. S. 547, 585, 35 L. Ed. 1110. Upon this construction of the Constitution it was held that the statute then under consideration merely prohibiting the use in evidence in any proceeding against him of the testimony a witness might have given in other described proceedings, was not equivalent to the protection resulting to him from the constitutional privilege to remain silent, and that nothing short of complete immunity from prosecution or punishment could be so equivalent; that unless the statute made it impossible that there should be a "criminal case" against him which might be aided in the way described by some answer to the questions propounded he still might refuse to answer. The Court not only decided the inability of Congress to infringe upon this right of silence and the broad and liberal construction which must be accorded the constitutional guaranty, but by original statement and apt quotation dwelt on the sacredness of that right and the tyrannical and despotic character of attempts by government to outrage the privacy of the individual, in emphasis of the impropriety and inconsistency of any, even the first and most insiduous step in that direction by a government created by the people for the primary purpose of assuring and protecting individual liberty.

To this admonition from the Court Congress responded by enacting, in modification of the former attempted legislation, the Statute of 1898, which, as far as material, provided: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents (in certain proceedings) on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission. * * * Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." Act February 11, 1893, c. 83, 27 Stat. 443 (U. S. Comp. St. 1901, p. 3173). In *Brown* v. *Walker* (C. C.), 70 Fed. 46, 49, the Act of 1893 was first held valid and the Court there declared that, "In practical effect the legislative act throws a greater safeguard around the petitioner than the constitutional provision." This decision was affirmed by the Supreme Court in *Brown* v. *Walker,* 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, where it was held that the Constitution did not pretend to excuse one from disclosing facts tending merely to disgrace him.

Another consideration which might well have had weight in framing such legislation was the removal of all inconvenient disputes and uncertainties as to the scope of inquiry to which the witness might be subjected in the effort to learn facts upon which others might be charged, so that he might not obstruct the examination by objecting to disclosure of apparently remote and immaterial matters by raising the possibility that his answers might be criminatory as to some matter unknown to the tribunal so that, therefore, it might be unable to overrule his objection.

Exemption from compulsory self-incrimination is not a natural right, nor a right secured by the Federal Constitution which an act of the Legislature of New Jersey cannot take away or abridge.

By the Fifth Amendment to the Constitution of the United States it is, among other things provided that no person shall be compelled, in any criminal case, to be a witness against himself. Many of the states have included a similar prohibition in their constitutions. There is no such prohibition in the Constitution of New Jersey. *State* v. *Zdanowicz,* 40 Vroom, p. 619.

There is a citizenship of the United States and a citizenship of the State which are distinct from each other. Their privileges and immunity, although fundamental, which do not arise out of the nature and character of the national government, or are not specifically protected by the Federal Constitution, are attributes of state and not national citizenship. *Twining* v. *New Jersey,* 211 U. S. 78, 53 Law Ed. 97.

In order to get immunity the citizen must not wait until the compulsion becomes irresistible.

The immunity law is broader than the privilege given by the Fifth Amendment which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which a witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the trial. The immunity flows to the witness by action of law, and without any claim on his part. That no act of any kind on his part which amounts to a claim of immunity is demanded by the law. The law never puts a premium on contumacy. A person does not become a favorite citizen by resistance to a lawful requirement. On the contrary, the policy of

the law favors the willing giving of evidence whenever an officer entitled to make a demand makes it upon a citizen who has no right to refuse. And it would be absurd, and un-American, to favor the citizen who resists and places obstacles in the way of the state, as against the citizen who with a full knowledge of the law obeys without resistance the demand of a presiding judge.

A subpoena is not necessary where the person is present in court, or within the verge of the court. *Bram* v. *United States,* 168 U. S. 532, 29 Law Ed. 746.

The right of a witness to claim his privilege against self-incrimination afforded by the United States Constitution, Fifth Amendment, when examined concerning an alleged violation of the Anti-trust Act of July 2, 1890, is taken away by the proviso to the Act of February 25, 1903, that no person shall be prosecuted or be subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution, under certain named statutes, of which the Anti-trust Act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the state courts for the offense disclosed. *Hale* v. *Henkel,* 201 U. S. 43, 50 L. Ed. 652.

Nor does the difficulty, if any, of procuring the testimony which a person has given on his examination before a grand jury concerning an alleged violation of the Anti-trust Act of July 2, 1890, render the immunity from prosecution or forfeiture given by the proviso to the Act of February 25, 1903, insufficient to satisfy the guaranty of the United States Constitution, Fifth Amendment, against self-incrimination.

One implicated in the illegal registration of another as a voter cannot avoid testifying as to the facts of such registration, on the theory that he would incriminate himself, where the statute provides that the testimony so given shall not be used in any prosecution or proceeding,

civil or criminal, against the person testifying, and that a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given. *People* v. *Cahill,* 193 N. Y. 232, 20 L. R. A. (N. S.) 1084, 86 N. E. 39.

An immunity clause contained in an election law, which provides that "no witness giving evidence in any prosecution or other proceeding under this act shall ever be proceeded against for any offense against this act or against the other election laws, committed by him at or in connection with the same election," was held in *Flanary* v. *Com.,* 113 Va. 775, 75 S. E. 289, to be co-extensive with the constitutional privilege of silence.

And in *Lockett* v. *State,* 145 Ark. 415, 224 S. W. 952, it was held that a witness before the grand jury investigating alleged election frauds could not, on the ground that it would incriminate him, refuse to answer a question pertaining to assessment blanks fraudulently issued for the purpose of enabling parties to vote, since he was afforded ample protection under Sect. 3087 of Kirby's Digest, which provided that "in all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense."

The provision of the New York Penal Code to the effect that no person who testifies upon any investigation or proceeding for a violation of the statute relating to gambling shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction concerning which he may testify or produce evidence, and that no evidence so given or produced shall be received against him upon any criminal investigation or proceeding, was held in *People ex rel. Lewisohn* v. *Court of General Sessions,* 96 App. Div. 201, 89 N. Y. Supp. 364, affirmed without opinion in 179 N. Y. 594, 72 N. E. 1148,

to satisfy the constitutional guaranty against self-incrimination.

And such a statute would be constitutionally broad enough if it forbade any future prosecution. *Re Kittle,* 180 Fed. 946.

In the investigation of the meaning of the statute, we resort first to its words, and, when clear, they are decisive.

It is contended by the State that Article 31, Section 77 of the Election Act does not relate to proceedings of the character mentioned in the Special Plea, and should be given the same meaning which it had in Section 5 of the Statute of 1906, entitled "An Act to define the crime of bribery, and to provide punishment therefor." There are always two parties to a bribery, the corrupt giver and the official receiving the bribe. What other person could be intended? Therefore, it is not necessary either to restrict or enlarge the significance of the words "any person." It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *United States* v. *First National Bank,* 234 U. S. 245, 58 Law Ed. 1298.

Where the language is plain and admits no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. There is no ambiguity in the terms of this act, and clearly it includes both defendants.

For these reasons we do not find any necessary or irresistible presumption that there could have been no legislative intent to provide any immunity which would not have resulted from according accused merely the privilege of silence guaranteed him by the Constitution, but must presume that the words of the statute mean what they say, construed, like all other statutes where there is any

ambiguity, in the light of the surrounding circumstances and general purpose so far as known. Our statute is obviously an adoption of the Federal act, except as the field of suspension from constitutional protection is broadened somewhat.

It is upon this presumption in favor of a strictly limited intent in this legislation that counsel for the State bases a contention that unless a witness resists answering a question, at least to the extent of asserting that the answer may tend to criminate him and that he claims his constitutional privilege to refuse answer, no immunity from prosecution is earned by him. To this position there are two answers, first, that the statute in terms imposes no such limitation upon the immunity, for it assures it to any person "called to testify," not who may be compelled to testify or who may testify after first refusing or protesting and asserting his constitutional right. Doubtless no criminal can immune himself by volunteering evidence without lawful demand. But a more obvious answer is that the law, giving the prosecuting officers and the investigating tribunal the power and right to demand the answer; the subpoena commanding attendance; the administering the oath, and the putting the question, deprive the witness of any privilege to withhold the information, or to effectively protest, and notify him that the tribunal absolutely demands the testimony. A declaration that he would like to assert that privilege if he had it when by the very proceeding he is warned, that he has it not, would be so entirely futile as to be puerile. What sense in his asking whether the information is insisted on when all the steps taken constitute most ambiguous insistence? Why assert a privilege when he had none?

It is respectfully submitted (a) that exemption from compulsory self-incrimination is not a natural right, nor a right secured by the Federal Constitution which an act of the Legislature of New Jersey cannot take away or abridge; (b) that in order to get immunity under the

statute, the citizen shall not waive until the compulsion becomes irresistible; and (c) that in the investigation of the meaning of the statute, we resort first to its words, and, when clear, they are decisive.

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