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New Jersey, ss.:

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, GREETING: Because in the record and in the proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between The State of New Jersey and Michael Mussikee and Joseph Horne, defendants, upon an indictment, and the giving of judgment thereon in the Court of Oyer & Terminer of the County of Essex, constituting the Court of General Quarter Sessions of that County, upon a writ of error from our said Supreme Court of Judicature to the said Court of Oyer & Terminer, as aforesaid, manifest error hath intervened to the great damage of the said defendants, as by their complaint we are informed; we being willing that the error, if any there be, should, in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the 26th day of December, 1927, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

(L. S.)

Return to Writ of Error.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, in the last resort in all causes, at Trenton, the sixth day of December, 1927.

JOSEPH F. S. FITZPATRICK,
Clerk.

MERRITT LANE,
Attorney for Michael Mussikee.

KESSLER & KESSLER,
Attorneys for Joseph Horne.

Return to Writ of Error.

NEW JERSEY SUPREME COURT.

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

v.

MICHAEL MUSSIKEE and JOSEPH HORNE,
Plaintiffs-in-Error.

In answer to the writ of error issued out of the New Jersey Court of Errors and Appeals in the last resort in all causes, in the above entitled cause, we, the Justices of the Supreme Court of Judicature of the said County within named, do return and certify to the New Jersey Court of Errors and Appeals in the last resort in all causes, the record and proceedings whereof mention is within made, with all things touching and concerning the same, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J.

Writ of Error.

NEW JERSEY SUPREME COURT, ss.:

(SEAL) The State of New Jersey, to our Court of Oyer and Terminer, of the County of Essex, constituting the Court of General Quarter Sessions, in and for said County, GREETING: Because in the indictment and in the record and proceedings and also in giving of judgment upon a certain indictment against Michael Mussikee, of Passaic, and Joseph H. Horne, of the City of East Orange, County of Essex, for wilfully and maliciously burning and causing to be burned and aiding and consenting to the burning of the factory building of the Merritt Products Corporation, a corporation located at West Orange, in said County of Essex, and setting fire to and burning and aiding, procuring and consenting to the setting fire to and burning of said building and the goods, merchandise and other chattels then therein were then insured by certain insurance corporations named in said indictment against loss and damage by fire, with intent to prejudice said corporations which had theretofore underwritten certain policies of insurance on said building, goods, merchandise and other chattels such policies being then in full force and effect, whereof the said Michael Mussikee and Joseph H. Horne have been indicted and are thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Michael Mussikee and Joseph H. Horne, as it is said, manifest error has intervened to the great damage of said Michael Mussikee and Joseph H. Horne, as from their complaint we have received

Return.

State of New Jersey, } ss.:
County of Essex, }

I, EDWIN C. CAFFREY, Judge of the Court of Quarter Sessions, Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey the Indictment, Judgment Record and Proceedings together with the entire record and proceedings had at the trial with all things touching and concerning the same as by the written Writ to me directed, I am commanded.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Court at Newark, this 28th day of June, A. D. 1926.

(SEAL)

EDWIN C. CAFFREY,
Judge of the Court of Quarter Sessions,
Essex County, New Jersey.

Indictment.

State of New Jersey, } ss.:
County of Essex, }

BE IT REMEMBERED, that at a Court of Oyer and Terminer holden at Newark, in and for the County of Essex, on the first Tuesday in April, in the year of our Lord, one thousand nine hundred and twenty-four, 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

information, we being willing in that behalf to correct the error in due manner, if any there shall be, and that speedy justice be done for them, the said Michael Mussikee and Joseph H. Horne, do command you that if judgment be thereupon given that then you do send the indictment, entire record and proceedings aforesaid, together with all things touching and concerning the same, to us under your seal, distinctly and openly, and this writ, so that we may have them before our Supreme Court of Judicature, at Trenton, on the 1st day of May next, that inspecting the indictment, records and proceedings aforesaid, we may further do thereupon for correcting the error that which of right and according to law shall be fit to be done.

WITNESS, his Honor, William S. Gummere, Chief Justice of our said Supreme Court, at Trenton, the 12th day of April, in the year of our Lord nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

MERRITT LANE,
Attorney Mussikee.

KESSLER & KESSLER,
Attorneys Horne.

Presented in open court this 12th day of April, 1926.

EDWIN C. CAFFREY,
Judge.

of Walter C. Richman, John J. Chegan, William Pfeil, Sr., George Bailey, Alfred Stahl, Louis C. Breidenbach, Howard Liveright, Robert C. Thomson, Charles G. Hahn, Richard P. Hartdegen, Stephen Fogarty, Hugh J. Devlin, Robert C. Klemm, John A. Stengel, Joseph McDonough, William H. Muhlker, Leopold Rich, John Kay, Mitchell J. Preston, James J. Fitzsimmons, Henry W. Keim, John A. Kelly, George J. Wolf, good and lawful men of the County of Essex, duly summoned and then and there duly sworn, and charged to enquire in behalf of the State of New Jersey, in and for the County of Essex, it is presented in manner and form following, to wit:

Essex County, to wit: The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Michael Mussikee and Joseph H. Horne on the sixth day of January, in the year of our Lord one thousand nine hundred and twenty-four at the Town of West Orange, in the County of Essex aforesaid wilfully and maliciously did burn and cause to be burned and aid and consent to the burning of the factory building of the Merritt Products Company, a corporation—contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the Grand Jurors aforesaid, upon their oath do further present that the said Michael Mussikee and Joseph H. Horne on the sixth day of January, in the year of our Lord one thousand nine hundred and twenty-four, at the Town of West Orange in the County of Essex aforesaid, wilfully and maliciously did set fire to and burn and aid, procure and consent to the setting fire to and burning

of the building known as 494-498 Valley Road, in the Town of West Orange, aforesaid, and the goods, merchandise and other chattels then therein, which building, goods, merchandise and other chattels were then insured by the Allemannia Insurance Company, Bankers and Shippers Insurance Company, Commercial Union Assurance Company, Fuso Marine Insurance Company, Glens Falls Insurance Company, Great Lakes Insurance Company, London Assurance Company, New Zealand Insurance Company, Niagara Insurance Company, Pennsylvania Fire Insurance Company, Royal Insurance Company, Springfield Fire and Marine Insurance Company, Standard Insurance Company, Farmers Fire Insurance Company of New York, Northern Insurance Company of New York, and the Scottish Union and National Insurance Company, corporations, against loss and damage by fire, with intent to prejudice said corporations, said corporations having theretofore underwritten certain policies of insurance on said building, goods, merchandise and other chattels, the said policies being then and there in full force and effect 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. O. Bigelow,
Prosecutor of the Pleas.

And on the tenth day of May, A. D. nineteen hundred and twenty-four, 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.

Plea.

And afterwards, that is to say, on the twenty-fifth day of June, A. D. nineteen hundred and twenty-four, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Hon. Edwin C. Caffrey, Presiding Judge of the Court of Common Pleas, Michael Mussikee and Joseph H. Horne, in the custody of Harry B. O'Connell, Sheriff of the County of Essex aforesaid, and the said Michael Mussikee and Joseph H. Horne, being brought before the bar in their own proper persons 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, John O. Bigelow, Prosecutor of the Pleas of said State, for said County of Essex in this behalf doth the like.

Therefore, let a jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex on the ninth day of December, A. D. nineteen hundred

and twenty-four, 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 Michael Mussikee and Joseph H. Horne to recognize upon their oath whether the said Michael Mussikee and Joseph H. Horne is Guilty of the premises in the said indictment specified or Not Guilty because the said John O. Bigelow, Esquire, as the said Michael Mussikee and Joseph H. Horne put themselves upon the jury and the same time is given to the parties aforesaid at the same place.

And afterwards, that is to say the twenty-ninth day of March, A. D. nineteen hundred and twenty-six, to which day said trial was postponed application by Counsel for Defendants to withdraw their respective pleas of Not Guilty for the purpose of making a motion to Quash said indictment, the Court after hearing said application denied same and trial continued at the same Court of Quarter Sessions, holden before the Hon. Edwin C. Caffrey, Judge of the Court of Common Pleas, comes the said John O. Bigelow, Prosecutor, who prosecutes as aforesaid, and the said defendants, Michael Mussikee and Joseph H. Horne and the jury of whom mention is before made, and by Harry B. O'Connell, Sheriff of the County of Essex, for this purpose empanelled and returned to wit: (after the following challenges) by the State 9, by Defendants 8, James J. Hogan, Frank M. Sutphen, W. Raymond Adams, Robert A. O'Neill, James B. Bailey, Raymond E. Sayrs, John W. Pitner, Jerry M. Wakefield, James Burns, Wil-

liam L. Flye, Wm. Geo. Barker and Everitt G. Garrison, 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 first day of April, A. D. nineteen hundred and twenty-six, when the jury returned into Court in charge of the officer sworn to attend them, and then and there in the presence of the Prosecutor, Defendant and Court do say upon their oath "We find these two defendants Guilty in manner as is set forth in the indictment" and so they say all. Counsel for defendants requested that the jury be polled, whereupon the clerk called the roll and each juror, for himself, answered, "I find these two defendants Guilty in the manner and form as is set forth in the indictment."

Whereupon all and singular, the premises being seen and by the Court now here fully understood it is on this twelfth day of April, A. D. nineteen hundred and twenty-six, the Court (Hon. Edwin C. Caffrey) do order and adjudge that the two defendants be imprisoned in the State Prison of this State for a minimum term of two and one-half years and for a maximum term of five years at hard labor each upon this conviction; that they pay a fine of one thousand dollars each; that they pay the costs of this prosecution and that they both stand committed until said fine and costs be paid, and the defendants be in Mercy, etc.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

(Monday, March 29, 1926.)

STATE OF NEW JERSEY, *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE.	On Indictment No. 16, Dec. T., 1925, for Burning with Intent to Defraud.

Before—Hon. EDWIN C. CAFFREY, Judge and a jury.

For the State appears J. VICTOR D'ALOIA, Assistant Prosecutor of the Pleas of Essex County.

For the defendant Michael Mussikee appear LANE, LYNCH & SMITH (by MERRITT LANE).

For the defendant Joseph H. Horne appear KESSLER & KESSLER (by SAMUEL I. KESSLER).

Counsel for the defendants move to withdraw the plea of not guilty for the purpose of moving to quash the indictment.

Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

A jury is called and sworn.

Mr. D'Aloia opens to the jury as follows:

May it please your Honor. Gentlemen of the jury. You have been empanelled to try this indict-

ment entered by the Essex County Grand Jury, which charges that on the 6th day of January, 1924, these two defendants, Michael Mussikee and Joseph H. Horne, the two men sitting right along the rail, the second and the third man—the second man, the gentleman in gray is Michael Mussikee; the man next to him in the same direction is Joseph H. Horne—that they did set fire to a building in the Town of West Orange, located at the corner of Joyce Street and Valley Road; that they did that wilfully and maliciously, or they caused it to be done, or they aided in that particular fire or consented to the burning of that place. Now, that was a factory building, and it was conducted there as the Merritt Products Company, Incorporated. That is the first charge in this indictment, that they did wilfully, maliciously burn and cause to be burned, aid and consent to the burning of the factory building of the Merritt Products Company, a corporation. The second count in the indictment charges these two men on that same day, in the Town of West Orange, that they wilfully set fire to, aid and burn and consent. We contend that they either did it themselves or they aided in the burning, or they procured somebody to burn and consented to the setting fire of and to the burning of that building at 494-8 Valley Road and that the goods, merchandise and other chattels therein were burned for the purpose of defrauding the following insurance companies, the Allemannia Insurance Company, Bankers and Shippers, Commercial Union, Fuso Marine Insurance Company, Glens Falls Insurance Company, Great Lakes Insurance Company, London Insurance Company, New Zealand Insurance Company, Niagara Insurance Company, Pennsylvania Fire

Insurance Company, Royal Insurance Company, Springfield Fire and Marine Insurance Company, Standard Insurance Company, Fire Insurance Company of New York, Northern New York, Scottish Union and National Insurance Company, all corporations, which had insured the chattels in the building against loss by fire.

Now, very briefly stated, on the night of January 6, 1924, shortly after midnight, a fire alarm was sent in to the Town Fire Department of West Orange, and when the fire apparatus arrived, there was a fire in this factory. The chief of the Fire Department and his firemen will tell you that they broke into the building and they put the fire out, whatever was burning; that there were two separate fires inside of the building. The chief will tell you, from his experience as a fire fighter, that there was no connection that he could see between the two fires and that that fact started an investigation; fire broke out in two separate parts of this building, and the chief will tell you that there was no connection between the two fires. We will also prove to you that not only was the fire of incendiary origin, but at the time there was upwards of $100,000 of insurance upon the building and contents, and shortly thereafter proofs of loss were submitted to the various insurance companies and the claim was made for $66,000 worth of insurance. We will show you by a witness that some months prior to this night in January the defendant Joseph H. Horne approached the witness and made a proposition to him. He wanted this factory cleaned out. He offered this witness $1,000 for the job. We will also show you that the defendant Mussikee went to someone immediately after the fire and complained about the quality

of work which was done by those who had set fire to the place, that the damage was not enough, and that the damage was mostly done by the water and not by the fire and that it was a bad job.

Now, we will show you, gentlemen of the jury, that on this night in question at that unearthly hour, that about fifteen minutes after midnight that this place was set fire to, that the insurance existed, that immediately after the fire steps were taken to collect the insurance, that the fire was of an incendiary origin, that one of the defendants tried to hire somebody to set fire to the place and the other defendant saying that he had some idea of what was done in the Town of West Orange, that the job was not done properly and that those who were clammoring for money he was not going to pay them, and if we show you that at this hour of the night when the fire alarm was sent in there was an automobile outside and it stood there for some time and the people who knew the automobile owned by Joseph H. Horne will tell you that that automobile was of the same color and the same make as the defendant Joseph H. Horne's automobile, and when we show you that a certain message was delivered to Joseph H. Horne's boarding house to communicate with his co-defendant in Passaic about the fire in the factory, that somebody was clammoring for pay, then we are going to say to you that arson cases of this character and burning cases can only be proven by circumstantial evidence, because the State in ninety-nine cases out of a hundred cannot procure eyewitnesses, but we will show you enough circumstances and enough interest on the part of these defendants to show you at the end of the case

and at the end of all the case to warrant a verdict of guilty.

Mr. Lane: I move in a mistrial on the Prosecutor's opening because of the reference by the Prosecutor to a certain message which he referred to and, likewise, because of the reference by the Prosecutor to the alleged being at the place of the automobile that the Prosecutor has referred to.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

EDWARD H. SCHWARTZ, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. You are connected with the Newark Police Headquarters? A. Yes.

Q. And besides that you are a civil engineer? A. Yes.

Q. And that diagram on the board there was made by you? A. Yes.

Q. And it was made from another one which was made from the original premises in West Orange? A. No, it was made from the original data and notes taken at the time on May 21, 1924.

Q. Will you tell us what that diagram or what that plan represents? A. The plan represents the first floor or ground floor of the building known as 494 Valley Road, West Orange, occupying the

northeast corner of Joyce Street and Valley Road; drawn to the scale of one-quarter inch equals one foot.

Q. Now, what are the different partitions and what do they partition off? A. The partitions as shown and the room marked B, also that marked A, shows the main entrance of the building and were presumably occupied as offices. The room between the partition and marked C is used totally as a stock room or store room, as is also a small room partitioned off and marked "Stock Room." There are three toilets shown in the large room marked E. The small square in the center represents uprights or pilasters. To the south of the building a boiler pit with a boiler as shown. Next is a partition or loading platform off the street level going to the room marked B. These two squares show uprights or supports to the roof. Doors as shown and the sliding door into the loading platform or driveway.

Q. Then, if I understand that diagram correctly, the only entrance to the building on the Joyce Street side is through that sliding door? A. And through the small door shown here.

Q. At the extreme rear? A. Yes.

Q. Any other entrance? A. No, sir.

Q. How many entrances on Valley Road? A. Two.

Q. And the one nearest to the corner, where does that lead to? A. This one?

Q. No, the corner, the one nearest the corner of Joyce Street. A. It leads to the main operating room marked E.

Q. And the other one? A. Into the office.

Q. How do you get from the office into any of the rear rooms, those two big rooms you have

marked? A. Through this doorway shown between A and B.

Q. No, E and B. A. Through the doorway, through C into B, or through E around the platform, to this sliding door, as shown here, into room B.

Q. What does the front of the building measure? A. 44 feet, 6 inches.

Q. What is the length of the building, that is, the depth of it? A. 124 feet.

Q. How wide is it in the back? A. 40 feet, 9 inches.

Q. How wide is that sliding door on the Joyce Street side? A. 9 feet, 6 inches.

Q. How far in does it go to the platform, that entrance, that driveway? A. 23 feet, 6 inches.

Q. How wide is that bench shown in room E and how long is it? A. It is 2 feet, 6 inches in width and 24 feet in length.

Q. Do you remember the building itself from the outside? A. Well, as to its construction?

Q. Yes. A. Frame.

Q. Frame construction? A. Yes.

Q. How many stories? A. One.

Q. That arrow indicates—points north? A. Yes.

Q. The building faces west on the east side of Valley Road? A. Yes.

Q. And on the north side of Joyce Street? A. Yes.

Q. That is on the northeast corner of both streets? A. Yes.

Cross examination by Mr. Kessler:

Q. Did you observe the building that was on the northwest corner? A. Well, perhaps I did at

the time, but it is two years ago. I do not remember.

Q. Do you know whether it was a tall or low building? A. That I don't know.

Q. Was it built right up to the sidewalk or not? A. No, I couldn't say positive.

Q. Now, how wide is the door leading into the first room here? A. 2 feet, 6 inches.

Q. These lines here, they indicate partitions? A. Yes.

Q. And did you observe how high the partitions were? A. I did, but the uprights reached to the ceiling, but there had been portions burned away and I could not tell whether it had reached the ceiling or not.

Q. You could not tell whether the portions that were burned reached from the floor to the ceiling? A. It probably did.

Q. What kind of partition was it? A. I think it was plaster board and wooden uprights; either that or beaver board.

Q. How wide is this opening through these two spaces? A. Five feet.

Q. Is there any doorway across? A. No, sir.

Q. And that is open all the way up to the ceiling? A. It was.

Q. And how wide was the next opening? A. 3 feet 6 inches.

Q. And is there a door there? A. No, sir, there are no doors in any of these openings.

Q. And take the third opening, how wide was that? A. 4 feet 6 inches.

Q. And there is no door there? A. No, sir.

Q. Now, the opening between C and B, was there a sliding door there? A. Yes.

Q. And what position did you find the sliding door in when you inspected the building? A. Partially open.

Q. When was it you inspected the building? A. May 21, 1924.

Q. And how wide is that opening between the two rooms? A. 4 feet 6 inches.

Q. Now, what is the construction between this point and the point here?

The Court: What are you referring to?

Mr. Kessler: What kind of partitions, construction is it between B and C?

The Witness: Wooden.

Q. Was that solid? A. No, sir.

Q. What do you mean? A. I mean it was—may I refer to my notes on that?

Q. Sure, by all means. A. I have that marked beaver board.

Q. Do any of these partitions between C and B and the partition between C and E—did they have any windows, or were they solid beaver board? A. No. This toilet here had a window into here, and these two had windows to the side of the building. This had none, as shown.

Q. Now, this window in the toilet looked into room C, is that right? A. Yes.

Q. And the toilet had a solid partition around it except at the doorway? A. Yes.

Q. The partition between E and the space marked here representing platforms, was that solid, or did it have any opening? A. That had the one opening as shown here; also this door here, a swinging door, and then it had a solid door, as shown here, and two windows.

Q. I am pointing to this partition. Did that have any windows? A. No.

Q. Then these two windows between room E and the loading platform, that had two windows? A. And also into the boiler pit.

Q. What surrounded the boiler, as you saw it? A. It was in a concrete pit and an iron railing.

Q. How deep a pit was it? A. Nine inches.

Q. What construction was the floor around the boiler? A. Concrete.

Q. Did you observe the building, all the building? A. No only casually.

Q. What was the construction of the ceiling of the building? A. If I remember correctly, the interior was clap board, that is, the sealing board, and that was pretty well pulled out.

Q. Were they boards or beaver boards? A. They were boards.

Q. Are you quite sure of that? A. No, I am not positive, but I think they were.

Q. Do your notes show that? A. No.

Q. You were there May 21, 1924? A. Yes.

Q. About two years ago? A. Yes.

Q. And you are only saying they were clap boards from your own recollection? A. Yes.

Q. You have no notes of it? A. No.

Q. You would not be surprised to know, then, that the ceiling was constructed of beaver board? A. Yes, I have it beaver board, pardon me. I have marked it.

Q. So that the ceiling was constructed of beaver board? A. Yes.

Q. Did you observe whether the beaver boards were of large size or small size? A. No, I didn't.

Q. Did you observe the cross beams on the ceiling, whether they were fir boards or not? A. No.

Q. You are a construction engineer? A. Yes. They were pretty well burned and the floor was very unsafe when I was there.

Q. Can you say from the best of your recollection about how far apart the cross beams of the ceiling were upon which the beaver boards were nailed? A. Well, roughly estimating, about six feet apart.

Q. Now, from your experience as an engineer, how are beaver boards attached to the cross beams? A. They are nailed.

Q. They are just tacked on? A. Yes, and then there is a strip underneath that.

Q. Well, the only method of holding the beaver board on cross beams is by tacking them? A. And cementing them.

Q. Do you know whether these were cemented or not? A. No.

(Map offered in evidence and marked Exhibit S. 1.)

Mr. D'Aloia: May it please your Honor, at the request of the stenographer and with the consent of counsel for the defense, we are going to change the letters B and D. Now, is there any objection to changing room B to F?

Mr. Kessler: F.

Mr. D'Aloia: And this room D to L?

Mr. Kessler: Yes.

CHARLES E. KLING, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. What business were you in during the year of 1924? A. Insurance adjuster.

Q. Do you know the defendant in this case, Joseph H. Horne? A. I do.

Q. When did you first see him? A. Along about the latter part of January, 1924.

Q. Where? A. Well, it was up there in Orange and in a building which they had rented for a new office. I do not recall the location where they moved after the fire.

Q. Did you go to the building where the fire had taken place? A. I did, several times.

Q. And do you know of your own knowledge what name the business was being conducted under at the corner of Joyce Street and Valley Road? A. Merritt Products Company.

Q. Do you know of your own knowledge who the president was? A. Why, Joseph H. Horne said that he was the president and he swore to the proof as president of that company.

Q. Do you know of your own knowledge how much insurance there was on that particular building at the corner of Joyce Street, the northeast corner of Joyce Street and Valley Road?

Mr. Kessler: The best proof is the policies.

Mr. D'Aloia: We have not the policies.

The Court: Is the purpose of this question to establish there was insurance on the premises?

Mr. D'Aloia: Yes, sir, and how much.

The Court: Have you any objection to that?

Mr. Kessler: No, none at all.

Q. How much insurance was there on the building and on the merchandise on January 6, 1924? A. I asked that question and it was stated to me that there was $20,000 on the building, $70,000 on the stock and there was a little, $2,500 policy on other fixtures.

Mr. D'Aloia: I offer the policies in evidence, which show the different amounts of insurance in the different companies.

(Marked Exhibit S. 2.)

Q. Now, I show you the proofs of loss. Were they submitted to you by the defendant, Joseph H. Horne, as the president of the Merritt Products Company? A. They were, through his representative.

Q. And how much was the claim made under the proofs of loss under those different policies?

Mr. Lane: I object to that as not binding on the defendant Mussikee.

The Court: We will admit it with the limitation that this evidence only applies to Joseph H. Horne.

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

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

A. The claim on the contents was $34,000. I have just forgotten the exact figures of the building. May I look at these proofs?

Q. Yes, surely. A. I have a memorandum of it, and may I consult my memorandums?

Q. Well, look at the proofs and the memorandums in order to refresh your memory. A. The proofs were submitted for $34,000 on the stock; for $4,871.06 on the building and $700 on the fixture policy.

The Court: That is, stock $34,000?

The Witness: $34,000.

Mr. D'Aloia: I offer the proofs of loss in evidence.

Mr. Lane: The same objection for the defendant Mussikee.

The Court: Yes, they will be admitted as applying to Joseph H. Horne and I will meet that in my charge.

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

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

The Court: Do I understand those affidavits were signed by Joseph H. Horne?

The Witness: Yes.

Q. All the verifications were sworn to and signed by Joseph H. Horne? A. My recollection is they were signed by Joseph H. Horne on the building as president of the Horne Realty Company and by Joseph H. Horne as president of the Merritt Products Company.

(Marked Exhibit S. 3.)

JOHN L. DAY, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. You are attached to the Newark Police Department? A. I am.

Q. And you were so attached in 1924? A. Yes.

Q. You are known as the official photographer of the department? A. Yes.

Q. At the request of the prosecutor's office, did you go to premises at the northeast corner of Joyce Street and Valley Road and take certain photographs? A. I did.

Q. When was that? A. The morning after the fire.

Q. The 7th of January, 1924? A. 1924.

Q. I show you a photograph and ask you if you took that on that occasion? A. I did.

Q. What does that represent? A. It is the building located on the northeast corner of Joyce Street and Valley Road, taken from the southwest corner.

Q. Now, will you please put an arrow up there on the diagram known as S. 1, indicating where your camera was placed and which way it was facing when that photograph was taken by you? A. The camera was on the southwest corner, facing in a northeasterly direction. I will mark it C. S. 4.

(Photograph marked Exhibit S. 4.)

Q. Did you take photographs of the inside of the building? A. Yes.

Q. I show you another photograph and ask you if you took that on the occasion when you were

there, as part of the interior of the building? A. I did.

Q. Now, will you please put a mark on S. 1 indicating where your camera stood and an arrow showing the direction in which the camera was pointed? A. This is a photograph of Room L. The camera was at the rear of the building, or easterly end of the building, facing in a westerly direction, about the center, and so marked C. S. 5.

(Photograph marked Exhibit S. 5.)

Q. I show you another photograph and ask you if you took that as a part of the interior on the occasion you were there? A. I did.

Q. And will you please indicate on S. 1 where your camera was and which way it was facing? A. This is a photograph of Room C. The camera was at or about the place marked "Scale," I think it is here on the map, facing in an easterly direction of the building, so marked C. S. 6.

(Photograph marked Exhibit S. 6.)

Q. I show you another photograph and ask you if you took that on that occasion as a part of the building? A. I did.

Q. Now, will you show us where your camera was and in which direction it was facing? A. This is a photograph of Room E. The camera was in the west end of the building, facing in an easterly direction, so marked C. S. 7.

(Photograph marked Exhibit S. 7.)

Q. I show you another photograph and ask you if you took this on that occasion you were

there and if it is part of the interior of the building? A. Yes.

Q. Now, will you kindly mark what that represents on the diagram? A. This is a photograph showing the sliding doors between the platform to the entrance, and so marked boiler pit on the map. The camera was about at the end of the bench, facing in a northerly direction, or northeasterly direction, so marked C. S. 8.

(Photograph offered in evidence and marked Exhibit S. 8.)

Q. Now, did you make a note of the dates when you took those photographs? A. I believe I did; I was up there with Mr. Schwartz.

Q. Well, Mr. Schwartz testified he went up there sometime after the fire, so when you said you took them the day after the fire you were not right about that? A. No, I don't think so, no. I was up there, I think, sometime in May.

Q. Sometime after the fire? A. I thought the fire was in May.

Q. You went up when Mr. Schwartz went up to make a survey? A. Yes. I was with him there at the time.

Cross examination by Mr. Kessler:

Q. Who was there when these photographs were taken? A. Why, Detective Slutsky of the prosecutor's office, and the chief of the West Orange Fire Department.

Q. Who else was there? A. Myself and Mr. Schwartz.

Q. Anybody else? A. No, I don't believe there was. There may have been a fireman there.

Q. Any representatives of the insurance companies there? A. Not while I was there. There may have been somebody there.

Q. There was somebody else there, wasn't there, Mr. Day? A. Not to my knowledge. There may have been somebody in the back that came in, but I didn't see anybody. That is all I saw.

Q. Weren't the gentlemen from the insurance company directing you how to take these photographs? A. No.

Q. Who did instruct you as to the location of the camera and for what use they desired to have them taken? A. Mr. Slutsky.

Q. Who was with Mr. Slutsky at that time? A. Well, we were all there together.

Q. Other than those you mentioned by name? A. I don't know.

Q. Wasn't there another gentleman who you were not introduced to, perhaps? A. No, not to my knowledge.

Cross examination by Mr. Lane:

Q. I show you State's Exhibit 8 and the photographs which I shall ask to have marked for identification.

(Photographs marked D. 1 and D. 2 for identification.)

I ask you whether the two photographs which I have had marked for identification do not show the same boiler that is shown in State's Exhibit 8? A. It may be the same boiler, and it may not. Of course, I do not know where these photographs were made.

Q. How long have you been taking photographs? A. Twelve years.

Q. For police work? A. All kinds of work.

Q. And yet you cannot tell me, by looking at those two photographs, whether they are not photographs of the same identical thing taken from two angles? A. It is possible they are.

Q. I am not asking you any possibility. You, as a photographer, taking photographs for police work for twelve years, cannot tell me they are of the same thing? A. Well, I would not say they were or were not. I could not say positively unless I had the negative made. They resemble it.

Q. Well, they resemble it. Aren't there details in that photograph that indicate that that cannot help but be of the same thing? A. Yes, there are.

Q. Well, then why do you hesitate? A. But, as I say, I could not say that these negatives were made at the same place as this one, because perhaps there are several boilers around in the same location.

Q. Well, boilers around with the same surrounding, the same burning, to the same extent identical? A. It is possible. I should say they were in the same building and the photographs are the same, but I wouldn't take an affidavit.

Q. Those photographs which I have last shown you indicate that the boiler pit—the boiler room is of considerably larger extent than the photograph you took at the time.

Mr. D'Aloia: I object to that question.

Q. Well, do they not?

Mr. D'Aloia: No. This witness says he cannot tell where those photographs were taken and he cannot tell whether they are photographs of the same boiler.

The Court: Are you going to offer these in evidence?

Mr. Lane: I am.

The Court: I will allow the question.

A. Yes, it shows a greater space than the one I took.

Q. The one you took, from a photographic standpoint, gives an impression of a very circumscribed area? A. No, I wouldn't say that.

Q. Are you still uncertain as to whether those two photographs I last showed you— A. Well, I should say they were made at the Joyce Street building. They appear to be made at the Joyce Street building.

Q. And there is no doubt in your mind about that, is there? A. No doubt, but I don't know. I would have to see the man who made them to say they were made there, because, as I say, there is a difference in the area.

Q. Having seen a thing, you are not sufficiently expert in photography to tell me whether the thing you made a photograph of is or is not a photograph? A. Oh, there are several ways of making a photograph.

JAMES J. SHEEHAN, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. You were a member of the West Orange Fire Department in January, 1924? A. Yes.

Q. And do you remember an alarm of fire coming in on the morning of the 6th of January, 1924? A. I do.

Q. What was the exact time when the alarm came in? A. 12:17 A. M.

Q. And what did you do when the alarm came in? A. Well, I responded immediately.

Q. Where did you go? A. We went to a building situated on the east side of Valley Road, on the corner of Joyce Street, known as—

Q. As what? A. The Merritt Products Company.

Q. I show you Exhibit S. 4 and ask you if that photograph represents the place? A. It does.

Q. Now, what did you see was burning; what part of this particular building shown in this photograph at that corner of Joyce Street and Valley Road was burning when you got there? A. In the rear of the office, is where the first fire was.

Q. The rear of the office? A. Yes.

Q. And can you look at that diagram known as S. 1— A. On the Joyce Street side.

Q. On the Joyce Street side. Take this pointer. This is Valley Road and this is the Joyce Street side, and that is plant. A. I do not know as I can just pick that out on the map.

Q. Well, come near and see if you can. Now, here is the Joyce Street side and there is the Valley Road side and there are the offices up there and here is the big room. Tell us where you found the building burning. A. Burning about in the neighborhood of here, on the Joyce Street side.

Q. And then what did you do? A. Why, I laid in lines of hose and we found that the building was so barred that we simply had to burst in the side door.

Q. The side door on which side of the building? A. On the Joyce Street side.

Q. And I show you Exhibit S. 4. Does that show the door? A. Yes. There is the door right there.

Q. Now, what did you do, if anything, to that door? A. I simply called on men to bring the battering ram and burst the door in.

Q. Did you do that? A. Yes.

Q. When you got in, what did you find? A. I found simply a fire burning good and proper.

Q. If I understood you correctly, you pointed to fire being right back here at this spot when you first arrived there. A. Yes.

Q. And then you broke through this door? A. Yes.

Q. Where was the fire then? A. About twenty feet on the east side.

Q. Where? A. Probably down here in the neighborhood—

Q. The partition between room E and room C—

Mr. Kessler: We cannot hear the testimony of the chief.

Q. Now, will you put the word "fire" about the place where you saw the fire? A. As near as I possibly can.

Q. Yes, as near as you possibly can. Now, whereabouts was it? A. There.

Q. Now, take your seat. Was there any fire anywhere else beside those two places you have indicated? A. No, sir.

Q. How long did it take you to extinguish the fire? A. Probably about a little between four and five hours.

Q. But I mean how long did it take you to sufficiently extinguish the fire so as to make an examination? A. Probably in the neighborhood of an hour and a half.

Q. What was in there when you first got a chance to observe? A. Why, there was a lot of stock, a webbing stock, and there was some children's bags, and there was a liquid—a rubber liquid for pasting paper packages.

Q. Now, when you got an opportunity to make a complete examination, did you do it? A. Pretty much, yes.

Q. Did you find when you made your complete examination any connection between the fire which was located in room E, right back of the office on the Joyce Street side, and the fire which was burning when you broke in through this door with your battering ram in room C; did you find any connection between the two fires? A. No, sir; none.

Q. Would you say there were separate fires? A. Yes.

Mr. Kessler: Objected to. It is not fair to characterize what they were. The jury will draw the conclusion and I ask that the answer be stricken out.

The Court: Sustain the objection. The last part will be stricken out.

Q. Did you discover any connection between the two fires? A. No, sir. There were two separate and distinct fires.

Mr. Kessler: May I ask that that latter part be stricken out?

The Court: That will be stricken out.

Q. Now, we limit ourselves to your discovery, of any connection between the two fires; did you find any? A. No.

Q. Was there any fire in the boiler? A. Possibly. If there was it was a very small fire, very small; I hardly think there was, but I would not say positively.

Q. Was there any connection between the fire in the boiler and either of the fires you have described? A. None.

Q. You made a minute examination to establish that, did you? A. Yes.

Mr. Kessler: I object as leading.

The Court: Sustained.

Q. What kind of an examination did you make to find that out? A. Why, to see the material and so forth that was around the furnace and the pit where the furnace stood.

Q. Now, was there any connection between the fire in the boiler, what little there was, and the fire in room C you have described and the fire in room E? A. No, sir.

Q. Was there any connection between the fire in room E and the fire in room C? A. No, sir.

Q. Now, I am going to show you these photographs and ask you if you recall the appearance of the premises when the fire was sufficiently put out to enable you to make an examination. I show you Exhibit S. 5. Is that the way this room in the rear looked in looking from the rear toward the front, this room here in the back, looking from

the rear toward the front; is that the way it looked? A. Yes.

Q. I show you Exhibit S. 6 and ask you if that is the way the part of the premises looked which is marked here on the diagram as S. 1 as room C, looking from the front toward the toilet? A. I think it is.

Q. That is your recollection of it? A. Yes.

Q. I show you Exhibit S. 7 and ask you if that photograph represents what you saw in room E immediately after the fire when it was sufficiently extinguished to enable you to look into E from the front toward the rear? A. That is a pretty hard thing for me to dope out on this picture.

Q. Do you remember the room in which this belting was? A. Yes.

Q. And did it look like that when the fire was out? A. Yes, to some extent.

Q. Now, do you remember looking at the boiler, or the part of the premises where the boiler was situated? A. I do.

Q. And I show you Exhibit S. 8 and ask you if that represents the premises, as you saw them, after the fire, looking from room E toward the boiler pit? A. Yes.

Cross examination by Mr. Lane:

Q. When did you go back to the fire after it had been put out? A. In the afternoon of the same day.

Q. And when was the next time that you went back to the fire? A. Well, now, I can't positively say as to when. You mean the third visit?

Q. Yes. A. I am just stating when I made my first visit after the fire was extinguished was

about four or four-thirty in the afternoon of the same day of the fire.

Q. Was it then that you made your examination to determine whether or not there was any connection between these two fires that you have referred to? A. Yes.

Q. And you made an examination at that time and the fire broke out? A. The fire had been extinguished from the early morning previous.

Q. And you made your examination at that time to determine whether there was any connection between the two fires? A. I generally inspect all fires.

Q. Well, did you or didn't you? A. What is that?

Q. Did you or didn't you? A. Yes.

Q. And you found that there was no connection between the two fires; is that right? A. Right.

Q. And you made another examination in February, about a month later, when the photographs were taken, or when certain photographs were taken? A. I did not make any examination then.

Q. So the only examination you made to determine whether there was any connection between the two fires was after the fire was out on the next day? A. The same day.

Q. But after the fire was out? A. Yes.

Q. Do you remember testifying in this court, in a former trial of this case, "*Question*: You examined the two fires for the purpose of trying to find out if one was connected with the other? *Answer*: My dear sir, the fire had extended to such an extent and had burned to such an extent that after the fire was teetotally out it would take

an expert to say." Did you so testify? A. I may have, yes.

Q. Well, if you did, how do you square it with your testimony now that you made an examination after the fire was totally out? A. Well, it is two years ago since then and a man is liable to forget a lot in two years. You have it there in print.

Q. Yes, but your recollection of what happened becomes more acute as time goes by. A. I am testifying to the best of my ability.

Q. Well, don't you say that two years ago—not two years, but several months ago—you testified that after the fire was out you testified that it would take more than an expert to determine whether there was any connection between the two fires, and you testified before this jury as to whether there was any connection between the two fires, and you said there was no connection. Now, how does that occur? A. When was the last trial I testified?

Q. On the 25th day of June, 1924. A. Well, that is about two years ago.

Q. Yes, but don't you see, you are remembering more than you remembered then?

Mr. D'Aloia: What page is that?

Mr. Lane: Thirty and thirty-one.

Q. You could not tell us a year ago after the fire whether there was any connection between the two fires, but now you seem to be able to tell us. What stimulated your recollection? Have you been talking to the prosecutor? A. No, sir.

Q. Have you been talking to Mr. Slutsky or any representative of the prosecutor's office? A. No, sir.

Q. Or with any representative of the insurance companies? A. No, sir.

Q. Well, then, I ask you what it is that has stimulated your recollection so that you can now say, as an expert, from an examination you made after the fire, that there were two separate and distinct fires, and no connection between the two, when in June, 1924, you told us that the fire had burned to such an extent that after it was teetotally out it would take more than an expert to tell? A. Well, I was not talking to anybody. I never mentioned it.

Q. Well, then, I am asking you for some explanation as to why you testified to one thing now when you said you could not do it in June? A. Well, if I testified so at that time and I testified different now, it is through an error; it is not intentional.

Q. Well, I understand it is not intentional. A. I do not class myself as an expert.

Q. Well, but you have told the Prosecutor of the Pleas, in response to his question, that you made an examination after this fire and from your examination after the fire you could say there was no connection between the two. Now, that you have said, and I am only directing your attention to the fact that in June, 1924, you said that after the fire was teetotally out it would take more than an expert to tell that, and I am wondering why, as an expert, you testify as you do now.

The Court: Did he testify as to whether or not it was distant or whether they were connected?

Mr. Lane: From an examination after the fire, he said he could not tell.

A. Is that the words there?

Q. I have read you exactly what you said. All right. I will pass to another thing. When you came to this fire, how far away were you when you knew there was a fire? A. How far from the fire, you mean?

Q. Yes. A. Why, as we got probably within fifty or seventy-five feet of it, we could see the flames inside.

Q. Well, now, it is about 150 feet, wasn't it, or 200? A. Well, somewhere thereabouts, probably; somewhere just as we got around the bend.

Q. And then what did you see? A. Well, I see burning inside in the interior of the building.

Q. Well, you saw more than that, didn't you? The building was a mass of flames, wasn't it? A. Yes, quite some flames.

Q. And the fire was coming out of the windows, wasn't it? A. Not exactly, no.

Q. And there was a great deal of smoke connected with the fire, wasn't there? A. There was, certainly, some.

Q. Well, now, a great deal is different than some. There was a great deal of smoke connected with this fire? A. There always is with a fire.

Q. Well, wasn't it particularly so with respect to this fire because of the nature of the material that was burning? A. Well, I would not say; I could not.

Q. Do you remember testifying at the last trial, "*Question*: It was a fire in which there was a lot of smoke involved? *Answer*: A lot of smoke; intense." A. Yes.

Q. Now, wait a minute. Smoke and heat, both. Do you remember that? A. Yes.

Q. Then, there was a lot of smoke? A. There was quite some smoke.

Q. And it was a hot fire, wasn't it? A. Yes.

Q. And the flames were bursting out of the windows, weren't they? A. Not exactly.

Q. Well, then, how nearly? Tell us what they were doing. A. Well, they were so hot it was snapping the glass and breaking it.

Q. Well, the building was full of smoke, at any rate, wasn't it? A. Yes, to some extent.

Q. Now, was it filled with smoke to some extent or was it filled with smoke? A. It was filled with smoke.

Q. Well, you drew a distinction. I didn't. You drew a distinction between filled with smoke and filled with smoke to some extent. What do you mean? A. Well, it was not filled to such an extent that you could not enter it.

Q. Well, you testified at the last trial, page 47, "What did you find in the way of burning, was the building filled with smoke? *Answer*: Certainly, it was." That was true, wasn't it? A. Yes.

Q. And the flames were shooting right up to the windows, weren't they? A. Yes.

Q. And you had to burst into this flaming, smoking building; that is so, isn't it? A. Yes, we burst in the door.

Q. And yet you told me that you saw, when you burst into that flaming, smoking building, two distinct and separate fires; is that right? A. Yes.

Q. Well, just how could you see them through this—in this flame and smoke; how could you tell whether there were two separate and distinct fires or not? A. Simply by looking.

Q. Well, did you say so because when you burst into this flaming, smoking building, a flame there and a flame here; is that the reason why you say there were two separate and distinct fires? A. Yes.

Q. Well, don't you know that when a building is burning on the inside, it does not all burn at the same time? A. I certainly do.

Q. Well, then, tell me how it was that you could tell that, simply because in this smoking, burning building that there was a space between the two separate fires? A. There was no connection between them.

Q. Well, how could you tell, between the smoke and the flames, whether there was any connection or not? A. I could see.

Q. You could see through the smoke and flames what? A. Fire.

Q. Yes, fire, and because you could see between the smoke and flame, one flame here and another flame there, you said there was no connection between the two. How could you see through the smoke? A. You can see through smoke.

Q. And you saw through the smoke that there was no connection? A. Firemen have to see through smoke.

Q. Well, I don't believe—well, I will withdraw that. Did you look at the roof? A. Yes.

Q. Did you see whether the roof had burned or not? A. I did.

Q. Had it? A. Yes. The roof was burned.

Q. Did you look at the roof and see that the beaver boards had burned in places? A. I did.

Q. And you saw they had burned in places? Yes or no? A. They had, some.

Q. And I suppose if a flaming beaver board dropped; that is, from a roof, and dropped on stock it sets fire to it? A. Very apt to.

Q. Well, did you look on the roof to see where this second fire was or was blazing, whether the beaver boards on the top of the roof were off or not? A. No, I don't think I did.

Q. Well, don't you know that there could be a connection between the two fires on the beaver boards on that roof? A. There probably could.

Q. And there might be any number of fires in there with apparently no connection started from these blazing beaver boards dropping from the roof, isn't that so? A. You see, where there is sparks or burning timbers, you ignite anything underneath.

Q. Well, then, I ask you again how it is that you can tell us that there were two fires of different origin, or if you really meant to tell us that? A. From my inspection and observation after arriving at the fire it appeared so to me.

Q. Well, what connection did you expect to find between the two fires? A. I had not just exactly figured what I would expect.

Q. You tell us now that there were two separate and distinct fires. You have told us, also, that the beaver boards on the roof had dropped. You have told us, also, that if the beaver boards on the roof dropped they would set fire to the stock underneath where they dropped, and you told us you made no inspection to tell us whether the beaver boards above the second fire had dropped. Now, I asked you whether there was no connection between the two fires and what connection would you expect to find that there was between them— A. I would like to ask that those questions be put

plainly so that I can understand just exactly what you mean.

Q. You have told us, as I understand it, chief, that there were two separate and distinct fires. I understand—the inference, at any rate, of your testimony is that the tw oseparate and distinct fires were of separate and distinct origin; is that right? A. To the best of my ability.

Q. I am not trying to test your ability. Now, what I want to know is, you say you base that upon the fact that there was no connection between the fires. I want to know what connection you would expect to find between the fires if they were of the same origin; what kind of a connection was absent? A. I cannot quite—

The Court: Why did you say there were two separate fires?

The Witness: I do not quite understand yet, I must acknowledge.

Q. Well, chief, I tried to make it as plain as I could. You told us there might be a connection between the two fires by way of the roof; you told us that you made no such inspection, and yet you testified there were two separate fires, and I ask you how you can tell us when you made no inspection. A. Not until the afternoon of the same day.

Q. Well, now, what inspection did you make the afternoon of the same day to determine that? A. I went through the building and inspected the interior of the building.

Q. What did you find then? A. I found, simply, that the burned parts were very much greater on certain places than others.

Q. Well, that is to be expected? A. Not always.

Q. Not always, but you do not mean to tell us that a fire in a building burns regularly? A. No, I don't.

Q. Well, it is just the reverse of that? A. Because there are no two fires alike.

Q. And this was a kind of stock, this thing that was burning was a stock of what? A. Why, it was a belting of web, I believe, or common ordinary webbing.

Q. Rubber? A. Not rubber. It was some rubber.

Q. Now, chief, I understand you to say that on the afternoon of the same day you made this inspection ? A. Yes.

Q. Are you sure about that? A. Well, I went there on a Sunday afternoon.

Q. What? A. I went there on the sixth of January, in the afternoon. The fire was in the morning and I went there in the afternoon.

Q. Now, do you remember testifying in the other case, after having been asked as to when you went to the fire first after the fire was out? You said, "*Question*: You did not go to the fire until the twenty-second of February? *Answer*: I went there on the seventh of January to see if I could enter, but the door was barred up and the windows were barred up, and I did not want to break in." A. I may have said that.

Q. Well, is that true? A. It may be.

Q. Well, then, if that is true, when did you make your inspection to determine whether there was any connection between these two fires that you were telling us about a few minutes ago? A. I made the inspection on Sunday afternoon. The fire occurred in the morning.

Q. That was January seventh? A. January sixth.

Q. And you made your inspection on January seventh? A. No, sir; on the afternoon of January sixth I was there.

Q. On the afternoon of the sixth of January? A. Yes.

Q. And then was when you made your inspection? A. Yes.

Q. All right. What did you find on that inspection that would help you to determine as to whether there was any connection between the two fires? Now, by the way, are you certain the fire was the morning of the sixth? A. Yes, to the best of my ability, January sixth.

Q. Now, the fire was on a Saturday night, wasn't it? A. It could not be on a Saturday night when it was 12:17 A. M.

Q. All right. Then it was on the morning of the seventh? A. Yes.

Q. All right. It was on the morning of the seventh; is that right? A. Not on the morning of the seventh.

Q. Well, it was the morning of the sixth or seventh. (Not answered.)

(Adjourned until tomorrow, Tuesday, March 30, 1926.)

SECOND DAY.

Tuesday, March 30, 1926.

Appearances as before stated.

Trial continued pursuant to adjournment.

JAMES J. SHEEHAN resumes the stand.

Cross examination (continued) by Mr. Lane:

Q. Chief, when did you first go to the fire—when you first got to the fire, which part of the building did you go to? A. I went around to the south side, on the Joyce Street side.

Q. And what led you to go to the Joyce Street side instead of the other side? A. Because there was a high wind blowing. I didn't want to break in the front of the building to create a draft.

Q. It was a very windy night and very cold? A. Extremely cold; extremely.

Q. How long did you work—or what did you do when you got to the Joyce street side? A. Why, I burst in the sliding door with a battering ram to get inside of the building.

Q. On the Joyce Street side? A. Yes.

Q. Will you point to the door that you first went to? A. This is the door, right here.

Q. Now, before you burst that door through, how long did you work there on that side of the building? A. I worked probably in the neighborhood of two or two and a half hours.

Q. Did you go on the other side? A. Yes, there was another company on this other side on a second alarm.

Q. What time did they come? A. I just cannot recall that.

Q. In the testimony which you gave in the other trial, if my recollection serves me right, you said the second alarm was 12:45. A. Well, it must be so, if it is there.

Q. Page 36. "*Question*: When was the second alarm—

Mr. Lane: May it be conceded by the State when I read this, calling the attention of the prosecutor to the page which I am reading, that I am reading correctly?

Mr. D'Aloia: Yes.

Q. "*Question*: When was the second alarm sent in? *Answer*: About 12:45, somewhere thereabouts, as far as I can remember. I am not going to pin myself down to the minute there, because after working previous to sending in the second call and going across the street, I don't just exactly know the particular minute or number of minutes." It was about 12:45, was it? A. Well, I suppose; if it is there it must be.

Q. All right. At that time when you sent the second alarm in you were working on the Joyce Street side and when that alarm was responded to the company which responded to it went to which side of the building? A. The east side.

Q. That is the Valley Road side? A. No.

Q. Which side? A. The east side would be the one adjoining the ice house—ice house plant; probably it does not show there.

Q. Well, this side here? A. The east side would be just on the other side over here.

Q. Opposite the Joyce Street side? A. Yes, on the opposite side.

Q. And did you go over there to that side? A. I stationed a company there to protect the adjoining property.

Q. Before you battered in the door did you put a line of hose in? A. We tried to, yes.

Q. Where? A. From the Joyce Street side.

Q. Through the window? A. Yes, through a window.

Q. Well, you got the hose in? A. Not exactly, we didn't get it in to be of no advantage.

Q. Well, you put water through it? A. Yes.

Q. How long did you continue to put water through that hose before you battered in the Joyce Street side? A. Until we got the door broken through.

Q. And then how many lines of hose did you shoot through the opening that you made by the battering? A. As near as I can recall, one line.

Q. How many lines of hose altogether during the progress of that fire were used on the Joyce Street side? A. Why, a portion of the time I think there were two; only a part of the time, and part of the time one.

Q. And how many lines of hose were used on what you call the east side? A. One.

Q. And are those all the lines that were used at that fire? A. That is all.

Q. Of course, when you shoot a line of hose through a window and put water through that hose and that water happens to strike blazing material, it is likely to detain that blazing material for a moment, isn't it, at any rate? A. Yes.

Q. And after the hose is taken off the material may still retain sufficient life to burst out in flame; that is so, too, isn't it? A. Well, it all depends on the material that is in flame.

Q. Well, you know you may play a hose on fire for a considerable length of time and take the hose away and afterwards the flame will break

out again? A. Well, only under certain conditions.

Q. Well, when you have a slow burning material such as was involved here, if you put a line of hose on a batch of that material and keep it there for a little while and withdraw the hose it is liable to break out again, isn't it? A. It may burst out a little again.

Q. Well, if it burst out a little again it is likely to burst out a whole lot unless you catch it again? A. Well, we would catch it.

Q. Yes, but if you are not there to catch it it is likely to burst out and start another fire? A. It may spread, yes.

Q. And you had one line of hose covering the entire building inside? A. The entire building.

Q. I will withdraw it. You had one line of hose for one side of the building and one line for the other side after the second alarm went in covering this entire fire; that is right, isn't it? A. Yes.

Q. Do you remember what pressure you had? A. No, I know we had good pressure; sufficient pressure to—

Q. To what? A. To extinguish the fire.

Q. Well, the higher your pressure and the better your pressure the longer your water carries? A. By all means, yes.

Q. And the longer your water carries in a solid column, too, isn't it; is that right? A. What is that?

Q. And the further your water carries in a solid column? You know what I mean. A. No, I don't.

Q. Without spreading. It shoots right out of the hose solid? A. Yes.

Q. And the higher the pressure the further that goes, doesn't it? A. Yes.

Q. And the higher the pressure when that column hits a flame, the quicker it extinguishes the particular flame, too, isn't that so? A. Yes.

Q. But the less it affects anything surrounding; that is so, too, isn't it; in other words, you can, with that solid column, make a complete path through the flame if it is burning on the floor? A. Where the stream hits it, if there is pressure enough.

Q. And you say you had a very good pressure here, is that right? A. Yes.

Q. And I suppose between the two walls of this building there is how many feet?

Mr. Lane: It is in evidence, do you know, Mr. D'Aloia?

Mr. D'Aloia: I think it is forty-six or forty-two feet.

Q. Well, a space of forty feet is not very far for a column of water coming out of a hose under heavy pressure, or good pressure, to carry in a solid column, is it? A. It all depends on the number of lines that is in.

Q. Well, I don't know as the number of lines has anything to do with water coming out of one line. I am talking about water coming out of one line, under good pressure, forty-five feet is a very small distance for that hose to carry before the water begins to spread? A. Yes. It will reach forty.

Q. Yes. It will reach one hundred and forty feet without spreading to any great extent if it is under good pressure? A. Well, what do you call a good pressure?

Q. I am using your pressure; you said you had a good pressure. A. Yes, I had a fair working pressure.

Q. Well, even a fair working pressure of water will carry for a great deal longer distance than forty feet in a solid column, won't it? A. It probably will.

Q. I suppose there was considerable excitement about this fire when you first got there and had to batter in this door, wasn't there? A. The same as usual at any fire.

Q. Yes, everything was being done just about as rapidly as it could be done? A. Yes.

Q. Did you notice whether your column of water was directed at any time towards the rafters? A. Yes, I think it was.

Q. Quite a blow is struck by a column of water striking a solid object at a distance of twenty feet or twenty-five feet; that is true, isn't it? A. Yes, in striking a solid object, yes.

Q. Well, if this struck these beaver boards, which were tacked on or nailed on to these rafters, it is quite likely to rip those beaver boards off if they were not already falling, isn't that so? A. I don't think that is so.

Q. You do not think that a column of water— A. If the beaver boards were nailed on properly.

Q. Do you know what a beaver board is? A. Yes.

Q. And you know that there is a void between the beaver board and the roof construction; the beaver boards are nailed over the rafters and there is an empty space back of the beaver boards; you know that? A. Yes, I do.

Q. Well, do you mean to tell me that a column of water, under good pressure, striking one of those beaver boards in the middle, is not going to

split that beaver board and bring it down? A. I don't think so.

Q. Do you know what the force of a column of water at that distance is, mathematically? A. I don't.

Q. Well, if those beaver boards were already burning and had become loosened by reason of the fact that they were burning, this column of water would, without doubt, bring them down, wouldn't it? A. That might be.

Q. And you have already testified, of course, if they fell on inflammable material another fire would start which you would not be very likely to catch immediately with one column of water which would be at but one place at once. Now, you said, I believe, in your direct examination, that there was very little fire around the boiler? A. Yes.

Q. Well, now will you look at this photograph, State's Exhibit S-8, and tell me whether that photograph is a representation of what you call little fire? A. No. Of course, this photograph, as far as it goes is all right. This was taken I do not know just when; sometime after the fire.

Q. Well, we will assume it was taken when it was testified to, about May, I think. The natural result of that being taken so late would be that the ravages of the fire would be cleared up rather than accentuated; isn't that true? A. Yes.

Q. I am asking you whether that is a representation of what you call a little fire around the boiler? A. Yes.

Q. Well, now, I direct your attention to the fact that right over the boiler— A. By the side of the boiler.

Q. Yes, by the side of the boiler and above the boiler the beams are all charred. A. They had

no protection there. Therefore, there was nothing there but the shingle nailed on fir strips at that particular point.

Q. Well, there had to be a fire there? A. Yes.

Q. Right within a foot and a half, as I gather from this photograph, from the boiler alongside of the wall, also indicates that fire has been there, doesn't it? A. Yes, there was some fire there.

Q. And I direct your attention to the fact that this wall right opposite the boiler seems to be charred and scarred and that the door, which is directly opposite, or directly contiguous to it, joins on with it, does not seem to be scarred at all, or charred; that is a fact, isn't it? A. Yes.

Q. Now, that is something that you very often find in a fire, isn't it, that one part of a wall will be charred and burned and part of the wall next door to it— A. A very common thing.

Q. Fire jumps from one place to another, is that right? A. Yes.

Q. And fire goes up usually, does it not, if it can? A. General rule, if it has anything to go up on, but if it has not, it will come down.

Q. Yes, but wood it can go up on? A. Yes.

Q. Now, I direct your attention to the fact that in this photograph, S. 8, it appears that right next to this boiler the base is burned and charred and as you go up it spreads over a wider territory, so that when you get up to the studding, about eight feet above the top of the boiler, you find that the studding is all charred; that is a fact, isn't it? A. Yes.

Q. Now, directing your attention to the fact that directly underneath this charred studding and right next to the base, which is burned, there is a door that shows no trace of flame at all. Now, keeping those things in mind, does it not indicate

that it is very probably that there has been a hot fire right near the base of this boiler which set fire to the baseboard right directly opposite the boiler and that the fire just went up and spread out, leaving that door wholly untouched? A. I don't think so.

Q. Well, now, will you tell me why not? A. Why, in the first place, there was not anything that I could see or find at the time close enough to the boiler to create the fire.

Q. I am asking you now to confine yourself to elements I have confined myself to, to wit, what appears from that photograph. I am only asking you whether the way that photograph appears does not indicate that there is a probability, or possibility, rather. I am not asking you for any outside information. A. It may be probable.

Q. Well, now, fire you have said, goes up and if you find two sticks of wood standing together of comparatively close proximity and over those two sticks of wood—if one of those two sticks of wood is burned and the other is not touched—and over those two sticks of wood you find this wall is burned, now, the natural inference is that the fire started at the base of the spot which runs up and ran up that spot under a draft and spread out, isn't that so? A. Yes.

Q. And that is what would appear from that photograph, isn't it? A. That is the way your photograph looks.

Q. Now, there is still another way that that might possibly happen and that would be for the fire to start originally in the rafters, isn't that so? A. I don't think so.

Q. And then slowly eat its way, or rapidly, eat its way down? A. No, I don't think so.

Q. You don't think that is a possibility? A. Well, it might be a probability.

Q. Well, it is a possibility, at any rate; in fact, it is a pretty hard thing to account for the vagaries of flame, isn't it? A. Yes.

Q. Have you told us where you thought the hot fire was? A. I don't remember.

Q. You don't remember? A. No.

Q. Well, can you tell me now where the hottest fire was? A. Why, it was extremely hot throughout the whole building; that is, the whole front of the building from that doorway there all to the office.

Q. Exactly. Where it burned the most. A. There was extreme heat.

Q. Do you know where it burned the most? A. It burned mostly back of the office and on the east side of the building.

Q. On the east side of the building? A. Yes.

Q. That is on the side opposite the Joyce Street side? A. No, the other side; just the reverse from Joyce Street.

Q. Well, the roof was in part burned off, wasn't it? A. That was on the east side.

Q. Well, about where as to that diagram? A. I think it was somewhere right in here.

Q. On the east side? A. Yes.

Mr. D'Aloia: Indicating what room?

Mr. Lane: Indicating the stockroom.

Mr. D'Aloia: Well, room C.

Mr. Lane: Well, he pointed to the stockroom.

Q. To what extent was the roof burned? A. Through and through.

Q. What? A. The roof was burned through.

Q. Yes, but extending how far into the building? A. Why, at that particular point there was nothing but shingles on firring strips and the rafters, and just what the actual size of the burned space was, I cannot say.

Q. Well, was it about the center of the building that this hole was through the roof? A. A little, I think, to the rear.

Q. But approximately the center of the building? A. Well, I would say so.

Q. I don't want you to say so. I want your recollection. A. Well, I cannot just recollect that.

Q. Well, you said in the former trial, on page 37, "*Question*: Can you show me on that diagram what portion of the roof was entirely burned off? *Answer*: I don't know as I can. *Question*: You told us where the fire was. *Answer*: The roof, yes, the roof was burned off in along here. *Question*: Will somebody mark that? *Answer*: This adjoins the Standard Plate Ice Company's property." Where is that? A. Just about where I pointed out.

Q. "That is to the north? *Answer*: Yes. *Question*: The north wall and extending out of the north wall for how many feet? *Answer*: I would call this the northeast wall. *Question*: I think you are right, that is about how many feet out, extending through that wall, burned through. The Court: Mark it. *Answer*: I wil tell, Judge, it is a pretty hard thing for me to say, but there was quite a whole portion of this northeast side there. *Question*: About the middle of the building? *Answer*: Well, a little better than the middle, very close to the middle of the building." Is that correct? A. It must be, if it is there.

Q. And you further state, page 37, "*Question*: Well, how close to the Joyce Street wall of the building did you find the roof hole come, do you know what I mean? *Answer*: Why, it came to almost the center of the roof." That is correct, isn't it? A. Yes, it must be, if it is there.

Q. Well, after these two years, chief, have you any recollection, any present recollection, as to what did occur at this fire, or are you wholly depending upon what I am reading to you? A. A man having one hundred and one cases of the kind to remember, it is a pretty hard thing to remember it in about twenty-seven months, and it is twenty-seven months or more since this occurred—a hundred and one things on a man's mind.

Q. I concede that and I do not criticise you. All I want to know is the facts. Now, the south side of the building is what you call the Joyce Street side? A. Yes.

Q. How much of the fire was there? A. Well, there was quite some fire—the material inside—not so much through the building.

Q. The floor was untouched, wasn't it? A. Yes, untouched.

Q. And would you expect to find, where there was a hot fire of boxes, including this fuel with the stuff that was in this building burned for any length of time where the boxes were sitting upon the floor without scorching the floor? A. Yes, I would.

Q. There were portions of this building where the floor was touched. What portion of the building was it that the floor was scorched and touched? A. Well, in the neighborhood of where those toilets are the floor was burned through to some extent.

Q. That is about where the boiler was? A. No. The boiler was in front.

Q. Well, now, this is the boiler and here are the toilets. Now, isn't it a fact that the floor was scorched all around in that immediate neighborhood? A. Yes—it was not in that neighborhood, a portion of it.

Q. Well, a portion of it, and the floor was untouched on the Joyce Street side, although there was a hot fire in these boxes on the Joyce Street side, is that right? A. Yes.

Q. Can you, by looking at State's Exhibit S. 6, tell me what that represents, what portion of the building that represents? A. Well, I think that represents the northeast side, as near as I can judge on the pictures; on that side (illustrating).

Q. Over here? A. Yes.

Q. There was a hot fire there, wasn't there? A. Yes.

Q. Now, will you tell me, if you can tell me, what State's Exhibit S. 7 represents? A. I do not remember just what this was.

Q. Isn't that the Joyce Street side? A. It probably is.

Q. Well, now, in looking at that photograph you can see that there is not only the floor untouched, but that there are boxes standing in close proximity to each other which are likewise untouched; that is true, isn't it? A. Yes.

Q. It could not have been a very hot fire along that wall to leave those boxes untouched as well as the floor unscarred? A. It would all depend upon the amount of water that was put on that particular place.

Q. Can't you tell by looking at that photograph and those boxes that those boxes had never been touched with flame; that those boxes were not

boxes that had been burning and water had hit them—doesn't it show on the face that they were never touched with flame? A. There were not very many boxes in that place which were not touched by flame; they were touched more or less.

Q. What? A. They were touched to some extent.

Q. Well, do you think, looking at that, as a fireman, that those boxes standing on the floor is any indication of being touched to any extent? A. Well, I cannot just see what the extent was.

Q. Well, irrespective of that, though, you said there was a hot fire at that point? A. Yes, there was.

Q. Now, looking at that photograph again and observing the lower part of the floor, the lowest part of the photograph, let me particularly draw your attention to this little bench on the right-hand side of the photograph. A. Yes.

Q. And then drawing your attention to the upper part, isn't it quite clear that whatever fire struck that portion of the building came from the top and not from the bottom at all? A. I don't think so.

Q. Well, the bottom does not show any indication of burning, does it, and the top does show an indication of burning? A. Yes, there is a space there which shows an indication of flame, if I can see.

Q. Yes, that is the top. A. Yes, right here (illustrating).

Q. Yes. Exactly. Now, show me any part of that photograph on the floor, or anywhere near the floor on the walls, that shows any indication of any burning. A. I am not a judge

on photographs and, as far as the looks of it goes, I cannot just—

Q. You cannot see it? A. And nobody else.

Q. I can't, either, because it is not there. On the top, however, as to this eight feet—it may be six, eight, ten—but on the top of the wall, above that plate, there is a clear indication of burning that nobody can be mistaken about; that is so, isn't it—windows knocked out and charred wood; isn't that so? A. Yes.

Q. Well, now, chief, can't you tell, as a fireman, that that is a clear indication that whatever fire hit that part of the building hit it traveling about? A. Not exactly; no. A fire is a peculiar thing, and, as I said before, I have forgotten just the certain things that occurred at that fire, and, from those pictures, no man can judge.

Q. You will say—taking State's Exhibit 6 and State's Exhibit 7—you will say that from those pictures no man can judge where there was and where there has not been fire—do you mean that—assuming that they are correct representations and they are the State's Exhibits? A. The difference there, just that one side was covered with beaver board and the other side was not.

Q. I do not quite understand that. A. This side of the building was sealed.

Q. Yes. A. With beaver board.

Q. Yes. A. This one side.

Q. Well, what about it? A. Well, the beaver board will resist more heat and fire than a shingle or a piece of wood.

Q. And where beaver board resists fire and the fire is going through the rafters, the fire will travel in the space between the beaver board and the roof along the rafters for a considerable

distance before it breaks out; that is so, isn't it? A. Not always. It may.

Q. You say beaver board is slow burning? A. I do.

Q. All right. The ceiling is sealed with beaver board and above the beaver board there are rafters, and there is a fire in one end of the building in the rafters and that fire is liable to travel along those rafters hemmed in by these beaver boards and it is likely to go through 100 or 150 feet from the beginning? A. Exactly.

Q. And when it came through and it shows on this photograph what occurred and that this fire on the floor was hot because it came from the rafters— A. No, it didn't come from the rafters. It come from the material and cases on the floor.

Q. How did it get to the material and cases on the floor? A. I cannot say.

Q. Well, one way it could have gotten to the material and cases on the floor is from the rafters and come on down. A. It could in other ways, too.

Q. And if the physical condition is such that the floor is unscarred, the boxes standing on the floor unscarred, but that near the ceiling the wood is all burned, it is a pretty clear indication that it came through the rafters; isn't that right? A. It could come from the material on the floor and go through the rafters and wooden shingles.

Q. But if you had the material on the floor burning, you wouldn't expect one box standing on the floor to be burned—well, you wouldn't expect the floor to be covered with this material, and no indication shown upon the floor, would you, if the fire was there? A. I would expect

the material to be burned and from the material, as I say, to the timbers and to the roof.

Q. Now, does this photograph, Exhibit S. 7, give any indication whatever of that? A. Well, as I say, I cannot judge from those photographs. They are very misleading to the average man.

Q. Now, I understood you to say yesterday that you went in this building on the afternoon of the fire? A. Yes.

Q. Do you remember testifying in the previous trial, page 50, "*Question*: You did not go on the fire until the twenty-second of February? *Answer*: I went out there on the seventh of January to see if I could enter, but the door was barred up and the windows were barred up and I didn't want to break in. *Question*: Then, you went on the second of February, 1924?" That is a mistake. It should be the twenty-second. "*Answer*: Yes, sir," and on 56, "*Question*: When did you first visit the inside of the building after the fire? *Answer*: The following afternoon; the fire occurred on Sunday morning at 12:17 and I visted that very location in the afternoon about 5:30 that same day. *Question*: But that day you couldn't get in? *Answer*: No. *Question*: I am asking you, chief —please don't misunderstand the question—when was the first time you visited the interior of the building after the fire; I understood you to say it was the twenty-second of February. *Answer*: I said that was the day I was inside the building when both pictures were taken. *Question*: Very well, then, suppose you answer this question—what was the first time after the fire that you visited the inside of the building? *Answer*: I

can't recall the date; I can't just tell you. *Question*: How long after the fire? *Answer*: I tried to visit it about a week after, I think." Do you remember testifying that way? A. Well, if it is there, it must be I testified.

Q. Now, do you say that you actually went inside of that building? I do not mean visited the location, that you actually went inside of the building the afternoon after the fire? A. The Sunday after the fire I went inside of a portion of that building, yes.

Q. You went inside? A. Yes.

Q. And your recollection is quite distinct with respect to that? You were present when the photographs were taken, weren't you? A. Yes.

Q. Was that not only—so you are not looking at these photographs—pou saw what was taken at the time these photographs were taken? A. I will say yes. I think there were two or three gentlemen there who were at that time absolute strangers to me. They came to fire headquarters and I went with them. They told me what their errand was and I went down to the building with them.

Q. Now, won't you carry your mind back to that date, the twenty-second of February? A. I do not remember the date.

Q. Well, carry your mind back to the event. Do you remember when this photograph, Exhibit S-6, was taken? A. Do I remember as to when it was taken?

Q. Were you there when that was taken? A. Yes.

Q. You saw the camera pointed at the objects delineated on this photograph? A. Yes.

Q. Now, just take your mind back to that time and try to see what the camera saw. What do

you see that gave any indication of fire on the floor or fire in the boxes standing on the floor? A. Why, I seen a complete wreck of the building and contents.

Q. I know. That is very general. It was completely wrecked, but I am asking you when you looked at that Joyce Street side at which the camera was pointed, what you saw there that indicated a fire on the floor and in the boxes standing on the floor there? A. I do not remember.

Q. Well, don't you know you didn't see anything? A. What do you mean, anything?

Q. Anything that indicated a fire on the floor or in the boxes standing on the floor along the Joyce Street side of this building. A. Yes; I seen a whole lot of things.

Q. I am trying to get you to remember what you did see so I can see whether I see it in the photograph. A. I seen the bench and I seen some belting; I seen some cement, glue or rubber glue, little patches and a lot of light children's bags; I suppose they were school children's bags, lying on the bench.

Q. They were still lying there and they were not touched with fire? A. Some were and some were not; quite a number of them were.

Q. No. These materials lying on this bench; some were touched with fire and some were not? A. Yes.

Q. Is this the bench? A. I cannot say.

Q. You cannot tell? A. No.

Q. That material of which those boxes were made is very frail, isn't it? A. The boxes?

Q. Yes. A. I don't know just how frail it was; I cannot recall.

Q. Well, it was timber, wasn't it? A. No, I don't know as it was.

Q. What you usually use as kindling wood for furnaces? A. What, for making boxes?

Q. Yes, for making a fire. A. Well, if I was kindling a fire I would use kindling wood.

Q. Yes, but this material of which those boxes were made was just ordinary kindling wood? A. Well, it was probably half inch.

Q. You think they were half inch? A. I only surmise.

Q. Now, do you remember talking to Miss Ayers and Joseph H. Horne? A. I do, very well.

Q. After this fire? A. After the fire, yes.

Q. Do you remember Joseph H. Horne calling your attention to a newspaper article that appeared in one of the Newark papers? A. No, sir. Joseph H. Horne did not call my attention; Miss Ayers did.

Q. Miss Ayers did? A. Yes.

Q. Do you remember telling her and Joseph H. Horne that there was nothing suspicious about the fire? A. I told Joseph H. Horne—

Q. Did you or didn't you? A. No, I didn't say anything about suspicion.

Q. Do you remember testifying in the previous case, page 54, "*Question*: Didn't Joseph H. Horne call your attention to a newspaper article that appeared in one of the Newark papers in which this fire was suggested as a suspicious fire, and didn't you say that any statement to that effect was untrue and that you were not responsible for the newspaper article? *Answer*: Not at that particular time. *Question*: Well, Chief, at any time, I don't care what the time was. *Answer*: I may have at another time, yes. *Question*: And do you

remember when the other time was that you may have said that? *Answer*: No, I cannot just recall. *Question*: How long after the fire was it? *Answer*: Why, it was probably a week or two, somewhere thereabouts, but it was not Joseph H. Horne I made the remark to, Judge. *Question*: Miss Ayers and Joseph H. Horne were there? *Answer*: Joseph H. Horne was not there. *Question*: No, Miss Ayers was there? *Answer*: Yes, sir. *Question*: Then, it was to Miss Ayers the remark was made? *Answer*: Yes, sir;" do you remember testifying to that? A. I do not remember, but I must have testified if it is there, but I do not remember.

Q. Well, if you did so testify, and you did, it being stipulated that I am reading correctly from the record, that statement was not true? A. True to a great extent, yes. It was true as far as Miss Ayers was concerned.

Q. Well, the question was whether you made the remark and you said that you had not made the remark at the time stated by counsel, but you did make the remark at some other time; that is the effect of your testimony. Now, that was not true? A. Yes, it was true.

Q. Well, then, you did make the remark to Miss Ayers that there was nothing suspicious about the fire? A. Probably I did.

Q. Well, then, will you tell me why you told me a few moments ago that you did not? A. I cannot quite understand that.

Q. Well, you have told us, if my understanding of the English language is correct, two things, one that you did not make the remark that it was not a suspicious fire; second, that you testified at the previous trial—second, that you did make the re-

mark that it was not a suspicious fire. Now, your last statement is that you did make the remark. Now, which is correct? A. The remark, as I recall the question, was pertaining to an article that was published in the Newark Evening News?

Q. I don't care what the thing was about. The question directed to you was whether you had made the remark that it was not a suspicious fire. You told me first you had not. Now you tell me you had. A. Well, if it is in the previous testimony, I must have said so.

Q. Then I told you it was in the previous testimony and then I asked you whether if it was in the previous testimony it was true, and you said yes. Now, I am not so concerned, Chief, whether it is true or is not. I am asking you why you said one thing one time and another thing another time. A. Well, it is lack of memory.

Q. I will go back once more. What is your recollection as to whether you said it or you didn't? A. My recollection is that probably I did say to them I had no suspicions.

Q. That you had no suspicion? A. Yes.

Q. Now, that is your recollection today? A. It probably is.

Q. Your recollection cannot be probably. What is your recollection today?

The Court: Just a minute. Recollection as to what he said, or recollection as to his impression at the time of the fire.

Mr. Lane: No, recollection as to what he said.

Q. Your recollection may be that you probably said so, but I don't want any probable recollection. A. Well, I don't remember.

Q. Now, you don't remember. That is all.

Cross examination by Mr. Kessler:

Q. Do you remember talking to a man by the name of John Moran? A. I do not remember; what John Moran was that, please?

Q. Do you know more than one? A. Yes.

Q. Do you know John Moran who formerly worked for the Edison Company? A. Yes.

Q. Did you have a conversation with him about this fire? A. Not to any extent.

Q. Did you have any conversation with him? A. He mentioned it one or two times, that is all.

Q. And did he say to you that it is reported that you had stated that the fire had started in several places, and did you say to him, "That is not true, because I never said so"? A. I guess that is so.

Q. When was this conversation with Mr. Moran? A. I cannot recall, because I didn't keep any date.

Q. With reference to the fire, how long after the fire? A. Oh, I imagine it was just, as near as I can remember now, it was just previous to the case coming up here.

Q. That was some time in June? A. I cannot just say exactly what time it was.

Q. Well, the fire was in January and the case was brought sometime in June, and some time prior to June you did tell Mr. Moran that it was not a fact that the fire did not start in more than one place?

The Court: Well, is it a fact that he said that or made the statement?

Q. Isn't it a fact that you stated to Mr. Moran that the fire didn't start in more than one place? A. No, sir.

Q. Didn't you say a few moments ago that you did say that?

Mr. D'Aloia: No, that is confusing. He said he didn't.

Q. Didn't you say to Joseph H. Horne, when you answered the question that is reported you said that the fire had started in more than two places, that you said, "I never said so;" isn't that the answer you gave him? A. That is the answer, probably.

Q. So, you did tell Joseph H. Horne that you never stated that the fire started in more than two places? A. I can't remember.

Q. Now, do you know Mr. Grosso, the lawyer? A. I do, very well. He is town attorney.

Q. Have you ever had any conference with him regarding this fire? A. Never; never spoke a word to him about it.

Q. Hadn't you been in counsel with him previous to the last trial and haven't you been in conference with him recently as to the testimony you are going to give in this case? A. No.

Q. When did you last talk to Mr. Grosso? A. I don't really know when I did. It is so long ago I forget when I had any conversation with Mr. Grosso.

Q. Was it previous to the last trial? A. I never spoke to Mr. Grosso pertaining to the case.

Q. Isn't it the practice of the fire department when you are subpoenaed in a case that you talk to your counsel?

Mr. D'Aloia: I object.

The Court: Sustain the objection. The witness ought to be given time and place.

Mr. Kessler: I think we have a right to examine this witness to any conversation he may have had.

The Court: Yes, but before you can examine him as to the conversation, fix the time.

Mr. Kessler: I think I did. Just previous to the last trial and just previous to this trial.

The Court: No. That is too indefinite.

Q. Have you had any conversation within the last three or four weeks with Mr. Grosso? A. No.

Q. With reference to the fire? A. No.

The Court: I will rule again that that is not the proper way to ask the question.

Mr. Kessler: I think that is sufficient time.

The Court: It is not.

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

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. Chief, when you approached the fire, what kind of apparatus were you on when you came to the fire? A. Chemical pumper and hose.

Q. And how many pieces of apparatus came to the fire on the first alarm? A. Two.

Q. What was the other? A. Hook and ladder truck.

Q. On which fire apparatus was the ramming rod? A. On the truck.

Q. Hook and ladder truck? A. Yes.

Q. Where did the hook and ladder truck stop when it came to the fire? A. I cannot really answer that question, because the probabilities are the truck stopped on Valley Road, or it may have pulled into Joyce Street. My attention was on other things, rather than to know where the apparatus stopped.

Q. You don't know where that truck stopped? A. I think the truck was sent on Joyce Street, as near as I can remember.

Q. You approached the fire in this direction, going toward Joyce Street? A. Yes.

Q. I think that you testified that you approached the fire within fifty or seventy-five feet? A. Yes.

Q. Where was the flame you first observed in the interior of the building? Take the pointer and indicate, please. A. Probably through here.

Q. You saw the fire in room E, is that right? A. I don't know just where room E is.

Q. Here is room E. You marked it yesterday. A. Yes, exactly.

Q. You came along the street? A. Yes.

Q. And you saw the fire here as you came along? A. Yes, as I came along Valley Road.

Q. How could you see the fire here through the solid wall? A. Because there was a large window fronting on Valley Road. There was a window right here.

Q. And which window was it that you smashed and put in a line of hose? A. Well, I can't just recall now which window.

Q. Well, how far from the entrance of the place where you used the battering ram? A. Well, we used the battering ram on this door.

Q. How far from this point? A. I cannot say.

Q. Was it below or above it? A. What do you mean?

Q. Was it below this driveway or entrance that you have mentioned? A. It was between that driveway and Valley Road.

Q. Do you know which one it was? A. I can't just say which one.

Q. Was it the window nearest Valley Road? A. I can't say positively.

Q. You would not point out which one it was? A. I don't think I could point out very well.

Q. How long had the hose been played on the fire through the window before you actually effected an entrance to this opening here? A. Well, just as soon as—I can't just say to the exact minute, but it probably was within at least ten or fifteen minutes.

Q. So that a hose had been playing on this fire at high pressure for ten or fifteen minutes at least before you effected an entrance? A. Well, I would not say ten or fifteen; that is pretty hard.

Q. Well, you did say— A. Well, probably it was; I said it was probably.

Q. And then when you broke down this door with your battering ram, did you use a different line of hose or bring in this hose? A. No, sir, I brought in another line of hose from Joyce Street.

Q. So that at that time there was two lines of hose playing on the fire, the one you brought through the window and the one you brought through this opening? A. Yes.

Q. Did you enter the building immediately after breaking in? A. Yes, I entered as far as I could.

Q. Who entered with you? A. A fireman by the name of Hoffman.

Q. And who else? A. I just can't recall who the others were.

Q. How many firemen did you have working with you on the first line? A. I had probably in the neighborhood of six or seven.

Q. When you broke into the door, what happened? A. I simply carried the line in and played it on the flaming material that was inside.

Q. Were you met with a very heavy black smoke? A. Most undoubtedy.

Q. And this was a solid smoke that came out, rubber burning? A. Well, I would not say it was solid.

Q. Well, it was very black? A. It was black, but I wouldn't say it was very black.

Q. Well, what would you say it was? A. Well, you say heavy black. As a fireman I cannot just get now your dope.

Q. Well, did you ever see any blacker smoke than came out of this fire? A. Yes, a whole lot blacker.

Q. And what material would create a blacker smoke? A. Well, I think soft coal or certain kinds of oil.

Q. Well, you are not called upon to put out soft coal fires. The fires you have been called to put out, do you know of any fire of a heavier black smoke than the one in this fire? A. Yes.

Q. What kind of material would create it? A. I found an oil fire which created just as heavy and black smoke.

Q. That fire was just as heavy as an oil fire with a heavy black smoke fire, is that right? A. Yes.

Q. And did you enter upright; did you walk into the place? A. Yes, at that particular entrance, that door.

Q. At this particular entrance did you enter upright? A. Yes.

Q. Did the men who carried the hose walk in? A. Now, I cannot say that, because I don't really know just whether they did or not.

Q. Well, if they didn't walk in, how do you think they got in? A. Well, they might have crawled in, as we commonly call it.

Q. They carried a hose and crawled in on the floor. Smoke has a tendency to rise, if there is any clearance it is on the ground? A. Yes.

Q. And didn't these firemen carry this hose crawling on the floor? A. They may have.

Q. Can't you remember? A. Well, a man cannot remember everything, remember everything as to what each man on a line of hose might do.

Q. As a matter of fact, the men went in before you went in and you could not walk in because of the density of the smoke? A. No, I wouldn't say that, because the hose probably came in about the same time I did.

Q. Well, the hose was used to clear out the atmosphere? A. Not always.

Q. Well, didn't it in this case? A. My dear sir, the custom—

Q. No, in this case didn't the hose come in first with the men crawling on their bellies? A. I do not recall that they did.

Q. You do not recall it? A. I do not recall it.

Q. At least, you were right there with them if you were not ahead of them? A. I imagine, yes.

Q. And then did you see the hose played on the fire? A. I seen water, I did not see the hose.

Q. Well, water coming out of the hose; you saw water played on the fire? A. Yes.

Q. And in which direction was the water being shot? A. Different directions, wherever the fire was burning; maybe it was there a minute and then maybe over here. A practical fireman will not keep his stream in one spot.

Q. In which direction was the water first turned? Will you point out, please? A. Right back in here and through here.

Q. How far was the hose carried in before the water came out of the hose, do you know? A. How far was the hose carried in?

Q. Into the building. A. Just inside of the opening of the door.

Q. And then they shot the water? A. Shot the water on to the flaming material.

Q. Which direction? A. Why, right through the entrance here and shot the water right out through here and on across through here.

Q. Where was your water first shot in? A. Right in here.

Q. Well, there is a wall here. A. There is a platform right here. There is an opening right here.

Q. You shot it through this opening? A. Yes.

Q. Now, when you came in here and you shot the water through this opening, you shot it right up straight? A. Well, I wasn't on the line.

Q. You were watching it? A. Yes, I was.

Q. And did you see through the smoke? A. I could see the flame.

Q. Could you see the flame through this dense, black smoke that oil produces? A. Yes.

Q. You could look through that smoke and actually see flames? A. If I did not, I would be a mighty poor fireman.

Q. You mean you saw flames or the glow of a flame; which was it? A. I seen the flame; the actual flame.

Q. Through this dense smoke? A. Yes.

Q. And where was it you saw the flame? A. Just as I pointed it out to you.

Q. Point it out again. A. Here was the opening and the fire was burning right through here, and also burning through here. Now, the stream of water was directed right through here and on to this material and stuff that was burning.

Q. Where were you standing when you saw the flame, as pointed out there, in room E and the flame in room C? A. Right back in here.

Q. Point it out. A. Well, as near as I can judge, I was standing right back here on a platform which extended across here, a loading platform, if I might call it.

Q. Will you mark, as best you can, where you were standing? A. Well, the probabilities are around in here.

Q. Can I choose this spot? A. Well, as near as I can surmise; I cannot say positively that was the exact spot, but it was somewhere thereabout.

Q. Mark that E. D. where you were standing. Now, at E. D., you looked up and saw the dense smoke and you also saw the flame in room C? A. Yes.

Q. Will you explain to me how you can explain

the flames in room C in the solid partitions around the toilets—

Mr. D'Aloia: That is the boiler pit.

A. This was a way ahead of the toilet.

Q. The boiler pit. A. Well, there was two openings there that you could see across to the east side wall.

Q. As a matter of fact, when you looked into this building into room E, which was the only room you could look into, it was one solid mass of flame, was it not? A. I won't say it was a solid mass. A double flame.

Q. Wnere in the room did you look in that you did not see flames before the hose was turned on the fire? A. Well, I can't just exactly say what part of the room.

Q. As a matter of fact, through the smoke and the glow of the fire, you could not tell what part was burning, isn't that so? A. Well, I could tell what part was burning, but, as I say, the fire had been burning in different places, but it is a mighty hard thing now just to point out on that map just the spot.

Q. Didn't you say yesterday or this morning that the building was one mass of flames? A. That is the front of the building was.

Q. This is the front of the building? A. Yes.

Q. And this is the rear? A. Yes.

Q. This front of the building was a mass of flames? A. Yes, right there.

Q. And if the building was a mass of flames, how could you tell us whether there was more than one fire? A. By seeing.

Q. Well, if it is a mass of flames, how can there be more than one fire? A. Well, from a fireman's point of view, it could be.

Q. Well, you are an experienced fireman. Explain it to this jury how that could be. A. Well, there could be one fire here and another fire over here.

Q. And yet the building a mass of flames? A. Yes; that is through here and over in here it could be.

Q. How long did you stay on the fire? A. Why, probably until 5:30 or about there, as near as I can recall.

Q. In the morning? A. In the morning.

Q. Didn't you leave the fire? A. I left when the fire was entirely extinguished and nothing was left.

Q. When did you leave the fire the first time after you got there? A. I left this fire to go to a house by invitation of an acquaintance for about fifteen or twenty minutes.

Q. When? A. I cannot recall the time.

Q. How long after you got to the fire? A. I can't just say how long.

Q. Was it half an hour? A. I think so, and quite some longer than a half hour, but I can't exactly say.

Q. Was it an hour? A. Yes, more than an hour.

Q. Was it an hour and a half? A. Yes.

Q. Two hours? A. Probably two hours; somewhere thereabouts.

Q. How long was it you left the fire after you turned in the second alarm? A. Probably just as quick as I could get a telephone connection and call number two company, I don't know just exactly how long that took.

Q. From where did you turn in the second alarm? A. I think I turned that in at a party by the name of Baldwin. I think she was a tenant who lived on Valley Road, if I remember right. That is my memory.

Q. Well, didn't you give it from a fire alarm box? A. I may have sent it in from a fire alarm box, too.

Q. Well, what do you mean you may have? Now, did you send in the second alarm from a fire box or did you go to somebody's house? A. Well, really, I cannot just recall, but I do know I went to this house.

Q. Where in the neighborhood of this fire was there a fire box? A. Right across the street.

Q. And can't you say whether you ran across the street to turn in the second alarm or whether you went to somebody's house to telephone in the second alarm? A. I can't just recall that.

Q. Do you remember approaching this fire alarm box and finding that you did not have the key to turn it? A. The key? No, I don't remember anything of the kind, because there is a key in the box all the time.

Q. You say that you may have turned this alarm in at some house, is that right? A. It is like a dream to me.

Q. The whole thing seems like a dream to you. A. Well, there is no wonder. As I said, if I could only memorize those things for two years.

Q. Whose house was it you went to turn in the second alarm? A. I cannot recall the owner.

Q. Whereabouts was it? A. Valley Road.

Q. How far away from the fire? A. Probably two or three hundred feet.

Q. Why would you go to somebody's house to telephone in an alarm when right across the street there was a fire box?

Mr. D'Aloia: That is objected to as argumentative.

The Court: Sustain the objection.

Q. Why was it necessary to go to the home of somebody in the neighborhood to telephone in an alarm?

Mr. D'Aloia: The same objection.

The Court: I understand the witness says he cannot say whether he turned it in from the box or this house, but he knows he went to this house.

Q. Did you go to that house on two occasions? A. I cannot recall.

Q. Was it the same house you went to get a cup of coffee? A. Yes. I had a cup of coffee and, in fact, I had a little better.

Q. What is that? A. You pretty near know now.

Q. Did you have more than one? A. No.

Q. One good one; it was one good one? A. I said I could have better than a cup of coffee.

Q. You said you did have better. A. I said I could have.

Q. Well, what was the conversation about? Didn't you say you had something better than a cup of coffee? A. I said I could have.

Q. Did you have it? A. Yes.

Q. So you did have it? A. Yes.

Q. Not only could, but did. I assume it was liquor. A. I don't know.

Mr. D'Aloia: I object.

Mr. Kessler: I think it is quite important.

The Court: I do not think we need go into that.

Mr. Kessler: I think it is quite important whether his recollection is good when he came back and examined the premises.

The Court: Well, if you think that way, proceed.

Mr. Kessler: Well, I won't take any longer on it.

Q. And it was after you had what you called it, without giving it a name, that you went back to the fire? A. Yes.

Q. And was it after that that you made this examination? A. No.

Q. When did you make this inspection? A. In the afternoon, that Sunday.

Q. Did you make any inspection there at all after the fire? A. Not immediately after the fire.

Q. Why not? A. Because I had a very important one to make that Sunday morning. If you want to know the facts, I had to go to New York. I had to go up to 42nd Street, and when I returned—

The Court: No. Never mind.

Q. No. I mean after you had the fire under control. A. That is what I was going to tell you.

Q. You had an important engagement to go to New York and that is why you could not make an inspection of this fire which was your public duty to do.

The Court: Do not answer that.

Q. Did you go back to the fire house between the time you first got to the fire and before you sent in the second alarm? A. I went back when I went back for good.

Q. I beg your pardon? A. I went back when I went to the fire house.

Q. And that was for good? A. Yes.

Q. Isn't it a fact that you left the fire at some time and went to the fire house and did not return to the fire? A. When the fire was under control I went to the captain and told him I was going back to headquarters for a few minutes and I told him the reason.

Q. What was the reason?

Mr. D'Aloia: I do not think that reason makes any difference.

The Court: Well, if you think it is important, very well.

Q. Why did you go back to the fire house? A. The reason I went back to the fire house was I had a cut shin; a scarred skin went up against a box and the blood was pouring down and I had to go back to put a bandage on, which was never asked before, and I am going to tell you that was one of the things.

Q. You were asked that question at the last trial. A. Probably I was; I do not recall.

Q. Wasn't this question asked and didn't you give me this answer, pages 58 and 59, "*Question*: On the night of the fire did you leave before the fire was over? *Answer*: No, sir; I did not; that is, I left there and came back to headquarters, if you mean that. *Question*: I mean, I want to find out if you stayed there all the time. *Answer*: I stayed there during the fire until the fire was completely under control and then I went to the captain and told him I was going back to quarters, because I had a reason, I was sick." Is that the reason? A. Probably it is.

Q. You did not say you had a cut shin at the last trial? A. I told you now, since you insist on knowing the reason. Now, that was the only reason.

Q. Do you know Mr. Baldwin? A. I know several Mr. Baldwins.

Q. Well, the gentleman I just spoke to.

Mr. D'Aloia: Let him stand up.

Q. Do you know that Mr. Baldwin? A. Yes.

Q. He was there at the fire? A. I don't know; I didn't see him.

Q. Did you see him at the fire house that morning? A. I do not recall.

Q. Didn't you, Chief, an hour or two after you were at this fire, return to the fire house and warm yourself at the radiator and Mr. Baldwin walked to the fire house and after that you returned to the fire? A. No, sir.

Q. That is not so? A. If I returned to the fire house, I went right upstairs.

Q. Within an hour or two after the fire? A. Not an hour or two.

Q. Answer my question yes or no? A. No.

Q. In which direction was the wind blowing? A. The wind was blowing, as near as I can judge, mostly from the west; northwest, possibly.

Q. Indicate, so that we are not mistaken on the direction. Was the wind blowing in the direction of this arrow that is northwest, I think? A. No, the wind was blowing more, if I can recall it right, the wind was coming this way, through here.

Q. That is south. A. No, sir, that would be

west, to my estimation. This building—if this is the front of the building—I should say to the west.

Mr. D'Aloia: That is right.

The Witness: Northwest.

Mr. D'Aloia: This arrow here points north. This is west, so that the chief says that this building facing this way faces west. This is east. That is why the chief sometimes called this the east side of the building.

Q. Which way was the wind blowing? A. The wind was blowing northwest, as near as I can recall.

Q. And the wind was coming down this way? A. I would not say no. It was blowing northwest.

Redirect examination by Mr. D'Aloia:

Q. Now, Chief, look at this photograph, S-4. There is a picture of the building showing the front. Now, here is a pencil, and I went you to put on that picture a mark where you saw the fire or through what part or aperture of the front of the building you saw the fire. If necessary, put a hole through the photograph. A. This would be the front of the building?

Q. That is the front of the building. That is the Joyce Street side, and you can see the door? A. Yes.

Q. Now, show me on the front. A. The fire was right along here.

Q. Now, will you tell me what windows in front you saw that through as your apparatus was coming along Valley Road? A. We see it in through this window in here.

Q. Well, why don't you put a hole through it? You saw it through that window? A. Yes.

Q. Now, did you see through any other door or window in front of the building? A. Not on the building.

Q. But where the hole is, you could see through that? A. On the side, yes.

Q. Now, I want you to show me on the Joyce Street side of this building, if you recall, what door you rammed through. A. This door right here.

Q. Put a hole in it? A. That is it.

Q. Now, you see this row of windows, 1, 2, 3, 4, 5, to 14, in a row on the Joyce Street side? A. Yes.

Q. Now, try to tell us, if you can, which window a line was put through, as near as possible. A. Well, I think that line was put through about the fourth window.

Q. The fourth window from the front? A. Yes.

Q. Now, I will put a hole through that with your permission. Your apparatus came along Valley Road? A. Yes.

Q. Toward Joyce Street? A. Yes.

Q. Will you mark that with an arrow showing the direction in which your apparatus was coming?

Mr. D'Aloia: You will agree, Mr. Lane? The apparatus was coming this way, along Valley Road toward this corner?

Mr. Lane: If that is what he said.

Q. Now, I show you Exhibit S. 6. There are no beaver boards on that ceiling, are there? A. No, sir.

Q. I show you Exhibit S. 7. That ceiling is all beaver boards? A. Yes.

Q. None of the beaver boards there in S. 7 appears to have been burned, is that right? A. That is correct.

Q. All the rafters in S. 6 are burned or charred, aren't they? A. Yes, the shingles also.

Q. Now, shortly after the fire there was an article that appeared in one of the newspapers. A. The Newark Evening News, I think the following Monday afternoon.

Q. And that article attributed certain statements to you.

Mr. Lane: I object to that as not proper redirect and immaterial, incompetent, and not binding upon us as to what appeared in any article.

The Court: It was brought out on cross examination and I will allow him to refer to it on redirect.

Mr. Lane: All he was asked on cross examination was whether he did not make a direct statement to Miss Ayers.

The Court: Well, I am not going to allow a reference to a newspaper. Somebody made a reference. I think Mr. Kessler did. I will allow the question.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Q. Now, do you remember Miss Ayers and Joseph H. Horne calling your attention to the article? A. I remember Miss Ayers.

Q. Calling your attention to the article? A. Yes.

Q. Now, what did she say to you and what did you say to her?

Mr. Lane: I object. It is immaterial and incompetent and not binding on us, and hearsay.

The Court: I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

The Court: Was Joseph H. Horne there?

The Witness: Not at that time; no, sir; she was alone.

Q. Well, did you have a conversation with Joseph H. Horne? A. In his place of business, pertaining to the amounts of insurance loss and so forth, I did, and that was all, and I told Joseph H. Horne—

Mr. Lane: No.

Q. Don't tell us what you told Joseph H. Horne. At the time you spoke to Miss Ayers was Joseph H. Horne there? A. No, sir; not first off.

The Court: What do you mean?

The Witness: Miss Ayers called at headquarters to have a conversation with me pertaining to this article that appeared in the Newark Evening News, and asked me certain questions.

Q. And you answered them? A. Yes.

Q. She asked you questions and you answered them about that article? A. Yes.

Q. Now, did Miss Ayers ask you—

Mr. Lane: I am going to object to this at this time before you go one moment further, because the question apparently is being put in a leading form. It is getting in the jury box the conversation that the prosecutor hopes to get in, in a leading form, and if it is permitted in that way I shall move a mistrial.

The Court: I do not know what the question is.

Mr. D'Aloia: I insist I have a right to ask this question.

The Court: Ask it.

Q. The question is, did Miss Ayers ask you this question, "Did you tell the Newark Evening News man what is in this article?" and didn't you answer, "No." A. She did.

Q. And isn't it a fact that when Joseph H. Horne came to you he put the same question to you; he said, "Chief, did you say to the News man what is in this article?" and you said, "No." A. I cannot recall that.

Q. Now, when you said no to Miss Ayers' question it was with reference to whether or not you had spoken to a newspaper man, isn't that so? A. Yes.

Q. Now, at the last trial, Chief, did you testify as follows—

Mr. Lane: That is objected to.

The Court: Sustain the objection, because there seems to be no need of referring to it as yet.

Q. Now, Mr. Lane has asked you what particular connection you expected to find between the two separate fires that you described in your direct examination. Did you find any connection at all between those two fires? A. No.

Q. Did you make a report about what you found there after the fire?

Mr. Lane: I object. It is immaterial and incompetent.

The Court: Sustain the objection.

Q. I show you Exhibit S. 8 and I ask you if that exhibit shows on the right-hand side the door which leads from the loading platform? A. Yes.

Q. And I call your atention to the point that you picked out for Mr. Kessler where you were standing when you first looked into the building upon your arrival at the fire. A. Yes.

Q. Now, standing in this door, can you look diagonally across into room C? A. You can.

Q. Looking at the photograph and standing here at this point where you said was a door, can you look into room C? Just look. A. Yes, I think you can.

Q. And if there were a fire in room C and you were standing here at this door, as shown in that photograph, could you see it? A. I could.

Q. And did you see it that night? A. No.

Q. And when you looked straight ahead, did you see another fire right straight ahead of it that night? A. I did.

Recross examination by Mr. Lane:

Q. I show you this photograph, Exhibit S. 7, which the prosecutor showed you, and you told the prosecutor very definitely and distinctly and from this photograph that the beaver boards on the ceiling of that room showed no indication whatever of fire; is that right? A. It showed very little; very, very little; it might be blackened from the smoke, but that is all.

Q. And you are willing to make that statement based upon the photograph? Now, I am asking you why you cannot tell me clearly what there is on the floor of that photograph of the room delineated by that photograph and the boxes standing on it that indicate any fire and why can't you tell me there was nothing there when you can tell the prosecutor there was nothing on the ceiling to show it? A. The ceiling was one thing and the floor another.

Q. Yes, but look at the floor and you have told me because that was a photograph you could not tell me whether there was anything there or not, but you didn't tell that to the prosecutor with respect to the ceiling. Now, why can't you tell me whether or not from the photograph there is any indication of fire on the floor? A. Well, I think there is some.

Q. Where is it? A. On this material right along here.

Q. Put a pencil mark on the place you think there is some. A. I think there was fire along here.

Q. Well, mark something that indicates where you think the photograph shows it. A. A fire on there, to a small extent.

Q. To a small extent? A. Yes, some of that wood was charred.

Q. Well, now, you have pointed to something which is up against the wall upon which the fire—to reach which the fire could travel down the rafters above, haven't you? Like the place on this photograph that you say there was no indication of fire, it was right up to the foot of the wall, isn't it? A. Yes.

Q. Showing something out in the room upon that photograph which indicates the presence of fire as having been there. A. I cannot say from that photograph.

Q. It is not there, is it? A. Well, I don't know; I can't say.

Q. That photograph is just as free of any indication of fire on the floor as it is free of indication of fire on the ceiling at that particular point, isn't it? A. I can't say that.

Q. Well, you can't say.

Mr. D'Aloia: Isn't that argumentative?

Mr. Lane: Well, I am wondering why he answered your questions and cannot answer mine with respect to the floor.

Mr. D'Aloia: Because I am pointing to a place on the ceiling and that is clear.

Mr. Lane: And the floor is equally clear.

Q. At any rate, you cannot show me on the photograph anything out in the room that shows an indication of fire, because, if you can show me on the photograph, then I want you to mark it. A. Only on a charred board.

Q. Yes. That is right up against the wall? A. (No answer.)

Recross examination by Mr. Kessler:

Q. Chief, just look at these materials. Are these the kind of materials that you found in the fire? A. Some, some of it.

Q. Well, the same nature, but this is the kind of material that was there; that is what you call webbing? A. Yes, that is some of it.

Q. And this is what you call a rubber kit that had the rubber in? A. I suppose so.

Q. Well, it was in the same kind of a carton, wasn't it? A. I answered it was, yes.

Mr. Kessler: I ask that the box be marked for identification.

(Marked D. 3 for Identification.)

MAMMIE URSALLO, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. Where did you live January 6, 1924? A. 35 Joyce Street.

Q. And where was that with reference to the factory of the Merritt Products Company? A. The house before the factory.

Q. The house before or next to it on the same side of Joyce Street? A. The house next to it on the same side.

Q. I show you a photograph called Exhibit S. 4. Do you see your house there? A. Yes.

Q. It is right next to the factory in the rear? A. Yes.

Q. And what kind of a house is that? A. Frame building.

Q. Which floor did you live on? A. Third floor.

The Court: You say to the rear of the factory?

Mr. D'Aloia: Yes, right here, fronting on Joyce Street.

Q. The factory was built right up close to the side of the house you were living in? A. Yes.

Q. You lived on the third floor? A. Yes.

Q. What kind of a family did you have there?

Mr. Lane: I object. It is immaterial.

The Court: Sustain the objection.

Q. Were you home on this Sunday night? A. Saturday night; yes, sir.

Q. Saturday night? A. Yes.

Q. And will you tell the Court and jury what you noticed, if anything, early in the evening before twelve o'clock? A. Well, about eight o'clock I smelled rubber burning.

Q. And how long did you smell that odor around there? A. Well, I don't really know.

Q. What time did your husband come home? A. About half-past ten.

Q. And had the burning rubber odor stopped at any time from the time you first noticed it until your husband came home? A. No. I smelled it continually.

Q. What time was it when you heard the fire alarm? A. About a quarter after twelve, or something like that.

Q. Were you up? A. No, sir.

Cross examination by Mr. Lane:

Q. Did the smell of rubber get more intense as time went on? A. What is that?

Q. Did it get more intense, this smell of rubber, as time went on? A. Well, I don't really know. I thought it was a coal gas coming out of my stove.

Q. That is what you thought? A. That is what I thought, yes.

Q. You do not remember whether it got more intense until you heard the fire alarm? A. No, sir.

Cross examination waived by Mr. Kessler.

MARGARET CHRISTIANSON, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. Where were you residing on January 5th and 6th, 1924? A. In my home at Valley Road, 495.

Q. And where is 495 with reference to this factory at the corner of Joyce Street and Valley Road? A. Right across the street.

Q. I suppose you don't know much about that diagram, but I will show you this Exhibit S. 4. There is a picture of the factory. A. Yes.

Q. Would your house be right off here to the left where this automobile is standing? A. Yes, right across from there.

Q. What floor of the building did you live on? A. The second floor.

Q. Now, do you remember Saturday night, January fifth, looking out of your second floor window across the street? A. Yes.

Q. Will you tell me what you saw in front of the factory on the Valley Road side? A. A dark automobile.

Q. What kind of an automobile was it?

Mr. Lane: I object. It is immaterial.

The Court: I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Q. What kind of an automobile? A. A dark automobile.

Q. Do you know the defendant Joseph H. Horne, the man who was the owner of the place? A. I know him to see.

Q. I mean this gentleman over there; the third man in the line with the glasses. A. Yes, I know him to see.

Q. Had you seen him go and come from the factory at different times? A. No.

Q. Did you ever see him in that automobile? A. Not that time.

Q. I mean before that night. A. No.

Q. Well, had you seen an automobile he was in at any time? A. Yes, I saw the automobile.

Q. Now, tell us about the automobile that was out there in front this Saturday night when you looked out of your second story window? A. I saw a dark automobile.

Mr. Lane: Is that the end of the question?

Mr. D'Aloia: No, I am not finished.

Q. Had you seen that automobile or an automobile that looked like the automobile that you saw that night before in front of that factory? A. Yes, I did.

Mr. Lane: I object as immaterial and incompetent, in so far as it contains within it a statement, an automobile that looks like that.

The Court: I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. What is your answer? A. Yes, I have seen a car like that.

Q. How many times before that night had you seen this automobile that you say looked like the one that you saw in front there that night?

Mr. Lane: I object to that question on the same grounds; that is, the words "that looked like it."

The Court: Overruled.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. How many times had you seen an automobile that looked like that one? A. Several times before.

Q. What was the color of it? A. Dark.

Q. Was it an open car or a closed car? A. Open car.

Cross examination by Mr. Lane:

Q. Would you say that that automobile was the automobile that you had seen before used by Joseph H. Horne? A. Well, I wouldn't say; no.

Q. What? A. I wouldn't say it was the same car.

Mr. Lane: I move to strike out the testimony that has been given by this witness with respect to the automobile, upon the ground that it is incompetent and irrelevant and immaterial and that it is not probative in any kind, shape or form.

The Court: Overruled.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(Seal)

Cross examination by Mr. Kessler:

Q. I think you testified that you had never seen Joseph H. Horne in any automobile. A. Well, not at the present time.

Q. You had never seen him at any time in any automobile of any kind or description? A. Well, I have saw him in a car several times before.

Q. Well, didn't you say on direct examination —perhaps I misunderstood you—that you did not see Joseph H. Horne in any automobile, but that you had seen an automobile standing in front? A. Yes. I said I saw a car that looked like Joseph H. Horne's car standing in front of the factory.

Q. Well, had you ever seen Joseph H. Horne in that automobile? A. Yes, I have.

Recross examination by Mr. Lane:

Q. What kind of a street is this Valley Road, it is an asphalt pavement? A. Yes.

Q. Main thoroughfare? A. Yes, main thoroughfare.

Q. And there was no person in front of the Joseph H. Horne factory right there? A. No.

Q. And you lived right in front? A. Right in front of the factory.

Q. And a person coming out of the factory, you could see anybody going in or out? A. No, sir.

Q. What do you mean, no, sir? A. I didn't see nobody come in and out of the factory on that evening.

Q. No. I mean to say anybody walking across the street, you could see go in or out of the factory? A. Yes.

Q. You have seen many cars of this same general description that you say you saw that night? A. Yes, several times.

Q. Can you tell me what time it was that you saw this? A. Well, I presume nine or nine thirty.

Redirect examination by Mr. D'Aloia:

Q. Then, how long was the car standing there that you recall? A. That I couldn't say.

Q. More or less? A. Well, I couldn't make any statement what time it was standing there.

Q. Well, did it stop there or go right on? A. Just standing when I saw it.

Mr. Lane: I renew my motion to strike out this testimony on the same ground I stated before.

The Court: What is the materiality of the evidence.

Mr. D'Aloia: The evidence is here is a woman who lives directly across the street from this place and she knows the automobile used by the owner—

Mr. Lane: I move a mistrial because of the statement of the prosecutor.

The Court: No. The jury will disregard the statement.

Mr. D'Aloia: I think Mr. Kessler's cross examination of this witness brought out the fact that she had seen Joseph H. Horne in an automobile.

The Court: No. I am asking the primary reason from your point of view.

Mr. D'Aloia: My point of view is an automobile like this, of its general lines and contour, which has been testified to by one witness that saw it in the factory and saw this in the factory, was there that night between nine and nine-thirty before the fire. It is a very serious indication, from our point of view, as to the identity of the persons, or to substantiate that part of the indict-

ment that the defendant Joseph H. Horne consented to or aided in setting fire to this particular fire, because an automobile which looked like his was out in front three hours before the alarm went in and at a time when burning rubber was being smelled in the neighborhood. I say that incident is one which has great probative force. It may be circumstantial, but it is something the jury should consider.

Mr. Kessler: There is no testimony that this car looked like Joseph H. Horne's. All this witness said was that she saw Joseph H. Horne in a car, but did not make any connection between Joseph H. Horne and this car.

Mr. Lane: I suppose there are hundreds of cars that look like the automobile I drive and I don't want to be convicted of burning a factory because a car that looks like my car happened to be standing out in front of the factory before it was burned.

The Court: I will allow the testimony.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(Seal)

ERNEST LANGE, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. Do you remember Saturday night, January 5, 1924? A. Yes.

Q. Where were you residing on that day? A. At a neighbor's.

Q. Where? A. 502 Valley Road.

Q. Where was 502 Valley Road with relation with Joyce Street and Valley Road, where this factory was owned by the Merritt Products Company? A. It was the second house in from Joyce Street on Valley Road.

Q. On the same side of Valley Road as the factory? A. Yes.

Q. What time did you get home that night? A. Quarter to eleven.

Q. On what side of Valley Road did you pass when you went toward your home; did you pass on the same side where the factory was? A. Yes.

Q. And at a quarter to eleven, did you notice anything outside of that factory building? A. I did.

Q. What was it? A. A machine.

Q. What kind of a machine? A. I don't know.

Q. Well, was it open or closed? A. I don't know.

Q. You passed right on? A. Yes.

Q. Was there anybody in it? A. I don't know.

Mr. Lane: On behalf of the defendant Mussikee I move to strike out this testimony from the record as incompetent and irrelevant.

The Court: Overrule the motion.

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.

EDWIN C. CAFFREY,
Judge.

(Seal)

Cross examination by Mr. Kessler:

Q. You are familiar with the properties right opposite this factory, are you not; immediately opposite? A. Yes.

Q. There are private dwelling houses there, are there not, on this side of the street? A. Yes.

Q. There are a number of private dwelling houses? A. Yes.

Q. People living in there, occupying them? A. Yes.

Q. You do not know whether that car belonged to anybody across the street or not? A. I cannot tell you.

FRANK DIENZO, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. What business were you in in January, 1924? A. Making automobile patches.

Q. Do you remember the Saturday afternoon of January 5, 1924? A. Yes.

Q. Did you have occasion to go to the factory of the Merritt Products Company situated at the corner of Joyce Street and Valley Road that afternoon? A. Yes.

Q. What time did you get there? A. I got there a little after one.

Q. In the afternoon? A. Yes.

Q. What did you do when you got there? A. I went there and wrapped up some toilet pipes with asbestos and put beaver board in the office, and about half-past four I left there, and some man come there when I was leaving.

Q. While you were there those two or three hours, did you have occasion to go to the boiler pit? A. No; I wasn't in the boiler pit.

Q. Was there any fire in the boiler? A. I don't know, so far as I know.

Q. So far as you know there was not any fire?

Mr. Kessler: I object to that. He did not say that.

Q. Were you around that boiler? A. No, sir; I wasn't around the boiler.

Q. You were there four hours? A. Yes.

Q. Now, tell us was there any fire in the boiler or not? A. I don't know.

Q. How close did you get to it? A. I didn't get anywhere near it.

Q. Where did you do this work? A. In the pit of the toilet.

Q. Do you know anything about the partitions? A. Yes, there is a partition right there.

Q. And if this door is open you can look in the boiler pit? A. I didn't go in there.

Q. You went out with Joseph H. Horne at four o'clock? A. I didn't.

Q. Who did you go out with? A. Mr. Robertson.

Q. Did Joseph H. Horne go with you? A. No.

Q. Well, did he remain in the factory? Was there anybody else left in the factory with Joseph H. Horne? A. Somebody was coming in as we went out.

Q. What time was it you left? A. About half-past four or quarter to five.

Q. Who went with you? A. Robertson.

Q. And leaving Joseph H. Horne in there all alone and somebody who was coming in as you went away? A. Yes.

Q. You do not know what time Joseph H. Horne left? A. No, sir.

Cross examination by Mr. Kessler:

Q. Who did you see come in? A. I didn't recognize him.

Q. Was it a man or woman? A. Man.

Q. Was there a man with him? A. Not as I noticed.

Cross examination waived by Mr. Lane.

AUGUST BRANDIN, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. During the fall of 1923, what particular position did you occupy with the municipal government of the Town of West Orange? A. Tax assessor.

Q. In the month of October, 1923, as the tax assessor of the town, did you go to the corner of Joyce Street and Valley Road to the factory of the Merritt Products Company? A. I did.

Mr. Lane: I object to that as immaterial and irrelevant. What difference does it make whether he went there at that time or whether he didn't?

The Court: What date?

Mr. Kessler: October, 1923.

Mr. D'Aloia: The object is to show the place was not doing any business.

Mr. Lane: I object. That is unfair.

The Court: Sustain the objection.

Q. Did you go there in November? A. No, sir.

Q. How many times did you go there?

Mr. Lane: I object.

The Court: Sustain the objection in that form.

Q. Well, did you go there in the month of December? A. No, sir.

Q. Did you make any assessment of that property in the fall of 1923 up to January 1, 1924?

Mr. Lane: I object. It is immaterial and irrelevant.

The Court: Sustain the objection.

Q. How many visits did you make to the factory during the months of September, October and November, 1923? A. I just made one.

Mr. Lane: I object to that as immaterial.

The Court: He said just once.

Mr. D'Aloia: Now, I submit, I have a right to ask that question.

The Court: No. I will not allow the question.

Cross examination waived.

ISRAEL TURAK, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. Do you know the defendant Mussikee? A. Yes.

Q. The man on trial? A. Yes.

Q. How long had you known him in the fall of 1923? A. 1923?

Q. Yes. A. I was working for him.

Q. How long had you known him before that time? A. About ten or twelve years.

Q. Where were you working for him in 1923? A. School Street.

Q. What city or town? A. Passaic.

Q. Where did the defendant, Mr. Mussikee, live at that time? A. At the job.

Q. Near the job? A. Yes.

Q. In Passaic? A. Yes.

Q. Well, now, do you remember a conversation you had with him on the job in September, 1923? A. Yes.

Q. Now, tell the jury what he said to you?

Mr. Lane: I object. It is incompetent, immaterial and irrelevant, September, 1923.

The Court: The question is rather indefinite.

Mr. D'Aloia: Well, I will make it a little more definite.

Q. What did the defendant Mussikee say to you with reference to something in Orange?

Mr. Lane: I object to that.

Q. West Orange, New Jersey.

Mr. Lane: I object to that on the same ground.

The Court: I will allow 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.

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr. Kessler: I object to it as not binding on Joseph H. Horne, the other defendant.

The Court: No statements made by Mussikee are not binding on Joseph H. Horne. I will meet that in my charge.

Q. What did he say? A. I worked for Mr. Mussikee at School Street. I dig some cellars, and he told me I have some good job for you; I have a fire job. Where? West Orange. I make a deal with him for $3,000. He promised to get for me $3,000 for the job.

Q. You made a deal with him for $3,000? A. Yes.

Q. To do what? A. Fire job.

Q. Where? A. West Orange.

Q. What kind of place to be set? A. Small fire.

Mr. Lane: I object, on the ground it is leading.

The Court: Sustain the objection.

Q. What kind of a building was the fire job to be on?

Mr. Lane: I object.

A. Small factory building.

The Court: Reframe your question.

Q. Did he tell you the kind of building? A. He told me a small factory building.

Mr. Lane: I object to that as a leading question, and the proper question is what he said.

The Court: Yes.

Q. Give us the conversation, what he said to you and what you said to him.

Mr. Lane: I object to that as incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

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

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

EDWIN C. CAFFREY,
(SEAL) Judge.

The Court: Of course, if it is not connected, it will be stricken out.

Q. What did he say to you and what did you say to him? A. He said he had a job in West Orange of some kind. I said, "What kind?" "A small fire."

Mr. Lane: I cannot understand him.

The Witness: He told me he had a fire job in West Orange, a small factory. I make a bargain for $3,000 to do the job. I never do the job, because I want to know

the place, and I left him and I did not speak to him no more about that job. I want to know what was going on.

Q. You never spoke to him about that job again? A. No.

Q. He never spoke to you? A. No.

Q. Did you see him in January, 1924? A. Yes.

Q. What date was it? A. The fifteenth of January.

Q. Where did you see him? A. I drive a team of my own.

Q. Speak slow and open your mouth and we can understand you. Where did you see him the fifteenth of January? A. I drove a team myself and I see him in the street.

Q. What city? A. Passaic.

Q. Did you still live in Passaic in 1924? A. Yes.

Q. Now, what did Mussikee say to you and what did you say to him? A. Mussikee tells me in the street, "Come on, I want to ask you something," and I said, "All right," and I turned the horses, and Mussikee tells to me, "You know the job is done." I told him, "All right, I don't care whether it is done or not done." "You know Fisch and Finkelstein have come for some money." I said, "Money for what?" "For the job that is done in West Orange."

Q. What else was said between you? You said to him, go ahead and give him the money? A. Yes.

Q. What did he say? A. What do you think? I can't give him money. I no do the job.

Q. You could not give him any money?

The Court: Whom do you mean?
The Witness: Mussikee.

Q. Now, you are talking to Mussikee on the fifteenth of January in Passaic now? A. Yes.

Q. Now, tell us what was said by him to you and you to him. There seems to be some confusion. What did he say on the fifteenth? A. He told me there is Finkelstein and Fisch want some money, and I told him to give it to him. You know the job in West Orange.

Q. Who said that? A. I said that, "Give him the money."

Q. Who said about the job in West Orange? A. Mussikee.

Q. And you said, "Well, go ahead and give it to him"? A. Yes.

Q. What did Mussikee say? A. He did not answer, and after a little while I told him how the job is coming, is it good or bad.

Q. Now, what did Mussikee say? A. More water than fire.

Q. Then what next did you say? A. I didn't say nothing.

Q. What did he say? A. He didn't say nothing.

Q. Now, did you know a man by the name of Fisch? A. Yes.

Q. And did you know a man by the name of Finkelstein? A. Yes.

Q. When he mentioned those two names you knew who he was talking about? A. Yes.

Q. Do you know what Fisch's business was?

Mr. Lane: I object to that.
The Court: Sustain the objection.

Q. Do you know what Finkelstein's business was?

Mr. Lane: I object to that.
The Court: Sustain the objection.

Cross examination by Mr. Kessler:

Q. How long have you been in this country? A. Fourteen years.

Q. And what has been your business? A. Excavation.

Q. For the whole period of fourteen years you have been in the excavating business; is that right? A. Yes.

Q. And during that time Mr. Mussikee was a builder in Passaic and for the period of fourteen years, off and on, you did some excavating work for him? A. Not all for him.

Q. No, not all. You worked for a lot of people, didn't you? A. Yes.

Q. And for the period of fourteen years you did many jobs for Mr. Mussikee? A. About four jobs.

Q. And they were some substantial houses he was building? A. All houses.

Q. Do you know Mr. Mussikee's business was that of a builder? A. Yes.

Q. He is quite an extensive operator in the State? A. What do you mean, operator?

Q. Well, he does quite a big business of building. A. Sometimes good and sometimes bad. Not each year exactly good or bad.

Q. But he does a great deal of building; that is right? A. Yes.

Q. And have you ever had any trouble with Mr. Mussikee? A. No.

Q. What is that? A. No.

Q. You are on friendly terms with him? A. When I work he pays.

Q. You are still on friendly terms with him? A. No.

Q. You are not? When did you have a falling out? When did you have a fight or argument with him? A. Never.

Q. Well, since when are you not on friendly terms with him?

The Court: Do you understand that question?

Q. Are you mad at him? A. No.

Q. Is he mad at you? A. I don't know. Ask him.

Q. Did you have any business trouble with him? A. No.

Q. Did it ever become necessary for you to sue him? A. No.

Q. Didn't you sue him? A. No.

Q. Did you get paid for the last job you had with Mr. Mussikee? A. Paid by the lawyer the last bill.

Q. Whose lawyer was that? A. His lawyer.

Q. And why was it necessary to go to a lawyer; was there any dispute? A. He don't want to pay.

Q. And that was the last job you did for him? A. Yes.

Q. When was that last job? A. September.

Q. You had no other business with Mr. Mussikee at any time excepting to dig four cellars for him; is that right? A. Yes.

Q. Did you have any other business than that of digging for him? A. None.

Q. You had no business, of being in the firemaking business; were you ever in the business of making fires or setting fire to buildings? A. No.

Q. You never did that? A. No.

Q. And can you tell us why Mr. Mussikee approached you and asked you to set fire to a building? A. He wanted to make me rich.

Q. Had you ever had a conversation with him about this building before other than this conversation you testified to in September? A. None.

Q. What was the first thing that Mr. Mussikee said to you about this fire? A. He said to me, "I have some factory in West Orange," and he wanted to burn it up.

Q. We cannot hear you. A. Mr. Mussikee tells me some time in September he had some job for me. I told him what kind of job and he told me he had a factory to burn, and I told him all right.

Q. What was the first thing said, the first thing that Mr. Mussikee said to you was, "I have some job for you in West Orange"? A. Yes.

Q. And did you have any such conversation with him as that before? A. Never.

Q. Never? A. No.

Q. And were you on visiting terms with Mr. Mussikee, did he visit at your house and you visit at his house? A. A couple of times.

Q. On a business proposition, on a question of digging? A. Yes.

Q. You were not on any particular social terms, were you?

The Court: I do not think he understands.

Q. You and your wife did not visit Mr. Mussikee

and his wife? A. No.

Q. And the only time you went to his house was a couple of times when you had something with reference to digging; is that so? A. Yes.

Q. And yet you want us to understand that the first thing he said to you was, "I have a job for you;" is that right? A. Yes.

Q. And you said, "All right," what is it? A. Fire job.

Q. You said all right? A. Yes.

Q. Why did you say all right? Did you intend to set fire to this building? A. I didn't intend to. I want to know about the job.

Q. Why was it that you wanted to know about this job? A. Any job when a man—

Q. Is this what you said, "It is a good thing to know, because anything you know like that it is a good thing to make some money." Is that what you said? A. Yes.

Q. What do you mean by that, blackmail? A. No blackmail; blackmail is different.

Q. And making money like this is different? A. Yes.

Q. You meant you wanted to know where this fire was, because after you knew where the fire was you could make the money? A. Yes.

Q. Well, how could you make the money? A. Should be quiet in the job.

Q. Well, you should keep your mouth shut? A. Yes.

Q. So that you wanted to know where this fire was to be and you could make some money and the way you could make that money was to keep your mouth shut? A. Blackmail is in the street and my business was in the house.

Q. Is that the only difference? Is that right? Now, after you agreed—at least, you told Mr. Mussikee, you want us to understand, that you agreed to go through with this, and make this fire? A. No, I didn't make the fire.

Q. No, you didn't make it; neither did we; but after you agreed to make this fire, nothing was said to you by Mr. Mussikee and you never said anything to Mr. Mussikee until some time around the 15th of January, 1924. That was the next conversation? A. Yes.

Q. The first conversation was in September and you agreed to go through with this, although you never intended to and you never had a conversation with Mr. Mussikee about it until January 15, 1924. That is four months, isn't it? Now, if Mr. Mussikee did have this conversation with you and if you did agree to go through with this fire, although you never intended to do it, why did you ask Mr. Mussikee about it after this conversation in September? A. I don't want that fire making.

Q. But you wanted to make him believe you were going to make the fire; isn't that what you said, although you never intended to do it? A. Never.

Q. Now, why is it since you wanted to get this information to make this money, not blackmail, but in the house, why is it that you did not inquire further from him about the fire? A. What do you mean?

Q. Why didn't you talk to him? A. I don't want to talk with him.

Q. You agreed, so far as Mr. Mussikee was concerned, although you never intended to go through with it, to make a fire, in September? A. Yes.

Q. And when you agreed he said all right? A. Yes.

Q. And then he never said another word to you until January fifteenth, from the September conversation he never said a word to you until the fifteenth of January? A. Yes.

Q. And between that time, September and January, you were doing some work for Mr. Mussikee, were you not? A. Yes.

Q. You were digging for him? A. Yes.

Q. Oh, you met him often? A. Yes.

Q. Between September and January? A. Yes.

Q. And although you met him often, you never had a conversation with him about it? A. No.

Q. Now, on the fifteenth of January you were driving a team of horses on School Street? A. Yes.

Q. And when you were driving the team of horses on the street you saw Mr. Mussikee on the sidewalk? A. No, he passed me along the side.

Q. You were on the street? A. Yes.

Q. Driving a truck? A. Yes.

Q. And he was on the sidewalk? A. Not walking; passing in a machine.

Q. He passed you and asked you to get off? A. On that street, School Street.

Q. And you got off your truck? A. Yes.

Q. And went over to Mr. Mussikee's car? A. No, he come over.

Q. And you got off your truck? A. Yes.

Q. And you had this conversation which you related? A. Yes.

Cross examination by Mr. Lane:

Q. How do you know it was in September that you saw Mr. Mussikee? A. I know; I remember.

Q. I know, but how do you place it as September? A. What date?

Q. Yes. A. I cannot remember exactly the date.

Q. How do you place the month? A. I remember in September. I know exactly.

Q. Have you not anything to fix it about when; you just carry it in your head? A. I carry everything before; not in three years.

Q. You remember things ten years before? A. Yes.

Q. How do you remember the second conversation you had was on January fifteenth? A. I remember this date.

Q. Well, you were in business? A. I am in business.

Q. What was the date this case was tried before? A. I do not remember the date.

Q. Well, you testified here in court. A. Yes.

Q. Well, can't you remember the date you testified, if you remember a conversation you had on the fifteenth? A. I do not keep the court in mind.

Q. No; I am wondering why you kept January fifteenth in mind. A. Well, this trial was coming.

Q. Isn't there any way by which you can tell us certainly that it was the fifteenth? Might it not have been the fourteenth of January? A. No.

Q. How can you tell me it is not the fourteenth? A. I remember on the fifteenth.

Q. You just remember it? A. Yes.

Q. Is there anything that you can refer to that will help things out? A. I can say nothing. I know I just remember on the fifteenth.

Q. Don't you remember when you testified here before that you referred to some little job that you had and that was the reason why you remembered it? Now, is that the reason why you remembered it? Do you remember the little job you had that you testified to the last time? A. What job?

Q. Well, I don't know. That is the way you fixed it the last time? A. I know exactly the 15th of January, 1924.

Q. I am asking you whether you remember a little job you had about that time that made you remember it as the fifteenth? A. I remember it. I work at different places and different jobs and I remember I passed him on the fifteenth.

Q. So you just remember the fifteenth without anything to call it to your mind? A. Yes.

Q. What did you mean when you testified, page 139: "*Question*: If you remember the fifteenth of January, why can't you remember what day of the week it was? *Answer*: I remember the fifteenth, and he was talking after, and then a couple of days after, on the eighteenth, I got a little job, to finish it, and I finished his job; that is the reason I remember the day he talked to me." Now, that is what you said the last time. Now, is that the reason you remember that he talked to you on the fifteenth? A. Yes.

Q. Well, why didn't you tell me that a few minutes ago, instead of waiting for me to read it from the record? A. When did you tell me?

Q. Where did you come from? You come from Poland? A. Russia.

Q. You were a saloon-keeper there? A. Yes.

Q. And when you came to this country you were a saloon-keeper in Passaic? A. No.

Q. In this country? A. No.

Q. After you came to this country weren't you engaged in the saloon business? A. No.

Q. You immediately went in the excavating business when you came over here? A. Yes.

Q. And that was how many years ago? A. Fourteen.

Q. And you have been doing a contracting business on your own hook ever since that time? A. Yes.

Q. Now, you understand the English language pretty clearly, don't you? A. Yes.

Q. What? A. I understand everything.

Q. Understand English? A. Yes.

Q. Well, then, will you tell me why it was when I asked you a few minutes ago, when I asked you how you remembered it was the fifteenth of January, that you didn't tell me about this little job? A. A little job?

Q. Tell me now why is it that you remember it was the fifteenth of January? A. I carted some stone for some party.

Q. Do you know what day of the week it was? A. I don't remember what day of the week it was.

Q. If you remember it was the fifteenth of January that you had the conversation, why don't you know what day of the week it was you had a talk with him? A. If I had a talk I marked it in the book.

Q. Where is the book? A. The book is not here.

Q. The book was here the last time? A. Yes.

Q. Why didn't you bring it down this time? A. I don't know.

Q. You know the last time of the trial the book was here and you were questioned by me? A. Yes.

Q. Why didn't you bring the book today? A. I don't need the book when I swear. This is the third time I swear about this case.

Q. You have sworn more times than that? A. No.

Q. Let me see. You have made three statements to the insurance company.

Mr. D'Aloia: I object to that.

The Court: Sustain the objection.

A. I made one—

Mr. D'Aloia: Don't talk when I object.

Q. Who did you first talk to about this case? A. I talked to nobody about this case, only in West Orange.

Q. Do you know Mr. Cooper? A. Yes.

Q. You told him about it, didn't you? A. Yes.

Q. How long after you stopped work for Mussikee? A. January, 1924.

Q. Did you talk to any detective from the insurance company about it? A. I do not remember. I do not know whether he was an insurance detective or a Passaic detective.

Q. Don't remember whether you were talking to Mr. Cooper and the insurance detective at the same time? A. Yes, I know Cooper.

Q. And you talked to the insurance detective? A. I think so.

Q. How many statements did you make to the insurance detectives? A. One statement to the insurance detectives and one statement in West Orange.

Q. Do you remember testifying, page 142: "How many times did you talk to the detective from the insurance company? *Answer*: About three times; three statements I got. *Question*: And were they with Mr. Cooper at the time you talked with them? *Answer*: Yes, sir." A. Yes.

Q. Then, they got three statements from you; is that right? A. I think so.

Q. What? A. I think so.

Q. Did they tell you after they got the first statement—did they come to you and tell you they wanted a second statement because they did not have what they wanted in the first statement? A. No.

Q. Well, then, how is it that you come to make three statements? A. I make a statement and they read it all the same and I sign my name.

Q. Well, these statements were made at three different times? A. I don't care whether—

Q. These statements were made at three different times? A. I cannot tell.

Q. Well, the statements were made after the talk you had with Mussikee. Now, you remember you talked with Mussikee very well. Now, I want you to remember equally as well the talk you had with the detective. Were those statements made at the same time or three different times? A. The same time.

Q. Well, why didn't you tell me that before? A. If I have a book and read it I know everything.

Q. Isn't it a fact that you made one statement and they came back and said they wanted more,

and then you made another; isn't that right? A. Right.

Q. And isn't it a fact that after they got the second statement they came back and said they wanted a third statement; they hadn't gotten enough yet? A. Right.

Q. Well, is it right or isn't it? So that you enlarged your story as you went on, didn't you?

Mr. D'Aloia: I don't think he understands that word "enlarged."

Mr. Lane: All right.

Q. So that you added to your story—I will withdraw that. So as time went by you remembered more? A. No, not more; everything at one time. You make one statement; that is not good; you make another statement.

Q. What did you mean when you said, and the question was put to you many times; did you talk to the detective from the insurance company about three times; three statements I got. What did you mean by that if it was all at one time and only one talk? A. I never talked a whole lot; just the one time and make three statements. I don't know why they need three statements. I am not a lawyer. They read the statement and I tell them the truth and I sign my name. I don't know what statements. I told them the truth the first time.

Q. Did you say anything in your direct examination—well, now, wait a minute. When Mussikee talked to you, did he speak of some job in West Orange? A. Yes.

Q. Sure about that? A. Yes.

Q. Absolutely? A. Absolutely.

Q. Well, what did you mean when you testified on the other trial, page 138, "*Question*: I want to

know everything he said and everything you said. *Answer*: He said to me he got a job in Orange, he not ask me in West Orange, just in Orange, some job in a factory, he needs to take it down by fire." A. Yes, in Orange.

Q. Well, just a moment ago you said it was in West Orange. Now, at the last trial you said he did not refer to West Orange, he said Orange. Now, which is right?

Mr. D'Aloia: Well, how about line 25?

Mr. Lane: That is included in the question. I am using his language. In his answer he said he did not use the term Orange.

Q. Which is right; did he say Orange or West Orange? A. He said Orange.

Q. He did not say West Orange? A. No.

Mr. D'Aloia: Just a minute. I told Mr. Lane he could read from that book if he read correctly.

The Court: Suppose you read verbatim.

Mr. Lane: I have read verbatim and I am not asking this witness anything with respect to that book now at all.

The Court: You certainly have. You directed his attention to an answer given by him at the other trial. Now, read it verbatim.

Mr. Lane: It was so read.

The Court: Read it again.

Q. I want to know everything you said and everything he said. "He said to me he got a job in Orange, he not ask me in West Orange, just in

Orange, some job in a factory, he needs to take it down by fire."

Mr. D'Aloia: Now, how about three questions above?

Mr. Lane: I do not propose to read any more.

Mr. D'Aloia: I do not think it is fair for Mr. Lane to take an answer in English as it appears in this—

The Court: He may direct the witness' attention to it.

Mr. Lane: I asked the witness whether he said that Mussikee said West Orange or Orange and he answered that now, he says that Mussikee said Orange and not West Orange.

Q. Now, is that so or isn't it? Then he did not say West Orange? A. He said Orange.

Q. And not West Orange? A. Not West Orange.

Q. Who told you to say West Orange on the stand here today? A. Nobody told me nothing. I talk West Orange.

Q. You said West Orange here on the stand here today because the fire was in West Orange? A. Yes, because I remember in the mind. Mussikee just said to me at the time I was talking to him about the fire in Orange and not West Orange.

The Court: Now, what are you referring to, the conversation of September or January?

The Witness: January, because I read in the paper about the sixth of January.

Q. And when you read in the paper about the sixth of January, that is the reason why you say West Orange, isn't it? A. Yes.

Q. Although Mussikee said Orange; is that right? A. Yes.

Q. Mussikee never said West Orange to you, did he? A. No.

Q. Now, if I recollect your testimony, your direct testimony, this morning, or your cross examination a few minutes ago, you said something about money in Newark. A. What do you mean money?

Q. I mean you were holding this information because you could get some money in Newark. What did you mean by that? A. No, sir; I no say nothing about this.

Q. Well, that word "Newark." A. No.

Q. Where did you expect to get the money from? A. I didn't expect no money.

Q. You did not expect to get any money? A. No.

Q. Well, why did you remember this conversation, then, or why did you ask him the further information when you did not intend to go on with the job? A. I didn't ask him no money.

Q. No. Who were you going to get this money from, this blackmail or whitemail? A. I don't know anything about money.

Q. Didn't you use the term "Newark" in connection with that? A. No.

Q. Sure about that? A. Sure.

Q. Well, did the insurance companies or detectives give you any money? A. No.

Q. For making these statements? A. No.

Q. Did you ask them to? A. No, sir.

Q. Why not? A. If I have the money—

Q. Well, that is one of the reasons why you got the information from Mussikee? Why didn't you ask them for it? A. No, I don't want no money. When I swear, I swear everything true.

Q. Why didn't you ask them for money? A. I don't want no money. What do you want to go to jail for that money?

RECESS.

Cross examination (continued) by Mr. Lane:

Q. Mr. Turak, who drew up the statement that you signed? A. First in Passaic.

Q. Well, who drew them up? A. I don't know who drew them up.

Q. Do you remember testifying, page 145, "*Question*: The statements you made to the police? *Answer*: Yes, sir. *Question*: Who drew that statement? *Answer*: Who drew? *The Court*: Who wrote it? *The Witness*: The fire insurance company." Did the fire insurance people write the statement? A. Yes.

Q. Then, why didn't you tell me that before? A. I didn't know what you asked me. I didn't know what you want me to answer.

Q. I understood your testimony this morning in speaking about the conversation you had with—the talk you had with Mr. Mussikee on the fifteenth of January, Mussikee said something—you told Mussikee to give money to— A. Finkelstein.

Q. Finkelstein and Fisch? A. Yes.

Q. And as I heard you, you said that Mussikee said, "No, why should he give money to Finkelstein and Fisch, he didn't do it;" is that right; is that what you said? A. I don't know. Maybe he give it to him, and maybe not.

Q. I didn't ask you that. Did Mr. Mussikee say why should he give money to Finkelstein and Fisch? A. I don't know. I just told Mussikee to give it to him.

Q. I know you did, and didn't he say why should I pay it, he no do it? A. He no do the job.

Q. Didn't you say this morning that Mussikee said, using your own language, "Why should he give the money, or I can't give the money, I no do the job"? A. He not say to me.

Q. Didn't you say this morning that Mussikee said to you, "I cannot give them any money, I no do the job"? A. Yes.

Q. And that is what he did say to you, isn't it? A. Yes.

Q. There is no question about that—withdraw that last question. That is all.

Redirect examination by Mr. D'Aloia:

Q. Now, you said this morning that Mussikee said to you that some people wanted the money from him in January? A. Yes.

Q. What did you say to Mussikee when he said that? A. Give it to them.

Q. What did Mussikee say to you? A. He said to me when you give it—

Q. No, when you said to Mussikee give it to them, what did Mussikee say? A. Mussikee said, "I don't do the job and I cannot give it to them."

Q. What else did he say? A. I told him how the job is done.

Q. Did Mussikee say to you, you didn't do the job; you can't give it to them?

Mr. Kessler: I object. That is not his testimony.

The Court: Well, he is asking. He is not doing anything more than recalling to his mind some testimony.

Mr. Kessler: But the prosecutor is stating a fact which the witness did not testify to.

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.

EDWIN C. CAFFREY,
(SEAL) Judge.

Q. Did you understand my question before this one? A. Yes.

Q. You saw Mussikee on the fifteenth of January? A. Yes.

Q. Now, tell us what he said to you and what you said to him. Now, go slow and tell us what Mussikee first said to you on that 15th day of January, 1924? A. Mussikee said to me, Finkelstein and Fisch is going to Mussikee to School Street to give them money for the West Orange job fire.

Q. What else did he say? A. And he said to me he did not want to give it to them.

Q. What did you say? A. I said to Mussikee how the job is looking and he told me the job was more water than fire.

Q. Now, what did he say about your not doing the job or he not doing the job. What was that remark? A. What do you mean?

Q. You told these gentlemen here something that misled them.

Mr. Kessler: No.
Mr. O'Aloia: All right.

Q. You told me something about Mussikee saying he not do the job or I not doing the job. Now, explain that.

Mr. Kessler: We object to the explanation.

A. He say I no do the job.

The Court: He is asking him to repeat what he said.

Q. Now, tell us that part of the conversation which Mr. Kessler and Mr. Lane have been calling, "I no do the job." A. Mr. Mussikee said, "How can I give the money for the two people. I no do the job. Why should I give Finkelstein and Fisch money after Finkelstein and Fisch has come to all Passaic people and tell them go ahead, I got the money," and he give them money, too.

Q. He would not give them any money because you told us now, because he said if he gave Finkelstein and Fisch some money he might have to give it to somebody else, too?

Mr. Kessler: No.
The Court: Use his language.

Q. What was it he said on that fifteenth day of January about Fisch and Kinkelstein? Give us everything Mussikee said about Fisch and Finkelstein. Everything. Go ahead. A. What do you mean?

Q. What did Mussikee say when he talked about Finkelstein? A. He said they want money, he should give them money for the West Orange job. He promised so much, $1,500, he promised to give it to him.

Q. Did Mussikee say to him—

Mr. Kessler: The prosecutor is suggesting the answer. That is not what the witness said at all.

The Court: I do not so understand it.

Q. Now, did Mussikee say to you on that 15th day of January, 1924, that he had promised, he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job?

Mr. Lane: I object to that question on the ground that it is leading and suggestive.

The Court: Overrule 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.

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. Now, answer that question. (Question read.) A. Yes.

Q. Now, after he said that, what else did he say about Fisch and Finkelstein? A. No more. He said; I know no more.

Q. Well, you told Mr. Lane something about Mr. Mussikee saying that Fisch and Finkelstein wanted some money? A. Yes.

Q. Well, what did Mussikee say about Fisch and Finkelstein wanting some money? A. West Orange

job. He promised before I give him the job, and if I do the job I want the money.

Q. What else did he say? A. Nothing.

Q. Well, did he say anything about the way the job was done? A. Well, he said to me—

Q. Who said to you? A. Mussikee.

Q. Well, what did he say about how the job was done? A. He said more water than fire.

Q. Now, how many statements did you sign? A. I signed two statements.

Q. One where? A. One in Passaic, in the Detective Bureau, and one in West Orange.

Q. Now, do you remember the one in West Orange was a complaint before a judge? A. Yes.

Q. Now, do you recognize the one you signed in Passaic? A. Yes.

Q. Look at it.

Mr. D'Aloia: I offer it in evidence.

Mr. Kessler: Objected to.

The Court: Sustained.

Mr. D'Aloia: I heard an objection by Mr. Kessler.

Mr. Kessler: The objection is for both.

Recross examination by Mr. Kessler:

Q. Did I understand you to say that Mr. Mussikee told you that Finkelstein and Fisch wanted money whether they did the work on the job or not; is that right? A. Yes.

Q. So they did not say that they did the work on the job, but whether they did or not, they wanted money; is that so? A. Yes.

Mr. D'Aloia: Just a minute.

Mr. Kessler: He said yes.

Mr. D'Aloia: He is not talking to Finkelstein and Fisch.

Mr. Kessler: Mussikee told him what they said.

Q. Mussikee said to you that they wanted money whether they did the work on the job or not? A. Yes.

Q. And that was the only reason you wanted the information, so that you could get the money? A. I don't want money.

Q. Didn't you testify before— A. I don't want money.

PHILIP GOLDBERG, sworn in behalf of the State.

Direct examination by Mr. D'Aloia:

Q. Do you remember the fall or late summer of 1923? A. Yes.

Q. During that part of that year, where were you living—August, September, October, November, December, 1923? A. Clifton.

Q. Clifton, New Jersey? A. Yes.

Q. Up near Passaic? A. 10 Prestovilla.

Q. Do you remember seeing the defendant Joseph H. Horne at your house in Clifton? A. I do not remember the face, but I remember somebody was there was that name.

Q. Do you remember the defendant Joseph H. Horne? A. Yes.

Q. Do you know the defendant Joseph H. Horne in court? A. I see him.

Q. Do you know him? A. Sure, I know him.

Q. That is the man I am talking about, that you know to be Joseph H. Horne. Did he come up to your place in Clifton? A. Yes.

Q. When was it? A. The middle part of October, 1923.

Q. And did he talk to you there? A. Yes.

Q. What did he say to you?

Mr. Lane: I object to that on behalf of the defendant Mussikee.

The Court: What was said by Joseph H. Horne is not binding upon Mussikee.

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.

EDWIN C. CAFFREY,
(SEAL) Judge.

A. He told me that a particular friend of mine sent him there.

Q. Did he give you the name of the friend? A. He did not give me no names. He got sent by a pretty good friend and he got to do a job in Orange, New Jersey. Where is the house? He said, Newark.

Q. What did he say the job was going to be? A. The job was to be a good job, to make $300 on the job, and the job got to be a clear job.

Q. What was the job? A. He did not say anything what the job is, but it has got to be a clean job to the ground, but I understand what he meant.

Q. To the ground, and you understood what he meant? A. I understand.

Q. What did you understand that he meant?

Mr. Lane: I object.

The Court: Sustain the objection.

Q. What next did he say? A. Next he did not say nothing and I answered him.

Q. What did you say? A. I said I am a man over age and I have seven children, three girls in high school and three girls in public school, and I am not going to do any jobs like this job.

Q. Now, has anybody been talking to you since the last trial? A. No.

Q. Are you sure? A. Nobody.

Q. Now, at the last trial I asked you what Joseph H. Horne said to you and here is your answer.

Mr. Lane: I object.

Mr. D'Aloia: I am surprised by his testimony up to this point.

Mr. Lane: What point?

Mr. D'Aloia: That no name was mentioned by Joseph H. Horne.

Q. Now, at the last trial when you were asked by me what Joseph H. Horne said to you in Clifton when he first came to your house in October, here is what you answered, "And he said, 'Well, I am sent from a friend of yours, Mr. Mussikee sent me over to you if you want to go up there in Orange.'" Did you make that answer? A. He didn't mention no name.

Mr. Lane: I object to that upon the ground that the only purpose in that testimony could be to bind the defendant Mussikee and that with respect to the defendant Mussikee it is pure hearsay.

The Court: Well, I will admit it as part of the conversation with Horne, but I will rule it has no effect on Mussikee.

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.

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr. Lane: Its purpose can only be to bring in the defendant Mussikee.

Mr. D'Aloia: No, that the place Orange was mentioned.

Q. Now, does that refresh your recollection as to that conversation? A. I don't understand that question.

Q. Now, you had never seen Joseph H. Horne before? A. No.

Q. That was the first time you saw him? A. The first time.

Q. And he came directly to your address in Clifton? A. Yes.

Q. And when he came he asked you if your name was Goldberg? A. Yes.

Q. And he told you he seen him? A. I asked him who sent him and he said it makes no difference but a particular friend of yours sent me here.

Q. Didn't he give you the name of the friend? A. He said Mike.

Q. Did you know Mussikee? A. I know Mussikee the last fifteen years.

Q. And what is his first name? A. Mike.

Q. Now, you are sure he wanted a job done in Orange to clean a factory to the ground and there was $1,000 in it for you? A. Yes.

Q. And you said, "No, I have my children now in school and I do not want to do that kind of a job"? A. Yes.

Q. And he went away? A. Yes.

Q. How did he come there to your place, on foot? A. He come in a machine.

Q. And what kind of a machine was it? A. It was a black machine and was covered on the side with curtains.

Q. It was not a closed car? A. It was an open car, but closed.

Q. It was black in color? A. Black in color.

Q. How long did this conversation up there in Clifton last between you and Joseph H. Horne? A. About a couple of minutes.

Q. And you refused to do the work? A. Yes.

Q. Now, after that when was it that you saw the defendant Mussikee in Passaic? A. That was in January some time, the middle part of January.

Q. The middle part of January, 1924? A. Yes.

Q. Now, where did you meet Mussikee? A. I meet him in where his apartment is.

Q. Did you talk to him? A. Yes.

Q. What did you say to him? A. I got sent from Finklestein to tell you—

Q. You were sent to Mussikee by Finkelstein? A. Yes.

Q. Now, you are at Mussikee's apartment house, you are in front, and you are talking to Mussikee? A. Yes.

Q. What did you say to Mussikee? A. I said, "Finklestein wants $300, which you give him and he will be glad."

Q. What else? A. About the arson case in Orange.

Q. Who said that? A. I said it.

Q. What did he say? A. He said, "I haven't nothing to do with that case."

Q. What did you say? A. I said, "You will be sorry if you do not fix up with that fellow," and he said, "I have nothing to do with them, because they are a bunch of bandits."

Q. Now, did you say anything to Mussikee about what Finkelstein would do if he did not get the $300? A. Yes, he will go and report it to the East or West Orange—I don't know just where it was, West or East or North, but I told him he will go to West Orange or in Orange.

Q. Well, did you use all those words or one word? A. No.

Q. What was the word? A. Orange.

Q. I know, but in telling what Finkelstein would do. A. That he would go and report it to the insurance company.

Q. Do you remember your testimony in the last case? A. Yes, I remember everything.

Q. Did you tell us at the last trial that you met Mussikee and you said this, page 285: "*Question*: After January sixth did you have a talk with Mussikee? *Answer*: Yes, but I don't remember what day. *Question*: Was it in the month of January? *Answer*: Yes. *Question*: Will you please tell the jury what Mussikee said to you?" Then there is a lot of objections. "*Question*: (On page 286) What did he say and what did you say? *Answer*: I said Philip Finkelstein sent me over to him to say he should give him some money; he should settle there; he should give him $300—" Then there was a motion made to strike it out and it was stricken out. Now, at that time did you say anything about Finkelstein saying that he was going to squeal? A. Yes.

Q. Now, did you use that word when you talked to Mussikee or did you say that he was going to West Orange? A. I used that word.

Q. What word? A. That he was going to squeal; he was going to report the case.

Q. Now, did you use the word "squeal"? A. No, I told him he would go and report to the police or insurance company, or something like that, if he would not settle with him.

Q. Now, here is a question, down at the bottom of page 286: "*Question*: You don't understand me. What did Mussikee say?" And the answer that you made was this, "I know it." Now, did Mussikee make that answer on that day when you talked to him in the middle of January in front of his apartment house in Passaic when you were sent there by Finkelstein to collect the $300 and you told him it was for the arson case in Orange and if he didn't pay the $300 that Finkelstein would go and squeal? Now, did Mr. Finkelstein use the word "squeal"?

Mr. Kessler: The prosecutor is excited. Read the question above.

Q. Did he say anything that had been done in West Orange? "*Answer*: I told him, I said, There is a fire there in West Orange.'" The next question is, "What did Mussikee say?" "Mussikee said, his answer is, 'I know it.'"

Mr. Kessler: About the fire in West Orange, not paying $300.

Q. Did Mussikee say on that day in January that he knew about a fire in West Orange? A. Yes, he heard there was a fire, but an excellent fire.

Q. He knew there was a fire in West Orange and it was an excellent fire? A. Yes.

Q. And that is why you came to deliver Finkelstein's message to ask him for $300? A. And he said he was not afraid.

Q. And then you said to Mussikee—and then it was you said, "If you don't give the money to Finkelstein he will squeal"? A. Yes.

Cross examination by Mr. Kessler:

Q. Did you see that man at your house in Clifton this October? A. I do not remember the face.

Q. Just look at him. A. I know him. I have seen him twice.

Q. This is a very serious thing. This is the defendant Joseph H. Horne? A. Yes.

Q. Did you see the defendant Joseph H. Horne at your house in October, and you have testified; did you see him there; this man standing up now? A. Yes—maybe no and maybe yes; I do not remember the face.

Q. Maybe no and maybe yes. A. And maybe yes.

Q. And you are not sure whether you saw him there or not? A. I am not sure.

Q. Did you see the man's face? A. I see the face. He had big eyeglasses there.

Q. He has eyeglasses now. A. Not that kind.

Q. The man you saw had different eyeglasses? A. Different eyeglasses, and a cap.

Q. Was he the man you saw at your house? Will you swear? A. No, I wouldn't.

Q. So that all the conversation you had with a man in Clifton—you are not sure, you do not know this is the man or not? A. No.

Q. Look at him. I want to be sure about it. A. I have seen him twice already.

Q. Did you see him in your house at Clifton that day? A. I wouldn't say yes or no.

Q. And the reason you will not say yes or no is because you are not sure? A. I ain't sure.

Q. And before when the prosecutor repeated and repeated and repeated that you saw Joseph H. Horne, you simply took the prosecutor's word for it that the man that you saw was Joseph H. Horne? A. Sure.

Q. The prosecutor said that Joseph H. Horne was at your house and you answered yes? You meant by that that if he was at your house, if his name was Joseph H. Horne, Joseph H. Horne was the man, but you are not sure that the defendant was the man; is that so? A. Yes.

Q. What time of the day or night did this conversation take place? A. The first time he goes over to my place?

Q. Was there any other time? A. No, the first time, I mean.

Q. What time did this conversation take place with this man that the prosecutor has been calling Joseph H. Horne? A. Excuse me.

Q. And you know this conversation you told the prosecutor about, a man came to your house— A. Oh, it was in the afternoon.

Q. What time of the day? A. About four; half past four.

Q. It was a clear day? A. No, this was a rainy day.

Q. And where were you holding this conversation, in your house? A. In the front of the street; he was sitting there in the machine.

Q. You had come out to the machine? A. I was out to the machine.

Q. And you were standing? A. Yes.

Q. How far away were you from him? A. Right close to the machine.

Q. As if this were the man and you were standing close to him yourself and you were looking at him? A. Yes. He had eyeglasses on.

Q. You had no trouble to see me? A. If I see you in the street I wouldn't recognize you.

Q. You have no trouble in seeing me now? A. No.

Q. And seeing my features? A. No.

Q. And the chances are if you saw me outside you would recognize my face and features? A. Maybe not.

Q. Well, now, Joseph H. Horne was about as far away from you as I am now? A. Yes.

Q. And you talked to him two or three minutes? A. About five minutes.

Q. And all the time you were looking at him? A. No. Maybe I looked at the machine.

Q. He was a strange man you had never met before and he was putting rather a delicate proposition to you and you naturally were looking at him in surprise, that he was putting that proposition to you? A. I looked at him.

Q. And you kept on looking at him as you are now? A. No, I am not now.

Q. What are you doing now? A. I am looking at that book.

Q. Well, you had every opportunity to see the man? A. Yes.

Q. And you did that for a period of five minutes or more? A. Yes.

Q. And now you cannot tell me whether that man was Joseph H. Horne who just stood up or not? A. I ain't sure.

Q. Was there any other way that you could tell

whether he was the man or not; was the man a stout man, was he a thin man? A. Well, he was in a big coat.

Q. Joseph H. Horne is a pretty big man. You saw him stand up. A. Well, the way he was sitting in the machine he was big.

Q. Was he a man as big as Joseph H. Horne? A. He looked about that size.

Q. Was he a man about as fat or stout as Joseph H. Horne is now? A. I couldn't say.

Q. He was a man who wore bigger glasses than Joseph H. Horne? A. Yes, and side glasses—what do you call them?

Q. Goggles? A. Yes.

Q. So the man you spoke to wore goggles? Is that right? A. Yes.

Q. After you told him you would not do that sort of thing he drove away? A. Yes.

Q. You never heard anything about this until some time in January? A. January sixth.

Mr. Kessler: Now, in view of the testimony of this witness so far as it affects Joseph H. Horne I ask that it be stricken out. There is no identification.

The Court: No. He said he is not certain. I will allow the jury to pass on his testimony.

Counsel for defendant Joseph H. Horne prays an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr. Lane: And a motion is made on behalf of the defendant Mussikee, not so far

as it relates to the conversation, but with respect to identification.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Cross examination by Mr. Lane:

Q. When you told Mr. Mussikee that these people would squeal, Mussikee said, "I am not afraid of it." A. Yes.

Q. "And I didn't have anything to do with it." A. No. I no got nothing to do with it.

Q. How many times have you been convicted of crime? A. Several times.

Redirect examination by Mr. D'Aloia:

Q. What have you been convicted of? A. Horse stealing.

Q. Have you been convicted of setting fire to any place? A. Yes.

Recross examination by Mr. Lane:

Q. Mr. Goldberg, what was the date of your last conviction? A. I do not remember.

Q. Well, let me see if I can refresh your recollection. It was the 14th day of May, 1924, was it not, when you were tried by a jury in Passaic County? A. Last Friday, the last one was last Friday.

Q. Yes, last Friday was the affirmance by the Court of Errors and Appeals of your conviction? A. Yes.

Q. Now, that conviction that was affirmed last Friday, you were tried on the 14th of May, 1924, weren't you? A. Yes.

Q. And that charge was conspiracy, wasn't it? A. Yes.

Redirect examination by Mr. D'Aloia:

Q. Conspiracy to burn a building? A. Yes.

STATE RESTS.

MOTION FOR DISMISSAL OF COMPLAINT.

(The jury retires while the following motion for a dismissal of the complaint is made.)

Mr. Lane: On behalf of the defendant Mussikee, and this motion may also be considered as a motion on behalf of the defendant Joseph H. Horne, I move for the dismissal of the indictment upon the same grounds which I moved to quash the indictment in the earlier part of this case with respect to the first count, and I make a motion addressed to each count specifically, upon the ground that there is contained in the first count two separate and distinct crimes, to wit, wilfully and maliciously burning, and the wilful and malicious aiding and consenting to the burning, and because that count in the indictment does not describe the building as a dwelling house which is an integral part of the description of the offense, and with respect to the second

count, I move to dismiss on the ground that there is contained in the second count at least two separate and distinct crimes, to wit, the wilful and malicious burning, and the aiding and procuring or consenting to the setting fire to or burning of the building, and also the crime of burning the goods, wares and merchandise and other chattel contained therein are two separate and distinct crimes. I also move to dismiss the indictment, or, rather, to dismiss the case at this stage with respect to the entire indictment, and both counts specifically, because the crime denounced by the statutory provisions are such that two persons cannot be jointly indicted, there being no charge in the indictment of conspiracy, or union, between the two. I also move for the direction of a verdict, or for a dismissal of the indictment at this stage of the case, because so far as the first count now stands, that is, with respect to the burning of the building or the consenting to the burning of the building, there is no proof in the case at the present time from which the jury have any right to infer or can infer the fire in this case was of an incendiary origin.

I also move to dismiss the indictment with respect to the second count upon the ground that there is no proof in the case from which the jury can find or have any right to infer that there was any intent upon the part of the defendant Mussikee, at least, and this is made specifically with respect to the defendant Mussikee, to defraud any insurance companies. There is no proof whatever in the case that Mussikee had any knowledge,

of any kind, nature or description, that there was any insurance upon this building.

I move at this time to dismiss the proceedings with respect to the entire indictment and with respect to each count specifically upon the ground that as the evidence now stands there is absolutely nothing to be considered by the jury; first, there is no proof in the case from which the jury would have a right to say that the fire was of an incendiary origin. Secondly, there is no proof in the case that ties up the defendant Mussikee as an actor with respect to this burning.

Mr. Kessler: So far as the defendant Joseph H. Horne is concerned, there is absolutely no evidence in the case. Joseph H. Horne's name was not mentioned until the last witness, Mr. Goldberg, and all he said was a man had a conversation with him, and he does not know whether Joseph H. Horne, the defendant, is the man that came to talk with him. That is the only connection with the entire case. He doubts. He would not say yes or no. Now, under a reasonable doubt, we are entitled to a direction so far as Joseph H. Horne is concerned.

Mr. Lane: When I said I moved for the direction of a verdict to dismiss the proceedings, I mean a motion for a dismissal at this stage of the case.

(Motion denied.)

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Mr. Kessler opens for the defendant Joseph H. Horne.

Mr. Lane opens for the defendant Mussikee.

RUSSELL S. WISE, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you live? A. Passaic.

Q. What is your business? A. Civil engineering.

Q. How long have you lived in Passaic? A. I was born there; forty-two years.

Q. How long have you been a civil engineer? A. Since 1889; twenty-seven years.

Q. Do you know Mr. Mussikee, one of the defendants? A. I do.

Q. How long have you known him? A. I think about eight years.

Q. Have you had any business relations with him? A. I have.

Q. Do you come in contact with the people with whom he has business relations? A. I do.

Q. Do you know his general reputation? A. Yes.

Q. You are a member of the Assembly also, aren't you? A. Yes.

Q. And I suppose in campaigning you come in contact with people all over the county? A. A great many of them.

Q. What is Mr. Mussikee's general reputation for veracity? A. Good.

Q. What is his general reputation as to honesty, fair dealings and as a law-abiding citizen? A. I have always found it good.

Floyd H. Crane, direct.

Cross examination by Mr. D'Aloia:

Q. Do you visit him socially? A. No.

Q. You do the engineering work for him on all his jobs? A. I do.

Q. And his bills are paid pretty promptly? A. Always.

FLOYD H. CRANE, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you reside? A. Passaic, New Jersey.

Q. What is your business? A. I am in the sash and door business.

Q. How long have you been in that business? A. Thirty-six years.

Q. Do you know Mr. Mussikee? A. Yes.

Q. How long have you known him? A. About ten years.

Q. Have you had business dealings with him? A. I have.

Q. Do you come in contact with people who have had business dealings with him? A. I do, yes.

Q. Do you know his general reputation? A. Yes.

Q. What is his general reputation for truth and veracity? A. Good.

Q. What is his general reputation for lawfulness, honesty and fair dealing? A. Very good.

Garrett Rossma, direct.

Cross examination by Mr. D'Aloia:

Q. You do not visit Mr. Mussikee socially, either, do you? A. No.

Q. You furnish the sash and the doors and plans for the houses that Mr. Mussikee erects? A. I have not in the last three or four years.

Q. But you have before? A. I have before, at different times, yes.

Q. Then, you have not seen him very frequently during the last three or four years? A. No.

Q. Then, you have not heard so much about him during the last three or four years? A. No.

Q. You are basing this testimony you are giving about his reputation by what you knew of him when you furnished material for his various buildings? A. At the time, yes.

Q. I understand you to say that you do not visit him socially and that Mussikee doesn't visit your family? A. No.

Q. You do not know who might know him in a social way? A. No, sir.

Q. Your relations with him are with regard to business dealings with him? A. Yes.

GARRETT ROSSMA, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. What is your business? A. Building contractor.

Q. How long have you been in business? A. About twenty-eight or twenty-nine years.

Q. How long have you known Mr. Mussikee? A. Oh, about fifteen years, as near as I can remember.

Q. Have you ever had business relations with him? A. Just being competitors in business.

Q. You are competitors? A. Yes.

Q. You come in contact with people whom he comes in contact with? A. Yes.

Q. You deal with the same people he does? A. More or less.

Q. Do you know his general reputation? A. Yes.

Q. What is his general reputation for truth and veracity? A. Very good, so far as I know.

Q. What is his general reputation as to honesty, fair dealing and as a law-abiding citizen? A. Good.

Cross examination by Mr. D'Aloia:

Q. You do not visit him socially, either? A. Yes, he comes to my house to talk over things.

Q. Do you ever go to his? A. Yes.

Q. Did you have occasion to discuss his reputation at any time with anybody? A. Well, we don't discuss those things socially.

Q. I mean with anybody else? A. No.

Q. You were in business up there and he was in business, and so far as you know he is all right? A. I do, yes.

Q. You never heard his honesty discussed? A. I never heard it questioned.

WILLIAM SCHEIN, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. Where do you live? A. Brooklyn.

Q. Do you know the defendant Joseph H. Horne? A. Yes.

Q. How long have you known him? A. I know him since he was born, since he was a child, before he come from the old country.

Q. You both came from the same country? A. Same country.

Q. How long are you in America? A. Sixteen years.

Q. And have you been visiting him for the last sixteen years? A. I visited him all the time.

Q. On this Saturday afternoon before the fire did you see Joseph H. Horne? A. I saw him.

Q. Where? A. In the building; in the factory—not in the factory; in the office I was.

Q. In the office of the factory in West Orange? A. Yes.

Q. Who was there with you? A. My daughter was there.

Q. And who did you meet when you went in the office? A. There was some man; I don't know him.

Q. And who else was there? A. Nobody.

Q. Joseph H. Horne was there? A. Joseph H. Horne was there.

Q. When did you get to the factory? A. I cannot tell you exactly the time. This was about five o'clock; maybe later, about five minutes, ten minutes; I cannot tell you.

Q. How long did you stay in the office? A. About five or ten minutes. I cannot tell you exactly.

Q. Then, where did you go from the office? A. I was outside about a half an hour from the office, in the front of the building, because I had a flat with my machine. I came in the machine with my daughter.

Q. You had a flat tire? A. Yes.

Q. And you were fixing it? A. Yes.

Q. Can you tell us whether or not it was cold or warm in the office? A. The office was warm; outside it was cold.

Q. And after you fixed your flat tire, what happened? A. I went on.

Q. Did Joseph H. Horne go with you at the time? A. He was waiting for me about five minutes. He told me he was sick and he wanted to go home; only I took the tools for him in the machine and he went with his machine home.

Q. He left at the same time you left? A. Before.

Q. His car went first? A. Before my car. We left together.

Q. Did you see him lock up the factory? A. Yes.

Cross examination by Mr. D'Aloia:

Q. You say when you got there somebody was there fixing the pipes? A. I didn't say. I was not in the factory.

Q. Were you in the office? A. Yes. Nobody was in the office; only one man was inside.

Q. Inside where? A. In the office. He was sitting with Joseph H. Horne. He was talking.

Q. Did you see anybody fixing the pipes? A. No.

Q. You had your daughter with you? A. Yes.

Q. Did she come in the office? A. She was in the office, too. The outside was cold.

Q. You were only in there about two or three minutes? A. About five minutes; maybe more; I cannot tell you exactly.

Q. And did you go in the office before you fixed the tire or after you fixed the tire? A. No, before I fixed the tire.

Q. Where was Joseph H. Horne's automobile? A. Outside.

Q. What kind of a looking automobile did Mr. Horne have? A. A Durant.

Q. Was it an open car? A. Open car.

Q. Was it black in color? A. No, brown.

Q. Well, it was dark in color.

Mr. Kessler: No. It was brown, he said.

Q. And did you see Joseph H. Horne close up? A. Yes.

Q. Did you see him lock the office door? A. Inside?

Q. No, when he left to go outside to leave with you to go home. A. Yes, he locked the door.

Q. What did he lock the door with? A. He locked the door.

Q. With what? A. With a key.

Q. And what did he do with it after he locked the door? A. He went in the machine and went home.

Q. Now, you left Joseph H. Horne in front of his place after he had locked the front door with a key? A. He went with his machine before me.

Q. You went right after him? A. Right after him.

Q. You did not come back to that place that night? A. No.

Q. Did you go to Joseph H. Horne's house after he told you he was sick? A. No.

Q. And that is all you know? A. That is all.

Q. You came all the way from Brooklyn to go in that office for five minutes and then to fix your tire outside? A. And then go away.

Q. You did not have any business to do with Joseph H. Horne that afternoon? A. I went to visit him; he was sick.

Q. When did you find out he was sick? A. Wednesday or Thursday.

Q. Well, didn't you tell Mr. Kessler that night he told you he wanted to go home because he felt sick?

Mr. Kessler: He did not say that. It is not fair to lead the witness.

The Court: This is cross examination.

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.

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. Didn't you tell Mr. Kessler that it was after your arrival to this place, to the factory, with your daughter that Joseph H. Horne informed you that he did not feel well and he was going home; didn't you tell him that? A. Who?

Q. Mr. Kessler.

The Court: On your direct examination.

The Witness: He didn't ask me anything.

Mr. Kessler: He may not know my name.

Q. Joseph H. Horne's lawyer. A. He did not ask me it.

Q. Didn't you say that that night after you got there and had been there about five minutes Joseph H. Horne told you he was not feeling well and he was sick and he wanted to go home? A. When I came there I was there maybe more than a half an hour, only inside, I was only about five minutes, maybe more, maybe six, but not more, because he was sitting with a man—he was sitting in the office with a man. I do not know this man. This man with a closed machine in the front. I don't know him. I told him, "Mr. Horne, how do you feel?" and he told me, "I am sick, I am very sick; I want to go home," and I asked him—

Q. Never mind that. Wasn't that the first time that you knew that Mr. Horne was not feeling well when he answered your question? A. No. He told me this.

Q. Well, that is what he told you up there in the factory? A. In the office.

Q. And you went outside and fixed your tire? A. Yes.

Q. And you and your daughter went away? A. I went out and he was sitting with a man in the office talking.

Q. And then you fixed your tire? A. I fixed my tire outside, and he come out and I asked him, "Mr Horne, give me tools—

Q. No, we are past that. You got the tools, you fixed your tire and then Mr. Horne locked the door with a key, put it in his pocket, and he goes home and you and your daughter go home to Brooklyn; that is right? A. Yes.

GERTRUDE SCHEIN, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. You are the daughter of the gentleman who was just on the witness stand? A. Yes.

Q. Where do you live? A. 511 Liberty Avenue, Brooklyn.

Q. On the Saturday of the fire do you remember going to West Orange? A. Yes, I do.

Q. About what time did you get there? A. About five o'clock.

Q. And was there anything the matter with the machine? A. Well, we happened to have a flat.

Q. And did you stop at Mr. Horne's factory? A. Yes.

Q. Did you go inside? A. Yes.

Q. Did your father go inside? A. Yes.

Q. When you went inside, who did you see? A. Well, there was a certain gentleman in there talking to Mr. Horne.

Q. Do you know the name of that gentleman? A. No, I don't.

Q. Did you hear the name while you were there? A. I don't know.

Q. Do you know whether it was a Mr. Tepperman? A. I don't, but I might remember if I saw him.

Q. How long did you stay in the factory? A. We were there about ten minutes.

Q. And just what did you do? A. And then we went out to fix the flat tire.

Q. At the time that you were in the factory, did you observe—in the office—did you observe whether it was warm or cold? A. It was comfortable, nice and warm.

Q. And you went out and helped your father fix the tire? A. Yes.

Q. About how long did it take? A. About twenty minutes.

Q. And while you were fixing the tire, did you see what nappened to this man who was in the office? A. He went away.

Q. What happened to Mr. Horne? A. Then Mr. Horne came out and gave us the tools and then, of course, he did not help us fix it, because he was not feeling well, and we fixed it ourselves.

Q. And after you fixed the tire, what happened? A. Mr. Horne locked the door and went home. He went home in his car and we went home in our car.

Q. Did you come particularly to visit Mr. Horne? A. We knew Mr. Horne was not feeling well. My father called him up during the week and we come out and Mr. Horne said he was not feeling well and he would go right to bed.

Q. And was there any other reason for visiting him? A. And we were making a party; we think perhaps he might be well enough to come to the party on Sunday.

Cross examination by Mr. D'Aloia:

Q. Did you know he was going to be at the factory at that hour? A. If I knew?

Q. Did you know Mr. Horne, the man who was sick, that called up your father and told him so, did you know that he would be at the factory? A. I didn't know.

Q. Did you come directly to the factory? A. Yes.

JOHN BALDWIN, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. What is your business? A. Guard at the penitentiary.

Q. And where do you live? A. Valley Road, West Orange; 378.

Q. And do you know the fire house where the chief is connected? A. Yes, I do.

Q. And where is it located with reference to your own house? A. Almost opposite.

Q. And do you remember the night of the fire or morning of the fire? A. I do.

Q. About what time was this fire? A. About a quarter after twelve.

Q. And where were you at that time? A. Going into my yard.

Q. And what did you do when you heard of the fire? A. Why, I counted the box, as I always do, and followed the engine over to the fire. It was about three blocks from my house.

Q. So this fire was about three blocks from your house? A. Yes.

Q. And did you go to the fire? A. I did.

Q. How long did you stay there? A. About a half an hour.

Q. Did you observe what part of the roof the flames were coming out of? A. No.

Q. You stayed at this fire about a half an hour? A. Yes.

Q. And then what did you do? A. It was so cold I decided to go home.

Q. What time did you get home? A. About ten minutes to one.

Q. And as you got to your house, what did you observe? A. As I was going in the yard I noticed

a fireman going in the fire house, and as the fire was not out, I thought he was hurt, and I went over to see if I could help him.

Q. Who was it? A. It was the chief.

Q. What was he doing? A. He was leaning over the radiator.

Q. He was leaning over the radiator? A. Yes, on the first floor.

Q. How long was he at the fire house before he left? A. Why, he ordered me out of the fire house, and I went out, and I left before he came out. He went upstairs and I left and went home.

Q. About how long after you saw him go in did he remain in the place until you went away to your house? A. Oh, about fifteen minutes.

Q. So he was in the fire house about fifteen minutes after you left to go to your home? A. Yes.

Cross examination by Mr. D'Aloia:

Q. What did you say your name was? A. Baldwin.

Q. Where had you been that night? A. Out visiting friends.

Q. Coming home about a quarter after twelve? A. About a quarter after twelve.

Q. Your house was located where with reference to this fire? A. Almost opposite.

Q. I am talking about the fire. Where was the fire with reference to your house? A. Why, the fire was three blocks from my house.

Q. You did not take any interest in going to the fire? A. I didn't.

Q. No. A. I went to the fire.

Q. And you stayed there how long? A. About a half an hour.

Q. And during that half hour, who was in command of the fire department? A. Why, a private of the Orange Fire Department happened to take command.

Q. What is his name? A. Eagan.

Q. Is he here? A. I don't know.

Q. You mean to say you were there half an hour and the chief wasn't there? A. I didn't see him in command.

Q. Oh, then, the chief was there the half hour you were there? A. He was.

Q. And did you see them use the ram on the Joyce Street side? A. No.

Q. What were you doing? A. I was watching the fire.

Q. Which side of the place were you on, Joyce Street or Valley Road? A. Both.

Q. Well, at one time while you were there didn't you see them use the battering ram on the side door? A. No.

Q. Wasn't that done by either Eagan or Sheehan? A. I don't know.

Q. Did you see them put in a line through one of the windows on the Joyce Street side? A. I didn't.

Q. Did you see them put a line in on that sliding door on Joyce Street? A. I didn't.

Q. Why didn't you testify at the last trial? A. Because I wasn't subpoenaed.

Mr. Lane: I object.

The Court: Sustained.

Q. Did you get a subpoena for this trial? A. I did.

Q. When did you get it? A. Friday or Saturday.

Q. To whom had you told this terrible story that when you went into the fire house you had seen the chief leaning up against the radiator?

Mr. Lane: I object to that question, this terrible.

Mr. D'Aloia: I will withdraw that.

Q. This story about the chief leaning against the radiator in the fire house? A. To my friends.

Q. Who are they? A. Some of the firemen.

Q. Some of the firemen are friends of yours? A. Yes.

Q. And when you told it to them, you told it in a spirit that you liked the chief very much? A. How do you know?

Q. And that is why you are testifying here before this jury. You testified that you saw him leaning up against the radiator a half an hour because you don't like him? A. It happens to be the truth.

Q. It happens to be the truth you do not like him? A. He was in the fire house.

Q. It happens to be the truth because you do not like him? A. I refuse to answer.

The Court: Answer the question.

The Witness: Well, he is no friend of mine.

JOHN FARBLADE, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. In January, 1924, you were connected with the West Orange Fire Department? A. I was.

Q. And were you on duty on the night of January 6th, or the morning of that day? A. I was.

Q. And were you one of the firemen that attended to this fire of the Merritt Products Company? A. I was.

Q. What time did you get to the fire? A. Well, approximately between a quarter after and half past twelve, some time.

Q. And were you on the same truck as the chief? A. I was on the same truck with the chief.

Q. And where did your truck stop when you came to the fire? A. It just hesitated a moment at Joyce Street to let the chief and other men off and we continued on to Central Avenue to a hydrant and coupled our hose.

Q. What did you do after you coupled your hose? A. The apparatus ran back with the hose, and when I got the signal to turn the water on, I ran back to the building.

Q. When you got to the building, what was going on? A. Well, they had not done anything yet.

Q. How long did that take place from the time you got back? A. Well, we generally make those couplings in a minute and a half.

Q. How long was it before you got back to the fire before you got back and they had done nothing? A. Well, it was only about 200 feet, and I ran back.

Q. Did you see them break a window? A. I helped to break a window.

Q. Whereabouts was that? A. Right adjacent to this sliding door; the first window here.

Q. Will you mark that one "F"? Who held the hose that was through that window? A. A man by the name of Huffman and myself.

Q. And how long was the water put through that window? A. Well, just a minute, indiscriminately, and we were ordered to withdraw it.

Q. And then what happened? A. The door was broken in.

Q. By this battering ram? A. Yes.

Q. Who entered the building? A. Captain Scalley, Bill Harrison, Peter Jaggers and myself.

Q. Who carried the hose in? A. We four all had to together.

Q. Did it take four men to hold that hose? A. As a rule, when the pressure is good and strong, you have two men on the line and two at the nose.

Q. And this was strong? A. It was fair.

Q. And it took four men to hold? A. Not necessarily.

Q. How did you enter the building? A. Through the sliding door.

Q. How did you enter it? A. Crouching; we were below the fire at the time.

Q. Where was the fire? A. Well, it would be very hard for me to answer that question.

Q. What do you mean by that? A. Because it was impossible for me with my eyesight, just only fair, to designate in a moment in what locality in that building the fire was.

Q. When the door was crashed, what came out? A. A dense cloud of smoke.

Q. What kind? A. Very dense.

Q. Black smoke? A. Yes.

Q. Could you look through that smoke? A. Not with my eyes.

Q. Well, could anybody look through that smoke?

Mr. D'Aloia: I object. It calls for a conclusion.

The Court: Sustained.

A. I could not look through it.

Q. You had no particularly weak eyes? A. No, except at very short distance, when I read.

Q. Otherwise your eyes are normal eyes and you could not see through that dense smoke? A. I could not.

Q. Could you see whether there were flames in that part of the building or not? A. Not when we went in.

Q. When you brought the hose in, how much were you crouching? A. About half of our height. The loading platform was that high (illustrating) and we had to get down this low (illustrating).

Q. And when you got in, where did you go to? A. We ran up here a distance of ten or twelve feet where the platform raised and there was an entrance in here.

Q. Where did you bring your water? A. We brought it right in here and then turned around and directed a line of water through here.

Q. And so you came in through here and went over there? A. Yes.

Q. And then you shot your line of hose up this way? A. Yes.

Q. And this was the direction of your stream? A. Indiscriminately in that direction.

Q. And was the water quite strong? A. A good stream.

Q. And how long did you hold that stream in this opening in that direction? A. Well, we worked it around in a general direction that we could see through the smoke.

Q. Could you see any flames? A. Not what I would call it.

Q. What would you call it? A. A glare.

Q. Did it not appear to you that the building was a mass of flames? A. Absolutely not at that time.

Q. What did it appear to you to be? A. Just simply an ordinary fire with a considerable lot of smoke at that time.

Q. Was there any reason, any fire reason, why you came across here to this opening and did not go to that opening? A. Why, as far as we could see and, to tell the truth, it was impossible to see anything at a distance of more than two or three feet at times. When we came in here, this platform here, you could not see through there, and I think there was a door at that time, we could not see any ingress.

Q. You could not see there was an opening? A. No.

Q. And you saw that opening? A. Yes.

Q. And a fireman goes toward an opening, and that is why you went there? A. Yes.

Q. And here you could not see an opening and you think that the door was closed? A. Yes.

Q. About how long did you fight this fire? A. From the inception to the finish?

Q. About how long was that? A. From about a quarter after or half past twelve to possibly four or half past in the morning, and then I stayed on duty there and was on guard duty.

Cross examination by Mr. D'Aloia:

Q. Did you go back to the fire after it had been extinguished at all? A. I continued right on at that time, right there at the time.

Q. Did you notice that room C was burned and had no beaver boards on the ceiling? Look at the diagram and see what I mean by room C. C is the room into which you ran your line of hose after getting in. A. That one?

Q. Yes. Did you notice the ceiling? A. Not particularly.

Q. Did you notice there were no beaver boards there and never had been any there?

Mr. Kessler: Objected to. There is no proof there had not been any there.

A. I didn't see until in the morning.

Q. In the morning when you had an opportunity to see, did you notice the condition of that ceiling? A. Just dimly.

Q. Did you go into the first room, E? A. Yes, we extinguished what remained of the fire.

Q. No. After you got through with the extinguishing of the fire. A. Yes, we went into that room.

Q. Did you find evidence of a fire? A. There was evidence of fire all through that room.

Q. Well, did you find evidence of it where that word is? A. No more than any other place.

Q. Did you find it in this other room? A. Yes. We extinguished the fire in that room.

Q. I am going to show you a photograph. This is Exhibit S. 8. Now, can you say that that photograph represents a view that you get standing in this doorway here? A. Yes.

Q. And looking catacornered in that room? A. Yes.

Q. Now, do you see this partition? A. Yes.

Q. Do you see it is not burned at all, that it is standing erect? Look at it and see. A. Why, I only see a small portion of it there.

Q. Well, do you see a small portion of it here? A. A small portion.

Q. Well, do you see a portion dividing off that door? A. Yes.

Q. Do you see that the portion that you can see there is not burned? A. Well, it is not badly burned. It looks to me as if there were a slight scorching there.

Q. Nothing burned there? A. No.

Q. I am going to show you another photograph. There is the ceiling of room C on the northerly side of that partition. A. Yes.

Q. There is lots of fire there? A. Yes.

Q. Lots of fire all in that room? A. Yes.

Q. Now, let us see, when were you fired from the West Orange Fire Department?

Mr. Kessler: Objected to.

Q. Well, when were you asked to sever your connection with the Fire Department? A. Why, some time in February.

Q. Of what year? A. The same year.

Q. And who asked you to sever your connections? A. The men who had the right to, the commissioners of West Orange.

Q. You always blamed the fire chief? A. How do you know?

Q. Well, I asked you. A. Well, I refuse to answer that question.

Q. Well, isn't that the reason why you came down here today to be a witness for the defense, to try to make the chief look small before a jury, because you suspected you were fired by the Fire Department by reason of what the chief said to the commissioners? A. No; if you want to hear it—

Q. You don't like the chief, do you? A. Not particularly; I shouldn't.

Redirect examination by Mr. Kessler:

Q. You were not here at the last trial? A. Absolutely not; no, sir.

Q. Had you known what the chief testified at the last trial? A. Only what I heard of the witnesses.

Q. And you heard how he had described the fire? A. Exactly.

Q. And you agree that that was a fact?

Mr. D'Aloia: Objected to.

The Court: Sustain the objection.

Q. Was it the result of what you heard—what you mentioned to some of your friends what the real facts were—

The Court: I do not think that characterization—

Q. As the result of what you had heard of the testimony of the chief, did you mention to your friends what you had seen of the fire?

Mr. D'Aloia: That is objected to.

The Court: Sustain the objection.

Q. Do you remember somebody from my office coming to see you? A. Yes.

Q. And are you subpoenaed here? A. I am.

Q. Have you your subpoena here? A. I have.

Q. Will you produce it?

Mr. D'Aloia: I object.

Adjourned until tomorrow, Wednesday, March 31, 1926, at ten o'clock A. M.

THIRD DAY.

Wednesday, March 30, 1926.

Appearances as before stated.

Trial continued pursuant to adjournment.

JOHN FARBLADE, resumes the stand.

Redirect examination (continued) by Mr. Kessler:

Q. I overlooked yesterday in asking you some further questions about the fire, after you brought your hose and played some water on the fire through this opening and up through here, how long did you remain in there with your hose of water? A. Probably a period of ten or fifteen minutes at that point.

Q. And then what happened after that? A. We were ordered to withdraw from there and go to the roof.

Q. Did you go to the roof? A. I did.

Q. What did you find on the roof? A. We found there was considerable smoke and some flame coming from around the back of the boiler.

Q. And did you see the flames coming from the back of the boiler? A. A small flame, yes.

Q. What did you do? A. We found in pouring water there there was considerable steam, and I informed the captain we would be scalded, and he said, "We will cut a hole in the roof."

Q. Was a hole cut in the roof? A. Yes.

Q. What did you do? A. Put the hose down in.

Q. And where did you play the hose through the hole in the roof? A. We cut a hole just about on a line of the boiler and in a position about here,

about ten or fifteen feet away from the boiler, I should imagine.

Q. I show you State's Exhibit S. 4, which is a photograph of the building. Now, is that the boiler stack? A. This small stack right here.

Q. And the hole was cut right there? A. Obliquely, and this way over to the edge of the roof slightly, about ten or fifteen feet from the hole the stack came up.

Q. About here? A. The stack protruded right up here, and just about here the hole was cut in the roof.

Q. And did you pour water for how long there? A. Approximately, for forty or forty-five minutes.

Recross examination by Mr. D'Aloia:

Q. Now, if that boiler had been in that fire, fire all around it, and it had gotten hot and you poured water on it, it would cause steam? A. Naturally.

Q. The steam did not necessarily come from the fire in the boiler? A. Nobody said that at that time.

Q. No, but if the boiler got raging hot all around and you came along with a stream of water, there would be steam? A. Yes.

Q. You never told this to anybody before this trial? A. No, sir.

JOHN MORAN, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. Where do you live? A. Irvington.

Q. In 1924 where did you live? A. Mt. Tabor.

Q. Did you know the firm of Howe & Davis? A. Yes.

Q. They are lawyers? A. Yes.

Q. In Orange? A. Yes.

Q. Do you know Chief Sheehan? A. Yes.

Q. Did you have any conversation with the chief some time prior to the last trial? A. Yes.

Q. About when was it? A. About May, 1924.

Q. Did you, in the course of your conversation with the chief, ask him was there anything suspicious about the fire, and did he say no—

Mr. D'Aloia: I object.

Q. —there was absolutely nothing suspicious about the fire.

Mr. D'Aloia: That is objected to on the ground there is no foundation laid for it.

The Court: Sustain the objection. It is collateral.

Mr. Kessler: If he asserts it on direct examination, we have a right to contradict it.

The Court: You asked the chief on cross examination.

Mr. Kessler: Yes, but that was following the direct examination by the prosecutor on the question of finding two fires, which would create in the minds of the jury that the chief did find two fires.

The Court: Unless the prosecutor brought out this question you are asking now, I will not permit it, if it was brought out for the first time on your cross examination.

Mr. Kessler: I think the prosecutor did bring it out.

Mr. Lane: The testimony, as far as the defendant Mussikee is concerned, the testimony of the chief was offered by the State in its entirety for the purpose of showing evidence which would tend to indicate that the fire was of an incendiary origin. If that was not the purpose, the testimony is improperly in the case. On cross examination the chief was asked a question whether he had made certain statements, among others this statement, which tends to indicate that any evidence that he might give now as to the fire being of a suspicious nature was stated at a previous time—

The Court: I will allow the question.

Mr. D'Aloia: Mr. Kessler, in cross examining the chief, spoke about a newspaper article which contained certain statements, and it was about those statements in the newspaper article that the chief was asked about, and when he was asked about these various persons, whether he had made these statements, made in the newspaper articles, he said no. My objection goes to the fact that the chief's attention was not called in Judge Davis's office and I tried to get Mr. Kessler to fix the time and place and he fixed it six weeks before the last trial, not fixing any place, and when it was allowed, it was with reference to a conversation with a newspaper article.

The Court: I will allow the question.

Q. (Question read.) Did you ask him that question and did he give you that answer? A. Yes.

Q. And did you further ask him this question and did he give you this answer in the course of this same conversation, "Chief, I understand there is some talk about your having said there were two fires; is that so?"

Mr. D'Aloia: I object on the same ground.

The Court: Did you call the chief's attention to that?

Mr. Kessler: Yes, sir.

Q. Did you say this to the chief, "Were there two fires?" A. Yes.

Q. And what was his answer, "Nobody could tell; the place was a mass of flames and it would take more than an expert to tell."

Mr. D'Aloia: The same objection. There is no foundation laid for it.

The Court: I do not recall. I recall a reference to the chief's testimony at the former trial in response to Mr. Lane's question that he said it would take more than an expert to tell, but if you can show me the chief was asked these questions, I will allow them, but in the absence of testimony—

Q. Did the chief make this answer to you, that he could not tell whether there were two separate fires?

Mr. D'Aloia: I object on the same ground.

The Court: Did you ask the chief that question?

Mr. Kessler: Yes, sir. I have it here just as I have it written.

Mr. D'Aloia: Well, it may refer to this particular witness.

Mr. Kessler: Certainly, Moran. I laid the foundation with the chief. I think the prosecutor made a rather discourteous remark in the presence of the jury. He said he may have said so, but I don't believe it.

Q. Did he make that answer? A. Read the question.

Q. That he could not tell whether there were two separate fires? A. He did.

Q. How long have you known the chief? A. At least twenty-five years.

Cross examination by Mr. D'Aloia:

Q. You were not a witness in the last trial? A. No.

Q. You were not subpoenaed by Mr. Davis? A. No.

Q. And you know that Mr. Davis represented one of these defendants at the last trial.

Mr. Lane: I object as immaterial.

The Court: I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Q. When did you first tell present counsel this alleged conversation with the chief? A. Within a week.

Q. A week ago? A. Yes.

Q. Did they come to you? A. I came under subpoena.

Q. Yes, but how did they know whom to subpoena; you don't know how they came to you with these subpoenas? A. Why, no.

Q. But the fact remains that this conversation with the chief that you have just given to the jury took place in Judge Davis's office? A. It did not.

Q. Where did it take place; in Judge Davis's presence? A. No.

Q. Where did it take place? A. In the fire house in West Orange.

Q. Did you tell it to Judge Davis? A. No.

Q. To whom did you first tell it after its alleged occurrence? A. Why, I reported it to Mr. Davis's office, through Mr. Berstecher.

Q. Then you did tell it to Mr. Davis's representative? A. Yes.

Q. And how long was that before the last trial? A. It may have been a couple of weeks before the last trial.

Q. And you were not subpoenaed as a witness at the last trial? A. They tried to get in touch with me.

Q. You were not at the last trial? A. No.

Q. And you did not get a subpoena? A. I received a telegram after the trial was over.

Q. Did you make a statement in writing? A. Yes.

Q. Do you know who has it? A. No.

Q. You do not know how you came to be subpoenaed this time? A. No.

Redirect examination by Mr. Kessler:

Q. You were making an investigation of this case for the firm of Howe & Davis? A. Yes.

Q. And after you made this investigation and had this conversation, you reported to Howe & Davis in writing? A. Yes.

Q. And after you made this report, were you in town? A. No.

Q. Where did you go to? A. Mt. Tabor.

Q. Did Judge Davis know your address? A. He found it. I received a telegram to come down, but there was a delay in the message, as it takes longer to deliver a telegram than a letter.

Q. And when you came here, what happened? A. I was here. I heard some of the trial, but the telegram was on the way while I was here. I was in the courtroom, but Judge Davis did not know I was here.

Q. And the case was closed before Judge Davis knew you were in the courtroom? A. No, I would not say that; the case was closed the next day.

Q. In other words, when you came here the case was closed so far as testimony was concerned? A. Yes.

Recross examination by Mr. D'Aloia:

Q. And you were making an investigation in the employ of Judge Davis, as counsel for one of these defendants? A. Yes.

Q. And while making that investigation, you say that this alleged conversation took place? A. Yes.

Q. You were being paid, or you were paid for the investigation? A. Yes.

Cross examination by Mr. Lane:

Q. Did you find out afterwards that the chief on the stand had admitted the fact that you could

not tell after the fire was over that there were two fires or not?

Mr. D'Aloia: That is objected to.

The Court: Sustain the objection. What is your business?

The Witness: I am an oil man.

Redirect examination by Mr. Kessler:

Q. Were you formerly employed by the Edison Company? A. Yes.

ARTHUR S. CORBIN, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you reside? A. Passaic.

Q. How long have you lived there? A. Forty-seven years.

Q. What is your business? A. Lawyer.

Q. Profession. Have you any other business or profession? A. President of the Guarantee Mortgage and Title Insurance Company.

Q. How long have you occupied that position? A. Seven years.

Q. Did you know Mr. Mussikee? A. Yes.

Q. How long have you known him? A. About twelve years.

Q. Have you had business relations with him? A. Yes.

Q. Do you know people with whom he does business? A. A good many of them.

Q. Do you know his general reputation? A. Yes.

Russell Atkinman, direct.

Q. What is his general reputation for truth and veracity, good or bad? A. So far as I know, it is good.

Q. What is his general reputation for honesty, fair dealing and for abiding by the law? A. It is good, so far as I know.

Cross examination waived.

RUSSELL ATKINMAN, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you reside? A. Passaic, New Jersey.

Q. How long have you lived in Passaic? A. About thirty-nine years.

Q. What is your business? A. Banking.

Q. And connected with what company in what capacity? A. Treasurer of the Hobart Trust Company in Passaic.

Q. How long have you been treasurer of the Hobart Trust Company? A. About eleven or twelve years.

Q. Do you know Mr. Mussikee? A. Yes.

Q. How long have you known him? A. Seven or eight years.

Q. Have you had business relations with him? A. Yes.

Q. Do you know the people with whom he has business relations? A. Some of them.

Q. Do you know his general reputation? A. Yes.

Q. What is his general reputation for truth and veracity? A. Good.

Frank Terhune, direct.

Q. What is his general reputation for honesty, fair dealing and abiding by the law? A. Good.

Cross examination by Mr. D'Aloia:

Q. Do you know where he lives? A. Yes.

Q. Did you acquire that knowledge since the last trial? A. Well, he happens to live near where I do.

Q. Now? A. Now.

Q. Before the last trial you did not know where he lived? A. No.

Q. And you never visited him socially before the last trial? A. No.

Q. And he never visited you? A. No.

Q. Your relations between him and the trust company and the relations up there are the relations between a bank and a depositor? A. Yes.

FRANK TERHUNE, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you live? A. Passaic, New Jersey.

Q. What is your business? A. I am treasurer of the Peoples' Bank and Trust Company.

Q. And how long have you resided in Passaic? A. All my life.

Q. And that is how long? A. About fifty-one years.

Q. And do you know Mr. Mussikee? A. I do.

Q. How long have you known Mr. Mussikee? A. I think about eight or ten years.

Q. Have you had business relations with him? A. I have.

Q. Do you know people among whom he does business in Passaic? A. A great many.

Q. Do you know what his general reputation is? A. I do.

Q. What is his general reputation for veracity? A. Good, as far as I know.

Q. What is his general reputation for honesty, fair dealing and abiding by the law? A. Good.

Cross examination by Mr. D'Aloia:

Q. Do you know if he does business with a man by the name of Israel Turak? A. I do not.

Q. Do you know whether he does business and has done business with another man by the name of Goldberg?

Mr. Lane: I object to that. There is no testimony as to that.

The Court: There is no testimony.

Q. Do you know whether he had a man by the name of Turak doing excavating work for him? A. No.

Q. You never had any social relations with Mussikee or his family? A. No, just business.

Q. And he meets his obligations? A. Yes.

Q. And you come here and say he pays his debts when due? A. Yes.

MAX EPSTEIN, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you live? A. Passaic, New Jersey.

Q. How long have you lived there? A. Eleven years.

Q. What is your business? A. Realtor.

Q. Do you know Mr. Mussikee? A. Yes.

Q. How long have you known him? A. About eight years.

Q. Have you had business relations with him? A. Yes.

Q. Have you had social relations with him? A. Yes.

Q. Do you know his reputation; do you know the people with whom he comes in contact, both socially and in a business way? A. Quite some.

Q. Do you know what his general reputation is? A. Yes.

Q. What is his general reputation for truth and veracity, good or bad? A. Good.

Q. What is his general reputation for honesty and fair dealing and abiding by the law? A. Good.

Cross examination by Mr. D'Aloia:

Q. You say you know him socially? A. Yes.

Q. Do you know people who have social relations with him, too? A. Yes.

Q. Do you know people who have business relations with him? A. Quite some.

Q. Do you know a man by the name of Fisch? A. No.

Q. Do you know a man by the name of Finkelstein? A. Which Finkelstein?

Q. Were you in court yesterday? A. No; I have never been here before.

Q. You were not here until this morning? A. I just got here this morning.

Q. You know several Finkelsteins? A. No.

Q. Well, why do you ask which Finkelstein? A. Because there are a dozen Finkelstein families in Passaic that he knows and I know.

Q. Do you know some that have social contact with Mussikee? A. Yes.

Q. Do you know Turak? A. No.

Q. You do not know the man who did the excavating for him in a business way? A. No.

Q. How long have you been away from Passaic? A. I was away during 1914 to 1923, but my entire family lived in the City of Passic, and although I have not resided there during that period, I knew Mr. Mussikee for twenty years back, but I did not know him socially until I returned, but I visited Passaic once at least a week and the entire family lived there.

Q. But you were away from Passaic until 1923? A. Yes.

LENA NEVINS, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. Where do you live? A. 174 Valley Road, West Orange.

Q. And with whom do you live there? A. Mrs. McDonald.

Q. And did you live there in January, 1924? A. No. 198 Halsted Street, East Orange.

Q. You lived at 198 Halsted Street? A. Yes.

Q. And do you know Mr. Joseph H. Horne? A. I do.

Q. And how long have you known Mr. Horne? A. Well, for three years.

Q. Mr. Horne lived with you? A. He did.

Q. For how long a period of time did he live with you? A. Well, for about one year.

Q. He lived at your house on Halsted Street, East Orange? A. Yes. He rented a room there.

Q. And do you remember the early part of January, 1924? A. I do.

Q. Do you remember around the 4th, 5th and 6th of January, around that period of time, when Mr. Horne was sick? A. He was sick.

Q. Attended by any physician? A. He was.

Q. Do you know the name of the physician that attended him? A. Dr. Livingston.

Q. And who else? A. And Dr. Stevens.

Q. What was the matter with Mr. Horne? A. He had a very sore back from a mustard-plaster.

Q. And he was attended by Dr. Livingston and Dr. Stevens? A. Yes.

Q. Do you remember the night of the fire? A. I do.

Q. Was he attended that night by any doctor? A. He was.

Q. Doctor whom? A. Dr. Livingston.

Q. And did you help him that night? A. Well, I did just after the doctor was there, all I could.

Q. And about one o'clock in the morning, did anybody come to your door? A. Well, the telephone rang and I went into Mr. Horne's room and I wanted to know from the telephone oper-

ator whether she could tell me who phoned and she could not, so just as I was going to hang up the receiver the door bell rang.

Q. Was Mr. Horne in his room when you went in? A. He was.

Q. Was the telephone in his room? A. It was.

Q. And was he awake or asleep? A. He was asleep.

Q. When had he come home that night? A. Ten minutes of six.

Q. What did he do when he got home? A. He went right upstairs to his room.

Q. And did he leave that room from ten minutes to six until you saw him asleep? A. He did not.

Q. And somebody rang the door bell? A. Yes.

Q. Who was it? A. It was the man from the garage next door.

Q. There was a garage next door? A. Right next door.

Q. And it was the night man there? A. Yes.

Q. Was he a white man or colored man? A. Colored.

Q. And did you have any conversation with him? A. I did. He told me that Mr. Horne's factory was on fire.

Q. Did he tell you how he knew? A. No. He just said to tell Mr. Horne.

Q. Did he say that he had tried to telephone your house? A. He did not say anything, only just to tell Mr. Horne.

Q. And what did you do? A. I went upstairs and tried to arouse Mr. Horne, and so afterwards I did, and I said, "Mr. Horne"—I broke this as gently as I could, and I said, "Mr. Horne, your factory is on fire," so he jumped up and he said, "My God, Mrs. Nevins, what will I do," because he was so sick.

Q. What did he do? A. Then he got up and he wanted me to phone for my son to come over and take him down to the factory. He did not know how he could drive the machine, but my son did not hear me. He heard the telephone ring, but it was in his house; it was next door, so he said, "If it rings any longer there must be something the matter with mother."

Q. After you telephoned your son to come to your house— A. Yes.

Q. —where did Mr. Horne go? A. Then he went down to the garage and went to the factory.

Q. Now, Mr. Horne lived in your house for how long? A. For one year.

Q. And during that time had you become acquainted with him sufficiently as to testify as to the people he was associated with? A. Yes.

Q. Do you know what his general reputation in the community was? A. Good.

Q. What is his general reputation for honesty, truth and veracity? A. Very good.

Q. What is his general reputation for being a law-abiding citizen? A. Good.

Cross examination by Mr. D'Aloia:

Q. You do not know where his automobile was that night? A. I do.

Q. You mean he told you? A. He didn't.

Q. Your son drove him to the factory in your car? A. He did not. He went himself.

Q. He went himself? A. Mr. Horne drove his own car.

Q. Now, you were asleep that night? A. Sure, I was, until I heard the phone.

Q. Now, what time did you go to sleep? A. Now, that I could not tell you.

Q. Well, did you to to sleep about eight o'clock? A. Oh, no.

Q. Was it nine o'clock? A. It was after that.

Q. Well, about half past nine? A. No, it was, I think, later than that.

Q. But you had been asleep several hours? A. Yes.

Q. And Mr. Horne had a key to let him in and out? A. He had a key, but he didn't—

Q. You were asleep a couple of hours? A. I know the doctor was there and he gave him a hypodermic and he was just asleep when I went in my room.

Q. And when was that? A. That was between eight and nine o'clock.

Q. And you went asleep after that? A. No, I didn't.

Q. You went to sleep after nine o'clock? A. Well, I could not exactly tell you what time I went to sleep.

Q. Now, you told Mr. Kessler that you know the people who were associated with Mr. Horne there? A. Well, I do not know what people he means.

Q. Well, you answered him and said yes, you do know the people with whom Mr. Horne associated. A. Well, there were quite a few people came to the house whom I know.

Q. Now, after the night of this fire you went to the door and met a man by the name of Finkelstein—

Mr. Kessler: I object to that as not cross examination.

The Court: I will allow it.

Q. Didn't you answer the door some time after the fire and meet a man who said he was Finkelstein?

Mr. Kessler: Objected to as not proper cross examination.

Mr. Lane: I object on the further ground that it is hearsay.

The Court: No. The question is did she have a conversation with a man named Finkelstein, and I will allow that question.

Mr. Lane: That I object to on the ground it is immaterial.

The Court: Allowed.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. Will you answer the question? A. He did not ask me any questions.

Q. No; did a man by the name of Finkelstein come to your house where Mr. Horne lived after the fire looking for Mr. Horne?

Mr. Kessler: Objected to, whether the witness knows if it was Finkelstein.

Mr. D'Aloia: I am going to reframe it.

Q. Did a man who told you his name was Finkelstein come to your house after the fire inquiring for Mr. Horne? Yes or no.

Mr. Lane: That is objected to on the ground it is immaterial, irrelevant and incompetent, and also hearsay, and getting into the evidence statements from a man who said he was Finkelstein.

The Court: I will allow it; answer yes or no.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. What is the answer? A. Well, there was a man—

Q. No. You can answer that yes or no. A. There was a man quite a while after by the name of Finkelstein.

Q. And did he leave with you a message for Mr. Horne?

Mr. Lane: I object on the same grounds I objected to the other question.

The Court: I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Mr. Kessler: I further object on the ground that he does not fix the time.

Q. This was after the fire happened, Mrs. Nevins? A. Yes.

Q. Now, did he leave a message with you for Mr. Horne?

Mr. Kessler: Fix the time.

The Court: What was the time?

The Witness: That I could not tell you; I could not tell you that.

The Court: What time did Mr. Horne leave?

The Witness: The time he left?

The Court: What date was it?

The Witness: That I could not tell you.

Mr. Kessler: How long after the fire?

The Witness: Quite a while after the fire.

Mr. Kessler: Is it weeks or months?

The Witness: That I could not tell you.

Mr. Kessler: See how this is improper cross examination? It was not right after the fire. It does not belong in the case.

Mr. D'Aloia: This is not my witness and I am asking her questions which are proper on cross examination.

Mr. Kessler: I do not think the prosecutor has a right to go into that unless he wants to make her his own witness.

The Court: We will meet that when it comes to it.

Q. After the fire did a messenger by the name of Finkelstein leave a message with you for Mr. Horne?

Mr. Kessler: I object to that as immaterial and incompetent, and the effect of it is to bring in the case an act on the part of Finkelstein, or a man named Finkelstein.

The Court: We are not having the conversation.

Mr. D'Aloia: I will avoid the use of the messenger in order to satisfy counsel for the defense.

Q. Did you receive a paper upon which there was something written to give to Mr. Horne?

Mr. Lane: I object to that as immaterial, incompetent and irrelevant, and what a man who said he was Finkelstein gave to this witness is not binding at all upon anybody.

The Court: Overrule the objection.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. Answer the question yes or no. A. Yes.

Q. Now, when Mr. Horne came in after this visit and after you had received this paper, did you give him the paper?

Mr. Kessler: Objected to on the ground before stated.

Q. Did you give the paper to Mr. Horne?

Mr. Kessler: This is cross examination and the prosecutor must fix the time. Your Honor probably remembers about this paper. It was weeks afterward. I think it is getting to the jury it was the same night. It was weeks after the fire.

The Court: I will allow that answer to be made.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. How long after you had received this paper from this man was it that Mr. Horne came in and you gave it to him? A. Quite a while after.

Q. The same day? A. Yes.

Q. Now, when you gave this paper to Mr. Horne, do you know what Mr. Horne did?

Mr. Kessler: Objected to on the same grounds.

The Court: I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. What did he do? A. He went upstairs.

Q. You had a telephone upstairs? A. He did.

Q. Well, did he use the telephone? A. That I could not tell you.

Mr. Kessler: I object.

The Court: I will allow it.

Mr. Lane: I specifically object to that question with reference to this telephone act.

The Court: I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. Do you know whom he called up on the telephone? A. I do not.

Mr. Lane: I object.

The Court: I will allow it.

Q. What is that? A. I do not.

Q. Do you remember testifying at the last trial? A. He went upstairs.

Q. Do you remember testifying at the last trial? A. I do.

Q. Do you remember this question being put to you?

Mr. Kessler: Objected to. That is not contradiction, because she testified to nothing about that subject on direct examination. It is cross examination on a new subject and he is bound by the answer.

The Court: I will allow the question.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. Do you remember this question being put to you, page 257, "Question: Mr. Horne came home about six o'clock and called up Mussikee in Passaic, that is true, isn't it?" And your answer was, "Yes." A. I do not know what time Mr. Horne came home that day.

Q. That is not the question. At the last trial when you were being examined about this episode of Mr. Horne getting a message from you and going upstairs, you were asked this question, "Mr.

Horne came home about six o'clock and called up Mussikee in Passaic, now, that is true, isn't it? *Answer*: Yes." Now, is it? Is this the answer you made to the question at the last trial and is it true? A. Well, he must have rung him up when he went upstairs.

Mr. Kessler: I move it be stricken out what he must have done.

The Court: That will be stricken out, that is not an answer at all.

Redirect examination by Mr. Kessler:

Q. You do not know who he called up? A. No.

The Court: Did you testify at the last trial it was Mr. Mussikee he called?

The Witness: A note was left for Mr. Horne and he went upstairs. Now, whether he called Mr. Mussikee or not, that I don't know, but it was for Mr. Horne from Mr. Mussikee.

Mr. Kessler: I move that that be stricken out as improper and immaterial.

The Court: How do you know it was from Mr. Mussikee?

The Witness: I saw the note.

The Court: Do you know Mr. Mussikee's handwriting?

The Witness: I do not.

The Court: That will be stricken out.

Mr. Kessler: I ask your Honor to instruct the jury to disregard any testimony with regard to that.

The Court: Yes. This testimony as to the note from Mr. Mussikee will be stricken out.

Mr. D'Aloia: This testimony about the note from Mr. Mussikee was being elicited by the gentlemen on the other side.

Mr. Kessler: It was in answer to a question by the Court.

The Court: I asked her how she knew and she said because—I think she said Mr. Mussikee's name, but she cannot tell, she never saw Mr. Mussikee sign his name and she cannot tell that, and that note is not here and I struck out that testimony.

Mr. Lane: I move a mistrial because that testimony has gotten into the record and there is no justification for the inference that any of Mussikee's writing was on that note at all in any manner, shape or form.

The Court: Well, the jury will pass upon this case from that which is in evidence and that which is not in evidence will be disregarded by the jury.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Mr. D'Aloia: Do I understand your Honor's ruling is because the note is not here?

The Court: No. It is from the witness' answer how she knew what the note was. Whom did you give the note to?

The Witness: To Mr. Horne.

Q. Mrs. Nevins, when was it that this man came to your house? A. I could not say the date, but quite a while after.

Q. After what? A. After the fire.

Q. Well, what do you mean by quite a while? A. Well, I could not tell you exactly how long.

Q. Was it weeks? A. Yes. I could not tell you exactly whether it was a week or two or what.

Q. Well, can you give us your best recollection of how long after the fire that you have given us about this man coming to the house? A. I could not say that.

Q. Was it a month? A. It might have been.

Q. Was it more than a month? A. It might have been; I could not tell you.

Q. It might have been more than a month? A. Yes. I could not tell you.

Q. It might have been more than two months? A. That I could not say.

Q. In other words, it was a long time after the fire? A. Yes.

Q. And you cannot tell whether it was a month or two, then? A. No, I cannot.

Mr. Kessler: In view of the direct testimony, I ask that the entire testimony be stricken out. She was only examined, I think, on the point of time, from the time this colored man came in and told her about the fire. It was over our objection. It now appears it was a month or two more after this fire and she certainly was not examined on that on her direct and, therefore, I desire her entire testimony to be stricken out.

The Court: I believe that is more or less in the discretion of the Court and, then, it

relates to one of the defendants and it is evidential as to the course of conduct.

Mr. Kessler: There is a great period of time intervening between the time of the fire and the alleged conversation or delivery of the paper.

The Court: It relates to the course of conduct of the defendant.

Mr. Kessler: Your Honor refuses it?

The Court: Yes.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr. Lane: That same motion is made for the defendant Mussikee.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Recross examination by Mr. D'Aloia:

Q. You do not know whether it was two weeks after the fire? A. I do not; I could not say.

Q. You do not know whether it was a week after the fire? A. No; that I could not say either.

Cross examination by Mr. Lane:

Q. It was not the day after the fire? A. Oh, no.

Q. Or the next day? A. No, I don't think so. I think it was quite a while after the fire.

Recross examination by Mr. D'Aloia:

Q. And that may have been a week, so far as your best recollection is concerned? A. That I could not say.

AGNES AYRES, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. Where do you live? A. Belleville.

Q. Belleville, New Jersey? A. Yes.

Q. By whom are you now employed? A. The Union Building Company.

Q. That is the company that owns the Union Building and Essex Building here on Clinton Street, Newark? A. Yes.

Q. In March, 1923, and up until the fire and thereafter, where were you employed? A. By the Merritt Products Company.

Q. And where was their place of business? A. Valley Road and Joyce Street.

Q. West Orange? A. West Orange.

Q. And what was your position with that company? A. Bookkeeper.

Q. And for how long a period of time did you continue to work for the Merritt Products Company? A. Until July, 1924; July 19th.

Q. And then in July, 1924, you left their employ and have since been in the employ of the Union Building Company? A. Yes.

Q. So that you are not now employed by the Merritt Products Company or Mr. Horne, or anybody associated with it? A. No.

Q. During the period of time from March, 1923, up until the time of the fire, was the company actively in business? A. Yes.

Q. And what was the business of the company? A. They manufactured automotive parts.

Q. Anything else? A. No, that is all.

Q. And about how many men were in the employ of the company around the period of time of the fire? A. Well, it was mostly girls' work.

Q. Well, how many people? A. About five.

Q. Including yourself? A. Excluding myself.

Q. Now, on the morning of Saturday, the day before the fire—the fire was 12:15 Sunday morning, was the factory in operation? A. Yes.

Q. And how many people were employed? A. Four or five.

Q. Including yourself? A. Excluding myself.

Q. And when did you stop work on that day, the Saturday before the fire? A. I left the office somewhere between 2 and 2:30.

Q. Had Mr. Horne been in that morning? A. Just for the briefest possible time.

Q. About what time? A. From a few minutes before one.

Q. And then you left? A. Yes, between 2 and 2:30.

Q. And whom did you leave there when you went? A. Mr. George W. Robinson and Frank Vincenzo.

Q. He was the man employed there to fix the pipes who testified here the other day? A. Yes.

Q. And were you in and out of the factory that morning? A. Yes.

Q. Was the factory warm or cold that morning while the girls were working? A. Warm.

Q. And how did you obtain heat in the factory? A. Steam heat.

Q. And where did you get the steam heat? A. They had to generate their own steam. They had a boiler of their own.

Q. And will you turn your back and look at the map and can you tell us where the boiler was on that map? A. In the center there.

Q. Point it out. A. Right about here.

Q. And was there any other boiler or any other place you could obtain heat for the building that day? A. Nothing outside of a couple of little gas heaters in the office.

Q. And do you know whether there was fire in the boiler that day? A. There was.

Q. And is that the manner they obtained the heat tor the building? A. Yes.

Q. Did you observe where the electric wires for that building were laid in the building? A. Yes.

Q. And where were they? A. They were in the regulation little steel cables through the center of the ceiling in the old building.

Q. Where were the wires attached to? A. To wainscoting ceiling.

Q. Were they exposed or behind the wainscoting? A. No, they were open.

Q. And they were attached to the cross beams in the ceiling? A. No, the cross beams were covered with wainscoting, little narrow boards.

Q. And the wires were up above the wainscoting? A. Yes.

Q. And did you observe from what part of the building they came into the building from the outside in? A. Well, if I remember rightly, they ran all through the office and right through the center of the building and in the rear of the factory.

Q. What do you mean by the center of the building? Will you indicate with your pointer just what you mean by through the center of the building? I think the testimony is that this is the office and a small room and this is Valley Road and the outline here is the entire building and this is the loading platform. A. The wire came through right here in a cable.

Q. Indicating in the room marked C? A. Yes.

Q. When did you first learn of the fire? A. Oh, perhaps a quarter to one Sunday morning.

Q. And how did you learn of it? A. One of our employees who lived directly opposite the premises called me up at my home.

Q. When did you go to the premises? A. Not until Monday morning.

Q. And when you got there, what did you find? A. I found the place had been burned.

Q. When you heard about a quarter to one, when you learned of the fire, what did you do, if anything? A. Why, the natural thing for me to do—

Q. No, what did you do? A. I called Mr. Horne up.

Q. Did you get the house? A. No, sir; the telephone operator got no answer.

Q. And about what time were you making the telephone call? A. Immediately after I got the telephone message.

Q. You mean right after quarter of one? A. Yes.

Q. And for how long a period of time did you try to get Mr. Horne's house? A. Oh, for perhaps five or ten minutes, and I called the garage next door.

Q. And do you know who you spoke to in the garage next door? A. The night attendant.

Q. And did you give him a message to deliver? A. I did.

Q. And you, of course, do not know whether he delivered it or not? A. Well, he must have.

Q. And so you telephoned to this man Matthews? A. I don't know who he was, but I insisted that he deliver the message.

Q. And when you got there on Monday did you observe this electric wiring? A. Yes.

Q. And did you observe the condition the electric wiring was in that Monday morning? A. Yes.

Q. What was the condition of it? A. The ceiling had been entirely burned away, and the rafters had fallen and naturally the wires fell with it.

Q. The ceiling had entirely burned away? A. Yes.

Q. And the wires were down? A. Yes.

Q. And so were the rafters? A. Yes.

Q. Did you observe where the fire had done the most damage? A. In the old portion of the building.

Q. Will you take the pointer and indicate what you mean by the old portion of the building? A. All in through here.

Q. Are these the kinds of materials you manufactured in your factory? A. Yes.

Mr. Kessler: Showing Exhibit D. 1 for Identification.

Cross examination by Mr. D'Aloia:

Q. What time was it you left on that Saturday? A. Between two and two-thirty.

Q. And who did you leave there? A. Frank Vincenzo, Mr. Robinson and Mr. Horne.

Q. None of the girls? A. No.

Q. There was not any heat needed for that afternoon? A. Why, the fire was naturally burned down; burned itself out.

Q. You left at two-thirty? A. Yes.

Q. Your general stock consisted of such materials as have been exhibited to you by Mr. Kessler? A. That and shellac and so forth.

Q. What is that? A. Shellac and such things as that.

Q. You mean— A. Shellac and cement.

Q. How many loads of goods were taken out of that place subsequent to the fire? A. None. No such terrible loads.

Q. You were the bookkeeper up until July? A. Yes.

Q. Now, look at this photograph, Exhibit S. 9. Is that the way that particular room, which was the main room, looked when you got there Monday morning? A. No.

Q. What was the condition? A. This is not the main room; that was the store room.

Q. That is this room back here? A. Yes.

Q. Now, looking at the photograph, is that the way it looked Monday morning when you got there? A. No.

Q. What was the condition? A. Why, the place was loaded with stuff.

Q. Well, you just told me a minute ago that no big loads were taken away subsequent to the fire? A. After the fire.

Q. I asked you if after the fire any of the stock was taken out, and you said no, no big loads. A. The stock was taken out after the insurance adjusters told us it was all right to remove it.

Q. How much of it was taken out? A. It was all removed that it was possible to.

Q. When? A. After the insurance adjusters had given permission.

Q. When was that? A. Why, perhaps a month or six weeks after; I do not recall the exact date.

Q. It may have been two or three months after? A. It might have been.

Q. Were you there on the day the photographs were taken by the photographer? A. I do not recall that I was.

Q. You were there until July, weren't you? A. I was, your Honor, but please remember they moved to another place after the fire; it was not possible to continue business there.

Q. I understand that, but you remained there at the place after the fire. Were you there on the day these photographs were taken?

Mr. Kessler: She does not know when they were taken.

Q. Well, they were taken prior to July. Well, when was the settlement made? A. I do not recall the exact date of the settlement.

Q. And you do not recall whether you were at the place when the photographs were taken or not? A. Well, Mr. D'Aloia, it would not possibly be fit for anybody to work there. There was no heat in the place. It was full of ice.

Q. Have you any records of that business? A. I have not them here.

Q. Now, isn't it a fact that just before this night of the fire there was very little stock in any of those rooms? A. No, sir; there was plenty of stock.

Q. But you haven't any books here to show how much there was? A. No, I haven't it here.

Q. You paid a lot of attention to the electric wires before this thing occurred? A. Well, when one went in and out of the rooms, one could not scarcely help learn the outlay of various things.

Q. I show you a photograph of it. Do you recognize it? A. Yes, I do.

Q. Now, will you please tell us where the electric wires were there? A. Here.

Q. Right across the ceiling? A. Yes.

Q. Do you notice that all those rafters there are charred? A. Yes.

Q. And they are all charred uniformly right across, aren't they? A. Probably. I cannot tell from the photograph.

Q. Now, recalling where the electric wires were, do you find any more burning at that particular spot on the rafters than you find on any of the other rafters? A. No.

Q. Do you say the electric wires were running along the rafters here? A. Yes.

Q. Were there any electric wires in this front room? A. Certainly.

Q. Show us on this picture, which represents that room, and shows a great portion of the room, where they were. A. I could not tell you where they were.

Mr. Lane: I object to the statement they show a great portion of the ceiling.

Mr. D'Aloia: I say this photograph does.

Mr. Lane: Well, it does not. There is a haze there.

Mr. D'Aloia: Now, I would like to ask counsel for the defense if this is a haze on the ceiling.

Mr. Kessler: Certainly.

The Court: Direct your witness' attention to the photograph.

Q. I show you this photograph. Can you see the ceiling? A. Yes.

Q. You do not see any haze there? A. I see the wires there.

Q. Where are they? A. Right there.

Q. Down? A. Down.

Q. Do you see that wire is galvanized? A. Yes. I do not know what it is.

Q. Well, you see it there. It looks like what you saw when it was up? A. Probably it was galvanized, because the law requires it.

Q. That particular portion of wire there shows pretty white, doesn't it? A. Yes.

Redirect examination by Mr. Kessler:

Q. When did your company move out of these premises? A. As soon as the insurance company had made the adjustment.

Q. About how long after the fire? A. Perhaps about six weeks.

Q. About six weeks after the fire, you moved out? A. Yes.

Q. Where did you move to? A. Freeman Street.

Q. Freeman Street in West Orange? A. Yes.

Q. And you worked there until June? A. July.

Q. When you left their employ? A. Yes.

Q. Now, all the goods that were movable after the adjustment by the insurance company were taken out and transported to the Freeman Street address? A. Yes.

Paul Livingston, direct.

Q. And then did you continue business after the removal of these goods until some time in June? A. Yes.

Q. Can you say about how much goods were moved that could be moved? A. As near as I can say, there was about $40,000 worth of stuff salvaged from the fire.

Recross examination by Mr. D'Aloia:

Q. How many loads were taken away? A. Well, I could not very well recall that; there was plenty of loads.

PAUL LIVINGSTON, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. You are a practicing physician in the City of East Orange? A. I am.

Q. And you have been for how long? A. Thirteen years.

Q. And do you also practice in Orange? A. I do.

Q. And where is your place of business? A. 299 Main Street, East Orange.

Q. Do you know the defendant, Joseph H. Horne? A. I do.

Q. And have you attended him at any time? A. Yes.

Q. When for the first time? A. Just about six or seven months before the last time I attended, that is, before the had his burns.

Q. And what were you attending him for? A. He had a neuritis; neuritis of the shoulder.

Paul Livingston, direct.

Q. Have you ever examined his heart and know whether he has a bad heart? A. Yes.

Q. He has a bad heart? A. No, he has not a bad heart.

Q. At the time you examined him six or seven months before the fire, he had a good heart? A. Yes.

Q. Now, prior to the time of the fire, when had you examined Mr. Horne? A. Probably a month or two; I do not recollect the date.

Q. I mean just previous to the fire did you see him? A. Oh, yes, I saw him for the first time January 5th.

Q. And where did you see him? A. At his house.

Q. About what time? A. I saw him for the first time about nine o'clock in the morning.

Q. And what was the matter with Mr. Horne at nine o'clock that morning? A. He had a severe burn of the shoulder.

Q. Do you know what caused the burn? A. It was caused by applications of a mustard plaster upon the shoulder.

Q. You mean too long an application? A. Too strong a mustard plaster.

Q. And what did you do for him? A. Soothing applications, boric acid, ointments and a soothing application.

Q. Where was he when you saw him? A. In his bed in his room at his house.

Q. When did you leave? A. About a half an hour after I came in.

Q. Did you see him again that day? A. No, I didn't see him until the next day.

Q. Were you called to see him the next day? A. Yes. I could not get there.

Q. Did you send anybody else? A. Yes, I sent Dr. Stevens, my assistant.

Q. Is Dr. Stevens your assistant? A. Yes.

Q. Did he got to see him? A. Yes.

Q. Was this burn that you observed on Mr. Horne—was that a painful burn? A. Very painful.

Cross examination by Mr. D'Aloia:

Q. You saw him Saturday morning first, January 5th? A. Yes.

Q. And you found him suffering from this terrible burn? A. Yes.

Q. And that night it was necessary for you to send Dr. Stevens there because you could not attend. Do you know what time you sent Dr. Stevens there? A. I sent Dr. Stevens there two or three o'clock—four A. M. of the morning of the 6th. I could not get there. He called up first about his burns and I sent Dr. Stevens there and that was four o'clock on the morning of the 5th.

Q. That was early Saturday morning? A. I judge so.

Q. And you went there that same morning? A. Yes.

Q. Around half past nine. A. That is it.

Q. And then you did not see him at all during that whole day of Saturday, until some time the next day, which was Sunday? A. I saw him around eleven o'clock that night.

Q. Where? A. At his house. I came there after office hours to dress his burn. He had lots of burns.

Q. You mean which night? A. The night of the 5th.

Q. Then you saw him twice on the 5th? A. Yes.

Q. Let's see, Dr. Stevens saw him on the morning of the 5th about four o'clock and you saw him on the morning of the 5th about half past nine at his house and you went there near eleven, are you sure it was eleven? A. Eleven or twelve. I could not tell the exact time.

Q. About midnight you went there? A. Yes.

Q. And the man was very sick and very painful? A. Yes.

Redirect examination by Mr. Kessler:

Q. Doctor, can't you recollect about what time it was on Saturday night that you made this call? A. Well, I think it was very late getting there. I think it was almost around twelve o'clock; between eleven and twelve o'clock; around in there; I cannot tell exactly.

Q. And when you got there, where was the defendant? A. He was in bed suffering with pain.

Q. And what did you do for him that night? A. Why, I gave him a hypodermic—morphine.

Q. And that was to induce sleep? A. Yes, Relieve the pain.

Q. And that naturally produces sleep? A. Yes.

Q. And when did you see him after that? A. I saw him the next day. I could not get there the next day during the day. I went there in the evening after office hours again around ten or eleven o'clock, or around that time.

Q. Was he still in pain at that time? A. Yes.

Recross examination by Mr. D'Aloia:

Q. And that was Sunday night? A. Yes.

MERTIN H. STEVENS, sworn in behalf of the defendant, Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. You are a practicing physician in East Orange? A. I am.

Q. You are associated with Dr. Livingston? A. Right.

Q. At his request did you go to see Mr. Horne? A. I did.

Q. About what time? A. I first saw him on the morning of January 5th about four o'clock in the morning.

Q. And what was he suffering from? A. He was suffering from a burn of the shoulder.

Q. Mustard plaster burns? A. As I recollect, yes.

Q. Did you ever see him after that? A. Yes. I saw him subsequently.

Q. When? A. I saw him the next day both in the morning and afternoon, and again about three days later.

Q. Now, the next day, do you mean the same day? A. No, I mean the 6th.

Q. You saw him on the 6th? A. I did.

Q. That was on Sunday? A. I do not remember the day of the week; it was the 6th.

Cross examination by Mr. D'Aloia:

Q. You made how many calls between the 5th and the 6th? A. Why, on the 5th I made one and on the 6th too.

Q. That was very painful, that condition you found him in? A. It was.

Redirect examination by Mr. Kessler:

Q. Did you see him on the 9th again? A. I did.

Q. Was it necessary for you to see him? A. He asked for us to come and see him.

Q. Was he in pain then? A. Why, the burn was healing, I do not recollect how much pain he had at the time.

The Court: Doctor, you said you called twice on the 6th.

The Witness: I did.

The Court: Did you call at his suggestion or your own?

The Witness: Why, it was Dr. Livingston's, I believe; he asked me to go and see him.

DEAN MATTHEWS, sworn in behalf of the defendant, Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. In January, 1924, by whom were you employed? A. Nolan's garage.

Q. What was your business there? A. Night man.

Q. And where was this garage located? A. Corner Halsted Street and Central Avenue.

Q. In what city? A. East Orange.

Q. Do you know Mr. Horne? A. Yes.

Q. How long had you known Mr. Horne? A. I had been there about six months at that time.

Q. You had been there about six months? A. Yes.

Q. How had you become acquainted with Mr. Horne? A. Just a customer.

Q. Did he store his car there? A. Yes.

Q. Do you remember the night of the fire? A. Yes, I do.

Q. Do you remember when his car came into the garage? A. Yes, I remember it.

Q. What time? A. Well, it was around six o'clock. I was due on the job at six o'clock and the same time I got there he had—

Q. I beg your pardon! A. Sometimes I was in around half-past five.

Q. Did you see Mr. Horne come in? A. Yes.

Q. He came in some time around six o'clock? A. Yes.

Q. Who drove his car in? A. He drove it in.

Q. What did he do with his car after he drove it in the garage? A. He left it on the floor and I put it away.

Q. And then did he go out? A. Yes.

Q. And from then on until one o'clock where was Mr. Horne's car? A. In the usual place where I kept it.

Q. Now, about one o'clock did you receive a telephone call? A. Yes.

Q. Was it from a man or woman? A. It was a lady called, I think.

Q. And did she ask you to deliver a message? A. Yes.

Q. And after she asked you to deliver the message, where did you go? A. I went next door to Mrs. Nevins'.

Q. And for whom was the message? A. For Mr. Horne.

Q. And did you give that message that this lady on the telephone gave you to Mrs. Nevins? A. Yes, I did.

Q. What was the message? A. To say that Mr. Horne's factory was on fire.

Q. And then did you go back to your place? A. Yes, I went right away back.

Q. And did you see Mr. Horne after that? A. About ten or fifteen minutes after he came in.

Q. About ten or fifteen minutes later Mr. Horne came into the garage? A. Yes.

Q. What happened after he got there? A. He asked me if I could drive him to his factory and I could not go, so I got the car for him and he went.

Q. You got the car out for him? A. Yes.

Q. And he drove it himself? A. Yes.

Cross examination by Mr. D'Aloia:

Q. How many cars were in this garage? A. I don't know; something like seventy-five or something like that.

Q. This was a Saturday night? A. It was a Saturday night, yes.

Q. I ask you now, can you tell us how many cars came in between seven and eight o'clock? A. No, I could not tell.

Q. You could not tell us whose cars they were? A. I could not recall everybody's car; no, sir.

Q. Can you tell us how many cars came in between eight and nine o'clock that night? A. Not an awful lot, because the most of them was in already; it was an awfully cold night.

Q. I know, but can you tell us who came in between eight and nine o'clock that night? A. No, I couldn't.

Q. It was a pretty cold night that night? A. Yes, pretty cold night.

Q. Do you know whether Mr. Horne came in between nine and ten o'clock that night with his car? A. Yes, with his car.

Q. Between nine and ten o'clock? A. Earlier than that.

Q. What is that? A. He came earlier than that.

Q. Well, was it nine or ten? A. No, around six o'clock.

Q. Well, you didn't go on duty until seven. A. No, I was on duty at six o'clock.

Q. Do you remember testifying at the last trial? A. Yes.

Q. You were asked this question: "What time did you go on duty?" And you said seven o'clock in the evening; is that right? A. If it is down there, I guess it is.

Q. Now, if you said that it is right? A. If I said that, that was right.

Q. And you were asked this question, "Can you tell me how many cars came in between seven and eight o'clock and whose cars they were?" And your answer was, "No, I didn't take notice." That is right, isn't it, you didn't take notice of any cars that came in that night? A. Well, I take notice of some cars.

Q. To whom have you been speaking about this case? Have you been talking to any of these gentlemen at the other table? A. No, I haven't.

Q. You haven't? A. No.

Q. Did you talk to anybody before the last trial about remembering Mr. Horne's car coming in? A. No.

Q. Well, how did you come here today and say that Mr. Horne's car came in about six o'clock when you went on duty at seven o'clock? A. Well, I possibly got the hour mixed up.

Q. Now, isn't it possible that Mr. Horne's car came in between eight and nine o'clock or nine and ten o'clock and you not remember it because of the number of cars and the temperature outside and the work you had to do? A. No, that is not possible.

Q. But you are the man who got the message around midnight or after midnight, that there was a fire? A. Yes, I got the message.

Q. And you are the man who went in and told Mr. Horne? A. I delivered the message next door.

Q. And Mr. Horne asked you to drive him to the fire and you couldn't? A. Yes.

Q. And you couldn't go? A. No.

Q. And all you know is when Mr. Horne came in about one or half-past one that morning his car was there? A. No.

Q. He went out with his car after the fire was announced to you? A. Yes.

Q. Now, that is the only thing you know, his car was there in the garage when the fire message came to you and you went and called him? A. It was there.

Q. But you do not remember when it came in at all because of the number of cars that came in and went out? A. Well, some few I could remember, because I always took care of those special cars and put them away for them.

Q. Now, you won't tell us that Mr. Horne's car came in between nine and ten o'clock and Mr. Horne—or the car without Mr. Horne did not come in the Amherst garage that night without Mr. Horne. A. I will swear the car came in after I went on duty.

Q. And you went on duty at seven o'clock? A. Yes.

Redirect examination by Mr. Kessler:

Q. When did you go on duty? A. Well, as I said, I possibly got the hour mixed up.

Q. When did you recollect the time that you went on duty? A. Well, that is what I wanted to say.

Q. Go ahead. A. I was supposed to get there at a certain time.

Q. What time? A. Well, I don't know whether it was seven or six now. That is what I wanted to say.

Q. You are not sure whether you were to go on duty at six or seven? A. That is it.

Q. But whatever time you got on duty Mr. Horne came in with his car and put it away? A. Yes.

Q. About how long were you on duty when he did come in with his car? A. Well, it was not very long, because I had not started my washing.

Q. So it was between six and seven, or whatever time you went on duty that Mr. Horne came in? A. Yes.

Q. And you put that car in its proper place from either six or seven o'clock and it remained there until one o'clock when he came and took it out? A. Yes.

Recross examination by Mr. D'Aloia:

Q. Now, after the fire did anybody come to see you from Judge Davis' office? A. No, sir.

Q. And when did you first make a statement about what you were doing that night and what time Mr. Horne's car came in? A. Well, it was quite a while after that.

Q. And how long after? A. I do not exactly know.

Q. A couple of months? A. Well, I do not know how long it was.

Q. Did you sign a paper for the gentlemen who came to see you? A. They didn't come to see me.

Q. Did you go to see them? A. I had a notice to come there.

Q. Well, did you sign a paper when you got there? A. Well, I do not recall whether I did or not.

Q. Your memory is not so good? A. Well—yes, pretty good.

Cross examination by Mr. Lane:

Q. You do not very often have cases in your garage where the owners are sent for because of fires in their buildings? A. No, sir.

Q. That is the only one you had of that kind? A. Yes.

Q. And you would remember it? A. Yes.

JOSEPH A. NEVINS, sworn in behalf of the defendant, Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. You are the son of Mrs. Nevins, who testified on the witness stand this morning? A. I am.

Q. And in January, 1924, did you live with your mother? A. No; I lived 227 Elmwood Avenue, East Orange.

Q. Are you a married man? A. Yes.

Q. Was your family there? A. Yes.

Q. Do you know Mr. Horne? A. I do.

Q. Do you know how long he lived at your mother's house? A. I think he came there some time in August; the latter part of August.

Q. And he lived there all the way up to January and thereafter? A. And thereafter, yes.

Q. And had you an opportunity to meet some of the people that he knew? A. Very often.

Q. And did you ever hear his reputation discussed? A. No, I can't say that I did.

Q. Did you know the people who come in contact with him in West Orange and East Orange where he lived? A. Yes.

Q. Do you know his general reputation for being a law-abiding citizen? A. I have never heard anything against it.

Q. Do you know his general reputation for truth and veracity? A. I always found it good.

Q. Now, on the 5th of January, the day of the fire, it was on a Saturday? A. Yes.

Q. Did you have occasion to go to the factory? A. I did.

Q. When did you go there? A. About ten minutes to four or somewhere about that time.

Q. And who was with you? A. Mr. Smallwood.

Q. What were you doing there? A. We were trying to interest Mr. Horne in a painting business, the painting of automobiles.

Q. You were trying to induce him to go in business with you?

Mr. D'Aloia: Is that material?

Q. And when you got there about a quarter to four, who was there? A. Why, there was some man in the office at the time; I do not recall who it was.

Q. And who else was there? A. Some young man out back working around.

Q. What was he working on? A. I cannot say, but from the material he was handling I judge he was working on pipes, or covering pipes, or something like that.

Q. And how long were you and Mr. Smallwood there? A. About a half hour.

Q. Did you go through the factory? A. Yes.

Q. Who took you through? A. Mr. Horne.

Q. Did you go all around? A. Yes.

Q. Did you observe the boiler in the factory? A. I noticed the boiler.

Q. Was the factory warm or cold? A. Warm.

Q. Did you observe whether there was any steam on? A. I didn't observe the gauge, but I think there was a fire in the boiler.

Q. Now, on the night of the 6th, around one o'clock, did you receive a telephone call? A. No, I didn't receive a call. The place where I was living had a store there and there was a telephone in the store. I had no phone. That phone kept ringing so much I knew nobody was calling the store at that time, and I told my wife: "I think there is something wrong," and I could not get to it to answer it, of course, so I waited awhile and it started ringing again, and I told my wife I was going over to see my mother, there must be something wrong with my mother.

Q. How long after did you leave from the house? A. About a half an hour.

Q. And did you go to the house? A. Yes.

Q. What time? A. I cannot recall the exact time.

Q. Somewhere around one o'clock? A. Yes.

Q. Was Mr. Horne there? A. No, he was not there.

Q. After you left Mr. Horne's factory and between that time and six o'clock did you go to see your mother at her house? A. Yes, I stopped there to see if she wanted anything for Sunday.

Q. What time did you get there? A. Well, I came direct from the factory with Mr. Smallwood in his car.

Q. You left Mr. Horne at the factory? A. Yes.

Q. Did you see him again after that? A. Yes.

Q. Where? A. About ten minutes to six, coming to my mother's house.

Q. And where did he go to? A. He went right upstairs; I presume to his room.

Q. How long did you stay at your mother's house? A. Somewhere around eight or nine o'clock; or eight-thirty.

Q. Between the time you got there and the time you left did Mr. Horne leave the house? A. No.

Cross examination by Mr. D'Aloia:

Q. Were you in the room with him? A. Several times.

Q. What was the time before eight-thirty that you were in his room? A. Just before I left the house to go home.

Q. What time was it? A. Around eight-thirty or nine o'clock.

Mr. Kessler: I object. The prosecutor has no right to mis-state testimony.

The Court: Probably it is a mistake. Ask the question over again.

Mr. Kessler: Around eight-thirty. It may mean eight o'clock.

The Witness: It don't. It means eight-thirty.

Q. When you say eight or eight-thirty, what does it mean? A. It may be a quarter to nine; somewhere around there.

Q. It may be a quarter after eight? A. No. I doubt it very much.

Q. Let's see. You took over this business after the fire? A. I did.

Q. Now, when did you first start to remember whether there was any steam up in the boiler? A. He just asked me the question. It is the first time I have been asked.

Q. You appeared as a witness at the last trial? A. I did.

Q. There was not anything said to you about the boiler? A. It was not asked.

Q. Do you remember Judge Davis asking these questions, how old you were, and you told him? A. I probably did.

Q. And that you went to the factory around four o'clock? A. No, I didn't say that; I said ten minutes to four.

Q. Well, let's use your expression "around eight-thirty." Well, around four o'clock may mean ten minutes to four.

Mr. Kessler: What page are you referring to?

Mr. D'Aloia: 245.

Q. What time did you go there, about ten minutes to four? A. Yes.

Q. How long did you stay? A. I stayed about a half an hour.

Q. "*Question*: While you were there did you see Mr. Horne? *Answer*: I did. *Question*: What

part of the building did you see him in? *Answer*: He was in the office. *Question*: Smaller office or larger office? *Answer*: The smaller office. *Question*: What did you and Mr. Smallwood go there to see Mr. Horne about? *Answer*: We went around to look at some buildings where we were figuring to start building in East Orange. *Question*: What kind of a business were you starting? *Answer*: Painting. *Question*: Painting of what? *Answer*: Automobiles. *Question*: And you were trying to get Mr. Horne interested? *Answer*: Yes. *Question*: When you left, did you leave with Mr. Smallwood? *Answer*: I did. *Question*: And did you leave Mr. Horne there? *Answer*: Yes, sir; I did. *Question*: Who was there at that time besides Mr. Horne? *Answer*: There was some young man there working on some pipe or something. *Question*: While you were there in the factory, Mr. Nevins, what did you do, if anything, besides talking to Mr. Horne? *Answer*: We walked through the factory. *Question*: You and Mr. Smallwood? *Answer*: Yes, sir. *Question*: What condition did you find the factory to be in, so far as being orderly or disorderly. *Answer*: It was in very good condition. *Question*: And did you go through the entire factory from the front to the back? *Answer*: I did. *Question*: What did you find in the larger part of the rear? *Answer*: That seemed to be a sort of a store room. *Question*: Well, what did you find there; what did you see there, at least? *Answer*: Just what do you mean? *Question*: Well, did you see any goods, or boxes, or crates, or what? *Answer*: Oh, yes, any quantity of them. *Question*: Of what? *Answer*: All different kinds of goods, such as web straps, and different things

like that. *Question*: And how were they arranged? *Answer*: In neat piles. *Question*: What part of the rear of the building did that take up? *Answer*: All of the rear. *Question*: When we speak of the rear, we mean the part of the building down toward the bottom of the picture there. *Answer*: Yes, sir. *Question*: What time did you say it was when you left the factory? *Answer*: About twenty minutes past four. *Question*: Where did you go then? *Answer*: Home." Then you told us about going home. Now, in that minute description of the factory, in answer to Judge Davis' questions, you notice you omitted any reference to any steam being up in the boiler.

Mr. Lane: I object. It is inconsistent with questions put by counsel and it is not any minute description made by the witness, at all.

The Court: Sustained.

Q. Well, in your answer to Judge Davis' questions, when he asked you a question such as this, "Did you go through the entire factory from the front to the rear?" and your answer is, "I did," and the question is what did you find in the larger part of the rear, and your answer it was a sort of a store room, and the next question, "Did you see any goods, or boxes, or crates, or what," you didn't say anything about the boiler then.

Mr. Lane: I object to that as improper.
The Court: Objection sustained.

Q. I want to know now, after that particular preliminary examination when was it since the

last trial that these gentlemen or somebody else asked you about the steam in the boiler? A. The first time was by this gentleman now.

Q. You do not mean to tell me you did not know that you were going to say there was steam up? A. I didn't know a thing he was going to ask me.

Q. This question was put to you for the first time today? A. Yes.

Q. And your answer was, "Yes, I noticed the boiler and I think there was steam up," and you never discussed that phase at all? A. No, I didn't.

Redirect examination by Mr. Kessler:

Q. Did I talk to you at all? A. No.

Q. Did anybody from my office talk to you? A. No.

Q. Did any other counsel or anybody else approach you on this question? A. No.

Q. The only reason you did not mention steam at the last trial was because you were not asked? A. No.

HENRY SMALLWOOD, sworn in behalf of the defendant, Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. What is your business? A. Painter.

Q. And do you know Mr. Nevins, the gentleman who was just on the stand? A. Yes.

Q. Do you remember the 5th of January, 1925? A. Yes.

Q. Or 1924; I mean the day of the fire? A. Yes.

Q. Where did you live? A. At that time?

Q. Yes. A. 143 Whittlesey Avenue.

Q. What city, what town? A. West Orange.

Q. And you knew of this fire? A. No.

Q. Had you known of tnis fire when it occurred? A. I know the fire, the next day when I passed it.

Q. And were you at this factory on the day of the fire? A. Yes.

Q. That is, on Saturday? A. Yes.

Q. With whom did you go there? A. Mr. Nevins.

Q. And what time did you get there? A. Why, between three-forty-five and four o'clock.

Q. And how long did you stay there? A. Probably a half an hour.

Q. And what did you do while you were there for a half an hour? A. Talking with Mr. Horne.

Q. And did you go through the factory? A. We did.

Q. And who took you through? A. Mr. Horne.

Q. And who went through the factory? A. Mr. Nevins, Mr. Horne and myself.

Q. Now, while you were going through the factory, did you observe whether it was warm or cold in the factory? A. Warm or cold?

Q. Yes. A. Cold in the factory, but warm in the office.

Q. Did you pay any attention, or did you observe the steam boiler, or the boiler in the building? A. I only seen the boiler; I did not take any particular notice of it.

Q. Did you notice whether the boiler had fire in it or not? A. I couldn't say.

Q. Did you observe it at all? A. No.

Cross examination by Mr. D'Aloia:

Q. Mr. Smallwood, you went along with Mr. Nevins? A. Yes.

Q. And when you got to the office, you found Mr. Horne there, didn't you? A. Yes.

Q. Who suggested walking around the factory? A. Mr. Horne.

Q. He said to you, "You have never seen my factory," didn't he? A. Yes.

Q. And "How would you like to go around; I would like to take you through"? A. Yes.

Q. And he took you all around and showed you the rear and all the places there were there? A. He showed us the general run of the place.

Q. Well, he showed you the goods in back? A. Yes.

Q. And he showed you how he had them piled up on the shelves? A. He did not call my attention to it.

Q. Well, you saw them? A. Yes.

Q. You did not have any interest in going around that factory, did you? A. No.

Q. You got there about ten minutes to four? A. Around that time, yes.

Q. And how long had you been there with Mr. Nevins and when Mr. Horne suggested that you go around the factory with him? A. About five minutes before we left.

Redirect examination by Mr. Kessler:

Q. Did Mr. Horne know that you were going to see him? A. I can't hear you.

Q. Had you made an appointment with Mr. Horne to meet him there? A. Yes.

Q. Who had made the appointment? A. Mr. Nevins.

Q. Mr. Nevins had made the appointment to go and see Mr. Horne there? A. Yes.

Recross examination by Mr. D'Aloia:

Q. Now, you recall it was cold in the factory and warm in the office? A. Yes, a small heater.

Redirect examination by Mr. Kessler:

Q. You mean by that it was colder in the factory than in the office? A. Yes.

Q. Was it just as cold outside as it was in the factory? A. No.

Q. It was warmer in the factory than outside? A. Yes.

The Court: What was it that you said about a small heater?

The Witness: Yes, in the office.

The Court: What kind of heater?

The Witness: Gas heater.

CHARLES O. IRELAND, sworn in behalf of the defendant, Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. What is your business? A. I am vice-president of the Midwood Trust Company, New York.

Q. Do you know Mr. Horne? A. Yes.

Q. How long have you known him? A. I have known Mr. Horne for five years, about.

Q. That is a bank located in Brooklyn, New York? A. Yes.

Q. Is that the town or city or community that Mr. Horn lives in? A. He lived there at the time I first met him.

Q. And do you know how long he lived there? A. I could not say exactly, but my recollection is that he lived there for some two or three years after I first met him. I could tell from my records.

Q. And do you know the occasion of a fire? A. Yes.

Q. And did he live there at the time of the fire? A. No.

Q. Where did he live at that time? A. He lived in East Orange.

Q. Did you know where the factory was? A. I did.

Q. And did you have occasion to visit him? A. I did.

Q. And did you visit him? A. I did.

Q. When? A. About December 20th, previous to the fire.

Q. And did you observe the layout of the factory? A. I did.

Q. And did it appear to you to be in good way or shape?

Mr. D'Aloia: I object to that.

The Court: Sustain the objection.

Q. It was December 20, 1923, you were there? A. That was December previous to the fire, 1923.

Q. Were you there during a business day or Saturday or Sunday? A. I was there during a business day in the afternoon.

Q. Was the factory in operation? A. It was.

Mr. D'Aloia: I object.

The Court: Sustain the objection. What is the purpose of this?

Mr. Kessler: We have a right to show that this was an operating and good running business.

The Court: Oh, no.

Q. Do you come in contact with people who Mr. Horne associates with? A. Yes, I know a number of them.

Q. Do you know his general reputation in the community in which he lives? A. I do.

Q. What is his general reputation for truth and veracity? A. Very good, indeed.

Q. What is his reputation for honesty and fair dealing and being a law abiding citizen? A. My check-up showed he was first-class in every way.

Cross examination by Mr. D'Aloia:

Q. Was it a bank check-up? A. It was a moral check-up first.

Q. With whom did you first begin to check up his morality? A. I checked up with a number of people with whom I was acquainted.

Q. Why? A. Because I do with everybody.

Q. Why did you check up the morality of Horne; did anybody question it? A. No, it is the general practice in my bank; it is the general practice in my bank.

Q. Then all you know of him is being a man doing business with your institution? A. I knew him socially.

Q. And your check-up was more in the nature of a financial check-up than anything else? A. I wanted to know his moral standing first.

Q. Who did you speak to? A. I spoke to a

number of people. I have the names in my pocket.

Q. When did you make the list? A. After I come back to the bank.

Q. Do you enter the names of the people you checked up with in your book for future reference? A. Well, for future reference.

Q. You never suspected you were going to be called to testify? A. No.

Q. Well, aren't they representations received by your bank as a matter of course; a gentleman wants to do business with your bank and you won't do business until he sends in letters from Tom Brown and some others and simply say good, bad or indifferent after receiving those letters which you demand? A. What is the question?

Q. I will tell you what the question is. You say you are the vice-president of a trust company? A. I do.

Q. You did not understand the question? A. There was so much of it I didn't get the drift of it.

Q. If I were president, I would ask you to resign.

Mr. Kessler: That is perfectly improper.

Q. Now, Mr. Vice-President, listen to the question, and then when I get through, don't ask me what the question is. Isn't it a fact that the list of names you have in your pocket you made from a list of depositors you have over there in your institution, you know only what you get from letter-heads of different individuals from whom you ask information regarding Mr. Horne? A. No.

Q. Where did you get the list? A. I got it from several depositors.

Q. Didn't you just tell me you made a list from a check-up? A. I told you I put the names in that book.

Q. What? A. Why, different names.

Q. How long back in January, 1924? A. From August, 1921, up to January, 1924.

Q. How many names have you? A. Six, seven or eight names.

AINSLEE M. WARDELL, sworn in behalf of the defendant Joseph H. Horne:

Direct examination by Mr. Kessler:

Q. Are you connected with the Midwood Trust Company of Brooklyn? A. Yes.

Q. What position do you hold there? A. I am manager of the claim department.

Q. Do you know Mr. Joseph H. Horne? A. I do.

Q. How long have you know Mr. Horne? A. Five years.

Q. And during that time have you had an opportunity to become acquainted with him personally? A. Yes.

Q. And do you know some of the people with whom he associates? A. I know some.

Q. Do you know his general reputation in the community in which he lives? A. Yes.

Q. What is his general reputation for honesty, truth and veracity? A. Very good.

Q. What is his general reputation for being a law-abiding citizen? A. Good.

Cross examination by Mr. D'Aloia:

Q. Do you visit him socially? A. I have been out on two or three social occasions with him.

Q. You have not any list of the people you checked him up with? A. I have the memorandums of them; I never checked him up.

Q. Do you have a memorandum or a list of names with whom he has been checked up? A. I have a list of them.

Q. In your pocket? A. Either this pocket or my overcoat.

MORRIS LIEB, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you live? A. Clifton, 268 Madison Avenue.

Q. How long have you lived there? A. About twelve years.

Q. Do you know Mr. Mussikee? A. Yes.

Q. How long have you known Mr. Mussikee? A. I have known Mr. Mussikee about twelve or fourteen years.

Q. Do you know his friends? A. Yes.

Q. How did you come to know him? A. First I knew him as I am a builder and he is a builder and we used to see each other and then I was the president nine years in a congregation where Mr. Mussikee was treasurer for the last six months, and then he resigned.

Q. When did he resign? A. About six months.

Q. What congregation is that? A. Beth Israel, 122 Madison Street.

Q. Do you know his general reputation? A. Yes.

Q. What is his general reputation as to truth and veracity? A. Good.

Q. What is his general reputation for honesty and fair dealing and as a law-abiding citizen? A. Good.

Cross examination by Mr. D'Aloia:

Q. Do you know Israel Turak? A. Yes.

Q. Do you know that Mussikee knows Turak? A. Well, everybody knows him.

Q. Do you know that Mussikee know Turak? A. I believe so, because everybody knows him.

Q. Did you know Fisch; did you see him sitting in court? A. Yes, I seen him outside the court.

Q. Did you know Finkelstein? A. Yes.

Q. Did you know that Mussikee knew both Fisch and Finkelstein? A. I could not tell you that.

Q. Did you see Goldberg? He comes from Clifton. A. Yes, I see him outside.

Q. Did you know that Mussikee knew Goldberg? A. I could not tell you that.

Q. Do you know very much about Mussikee outside of being a builder and competing with him and succeeding him in office in the same organization?

Mr. Lane: He did not say he succeeded him.

Q. Didn't you say you became the president when he resigned? A. No, sir. I was president and he was treasurer with me at the same time.

Q. Where does Mussikee live in Clifton? A. He lives at Passaic.

Q. Do you know Goldberg's address in Clifton? A. No, sir.

Q. You do not know Goldberg at all? A. I know him.

Q. Well, where does he live? A. I could not tell you. I never had any dealings with him.

Redirect examination by Mr. Lane:

Q. But everybody knows Goldberg, too? A. I believe so.

Recross examination by Mr. D'Aloia:

Q. Well, then, if everybody knows him, then you know Mussikee knows him? A. Maybe he does and maybe not.

J. H. OSBORN, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. Where do you live? A. Passaic.

Q. How long have you lived in Passaic? A. About twenty-six years.

Q. What is your business? A. Postmaster.

Q. How long have you been postmaster? A. Three years.

Q. What was your business before that? A. I was one of the commissioners.

Q. Commissioner of what? A. Of finance.

Q. How long had you been a commissioner of finance? A. Eight years.

Q. Do you know Mr. Mussikee? A. I do.

Q. How long have you known him? A. About six or seven years or more.

Q. Do you know the people with whom Mr. Mussikee does business and he comes in contact with? A. Well, I know some of his friends. I know him more as being a public man myself and meeting him perhaps sometimes every day.

Q. Do you know his general reputation for truth and veracity? A. As far as I know, O. K., all right.

Q. Do you know his reputation for honesty and fair dealing and as a law-abiding citizen? A. As far as I know, he is.

Q. What is it, good or bad? A. Good.

Cross examination by Mr. D'Aloia:

Q. You do not visit him at his home? A. No, I do not.

Q. He does not visit at your home? A. No.

BARTON M. STEWART, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. What is your business? A. I am tug dispatcher for the Erie Railroad.

Q. Where do you live? A. Passaic.

Q. How long have you lived in Passaic? A. Eleven years.

Q. And do you know Mr. Horne? A. Yes.

Q. How long have you known Mr. Horne? A. Ten years.

Q. And do you know where he lived? Did he

ever live in Passaic? A. He lived next door to me for a period.

Q. For how long a period of time? A. Why, until September or October.

Q. And did you become acquainted with some of his friends and were they also friends of yours? A. I know quite a few.

Q. And do you know his general reputation in the community where he lived? A. Good, as far as I know.

Q. I assume it is yes. A. Yes.

Q. What is his reputation for being honest and a law-abiding citizen? A. Good.

Q. What is his reputation for truth and veracity? A. Good.

Cross examination by Mr. D'Aloia:

Q. You say you know his friends? A. Some few of them who live in Passaic with me, as I say, for a period.

Q. Do you know one of his friends is Mussikee? A. No, I don't know Mussikee.

Q. You don't know Mussikee at all? A. I know him by face, but never had a speaking acquaintance with him.

BENJAMIN SOCHMAN, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. Where do you live? A. I live 1277 Thirty-eighth Street, Brooklyn.

Q. How long have you lived in Brooklyn? A. The last twenty years.

Q. What is your business? A. Live poultry business.

Q. You know the defendant, Joseph H. Horne? A. Yes.

Q. How long have you known Mr. Horne? A. The last twelve years.

Q. Do you visit him socially? A. Yes.

Q. Does he visit you and your family? A. Once in a while.

Q. Do you know his general reputation in the neighborhood in which he lives? A. Yes.

Q. What is his general reputation for truth and veracity? A. Good.

Q. And what is his reputation for honesty and being a law-abiding citizen? A. Good.

Cross examination by Mr. D'Aloia:

Q. When did Mr. Horne last live in Brooklyn? A. Well, he lives in Brooklyn now.

Q. Did you know him when he lived in West Orange? A. Yes, I did.

Q. Did you know him when he lived in Passaic? A. I knew him, yes.

Q. When he lived in Passaic? A. I did know him.

Q. Did you go to his house very often when he lived in Passaic? A. No.

Q. Did you go there at all? A. No.

Q. Do you know anybody in Passaic that he knew? A. No, I don't.

JACOB COHEN, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. Where do you live? A. 1630 Fortieth Street, Brooklyn.

Q. How long have you lived in Brooklyn? A. Fourteen years.

Q. What is your business? A. Garage business now.

Q. And do you know Mr. Horne, the defendant in this case? A. Yes.

Q. How long have you known Mr. Horne? A. Oh, about thirteen years, I should say.

Q. Do you know people who associate with him socially and personally? A. Yes.

Q. Do you visit him and does he visit your family? A. Yes.

Q. Do you know his general reputation in the community in which he lives? A. Yes.

Q. What is his general reputation for truth and veracity? A. Good.

Q. What is his reputation for being a decent, law-abiding citizen? A. Good.

Cross examination by Mr. D'Aloia:

Q. Did you know him when he had a factory in West Orange and lived in West Orange? A. Yes, I knew him and knew he had a factory there.

Q. What is your name? A. Cohen.

Q. Do you visit Mr. Horne very often? A. Not now, no.

Q. He lives in Brooklyn now? A. Yes.

Q. And you live in Brooklyn? A. Yes, but I have my business in the Bronx.

Q. Do you go home late at night? A. Yes.

Q. And you are not visiting him now? A. Not very often; no.

NATHAN KEMPER, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. Where do you live? A. 971 Forty-fifth Street, Brooklyn.

Q. How long have you lived in Brooklyn? A. I lived in Brooklyn six years.

Q. Where did you live prior to that time? A. In Newark.

Q. Newark, New Jersey? A. Yes.

Q. How long have you known Mr. Horne? A. Sixteen or seventeen years.

Q. You have known him for the past sixteen or seventeen years? A. Yes.

Q. Do you know his reputation in the neighborhood in which he lives? A. Yes.

Q. What is his reputation for truth and veracity? A. Very good.

Q. What is his reputation for honesty and fair dealing and being a law-abiding citizen? A. Very good.

Cross examination by Mr. D'Aloia:

Q. How far away from him do you live? A. Now?

Q. Yes. A. I live on 45th. I do not know exactly where Mr. Horne lives now.

Q. Did you ever visit him when he was out here in West Orange? A. No.

Q. You do not know where he lived then? A. No.

Q. Do you know where he lived when he lived in Passaic? A. Yes.

Q. Did you visit him there? A. Yes.

Q. Do you know his friends there? A. Some of them.

Q. Did you know Mussikee? A. No.

Q. You don't know Mussikee? A. No.

Q. So the last time you visited Mr. Horne was when he lived in Passaic and that was several years ago? A. No. The last time I visited Mr. Horne was when he lived in Brooklyn.

Q. When? A. A couple of years ago.

Q. He has not visited you in a couple of years? A. No.

Q. Did he ask you to come here and be a witness? A. No.

Q. When did he ask you to come? A. I just heard of it.

Q. You came voluntarily? A. Yes.

Q. And said, "Here, Mr. Horne, if you need me as a character witness, I am here to take the stand and will volunteer." A. Yes.

MICHAEL MUSSIKEE, defendant, sworn in his own behalf.

Direct examination by Mr. Lane:

Q. Where do you live? A. 138 Manhattan Avenue, Passaic.

Q. How old are you? A. Forty-one.

Q. Are you married? A. Yes.

Q. Have you any children? A. Yes.

Q. How many? A. Four.

Q. How long have you lived in Passaic? A. Twenty-one years past.

Q. What is your business? A. Building contractor; contractor and builder.

Q. How long have you been in the contracting business in Passaic? A. For the last eighteen years for myself.

Q. For yourself? A. Yes.

Q. Do you know a man by the name of Israel Turak? A. I do.

Q. What is his business? A. Excavating cellars.

Q. How long have you known him as an excavator of cellars? A. I should say about ten or eleven years.

Q. How did you come to know Turak? A. In the usual way. When we start to build houses we give our contracts to figure it, estimates of contractors, and he happened to be one of the contractors to give me an estimate on several jobs and the cheapest man gets the work; some jobs he was cheaper and some jobs higher.

Q. You hired him when he was low? A. Yes.

Q. And did he work for any other contractors in Passaic? A. Yes.

Q. Did you have any conversation with Mr. Turak in the month of December, 1923, or at any other time in which you stopped him and told him in effect that you wanted him to burn some building down in Orange or West Orange, or some other place, and offered him $3,000 for doing it, or any other sum? A. I didn't.

Q. Did you have any conversation with Mr. Turak at that time, or any other time, when the

subject of conversation was the participation by you in any manner, shape or form of the burning down of any building? A. No, sir.

Q. Now, did you on the 15th day of January, 1924, or at any other time have a conversation with Mr. Turak in which this fire or a fire in Orange or West Orange was discussed and the names of Finkelstein and Fisch were brought in and Turak advised you to pay them some money and you said that the building had been burned or words to that effect, but that it was not a big fire, but a small fire, or more water than fire, or words to that effect? A. I did not.

Q. Did you have any conversation with Mr. Turak on the 15th day of January, or at any other time, in which the fire which had occurred in West Orange or Orange was discussed or talked about at all? A. No.

Q. What were your relations in January with Mr. Turak as to friendliness or unfriendliness? A. It was unfriendly. It was certain disputed bills. Mr. Turak excavated four cellars and it was $2,200, the cellars to be measured up before he started to excavate, and when he finished, the amount came up to $2,200. After the builder gave it to him he put underneath 485 extra cubic yards. I asked him how he got 485 extra yards and he said he found it and I said, "We will not pay it—

Mr. D'Aloia: I do not think we are interested in this controversy.

Q. Now, I show you a bill dated January 28, 1924, and ask you—

Mr. D'Aloia: I object to the bill as a self-serving declaration.

The Court: What is the question?

Q. I ask you to look at the paper and then tell me whether it is a bill which has anything to do with the trouble between yourself and Turak about that time? A. Yes. This is the bill that I disputed, and we went up to a lawyer's office and there we settled. We paid $60 on account of this bill.

Q. And that bill is dated when? A. Some time in January.

Q. And the settlement was made when? A. March 11th.

Q. And Turak took $60 for the amount of the bill which was how much? A. $134.55.

Q. And from the date of the delivery of that bill to the date of the settlement in March, what were your relations with Turak? A. Very unfriendly.

Mr. Lane: I offer the bill.

Mr. D'Aloia: I object to it.

The Court: Sustain the objection.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Q. Were you present when that receipt or when that name of Turak was written on that bill?

Mr. D'Aloia: I object to that as immaterial.

The Court: Well, it might or might not be.

A. Yes.

Q. Did you see him sign it? A. Yes.

Q. And is that his signature? A. Yes.

Mr. Lane: I renew the offer.

Mr. D'Aloia: And I renew the objection.

The Court: The same ruling.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Q. Do you know a man by the name of Goldberg? A. I do.

Q. Do you know what his reputed business is? A. He is a banker.

Q. Have you ever had any business relations with him of any kind, nature or description? A. No.

Q. How do you happen to know him at all? A. He worked for a party by the name of Louis Bohen and he used to work on my jobs several times, but he worked for Mr. Bohen.

Q. Do you remember a conversation which you had with him sometime in January, 1924, in which some fire in West Orange was mentioned? A. I do.

Q. Do you remember the date? A. I do not; I do not recall the date.

Q. Where was that conversation? A. That was on Louisa Street, Passaic.

Q. Tell me what was said. A. Mr. Goldberg came up to me and said that a party by the name of Finkelstein wants that I should call Horne and Mr. Horne will give him $300 if I will not give him $300 for setting the fire in West Orange, and my answer was I did not have anything to do with that and if they had any dealings with Mr. Horne, let them call themselves.

Q. Did you say to Mr. Goldberg at that time that you knew there was a fire in West Orange and that it was an excellent fire, or that it was more water than fire, or anything with respect to the details of the fire? A. I did not.

Q. What did Goldberg do after you had this conversation with him? A. He left.

Q. Did you have anything to do whatever with the fire which took place at the Horne factory which has been referred to in this case? A. I did not.

Q. Did you suggest or consent or aid or procure to the setting of fire to that place? A. I did not.

Q. Did you know anything about the fire until after it had taken place? A. Nothing at all.

Cross examination by Mr. D'Aloia:

Q. Do you know how Goldberg knew that you knew Horne? A. I don't.

Q. Do you know what made Goldberg come to you with a message from Finkelstein that you should call Horne in West Orange? A. I do not.

Q. You knew Horne, though? A. I did.

Q. You were associated with him in business at one time? A. No, sir.

Q. Well, you were interested in the same projects? A. Not exactly.

Q. You knew he had this factory in West Orange? A. I did.

Q. You had been to the factory? A. Yes.

Q. You knew the factory building? A. I did.

Q. And you knew the premises at Joyce Street and Valley Road? A. I did.

Q. Now, how long after the fire was it, if at all, that Horne called you up from his house—Mrs. Nevins'? A. I do not recall exactly. That was some time in January.

Q. How long after the fire; was it a week? The fire occurred on the 6th. Now, was it about a week? You say it was some time in January? A. Well, I should say it was about a week after.

Q. And in the conversation that Horne had with you he told you that a man by the name of Finkelstein had been to see him? A. He did.

Q. And a man by the name of Finkelstein had been to see him about the factory fire? A. No, not exactly.

Q. Now, you told this jury that Turak was working for you in September on School Street? A. He was.

Q. And he was excavating for you? A. He did.

Q. And up to September you had no trouble with him? A. Well—

Q. You had had no trouble of any kind or consequence? A. Well, I didn't say we did. It is only sometimes there was a dispute about excavating, the way you are working on a wall, you might have disputes once in a while.

Q. But they were always disputes of no moment? A. Yes.

Q. Now, this settlement that you made with him some time in March was for work that had been done by Turak in January? A. Yes.

Q. So that he was still— A. Not in January exactly.

Q. When had it been done? A. That was done before that time, because in January my work was completed.

Q. When was the work done that was settled for in March? A. Some time in September.

Q. He wanted $138 and you settled with him for $60. What was the amount? A. $134.55.

Q. And you settled with him for $60? A. Yes.

Q. There were no deductions made for work that you say was not finished or something there that you say he had not done? A. Yes.

Q. And that ended amicably? A. Yes.

Q. You gave him $60 and he gave a receipt for it? A. Yes.

Q. Now, do you know of any other reason why Turak should tell the jury that in September you said to him that you had a job for him, the burning down of a building in West Orange, and there was $3,000 for him outside of that bill? A. I do not.

(Recess from 1:00 to 2:00 P. M.

AFTER RECESS.

MICHAEL MUSSIKEE, resumes the stand.

Cross examination (continued) by Mr. D'Aloia:

Q. Now, isn't it a fact that this particular settlement with Turak was for work done on January 18th, 24th and 25th of the month of January, 1924? A. I do not recall at the time, unless I look at my bill.

Q. Well, look at the bill.

The Court: Look at the bill.

Q. Look at the first item and the date. A. Yes, it was.

Q. What was the first item? A. January 18th.

Q. What year? A. It don't say.

Q. Well, you know what year it was? A. Yes.

Q. What year was it? A. 1924.

Q. So that Turak was working for you during the month of January, 1924? A. Finishing up his work.

Q. And you saw him on the 15th of January, 1924, didn't you? A. I didn't.

Q. Well, was he working for you on the 15th? A. He did not.

Q. The work there shows the 18th. A. Yes.

Q. Well, when did you make the agreement for that work he did on the 18th? A. Well, that was some time in the middle of the summer.

Q. Now, will you tell us you did not meet him on the 18th of January? A. I didn't.

Q. And you did not say to him the two men, Fisch and Finkelstein, had come to you and wanted some money for a fire they had set in West Orange? A. I didn't.

Q. You did not say that to him? A. I didn't have any conversation with him.

Q. And you didn't say to him that you were not going to pay the money to Fisch and Finkelstein because the fire was not properly set or the most of the damage was done by water instead of fire? A. I did not.

Q. You did know Fisch? A. Yes.

Q. Fisch was a carpenter? A. Yes.

Q. He is working for you now? A. No.

Q. He had been working for you then? A. Not then; previous to that.

Q. What time? A. Several times previous.

Q. Well, he was there in January, 1924? A. He wasn't.

Q. Do you know Finkelstein? A. There are many Finkelsteins.

Q. Do you know the Finkelstein who was referred to? A. I know him by sight.

Q. You know him by sight? A. Yes.

Q. Did you know him in January, 1924? A. I knew him in 1918.

Q. Did you see him here at the last trial? A. I did so.

Q. Where is he now; do you know? A. I do not know; maybe you could tell me.

Q. Do you know where his family lives? A. I don't.

Q. Don't you know he lives in Passaic? A. I don't.

Q. Or rather his family? A. His father lives in Passaic.

Q. When did you last see him since the last trial? A. I have not seen him.

Q. You have not seen him in Passaic, either? A. No.

Q. I think you told me before the noon adjournment that you knew Goldberg. A. I did.

Q. And Goldberg came to you with this message up to either Clifton or Passaic? A. Passaic.

Q. Where? A. Louisa Street.

Q. When? A. Some time in January.

Q. Nineteen twenty-four? A. Yes.

Q. And he said to you, "Now, I got word from a man by the name of Finkelstein you are to give him $300." A. Not at the time. He came up to

me and he said he wanted me—that Finkelstein wants that I should call Mr. Horne.

Q. Who told you that? A. Goldberg.

Q. About what? A. That Mr. Horne had a fire and he knows that Mr. Horne is a friend of mine and I should call Mr. Horne to give him $300, and I said, "If you do any business with Mr. Horne, you phone yourself."

Q. Do you know of any other reason why Goldberg should come to you with a message from Finkelstein? A. The only reason that he came is to blackmail.

Q. And you are a big and important business man in Passaic? A. I was.

Q. And you knew this gang was trying to blackmail you? A. Yes.

Q. Did you make a complaint to the police? A. I didn't.

Q. Now, you knew Goldberg? A. I did.

Q. And you came to the conclusion from the fact that you heard Finkelstein's name and Fisch's name that this was a gang of blackmailers and firebugs trying to get some money out of you? A. Not at that time.

Q. Well, that was the time when the demand for $300 was made of you? A. Not of me.

Q. Well, Goldberg came to you, and he testified yesterday that he asked you for the $300 that Finkelstein wanted. A. No.

Q. You say that is not so? A. Yes.

Q. You say Goldberg came to you and asked you to call up Horne that Finkelstein wanted $300 from Horne? A. Yes.

Q. But Goldberg did tell you in that conversation that Finkelstein wanted $300 for setting the fire in West Orange? A. He didn't mention the

fire. He said they would connect me with his fire if I didn't call Mr. Horne.

Q. With whose fire? A. With Mr. Horne's fire, if I don't call Mr. Horne to give them $300 they would connect me with Mr. Horne's fire.

Q. Well, that spells to your mind as a business man in Passaic a blackmailing scheme? A. I should say so, yes.

Q. And you did not make any complaint to the police? A. I didn't.

Q. You knew Finkelstein and you knew Goldberg and you didn't go to the police and say, "Here, this bunch of crooks is trying to get $300 from me and they threaten to connect me with the fire in West Orange I didn't know anything about, and I want them put in jail." A. Well, I didn't know anything exists.

Q. How long did you know Goldberg before this date when he came to you with this message? A. Oh, I should say eight or ten years before.

Q. You had known him eight or ten years—not eight or ten years before—you knew him a period of eight or ten years? A. Yes, I should say about that time.

Q. Now, when was it last before the 6th day of January, 1924, that you went to this factory that Horne was conducting as president of the Merritt Products Company? A. I cannot get you.

Q. When was the last time before the 6th of January, 1924, that you visited the factory conducted by Horne as president of the Merritt Products Company? A. I should say about four or five months before.

Q. What month? A. I do not recall.

Q. Was it in September? A. No, it was not. I should have no knowledge or record when that visit to him was.

Q. Well, wasn't it around September? A. No; it was before that time.

Q. Was it around the time when Turak was excavating the cellar on School Street, Passaic, for you? A. No; it was before that time.

Q. Well, when was it; how long before? You said four or five months before the 6th of January. Now, I ask you if it was in September. A. I think it was some time in August.

Q. And when did you begin the work on the excavation of the cellar that Turak was doing for you at School Street, Passaic? A. That was in 1923.

Q. Well, we are talking about 1923, because seven days before the 6th of January, 1924, is 1923. A. I think it was I started sometime in—the first we started to excavate our cellars was in December, 1922, and then snow and winter came along, and we did not work until sometime in April, 1923, and we continued excavating from April until about sometime in the middle of May, and then we went on with our brick work, and there was not any work for Mr. Turak to do on that job only when the buildings were completed, he came up there to clean up the rubbish that was left from the building.

Q. When was that, September, 1923? A. That was sometime during the months of October, November, December and January.

Q. How long before you first say Turak had the School Street job to clean up in the fall of 1923 was it that you had been in the factory at Joyce Street and Valley Road, West Orange? A. I called him up on the telephone, "We are through with the building."

Q. Who? A. Mr. Turak.

Q. That is not the question. When did you see Turak at the School Street job when he was cleaning up in the fall of 1923 first, the first time you saw him there? A. That was in October sometime.

Q. How long before that time when you saw him in October was it that you had been to the factory at Joyce Street and Valley Road, West Orange? A. About a couple of months.

Q. That would make it about the last part of August? A. I think so; about the middle part of August sometime.

Q. Now, you say that Turak and you did not have this conversation in September that he testifies to? A. I didn't.

Q. You didn't say to him, "Will you do a job in West Orange where there is a factory and there is $3,000 in it for you." A. I didn't have any conversation with him—have anything to do with the man.

Q. What business did you have with Horne that brought you up to the West Orange factory about a month or two before that? A. Mr. Horne intended to build certain apartment houses and he wanted me to give him the figures.

Q. Where? A. In Orange.

Q. He was going to build some apartment houses in Orange? A. Yes.

Q. And you went to the factory at Joyce Street and Valley Road? A. Yes.

Q. How long had you been in communication with him about this particular job? A. Oh, very often.

Q. Did you see Finkelstein in the month of January, 1924? A. I did.

Q. Uh? A. I did.

Q. Where? A. He came in up to the job where I was finishing up his building.

Q. What date was that? A. I do not recall the date; that was some time in January.

Q. Well, was it after the 6th? A. Yes.

Q. Was it after the time that Goldberg had said to you that Finkelstein wanted some money from Horne and you should call Horne up and give him $300 for the fire set? A. Yes.

Q. Did you talk with him? A. I did.

Q. But you did not make any complaint against him? A. I didn't.

MEYER I. TEPPERMAN, sworn in behalf of the defendant, Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. What is your business? A. Real estate.

Q. Where are you engaged in business? A. 132 Ridgewood Avenue and 190 Market Street.

Q. Newark, New Jersey? A. Newark, New Jersey.

Q. Do you know Mr. Joseph H. Horne, the defendant in this case? A. Yes.

Q. And did you know him in January, 1924? A. Yes.

Q. Did you know where his place of business was? A. Yes.

Q. Did you have occasion to go there? A. Yes.

Q. When was it? A. It was January. I do not remember the date. It was that date.

Q. What do you mean, the date of the fire? A. The date you recall.

Q. And that was on January 5th, I think. A. I think it was a Saturday.

Q. Saturday, January 5th. About what time did you get to the factory? A. After twelve o'clock.

Q. And do you know when after twelve o'clck? A. No, I couldn't just say now.

Q. Can you refresh your recollection? A. I cannot remember.

Q. You testified at the last trial, did you not? A. Yes.

Q. And wasn't this question asked you, "What time did you get there?" and you answered, "I got there around two o'clock." Does that refresh your memory any? A. It may have been two o'clock. I know it is after twelve.

Q. And what did you go there for?

Mr. D'Aloia: I object to that. It is absolutely immaterial.

The Court: I will allow it.

Q. What did you go there for? What was the nature of the business? A. I had dealt with Mr. Horne to sell him this old synagogue across the street here.

Q. On High Street? A. On High Street.

Q. And did you meet Mr. Horne there at the factory? A. Yes.

Q. When you left was there a man and young lady there?

Mr. D'Aloia: I object to that as leading.

Q. Who was there when you left? A. There was a young lady there and man came in.

Cross examination by Mr. D'Aloia:

Q. What time did you leave? A. It must have been around four o'clock.

Q. And what time did you get there? A. Well, I got there in the afternoon.

Q. Well, what time? A. Well, it must have been around two o'clock, because I cannot remember.

Q. Well, you were there about an hour or an hour and a half? A. An hour and a half or two hours.

Q. You went directly to the factory from your Newark place of business? A. Yes.

Redirect examination by Mr. Kessler:

Q. Do you remember the time you left; can you fix it more definitely? A. No, I can't. I go to so many places.

Mr. D'Aloia: Didn't he say four o'clock?

Mr. Kessler: Well, I am surprised at the testimony.

Q. Do you remember this testimony, this question asked you at the last trial?

Mr. D'Aloia: I object to reading any testimony.

The Court: I do not think this witness comes within the rule you have to neutralize the testimony.

Mr. Kessler: Apparently his memory is not refreshed on a thing probably over a year and a half ago.

The Court: You can ask him whether or not he said it, but so far as reading his testimony at this time, it is improper.

Q. Well, didn't you say you left at five o'clock? A. Well, by good man, I could not remember from that time the exact time.

Q. In any event, whether four o'clock or five o'clock, you found a young man and young lady there? A. Yes.

Mr. D'Aloia: I object to that as leading.

The Court: He is reading what the witness said.

JOSEPH H. HORNE, defendant, sworn in his own behalf.

Direct examination by Mr. Kessler:

Q. You are one of the defendants in this case? A. Yes.

Q. And where do you now live? A. 1053 East 16th Street, Brooklyn.

Q. Where did you live in January, 1924 A. 198 Halsted Street, East Orange.

Q. And with whom did you live there? A. With Mrs. Lena Nevins.

Q. And that is the lady who was on the witness stand this morning? A. Yes.

Q. Now, you were the president or still are the president of the Merritt Products Company? A. Yes.

Q. Was this company the occupant of the premises at the corner of Valley Road and Joyce Street, West Orange? A. Yes.

Q. That was consumed partially by fire? A. Yes.

Q. Who owned that building? A. The Horne Realty Company.

Q. And you are, in fact, the Horne Realty Company? A. Yes.

Q. What was the nature of the business that you conducted in this factory? A. Manufacturing a variety of automobile accessories.

Q. And how long had you been in that business? A. I believe since 1920.

Q. What was your business prior thereto? A. You mean the nature of my business?

Q. What was the business before this time; what was your business before you went into the auto accessory business? A. In real estate.

Q. How long have you been in this country? A. About twenty-seven or twenty-eight years.

Q. How old you? A. Fifty-two years.

Q. And here for twenty-seven years and you are fifty-two? A. Yes.

Q. Have you a family? A. Yes.

Q. How many children?

Mr. D'Aloia: I object. It is absolutely immaterial.

The Court: Sustain the objection.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Q. When you first came to America, where did you go to live? A. Braddock, Pennsylvania.

Q. How long were you in Pennsylvania? A. About nine years.

Q. Then where? A. Here and Brooklyn, Borough Park.

Q. What business did you engage in in Brooklyn? A. Why, in the real estate business.

Q. What do you mean? A. Buying houses, remodeling houses, building houses, buying lots.

Q. How long did you remain in business at that time? A. Oh, a good many years.

Q. And then where did you go to from there? A. Well, I moved to Passaic Park.

Q. New Jersey? A. That is near Passaic, only about a mile and a half.

Q. A mile and a half outside of Passaic? A. Yes, before reaching Passaic.

Q. How long did you live in Passaic Park? A. About two and a half years. I was connected with a concern, the Union Novelty Brass Works in Garfield; it is just across the river.

Q. During that time you were at Garfield, did you become acquainted with Mr. Mussikee? A. Yes.

Q. Did you engage in any business with him? A. Not at that time.

Q. At any time? A. Yes.

Q. When did you engage in business with Mr. Mussikee? A. When I moved out of Passaic. I believe the next year he came up with another party and made a proposition to go and build some houses in Passaic, and he also told me he had a pretty good place in Boonton, New Jersey, and I accepted this proposition and we went in, about five people, under the name of the Trio Realty Company.

Q. Where did you live at that time? A. I lived in Borough Park.

Q. You had moved out of Passaic Park and moved to Borough Park, New York? A. Yes.

Q. And you went in business with five other people in the construction of houses in Passaic? A. Yes.

Q. How long did you remain in that business? A. Only five months.

Q. What did you do after that? A. We bought some property in Monroe Street and we started to excavate there, and we bought some lots in Brooklyn, and I found I invested over $10,000 in cash myself—

Mr. D'Aloia: We do not want to go into details.

Q. You stayed in that business about five months? A. The partners did not make the right investments, so I gave it up, I lost.

Q. What business did you go in after that? A. In the real estate business.

Q. Where? A. Flatbush.

Q. Did you remain in that business until 1920, when you went into this business in West Orange? A. Yes.

Q. When did you open the factory at West Orange? A. I believe it was 1922.

Q. And you continued that business up until the time of the fire? A. Yes.

Q. What was the nature of your business there? I believe you told me manufacturing auto accessories. Don't bother. Do you know a man by the name of Goldberg? A. I don't. I just know him now.

Q. Did you ever know him before on the witness stand at the last trial? A. I never did in my life.

Q. Do you know a man by the name of Turak? A. Never did in my life.

Q. Did you ever hear of a man Finkelstein who testified in the last case? A. Never did.

Q. Did you ever hear of a man by the name of Fisch? A. Never did.

Q. Did you ever have any business dealings with him? A. Never.

Q. Did you ever have any conversation with him? A. Never; never saw him before.

Q. Did you ever go to Clifton and talk to this man Goldberg? A. Never.

Q. Were you the man in an automobile and did you have a conversation with him about a fire in Orange? A. No.

Q. Did you ever go to Clifton at any time in your life? A. Never.

Q. Do you know where Clifton is? A. I went to Paterson a couple of times to investigate some property, so I knew about Clifton, passing through in an automobile.

Q. Now, the State charges you that you set fire to this building—did you set fire to it? A. I never did.

Q. Did you ever procure anybody, no matter whether his name is mentioned here or not? A. Never had any conversation with anybody.

Q. Did you have any conversation with anybody concerning the setting fire of any building anywhere at any time? A. Never did.

Q. Now, on the day at or about January 15—5th, 1924, which was the date of the fire, or night or morning of the fire, what was the condition of your health? A. I took sick about five or six days before the fire. I received a cold in my shoulder and then I was advised to put a mustard plaster, so I did. I applied a mustard

plaster and, instead of keeping it there for a few minutes, I went to sleep, and when I woke up I had a terrible sore, and so I was sick in bed a few days.

Q. Did Dr. Stevens and Dr. Livingston attend you? A. Yes, they did.

Q. As they testified in court, without going over it again? A. Yes.

Q. Now, this Saturday were you in the factory in the morning? A. I was there about 1:30.

Q. Were you there before that? A. Well, a few days before.

Q. Well, were you there that Saturday morning? A. I was.

Q. Were you there before 1:30 that morning? A. No.

Q. This was the first time that day you got there? A. Yes.

Q. How long did you stay? A. I stayed there until about half-past five.

Q. Do you know this man Vincenzo? A. Yes.

Q. Was he there? A. Yes.

Q. What was he doing? A. He was engaged to cover the pipes with asbestos.

Q. What kind of pipes? A. Well, water pipes.

Q. Who else came in? A. Well, after that the two men came in, Mr. Nevins and Mr. Smallwood.

Q. Mr. Nevins was the son of your landlady? A. Yes.

Q. And how long did they stay? A. Oh, about half an hour or three-quarters of an hour.

Q. After they left, did anybody else come in? A. Mr. Tepperman.

Q. That was the witness just on the stand? A. That real estate man. We had a conversation about some property.

Q. How long did he stay? A. He stayed there about two or two and a half hours.

Q. While he was there, did anybody come to the factory? A. Well, the last people, Mr. Schein and Miss Schein.

Q. They were the gentleman and his daughter who were on the stand yesterday? A. Yes.

Q. They came there about what time? A. They came there around five o'clock.

Q. And how long did they stay? A. Oh, about half an hour or three-quarters.

Q. What were they doing? A. They were fixing a tire. They had a blow-out. They came in —they are old friends of mine and his daughter was engaged and they came to invite me for the next day to come to the engagement and, in the meantime, he called up a few days ago and he was told I was sick, so he came to find out about my health.

Q. When did they leave after repairing their car? A. They left the same time I left.

Q. What time did you leave? A. About a quarter to six.

Q. And where did you go? A. Right straight home.

Q. And where did you keep your car? A. Right next to the house where I lived there was a public garage.

Q. Did you notice the colored man on the witness standing this morning? A. Yes.

Q. Was he the night man there? A. Yes.

Q. What time did you get in the garage? A. It just takes only a few minutes to ride from the factory to the house.

Q. Well, what time will you say it was? A. Well, before six o'clock.

Q. And did you leave your car in the garage? A. I left it right there on the floor.

Q. Where did you go from there? A. I went right straight up to the house, because I called the doctor from the factory and said, "I am going right home, because I have a terrible pain again."

Q. When you got home, what did you do? A. Went right upstairs to bed.

Q. Well, how long did you stay in bed? A. Well, I stayed in bed until I was called by Mrs. Nevins.

Q. And in the meantime, when you were in bed, did the doctor come? A. Yes.

Q. What time? A. I could not remember exactly the time.

Q. Some time later? A. Yes, about two hours later, I believe. He answered he was busy and he came later.

Q. Did he do anything for you? A. Yes.

Q. What did he do? A. He bandaged me up and gave me a hypodermic, a needle.

Q. And then you fell asleep? A. Yes.

Q. What was the next thing that happened after you fell asleep? A. It so happened that Mrs. Nevins called me up—she woke me up and told me about the fire.

Q. What did you do? A. So she helped to dress me and I went right straight down to the garage and asked the night man to take me up to the factory and he told me he could not leave the floor there because a good many people expected to come in and he did not like to leave the garage.

Q. He was alone? A. Yes. He pulled out the car and I went right straight to the factory.

Q. What time did you get to the factory? A. About a quarter to one or one o'clock; I could not tell you exactly.

Q. How long did you stay? A. Oh, about fifteen or twenty minutes, or half an hour.

Q. And where did you go after that? A. I went in across the way. I felt very bad and I went in across the way from the factory. There used to be a woman working in our factory, and she called me in the house and I stayed there for a few minutes, and I went right back home.

Q. And were you in bed the next day? A. Yes.

Cross examination by Mr. D'Aloia:

Q. How many times did you see Mr. Mussikee at your factory between the last part of the summer of 1923 and the first of January, 1924? A. You mean how long?

Q. How many times did he visit you at your factory during the period of four or five months, the end of the summer of 1923 and January 1, 1924? A. I saw him about two months or three months before. I do not recollect the time.

Q. How many times did he come during those four or five months the latter part of the year of 1923? A. Two or three times.

Q. What was the last time before the first of January that he came to the factory? A. I do not remember exactly.

Q. But you are sure that during the last three or four months during the year of 1923 Mussikee came to see you two or three times at the factory? A. Yes, from that summer.

Q. Now, do you remember testifying in your own behalf at the last trial? A. I believe I do.

Q. You remember that? A. I do.

Q. You were asked this question—

Mr. Kessler: What page?
Mr. D'Aloia: 201, in the middle.

Q. "How many times did you see Mussikee last year, between the end of the summer and January 1st"—last year in this question was 1923—and here is your answer, "About three or four times." Did you make that answer? A. Yes.

Q. Now, is that correct? A. Yes.

Q. That Mussikee visited you at your factory at the corner of Joyce Street and Valley Road, West Orange, three or four times between the end of the summer and the 1st of January? A. Yes.

Q. Now, when was it that he made his last visit before the 1st of January? A. I do not recollect exactly; about two months before.

Q. Two months before? A. Yes.

Q. Now, right after this fire you were still living at Mrs. Nevins'? A. After the fire, yes.

Q. And you got a message, or a note, didn't you? A. Yes.

Q. And after you got that note, you got into communication with Mussikee, didn't you? A. Yes, the same day.

Q. Now, how long after that was it that Mr. Cooper talked to you—Mr. Cooper. How long was it after the day you communicated with Mussikee after you received this note, which was left at Mrs. Nevins' sometime after the fire; how long after the time you communicated with Mussikee

was it that you spoke to Mr. Cooper? A. I think about three or four weeks or a month.

Q. And when Mr. Cooper put this question to you, "How long is it since you have seen Mussikee," isn't it a fact that you answered that you had not seen Mussikee in about ten years? A. This was not the truth. I never said a word to him.

Q. What is that? A. I never said a word to him.

Q. Did you talk to him? A. I did.

Q. Did he ask you if you know a man named Michael Mussikee? A. I explained the whole case.

Q. Did he ask you if you knew a man named Michael Mussikee? A. Yes.

Q. Now, didn't you answer this question when he put the question, "When did you see Mike Mussikee last," didn't you say, "I haven't seen him for ten years"? A. Never did. This was not the truth.

Q. Never did. A. I told him the same as I tell the Court now.

Q. Let's see. You were in the real estate business with Mussikee in Passaic? A. Five months.

Q. What year? A. It was about eight or nine years.

Q. You mean eight or nine years before January, 1923? A. About seven years.

Q. Now, did you answer Cooper and say to him when he asked you this question directly, "When did you last see Mussikee?"—Michael Mussikee—didn't you say, "I have not seen him since we were in business together in Passaic? A. I didn't. I told him all that I tell you now; in fact, I have a lot to tell about this man Cooper.

Q. Do you mean to say you told him you saw Mussikee at your factory at Joyce Street and Valley Road four times from the summer and the 1st of January? A. He did not ask me that.

Q. Didn't he ask you when you had seen Mike Mussikee? A. He did.

Q. Well, you had not seen him except at your property? A. I did tell him I saw him a couple of times when he come up and brought the plans and specifications for this property I intended to build.

Q. What kind of an automobile did you have on January 6, 1924? A. Durant.

Q. Open car? A. Open car.

Q. Did you have side curtains for it? A. I did, but I never wore them. I had them in the garage.

Q. You know where Clifton is? A. I do.

Q. You knew where Clifton was in the summer of 1923? A. I did.

Q. And in the summeer of 1923, did you wear glasses a little heavier than those you wear now? A. No, I didn't.

Q. Did you wear glasses at all? A. I did. I have two pair of glasses.

Q. When did you have occasion to go to Patterson from Passaic and go through Clifton? A. At the time when I lived in Passaic Park.

Q. Did you live in Passaic Park during the year of 1923? A. No, sir. I had my property there.

Q. You had property there? A. Yes.

Q. And you visited the property time and again? A. I sold the year before, the property.

Q. When did you last visit Mussikee about these apartment houses you were going to build? A. I

sent him a letter. My bookkeeper took a letter to go ahead and send to Mussikee if he would be interested and accept these properties.

Q. But you never went to Passaic to see Mussikee? A. No.

Q. You did not know that Mussikee had in his employ a man by the name of Turak? A. I never did.

Mr. Lane: I object that he had Turak in his employ. Turak was an independent contractor.

Mr. D'Aloia: All right. I will put it as Mr. Lane puts it.

Q. You did not know that there was an excavator of cellars doing work in January with Mussikee by the name of Turak? A. No.

Q. And you did not know he had in his employ a carpenter by the name of Fisch? A. I didn't.

Q. And you did not know he had a painter by the name of Goldberg? A. No.

Q. Now, you had a doctor on the morning of the 5th at four o'clock? A. I believe I did.

Q. You had Dr. Stevens at four o'clock on the morning of the 5th and your condition was so bad that you had Dr. Stevens at half-past nine on the morning of the 5th? A. Yes.

Q. And your condition was so bad that on the night of the 5th, around midnight, the doctor had to come again? A. Yes.

Q. Now, will you tell us what extra pressure was on at the factory which caused your going there at half-past one in the afternoon, being so sick as to necessitate the services of two doctors? A. I will explain.

Q. What was it? A. I had the big pain in my shoulder.

Q. What was it that brought you to your factory? A. On account of making many appointments with these people to meet them there, and then I feel I am afraid to go there, and with the consent of the doctor—I asked the doctor if I am allowed to and he told me yes.

Q. Let's see. You met Smallwood there? A. I did.

Q. And you took him around to show him the factory? A. Smallwood and Mr. Nevins both.

Q. And you showed them how the goods was all put on the shelves in the rear room? A. I didn't show them no shelves. I just showed them through the factory. Not one person was interested how I keep the factory.

Q. Did you know Smallwood was coming there? A. Smallwood and Nevins.

Q. Nevins lived in the same house with you? A. He didn't. I made an appointment with Mr. Tepperman and on account of the pipes, because it was terribly cold, and I made this appointment with Frank Vincenzo that he should come there and cover the pipe.

Q. To cover the steam pipes? A. To cover the water pipes; they should not freeze.

Q. The water pipes and steam pipes? A. The water pipes. He covered them a week ago only with cloth and after that I was advised to cover them with asbestos.

Q. You did not know this gentleman with his daughter from Brooklyn was going to call on you about five o'clock? A. I never did.

Q. And you did not know they were going to get a flat out there? A. Sure not.

Q. And you told them you were very sick and wanted to go home? A. I told them I would not go to the engagement.

Q. And you went home? A. I went home.

Q. And at that time there was nobody there but yourself? A. Mr. Tepperman.

Q. What time did Mr. Tepperman go? A. Mr. Tepperman arrived about an hour later when I came to the office. I came to the office about a quarter to one and he came about half-past two.

Q. You told Mr. Kessler that you went to the factory about half-past one? A. Yes, about half-past one.

Q. Now, you tell me a quarter to one. A. As I say, Mr. Tepperman arrived to the factory about an hour or an hour and a half later after my going to the factory.

Q. Anyhow, this man whose tire got flat outside— A. Mr. Schein.

Q. Yes. When he went away there was nobody in the factory, because you closed the front door with a key? A. Sure.

Q. And before you locked that front door with the key, did you make an inspection of your windows? A. I did not.

Q. Well, when you went around with Mr. Smallwood in the factory and which you got back here to this rear room, these windows, none of them were open, were they? A. I do not recollect.

Q. You do not recollect? A. No, I don't.

Q. Who locked the sliding door on Joyce Street? A. My man.

Q. Which man? A. There was a man—I believe he is in court here today.

Q. Who is he? A. The tall fellow who was there all the time.

Q. When did he do it? A. Before he left. They used to work only until twelve o'clock.

Q. When you got there at half-past one this afternoon, this door was closed? A. I believe so.

Q. Well, you went through there and came out with Mr. Smallwood about four o'clock and there were no windows open? A. No. I will explain.

Q. No. Answer my question. You did not see any window open? A. I do not recollect.

Q. Now, look at the photograph. On the outside of the window is a lot of wire netting? A. Yes.

Q. Covering the entire window? A. With wire, surely; it was always covered with wire.

Q. And you had pretty heavy glass, too? A. Yes.

Q. And that also was the condition of these windows back here south or, rather, east of the door? A. Yes. It was all straight windows.

Q. But covered with wire netting? A. Covered with wire.

Q. And these windows on the north side, sometimes called the easterly side, they were covered with wire? A. They were coverd with fine wire.

Q. Well, none of the windows were open when you left that day? A. No.

Q. And you noticed the side door was closed? A. Yes.

Q. And you locked the front door? A. Yes.

Q. What time was it? A. About a quarter to six or twenty minutes to six.

Q. Which door did you lock? A. The front door from the office.

Q. Which one? A. Right here.

Q. The old building was the only building standing when you first bought this place? A. Yes.

Q. And you had this addition put on? A. Yes; I built twice.

Q. This one-story addition? A. Yes.

Q. And how much did the one-story addition cost you? A. I do not remember; it is in the books.

Q. About $6,000? A. It cost me about $20,000, the building with the equipment. I built up fifty-five—

Q. Wait. Just hold that picture toward the jury. Where I have my finger is the old building and you added on this shed? A. What do you call shed?

Q. This entire building on the side of the pitch roof. A. I put this whole building up separate, 155 feet.

Q. So that when you first bought this place this was none—this was the only building on it? A. Right.

Q. And this had a pitch roof? A. Right.

Q. Well, you had your architect fix a roof that appears here on the side of the pitch roof and go out to the corner? A. First, I built up to here.

Q. And then you built on further back? A. And then I bought so much stock I figured it would be better to save storage, so I put up my whole building to the end of the lot.

Q. How were your steam pipes covered; were they covered with asbestos when they left the boiler? A. No; they were not.

Q. You owned some stock of the H. & B. Company; S. & B. L. Realty Company, and you had

another corporation which was called the Horne Realty Company? A. Yes.

Q. That owned that building? A. Right.

Q. And you conducted the business inside under the name of the Merritt Products Company? A. Right.

Q. That was a separate and distinct corporation of yours? A. Well, it was the Merritt Rubber Company before.

Q. Well, you called it the Merritt Products Company? A. Right.

Q. And that was your company? A. Yes.

Q. And then you had another concern in real estate over in Brooklyn? A. Yes.

Q. That was incorporated? A. Yes.

Q. And then you had some corporation you were going to form for the expedition of the apartment houses between yourself and Mussikee? A. That was the Modern Realty Company.

Q. And Mussikee was going to be connected with you? A. Absolutely not. I did not have any connection with Mussikee except the five houses at the time I lived in Passaic Park, and this was all I knew about Mussikee.

Q. You were in Passaic in the Novelty Brass Works, and then you formed a partnership with Mussikee and some other people, some realty company? A. Trio Realty Company.

Q. And then here the latter part of 1923 you are telling us that you renewed your acquaintance with Mussikee and sent for him and that he called three or four times at the factory in West Orange, because you intended to build some apartment houses in Orange? A. If you don't let me explain myself—

Mr. Lane: Answer the question.

Q. Didn't you tell us why Mussikee came to the factory during the latter part of the year 1923 was to see you in connection with some building operations that you were to start in West Orange? A. Yes.

Q. How long had you been in business in Brooklyn? A. I had eighteen years.

Q. Eighteen years? A. Right.

Q. How long had you been over here in West Orange all told around this time in 1923? A. About two years.

Q. Who built the factory, the addition? A. I did.

Q. Who was the contractor? A. Mr. Wolf.

Q. Well, didn't you think that Mr. Wolf was a good enough man to build your houses? A. I communicated with his partner and he said it would be too heavy for him to do it.

Q. And you could not find anybody heavy enough in Orange? A. I did. I sent for Mr. Wolf's partner and he told me it was too heavy for him.

Q. You gave us the reason you selected Mussikee to take up the building of the apartment houses in 1923 was because the other man said it was too heavy for him? A. Yes.

Q. Well, didn't you know you had had another proposition with Mussikee, a building proposition which failed? A. No, it didn't fail.

Mr. Kessler: Does the prosecutor intend to prove that company failed?

Mr. D'Aloia: No.

Mr. Kessler: Why mention it.

Mr. D'Aloia: Well, I remember his testimony that he got out because of the investment.

Mr. Kessler: I say it is absolutely unfair when he says that he does not intend to prove it.

Q. Didn't you tell Mr. Kessler, in your direct examination, that after this parntership between yourself and Mussikee and three or four other people, you got out because you did not like the way certain investments were made? A. They did not invest as they should.

Q. It was not profitable? A. It was not for me.

Mr. Kessler: I object.

The Court: Sustain the objection.

Q. Now, you are telling us, in 1923, after a lapse of seven years from the time you were last associated with Mussikee, you could not find anybody in this neighborhood up here outside of Wolf, and you sent for Mussikee and he visited you three or four times at the factory.

Mr. Kessler: He did not testify he could not find anybody.

Q. So that was why Mussikee was visiting your factory during the latter part of 1923? A. I just asked him to give me an estimate.

Q. You asked him to give you an estimate and he came three or four times? A. He only came once and I took him up to my lot.

Q. Didn't you tell me when I asked you in this question, "How many times did you see Mussikee during the summer of 1923 up to January, 1924," you said three or four times? A. Yes.

Q. Then, he did come about three or four times? A. Yes.

Q. Then you told me the reason he came to give you an estimate on these houses. A. The last time. Previous to that. You asked me when he come last.

Q. You told Mr. Kessler you were making automobile accessories? A. Manufacturing automobile accessories.

Q. This is the material you had there? A. Yes, and a good many others; one-half inch up to an inch and a half.

Q. All webbing? A. Webbing.

Q. And you made what for automobiles? A. Web straps.

Q. Where did they go in an automobile? A. For tying up tires on the rear or sides, using them for different purposes, and then I used to manufacture trunk straps. I sold a good many of them herein Newark.

Q. You would buy the webbing from what concerns? A. I used to buy the webbing from the Government and different big dealers, which I have everything to prove.

Q. And you would get the webbing in different sizes and make straps? A. Right.

Q. And then you made school tools? A. Yes.

Q. And you bought the webbing from the Government? A. Yes, I did, hundreds and hundreds of thousands of them.

Redirect examination by Mr. Kessler:

Q. Did this company you were connected with ever go bankrupt? A. Never did in my life.

Q. Did any of the companies you were ever connected with go bankrupt? A. Never.

Mr. D'Aloia: I object.

The Court: Sustain the objection.

Q. On this Saturday morning when the doctor was there at half-past nine, and you went back to the factory, did you feel any better? A. I did.

Q. And was it after that that you began feeling worse again? A. Yes.

Q. Had the doctor given you a hypodermic that morning? A. Yes.

Q. Now, there is some testimony here about this note and your making a telephone call to Mr. Mussikee. Did you call up Mr. Mussikee? A. I did.

Q. Did you get him on the wire? A. I did get him on the wire, somebody there, a lady answered there if he was not there he was in the building.

Q. Did you get him finally? A. He called me up.

Q. What did he say to you and what did you say to him?

Mr. D'Aloia: I object to that as a self-serving declaration.

The Court: Let the conversation go in.

A. He called me up and then he asked me why did I call him up, and then I told him that reason, that I received a note here from a fellow signed by the name Finkelstein and did you send him over here, and he stated because of the building, and I thought he sent some carpenters and perhaps I would give him the work.

Q. What did he say? A. He said he never sent a man named Finkelstein and he did not know I had the fire.

Q. So when you called him up he said he did not send Finkelstein to you? A. Never did.

Q. And he did not know at that time you had the fire? A. He didn't.

Q. And did you tell him you had the fire? A. I did. I told him that.

Q. Let me see the other pair of glasses that you have.

Recross examination by Mr. D'Aloia:

Q. You just told Mr. Kessler that you told Mr. Mussikee over the telephone that a man named Finkelstein came to your boarding house about the building? A. I read for him the note.

Q. About the building, you say, it was? A. Regarding the factory.

Q. The factory? A. Right.

Q. Well, now, you said to Mr. Kessler that you told Mussikee over the telephone that a man named Finkelstein had left a note there for you about the building? A. Yes.

Q. And you previously told us your business with Mussikee was about building an apartment house. A. I read to him what the note stated.

Q. Now, isn't it a fact that the note that you got when you called up Mussikee specified that this man Finkelstein called with reference to the factory? A. That is what he did.

Q. And didn't it specify with reference to the fire at the factory? A. No. No fire at all.

Q. Where is the note? A. It must be here in court.

Q. Well, who did you give it to last? A. My attorney.

Q. Where is it now? A. I don't know.

Mr. Kessler: The last we know of it the State had it.

Mr. D'Aloia: Well, the State has a receipt that he got it back after the last trial.

Mr. Kessler: The note is in the record of the last case and we will consent it be read in the record.

Mr. D'Aloia: If you will consent that it be read into the record now, I will consent with you.

Mr. Lane: At page 257. It is as near as you can get it what the note was.

Mr. D'Aloia: The note was not read in the record, but it was offered in evidence by Mr. Davis. All we can do is to get the part offered by Mrs. Nevins. That is page 57. the question is, "'I gave it to Mr. Horne?' *Answer*: Yes, sir." The next question is, "And, 'The paper said to call up Mr. Mussikee at 5:30 o'clock at Passaic,' that's true, isn't it?" "Yes." The next question is, "'Mr. Horne came home about six o'clock and called up Mussikee in Passaic,' that's true, isn't it?" "Yes." And the next question is the redirect examination by Mr. Davis of that same witness and she tells Mr. Davis the man who left the paper was Finkelstein, and shows the paper and she identifies it and it is introduced in evidence as an exhibit for the defense.

Mr. Kessler: I will ask the prosecutor not to direct remarks to me in the nature that he just made.

The Court: I did not hear him.

Mr. Kessler: The last time this paper was

in the hands of the prosecutor and that is all we know about it.

Mr. D'Aloia: The prosecutor will answer that statement and say that that paper was given back to Judge Davis by Mr. Berstecher and we have a receipt to that end and it was used for the purpose of appeal.

Mr. Lane: I beg your pardon! It was not.

Mr. D'Aloia: Well, that is what they said they wanted it for. It was not our exhibit and we had to give it back.

Mr. Lane: I know what it was but if the prosecutor is going to make any assertion that tne word fire was in that note, and I know it was not, I do not, I do not propose to put my recollection against any such statement he may make.

Mr. D'Aloia: What are you basing your recollection upon?

Mr. Lane: I am basing my recollection upon the fact I went through five days of trial and the note was here with us and if the word fire was in that note the prosecutor would have been referring to it from beginning to end.

The Witness: I remember every word of it.

Q. Now, tell it to us as you remember. A. I will. Mr. Horne: Kindly call Mr. Mussikee. Stating telephone number so and so. Very important regarding your factory, and signed Finkelstein. I remember every word.

Q. When did you last see that? A. At the time here in court.

Q. And you have not seen it since? A. I have not.

The Court: I take it that the statement of Mr. Horne as to that note is stipulated on the record.

Mr. Lane: It is so far as I am concerned.

Mr. D'Aloia: I cannot do anything but take that answer.

Mr. Lane: That corresponds with the copy I have in my possession made by counsel.

MICHAEL MUSSIKEE, recalled.

Direct examination by Mr. Lane:

Q. Mr. Mussikee, did you in January, 1924, or at any time send a man named Finkelstein or anybody else over to Mr. Horne's factory for the purpose of leaving a note directing Mr. Horne to call you up? A. I did not.

Q. Do you remember Horne calling you up sometime about a week or so after the fire? A. When I came home my daughter told me that Mr. Horne had called me up and I should call him back when I come home.

Q. You called him up? A. Yes.

Q. What happened? A. I called him and I said, "Mr. Horne, what do you want me for?"

Mr. D'Aloia: I object to the conversation, because it is a self-serving declaration.

The Court: No. I will allow all the conversation.

A. (Continuing.) And I asked Mr. Horne what did he want me for, and he said there was a man

by the name of Finkelstein left a note he should call me up, and he asked me if I sent a man named Finkelstein and I told him I didn't know anything about it, and then he told me he had a fire in the factory.

Q. That was the first you knew? A. That was the first I knew.

Cross examination by Mr. D'Aloia:

Q. What was the date of that conversation? A. I do not recall the date.

Q. But you do recall that on the 15th of January, 1924, you did not talk to Turak? A. I did not.

Q. And you did not tell him that you knew about the fire that Finkelstein had set with Fisch because it was a rotten fire, because most of the damage was done by water.

Mr. Kessler: Objected to.

Q. You do not remember having any such conversation with Turak, do you? Look this way. A. No.

Q. But you do remember precisely what the conversation was between you and Horne after Finkelstein had left a note there for him to call you up? A. That was simple to remember that.

Q. Did Mr. Horne say to you that the note said that Finkelstein had left a note that said something about the factory? A. He didn't tell me anything of the kind.

Q. Did you hear Mr. Horne remember word for word what the note contained? A. Yes, but Mr. Horne did not read that note to me.

Q. He did not say anything to you that the note said anything about the factory? A. He didn't.

Q. The only information you got about the factory was from Horne; he said—when he said, "Mussikee, I had a fire there." A. That is the only time.

Q. When did you hear from Horne? A. Mr. Finkelstein come to me and said I should call him.

Q. You did not say he had no right to have Horne call you up about the factory? A. I did not have any such conversation with him.

Q. When was it you had a conversation with Goldberg about the $300?

Mr. Lane: Objected to.

Mr. D'Aloia: I will withdraw the question.

Q. When was it that you talked to Goldberg and Goldberg asked you for $300 to give Finkelstein for a fire in West Orange with reference to the conversation you just told us you had with Mr. Horne over the wire?

Mr. Kessler: Objected to.

The Court: I will allow the question.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

A. That was some time in January.

Q. Was it before this conversation with Horne? A. No, that was after.

Q. It was after? A. Yes.

Q. And that all happened pretty nearly together, the conversation with Finkelstein, the talk with Horne over the telephone and the talk with Goldberg? A. Well, that was after the conversation I had with Goldberg.

Q. Well, your recollection is that they happened at short intervals? A. A few days.

Redirect examination by Mr. Lane:

Q. You did have a conversation with Mr. Horne on the telephone? A. I did.

Q. Do you remember that? A. Positively.

Q. Did you have any conversation of any kind, nature or description with Mr. Turak? A. I did not.

Q. And you do not remember something you never had? A. No.

J. FRED BERSTECHER, sworn in behalf of the defendant Mussikee.

Direct examination by Mr. Lane:

Q. You are an attorney? A. I am.

Q. With what firm are you connected? A. Howe & Davis.

Q. And were you connected with that firm during the last trial of this case against Mussikee and Horne? A. I was.

Q. Are you the gentleman who obtained from the Prosecutor of the Pleas whatever exhibits were returned at the conclusion of the last trial? A. It was at my insistence they were returned. I did not get them.

Q. You did not get them personally? A. No.

Q. Were they, after you got them, or after they were received by a representative of your office, turned over to you? A. They were put directly in the law library for future reference.

Q. This case has been on several times before and not tried?

Mr. D'Aloia: I object to that.

The Court: What is the purpose of it?

Mr. Lane: The purpose of it is to show he has made several searches for that note.

Q. The case was also printed for the Supreme Court? A. It was.

Q. Did you make a search in those files to find out whether that note was there? A. I did.

Q. Could you find the note? A. I could not.

Q. Do you remember yourself ever having seen that note? A. At the former trial, yes, but not since.

Q. I say, since the former trial? A. No.

Q. It went out to the jury, did it not? A. I believe so.

Q. Do you know who it was that prepared this copy of the note that I hold in my hand, purported copy of the note? A. The handwriting on it is Judge Davis' handwriting.

Q. That is Judge Davis' handwriting? A. Yes. We could not find the note with the exhibits in the case and we were going to try to agree on it.

Q. And that is what Judge Davis prepared as his recollection of the contents of the note? A. Yes.

Q. Is that your recollection of the contents of the note? A. Exactly.

Mr. Lane: I offer that paper.

(Paper marked Exhibit D. 2.)

Q. Do you remember giving any receipt to the Prosecutor of the Pleas for any exhibits in this case or for that note? A. I do not.

Cross examination by Mr. D'Aloia:

Q. Your associate came down for the exhibits? A. I think the office boy.

Q. Well, he came down in your name? A. Somebody did.

Q. Do you know where Judge Davis got this copy? A. I do not know.

Q. Do you know whether he copied it from the original note in lead pencil? A. I do not know that.

Q. You told Mr. Lane that your recollection is that this is what Judge Davis recalled of the note? A. Yes.

Q. Now, you don't know whether this was done that way from Judge Davis' memory or copied from the note received from us? A. I don't know.

Q. The fact remains the note has not been found since the date of the trial, so far as you know? A. We did not have the note.

Q. So far as you know? A. No.

HELEN A. KATES, sworn in behalf of the defendant, Joseph H. Horne.

Direct examination by Mr. Kessler:

Q. You are the daughter of Mr. Joseph H. Horne? A. Yes.

Q. How old are you? A. Twenty-six.

Q. And how many brothers and sisters have you? A. I have one brother and one sister.

Q. So that there are three children in the family? A. Yes.

Q. All married? A. Yes.

Q. And on the day before the fire did you visit your father? A. The day before.

Q. And it was on a Friday? A. Friday.

Q. And what did you find was the matter with him? A. Why, he had some trouble with his shoulder.

Q. And where did you live? A. I lived in Brooklyn.

Q. And did you go back to Brooklyn that Friday? A. Friday I did.

Q. When did you come out again? A. On Sunday.

Q. What time, Sunday morning? A. About eleven or twelve o'clock.

Q. Between eleven and twelve o'clock? A. About.

Q. Did you see your father on Sunday? A. I saw him all day.

Q. Where was he? A. In bed.

Q. What was he suffering from? A. His shoulder.

(Cross examination waived.)

LENA NEVINS, recalled.

Direct examination by Mr. Kessler:

Q. I want to be sure it is in the record this man who called at your house and asked for Mr. Horne when you told him he was not there, what did this man do? A. He came in and asked me whether Mr. Horne was home and I said no, and he said, "Have you a piece of paper?" So I think he said—I won't be sure about that—but we had a piece of paper and he wrote the note.

Q. You saw him write the note himself? A. Yes, I did.

Q. And then did he hand it to you? A. He handed it to me and said, "Give this to Mr. Horne if he comes in."

Q. So it was the note he wrote in the house? A. In the library.

Q. You had seen this man write it? A. I had.

Cross examination by Mr. D'Aloia:

Q. And you told us this morning that happened quite a while after the fire? A. I didn't say how long, but he wrote the note.

GEORGE L. HARRISON, sworn in behalf of the defendant Joseph H. Horne.

Direct examination by Mr. Kessler:

Mr. Kessler: May I offer in evidence the box of material here contained?

Mr. D'Aloia: No objection.

(Box received in evidence and marked Exhibit D. 3.)

Q. You are a photographer? A. Yes.

Q. How many years' standing? A. About thirty years.

Q. At the request of the office of Howe & Davis, did you go to this factory at the corner of Joyce Street and Valley Road? A. I did.

Q. And did you take any photographs? A. I did.

Q. I show you a photograph and ask you if that is one of the photographs you took? A. Yes.

Q. And what does that photograph that you now have in your hand represent? A. That is looking east.

Q. What room is that? A. That is the back room, looking east, the back of the building.

Q. The back room looking east? A. Down here, taken from the upper part.

Q. Taken here looking down? A. Yes.

Cross examination by Mr. D'Aloia:

Q. By your testimony, that represents the rear? A. Looking east.

Q. Will you please put a mark indicating where your camera was and an arrow showing in which direction the camera was pointed?

Mr. Kessler: Are you familiar with this map? This is Valley Road.

Q. The camera was in here in room A, looking this way, looking east? A. The camera was about here, looking east.

Q. The rear is east and the front west, and the right-hand side of the diagram north and left-hand side is south. Now, will you show where your camera was when you took that picture, showing with an arrow how your camera was pointed. A. The picture was taken two years ago and, if I remember right, that was taken in this corner.

Redirect examination by Mr. Kessler:

Q. Where did you have your camera when you took that picture? A. The camera was here.

Q. And you took the picture facing in? A. Yes.

(Photograph marked Exhibit D. 2.)

Q. I show you another photograph and ask you what that photograph represents? A. This picture was taken from this point here looking southeast.

Q. That picture was—your camera was here. There was your camera. I will mark it with an "X," and facing in that direction? A. Yes.

(Photograph marked Exhibit D. 3.)

Q. I show you a photograph and ask you if that is the part of the room showing the boiler? A. This, if I remember right, was taken from about here.

Q. Where was your camera? A. About in here.

Q. Mark it with a "Y."

(Photograph marked Exhibit D. 4.)

Q. I show you another photograph and ask you what view that represents? A. That was taken here, looking this way.

Q. Mark it with a "Z." A. Southwest.

(Photograph marked Exhibit D. 5.)

Q. I show you what appears to be a close-up view of a boiler, and where was the camera when you took that picture? A. About here.

Mr. D'Aloia: Mark that D. 6.
(Photograph marked Exhibit D. 6.)

Q. I show you another one, and where was that taken? A. Taken here, looking that way.

Q. Where was the camera? A. Right here, looking this way.

Mr. D'Aloia: Mark that D. 7.
(Photograph marked Exhibit D. 7.)

Defendants Rest.

JOHN T. COYLE, sworn in behalf of the State in rebuttal.

Direct examination by Mr. D'Aloia:

Q. Were you connected with the Passaic Fire Department in the months of January and February, 1924? A. I was.

Q. And you have since been connected with that department? A. Yes.

Q. Subsequent to the last trial, have you or have you not made efforts to locate Philip R. Finkelstein? A. I have.

Q. Do you know him? A. Yes.

Q. Have you been able to locate him? A. I have not.

Q. Did you make those efforts at the request of the prosecutor's office? A. Mr. Slutsky, of this office.

Q. Where did you go to try to find Mr. Finkelstein? A. I went to all his usual haunts.

Q. Do you know where he is now? A. I do not believe anybody else does.

FRANK B. COOPER, sworn in behalf of the State in rebuttal.

Direct examination by Mr. D'Aloia:

Q. Do you remember having a conversation the early part of 1924, subsequent to this fire at West Orange, with Mr. Horne? A. Yes, I did.

Q. When was it, what month? A. It must have been sometime after the 10th of March, between the 10th of March, 1924, and about the 15th of May.

Q. Prior to the 10th of March, 1924, had you investigated this fire in West Orange? A. I assisted in the investigation, yes.

Q. Now, after your investigation was through, finished or partly finished, did you have occasion to speak to Mr. Horne? A. Yes.

Q. Did you say to Horne this; did you ask him this question, "When have you last seen Michael Mussikee of Passaic?" A. Yes, I did.

Q. Will you please tell the jury what his answer was? A. His answer was he had not seen Mr. Mussikee in several years, not since he got out of business with him several years ago, when

he was in the building business, and he said the reason he got out of that business was because Mr. Mussikee was a crook.

Mr. Lane: I object to that. It is calling for a conclusion.

The Court: That part will be stricken out.

Q. How long is it since he said he had not seen Mussikee? A. Several years.

Q. Did you tell him the purpose of your business?

Mr. Lane: Objected to.

Mr. D'Aloia: I will withdraw that.

Cross examination by Mr. Lane:

Q. What is your business? A. I am an investigator.

Q. For whom? A. The National Board of Fire Underwriters.

Q. How long have you been an investigator for the National Board of Fire Underwriters? A. Going on to five years.

Q. And were you one of those who were present when the witness Turak made his statement?

Mr. D'Aloia: I object as not proper cross examination.

The Court: Sustain the objection.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Mr. Lane: It is offered for the purpose of attacking the credibility of the witness.

The Court: The same ruling.

Q. Were you actively engaged at the time you spoke with Mr. Horne in getting statements from witnesses on behalf of the fire insurance company?

Mr. D'Aloia: I object to the form of that question.

The Court: I will allow that.

A. I assisted in the investigation—

Q. Can't you answer that yes or no? A. I assisted.

Q. Can't you answer that yes or no? A. The only answer I can make to that is that I assisted.

Q. Well, you were actively engaged in assisting, then? A. Yes.

Q. And how long had you been so actively engaged in assisting in getting statements from witnesses on behalf of the fire insurance companies? A. I cannot say that I did it on behalf of the fire insurance companies. I did it on behalf of the authorities of Essex County.

Q. Oh, the authorities of Essex County, the prosecutor's office engaged you as the agent of the fire insurance companies to assist and aid and help in the prosecution? A. They do not engage; no.

Q. Then, who did you make the investigation for, the insurance companies or prosecutor's office? A. I made it for both.

Q. Were you retained or requested by the prosecutor of the pleas to make this investigation? A. I do not recall whether we were re-

quested or not in this particular case by the prosecutor of the pleas.

Q. Well, then, why did you say you were acting on behalf of the prosecutor's office? A. Because we always assist the authorities in the investigation of fires.

Q. You mean you always assist them or you ask them to assist you? A. We assist them.

Q. Your object in investigating for the fire insurance companies was to escape the payment of money? A. That we have nothing to do with.

Mr. D'Aloia: Doesn't that call for a conclusion?

The Court: No.

Q. You are unconcerned whether you pay the money or not? A. The National Board of Underwriters has no concern one way or the other whether the insurance company pays the money or not.

Q. The purpose of your investigation is wholly in the service of the public? A. Absolutely.

Q. Not in the service of the fire insurance companies, although you are called a National Board of Fire Insurance Underwriters. What do you mean by that? A. I mean our investigations are conducted on fires to investigate the origin; we might say for the reason of determining the origin of the fire, to see if an overt act has been committed.

Q. But that is purely from a public viewpoint and not from the selfish interests of the company? A. I would not say that; no.

Q. Well, would you say it was not? A. I cannot say it was.

Q. Purely public? A. It might be public and the companies might be interested, and no doubt they are; naturally, they are interested in knowing.

Q. Why not frankly say so? A. For the reason it is not the answer I could make to your question.

Q. How long did this conversation between you and Mr. Horne take place? A. Well, I cannot state just how long I talked with him personally. There was another gentleman on the investigation who did most of the talking to Mr. Horne.

Q. Who was the other man? A. A man by the name of Miller.

Q. Who was he? A. Another investigator for the National Board of Fire Underwriters.

Q. And was he also actively assisting you in the interest of the public in making this investigation? A. We were working together.

Q. How long did the conversation, whether participated in by you alone or by the two of you, take place? A. Oh, probably an hour and a half or so; as I remember it, possibly two hours.

Q. An hour and a half, is that right, to two hours? Where? A. At the police station at West Orange.

Q. Anybody else present when that took place? A. Lieutenant Hassell of the West Orange police.

Q. Anybody else? A. I believe the chief was there for a while, in and out.

Q. Anybody else? A. I cannot say; I cannot remember whether there was anybody else.

Mr. Lane: In view of the witness' testimony, I intend to ask a question which your Honor has already overruled.

Q. Were you present at the time the statement or statements made by Turak were made?

Mr. D'Aloia: I object to that question.
The Court: I will allow it.

A. I do not want to tie myself down to swearing to this, because I may have been and may not. I was there when some of them made statements, but whether Turak made some of them I would not swear to.

Q. So your recollection as to what was said by Horne is quite clear and distinct as to the very words used, but you cannot tell us whether you were present when the witness Turak made a statement; you cannot tell us that. A. I remember he—my memory failed me in this case also, as to what Mr. Horne told me until I happened to look at it the other day.

Q. At any rate, you have no present recollection as to whether you saw the witness Turak or not? A. Oh, I have seen him.

Q. But you have no recollection as to whether you were one of those who were present when his statement or statements were made? A. I may have been.

Redirect examination by Mr. D'Aloia:

Q. I show you Turak's statement and show you your name there as a witness? A. Yes, that is my name.

Q. Now, answer Mr. Lane's question? A. I was present.

Q. When Turak made a statement? A. Yes.

Q. And Turak made a statement before the conversation you had with Horne? A. Yes.

Q. And it was on the information Turak had given—

Mr. Lane I object to that.
The Court: Sustain the objection.
Mr. D'Aloia: I am going to make an offer again to counsel for the defense to Turak's statement.
Mr. Lane: I object to it again.

Adjourned until tomorrow, Thursday, April 1, 1926, at 10:00 o'clock A. M.

FOURTH DAY.

Thursday, April 1, 1926.

Appearances as before stated.

Trial continued pursuant to adjournment.

Mr. Lane: I suppose your Honor will recollect that when I read the questions of certain witnesses and extracts from their testimony, the State stipulated that what I read was correctly read from the record, and I would like to have that so that we can refer to it in the argument that the testimony was offered in proper form. No objection to that?

Mr. D'Aloia: None at all.

Mr. Lane: At this time I move to strike from the record all the testimony which had reference to an automobile being at the place of this fire on the night of the fire and

which testimony, as I understand it, was admitted subject to being connected, or having the automobile in some way connected with one of the defendants at the bar. There has been no such connection and I move to strike out the testimony as immaterial and irrelevant and incompetent.

The Court: I will deny that motion.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFERY,
(SEAL) Judge.

Mr. Lane: I now move on behalf of both defendants, and particularly on behalf of the defendant Mussikee, to strike out of the case all the testimony which has reference to the note, Exhibit D. 2, upon the ground that there is no connection shown between either of the defendants to that note and particularly with respect to the defendant Mussikee, and upon the ground that that testimony is immaterial, incompetent and irrelevant.

The Court: That note, a copy of which was offered in evidence by the defense?

Mr. Lane: Yes, sir.

The Court: The motion will be denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFERY,
(SEAL) Judge.

MOTION FOR DIRECTION OF A VERDICT.

Mr. Lane: I now move for the direction of a verdict in favor of both defendants, and specifically with respect to each of the defendants, so that the motion may be considered made on behalf of each defendant separately. The first count, first upon the same ground which I urged in the motion at the close of the State's case as to the legal sufficiency of the indictment and with respect to the second count specifically upon the same grounds, and unless your Honor requires it, I do not desire to repeat those grounds at this time. I move also for the direction of a verdict on behalf of each of the defendants separately, because there is no evidence in the case from which the jury may find, and I might say to each of the counts separately, either with respect to the first or with respect to the second count that the fire in question was of an incendiary origin, also that there was no evidence which connects either the defendant Horne or the defendant Mussikee with the fire and, specifically with respect to the second count, on behalf of the defendant Mussikee, because there is no evidence whatever from which there can be any inference or finding at any rate, that the defendant Mussikee did anything with intent to prejudice the insurance companies, there being no evidence in the case whatever that Mussikee had any knowledge whatever as to whether the building and its contents was, in fact, covered by insurance or no.

The Court: The motions will be denied.

Defendants' counsel pray an exception to this ruling of the Court.

Motions to Compel State to Elect.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr. Lane: I move that the State be compelled to elect whether it intends to go to the jury on the first count or the second count, and the ground upon which that motion is made is that the act or all the acts charged by the State are in effect a single state of facts and the first count charges us with one crime and the second with another crime, in other words, we are charged with two crimes under one law and it is likely to subject us to double punishment or double jeopardy.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr. Lane: I now move to compel the State to elect whether it intends to charge us on the first count with the actual burning or with aiding and consenting to the burning.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Summing up by Mr. Lane for Defendant Mussikee.

Mr. Lane: I now move with respect to the second count to compel the State to elect whether they are charging us with the actual setting of the fire and burning or with the procuring and consenting.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

TESTIMONY CLOSED.

Mr. Lane: With the permission of the Court, gentlemen of the jury. We have been or, rather, you have been patiently listening to this case for three or four days, in which the testimony, notwithstanding the length of time that it has taken to adduce it, at least, from the standpoint of the State, it seems to me is in a very narrow compass.

Before I go into a consideration of the testimony, I want to say to you that in a criminal case—it is my judgment, at any rate, and my thought that the defense is at a serious disadvantage, because it is obliged to address the jury in the first instance. Whatever I may say is subject to the criticism of the Prosecutor of the Pleas after I get through and I shall have no opportunity to answer the criticism which he may make. I cannot anticipate. There may be a complete answer by the defense while he speaks, and after he speaks it is through. It cannot answer him, although

there may be a complete answer, so that I say to you that the defense in a criminal case, particularly one such as this, which rests upon and must rest, if it rests upon anything, upon mere suspicion, upon mere inferences, and that kind of a case, particularly where the prosecutor may rove around drawing inferences of all kinds, nature and description, which we have no knowledge of at all, is under a very serious handicap.

Now, I listened to the Prosecutor of the Pleas, when I was opening this case to you, gentlemen of the jury, and I heard him say to the Court that he did not like to interrupt. He whispered it to the Court, but I heard it, and I think the jury must have heard it. Now, I want to say to the Prosecutor of the Pleas that I have no objection whatever to his interrupting at any time during the time that I may be addressing this jury and, if I misstate facts of if I misstate the law to the extent that I am privileged to quote law, I have no objection at all to Mr. D'Aloia interrupting me then and there, because if he does interrupt me then and there I shall have an opportunity then and there to answer him and to support my view of the case as against his interpretation. It will not bother me a bit. I welcome it. So he need have no hesitancy whatever in interrupting me whenever he pleases. If my argument cannot stand the test of interruption by the Prosecutor of the Pleas, then it is not an argument that should be made to the jury and I do not propose to make an argument to the jury and I do not propose to state anything that I am not quite content to have challenged when I say it, and, if I have made a mistake, I will admit it. If I have not, I will support my position.

Of course, you know, as a matter of fact, that the burden is upon the State to satisfy you of the guilt of these defendants beyond a reasonable doubt, and that means something in this kind of a case. The case is important—important from the standpoint of the State, important from the standpoint of the insurance companies, but equally important from the standpoint of the defendants, and human nature is such, circumstances are such and human recollection is such that the law has said, before you send a man to jail, you should be convinced of his guilt beyond a reasonable doubt, and for this reason, that if you send him to jail there is nothing that you can do if he be innocent to compensate him for being sent to jail. There is nothing more horrible to contemplate, in my judgment, than an innocent man confined in jail, knowing that he is innocent, but knowing that he must be confined, and it is for that reason that it has been expressed so many times under the common law that it is better that ninety-nine guilty men escape than one innocent man be punished, and you never can tell, and I cannot and no one can tell, not even the Prosecutor of the Pleas, when it may be that innocent as you or I or he may be of the commission of a crime, we may be so in the coils of circumstantial evidence that if it were not for the doctrine of reasonable doubt we would go to jail; no human evidence is infallible. Even if a person sees a thing—two or three see a thing done, give them an hour and you will have three different stories as to what was done. It is bound to be so, because we, none of us, see with the other's eye. We are all different. We all see different things at

the same time, although the thing may be but one thing.

Circumstantial evidence is sometimes said to be stronger than actual evidence. Sometimes—and when I say actual evidence I mean evidence of witnesses who see a thing done. Human life is so complex that we can imagine ourselves almost any time, under particular circumstances, surrounded by circumstances which would point toward guilt, however innocent we may be. I mention that particularly because there is no direct evidence in this case of any kind, nature or description connecting either of these defendants with this affair. There is no circumstantial evidence even worthy of the name in this case connecting either of these defendants with this affair I cannot imagine, as I am standing here, upon what circumstances the State will say to you that it has connected either one of these defendants with the setting of this fire beyond a reasonable doubt, nor in any way. The prosecutor will say to you that Mussikee, when he was approached by Goldberg, did not go to the police, he is guilty, threatened with blackmail but he did not go to the police and therefore what? Therefore he must be guilty else he would have gone to the police with this story of blackmail. It is like the cry of the Prosecutor of the Pleas, or Prosecutors of the Pleas, who always point to the fact that a man who runs from the scene of the commission of the crime is guilty. Well, now, you know that that is not so and I know that it is not so. I have had experience with a distinguished judge of the Court of Common Pleas—not of this County and not now on the bench, and I want to tell you that distinguished judge and myself, when we heard a shot in New York, in Chinatown, one time when we were innocently there, made tracks to get away from that place very rapidly, and, yet, upon the theory of the Prosecutor of Pleas, because we were seen or might have been seen speedily departing from that place where that shot was fired, we were guilty of murder, which it afterwards transpired was committed at that spot that night. The natural tendency is to get away. The brazen criminal does not get away. The brazen criminal stands on the spot and he is the first one to discover the crime and he helps the police. He is the brazen criminal. He knows how to protect himself.

Now, with respect to this blackmail and to any inference to be drawn from the fact that Mussikee did not report it to the police at that time. If somebody attempted to blackmail you, do you know what you would do? I say to you that you do not and I do not know what I would do. I know this—I would know this—that the moment I went to the police with this charge of blackmail, that moment the thing would become public and that moment, innocent as I might be of the act for the alleged performance of which they were attempting to blackmail me, the moment that became public, those of the public who liked me would believe I was innocent and those of the public who did not like me would believe I was guilty. It is like a libel suit. Any man who brings a libel suit is a fool. He gets a verdict of a jury against the defendant that he has been libeled. Do you think for one moment that that verdict of the jury changes the mind of anybody? All a man who

brings a libel suit, innocent as he may be, accomplishes is to spread the libel and spread the charge broadcast among all of his friends and acquaintances and, notwithstanding the fact that the jury may find him absolutely innocent, those who like him will believe he is innocent and those who do not like him will believe he is guilty. So I say the man is a fool who starts a libel suit, and to go to the police with a charge of blackmail is to invite the charge against you which will be spread broadcast—which you have done yourself—and no matter how innocent you may be, some people will think you guilty. So what does a man do who is blackmailed? If he is the ordinary man he does nothing; he puts it out of his mind; he forgets it; and says, "I hope to God," as Mussikee said on the stand practically, "That nothing comes of it." That is his attitude. That is a reasonable attitude. What does the man do who is guilty of the act for which he is to be blackmailed or for which they attempt to blackmail him? He thinks to himself just as the criminal does who has committed a crime and stays on the scene as the first man and is one of the first to discover the crime and help the prosecution to find out who did it. He thinks to himself, "If I get to the police first and make this charge of blackmail then I am going to discount the testimony of these people who are trying to blackmail me." And let me say to you, Mr. Prosecutor of the Pleas, that the man who runs to the police with a tale of blackmail is usually guilty of the things the blackmailers say, and he goes to the police simply to be there first, to strike the first blow and so to discount what the blackmailers may say and, being guilty, he does not

care what his friends and acquaintances may think. All he cares about is to escape jail. But the man who is innocent has no thought of protecting himself, because he cannot contemplate, in his mind, that, innocent as he may be, these blackmailers can accomplish anything. All he thinks in his mind is that, "If I go to the police or if I make this thing public, look at the position I put myself in," and he adopts the attitude of doing absolutely and utterly nothing. And that conduct is the conduct of an innocent man, not the conduct of a guilty man trying to shut the mouths of the blackmailers. Now, so much for that.

There are two elements in this case—two facts which must appear to you, both of them beyond a reasonable doubt, before these men should be convicted; first, that the fire was, in fact, of an incendiary origin, and, secondly, that these defendants had something to do with that particular fire. Now, let us take the first. What is the evidence in this case that this fire was of an incendiary origin? I say there is none. The Prosecutor of the Pleas may say or claim that he finds evidence that the fire was of an incendiary origin from the chief of the fire department or fire marshal, or whatever his particular position may be; that there were two fires—two separate fires—and the prosecutor will tell you that there could not be two separate fires without the fire being of an incendiary origin. You have heard the testimony of the fire marshal. You heard how he came to this Joyce Street side of the building and how he put a hose in through the window and shot the stream somewhere into that building, and then how he put a battering-ram in through there, I

think, and took the hose in here and shot the hose that way. You heard him say that this was a hot fire, that there was dense, heavy smoke. Someone —I have forgotten now whether it was the chief or not—has compared it with the smoke of an oil fire. In any event, you know what smoke rubber will make. And after this hose was taken in through here and directed into room E, the chief said that he saw two fires, one in room E and one in room C. Now, remember the chief's testimony to the effect that he had a high pressure on that night, or good pressure; remember his testimony that the water coming out of that hose would carry in a solid column a distance further than any of the walls of this building from the point where the hose was. Is there any wonder that after playing this hose through here there should appear to be a separation between these two fires? It would be a most extraordinary circumstance if there did not. I do not know whether any of you have had experience with a fire hose. You certainly, some of you, have had experience with the ordinary garden hose, and you multiply the ordinary garden hose in the diameter of the pressure of a fire hose, and increase the pressure and you can imagine what a column of water coming out of that hose under high pressure will do to a thing it hits. It will not only put out the fire, but with respect to boxes and stock and things of that kind, it will break them to pieces and it will shove them aside. If a man happens to be there and it hits him, it kills him. If it hits the ceiling, it rips the beaver boards that are only tacked upon that ceiling down. It cannot help it. And remember that this chief said that before he put his hose in here he had

put his hose through one of these windows—I have forgotten where—and for some length of time the hose had been played through there, and yet this fire marshal is willing to come here, where the liberty of two men is at stake and, for the purpose of attempting to indicate that this fire was of an incendiary origin, he tells you that there were two separate and distinct fires there. In my judgment, gentlemen of the jury, and I have no doubt it is true, there were five, six or seven separate and distinct fires there. I have no doubt but that when that hose played across that floor wherever it played it put the fire out and there was fire on both sides, and I have no doubt that that happened all over here, and I have no doubt that if you had eyes sufficiently powerful to see through dense smoke, like smoke from a fire, you could have found there any number of separate, and distinct fires after once that hose began playing up and down that floor. It could not have helped it. Now, you will remember that to bolster up the state of the case—to bolster up the State's case, the fire chief testified that he went back there the following afternoon, if I mistake not, and that he then went over this floor of this building and he then saw that there were two separate and distinct fires. I wonder, gentlemen, how his recollection became so refreshed between the time of the last trial which was but a short time comparatively after the event, and today. He told us nothing about that at the last trial. At the last trial he said that the first time he was in that building was some weeks afterwards, or at least a week after the fire. But, however that may be, he told us at the first trial positively that after

that fire was totally out—he used the words teetotally out—it took more than an expert to tell whether there were two fires or not. What does the State mean by attempting to convict defendants upon such testimony? How was the recollection of this fire marshal—no, not refreshed, because he did not refresh his recollection—how did it come that upon this trial he deliberately contradicts what he said at the first trial? How does it come that he now says to you, in order to make the State's case stronger, that he went back there after the fire was out, examined the premises, and found that there were two separate and distinct fires, whereas, at the first trial, he said first that he had not been there at that time and, secondly, that after that fire was out, you could not tell, it took more than an expert to tell whether there were two fires or there were not. Is that the kind of testimony that the State wants to produce to put one in jail? And it is solely upon that testimony that the State claims, or will claim, or, at least, I can imagine of nothing else, that this fire was of an incendiary origin. Now, I ask again, how did the chief come to change his testimony? I do not know. I have not talked to him. You heard the testimony of the two firemen—or one fireman. I think he was produced here by the defense. He was discharged from the fire department by reason of or because of the intervention of the chief. I will admit that. Compare the two men well. You saw them on the stand. Compare them. That man who testified here for the defense told a complete story that can be tested by common experience and found to be true. He testified without any equivocation. He did not change any testimony that he had given before, because he had never testified before. He was a good, up-standing man, and a man who was fit to be in the fire department, as I saw him, and I have no hesitancy, in looking at the two men, the chief and the fireman, to determine which one is the most efficient, and he tells you—and you will remember that the chief said that he doesn't know how this hose went in, he doesn't know whether they went in stooping or whether they stood up, he doesn't know anything about it. Of course, he doesn't. He was in the position that a general of an army in military affairs is usually in in warfare today, several miles behind the front. He was not carrying that hose in. His men were doing that, and his men, or one of his men—this fireman—comes here and tells you how they did carry it in. He was there. He can tell you, and he says they carried it in stooping, as you would expect, heavy, dense smoke, part of the building apparently in flames seething towards them—they walked in with the hose, four men of them, and when they got that hose in that hose was near the ground, and the fire was on the ground and when the water started to leave that hose, that water started in a solid column along that floor, and, then, perhaps, to give the chief the credit of the benefit of a doubt, after his men had gone in with the hose, the chief went in and he saw what seemed to him to be separate fires, although the fireman who was here told you that it was impossible to tell, and the usual emotions that are common experience would tell us that it would be absolutely and utterly impossible to tell.

Firemen's eyes are human the same as yours and mine, and they cannot stand smoke, and I cannot see how you could look through that smoke and say there were two separate fires. The fireman tells you another thing, that they went on the roof and, in fact, everybody can see this building was burned out in the roof. They put the hose through the roof and played the hose along this portion of the building. Now, if that is not the way the thing was done, if this fireman who came here and testified was not telling the truth, there were three more firemen on that hose and they are available to the State, and the State has not produced them. Let us say that the State could not have anticipated what we were going to produce until we produced it. Did sufficient time elapse from the time we produced it until now for the State to produce any one of the other three firemen who were on that hose and who were in there? No, they preferred to rely upon the evidence of the chief, who tells you one thing today, when he told another jury something else before, absolutely contradictory, and who, for some reason or other, during the progress of this fire, was obliged to go some place for the purpose of warming himself. I have not heard of his men who were carrying the hose inside of the building going to warm themselves, and it is a cold job holding a hose on an icy day in the middle of winter, colder than standing where you could put your hands in your pockets and direct the work. For some reason or other, the chief had to go to some place during the course of the fire and he had to have something there which was not tea and which he has not explained

what it was. I have no objection to the chief getting that which was not tea, quite the contrary, but I do suggest that if he does it, that that which was not tea was not quite of the quality which, after partaking thereof, would incline one to be of a properly observing frame of mind, and it may be for that reason that the chief saw that which could not have been, and it may be for that reason the chief now testifies to something before you when he testified to something quite different when he was on the stand before. I rather would credit it to that which was not tea or which was not coffee, or whatever the liquor was that I would to attribute it to any absolute intent on the part of the chief to deceive anybody. I do not like to think that anybody would deliberately and wilfully attempt to swear away the liberties of two men. I do not like to think that. I would rather be charitable and attribute it to the other thing. Then, it may be attributed to what was the fact, that this chief has testified to one thing here before you and he has testified to something quite different at some other time, and it is the fact that this fireman comes to you and tells you exactly what occurred when he was on the job and that there were three more firemen on that job, who the State could produce, if it so desired, and which it has not produced.

Now, let me at this point say to you that in examining the photographs—let me see the photographs of the State, please—you will find in both the photographs of the State and the photographs of the defense boxes that appeared to be littered on the floor of this building, and, I may be mistaken in this, but I am inclined to think, if my

recollection serves me aright, something was made at the last trial of the fact that this litter appeared here, where the testimony shows that when Horne left the building at five o'clock that night, or whenever he did, everything was neatly piled, and that that litter there must show some indication that somebody must have tried to make a fire, or something of that kind. Now, the evidence in this case shows—

Mr. D'Aloia: I do not recall any such point made at the last trial.

Mr. Lane: All right. If there was not, I assume that point will not be made at this trial.

Mr. D'Aloia: Not at all. The photographs were made a long time after the fire.

Mr. Lane: The State's photographs were taken in May and the photographs of the defense were taken in June, and between the time of the fire and the taking of the photographs the goods had been removed from this place, and that is the result on the floor of the removal of the goods. It does not purport to show what the goods were or how the floor looked at the time of the fire. I do say to you this, though, that there was no change in the floor. Nothing had been done by way of repair, and when you come to examine each one of these photographs you will find there no evidence of any burning with respect to the floor at all, although, according to the chief, this hot fire was right on the floor and could not help but have scorched the floor, if there was any such hot fire as the chief says there was.

Now, another circumstance may be pointed to by the prosecutor with respect to this fire and that is this, that somebody saw an automobile which looked like Horne's outside of this place

at 9:30, I think, and that they saw it again at 11:30 or 11:45.

Mr. D'Aloia: 11:15.

Mr. Lane: At 11:15, a quarter past eleven, and that that automobile looked like Horne's. Well, I think the prosecutor and I both own cars of a rather standard make, and I do not know that the prosecutor or I, either, want to be convicted of crime because a car that looked like our cars happened to be standing opposite a house on a certain night when a crime was committed. I do not want to be, if the prosecutor does, but let us see about that automobile. The prosecutor produced a witness who testified that this witness smelled rubber burning at eight o'clock, or 8:30. The prosecutor tried to show you—will argue to you—else the testimony is of no importance at all, that Horne's automobile was out in front of that place at 9:30 and remained there until 11:15, and the fire alarm went in at 12:15; in other words, having set the fire prior to eight o'clock, and the fire having progressed to such an extent that the people in the adjoining house could smell the rubber burning, the fire bug stayed there for three solid hours. Now, the prosecutor has got to take one horn of that dilemma or the other. He has got to say that the woman who testified that she smelled rubber burning at 8:30 o'clock is mistaken, or he has got to say that the automobile that was outside there was not the fire bug's car, or he has got to say to you gentlemen of the jury that the fire bug, having set the fire and the fire having progressed to such an extent that you could smell rubber burning in the neighborhood, remained at the scene of the crime with his automobile standing in front of it for three solid hours, apparently

waiting for the fire to break out and for the fire company to come and catch him there. Now, what kind of testimony is that to show that this fire was of incendiary origin, if we assume that the inference that the prosecutor seeks to draw from the presence of this automobile—if we assume it was Horne's car? It was not, unfortunately. I wish it were. If this testimony that the fire was burning at eight o'clock—if we assume it was Horne's car, it is proof positive that Horne had nothing to do with the burning of this building, because he nor any other person attempting to set fire would stay at the scene of the crime for three hours watching the fire burn and without knowing when an alarm would be sent in and the fire companies arrive. But Horne was sick in bed. But I will leave that to his own counsel. I am now referring to that to show you gentlemen of the jury that that piece of evidence coming from the State's witness is diametrically opposed to any theory of incendiarism at all.

Now, where was this fire; how was it set, if it was set; where was it set, if it was set; how did it get afire? I don't know. Neither does the chief. Neither does the prosecutor, nor can you tell, nor anyone else. There are several ways by which this building could have got afire absolutely innocently. There was the boiler. Now, we have not produced any witness here to tell you that there was fire in the fire box of that boiler. If we had desired to frame testimony, we could have done that. It is easy enough to have a witness come if you are trying to perjure yourself, or if you are willing to perjure yourself. It is easy enough to have a witness come, and say, "I saw a fire in that boiler

at that time." I would have some doubt as to that witness' testimony, for this reason, that when one walks around or works around a building, he does not remember whether there was a fire in the fire box. One does not get down and see if there is a fire there. It is a hard thing to remember a small thing of that kind and to truthfully testify that you did, in fact, see fire in the fire box on that day. But here is what you can say, "We were working on that day; it was a cold day and it was warm, and where did the heat come from?" One of the witnesses says it was colder outside in the factory than it was in the office. Yes, because there was a gas stove in the office. Other witnesses who were there say it was warm in the factory, and he does not say it was cold in the factory. Of course, it would be warmer in the office than in the factory, the office being heated by this gas stove and all the rest of the heat coming from this boiler. But it was warm there and it was not cold like it was outside. Where did it come from? There is only one place it could come from and that is the boiler. Now, if there was fire in that boiler—I call your attention to D. 8, I think it is—just look at it, look at that boiler, look around it. Now, you will see that right around here, around the boiler, it is all burned away. You will see the post here right beside the boiler burned away, scorched. You will see this door jamb I am pointing to has not got a mark of flame on it. You will see right above the door that the rafters and studdings are all charred and burned, both sides. It is all knocked off. Now, you remember when the chief was on the stand I got him to say, as we all know

without his saying—I got him to say if you start a fire down at the base here, the tendency, of course, of that fire is to go up and as it goes up it spreads. It would be, therefore, a natural thing to expect fire, which originated in that boiler, spreading to this surface and going up and leaving absolutely unscathed this door and leaving unscathed this door over here. It goes up and spreads as it goes up. That is the only way that fire could have occurred, or the way that condition could have been created at that particular point, because if the fire had come from this direction, it would have hit the door before it hit the boiler. If it had come from this direction, it would have come down generally, not in spots. What happened or what may have —I do not guarantee this at all—I am using it as an illustration of what may have happened. I am like the chief, when this fire was totally out, nobody could tell what caused it. It may have started here and spread up and over, and the building was on fire. Another way by which it could have occurred, these boards of the ceiling, and which also might account for the separate fires which my friend, the chief, saw, these rafters or beams were covered with beaver board and those beaver boards, you will see in some of these photographs—take this photograph Exhibit D. 6, for instance, see how those beaver boards are; this space here; the beaver boards have completely dropped down on the floor; you see some of the boards there which are hanging, just hanging to the wall or ceiling there. The prosecutor made much of the photograph in which he showed the ceiling here with beaver boards which happened to be disturbed. That is only a small part of the

building in this photograph, but look at the ceiling in the others and see them hanging down and remember that there was directed up at that ceiling and all around this wall this column of water, and, then, can you say there was no reason why several separate fires might have been started on the floor of that building. That is another way by which this could have spread, another way by which it could have started, and one of the most usual ways for fire to start these days is by the crossing of electric wires, or by short circuit of some kind. Many fires are caused in that way. We all know that. It is common experience. Then, some of us have had the experience of going down in the cellar and seeing where a little flame was beginning to start where a wire had crossed. These wires, or these electric wires in this building ran along the ceiling, and you will see from the photographs and also from the testimony that the rafters, the whole business, was burned out, the ceiling part, a hole right through the roof was burned out up there, somewhere in the center of the building. Now, that is what one would naturally expect to find if that fire started in the rafters on the ceiling from the electric connection or defect in the electric connection, and if the fire started that way, one would naturally expect to find the ceiling burned, and there is a photograph showing it, and one would also naturally expect to find not much of the floor burned, and for this reason, that the fire, if it started that way, would travel along the rafters, burning out the rafters as it went until it found an opening, and then slowly eat its way down, and let us look at some of these photographs and see whether that explanation is not tenable. Now, you see, taking

the words, "I didn't do the job; why should I give it to Finkelstein and Fisch; yes, I did do the job, but there was more water than fire and, therefore, I should not pay." Now, does a man make two statements of that kind? Not if he is either innocent or guilty. Turak put Mussikee in the position of making statements that no sane man could possibly have made. He says in so many words, and he repeated it time over and again, both under my examination and under the examination of the prosecutor, that when Mussikee said, "I no do the job," that is what he said. Now, let us see if we cannot determine from his own testimony as to who did say something about the water. I have that marked at one point in his testimony. Turak said that it was he, Turak, who made the statement that there was more water than fire, and that little statement made by him indicates what the truth may have been, if the conversation ever took place. As a matter of fact, Mussikee says he never talk to Turak, and when you come to analyze the testimony of Turak, you find that Turak tells a story as to what was said that is impossible, because no man, as I said before, would say, "I no do the job," and a moment afterwards begin to talk about the fire being more water than fire, and Turak at one part of the testimony said that it was he who said that the fire was more water than fire. If Mussikee is a liar, if Mussikee intended to perjure himself, why didn't he deny the testimony of Goldberg? If this conversation with Turak took place, there is no more reason for denying the conversation with Goldberg than there was for denying the conversation with Turak or vice versa. As a matter of

fact, the conversation with Turak did not take place, and Mussikee says it did not, but a conversation did take place with Goldberg, and Mussikee frankly tells you that it did take place and what it was. Isn't that honest? If he was going to lie about it, he would have denied both conversations. He does not. He stands by the truth. What was said by this fire bug, or rather, this conversation with this—a conversation with this man Goldberg did, in fact, take place. Now, when you come to analyze the testimony of Turak, however, as I said before, upon his testimony alone, what is there in it that ties up Mussikee with the setting fire of this building at this particular time? Absolutely and utterly nothing. Now, one other thing is important to remember with respect to Goldberg—with respect to Turak particularly, when you take it in connection with the chain of testimony of the chief of the fire department. You will remember that Turak said that he had made statements to the insurance company, and he says at several places —he said in his previous trial that he made three statements. There is one line of testimony, however, in this trial, that shows how this case has been worked up; not by the prosecutor, but by the gentleman representing the insurance company, who is acting solely in the interest of the public, and not for the protection of the insurance company. Under my examination he said, so that you add it to your story—I will withdraw that. "So as time went on you remembered more? *Answer*: No, not more; everything at one time. You make one statement; that is not good, you make another statement." If there ever was confession of the way in which a case has been worked up, it is in those words. Think of it! The

liberties of two men at stake. A detective of the insurance company, acting for the insurance company, working up this case for the public. How absurd! And you get Turak, "You make one statement; it is not good, you make another statement." And this man Cooper was there when the Turak statements were made, and my friend, the prosecutor of the pleas, with a great flourish, has offered to the defense a statement—a statement—signed by Turak. Which statement?

Mr. D'Aloia: The only statement. I offer it now, too.

Mr. Lane: Then, Mr. Turak is a liar—

Mr. D'Aloia: No, he is not. He testified in West Orange.

Mr. Lane: —Mr. Turak has told you time over and again that he made three statements, and I have read his testimony, "You make one statement; it is not good, you make another," and the prosecutor of the pleas now says that there is only one statement. Well, then, is Turak telling the truth and does the prosecutor of the pleas want you gentlemen to convict these men with what is equivalent of arson upon the testimony of a man who says that he made three statements, when the prosecutor says he made one? You are not convicting these men upon the statements of the prosecutor; you are convicting these men upon the evidence, and I repeat that notwithstanding the testimony—rather, the statement of the prosecutor, but confining myself to the evidence, there were three statements and, by the testimony of Turak, there were three statements, because "You make one statement; it is not good, you make another," and I say that when the prosecutor, with

a flourish, offers here a statement, I have no interest in that statement. I want the three statements that were made, the ones which were not good. I want the one that was not good, not the one that the gentleman for the insurance company finally got that was good. Can you read between the lines and can you now find an explanation for the change of testimony of the chief? Now, this man Goldberg. Are you going to pay any attention to him, the gentleman who has been convicted of horse-thieving as well as arson, whom everybody knows? Of course, they know him. He tells us about some talk which he had with a man whom the prosecutor will say was Horne, but there is no evidence to support any such conclusion, because Goldberg says he does not know who he was. And what does Goldberg say, that he went to Mussikee and told Mussikee that if he did not give him money that he would squeal. And what does Mussikee do? He says, "I am not afraid; let them squeal; I did not do it; I had nothing to do with it." Is that the conduct of a guilty man? Now, one other thing. Turak was working for Mussikee, and yet Turak would have you believe he was not working for him; Turak was working for him excavating, independent contractor, and, according to the prosecutor, or the inference the prosecutor will seek to draw, a man is responsible for his contractor, you have got to go and examine the moral standard of all the contractors you employ, but Turak was employed working for Mussikee after this alleged conversation in September in which Mussikee asked him, Turak says, to set this fire for $3,000, and yet, strangely enough, the thing never was mentioned between them again. Not a

word. He led Mussikee to believe that he was going to do it, although he did not intend to do it, and yet not a word about it for three or four months. Is that conceivable? Is it possible? Wouldn't Mussikee want to know whether his instructions were being carried out or not? Then, singularly enough, in January, 1924, there is a fight between Mussikee and Turak with respect to a bill. Now, mind you, Turak says that on January 15 he had this talk with Mussikee. There was this dispute with respect to the bill, and yet Mussikee stood firm and forced Turak in March, 1924, to take $60 for this $134 bill. Do you believe, for one minute, that if this man Turak had anything on Mussikee that Mussikee would have acted in that way? No. For the sake of the difference between $134 and $60, would he have exposed himself to this? No, sir. When Goldberg approached him he said, "I am not afraid." When Turak says he approached him, although he didn't, he forced Turak to take $60 instead of $134, on a bill for excavating. Is that the conduct of a guilty man? This note that the prosecutor, unfairly, it seems to me, characterized or stated that it had the word fire in it. It did not. And I take the word of Judge Davis rather than the unsworn statement of the prosecutor. If it did, why didn't the prosecutor put somebody on the stand to swear to it? I don't care. It didn't make any difference in this case; whether it had those words in this case is quite immaterial. But it did illustrate the unfairness with which not only this case had been built up, as witness the testimony of the fire chief and these three statements of Turak, but the unfairness with which this case was tried. It did not

make a trifle of difference whether the fire was water or was not. We are not bound by what Mr. Finkelstein did. We say that Fisch and Finkelstein unquestionably were attempting to blackmail Mussikee. Nobody contends that Mussikee had anything to do with this note. There is not a scintilla of evidence in the case that Mussikee had anything to do with this note. And my friend, the prosecutor, with another great flourish, put a witness on the stand to say Finkelstein could not be found. Whose fault is that? Who could have kept him here? The State could have kept him here. The State could have bound him over as a witness, if it wanted to. The State could have, if it thought that Finkelstein or Fisch set this fire, indicted them insead of these other men. But where is Fisch? He was here in this court room. He is not gone. Why doesn't the prosecutor call Fisch?

Mr. D'Aloia: Do you want me to tell the jury in answer to that?

Mr. Lane: No.

Mr. D'Aloia: All right. When I do get up and answer that particular question I beg of you not to interrupt.

Mr. Lane: I shall interrupt you.

Mr. D'Aloia: I shall answer that question, why didn't I call Fisch. If you challenge me, I will do it.

Mr. Lane: I did not challenge you. I do not propose, gentlemen of the jury, to submit my client to the unsworn statements of the prosecutor of the pleas as to why he does or does not do a particular thing. I am quite content if the prosecutor of the pleas takes the stand, or if any other members of

prosecutor's office take the stand as to a course of conduct, so they can be examined, but as to what the prosecutor of the pleas, particularly after the prosecutor has injected the word "fire" into this note, what the prosecutor of the pleas may now evolve in his mind for not calling the witnesses for the State that sat on that bench during the course of this trial, I do not propose to be bound by. There are many reasons why it should not call him. The fact is that he did not call him, and he sat here, and the fact is that he made a great to-do over the fact that Finkelstein was not here, and the fact is that if he wanted Finkelstein here, there is a way by which he could have kept him here, and the fact is that these men, Fisch and Finkelstein—just whatever connection they have with this affair I do not know—but they do stand unindicted and up to date the prosecutor of the pleas, at any rate, has not said that Fisch and Finkelstein set this fire, and so far as we know, who did set the fire?

Now, one more word and I am through. In a case of this kind, gentlemen of the jury, the defendants are at an extremely serious disadvantage. The evidence against them, worked up in the way in which I have stated it has been worked up, which appears from the evidence, not from my statements, coming from the source from which it does, a man—confessed blackmailer, or one who gets information for the purpose of blackmailing; the other a confessed hose thief and convicted of arson, is hard to meet. There is no way by which you can meet it, except by your denial or by your explanation. There is only one other thing. It is not the kind of a case where you are accused of

doing certain things at a particular point where there may be other witnesses whom you can call. You cannot do it. Goldberg put Mussikee and himself alone, so that there is only Goldberg and Mussikee talking. Turak put Mussikee and Turak alone. So there is only Turak and Mussikee talking. You cannot do anything. There is no way by which you can defend yourself except to say, "I didn't do it; I didn't make that statement. Here is what I did say." Now, in a case of that kind, where it depends so much particularly upon the words of this class of witnesses, there is only one other thing a defendant can do and that is produce evidence of his good reputation. That is a dangerous thing to do for a defendant, a very dangerous thing to do, because although the State cannot attack the general reputation of a defendant under ordinary circumstances, if the defendant himself puts his general reputation at issue, the State can attack the general reputation of the defendant, and in this case tried before, a year and a half ago, there was evidence put in of good reputation, and the State knew, or might reasonably have surmised that we would put in evidence of good reputation in this trial, because it was about all we could do. Have you heard a single witness produced on the part of the State testify with respect to the reputation of these two defendants? That speaks louder than the testimony of the reputation witnesses put upon the stand. Now, with respect to the defendant Mussikee, we produced bankers, we produced officials, we produced social acquaintances, we produced members of his congregation, we covered his activities as a man in the home, in the church, as a business man in his business and in his bank-

ing connections, and we have produced witness after witness here who testified that the reputation of this man for truth and veracity and his reputation for lawfulness and law abiding and so forth, is good. All kinds of reputation, and the best of that, of course—no, the best of that is that coming from the bankers, because you know, as I know, that bankers loan upon moral risk. There are some men who bankers will loan upon collateral, and it must be good collateral, and that is when they do not know you. It is the position they take, but if they investigate you, as they do, they very often loan without collateral, sometimes without even thinking of collateral, upon the moral risk, and I have heard bankers say the important thing is the moral risk, and they make up their minds and they get that in some way or another, and they are expert in getting it, and these bankers, this congregation and the social friends of this man and people from whom he has been doing business with for over twenty years in the City of Passaic, come here and say he is a man of good reputation, and not one witness produced by the State, although we put our general reputation at issue—not one witness produced by the State.

Now, I am going to ask you gentlemen in closing whether you are going to take these two men of good, unblemished reputations and upon the word of this chief of the fire department, who changed his testimony to hang these men, and upon the word of Turak, who tell you a story impossible to be true, because no sane man would have said in one breath, "I no do it," and in another breath talk about it as if he had, and who also has made three statements, "I make one statement; it is not

good, I make another," and upon the word of Goldberg, this self-confessed horse thief, where there is not a single scintilla of evidence in this case against us, are going to take men of that class, upon that kind of evidence, and say that beyond a reasonable doubt it appears to you that these men are guilty? Would you like to be treated by a jury in any such manner?

Mr. Kessler: May it please your Honor and gentlemen of the jury. I hope that I will not be too long to tire you out, because you have listened to what I think is the finest analysis of the facts in the case that could have been given in a fair way, and I have no quarrel with the prosecutor's office or the prosecutor trying his case. He and I were associated a good many years in the prosecutor's office. He is a zealous and honest official. He is doing his duty as he sees it and as he sees it to do his duty. He is a man experienced in the law. I know of no man in the County of Essex who knows how to try a criminal case better than Judge D'Aloia. I know of no man who, when he wants a witness and really wants him, who knows how to get after him better than Judge D'Aloia, and I wonder—and I am satisfied that Judge D'Aloia did not want Finkelstein. I am sure he did not want Finkelstein, because what good, in the first place, would Finkelstein do to his case and, in the second place, knowing Judge D'Aloia as I do know him, giving him full credit for his ability that he has, what effort did he make to find Finkelstein? How do you know that Finkelstein is not in Passaic; how do you know he is not in Newark; how do you know he is not about these parts? Why, you have the testimony of the fire-

man! A fireman trying to fight fires has been selected by Judge D'Aloia to find a witness. The very statement is ridiculous. With all the millions behind this National Underwriters Insurance Company, with all their trained corps of detectives, with the prosecutor's detectives, spendid men, experienced in tracking down criminals, and ferreting out witnesses in a case, with the police of Newark at his command, with the police department of Passaic under his control, and, last, but not least, with the police department of West Orange ever with him, with that kind of people, the fire department appeared to be the better—that they be let out of the case, the easier it will be tried by the prosecutor; with all those people at his command, to find a witness, he gets a fireman to look for him! Does he want Finkelstein? If he wanted him this National Fire Underwriters, with their power all over the United States, representing every insurance company in the country, with agencies in every city, with the police within his control—he produces a fireman, who say, "I could not find this witness Finkelstein." What is the purpose of the testimony? I charge you the purpose is not an honest one. It is not a fair one. It is what we call a legal trick to confuse an honest jury. He wants to give you the impression that our defense has concealed Finkelstein or that if Finkelstein were here it would help this case—it is just a legal trick to confuse the minds of an honest jury. When a case will not stand on the facts, a lawyer will stress anything. In an attempt to put it over we sometimes resort to that kind of a practice. To follow out what Mr. Lane has said about this Turak statement, or three statements, and the prose-

cutor interrupted him and said, "There is only one," I will say this for the prosecutor, if the prosecutor had three statements in his possession, I know him to be honest enough to say that. He wouldn't stand up for long otherwise and tell you he has only one. I honestly and firmly believe that the prosecutor has only one Turak statement. If he had more than one he would never have mentioned the fact that he only had one. He may not have produced the three, but he would not have produced the statement that he only had one. The prosecutor had nothing to do with the taking of those statements. The insurance company worked this case up. I do not say so. The insurance company witnesses said so. They took the statement and it is consistent with what the prosecutor said and that which Turak said. Turak said he made three statements. As consistent with the prosecutor saying he has only one, because when you follow out his language, he said, "When I made one statement, and that no good, I make another," not to the prosecutor, not to any of the prosecutor's detectives, who would not conceal such a fact, but to the insurance company investigator. You don't think for a moment the insurance company investigator came to Judge D'Aloia and said, "Turak made three statements and these are the three statements." The chances are if the truth were told to the prosecutor, if he were informed of the truth of this case, he never would have indicted Horne and Mussikee. When the insurance company worked up the case they presented it to the prosecutor finished, complete with evidence to make the prosecutor believe that there was a case, and if they produced the three statements of Turak to the prosecutor, in

his experience and in his honesty, he would have said, "This office in Essex County will not stand for that kind of practice, because I will not permit a witness to take the stand to commit perjury, and when he made one statement and if the insurance company did not like it and you compelled him to make another, when you didn't like the second one you compelled him to make a third, I will not lend this office in Essex County to help the insurance company to avoid paying the insurance policies." But he had only one statement. It was the only one produced, but the insurance company investigator who sits back there knows in his heart and soul that he has in his possession either with him or in his office, two other statements that Turak made, because Turak cannot be mistaken about that. Turak is not a witness for the defense. He is not trying to help us. When he finally confesses under cross examination by Mr. Lane that he made three statements at least that part of his story you can believe and take for the truth. Now, I have no quarrel with the Chief of the Fire Department Sheehan. I am not so sure that Sheehan does not absolutely believe that which he told you to be the truth. I will not for a moment think that Sheehan has even exaggerated the situation as he now sees it. Common experience has taught us and, if you observed when we filled this jury box, we took a considerable time in the examination of the jury. Now, there is only one purpose in that either by the State or the defense. We have a common purpose. We try to fill the jury box with men whom we believe have had common experience in life, who have intelligence enough to apply that common experience to the evidence and in sifting

out the truth when you go to the jury room, and we know by common experience that when a man of the calibre of Chief Sheehan, when he has once made a break like saying there were two fires that the thing devolves in his mind and he is thinking about it, and as he is thinking about it, it gets bigger and bigger, and he is more definitely sure it is correct. I do not know what caused him to think there were two fires. I honestly believe he did think there were two fires. I do not believe it is a concocted part of the story. He honestly believed there were two fires, but he frankly admits that the different causes for the two fires he overlooked. You will remember on cross examination I asked him whether he observed when he came in when he looked in he saw two fires, and I asked him where he looked and he said he looked down. I asked him, "Did you look on the ceiling?" There is the crux of the whole case so far as Mr. Sheehan's testimony is concerned. His answer was, "I didn't." Now, this fire, and there cannot be but only one cause, there isn't any proof at all that any setting originated in this room marked C. I do not know whether it was because of the boiler or because of cross wires. One cause is as good as another. It is only a guess. There is not any evidence of it. You cannot tell. It is your common experience applied by you to this case as to what caused that fire. I do not know whether it was cross wires or whether it was the boiler. Was there a fire in the boiler? In addition to what Mr. Lane has said to you, do you remember the testimony of Mr. Moran, who was a fireman, and he said the smoke and the flames were coming in and out the chimney, and steam was coming out of the

boiler. Now, gentlemen, I do not know whether there was a fire in that boiler or not, but I do know that steam was coming out of the boiler—I think he said the chimney of the boiler. Now, of course, the surrounding fire may have caused the boiler to overheat and send steam up. I do not believe it. I believe that steam was caused by some fire in the boiler, in the fire box. The greatest damage was done in and about that boiler, and when they came into this opening Forblade thinks that the door was closed. If that is so, the chief could not look through. They came across here and they sent their stream in room C, where they claim part of the fire took place, and then they were there fifteen or twenty minutes. Now, gentlemen of the jury, a stream of that size, with a pressure behind it, takes less than fifteen minutes to put out a fire in the path which that stream strikes and I venture to say that after they were in there for about fifteen minutes and part of the smoke had cleared because they had left this opening, it was then the chief who looked around to see how best to fight the fire outside thought the fire must be fought from the roof, because the flames were starting from it, and it was then the chief entered the building after they had been playing this hose for fifteen minutes to call the firemen out in order to go up on the roof. It was then that the chief entered that building and it was then for the first time, and only then, that he observed what he thought were two fires, because he saw a fire in C burning and he saw the fire in E, and he saw this path cleared apparently by this stream, he did not look upon the ceiling to see what connection there was to it. So that, gentlemen of the jury, the only importance of

this testimony is the question of setting the fire. The State wants you to infer that because of more than one that the greater likelihood of a setting. That is all. The testimony does not tell everything, because if there were two fires that does not prove it was set, but it does show in some measure the likeliness of it being set, because it is a strange thing a building would catch fire in two places. It is not conclusive. It is only a deduction that you might make. Now, the less said of a man by the name of Turak and Goldberg in a situation of this kind, the better, because I wonder how the insurance company—mind you, this is not a case worked up by the State who have a public duty to perform; it is not a case of a citizen coming to the prosecutor who says that he has been injured—this was a case that was handed to the prosecutor completely investigated and said, "Go ahead, there is a crime committed," and I wonder where the insurance company, or how the insurance company made a connection and came in contact with Goldberg or Turak. One of two ways. It cannot be any other way. I challenge the prosecutor to tell you how there can be any other than one or two ways. Either these men were planted in this case by the insurance companies, or these men went to the insurance companies. Of course, you will say, "What is the difference how they got together, as long as they did get together eventually?" Of course, it makes this difference, because, if they were planted by the insurance companies—I mean perjured witnesses produced by the insurance companies—I do not believe that. It is a theory. I do not think that is the way it happened. The other way, and the only way, it seems to me, it could have happened, is

by these men going to the insurance company or informing someone of the situation to make a contact with the insurance companies. Did they do that because they were decent, law-abiding citizens, honest citizens, who wanted to see justice done and guilty men punished, or did they have an ulterior motive? I do not need to answer. They answered it. Turak told you why he wanted this information. You wondered why Turak did attempt that. Perhaps many of you have not had the experience of testifying in Court. If you have, you are more intelligent and higher typed mentally in every other case than this man Turak, but when you get a man like Turak on the witness stand and you do not jump down his throat, he is not watching you all the time. You just talk to him casually and ask him a question. He sort of forgets he is talking to opposing counsel and he is in court, and he gets in a conversational situation with you and, lo and behold, it is out, that which he wanted to conceal, and once it is out, the damage is done. He has admitted it and he is bound by it. That is what happened in this case. You remember my examination of Turak, because of that conversational examination, and I asked him why—not jumping at his throat—he was not watching me particularly—I asked him, "Why, if you did not want to set fire to this building, and you were not going to be a party to it, why did you want this information?" "If I have such information I can make money." It is out. If this is an honest man who wants to see justice done and a guilty one punished, "If I have such information I can make money." There is your case. The whole thing of it. Money from whom and by whom? Judas was classed as a

prince compared with Turak. If, in the first place, he could not get $300 from Mussikee or Horne, if he could not get it in that way, Turak was going to get it by selling him out to an insurance company and collecting from that end, because what other reason could he have had for going to the insurance company? What promises had been made to him for this information which he had divulged, which was not for an honest public interest or purpose. So that you have on the one hand Turak, a confessed blackmailer, with an attempt to find out information which he could sell or blackmail these defendants. And his assistant and associate in the situation, Goldberg, I think they used to hang them for horse thieving out West. I don't know whether they still do. If they do not, they ought to, particularly in this case, because he is not only a thief, but he is a fire bug; not only a fire bug, but he is a betrayer, a vendor of the character of honest men, which is the worst crime in the world. Oh, the prosecutor will say to you, "We hold no brief for these men; it is only men of that type that will set fire; it is only fire bugs who will do business with men like Horne and Mussikee; we hold no brief for them, but we give you the best kind of evidence that we have, because it is only that type of men that would engage in that kind of business." I say to you, be that as it may, you have on the one hand a confessed blackmailer and his associate, a convicted man. It was only last week he said his case was affirmed by the Court of Errors and Appeals. On the other hand, you have a man like Horne, fifty-six or fifty-seven years of age, a grandfather, a father of three children, every one of them married and respected in

society. They have children of their own. A man who has been in this country for twenty-seven years and not a blotch upon his name, not a suggestion that he had ever committed a crime, or violated the laws of this country. You have that on one hand and that applies as well to Mussikee. You have that on one hand, a grandfather, fifty-seven years of age, who has never committed a crime in his life, and you have standing beside him a dozen or more men in this State and this country, bankers, business associates, social friends, members of his lodge, standing beside him and saying that his reputation is good. You have his past good living standing as a silent witness in this case. As against what? Against a confessed criminal and a blackmailer. Are you going to send this man to jail for that? And yet it may be said with as fair an argument that if they are the men who will do business with Mussikee and Horne in setting fire to the place, they are of the same ilk and type who would concoct a story to sell it to the insurance companies to convict innocent men. But after all is said and done, why was this fire set? Who was going to be the gainer by it? This man Horne is not an insane person. It is not charged so. He doesn't want a fire set because he likes to see a fire burning. That is not what they charge Horne. They charge Horne with attempting to defraud the insurance companies. Now, let us see if this building was over-insured. If he carried too much insurance on his stock, what do you think the prosecutor would have done? We are not dealing with an inexperienced man on the other side who overlooks anything. He does not overlook a thing. If this building and the contents were

over-insured, you would hear volumes in this court room, and I might warn you while I am on the subject, do not mistake the volume of Judge D'Aloia's voice for the quality of his testimony. One does not compare with the other. It has been testified to by the State that there was $70,000 worth of insurance upon the contents. The State proves that the insurance companies admitted that the amount of damage done by the fire to the contents was $34,000. I think on cross examination the young lady, whose name I have forgotten—I think it was Ayres—testified that the goods salvaged brought an additional $40,000, so that the goods that were insured for $70,000 admittedly brought $74,000. Does that show over-insurance? Does that show that Mr. Horne could profit by a fire? Does that show that Mr. Horne would set a fire or be a party to it? Here is another reason why Mr. Horne would not set fire to this building—at least he would set fire to no building—you will remember that the testimony shows that this part of the building was the original building when Mr. Horne bought the plot, that thereafter when he saw business was good, he built this part of the building, and then he added an addition, and then he found conditions still bad and unable to accommodate his needs and he built this other part of the building. Now, gentlemen of the jury, bear this fact in mind. The whole length of time that Mr. Horne was there in West Orange was one year and a half. Within that year and a half he had two building operations indicative of good business. Would a man who has a good business—would a man who has an increase in his business necessitating the building twice within a year and a half want

to go out of business by setting a fire? Not very likely. If this factory were closed because of lack of business, if Mr. Horne was financially embarrassed, do you think the prosecutor would have overlooked that? It is evidential and it is of great value in a case of this kind. This prosecutor would never have overlooked that. The prosecutor's cross examination proved that Mr. Horne was worth considerable money and still is. He owns stocks and bonds; he owns stock in other corporations; he owns real estate. Is it likely a man with means, with a business established a year and a half and rebuilt twice, his business going on good, a man of his age and of his reputation, of his standing in the community, is it likely that he would have been a party to an arson case in order to collect some thirty-four or thirty-six thousand dollars?

Gentlemen of the jury, I am quite confident when you take this case into the jury room that you will come to the conclusion that it is not likely that he would do it, but that he, in fact, did not do it, and that you will say to this man Turak and his confederate Goldberg that so far as Essex County is concerned, he may do business with the insurance companies and get his pay for it, but he cannot fool twelve intelligent men in Essex County. I thank you.

The Court thereupon took a recess from one to two P. M.

AFTER RECESS.

Mr. D'Aloia: May it please your Honor. Gentlemen of the jury. A man feels slightly perturbed when for three hours he is told he is a wonderful lawyer and wonderful prosecutor and, then, in the

same breath, you gentlemen are told by eminent counsel for the defense that my main object in life is to convict their innocent clients. I am a great lawyer, I am the most wonderful prosecutor in the world, according to Mr. Kessler—not much according to Mr. Lane, but I have no other ambition than to convict innocent men—innocent men in whose behalf two of the best lawyers in the State of New Jersey had to argue for three hours to try and tell twelve men how innocent they are. This is an arson case; this is the burning of a building, and in the annals of criminal law—and I do not fear any contradiction by Mr. Lane or Mr. Kessler—it is one of the most difficult crimes to prove, yet it is one of the most common crimes perpetrated, and we have in the books this one line written by an eminent legal orator, that convictions for arson are as uncommon as the crime of arson is common, and that is because of the difficulty in getting proof. When this kind of a dastardly deed is perpetrated those in whose interest it is being done are usually busy manufacturing alibis, so that they put between themselves and the scene distance or obstacles so that in case of trouble twelve men can be talked to by eminent lawyers they can retain and say, "Look here, when this thing occurred I had two physicians come and see me at 4:00 A. M. and 9:00 A. M. on the 5th of January and twelve o'clock at night it was necessary for a doctor to come and see me and, therefore, I was sick." That is Horne. Mussikee says, "Why, I am up in Passaic," and his lawyer says, "Well, what has Mussikee got to do with this fire; this is nothing more than a blackmailing scheme," and they try to get away with that.

Now, let us see what the facts are. Chief Sheehan of the West Orange Fire Department has maintained since this fire that there were two separate fires. Now, by separate fires it is understood that the second fire is not started by the first, nor the first one discovered started by the second, and that is an indication beyond a reasonable doubt that that fire is not accidental. Now, let us see what defense these men are preparing for themselves. At the last trial we did not have a syllable of testimony about a fire in the boiler, but you heard Mr. Lane say somebody—he would not say who—had gotten the chief to change his testimony. Well, that chief's testimony was not changed a bit. He said there were two separate fires then and for two days on that stand he told you twelve men there were two separate fires and they did not contradict him. They tried to. Mr. Lane stood there and said, "Who are the other three men who had ahold of that hose; why didn't the State call those other three men?" Those other three men were busy at other business. It was not their business to investigate the cause of the fire, or origin. It was their business to hold the nozzle of that hose and play it on the flames and put the fire out. So I will say this to Mr. Lane, "Why didn't you call those three men, none of whom have been fired by the fire department, none of whom believed the chief was responsible for their discharge?" What is sauce for the goose for not calling witnesses is sauce for the gander. The reason why they could not call one of the other three men is because they couldn't find one to contradict the chief, and the reason they called Forblade is because he did not like the chief and he is willing to lie to contradict the chief, and the

other three men are not willing to. Now, so far as aiding, they could not. They would say, "We were given instructions and we followed instructions; we did not pay any attention whether we saw two, three or four flames; we had all we could do to do what we had to." We did not call them. We are not here to question the witnesses with witnesses, but when Mr. Lane asked me to explain why we did not call them, there is the explanation, and there is another explanation why they did not call the other three men, because none of them would contradict the chief. None of them had feeling against the chief except Forbade, because he says he holds the chief responsible for his discharge in 1924. Now, where was Forblade at the last trial? Why didn't Moran, the investigator for Judge Davis, the man you saw on the stand, who is also called to contradict the chief; why didn't Moran locate Forblade from the evidence he gave here on this stand, and from the importance attached to him by Mr. Kessler and Mr. Lane he was the most important witness for the defense. Where was he at the last trial? Where was Moran, the investigator? Did he fail to go to that fire house and find out that Forblade, who lived in West Orange, had been fired, and tell this story how he crouched along with the hose and all he could see looking up over here was black smoke? No, they didn't get Forblade the last time, and they didn't get my friend Baldwin. You know Baldwin, the keeper at the penitentiary. When I asked him why he came here to contradict the chief he told that story about the chief being over a radiator when he went to the fire house to get warm. He was not seen at the last trial,

but he has a grievance against the chief, and he would not tell you what it was. He said, "I refuse to answer the question," and they want you to contradict the honest chief. The chief is honest in this thing, because if he was not honest when we deal with this ilk, we lose. Now, I have heard a great deal said about Finkelstein. Mr. Kessler said to you that Finkelstein's absence and my reference to him by putting Mr. Coyle of the Passaic Fire Department on the stand to show you that his usual haunts in Passaic failed to yield any semblance of Finkelstein, that Mr. Coyle has been to all his usual haunts time and again and could not find Finkelstein, that is a trick, and he said, "You know the National Board of Underwriters representing the insurance companies all over the United States of America and the prosecutor's office, with a great deal of money behind it, and the police departments of Newark and Passaic and as well as of West Orange, they failed to bring Finkelstein here," but he failed to say this, that if Finkelstein is on the other side of the Hudson, all the forces I represent and the forces of the police in Essex County or any other part of the State and his Honor's orders or the Chief Justice's orders cannot bring Finkelstein across the Hudson River, and that is why Finkelstein is not here. Now, I am challenged in another manner. Where is Fisch and why wasn't Fisch called? Well, you did not know that Fisch existed until I called Mussikee's attention to him sitting there. I do not think Mr. Lane wants me to tell you why I did not call Fisch. I do not think he objects, and I am not going to tell you why. I did not call Fisch, except to limit myself to say this, Mr. Foreman: Fisch is employed in the employ of Mussikee as a carpenter, and so after this occurrence at West Orange—

Mr. Lane: I move upon the prosecutor of the pleas' statement a mistrial of the case. There is no such evidence in the case.

The Court: No. The testimony, as I recall it, was that he had been employed at some time or another.

Mr. D'Aloia: And subsequent to the 6th of January.

The Court: The jury will disregard any erroneous statements and pass entirely upon the evidence.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr. D'Aloia: I cannot talk any more about Fisch or I am going to be interrupted, but I will go back to Turak. You know this National Underwriters has been charged by Mr. Lane with pretty nearly everything on the calendar, and our office has been charged with everything with a few exceptions. I do not know why there should be a contradiction between Mr. Lane and Mr. Kessler. Kessler believes that the State only has one statement made by Turak. Mr. Lane insists that there were three, and he insists upon saying that two of them have been lost.

Mr. Kessler: The prosecutor has no business to handle or use that statement.

Mr. D'Aloia: I can look at it.

Mr. Kessler: Well, he has asked for it in the presence of the jury and he ought not be permitted to do it. It is improper.

Mr. D'Aloia: Well, anyway, I will simply refer to it. I offered this statement, as Mr. Lane has told you, with a great flourish, and I offered it to him when he was summing up, but Mr. Lane insisted upon trying to fool you twelve men by saying there were three such statements, and he bases his argument on the English spoken by Turak. Now, I am going back to Turak's testimony, and Turak's testimony is this, "I made a statement in Passaic and I made one in West Orange. They told me that the first one was no good, and I made another one here at the last trial." How many does that make? That is three. Now, what does he mean in his poor English? The one in Passaic is no good. Mr. Lane knows just as well as I do that that cannot be introduced in evidence. They need Turak there in person in the Police Court of West Orange when Judge Davis, who represented Horne, wanted an examination and wanted to find out what was against his man. Turak was told in Passaic, "You have got to go to East Orange in person." He said, "Well, you have my statement." He said, "I do not want to repeat my statement."

Mr. Lane: I again move for a mistrial. There is no evidence in this case of any kind, nature or description—

Mr. D'Aloia: You commented upon it.

Mr. Lane: Not on any such statement as that.

The Court: The motion will be denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(Seal)

Mr. D'Aloia: And I have a right to infer from Turak's explanation when he had to come to West Orange in person and he tried to get out of it—Just as Mr. Lane and Mr. Kessler assured you, I do not hold any brief for Turak, Fisch or Finkelstein, because none of them in their statements will come close enough to say, "I set that fire." I would just relish trying Fisch, Finkelstein or Goldberg if they set that torch that night and set that fire, and I would relish asking the jury to send them to State's Prison for life, when you look at this frame building next door with families on both floors, on the 6th of January, in cold weather. Anybody who assists in that kind of crime to get a few paltry dollars from an insurance company gets no sympathy from me, but I tell you we are up against it in these cases. But I say Turak, when this piece of paper could not be used—

Mr. Kessler: There is not any testimony it could not be used.

The Court: No; the testimony is he was told it was no good.

Mr. Kessler: My motion is addressed to the prosecutor's remarks to the jury, that he had no right to make them.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(Seal)

Mr. D'Aloia: I put Mr. Cooper on for the purpose of contradicting Horne. Horne, immediately after this fire—a short time afterwards—when Cooper went to him with this question, "Do you know Mike Mussikee of Passaic?" he said, "No, I have not seen him since seven or eight years ago when we were in business together." When I got through with that line of cross examination Mr. Kessler and Mr. Lane just asked Cooper about this Turak statement. Why didn't Mr. Lane ask Cooper how many statements Turak made?

Mr. Kessler: Counsel has no right to show that statement to the jury.

The Court: Counsel will not use it.

Mr. D'Aloia: Now, we have an incendiary fire. There is no question about that. I do not care anything about that. There is fire in room C and room B has a partition over here which divides it from room E. I want you to take particular notice of that partition. No fire there that communicated from room E. There was a fire in this room. There was a fire in this room. There is a partition here shown on that photograph, but it is not burned. Oh, Mr. Lane has a wonderful exhibition of technical knowledge of how it runs along the rafters. Well, those partitions are solid and they go right up to the ceiling and there is no hole burned through them. What they try to call a mist is trying to mystify the jury. Look at that. Not one of the beaver boards has come down, and that is room E. There is a fire, and

another one along the floor in there. Now, on this night in question what do we find? This door closed up to be battered in, every window covered here with heavy glass and heavy wire netting, and I will correct Mr. Lane's statement as to where the hose came through in here. Mr. Kessler put his initials here, "F. D.," fire department, right here. That stream of water had nothing to do with that front part of that building westerly of that sliding door. They want to give you the effect of the force of water, what it may do. They cannot get away from the fact that there were two separate fires. Oh, Mr. Lane says, "The prosecutor's automobile and mine look like other automobiles. Do you want to be convicted because your automobile was seen somewhere? I wouldn't want to be convicted," says Mr. Lane, "because my automobile looks like some other automobile," but I will say this, that when my automobile or some automobile that looks like my automobile, stands in front of my house, or my factory, you have a right to infer that I am in the neighborhood, or somebody is using my car, either a member of my family or one of my workmen with my permission. This automobile that looks like Horne's automobile was not seen in the wilds of Passaic County. The automobile which looked like Horne's was seen in front of Horne's factory. That is the important part of the similarity between those cars. Mr. Lane tells you that is nothing. A woman across the street at half-past nine sees that open dark touring car there. It looked like Horne's automobile. It is in front of Horne's factory. It is Horne's factory that is set fire to about two or three hours later. It is Horne's fac-

tory where this incendiary fire is started. We have a right to show you the probative force of the similarity of that automobile and the one owned and used by Horne and seen by the woman across the street day after day. That is how important that factor is. Now, there was no fire in the boiler because Mr. Smallwood, called by them, says the factory was cold at four o'clock that afternoon. It is not an electric light wire fire, because you cannot take the testimony of a bookkeeper, of a lady bookkeeper, or people in the building. You have a lot of expert electric contractors that you could call if you wanted to show this jury that it was caused by badly insulated electric wire; you are not going to get at it by having that lady, whose business it was to keep books, come here and tell you, in her opinion, that, because this wire was down there in one of the pictures and it is galvanized white, don't let them hang anything on that. That woman bookkeeper does not know anything about fires caused by non-insulated wires. Mussikee was in the contracting business. He knows an electrician. No, they cannot find any fire in the boiler, so they say, "Wait a minute; it may have been badly insulated wires." That falls flat. What did it? Oh, Mr. Lane says there was an odor of rubber early in the evening. So there was. I do not know who was in there when that automobile was outside and I do not know what kind of experiments were being made to make trailers out of this, and I do not know what kind of inflammable material was being tested or what time you say that car was outside. But you try and light that up in your jury room and it won't light. There was nothing there inflammable. No gasoline, no benzine, nothing at all. Just this stuff here. I do not know who was there trying to experiment with that to see how much of it was safe to use later on in the night, and the odor permeated that atmosphere in that particular factory. But we have this fire. We have Mr. Kessler telling you what a wonderful business Horne was doing, and yet when I tried to put on Mr. Brands, the tax assessor of West Orange, who went there in the month of October to make an assessment, they object to his testimony—

Mr. Kessler: The prosecutor has no right to refer to anything that has been ruled as improper.

The Court: I will meet that in my charge.

Mr. D'Aloia: So much for that. What is the evidence? You twelve men are going to exculpate these people because a gang of blackmailers and blacklegs and firebugs up in Passaic were trying to victimize them? Mr. Kessler with a great deal of seriousness tries to make you believe that. Now, let me ask you one thing, gentlemen. Turak is an excavator connected with Mussikee, because he excavates cellars for him. Fisch is a carpenter who does carpenter work for Mussikee. Goldberg is a painter living in Clifton.

Mr. Lane: I object to that.

Mr. D'Aloia: Well, your man said he hired him. I am going back to the time of the fire.

Mr. Lane: I make my objection that there is no such testimony and I renew the motion for a mistrial because you have referred to it. He said Fisch was a carpenter connected with Mussikee.

Mr. D'Aloia: Doing work for Mussikee.

The Court: At some time or another he did work for Mussikee.

Mr. Lane: That is not the time of the fire.

The Court: Well, the prosecutor can comment and draw proper inferences.

Mr. D'Aloia: My examination of Fisch—"Isn't he a carpenter?" "Yes." "And didn't he do work for you in January?" He said, "No, not them."

Mr. Lane: I made my motion.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
(Seal) Judge.

Mr. D'Aloia: So let us go back before the interruptions. Turak is an excavator of cellars, and worked for Mussikee. Fisch is a carpenter known to Mussikee. Goldberg is a painter living in Clifton known to Mussikee. Now, just get that fixed in your minds. Where would Turak find that Mussikee knew Horne or knew that Horne had a factory in West Orange unless Mussikee spoke to him first? Where would Goldberg, where would Finkelstein, as the testimony appears, come to send Goldberg to Mussikee to collect $300 for a fire in West Orange if the information had not first come from Mussikee? Now, there is a question you have got to decide in the jury room. You take their defense as they offer it to you and before you can acquit them you have got to believe it. Goldberg is a fire bug, Turak is a crook.

Finkelstein is just as bed and Fisch is just as bad, if not worse. Why do they come and pick on Mussikee to collect money for a fire in West Orange in a factory owned by Horne when they do not known that Mussikee knows Horne? There are six hundred thousand people in the vicinity of Passaic and Paterson more wealthy than Mussikee ever dared to be. Why didn't these crooks and blackmailers try to blackmail somebody else? Why should they hit upon a good case and pick out Mike Mussikee who happens to be a very good friend of Horne's, an ex-business associate of Horne's, knowning Horne had a factory in West Orange at Joyce Street and Valley Road? That is what you have got to answer, and you have got to find the subject of burning that place up was first opened by Mussikee to Turak and Turak to Goldberg. Goldberg, Fisch and Finkelstein at some stage or other during the last closing months of the year of 1923, either talked to Horne at Clifton, or Horne went to Clifton and saw Goldberg and said your good friend Mike sent me here, I have a job for you in West Orange, I want you to do it up right to the ground, there is $1,000 in it for you. I asked Goldberg what his response was to Mike Mussikee, "What did you say to this man Horne?" "I have children in High School now, and I am not doing that kind of work." Now, gentlemen of the jury, Mr. Kessler puts another question that I have got to answer. I am sorry I have to take up too much time. There are only two methods, according to Mr. Kessler, only two solutions whereby this bunch of crooks came in contact with Mr. Cooper of the Fire Underwriters Association. One is that they went to the Fire

Underwriters with their story and the other that they wanted to blackmail Mussikee and wanted to sell their information, but he left out the real manner in which we discovered Goldberg, how we discovered Fisch and Finkelstein and we discovered Turak and we came to the conclusion that this case should be presented to the Grand Jury, and that is why we are here trying it, and here is the method. Goldberg was arrested in Passaic—

Mr. Kessler: Objected to.

The Court: Yes.

Mr. Kessler: I ask for a mistrial.

The Court: The jury will disregard that.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Mr. D'Aloia: Goldberg's conviction was affirmed last Friday, brought out by Mr. Kessler, and the conviction was up in Passaic County, and it was conspiracy, and in answer to my question he said it was conspiracy to burn, and we have that in evidence. Goldberg's conviction was affirmed last Friday by the highest court in this State. When was it tried? It has been up to two courts. When Goldberg was arrested, I don't know what he said to the Passaic police to help himself, "Let me off here and I will give you some information about a fire in West Orange, and if you don't believe me, Turak will tell you about it, and if you don't believe me and Turak, Finkelstein and Fisch will tell you about it," and that is how the fire department in Passaic gathering this band of fire

bugs got the information to the police department of Passaic that these fellows knew something about a fire in West Orange, and they limit themselves very carefully in the information they give to the authorities.

Mr. Lane: I move for a mistrial on the statement of the prosecutor as to the information furnished and as to the limitations, and I move for a mistrial upon the statement made by the prosecutor with respect to what occurred in the police—Goldberg told to the police in the last few minutes.

The Court: The jury will disregard anything not in evidence.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Mr. D'Aloia: Mr. Kessler told this jury how these men came in contact with the fire underwriters and they gave all kinds of statements, but he forgot to mention this meeting. Now, I will show you how they limit themselves. Mr. Turak—

The Court: Unless that is in evidence you cannot discuss it.

Mr. D'Aloia: I am coming down to the testimony. Turak says in September Mussikee said to him, "While I was on the job at School Street," he said, "Turak, you do a job for me in West Orange. There is $3,000 in it for you," and he said, "Well, where is it?" "West Orange." "What is it?" "Fire." "Then Mr. Mussikee did not speak

to me about it any more until the 15th of January." Now, this is true about his making his first statement that they have been talking so much about. The 15th of January he saw me—

Mr. Lane: I object to that.

Mr. D'Aloia: That is the testimony given by Turak.

The Court: No, but why characterize it by the first statement. We are concerned with testimony at this trial.

Mr. D'Aloia: And I am answering Mr. Kessler's suggestion to this jury how this information was obtained by us and how they came in contact with the fire underwriters. On the 15th of January Mussikee spoke to me about the job, "Fisch and Finkelstein want some money from me and I do not want to give it to them, and what for; they want it for a fire in West Orange." "Well, you better give it to them." "By the way, was that job done," says Turak to Mussikee. He said, "Yes."

Mr. Kessler: Objected to.

Mr. D'Aloia: I am going to read.

Mr. Kessler: You must state the facts.

Mr. D'Aloia: I am not misstating the facts any more than you did. Here is the question, "What did Mussikee say when he talked about Finkelstein?" This is Turak's testimony in this trial. He said, "They want money, he should give them money for the West Orange job, Mussikee, he promised so much, $1,500, he promised to give it to him." Now, that is the testimony of Turak as to the conversation with Mussikee in January, and what do you spell out of that and what is it reasonable to infer? That the proposition made

by him to Turak in September he had made to the other people for $1,500. Now, what does Turak say? Now, what about that job, was it done?

Mr. Kessler: Is that in the record?

The Court: The prosecutor has no right to comment.

Mr. Kessler: That is not in the record.

Mr. D'Aloia: And all of the things you said were not in the record. Well, we will all agree that that is the testimony substantially. Now, here is the same substance of Turak's testimony. He says, "How about that job, was it done?" And Mussikee said, "Yes, but it is no good; most of the damage was done by water and not by the fire." Now, does Mussikee admit that? Is Turak telling you the truth? What right have they to attack Turak when Mussikee takes the stand shortly afterwards and says, "Yes, Goldberg came to me and he wanted $300 from me, and a man by the name of Finkelstein had sent him to me for the fire in West Orange, otherwise he would squeal." Now, what right have you to dispute Turak when we have Mussikee on the stand and said Goldberg did come to me and that he represented Finkelstein and he did want $300 for the West Orange job or he would squeal on me? "What did you do," said counsel. "I told him I would not give him a cent because I did not know anything about it." Now, is Turak lying? You have got to take the Goldberg conversation, admitted by Mussikee, in conjunction with what Turak said at or about the same time, and you have got to believe both. Turak, a horse thief and a fire bug, yes, but when a job like that is desired by Mussikee and Horne, they cannot get Kessler, the Democratic County Chairman, to do it, they cannot

get the ex-Vice-Chancellor, our great Mr. Lane, to do it, they have got to go to fire bugs. Fire bugs known to Mussikee. Mussikee and Horne knew where to go. That is why they went to Clifton and dealt with Finkelstein and Goldberg and the rest of them, and when they go to trial they hide behind vice-presidents of banks who do not know anything about them except when a note is due that note is met, and then say, do not convict us, those fellows are tar black and we are lily white, and I say when they want to pull a job like that they cannot go to people who are lily white, such as eminent counsel here so the State of New Jersey can fix the responsibility where it ought to be fixed, but the State can say to you twelve men that you piece this together. And Mr. Lane says then when he is about to be blackmailed if he goes to the police station there are some people who may believe those charges against him and there are others who may not, and that is offered as an excuse for this prominent citizen of the City of Passaic who is being blackmailed by a crowd of crooks. I will tell you the reason why he did not go there. He never thought that these crooks would have the guts, he never believed that Goldberg might be picked up for burning a building in Passaic and go to trial and then squeal. He thought they would not have the guts to squeal on him, because every time they said something about that fire, they would get themselves in bad. He did not think of Goldberg being indicted in Passaic for that other fire where the conviction was affirmed last Friday and, to help himself out, like the rat he is, he gave the authorities the information to lead us to Horne and Mussikee. That is where Musikee miscalculated. You know here

is a very funny little straw that will tell you how the wind blows. Two doctors on the morning of the fifth, one toward midnight on the fifth, Dr. Stevens, takes the stand and says I went there at midnight Saturday night. That call was not necessary. That call was not necessary when he had spent three hours in that factory in the afternoon. When I asked him why, being so sick, he said he had an appointment with Tepperman, who was going to sell him the synagogue across the street. With a telephone upstairs this man, who needed two doctors on the morning of the fifth, has to leave his sick-bed with that terrible burn on his shoulder and go to that factory at half-past one and be the last one to leave, and he locked the front door, and we have this father and daughter from Brooklyn to help him out, Horne was sick on Wednesday and they came out to see this sick man and they knew where he lived, and they went directly to the factory without going to the house. So you see, gentlemen of the jury, that testimony of the father and daughter is only part of the testimony that they manufactured in behalf of themselves. He locked that door. He wants somebody to say he left it, because he knows we might get somebody here to say he went to that factory that Saturday afternoon. But that midnight call of the doctor is another working of that brain of Horne's. He knew that fire would break out. What was the safest thing to do? Send for a doctor just a couple of minutes before the alarm, because I can show by my landlady and her son and the boy from the garage that I was sick. That is in line with the other stunt he pulled when the fellow Smallwood went to the factory in the afternoon at four o'clock

and he showed him around the factory. All preparations, gentlemen. He knew what was going to come off that night. Now, we come back to this one question that I am going to ask you to answer when you go upstairs. If you can find for me any reason why these blacklegs and these crooks and blackmailers and fire bugs and horse thieves should pick on Mussikee and not on anybody else up there without this being the reason, that Mussikee, having acquainted them or some of them with his intention about that factory in West Orange before the fire you acquit them, but if you cannot find any satisfactory reason, but that satisfactory reason, you have got to conclude that Mussikee and Horne, the man who was going there in October for the purpose of looking up the building of apartment houses for this rich factory owner was going up there for the purpose of getting the lay of the ground so he could make terms with the ilk who subsequently turned on him—now, if you can show me why they should pick on Mussikee and try to blackmail him, why they should guess that Mussikee knew Horne—but don't forget this note, that spells out the link of combination between Horne and the fire and Mussikee and the fire. Right there there is the whole story. Finkelstein, the man who has not been seen since the last trial—and you know it is not strange for defense witnesses to escape and get away, and it is not strange for money to be used for that purpose in a crime of this kind. There is Finkelstein's signature and here is the message. He goes to Horne's boarding house and is admitted by Mrs. Nevins ofter the fire. "Mr. Horne, please call up your friend, Mr. Mussikee, in Passaic, about the factory, the factory that burned." Finkelstein is

one of the reputed blackmailers. He is up at Horne's boarding house. Horne is not in, and he leaves this note for Horne, and Horne calls up Mussikee when he comes in and gets this. Here is where I call your attention to another attempt made by that vice-president of four or five corporations like the Merritt Products Company—all fly-by-night, wild-cat concerns. Here is what he says. What was the conversation by Mussikee? "A fellow by the name of Finkelstein comes to see me about the building"—he finally got the word building in. When he tried to make you believe that that conversation was about the building of apartment houses, that note and that conversation was not about that at all. It was about the factory, the factory which had been burned down a week or ten days before, and the original of this note is not here. You heard a great deal of what became of it. We took this by consent, prepared by one of the ex-counsel for the defendants, but I had to make Horne change that word building. Fooling you twelve men until I got this out. I made him first change the word. "Wasn't it at the factory?" In order to get that I had to insert the word fire to refresh his recollection, which at that moment he did not recollect. There you have the whole case. Oh, yes, both guilty. Yes, the toughest thing in the world to bring these two defendants close up to that fire, but here in this case, through this gang of crooks, who will always squeal, but when they do, society gains. The State of New Jersey puts them on trial. We leave it to you. There is nothing in my heart against these men personally, but if they had these crooks set fire to that factory in the middle of that January night,

they should be punished without any mercy, and this fake alibi, this fake sickness that is contradicted by his visit to the factory, his automobile out there that night, his visit to Goldberg—Yes, those crooks out there furnished us with the backbone of our case, but what can we get? You cannot get anything but that in a case of this sort, and the State says, "You, Mr. Foreman, and gentlemen of the jury, you do your duty as you see it under this evidence and realize in this kind of a case your community and mine is up against the most dastardly crime." I ask you for a verdict of guilty.

Mr. Lane: Because of the prosecutor's summing up and the misstatement of facts, some of which have been withdrawn and some of which have not been withdrawn, and this fly-by night, I ask a mistrial.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFERY,
(SEAL) Judge.

Mr. Lane: And by reason of the prosecutor's summing up, I hand your Honor additional requests to charge.

The Court: I will not take the requests at this time.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFERY,
(SEAL) Judge.

Charge to Jury.

The Court thereupon charged the jury as follows:

CAFFREY, J.:

Gentlemen of the Jury. The defendants, Michael Mussikee and Joseph H. Horne, are being tried on this indictment containing two counts. The first count relates to the wilful and malicious burning and causing to be burned, and further the indictment sets out, and consent to the burning of the factory building of the Merritt Products Company, a corporation, and the second indictment charges these defendants that on the 6th of January, in the year of 1924, they wilfully and maliciously did set fire to and burn and aid, procure and consent to the setting fire to and burning of the building known as 494-498 Valley Road, in the Town of West Orange, aforesaid, and the goods, merchandise and other chattels then therein, which building, goods, merchandise and other chattels were then insured by various insurance companies with intent to prejudice or defraud. This indictment will be taken by you to the jury room, where you may read it in its fullness.

The State in electing to try these men, has taken on the burden of establishing the guilt of one or both as to every material element in the case.

Under the law, the act, if done, must be done wilfully or maliciously, and it has been said, in a legal sense, malice is never understood to denote general malevolence or unkindness of heart or enmity against a particular individual, but it signifies, rather, the intent from which flows any injurious or illegal act committed without legal

justification. So in that sense "malice" is used in this indictment. With reference to the word "prejudice," as mentioned in the indictment and the statute upon which it is predicated, our courts have said that it is used in the sense to cause any damage or loss to the insurer. Therefore, in so far as a benefit coming to an insured is concerned, that is not the criterion. As I have mentioned before, the upper courts of this State have said that we use it in a sense as to mean any damage or loss to an insurer.

Another element which must be established in this case is that the defendant or defendants by themselves or by the aid of someone else, or through the procuring, through the agency of some other person or persons, did set fire to this building. Under the law, you may infer the fact of setting fire from the proof before you, of the acts or conduct of the defendant or defendants, and, while there is no evidence in this case of the actual touching of a match to ignite the fire, the actual starting of the fire, the law says you may infer the facts from the proof of acts or conduct of the defendants—that is, if the evidence justifies it, if there is sufficient evidence to justify that inference. You cannot infer that merely from the fact that there was a fire. You cannot infer that the defendant or defendants started it, but if you find there is sufficient evidence in the case to justify it, you may infer the fact from such evidence, and it must be shown that it was with the intent —that is to say, that the fire was set with the intent to burn. That also may be inferred by the jury from the proven facts and circumstances in the case.

These defendants, like all other persons charged with crime, are presumed to be innocent, and the burden of establishing guilt rests upon the State. The State must satisfy you as to that guilt beyond a reasonable doubt. Reasonable doubt is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the testimony, leaves the minds of the jurors in that condition that they cannot say they have an abiding conviction to a moral certainty of the truth of the charge.

In this case, too, there is evidence of good character or reputation, and if, upon such consideration, there exists a reasonable doubt, even though that doubt be engendered merely by previous good reputations, the defendants are entitled to an acquittal. The State contends that this fire was the result of a criminal act and I am not going to review the testimony. Counsel have argued practically for four hours before you and I am relieved of any extended discussion of the testimony. The fact seems to be admitted that there was a fire at this factory in West Orange. I think the testimony of the chief and the other fireman is to the effect that an alarm was sounded at 12:15 or 12:17 on the morning in question. You have heard the testimony of the chief as to the location of the fire, and you have heard the testimony of the other parties who have sworn to facts. There is no proof in this case that the defendants were at or near the scene of the fire. The State attempts to connect the defendants with this fire by reason of conversations alleged to have been had by the

defendants with other men who have been mentioned. I think Turak was the first man called with reference to an alleged conversation with Mussikee and concerning the doing—I think the language used was clean up, or some similar words which you will recall yourselves, and the next conversation was had, according to the testimony of Turak, on the 15th of January, when there was some discussion as to the result of the fire. Mussikee has denied any such conversations. Then, you have in evidence testimony concerning a conversation with regard to the payment of money to Fisch or Finkelstein. Then, you have in evidence, too, a copy of a note which was given to Mr. Horne by Mrs. Nevins, which was left at his place some time after the fire, which speaks for itself, and calls the attention of Horne to the fact that he call up his friend Mussikee, and Mr. Horne denies any knowledge as to the reason why this note should come through Finkelstein.

This case is one between the State of New Jersey and these defendants and, while one count in the indictment is predicated upon the statute relating to an act wherein there was an attempt to do something to prejudice an insurance company, this matter which you are to decide is not an issue raised between these defendants and one or more insurance companies. It is a matter between the defendant and the State of New Jersey. You, as jurors, under your oaths, are to decide this case precisely in keeping with the issue that has been raised by this indictment. If you believe the State has failed to sustain its burden, you ought to acquit. On the other hand, if you are satisfied beyond a reasonable doubt that the State has made

out its case, it is your duty to convict. Coming as you do to the duty of jurors, your transition has been sudden, that is, from your daily vocations, but despite the sudden transition you are just as important a factor in the administration of the law as persons who are engaged in its administration by reason of a longer tenure. It is your duty as jurors to take the evidence and give such credit to it as you see fit, and, I might say, in reference to that point, in arriving at the value of the testimony, you may consider the interest that anyone has in the outcome of this case. What interest has the chief? What interest has Baldwin, or the discharged fireman? What interest has Goldberg, Turak or any other witness that has been called either by the State or defense? Very properly you may consider the interest that the defendants have in the outcome, because they are on trial, and your verdict is going to determine their guilt or innocence, and so that is a proper consideration in this case.

I have fifty-three requests to charge submitted jointly by counsel for the defense, and I will take those up now.

These are the requests of counsel for Mussikee.

1. "The indictment in this case is of itself a mere accusation or charge against the defendant and is not of itself any evidence of the guilt of the defendant and no juror in this case should permit himself to be, to any extent, influenced against the defendant on account of the indictment in the case." I so charge you.

2. "It is the duty of the jury to distinguish between the statements made by the prosecuting

attorney in this case and the evidence upon which his statement is made. The repetition of an argument made to the jury oftentimes acquires, by that mere fact, the force of evidence itself. For this reason you must carefully distinguish and analyze the basis of the assertions which were made to you by either side and see what basis they have in the evidence." Of course, that equally applies to the argument of counsel for the defense.

The third I deny, because I have already charged it in substance.

The fourth I deny, because I have charged it in substance.

The fifth I also deny for that reason.

The sixth I deny.

The seventh I deny.

The eighth I deny.

9. "The Court has admitted in this case evidence of statements made prior to the trial by certain witnesses called by the State. The State was permitted to offer testimony of these statements and to examine the witnesses thereon solely for the purpose of neutralizing the testimony of the witnesses which has been given upon the examination by the State. And the jury may, if they believe that the statements were, in fact, made by the witnesses, consider that fact in reaching a conclusion as to whether they will believe the testimony given on the stand and may consider the evidence of these statements made before the trial for that purpose only." I so charge you.

10. "Because the statements made before the trial by the witnesses called by the State which

have been permitted by the Court for the purpose of neutralizing the testimony of the witnesses given in court were not made in the presence of the defendant and were not subject to cross examination, the jury are to entirely disregard these statements as in any way tending to prove the truth of the facts which they relate." I so charge you.

The eleventh I deny.

The twelfth I deny.

13. "Before there can be a conviction of the defendant upon the first count the jury must be satisfied beyond a reasonable doubt that the factory building of the Merritt Products Company was in fact burned as a result of the incendiarism." I so charge you.

Thirteen-a, I deny.

Fourteen, I deny.

Fifteen, I deny.

Sixteen, I deny.

Seventeen, I deny.

Eighteen, I deny.

Nineteen, I deny.

Twenty, I deny.

Twenty-one, I deny.

Twenty-two, I deny.

Twenty-three, I deny.

Twenty-four, I deny.

Twenty-five, I deny.

Twenty-six, I deny.

Twenty-seven, I deny.

Twenty-eight, I deny.

Twenty-nine, I deny.

Thirty, I deny.

Thirty-one, I deny.
Thirty-two, I deny.
Thirty-three, I deny.
Thirty-four, I deny.
Thirty-five, I deny.
Thirty-six, I deny.
Thirty-seven, I deny.

38. "The jury may convict on one but not both counts." I deny that also. No, I will charge that. The jury may convict on one, and I will modify it and say on one or both if the evidence warrants it.

39. "One of the State's witnesses, Goldberg, has admitted that he has been convicted of crime. That act must be taken into consideration by the jury in determining what credit should be given to the testimony of the witness Goldberg." I so charge you.

40. "The defendants having put their general reputation at issue by putting on reputation witnesses, it was open to the State to call witnesses attacking the general reputations of the defendants." I so charge you.

The requests of the defendant Horne.

I have already charged with reference to reasonable doubt and presumption of innocence.

Two, I deny.

Three, I deny.

4. "Any statements made by the defendant Mussikee and not in the presence of the defendant Horne cannot be considered as evidence against the defendant Horne." I will say, too, any statements attributed to Horne not made in the presence of Mussikee cannot be considered as evidence against Mussikee.

5. "The acts of the defendant Mussikee are not binding upon the defendant Horne unless it be expressly shown that they were committed with the knowledge of, and by consent of, the defendant Horne.

Five-a, I deny.

Six, I deny.

7. "The denial by the Court of motions made by counsel in this case, are not to be taken as prejudicing either defendant, but are based on matters of law addressed to the Court." I so charge you.

Eight, I deny.
Nine, I deny.
Ten, I deny.
Eleven, I deny.
Twelve, I deny.
Thirteen, I deny.

These denials are because I have already covered the matters in my charge.

I might say this with reference to the note from the jurors, the question coming from juror number twelve, "Counsel repeatedly refers to evidence in previous trial. May the jury have testimony of Finkelstein and Fisch on previous trial?" We could not offer in evidence the testimony of either of the gentlemen as recorded in the prior trial and you are only privileged to consider the testimony so far as those men are concerned as you have heard it before you in this trial.

(The jury retires.)

Mr. Lane: I want to except to that portion where the Court said the burden to prove the elements of the crime was on the State, the point being in that request or, rather, in that portion of the charge taken in connection with the requests to charge, the Court did not instruct the jury that the burden was on the State beyond a reasonable doubt with respect to each of the elements of the crime.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Secondly, that portion where the Court used the language to this effect, "You may infer the act of setting fire by the proofs before you."

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Thirdly, the language that the Court used where it stated, "If you find there is sufficient evidence in the case you may infer, and so forth."

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Fourth, the reference by the Court with reference to the note.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Fifth, what the Court said with respect to that.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Sixth, what the Court said with respect to the question of the matter of the case not being between insurance companies and so forth, but between the State of New Jersey and the defendants.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Sixth, (a) where the Court said that they could give such credit to the evidence as they saw fit, particularly that portion in which you said, "You may consider the interest of the parties, and so forth."

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Seven, what the Court said with respect, "Very properly you may consider the interest of the defendants, and so forth."

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

EDWIN C. CAFFREY,
(Sealed) Judge.

And I except to each denial of the requests to charge made by the Court specifically.

Exceptions to Charge.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

And I also except to the refusal of the Court to receive the three requests which I desire to hand to the stenographer for the purpose of identification, which were handed to the Court at the close of the summing up of the prosecutor, and they were based upon the prosecutor's summing up. I except to the refusal of the Court to receive and to charge them.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Mr. Kessler: Your Honor will permit me the same exceptions and, in addition to that, I desire to except to that part of the charge with reference to reasonable doubt.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

Also that part where you say Horne denied knowledge as to why this note did not come from Finkelstein. There is no proof that this note did come from Finkelstein in the case.

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

EDWIN C. CAFFREY,
(Sealed) Judge.

And I desire an exception to the requests which your Honor has not charged.

Defendant Mussikee's Requests to Charge.

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

EDWIN C. CAFFREY,
(SEAL) Judge.

Mr Lane: I join in the two exceptions to the charge made by Mr. Kessler, and I also pray a general exception to the Court's charge.

Mr. Kessler: I pray a general exception.

Exceptions allowed; let them be sealed, and they are signed and sealed accordingly.

EDWIN C. CAFFREY,
(SEAL) Judge.

DEFENDANT MUSSIKEE'S REQUESTS TO CHARGE.

1. The indictment in this case is of itself a mere accusation or charge against the defendant and is not of itself any evidence of the guilt of the defendant, and no juror in this case should permit himself to be, to any extent, influenced against the defendant on account of the indictment in the case.

2. It is the duty of the jury to distinguish between the statements made by the prosecuting attorney in this case and the evidence upon which his statement is made. The repetition of an argument made to the jury oftentimes requires, by that mere fact, the force of evidence itself. For this reason you must carefully distinguish and analyze the basis of the assertions which were made to you by either side and see what basis they have in the evidence.

3. The law does not require of the defendant that he prove himself innocent. The law imposes

upon the prosecution the burden of proving the guilt of the defendant beyond all reasonable doubt.

4. In the investigation of all matters of fact and in the weighing of evidence the jury have no right to assume the guilt of the defendant and then to reconcile the testimony with such theory, but it is the sworn duty of the jury to presume the innocence of the defendant and to give him the benefit of such presumption all through the trial and at every stage of investigation of the evidence in the jury room until it is overcome, if it shall be overcome, by proof beyond a reasonable doubt.

5. The evidence, in order to deprive the defendant of the benefit of the presumption of innocence, must not only be consistent with the theory of guilt but must be inconsistent with and exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendant, the law makes it their duty to do so.

6. If, upon a full consideration of all the evidence in the case, the jury entertain a reasonable doubt as to whether the defendant is guilty, then you should find him not gnilty.

7. If, upon a fair and impartial consideration of all of the evidence in the case, the jury find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the guilt of the defendant and the other is consistent with the innocence of the defendant, then it is the policy of the law, and the law makes it the duty of the

jury to adopt that theory which is consistent with the innocence of the defendant and to find the defendant not guilty.

8. A reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction amounting to a moral certainty of the truth of the charge.

9. The Court has admitted in this case evidence of statements made prior to the trial by certain witnesses called by the State. The State was permitted to offer testimony of these statements and to examine the witnesses thereon solely for the purpose of neutralizing the testimony of the witnesses which had been given upon the examination by the State. And the jury may, if they believe that the statements were, in fact, made by the witnesses, consider that fact in reaching a conclusion as to whether they will believe the testimony given on the stand and may consider the evidence of these statements made before the trial for that purpose only.

10. Because the statements made before the trial by the witnesses called by the State which have been permitted by the Court for the purpose of neutralizing the testimony of the witnesses given in Court, were not made in the presence of the defendant and were not subject to cross examination, the jury are to entirely disregard these statements as in any way tending to prove the truth of the facts which they relate.

11. In determining the guilt or innocence of the defendant, although the jury may consider the

statements which were made prior to the trial by the witnesses called by the State which the Court has admitted as withdrawing from the case the testimony of the witnesses who made them, or such part of the testimony of the witnesses who made them as to the jury may consider proper to reject, the jury may not consider that as matter of fact the matters related in the statements made prior to the trial actually took place.

12. In determining the guilt or innocence of the defendant where a statement made prior to the trial has been admitted in evidence, solely for the purpose of neutralizing testimony, to the effect that one of the defendants made certain statements to the witness or to the effect that the witness had a conversation with one of the defendants or that the witness or one of the defendants performed a certain act, the jury must wholly disregard these statements as proving that as a matter of fact these things took place, and unless there is some other evidence in the case to the effect that they did take place, the jury must consider that they did not take place.

13. Before there can be a conviction of the defendant upon the first count the jury must be satisfied beyond a reasonable doubt that the factory building of the Merritt Products Company was in fact burned as a result of the incendiarism.

13a. Before the jury can convict the defendand Mussikee, upon the first count, the jury must be satisfied beyond a reasonable doubt that the defendant actually, wilfully and maliciously burned the factory building of the Merritt Products Company or aided and consented to the burning.

14. The words "aid and consent" in the statute upon which the first count is based, imply an active act upon the part of the defendant. They do not mean mere acquiescence. Before the jury can convict they must be satisfied beyond a reasonable doubt that the defendant actively aided and assisted wilfully and maliciously in the burning of the building.

15. Before there can be a conviction upon the second count the jury must be satisfied beyond a reasonable doubt that the defendant, Mussikee, did burn the building or aid, procure and consent to the burning of the building wilfully and maliciously.

16. Before the jury can convict the defendant upon the second count it must be satisfied beyond a reasonable doubt that the intent of the defendant was to prejudice insurers.

17. The words, "aid, procure and consent," as used in the statute upon which the second count is based, mean more than mere passive acquiescence and the defendant, Mussikee, cannot be convicted unless he actively and with the intent to prejudice insurers, burned, aided or assisted in the burning of the building or procured its burning in some way or manner.

18. The State is called upon to prove every element of the crime charged beyond a reasonable doubt. If the State has failed to prove any one of the elements necessary to constitute the crime beyond a reasonable doubt, there must be a verdict of acquittal.

Defendant Mussikee's Requests to Charge.

19. Under the first count before there can be a verdict of guilty the State must prove beyond a reasonable doubt, first the fact that the building was burned as a result of incendiarism, and secondly, that the defendant aided and consented (in an active sense) to the burning.

20. Before there can be a conviction under the second count the jury must be satisfied beyond a reasonable doubt, first that the building was, in fact, burned as a result of incendiarism; secondly, that the defendant either burned or aided, procured and consented (in an active sense) to the burning; thirdly, that the intent of the defendant was to prejudice insurance corporations having insurance upon said building.

21. There is no evidence in the case from which the jury can infer or conclude that the value of the stock or merchandise in the factory at the time of the fire was of such an amount as that there was such over insurance as can be considered as bearing upon the question of motive.

22. There is no evidence in the case from which the jury can infer or conclude that the value of the real estate was of such amount as that there was such over insurance as can be considered as bearing upon the question of motive.

23. The mere happening of the fire is not sufficient to justify the jury in inferring the guilt of the defendant. The presumption is that the fire was accidental. That presumption persists until it is overcome by the State by proof, and the proof must be beyond a reasonable doubt.

24. There is no proof in the case from which the jury may infer that the fire was of incendiary origin.

Defendant Mussikee's Requests to Charge.

25. There is no proof in the case from which the jury may find that the defendant, Mussikee, had any knowledge of the amount of the insurance carried upon said building.

26. Unless the jury are satisfied beyond a reasonable doubt that the defendant Mussikee had knowledge of the insurance upon said building, the jury cannot find that any act of his was with the intent to prejudice any insurance company.

27. Before there can be a conviction the jury must be satisfied beyond a reasonable doubt that the defendant Mussikee had something to do with the particular fire referred to in the indictment.

28. Even if the jury believe that statements were made with respect to the burning of this building some time prior to the fire, unless the jury are convinced beyond a reasonable doubt that the defendant, Mussikee, in fact, had something to do with the particular fire referred to in the indictment there must be an acquittal.

29. The jury are instructed to disregard the evidence of any statements made by the defendant, Mussikee, prior to the fire, as bearing upon the question as to whether he had anything to do with the particular fire referred to in the indictment.

30. The jury are instructed to return a verdict of not guilty with respect to the defendant, Mussikee, upon the first count for the reasons stated in the motion to direct a verdict.

31. The jury are instructed to return a verdict of not guilty with respect to the defendant,

Mussikee, upon the second count for the reasons stated in the motion to direct a verdict.

32. There has been evidence offered of the reputation of the defendant Mussikee. In determining the guilt or innocence of the defendant, it is the duty of the jury to consider all of the evidence in the case, including the evidence relating to the reputation of the defendant, and if, upon a consideration of all of the evidence, including that of reputation, these exists a reasonable doubt of the guilt of the defendant, even though that doubt be engendered merely by the evidence of reputation, it is the duty of the jury to acquit.

33. Evidence of good reputation may be sufficient of itself to raise a reasonable doubt of the guilt of the defendant in the jury's mind, and if such evidence does in fact raise such reasonable doubt, then the defendant is entitled to an acquittal and is the jury's duty to acquit.

34. The jury may not consider in determining the guilt or innocence of the defendant Mussikee the note written by Finkelstein and left at Mrs. Nevins' house for Horne.

35. The jury may not consider in determining the guilt or innocence of the defendant Mussikee any part of the testimony of the witness Mrs. Nevins.

36. There is no evidence whatever in this case which the jury may consider as bearing upon the alleged participation of Mussikee in the transaction except that of Turak and Goldberg.

37. There is no evidence in this case that Mussikee sent Finkelstein to Horne.

38. The jury may convict on one but not both counts.

39. One of the State's witnesses, Goldberg, has admitted that he has been convicted of crime. That act must be taken into consideration by the jury in determining what credit should be given to the testimony of the witness Goldberg.

40. The defendants having put their general reputation at issue by putting on reputation witnesses, it was open to the State to call witnesses attacking the general reputations of the defendants.

DEFENDANT MUSSIKEE'S REQUESTS TO CHARGE BASED ON PROSECUTOR'S SUMMING UP.

1. The difficulty of securing proof furnishes no reason for a conviction without proper proof.

2. The difficulty of securing proof does not alter the rule that before convicting the defendants the jury must be satisfied by proof beyond a reasonable doubt of the guilt of the defendants.

3. There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature.

DEFENDANT HORNE'S REQUESTS TO CHARGE.

1. The doctrine of burden of proof, reasonable doubt and presumption of innocence.

2. No conversations between the defendant Mussikee and any other persons can in any way be binding upon the defendant Horne, unless you find from the evidence that it has been proven beyond a reasonable doubt that the fire was set and that the setting was brought about by reason of an agreement between Horne and Mussikee; and unless such an agreement is proven beyond a reasonable doubt, no testimony as to such conversations can bind the defendant Horne.

3. The presumption of law is that the fire originated in an entirely innocent and accidental way so far as the defendant Horne is concerned and this presumption continues until and unless the State has overcome the presumption of innocence by legal testimony which must satisfy you beyond a reasonable doubt as to the guilt of the defendant Horne.

4. Any statements made by the defendant Mussikee and not in the presence of the defendant Horne cannot be considered as evidence against the defendant Horne.

5. The acts of the defendant Mussikee are not binding upon the defendant Horne unless it be expressly shown that they were committed with the knowledge of, and by the consent of, the defendant Horne.

5a. One of the State's witnesses, Goldberg, has admitted in his testimony having been convicted of a crime. Conviction of a crime is evi-

dence which will tend to impeach the credibility of his testimony, and you are justified in considering the fact that he has been convicted of a crime in deciding whether you should or should not believe Goldberg's testimony.

6. Evidence has been introduced on the part of the defendant as to his good character or reputation. You are obliged to consider this evidence as to the good character of the defendant, and if such evidence in the case is sufficient to raise a reasonable doubt in your minds as to the guilt of the defendant you should in such case acquit the defendant.

7. The denial by the Court of motions made by counsel in this case, are not to be taken as prejudicing either defendants, but are based on matters of law addressed to the Court.

8. In order to convict the defendant Joseph H. Horne you must be satisfied beyond a reasonable doubt that the person with whom the witness Goldberg spoke to at Clifton was in fact the defendant Joseph H. Horne.

9. If you are not satisfied that the defendant Joseph H. Horne was the person who talked to the witness Goldberg who testified on cross examination that he did not know whether the defendant Horne was the person he spoke to, you must acquit the defendant Horne.

10. If, upon a full consideration of all the evidence in the case, the jury entertain a reasonable doubt as to whether the defendant is guilty, then you should find him not guilty.

11. Circumstantial evidence must be clear, convincing and conclusive, excluding all rational doubt as to the defendant's guilt in order for you to convict him of this charge.

12. Proof beyond a reasonable doubt of every material and essential element of this offense is necessary in order to convict the defendant.

13. Even if you believe that the defendant Mussikee had these said conversations with the witnesses Goldberg and Turak nevertheless you must be satisfied beyond a reasonable doubt that the fire was of an incendiary origin before you can convict the defendant.

LIST OF EXHIBITS.

State's Exhibits.

S. 1. Plan of building occupied by Merritt Products Corp., on northeast corner of Joyce Street and Valley Road, West Orange, N. J.
(offered at p. 19.)

S. 2. Policies, showing different amounts of insurance in different companies on the building and merchandise as of Jan. 6, 1924.
(offered at p. 21.)

S. 3. Proofs of loss submitted to insurance adjuster.
(offered at p. 22.)

S. 4. Photograph of building located on northeast corner of Joyce Street and Valley Road taken from southwest corner.
(offered at p. 23.)

S. 5. Photograph of interior of Room "L" facing in westerly direction on diagram.
(offered at p. 24.)

S. 6. Photograph of interior of Room "C," facing in easterly direction on diagram.
(offered at p. 24.)

S. 7. Photograph of interior of Room "E," facing in easterly direction on diagram.
(offered at p. 24.)

S. 8. Photograph, showing sliding doors between platform to entrance (boiler pit on diagram) facing in northerly direction.
(offered at p. 25.)

S. 9. Photograph of interior store-room.

Defendants' Exhibits.

D. 1. Photograph of interior.
(offered at p. 26.)

D. 2. Photograph of interior.
(offered at pp. 26, 291.)

D. 2. Copy of note delivered to Horne.
(offered at p. 287.)

D. 3. Box containing burned materials.
(offered at pp. 92, 290.)

D. 3. Photograph of interior.
(offered at p. 291.)

D. 4. Photograph of interior showing view of boiler.
(offered at p. 291.)

D. 5. Photograph of interior showing view of boiler.
(offered at p. 292.)

D. 6. Photograph of interior showing close-up view of boiler.
(offered at p. 292.)

D. 7. Photograph of interior showing view of boiler.
(offered at p. 292.)

Motion for Arrest of Judgment.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Monday, April 12, 1926.

STATE OF NEW JERSEY, *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE.	On Indictment No. 16, Dec. T., 1925, for Burning with Intent to Defraud.

Before—Hon. EDWIN C. CAFFREY, Judge.

Mr. Kessler: I move in behalf of both defendants for an arrest of judgment upon the ground in respect to the first count there is no allegation in the indictment of the burning of any building covered by the statute, as defined by section 124 of the Crimes Act.

Secondly, upon the ground that the count is bad for duplicity, the offense charged being having burned and caused to be burned, and aiding and consenting to the burning, two separate and distinct crimes.

I also move an arrest of judgment on the second count upon the ground that in that count there are charges of two substantive offenses, that is, the offense of setting fire to and burning, and the offense of aiding, procuring and consenting to the setting fire.

I also move an arrest of judgment with respect to the entire indictment and with respect to both counts, on the ground that the crimes charged are not such that there can be a joint indictment,

where there is no allegation of conspiracy or joint action.

I also move an arrest of judgment with respect to both counts, that there is not sufficient evidence in the case from which the jury could deduce the guilt of either or both defendants.

The Court: Motion denied.

Defendants' counsel pray an exception to this ruling of the Court.

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

EDWIN C. CAFFREY,
Judge.

(SEAL)

Certificate of Judge.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

STATE OF NEW JERSEY, *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE.	On Indictment No. 16, Dec. T., 1925, for Burning with Intent to Defraud.

I, Edwin C. Caffrey, 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.

EDWIN C. CAFFREY,
Presiding Judge of the Essex County
Court of General Quarter Sessions.

Dated

Certificate of Court Stenographer.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

STATE OF NEW JERSEY, *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE.	On Indictment No. 16, Dec. T., 1925, for Burning with Intent to Defraud.

I, Harold T. Cook, an official stenographer of the Essex County Court of General Quarter Sessions, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the above-entitled case, which trial was held before the Hon. Edward C. Caffrey, Presiding Judge of the Essex County Court of General Quarter Sessions in and for the County of Essex, and a jury, on Monday, March 29; Tuesday, March 30; Wednesday, March 31, and Thursday, April 1, 1926, at Newark, New Jersey.

HAROLD T. COOK.

Dated May 7, 1926.

Assignment of Errors for Defendant, Michael Mussikee.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Prosecutor-Defendant-in-Error,* *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE, *Respondents-Plaintiffs-in-Error.*	On Error to Essex Quarter Sessions. Assignment of Errors for Defendant Michael Mussikee.

Afterwards, in the Supreme Court of Judicature of the State of New Jersey, comes the said Michael Mussikee and says that in the records aforesaid and also that in the matters contained in the bill of exceptions and also in the giving of the verdict and judgment aforesaid, there is manifest error, in this respect, to wit:

1. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion to quash the first count of the indictment.

2. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion of the defendant to quash the second count of the indictment.

3. Because the Trial Judge declined to permit the defendant at the opening of the present trial to withdraw the plea of not guilty for the purpose of moving to quash the indictment.



Exhibit S-7.



Exhibit 5-6



Exhibit S-8.


ICE M.N.HIGGINS, INC. ICE

Exhibit S-4

Assignment of Errors for Defendant Mussikee.

4. Because the Trial Judge refused to direct a mistrial on the motion of the defendant, Mussikee, after the prosecutor's opening, because of the reference by the prosecutor to a certain message which he referred to in his opening and likewise because of the reference by the prosecutor to the alleged fact that a certain automobile was near the place of the fire upon the night of the fire.

5. Because the Trial Judge over the objection of the defendant, Mussikee, admitted testimony of the witness, Kling, as to the claim made under the proofs of loss as follows: "Q. And how much was the claim made under the proofs of loss under those different policies? A. The claim on the contents was $34,000.00. I have just forgotten the exact figures of the building. May I look at these proofs?"

6. Because the Court over the objection of the defendant, Mussikee, admitted in evidence the proofs of loss.

7. Because the Court over the objection of the defendant, Mussikee, permitted the witness, Sheehan, to testify to a conversation between himself and a Miss Ayres, the testimony being in part as follows: "Q. Now, shortly after the fire there was an article that appeared in one of the newspapers. A. The Newark Evening News, I think the following Monday afternoon. Q. And that article attributed certain statements to you." This question was objected to and the objection overruled and an exception taken. And thereupon the following question was asked: "Q. Now, do you remember Miss Ayres and Mr. Horne calling your attention to that article. A. I remember Miss

Ayres. Q. Calling your attention to the article? A. Yes. Q. Now, what did she say to you and what did you say to her?" This question was objected to, objection overruled and an exception taken. The witness then answered that he did not have a conversation with Miss Ayers at the time stated in the question but did at some other time and the witness was permitted, over objection, to testify to this conversation.

8. Because the witness, Margaret Christianson, was permitted, over objection and exception, to testify to the kind of an automobile which she had seen on the Valley Road side of the factory upon the night of the fire, the testimony being in part as follows: "Q. What kind of an automobile was it? A. A dark automobile."

9. Because the Court, over the objection and exception of the defendant, Mussikee, permitted the witness, Margaret Christianson, to state in effect that the automobile looked like a car which she had seen the defendant, Horne, drive, the testimony being in part as follows: "Q. Had you seen that automobile (the automobile the witness had previously stated she saw in front of the factory) or an automobile that looked like the automobile that you saw the night before in front of that factory? A. Yes, I did. Q. What is your answer? A. Yes, I have seen a car like that. Q. How many times before that night had you seen this automobile that you say looked like the one that you saw in front there that night? A. How many times had you seen an automobile that looked like that one? A. Several times before."

10. Because the Court declined to grant the motion of the defendant, Mussikee, to strike out the testimony of the witness, Margaret Christianson, when it appeared upon cross examination that she could not say that the automobile she had seen on the night of the fire was an automobile which she had previously seen used by the defendant, Horne.

11. Because the Court declined to grant the motion of the defendant, Mussikee, to strike out the testimony of the witness, Margaret Christianson, when after the close of her testimony, it appeared that the witness was wholly unable to identify the automobile which she says she saw in front of the factory upon the night of the fire.

12. Because the Trial Court refused, upon the motion of the defendant, Mussikee, to strike out the testimony of the witness, Lange, with respect to a car which he says he saw in front of the factory upon the night of the fire, the said car in no wise being identified as having any connection whatever with either of the defendants.

13. Because the Trial Court, over the objection and exception of the defendant, Mussikee, permitted the witness, Turak, to testify to an alleged conversation between the witness and Mussikee in September, 1923.

14. Because the Trial Court, over the objection and exception of the defendant, Mussikee, permitted an answer to the following question, the conversation referred to having reference to one alleged to have taken place between the witness, Turak, and defendant, Mussikee, in September, 1923: "Q. Give us the conversation what he said to you and what you said to him?"

15. Because over the objection and exception of the defendant, Mussikee, the Trial Court permitted the witness, Turak, to answer the following question: "Q. Now, did Mussikee say to you on that 15th day of January, 1924, that he had promised, he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job?"

16. Because the Trial Court, over the objection and exception of the defendant, Mussikee, permitted the witness, Goldberg, to testify to a conversation alleged to have taken place between himself and Horne in October, 1923.

17. Because, over the objection and exception of the defendant, Michael Mussikee, the Trial Court permitted the following question to be put to the witness, Goldberg, and answered by him: "Q. Now, at the last trial when you were asked by me what Mr. Horne said to you in Clifton when he first came to your house in October, here is what you answered, 'And he said, " 'Well, I am sent from a friend of yours, Mr. Mussikee sent me over to you if you want to go up there in Orange,' " "Did you make that answer?"

18. Because the Trial Court overruled the motion of the defendant, Mussikee, to strike out the testimony of the witness, Goldberg, with respect to his alleged conversation with the defendant, Horne, because the witness, Goldberg, could not identify the defendant, Horne.

19. Because the Trial Court refused at the conclusion of the State's case, to grant the motion of

the defendant, Mussikee, for a dismissal of the defendant, Mussikee, for a dismissal of the first count of the indictment or for a direction of a verdict in favor of the defendant, Mussikee, thereon.

20. Because the Trial Court at the conclusion of the State's case, declined to grant the motion of the defendant, Mussikee, for a dismissal of the second count of the indictment or for a direction of a verdict in favor of the defendant, Mussikee, thereon.

21. Because the Trial Court permitted the prosecutor to interrogate the witness, Lena Nevins, with respect to a man named Finkelstein coming to the house after the fire with a note for Horne, which testimony all went in over the objection and exception of the defendant, Mussikee.

22. Because the Trial Court permitted an answer by the witness, Lena Nevins, over the objection and exception of the defendant, Mussikee, to the prosecutor's question: "Q. Didn't you answer the door some time after the fire and met a man who said he was Finkelstein?"

23. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question: "Q. Did a man who told you his name was Finkelstein come to your house after the fire inquiring for Mr. Horne? Yes or no."

24. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put by the prosecutor? "Q. And did he leave with you a message for Mr. Horne?"

Assignment of Errors for Defendant Mussikee.

25. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put by the prosecutor: "Q. Did you receive a paper upon which there was something written to give to Mr. Horne?"

26. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Did you give the paper to Mr. Horne?"

27. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Now, when you gave this paper to Mr. Horne, do you know what Mr. Horne did?"

28. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to testify in answer to a question put to her by the prosecutor with respect to Horne calling someone up on the telephone after delivery of the message to him.

29. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to be interrogated by the prosecutor with respect to her testimony upon the previous trial and permitted the prosecutor to put the following question: "Q. Do you remember this question being put to you, page 257, 'Question: Mr. Horne came home about six o'clock and called up Mussikee in Passaic, that is true, isn't it?' And your answer was, 'Yes.'"

Assignment of Errors for Defendant Mussikee.

30. Because the Trial Court declined to grant a mistrial upon the motion of the defendant, Mussikee, questions by the Court having been put to the witness, Lena Nevins, which caused Lena Nevins, to state that the note was from Mr. Mussikee, whereas the fact was, as it appeared by the witness' testimony that she had no knowledge as to who the note was from and because it appeared that although the jury was instructed to disregard the testimony, that the note was from Mr. Mussikee, the condition of the record was such as that the instructions could not remove the influence which must have been made upon the jury.

31. Because the Trial Court refused upon the motion of the defendant, Mussikee, to strike out the testimony of the witness, Lena Nevins, at its conclusion.

32. Because the Trial Court declined to receive in evidence upon the offer of defendant, Mussikee, a bill from the witness, Turak, to the defendant, Mussikee.

33. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the following question to be put to the defendant, Mussikee, by the prosecutor:

> "Q. When was it that you talked to Goldberg and Goldberg asked you for $300.00 to give Finkelstein for a fire in West Orange with reference to the conversation you just told us you had with Mr. Horne over the wire?"

34. Because the Trial Court at the conclusion of the trial, declined to grant the motion of the defendant, Mussikee, to strike from the record all the testimony which had reference to an auto-

mobile being at the place of the fire on the night of the fire.

35. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to strike out of the case, all the testimony which had reference to the note, Exhibit D. 2.

36. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a direction of a verdict upon the first count in favor of the defendant, Mussikee.

37. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a direction of a verdict in favor of the defendant, Mussikee, upon the second count.

38. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to compel the State to elect whether it intended to go to the jury upon the first count or the second count.

39. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to compel the State to elect whether it intended to charge the defendant, Mussikee, upon the first count with the actual burning or with the procuring and consenting to the burning.

40. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to compel the State to elect whether it intended to charge the defendant Mussikee, upon the second count with the actual burning or with the procuring and consenting to the burning.

41. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the prosecutor's summing up, when the prosecutor referred to the man, Fisch, as

being in the employ of the defendant, Mussikee, as a carpenter.

42. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the prosecutor's summing up, when the prosecutor referred to statements as having been made by the witness, Turak, in Passaic, among other things, as follows: "Turak was told in Passaic, 'You have got to go to East Orange in person.' He said, 'Well, you have my statements.' He said, 'I do not want to repeat my statement,'" there being no evidence whatever upon which any such statement could be based.

43. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial when the prosecutor in the course of his summing up used the following language: "Anybody who assists in that kind of crime to get a few palty dollars from an insurance company gets no sympathy from me, but I tell you we are up against it in these cases. But I say Turak, when this piece of paper could not be used—" (referring to a statement supposed to have been made by the witness, Turak, then in the possession of the prosecutor).

44. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the summing up of the prosecutor when the prosecutor continued to refer to the man, Fisch, as a carpenter who does carpenter work for Mussikee.

45. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the summing up of the prosecutor

when the prosecutor referred to how it was that the matter came to be presented to the Grand Jury by the prosecutor's office and referred to the arrest of Goldberg in Passaic, etc.

46. Because the Trial Court during the prosecutor's summing up, declined to grant the motion of the defendant, Mussikee, for a mistrial, when he related how the police received information from Goldberg and in effect what Goldberg said to the police.

47. Because the Trial Court at the conclusion of the prosecutor's summing up declined to grant the motion of the defendant, Mussikee, for a mistrial, which motion was based upon the misstatement of facts contained in the prosecutor's summing up and upon the references by the prosecutor to matters not in evidence.

48. Because the Trial Court declined to receive, at the conclusion of the prosecutor's summing up, from the defendant, Mussikee, additional requests to charge, based upon the prosecutor's summing up.

49. Because the Trial Court declined to charge the third request of the defendant, Mussikee, to charge, which was as follows:

> "The law does not require of the defendant that he prove himself innocent. The law imposes upon the prosecution the burden of proving the guilt of the defendant beyond all reasonable doubt."

50. Because the Trial Court declined to charge the fifth request of the defendant, Mussikee, to charge, which was as follows:

> "The evidence, in order to deprive the defendant of the benefit of the presumption of innocence, must not only be consistent with the theory of guilt but must be inconsistent with and exclude every reasonable theory of innocence and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendant, the law makes it their duty to do so."

51. Because the Trial Court declined to charge the seventh request of the defendant, Mussikee, to charge, which was as follows:

> "If, upon a fair and impartial consideration of all the evidence in the case, the jury find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendant, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendant and to find the defendant not guilty."

52. Because the Trial Court declined to charge the eleventh request of the defendant, Mussikee, to charge, which was as follows:

> "In determining the guilt or innocence of the defendant, although the jury may consider the statements which were made prior to the trial by the witnesses called by the State, which the Court has admitted, as withdrawing from the case the testimony of the witnesses who made them, or such part of the testimony of the witnesses who made them as to the jury may consider proper to reject, the jury may not consider that as matter of fact the matters related in the statements made prior to the trial actually took place."

53. Because the Trial Court declined to charge the twelfth request of the defendant, Mussikee, to charge, which was as follows:

> "In determining the guilt or innocence of the defendant where a statement made prior to the trial has been admitted in evidence, solely for the purpose of neutralizing testimony, to the effect that one of the defendants made certain statements to the witness or to the effect that the witness had a conversation with one of the defendants or that the witness or one of the defendants performed a certain act, the jury must wholly disregard these statements as proving that as a matter of fact these things took place and unless there is some other evidence in the case to the effect that they did take place, the jury must consider that they did not take place."

54. Because the Court declined to charge the request of the defendant, Mussikee, to charge, No. 13a, which was as follows:

> "Before the jury can convict the defendant Mussikee, upon the first count, the jury must be satisfied beyond a reasonable doubt that the defendant actually, wilfully and maliciously burned the factory building of the Merritt Products Company or aided and consented to the burning."

55. Because the Trial Court declined to charge the fourteenth request of the defendant, Mussikee, to charge, which was as follows:

> "The words 'aid and consent' in the statute upon which the first count is based, imply an active act upon the part of the defendant. They do not mean mere acquiescence. Before the jury can convict they must be satisfied beyond a reasonable doubt that the defendant actively aided and assisted wilfully and maliciously in the burning of the building."

56. Because the Trial Court declined to charge the fifteenth request of the defendant, Mussikee, to charge, which was as follows:

> "Before there can be a conviction upon the second count the jury must be satisfied beyond a reasonable doubt that the defendant, Mussikee, did burn the building or aid, procure and consent to the burning of the building wilfully and maliciously."

57. Because the Trial Court declined to charge the sixteenth request of the defendant, Mussikee, to charge, which was as follows:

> "Before the jury can convict the defendant upon the second count it must be satisfied beyond a reasonable doubt that the intent of the defendant was to prejudice insurers."

58. Because the Trial Court declined to charge the seventeenth request of the defendant, Mussikee, to charge, which was as follows:

> "The words, 'aid, procure and consent,' as used in the statute upon which the second count is based, mean more than mere passive acquiescence and the defendant, Mussikee, cannot be convicted unless he actively and with the intent to prejudice insurers, burned, aided or assisted in the burning of the building or procured its burning in some way or manner."

59. Because the Trial Court declined to charge the eighteenth request of the defendant, Mussikee, to charge, which was as follows:

> "The State is called upon to prove every element of the crime charged beyond a reasonable doubt. If the State has failed to prove any one of the elements necessary to constitute the crime beyond a reasonable doubt, there must be a verdict of acquittal."

60. Because the Trial Court declined to charge the nineteenth request of the defendant, Mussikee, to charge, which was as follows:

> "Under the first count before there can be a verdict of guilty the State must prove beyond a reasonable doubt, first the fact that the building was burned as a result of incendiarism, and second, that the defendant aided and consented (in an active sense) to the burning."

61. Because the Trial Court declined to charge the twentieth request of the defendant, Mussikee, to charge, which was as follows:

> "Before there can be a conviction under the second count the jury must be satisfied beyond a reasonable doubt, first that the building was, in fact, burned as a result of incendiarism; second, that the defendant either burned or aided, procured and consented (in an active sense) to the burning; third, that the intent of the defendant was to prejudice insurance corporations having insurance upon said building."

62. Because the Trial Court declined to charge the twenty-first request of the defendant, Mussikee, to charge, which was as follows:

> "There is no evidence in the case from which the jury can refer or conclude that

> the value of the stock or merchandise in the factory at the time of the fire was of such an amount as that there was such over insurance as can be considered as bearing upon the question of motive."

63. Because the Trial Court declined to charge the twenty-second request of the defendant, Mussikee, to charge, which was as follows:

> "There is no evidence in the case from which the jury can infer or conclude that the value of the real estate was of such amount as that there was such over insurance as can be considered as bearing upon the question of motive."

64. Because the Trial Court declined to charge the twenty-third request of the defendant, Mussikee, to charge, which was as follows:

> "The mere happening of the fire is not sufficient to justify the jury in inferring the guilt of the defendant. The presumption is that the fire was accidental. That presumption persists until it is overcome by the State by proof, and the proof must be beyond a reasonable doubt."

65. Because the Trial Court declined to charge the twenty-fourth request of the defendant, Mussikee, to charge, which was as follows:

> "There is no proof in the case from which the jury may infer that the fire was of incendiary origin."

66. Because the Trial Court declined to charge the twenty-fifth request of the defendant, Mussikee, to charge, which was as follows :

> "There is no proof in the case from which the jury may find that the defendant, Mus-

sikee, had any knowledge of the amount of the insurance carried upon said building."

67. Because the Trial Court declined to charge the twenty-sixth request of the defendant, Mussikee, to charge, which was as follows:

> "Unless the jury are satisfied beyond a reasonable doubt that the defendant Mussikee had knowledge of the insurance upon said building, the jury cannot find that any act of his was with the intent to prejudice any insurance company."

68. Because the Trial Court declined to charge the twenty-seventh request of the defendant, Mussikee, to charge, which was as follows:

> "Before there can be a conviction the jury must be satisfied beyond a reasonable doubt that the defendant Mussikee had something to do with the particular fire referred to in the indictment.

69. Because the Trial Court declined to charge the twenty-ninth request of the defendant, Mussikee, to charge, which was as follows:

> "The jury are instructed to disregard the evidence of any statements made by the defendant Mussikee prior to the fire, as bearing upon the question as to whether he had anything to do with the particular fire referred to in the indictment."

70. Because the Trial Court declined to charge the thirty-second request of the defendant, Mussikee, to charge, which was as follows:

> "There has been evidence offered of the reputation of the defendant Mussikee. In determining the guilt or innocence of the defendant, it is the duty of the jury to consider all of the evidence in the case, including the evidence relating to the reputation of the defendant, and if, upon a consideration of all the evidence, including that of reputation, there exists a reasonable doubt of the guilt of the defendant, even though that doubt be engendered merely by the evidence of reputation, it is the duty of the jury to acquit."

71. Because the Trial Court declined to charge the thirty-third request of the defendant, Mussikee, to charge, which was as follows:

> "Evidence of good reputation may be sufficient of itself to raise a reasonable doubt of the guilt of the defendant in the jury's mind, and if such evidence does, in fact, raise such reasonable doubt, then the defendant is entitled to an acquittal, and it is the jury's duty to acquit."

72. Because the Trial Court declined to charge the thirty-four request of the defendant, Mussikee, to charge, which was as follows:

> "The jury may not consider in determining the guilt or innocence of the defendant Mussikee the note written by Finkelstein and left at Mrs. Nevins' house for Horne."

73. Because the Trial Court declined to charge the thirty-fifth request of the defendant, Mussikee, to charge, which was as follows:

> "The jury may not consider in determining the guilt or innocence of the defendant Mussikee any part of the testimony of the witness, Mrs. Nevins."

74. Because the Trial Court declined to charge the thirty-seventh request of the defendant, Mussikee, to charge, which was as follows:

> "There is no evidence in this case that Mussikee sent Finkelstein to Horne."

Assignment of Errors for Defendant Mussikee.

75. Because the Trial Court declined to charge the thirty-eighth request of the defendant, Mussikee, to charge, which was as follows:

> "The jury may convict on one but not both counts."

76. Because the Court declined to charge the defendant, Mussikee's, additional request to charge No. 1, which was as follows:

> "The difficulty of securing proof furnishes no reason for a conviction without proper proof."

77. Because the Court declined to charge the defendant, Mussikee's, additional request to charge No. 2, which was as follows:

> "The difficulty of securing proof does not alter the rule that before convicting the defendants the jury must be satisfied by proof beyond a reasonable doubt of the guilt of the defendants."

78. Because the Court declined to charge the defendant, Mussikee's, additional request to charge No. 3, which was as follows:

> "There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature."

79. Because the Court charged as follows:

> "The State in electing to try these men has taken on the burden of establishing the guilt of one or both as to every material element in the case."

80. Because the Court throughout the charge, although requested so to do, did not make it clear to the jury that the burden was upon the State to prove each and every element of the crime charged beyond a reasonable doubt.

Assignment of Errors for Defendant Mussikee.

81. Because the Court charged the jury as follows:

> "Under the law, you may infer the fact of setting fire from the proof before you, of the acts or conduct of the defendant or defendants and, while there is no evidence in this case of the actual touching of a match to ignite the fire, the actual starting of the fire, the law says you may infer the facts from the proof of acts or conduct of the defendant—that is, if the evidence justifies it, if there is sufficient evidence to justify that inference."

82. Because the Court charged the jury:

> "You cannot infer that merely from the fact that there was a fire. You cannot infer that the defendant or defendants started it, but if you find there is sufficient evidence in the case to justify it, you may infer the fact from such evidence, and it must be shown that it was with the intent—that is to say, that the fire was set with the intent to burn. That also may be inferred by the jury from the proven facts and circumstances in the case."

83. Because the Court charged the jury:

> "Then you have in evidence, too, a copy of a note which was given to Mr. Horne by Mrs. Nevins, which was left at his place some time after the fire, which speaks for itself, and calls the attention of Horne to the fact that he call up his friend, Mussikee, and Mr. Horne denies any knowledge as to the reason why this note should come through Finkelstein."

Assignment of Errors for Defendant Mussikee.

84. Because the Court charged the jury:

"It is your duty as jurors to take the evidence and give such credit to it as you see fit, and, I might say, in reference to that point, in arriving at the value of the testimony, you may consider the interest that anyone has in the outcome of this case. What interest has the chief? What interest has Baldwin, or the discharged fireman? What interest has Goldberg, Turak or any other witness that has been called either by the State or defense? Very properly, you may consider the interest that the defendants have in the outcome, because they are on trial, and your verdict is going to determine their guilt or innocence, and so that is a proper consideration in this case."

85. Because the Court did not properly charge the rule with respect to reasonable doubt.

86. Because the Court denied the motion in arrest of judgment.

87. Because manifest injustice was done to the defendant by the whole charge of the Court.

88. Because in other respects the verdict and judgment were erroneous.

89. Plaintiff assigns as error and specifies as cause for reversal under the provisions of Chapter 349 of the Laws of 1921 that the verdict was against the weight of the evidence.

MERRITT LANE,
Attorney for and of Counsel
with Defendant Mussikee.

Specifications of Causes for Reversal for Defendant, Michael Mussikee.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Prosecutor-Defendant-in-Error,* *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE, *Respondents-Plaintiffs-in-Error.*	On Error to Essex Quarter Sessions. Specifications of Causes for Reversal for Defendant Michael Mussikee.

The plaintiff-in-error assigns the following reasons or causes of reversal of the judgment and verdict in the above-entitled cause upon the whole record:

1. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion to quash the first count of the indictment.

2. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion of the defendant to quash the second count of the indictment.

3. Because the Trial Judge declined to permit the defendant at the opening of the present trial to withdraw the plea of not guilty for the purpose of moving to quash the indictment.

4. Because the Trial Judge refused to direct a mistrial on the motion of the defendant, Mussikee, after the prosecutor's opening, because of the reference by the prosecutor to a certain message which he referred to in his opening and likewise because of the reference by the prosecutor to the alleged fact that a certain automobile was near the place of the fire upon the night of the fire.

5. Because the Trial Judge over the objection of the defendant, Mussikee, admitted testimony of the witness, Kling, as to the claim made under the proofs of loss as follows: "Q. And how much was the claim made under the proofs of loss under those different policies? A. The claim on the contents was $34,000.00. I have just forgotten the exact figures of the building. May I look at these proofs?"

6. Because the Court over the objection of the defendant, Mussikee, admitted in evidence the proofs of loss.

7. Because the Court over the objection of the defendant, Mussikee, permitted the witness, Sheehan, to testify to a conversation between himself and a Miss Ayres, the testimony being in part as follows: "Q. Now, shortly after the fire there was an article that appeared in one of the newspapers. A. The Newark Evening News, I think the following Monday afternoon. Q. And that article attributed certain statements to you." This question was objected to and the objection overruled and an exception taken. And thereupon the following question was asked: "Q. Now, do you remember Miss Ayres and Mr. Horne calling your attention to that article? A. I remember Miss Ayres. Q.

Calling your attention to the article? A. Yes. Q. Now, what did she say to you and what did you say to her?" This question was objected to, objection overruled and an exception taken. The witness then answered that he did not have a conversation with Miss Ayres at the time stated in the question but did at some other time and the witness was permitted, over objection, to testify to this conversation.

8. Because the witness, Margaret Christianson, was permitted, over objection and exception, to testify to the kind of an automobile which she had seen on the Valley Road side of the factory upon the night of the fire, the testimony being in part as follows: "Q. What kind of an automobile was? A. A dark automobile."

9. Because the Court, over the objection and exception of the defendant, Mussikee, permitted the witness, Margaret Christianson, to state in effect that the automobile looked like a car which she had seen the defendant, Horne, drive, the testimony being in part as follows:

> "Q. Had you seen that automobile (the automobile the witness had previously stated she saw in front of the factory) or an automobile that looked like the automobile that you saw that night before in front of that factory? A. Yes, I did. Q. What is your answer? A. Yes, I have seen a car like that. Q. How many times before that night had you seen this automobile that you say looked like the one that you saw in front there that night? Q. How many times had you seen an automobile that looked like that one? A. Several times before."

10. Because the Court declined to grant the motion of the defendant, Mussikee, to strike out the

testimony of the witness, Margaret Christianson, when it appeared upon cross examination that she could not say that the automobile she had seen on the night of the fire was an automobile which she had previously seen used by the defendant, Horne.

11. Because the Court declined to grant the motion of the defendant, Mussikee, to strike out the testimony of the witness, Margaret Christianson, when after the close of her testimony, it appeared that the witness was wholly unable to identify the automobile which she says she saw in front of the factory upon the night of the fire.

12. Because the Trial Court refused, upon the motion of the defendant, Mussikee, to strike out the testimony of the witness, Lange, with respect to a car which he says he saw in front of the factory upon the night of the fire, the said car in nowise being identified as having any connection whatever with either of the defendants.

13. Because the Trial Court, over the objection and exception of the defendant, Mussikee, permitted the witness, Turak, to testify to an alleged conversation between the witness and Mussikee in September, 1923.

14. Because the Trial Court, over the objection and exception of the defendant, Mussikee, permitted an answer to the following question, the conversation referred to having reference to one alleged to have taken place between the witness, Turak, and defendant, Mussikee, in September, 1923: "Q. Give us the conversation, what he said to you and what you said to him?"

15. Because over the objection and exception of the defendant, Mussikee, the Trial Court permitted the witness, Turak, to answer the following question: "Q. Now, did Mussikee say to you on that 15th day of January, 1924, that he had promised, he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job?"

16. Because the Trial Court, over the objection and exception of the defendant, Mussikee, permitted the witness, Goldberg, to testify to a conversation alleged to have taken place between himself and Horne in October, 1923.

17. Because over the objection and exception of the defendant, Michael Mussikee, the Trial Court permitted the following question to be put to the witness, Goldberg, and answered by him: "Q. Now, at the last trial when you were asked by me what Mr. Horne said to you in Clifton when he first came to your house in October, here is what you answered, 'and he said, "Well, I am sent from a friend of yours, Mr. Mussikee sent me over to you if you want to go up there in Orange," ' did you make that answer?"

18. Because the Trial Court overruled the motion of the defendant, Mussikee, to strike out the testimony of the witness, Goldberg, with respect to his alleged conversation with the defendant, Horne, because the witness, Goldberg, could not identify the defendant, Horne.

19. Because the Trial Court refused at the conclusion of the State's case, to grant the motion of the defendant, Mussikee, for a dismissal of the first count of the indictment or for a direction of a verdict in favor of the defendant, Mussikee, thereon.

20. Because the Trial Court at the conclusion of the State's case, declined to grant the motion of the defendant, Mussikee, for a dismissal of the second count of the indictment or for a direction of a verdict in favor of the defendant, Mussikee, thereon.

21. Because the Trial Court permitted the prosecutor to interrogate the witness, Lena Nevins, with respect to a man named Finkelstein coming to the house after the fire with a note for Horne, which testimony all went in over the objection and exception of the defendant, Mussikee.

22. Because the Trial Court permitted an answer by the witness, Lena Nevins, over the objection and exception of the defendant, Mussikee, to the prosecutor's question: "Q. Didn't you answer the door some time after the fire and meet a man who said he was Finkelstein?"

23. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question: "Q. Did a man who told you his name was Finkelstein come to your house after the fire inquiring for Mr. Horne? Yes or no."

24. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put by the prosecutor: "Q. And did he leave with you a message for Mr. Horne?"

25. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put by the prosecutor:

"Q. Did you receive a paper upon which there was something written to give to Mr. Horne?"

26. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Did you give the paper to Mr. Horne?"

27. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Now, when you gave this paper to Mr. Horne, do you know what Mr. Horne did?"

28. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to testify in answer to a question put to her by the prosecutor with respect to Horne calling someone up on the telephone after delivery of the message to him.

29. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to be interrogated by the prosecutor with respect to her testimony upon the previous trial and permitted the prosecutor to put the following question: "Q. Do you remember this question being put to you, page 257, 'Question: Mr. Horne came home about six o'clock and called up Mussikee in Passaic, that is true, isn't it?' And your answer was, 'Yes.'"

30. Because the Trial Court declined to grant a mistrial upon the motion of the defendant, Mussikee, questions by the Court having been

put to the witness, Lena Nevins, which caused Lena Nevins to state that the note was from Mr. Mussikee, whereas the fact was, as it appeared by the witness' testimony, that she had no knowledge as to who the note was from and because it appeared that although the jury was instructed to disregard the testimony, that the note was from Mr. Mussikee, the condition of the record was such as that the instructions could not remove the influence which must have been made upon the jury.

31. Because the Trial Court refused upon the motion of the defendant, Mussikee, to strike out the testimony of the witness, Lena Nevins, at its conclusion.

32. Because the Trial Court declined to receive in evidence upon the offer of defendant, Mussikee, a bill from the witness, Turak, to the defendant, Mussikee.

33. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the following question to be put to the defendant, Mussikee, by the prosecutor: "Q. When was it that you talked to Goldberg and Goldberg asked you for $300.00 to give Finkelstein for a fire in West Orange with reference to the conversation you just told us you had with Mr. Horne over the wire?"

34. Because the Trial Court at the conclusion of the trial, declined to grant the motion of the defendant, Mussikee, to strike from the record all the testimony which had reference to an automobile being at the place of the fire on the night of the fire.

35. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to strike

out of the case, all the testimony which had reference to the note, Exhibit D. 2.

36. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a direction of a verdict upon the first count in favor of the defendant, Mussikee.

37. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a direction of a verdict in favor of the defendant, Mussikee, upon the second count.

38. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to compel the State to elect whether it intended to go to the jury upon the first count or the second count.

39. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to compel the State to elect whether it intended to charge the defendant, Mussikee, upon the first count with the actual burning or with the procuring and consenting to the burning.

40. Because the Trial Court declined to grant the motion of the defendant, Mussikee, to compel the State to elect whether it intended to charge the defendant, Mussikee, upon the second count with the actual burning or with the procuring and consenting to the burning.

41. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the prosecutor's summing up, when the prosecutor referred to the man, Fisch, as being in the employ of the defendant, Mussikee, as a carpenter.

42. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the prosecutor's summing up, when the prosecutor referred to statements as having been made by the witness, Turak, in Passaic, among other things, as follows: "Turak was told in Passaic, 'You have got to go to East Orange in person.' He said, 'Well, you have my statement.' He said, 'I do not want to repeat my statement,' " there being no evidence whatever upon which any such statement could be based.

43. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial when the prosecutor in the course of his summing up used the following language: "Anybody who assists in that kind of crime to get a few paltry dollars from an insurance company gets no sympathy from me, but I tell you we are up against it in these cases. But I say Turak, when this piece of paper could not be used—" (referring to a statement supposed to have been made by the witness, Turak, then in the possession of the prosecutor.)

44. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the summing up of the prosecutor when the prosecutor continued to refer to the man, Fisch, as a carpenter who does carpenter work for Mussikee.

45. Because the Trial Court declined to grant the motion of the defendant, Mussikee, for a mistrial during the summing up of the prosecutor when the prosecutor referred to how it was that the matter came to be presented to the Grand

Jury by the prosecutor's office and referred to the arrest of Goldberg in Passaic, etc.

46. Because the Trial Court during the prosecutor's summing up, declined to grant the motion of the defendant, Mussikee, for a mistrial, when he related how the police received information from Goldberg and in effect what Goldberg said to the police.

47. Because the Trial Court at the conclusion of the prosecutor's summing up declined to grant the motion of the defendant, Mussikee, for a mistrial, which motion was based upon the misstatement of facts contained in the prosecutor's summining up and upon the references by the prosecutor to matters not in evidence.

48. Because the Trial Court declined to receive, at the conclusion of the prosecutor's summing up, from the defendant, Mussikee, additional requests to charge, based upon the prosecutor's summing up.

49. Because the Trial Court declined to charge the third request of the defendant, Mussikee, to charge, which was as follows:

> "The law does not require of the defendant that he prove himself innocent. The law imposed upon the prosecution the burden of proving the guilty of the defendant beyond all reasonable doubt.

50. Because the Trial Court declined to charge the fifth request of the defendant, Mussikee, to charge, which was as follows:

> "The evidence, in order to deprive the defendant of the benefit of the presumption of innocence, must not only be consistent with the theory of guilt but must be inconsistent

with and exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendant, the law makes it their duty to do so."

51. Because the Trial Court declined to charge the seventh request of the defendant, Mussikee, to charge, which was as follows:

"If, upon a fair and impartial consideration of all the evidence in the case, the jury find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendant, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendant and to find the defendant not guilty."

52. Because the Trial Court declined to charge the eleventh request of the defendant, Mussikee, to charge, which was as follows:

"In determining the guilt or innocence of the defendant, although the jury may consider the statements which were made prior to the trial by the witnesses called by the State, which the Court has admitted, as withdrawing from the case the testimony of the witnesses who made them, or such part of the testimony of the witnesses who made them as to the jury may consider proper to reject, the jury may not consider that as matter of fact the matters related in the statements made prior to the trial actually took place."

53. Because the Trial Court declined to charge the twelfth request of the defendant, Mussikee, to charge, which was as follows:

"In determining the guilt or innocence of the defendant where a statement made prior to the trial, has been admitted in evidence, solely for the purpose of neutralizing testimony, to the effect that one of the defendants made certain statements to the witness or to the effect that the witness had a conversation with one of the defendants or that the witness or one of the defendants performed a certain act, the jury must wholly disregard these statements as proving that as a matter of fact these things took place and unless there is some other evidence in the case to the effect that they did take place, the jury must consider that they did not take place."

54. Because the Court declined to charge the request of the defendant, Mussikee, to charge, No. 13a, which was as follows:

"Before the jury can convict the defendant Mussikee, upon the first count, the jury must be satisfied beyond a reasonable doubt that the defendant actually, wilfully and maliciously burned the factory building of the Merritt Products Company or aided and consented to the burning."

55. Because the Trial Court declined to charge the fourteenth request of the defendant, Mussikee, to charge, which was as follows:

"The words 'aid and consent' in the statute upon which the first count is based, imply an active act upon the part of the defendant. They do not mean mere acquies-

cence. Before the jury can convict they must be satisfied beyond a reasonable doubt that the defendant actively aided and assisted wilfully and maliciously in the burning of the building."

56. Because the Trial Court declined to charge the fifteenth request of the defendant, Mussikee, to charge, which was as follows:

"Before there can be a conviction upon the second count the jury must be satisfied beyond a reasonable doubt that the defendant, Mussikee, did burn the building or aid, procur and consent to the burning of the building wilfully and maliciously."

57. Because the Trial Court declined to charge the sixteenth request of the defendant, Mussikee, to charge, which was as follows:

"Before the jury can convict the defendant upon the second count it must be satisfied beyond a reasonable doubt that the intent of the defendant was to prejudice insurers."

58. Because the Trial Court declined to charge the seventeenth request of the defendant, Mussikee, to charge, which was as follows:

"The words, 'aid, procure and consent,' as used in the statute upon which the second count is based, mean more than mere passive acquiescence and the defendant, Mussikee, cannot be convicted unless he actively, and with the intent to prejudice insurers, burned, aided or assisted in the burning of the building or procured its burning in some way or manner."

59. Because the Trial Court declined to charge

the eighteenth request of the defendant, Mussikee, to charge, which was as follows:

"The State is called upon to prove every element of the crime charged beyond a reasonable doubt. If the State has failed to prove any one of the elements necessary to constitute the crime beyond a reasonable doubt, there must be a verdict of acquittal."

60. Because the Trial Court declined to charge the nineteenth request of the defendant, Mussikee, to charge, which was as follows:

"Under the first count before there can be a verdict of guilty the State must prove beyond a reasonable doubt, first that fact that the building was burned as a result of incendiarism, and second, that the defendant aided and consented (in an active sense) to the burning."

61. Because the Trial Court declined to charge the twentieth request of the defendant, Mussikee, to charge, which was as follows:

"Before there can be a conviction under the second count the jury must be satisfied beyond a reasonable doubt, first that the building was, in fact, burned as a result of incendiarism; second, that the defendant either burned or aided, procured and consented (in an active sense) to the burning; third, that the intent of the defendant was to prejudice insurance corporations having insurance upon said building."

62. Because the Trial Court declined to charge the twenty-first request of the defendant, Mussikee, to charge, which was as follows:

"There is no evidenec in the case from which the jury can infer or conclude that

the value of the stock or merchandise in the factory at the time of the fire was of such an amount as that there was such over insurance as can be considered as bearing upon the question of motive."

63. Because the Trial Court declined to charge the twenty-second request of the defendant, Mussikee, to charge, which was as follows:

"There is no evidence in the case from which the jury can infer or conclude that the value of the real estate was of such amount as that there was such over insurance as can be considered as bearing upon the question of motive."

64. Because the Trial Court declined to charge the twenty-third request of the defendant, Mussikee, to charge, which was as follows:

"The mere happening of the fire is not sufficient to justify the jury in inferring the guilt of the defendant. The presumption is that the fire was accidental. That presumption persists until it is overcome by the State by proof, and the proof must be beyond a reasonable doubt."

65. Because the Trial Court declined to charge the twenty-fourth request of the defendant, Mussikee, to charge, which was as follows:

"There is no proof in the case from which the jury may infer that the fire was of incendiary origin."

66. Because the Trial Court declined to charge the twenty-fifth request of the defendant, Mussikee, to charge, which was as follows:

"There is no proof in the case from which the jury may find that the defendant, Mussikee, had any knowledge of the amount of the insurance carried upon said building."

67. Because the Trial Court declined to charge the twenty-sixth request of the defendant, Mussikee, to charge, which was as follows:

"Unless the jury are satisfied beyond a reasonable doubt that the defendant Mussikee had knowledge of the insurance upon said building, the jury cannot find that any act of his was with the intent to prejudice any insurance company."

68. Because the Trial Court declined to charge the twenty-seventh request of the defendant, Mussikee, to charge, which was as follows:

"Before there can be a conviction the jury must be satisfied beyond a reasonable doubt that the defendant Mussikee had something to do with the particular fire referred to in the indictment."

69. Because the Trial Court declined to charge the twenty-ninth request of the defendant, Mussikee, to charge which was as follows:

"The jury are instructed to disregard the evidence of any statements made by the defendant Mussikee prior to the fire, as bearing upon the question as to whether he had anything to do with the particular fire referred to in the indictment."

70. Because the Trial Court declined to charge the thirty-second request of the defendant, Mussikee, to charge, which was as follows:

"There has been evidence offered of the reputation of the defendant Mussikee. In determining the guilt or innocence of the dfendant, it is the duty of the jury to consider all of the evidence in the case, including the evidence relating to the reputation

of the defendant, and if, upon a consideration of all of the evidence, including that of reputation, there exists a reasonable doubt of the guilt of the defendant, even though that doubt be engendered merely by the evidence of reputation, it is the duty of the jury to acquit."

71. Because the Trial Court declined to charge the thirty-third request of the defendant, Mussikee, to charge, which was as follows:

"Evidence of good reputation may be sufficient of itself to raise a reasonable doubt of the guilt of the defendant in the jury's mind, and if such evidence does in fact raise such reasonable doubt, then the defendant is entitled to an acquittal, and it is the jury's duty to acquit."

72. Because the Trial Court declined to charge the thirty-fourth request of the defendant, Mussikee, to charge, which was as follows:

"The jury may not consider in determining the guilt or innocence of the defendant Mussikee the note written by Finkelstein and left at Mrs. Nevins' house for Horne."

73. Because the Trial Court declined to charge the thirty-fifth request of the defendant, Mussikee, to charge, which was as follows:

"The jury may not consider in determining the guilt or innocence of the defendant Mussikee any part of the testimony of the witness, Mrs. Nevins."

74. Because the Trial Court declined to charge the thirty-seventh request of the defendant, Mussikee, to charge, which was as follows:

"There is no evidence in this case that Mussikee sent Finkelstein to Horne."

75. Because the Trial Court declined to charge the thirty-eighth request of the defendant, Mussikee, to charge, which was as follows:

"The jury may convict on one but not both counts."

76. Because the Court declined to charge the defendant, Mussikee's additional request to charge No. 1, which was as follows:

"The difficutly of securing proof furnishes no reason for a conviction without proper proof."

77. Because the Court declined to charge the defendant, Mussikee's additional request to charge No. 2, which was as follows:

"The difficulty of securing proof does not alter the rule that before convicting the defendants the jury must be satisfied by proof beyond a reasonable doubt of the guilt of the defendants."

78. Because the Court declined to charge the defendant, Mussikee's additional request to charge No. 3, which was as follows:

"There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature."

79. Because the Court charged as follows:

"The State in electing to try these men has taken on the burden of establishing the guilt of one or both as to every material element in the case."

80. Because the Court throughout the charge, although requested so to do, did not make it clear to the jury that the burden was upon the State to prove each and every element of the crime charged beyond a reasonable doubt.

Specification of Causes for Defendant Mussikee.

81. Because the Court charged the jury as follows:

"Under the law, you may infer the fact of setting fire from the proof before you, of the acts or conduct of the defendant or defendants and, while there is no evidence in this case of the actual touching of a match to ignite the fire, the actual starting of the fire, the law says you may infer the facts from the proof or acts or conduct of the defendant—that is, if the evidence justifies it, if there is sufficient evidence to justify that inference."

82. Because the Court charged the jury:

"You cannot infer that merely from the fact that there was a fire. You cannot infer that the defendant or defendants started it, but if you find there is sufficient evidence in the case to justify it, you may infer the fact from such evidence, and it must be shown that it was with the intent—that is to say, that the fire was set with the intent to burn. That also may be inferred by the jury from the proven facts and circumstances in the case."

83. Because the Court charged the jury:

"Then you have in evidence, too, a copy of a note which was given to Mr. Horne by Mrs. Nevins, which was left at his place some time after the fire, which speaks for itself, and calls the attention of Horne to the fact that he call up his friend, Mussikee, and Mr. Horne denies any knowledge as to the reason why this note should come through Finkelstein."

Specification of Causes for Defendant Mussikee.

84. Because the Court charged the jury:

"It is your duty as jurors to take the evidence and give such credit to it as you see fit, and, I might say, in reference to that point, in arriving at the value of the testimoney, you may consider the interest that anyone has in the outcome of this case. What interest has the chief? What interest has Baldwin, or the discharged fireman? What interest has Goldberg, Turak or any other witness that has been called either by the State or defense? Very properly, you may consider the interest that the defendants have in the outcome, because they are on trial and your verdict is going to determine their guilt or innocence, and so that is a proper consideration in this case."

85. Because the Court did not properly charge the rule with respect to reasonable doubt.

86. Because the Court denied the motion in arrest of judgment.

87. Because manifest injustice was done to the defendant by the entire charge of the Court.

88. Because in other respects the verdict and judgment were erroneous.

89. Plaintiff assigns as error and specifies as cause for reversal under the provisions of Chapter 349 of the Laws of 1921 that the verdict was against the weight of the evidence.

MERRITT LANE,
Attorney for and of Counsel
with Defendant Mussikee.

Assignment of Errors for Defendant, Joseph H. Horne.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Prosecutor-Defendant-in-Error,* *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE, *Respondents-Plaintiffs-in-Error.*	On Error to Essex Quarter Sessions. Assignment of Errors for Defendant Joseph H. Horne.

Afterwards, in the Supreme Court of Judicature of the State of New Jersey, comes the said Joseph H. Horne, and says that in the records aforesaid and also that in the matters contained in the bill of exceptions and also in the giving of the verdict and judgment aforesaid, there is manifest error, in this respect, to wit:

1. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion to quash the first count of the indictment.

2. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion of the defendant to quash the second count of the indictment.

3. Because the Trial Judge declined to permit the defendant at the opening of the present trial to withdraw the plea of not guilty for the purpose of moving to quash the indictment.

Assignment of Errors for Defendant Horne.

4. Because the Trial Judge refused to direct a mistrial on the motion of the defendant, Horne, after the prosecutor's opening, because of the reference by the prosecutor to a certain message which he referred to in his opening and likewise because of the reference by the prosecutor, to the alleged fact that a certain automobile was near the place of the fire upon the night of the fire.

5. Because the Trial Judge over the objection of the defendant, Horne, admitted testimony of the witness, Kling, as to the claim made under the proofs of loss as follows: "Q. And how much was the claim made under the proofs of loss under those different policies? A. The claim on the contents was $34,000. I have just forgotten the exact figures of the building. May I look at these proofs?"

6. Because the Court over the objection of the defendant, Horne, admitted in evidence the proofs of loss.

7. Because the Court over the objection of the defendant, Horne, permitted the witness, Sheehan, to testify to a conversation between himself and a Miss Ayres, the testimony being in part as follows: "Q. Now, shortly after the fire there was an article that appeared in one of the newspapers. A. The Newark Evening News, I think the following Monday afternoon. Q. And that article attributed certain statements to you." This question was objected to and the objection overruled and an exception taken. And thereupon the following question was asked: "Q. Now, do you remember Miss Ayres and Mr. Horne calling your attention to that article? A. I remember Miss Ayres. Q. Calling your at-

tention to the article? A. Yes. Q. Now, what did she say to you and what did you say to her?" This question was objected to, objection overruled and an exception taken. The witness then answered that he did not have a conversation with Miss Ayres at the time stated in the question but did at some other time, and the witness was permitted, over objection, to testify to this conversation.

8. Because the witness, Margaret Christianson, was permitted, over objection and exception, to testify to the kind of an automobile which she had seen on the Valley Road side of the factory upon the night of the fire, the testimony being in part as follows: "Q. What kind of an automobile was? A. A dark automobile."

9. Because the Court, over the objection and exception of the defendant, Horne, permitted the witness, Margaret Christianson, to state in effect that the automobile looked like a car which she had seen the defendant, Horne, drive, the testimony being in part as follows:

"Q. Had you seen that automobile (the automobile the witness had previously stated she saw in front of the factory) or an automobile that looked like the automobile that you saw that night before in front of that factory? A. Yes, I did. Q. What is your answer? A. Yes, I have seen a car like that. Q. How many times before that night had you seen this automobile that you say looked like the one that you saw in front there that night? Q. How many times had you seen an automobile that looked like that one? A. Several times before."

10. Because the Court declined to grant the motion of the defendant, Horne, to strike out the

testimony of the witness, Margaret Christianson, when it appeared upon cross examination that she could not say that the automobile she had seen on the night of the fire was an automobile which she had previously seen used by the defendant, Horne.

11. Because the Court declined to grant the motion of the defendant, Horne, to strike out the testimony of the witness, Margaret Christianson, when after the close of her testimony, it appeared that the witness was wholly unable to identify the automobile which she says she saw in front of the factory upon the night of the fire.

12. Because the Trial Court refused, upon the motion of the defendant, Horne, to strike out the testimony of the witness, Lange, with respect to a car which he says he saw in front of the factory upon the night of the fire, the said car in no wise being identified as having any connection whatever with either of the defendants.

13. Because the Trial Court, over the objection and exception of the defendant, Horne, permitted the witness, Turak, to testify to an alleged conversation between the witness and Mussikee in September, 1923.

14. Because the Trial Court, over the objection and exception of the defendant, Horne, permitted an answer to the following question, the conversation referred to having reference to one alleged to have taken place between the witness, Turak, and defendant, Mussikee, in September, 1923: "Q. Give us the conversation, what he said to you and what you said to him?"

15. Because over the objection and exception of the defendant, Horne, the Trial Court permitted the witness, Turak, to answer the following question: "Q. Now, did Mussikee say to you on that 15th day of January, 1924, that he had promised, he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job?"

16. Because the Trial Court, over the objection and exception of the defendant, Horne, permitted the witness, Goldberg, to testify to a conversation alleged to have taken place between himself and Horne in October, 1923.

17. Because over the objection and exception of the defendant, Joseph H. Horne, the Trial Court permitted the following question to be put to the witness, Goldberg, and answered by him: "Q. Now, at the last trial when you were asked by me what Mr. Horne said to you in Clifton when he first came to your house in October, here is what you answered, 'and he said, "Well, I am sent from a friend of yours, Mr. Mussikee sent me over to you if you want to go up there in Orange," ' Did you make that answer?"

18. Because the Trial Court overruled the motion of the defendant, Horne, to strike out the testimony of the witness, Goldberg, with respect to his alleged conversation with the defendant, Horne, because the witness, Goldberg, could not identify the defendant, Horne.

19. Because the Trial Court refused at the conclusion of the State's case, to grant the motion of the defendant, Horne, for a dismissal of the first count of the indictment or for a direction of a verdict in favor of the defendant, Horne, thereon.

20. Because the Trial Court at the conclusion of the State's case, declined to grant the motion of the defendant, Horne, for a dismissal of the second count of the indictment or for a direction of a verdict in favor of the defendant, Horne, thereon.

21. Because the Trial Court permitted the prosecutor to interrogate the witness, Lena Nevins, with respect to a man named Finkelstein coming to the house after the fire with a note for Horne, which testimony all went in over the objection and exception of the defendant, Mussikee.

22. Because the Trial Court permitted an answer by the witness, Lena Nevins, over the objection and exception of the defendant, Mussikee, to the prosecutor's question: "Q. Didn't you answer the door some time after the fire and meet a man who said he was Finkelstein?"

23. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following question: "Q. Did a man who told you his name was Finkelstein come to your house after the fire inquiring for Mr. Horne? Yes or no."

24. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following question put by the prosecutor: "Q. And did he leave with you a message for Mr. Horne?"

25. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following

question put by the prosecutor: "Q. Did you receive a paper upon which there was something written to give to Mr. Horne?"

26. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Did you give the paper to Mr. Horne?"

27. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Now, when you gave this paper to Mr. Horne, do you know what Mr. Horne did?"

28. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to testify in answer to a question put to her by the prosecutor with respect to Horne calling someone up on the telephone after delivery of the message to him.

29. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to be interrogated by the prosecutor with respect to her testimony upon the previous trial and permitted the prosecutor to put the following question: "Q. Do you remember this question being put to you, page 257, 'Question: Mr. Horne came home about six o'clock and called up Mussikee in Passaic, that is true, isn't it?' And your answer was, 'Yes.' "

30. Because the Trial Court declined to grant a mistrial upon the motion of the defendant, Horne, questions by the Court having been put to

the witness, Lena Nevins, which caused Lena Nevins to state that the note was from Mr. Mussikee, where as the fact was, as it appeared by the witness' testimony that she had no knowledge as to who the note was from and because it appeared that although the jury was instructed to disregard the testimony that the note was from Mr. Mussikee, the condition of the record was such as that the instructions could not remove the infiuence which must have been made upon the jury.

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33. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the following question to be put to the defendant, Mussikee, by the prosecutor: "Q. When was it that you talked to Goldberg and Goldberg asked you for $300.00 to give Finkelstein for a fire in West Orange with reference to the conversation you just told us you had with Mr. Horne over the wire?"

34. Because the Trial Court at the conclusion of the trial, declined to grant the motion of the defendant, Horne, to strike from the record all the testimony which had reference to an automobile being at the place of the fire on the night of the fire.

Assignment of Errors for Defendant Horne.

35. Because the Trial Court declined to grant the motion of the defendant, Horne, to strike out of the case, all the testimony which had reference to the note, Exhibit D. 2.

36. Because the Trial Court declined to grant the motion of the defendant, Horne, for a direction of a verdict upon the first count in favor of the defendant, Horne.

37. Because the Trial Court declined to grant the motion of the defendant, Horne, for a direction of a verdict in favor of the defendant, Horne, upon the second count.

38. Because the Trial Court declined to grant the motion of the defendant, Horne, to compel the State to elect whether it intended to go to the jury upon the first count or the second count.

39. Because the Trial Court declined to grant the motion of the defendant, Horne, to compel the State to elect whether it intended to charge the defendant, Horne, upon the first count with the actual burning or with the procuring and consenting to the burning.

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Assignment of Errors for Defendant Horne.

42. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial during the prosecutor's summing up, when the prosecutor referred to statements as having been made by the witness, Turak, in Passaic, among other things, as follows: "Turak was told in Passaic, 'You have got to go to West Orange in person.' He said, 'Well, you have my statement.' He said, 'I do not want to repeat my statements,'" there being no evidence whatever upon which any such statement could be based.

43. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial when the prosecutor in the course of his summing up used the following language: "Anybody who assists in that kind of crime to get a few paltry dollars from an insurance company gets no sympathy from me, but I tell you we are up against it in these cases. But I say Turak, when this piece of paper could not be used—" (referring to a statement supposed to have been made by the witness, Turak, then in the possession of the prosecutor).

44. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial during the summing up of the prosecutor when the prosecutor continued to refer to the man, Fisch, as a carpenter who does carpenter work for Mussikee.

45. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial during the summing up of the prosecutor when the prosecutor referred to how it was that the matter came to be presented to the Grand

Jury by the prosecutor's office and referred to the arrest of Goldberg in Passaic, etc.

46. Because the Trial Court during the prosecutor's summing up, declined to grant the motion of the defendant, Horne, for a mistrial, when he related how the police received information from Goldberg and in effect what Goldberg said to the police.

47. Because the Trial Court at the conclusion of the prosecutor's summing up declined to grant the motion of the defendant, Horne, for a mistrial, which motion was based upon the misstatement of facts contained in the prosecutor's summing up and upon the references by the prosecutor to matters not in evidence.

48. Because the Trial Court declined to receive at the conclusion of the prosecutor's summing up, from the defendant, Horne, additional requests to charge, based upon the prosecutor's summing up.

49. Because the Trial Court declined to charge the second request of the defendant, Horne, to charge, which was as follows:

> "No conversations between the defendant Mussikee and any other persons can in any way be binding upon the defendant Horne, unless you find from the evidence that it has been proven beyond a reasonable doubt that the fire was set and that the setting was brought about by reason of an agreement between Horne and Mussikee; and unless such an agreement is proven beyond a reasonable doubt, no testimony as to such conversations can bind the defendant Horne."

50. Because the Trial Court declined to charge the third request of the defendant, Horne, to charge, which was as follows:

> "The presumption of law is that the fire originated in an entirely innocent and accidental way so far as the defendant, Horne, is concerned, and this presumption continues until and unless the State has overcome the presumption of innocence by legal testimony which must satisfy you beyond a reasonable doubt as to the guilt of the defendant, Horne."

51. Because the Trial Court declined to charge "B" of the fifth request of the defendant, Horne, to charge, which was as follows:

> "One of the State's witnesses, Goldberg, has admitted in his testimony having been convicted of a crime. Conviction of a crime is evidence which will tend to impeach the credibility of his testimony, and you are justified in considering the fact that he has been convicted of a crime in deciding whether you should or should not believe Goldberg's testimony."

52. Because the Trial Court declined to charge the sixth request of the defendant, Horne, to charge, which was as follows:

> "Evidence has been introduced on the part of the defendant as to his good character or reputation. You are obliged to consider this evidence as to the good character of the defendant, and if such evidence in the case is sufficient to raise a reasonable doubt in your minds, as to the guilt of the defendant, you should in such case acquit the defendant."

Assignment of Errors for Defendant Horne.

53. Because the Trial Court declined to charge the eighth request of the defendant, Horne, to charge, which was as follows:

> "In order to convict the defendant, Joseph H. Horne, you must be satisfied beyond a reasonable doubt that the person with whom the witness, Goldberg, spoke to at Clifton was in fact the defendant, Joseph H. Horne."

54. Because the Trial Court declined to charge the ninth request of the defendant, Horne, to charge, which was as follows:

> "If you are not satisfied that the defendant, Joseph H. Horne, was the person who talked to the witness, Goldberg, who testified on cross examination that he did not know whether the defendant, Horne, was the person he spoke to, you must acquit the defendant, Horne."

55. Because the Trial Court declined to charge the tenth request of the defendant, Horne, to charge, which was as follows:

> "If, upon a full consideration of all the evidence in the case, the jury entertain a reasonable doubt as to whether the defendant is guilty, then you should find him not guilty."

56. Because the Trial Court declined to charge the eleventh request of the defendant, Horne, to charge, which was as follows:

> "Circumstantial evidence must be clear, convincing and conclusive, excluding all rational doubt as to the defendant's guilt in order for you to convict him of this charge."

Assignment of Errors for Defendant Horne.

57. Because the Trial Court declined to charge the twelfth request of the defendant, Horne, to charge, which was as follows:

> "Proof beyond a reasonable doubt of every material and essential element of this offense is necessary in order to convict the defendant."

58. Because the Trial Court declined to charge the thirteenth request of the defendant, Horne, to charge, which was as follows:

> "Even if you believe that the defendant, Mussikee, had these said conversations with the witnesses Goldberg and Turak, nevertheless, you must be satisfied beyond a reasonable doubt that tne fire was of an incendiary origin before you can convict the defendant."

59. Because the Court declined to charge the defendant, Horne's additional request to charge #1, which was as follows:

> "The difficulty of securing proof furnishes no reason for a conviction without proper proof."

60. Because the Court declined to charge the defendant, Horne's additional request to charge #2, which was as follows:

> "The difficulty of securing proof does not alter the rule that before convicting the defendants the jury must be satisfied by proof beyond a reasonable doubt of the guilt of the defendants."

61. Because the Court declined to charge the defendant, Horne's additional request to charge #3, which was as follows:

> "There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature."

Assignment of Errors for Defendant Horne.

62. Because the Court charged as follows:

"The state in electing to try these men, has taken on the burden of establishing the guilt of one or both as to every material element in the case."

63. Because the Court throughout the charge, although requested so to do, did not make it clear to the jury that the burden was upon the State to prove each and every element of the crime charged beyond a reasonable doubt.

64. Because the Court charged the jury as follows:

"Under the law, you may infer the fact of setting fire from the proof before you, of the acts or conduct of the defendant or defendants and, while there is no evidence in this case of the actual touching of a match to ignite the fire, the actual starting of the fire, the law says you may infer the facts from the proof of acts or conduct of the defendant—that is, if the evidence justifies it, if there is sufficient evidence to justify that inference."

65. Because the Court charged the jury:

"You cannot infer that merely from the fact that there was a fire. You cannot infer that the defendant or defendants started it, but if you find there is sufficient evidence in the case to justify it, you may infer the fact from such evidence, and it must be shown that it was with the intent—that is to say, that the fire was set with the intent to burn. That also may be inferred by the jury from the proven facts and circumstances in the case."

Assignment of Errors for Defendant Horne.

66. Because the Court charged the jury:

"Then you have in evidence, too, a copy of a note which was given to Mr. Horne by Mrs. Nevins, which was left at his place some time after the fire, which speaks for itself, and calls the attention of Horne, to the fact that he call up his friend, Mussikee, and Mr. Horne denies any knowledge as to the reason why this note should come through Finkelstein."

67. Because the Court charged the jury:

"It is your duty as jurors to take the evidence and give such credit to it as you see fit, and, I might say, in reference to that point, in arriving at the value of the testimony you may consider the interest that anyone has in the outcome of this case. What interest has the chief? What interest has Baldwin, or the discharged fireman? What interest has Goldberg, Turak or any other witness that has been called either by the State or defense? Very properly you may consider the interest that the defendants have in the outcome, because they are on trial and your verdict is going to determine their guilt or innocence, and so that is a proper consideration in this case."

68. Because the Court did not properly charge the rule with respect to reasonable doubt.

69. Because the Court denied the motion in arrest of judgment.

70. Because manifest injustice was done to the defendant by the entire charge of the Court.

71. Because in other respects the verdict and judgment were erroneous.

Assignment of Errors for Defendant Horne.

72. Plaintiff assigns as error and specifies as cause for reversal under the provisions of Chapter 349 of the Laws of 1921 that the verdict was against the weight of the evidence.

KESSLER & KESSLER,
Attorneys for Defendant, Joseph H. Horne.

Specifications of Causes for Reversal for Defendant, Joseph H. Horne.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Prosecutor-Defendant-in-Error,* *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE, *Respondents-Plaintiffs-in-Error.*	On Error to Essex Quarter Sessions. Specifications of Causes for Reversal for Defendant Joseph H. Horne.

The plaintiff-in-error assigns the following reasons or causes of reversal of the judgment and verdict in the above-entitled cause upon the whole record:

1. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion to quash the first count of the indictment.

2. Because the Trial Judge upon the 25th day of June, 1924, at the time of the first trial of the indictment herein overruled the motion of the defendant to quash the second count of the indictment.

3. Because the Trial Judge declined to permit the defendant at the opening of the present trial to withdraw the plea of not guilty for the purpose of moving to quash the indictment.

4. Because the Trial Judge refused to direct a mistrial on the motion of the defendant, Horne, after the prosecutor's opening, because of the reference by the prosecutor to a certain message which he referred to in his opening and likewise because of the reference by the prosecutor to the alleged fact that a certain automobile was near the place of the fire upon the night of the fire.

5. Because the Trial Judge over the objection of the defendant, Horne, admitted testimony of the witness, Kling, as to the claim made under the proofs of loss as follows: "Q. And how much was the claim made under the proofs of loss under those different policies? A. The claim on the contents was $34,000.00. I have just forgotten the exact figures of the building. May I look at these proofs?"

6. Because the Court over the objection of the defendant, Horne, admitted in evidence the proofs of loss.

7. Because the Court over the objection of the defendant, Horne, permitted the witness, Sheehan, to testify to a conversation between himself and a Miss Ayres, the testimony being in part as follows: "Q. Now, shortly after the fire there was an article that appeared in one of the newspapers. A. The Newark Evening News, I think the following Monday afternoon. Q. And that article attributed certain statements to you." This question was objected to and the objection overruled and an exception taken. And thereupon the following questions was asked: "Q. Now, do you remember Miss Ayres and Mr. Horne calling your attention to that article? A. I remember Miss Ayres. Q. Calling your attention to the article? A. Yes. Q. Now,

what did she say to you and what did you say to her?" This question was objected to, objection overruled and an exception taken. The witness then answered that he did not have a conversation with Miss Ayers at the time stated in the question but did at some other time, and the witness was permitted, over objection, to testify to this conversation.

8. Because the witness, Margaret Christianson, was permitted, over objection and exception, to testify to the kind of an automobile which she had seen on the Valley Road side of the factory upon the night of the fire, the testimony being in part as follows: "Q. What kind of an automobile was it? A. A dark automobile."

9. Because the Court, over the objection and exception of the defendant, Horne, permitted the witness, Margaret Christianson, to state in effect that the automobile looked like a car which she had seen the defendant, Horne, drive, the testimony being in part as follows:

"Q. Had you seen that automobile (the automobile the witness had previously stated she saw in front of the factory) or an automobile that looked like the automobile that you saw that night before in front of that factory? A. Yes, I did. Q. What is your answer? A. Yes, I have seen a car like that. Q. How many times before that night had you seen this automobile that you say looked like the one that you saw in front there that night? Q. How many times had you seen an automobile that looked like that one? A. Several times before."

10. Because the Court declined to grant the motion of the defendant, Horne, to strike out the tes-

timony of the witness, Margaret Christianson, when it appeared upon cross examination that she could not say that the automobile she had seen on the night of the fire was an automobile which she had previously seen used by the defendant, Horne.

11. Because the Court declined to grant the motion of the defendant, Horne, to strike out the testimony of the witness, Margaret Christianson, when after the close of her testimony, it appeared that the witness was wholly unable to identify the automobile which she says she saw in front of the factory upon the night of the fire.

12. Because the Trial Court refused, upon the motion of the defendant, Horne, to strike out the testimony of the witness, Lange, with respect to a car which he says he saw in front of the factory upon the night of the fire, the said car in no wise being identified as having any connection whatever with either of the defendants.

13. Because the Trial Court, over the objection and exception of the defendant, Horne, permitted the witness, Turak, to testify to an alleged conversation between the witness and Mussikee in September, 1923.

14. Because the Trial Court, over the objection and exception of the defendant, Horne, permitted an answer to the following question, the conversation referred to having reference to one alleged to have taken place between the witness, Turak, and defendant, Mussikee, in September, 1923: "Q. Give us the conversation, what he said to you and what you said to him?"

15. Because over the objection and exception of the defendant, Horne, the Trial Court permitted the witness, Turak, to answer the following question: "Q. Now, did Mussikee say to you on that 15th day of January, 1924, that he had promised, he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job?"

16. Because the Trial Court, over the objection and exception of the defendant, Horne, permitted the witness, Goldberg, to testify to a conversation alleged to have taken place between himself and Horne in October, 1923.

17. Because over the objection and exception of the defendant, Joseph H. Horne, the Trial Court permitted the following question to be put to the witness, Goldberg, and answered by him: "Q. Now, at the last trial when you were asked by me what Mr. Horne said to you in Clifton when he first came to your house in October, here is what you answered, 'and he said, "Well, I am sent from a friend of yours, Mr. Mussikee sent me over to you if you want to go up there in Orange."' Did you make that answer?"

18. Because the Trial Court overruled the motion of the defendant, Horne, to strike out the testimony of the witness, Goldberg, with respect to his alleged conversation with the defendant, Horne, because the witness, Goldberg, could not identify the defendant, Horne.

19. Because the Trial Court refused at the conclusion of the State's case, to grant the motion of the defendant, Horne, for a dismissal of the first count of the indictment or for a direction of a verdict in favor of the defendant, Horne, thereon.

20. Because the Trial Court at the conclusion of the State's case, declined to grant the motion of the defendant, Horne, for a dismissal of the second count of the indictment or for a direction of a verdict in favor of the defendant, Horne, thereon.

21. Because the Trial Court permitted the prosecutor to interrogate the witness, Lena Nevins, with respect to a man named Finkelstein coming to the house after the fire with a note for Horne, which testimony all went in over the objection and exception of the defendant, Mussikee.

22. Because the Trial Court permitted an answer by the witness, Lena Nevins, over the objection and exception of the defendant, Mussikee, to the prosecutor's question: "Q. Didn't you answer the door some time after the fire and meet a man who said he was Finkelstein?"

23. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following question: "Q. Did a man who told you his name was Finkelstein come to your house after the fire inquiring for Mr. Horne? Yes or no."

24. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following question put by the prosecutor: "Q. And did he leave with you a message for Mr. Horne?"

25. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following

question put by the prosecutor: "Q. Did you receive a paper upon which there was something written to give to Mr. Horne?"

26. Because the Trial Court over the objection and exception of the defendant, Mussikee, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Did you give the paper to Mr. Horne?"

27. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to answer the following question put to her by the prosecutor: "Q. Now, when you gave this paper to Mr. Horne, do you know what Mr. Horne did?"

28. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to testify in answer to a question put to her by the prosecutor with respect to Horne calling someone up on the telephone after delivery of the message to him.

29. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the witness, Lena Nevins, to be interrogated by the prosecutor with respect to her testimony upon the previous trial and permitted the prosecutor to put the following question: "Q. Do you remember this question being put to you, page 257, "Question: Mr. Horne came home about six o'clock and called up Mussikee in Passaic, that is true, isn't it?" And your answer was, "Yes."

30. Because the Trial Court declined to grant a mistrial upon the motion of the defendant,

Horne, questions by the court having been put to the witness, Lena Nevins, which caused Lena Nevins to state that the note was from Mr. Mussikee, whereas the fact was, as it appeared by the witness' testimony, that she had no knowledge as to who the note was from and because it appeared that although the jury was instructed to disregard the testimony that the note was from Mr. Mussikee, the condition of the record was such as that the instructions could not remove the influence which must have been made upon the jury.

31. Because the Trial Court refused upon the motion of the defendant, Horne, to strike out the testimony of the witness, Lena Nevins, at its conclusion.

32. Because the Trial Court declined to receive in evidence upon the offer of defendant, Mussikee, a bill from the witness, Turak, to the defendant, Mussikee.

33. Because the Trial Court over the objection and exception of the defendant, Horne, permitted the following question to be put to the defendant, Mussikee, by the prosecutor: "Q. When was it that you talked to Goldberg and Goldberg asked you for $300.00 to give Finkelstein for a fire in West Orange with reference to the conversation you just told us you had with Mr. Horne over the wire?"

34. Because tne Trial Court at the conclusion of the trial declined to grant the motion of the defendant, Horne, to strike from the record all the testimony which had reference to an automobile being at the place of the fire on the night of the fire.

35. Because the Trial Court declined to grant the motion of the defendant, Horne, to strike out of the case all the testimony which had reference to the note, Exhibit D. 2.

36. Because the Trial Court declined to grant the motion of the defendant, Horne, for a direction of a verdict upon the first count in favor of the defendant, Horne.

37. Because the Trial Court declined to grant the motion of the defendant, Horne, for a direction of a verdict in favor of the defendant, Horne, upon the second count.

38. Because the Trial Court declined to grant the motion of the defendant, Horne, to compel the State to elect whether it intended to go to the jury upon the first count or the second count.

39. Because the Trial Court declined to grant the motion of the defendant, Horne, to compel the State to elect whether it intended to charge the defendant, Horne, upon the first count with the actual burning or with the procuring and consenting to the burning.

40. Because the Trial Court declined to grant the motion of the defendant, Horne, to compel the State to elect whether it intended to charge the defendant, Horne, upon the second count with the actual burning or with the procuring and consenting to the burning.

41. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial during the prosecutor's summing up, when the prosecutor referred to the man, Fisch, as being in the employ of the defendant, Mussikee, as a carpenter.

42. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial during the prosecutor's summing up, when the prosecutor referred to statements as having been made by the witness, Turak, in Passaic, among other things, as follows: "Turak was told in Passaic, 'You have got to go to West Orange in person.' He said, 'Well, you have my statement.' He said, 'I do not want to repeat my statement,'" there being no evidence whatever upon which any such statement could be based.

43. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial when the prosecutor in the course of his summing up used the following language: "Anybody who assists in that kind of crime to get a few paltry dollars from an insurance company gets no sympathy from me, but I tell you we are up against it in these cases. But I say Turak, when this piece of paper could not be used—"(referring to a statement supposed to have been made by the witness, Turak, then in the possession of the prosecutor).

44. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial during the summing up of the prosecutor when the prosecutor continued to refer to the man, Fisch, as a carpenter who does carpenter work for Mussikee.

45. Because the Trial Court declined to grant the motion of the defendant, Horne, for a mistrial during the summing up of the prosecutor when the prosecutor referred to how it was that the matter came to be presented to the Grand Jury by the

prosecutor's office and referred to the arrest of Goldberg in Passaic, etc.

46. Because the Trial Court during the prosecutor's summing up, declined to grant the motion of the defendant, Horne, for a mistrial, when he related how the police received information from Goldberg and in effect what Goldberg said to the police.

47. Because the Trial Court at the conclusion of the prosecutor's summing up declined to grant the motion of the defendant, Horne, for a mistrial, which motion was based upon the misstatement of facts contained in the prosecutor's summing up and upon the references by the prosecutor to matters not in evidence.

48. Because the Trial Court declined to receive, at the conclusion of the prosecutor's summing up, from the defendant, Horne, additional requests to charge, based upon the prosecutor's summing up.

49. Because the Trial Court declined to charge the second request of the defendant, Horne, to charge, which was as follows:

> "No conversations between the defendant Mussikee and any other persons can in any way be binding upon the defendant Horne, unless you find from the evidence that it has been proven beyond a reasonable doubt that the fire was set and that the setting was brought about by reason of an agreement between Horne and Mussikee; and unless such an agreement is proven beyond a reasonable doubt, no testimony as to such conversations can bind the defendant Horne."

Specification of Causes for Defendant Horne.

50. Because the Trial Court declined to charge the third request of the defendant, Horne, to charge, which was as follows:

> "The presumption of law is that the fire originated in an entirely innocent and accidental way so far as the defendant Horne is concerned, and this presumption continues until and unless the State has overcome the presumption of innocence by legal testimony which must satisfy you beyond a reasonable doubt as to the guilt of the defendant Horne."

51. Because the Trial Court declined to charge "B" of the fifth request of the defendant, Horne, to charge, which was as follows:

> "One of the State's witnesses, Goldberg, has admitted in his testimony having been convicted of a crime. Conviction of a crime is evidence which will tend to impeach the credibility of his testimony, and you are justified in considering the fact that he has been convicted of a crime in deciding whether you should or should not believe Goldberg's testimony."

52. Because the Trial Court declined to charge the sixth request of the defendant, Horne, to charge, which was as follows:

> "Evidence has been introduced on the part of the defendant as to his good character or reputation. You are obliged to consider this evidence as to the good character of the defendant, and if such evidence in the case is sufficient to raise a reasonable doubt in your minds, as to the guilt of the defendant you should in such case acquit the defendant."

Specification of Causes for Defendant Horne.

53. Because the Trial Court declined to charge the eighth request of the defendant, Horne, to charge, which was as follows:

> "In order to convict the defendant Joseph H. Horne you must be satisfied beyond a reasonable doubt that the person with whom the witness Goldberg spoke to at Clifton was in fact the defendant Joseph H. Horne."

54. Because the Trial Court declined to charge the ninth request of the defendant, Horne, to charge, which was as follows:

> "If you are not satisfied that the defendant Joseph H. Horne was the person who talked to the witness Goldberg who testified on cross examination that he did not know whether the defendant Horne was the person he spoke to, you must acquit the defendant, Horne."

55. Because the Trial Court declined to charge the tenth request of the defendant, Horne, to charge, which was as follows:

> "If, upon a full consideration of all the evidence in the case, the jury entertain a reasonable doubt as to whether the defendant is guilty, then you should find him not guilty."

56. Because the Trial Court declined to charge the eleventh request of the defendant, Horne, to charge, which was as follows:

> "Circumstantial evidence must be clear, convincing and conclusive, excluding all rational doubt as to the defendant's guilt, in order for you to convict him of this charge."

57. Because the Trial Court declined to charge the twelfth request of the defendant, Horne, to charge, which was as follows:

> "Proof beyond a reasonable doubt of every material and essential element of this

offense is necessary in order to convict the defendant."

58. Because the Trial Court declined to charge the thirteenth request of the defendant, Horne, to charge, which was as follows:

"Even if you believe that the defendant Mussikee had these said conversations with the witnesses Goldberg and Turak nevertheless you must be satisfied beyond a reasonable doubt that the fire was of an incendiary origin before you can convict the defendant."

59. Because the Court declined to charge the defendant Horne's additional request to charge No. 1, which was as follows:

"The difficulty of securing proof furnishes no reason for a conviction without proper proof."

60. Because the Court declined to charge the defendant Horne's additional request to charge No. 2, which was as follows:

"The difficulty of securing proof does not alter the rule that before convicting the defendants the jury must be satisfied by proof beyond a reasonable doubt of the guilt of the defendants."

61. Because the Court declined to charge the defendant Horne's additional request to charge No. 3, which was as follows:

"There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature."

62. Because the Court charged as follows:

"The State in electing to try these men, has taken on the burden of establishing the

guilt of one or both as to every material element in the case."

63. Because the Court throughout the charge, although requested so to do, did not make it clear to the jury that the burden was upon the State to prove each and every element of the crime charged beyond a reasonable doubt.

64. Because the Court charged the jury as follows:

"Under the law, you may infer the fact of setting fire from the proof before you, of the acts or conduct of the defendant or defendants and, while there is no evidence in this case of the actual touching of a match to ignite the fire, the actual starting of the fire, the law says you may infer the facts from the proof of acts or conduct of the defendant—that is, if the evidence justifies it, if there is sufficient evidence to justify that inference."

65. Because the Court charged the jury:

"You cannot infer that merely from the fact that there was a fire. You cannot infer that the defendant or defendants started it, but if you find there is sufficient evidence in the case to justify it, you may infer the fact from such evidence, and it must be shown that it was with the intent—that is to say, that the fire was set with the intent to burn. That also may be inferred by the jury from the proven facts and circumstances in the case."

66. Because the Court charged the jury:

"Then you have in evidence, too, a copy of a note which was given to Mr. Horne, by

Mrs. Nevins, which was left at his place some time after the fire, which speaks for itself, and calls the attention of Horne, to the fact that he call up his friend, Mussikee, and Mr. Horne denies any knowledge as to the reason why this note should come through Finkelstein."

67. Because the Court charged the jury:

"It is your duty as jurors to take the evidence and give such credit to it as you see fit, and, I might say, in reference to that point, in arriving at the value of the testimony you may consider the interest that anyone has in the outcome of this case. What interest has the chief? What interest has Baldwin, or the discharged fireman? What interest has Goldberg, Turak or any other witness that has been called either by the State or defense? Very properly you may consider the interest that the defendants have in the outcome, because they are on trial and your verdict is going to determine their guilt or innocence, and so that is a proper consideration in this case."

68. Because the Court did not properly charge the rule with respect to reasonable doubt.

69. Because the Court denied the motion in arrest of judgment.

70. Because manifest injustice was done to the defendant by the entire charge of the Court.

71. Because in other respects the verdict and judgment were erroneous.

72. Plaintiff assigns as error and specifies as cause for reversal under the provisions of Chapter 349 of the Laws of 1921 that the verdict was against the weight of the evidence.

KESSLER & KESSLER,
Attorneys for Defendant, Joseph H. Horne.

Remittitur.

NEW JERSEY SUPREME COURT.

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

v.

MICHAEL MUSSIKEE and JOSEPH HORNE,
Plaintiffs-in-Error.

} On Writ of Error.

This cause having been submitted at the January Term, nineteen hundred and twenty-seven, of this Court, by John O. Bigelow, Esquire, and J. Victor D'Aloia, Esquire, Attorneys for the Defendant-in-Error, and Merritt Lane, Esquire, and Messrs. Kessler and Kessler, Attorneys for the Plaintiffs-in-Error, and the Court having considered the same and finding no error in the record and proceedings in the Essex County Court of Quarter Sessions;

It is thereupon ordered and adjudged that the judgment of the Essex County Court of Quarter Sessions, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the Essex County Court of Quarter Sessions to be proceeded with in accordance with this judgment and the practice of said Court.

Entered Nov. 22nd, 1927.
On motion of

JOSEPH L. SMITH,
Prosecutor of the Pleas,
Attorney for Defendant-in-Error.

Assignment of Error of Plaintiff-in-Error Michael Mussikee.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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

v.

MICHAEL MUSSIKEE and JOSEPH HORNE,
Plaintiffs-in-Error.

Afterwards, to wit, on the return of the said writ before the New Jersey Court of Errors and Appeals, came the said Michael Mussikee, by Merritt Lane, his attorney, and says that in the record and proceedings aforesaid and also in the giving of judgment there is manifest error, to wit:

1. Because the Supreme Court erred in giving judgment for the State of New Jersey and affirming the judgment brought up by the writ of error from the New Jersey Supreme Court, whereas, the said Supreme Court should have given judgment for the plaintiff-in-error, Michael Mussikee, and reversed the judgment brought up for one or more of the reasons set forth in the assignment of errors and in the specification of causes for reversal in the New Jersey Supreme Court.

MERRITT LANE,
Attorney for and of counsel with Plaintiff-in-Error, Michael Mussikee.

Assignment of Error of Plaintiff-in-Error Joseph Horne.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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

v.

MICHAEL MUSSIKEE and JOSEPH HORNE,
Plaintiffs-in-Error.

Afterwards, to wit, on the return of the said writ before the New Jersey Court of Errors and Appeals, came the said Joseph Horne, by Kessler & Kessler, his attorneys, and says that in the record and proceedings aforesaid and also in the giving of judgment there is manifest error, to wit:

1. Because the Supreme Court erred in giving judgment for the State of New Jersey and affirming the judgment brought up by the writ of error from the New Jersey Supreme Court, whereas, the said Supreme Court should have given judgment for the plaintiff-in-error, Joseph Horne, and reversed the judgment brought up for one or more of the reasons set forth in the assignment of errors and in the specification of causes for reversal in the New Jersey Supreme Court.

KESSLER & KESSLER,
Attorneys for and of counsel with
Plaintiff-in-Error Joseph Horne.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* MICHAEL MUSSIKEE and JOSEPH H. HORNE, *Plaintiffs-in-Error.*	*On Error to Supreme Court Affirming a Judgment of Conviction of Essex Quarter Sessions.* *Before* CAFFERY, *J., and a Jury.* *Indictments under Secs. 124 and 126 of the Crimes Act.*

BRIEF FOR PLAINTIFF-IN-ERROR MUSSIKEE.

(Italics our, except where otherwise noted.)

Statement of the Case.

The case went to the Supreme Court on strict bill (assignment of errors, p. 398), and on review of the whole case (return, p. 5; specification of causes for reversal, p. 419). The case comes here by the same method (p. 142).

Defendants were jointly indicted (first count) for wilfully and maliciously burning and causing to burn *and* aiding and consenting to the burning of the factory building of the Merritt Products Company under Section 124 of the Crimes Act, 2 C. S. of N. J. 1786, and (second count)

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for wilfully and maliciously setting fire to and burning and aiding, procuring *and* consenting to the setting fire to and burning of the building known as 494-498 Valley Road, in the Town of West Orange, *and* goods, merchandise and other chattels then therein to prejudice insurance companies under Section 126 of the Crimes Act, 2 C. S. of N. J., page 1786 (indictment, p. 3).

They were jointly tried on June 24, 1924. A motion to quash was made and denied. The defendants were convicted and a writ of error taken from the Supreme Court. On April 16, 1926, that court (Gummere, *C. J.,* Parker and Katzenbach, *J. J.*) reversed the conviction (101 N. J. L. 268). The re-trial opened on March 29, 1926 (p. 11). Defendants moved for permission to withdraw the plea of not guilty for the purpose of moving to quash. This motion was denied. While the trial court did not state the reason, it is fair to assume that it was because the motion had already been made at a previous stage of the proceedings and denied, and exception taken. The judgment record (p. 8) (erroneously, we think) omits any reference to the previous trial and to the motion to quash. The record does not truthfully record what took place below in the course of the case (See opinion of the Supreme Court, 101 N. J. L. 268). At the conclusion of the State's case a motion was made to dismiss the indictment, and each count specifically, upon the same grounds which were urged upon the motion to quash, and these grounds were specifically indicated (pp. 146, 147). The motion also was based upon the ground that there was no proof of guilt so far as Mussikee was concerned (p. 147). The motion was denied. At the conclusion of the whole case these motions were renewed (p. 303) and the

court was asked to compel the State to elect between the first and second counts, and this was denied (p. 304). The court charged the jury (p. 369) and denied the request of Mussikee to charge that there could be a conviction upon one count but not upon both. (Request 38, p. 389.) The jury returned a verdict of guilty upon both counts (p. 10). A motion was then made in arrest of judgment (p. 394) because of the defective indictment. The defendants were thereupon sentenced to a minimum term of two and a half years and a maximum term of five years at hard labor and to pay a fine of $1,000 each. The sentence of the court on the previous conviction had *not* included a fine.

A writ of error to this conviction was taken to the Supreme Court, which court (Gummere, *C. J.,* and Black and Lloyd, *J. J.*) affirmed the conviction (p. 474), and thereupon this writ of error was taken from this court.

There are many assignments of error and specification of causes for reversal. They may, however, be divided into a limited number of classes.

POINT I.

There was error in the refusal of the court to quash the indictment (p. 11); in refusing to compel the State to elect upon which offense it intended to go to the jury (p. 304); in refusing to elect upon which count it intended to go to the jury (p. 304); in refusing to direct a verdict for the defendant Mussikee or to dismiss the indictment (p. 146); in refusing to direct a verdict in favor of defendant Mussikee at the conclusion of the whole case (p. 303); in refusing to grant defendant Mussikee's requests to charge 30, 31 and 38; in refusing defendant Mussikee's motion in arrest of judgment.

This point involves a consideration of the assignments of error and specification of causes for reversal 1, 23, 19, 20 (insofar as the latter rest upon alleged infirmities in the indictment), 36, 37 (insofar as the latter rest upon alleged infirmities in the indictment), 38, 39, 40, 75, 86.

The matters here argued were considered by the Supreme Court in its opinion upon the first writ of error, *State* v. *Mussikee,* 101 N. J. L. 268, and resolved against Mussikee and, for that reason, they were not considered by the Supreme Court in its opinion upon the second writ of error, although not abandoned in that court, and those matters are now properly before this court.

The questions involved under the assignments and specification of causes for reversal are so closely related as that they may be argued together.

A. The indictment (p. 5) consisted of two counts; the first count charged that defendants "wilfully and maliciously did burn *and* cause to be burned *and* aid *and* consent to the burning of the factory building of the Merritt Products

Company, a corporation." The second count charged that the defendants wilfully and maliciously did set fire to, burn *and* aid, procure and consent to the setting fire to and burning of the building known as 494-498 Valley Road, in the Town of West Orange, aforesaid, *and* the goods, merchandise and other chattels then therein, which building, goods, merchandise and other chattels were then insured by the (naming insurance companies) corporations, against loss and damage by fire, with intent to prejudice said corporations, said corporations having theretofore underwritten certain policies of insurance on said building, goods, merchandise and other chattels, the said policies being then and there in full force and effect."

The first count was intended to charge a crime under Section 124 of the Crimes Act, 2 C. S. of N. J., page 1786, which reads as follows:

> "Any person who shall wilfully or maliciously burn, *or* cause to be burned, *or* aid, counsel, procure, *or* consent to the burning of any barn, stable, or other building of another, not a parcel of a dwelling house, or any shop, storehouse, warehouse, malt-house, mill, or other building of another * * * shall be guilty of a high misdemeanor."

The second count was intended to charge a crime under Section 126 of the Crimes Act, 2 C. S. of N. J., Section 126, page 1786, which reads as follows:

> "Any person who shall wilfully or maliciously set fire to, or burn, *or* aid, counsel, procure, *or* consent to the setting fire to or burning of any building * * * *or* any goods, wares, merchandise, or other chattels, which shall at the time be insured by any person or corporation against loss or damage by fire, with intent to prejudice any person or corporation that has underwritten

> or shall underwrite any policy of insurance thereon, whether the same be the property of such person, or any other, shall be guilty of a high misdemeanor."

Both counts are defective because each of them charge two, at least, separate and distinct crimes. The first count charges that defendants wilfully and maliciously did burn *and* cause to be burned *and* did aid and consent to the burning. The second count charges that defendants did set fire to and burn *and* aid, procure *and* consent to the setting fire to *and* burning.

The 124th Section of the Crimes Act under which the first count is framed, *in the disjunctive,* provides for the crime of burning *or* causing to be burned *or* aiding * * * *or* consenting to the burning.

The 126th Section of the statute, under which the second count is framed, provides, *in the disjunctive,* for the crime of setting fire to *or* burning *or* aiding, procuring *or* consenting to the setting fire to, etc.

In *State* v. *Brand,* 76 N. J. L. 267, referring to the 126th Section of the statute, the Supreme Court said:

> "We think that this statute denounces two distinct crimes, one the wilfully or maliciously setting fire to or burning the insured property with intent to prejudice the underwriter; the other, aiding, counseling, procuring or consenting to the setting fire to or burning of such insured property."

That case was affirmed by this court, 77 N. J. L. 486. There was no criticism in the opinion of this court of the opinion of Mr. Justice Swayze in the Supreme Court to the effect that two separate and distinct crimes were provided for by the statute.

The reasoning of the Supreme Court in the Brand case is as applicable to Section 124 as it is to Section 126.

The second count is further duplicitious in that it also charges the burning of a building *and* the burning of goods, merchandise and other chattels then therein, the statute providing, *in the disjunctive,* for the crime of the burning of any building *or* any goods, wares, merchandise or other chattels. The indictment reads as if the statute read that the crime denounced was the burning of a building *and* its contents. On the contrary, the goods, wares, merchandise and other chattels referred to in the statute have no connection with any particular building burned. The statute provides for two distinct offences, *i. e.,* the burning of a building *and* the burning of goods, wares and merchandise wherever located.

If the counts of the indictment contain a charge of more than one crime they are bad.

That but one crime can be charged in a single count is fundamental.

State v. *Sing Lee,* 94 N. J. L. 266;
State v. *Brown,* (5 Adv. R. 1160, 138 Atl. 370).

In the Brand case, as well as in *State* v. *Lamb,* 81 N. J. L. 234, it is suggested that the charge of one of the offenses may be treated as surplusage and the indictment amended, under Section 44 of the Criminal Procedure Act, citing *State* v. *Kern,* 51 N. J. L. 259; *State* v. *Bartholomew,* 69 N. J. L. 162, and it was noted in the Brand case that no motion to quash the indictment was made as required by Section 44.

In *State* v. *Lamb,* 81 N. J. L. 234, the Supreme Court declined to set aside an indictment upon

the ground that there was more than one crime charged in one count, upon a motion to quash holding that the State should be permitted to strike out one of the charges if what was left sufficed to charge a crime, but that it would be for the State to *elect* on which charge defendant should be tried.

In the case at bar, after the denial of the motion to quash, a motion to compel the State to *elect* was made, which was denied. The motion was renewed at the conclusion of the State's case. It was again renewed at the conclusion of the whole case and denied. Thereupon, the State not having elected, the court was asked to charge the jury the 30th and 31st requests to charge, which requests were denied, and thereafter, defendant having been tried and convicted upon these duplicitious counts, the motion in arrest of judgment was made, which was denied. Upon the motion to direct a verdict, the Court expressly permitted counsel for defendant to make the motion without reciting the grounds (p. 305).

The cases which were relied upon below by the State are not controlling.

State v. *Price,* 11 N. J. L. 203 was in the Supreme Court, and the only words of the statute under consideration dealt with were the words "burn or cause to be burned." But the first count in the indictment in the case at bar does not content itself with alleging that defendants burned *and* caused to be burned but proceeds and alleges "and did burn *and* consent to the burning of the factory building" and the second count does not content itself with alleging that they did set fire to *and* burn but proceeds "*and* aid, procure and consent to the setting fire to and burning, which brings the case

within the reasoning of *State* v. *Brand,* 76 N. J. L. 267, referring to the 126th Section of the statute, affirmed by this court in 77 N. J. L. 486.

State v. *Traction Co.,* 67 N. J. L. 14, is a case in the Supreme Court and has no application to the case at bar. The charge there was the obstruction of a highway. The indictment charged the defendant with failure to repair and with obstructing. The court held that the failure to repair was one of the means by which the substantive offense to wit, the maintenance of a nuisance, could be effected, and therefore held the count not double, stating— "To allege in one count all of the acts by which a nuisance is constituted, does not render the count double."

State v. *Bartholomew,* 69 N. J. L. 160, was another case in the Supreme Court involving an indictment for embezzlement where the charge was, as laid in the indictment, that the defendant embezzled money, property and securities. It was held that the substantive offense was the embezzlement and that the reference to the words "money, property and securities" was a mere reference to the means by which the substantive offense had been committed.

State v. *Hatfield,* 87 N. J. L. 124, was another case in the Supreme Court and resulted in a *reversal* of the conviction. The statute was directed against the use and pretending to use any physiognomy, palmistry or like crafty science, or did pretend to tell destinies, or fortunes," etc. While the conviction was reversed, the court said:

> "As they all appear to be cognate offences care must be taken not to confuse the several specifications of the same offence, with cases where the offences are in their nature distinct or where the offences were committed on different dates."

The court treated the offence denounced by the statute as a single offence with different specifications as to how it could be committed.

But that is not the situation in the case at bar. As the court said in *State* v. *Brand,* 76 N. J. L. 267, there are *two* distinct offences denounced by the statute, and one not dependent upon the other. One may be said to be the offence of actual burning or causing to be burned and the other the offence of consenting to the burning. They are not dependent one upon the other and *both* distinct offences are charged in the single counts.

So far as I can ascertain this court has never passed upon this subject. It was not passed upon in *State* v. *Harris,* 100 N. J. L. 184, affirming the Supreme Court upon the opinion of that court, 1 N. J. Mis. 526, for the court held that the matter was not properly before it.

Nor is *State* v. *Bove,* 98 N. J. L. 350, affirmed 98 N. J. L. 576, referred to by the Supreme Court in the first opinion in this case, 101 N. J. L. 268, at p. 270, applicable. In that case the charge was the selling of lottery tickets, and that the defendant did "give, barter, sell and dispose of * * * and did deliver and furnish * * *." Of course the delivering and furnishing was a part of the giving, bartering and selling which is quite a different thing from the situation at bar, where two different offences are condemned by the statute.

The Supreme Court, the first time that this case was before it, 101 N. J. L. 268, suggested that the question was not properly before the court, citing *State* v. *Harris,* 100 N. J. L. 184. But it was before the Supreme Court the second time this case got to it for not only was a motion to quash made preceding the first trial, but

there was a refusal to compel the State to elect (p. 304) upon which offence it intended to go to the jury, a refusal to compel the State to elect upon which count it intended to go to the jury, a refusal to direct a verdict or to dismiss the indictment, at the close of the State's case, a refusal to direct a verdict at the conclusion of the whole case, a denial of the 30th, 31st and 38th requests to charge, a refusal to grant a motion in arrest of judgment.

B. There was error in the refusal of the trial court to compel the State to elect between the counts (p. 307) and in refusing to grant the request of defendant Mussikee to charge that the jury might convict upon one of the counts but not on both (33th request) Assignment of Errors and Specifications, 47 and 75.

The 123rd Section of the Crimes Act, 2 C. S. of N. J., page 1785, provides for the crime of arson, *i. e.,* the burning of a dwelling house of another. The 124th section is intended to cover the case of the burning of a house of another, not a parcel of a dwelling house. The 125th section is intended to cover the setting fire to a building of another with intent to burn. The 126th section is intended to cover the burning of a building *or* goods, wares and merchandise, whether they belong to the person causing the burning or to another, with intent to prejudice an insurer.

Defendants have each been found guilty under both the 124th and the 126th sections, *i. e.,* they have been found guilty of burning a building of another, not a dwelling house, and they have been found guilty of burning a building with intent to prejudice insurers. The acts which were committed by defendants, for the consequences of which they were found guilty under

both sections of the statute, were precisely the same acts. There was but one burning and there was but one set of acts. While section 124 does *not* cover the burning of goods, wares and merchandise, section 126 *does* cover goods, wares and merchandise as well as buildings and if the burning is with the intent to defraud insurance companies, then the burning of the building in the case at bar is covered by section 126 to the same extent as by section 124. The sole difference between the two sections, so far as here important, is with respect to *intent.*

The result is that, considering sections 124 and 126 as providing for separate and distinct crimes, each of the crimes being a high misdemeanor, defendant has been convicted of two high misdemeanors although he performed but one set of acts.

The result is double punishment.

We submit that the test is whether, had defendants been convicted under section 126 and then had been indicted under section 124 and the trial moved under that section a plea of *autrefois convict* would be a bar, and we submit that it clearly would operate as such a bar under the reasoning of the cases of *State* v. *Mouser,* 92 N. J. L. 474, and *State* v. *Rose,* 72 N. J. L. 462, and *State* v. *Cooper,* 13 N. J. L. 371.

POINT II.

THE FACTS.

In considering the facts, there will be included the argument upon the assignment of errors and specification of causes for reversal having to do—

(a) With the denial of the motion made at the conclusion of the State's case to dismiss the indictment or direct a verdict (p. 146, assignment of errors and specification of causes for reversal, 19, 20) so far as the motion was not based upon alleged infirmities in the indictment, and

(b) With the denial of the trial court of the motion to direct a verdict at the conclusion of the whole case (p. 303) (assignment of errors and specification of causes for reversal, 36, 37); insofar as the motions do not rest upon alleged infirmities in the indictment.

(c) With respect to the contention that the verdict is against the weight of the evidence (assignment of errors and specification of causes for reversal No. 89).

(d) With respect to the court's refusal, at various times throughout the trial of the case, to grant a mistrial; on the prosecutor's opening (p. 15), (assignment of errors and specification of causes for reversal No. 4); during the examination of the witness Lena Nevins (p. 196); (assignment of errors and specification of causes for reversal No. 30); during the prosecutor's summing up (exception pp. 351, 352, 357, 360, 361, 368; assignment of errors and specification of causes for reversal Nos. 41, 42, 43, 44, 45, 46, 47).

(e) With respect to the refusal of the court to receive and to charge the three additional requests of the defendant Mussikee presented after the prosecutor's summing up and based thereon (exception p. 368, additional requests p. 389, assignment of errors and specification of causes for reversal Nos. 48, 76, 77, 78).

(f) With respect to the admission by the court of the evidence of Mrs. Nevins as to the note; the refusal of the court to grant a mistrial during the course of that evidence; the refusal of the court to strike out the evidence with respect to the note during the course of the examination of Mrs. Nevins; the refusal of the court, at the conclusion of the whole case, to strike out all of the testimony having reference to the note; the refusal of the court to charge the 34th and 37th requests of defendant Mussikee to charge, which requests were based upon the evidence as to the note; the reference by the court to the note in the charge. (Assignment of errors and specification of causes for reversal Nos. 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 72, 73, 74 and 83.)

The matters above referred to will be argued under one head as they all involve a general consideration of the testimony.

Defendant Joseph H. Horne was the president of the Merritt Products Company, a corporation which had been engaged for sometime before the fire in the manufacture of automobile accessories and belts made from khaki webbing and rubber (p. 279). He was also the president and largest stockholder of the Horne Realty Company, which owned the real estate (p. 260). The building was on the corner of Joyce street and Valley Road, West Orange. Horne had lived in East Orange for upwards of three years

prior to which time, for two and a half years, he had lived in Passaic Park and was connected with the Union Novelty Braid Works in Garfield (p. 261), and he had lived in Flatbush and Borough Park, Brooklyn for eighteen years (p. 277) and had there been engaged in buying and remodelling houses, etc. (pp. 261-262). He was fifty-two years old and had a family. The court refused to permit him to testify as to how many children he had (p. 260). His daughter, however, was produced (p. 290) and said that she was twenty-six years old and that there were three children, all married. He produced a number of character witnesses. Ireland, vice-president of the Midwood Trust Company, New York and Brooklyn (p. 229); Wardell, connected with the Midwood Trust Company of Brooklyn (p. 233); Stewart, tug dispatcher for the Erie Railroad (p. 237); Sochman in business in Brooklyn for more than twenty years (p. 238); Cohen in business in Brooklyn for fourteen years (p. 240); Kemper in business in Brooklyn for six years (p. 241).

Defendant Mussikee lived in Passiac. He was forty-one years old; married, with four children; he had lived in Passaic for twenty-one years and had been a building contractor in business for himself for the past eighteen years. He produced a number of character witnesses. Weiss, a civil engineer, Passaic (p. 149); Crane, in the sash and door business in Passaic (p. 150); Rossma, a building contractor in Passaic (p. 151); Corbin, lawyer and also president of the Guarantee Mortgage and Title Insurance Company (p. 179); Atkinson, treasurer of the Hobart Trust Company in Passaic (p. 180); Terhune, treasurer of the Peoples Bank and Trust Company (p. 181); Epstein, a real estate dealer

in Passaic (p. 183); Lieb, a builder in Passaic (p. 234), and president, for nine years, of a congregation of which Mussikee had been treasurer; Osborn, postmaster of Passaic (p. 236).

The State's case did not develop any relations between Horne and Mussikee.

Defendant Horne testified that about a year after he had moved from Passaic Park to Borough Park, New York, which would be about *eight years before the fire* (p. 267), he and Mussikee, with about five others, under the name of the Trio Realty Company, were interested in some property; that the business only continued for about five months (pp. 261, 262). In 1923 Horne contemplated building some houses on lots which he had bought in West Orange (pp. 276, 277). Mussikee visited him at the factory three or four times during the summer of 1923 (pp. 278, 279, 269, 270). The last time was about two months before the 1st of January, 1924 (p. 268), which would make it November. See Mussikee's testimony, pp. 254, 255.

There is no proof in the case, other than as above, of any relations between Horne and Mussikee prior to the fire.

Counsel for the State in its brief in the Supreme Court said:

> "Mussikee's interest in the fire does not appear. * * * It may well be that Horne engaged Mussikee as an expert in successful fires. Of course, as pointed out by this court, on review of the first trial, the State could not prove Mussikee's experience in this line."

This, we submit, is an innuendo which throughout the trial was injected into the jury box although the Supreme Court, upon the first trial,

had excluded evidence of the alleged facts upon which any such innuendo could be based. Notwithstanding the prior determination that evidence going to the *fact* was not competent, the prosecutor, on the trial and in the Supreme Court, relied upon the *innuendo* as if the fact had been proven. Counsel for the State also in his brief in the Supreme Court said:

> "After the fire, Horne denied having seen Mussikee for several years."

It is true that Cooper, the investigator for the National Board of Fire Underwriters, (p. 295) and who was present at the time the statement of Turak was made and who witnessed Turak's signature, which statement will hereafter be referred to, it appearing, we submit, upon the examination of Turak himself, that either that statement or his statement upon the stand was false, said that Horne had made this statement to him (p. 295). But Horne denied having made any such statement (p. 269).

The State's Case.

The fire occurred on January 6th, 1924. The State attempted to prove that it was incendiary in origin by Sheehan, chief of the West Orange Fire Department. He says that the alarm came in at 12:17 A. M. (p. 31). He immediately responded. He first saw the fire burning on the Joyce street side (p. 31). He laid in hose and found that the building was so barred that they had to burst in the side door on the Joyce street side (p. 32); they found "*simply a fire burning good and proper.*" He indicates on a diagram that when he burst in he saw the fire about twenty feet on one side of the partition between Rooms E and C, and another fire the other side of the partition. It took four or five hours to

extinguish the fire. He then says that it took probably *an hour and a half to extinguish the fire "so as to make an examination."* And—

> "Q Now, when you got an opportunity to make a complete examination, did you do it? A Pretty much, yes.
>
> Q Did you find when you made your complete examination any connection between the fire which was located in room E, right back of the office on the Joyce street side, and the fire which was burning when you broke in through this door with your battering ram in room C; did you find any connection between the two fires? A No, sir; none.
>
> Q Would you say there were separate fires? A Yes."

This latter was stricken out and then—

> "Q Did you discover any connection between the two fires? A No, sir. There were two separate and distinct fires."

The latter part of this answer was stricken out.

He then repeated that he *did not* find any connection between the two fires. He is *unable* to say whether there was a fire in the boiler. He says there was no connection between the fire in the boiler, if there was one, and either of the fires he had described.

On cross examination he testified (p. 36) that he made his inspection, from which he determined that there was no connection between the two fires, about four or four-thirty in the afternoon of the same day of the fire. And (p. 36)—

> "Q So the *only* examination you made to determine whether there was any connection between the two fires was after the fire was out on the next day? A The same day.
>
> Q *But after the fire was out?* A *Yes.*"

But, he had testified in the previous trial—

> "You examined the two fires for the purpose of trying to find out if one was connected with the other? Answer: *My dear sir, the fire had extended to such an extent and had burned to such an extent that after the fire was teetotally out it would take an expert to say.*"

He testifies at *this* trial that he may have said that thing and his explanation is—

> "Well, it is two years ago since then and a man is liable *to forget* a lot in two years."

He had testified at the previous trial (p. 39) that when he first came to the fire the building was filled with smoke. He tried to qualify that statement at this trial but finally admitted that when he first arrived the building *was* filled with smoke; that it was a hot fire and that the flames were shooting up to the windows and he had to burst into this flaming and smoking building (p. 40). He repeats (p. 40) that when he burst into the flaming, smoking building he saw two distinct and separate fires, and (p. 41)—

> "Q Well, did you say so because when you burst into this flaming, smoking building, you saw a flame there and a flame here; is that the reason why you say there were two separate and distinct fires? A Yes."

He concedes, however, that *when they burst in, the roof was burned, the beaver boards, which formed the ceiling were burned and that, if flaming beaver boards dropped from the roof on the stock, it would set fire to it* (p. 42), and (p. 42)—

> "Q Well, did you look at the roof to see where this second fire was or was blazing, whether the beaver boards on the top of the roof were off or not? A No, I don't think I did.
>
> Q Well, don't you know that there could be a connection between the two fires on the

beaver boards on that roof? A There probably could.

Q And there might be any number of fires in there with apparently no connection started from these blazing beaver boards dropping from the roof, isn't that so? A *You see, where there is sparks or burning timbers, you ignite anything underneath.*"

We submit that the statement of counsel for the State in the Supreme Court that our suggestion, that the original fire may have traveled along the ceiling and beaver boards burning and dropping may have started a second fire, finds no support in the testimony is negatived by the chief's testimony at this point as well as by the State's Exhibits S. 6 and S. 7, which showed that the roof was completely burned and the beaver boards, which formed the ceiling, had fallen, and that the suggestion of counsel for defendants is fully supported by the testimony of the chief from pages 56, etc. It will not do to say that there was some distance between the two fires, nor does the fact that there was a partition running to the ceiling alter the situation. There was no separation at the roof and the fire, in fact, *did* travel over the entire ceiling notwithstanding this partition. Whatever partition there was was wholly a frame open partition.

On page 46 the chief says that before they burst the door, they had worked probably "in the neighborhood of two or two and a half hours"; before they burst the door through they had been playing the hose upon the fire through a window (p. 48). He concedes that if you play a hose on burning material on a floor it may put out the flame in places, and then, if the hose is removed, the flame may again break out (pp. 48, 49). He had a good pressure (p. 49). He concedes that: with this good pressure, a solid

column of water will come out of a hose and proceed, in a solid column, for more than forty feet, which was the width of this building (pp. 50, 51); there is a void between the beaver board ceiling and the roof construction; if the boards were burning and the water struck the ceiling the boards would be brought down (p. 52). The roof was burned through (p. 55) about the middle of the building (p. 56). The hose had been playing on the fire at high pressure for at least ten or fifteen minutes before they effected an entrance (p. 74). When they effected an entrance they brought in another hose and had two hose playing on the fire. The smoke was as heavy as an oil fire (p. 76). The firemen carrying in the hose may have crawled in with it, and, page 79—

"Q As a matter of fact, through the smoke and the glow of the fire, you could not tell what part was burning, isn't that so? A Well, I could tell what part was burning, but, as I say, the fire had been burning in different places, but it is a mighty hard thing now just to point out on that map just the spot."

The chief was shown the photographs. His examination, taken in conjunction with the photographs, State's Exhibits S. 6 and S. 7, shows that: there were boxes of material standing upon the floor; some of the boxes were burned and some had never been touched by flame; *the floor generally was unscarred by flame; the roof was completely burned;* the beaver boards, which formed the ceiling, had fallen (pp. 56, 57, 58, 59), the fire was hottest in the roof and in proximity thereto (p. 60).

The photograph of the boiler pit shows that there was a hot fire around the boiler and the way the fire ran around the boiler and over the

casing extending to the rafters, indicates that it may well be that this fire started from the boiler (pp. 53, 54) and ran up into the rafters, and, page 61—

> "Q All right. The ceiling is sealed with beaver board and above the beaver board there are rafters, and there is a fire in one end of the building in the rafters and that fire is liable to travel along those rafters hemmed in by these beaver boards and it is likely to go through 100 or 150 feet from the beginning? A Exactly."

The witness testified (p. 81)—

> "Q You say that you may have turned this alarm in at some house, is that right? A It is like a dream to me.
>
> Q The whole thing seems like a dream to you. A Well, there is no wonder. As I said, if I could only memorize those things for two years."

The witness first attempted to make it appear (p. 80) that he remained continuously at the fire until 5:30 in the morning. Pressed, however, he said he left the fire to go to a house, by invitation of an acquaintance, for about fifteen or twenty minutes. He cannot say when. He thinks it was more than a half hour after he got to the fire and then says probably two hours, and (p. 80)—

> "Q How long was it after you left the fire after you turned in the second alarm? A Probably just as quick as I could get a telephone connection and call number two company, I don't know exactly how long that took."

He then says that he thinks he turned in the alarm from the house of a "party by the name of Baldwin," or "I may have sent it in from a fire alarm box, too" (p. 81). There was one right across the street. He cannot recollect

whether, during the course of the fire, he went to this house on two occasions, and (p. 82)—

> "Q Was it the same house you went to get a cup of coffee? A Yes, I had a cup of coffee, and, in fact, I had a little better.
>
> Q What is that? A You pretty near know now.
>
> Q Did you have more than one? A No.
>
> Q One good one; it was one good one? A I said I could have better than a cup of coffee.
>
> Q You said you did have better? A I said I could have.
>
> Q Well, what was the conversation about? Didn't you say you had something better than a cup of coffee? A I said I could have.
>
> Q Did you have it? A Yes.
>
> Q So you did have it? A Yes.
>
> Q Not only could, but did. I assume it was liquor? A I don't know."

He then denies (p. 81) that he made the examination after he went back to the fire, insisting that he did not make the examination until the afternoon, and that the reason why he did not was because he had an important engagement in the morning in New York (p. 83). And all this notwithstanding the fact that he had testified at the previous trial that, after the fire was out, *it was impossible to determine whether there were two fires or not* (p. 36), and that the first time he went back to the fire after it was out was on Sunday morning and he *could not get in.*

He testified (p. 80)—

> "Q How long did you stay on the fire? A A Why, probably until 5:30 or about there, as near as I can recall.
>
> Q In the morning? A In the morning.
>
> Q Didn't you leave the fire? A I left when the fire *was entirely extinguished and nothing was left.*"

But, on page 84, he says that he left "when the fire was *under control*" and went back to headquarters for a few minutes because he had a cut shin. He had testified at the previous trial that he went back to headquarters because he was sick.

This witness' testimony was summarized in the summing up (p. 311) and we refer to what was there said as part of this brief.

The witness is interrogated as to whether he did not state to Miss Ayres that there was nothing suspicious about the fire. He first answered "no, I didn't say anything about suspicious," and then his testimony upon the previous trial having been brought to his attention he says (p. 66)—

> "Q *Well, then, you did make the remark to Miss Ayres that there was nothing suspicious about the fire?* A *Probably I did.*"

And, then, p. 67—

> "Q I will go back once more. What is your recollection as to whether you said it or you didn't? A My recollection is that probably I did say to them that I had no suspicions.
>
> Q That you had no suspicion? A Yes.
>
> Q Now, that is your recollection today? A It probably is.
>
> Q Your recollection cannot be probably. What is your recollection today? * * *
>
> Q Your recollection may be that you probably said so, but I don't want any probable recollection. A Well, I don't remember."

He is interrogated as to statements made to Moran (p. 68)—

> "Q *And did he say to you that it is reported that you had stated that the fire had started in several places, and did you say to him, 'That is not true, because I never said so?'* A *I guess that is so.*"

This was *all* of the evidence produced by the State with respect to the alleged incendiary origin of the fire. At no time did the chief say that the fire was of incendiary origin. The basis of the State's claim is to be found in the one statement of the chief that there were two fires.

But this statement is so qualified by what the chief subsequently said that we submit his testimony offered no support whatever for an inference that the fire was of incendiary origin. At the time he reached the building it was a mass of flames. It was heavy with smoke. He put the hose in and played it under high pressure for at least ten or fifteen minutes before he burst in. After the door was burst in the firemen, *not the chief,* took another hose in. The building was a continuous structure, one hundred and fifty feet long. There were light wooden partitions at certain points but they were open. When he first saw the fire he could see nothing but a lot of blaze and somke. It was not until after the hose had been shot in and had been playing for sometime that he says he saw the two fires, *but* he says that *there was nothing unusual in finding a fire burning in two or three places under such conditions.* The rafters were burned and charred. The ceiling was covered with beaver boards. These beaver boards had dropped. The floor was covered with stock.

It is apparent that, as the roof burned, the beaver boards burned. As the beaver boards burned they dropped on the stock below and ignited it. Wherever a piece of beaver board dropped a fire would start. That this is the way it happened is demonstrated by the fact that the stock was burned in different places. Certain stock was burned; other stock standing alongside was not burned. The floor underneath

the burned stock in many instances was not even charred. The roof was burned through somewhere about the location of the boiler. The boiler room gives indication that there was a hot fire at this point which could undoubtedly have run up the siding to the rafters.

The presumption is that the fire was accidental and to overcome that presumption there is no evidence save only that above referred to.

The law upon the matter of the presumption that the fire was accidental and the nature of the proof required of the incendiary origin of the fire is elsewhere given under Point III.

It is submitted that the indictment should have been dismissed at the close of the State's case or the motion to direct a verdict at the close of the whole case should have been granted on the ground that there was no proper proof that the fire was of incendiary origin and that, assuming that there was sufficient proof to go to the jury, the verdict, which must include as one of its elements, and beyond a reasonable doubt, that the fire was of incendiary origin, is against the clear weight of the evidence.

The State produced the witness Ursallo who testified that: she was a tenant on the third floor of the house next to the factory, in the rear; about eight o'clock she smelled rubber burning; she does not know how long she smelled it, but that it was up to the time that her husband came home, *about ten-thirty;* she thought "it was coal gas coming out of my store" (p. 96).

To involve the defendant Horne the witness Margaret Christensen was produced (p. 96); she lived across the street from the factory. Over

objection (p. 97) and exception, she was permitted to testify that she had seen a dark automobile that night out in front of the factory and that she had seen an automobile which looked like the one she saw that night at the factory several times (p. 99). On cross examination, she refuses to say that the automobile she saw the night of the fire was the automobile which she had previously seen used by Horne. She saw the car about nine or nine-thirty P. M. A motion was made to strike this testimony out (pp. 99, 101), which was denied and exception taken.

Lange, who lived in the second house in from Joyce street on Valley Road, testified that a *quarter to eleven P. M.* he noticed a machine in front of the factory. He does not know whether it was open or closed. A motion was made to strike out this testimony which was denied (p. 101) and exception taken. If we assume the truth of all this testimony and that the automobiles had anything to do with the fire, *the fire bugs had the fire burning at eight o'clock so that rubber burning was smelled in the neighborhood but remained with their car until 10:45 at least apparently waiting for the fire to be discovered, for the alarm went in at 12:17 and at that time the entire interior was a flaming, smoking furnace.*

A further attempt to involve Horne was made through the witness Goldberg (p. 134). On direct examination he testifies that Horne came to his house in the middle of October, 1923, and said that he had been sent to him "by a pretty good friend and he got to do a job in Orange, New Jersey * * *." "The job was to be a good job, to make $300 on the job, and the job got to be a clear job." The man who came to see him

did not mention the name of the person who sent him (p. 136).

On cross examination (p. 141) *he says he does not know whether the man who came to see him in October, 1923, was Horne, or not. He refuses to identify Horne* (pp. 141, 142, 143, 144). Notwithstanding the refusal of the witness to identify Horne the court declined, on motion, to strike out the testimony (pp. 144, 145) and excepion was taken.

It is the testimony of this witness Goldberg to which counsel for the State must have referred when he said in his brief in the Supreme Court that "the most important proof to this end was evidence that before the fire the defendants had tried to engage certain persons, Turak and Goldberg * * *." Goldberg *did not* identify Horne as the person whom he saw. Horne absolutely denied having seen Goldberg, yet not only was this testimony of Goldberg admitted without his identification of the person who spoke to him, but it was permitted to overcome the denial of Horne.

To involve the defendant Mussikee the witness Turak was produced. Turak says that: he has known Mussikee for ten or twelve years; he was working for him in September, 1923 (p. 108). Over objection and exception he was permitted to testify to a conversation which he says he had with Mussikee in September, 1923 (p. 109)—

> "A I worked for Mr. Mussikee at School street. I dig some cellars, and he told me I have some good job for you; I have a fire job. Where? *West Orange.* I make a deal with him for $3,000. He promised to get for me $3,000 for the job."

Mussikee told him that it was a small factory building, and (p. 110)—

> "Q What did he say to you and what did you say to him? A He said he had a job in *West Orange* of some kind. I said, 'What kind?' 'A small fire.' "

He says he never did the job because—

> "I want to know the place, and I left him and I did not speak to him no more about that job. I want to know what was going on."

He then said he saw Mussikee in January, 1924, and the following conversation took place—

> "A Mussikee tells me in the street, 'Come on, I want to ask you something,' and I said, 'All right,' and I turned the horses, and Mussikee tells to me, 'You know the job is done.' I told him 'All right, I don't care whether it is done or not done.' 'You know Fisch and Finkelstein have come for some money.' I said, 'Money for what'? 'For the job that is done in West Orange.'
>
> Q What else was said between you? You said to him, go ahead and give him the money? A Yes.
>
> Q What did he say? A What do you think? I can't give him money. *I no do the job.*"

He also says that Mussikee told him that the job was more water than fire.

On cross examination, the witness first denies that he had any trouble with Mussikee. It immediately appears that he had had (p. 114) and that *about the time of this alleged conversation in January* there was a dispute over a bill which was settled through a lawyer. He had never had any conversation with Mussikee about burning buildings before September, 1923. It came out of a clear sky. He agreed to do it, although not intending to perform, and yet he said nothing to Mussikee thereafter nor did Mussikee to

him. Although he did not intend to perform he got the information *for blackmail purposes* (p. 116).

Counsel for the State in his brief in the Supreme Court rather scouted at the idea of blackmail, but the witness Turak testified that he got this information for *blackmail* purposes. Counsel also suggested that it was strange that Mussikee should be singled out for blackmail unless he was criminally concerned with the fire. The answer to that is that it is *not* a fact that persons singled out for blackmail are *always* guilty of crime. To assume that a person so singled out is always guilty of crime would be to create a condition of chaos.

Turak had testified that the date of his second talk was the 15th of January, 1924 (p. 111). He cannot tell us how he fixed that date (pp. 119, 120). He comes from Russia and was a saloon keeper there (p. 121). He first told Cooper, an insurance detective, the story he now tells. He made three statements (pp. 123, 124), and—

> "Q Isn't it a fact that you made one statement and they came back *and said they wanted more, and then you made another;* isn't that right? A *Right.*
>
> Q And isn't it a fact that after they got the second statement they came back and said they wanted a third statement; *they hadn't gotten enough yet?* A *Right.*
>
> * * * * * * *
>
> Q So that you added to your story—I will withdraw that. So as time went by you remembered more? A No, not more; everything at one time. *You make one statement; that is not good; you make another statement.*"

He swears positively that Mussikee mentioned a *West Orange job* (p. 124). His testimony upon

the previous trial is then brought to his attention and he changes and denies that Mussikee said West Orange and insists that he only said *Orange.*

The statements were made out by the fire insurance people (p. 126). In the conversation which took place between Mussikee and Turak on the 15th of January Mussikee insisted that he would not pay any money *because he did not have anything to do with the job* (p. 131). The prosecutor was then permitted by the court over objection and exception, to put the following leading question (p. 132)—

> "Now, did Mussikee say to you on that 15th day of January, 1924, that he had promised he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job?
>
> Q Now, answer that question. A Yes."

On re-cross, p. 134—

> "Mussikee said to you that they wanted money whether they did the work on the job or not? A Yes."

This question was leading. There was nothing in the witness' previous testimony which had suggested it, and the result was, in reality, testimony by the prosecutor and not by the witness.

Philip Goldberg was called to involve both Horne and Mussikee. We have considered his testimony so far as it has reference to Horne. He says that: he has known Mussikee for fifteen years; he had a conversation with Mussikee in Passaic in the middle of January; he was sent to Mussikee by Finkelstein (p. 138); he said to Mussikee, "Finkelstein wants $300 which you give him and he will be glad." Mussikee replied—*"I haven't nothing to do with that case";* he told Mussikee that he would be sorry if he

"did not fix up with that fellow"; Mussikee replied, *"I have nothing to do with them, because they are a bunch of bandits";* he told Mussikee that Finkelstein would go and report it to the insurance company; Mussikee told him that he had heard that there had been a fire and that it was an excellent fire (p. 141); when Goldberg said that Finkelstein would squeal, Mussikee said, "I am not afraid of it. *I no got nothing to do with it.*"

This man Goldberg has been several times convicted of crime—horse stealing, setting fires (p. 145). His last conviction had been affirmed by this court on the Friday before the trial (p. 145). The conviction was for conspiracy.

Kling, an insurance adjuster, testified that: there was $20,000 insurance on the building, $70,000 on the stock and $2,500 on the fixtures (p. 21). Proofs of loss were submitted for $34,000 on the stock, $4,871.06 on the building and $700 on the fixtures.

The testimony of Turak and Goldberg was considered in detail in the summing up (p. 324, etc.) and we do not desire to repeat here what was there said.

The State called the witness Dienzo (p. 104), who testified that: he was at the factory on the Saturday afternoon of the fire; he was wrapping the toilet pipes with asbestos and put beaver boards in the office and left about half-past four; there were others in the factory at the time. He did not help the State.

This was the State's case.

It is submitted that there was no proof that the fire was incendiary and no proof that Mussikee was in anywise involved.

The testimony of Turak was discredited and amounted only, if believed, to this: in September, 1923, Mussikee offered Turak $3,000 to burn a building in Orange; Turak agreed to burn the building; he never intended to burn it; he got the information so that he *might practice blackmail on Mussikee;* nothing was said between Mussikee and Turak about the matter from September, 1923, until January 15th, 1924, although they were meeting daily; on *January 15th, 1924,* Turak met Mussikee; this was at a time when he was having a controversy with Mussikee over a bill, which was settled through a lawyer; Mussikee told him that the job was done and that Finkelstein and Fisch had come for some money and that he would not give them any money because *he had nothing to do with the job.*

The testimony of Goldberg was discredited; he had been convicted several times; his last conviction had been affirmed by this court on the Friday before the trial. All his testimony amounts to is that: he saw Mussikee about the middle of January, 1924, and told him that Finkelstein wanted $300 or he would squeal and that Mussikee replied that *he had nothing to do with the matter whatever; that he was not afraid.*

There was no evidence of over-insurance; no evidence, or suggestion of evidence, that Mussikee had any knowledge of any insurance; no evidence that Horne, or the Merritts Product Company, was in financial difficulties or that insurance had been recently placed and *no evidence of any motive.* There was a complete failure to prove any of the usual concomitants

of a burning for profit. There was no evidence of any relations between Horne and Mussikee which would make it appear that they would unite in burning this building. There was no evidence whatever of any relations between Horne and Mussikee at the time of the fire.

It is submitted that the indictment should have been dismissed at the close of the State's case. Assignment of Errors and Specification of Causes for Reversal Nos. 19 and 20.

In defense Horne stated that he did not know Goldberg and had had no conversation with him (p. 262) and it is to be borne in mind that *Goldberg had refused to identify Horne,* and yet his testimony was permitted to stand and was relied upon by the Supreme Court in affirming. Horne said that: four or five days before the fire he had gotten a cold in his shoulder and had applied a mustard plaster to it which had burned him and, as a result, he was confined to bed for a few days (p. 264); on the afternoon of the day of the fire he was at the factory at 1:30; he stayed until 5:30; the State's witness Dienzo was working covering pipes with asbestos (p. 264); during the afternoon two men came in, Nevins, the son of Horne's landlady, and a Mr. Smallwood; they stayed for half or three-quarters of an hour, and after they left a Mr. Tepperman came in, who stayed for two or two and a half hours; when they left Mr. Schein and Miss Schein came in about five o'clock and stayed for a half or three-quarters of an hour; they were fixing a tire; Horne and Miss Schein and Mr. Schein left the factory about a quarter to six and he went right home; he took his car to the garage, which was next to the house where he lived; the colored nightman was in charge (p. 265); he went right straight up to the house and went to bed;

the doctor called upon him to treat him; the doctor bandaged him and gave him a hypodermic and he went to sleep; the next thing he knew Mrs. Nevins woke him up and told him about the fire; he went right down to the garage and got his car and arrived at the factory about a quarter to one or one o'clock; afterwards he went home and was in bed the next day (p. 267).

He is corroborated as to his movements on this night by William Schein (p. 153); Gertrude Schein (p. 158); Mrs. Nevins (p. 184), who testifies that when she woke Horne up she said, "Mr. Horne, your factory is on fire," so he jumped up and he said, "My God, Mrs. Nevins, what will I do," because he was so sick; Dr. Livingston (p. 208); Dr. Stevens (p. 212); Matthews, the colored garage attendant (p. 213); Joseph A. Nevins (p. 219); Smallwood (p. 226); Tepperman (p. 256).

Unless these corroborating witnesses are deliberately perjuring themselves, and their credit is in nowise affected, Horne had been an ill man for some days before the day of the fire; he was at no time alone in the factory from one o'clock in the afternoon until he left the factory at six o'clock; the factory was in perfect condition when he left; he immediately went to bed and was attended by a physician; he was awakened out of a sleep by news of the fire, went to the fire and then returned home and went to bed and was in bed the next day ill; his car was in the garage from six o'clock in the evening until he went to get it to go to the factory after he had been awakened and informed that there was a fire.

The prosecutor in his summing up (p. 365) told the jury that *this was all an arranged plan*

on the part of Horne. He goes to the extent of saying that: Dr. Stevens says he went there at midnight on Saturday night; *that call was not necessary.* But Dr. Stevens testified that he saw Horne on the morning of the 5th and again on the 6th in the morning and in the afternoon and again three days later on the 9th. He said that the condition he found him in was very painful. It was Dr. Livingston, not Dr. Stevens, who saw him on January 6th, the night of the fire (p. 210) and *he* says that Horne "was in bed suffering with pain," and that he gave him a hypodermic of morphine *to relieve the pain* (p. 211). There is nothing in the testimony to justify the inference of the prosecutor that these physicians thought that Horne was malingering or that it was not necessary for them to attend him. Nor is there anything in the testimony of the corroborating witnesses to indicate that they were parties to a set-up on the part of Horne.

Miss Ayres, who was the bookkeeper of the Merritt Products Company at the time of the fire but who, at the time of the trial, had no connection whatever with either Horne or the Merritt Products Company (p. 199), testified that: on the Saturday of the fire there were five people working in the factory; she left the office somewhere between two and two-thirty; she left Horne there with Robinson and Dienzo; the factory was warm; there was a fire in the boiler from which the heat to warm the factory was obtained (p. 201); *the electric wires in the building ran through the center of the ceiling; they were exposed;* they ran in the rear of the factory and also *in the center* (pp. 201, 202); she first learned of the fire about quarter to one Sunday morning; one of the employees, who lived directly opposite the premises, called her

up at her home; she tried to get in touch with Horne but could get no anwser on the telephone (p. 202); she called the night attendant at the garage and gave him the message to deliver to Horne (this night attendant was Matthews, and it was Matthews who came to the house where Horne lived and gave the message to Mrs. Nevins, who wakened Horne. See Mrs. Nevins' testimony (p. 186), and Matthews' testimony (p. 214); when she got to the building on the Monday after the fire she found that *the ceiling had been entirely burned away; the rafters had fallen and the wires had fallen with it* (p. 203); at the time she left the factory on Saturday, the place was in order and when she got there on Monday, *although the stock was burned, it was in order* (p. 204).

A false impression is created by the State's photographic exhibits. These photographs showed more or less litter on the floor. They were not taken, however, until May or June and after the goods which had been destroyed by the fire had been removed. Miss Ayres makes it clear that, except for the ravages of fire, the factory, so far as the placing of stock was concerned, was in perfect condition the Monday after the fire.

Miss Ayres is corroborated, with respect to a fire being in the boiler, inferentially, by the testimony of Joseph A. Nevins to the effect that, when he was in the factory part of the premises it was warm (p. 221). In view of the fact that this portion of the premises was heated *only* from this *boiler* and that it was a bitter cold day there *had* to be a fire in the boiler. Also see the testimony of Smallwood that it was warmer in the factory than outside (p. 229).

Mussikee denies that he ever had any conversation with Turak at which the statements were

made to which Turak testifies. He says that: in January, 1924, his relations with Turak were unfriendly; they had a controversy over a bill; Turak attempted to charge him $134.55 for some excavating and the matter was finally settled by Turak taking $60 (p. 245). He refers to the bill which was offered in evidence but the offer was excluded (p. 245). He knows Goldberg, who is a painter by trade (the record shows banker, p. 246; this is a mistake). He says that: sometime in January, 1924, Goldberg came to him and said that a party by the name of Finkelstein wanted him to call up Horne and that Horne would give him $300 "if I will not give him $300 for setting the fire in West Orange, and my answer was I did not have anything to do with that and if they had any dealings with Mr. Horne, let them call themselves"; immediately after this Goldberg left; he did not tell Goldberg that he knew there was a fire in West Orange and that it was an excellent fire or that it was more water than fire or anything else with respect to the fire.

Baldwin, a guard at the penitentiary, who lived at 378 Valley Road, West Orange, says that: he was at the fire; stayed there about half an hour; it was then so cold that he went home, getting home about ten minutes to one; he was going in the yard and noticed a fireman going into the fire house "and as the fire was not out, I thought he was hurt, and I went over to see if I could help him." He found it was the chief leaning over the radiator on the first floor; the chief ordered him out of the fire house; the chief went upstairs and Baldwin left and went home; this was about fifteen minutes after he had left the fire to go to his home. *According to the chief he was, at this time, at the fire.*

A fireman, Farblade, is produced (p. 163) who testifies that: he was one of the firemen at the fire; he got there between quarter after and half-past twelve on the same truck with the chief; when he got to the building *nothing had been done;* he helped to break in the window with a battering ram (pp. 164, 165); he was one of the firemen *who took the hose in crouching;* they were met with a very dense cloud of black smoke through which *they could not see* (pp. 165, 166); *they shot their water indiscriminately*—"a good stream"—(p. 166); they could see *no flame, only a glare;* it was just simply *an ordinary fire* with a considerable amount of smoke at that time; *it was impossible to see for a distance or more than two or three feet;* he was at the fire until it was finished, and then stayed on there and was on guard duty (p. 167); he went on the roof and found there "was considerable smoke and some flames coming from around the back of the boiler"; they poured in water "and there *was considerable steam";* a hole was made through the roof through which they played the hose (pp. 171, 172); they played water at this point, which was right over the boiler, approximately *forty or forty-five minutes.*

The State failed to produce the other firemen who took the hose in crouching. It preferred to rest upon the discredited chief.

Moran testified that: he saw Sheehan in May, 1924; Sheehan told him that there was *absolutely nothing suspicious about the fire* (pp. 173, 174); when Moran asked him if there were two fires the chief *said nobody could tell and the place was a mass of flames and it would take more than an expert to tell* (p. 175).

We now come to a piece of evidence which we insist is improperly in the case.

The witness Lena Nevins was called to testify *only* to the physical condition of Horne on the night of January 5th and the morning of the 6th and to her awakening Horne on the morning of the 6th and telling him about the fire (p. 185). On cross examination over objection and exception she was asked (p. 188)—

"Q Now, after the night of this fire you went to the door and met a man by the name of Finkelstein—"

The question was allowed and repeated.

"Q Didn't you answer the door sometime after the fire and meet a man who said he was Finkelstein?"

Over objection and exception the question was allowed (p. 189).

It was reframed.

"Q Did a man *who told you his name was Finkelstein* come to your house after the fire inquiring for Mr. Horne? Yes or no."

This question was allowed over the objection and exceptions (pp. 188, 189). It was answered—

"A There was a man *quite a while after* by the name of Finkelstein."

The question was then asked—

"Q And did he leave with you a message for Mr. Horne?"

This was admitted. There was considerable colloquy and finally the question was put (p. 192)—

"Q Did you receive a paper upon which there was something written to give to Mr. Horne?"

Over objection and exception the witness was permitted to answer "yes."

The following question was then permitted over objection and exception—

"Q Now, when you gave this paper to Mr. Horne, do you know what Mr. Horne did?"

The answer was—

"He went upstairs."

The following question was then admitted over objection and exception—

"Q Well, did he use the telephone? A That I could not tell you."

The witness, having stated that she did not remember, was confronted, over objection and exception (p. 194), with her testimony in the previous case—

"Q Mr. Horne came home about six o'clock and called up Mussikee in Passaic, that is true, isn't it?"

And your reply was, "Yes."

"A I do not know what time Mr. Horne came home that day."

The following then occurred—

"Q That is not the question. At the last trial when you were being examined about the episode of Mr. Horne getting a message from you and going upstairs, you were asked this question, 'Mr. Horne, came home about six o'clock and called up Mussikee in Passaic, now, that is true, isn't it? Answer, Yes.' Now, is it? Is this the answer you made to the question at the last trial and is it true? A Well, he must have rung him up when he went upstairs.

Mr. Kessler: I move it be stricken out what he must have done.

The Court: That will be stricken out, that is not an answer at all.

Re-direct examination by Mr. Kessler.

Q You do not know who he called up? A No.

The Court: Did you testify at the last trial it was Mr. Mussikee he called?

The Witness: A note was left for Mr. Horne and he went upstairs. Now, whether he called Mr. Mussikee or not, that I don't know, *but it was for Mr. Horne from Mr. Mussikee.*

Mr. Kessler: I move that that be stricken out as improper and immaterial.

The Court: How do you know it was from Mr. Mussikee?

The Witness: I saw the note.

The Court: *Do you know Mr. Mussikee's handwriting?*

The Witness: I do not.

The Court: That will be stricken out.

Mr. Kessler: I ask your Honor to instruct the jury to disregard any testimony with regard to that.

The Court: Yes. This testimony as to the note from Mr. Mussikee will be stricken out.

Mr. D'Aloia: This testimony about the note from Mr. Mussikee was being elicited by the gentlemen on the other side.

Mr. Kessler: It was in answer to a question by the court.

The Court: I asked her how she knew and she said because—*I think she said Mr. Mussikee's name,* but she cannot tell, she never saw Mr. Mussikee sign his name, and she cannot tell that, and that note is not here and I struck out that testimony.

Mr. Lane: I move a mistrial because that testimony has gotten into the record and there is no justification for the inference that any of Mussikee's writing was on that note at all in any manner, shape or form.

The Court: Well, the jury will pass upon this case from that which is in evidence and that which is not in evidence will be disregarded by the jury."

An exception was allowed to the refusal of the court to grant a mistrial.

> "Mr. D'Aloia: Do I understand your Honor's ruling is because the note is not here?
>
> The Court: No, it is from the witness' answer how she knew what the note was. Whom did you give the note to?
>
> The Witness: To Mr. Horne."

This episode took place sometime after the fire, perhaps a month (p. 197).

A motion was made to strike out the witness' testimony with respect to this note *in toto* and was denied, and exception taken (pp. 197, 198).

The effect of this cross examination by the State, upon matters which had not been adverted to in anywise upon the direct examination, was to get to the jury the fact that a man named Finkelstein, who had been referred to by Goldberg, had delivered a note to Horne sometime after the fire *and that this note was from Mussikee and that upon receiving it Horne telephoned Mussikee.*

It is true that the testimony that it was from Mussikee and that Horne had telephoned Mussikee after its receipt was stricken out. But the jury was left with the inference that the note *was signed* by Mussikee and this inference was injected into the case by the questions of the court (p. 195). The court said in striking the testimony out (p. 196)—

> *"I think she said Mr. Mussikee's name."*

She had not made this statement. The note had been before the court on the previous trial and there was no justification for the inference that it was signed by Mussikee or that it might have been written in Mussikee's handwriting.

There was no identification of Finkelstein. It was error to permit testimony that a man *who gave the name of Finkelstein* had left the note. The court let the evidence stand to the effect that a man who said he was Finkelstein brought the note and that Horne, upon its receipt, went upstairs where there was a telephone. It also had permitted reading to the witness her testimoney given upon the previous trial when she said that Horne called up Mussikee (p. 194). The effect upon the jury of this testimony, which effect could not be removed by any direction to disregard the testimony stricken out, was that Finkelstein had brought a note from Mussikee to Horne, signed by Mussikee, or written by him, and that Horne had thereupon called up Mussikee and had had a telephone conversation with him.

The court having declined to direct a mistrial and having likewise declined to strike the witness' evidence from the record (p. 197), the defendants were *forced* to do what they could to remove the impression thus erroneously made upon the jury. Horne testified that he had received the note and did get Mussikee on the telephone and told him that he had received a note "from a fellow signed by the name of Finkelstein" and asked Mussikee if he sent him over. Mussikee told him that he had not sent him over and *did not know that there had been a fire* (pp. 280, 281). *Horne told Mussikee about the fire* (p. 281). The prosecutor then asked (p. 281)—

> "Q Now, isn't it a fact that the note that you got when you called up Mussikee specified that this man Finkelstein called with reference to the factory? A That is what he did.
>
> Q *And didn't it specify with reference to the fire at the factory?* A No, no fire at all."

The note had been lost. It had been presented at the previous trial. *There was no suggestion at any time that the note said anything about a fire and yet the prosecutor, by his question, injected into the minds of the jury that it, in terms, referred to the fire.*

Mussikee denied (p. 284) sending Finkelstein to Horne. He corroborated Horne as to the telephone conversation (pp. 284, 285).

The prosecutor by this time had succeeded in injecting into the jury box not only that the note had been delivered by Finkelstein to Horne, *signed or written by Mussikee asking Horne to call him up, but that it also contained a reference to the fire.* It must be remembered that *no one identified Finkelstein.*

The defense was, therefore, *forced* to call Mr. Berstecher (p. 287) to prove the contents of the note which was offered in evidence as Exhibit D. 2. It said nothing about the fire nor was it signed by Mussikee and the court and prosecutor had both been present at the previous trial when it had been admitted in evidence.

At the conclusion of the whole case a motion was made to strike out all of the testimony having reference to this note. That motion was denied and exception taken (p. 302). The court was asked to charge the 34th request—

> "34. The jury may not consider in determining the guilt or innocence of the defendant Mussikee the note written by Finkelstein and left at Mrs. Nevin's house for Horne."

And the 37th request—

> "37. There is no evidence in this case that Mussikee sent Finkelstein to Horne."

These requests were declined and exceptions allowed (p. 376). They form the basis of the 72nd and 74th assignment of errors and specification of causes for reversal.

The note was relied upon by the prosecutor. He said in his summing up (p. 366)—

> " * * * but don't forget this note, *that spells out the link of combination between Horne and the fire and Mussikee and the fire. Right there there is the whole story.* Finkelstein, the man who has not been seen since the last trial—(No proof of this) and you know it is not strange for defense (not a defense witness) witnesses to escape and get away, and it is not strange for money to be used for that purpose in a crime of this kind (no suggestion of proof of this). There is Finkelstein's signature and here is the message. He goes to Horne's boarding house and is admitted by Mrs. Nevins after the fire. 'Mr. Horne, please call up your friend, Mr. Mussikee, in Passaic, about the factory, the factory that burned.' "

The note ends with the words "about the factory." The words *"the factory that burned"* are the prosecutor's.

> "Finkelstein is one of the reputed blackmailers. He is up at Horne's boarding house. Horne is not in, and he leaves this note for Horne, and Horne calls up Mussikee when he comes in and gets this. Here is where I call your attention to another attempt made by that vice-president of four or five corporations like the Merritt Products Company—*all fly-by-night, wild-cat concerns.*"

No evidence of this.

> "Here is what he says," etc.

In its charge to the jury the court said—

> "Then, you have in evidence, too, a copy of a note which was given to Mr. Horne by Mrs. Nevins, which was left at his place some time after the fire, which speaks for itself, and calls the attention of Horne to the fact that he call up his friend Mussikee, and Mr. Horne denies any knowledge as to the reason why this note *should come through Finkelstein.*"

The person who left this note was wholly unidentified yet the court tells the jury that it was delivered by Finkelstein (p. 372).

The conduct of the case was such as that it was impossible to eradicate from the jury's mind that the note had come from Mussikee *and yet there was not a scintilla of evidence in the case that it had.* The very words of the court in its charge to the jury (p. 372)—

> "Then, you have in evidence, too, a copy of a note which was given to Mr. Horne by Mrs. Nevins, which was left at his place some time after the fire, which speaks for itself, and calls the attention of Horne to the fact that he call up his friend Mussikee, and Mr. Horne denies any knowledge as to the reason why this note should come *through* Finkelstein."

When the word *"through"* is used with respect to the delivery of an instrument it indicates that it has been sent, not by the person who delivers it, but by someone else. Who sent it? And yet the testimony was that it had been written by the man who said he was Finkelstein *at Mrs. Nevins' house* (p. 291). *Mussikee could therefore have had nothing to do with it.* The effect of the cross examination of Mrs. Nevins on page 195 is that *Mussikee sent it,* and that it was *Mussikee's note.*

And yet there is no evidence whatever to connect Mussikee with the note or the sending of it.

The evidence with respect to this note upon the cross examination of Mrs. Nevins was improperly admitted over objection and exception. The admission forms the basis of the 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th and 29th assignment of errors and specification of causes for reversal.

Having been admitted and an improper construction put upon the note, it was error for the trial court to deny a mistrial. This forms the basis of the 30th assignment of errors and specification of causes for reversal.

At the conclusion of the witness' testimony it appearing that the note was delivered a long time after the fire and there being no identification of the person who left it and no proof whatever that Mussikee had anything to do with it, the testimony *should have been stricken out.*

It was error to deny the motion to strike out. This forms the basis of the 31st assignment of errors and specification of causes for reversal.

Counsel for the State in the Supreme Court suggested that we could not seriously contend that a mistrial should have been granted because of testimony volunteered by our witness and struck out by the court. While the witness, Lena Nevins, was called by the defense her testimony on direct was confined to a subject matter with respect to which the cross examination by the State (p. 187) had nothing to do. The cross examination was allowed by the court over objection of the defense (p. 188). The witness, Mrs. Nevins, became the State's witness. The entire cross examination from page 187 to page 195 had nothing to do with the direct examination.

The testimony objected to was brought out on the examination by the court. It would be one thing if a single piece of evidence had gotten into the case which the court struck out. There was more than that in this case. The testimony was *drawn* out and *then* struck out.

However that may be, in view of the fact that Mussikee had, in no way, been connected with the note at the close of the State's case it was the duty of the court, we submit, to have charged the 34th request of the defendant Mussikee, *i. e.,* that in determining the guilt or innocence of the defendant Mussikee this note must not be considered, which refusal to charge will be hereafter considered.

The court having declined these various requests, it became necessary for the defense to prove the telephone conversation, which followed the receipt of the note. This it did. The prosecutor thereupon cross examined Horne and injected the word "fire" *into the note. The note had been present at the previous trial and did not contain any such word.* This drove the defense to proving the contents of the note.

At the conclusion of the whole case, there being no evidence whatever either of the identity of the person who left the note for Horne or that Mussikee had anything to do with it, it was error for the trial court to refuse, upon the motion of the defendant Mussikee, to strike out all of the testimony which had reference to it.

This forms the basis for the 35th assignment of errors and specification of causes for reversal.

In any event upon the record as it stood at the conclusion of the case, it is submitted that defendant Mussikee was entitled to have charged

the 34th request to the effect that the jury might not consider, in determining the guilt or innocence of the defendant Mussikee, the note written by Finkelstein and left at Mrs. Nevins' house for Horne," the denial of which forms the basis of the 72nd and 74th assignment of errors and specification of causes for reversal.

The prosecutor commented upon the note and with respect to it said that *it told the whole story* (p. 366) and the court commented upon it in its charge in a manner which permitted the jury to infer that it had been sent by Mussikee through Finkelstein. (Assignment of errors and specification of causes 83.) Assuming the prosecutor's statement to be correct that the note told the *whole story*, the result has been a convicion of these defendants because of a note, the identity of the writer and the deliverer of which is unknown to the record, and no connection shown of the defendant Mussikee with it.

The injection of this note into the case together with the injection by the prosecutor, during the course of the trial, of improper matters hereafter to be noted, explains why it is that the jury disregarded the clear weight of the evidence and found a verdict of guilty.

In his opening the prosecutor said (p. 13)—

> "We will also prove to you that not only was the fire of incendiary origin, but at the time there was upwards of $100,000 of insurance upon the building and contents, and shortly thereafter proofs of loss were submitted to the various insurance companies and the claim was made for $66,000 worth of insurance."

The record shows that there was $93,500 of insurance on the building, stock and fixtures (p. 23) and that the claim was for $34,000 on the

stock, $4,871.06 on the building and $700 on the fixtures (p. 24). The prosecutor must have known what his proofs would be when he made his opening.

The prosecutor continued—

> "We will show you by a witness that some months prior to this night in January the defendant Joseph H. Horne approached the witness and made a proposition to him. He wanted this factory cleaned out. He offered this witness $1,000 for the job."

The prosecutor referred to the witness Goldberg who *could not identify* defendant Horne (p. 141).

The prosecutor continued—

> "We will also show you that the defendant Mussikee *went to someone immediately* after the fire and *complained* about the quality of work which was done by those who had set fire to the place, that the damage was not enough, and that the damage was mostly done by the water and not by the fire and that it was a bad job."

There was no evidence to this effect.

The testimony of both Turak and Goldberg, who were the only witnesses who said anything about any talk with Mussikee, was either that *they approached Mussikee* or that the conversation was casual.

The prosecutor continued (p. 14):

> "There was an automobile outside and it stood there for some time and the people who knew the automobile owned by Joseph H. Horne will tell you that that automobile was of the same color and the same make as the defendant Joseph H. Horne's automobile, and when we show you that a certain message was delivered to Joseph H. Horne's boarding house *to communicate with his co-defendant in Passaic about the fire in the*

> *factory, that somebody was clammoring for pay,* then we are going to say to you that arson cases of this character and burning cases can only be proven by circumstantial evidence * * * ''

The prosecutor had been through the previous trial. He knew that the witness Christiansen could not identify the automobile which she saw outside of the factory at 9:30 o'clock that night as the automobile of Horne (pp. 100, 101) and that the witness Lange, who saw an automobile outside of the factory at 10:45, could not identify it as that of Horne (p. 103). The prosecutor also knew that the message which was delivered to Horne's house could not be connected with Mussikee and he also knew that the message, which was in evidence at the previous trial, did not ask Horne to communicate with Mussikee *''about a fire in the factory.''* Because of the reference by the prosecutor to the message and to the automobile a motion was made for a mistrial, which was denied (p. 15) and an exception allowed. This forms the basis of the 4th assignment of errors and specification of causes for reversal.

In the Supreme Court, counsel for the State said, with respect to this motion for a mistrial, that no arguable reason was then or is now advanced why the motion should have been granted. We think that the reasons heretofore set forth are arguable.

The prosecutor, on p. 33, indulged in leading questions to get from the witness Sheehan, Fire Chief of West Orange, the fact that the fires were separate fires. True, the answer to the leading question was stricken out, but it had been given and it could not be erased from the jury's mind.

On the re-direct examination of Sheehan the prosecutor was permitted by the court to ask

leading questions (p. 90). There was no purpose in objecting to these questions for, after the prosecutor had put them in leading form, the jury would assume that the answer would be "yes," and, by these questions, the prosecutor got to the jury what he desired although the questions might have been excluded.

The prosecutor called a witness Brandin, Assessor of the Town of West Orange (p. 106). This witness had been called at the previous trial and his testimony had been excluded and the prosecutor must have known that his testimony would be again excluded. Without a question by the court the prosecutor injected (p. 107) *''The object is to show that the place was not doing any business.''*

The effect on the jury, although the testimony was excluded, was precisely the same as if Brandin had said that the place was not doing any business, which was not the fact.

On the direct examination of the witness Turak the prosecutor was permitted, over objection, to ask the following question—

> "Q. Now, did Mussikee say to you on the 15th day of January, 1924, that he had promised he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job.''

Although the witness Turak had been examined, both on direct and cross, with respect to this conversation, he had not indicated that any such statement had been made. Nevertheless, the prosecutor was permitted to put the question in this leading, suggestive form.

We have already adverted to the fact that the court permitted the prosecutor, on the cross examination of Mrs. Nevins (p. 187) to get her

to testify with respect to a certain message left by a man *who said* he was Finkelstein, although the subject had not been opened on direct examination and although Finkelstein was in nowise identified, and to the questions put by the court.

The court also, over objection, permitted the prosecutor to read to Mrs. Nevins her testimony upon the previous trial—*not to contradict anything which she had said on direct examination but to bring out something which the State desired to bring out not touched upon in anywise, on the direct* (p. 194).

We have also adverted to the examination by the court on page 195 which would lead the jury to believe that the note was either signed by Mussikee or in Mussikee's handwriting, although the note had been before the court at the previous trial and there was *no justification* whatever for the inference that any of Mussikee's writing was on the note.

A motion was made for a mis-trial, counsel contending that striking out the testimony would not remove the impression made on the jury, which motion was denied, and exception taken, and it forms the basis of the 30th assignment of errors and specification of causes for reversal

In the examination of Horne (p. 277, etc.) the prosecutor asked questions which would indicate that the business enterprises with which Horne was connected with Mussikee had failed, notwithstanding the fact that the following colloquy took place (p. 277):

> "Mr. Kessler: Does the prosecutor intend to prove that the company failed?
> Mr. D'Aloia: *No.*"

Again, on the examination of Horne (p. 281) the prosecutor in referring to the note said:

> "Q And didn't it specify with reference to the fire at the factory? A No. No fire at all."

The prosecutor thus injected the word "fire" into the note, although he must have known that the note contained no such word and no reference to the fire.

See the colloquy (pp. 282, 283).

In summing up, the prosecutor started out by telling the jury (p. 347)—

> "This is an arson case; that is the burning of a building, and in the annals of criminal law—and I do not fear any contradiction by Mr. Lane or Mr. Kessler—it is one of the most difficult crimes to prove, yet it is one of the most common crimes perpetrated, and we have in the books this one line written by an eminent legal orator, that convictions for arson are as uncommon as the crime of arson is common, and that is because of the difficulty in getting proof."

On page 346 he told the jury—

> "Now, let us see what the facts are. Chief Sheehan, of the West Orange Fire Department, has maintained *since this fire* that there were two separate fires."

There is no proof to this effect of any kind, nature or description.

On the contrary, the proof is that, after the fire the chief had made statements that it was *not* suspicious and statements inconsistent with the claim that there were two separate fires.

On page 350, the prosecutor said—

> "I did not call Fisch, except to limit myself to say this, Mr. Foreman: Fisch *is* employed in the employ of Mussikee as a carpenter, and so after this occurrence at West Orange—"

There was no evidence that Fisch was in the employ of Mussikee as a carpenter either at the time of the trial or at the time of the fire. There *was* evidence that Fisch was employed by Mussikee at different times previous to the fire (p. 250). Mussikee expressly stated that Fisch was not working for him at the time of the trial (p. 250). The prosecutor was familiar with this testimony, and yet he told the jury, in explanation of his not calling Fisch, that Fisch was in the employ of Mussikee.

A motion for a mis-trial was made, which was denied, and an exception taken, which forms the basis of the 41st assignment of errors and specification of causes for reversal.

The prosecutor then turned to Turak (p. 351), and, in referring to the contention that Turak had made three statements, addressed the jury with a statement in his hand, which he said was the only statement which Turak gave although he had offered that statement in evidence upon two occasions during the course of the trial and it had been excluded (pp. 133, 301), and he had re-offered it, during the summing up of counsel for Mussikee (p. 328).

The effect of the prosecutor using it in the manner in which he did, during the summing up (pp. 351, 352), was precisely the same as if he had gotten it in evidence.

The prosecutor then continued (p. 352)—

> "Now, I am going back to Turak's testimony, and Turak's testimony is this: 'I made a statement in Passaic and I made one in West Orange. They told me that the first one was no good, and I made another one here at the last trial.' How many does that make? That is three. Now, what does he mean in his poor English? The one in Passaic is no good. Mr. Lane knows just as well as I do that that cannot be introduced in evidence. They need Turak there in person in the Police Court of West Orange when Judge Davis, who represented Horne, wanted an examination and wanted to find out what was against this man. Turak was told in Passaic, 'You have got to go to East Orange in person.' He said, 'Well, you have my statement.' He said, 'I do not want to repeat my statement.' "

There is no evidence of any kind upon which to base these statements of the prosecutor and a motion was made for a mis-trial, which was denied and exception taken, which forms the basis of the 42nd assignment of errors and specification of causes for reversal.

Notwithstanding the objections which had been made by counsel the prosecutor continued to refer to what had occurred in the Police Court in West Orange, and again referred to the statement which the prosecutor had in his hands (p. 353).

> "But I say Turak, when *this piece of paper* could not be used—"

The prosecutor was here referring to what he said was the statement of Turak which had been offered in evidence and excluded. He said that the paper could not be used although there was no proof to that effect. A motion was made for a mis-trial and denied, and exception taken which forms the basis of the 43rd assignment of error and specification of causes for reversal.

The prosecutor continued to use this paper in his summing up precisely as if it had been in evidence. The court said—

> "Counsel will not use it."

But it is apparent from the record that counsel *was* using it (p. 354).

On pages 355 and 356 the prosecutor lays much stress upon the car which was outside of Horne's factory upon the night of the fire, although there was no identification of the car.

On page 357 the prosecutor said:—

> "We have Mr. Kessler telling you what a considerable business Horne was doing, *and yet when I tried to put on Mr. Brands, the tax assessor of West Orange, who went there in the month of October to make an assessment, they object to his testimony—.*"

The prosecutor was here referring to his offer of the testimony of Mr. Brandin (p. 106) which he had told the court, in the presence of the jury, was for the purpose of showing that the factory was not doing any business and which testimony had been excluded. When the testimony was offered the prosecutor must have known that it would have been excluded because it was excluded at the previous trial, and yet he refers to it in his summing up (p. 357).

Again, the prosecutor insists (p. 357) in referring to Fisch as "Fisch *is* a carpenter who *does* carpenter work for Mussikee."

A motion for a mis-trial was made and denied, and exception taken which forms the basis of the 44th assignment of error and specification of causes for reversal.

On page 359 of the record the prosecutor says—

> "Goldberg, Fisch and Finkelstein at some stage or other during the last closing months of the year of 1923, either talked to Horne at Clifton, or Horne went to Clifton and saw Goldberg and said 'Your good friend Mike sent me here, I have a job for you in West Orange, I want you to do it up right to the ground, there is $1,000 in it for you.' I asked Goldberg what his response was to Mike Mussikee, 'What did you say to this man Horne?' 'I have children in high school now, and I am not doing that kind of work.'"

All of this depends upon the testimony of Goldberg, who *could not identify Horne* as the person who spoke to him.

The prosecutor continued (p. 360)—

> "* * * But he (Mr. Kessler) left out the real manner in which we discovered Goldberg, how we discovered Fisch and Finkelstein and we discovered Turak and we came to the conclusion that this case should be presented to the Grand Jury, and that is why we are here trying it, and here is the method. Goldberg was arrested in Passaic—"

A motion for a mis-trial was made and denied and exception taken and forms the basis of the 45th assignment of errors and specification of causes for reversal.

The prosecutor continued speaking about Goldberg's conviction—

> "When Goldberg was arrested, I don't know what he said to the Passaic police to help himself, 'Let me off here and I will give you some information about a fire in West Orange, and if you don't believe me, Turak will tell you about it, and if you don't believe me and Turak, Finkelstein and Fisch will tell you about it,' and that is how the fire department in Passaic gathering this band of firebugs got the information to the police department of Passaic that these fellows knew something about a fire in West Orange, and they limit themselves very carefully in the information they give to the authorities."

There was no evidence whatever in the case upon which these statements of the prosecutor could be based.

A motion was made for a mis-trial, which was denied, and exception taken, which forms the basis of the 46th assignment of error and specification of causes for reversal.

The prosecutor continued (p. 361), notwithstanding the admonition of the court, to refer to matters not in evidence. The court warned him (p. 361), when he started to refer to Turak, that if what he was about to say was not in evidence he could not discuss it. Nevertheless, he went on to say what Turak had stated in his "first statement," although there was no evidence to indicate what he had said in his first statement. What the prosecutor was attempting to do was to indicate to the jury that Turak's testimony upon the stand was to the same effect as what he had said in his statement which the prosecutor insisted, throughout the course of the trial, in referring to, although it had been offered in evidence and excluded. The court admonished the prosecutor and said—

> "No, but why characterize it by the first statement. We are concerned with testimony at this trial."

The prosecutor continued to mis-state evidence (pp. 362, 363), and his excuse was—

> "I am not mis-stating the facts any more than you did."

And (p. 363)—

> "And all of the things you said were not in the record."

The prosecutor continued to comment upon matters not in evidence. Upon page 364 he said—

> "He (Mussikee) did not think of Goldberg being indicted in Passaic for that other fire where the conviction was as affirmed last Friday and, to help himself out, like the rat he is, he gave the authorities the information to lead us to Horne and Mussikee. That is where Mussikee miscalculated."

There was no evidence that Goldberg to help himself out gave any information to the authorities.

In accounting for the absence of Finkelstein and Fisch the prosecutor said (p. 366)—

> "Finkelstein, the man who has not been seen since the last trial—and you know it is not strange for defense witnesses to escape and get away, and it is not strange for money to be used for that purpose in a crime of this kind. There is Finkelstein's signature (no proof of this) and here is the message. He goes to Horne's boarding house and is admitted by Mrs. Nevins after the fire, etc."

There was *no testimony of the identity of Finkelstein* and yet both the prosecutor in his summing up and the court in its charge to the jury treated the case as if Finkelstein was the person who left the note (pp. 366, 372).

On page 367 the prosecutor says—

> "Here is where I call your attention to another attempt made by that vice-president of four or five corporations like the Merritt Products Company—*all fly-by-night, wildcat concerns.*"

No evidence upon which this statement could be based. *The prosecutor had expressly disavowed any intent to prove that Horne's adventures had failed* (p. 277).

At the conclusion of the prosecutor's summing up a motion was made for a mis-trial (p. 368), which was denied, and exception taken, which forms the basis of the 47th assignment of error and specification of causes for reversal.

We are fully aware that, under ordinary circumstances, the granting of a mistrial is a matter of discretion, and it would be intolerable if testimony once in could not be stricken out and

if mis-trials were to be granted for every mis-statement of fact by counsel or the court. But, we submit, that, in a case of this kind where the evidence is of the nature it is, purely circumstantial, and where the case has been tried before so that all parties are fully advised as to what the evidence is to be, where the prosecutor starts out, as he did here, in his opening by mis-stating facts and continues, throughout the course of the trial, to inject, by leading questions and by statements at the bar, in the presence of the jury, matters which he *must have known would be excluded,* and then continued, throughout the course of his summing up, although admonished by the court, to mis-state facts and to refer to matters not in evidence, and to rely upon those matters not in evidence and those mis-statements of fact, to build up a circumstantial case against the defendants, it is an abuse of judicial discretion not to grant a mis-trial.

In *State* v. *Unger,* 94 N. J. L. 495, a motion for a mis-trial was made because a detective in the employ of the Prosecutor of the Pleas, who had been directed by the court to watch the jury and to see that no one had opportunity to communicate with them, had intruded on the privacy of the jury and was as active in the care and custody of the jury as the sworn constable. The Supreme Court had affirmed the opinion of the trial court "upon the ground that the granting of such motion is a matter of discretion, and that the defendants did not suffer any wrong or injury by its refusal."

This court held that the action of the trial court in refusing to grant a mis-trial was an abuse of a discretion and reversed the judgment of conviction upon that ground.

In *State* v. *Lewis,* 83 N. J. L. 161, the Supreme Court had declined to reverse a judgment of conviction because of the refusal of the trial court to grant a mis-trial based upon the method of examination indulged in by the prosecutor but, in its determination, conceded that, if the refusal of the trial court to grant a mis-trial had resulted in manifest wrong and injury to the defendant, the action of the trial court in declining to grant a mis-trial might be reviewed under the 135th section of the Criminal Procedure Act. It held, however, that the refusal of a mis-trial had not resulted in manifest wrong and injury.

This court in *State* v. *Unger,* 94 N. J. L. at p. 499, said of that case:

> "The Supreme Court in support of its judgment refers to State *v.* Lewis, 83 N. J. L. 161, but in that case the court of its own motion overruled a question put by the prosecutor. All that happened was that the court overruled a question, and as its action was favorable to the defendant, he could not have suffered the statutory manifest wrong and injury."

The situation is quite different in the case at bar.

That a mis-trial may be granted because of erroneous statements in the prosecutor's opening was recognized by the Supreme Court in *State* v. *Heller,* 2 Misc. Reports, p. 1023—when it said (with reference to an erroneous statement alleged to have been made by the prosecutor in his summing up)—

> "Whether such a statement was made or not, does not appear from the case sent up with the writ of error, as the opening address of the prosecutor of the pleas, constitutes no part of it. Assuming, however, that such an erroneous statement was made,

it certainly did not entitle the defendant to a dismissal of the indictment, which would seem to mean a quashing thereof of the entry of a *nolle pros.* The most that can be said in favor of the defendant's right, conceding for the purpose of disposing of this contention that the statement was harmful, is that he was entitled to have the court direct a mis-trial because of the erroneous statement, and, so an opportunity afforded him to be tried before another jury."

To deny a mis-trial where the prosecutor has from the beginning to the end of the case acted as here is, we submit, not a proper exercise of judicial discretion.

The Supreme Court in *Bashaw* v. *Eichenberger,* 125 Atl. 130, 100 N. J. L. 153, in a civil case, conceded that, while a motion for a mis-trial was a matter of discretion, yet if the discretion was abused it might be reviewed, and said—

"While it is true the fact of insurance by the defendant was an irrelevant circumstance in the trial, it is not apparent that any injury had arisen which could not be removed by proper instructions and caution to the jury."

In *Hall* v. *United States,* 150 U. S. 74, 37 L. Ed. 1003, reference had been made by the prosecutor to matters not in evidence and which were irrelevant. The defendant objected to the declaration and remarks of the District Attorney and excepted to the action of the court in overruling his objections. The court said:

"The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a

breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court and the jury directed to allow it no weight."

"The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial."

"Wrong or injury" as that expression is used in the one hundred and thirty-sixth section of the Criminal Procedure Act, means injury resulting from a wrong, *i. e.* from judicial action that either violated legal principles or *amounted* to an abuse of discretion.

State v. *Rombolo,* 91 N. J. L. 560.

Notwithstanding the numerous objections made to the remarks of the prosecutor and to his method of examination, the court at no time distinctly and definitely admonished the prosecutor or directed the jury to disregard specific remarks. True, at various points, the court used such expressions as (p. 351)— "The jury will disregard any erroneous statements and pass entirely upon the evidence," and p. 360— "The jury will disregard that," and p. 361— "The jury will disregard anything not in evidence."

But we submit that, at *no* time, did the court use such vigorous language as would be needed to remove the erroneous impressions made upon the jury's mind, if those impressions could possibly be removed, which we deny. When objection was made during the course of the prosecutor's summing up to the reference by the prosecutor to the evidence of Brandin which

had been excluded, the court said: *"I will meet that in my charge"* (p. 357).

The court does not refer to it in his charge.

The only way by which the court attempted to meet the situation was to charge the second request of the defendant Mussikee (p. 373).

That charge did not and could not remove the erroneous impression made upon the jury by the reference of the prosecutor to matters which were not in evidence. It could not remove from the jury's mind the idea of motive injected by the prosecutor without evidence to support it. If the erroneous effect of the improper utterances could have been removed, it could only have been by the action of the trial court at the time the utterances were made. The defendant Mussikee asked the jury to charge the 21st and 22nd requests designed to draw their attention particularly to the fact that there was no evidence of over-insurance which could be considered as bearing upon the question of motive, and the court declined to charge that. Why? *There was no evidence of motive.* The refusal of the court to charge these requests amounted to a ratification by the court of the prosecutor's injection in his summing up of matters outside of the record and *supplied a motive.*

Again, on the question of motive, the court declined to charge the third additional request of the defendant Mussikee (p. 389)— "There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature."

Certainly, the prosecutor having in his summing up attempted to supply the motives by referring to the corporations with which Horne had been connected as "fly-by-night" and wild-

cat concerns when there was no evidence to support any such assertion, the defendant was entitled to have the jury in effect specifically directed to disregard the assertion of the prosecutor and this would have been accomplished by the granting of the third additional request.

As heretofore stated, the trial court seemed to think that because these requests were handed up after the summing up he was permitted, arbitrarily, to decline to receive them. When they were offered his attention was specifically directed to the fact that they were based upon the prosecutor's summing up (p. 368).

In *Lambert* v. *Trenton and Mercer Co. Traction Company,* 4 N. J. Advance Reports, 2040, a request to charge had been made after the court had finished charging the jury. This court said:

> "While this request was more or less legally involved, it, however, comprehended substantially a correct statement of the legal rule * * *. The learned trial court, however, raised no exception to the form of the request, but refused to entertain it because it was not submitted in writing, and because it had not been submitted before the court delivered its charge, as required by the rules. The rule of procedure is settled that matters of law which either party desired to have charged shall be submitted in writing to the court before the charge is begun. Carmany *v.* West Jersey and Seashore Railroad Co., 78 N. J. L. 552."
>
> "Rules of court, however, are devised as a method of facilitating the correct and orderly exposition of substantive law, and the proper administration of justice, and when for any reason they cease in actual practice to accomplish that function, their efficacy as rules *pro tanto* cease, and such an equitable construction or application will be accorded them, as will effectuate the manifest design and purpose of their framers. * * *"

"We think that in the exigency, the learned trial court, realizing the omission, should have detained the jury sufficiently to state to them the rule of law governing the subject, or, as an alternative, if deemed necessary, should have requested counsel to reduce his request in writing and submit it for the court's consideration before final submission of the case to the jury."

The court reversed the judgment.

In *See* v. *Public Service Ry. Co.*, 82 N. J. L. 144, the Supreme Court said:

"Where counsel in summing up proceeds to dilate upon facts not in evidence, or to press upon the jury considerations which the jury would have no right to regard, *it is the plain duty of the court, upon objection made, to interpose; and a refusal of the court to interpose, where otherwise the right of the party would be prejudiced, would be legal error.*"

In *Blackman* v. *West Jersey & Seashore R. R. Co.*, 68 N. J. L. 1, the Supreme Court speaking by the Chief Justice said:

"The proper administration of justice in civil as well as in crinimal actions, requires that counsel shall be allowed the widest scope in his discussion of the evidence in a cause, but where he travels outside of the evidence, bases arguments on facts which have not been proved, and appeals to the prejudice of the jury, he not only far exceeds his privilege, but by his conduct vitiates a verdict in his client's favor, if exception is taken by his adversary to such statements."

The Chief Justice then quotes from Andrews, *J.*, in the case of *Williams* v. *Brooklyn Elevated Railroad Co.*, 126 N. Y. 96—

"The privilege of counsel, however, does not justify the introduction in his summing up of matters wholly immaterial and irrelevant to the matter to be decided, and which

the jury have no right to consider in arriving at their verdict. The jury are sworn to render their verdict upon the evidence. The law sedulously guards against the introduction of irrelevant or incompetent evidence by which the rights of a party may be prejudiced. The purpose of these salutary rules might be defeated if jurors were allowed to consider facts not in evidence, and the privilege of counsel can never operate as a license to state to a jury facts not in evidence or to present considerations which have no legitimate bearing upon the case, and which the jury would have no right to consider. Where counsel, in summing up, proceeds to dilate upon facts not in evidence, *or to press upon the jury considerations which the jury would have no right to regard, it is the plain duty of the court, upon objection made, to interpose*: and a refusal of the court to interpose, where otherwise the right of the party would be prejudiced, would be error."

The court having declined to grant a mistrial the defense attempted to protect itself from the effect of the mis-statements of the prosecutor by asking the court to charge three additional requests. The court declined to take the requests (p. 368). The court stated that it would not take the request "at this time."

While it is the general rule that requests should be submitted to the court before counsel begin to sum up it is submitted that where requests are based upon statements made in the prosecutor's summing up, it is the duty of the court to take them at the earliest opportunity that they can be presented by counsel and to consider them. Any other rule would result in denying to the defendant the right to make requests based upon the summing up of the prosecutor.

The first request was—

"1. The difficulty of securing proof furnishes no reason for a conviction without proper proof."

The second request was—

"2. The difficulty of securing proof does not alter the rule that before convicting the defendant the jury must be satisfied by proof beyond a reasonable doubt of the guilt of the defendant."

The prosecutor in his opening had adverted to the difficulty of securing proof in cases of this kind (p. 14) and in his summing up had told the jury that in the annals of criminal law arson is one of the most difficult crimes to prove, yet one of the most common.

The prosecutor's summing up was a plea for some consideration from the jury because of the difficulty the State was under in proving this kind of a case.

The defense was entitled to have the court charge that this difficulty of obtaining proof should not in anywise influence the jury to disregard the rule that the burden was upon the State to prove the guilt of the defendants beyond a reasonable doubt.

All that the court said upon the subject was (p. 369):

"The State in electing to try these men, has taken on the burden of establishing the guilt of one or both as to every material element in the case."

And page 371—

"These defendants, like all other persons charged with crime, are presumed to be innocent, and the burden of establishing guilt rests upon the State."

It is submitted that, in view of the presecutor's summing up, the defense was entitled to have the

jury specifically instructed that the difficulty of securing proof did not alter these rules laid down by the court.

The third request was as follows—

3. "There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature."

So far as the testimony goes there is not a single word which would indicate a motive for the commission of the crime. No proof is offered that the business of Horne was in a failing condition, or that the properties were over-insured or had been lately insured, or that Horne was in any need of money.

To get a motive before the jury, without proofs the prosecutor announced, when he called Brandin (pp. 106, 107), that the object of calling him was to show that the place was not doing any business.

We have already adverted to this remark and to its unfairness in view of the fact that the prosecutor must have known that the testimony of Brandin would be excluded.

Again, to get before the jury, without evidence, a motive, the prosecutor, upon the cross examination of Horne (p. 277), had asked the question— "Q Well, didn't you know you had had another proposition with Mussikee, a building proposition which failed."

Mr. Kessler, counsel for Horne, asked the prosecutor whether he intended to prove that the company failed, and the prosecutor answered that he did not.

Again, to get a motive before the jury the prosecutor in his summing up had said (p. 367)—

"Here is where I call your attention to another attempt made by that vice-president

of four or five corporations like the Merritt Products Company—*all fly-by-night, wild-cat concerns.*''

There being no justification whatever for this remark, it is submitted that the defense was entitled to have the jury specifically instructed that there was no evidence in the case that any of Horne's concerns were of a fly-by-night nature.

It is quite true that, as a general rule, as counsel for the State contended in the Supreme Court, the trial court is not required to comment upon the evidence upon request, but, we submit, that, where the prosecutor has, in his summing up, injected something into the jury box which is not in the evidence which supplies a motive, if the court may, in its discretion, refuse a mis-trial, it is the duty of the court, upon request, to instruct the jury to ignore the statement of the prosecutor which has no evidence to support it, and it was for that purpose that Mussikee's third request was made.

The refusal of the court to receive the three additional requests to charge (p. 368) and to charge them (p. 380) were excepted to and formed the basis of the 48th, 76th, 77th and 78th assignment of errors and specification of causes for reversal.

The matters above argued are contained within the subdivision A to E of Point II.

POINT III.

The court erred in its charge and in refusing to charge certain requests.

The court erred in refusing to charge defendant Mussikee's third request, which was—

> **''The law does not require of the defendant that he prove himself innocent. The law imposes upon the prosecution the burden of proving the guilt of the defendant beyond all reasonable doubt.''**

And the fifth request—

> **''The evidence, in order to deprive the defendant of the benefit of the presumption of innocence, must not only be consistent with the theory of guilt but must be inconsistent with and exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendant, the law makes it their duty to do so.''**

And the seventh request, which was—

> **''If, upon a fair and impartial consideration of all the evidence in the case, the jury find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the guilt of the defendant and the other is consistent with the innocence of the defendant, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendant and to find the defendant not guilty.''**

(P. 382, exception p. 379, assignment of errors and specification of causes for reversal, numbers 49, 50, 51, pp. 408, 409.)

We have already recited all that the court said upon the burden of proof and the presumption of innocence.

In connection therewith the court said:

> "Under the law, you may infer the fact of setting fire from the proof before you, of the acts or conduct of the defendant or defendants, and, while there is no evidence in this case of the actual touching of a match to ignite the fire, the actual starting of the fire, the law says you may infer the facts from the proof of acts or conduct of the defendants—that is, if the evidence justifies it, if there is sufficient evidence to justify that inference. You cannot infer that merely from the fact that there was a fire. You cannot infer that the defendant or defendants started it, but if you find there is sufficient evidence in the case to justify it, you may infer the fact from such evidence, and it must be shown that it was with the intent—that is to say, that the fire was set with the intent to burn. That also may be inferred by the jury from the proven facts and circumstances in the case."

This portion of the court's charge was duly excepted to page 378, and the exception forms the basis of the 81st and 82nd assignment of errors and specification of causes for reversal.

The court specifically referred, as items of evidence which the jury might consider, to the *note left by the man who said he was Finkelstein and to the automobile* (p. 372).

The court then followed—

> "You, as jurors, under your oaths, are to decide this case precisely in keeping with the issue that has been raised by this indictment. If you believe the State has failed to sustain its burden, you ought to acquit. On the other hand, if you are satisfied beyond a reasonable doubt that the State has made out its case, it is your duty to

> convict. * * * It is your duty as jurors to take the evidence *and give such credit to it as you see fit,* and, I might say, in reference to that point, in arriving at the value of the testimony, you may consider the interest that anyone has in the outcome of this case."

This latter part of the charge was excepted to and the exception forms the basis of the 84th assignment of errors and specification of causes for reversal.

In view of the nature of the testimony upon which the State asked a conviction, it is submitted that the defendant was entitled to a specific charge with respect to the presumption of innocence. The evidence against the defendants was *wholly circumstantial.* There was no direct proof either with respect to the fire being incendiary or with respect to the defendants being connected with it. The prosecutor had commented upon the difficulty of obtaining proof, and had, in fact, asked the jury to consider *that fact in weighing the evidence.* The court did not define the presumption of innocence. *It did not tell the jury that the presumption itself might give rise to a reasonable doubt.* It did not instruct the jury that while there might be a conviction upon circumstantial evidence, *the circumstances must be inconsistent with the theory of innocence.*

In *State* v. *Linker,* 94 N. J. L. 411, this court said, at page 415:

> "How obviously this is so will appear from the principle of law that a person charged with crime is presumed to be innocent until proven guilty. And this presumption abides with him through the trial, so that, therefore, when the jury go from the bar of the court to their room to deliberate, they enter that room with the presumption of innocence still protecting the accused."

And in *State* v. *Raymond,* 53 N. J. L. 260, cited with approval in the Linker case, the court said:

> "But on a criminal trial, it is not merely a belief in the defendant's innocence, but it is the absence of a belief in his guilt so clear and strong as to exclude reasonable doubt, which requires his acquittal. In the various mental conditions, ranging from that in which the jury think the accused innocent, to that in which they are convinced beyond a reasonable doubt of his guilt, he is entitled to the benefit of their uncertainty."

All that the defendant Mussikee asked the court to charge the jury, upon the presumption of innocence, was what this court in the Linker case held to be the proper scope of the presumption.

And in *State* v. *Sahazian,* 98 N. J. L. 430, the Supreme Court upon considering the presumption of innocence said:

> "It (the charge in the case there considered) is also open to the further objection that the presumption of innocence, which continues in a case until the evidence satisfies the jury beyond a reasonable doubt of the guilt of the defendants, may be taken away from the defendants by evidence of their guilt which would not satisfy the jury beyond a reasonable doubt."

The defendant having specifically requested this charge with respect to the effect of the presumption of innocence, the court did not meet the situation by charging as it did on page 369 that the defendants, like all other persons charged with crime, are presumed to be innocent, and the burden of proof of their guilt beyond a reasonable doubt rests upon the State. The defendant was entitled to a more specific statement with respect to what this presumption of innocence actually means.

Nowhere in the court's charge is there a specific statement that, if the circumstances are explainable upon the hypothesis of innocence, the defendants are entitled to an acquittal and the inconsistency with the hypothesis of innocence must be so strong as to convince beyond a reasonable doubt. The requested charge (5) was in accordance, we submit, with what this court held to be proper in *State* v. *Kuehnle,* 85 N. J. L. at page 227. This court said:

> "The judge charged that it was for the State to satisfy the jury beyond a reasonable doubt that what it charges is sustained by a fair inference from the facts only consistent with guilt and not consistent with innocence; and again he charged that although the circumstances might be consistent with the innocence of the defendant, they were not inconsistent with guilt, but that the jury was not to adopt the guilt of the defendant on that account; that they must adopt that which was innocent, but that if they could not reconcile the facts with honest conduct on the part of the defendant, then they might draw the inference, if it led to the single inference of guilt, and they must adopt that. We think this in effect instructed the jury that if they thought the circumstances consistent with innocence, they could not convict. The court was not required to go further."

The answer of the State in the Supreme Court was—

> "The legal principle contained in these requests is that the presumption of innocence protects the defendants until overcome by evidence which convinces the jurors of the defendants' guilt beyond a reasonable doubt."
>
> "Certainly, evidence producing in the minds of the jurors 'an abiding conviction to a moral certainty of the truth of the charge' cannot be evidence which is consis-

tent with the innocence of the defendants."

"Evidence of the former character, the court instructed the jury, was necessary to justify a conviction. The verdict proves that the jury found the evidence was inconsistent with and excluded every reasonable theory of innocence. Hence, the defendants were not harmed by the refusal of the court to charge these requests."

This is no more than saying that if the court should charge the jury a proper definition of reasonable doubt, it is not necessary for it to charge the presumption of innocence. The duty of the jury to acquit, unless satisfied by proof beyond a reasonable doubt, is one thing, the presumption of innocence is *quite another thing.* It is an *item of evidence* which the jury *must* consider in determining whether or not they are convinced beyond a reasonable doubt of the guilt of the defendants and our insistence is that the jury was not properly instructed with respect thereto and that this was the kind of a case where such an instruction was necessary.

The court erred in refusing the defendant's (Mussikee's) requests to charge, 13a, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, 26, 27 assignment of errors and specification of causes for reversal, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 66, 68.

Request 13a was designed to direct the jury's attention to the fact that, before they could convict upon the first count, they must be satisfied beyond a reasonable doubt that the defendant Mussikee *actually, wilfully* and *maliciously* burned the building.

The 14th request was designed to direct the jury's attention to the fact that the words "aid and consent" in the statute upon which the first count is based implied *more* than *mere acquiescence.*

The 15th request was designed to bring the jury's attention to the fact that, before they could convict upon the second count, they must be satisfied beyond a reasonable doubt that the defendant, *actively* aided and assisted *wilfully* and *maliciously* in the burning of the building.

The 16th request was designed to direct the jury's attention to the fact that, before they could convict the defendant Mussikee upon the second count, they must be satisfied beyond a reasonable doubt that the *intent* of the defendant Mussikee was to *prejudice* insurers.

The 17th request was designed to direct the jury's attention to the fact that the words "aid, procure and consent," as used in the 126th section of the statute meant *more* than *mere acquiescence.*

The court did not in its charge to the jury read the statute. It did not point out the elements of the crimes charged.

And on page 372 it said:

"This matter is not a matter of this insurance company or a dozen insurance companies against these defendants. It is a matter between the State of New Jersey and these defendants who have been presented, because the State contends that the law has been violated."

In no place in the charge does the court point out that, before the particular defendant could be convicted, the jury must be satisfied beyond a reasonable doubt, *not only* that the *fire was built with intent to burn,* but that the defendant *participated* in some *active* sense *in the burning* and so far as the second count is concerned, with the *intent to prejudice insurers.*

The defendant Mussikee, having requested a specific charge with respect to the elements of

the offense and with respect to *his participation in it,* was, we submit, entitled to have the jury so charged. In view of the nature of the testimony and of the fact that the defendants were being jointly tried, although not charged with conspiracy, the matter was of importance.

The 19th request was designed to bring to the jury's attention the fact that, with respect to the first count, they must be convinced beyond a reasonable doubt of two things, first, that the fire was incendiary, and, second, that the *defendant aided* and *consented,* in an *active* sense, to the burning.

The 20th request was designed to direct the jury's attention to the fact that, before there could be a conviction upon the second count, the jury must be satisfied of three things, first, that the building was in fact burned as a result of incendiarism; second, that the *defendant* either aided, consented or procured in the burning, and third, that the intent was to prejudice insurance companies.

Again, in view of the nature of the court's charge in which it *did not bring the jury's attention to the elements of these offenses upon which the defendants were being tried, it is submitted* that the defendant was entitled to these specific charges.

The contention of the State in the Supreme Court was that these requests were *substantially* charged. We submit that the general reference in the court's charge, referred to by the State, *did not meet the situation.* These two defendants were being jointly tried, though not charged with conspiracy. Defendant Mussikee was entitled to have the requests charged as particularly applicable to him. By the charge of the court, the

jury's attention was *not* directed specifically to the fact that *each defendant* was entitled to have his case considered alone and the purpose of the requests was not only to secure a charge with respect to the general rule embodied in the request, but to make it particularly applicable to the defendant Mussikee and we submit that that was Mussikee's right in view of the manner in which he was being tried.

The 21st request was designed to prevent the jury from considering any alleged over-valuation of stock or merchandise as an element bearing upon the question of motive. While there was no evidence which would warrant a finding that there was any such over-valuation as would bear upon the question of motive, the prosecutor had attempted to inject it and we submit that the defendant was entitled to have this question taken out of the jury box.

The 22nd request was designed to withdraw from the jury the question of any alleged over-valuation of the real estate as bearing upon the question of motive and it is submitted, with respect to this, that there was no evidence of such over-valuation as would bear upon the question of motive and the defendant was entitled to have this question taken out of the jury box.

The State in the Supreme Court insisted that these requests did not embody any rule of law and that it is well established that the defendant cannot insist upon comment upon the evidence. We concede that that may be the general rule but, in the case at bar, the prosecutor had throughout attempted to insinuate, by innuendo, over-valuation for purposes of insurance and had gotten the idea of over-valuation into the minds of the jury. Various motions to direct a mis-trial

had been made (p. 357) and denied. Under the circumstances of this case, it is submitted that the defendant was entitled to the requested charge to remove the impression from the jury which the prosecutor had improperly injected into the case. There was no evidence of motive proven and we submit that the defendant was entitled to have it so charged.

The 23rd request was designed to direct the jury's attention to the fact that the *mere happening of the fire* was *not* sufficient to justify the jury in inferring guilt, that the presumption was that the fire was accidental and that presumption prevailed until overcome by proof beyond a reasonable doubt.

One of the elements which the State was obliged to prove beyond a reasonable doubt was that the fire was of incendiary origin. That there was a fire there was no question. Under the law the presumption was that the fire was accidental. The burden was on the State to establish that it was not accidental beyond a reasonable doubt.

What will here be said has direct application to the motion for the direction of a verdict both at the close of the State's case and at the conclusion of the whole case, for there was no evidence from which the jury could infer that the fire was of incendiary origin.

Apparently the fire had been smoldering for several hours before it broke out. Such is the testimony of Mrs. Ursillo (p. 95), who lived next door to the building, and who smelled the burning rubber all night. The causes from which fires start innocently are too numerous to mention. Horne left the building accompanied by Schein and Schein's daughter. Horne locked the door and went out with them. He had been continuously with persons in and about the building as above stated since about one-thirty until he left. There is no testimony whatever of any preparations for the burning of the building or any suspicious circumstances about the burning or about the fire. The chief of the fire department had no reason to believe it was suspicious and it was the firebug Goldberg who first initiated the talk about Finkelstein wanting some money.

The rule is universally recognized that, in a case of burning of this sort, the *corpus delicti* must be satisfactorily established before there can be a conviction—not only that the building was burned but also that it was burned through the criminal agency of the defendants and was not an accidental or other providential cause.

Thus in *Phillips* v. *State,* 29 Ga. 105, it was said that, if nothing appears but the mere fact that the house was consumed by fire, the presumption is that the fire was the result of accident, or of some providential cause. To the same effect, *Rayland* v. *State,* 2 Ga. App. 492, 58 S. E. 689; and see *Williams* v. *State,* 125 Ga. 741, 54 S. E. 661, *infra.*

In *People* v. *Wagner,* 71 App. Div. 399, 75 N. Y. Supp. 950, where a person was accused of arson, it was said:

> "There is no presumption that every fire that occurs in a thickly populated city, in buildings occupied by many human beings, is of incendiary origin; *and although a man may have an inclination and a motive for burning a building, yet the burden cannot be placed on him, if, perchance, it should burn, of showing that the fire was from natural causes.*"

There being *no* evidence in this case tending to show that the fire was of incendiary origin,

so as to warrant the essential finding of the *corpus delicti,* by the jury, the conviction could not be sustained. Upon a second trial sufficient evidence was given to justify the jury to find that the fire was of incendiary origin, and, as a result, the accused was convicted. This conviction was sustained in *People* v. *Wagner,* 84 App. Div. 637, 82 N. Y. Supp. 1009, affirmed in 180 N. Y. 58, 72 N. E. 577.

In the case at bar even the motive is lacking nor is inclination shown unless it be by the conversations between Mussikee and Turak which could not bind Horne. But if *both* motive and inclination *had* been shown the jury could not therefrom infer that the fire was incendiary.

In *State* v. *Pienick,* 46 Wash. 522, 11 L. R. A. (N. S.) 987, 90 Pac. 645, where a person was accused of trying to set fire to a clothing store, the court, after holding that the *corpus delicti* of arson is *not* established by merely showing that a building has been burned, but *in addition* it must appear that the fire was caused by the wilful act of some person criminally responsible, held further that the recent presence of the accused in the store, the arrangement of certain boxes in a hollow square, the fact that the cheaper clothes were at that end of the store, and the fact that a rival clothier testified that he smelled kerosene, were insufficient to show that the fire was of an incendiary character, all the circumstances of the case, as shown by the accused, being perfectly consistent with the hypothesis of his innocence.

In *Brown* v. *Com.,* 87 Vt. 215, 12 S. E. 472, where a person was indicted for setting fire to a warehouse, the only evidence introduced by the prosecution to prove the *corpus delicti* was that

one witness thought it was of incendiary origin because it had the appearance of having caught from the outside, though it was burning both from the inside and outside when he saw it; another witness testified that when he saw the fire it was very small, and he could have put it out with two buckets of water, his reason for not doing so being that he had a sick brother nearby; he further testified that he put his head through a hole and saw where oil had been poured along the planks to a pile of trash; the other testimony was to the effect that two persons, in hunting a tame fox under the warehouse, about a week before the fire, did not remember seeing any trash, or any inflammable substance there. It was held that such evidence was insufficient to establish beyond reasonable doubt that the fire was incendiary, and not accidental—especially where it appeared that a political meeting had been held in the warehouse and many cigar stubs and lighted matches had been thrown around.

The evidence in the case at bar does not approach that present in the above-cited case.

So in *Williams* v. *State,* 125 Ga. 741, 54 S. E. 661, it was held that, when a house was consumed by fire, and nothing appears but that fact, the law rather implies that the fire was the result of accident, or some providential cause, than of a criminal design; thus making in this case the confession insufficient to sustain a conviction since, eliminating the confession, there was no other evidence sufficient to show beyond a reasonable doubt that there was a wilful and malicious burning of the house which was destroyed by fire.

Evidence that the house which was burned was an unoccupied dwelling house within sight

from the dwelling house of the prosecutor; that it was burned about 12:00 o'clock on Sunday night; that the door of the house was open and in plain view of the residence of the prosecutor; that there was no fire used in or about the house and, so far as was known to anyone, there was no fire about the house late in the afternoon or in the early part of the night of the burning; that the house had in it at the time of the burning some seed cotton and about 100 bushels of cotton seed; and that there were some tracks apparently made during the night in the public road going by the house that was burned, falls *far short of any criminal agency in the burning of the house.* (*West* v. *State* (1909), 6 Ga. App. 105, 64 S. E. 130.)

Compare this proof *held insufficient* with that present in the case at bar.

Where the only evidence introduced, other than the alleged confession of defendant, which tended to show that the burning of the building in question was by a criminal agency, was that the burning occurred at night, that the fire originated on the outside of the house, and that shortly after the house had burned tracks which resembled those of defendant who lived several miles from the scene, were discovered about 75 yards from the place where the building had stood, the *corpus delicti* was not proven. *Bolden* v. *State* (1911), 98 Mis. 723, 54 So. 241.

Where the only evidence tending to establish that the burning was caused by a criminal agency was several slight circumstances, it was wholly insufficient to establish the *corpus delicti*. *Ratcliff* v. *State* (1911), 99 Miss. 277, 54 So. 947.

But certainly if there was proof sufficient to go to the jury upon the question of the incendiary origin of the fire, the defense was entitled to specific instructions that the mere happening of the fire was not sufficient to justify the inference.

In no place in the charges does the court cover this specific matter, although it is the foundation of the State's case.

The 26th request was designed to direct the attention of the jury to the fact that, unless it was shown that Mussikee had knowledge of insurance on the building, the jury could not find that any act of his was with intent to prejudice the insurance company.

The 126th section of the statute requires that the burning must be with *intent to injure insurance companies.* It can hardly be said that a person who has *no* knowledge that there is insurance upon the property *can intend to injure insurance companies.*

Defendant Mussikee had requested the court to charge the jury the 25th request,

> "There is no proof in the case from which the jury may find that the defendant Mussikee had any knowledge of the amount of the insurance carried upon said building."

The court declined to charge this request and its refusal is made the basis of the 66th assignment of errors. *It is a fact that the record is barren of proof that Mussikee had any knowledge of the amount of insurance.* The charge against Mussikee was that he participated in this burning with intent to *prejudice* insurance companies. Even if it was not necessary for the State to prove that Mussikee had knowledge of the insurance upon the building, the

court was not justified in declining to grant the defendant's 25th request for the matter of his knowledge of insurance was a relevant fact to be considered by the jury. *Either his knowledge or his lack of knowledge were proper matters to be taken into consideration by the jury in determining his guilt.*

It is submitted therefore that defendant Mussikee was entitled to have the jury specifically charged that the record did not disclose on his part knowledge of the insurance carried upon the building.

The 27th request to charge was designed to direct the jury's attention to the fact, that unless the jury were satisfied beyond a reasonable doubt that the defendant Mussikee had something to do with the particular fire mentioned in the indictment, that is the fire which took place on the 6th day of January, 1924, he must be acquitted.

Of course, the defendant must be convicted of the charge of which he was being tried. Under ordinary circumstances, perhaps, the general charge of the Court to the effect that the burden was upon the State to establish guilt of the crime charged beyond a reasonable doubt would be sufficient. But in *this* case the State relied upon evidence that Mussikee had made some statements in the summer of 1923 to the effect that he had a job which he desired done in Orange and that after the fire, when a demand was made upon him for payment, he had stated that he did not intend to pay; that he was not afraid; that he had nothing to do with it.

If we assume that he made the statements attributed to him and that he had been mixed up with other fires, that does not necessarily

imply that he was guilty with respect to this specific fire and, in view of the nature of this testimony we submit, that it was the right of the defendant to have the jury specifically instructed that they must find the defendant guilty of participation in *this specific fire.*

POINT IV.

The court erred in the admission and rejection of testimony.

(a) The witness Margaret Christiansen was called (p. 96). She testified that: her home was across the street from the Merritt Products Company; she was home on Saturday night, January 5th; she saw an automobile at the front entrance of Valley Road between nine and nine-thirty; she described the automobile (p. 97); she had seen an automobile *like* the automobile that she saw that night before that time in front of the factory (p. 98); she *cannot say that the automobile that she saw that night was the one that she had seen before used by Horne* (p. 99); she has seen many cars "of this general description that you say you saw that night" (p. 100).

All of this testimony was admitted over objection and at its conclusion a motion was made to strike it out and the court declined to strike it out (pp. 96 to 102). Exceptions were taken. *The testimony was in nowise connected up.* The car, which was outside of the factory upon the night in question, was not identified as that of Horne. Nevertheless, on pages 355, 356, the prosecutor in his *summing* up relies upon the fact that this unidentified automobile was in front of the factory at nine-thirty at night as proof of the connection of Horne with the fire. And the Supreme Court, in affirming the judg-

ment, relied upon the fact that someone had seen this automobile standing in front of the building from nine to ten-thirty o'clock in the evening.

The State said, in the Supreme Court: "Evidence of the presence of an automobile at the scene of the fire was admissible as part of the *res gestae*, whether or not it was connected with the defendants." We submit that the doctrine of *res gestae* is extended too far by this statement. Without proof that the automobile had anything to do with the fire, it is hard to conceive that evidence of its presence was part of the *res gestae*. But even if so, *it could not be considered as evidence against the defendants,* and yet the jury were permitted to consider the *mere fact* that the automobile *looked like Horne's as a circumstance in determining the guilt of the defendants.* The defendant Mussikee *was* injured by *this* evidence because the State's case depended upon the setting of the fire by or through the medium of both Horne *and* Mussikee. Mussikee could not well be convicted if Horne were not.

The State called Ernest Lange (p. 102), who said that: he was a stone's throw from the factory on January 5th; he passed the factory about quarter before eleven and saw a car standing in front of it. A motion was made to strike out his testimony, which was denied (p. 103). *His testimony was not connected up.*

The admission of this testimony, which we insist was irrelevant, and the refusal of the court to strike out, was made the basis of the 8th, 9th, 10th, 11th and 12th assignment of errors and specification of causes for reversal.

Although it is submitted that the testimony of neither one of these witnesses had any probative value, nevertheless by it there was gotten into the jury's mind the fact that a car *resembling Horne's* was at that factory the night before the fire. Mrs. Christiansen puts the car there between nine and nine-thirty; Lange puts a car there at quarter before eleven. There was no testimony from either of the witnesses, or from anyone else, that they saw anybody get out of the car and go into the factory or come out of the factory and get into the car. There was no connection of the car with the defendants except the statement of Mrs. Christiansen that the one she saw *resembled Horne's car.* Many cars of different makes resemble each other. Cars of the same make resemble each other. This is no proof that the car *was* Horne's car. There was *no* proof that the car Lange saw was the same car Mrs. Christiansen saw. The car was simply standing in the street. While not *probative* evidence it was harmful because, taken in conjunction with the other evidence in the case, the jury might well have seized upon it as proof of the fact that Horne was at the factory in that car at that time, and it was most vigorously relied upon by the prosecutor of the pleas in his summing up and the Supreme Court relied upon it.

At the conclusion of the trial a motion was made to strike out of the case all reference to an automobile being at the place of the fire on the night of the fire upon the ground that the automobile had in nowise been connected with any of the defendants at the bar. This motion was denied (p. 302) and exception allowed. It is made the basis of the 34th assignment of error and specification of causes for reversal.

(b) The witness Turak was permitted to testify, over objection and exception, to conversa-

tions which he said he had with Mussikee in September, 1923 (pp. 108, 110). Assuming these conversations to have taken place, they had no effect whatever in connecting Mussikee with *the* fire which he was charged with setting, and it is submitted that the testimony was erroneously admitted. The exceptions are made the basis of the 13th and 14th assignment of errors and specification of causes for reversal.

(c) The prosecutor was permitted, over objection, to ask the following question— "Now, did Mussikee say to you on that 15th day of January, 1924, that he had promised, he, Mussikee, had promised Fisch and Finkelstein $1,500 to do the West Orange job?"

While we concede that it is a matter of discretion, under ordinary circumstances, whether counsel should be permitted to ask a question in a leading form, it is submitted that it was an abuse of the discretion of the court to permit the prosecutor, in this case, to inject, by leading questions to the witness Turak, who had been examined fully upon direct and cross, something which had not been referred to in *anywise* upon the direct examination and of the importance, from the standpoint of the prosecutor of that which was suggested by the leading question. The prosecutor injects into the question the words "West Orange" job when the witness had denied on cross examination that the term West Orange had been used in *any* connection, although the prosecutor had gotten the witness on direct examination to say it had been, notwithstanding that the witness on the previous trial had said it had not (p. 124).

The exception is made the basis of the 15th assignment of error and specification of causes for reversal.

(d) The witness Goldberg was permitted, over the objection and exception of defendant Mussikee, to testify to a conversation alleged to have taken place between himself and Horne in October, 1923. He was permitted to testify that Horne said that a friend had sent him. The witness denied (p. 135) that Horne mentioned Mussikee's name but was permitted to testify, over objection and exception, that he said that his friend's name was Mike, and that Mussikee's first name was Mike (p. 137). The prosecutor was permitted, over objection and exception, to put to the witness the following question (p. 136)—

> "Q Now, at the last trial when you were asked by me what Joseph H. Horne said to you in Clifton when he first came to your house in October, here is what you answered— And he said, 'Well, I am sent from a friend of yours, Mr. Mussikee sent me over to you if you want to go up there in Orange.' Did you make that answer?"

The witness answered that Horne did not mention any name, but the effect of the testimony on pages 135, 136 and 137 which the court permitted the prosecutor to bring out over the objection and exception of counsel was that Mussikee's name *was* mentioned.

The *only* purpose of injecting into this conversation the name of Mussikee was to connect Mussikee, through a conversation alleged to have taken place between Horne and Goldberg in October, 1923, with the fire which took place on January 6th, 1924. *It was pure hearsay.* It would not have been admissible in a conspiracy case for the purpose of proving the conspiracy. It certainly is not admissible where a conspiracy is not charged.

The exceptions taken are made the basis of the 16th and 17th assignment of errors and specification of causes for reversal.

(f) On the cross examination of Goldberg (p. 141) it appeared that Goldberg could *not* identify Horne. He said (p. 141)—

> "Q Was he the man you saw at your house? Will you swear? A No, I wouldn't.
> Q So that all the conversation you had with a man in Clifton—you are not sure, you do not know this is the man or not? A No.
> Q Look at him. I want to be sure about it. A I have seen him twice already.
> Q Did you see him in your house at Clifton that day? A I wouldn't say yes or no."

The witness is further examined and it appears beyond question that he *cannot identify Horne and it does not appear that the man Goldberg talked with gave his name.*

A motion was made to strike out the testimony of Goldberg with respect to that conversation, and the court said— "No, he said he is not certain. I will allow the jury to pass on his testimony." In other words, *defendants have been held to be bound* by the testimony of a witness with respect to a conversation alleged to have taken place between the witness and a man whom the witness will *not swear was one of the defendants. The witness does not even say that he thinks that it was one of the defendants.* He distinctly says that he will *not swear* it was one of the defendants. The mere statement of the proposition shows how erroneous it is. *The court apparently delegated to the jury the duty of determining whether the testimony was admissible, the duty of the court, not the jury.* Either the man who talked with Goldberg was Horne or he was not. If not Horne the testimony had no place in the case. Where is *the evidence* that the man was Horne?

The refusal of the court to strike out this testimony is made the basis of the 18th assignment of errors and specification of causes for reversal.

The prosecutor in his summing up relied upon this testimony (p. 359), and the Supreme Court in affirming did likewise. It is no answer to say, we submit, as the State did in the Supreme Court, that Goldberg was a reluctant witness. *The reluctance of a witness cannot take the place of testimony, certainly in a criminal case.*

The result is that Mussikee has been held to be bound by a conversation in October, 1923, between Goldberg and a man whom Goldberg *cannot identify as Horne* and because this *unidentified man* said to Goldberg in October, 1923, that his friend Mike had sent him and something was said about a fire Mussikee is found guilty of participating in a fire which occurred on January 6, 1924.

(g) The 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st and 35th assignment of errors and specification of causes for reversal bring up exceptions taken to the action of the trial court in admitting evidence of Lena Nevins and with reference to Ex. D. 2, and have already been argued under Point II.

It is respectfully submitted that the judgment should be reversed for the errors heretofore pointed out and that in any event *the verdict is against the weight of the evidence.* 89th assign-

ment of error and specification of causes for reversal.

Respectfully submitted,

DONALD LEFFERTS,
MERRITT LANE,
Of Counsel with Plaintiff-in-Error Mussikee.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* MICHAEL MUSSIKEE and JOSEPH H. HORNE, *Plaintiffs-in-Error.*	*On Error.*

BRIEF FOR THE STATE.

The defendants were convicted in the Essex Sessions, March 31, 1924, of burning a factory building, under Section 124 of the Crimes Act, and of burning with intent to prejudice the insurers under section 126. This conviction was reversed by the Supreme Court, 101 N. J. L. 268; 128 Atl. 591.

The defendants were again brought to trial upon the same indictment and were a second time convicted April 6, 1926. That conviction has been sustained by the Supreme Court. To review the judgment of affirmance, this present writ of error has issued.

I.

The Indictment.

The indictment in the case at bar followed the form that was considered by this court in *State* v. *Harris,* 100 N. J. L. 184; 124 Atl. 602. Every objection now urged to the indictment was argued at length both in the Supreme Court and in this court by the learned counsel for Harris. The opinion in the Harris case pointed out that the objec-

tion to the indictment was not properly raised at the trial but added,

> "We think, however, the criticism of the indictment in this respect is insubstantial and without merit."

The first count of the indictment now before the Court charges that defendants

> "willfully and maliciously did burn and cause to be burned, and aid and consent to the burning of the factory building of the Merritt Products Company."

The criticism is that this count is duplicitous in that it charges two substantive offenses; first, burning and second, aiding and consenting to the burning.

State v. *Price,* 11 N. J. L. 203, 215, held not to be double a charge that defendant did burn and cause to be burned. The Court pointed out that,

> "The expressions to burn and cause to be burned are not incongruous nor inconsistent."

And the Court cited Starkie that,

> "It is the usual practice to allege offenses cumulatively both at common law and under the description contained in penal statutes."

State v. *Traction Co.,* 67 N. J. L. 14. "When a single offense may be committed by many means or in one or another of several ways, then a count which charges its commission by several means or in several ways which are not repugnant, is not double."

State v. *Bartholomew,* 69 N. J. L. 160. "Where a statute makes two or three distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, it has in many cases been ruled they may be coupled in one count.

> *Whar. Cr. Pl. Pr.* (9th Ed.) 251. To state the successive gradations of statutory offenses conjunctively when they are not repugnant, is allowable."

State v. *Hatfield,* 87 N. J. L. 124, held that a person might be charged in a single count with using and pretending to use palmistry and physiognomy, saying

> "As they all appear to be cognant offenses, care must be taken not to confuse the several specifications of the same offense with cases where the offenses are, in their nature, distinct."

Tested by the cases mentioned above, the first count in the indictment now before the Court is not double. The words "burn and cause to be burned, and aid and consent to the burning" are successive gradations of a statutory offense and may each be regarded as representing a phase in the same offense. They are not repugnant or inconsistent, especially when there are two defendants. Each may be considered as aiding in the burning and as causing the building to be burned and, of course, consenting thereto; and the sum of these elements is that they did burn the building.

The section of the statute on which this indictment is founded, namely, Section 124 of the Crimes Act, is like the section denouncing forgery. Under that section it has been customary for many years, in Essex County at least, to charge in one count that defendant did,

> "Falsely make, forge and counterfeit and cause, counsel, hire, command and procure to be falsely made, forged and counterfeited, and willingly did assist in the false making, forging and counterfeiting."

The indictment in *State* v. *Ready,* 77 N. J. L. 329; 78 *Id.* 599, drawn by the late Henry Young, Esq., is an example. The distinguished counsel who represented the defendant in that case did not even suggest that the indictment was double.

The second count of the indictment in the present case alleges that the defendants,

> "Wilfully and maliciously did set fire to, burn and aid, procure and consent to the setting fire to and burning of the building known as 494-498 Valley Road in the Town of West Orange aforesaid, and the goods, merchandise and other chattels then therein" with intent to prequdice the insurers.

The first criticism of this count is that it is duplicitous in that it charges first, a burning and second, aiding, procuring and consenting to the burning. This objection has already been considered.

The second contention is that the count is double because it charges a burning of, first, the building and second, the chattels.

The claim of duplicity is based on the fact that the burning of a building is a crime even though no chattels be burned and conversely, the burning of chattels is a crime even though the building is not fired. It seems clear, however, that if the one act of the defendants of touching a match to the train that started the fire, resulted in the burning of both building and personalty, only one crime was committed.

State v. *Bartholomew, supra,* held that an indictment for embezzling money, property and securities was not duplicitous even though the embezzlement of any one of the three was a crime.

State v. *Brand,* 76 N. J. L. 267; 69 Atl. 1092, affd. 77 N. J. L. 486; 72 Atl. 131, considered an indictment of procuring, etc., the burning of both building and chattels. The indictment was not attacked on the ground of duplicity but on other grounds and was sustained.

The Supreme Court disposed of the objections to the indictment now before the Court upon its first review of this case, 101 N. J. L. 268; 128 Atl. 591, as follows:

> "We incline to think that it is not duplicitous as it follows the language of the statute and the various types of offense included in the statute seem to be so interrelated as to bring the case in line with the recent decision of this court in *State* v. *Bove,* 98 N. J. L. 350, 352; 116 Atl. 766, affd. 98 N. J. L. 576; 119 Atl. 926."

In the Bove case it was held that a count charging that defendant did give, barter, sell, dispose of, deliver and furnish to another, lottery tickets, was not duplicitous under the rule of the Hill case cited next below.

> *State* v. *Hill,* 73 N. J. L. 77; 62 Atl. 936. "The rule is entirely settled that if a statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment may, as a rule, embrace the whole in a single count; but it must use the conjunctive 'and' where 'or' occurs in the statute, else it will be defective as being uncertain."

Defendants' counsel relies upon *State* v. *Brand, supra.* In that case, no question of duplicity was raised by counsel or discussed either by Justice Swayze in the Supreme Court or Chancellor Pitney in this court.

The indictment is sufficient.

II.

Motion to Compel an Election.

When the testimony was closed, counsel for the defendants moved that the State be compelled to elect between the first and the second counts on the ground that all the acts charged are, in effect, a single state of facts. The motion was denied (Cas., p. 304).

The Supreme Court said on this point, upon its first review of the case,

> "There was no error in this refusal. The State was entitled, under the proof, to rely on both (counts). Nothing is more common than a general conviction on all of several counts, and the argument now made that this involves a double punishment is, in our estimation, entirely without substance."

The sentence of the Court is less than the maximum penalty prescribed by the statute for the offense charged in either count and may be supported by either count alone, disregarding the other.

A motion to compel an election is addressed to the discretion of the trial court.

The Court properly exercised its discretion in this respect.

III.

The Weight of the Evidence.

If the verdict was not against the weight of the evidence, then obviously there was some evidence to go to the jury, and the motions to direct an acquittal were properly overruled. It seems enough, therefore, to discuss the weight of the evidence and to say no more about the motions.

The general rule to be followed in considering the weight of the evidence has been settled by this court.

> *State* v. *Karpowitz,* 98 N. J. L. 546; 120 Atl. 40. "It is perhaps unnecessary to say that those who have the opportunity of personally seeing and observing the demeanor of witnesses are best qualified to judge of the credibility of witnesses and the weight to be accorded their testimony. Testimony which seems convincing in print would often be unconvincing if heard in court from the lips of witnesses.
>
> "Appellate courts should be cautious in setting aside a verdict of a jury upon the ground that the verdict is contrary to the weight of the evidence. It should only be done when it is clear that the verdict is the result of mistake, passion, prejudice, or partiality."

The fact that there have been two concurring verdicts of guilty on this indictment should also be considered by the Court.

> *Brown* v. *Paterson, etc., Co.,* 69 N. J. L. 474; 55 Atl. 87. "A second concurring verdict upon the same state of facts or on slightly varying evidence, should cause the court to hesitate before granting a third trial."

This rule has been followed in numerous cases of which the latest is *McMurtry* v. *Farm Service Exchange,* 130 Atl. 517.

The fact that the cases last above cited are civil cases does not detract from their weight, since it was specifically held in the Karpowitz case that the appellate court will weigh the evidence in the same manner as in a civil case upon a rule to show cause.

An excellent review of the facts is contained in Mr. D'Aloia's closing address to the jury (Cas., p. 346).

The facts developed by the evidence were briefly as follows:

The defendant Horne, was the president and principal stockholder of both the Merritt Products Company and the Horne Realty Company. The Realty Company owned the premises where the fire occurred and the Products Company occupied them (Cas., pp. 259 and 260).

The building was of frame construction, without any cellar, about 45 feet on Valley Road by 125 feet on Joyce street. Exhibit S. 4 gives an excellent idea of the exterior of the building. Exhibit S. 1 is a plan of the building.

At the time of the fire, the building was insured for $20,000, the fixtures for $2,500, and the stock for $70,000 (Cas., p. 23).

We said in our brief in the Supreme Court and we here repeat:

> "Mussikee's interest in the fire does not appear. He and Horne had known each other a long time and had been in business together (Cas., p. 261); they admitted seeing each other a few months before the fire (Cas., p. 253, l. 35). It may well be that Horne engaged Mussikee as an expert in successful fires. Of course, as pointed out by this court, on review of the first trial, the State could not prove Mussikee's experience in this line.
>
> "After the fire, Horne denied having seen Mussikee for several years" (Cas., p. 295, l. 35).

Counsel for defendants object that our surmise that Horne engaged Mussikee as an expert in successful fires, is an innuendo unsupported by the evidence. We reply that our inference is fully justified by Mussikee's association with firebugs like Turak and by his connection with this fire, in apparent behalf of Horne.

To establish the incendiary origin of the fire, the State relied upon Chief Sheehan of the West Orange Fire Department, who testified: The alarm sounded at 12:17 A. M. Sunday, January 6, 1924; he responded immediately (Cas., p. 31); he found two separate fires in two separate rooms and no connection between the two fires (Cas., p. 33). If there was any fire in the boiler, it was a very small one and had no connection with either of the two fires found by the chief (Cas., p. 34).

The defendants' counsel suggest that the original fire may have traveled along the ceiling, and beaverboards, burning and dropping may have started the second fire. There is no proof of this, however, and it is clearly negatived by the State's testimony.

One fire was in the westerly end of room E on the south side of the building and the other in room C on the north side, as shown in the map, Exhibit S. 1 (Cas., p. 33, l. 20). There was no connection between the fires. They were two separate and distinct fires (Cas., p. 33, ll. 25 and 35).

Exhibit S. 6 is a photograph of room C taken from the easterly end of the room with the camera facing west. On the right of the photograph is the partition between room C and room E. It will be noticed that the roof is badly charred. The door jamb appearing at the ex-

treme right of the picture is the jamb of the door at the easterly end of the room leading into room E. The fire appears to have been heaviest in this room at its easterly end.

Exhibit S. 7 is a photograph of room E taken from the southeasterly corner with the camera facing the boiler pit. The pillars across the center of the picture are shown on the map by square outlines down the center of the room. The boiler and smokestack may be seen with some difficulty in the background in the exact center of the photograph. The partition between room E and room C is at the left. It will be noticed that the beaverboards on the ceiling have not been burnd in the slightest, and that the partition on the left of the picture does show signs of fire. This was probably the same fire shown in Exhibit S. 6. It is in the easterly end of the partition near the door leading to room C.

Exhibit S. 8 is another photograph of room E taken from the southwesterly corner and facing the boiler pit. The opening shown on the left of the photograph leads into room C and discloses the window on the further side of that room. It will be noticed that the end of the partition between rooms E and C shown in the photograph, is entirely undamaged. The fire in the easterly end of this partition clearly exhibited in Exhibit S. 6 did not progress as far as the boiler pit. This photograph, Exhibit S. 8, clearly shows the second fire, namely, the one in the partition in the right of the photograph and away from room C. This partition is approximately 50 feet from the door jamb shown in S. 6.

It is most difficult to see how one of these two fires could have started the other.

The State then sought to prove that it was the defendants who started the fire. The most important proof to this end was evidence that before the fire, the defendants had tried to engage certain persons, Turak and Goldberg, to set the fire, and that after the fire, the defendants negotiated with these persons, as well as two others, Fisch and Finklestein, on the subject of payment.

There were also additional circumstances tending to the conclusion that the defendants were the guilty parties.

The factory usually was shut down Saturday afternoons. Horne, however, was at the factory the Saturday afternoon, eight or ten hours before the factory burned (Cas., p. 106, l. 5). At 9 or 9:30 that evening (Cas., p. 100, l. 37), a neighbor saw standing in front of the factory, an automobile that looked like Horne's car (Cas., p. 100, l. 10); it was a dark open car (Cas., p. 99, l. 8). Later, at 10:45 the same night, a car was still standing in front of the factory (Cas., p. 103, l. 20).

The State's witness, Israel Turak, of Passaic, worked as an excavator for Mussikee in 1923. He testified to a conversation with Mussikee in September, three or four months before the fire:

> "He told me he had a fire job in West Orange, a small factory. I make a bargain for $3,000 to do the job. I never do the job, because I want to know the place and I left him and I did not speak to him no more about that job. I want to know what was going on" (Cas., p. 110, l. 35).

Turak had another talk with Mussikee January 15, 1924, ten days after the fire. Mussikee told him that the job in West Orange was done;

that there was more water than fire, and that Finklestein and Fisch were asking him for money for the job; Turak advised him to pay, but he replied, "I no do the job" (Cas., pp. 111 and 112). However, he had promised them $1,500 to do the job (Cas., p. 132, ll. 1 to 32).

Turak's English is easily misunderstood. For instance, he frequently uses the word "told" when he means "asked" (Cas., p. 112, l. 22; p. 115, l. 21).

Philip Goldberg, of Clifton, near Passaic, saw Horne at Goldberg's home in October, 1923 (Cas., p. 135, ll. 1 to 10). Horne said a friend of Goldberg's had sent him; that he had a job to do in Orange to clean a factory to the ground and there was $1,000 in it for Goldberg. Goldberg understood what he meant and virtuously refused the offer, "No, I have my children now in school and I do not want to do that kind of a job" (Cas., pp. 137-138).

Counsel for the defendants urge that Goldberg did not identify Horne as the person with whom he had this conversation. Goldberg's testimony to this conversation was introduced as follows:

> "Q Do you remember the defendant, Joseph H. Horne? A Yes.
>
> Q Do you know the defendant, Joseph H. Horne, in court? A I see him.
>
> Q Do you know him? A Sure, I know him.
>
> Q That is the man I am talking about, that you know to be Joseph H. Horne. Did he come up to your place in Clifton? A Yes" (Cas., p. 134, l. 36 to p. 135, l. 5).

He then detailed the conversation.

It is true that on cross examination he said that he did not remember the face (Cas., p. 141, l. 15). He was a most reluctant witness. The jury might properly conclude that he was telling the truth when he said he knew Horne and had this conversation with him, rather than when he testified he did not remember the face.

Goldberg saw Mussikee the middle of January and told him he had been sent by Finklestein to demand $300 for the arson case in Orange (Cas., pp. 138-139).

Goldberg had been convicted of several crimes, including conspiracy to burn (Cas., pp. 145-146). Mussikee had known him eight or ten years (Cas., p. 253, l. 20).

The State proved an unsuccessful effort to locate Finklestein. Mussikee knew Finklestein at least by sight (Cas., p. 251).

Fisch was a carpenter who had worked for Mussikee (Cas., pp. 250-251). He was present in court during the trial (Cas., p. 331, l. 22), but apparently his character was such that neither the State nor the defense was willing to risk calling him to the stand.

Mussikee admitted knowing Turak, but denied the conversations with him (Cas., pp. 243-244); he also knew Goldberg who was reputed to be a banker and admitted the conversation with him in January. In fact he added this detail that Horne was mentioned by name in that conversation (Cas., pp. 246-247).

Mussikee testified that this gang was trying to blackmail him; he saw Finklestein shortly after Goldberg made his demands (Cas., p. 256, l. 10), but he made no complaint to the police (Cas., p. 252, l. 20).

And why should Mussikee, living in Passaic, be singled out for blackmail on account of a fire in West Orange, unless, in fact, he was criminally concerned with the fire?

The defense was a general denial and an alibi.

The verdict is supported by the weight of the evidence.

IV.

Reception of Evidence.

Margaret Christiansen, Assignments 8 to 11, Inclusive, and 34.

Mrs. Christiansen, over objection, was permitted to testify that at about nine or nine-thirty the evening of the fire, she saw standing in front of the factory, a dark, open automobile, that looked like the car in which she had on other occasions, seen the defendant Horne (Cas., pp. 97 to 101).

Evidence of the presence of an automobile at the scene of the fire was admissible as descriptive of the site and as part of the *res gestae,* whether or not it was connected with the defendants.

State v. *Weiner,* 127 Atl. 582.

The fact that the car looked like Horne's automobile was a circumstance to be considered in connection with all the other evidence in determining the guilt of that defendant.

It is not perceived how this evidence could injure the defendant Mussikee. Horne's counsel did not object to it.

Ernest Lange, Assignment 12.

Lange testified without any objection that he saw an automobile outside of the factory about 10:45 the night of the fire. A motion on behalf of Mussikee to strike out this evidence was denied (Cas., p. 103).

Clearly, the motion was too late. Furthermore, the evidence was proper as part of the *res gestae.*

Israel Turak, Assignments 13 and 14.

Turak testified that he had a conversation with Mussikee in September, 1923, three or four months before the fire. When the witness was asked to repeat the conversation, objections were interposed that the evidence was immaterial, apparently because the conversation was held too long a time before the fire.

The objections were overruled and Turak testified that on this occasion Mussikee asked him to set fire to a small factory building in West Orange. This was connected up with the fire mentioned in the indictment by the conversation between Turak and Mussikee shortly after that fire (Case, pp. 111, 112 and 132). The materialty of the evidence is apparent.

Assignment 15.

In examining Turak about the conversation of January 15, Mr. D'Aloia asked:

> "Q What did Mussikee say when he talked about Finklestein? A He said they want money, he should give them money for the West Orange job. He promised so much, $1,500, he promised to give it to him." * * *
>
> "Q Now, did Mussikee say to you on that 15th day of January, 1924, that he had

promised, he, Mussikee, had promised Fisch and Finklestein $1,500 to do the West Orange job?''

Objection that the question was leading was overruled.

The witness used English with difficulty. His testimony was hard to understand. There was no abuse of discretion in allowing this leading question. It did not contain a single element not found in the preceding answer of Turak (Case, p. 132, l. 1).

Philip Goldberg, Assignment 16.

Goldberg was asked if he knew the defendant Horne, and replied, ''Sure, I know him'' (Case, p. 135, l. 1). He was then allowed to testify over objection on behalf of Mussikee, to a conversation with Horne in the middle of October, 1923, some two and a half months before the fire (Case, p. 135, l. 10).

The overruling of this objection needs no argument to support it.

Assignment 16, relating to this testimony, alleges that this objection was made by the defendant Horne. This is not supported by the printed book.

Assignment 17.

The witness, Goldberg, was a convicted criminal and a most reluctant witness. In the course of his examination, Mr. D'Aloia expressed surprise that the witness had not testified to the name of the man mentioned by Horne as the one who had sent him to see Goldberg. The prosecutor then sought to refresh the memory of the witness by calling his attention to his testi-

mony at the first trial in which he testified that Horne said he had been sent by Mussikee. The witness replied, ''He didn't mention no name'' (Case, p. 136). Counsel for Mussikee then interposed an objection and the Court ruled, ''I will admit it as part of the conversation with Horne, but I will rule it has no effect on Mussikee'' (Case, p. 137, l. 1).

The objection was too late, the evidence was harmless, and furthermore, the Court charged:

> ''Any statements attributed to Horne not made in the presence of Mussikee, cannot be considered as evidence against Mussikee'' (Case, p. 376, l. 37).

Assignment 18.

Toward the close of Goldberg's evidence, a motion was made to strike out his testimony because he was unable to identify Horne as the man with whom the conversation was held. The motion was denied, the Court saying:

> ''He said he is not certain. I will allow the jury to pass on his testimony'' (Case, p. 144, l. 23).

The witness had first testified positively that he knew Horne (Case, p. 135, l. 1). On cross examination the first question asked him was:

> ''Q Did you see that man at your house in Clifton this October? A I do not remember the face'' (Case, p. 141, l. 15).

It was proper for the Court to let the jury decide whether or not this reluctant witness was telling the truth when he testified that he knew Horne and that he had had this conversation with him, or whether he had the conversation with an unknown man.

Lena Nevins, Assignments 21 to 29, inclusive, 31 and 35.

The State proved by the witness, Turak, that ten days after the fire, Mussikee told Turak that Finklestein and Fisch were asking for money on account of the fire (Case, pp. 111 and 112). Goldberg testified that he saw Mussikee about the middle of January and told him he had been sent by Finklestein to demand $300 for the fire (Case, pp. 138 and 139).

The State desired to show a direct connection between Finklestein and the other defendant, Horne, and not being able to locate Finklestein in order to put him on the stand (Case, p. 294), the prosecutor endeavored to show this connection on the cross examination of the defendant's witness, Mrs. Nevins.

Horne boarded with Mrs. Nevins in West Orange for about one year, around the time of the fire (Case, p. 185, l. 15). She testified that she knew the people he was associated with (Case, p. 187, l. 20). On cross examination she was asked:

> "Q Now, you told Mr. Kessler that you know the people who were associated with Mr. Horne there? A Well, I do not know what people he means."
>
> "Q Well, you answered him and said yes, you do know the people with whom Mr. Horne associated? A Well, there are quite a few people came to the house whom I know" (Case, p. 188, l. 24).

The State was then allowed over objection to prove that some time after the fire, Finklestein came to the house (Case, p. 190, l. 17) and left with Mrs. Nevins a note for Horne (Case, p. 192, l. 1); that she gave it to Horne the same

day (Case, p. 193, l. 8) and that Horne then went upstairs where there was a telephone; but whether he used the phone she did not know (Case, p. 193, l. 25), and if he did use it she did not know whom he called up (Case, p. 194, l. 1).

On re-direct examination, she said that Finklestein wrote the note in her presence (Case, p. 291).

While Mrs. Nevins was unable to fix the date of Finklestein's call, Mussikee's own testimony had the effect of fixing it at about one week after the fire.

The original note having been lost, the defense placed in evidence a copy as Exhibit D. 2 (Case, p. 289). The note was as follows:

> "Mr. Horne. Please call up your friend, Mr. Mussikee, in Passaic, about the factory. P. Finklestein."

Horne testified that he received the note and that he got into communication with Mussikee the same day (Case, p. 268, l. 32). And that he asked Mussikee if he had sent Finklestein to see him, and that Mussikee replied that he had not and that he did not know about the fire (Case, p. 280, l. 38).

Mussikee fixed the time of this telephone conversation as about a week after the fire (Case, p. 248, l. 15).

Mrs. Nevins' testimony about the note was certainly material and competent. The only arguable objection to the admission of her evidence was that it was cross examination not related to the subject of her direct examination. The

scope of cross examination lies largely within the discretion of the trial court.

Davenport v. *Patteson,* 98 N. J. L. 65, 118 Atl. 708.

The defendants cannot have been injured in their defense on the merits by laying before the jury this material evidence which was corroborated by their own testimony.

The real complaint of defendants does not seem to be directed against the rulings of the trial court, but against the statement *volunteered* by Mrs. Nevins and struck out by the Court, that the note was "from Mr. Mussikee." That incident cannot be a basis for reversing the judgment.

V.

Motions for Mistrial.

Counsel for the defendants moved for a mistrial at the conclusion of the State's opening (Case, p. 15) and again during the examination of the State's witness, Mrs. Christiansen (Case, p. 101), and again while defendant's witness, Lena Nevins, was being cross examined (Case, p. 196). The summation of the State was punctuated by six motions for a mistrial, beside other interruptions. These interruptions, whether so intended or not, must have largely destroyed the effect of the summation on the jury and also have distracted the attention of the prosecutor and made it very difficult for him to state the evidence with accuracy.

The denial of these motions is advanced as a ground for reversal in the brief for defendant, Mussikee, under the heading "The Facts."

The action of the trial court on a motion for a mistrial is not reviewable, even under Section 136 of the Criminal Procedure Act.

State v. *Martin,* 132 Atl. 93.

In order, however, to remove any suggestion that the trial judge's discretion was faulty, we will set forth the circumstances attending the motions.

First Motion for Mistrial.

In the course of his opening, Mr. D'Aloia stated that the State would show that the night of the fire there was an automobile outside the factory of the same color and make as Horne's automobile and that the State would show that a certain message was delivered to Horne's boarding house to communicate with Mussikee in Passaic about the fire in the factory (Case, p. 14, l. 20).

Mr. Lane then moved a mistrial because of the reference by the prosecutor to the message and to the automobile (Case, p. 15, l. 3).

No arguable reason was then or is now advanced why the motion should have been granted.

Second Motion for Mistrial.

Mrs. Christiansen testified that she lived across the street from the factory (Case, p. 96, l. 30), that she had seen Horne, the owner of the factory, in an automobile several times before the fire (Case, p. 99, l. 40).

At the close of her examination, Mr. Lane moved to strike out her evidence. Mr. D'Aloia, arguing on this motion, said:

"The evidence is, here is a woman who lives directly across the street from the place

and she knows the automobile used by the owner."

Mr. Lane: "I move a mistrial because of the statement of the prosecutor" (Case, p. 101, l. 18).

The statement complained of was an accurate recital of the evidence.

Third Motion for Mistrial.

On cross examination, Mrs. Nevins testified that quite a while after the fire a man by the name of Finklestein came to the house (Case, p. 190, l. 15) and left "a paper on which there was something written to give to Mr. Horne" (Case, p. 192, l. 1) and that she gave it to Horne the same day (Case, p. 193, l. 5). And that Horne thereupon went upstairs where there was a telephone (Case, p. 193, l. 21), that she did not know whom he called up on the phone (Case, p. 194, l. 1, and p. 195, l. 18).

The Court then asked the witness whether she had testified at the last trial, that it was Mr. Mussikee he telephoned and Mrs. Nevins volunteered that the note "was for Mr. Horne from Mr. Mussikee" (Case, p. 195, l. 20).

The witness then stated that she saw the note but did not know Mussikee's handwriting and thereupon the Court struck out the testimony that the note was from Mussikee.

Mr. Lane: "I move for a mistrial because that testimony has gotten into the record and there is no justification for the inference that any of Mussikee's writing was on that note at all, in any manner, shape or form."

The Court: "Well, the jury will pass upon this case from that which is in evidence and that which is not in evidence will be disregarded by the jury."

Mr. Lane, in his brief for Mussikee, says:

"The testimony objected to was brought out on the examination by the Court. * * * The testimony was drawn out and then struck out."

A reading of the testimony (Case, p. 195) will indicate that counsel is mistaken. The testimony was volunteered by Mrs. Nevins and was not brought out or drawn out by the Court or the prosecutor. When the Court struck out this evidence it did all that the defendants could reasonably ask. The third motion for a mistrial was properly denied.

Fourth and Sixth Motions for Mistrial.

Mussikee testified that Fisch was a carpenter and that he had worked for Mussikee several times, previous to the fire (Case, p. 250, l. 39).

Mr. D'Aloia, summing up, said:

"Fisch is employed in the employ of Mussikee as a carpenter and so after this occurrence at West Orange—" (Case, p. 350, l. 40).

Mr. Lane moved for a mistrial on the ground that this statement was not supported by evidence and the Court instructed the jury to disregard any erroneous statements.

A fair construction of this interrupted sentence is that Fisch was employed by Mussikee about the time of the occurrence in West Orange.

Again, Mr. D'Aloia: "Turak is an excavator connected with Mussikee because he excavates cellars for him. Fisch is a carpenter who does carpenter work for Mussikee.

Goldberg is a painter living in Clifton'' (Case, p. 357, l. 28).

Mr. Lane again moved for a mistrial, seemingly on the ground that there was no evidence that at the time of trial Fisch was in Mussikee's employ.

It is clear from the context that the prosecutor was referring to the time before the fire when the defendants were making arrangements for the fire; he was showing the connection then existing between the defendants and the group of firebugs.

Fifth Motion for Mistrial.

Israel Turak, one of the firebugs and a witness for the State, on cross examination said that he had made one statement to the insurance detectives and one in West Orange (Case, p. 123, l. 1). On further questioning, he said he made three statements, apparently—though it is not clear—at one time (Case, p. 123, l. 39, to p. 124, l. 35).

On re-direct examination, he testified that he made two statements, ''one in Passaic in the detective bureau and one in West Orange,'' and that the latter was a complaint before a judge (Case, p. 133, l. 12).

Mr. Lane, summing up, dwelt at length upon the statements made by Turak and an expression used by the witness, ''You make one statement; that is not good; you make another statement.'' Mr. Lane continued,

> ''Mr. Turak has told you time over and again that he made three statements * * * and the prosecutor of the pleas now says that there is only one statement'' (Case, p. 327, l. 20, to p. 328, l. 25).

Mr. D'Aloia, summing up, suggested that the fact was that Turak made one statement before detectives in Passaic, a second before the magistrate in West Orange, and a third at the first trial of this case. He proceeded,

> ''Turak was told in Passaic, 'You have got to go to East Orange in person.' He said, 'Well, you have my statement.' He said, 'I do not want to repeat my statement' '' (Case, p. 352).

Mr. Lane then moved for a mistrial because there was no evidence to support this comment.

We submit that this comment is entirely proper and is a most likely explanation of Turak's rather confusing evidence as to the statements he had made.

Seventh and Eighth Motions for Mistrial.

Mr. Kessler, summing up, stated that this case was worked up not by the State, but by the insurance company and that the insurance company came in contact with Goldberg and Turak in one or two ways.

> ''It cannot be any other way. I challenge the prosecutor to tell you how there can be any other than one or two ways. Either these men were planted in this case by the insurance companies, or these men went to the insurance companies'' (Case, p. 341, l. 28).

Mr. D'Aloia accepted this challenge and said that Mr. Kessler had left out the real manner in which the State discovered Goldberg—''Goldberg was arrested in Passaic—'' (Case, p. 359, l. 36, to p. 360, l. 12).

Mr. Kessler asked for a mistrial.

Mr. D'Aloia called attention to the affirmance of Goldberg's conviction a few days before the trial of this case and continued,

> "When Goldberg was arrested, I don't know what he said to the Passaic police to help himself, 'Let me off here and I will give you some information about a fire in West Orange, and if you don't believe me, Turak will tell you about it, and if you don't believe me and Turak, Finklestein and Fisch will tell you about it,' and that is how the fire department in Passaic gathering this band of firebugs got the information to the police department of Passaic that these fellows knew something about a fire in West Orange, and they limit themselves very carefully in the information they give to the authorities" (Case, p. 360, l. 34, to p. 361, l. 9).

Mr. Lane then moved a mistrial for the statement as to the information furnished and as to the limitations.

Goldberg had testified that he had been convicted in Passaic County, May 14, 1924, of conspiracy to burn a building and that the conviction had been affirmed by the Court of Errors and Appeals the Friday before the trial of the instant case (Case, p. 145, l. 30, to p. 146, l. 10).

The indictment now before the Court was presented four days before the Passaic conviction (Case, p. 7, l. 35).

The prosecutor's inferences as to what Goldberg told the police when arrested in Passaic are fairly drawn and certainly have more basis than Mr. Kessler's inferences on the same subject.

Ninth Motion for Mistrial.

Mr. Kessler, in summing up, said of Horne, "He owns stocks and bonds, he owns stock in other corporations, he owns real estate" (Case, p. 346, l. 12).

Mr. D'Aloia, in summation, used this expression:

> "Here is where I call your attention to another attempt made by that vice-president of four or five corporations like the Merritt Products Company—all fly-by-night, wildcat concerns" (Case, p. 367, l. 8).

This reference was apparently to the defendant Horne, although no objection was made to it by Horne's counsel, Mr. Kessler.

Horne had testified that he was president of the Merritt Products Company (Case, p. 259, l. 35); that he was, "in fact, the Horne Realty Company" (Case, p. 260). At one time he had been connected with the Union Novelty Brass Works in Garfield (Case, p. 261, l. 20). With Mussikee and others, he went into the Trio Realty Company (Case, p. 261, l. 35), and stayed in that business only about five months, but his partners did not make the right investments, "So I gave it up, I lost" (Case, p. 262, l. 20). He next went into the building business in Flatbush (Case, p. 262, l. 22), and remained in it until 1920, when he went into business in West Orange. Two years later he opened the factory in question (Case, p. 262, l. 30). The fire occurred January 5, 1924. All this was brought out on the direct examination of Horne.

On cross examination, other ventures of Horne's were mentioned—H. & B. Company, S. & B. L. Realty Company (Case, p. 275, l. 49), Modern Realty Company (Case, p. 276, l. 20).

Merritt Products Company was engaged in cutting straps from webbing purchased from the Government (Case, p. 279).

The frequent shifting around of Horne—from Braddock, Pa., to Brooklyn, to Passaic, to Garfield, back to Brooklyn, to West Orange, and the procession of different companies would certainly raise the suggestion in one's mind that his corporations were "fly-by-night, wildcat concerns."

At the conclusion of the summation, Mussikee's counsel, Mr. Lane, moved:

> "Because of the prosecutor's summing up and the misstatements of fact, some of which have been withdrawn, and some of which have not been withdrawn, and this fly-by-night, I ask for a mistrial" (Case, p. 368, l. 17).

None of the matters which were, or might have been, brought to the attention of the trial court would have justified a mistrial at the close of the long and careful trial which had been had, and in which the material facts had been fully laid before the jury.

VI.

Refusal to Charge as Requested by Mussikee.

Mussikee's Request No. 3.

> "The law does not require of the defendant that he prove himself innocent. The law imposed upon the prosecution the burden of proving the guilt of the defendant beyond all reasonable doubt."

The Court charged:

> "These defendants, like all other persons charged with crime, are presumed to be innocent and the burden of establishing guilt rests upon the State. The State must satisfy you as to that guilt beyond a reasonable doubt" (Case, p. 371, l. 1).

Mussikee's Requests Nos. 5 and 7.

> "The evidence, in order to deprive the defendant of the benefit of the presumption of innocence, must not only be consistent with the theory of guilt but must be inconsistent with and exclude every reasonable theory of innocence, and as long as the jury are able to reconcile the evidence with any reasonable theory of the innocence of the defendant, the law makes it their duty to do so" (Case, p. 429, l. 37).
>
> "If, upon a fair and impartial consideration of all the evidence in the case, the jury find that there are two reasonable theories equally supported by the testimony in the case, and that one of such theories is consistent with the innocence of the defendant, then it is the policy of the law, and the law makes it the duty of the jury to adopt that theory which is consistent with the innocence of the defendant and to find the defendant not guilty" (Case, p. 430, l. 13).

We said of these requests in our brief in the Supreme Court:

> "The legal principle contained in these requests is that the presumption of innocence protects the defendants until overcome by evidence which convinces the jurors of the defendants' guilt beyond a reasonable doubt.
>
> "Certainly, evidence producing in the minds of the jurors 'an abiding conviction

to a moral certainty of the truth of the charge' cannot be evidence which is consistent with the innocence of the defendants.

"Evidence of the former character, the Court instructed the jury, was necessary to justify a conviction. The verdict proves that the jury found the evidence was inconsistent with and excluded every reasonable theory of innocence. Hence, the defendants were not harmed by the refusal of the Court to charge these requests."

Counsel for the defendants criticises this argument on the ground that,

"This is no more than saying that if the Court should charge the jury a proper definition of reasonable doubt, it is not necessary for it to charge the presumption of innocence."

The Court did charge not only reasonable doubt but also the presumption of innocence (Case, p. 371, l. 1).

Furthermore, the requests under consideration are in substance like the one considered in *State* v. *Schilling,* 95 N. J. L. 145, that the jury "should endeavor if possible to reconcile all the circumstances of the case with that of innocence." The Court of Errors holding that a refusal to charge this request was not error, said,

"This was merely another way of stating the effect of reasonable doubt, and that the court had fully charged."

Mussikee's Requests Nos. 13A, 14, and 15.

These three requests have this element in common, that in order to justify a conviction on the first count, the burning must be both wilful and malicious. This count is drawn under Section

124 of the Crimes Act which denounces a burning that is either wilful or malicious. Hence there was no error in denying these requests.

Mussikee's Request No. 16.

"Before the jury can convict the defendant upon the second count, it must be satisfied beyond a reasonable doubt that the intent of the defendant was to prejudice insurers."

The Court instructed the jury that the second indictment charged the defendants with burning property which was "insured by various insurance companies, with intent to prejudice or defraud" and added that the indictment would be taken into the jury room where the jury could read it in its fullness (Case, p. 369, ll. 10 to 29). The Court then defined prejudice (Case, p. 370, l. 2), and continued, "Another element which must be established," etc.

The parts of the charge above referred to made it clear to the jury that they must be satisfied of the intent to prejudice insurers in order to convict on the second count.

Mussikee's Request No. 17.

"The words, 'aid, procure and consent,' as used in the statute upon which the second count is based, mean more than mere passive acquiescence and the defendant, Mussikee, cannot be convicted unless he actively, and with the intent to prejudice insurers, burned, aided or assisted in the burning of the building or procured its burning in some way or manner" (Case, p. 432, l. 29).

The Court charged the principle involved in this request in a manner more favorable to the defendant than was requested:

> "Another element which must be established in this case is that the defendant or defendants, by themselves, or by the aid of someone else, or through the procuring, through the agency of some other person or persons, did set fire to this building" (Case, p. 370, l. 16).

It will be noted that the Court required that the defendants should either have actually done the burning or procured it to have been done, and that a conviction was not permitted if the jury merely found that the defendants did aid or consent.

Mussikee's Request No. 19.

> "Under the first count before there can be a verdict of guilty the State must prove beyond a reasonable doubt, first the fact that the building was burned as a result of incendiarism, and second, that the defendant aided and consented (in an active sense) to the burning" (Case, p. 433, l. 16).

So much of this request as relates to incendiarism was charged by the Court:

> "Before there can be a conviction of the defendant upon the first count, the jury must be satisfied beyond a reasonable doubt that the factory building of the Merritt Products Company was in fact burned as a result of the incendiarism" (Case, p. 375, l. 15).

So much of this request as related to aiding and consenting is covered by that part of the charge quoted above under request No. 17.

Mussikee's Request No. 20.

This request requires in order to justify a conviction under the second count that the defendant had an intent to prejudice the insurers covering the *building*. The statute, indictment and the proofs all justified a conviction if the intent was to prejudice the insurers on the *chattels*.

Mussikee's Requests Nos. 21 and 22.

These requests do not embody any legal principle; they were intended to require the Court to comment on the evidence, namely, the failure of proof of over-insurance as affecting motive. It is well established that counsel cannot insist on comment on the evidence.

State v. *Panelli,* 81 N. J. L. 346;
State v. *Fuer,* 126 Atl. 432.

Defendants' counsel concede that this is the general rule but they urge there should be an exception in the case at bar because the prosecutor had attempted to insinuate the idea of overvaluation into the minds of the jurors. We deny that there was any improper insinuation, but whether there was or not, the Court fully covered this argument of the defendants by charging,

> "It is the duty of the jury to distinguish between the statements made by the prosecuting attorney in this case and the evidence upon which his statement is made" (Case, p. 373, l. 40).

Mussikee's Request No. 23.

> "The mere happening of the fire is not sufficient to justify the jury in inferring the guilt of the defendant. The presumption is

that the fire was accidental. That presumption persists until it is overcome by the State by proof, and the proof must be beyond a reasonable doubt" (Case, p. 413, l. 21).

This request was substantially charged. The Court, after instructing the jury that they might draw an inference of guilt from circumstances added, "You cannot infer that merely from the fact that there was a fire" (Case, p. 370, l. 30).

Mussikee's Request No. 25.

"There is no proof in the case from which the jury may find that the defendant Mussikee had any knowledge of the amount of the insurance carried upon said building."

This request does not embody any principle of law, but merely comment on the evidence. Hence it was not error for the Court to refuse to charge it.

Furthermore, lack of knowledge of the exact amount of insurance on the building was not very material to any issue in the trial.

Mussikee's Request No. 26.

"Unless the jury are satisfied beyond a reasonable doubt that the defendant Mussikee had knowledge of the insurance upon said building, the jury cannot find that any act of his was with the intent to prejudice any insurance company."

The fault of this request is its narrowness in that it confines the question of knowledge to insurance upon the building. Knowledge of insurance upon chattels would be sufficient in connection with other circumstances to support an intent to prejudice an insurance company.

Mussikee's Request No. 27.

"Before there can be a conviction, the jury must be satisfied beyond a reasonable doubt that the defendant Mussikee had something to do with the particular fire referred to in the indictment."

There was evidence of only one fire, namely, the one referred to in the indictment. No other fire was mentioned during the trial. The whole charge and especially the paragraph beginning on page 370, line 15, made clear to the jury that to warrant a conviction, they must find that the defendants themselves, or through the agency of another, set this fire.

VII.

Mussikee's Additional Requests to Charge.

At the conclusion of the summation for the State and just before the Court began to charge the jury, Mr. Lane stated:

"And by reason of the prosecutor's summing up, I hand your Honor additional requests to charge."

The Court declined to take the requests (Case, p. 368, l. 30).

It is the general rule in the Essex Sessions for the Court not to receive requests to charge after counsel has begun to sum up. This rule has been sustained by this Court.

Engeman v. *State,* 54 N. J. L. 247.

Counsel for defendants contends that, by exception to this rule, the Court should receive requests presented later, when the requests are made necessary or pertinent by something happening after counsel has begun to sum up.

There doubtless might be circumstances which should impel the Court to receive requests to charge later than the time usually fixed. But where counsel for the defendant merely overlooks some phase of the evidence or some feature of the case, and his attention is brought to it by the summation of the prosecutor, we take it that the Court is not required to receive a belated request.

Counsel's statement, "By reason of the prosecutor's summing up, I hand your Honor additional requests to charge," did not sufficiently apprise the Court that the requests were made necessary by some new factor injected into the case by the summation and hence the Court was under no duty to receive the requests.

Assuming, however, that the Court should have received these requests, there was no error in refusing to charge any of them.

During summation, Mr. D'Aloia referred to the fact "that convictions for arson are as uncommon as the crime of arson is common, and that is because of the difficulty in getting proof" (Case, p. 347, l. 21).

On opening the case, he had said,

> "We are going to say to you that arson cases of this character can only be proved by circumstantial evidence, because the State in ninety-nine cases out of a hundred cannot procure eye-witnesses" (Case, p. 14, l. 32).

The difficulty of obtaining proof in arson cases is well known. Counsel for defendants might easily have anticipated that the prosecutor would again refer to that fact and that even if he did not, the jury would consider it. Summation for

the State in this particular did not justify an additional request to charge.

The first two additional requests were:

> "1. The difficulty of securing proof furnishes no reason for a conviction without proper proof.
>
> 2. The difficulty of securing proof does not alter the rule that before convicting the defendants, the jury must be satisfied by proof beyond a reasonable doubt of the guilt of the defendants" (Case, p. 389, l. 20).

The legal principle involved was sufficiently charged by the Court:

> "The State, in electing to try these men, has taken on the burden of establishing the guilt of one or both as to every material element in the case" (Case, p. 369, l. 30).
>
> "These defendants, like all other persons charged with crime, are presumed to be innocent and the burden of establishing guilt rests upon the State. The State must satisfy you as to that guilt beyond a reasonable doubt" (Case, p. 371, l. 1).

Mussikee's third request was based on Mr. D'Aloia's fly-by-night reference mentioned above under Point V. The request was:

> "There is no evidence in this case that any of Horne's concerns were of a fly-by-night nature."

The Court is not required to comment on the testimony when requested, but only to charge legal principles.

State v. *Panelli, supra.*

VIII.

Refusal to Charge as Requested by Defendant Horne.

Horne's Request No. 2.

"No conversations between the defendant Mussikee and any other persons can in any way be binding upon the defendant Horne, unless you find from the evidence that it has been proven beyond a reasonable doubt that the fire was set and that the setting was brought about by reason of an agreement between Horne and Mussikee; and unless such an agreement is proven beyond a reasonable doubt, no testimony as to such conversations can bind the defendant Horne" (Case, p. 390, l. 9).

This request was charged in substance:

"Any statements made by the defendant Mussikee and not in the presence of the defendant Horne, cannot be considered as evidence against the defendant Horne" (Case, p. 376, l. 35).

Horne's Request No. 3.

"The presumption of law is that the fire originated in an entirely innocent and accidental way so far as the defendant Horne is concerned and this presumption continues until and unless the State has overcome the presumption of innocence by legal testimony which must satisfy you beyond a reasonable doubt as to the guilt of the defendant Horne" (Case, p. 390, l. 19).

The presumption of innocence and burden of proof were fully charged as mentioned earlier in this brief.

Horne's Request No. 5a.

"One of the State's witnesses, Goldberg, has admitted in this testimony having been convicted of a crime. Conviction of a crime is evidence which will tend to impeach the credibility of his testimony, and you are justified in considering the fact that he has been convicted of a crime in deciding whether you should or should not believe Goldberg's testimony" (Case, p. 390, l. 39).

This request was charged in substance:

"One of the State's witnesses, Goldberg, has admitted that he has been convicted of crime. That act must be taken into consideration by the jury in determining what credit should be given to the testimony of the witness Goldberg" (Case, p. 376, l. 16).

Horne's Request No. 6.

"Evidence has been introduced on the part of the defendant as to his good character or reputation. You are obliged to consider this evidence as to the good character of the defendant, and if such evidence in the case is sufficient to raise a reasonable doubt in your minds as to the guilt of the defendant you should in such case acquit the defendant" (Case, p. 391, l. 9).

This request also was charged in substance:

"In this case, too, there is evidence of good character or reputation, and if, upon such consideration (namely, of all the testimony), there exists a reasonable doubt, even though that doubt be engendered merely by previous good reputations, the defendants are entitled to an acquittal" (Case, p. 371, l. 17).

Horne's Requests Nos. 8 and 9.

These requests sought to narrow the issue to the one question whether the jury were satisfied beyond a reasonable doubt that Horne was the person with whom Goldberg talked at Clifton. The State was entitled to have the case determined by the jury on all the evidence.

State v. *Labriola,* 75 N. J. L. 483.

Horne's Request No. 10.

> "If, upon a full consideration of all the evidence in the case, the jury entertain a reasonable doubt as to whether the defendant is guilty, then you should find him not guilty."

The Court charged the usual definition of reasonable doubt, including the entire comparison and consideration of all the testimony (Case, p. 371, l. 7). Also that the State had the burden of establishing guilt as to every material element in the case (Case, p. 369, l. 30), and that if the State failed to sustain its burden, the jury ought to acquit (Case, p. 372, l. 37).

Horne's Request No. 11.

> "Circumstantial evidence must be clear, convincing and conclusive, excluding all rational doubt as to the defendant's guilt, in order for you to convict him of this charge."

Defendant was not entitled to an instruction that the evidence must be *conclusive.* It is enough that the evidence establish guilt beyond a reasonable doubt.

Underhill's Criminal Evidence. Sec. 16.

> "No greater degree of certainty in proof is required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the prisoner's guilt beyond a reasonable doubt."

Horne's Request No. 13.

> "Even if you believe that the defendant Mussikee had these said conversations with the witness Goldberg and Turak, nevertheless you must be satisfied beyond a reasonable doubt that the fire was of an incendiary origin before you can convict the defendant."

The gist of this request was charged:

> "Another element which must be established in this case is that the defendant or defendants by themselves or by the aid of someone else, or through the procuring, through the agency of some other person or persons, did set fire to this building" (Case, p. 370, l. 16).

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

JOSEPH L. SMITH,
Prosecutor of the Pleas.

J. O. BIGELOW,
Of Counsel with the State.

JUN 21 1924

STREET.

A

C

Store Room

Toilet

Toilet

D

Boiler

Boiler Pit

Loading Platform

E

B

Drive

VALLEY

JOYCE STREET.

Scale 1/4 Inch = 1 Foot.

Plan of Grond Floor No 494 Valley St.
at Orange N.J.

76

it S-1

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *Defendant-in-Error,* *v.* MICHAEL MUSSIKEE and JOSEPH H. HORNE, *Plaintiffs-in-Error.*	On Appeal from New Jersey Supreme Court.

BRIEF FOR JOSEPH H. HORNE, ONE OF THE PLAINTIFFS-IN-ERROR.

This case comes up to this Court on a writ of error to the New Jersey Supreme Court (S. C., p. 2).

The case was appealed to the Supreme Court on a strict bill (Assignment of Errors, p. 438) and on review of the whole case (Specification of Causes for Reversal, p. 455), and was there affirmed. The defendants were jointly indicted for wilfully and maliciously burning and causing to burn and aiding and consenting to the burning of the factory building of the Merrit Products Co., located at Nos. 494-498 Valley Road, West Orange, N. J., on January 6, 1924. This trial was held on March 29, 1926, before the Honorable EDWIN C. CAFFREY, Judge, and a jury, and was continued on March 30, 1926. The jury rendered a verdict as to both defendants of "guilty."

The defendant Mussikee was represented by Merritt Lane, Esq., as counsel and as to assignments of error, Numbers 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 30,

31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 59, 60, 61, 62, 63, 64, 65, 66, 67, 72 (and as to the Specifications of Causes correspondent to the aforementioned Assignments of Error, the same numbers), the arguments and citations in Mr. Lane's brief will not be repeated here, but it is most respectfully requested that they may be considered as if they were herein repeated and made a part of this brief and in behalf of this defendant. So as to avoid repetition, it is also requested that Mr. Lane's discussion of the facts and testimony be also considered a part of this brief.

POINT I.

The Trial Court erred in refusing at the conclusion of the State's case to grant the motion of the defendant Horne for a dismissal of the indictment or for a direction of verdict in favor of the defendant Horne.

This point covers assignments of error, Numbers 19 and 20. There are several facts which it was necessary for the State to prove beyond any reasonable doubt in order to hold the defendant Horne guilty of the crime charged.

1. The State must prove the *corpus delicti,* that is, that the burning of the building was a criminal act.

2. The State must prove that the defendant Horne was connected with or responsible for this criminal act. This involves of course, the question of identification of the defendant Horne. With respect to the first proposition, it is respectfully submitted that this question has been exhaustively covered by the brief of Mr. Lane for the defendant Mussikee and we beg leave to refer thereto for the argument on that point.

Mr Horne.

Please call up
factory.

31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 59, 60, 61, 62, 63, 64, 65, 66, 67, 72 (and as to the Specifications of Causes correspondent to the aforementioned Assignments of Error, the same numbers), the arguments and citations in Mr. Lane's brief will not be repeated here, but it is most respectfully requested that they may be considered as if they were herein repeated and made a part of this brief and in behalf of this defendant. So as to avoid repetition, it is also requested that Mr. Lane's discussion of the facts and testimony be also considered a part of this brief.

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Exhibit 2

Mr Horne.

Please call up your friend Mr. Mussiker in Passaic a
factory.

P. Finkelstein.

31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 59, 60, 61, 62, 63, 64, 65, 66, 67

for the argument on that point.







It is, however, deemed not to be undue reiteration to further consider the question of identification. At the end of the State's case, counsel for the defendant Horne moved to dismiss the proceedings on the grounds that there was no evidence in the case connecting the defendant Joseph H. Horne with the situation. There were only two witnesses called by the State for the purpose of connecting up the defendant Joseph H. Horne with the alleged crime.

The first was Margaret Christiansen, who resided at 495 Valley Road, across the street from the factory building which had been burned. She said (S. C. 95) she saw a dark automobile in front of the factory on Saturday night, January 5. She also said that she knew the defendant Joseph H. Horne but had never seen him in that particular automobile (S. C. 95, L. 33). On cross examination this witness would not say that the car in question was owned by Joseph H. Horne, but only that this car was outside the factory between 9 and 9:30 in the evening of the fire. It is respectfully submitted that there is nothing in the testimony of this witness which, in any way, connects the defendant Horne with the fire. The fact that there was a dark car parked outside the factory for a few minutes on the night of the fire is not sufficient to connect this defendant with the fire. It was not identified as his car. It was not even identified as a car which this defendant was accustomed to use. As a matter of fact, the witness said (S. C. 97) that she didn't say that it was the same car that had been previously used by Joseph H. Horne. It must be admitted that questions of identification are very broad and that a Court will permit a great latitude in testimony, but it must also be said that unless the witness will at least express as a matter of opinion or belief that

a certain fact is so, then there is no evidence of identity whatsoever. For example, if this witness had said that she saw an automobile which she was of the opinion was owned by Joseph H. Horne, or that she had seen him in a certain automobile at the time in question, then it is submitted there would be some evidence of identity, or if his connection with the automobile in question, and, of course, the road would be open for all probable inferences therefrom, but a more careful examination of Mrs. Christiansen's testimony shows that not only does she avoid any positive identification whatsoever, but she also refrains from expressing any belief or opinion. Defendant argues, therefore, that this witness's testimony should not have gone to the jury at all because there was no identification. Where there is some identification, either positively or a matter of belief or opinion, then the question becomes one as to the weight of the evidence, but where there is no identification, or no opinion or belief expressed, then the testimony should really be stricken out. The very least that can be said is that there was reasonable doubt as to Horne's ownership or connection with the automobile in question.

The other witness called by the State to identify the defendant Horne was Philip Goldberg who said (S. C. 132) that somebody by the name of Joseph H. Horne called on him in 1923, at his house. Goldberg said (S. C. 132) he did not remember the face but remembered the name. On his cross examination (S. C. 132) he did not identify the defendant in court saying that he was not sure —"maybe yes—maybe no." That the man who visited him had different kind of eye-glasses and a cap. He was cross examined carefully and throughout his examination expressed no opinion or belief that the defendant in court was the man

who called upon him. All that he knew was that a man of the name of Joseph H. Horne called on him.

Identification of a person would seem to depend upon the recollection by the witness of one or more of the following three factors:

First.—Some characteristic of the clothes.

Second.—Some characteristic of the person.

Third.—The voice.

The witness Goldberg was unable to connect up the defendant with any characteristic of the man who called upon him. As a matter of fact, he was unable to form any connection in his memory between the man who called upon him and the defendant in court, except the name Joseph H. Horne. It is respectfully submitted that the name alone is no identification. The reason for this is obvious. For example: What identification of William Smith would the name William Smith amount to when there are so many of them at large? A name is the easiest thing in the world to counterfeit. Here again, was, at least reasonable doubt, sufficient to justify a direction of verdict.

The State, in its brief before the Supreme Court, sets forth certain arguments which we presume it will also emphasize in this Court, and, therefore, this defendant seeks the liberty to anticipate and answer those arguments.

The State relies entirely upon the testimony of Chief Sheehan, of the West Orange Fire Department, to prove that the fire was of incendiary origin, in that he testified upon direct examination that he found two separate fires in the building and that there was no connection between the two fires. A careful reading of the testimony of

the Fire Chief and an analysis of the same will show that the witness did not go into the building until after the fire had been put out (S. C., p. 36, line 30). He further testified on cross examination that the fire had burned to such an extent that "After the fire was *teetotally out,* it would take an expert to say" whether the fires were connected (S. C., p. 36, line 35). He further testified that after a hose is put into a building, the column of water would make a complete path through the flame burning on the floor (S. C., p. 50, line 10), and it is respectfully urged that in view of the testimony throughout the case that a column of water was played into these rooms for some time before the fire was extinguished, and especially in view of the fact that one of the firemen testified that he entered the building with the hose through a door at the side of the building and that they played the hose in a general direction, which, from an examination of Exhibit S-1, will show was the dividing line between what the Chief afterwards found to be the two separate fires; that the playing of this stream of water upon the centre of the fire extinguished the fire at the centre and left what would seem to be two separate and distinct fires.

In answer to the State's contention that there is no proof that the fire may have traveled along the beaver boards along the ceiling and dropped and started a fire in a different place in the building, we deem it sufficient to refer to the photographs marked in evidence as the defendant's exhibits which, without a doubt, bear out the defendant's assertions.

The State then contended that there was evidence that the defendants had tried to engage Turak and Goldberg to set the fire, and that after the fire the defendants negotiated with these per-

sons as well as two others on the subject of payment. It is important to note at the outset that these defendants were not charged with a conspiracy and, therefore, any negotiations made by the defendant Mussikee are not at all material or evidential as against the defendant Horne especially in view of the fact that the State did not prove nor attempt to prove that these negotiations were made with the knowledge or consent of the defendant Horne.

The witness Turak testified only as to negotiations had with the defendant Mussikee; and, further, that the only purpose of his negotiations was so that he might blackmail the defendant Mussikee.

The State contends that the witness Goldberg testified that the defendant Horne went to Goldberg's house near Passaic and attempted to engage him to set a fire in the factory building owned by Horne. It is respectfully urged that this Court analyze carefully the entire examination of Philip Goldberg (S. C., p. 134). It will be found that on direct examination by the prosecutor, the witness was continually led into saying that the defendant Horne came to see him in Passaic, but nowhere in the direct testimony does it appear that the witness mentions the name of the defendant, and that the prosecutor was the only one to mention the name of the defendant Horne, and further, on cross examination by counsel for Horne, the witness Goldberg testified that he could not identify the defendant as the man who came to see him at his home, and that the only reason he said that the defendant was the man who came to see him was because he took the prosecutor's word that the man he saw was Joseph H. Horne, the defendant.

It is not deemed undue to quote from the cross examination of the witness Goldberg (S. C. 141, line 12) :

"Q. Did you see that man at your house in Clifton this October? A. I do not remember the face.

"Q. Just look at him. A. I know him. I have seen him twice.

"Q. This is a very serious thing. This is the defendant Joseph H. Horne? A. Yes.

"Q. Did you see the defendant Joseph H. Horne at your house in October, and you have testified; did you see him there; this man standing up now? A. Yes—maybe no and maybe yes; I do not remember the face.

"Q. Maybe no and maybe yes. A. And maybe yes.

"Q. And you are not sure whether you saw him there or not? A. I am not sure.

"Q. Did you see the man's face? A. I see the face. He had big eyeglasses there.

"Q. He has eyeglasses now. A. Not that kind.

"Q. The man you saw had different eyeglasses? A. Different eyeglasses, and a cap.

"Q. Was he the man you saw at your house? Will you swear? A. No, I wouldn't.

"Q. So that all the conversation you had with a man in Clifton—you are not sure, you do not know this is the man or not? A. No.

"Q. Look at him. I want to be sure about it. A. I have seen him twice already.

"Q. Did you see him in your house at Clifton that day? A. I wouldn't say yes or no.

"Q. And the reason you will not say yes or no is because you are not sure? A. I ain't sure.

"Q. And before when the prosecutor repeated and repeated and repeated that you saw Joseph H. Horne, you simply took the prosecutor's word for it that the man that you saw was Joseph H. Horne? A. Sure.

"Q. The prosecutor said that Joseph H. Horne was at your house and you answered yes? You meant by that that if he was at your house, if his name was Joseph H. Horne, Joseph H. Horne was the man, but you are not sure that the defendant was the man; is that so? A. Yes.

"Q. What time of the day or night did this conversation take place? A. The first time he gives over to my place?

"Q. Was there any other time? A. No, the first time, I mean.

"Q. What time did this conversation take place with this man that the prosecutor has been calling Joseph H. Horne? A. Excuse me.

"Q. And you know this conversation you told the prosecutor about, a man came to your house— A. Oh, it was in the afternoon.

"Q. What time of the day? A. About four; half-past four.

"Q. It was a clear day? A. No, this was a rainy day.

"Q. And where were you holding this conversation, in your house? A. In the front of the street; he was sitting there in the machine.

"Q. You had come out to the machine? A. I was out to the machine.

"Q. And you were standing? A. Yes.

"Q. How far away were you from him? A. Right close to the machine.

"Q. As if this were the man and you were standing close to him yourself and you were looking at him? A. Yes. He had eyeglasses on.

"Q. You had no trouble to see me? A. If I see you in the street I wouldn't recognize you.

"Q. You have no trouble in seeing me now? A. No.

"Q. And the chances are if you saw me outside you would recognize my face and features? A. Maybe not.

"Q. Well, now, Joseph H. Horne was about as far away from you as I am now? A. Yes.

"Q. And you talked to him two or three minutes? A. About five minutes.

"Q. And all the time you were looking at him? A. No. Maybe I looked at the machine.

"Q. He was a strange man you had never met before and he was putting rather a delicate proposition to you and you naturally were looking at him in surprise, that he was putting that proposition to you? A. I looked at him.

"Q. And you kept on looking at him as you are now? A. No, I am not now.

"Q. What are you doing now? A. I am looking at that book.

"Q. Well, you had every opportunity to see the man? A. Yes.

"Q. And you did that for a period of five minutes or more? A. Yes.

"Q. And now you cannot tell me whether that man was Joseph H. Horne who just stood up or not? A. I ain't sure.

"Q. Was there any other way that you could tell whether he was the man or not; was the man a stout man, was he a thin man? A. Well, he was in a big coat.

"Q. Joseph H. Horne is a pretty big man. You saw him stand up. A. Well, the way he was sitting in the machine he was big.

"Q. Was he a man as big as Joseph H. Horne? A. He looked about that size.

"Q. Was he a man about as fat or stout as Joseph H. Horne is now? A. I couldn't say.

"Q. He was a man who wore bigger glasses than Joseph H. Horne? A. Yes, and side glass—what do you call them?

"Q. Goggles? A. Yes.

"Q. So the man you spoke to wore goggles? Is that right? A. Yes.

"Q. After you told him you would not do that sort of thing he drove away? A. Yes.

"Q. You never heard anything about this until some time in January? A. January sixth."

The State further places great stress upon the testimony of the witness, Margaret Christiansen to the effect that on the evening of the fire she saw a car standing in front of the factory which looked like the defendant Horne's car. However, a careful reading of the direct examination of the witness reveals that the witness testified that she had seen an automobile in front of the factory on the evening of the fire and that she had seen the defendant Horne in an automobile before, but nowhere does she say that this car looked like the car in which she had seen Horne, and, further, she testified that she had not seen Horne in this automobile before.

The witness Lange testified that he saw a car outside of the factory building about 11 o'clock on the evening of the fire, but he could not state what kind of a car it was, nor did the State attempt to show that this was the same car that was seen by the witness Mrs. Christiansen. It is obvious that his testimony is of no importance in this case, the contention of the State to the contrary notwithstanding.

The defendant Horne showed, without contradiction, that his automobile was in the garage from about six or seven o'clock on the evening of the fire until after the fire had been discovered, and this testimony was given by the night man of the garage in which the defendant stored his car (S. C. 213).

The State has claimed that the defendant Horne could not avail himself of certain motions made in this case by counsel for the defendant Mussikee because the defendant Horne took no exception to the ruling of the Court. This point is answered by the fact that at the outset of the case it was agreed by counsel and the Court that any motions made and exceptions taken by counsel for one of the defendants should inure to the benefit of the other defendant and be considered as though motions were made and exceptions taken by both defendants, and this clearly appears from the State of the Case, as certified by the Trial Court that all exceptions taken are taken by "defendants'" counsel.

It is respectfully urged that there should have been a direction of verdict for the defendant

Horne at the end of the State's case, not only for the reasons above urged, but also for the reasons set forth in the brief of Mr. Merritt Lane for the defendant Mussikee.

POINT II.

The Trial Court erred in declining to charge certain requests of the defendant Horne.

The Trial Court refused to charge the following requests:

Assignment of Error Numbers 49-50-51-52-53-54-55-56-58.

49. Because the Trial Court declined to charge the second request of the defendant Horne to charge, which was as follows:

> "No conversation between the defendant Mussikee and any other persons can in any way be binding upon the defendant Horne, unless you find from the evidence that it has been proven beyond a reasonable doubt that the fire was set and that the setting was brought about by reason of an agreement between Horne and Mussikee; and unless such an agreement is proven beyond a reasonable doubt, no testimony as to such conversations can bind the defendant Horne."

50. Because the Trial Court declined to charge the third request of the defendant Horne to charge, which was as follows:

> "The presumption of law is that the fire originated in an entirely innocent and accidental way so far as the defendant, Horne, is concerned, and this presumption continues until and unless the State has overcome the presumption of innocence by legal testimony which must satisfy you beyond a reasonable doubt as to the guilt of the defendant, Horne."

51. Because the Trial Court declined to charge "A" of the fifth request of the defendant Horne to charge, which was as follows:

> "One of the State's witnesses, Goldberg, has admitted in his testimony having been convicted of a crime. Conviction of a crime is evidence which will tend to impeach the credibility of his testimony, and you are justified in considering the fact that he has been convicted of a crime in deciding whether you should or should not believe Goldberg's testimony."

52. Because the Trial Court declined to charge the sixth request of the defendant Horne to charge, which was as follows:

> "Evidence has been introduced on the part of the defendant as to his good character or reputation. You are obliged to consider this evidence as to the good character of the defendant, and if such evidence in the case is sufficient to raise a reasonable doubt in your minds, as to the guilt of the defendant, you should in such case acquit the defendant."

53. Because the Trial Court declined to charge the eighth request of the defendant Horne to charge, which was as follows:

> "In order to convict the defendant, Joseph H. Horne, you must be satisfied beyond a reasonable doubt that the person with whom the witness, Goldberg, spoke at Clifton was in fact the defendant, Joseph H. Horne."

54. Because the Trial Court declined to charge the ninth request of the defendant Horne to charge, which was as follows:

> "If you are not satisfied that the defendant, Joseph H. Horne, was the person who talked to the witness, Goldberg, who testified on cross examination that he did not know whether the defendant, Horne, was the person he spoke to, you must acquit the defendant, Horne."

55. Because the Trial Court declined to charge the tenth request of the defendant Horne to charge, which was as follows:

> "If, upon a full consideration of all the evidence in the case, the jury entertain a reasonable doubt as to whether the defendant is guilty, then you should find him not guilty."

56. Because the Tral Court declined to charge the eleventh request of the defendant Horne to charge, which was as follows:

> "Circumstantial evidence must be clear, convincing, and conclusive, excluding all rational doubt as to the defendant's guilt in order for you to convict him of this charge."

58. Because the Trial Court declined to charge the tirteenth request of the defendant Horne to charge, which was as follows:

> "Even if you believe that the defendant, Mussikee, had these said conversations with the witnesses Goldberg and Turak, nevertheless, you must be satisfied beyond a reasonable doubt that the fire was of an incendiary origin before you can convict the defendant."

It is respectfully claimed by this defendant that all of the above requests to charge are warranted both by the evidence in the case and by the law. An examination of each one, carefully, will indicate that it is material to the defendant's case, helpful to the jury and involves the application of correct legal principles.

It is further submitted that the Court erred in refusing to charge these requests not only for the reasons above mentioned, but also because the defendants were entitled to have them distinctly charged in such a way and manner as not to leave room for misapprehension or mistake by the jury and because these requests were not covered substantially by the Court's charge.

The case of *State* against *Degeralmo,* 83 N. J. L. 136, holds that one of the most important duties of the Court is to declare the law applicable to a case to the jury when requested so to do. This should be done in such a way as not to leave room for misapprehension or mistake. *Roe* v. *State,* 16 Vroom 49.

For example (referring to the request by the number of Assignments of Error) :

49. The proposition set forth in the request to charge here was not covered in any way by the Court's general charge, nevertheless, the request in itself is certainly material and legal.

50. It possibly may be argued that the Court's charge in a general way covered this request. Possibly it did, but the jury is certainly entitled to hear this defendant's conception of the evidence when it is both legal and material.

No. 51 was not covered by the Court's general charge.

Nos. 53 and 54 were not covered by the Court's general charge and yet both are warranted by the evidence as well as the law.

There seems to be no need to argue the fact that all of these requests would have benefited the defendant materially and would have fixed in the jury's minds those questions of fact and questions of law which the defendant was entitled to have fixed in the jury's minds.

It is respectfully submitted, therefore, that the judgment should be reversed for the errors heretofore pointed out and that in any event the verdict is against the weight of the evidence.

Respectfully submitted,

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