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## WRIT OF ERROR TO SUPREME COURT.

## New Jersey Court of Errors and Appeals

NEW JERSEY, *ss.*

(SEAL)

The State of New Jersey to the Chief Justice and Associate Justices of the Supreme Court of the State of New Jersey.

Because of the record and proceedings, also in the giving of judgment in the said Supreme Court, affirming the conviction in the Court of Quarter Sessions of the County of Essex, upon a certain indictment against Abraham E. Harris, of the City, County and State of New York, for arson; burning buildings, etc., and burning buildings to defraud insurers, etc., in violation of Sections 123, 124 and 126, respectively, of the act entitled "An Act for the punishment of crimes" (Revision of 1898), whereof before you, the said Abraham E. Harris, hath been indicted and is thereof convicted by a certain jury of the County of Essex, taken between the said State of New Jersey and the said Abraham E. Harris, as it is said, manifest error hath intervened to the great damage of the said Abraham E. Harris, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner and form, if any there be, and that speedy justice be done to him, the said Abraham E. Harris, in this behalf, do command you that if judgment be thereupon given, then that you distinctly and openly send under your seal the record and proceeding aforesaid before you in the said case, with all things touching the same, to our Court of Errors and Appeals in the last resort in all causes, to be holden at Trenton, on the thirty-first day of December, inst., and this writ, that the records and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

*Return to Writ.*

WITNESS, Edwin Robert Walker, Chancellor of the State of New Jersey, and President Judge of the said Court of Errors and Appeals, in the last resort in all causes, at Trenton aforesaid, this thirteenth day of December, nineteen hundred twenty-three.

THOMAS F. MARTIN,
*Clerk.*

ROBERT H. MCCARTER,
LEBER & RUBACK,
*Attorneys of Plaintiff-in-Error.*

## RETURN TO WRIT.

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

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

## WRIT OF ERROR.

Returnable January 6, 1923.

NEW JERSEY, *ss.*

(SEAL) The State of New Jersey to Edwin C. Caffrey, Esquire, Judge of the Court of Quarter Sessions of the County of Essex:

Because in the record and proceedings, and also in the giving of judgment upon a certain indictment against Abraham E. Harris, of the City, County and State of New York, for arson, burning buildings, etc., and burning building to defraud insurers, etc., in violation of Sections 123, 124 and 126, respectively, of the act entitled "An Act for the punishment of crimes," Revision of 1898, whereof before you he, the said Abraham E. Harris, has been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Abraham E. Harris, as it is said, manifest error hath intervened to the great damage of the said Abraham E. Harris, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, in any there shall be, and that speedy justice be done to him, the said Abraham E. Harris, command you that if judgment be thereon given then that you distinctly and openly send, under your seal, the record and proceedings aforesaid with all things touching the same, to our Justices of our Supreme Court of the State of New Jersey, on the 6th day of January next, and this writ that the record and proceedings aforesaid being inspected we may further cause to be done thereupon, for correcting that error, what of right and according to the law ought to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our said Court at Trenton, this 18th day of Decem-

ber, in the year of our Lord one thousand nine hundred and twenty-two.

LEBER & RUBACK,
*Attorneys for Plaintiff-in-Error.*

ROBERT H. McCARTER,
*Of Counsel.*

ENOCH L. JOHNSON,
*Clerk.*

Presented in open court this 18th day of December, 1922.

EDWIN C. CAFFREY,
*Judge.*

## RETURN.

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

I, Edwin C. Caffrey, Judge of the Court of Quarter Sessions in and for Essex County, New Jersey, Do HEREBY CERTIFY and return to the Supreme Court of Judicature of the State of New Jersey the indictment, judgment record and proceedings, together with the entire record of the proceedings, had at the trial, and all things touching and concerning the same as by the within writ to me directed I am directed.

(SEAL) IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of said court at Newark, N. J., this day of , A. D. 19 .

EDWIN C. CAFFREY,
*Judge of the Court of Quarter Sessions, Essex County, N. J.*

*Indictment.*

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

BE IT REMEMBERED, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, on the first Tuesday of April, in the year of our Lord one thousand nine hundred and twenty-two, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of Frank V. Oakes, Clinton F. McCord, Henry L. Jones, Lawrence A. Norton, Joseph T. Walsh, John H. Banta, William Bal, George H. Thompson, Carl Merz, Robert C. Lockward, William J. Milner, Fred W. McCabe, Samuel E. Oplinger, George J. Gates, Thomas Potter, James H. Trainor, John H. Hubley, Thomas A. F. Bauderman, Harry M. Jones, Walter C. Schryver, Henry M. Robinson, Eugene L. R. Cadmus, John J. Hill, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to inquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and form following, to wit: Essex Oyer and Terminer, April Term, A. D. 1922, Essex County, to wit: The Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, upon their oath present that Abraham E. Harris, late of the City of Newark, in the County of Essex aforesaid, on the ninth day of May, in the year of our Lord one thousand nine hundred and twenty-two, with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this Court, did wilfully and maliciously set fire to and burn a certain building known as No. 204 Morris avenue, in the said City of Newark, and the goods, wares, merchandise and other chattels then and there therein situated and being, which said building and which said goods, wares, merchandise and other chattels were at the time of the said setting fire to and burning of said building

insured by the American Equitable Assurance Company of New York City, Hartford Fire Insurance Company of Hartford, Connecticut, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Providence-Washington Insurance Company of Providence, Rhode Island, American Eagle Fire Insurance Company of New York City, New Zealand Insurance Company, North British and Mercantile Insurance Company, Firemen's Fund Insurance Company of San Francisco, California, Union Fire Insurance Company of Buffalo, New York, Girard Fire and Marine Insurance Company of Philadelphia, Pennsylvania, Concordia Fire Insurance Company and the Star Insurance Company of America of Newark, New Jersey, corporations, against loss and damage by fire, with intent to prejudice said corporations, to wit: the said American Equitable Assurance Company of New York City, Hartford Fire Insurance Company at Hartford, Connecticut, National Union Fire Insurance of Pittsburgh, Pennsylvania, Providence-Washington Insurance Company of Providence, Rhode Island, American Eagle Fire Insurance Company of New York City, New Zealand Insurance Company, North British and Mercantile Insurance Company, Firemen's Fund Insurance Company of San Francisco, California, Union Fire Insurance Company of Buffalo, New York, Girard Fire and Marine Insurance Company of Philadelphia, Pennsylvania, Concordia Fire Insurance Company and The Star Insurance Company of America, of Newark, New Jersey, which said corporations had theretofore underwritten certain policies of insurance on said building and on said goods, wares, merchandise and other chattels therein situated and being and which said policies of insurance were 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.

*Plea.*

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex upon their oath aforesaid, do further present that the said Abraham E. Harris, late of the City of Newark, in the County of Essex aforesaid, on the ninth day of May, in the year of our Lord one thousand nine hundred and twenty-two, with force and arms, at the city aforesaid, in the county aforesaid and within the jurisdiction of this Court, did unlawfully, wilfully and maliciously burn and cause to be burned and did aid, counsel, procure and consent to the burning of the building of another, to wit, the building of Charles A. Rosewater, 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.*

On the seventeenth day of June, A. D. 1922, on which day the said indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for said County of Essex, and then and there the said indictment was duly delivered and duly filed by the Clerk of said Court and an entry of such order and delivery and filing was then and there made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

And afterwards, that is to say, on the twenty-second day of June, A. D. 1922, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable Edwin C. Caffrey, Presiding Judge of the Court of Common Pleas, Abraham E. Harris, in the custody of Samuel F. Wilson, Sheriff of the County

of Essex aforesaid, and the said Abraham E. Harris being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is not guilty thereof, and therefore for good and evil he puts himself 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 October, A. D. 1922, 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 Abraham E. Harris to recognize upon their oath whether the said Abraham E. Harris is guilty of the premises in the said indictment specified or not guilty because the said John O. Bigelow, Esquire, Prosecutor, &c., as the said Abraham E. Harris puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

And afterwards, that is to say on the fifteenth day of November, A. D. 1922, Robert H. McCarter, counsel for defendant, moved for trial and plea of not guilty was withdrawn and a motion to quash said indictment was made which motion was denied by the Court and a plea of not guilty was re-entered.

And afterwards, that is to say the twentieth day of November, A. D. 1922, to which day the trial of aforesaid indictment was postponed at the same Court of Quarter Sessions, holden before the Honorable Edwin

*Judgment Record.*

C. Caffrey, Judge of the Court of Common Pleas, comes the said John O. Bigelow, who prosecutes as aforesaid, and the said Abraham E. Harris, and the jury of whom mention is before made, and by Samuel F. Wilson, Sheriff of the County of Essex, for this purpose empanelled and returned after the following challenges: By the State 3, by the defendant 10. After the tenth challenge had been made by defendant, Meyer E. Ruback, Esq., moved that defendant, being entitled to twenty peremptory challenges, be allowed to make further challenges, and thereupon said counsel challenged No. 7—a juror satisfactory to defendant—for the purpose of having the ruling of the Court, which challenge was denied by the Court, to wit: George A. Wolf, Joseph D. Smith, Arthur M. Condit, William F. Strubel, William Imlay, George Garrabrant, Ernest T. Eberhardt, Rynier V. Taylor, George W. McGuire, Jr., Harold J. Smith, William N. Lank, William L. Flye, being called, were sworn upon that jury to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued until the twenty-second day of November, A. D. 1922, 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 they find the said defendant guilty in the manner and form as is set forth in both counts of the indictment, and so they say all.

By request of Meyer E. Ruback, Esq., of counsel for defendant, the jury was polled by being asked by the Clerk if their verdict is that announced by their foreman, whereupon the Clerk called the roll and each juror for himself answered: "Guilty in the manner and form as is set forth in both counts of the indictment," and so they say all.

*Judgment Record.*

Judgment signed Nov. 22, 1922.

EDWIN C. CAFFREY,
*Judge.*

Whereupon all and singular, the premises being seen and by the Court now here fully understood, it is, on the eighteenth day of December, A. D. nineteen hundred and twenty-two, ORDERED AND ADJUDGED that the said Abraham E. Harris be committed to the State prison of this State for a term of not less than two and one-half years and not more than five years at hard labor and pay a fine of one thousand dollars and the costs upon this conviction and stand committed until said fine and costs are paid, which said costs are taxed by the Clerk at the sum of one hundred and forty-eight dollars and three cents, and the said defendant be in mercy, etc.

# Essex County Court of Quarter Sessions

Wednesday, November 15, 1922.

| | |
|---|---|
| THE STATE<br>*vs.*<br>ABRAHAM E. HARRIS. | *Indictment No. 57.*<br>*Burning and so forth.* |

Before Hon. Edwin C. Caffrey, *J.*, and a jury.

For the State appears J. Victor D'Aloia, First Assistant Prosecutor of the Pleas.

For the defendant appears Robert H. McCarter and Meyer E. Ruback.

*Mr. McCarter.* Before a jury is drawn in this case I would like to have an opportunity to withdraw the plea for the purposes of a motion to quash.

*The Court.* I will allow it.

*Mr. McCarter.* If the Court please, this indictment is in two counts. The first count is, I presume, under Section 126, as amended, of the Criminal Procedure Act. The second count is the one for the insurance claim, which I will discuss secondly.

* * * * * * *

Mr. McCarter moves to set aside the second count of the indictment on the following grounds:

First—Because the building is not described, "Not parcel of a dwelling house."

Second—The building is not localized and not shown to be anywhere within the jurisdiction of this court, which is absolutely essential.

Third—Because the count is duplicitous in charging the dual crime of actually burning and counseling, aiding,

abetting and procuring to be burned. While the latter may not be a fatal defect, it is under the late case in 81 N. J. L. incumbent upon the State to elect which of the two distinct crimes it will try.

*Mr. McCarter.* As to the first count, my criticism of that count is that it is duplicitous and contains in one count two distinct crimes.

(Counsel argue.)

*The Court.* I am going to deny your motions. I take it that this negative averment is not necessary, because following the cases there is nothing in the enacting or prohibitory clauses. So, under those circumstances I will deny your motions.

Mr. McCarter excepts to this ruling of the Court.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

(The defendant pleads not guilty to the indictment.)

Adjourned until 2 P. M.

AFTERNOON SESSION.

(After the defense had used ten peremptory challenges in the drawing of the jury, Mr. McCarter inquired of the Court whether, under the indictment, the defense was entitled to more than ten challenges on the ground that the indictment was one for arson.)

(Argument.)

*The Court.* I hold that you have ten challenges.

*Mr. Ruback.* In order that we may have the record on your Honor's ruling clear I am going to attempt to chal-

lenge one of the jury. I am going to select a juror who is satisfactory to us for the purpose only of getting your Honor's ruling. I want to challenge juror No. 7.

*The Court.* On the grounds that you have stated?

*Mr. Ruback.* On the ground that under the law we are entitled to twenty peremptory challenges and we have exercised only ten.

*The Court.* I mean, am I to take that in conjunction with what you said, that you are going to challenge No. 7?

*Mr. Ruback.* Yes, we challenge juror No. 7 peremptorily.

*The Court.* I deny your challenge.

*Mr. Ruback.* I pray an exception.

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

The jury is sworn.

Mr. D'Aloia opens in behalf of the State.

*Mr. McCarter.* If it please the Court, I call upon the State to elect whether they shall take, under the first count, which is the only count to which counsel, in his opening, has alluded—whether they rely upon the alleged burning of the merchandise or alleged burning of the building. It is my conception that the count is duplicitious and under the case of State against Brand, if his attention is called to it, he must elect.

*The Court.* I deny your motion.

*Mr. McCarter.* Exception. The same as to the second count.

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

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

*Direct examination* by Mr. D'Aloia.

Q Mr. Schwartz, what is your business? A Superintendent of the Bureau of Records, Police Department, City of Newark?

Q And by profession, you are what? A A civil engineer.

Q Were you engaged by the Prosecutor's office to make a plan, a floor plan of the second floor loft of the building known as 204 Morris avenue, City of Newark? A Yes, sir.

Q And did you make a plan? A Yes.

Q Is that the plan? A Yes.

Q Now, will you kindly explain that floor plan to us. A The map represents the second or top floor of the two-story brick building situated at the corner of Morris avenue and Thirteenth avenue, the south corner. The different tables, "sewing machine stands," and so forth, are marked as such on the map, so it would not be necessary, of course, to describe those.

Q Where would they be? Just point them out. A This is a sewing machine table (indicating). These are sewing machine tables which contained sewing machines right on the side. There are some others above it, cutting tables, which I presume are cutting tables. These are not sewing machine tables. These are bins and shelving (indicating). This, marked "gas plates," was a table covered with tin, or lined, rather, and contained two gas plates or stoves. Above that is shelving, and above that shelving, and to the south side of the building was tables, and to the east of them tables—in fact, there is a telephone booth situated at this point (indicating). I presume a dressing room or locker (indicating) to the east of the locker were toilets and an offset of two sinks or rather water drains. To the north of these two sinks is a large stockroom, I presume, with shelving. It also

had numerous sewing machine tables which had no machines on them. To the north of the stockroom is also a small stockroom, and to the north of that is the entrance, which is a door leading to the main factory loft, and to this stockroom, and also to the fire escape, which also was the stairway from which entrance is gained, and, of course, exit. This outline in red being the outer wall of the building. This, I presume, is an elevator shaft, but those two doors being locked, I was unable to see what it was used for, but it extended from the top to the bottom of the building. To the west of that, and connected with the second floor, is an entrance, which, at the time I was there, on May 10, 1922, I presume about 9:30 or 10 o'clock in the morning, that door was then locked. This is a door covered with tin on both sides, and there also was a shield door, or I suppose a portable fire door, which it would be called, as much as anything else, which could have been put on there with a bar. This door was securely locked, which led to the platform of the fire escape or the south entrance to the building, or the top floor.

Q There was no entrance to the building on the westerly side, that is, the front? A No, sir; that is, not to that floor.

Q The only entrance to that floor was through this stairway or by this stairway on the Thirteenth avenue side, which is the north side of the building? A Yes.

Q And that other exit there, which you are pointing to now, you say at 9:30 in the morning, when you made that plan or got your notes and measurements, was locked? A Yes.

Q That came on to the fire escape? A Yes.

Q Now, will you tell us what the scale of the map is? A Three-eighths of an inch to one foot.

Q Now, with your scale, will you tell us the distance or the width of the stockroom? The measurements of

the stockroom, the length and breadth? A Twelve feet in width; 29 feet 7 inches in length.

Q Now, will you tell us, please, the distance between the partition which divides the stockroom from the main room, to the front table there, near the westerly side of the building, Thirteenth avenue? A This table here (indicating)?

Q No, way off, to the right. A Seventy-two feet.

Q Now, will you give me the distance between that same partition, between the stockroom and the main floor, and the bins which appear in the center of the loft? A Thirteen feet 6 inches to the center.

Q To the center of the first bin? A Yes, sir; to the outside edge of the first bin.

Q Well, will you please give me the distance between that door leading to the stockroom and the center of the second bin? A Yes, sir; 16 feet 6 inches.

Q Now, give us the measurements of the loft over all? A Eighty-nine feet over all; that is the length.

Q Now, please give us the width. A Fifty-eight feet.

*Cross examination* by Mr. McCarter.

Q Now, Mr. Schwartz, who asked you to go up there to make this examination? A I think it was Lieutenant Hargan of the Prosecutor's office.

Q You are sure it was he? A Although it might be a request from the department.

*Mr. D'Aloia.* What was that answer?

*The Witness.* I think it was Lieutenant Hargan that first requested that I make that plan, but it might have been Detective Rothenberg, but I think it was Lieutenant Hargan.

Q And this was the day after the fire? A Yes.

Q May 10th? A Yes.

Q And the position of these different articles in the loft shows the position you found them in that morning? A Yes.

Q In other words, the fire had not disturbed very much of the contents of the loft? A Well, with the exception of a broken skylight, glass, and things of that sort, there was no actual disorder, with the exception of these two bins and a corner of the stockroom.

Q Now, what bins would you say were affected? A I think these three (indicating).

Q Mark with a cross the bins that you say had been affected by the fire. A Yes, sir.

(The witness marks the map with three crosses.)

Q Now, how high were those bins? A May I refer to my notes?

Q Certainly. A (Witness examines paper.)

Q I really am not insistent upon the exact measurements. I will take your estimate. A I can give that to you, Mr. McCarter.

Q All right. A These bins, the first three bins there, were 2 feet 6 inches in depth, and 2 feet in width, and at the front edge 2 feet 6½ inches in height. That is, they run up a little (indicating).

Q Yes, so they do not stand above the floor more than about 2 feet 6 inches? A Yes.

Q Now, these tables on either side of the bins, the tables where the machines were on either side of the bins, were about the normal height of tables? A These tables were the ordinary height and there was a shelving in back of them, and it was perhaps, if I may guess at it, 8 or 10 feet in height.

Q And that shelving, 8 or 10 feet in height, as you guess, was where? Point it out on the map. A This shelving was, I should judge, 8 or 10 feet in height.

Q Won't you then point, A, B and C, as being the location of the shelving which you recall as being 8 feet in height? A Shall I mark it?

Q Yes. A (Witness marks map.)

Q What have you marked? A I marked A, B, C, D and E.

Q As places where the shelving was about seven or eight feet in height, is that right, Mr. Schwartz? A Yes, sir; I might also add that the shelving in the stockroom was that same height.

Q Now, you have called the main room the loft. That, with the exception of the shelving and the tables and the bins, was one compartment, was it not? A Also—I will say it was all in the same loft, but it was sort of partitioned off by this shelving.

Q That's what I say. Read the question, Mr. Stenographer. (Question read.) A Yes.

Q Have you indicated in pink the windows? A No, the windows are indicated in black. The red indicates the brick wall.

Q So that on the outer walls, completely around this loft the black points indicate windows? A Yes, sir.

Q Now, you have referred to the compartment at the east end of the building as a stockroom, and the yellow marking on the west end of that is the partition between it and the main room, is it not? A No, this yellow line here, the yellow line that is right here is shelving, marked shelving. This is the partition itself, these dark yellow lines.

Q That partition did not go to the ceiling, did it? A No, sir.

Q How high is that partition? A I should judge about 8 feet.

Q Now, did you notice this morning that you were there, the scorching of the ceiling? A No, sir.

Q You did not notice the scorching of the ceiling? A No, sir.

Q And you can't say, therefore, that the ceiling was scorched to within about a foot of the shelving or parti-

tion on the southwest side of the stockroom? A No, sir.

Q These were the sewing machines (indicating)? A Yes, sir.

Q There were considerable machinery and fixtures in the place besides a large stock? A Oh, on a rough guess, I think there was fourteen on that side (indicating), 12 on that (indicating); 11 here (indicating) and 10 there (indicating), if I am not mistaken.

Q And in addition to that there was a large stock of goods there? A Well, the stock, Mr. McCarter, was in these bins and also on the shelf.

Q I say in the building, in the loft? A Well, in boxes.

Q You found a large quantity of boxes there which you assumed contained stock? A Yes.

Q This was a manufactory of some kind? A Yes.

Q Now, you have talked about the door being locked. Turning to the south end of the building, what you call the fire escape, that was an iron stairway leading down to the ground, wasn't it? A Yes, sir.

Q And that was in kind of an alley? A Yes, sir.

Q So that it was not an unnatural thing to lock the door from what you call the fire escape, but which really was an entrance into that loft, wasn't it? A An unnatural thing to do?

Q Yes. A Oh, I presume not.

Q Naturally when you leave a place over night you want it locked up? A Sure.

Q There was nothing to prevent anybody from going up these stairs and going right in there? A No, sir.

Q Now, in the front, on Thirteenth avenue, or the south, as you call it, was another iron stairway indicated here where the pointer is, leading up to the entrance there? A Yes, sir.

Q An iron stairway? A Yes.

Q And it was open? A Yes.

Q And nothing to prevent, if the door at the head of that stairway were unlocked, a thief or what not, getting into the building there? A If the door was unlocked.

Q I don't understand, then, that you attach any significance in your statement, which you repeated twice, that the door had been locked? A No, only in this way. I should have thought—

Q Never mind what you thought—

*Mr. D'Aloia.* He is going to try to explain it to you.

*The Witness.* In reference to that extra door which merely fitted in there—

Q I have not asked you about the extra door. A That door was standing right alongside of it.

Q Now, there are two doors, there were two doors at either side, were there not, two doors here, and one in the rear? A No, one door in the rear and one door in the front leading into the front office or reception room.

Q Only one door in the front? A Yes.

Q Sure about that? Now, think. A Yes, I am quite sure there is only one door.

Q Don't you know, as a matter of fact, there are two doors there in the front? A No, I do not.

Q You say you are sure there are not? A I don't say I am sure. Sometimes we make mistakes.

Q Oh, yes, I see. Now, that passageway indicated where the pointer is, from the loft into the so-called stockroom is an open passage way, not a door? A Yes, sir.

Q And the enclosure from the north end of the stockroom, at the west end of the building, is the office; or don't you know about that? A I don't know about that. It seemed as though it might have been used as an office because there was a grated window there?

*Edward H. Schwartz, cross.*

Q What floor is this loft on? A It should be called the third floor, but it is the second floor according to the two and a half story building, practically. You see, the first floor is somewhat elevated from the sidewalk, and the basement floor, which you might call a floor—you may say three floors, but not three stories. This is the top floor.

Q And there is a high sort of ground floor or basement, then, and then the first floor— A And then this floor.

Q And this floor is disconnected with the lower stories on the inside and its access and exit are through a so-called fire escape in the rear of the iron stairway on Thirteenth avenue? A Yes, sir.

Q Did you designate the enclosure at the west end of the building as a stockroom?

*Mr. D'Aloia.* Don't you mean the east end?

*Mr McCarter.* East end.

*The Witness.* Well, I didn't designate it as anything, merely as a room with shelves, partitioned off, I don't know what it was used for, there was shelving there which contained boxes and other things.

Q But that was not the only place where these shelves and boxes were? A Oh, no.

Q They were out in the other room? A Yes.

Q Did you notice any clothing hanging in the so-called stockroom? A Yes.

Q What was hanging there? A There was a coat hanging there.

Q Can you designate where that was hanging? A Yes, right at this point here.

Q Suppose you mark a Z where the coat was hanging that you noticed? A (Witness marks as requested.)

Q Did you notice whether that coat was burned? A It appeared to be scorched, it was not burnt.

*John L. Day, direct.*

Q Have you got any of the contents of that room in your possession? A No, sir.

Q Did you have them at all? A Never had any; no, sir.

*Re-direct examination* by Mr. D'Aloia.

Q Those long strips of yellow on the westerly side of the loft are those tables? A Yes, sir.

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

*Direct examination* by Mr. D'Aloia.

Q Mr. Day, what is your business? A Police photographer, Newark Headquarters.

Q Connected with the Newark Police Department? A Yes, sir.

Q Do you recall how long you have been a photographer? A About twelve years.

Q Did you take any photographs of the loft on the second or top floor of the building located at the southeast corner of Morris avenue and Thirteenth avenue? A I did.

Q When did you take them? A May 10th.

Q What hour of the day? A It was about, well, in the neighborhood of 9:30 and 10:30 in the morning.

Q I show you a photograph showing the exterior of the building on the Thirteenth avenue side and ask you if you took that picture? A Yes, sir.

Q What does that represent? A That represents the building on the corner of Thirteenth avenue and Morris avenue, the northerly side, the side of Thirteenth avenue.

Q Will you take the pointer and show us, please, what side of the building that photograph shows on the plan? A It is mainly that side (indicating), and that side (indicating), right there, the corner.

Q The northerly side and the westerly side in perspective, is that it? A Yes, sir.

*John L. Day, direct.*

*Mr. D'Aloia.* I ask that this photograph be marked S. 1.

(Marked S. 1.)

Q I show you another photograph and ask you if you took that picture on that occasion and at that place? A Yes, sir.

Q Will you tell us what part of the exterior of the building that photo represents? A This is the rear of the building, right here (indicating), and the alley way, and a photograph of this stairway.

Q Will you indicate on the plan whereabouts and in what direction your camera was when you took that picture? A My camera was right about here (indicating).

Q Facing the building? A Yes, sir.

Q Up in that corner of the stairway? A Yes, sir.

*Mr. D'Aloia.* I ask to have that picture marked S. 2.

(Marked S. 2.)

Q I show you another picture showing the front of the building and ask you if you took that picture? A I did.

Q At the same time and same place? A Same time; yes, sir.

Q What part of the exterior of the building does that photograph represent? A Right here (indicating).

Q The westerly side? A Yes.

Q Where was your camera with reference to the westerly side as shown on that plan? A About in the middle of the street.

Q To the west? A Yes.

Q And your camera faced the building? A Yes.

*Mr. D'Aloia.* I ask to have that picture marked S. 3.

(Marked S. 3.)

Q I show you a photograph of the interior and ask you to tell us on the plan, on the board there, what part of the interior that photograph represents? A This photograph represents, well, from about here, Mr. D'Aloia (indicating a point in the center of the front of the loft).

*The Witness.* Facing down to the rear.

Q Straight back? A Taking everything in from about this radius here (indicating).

Q And when did you take that picture? A The morning of May 10th.

Q At that place? A Yes.

Q On the top floor? A On the top floor, Thirteenth avenue and Morris avenue.

Q This building located on the southeast corner? A Yes.

*Mr. D'Aloia.* I ask that this photograph be marked S. 4.

(Marked S. 4.)

Q I show you another photograph and ask you if you took that? A Yes.

Q At that same place and at the same time? A Yes.

Q On the same floor of that building? A Yes.

Q Will you kindly tell us what part of that loft that picture represents? A It represents the sectional view, it covers about these three bins here, and this desk here (indicating), I believe is shown in the picture, just a portion of it. The top of it here. Also the gas plates, and there is a double door here (indicating). This is the desk on the photograph and part of this—well, I don't know what you call it—sort of a table, adjoining these cutting tables.

Q With a frame above it? A With a frame above it.

Q Will you kindly put the pointer on the plan and indicate to us where the camera was placed when you took that picture? A Right about here (indicating).

*John L. Day, cross.*

Q Facing what way? A Facing this way.

Q Southwest? A Yes.

Q Will you put your pointer there again and will you mark it with a double X? A Yes (marks double X).

*Mr. D'Aloia.* I ask that this photograph be marked S. 5.

(Marked S. 5.)

Q I show you another photograph and ask you if you took that picture? A Yes.

Q At the same place, on the top floor of that building, on the southeast corner of Morris avenue and Thirteenth avenue? A Yes.

Q On the same day? A Yes.

Q Will you kindly tell us on the map what part of that loft that photograph represents? A That represents a section of—well, what is called the stockroom. It is marked Z on the map here, which is right in there, here where the shelves are (indicating).

Q And that would be the southwest corner of that room? A Yes.

Q Will you indicate on the plan where you placed your camera, or located it, when the picture was taken? A Right about here.

Q Will you mark that with three X's, please?

(Marks three X's.)

Q And your camera was pointed directly at the corner room? A Directly at the corner; yes, sir.

Q That is in the southwest corner of that stockroom? A Yes.

*Mr. D'Aloia.* I ask that it be marked S. 6.

(Marked S. 6.)

*Cross examination* by Mr. McCarter.

Q Who asked you to go up there and take these photographs? A Why, no one asked me. I was ordered.

Q Who ordered you? A Mr. Schwartz.

Q The gentleman who was on the stand before? A Yes, sir.

Q And who asked, or ordered you, or told you where to place your camera, and what views to take, or did you choose them yourself? A Well, it was partially my choice, and I was told what to get, to make a photograph of, and I used my own judgment in placing the camera where I could get the best results.

Q Well, who told you what to get? A Well, I believe Mr. Schwartz told me.

Q Are you sure? A Well, I received orders from him.

Q This is no laughing matter, and it is a simple question. I am asking you who told you what to get? A Mr. Schwartz.

Q Well, was it he, or wasn't it? A Well, I believe Mr. Schwartz.

Q Why do you say, "I believe it was Mr. Schwartz"? A I believe it was.

Q Why do you hesitate and laugh and say you believe it was he. Now, who was it? A Mr. Schwartz.

Q Where, down at your office or up at the building? A No, at the building.

Q You were there at the same time he was there? A Yes, sir.

Q Who else was there? A Why, there were two firemen and Mr. Devereux.

Q Who is he? A He is an assistant of Mr. Schwartz, and that's all I know was there at that time.

Q Well, while you were there who was there? A While I was there, that's all that was there.

Q And what time did you get there? A I got there about 9:30 in the morning.

Q And remained there how long? A Until—I guess it was pretty near twelve.

Q Now, you have in this Exhibit S. 6, which represents, as I understand it, the corner of what has been called here the stockroom, a coat hanging up. Did you notice that coat? A Yes, sir.

Q There was no ceiling to that stockroom, no roof or ceiling shutting out the roof of the main loft? A I can't tell you.

Q You can't tell me? A No, sir.

Q And this photograph S. 5 has on it a table with two iron things, what are those things? A Those are gas plates.

Q Gas plates? A Gas plates, or gas stoves, whatever you want to call them.

Q You don't seem to like the word stove. Gas stoves, I suppose we common fellows would call them? A Well, I don't know.

Q And is there a gas pipe leading down to them, to these gas plates as you call them? A Well, those pipes here (indicating).

Q Are they for heating purposes, or don't you know? A I really don't know what they are for.

Q And on this same photograph, S. 5, this charred case, that stands there is represented on the sketch of the building where I am now pointing? A No, lower, the bin, the upper part, of course, is the shelving.

Q Well, I was talking about the upper part? A The upper part is the shelving.

Q And the lower part is the bin? A Yes, sir.

Q This room was all one loft, wasn't it? A I believe so.

Q Now, you did not take any photograph of the roof? A No, sir.

Q Did you notice whether there were any openings in the roof? A No, I did not notice.

Q During the time that you were engaged in this work with Mr. Schwartz, was there nobody in that loft except Mr. Devereux, you and Mr. Schwartz? A That is all I saw.

*Jacob Umansky, direct.*

Q Well, you would have seen them if they had been there? A Well, there was Mr. Schwartz, Mr. Devereaux and two firemen.

Q And that is all? A And there was a policeman at the entry, just as we came in, but he was not inside of the building, he was on the fire escape.

Q Anybody else? A Two firemen.

Q Anybody else? A Later, when we were coming away there was another man from the salvage corps, I think he is the captain or lieutenant, or something down there, he came up there with another man, another fireman.

*Mr. D'Aloia.* I offer the photographs in evidence with the same exhibit numbers that were marked on them.

(The six photographs were received in evidence and marked Exhibits S. 1, S. 2, S. 3, S. 4, S. 5 and S. 6.)

*Mr. D'Aloia.* I think the plan ought to be marked S. "A," so as not to conflict with the photographs. Have you any objection to the map, Mr. McCarter?

*Mr. McCarter.* Oh, no.

(The map is marked S. "A.")

JACOB UMANSKY, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Mr. Umansky, what was your business on or about the 9th of May, 1922? A I was the factory foreman for A. Harris & Company.

Q And where was your place of employment? A At 204-6 Morris avenue, Newark, New Jersey.

Q And what part of the building did the concern where you were employed occupy? A The second and top floor.

Q They both mean the same floor? A Yes, the second or top floor.

Q Now, how long had you been employed there on May 9th, 1922? A Why, in that particular loft?

Q Yes, in that particular place? A Since about the 25th of December, 1921.

Q And in what capacity were you employed there? A As a factory foreman.

Q Now, on the 9th of May, how many hands were employed there? A About twenty-five to thirty.

Q And what time of the day did those hands quit work? A All the operators at 5:30 usually.

Q What was the time when they quit on the 9th of May, 1922? A 5:30, maybe a few minutes later, on account of payday.

Q About 5:45 who was left in the factory, in the loft? A About 5:45, Mr. Harris, myself and Mr. Gilpatrick.

Q And who was Mr. Gilpatrick? A Mr. Gilpatrick was the head of the shipping department.

Q The shipping department of that concern where you were the foreman? A Yes, sir.

Q That is the Harris concern? A A. E. Harris concern, yes, sir.

Q Now, tell us from 5:45 on, after the hands had left on the 9th of May, 1922, what you did, what Gilpatrick did while you were there, and what Mr. Harris did, if you know? A Why, I had been giving reports to Mr. Harris for the time being while he was not there, usually when he used to come around, he used to get reports from me.

Q What did you do that night, May 9th, 1922, at 5:45 P. M., after the hands had left, and you, Mr. Gilpatrick and Mr. Harris were the only three men in the loft. What happened, what did you do, and what did they do? A Why, I straightened out the work for the day, made preparedness for the next day, and Mr. Harris was examining the merchandise that was supposed to be

manufactured, and also ready made merchandise, and also, we—that is, myself and also the head man of the shipping department, we had instructions from Mr. Harris a few days before to select for him a certain number of samples representing about a thousand dozen merchandise which we had ready for him.

Q Now, did you prepare those samples? A Yes, sir.

Q And did you wrap them up in the bundles? A Myself and Mr. Gilpatrick.

Q That was after 5:45 P. M.? A Yes, that was even later than 5:45.

Q Well, that was in the neighborhood of six o'clock? A About.

Q Then, what happened? A Then, Mr. Harris gives further instructions, as far as to shipments, took down reports from us, what was done for the day, what shipments were made, and what shipments are due to be made, and that is the way we passed the time.

Q Now, when you got through making the bundles—while you were making the bundles, did you leave Mr. Harris in the office? A Not particularly. He was around there, around us and also around the place.

Q Where did you make the bundles? Point out on the map where you and Mr. Gilpatrick made the bundles of the samples? A Why if—

Q Not if, where did you make them that night? A Pardon me, I cannot read the map.

Q Were you in court when that was explained? A No. If this is the shipping department, then, I presume that this was particularly—

*Mr. McCarter.* Well, we object to presumptions. I understand the witness was not in the room when Mr. Schwartz explained the map.

Q This is a map which represents the whole floor of that loft? A Yes.

Q This is the Morris avenue side? A Yes.

*Jacob Umansky, direct.*

Q This is the 13th avenue side, and this is the iron stairway that comes up from 13th avenue, the sidewalk, up to that floor, and this is the entrance, this is a little place here, and here is your stockroom. This is another door that you come into the main loft, and this is a sewing machine table and another sewing machine table, these are some more tables, and this place here is the bin, back of the bins are shelves, some more shelves and back of them some more shelves, and tables up here, these are tables (indicating.) Now, here you are coming up the stairway into the entrance here on 13th avenue. Tell us what part of the loft you were in when you made the bundles of samples that night? A Right here, at this table (indicating.)

(The witness points to a table on the southerly side of the loft.)

*The Court.* Is that marked?

*Mr. D'Aloia.* No, simply marked, "tables."

Q Where is the office shown on that map? A The office should be over here.

Q That's right near the door as you come in? A Yes, sir.

Q Where did you get your instructions from Mr. Harris to prepare those bundles of samples? A Well, I was packing—I had been making up these bundles.

Q Now, when you went to make your bundles of samples up on this table on the southerly side of the loft, where was Mr. Harris while you were making those bundles up, if you know? A I think that he immediately followed me to the samples to see where we made the bundles.

Q Now, stop thinking and see if you can recall the facts. Is it not a fact that Mr. Harris was in the office when you and Gilpatrick were making bundles of samples up for him?

*Mr. McCarter.* I object to that as leading.

*Witness.* I can't say so.

*Mr. McCarter.* One moment, I have an objection.

*Mr. D'Aloia.* I will obviate all the difficulty by withdrawing the question.

Q Now, do you know enough about that plant to tell us, if you recall, when you and Mr. Gilpatrick went to make up the bundles of samples for Mr. Harris, where you left Mr. Harris? A Yes, sir.

Q Where was he left by you and Gilpatrick? A I think Mr. Harris followed me to the shipping department to see we should make the bundles for him.

Q You think that? A I remember it distinctly.

Q You do? A Yes, sir.

Q Did he supervise the making up of the bundles? A No, sir.

Q Where did he go after he followed you to the shipping department, as you say? A He was going all over around the loft.

Q All around the loft? A Yes.

Q How long did it take you and Gilpatrick to make up these bundles? A About fifteen or twenty minutes.

Q You didn't see Mr. Harris, then, except when he followed you to the shipping department, and then he left?

*Mr. McCarter.* He didn't leave, I object to the question.

(Question withdrawn.)

Q You say, now, that you think Mr. Harris followed you from the office direct to the shipping department, is that right? A Yes, sir.

Q And you and Gilpatrick, when you got there, began to make up the bundles, is that right? A Yes.

Q And you were there making up the bundles from fifteen to twenty minutes? A Yes, sir.

*Jacob Umansky, direct.*

Q Do you know where Mr. Harris was during the fifteen or twenty minutes that you were in the shipping department? A He was all over the place.

Q Do you know where he was? A All over the place.

Q Was he in the shipping department during that time? A He was also in the shipping department.

Q Was he there all that time? A Not particularly all that time, but he was in the shipping department and in the cutting department.

Q How long of the fifteen or twenty minutes was he in the shipping department? A I am not—

Q How long was he in the shipping department? A In order to say the truth, I can't say if it was three or four minutes or six minutes.

Q Now, after you made up the bundles and got through making them up in the shipping department, was Mr. Harris there, or was he in the office? A He came back.

Q Where? A To the shipping department.

Q Where did he come from? A From the loft, wherever he was.

Q From where? A He was all through the loft, I don't know the last place he left when he came back.

Q Did you call him and tell him, or did Gilpatrick call him to say, "Your bundles are ready for you to take away?" A No, we did not. He came around to see if the bundles were ready for him to take away.

Q After you had made up the bundles were they convenient to carry, or hard to carry? A No, they were big bundles, rather bulky.

Q And did you and Gilpatrick try to change the size of them? A No, Mr. Harris told us as long as they are bulky as they are, "You had better send it over to the office at nine o'clock in the morning with our porter Fred."

Q Now, what happened, what happened after you and Gilpatrick made these bundles so bulky and inconvenient to carry that they were not carried, what happened?

*Mr. McCarter.* I object to that.

*The Court.* Objection sustained.

Q After Mr. Harris said, "Never mind, send them over in the morning because they were too big to carry," what happened? A After Mr. Harris noticed that the bundles are bulky and it was decided to send it over tomorrow morning to the office with our porter Fred, he also gave us the instructions to select for him samples representing a silk line. These samples represented a muslin line exclusively, and then he gave us orders to select for him samples representing a silk line, particularly camisoles, silk camisoles, and those silk camisoles, I don't know, I think there was a hundred or a hundred and twenty-five numbers to be selected, and he told me he was in a hurry to have it done for him. Now, we have had considerable orders—

Q Never mind what you had. What was done by you after you came to the point where Mr. Harris said, "Never mind, you can send those bundles over tomorrow morning." What did you do, what did Mr. Harris do and what did Gilpatrick do? A Then, Mr. Harris again discussed with us reports and instructions and so forth and so on.

Q For how long a time did he discuss them? A Well, for about near half an hour or three quarters of an hour.

Q What time was it then when that discussion ended? A I can't remember exactly what time it was, when we got through with the discussion.

Q About? A I can't say distinctly.

Q Well, what did you do after the discussion ended? A Well, then I communicated with Mr. Gilpatrick, our shipping clerk and found out from him the orders that

he has got due on hand to be delivered, and after finding out that he has got considerable orders to be delivered the next day and the next two days, and I found out that we will be delayed in making our shipments in time if we should get busy in selecting the silk samples for Mr. Harris, I suggested to Mr. Harris that he should relieve us for a day or two selecting the silk samples, being we got to attend to our due orders to deliver.

Q After that discussion was over, what happened? A After that discussion was over we went home.

Q Before you went home did Mr. Harris say anything to Gilpatrick, and if so, what? A He said several things, I don't know particularly what.

Q Now, try to remember. Did he say anything to Gilpatrick about doors and windows? A Oh, yes.

Q What did he say? A It happened that our porter, Mr. Fred—

Q What did Mr. Harris say to Gilpatrick? A Mr. Harris said, he asked Gilpatrick to see and examine whether all the windows are closed, being Mr. Fred was absent that evening.

Q Who is Fred? A Fred used to be the porter, and he used to take care of that.

Q Well, now, did Gilpatrick follow those orders out, that Mr. Harris gave him to close those windows? A Yes, sir.

Q Did you see him do it? A Yes.

Q All over the loft? A Yes.

Q Do you know how many windows there were? A I don't know particularly how many windows there were, but there were windows all around the loft.

Q Well, did he personally see that every window all around the loft was closed? A I believe so.

Q How about the doors, who took care of those? A What doors?

Q The doors leading to the outside of the building. A There are two kind of doors.

Q What about those doors, what was done about those doors, if anything by you, Gilpatrick or Harris? A Which doors do you refer to?

Q Doors that lead from the loft to the outside of the building. A On the 13th avenue side?

Q On any side? A Therefore, I say the doors leading to the hallway, leading to Morris avenue was all outer doors, it was exit door, there were two doors—

Q Well, what was there about that? A I beg your pardon.

Q What was there about that door leading to Morris avenue down? A Mr. Gilpatrick was always in charge to take care of those doors, that they shall be closed before leaving the place.

Q These are the doors you are referring to, these doors here (indicating)? A Yes, they are the elevator door and one fire escape door, exit door.

Q Were you with Gilpatrick that night? A When?

Q Just before you left? A Yes, surely, we were there; that is, exactly in the same room, the shipping department.

Q Did you see who fixed that door? A No, I did not.

Q Do you know who fixed this door before you left, this door leading out into the stairway, which leads down to the sidewalk on the 13th avenue side? A What do you mean by fixed?

Q How was it left, open? A You mean closed?

Q Yes. A Myself, Mr. Harris and Mr. Gilpatrick we were out, and Mr. Harris snapped one lock on the inside door. Is it necessary I should explain to you how the place is to be closed?

Q Yes. A The place is closed by a snap lock on the inside of the door.

*The Court.* Are you speaking of the 9th or generally?

Q I mean the night of May 9, 1922, how was the place closed at that particular point, on the door leading down to the iron stairway which goes down to the sidewalk of 13th avenue? A It was closed by a snap lock, and a patent lock.

Q Who did it? A Mr. Harris closed it up, the snap lock, and the patent lock, that also is a snap, and a skeleton key.

Q Who had the key that night, who turned it? A Mr. Harris closed it and turned the keys back to me.

Q Where were you? A I was with him.

Q Where, what part of the stairway, or doorway? A We were all about five or ten inches apart, one from each other.

Q Was Gilpatrick there? A Yes, sir.

Q Mr. Harris had the lock in his hand, didn't he? A Yes, one lock.

*Mr. McCarter.* Please do not lead him.

Q Where did he get the lock from? A From the table where the lock is always usually laid.

Q Who put the lock on the door? A Mr. Harris.

Q You had to get out of his way when he did that? A Not at all.

Q Well, you and Mr. Gilpatrick had to move on downstairs? A No, sir.

*Mr. McCarter.* I object to that question as leading.

*The Court.* Yes, you are leading this witness.

Q Well, give us the relative position of yourself, Mr. Gilpatrick, Mr. Harris, when Mr. Harris put that lock on the door? A That platform is big enough to take in a dozen people.

Q Where were you standing? A On the platform near the door, and Mr. Harris was at the front of the

door and Mr. Gilpatrick was with us, whether a foot apart or ten inches apart, I couldn't give you in inches.

Q Now, this skeleton key Mr. Harris had and used, did he have it himself before he turned it in the lock, or did you give it to him? A That skeleton key was attached on the bunch with all the keys.

Q Do you understand my question? A Yes.

Q That key that he used, turned in the lock, that you call a skeleton key, did he have it himself or did you give it to him before he used it? A No, it was together with the lock, and he had the lock with the key.

Q And you say he gave it to you after he turned it? A Yes.

Q Now, will you describe the way in which you and Mr. Harris and Mr. Gilpatrick went down the stairs? A Yes, as we got through—

Q No, as you went down the stairway after you locked the door? A Yes, we went through the stairway, the three of us, and that day, Mr. Harris—they had a dollar sale in Reid's department store—

Q Just a minute. Will you tell us, the way in which you, Mr. Gilpatrick and Harris went down the stairway after Mr. Harris locked the door with the skeleton key and the lock? A Mr. Gilpatrick, I believe, was in front; Mr. Harris was second and I was third, and that is the way we went down the stairway.

Q And where did you go? A Then, as I said, Mr. Harris said they had a dollar sale that day in Reid's department store and he asked us to come along with him and see the result and the rush and the sale.

Q What time was it? A A little after seven, and we went down 13th avenue, the three of us, and the time we reached Norfolk street Mr. Gilpatrick asked to be excused, not to go any further, because he wanted to go home to be in time for supper, so Mr. Harris excused him, and I understand he was waiting there for a car

to go home, and I went down with Mr. Harris as far as Reid's department store.

Q How long did you stay with Mr. Harris? A About a minute in front of the door of Reid's department store.

Q What time was it when you separated from Mr. Harris? A I suppose it was about half-past seven or so.

Q Where was he when you left him? A In the front of Reid's store on Market street.

Q Where he had this counter and sale as you said? A Yes, the door was closed already, it was after business hours.

Q (*By Mr. McCarter.*) Where is this Reid's department store? A On Market, I think, and Branford.

Q On Market and what? A I think it is Market and Branford.

Q They do not intersect.

Q (*By the Court.*) Whereabouts with reference to the Court House? A Right here down below.

Q You mean the corner of Market and Arlington streets? A I know I left him in front of the door on Market street entrance.

Q Market street at Arlington street? A If it is Arlington, I am not well acquainted what street it is.

Q Then where did you go? A Well, I told him that if—I was under the impression the sale was still going on, but I come over and see the door was locked, and I understood the sale was not going on any more, I asked him if I could be excused and say the prayers for my father, say Kaddish; he said, "What is your hurry?" I said, "it is getting late;" he said, "All right, go ahead," and I went over, and I also had a bundle with me—

Q Never mind that. What time was it when you left Mr. Harris? A I think it was about a quarter of eight or twenty minutes of eight or so.

*Jacob Umansky, cross.*

Q He asked you what your hurry was before you went? A Yes.

Q And you told him and he let you go? A Yes.

*Cross examination* by Mr. McCarter.

Q Mr. Umansky, you have spoken of the Harris Company, is that a corporation? A Yes.

Q And how long had you been employed by that corporation? A Why, direct as a foreman I was employed about a few years.

Q Where? A First in New York, their premises 133-141 West 21st street, and then to Newark, after they moved their factory here.

Q When was the factory moved from New York to Newark of this corporation? A Why we started in making preparations for moving on the 26th of December, 1921.

Q Were extensive improvements made? A Changes made?

Q In this loft? A I could not understand you.

Q Were any changes made or improvements made in this loft? A Yes, we removed our plant and installed here all our plant, carpenter work, machinery, plumbing and everything else.

Q What does this Harris concern make? A Ladies underwear.

Q They had been in some factory in New York and about December they moved from New York and come to this loft up on 13th avenue on the corner of Morris avenue? A Yes.

Q Can you tell us how far that is from High street where we are now, how many blocks? A It is a very short distance, I know I can make it in ten minutes' walk.

Q In ten minutes from here? A Yes.

Q Now, you installed toilets in that factory? A Yes.

Q Will you point that out on the scale where they were? A Right here (indicating).

Q You had male and female toilets? A Yes.

Q How many machines did you have in this plant, sewing machines? A Fifty-four machines installed.

Q Installed? A Yes; we had more but they were not installed.

Q Some were there but not installed? A Yes.

Q They had not been installed yet? A They were surplus machinery.

Q And how many girls worked these machines? A About—not always the same amount.

Q Well? A About twenty-five; sometimes thirty, sometimes twenty, sometimes twenty-two, not always the same amount.

Q Now, the factory hours for the girls and the operatives other than the foreman and the shipping clerk were what? A From 8 o'clock in the morning until 5:30 in the afternoon; now, the shipping clerk, myself and also the porter, we were not time workers; we worked as long as it was necessary.

Q The shipping clerk, yourself and the porter? A Yes.

Q What was the porter's name? A Mr. Fred Bauer,

Q And the shipping clerk was Mr. Gilpatrick? A Mr. Gilpatrick.

Q Where was Mr. Harris' headquarters? A In New York, 1182 Broadway.

Q Yes, he was not out here all the time? A No, sir.

Q How often did he come to the factory? A Sometimes three times a week; sometimes twice a week, sometimes four times a week.

Q Did you have men on the road? A Oh, yes, sure; we had several salesmen on the road.

Q And were sales conducted from New York; how did you get the orders out there to the factory? A Why, men on the road, usually they sent around their orders to the New York office, but I used to get a schedule or

copy of every order, consisting of about the entire system; I put it in practice and when to have it ready for delivery, and the same system applied to the shipping department, and that was the installation of the system.

Q What position did Mr. Harris hold in this company? A I don't know.

Q When was work actually commenced after you had installed your plant in this loft? A On February 4, 1922, I started the power, the first day.

Q Did you have electric lights in there? A No, sir, not on February 4th, the electric lights were not completed; electric lights were completed a few days after; but as a matter of fact, the first few days I was compelled to work shorter hours than the full capacity, because it used to get a little dark.

Q The 9th of May, I think was Tuesday? A It was Tuesday, because we used to have the payroll on Tuesday.

Q That was pay day? A Yes.

Q And was Mr. Harris accustomed to bring out the payroll? A Every Tuesday.

Q And on this occasion, Tuesday, the 9th of May, as usual he brought out the payroll? A Yes.

Q And you said that the fact that the men were paid off after the close of factory hours delayed them a little after five o'clock, is that right? A Yes, a few minutes, but if they are short somewhere I always tried to explain to everybody it was satisfactory.

Q And finally all the girls had left and you and Mr. Gilpatrick and Mr. Harris were there alone? A Yes.

Q What time do you place it that you, Mr. Gilpatrick and Mr. Harris were there alone to start with? A Why, between the hour of 5:45 until about 7:15 or 7:10 or something like that.

Q Then you were there from 5:45 to 7:15; that would, be about an hour and a half? A That would be about an hour and a half.

Q Now, the door up the iron stairway on 13th avenue leads to what enclosure? A This is a platform on the outside (indicating).

Q When you get inside? A This is the platform on the outside (indicating).

Q Yes. A And this platform leads to the door—that one door and then another door to make it able to go into the loft, and then there is another door in here to go into the lobby of the office; then there is another door that leads into the entrance of the factory.

Q So there is kind of a little lobby into which the door opened? A Yes.

Q And turning to the left you go to the office, so called? A Yes.

Q And going to the right you go to the loft? A Yes.

Q Now, this loft, is that one room? A Yes.

Q No partitions to the wall; you did have some place where there were racks, and where goods were stored? A I called them bins and shelves.

Q Now, what was the height of those shelves? A I think about nine feet high or ten feet high; I never had occasion to know exactly the height.

Q Now, what are these bins so called? A These bins are for the purpose of having there the work in process; you see our system of work is section work, one girl does only a part of the garment and when she is through before the next one could reach it to go on with the next part of the garment I can usually provide them the working part.

Q For instance, if a girl had finished her part of the undergarment, that would be put in the bin? A Until I would be able to give it to the next girl.

Q Now, these bins were about how high from the floor? A What?

Q How high was the top of the bins? A I think about 24 inches or so.

Q And you say in front of the bins, that is, towards 13th avenue, there is a table? A Yes, that was a table.

Q Were people working there? A No, sir; this was one of my tables; usually I am behind the counter taking the work from here and giving the work to the girls; it would not be right I should stand in the middle of the floor; so I had a table in front of me and these are tables for that purpose.

Q Now, what were these samples that were bundled up; what were those samples that were bundled up? A Samples representing ready made merchandise, ladies underwear, representing about a thousand dozen underwear, all kinds of underwear.

Q One of each different type? A Yes.

Q And they were to be sent to the New York office? A Yes.

Q Were those samples sent out on the road? A Why, the salesmen they had them with them.

Q Yes. A I don't think the salesmen had any samples with the exception maybe they had some.

Q Well, did the salesmen carry samples? A Why, those salesmen were carrying different kinds of samples.

Q You and Mr. Gilpatrick were engaged in wrapping up these samples? A Yes.

Q Had you had instructions to wrap them up before Mr. Harris arrived or after? A No, he was supposed to examine them first before we did anything further.

Q You have not answered my question. Did you get your first instructions to do up those packages of samples before or after Mr. Harris arrived? A After.

Q After Mr. Harris arrived? A Yes.

Q And you and Mr. Gilpatrick stood at the table at the extreme left-hand side, rear end of the building, putting up those bundles of samples as long as it took you to do it, which I understand you say was about an hour? A I beg your pardon.

Q How long did that take? A Oh, about fifteen or twenty minutes.

Q Now, where was Mr. Harris durng that time? A All over the floor, looking at merchandise finished and unfinished.

Q Do you know how long it had been since he had been in the factory before? A He had what?

Q Before, another day? A That was Tuesday; I think he had been in the factory previous either Saturday or the day before, Monday; I do not remember exactly.

Q This room just behind the so called office, that is indicated on the scale here, the partitions of that room did not go up to the ceiling, did they? A No, sir.

Q About how high were these partitions between it and the loft? A Why, I could not tell distinctly, but to my estimation those shelvings were about between ten and twelve feet high.

Q Did you say shelvings or partitions? A These were shelvings.

Q Were the partitions separate from the shelvings? A No, the shelving is on the partition.

Q There was the partition first? A Yes, and then shelving was piled to the partition.

Q And both shelving and partition was in your judgment about nine feet high? A Nine.

Q How high was the ceiling? A The same height of the entire loft all around—there was a skylight; the skylight was pretty high.

Q And the ceiling sloped down? A Yes.

Q And the ceiling was of wood? A A ceiling made of wood.

Q And the same ceiling was over this so called stockroom as the rest of the building? A Yes.

Q With the skylight in the center? A Yes.

Q What was kept in this stockroom? A Well, this was our trimming department.

Q What did you keep there? A All our necessary trimmings, embroideries, laces, ribbons.

Q Then it was not a stockroom, a place where the stock was kept, but a place where the trimmings for he manufacture was kept? A Yes.

Q And they were kept in boxes, were they? A Yes.

Q I notice here and also on the photographs some gas stoves; my friend, Mr. D'Aloia, did not seem to want to call them stoves but plates; do you remember those? A Yes.

Q What were they used for? A They were installed for the convenience of the girls to make tea or coffee for lunch time.

Q And those gas stoves were used for that? A Yes.

Q And was there gas in the building? A That is there was some kind of connection but we had a plumber to make the connections to the stoves.

Q So that you could use the gas that way? A Yes.

Q And then, as you have already told us, you installed electric lights for lighting purposes? A Yes.

Q What time of the day would the girls make tea or coffee there? A Between 12 and a quarter to one; that was at lunch time.

Q Now, on the 9th of May you told us that you were doing up these samples, and after the samples were done up can you recall what you did next? A After the samples were done up we remained there only to settle the question whether we must select the next silk samples, and after he got through and he permitted us to take care of the orders, but not to neglect giving him the silk samples, as soon as we can, it was decided and we went home.

Q First Mr. Harris wanted you to make samples from the silk goods? A Yes.

Q You made two kinds, silk and— A Muslin.

Q The first samples were muslin? A Yes.

Q And he also wanted some silk? A Yes.

Q And you had so many orders and you said it would interfere with those if you made up the silk samples, and he said, "all right, go ahead and make up the silk samples as soon as you can?" A Yes, because the orders were to be delivered.

Q What time did you leave there? A That evening?

Q Yes. A A little after seven.

Q I understand that Mr. Gilpatrick, and you and Mr. Harris all left together? A Yes.

Q You spoke of a lock and you spoke of two doors; tell us, if you will, whether there was more than one door from the top of the iron steps from 13th avenue? A Yes, there were two doors.

Q Well, when you first went there before any changes were made, how many doors were there? A There were no doors there at all; there was only that exit, side door; these doors were installed, as I understand, according to the agreement with the owner of the building—

*Mr. D'Aloia.* I do not think we ought to call for any conclusions there.

Q Was this entrance way made at the time you went there? A It was made during the time we were there already.

Q And how many doors were installed there? A Two doors.

Q What kind of doors, what type? A One frame door with a glass window, and one wooden door covered it with tin.

Q The wooden door with a glass frame above was the outside door? A Was the outside door.

Q What kind of lock was on that door? A A patent lock.

Q What do you mean by that? A Why a lock that will turn the key—a certain key, well; I don't know; I call it a patent lock.

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Q You mean a skeleton key, a thin key? There is mine. A A key like you have; of course, a certain key for a certain lock.

Q But it had a thing like I call a skeleton key, like the one I show you? A Well, I call a skeleton key a plain key.

Q Well, that outer door, the wooden door with the glass window, in it, had what you call a patent lock? A Yes.

Q What sort of key locked and unlocked that door? A Why, to unlock the door you had to use the proper key, but to lock the door all that is necessary is to leave down the snapper and the door closes by itself.

Q Now, that was the outer door; was there any lock on that door? A Yes, there was another lock on the door.

Q What kind of lock was that? A That was the lock I call had to be locked with a plain skeleton key.

Q A regular lock? A Yes, set in the door.

Q And you had to turn the key, it would not lock itself? A No.

Q So there were two locks to that door? A Yes.

Q Now, on the inner door, on one side which had tin and the other wood, what kind of lock was there? A Well, I think it was a Yale lock; also you could lock it without a key, but to open it you must have a key.

Q A padlock, would you call it? A Yes.

Q And that would snap itself, but to unlock it you would have to have a key? A Yes.

Q So there were three keys you had to have to get into those two doors? A Yes.

Q The snap lock, the lock like on the outside door and the padlock, which locked those up, had to be turned with a key to open it? A Yes.

Q How far apart were those two doors? A Oh, about nine, ten, twelve inches apart.

Q Now, when that inner door with a padlock was open during the day and you were all in there where was the padlock or the keys generally kept? A On the table in the office, because we had on the same bunch of keys, there also the keys that opened the elevator door, and the other door on the other side, and they were laying on the table for the purpose to use those, our porter and everybody else.

Q Did you send your stock down the elevator? A I beg your pardon.

Q What did you use the elevator for? A Freight elevator.

Q Up and down? A Up and down.

Q And when you wanted to open the elevator door there were keys on the same bunch for the elevator? A Yes.

Q So if you want to go out the door by the fire escape, so called, there was a bunch of keys? A Yes.

Q Now, you have stated on this night somebody went around and closed the windows, who was that? A That was Mr. Gilpatrick, in the shipping department.

Q This was on the 9th of May; had some of the windows been opened during the day? A Oh, yes, sure.

Q Now, by the way, is there an apartment house right next to the building on the side away from 13th avenue? A Yes, there is apartment houses in the location where this factory building is.

Q And where people live? A Yes.

Q And they look right into this loft from their windows? A They could if they wanted to.

Q How far are those windows in those apartments from the windows along here (indicating)? A I should judge the distance of, well, I should say about twenty-five feet apart or thirty.

Q And the windows were on a level? A Yes.

Q Now, did you see Mr. Gilpatrick— A Mr. Gilpatrick?

Q Did you see him go around and close all these windows? A Yes.

Q Was it customary to close the windows every night? A Oh, yes, but Mr. Bauer used to do it.

Q And Bauer was away? A Yes.

Q And you had a good deal of valuable stock there? A Yes.

Q Manufactured stock? A Ready made.

Q Have you any idea how much was there? A Well, according to my record—I used to have a stock record—there was finished and unfinished work, that is, including work in process; that is about 2,800 dozen stuff.

Q It may not be proper, but I will ask you what the names of some of these articles are? A Ladies nightgowns, chemise, camisoles, bloomers, drawers, childrens nightgowns, petticoats, pajamas, and so on and so forth.

Q And you had, as you call it, in process about 2,800 dozen? A About 2,800 dozen.

Q When Mr. Gilpatrick had closed up there was nothing more for you to do, so you all three left? A Yes.

Q The keys were on that table in the office? A When?

Q When you were ready to go? A Why, certainly; they should be there.

Q Well, were they there? A They were there.

Q Who picked them up? A Why, Mr. Harris must have taken them, because he had the keys and lock when we walked out.

Q He had the key and the lock when he walked out? A The key and the lock.

Q That is this padlock? A Yes.

Q That fastened on the staple on the inner door? A Yes.

Q As you went out ahead, Mr. Harris had the key, the bunch of keys, and he also had the padlock that snapped into this staple on this inner door? A Yes.

Q Well, you and Gilpatrick walked out on this floor or landing place on this stairway, did you? A Why, surely we walked out, with Mr. Harris.

Q And how big was that landing place there? A You mean the platform?

Q The platform? A Why, it was about a time and a half as big as this one.

Q Where you are sitting there? A Yes.

Q And what did Harris do after you and Gilpatrick got out on that platform? A He locked the—he snapped the lock.

Q Of this inner door? A Yes.

Q That padlock was snapped? A Yes.

Q You saw it? A Why, certainly.

Q He did? A That is the way it closed.

Q And you saw him do it? A Yes.

Q Does it make a click? A Not too much noise.

Q Well, does it make a click or is it perfectly silent? A Well, he closed the lock.

Q Well does it make a click or is it silent? A Very slightly.

Q And did it click that night? A I think so.

Q Then the outer door was closed? A Yes.

Q Did he snap the lock to that outer door? A All he has got to do is snap the door, the lock locks by itself.

Q Did he do anything to the other lock? A Well, he used the key.

Q And then after he had done that, as I understand you, he handed the keys back to you, am I right? A Yes.

Q And you kept those keys? A Yes.

Q Now, you, Mr. Gilpatrick and Mr. Harris then walked down those iron steps to the ground and turned around and came down 13th avenue towards the Court House, is that correct? A Yes.

Q And where was it you say Mr. Gilpatrick left you? A It was on Norfolk street, where the car tracks are.

Q And you came on down with Harris and you got down here below the Court House on the corner of Market street where Reid's have a store? A Yes.

Q And where you say some of Mr. Harris' stock was being sold? A Yes.

Q Was that stock made in this place or some other place? A Why, he used to buy there—

Q I didn't ask you that. I asked you whether it was stock from this place? A Well, it was a part of stock from this place.

Q His was not the only stock being sold at Reid's? A No, they have many departments there.

Q And you left Mr. Harris at the entrance to Reid's about what time? A About 20 minutes of eight or maybe five minutes before or five minutes later.

Q Now, before you left that factory did you see any signs or any preparations or any indications of fire? A Not to my knowledge.

Q Well, did you see it? A No, sir.

Q Was there anything done in your presence— A No, sir.

Q —by anybody there that prepared for a fire? A No, sir.

Q When did you first hear that a fire had taken place there? A The next morning about fifteen or twenty minutes of eight when I arrived to the place of business, as usual, I found the firemen at the front of the door.

Q And would they let you in? A No, sir.

Q You spoke of the fact that you did not get your electric light installed as early as you hoped. During February and January, when the days were short, how did you light that place, or how did the workmen light that place after it got dark, before work ceased?

*Mr. D'Aloia.* I do not like to object, but it is not cross examination. I permitted Mr. McCarter all the latitude without objection, but I do not think you ought to go over this part again.

*Jacob Umansky, cross.*

*The Court.* Objection sustained.

Q How did you work the plant without lights?

*Mr. D'Aloia.* I object to that, because he said they closed up a short time before the regular hour, because of the lack of light during a certain period.

*The Court.* We have been over that.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Mr. Umansky, did you ever have any chemicals in that place on the 9th of May? A What chemicals do you refer to?

*The Court.* Any chemicals.

Q Any chemicals, any articles of any kind for making dyes or what not? A Yes.

Q What? A I had dyes of certain shades and in order to be able to make up the dyes I used to use benzine for the purpose.

Q What did you have to dye in your manufacturing? A Why, laces.

Q The laces that go on these undergarments? A Yes.

Q And you, yourself, or your operatives, under your direction, mixed the dyes with which to do the dyeing? A No, that was myself; there is a little knowledge attached to it in order to be able to do it.

Q What besides the dyes did you use, benzine, you say? A Benzine.

Q What is that benzine used for? A That is benzine what makes the dye.

*Jacob Umansky, cross.*

Q Well, did you have anything else besides benzine there? A Yes, we used to have turpentine.

Q What was that for? A Turpentine used to be used in the shipping department for making marking ink, turpentine and I don't know what they call it—

Q Lamp black? A Yes, lamp black; that is what they call it; I do not know exactly what it is, but I know they used to use turpentine for marking the packages and cases.

Q And if the packages were full they used turpentine and lamp black and maybe something else to make this marking ink, is that right? A Yes.

Q Did they have any kerosene?

*Mr. D'Aloia.* I do not want to object to that, but it is not proper cross examination. He can call this man as his own witness.

*The Court.* I will rule that that is not 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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Did anybody ever smoke around that place?

*Mr. D'Aloia.* I object.

*The Court.* Objection sustained.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*Jacob Umansky, re-direct.*

Q During the time that you and Mr. Gilpatrick were engaged in bundling up the samples were you smoking? A I think we did; I wouldn't say exactly this minute or before or later. According to the rules we should not—

Q Never mind about the rules. Answer the question. A I think we did.

Q Yes. A Yes.

Adjourned until tomorrow, Thursday, November 16, 1922, at 10:30 o'clock A. M.

## SECOND DAY.

Thursday, November 16, 1922.
10:30 A.M.

Trial continued.

Appearances as before stated.

JACOB UMANSKY, resumes the stand.

*Re-direct examination* by Mr. D'Aloia.

Q You told Mr. McCarter, on cross examination, that Mr. Harris came there two or three times a week and that his headquarters were in New York, is that right? A Yes, sir.

Q Will you please tell the jury when was the last time, before this night of May 9th, that Mr. Harris locked that door? A That particular night?

Q No, that particular door; when was it last before the night of May 9, 1922, that Mr. Harris, your boss, whose headquarters were in New York and who only came out here two or three times a week, locked that door leading down the stairway to Thirteenth avenue? A He locked the door, the identical night, on May 9th.

Q Yes, but the last time before that, when was it? A Oh, I can't remember exactly when.

Q Of course not—

*Mr. McCarter.* Now, I object, "of course not."

*The Court.* That will be stricken out.

*Mr. McCarter.* I think, your Honor, that is very improper.

*The Court.* I have stricken it out.

*Mr. McCarter.* I think counsel ought to be cautioned about it. He has done it two or three times.

*Mr. D'Aloia.* I will withdraw that remark, Mr. McCarter.

Q Now, if I understand you correctly, you don't remember, do you? A I don't remember distinctly when before.

FRED A. GILPATRICK, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Mr. Gilpatrick, what was your business on the night of May 9, 1922? A Shipping clerk and stock clerk for A. E. Harris & Company.

Q Employed where? A 204 Morris avenue.

Q For whom? A A. E. Harris & Company.

Q Do you know Mr. Harris? A I do.

Q Do you know him? A I know him, yes.

Q And on the night of May 9th were you employed by the Harris concern? A Yes, sir.

Q Now, do you remember this afternoon of May 9th, about 5:30 P. M., do you remember that? A I do.

Q At what time were the hands paid off? A They were paid off between 5:15 and 5:40.

Q Now, at 5:40 were you in the loft? A I was.

Q Who else was there? A Mr. Harris and Mr. Umansky.

Q Now, will you tell us, from 5:40 on, on the evening of May 9, 1922, when you and Mr. Umansky and Mr. Harris were left in the loft, and the hands had gone home, what was done by you, by Mr. Harris and Mr. Umansky? A From 5:40 on?

Q 5:40 on, when the hands were paid off and gone? A Well, my business being the shipping and stock clerk there I had certain orders and books and records to look after and instructions to consider from Mr. Harris and Mr. Umansky as to filling orders and handling the different manufactured articles there.

Q Now, wait a minute. When was it that afternoon when you first saw Mr. Harris? A He came in there, I should say at 5:15.

Q Now, what did you do from 5:15 on? A I was preparing some samples to give to Mr. Harris when he came there, or to show him.

Q Who gave the orders for the samples? A Well, originally Mr. Harris gave the order.

Q What time was that? A Why, it was about three or four weeks before that.

Q That night, what time was it when he said he wanted some samples made up? A Well, he knew we were preparing those things, they had been prepared before that.

Q Did he say anything about it that night? A He said he would like to take them away with him.

Q What time was it when he said that? A Shortly after his arrival, say 5:25.

Q And did you and Umansky go and pack up those samples? A I did not pack them up right away.

Q You waited a little while and then you did it? A Eventually.

Q What time was it when you began to do it? A 6:30.

Q Where was Mr. Harris when you and Mr. Umansky packed the samples, what part of the loft? A Well, he

was in the shipping room; he was also in the operating room.

Q Now, do you know anything about that plan that is on the board there? A I do; yes, sir.

Q Well, this is a plan of the loft and here is the stairway coming up from Thirteenth avenue. This is the door, this is the stockroom, the main room and your shipping department is where? A Right there (indicating).

Q Where? A Right through here; it takes in all this whole space right here (indicating).

Q When you stand here at those tables and you are facing south, how high are those shelves? A Nine or ten feet.

Q When you are at those tables and a man is in the office, he can't see you at all, can he?

*Mr. McCarter.* Please don't lead him.

*The Court.* Don't lead the witness.

A You cannot see across there, the partitions are in the way.

Q When you are at those tables could you see anybody in the stockroom? A No.

Q Is this the place at these tables on the southerly side of the loft where you and Umansky prepared the samples? A Right on the end there at that table (indicating).

Q Right at this end? A Yes.

*The Court.* Do not you think you better refer to some part of it?

*Mr. D'Aloia.* Indicating the easterly end of the table along the southerly side of the loft.

Q You call that the shipping department, along that table, don't you, on the southerly side of the loft? A Shipping department and receiving department.

Q But there is no partition there that separates it from the rest of the loft, is there; there wasn't that night? A Certainly.

Q You mean the shelves were there? A All this here acts as partition. Those are shelves on that side and these are bins on that side (indicating).

*The Court.* Is any mark on there? He is referring to something and as far as the record is concerned, it means nothing.

*Mr. D'Aloia.* What is the letter on there?

*The Witness.* D on the shelves.

Q You say the shelves marked D with lead pencil, would act as a sort of partition, is that it? A It must be a partition, because the shelves there are nine or ten feet high on both sides, the same height.

Q Now, when you were at that table where you were packing up the samples with Mr. Umansky that night, could you see into the bins? A I was doing the samples up here (indicating). I could not see into the bins along here (indicating).

Q How long did you and Umansky take to do up those samples? A I should say it took about fifteen minutes.

Q When did you begin? A 6:30.

Q And what time were you finished? A That would be 6:45.

Q Pretty near 7 o'clock?

*Mr. McCarter.* 6:45.

A I can't tell you.

Q Well, did it take you more than fifteen minutes or less than fifteen minutes? A It took me what I said.

Q About fifteen minutes? A That was what I said before, wasn't it?

Q Now, after you got through with Umansky, where did you go from the table that you located in the shipping department? A You mean after 6:45?

Q After you got through preparing the samples that Mr. Harris was waiting for, where did you go? A I was in the shipping room, and Mr. Harris and Mr. Umansky

were there, so we started to discuss what we should do with those bundles.

Q And what was the ultimate result of the discussion? A We decided to leave them there.

Q How many dozen samples did you and Umansky pack up for the purpose of permitting Mr. Harris to take them away? A I don't know.

Q Was it a thousand dozen? A Wrapped up in those bundles?

Q Yes. A There wasn't no thousand dozen in those two bundles.

Q Were you in court yesterday when Mr. Umansky testified? A Yes.

Q How many dozen were there? A There were about—I can't say how many dozen, but there were probably—

*Mr. McCarter.* Don't guess; if you don't know, say so.

*The Witness.* I don't know how many dozen; that is what I said before.

Q Now, after you go through, where did you go with Mr. Harris and Mr. Umansky? A We started to go home, or to go out, I won't say home.

Q How did you get out of the place? A We went out to the—we started to come right out through here (indicating on map).

Q Who did? A We did.

Q Where was Mr. Harris? A He was right there with me, so was Mr. Umansky and we came along about here (indicating) and we looked around and the windows were open, so Mr. Harris asked me if I would close those windows, and so I said yes.

Q And that was just immediately before you went away? A That was just before we went out.

Q After you had packed the samples? A After we had packed the samples.

Q Well, did you close all the windows? A I went around and closed every window that was open, that I could see.

Q Did Umansky go with you when you went around to the windows? A No.

Q Where did he remain? A This side, right over here (indicating).

Q With whom? A Mr. Harris and Mr. Umansky.

*Mr. McCarter.* Might he designate, your Honor, where that is?

*The Court.* Yes.

*The Witness.* Right in the front here.

*Mr. D'Aloia.* He points to the front which indicates a door leading into a little lobby.

*The Witness.* There is a door goes out in that lobby and that is where they waited.

Q At the door which led into the lobby from the loft? A Right there (indicating).

*The Court.* Are you pointing now to the loft itself or the hall?

*The Witness.* The loft; this is all loft in here, and they stood right here (indicating); I could see them practically all the time I was there going around.

*Mr. D'Aloia.* Has that point been sufficiently described on the record?

*Mr. McCarter.* You say it is in the lobby and he says it is in the loft.

*Mr. D'Aloia.* No, I said it is at the door which leads into the lobby.

Q Will you put your pointer there? A Yes.

Q Now, that is right at the door which leads to the lobby? A Yes.

*The Court.* And he is pointing to a point in the loft.

Q Yes, in the loft at the door which leads into the lobby? A Yes.

Q How long did it take you to fix those windows and close them? A It took me probably five minutes.

Q What time was it when you got back to the point where you left Umansky and Harris? A Well, it was about seven o'clock.

Q What happened; how did you walk out? A After going around and closing the windows I came right out through here (indicating) and we made a few remarks to each other.

*Mr. D'Aloia.* Indicating the door which leads out of the loft into the lobby on the northerly side of the building.

*The Witness.* I went right out to the lobby and I went right out here on to this fire escape.

Q Who went first? A I did.

Q Who came after you? A Mr. Umansky.

Q Who was last? A And then Mr. Harris.

Q Now, what did Mr. Harris do about the doors or the locks? A He locked the doors.

Q Well, how, what did he do, if you know? A Why, he closed the inside door and there is a padlock goes on there.

Q Who put the padlock on? A Well, Mr. Harris put that padlock on.

Q Who turned the key? A He did.

Q Did you or Mr. Umansky have anything to do with locking those doors that night? A No.

Q When was it that Mr. Harris came to the loft before that night? A I don't know.

Q How long had you been employed by him? A Since the first part of March.

Q First part of March, 1922? A 1922.

Q And during the month of March and the month of April and up until the ninth of May do you recall Mr. Harris ever locking the doors before that night, yes or no? A No.

*Cross examination* by Mr. McCarter.

Q Mr. Gilpatrick, you were the shipping clerk? A Yes.

Q And a shipping clerk—what were your duties ordinarily? A To look after everything in the shipping and receiving department of that factory.

Q And orders would come in and you would attend to their being filled? A I would.

Q Stuff would come in to manufacture; did you have anything to do with that? A I received it.

Q You spoke of having had some direction before the night of the ninth of May when the fire occurred, about collecting several samples. How long before that did you first hear of a desire on the part of Mr. Harris to have some samples? A Something like four weeks.

Q And had any work been done by anyone, to your knowledge, yourself or anyone else, previous to the evening of May 9th, in choosing those samples? A Well, I had been some time picking those samples out from the stock.

Q Won't you describe what you were doing about those samples, what choice did you make, what samples did you select? A Well, there were certain samples that were requested, representing different quantities of goods in the stock.

Q And you had been for some time engaged in selecting those samples, had you? A I had.

Q Now, when was the first subject or mention that was made to you that night about those samples by anyone? A Mr. Harris was anxious to get those samples prepared so that he could take them over to New York City.

Q Were they already selected or only partially selected?? A They were not all selected.

Q So that more selection was done that night? A No, not that night.

Q When? A Well, afterwards, after the fire.

Q But I mean, were any more selections done that night? A No. What I mean is after Mr. Harris came there.

Q That is what I mean and your answer is no or yes? A No.

*The Court.* It is not clear to me. You mean that after Mr. Harris came there that night, you stopped making selections?

*The Witness.* That is what I have reference to.

Q What did you do with the samples after Mr. Harris arrived that night? A Why, he spoke about them and I showed them to him.

Q Were they packed up? A He said he wanted them packed up.

Q And were they packed up? A They were.

Q By whom? A By myself.

Q What was Umansky doing in connection with the samples? A He stood there by me.

Q You think it took you about fifteen minutes, after the subject of the samples came up that night, to wrap them up? A It took me, I should say, fully fifteen minutes.

Q And during the time that you were wrapping them up, Umansky was near you and do you know what Mr. Harris was doing, or didn't you observe? A I didn't observe particularly.

Q After the samples were done up, did it make a big or little bundle? A Fairly good size.

Q How many? A Two.

Q And then you started to leave, you say; there was nothing more to do. A You mean after the samples were done up, after I had the bundles done up, do you mean?

Q Yes, is that right? A We didn't leave right away, that minute.

Q I know; I am coming to the windows in a minute. Was there anything more to do before you closed the windows or started to leave and saw the windows open and Mr. Harris instructed you to close them? A I didn't do anything else.

Q So after the samples were packed up and found to be too big, you concluded to leave. Now, did you have any place to go, was anything said about where you were going? A Mr. Harris had a department in Reid's store on Market street and he wanted to go down there to attend to some business there and he asked Mr. Umansky to go along with him, and he asked me to go along.

Q Well, what time did you ordinarily leave the place, the factory? A I left it—

Q No, what time did you ordinarily leave the factory? A When my business was what I considered through for the day.

Q And that would ordinarily be what time, Mr. Gilpatrick? A It would be anywheres from 6:30 to seven o'clock.

Q Now, after you were though with the packages and Mr. Harris said he would go down to Reid's store and suggested that you and Umansky go along, you said something or other about the windows. Who called your attention to the fact that the windows were open? A Mr. Harris.

Q And did he ask you to close them? A He did.

Q Now, do you remember—of course I realize it is difficult to get the exact time or the exact spot after so long—but I will ask you, if you will, to tax your memory and tell us, if you can, about where you were when you discovered, or Mr. Harris discovered that some of the windows were open and suggested that you close them, about where were you standing? A We were walking right along this aisle way.

*Fred A. Gilpatrick, cross.*

Q The aisle way between the so-called stock room? A Let me take the pointer and I will show you where we were.

Q Yes. A We were right along here, about here some place (indicating).

Q Now, the aisle near the point marked XX? A Yes, sir.

Q And from that position did you stop walking there and was it there that the suggestion was made that you should close the windows? A That is where the suggestion was made.

Q And was Umansky with you and Mr. Harris with you at that time? A They were both with me.

Q Now, what route did you take, if you can remember, to close the windows; how did you go? A I went around this little—let me take the pointer—

Q Yes. A I went around this wall here (indicating).

Q That is the wall on the Thirteenth avenue side? A That is the Thirteenth avenue side, and that is the Morris avenue side (indicating) and then we came through into this alley way here.

Q Yes, on the south side of the building? A Yes, on the other side and then there is a window in here.

Q In where? A In this here place (indicating).

Q In the entrance to the toilet. A There is a toilet and a dressing room.

Q So, you went, then, completely around the building? A I circled all the way around.

Q But did you go into what we call the stock room? A I did not go in here at all.

Q You did not go in there at all? A No.

Q And were many of the windows open? A Quite a few of them.

Q And did you close them? A I closed all of them.

Q Are there windows in the adjoining building to the south, in this building, any flats or tenements looking into this loft? A Quite a few windows there.

Q And were those flats occupied at that time? A They were all occupied.

Q Were there any shades on the windows in your building? A In our building we had some shades.

Q Were the shades on the south side of the building up or down the night we have just been talking about? A They were up.

Q So that people from the tenements, right to the south of the building, could look right in, could they?

*Mr. D'Aloia.* I object to that, that calls for a conclusion.

*The Court.* I will allow it.

*The Witness.* Yes.

Q Now, when you passed from the tables where the samples were being packed down to the point marked "XX," could you see the bins, was there anything to prevent your seeing the bins? A I could see the bins.

Q And you know where those two gas stoves are, and these are the bins right near there, are they (indicating)? A Yes.

Q And those bins are how high, roughly speaking, the top of the bins? A Oh, you mean from the floor?

Q Yes. A Something like three feet.

Q And with an open side, open front, rather? A They are open on top.

Q They were used for what purpose, to throw the merchandise in, after it is segregated on the table in front? A I don't know what they are used for.

Q Now, you have stated that after you closed the windows you left. Where did you rejoin Mr. Umansky and Mr. Harris? A Right at this doorway leading to the vestibule.

Q Did you notice, as you went around the building, whether they were there all the time, or didn't you know about that? A As far as I know they were right there.

Q The keys, I believe, were kept on some table near the door; did you know about that? A Well, there was a table—if you will let me take the pointer I will just show you—(indicating) right in here in the office, that is where Mr. Umansky did his clerical work.

Q And the keys were on that table or desk? A According to his statement. I don't know where the keys were.

Q Never mind about his statement. You don't know where the keys were? A I don't know where the keys were.

Q At any rate after you closed the windows, the three of you started to go out, did you? A Yes.

Q And who had the keys? A Mr. Harris had the keys.

Q You all went out together. Are you able to recall who left first? A No, we didn't go out together, because the doorway would not be large enough. I went out first and Mr. Umansky and Mr. Harris; we were right in a group.

Q And how many doors are there, two? A There is two doors on the outside.

Q Leading right out to this iron landing? A The fire escape.

Q Now, where did you stand when the doors were locked? A I started to go down the fire escape.

Q Well, did you go down the fire escape or did you stop until the doors were locked; what did you do? Just tell us. A I went a little ways down the fire escape.

Q Then, what did you do? A And I stood there talking to them as I was going along.

Q How many steps did you take, if you can recall—I don't know whether you can—down the fire escape? A Why, I was probably down eight or ten steps.

Q And what did you see Mr. Harris do? A Well, I could see them every minute and I was talking to them.

*Fred A. Gilpatrick, cross.*

Q What did you see Mr. Harris do? A He was locking the doors.

Q Where was Umansky? A He stood on the corner of this platform.

Q He did not go down the steps at all? A No, sir.

Q Now, how many locks were there to those two doors, if you can recall? A Well, there is a padlock on the inside door, and there is a Yale lock and a common door lock on the outside door.

Q After the doors were locked then, where did you go, you and the others? A They came right down the stairs behind me and we walked down Thirteenth avenue.

Q Toward the Court House, toward this building? A This way.

Q How far did you continue with the party? A I left them at the Bergen street car line, on the corner of Thirteenth avenue and I think it is Norfolk street, isn't it, where that car goes over?

*The Court.* Which was it, Norfolk street or the Bergen street line.

*The Witness.* The Clifton car, I should say, the Clifton line.

*Mr. McCarter.* The Clifton avenue line?

*The Witness.* Yes.

Q Whatever that is, did you get on a street car? A I got on a street car as soon as one came along. I was there probably five minutes waiting for one.

Q Did I understand you to say that Mr. Harris had suggested that you go to Reid's? A He said, "Come on down with us."

Q Did you say anything when you did not go to Reid's or when you left them at the Clifton avenue line? A I said, "I am tired and want to get home and get something to eat. I don't feel like going down" or words to that effect.

Q Was it your duty to close the window every night? A No, sir.

Q Who did that? A Mr. Bauer.

Q He was what, the porter, or what was his position? A He was assistant to me.

Q Where was Bauer that night? A Why, he had been relieved a little earlier to do an errand for Mr. Harris.

Q What time? A It must have been around five o'clock.

Q Do you know where he was sent? A He was sent down to Reid's.

Q Was any message—did any message arrive in response to which he was sent down to Reid's? A They had telephoned up there.

Q Who had telephoned up? A Miss Harris.

Q At Reid's? A At Reid's.

Q What time? A I dont' know what time she telephoned.

Q At any rate in response to a telephone, Bauer was sent about five o'clock, down to Reid's, is that right? A Yes, sir.

Q Had Bauer been there most of the day prior to that time that he went to Reid's? A No.

Q Where had he been? A Been down to Reid's.

Q Most of the day? A Most of the day.

Q Did you see Mr. Harris give Umansky the keys? A No.

Q Now, when you were in that building and down to that time that you left, as you describe, did you see any preparations for a fire? A No.

Q Did you, beside closing the windows, lock the door on the elevators or the door of the rear exit, or were they already locked? A I don't remember whether I locked doors that night or not.

Q Did anybody smoke while you three men were in there? A During the whole period?

Q Yes. A I don't remember.

Q Do you smoke personally? A I do.

Q I didn't ask you if you did smoke? A Yes.

Q Do you say you did not smoke that night? A I said I don't remember whether I smoked that night or not.

Q After working hours you are accustomed to smoke there, aren't you? A I would smoke sometimes.

Q And you can't say whether you smoked that night or not? A I cannot.

Q Were there any windows in the so-called stock-room, that is the place where the ribbons and trimmings are kept?

*The Court.* Referred to on the plan as the stock-room.

*The Witness.* In this room here (indicating).

*The Court.* Yes.

*The Witness.* There are windows there.

Q Did you close them? A No.

Q Were they closed? A Yes.

Q Beg pardon? A They are always closed.

Q I didn't ask you whether they were always closed; I asked you whether they were closed that night.

*The Court.* By this witness, do you mean?

*Mr. McCarter.* If he saw whether they were closed or not.

*Mr. D'Aloia.* If I see that plan correctly, there are shelves in front of them.

*The Court.* But the witness testified, in response to Mr. McCarter's question, that there were windows there.

*Mr. D'Aloia.* Nobody could reach those windows. They were always closed.

Q Is it a fact that the windows are boarded over with shelves? A There is a row of shelves right along here (indicating).

*Fred A. Gilpatrick, re-direct.*

Q So that the windows in the so-called stockroom are not accessible and are always kept closed, is that right? A That's the idea.

*Re-direct examination* by Mr. D'Aloia.

Q Now, Mr. Gilpatrick, did you close the windows before you made up those bundles of samples, or did you make up the bundles of samples before you closed the windows? A The windows were closed after the bundles were wrapped.

Q That is what you say now; that is your best recollection. A That is what I say right now.

*Mr. D'Aloia.* Now, if the Court please, I claim surprise at this bit of testimony and I would ask leave under the D'Adame case, to examine the witness as to a statement he made on the 11th of May, 1922.

Q You made a statement two days after this occurrence, didn't you, Mr. Gilpatrick? A To whom?

Q To the persons in authority down in the police department, downstairs in the prosecutor's office? A I did.

Q And you signed that statement, didn't you; look at this signature; is that your signature? A Yes.

Q And is that the date, May eleventh, 1922, when you made the statement? A That is the date.

Q Now, your recollection, two days after this occurrence, was much better than it is now, wasn't it? A Why, you would think it would be.

Q Didn't you say in the statement which you made on the eleventh of May, as follows: "On Tuesday, May 9th, 1922—

*Mr. McCarter.* One minute. Do you propose to contradict him only on this one thing?

*Mr. D'Aloia.* Yes, but I will have to lead up to it.

*Mr. McCarter.* I object to reading the whole statement.

*The Court.* I will allow the witness' testimony to be neutralized just insofar as it is inconsistent, but not the general statement.

Q Didn't you say, "On Tuesday night, May 9, 1922, about 5 P. M., I saw Mr. Harris for the first time that day in the shipping department"?

*Mr. McCarter.* I object to the question as not within your Honor's ruling.

*Mr. D'Aloia.* That leads up to the point I am trying to make.

*The Court.* I don't want to cut you off, but we can only confine this examination just to neutralize the testimony only insofar as it is inconsistent.

*Mr. D'Aloia.* I am trying to get down to this point about the windows and about the bundles.

Q You then said, "I walked out to the front of the factory and saw Mr. Harris and Mr. Umansky sitting in the office talking to each other."

*Mr. McCarter.* I object to the question.

Q Did you say that?

*Mr. McCarter.* I have objected.

*Mr. D'Aloia.* Now, if the Court please, I have to lead up to this, I can't pick out these words, they don't make any sense.

*The Court.* I will allow it.

*Mr. McCarter.* I take an exception.

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

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Did you make this statement: "I walked out to the front of the factory and saw Mr. Harris and Mr. Umansky sitting in the office talking to each other"? A I don't remember.

Q Did you make this statement: "I went back to the shipping department to wait until they got through." A I don't remember.

Q And did you say this, "After a while I went back to the office and told them I was going home"?

*Mr. McCarter.* I object. I don't think counsel has a right to contradict his own witness by all this matter that is not inconsistent.

*The Court.* He has admitted surprise.

Q Did you say that or not? A Will you please repeat that?

Q "After a while I went back to the office and told them I was going home." A I don't remember that.

Q Did you say this, "Mr. Harris came out and asked me to close all the windows, which I did, and returned to where Mr. Harris was." Did you say that? A I don't remember saying that.

Q Did you say this: "Mr. Harris then asked me to do up some samples, so I took the samples to the shipping department and spent some time in making up two packages of samples." Did you say that? A I said that.

Q Now, how about this window proposition? Did you say that "Mr. Harris came out and asked me to close all the windows, which I did, and returned to where Mr. Harris was"?

*Mr. McCarter.* He has already answered that.

*Mr. D'Aloia.* No, he has not.

Q Did you say that?

*Mr. McCarter.* I say he has answered that.

*The Court.* I overrule the objection.

*Mr. McCarter.* I object to this ruling of the Court.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A I said Mr. Harris asked me to close the windows; I didn't say where he came from.

Q Now, listen to my question again. I am reading from a statement you are alleged to have made: "Mr. Harris came out and asked me to close all the windows, which I did, and returned to where Mr. Harris was." "Mr. Harris then asked me to do up some samples, so I took the samples to the shipping department and spent some time in making up two bundles of samples." Did you make that statement? A If it is on that paper—

Q If it is on that paper, then what? A I don't remember the statement on that paper that you have made just now.

Q Now, do you remember or not you closed the windows before you made up the bundles of samples? A The windows were closed afterwards.

Q Do you remember making the statement on the 11th? A I remember making the statement.

Q Now, if in this statement you made on the 11th, you said that you closed the windows first and you returned to where Mr. Harris was and Mr. Harris told you to make up some samples which you did, which is correct, your testimony today or the statement which you made on the 11th of May? A You will have to read the statement of the 11th of May.

Q Now, I am reading it to you.

*Fred A. Gilpatrick, re-cross.*

*Mr. McCarter.* Let him look at it.

*Mr. D'Aloia.* I will read it.

*Mr. McCarter.* I object to your reading it.

Q "Mr. Harris come out and asked me to close all the windows, which I did, and returned to where Mr. Harris was and Mr. Harris then asked me to do up some samples; so I took the samples up to the shipping department and spent some time in making up two bundles of samples"—is that right? A That is right.

Q That is the truth, isn't it? A That is the truth.

Q So, you closed the windows first and you went to where Mr. Harris was and then you were given orders to make up the two bundles of samples which you and Umansky did, is that right? A That's true.

*Re-cross examination* by Mr. McCarter.

Q Where was this statement made? A That was made down at the Police Headquarters.

Q Were you detained there?

*Mr. D'Aloia.* I object to that.

*The Court.* I will allow it. The paper is not in evidence.

*Mr. McCarter.* I did not suppose it was, but I think I have a right to know under what circumstances the paper was made.

*The Court.* I will allow the question whether or not he was detained.

Q Were you detained at the time? A I was not detained.

Q How did you happen to be at Police Headquarters, or wherever it was that you made the statement? A Well, they asked me to make that statement.

Q Who did? A Detective Rothenberg.

Q What? A Detective Rothenberg.

Q Where was it made? A It was made in the City Hall, in a building in back of the City Hall, on the second floor.

Q Who wrote it? A A stenographer there.

Q Was it taken down stenographically? A As I remember, he had a typewriter right there. Yes, it was typewritten and he wrote it right off.

Q Beg pardon? A He did.

Q Which do you now say is correct as to the order of events, first, which was done, fixing the samples or the closing of the windows? I want to know what is the truth about it and that's all we want. A When you asked me the questions before, the time was not considered.

Q I did not ask you for any explanations. I want to know now, after your recollection has been revived by this statement here, which event preceded the other, the closing of the windows or the fixing of the samples? A I can't remember.

Q You can't remember? A Not just now.

Q What is your best recollection? A According to the statement—

Q Never mind according to the statement. I want your best recollection at this minute. A My best recollection at this minute is that the samples were prepared before the windows were closed.

Q Who took you down to Police Headquarters? A I think I went down alone.

Q How did you happen to go down there? A I was asked to go down.

Q Who asked you to go down, I am trying to find out how you got down there? A The day after the fire we were all down there.

Q Well, you were not accustomed to go to Police Headquarters, were you? A No.

Q Well, how did you get there, can't you have some intelligence about the thing? A I am trying to recall

to my memory how I happened to be there that day. I would like to ask the detective over there—

Q No, if you don't know, say so, can't you remember? A No.

Q Had you ever been there before? A I had been there before.

Q When? A May 10th, the day after the fire.

Q Was that the day you made the statement? A What is the date on the statement?

Q Oh, I can't show you that. I am asking you if that is the date you made the statement? A I can't remember whether that was the date or not.

Q Were you there two days? A I was not there two days.

Q I don't mean two full days; were you there on two occasions? A Two different times I was there.

Q On the same day? A That I don't recall.

Q And on one of the two occasions that you were there you made some statement? A Yes.

Q Is that right? A That is what I said.

Q And who asked you to go there first? A I don't remember who asked me to go there first.

*Re-direct examination* by Mr. D'Aloia.

Q I show you this statement that you signed. Look at it, and after you have refreshed your memory, tell me whether it is refreshed or not. Read it, just your statement. A Well, this is all my statement—

Q That is your statement. Begin it from the beginning and finish it. A I thought all this other stuff was mine.

Q No, one page there is your statement. A I see; you want me to read it to myself, is that the idea?

Q Yes. A (Reads statement.)

Q Now, is your memory refreshed? A I think it is a little bit better now than it was before.

Q Now, did you close the windows before you made up the bundles of samples or did you make up the bundles of samples before you closed the windows? A According to—

Q Never mind according to anything. You say you refreshed your memory by reading the statement, didn't you? A Yes.

Q Now, we want your memory; we don't want it according to anything else. From memory did you close the windows before you made up the bundles of samples, or did you make up the bundles of samples before you closed the windows? A I don't remember.

Q Was your memory refreshed?

*Mr. McCarter.* One moment. He has read over the statement and he was asked to refresh his memory.

Q Is that your best answer? A That is my best answer.

Q Was your memory refreshed by reading the statement?

*Mr. McCarter.* I object, your Honor. He has already said he has read the statement.

*The Court.* I will allow him to go into it.

Q Was your memory refreshed by reading the statement? A Yes.

Q Was it refreshed as to the sequence of those two acts on your part, the closing of the windows and the making up of the bundles of samples, was it refreshed as to those two things? A Somewhat.

Q Now, did you make up the bundles of samples after you closed the windows, or did you close the windows after you made up the bundles of samples? A That I don't remember.

Q But you did tell the man who took your statement on the 11th of May that you first closed the windows and

you went to where Mr. Harris was and then you made up the bundle of samples, didn't you?

*Mr. McCarter.* That already appears twice. Must it appear three times?

*The Court.* Objection overruled.

*The Witness.* Will you let me explain something?

Q I don't want you to explain anything. Did you or did you not tell the man who took the statement on May 11, 1922, that you first closed the windows by Mr. Harris' orders and then you made up the bundle of samples by Mr. Harris' orders? A Is that what it says in the statement?

Q Did you see it there? A Well, if you will let me take it and read it, I will answer it.

Q Again? A I can't remember what is in that statement without I have it right in front of me.

Q All right. Read it again. A (Reads statement.) It says in there—

*Mr. McCarter.* You are not to read that out loud.

*The Court.* Read that part that you are in doubt about; read it to yourself and then answer the Prosecutor's question.

*The Witness.* I will have to let my answer stay the way I made it, I can't remember.

Q Since you made the statement have you spoken to Mr. Harris or Mr. Ruback about this case? A I have.

CHARLES A. ROSEWATER, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Doctor, are you the owner of the building located on the southeast corner of Morris avenue and Thirteenth avenue? A Yes, sir.

Q Known as 204 Morris avenue? A Yes, sir.

Q How long have you been the owner of it? A It was built by my father in 1895 and has been in the family ever since.

Q In May, 1922, and the 9th of May, were you the owner of that building? A Yes.

No cross examination.

FRED BAUER, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Where were you employed on the 9th of May, 1922? A A. E. Harris & Company.

Q As what? A Porter.

Q Do you remember the afternoon of the 9th of May, 1922? A I do.

Q Where were you about five o'clock in the afternoon? A Up at the factory.

Q And where did you go, if anywhere at that hour? A At that hour, it was after five when I went down to Reid's.

Q How long after five? A Why, I should say about a quarter of six, between half-past five and a quarter of six.

Q Who sent you? A Mr. Harris.

Q Did he say anything about coming back to the factory? A That evening?

Q Yes. A No, sir.

*Fred Bauer, cross.*

Q What did he say? A He told me he had a 'phone call from his daughter down to Reid's and to go down there and help her straighten out the material.

Q What did he tell you about coming back, anything? A Nothing at all.

Q Did he say that you were to come back to the factory or you could go home? A I could go home.

Q He said that, did he? A Yes, sir.

Q And you are sure of the time you left the factory? A I wouldn't say for sure.

Q Well, what was the time, so far as you recall it? A Between half-past five and six.

*Cross examination* by Mr. McCarter.

Q Had you been at Reid's before that day? A Yes, I had been down the biggest portion of the day.

Q Doing what? A Helping Miss Harris down there, wrapping.

Q Helping Miss Harris? A Yes, I was down there by Miss Harris.

Q You had been down to Reid's? A Yes.

Q The better part of the day? A Yes.

Q Helping Miss Harris? A Yes.

Q Doing what? A I was wrapping for Miss Harris.

Q She had a sale down there? A Yes, sir; a dollar-day sale.

Q And you were wrapping for her? A Yes.

Q And what time did you get back from the factory? A Why, I should say after four when I got back from Reid's.

Q From Reid's to the factory? A Yes.

Q And did Mr. Harris arrive there later or was he there when you got there? A It was about 5:15 when Mr. Harris came in there.

Q And he came to you and told you that a telephone call had come from Reid's, asking you to go down there again? A Yes.

Q And did you go down there? A Yes, sir.

Q And that you needn't come back to the factory? A Yes, sir.

Q And you could go home after you were through down there? A Yes.

Q What time was that? A When I came back?

Q No, what time was it when he told you to go down to Reid's, when the telephone had come? A Between half-past five and twenty minutes of six.

Q What time do you ordinarily leave the factory? A Six o'clock.

Q And you had to come down here to Reid's on Market street, corner of Arlington? A Yes, sir.

Q And he said after you got through there you could go home? A Yes, sir.

Q How long did you stay at Reid's? A Why, it was after seven when I come back from Reid's; I stayed there until about a quarter after seven.

Q Now, when Mr. Harris told you after you got through at Reid's you could go home, did he say anything about coming in the next morning? A Yes, sir; he told me to come in a little earlier the next morning to finish my cleaning up, which I had to leave the night before.

Q And where did you go after you left Reid's? A I walked up Thirteenth avenue toward home.

Q And did you see Harris again that night? A As I was coming up I seen Mr. Harris and Mr. Umansky going down toward Reid's.

Q Where? A It was between Thirteenth avenue and High street, or it might have been up further; I can't say exactly the right place which I met him.

Q It was down Thirteenth avenue? A Yes; going down Thirteenth avenue.

Q Somewhere around High street? A Around High street, it may have been further; I can't say exactly.

*Fred Bauer, re-direct.*

Q How near to the factory do you live? A Only a couple of doors away, about two doors away.

Q What time did you go to bed that night? A About ten o'clock, around ten o'clock.

Q Did you go to the fire? A I had not gone to bed—

*Mr. D'Aloia.* What difference does it make; I don't think it is material whether he went or not.

*The Court.* Do you object?

*Mr. D'Aloia.* Yes.

Objection sustained.

*Re-direct examination* by Mr. D'Aloia.

Q You cleaned up every night, didn't you? A Yes, sir.

Q Did you, in your cleaning up, and in the business that had been done there, were candles used? A Yes, a candle has been used when the firm first started.

Q Did you find this candle? A I did.

Q Where did you find it and when? A I think it was the day after the fire.

Q Where was it? A Just a minute; I think I found that laying on the shelf.

Q In what room? A By the ladies' dressing room.

Q Do you know anything about this plan? Now, this is the loft and this is the stockroom and the shipping room, and this is the office; this is the main loft. Where did you find it, if you recall, with reference to the trimming room and the stockroom? A The little shelf on the corner between the ladies' dressing room and the toilet.

*The Court.* Will you point to that?

*The Witness.* Yes, sir.

*Mr. D'Aloia.* Here, point to it on the map.

*The Witness.* (Indicating.) Right there.

*Fred Bauer, re-direct.*

Q And what did you do with it after you found it? A I gave it to Cappadona or Mr. Rothenberg.

Q One of the detectives? A One of the detectives.

Q What time was it on the day after that you found it? A I can't exactly say.

Q In the afternoon or in the morning? A Morning.

*Mr. D'Aloia.* I offer it in evidence.

*By the Court.*

Q When you saw Mr. Harris and Mr. Umansky when you were coming from Reid's, did you speak to them? A Yes, Mr. Harris stopped me and told me about getting in a little early in the morning to clean up before the girls got there, so the place would look a little decent.

Q Did Miss Harris leave Reid's? A No, Miss Harris did not leave Reid's when I left.

*By Mr. D'Aloia.*

Q Did you make a statement on the 11th of May? A Yes, sir.

Q I asked you a few moments ago if in your cleaning up you ever seen any candles there before the 10th of May and you said yes, didn't you?

*Mr. McCarter.* One moment.

*The Court.* He is calling the witness' attention to it. I don't know whether he said it or not. He is asking the witness whether on direct he did not mention some candles some other day.

*Mr. McCarter.* The subject of candles has been adverted to, both counsel said something about candles. He produced a candle and the witness says he found it there in the corner. Now, he proposes to bring out something he said in his statement.

*Fred Bauer, re-cross.*

*Mr. D'Aloia.* No. I asked him in cleaning up if he ever seen candles around there and he said yes, they were using them for different purposes.

*The Court.* He said that and now the Prosecutor is referring to some testimony.

Q Now, do you recall my question when I asked you had you seen candles? A I said yes.

Q And you do say yes now? A Yes, that one piece.

Q Not one piece. A No, other ones.

Q Before the 10th of May, in the afternoon, when you found this candle where you pointed out on the map, during your cleaning up of that loft every night, did you ever see a candle? A No.

Q Were candles used in the business? A No.

Candle offered in evidence and marked Exhibit S. 7.

*Re-cross examination* by Mr. McCarter.

Q Do I understand you to say you never seen any candles in that place? A Never before?

Q Never before? A Well, there had been, to tell the truth.

Q Well, that is what we want you to do, tell the truth. A Well, there had been.

Q Now, look here, young man, you answer my questions, and answer them truthfully. A All right.

Q You realize you are under oath? A I do.

Q As a matter of fact, isn't it true that when the carpenters were working there you brought them candles? A Yes.

Q Some big candles? A Yes, I brought them from my own home.

Q For them to use there? A Yes.

Q And they did use them? A Yes.

Q And did you get some little candles? A Yes, I got the penny candles.

*Fred Bauer, re-direct.*

Q And you brought them there? A Yes.

Q Why were they necessary? A To give the carpenters lights so they could finish what they were doing.

Q How many big candles did you bring for the carpenters? A I brought two of them big candles from my own home.

Q Something like this? A Yes.

Q Is that one you brought from your own home? A Well, I cannot exactly say.

Q Well, it was like that? A Yes, heavy plumbing candles.

Q When did you bring them there? A Oh, I cannot—

Q Oh, yes, you can? A No, I cannot remember when the carpenters first came in.

Q How often had you brought candles there? A How often have I brought them there?

Q Yes. A I brought several of them for them.

Q How many times? A Twice, that I know of.

Q And when did the carpenters leave? A I cannot exactly remember, I cannot remember when they left.

Q Was the electric light in before the concern commenced to operate? A No, sir.

Q How did they operate in the dark? A Well, they stopped before it would get dark.

Q Did you ever see candles lighted after the carpenters left? A No, sir.

Q But you did see them lighted while the carpenters and other workmen were there? A Yes.

*Re-direct examination* by Mr. D'Aloia.

Q Now, do you remember making a statement on the 11th of May, 1922? A I do.

Q Do you remember saying this to detective Rottenberg, "Detectives Rottenberg and Cappadonna showed me another candle at Police Headquarters, which I could not identify, because during my time of employment there

I never saw any candles in the place''; did you say that? A I do remember, yes.

Q Did you say that? A Yes.

Q Is that true? A Yes.

Q And it is true that during the time you were employed at Harris' you never saw any candles in the place? A No, sir.

Q Well, now, what does that ''no, sir,'' mean, that is true? A That is true.

Q It is a fact, and it is true, that while you were employed there for Harris and before the 10th of May, 1922, you never saw a candle in the place? A No, sir; I have not.

Q What do you mean by ''no, sir''? A Well, it is true.

Q What is true? A What you just said there.

Q That you never saw a candle in the place, that is true, is it? A That is true.

Q And the first candle you saw in the place was this piece of a candle you found on the afternoon of May 10, 1922, the day after the fire, is that right? A Right.

*Examined* by the Court.

Q What about the candles you brought from your own house, when were they used? A Well, they were used while the carpenters were there?

Q Was that before you considered your employment had begun? A I started with Mr. Harris as soon as they started moving in the Morris avenue building.

Q How long before the fire was it that the candles had been used by the carpenters? A Well, quite sometime.

Q Well, in months how long? A I think it was February—January or February; I do not remember when it was.

Q Well, did the carpenters use candles themselves? A Yes.

Q And then after the carpenters were finished did the plant begin operation? A They didn't have no electric light.

Q No, did they begin operations? A Quite sometime after.

Q From the time they began operating did they use candles then? A No, sir; they had lights in the place.

*Re-direct examination* by Mr. D'Aloia.

Q After you made this statement on the 11th of May, have you had a conversation with Mr. Harris about this case? A Mr. Harris; no, sir.

Q Did you have a conversation with any one that represents Mr. Harris? A Yes.

*Re-cross examination* by Mr. McCarter.

Q You made a statement to Mr. Ruback, just as you made a statement to the Prosecutor? A Yes.

Q Did you sign it? A Yes.

Q When were you first employed by A. E. Harris Company, or whatever the name of this enterprise is? A Well, I cannot just remember; they just started when I went in with them.

Q You live two or three doors off? A Yes.

Q And you were in there, though, while the carpenters were working? A Yes.

Q And they wanted some candles and you brought them there? A Yes.

Q And two of those you brought look like that one there? A Yes.

*Re-direct examination* by Mr. D'Aloia.

Q In that statement you made to Mr. Ruback, that Mr. McCarter has just brought out, did you state there, "During my time of employment there I never saw any candles in the place"?

*Charles H. Stocklein, direct.*

*Mr. McCarter.* I object.

*The Court.* Objection sustained.

Q Did you tell Mr. Ruback that during your time of employment there you never saw any candles?

*Mr. McCarter.* I object to the question.

*The Court.* Objection sustained.

Q What did you tell Mr. Ruback about the candles?

*Mr. McCarter.* I object.

*The Court.* Objection sustained.

CHARLES H STOCKLEIN, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Where were you residing on May 9, 1922? A Well, I was at the Fred Hess cafe on 13th avenue.

Q Were you employed by him? A No, sir.

Q Well, were you there at this cafe? A Yes.

Q On the night of the 9th? A Yes.

Q And will you tell us what, if anything, attracted your attention to the building on the southeast corner of Morris avenue and 13th avenue? A The night of the fire I was standing in the front of the place—

Q In front of what place? A In front of the saloon.

Q Look at that map. Can you tell us with reference to the building where the saloon was located?

*The Court.* Do you understand that map?

*The Witness.* Yes, sir.

A The saloon is represented over here.

Q At Morris avenue? A Morris avenue and 13th avenue.

Q Over here, diagonally across? A That is it.

Q That would be the northwest corner, is that right? A Yes.

*James J. Dolan, direct.*

Q And the building is on the southeast corner? A Yes.

Q And you were in front of the saloon? A I was standing in front of the saloon, on the Morris avenue side.

Q What did you see, if anything? A I was talking with a fellow there from the hospital and my eyes started working towards South Orange avenue and I see a light and I looked around and I see sparks flying up towards the ceiling.

Q Where, what windows did you look in? A Right along here; this is 13th avenue, isn't it (illustrating)?

Q Yes. A Well, right along here.

Q What time was it? A Well, I cannot exactly say what time.

Q What? A Between nine and ten.

Q Then what did you do? A I ran down and got the fire alarm.

Q What? A I went down and pulled the box on the next corner.

Q Did the fire apparatus come? A The fire apparatus came right away.

Q Do you know anything else about this? A No, sir.

Cross examination waived.

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

*Direct examination* by Mr. D'Aloia.

Q Were you attached to the Newark Fire Department on the 9th of May, 1922? A Yes.

Q And in what capacity? A Battalion Chief.

Q Do you remember an alarm that was calling the fire department or certain company to the southeast corner of Morris avenue and 13th avenue? A Yes.

Q On the night of May 9th, 1922? A Yes.

Q Did you respond to that alarm? A Yes.

Q Where was the fire? A The fire was on the top floor of the loft building at the southeast corner of Morris avenue and 13th avenue.

Q Do you recognize by that plan the loft where the fire was? A Yes.

Q Now, will you kindly describe what you found; what you did and what you found at that loft when you got there; take the pointer and go over to it.

Q On this particular night the chief engineer was off duty—

*The Court.* No. You were there. Tell us what you saw when you got there.

*The Witness.* In my capacity?

*The Court.* No, anything that you saw.

*The Witness.* I responded to this fire. When I arrived there No. 20 engine and No. 3 truck was at work; I went in and the men were working in through this building. The fire was burning, as I remember, over those bins; it is what we call a chemical fire.

Q What kind of fire? A A small fire that would be extinguished by chemicals, not using a big line.

Q What do you mean by over those bins? A Where those bins were located, to the best of my knowledge, there was a partition—

Q Yes. A —and the bins were on one side and the shelving on the other side attached to the partition.

Q Where was the fire with reference to the bin? A The fire was right over those bins.

Q Over them or in them? A Well, in them, over them and around them, and all through there.

Q Where else was there a fire? A While directing the work of the men there was a fireman called our attention to—

Q No, no. What did you do? While you were directing there what else did you do? A Well, we extinguished the fire.

Q Well, that is the one over the bin? A The one over the bin.

Q Then what did you do? A Why, we pulled the ceiling down, which was scorched, the men did with hooks.

Q Yes. A And after the fire was under control I left the plant in charge of Battalion Chief Donoghue.

Q Was there any other place in that loft where there was a fire besides the bins? A Yes.

Q Where? A There was a fire—well, I couldn't just exactly say where; to my mind, either at the end here, around one of those partitions.

Q Was it inside of the stockroom or outside? A Inside.

Q Did you find any connection between the fire inside of that room and the fire inside of the bins? A No, sir.

Q (*By the Court.*) You said your attention was directed to something. Without telling us what the conversation was, what did you have in mind that you saw? A Why, my attention was called by one of the fireman—

Q (*By the Court.*) No, do not tell us what was said, but your attention was directed to something; now what was this something? A Why, a paper carton half filled with gasoline, with a lighted candle in it.

Q Where was that paper carton? A Why, I think it was right inside of the trimming room.

Q (*By Mr. McCarter.*) What? A Inside of this room you described as trimming or stockroom.

Q Did you see it? A Oh, yes, I saw it.

Q Now, will you describe to us particularly as you saw it, this carton and what you saw? A I was called—

Q Never mind about being called. You were called and you went there and you looked at it; now, tell us what you saw when you looked in that room? A I saw

this carton where it was burning, half filled with gasoline, with a lighted candle in the center of it.

Q Did you take any portion of it? A No, I didn't touch it; I called—

Q No; you didn't take it yourself? A No, I didn't take it myself.

Q Now, just illustrate to the jury what this carton looked like, how high it was and what was in the center of it; what you saw; now give them a picture of what you saw; I wasn't there; I cannot do it, Chief, now, do it. A I was called—

*The Court.* No, you were looking at it.

A I saw a carton half filled with gasoline; it was a lighted candle in the center of the carton.

Q Now, will you tell us the size of that carton? From right there, by illustrating with your hands? A Well, something like you get oysters in, possibly four or five inches high and three inches in diameter.

Q Three inches in diameter and four or five inches high? A About that.

Q Now, what was there, if anything, in the center of the liquid? A A lighted candle was in there on a spool or some wooden receptacle.

Q A wooden float? A Yes.

Q And the candle on it? A Yes.

Q Did you see it? A Yes.

Q Was the candle lighted? A Yes.

Q How much of the candle was still unconsumed when you saw it; give us an idea with your hands? A Oh, possibly three-quarters or an inch of the candle left.

Q Do you know what became of that carton? A I do not; I know I ordered it—

Q Never mind; do you know what became of it? A No, sir.

Q Did you see anybody there do anything to it? A Yes.

*James J. Dolan, cross.*

Q What was done in your presence with the carton and by whom? A Why, Chief Donohuge accidently kicked it.

Q Then what happened? A Why, a slight explosion and burned the gasoline and half burned the carton.

Q Did you see it after it was half burned? A Yes.

Q Is this it? A It looks very much like it.

Q Well, look at it and examine it very carefully, and tell us whether that is it? A It is like the one I saw; I cannot say that it is it.

Q What became of the one you saw there? A I don't know.

*Cross examination* by Mr. McCarter.

Q Chief, do you remember what time the alarm was? A Yes, it was one minute after nine.

Q And where did you go from? A Mulberry and Lafayette.

Q That was your headquarters? A Yes.

Q Now, when you got there the firemen had already gotten in? A Oh, yes.

Q And the chemicals were out there on the bin? A Yes.

Q Had the fire been put out there? A Well, it was not entirely out; it was what you call darkened; it was so that you could walk in through the loft.

Q Was there any smoke up there? A Not a great deal; there was some smoke.

Q No water was used at all? A No water.

Q The fire was put out with chemicals? A Yes.

Q Now, you speak of the ceiling having been pulled down; had that been scorched or burned? A Scorched.

Q Wooden ceiling? A I am not sure whether it was wood; I would not positively say whether it was wood or metal; I know they were working with the hook when I went in, pulling it down, as they did not know whether

the fire got past that point or not; to make sure they pulled the ceiling down.

Q And was the ceiling pulled down over to or near the partition between the so-called stockroom? A No, I think it was more near the skylight, around the skylight, where there would be danger of fire getting through.

Q I am asking you what they did there; you said there was a wooden ceiling or some kind of ceiling on this place and the men were engaged in pulling it down to see whether the fire got beyond it; well, if it was a skylight there was nothing beyond the skylight but Heaven? A Well, it would be sealed up to the skylight.

Q Well, I don't ask you what you generally do, but I am asking you, as a matter of fact, if they did not pull down all the ceiling over to that partition? A I could not say just how much they pulled down.

Q Now, did you smell of the liquid that was in that carton? A There wasn't any liquid in the carton.

Q You said there was some gasoline in it. A Well, there was before it exploded.

Q Well, before it exploded did you smell it? A Why, no.

Q How did you know it was gasoline? A I don't know it was gasoline.

Q Well, why did you say it was gasoline then for? A It was a colorless liquid.

Q Oh, yes, you don't know whether it was gasoline or not, do you? A Well, I don't know whether it was gasoline or not.

Q And where did you say that carton was that you saw? A To my best recollection, it was right inside of this door in this room.

Q Just by the door? A Inside of the door in that room.

Q Was there a door there or doorway? A Doorway, it may have been a doorway; I am not positive about that.

Q And it was just inside of that doorway? A It was around—

Q To the right as you entered? A Yes.

Q Did you go in? A Yes.

Q The doorway there? A Yes.

Q You went in? A Yes.

Q And it was on the floor? A Yes.

Q This must have been what time? A Possibly about 9:15, 9:18, something like that, 9:20.

Q Were you there after the fire, the next day? A No, sir.

Q Did you see any other cartons around there other than that one you have referred to? A No, sir.

Q Was this carton before it was burned—was it one of these ice cream things? A Why, I don't know what you mean by ice cream things; I described it as something that you bring home oysters in, one of those round pasteboard boxes.

Q I show you a photograph taken May 11, 1922, apparently by the Koenig studio; look at it, and see if you recognize the location? A No, I could not say that I do recognize it; those buildings all look about alike to us.

Q Look at the top and see if your recollection is refreshed as to the pulling down of the roof or ceiling by the photograph which seems to have been taken on the 11th, assuming it was. A Well, that is generally the way it looks after we get through.

Q I am not asking you generally; you now say probably that is a correct exposition of the condition of the ceiling? A Very likely.

Q But the rest of the picture you cannot recognize? A Well, in a general way I could; this may all have been done after I left.

Q I said the rest of the picture? A I left the room.

*The Court.* I think the witness said he was not there after the fire, and this was taken on the 11th and manifestly he was not there.

*Mr. McCarter.* I understand that, but I am asking him if he recognizes the location and is able to put the carton in the place he has referred to; I am testing the witness's memory.

*Mr. D'Aloia.* He says he does not recognize the picture.

*The Witness.* I cannot say just now the particular spot that was found in; I just recollect that my attention was called to some suspicious thing in the building and I was called and saw the carton.

Q Are you able to say, in your judgment, looking at this picture, where that carton was? A No.

Q And you cannot recall now? A No, as I recall it, it was inside of the room or near that door, or some location.

Q Might it have been outside? A It might have been outside.

Q You are very indistinct, aren't you? A Well, things are not as quiet at a fire as they are in a court room; we do not go into details.

Q But, as a matter of fact, where there is a fire on hand there is a great confusion and the details naturally do not receive the same care and attention that they would if there were not a fire on hand; that is human nature, isn't it? A Well, that is the ordinary fire, but the details do receive consideration on this sort of a fire.

Q Now, how many fires do you attend? A Well, possibly—

Q On the average? A Well, about 500 a year.

Q Nearly two a day? A Yes.

Photograph marked Exhibit D. 1 for identification.

PATRICK J. DONOGHUE, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Your name? A Patrick J. Donoghue.

Q Were you a member of the Newark Fire Department on the 9th of May, 1922? A Yes.

Q Do you remember an alarm of fire which brought you to the southeast corner of Morris avenue and 13th avenue on the night of May 9th, 1922? A Yes.

Q With whom did you go to the fire in answer to the alarm? A With whom?

Q Yes. A My driver.

Q What time was it? A 9:01.

Q When you got to the place where the fire was, which way did you go in and on what side of the building did you enter? A I entered here.

Q Now, when you got inside what did you do? A When I got in here all this was burning, those shelvings, and the fire was in two or three of those bins; it had illuminated the entire second floor; I was the first that arrived in there with the members of Hook and Ladder Company No. 3; there was nothing there—

Q Now, when you say those bins and this is the fire, you mean those bins marked with an X there in the center of the plan, which is Exhibit A? A They are right next to this stove here, gas stove.

Q What else did you see? A What else did I see at that time?

Q Yes. A I seen nothing but the fire.

Q Right there by that particular spot? A Well, all this shelving was burning and the fire had extended to the skylight.

Q Yes. A And I had taken one of the extinguishers to turn it to the skylight to kill the fire there while the members of 3 truck were throwing pails of water and using two extinguishers on the fire.

Q Where were they throwing water? A All over this burning partition.

Q The bins, too? A Well, the fire was up here and it fell down into the bin.

Q What else did you do after that? A After I had the fire under control 20 engine had responded and I told them—

Q Never mind.

*Mr. McCarter.* Do not tell us what was said.

Q Go ahead. A Oh, you simply want what I done?

Q Yes. A I walked into this room and one of the three firemen called my attention to it and at this corner was a carton.

Q Put your pointer where you recall seeing the carton? A Right here (pointing).

Q That is the southwest corner of the stockroom as shown on S "A"? A Yes.

*The Court.* I think every three-eighths of an inch equals a foot?

A I should say about here from the end of this room here; it was about there.

Q Before you go any further with that pointer; I am showing you S. 6, which is a photograph of the corner of the stockroom that you have indicated on plan S. "A"; will you point out on the photograph where you saw the carton? A The carton was here.

Q Will you please put a mark there; there is an X mark, cross, on Exhibit S. 6, which is a photograph of that particular corner of the stockroom, or trimming room; now, go ahead and describe the carton as you saw it at that spot? A This carton was on the floor with a liquid in it, and on top of the liquid was a float; on top of the float was a candle; the candle was lit—

Q Yes. A This streamer coming up here—

Q Turn around and show that to the jury? A This streamer was attached to the carton, inside of the carton, rather, where this liquid was; from the smell of it I guess it was gasoline; this streamer came up along here, and I put my foot on top of this to extinguish the candle and it threw the light down and it ignited and I had to call a chemical stream in here to extinguish this.

Q What happened, if anything, when you put your foot on that candle and it touched the liquid? A Why it went afire.

Q How; describe what happened? A When I put my foot on top of the carton the top of it was charred

Q What happened? A It went afire; that is, the candle, and there is the float.

Q Tell the jury what position you found that carton in and illustrate with the carton; is that it? A Yes.

Q Who picked it up after it got afire? A I did.

Q And after you put your foot on it— A After we extinguished the fire that had started from this—

Q —you picked up what? A This (illustrating).

Q The candle, too? A Was in the carton.

Q And that float there? A Yes.

Q Will you demonstrate to the jury how the carton with the candle, with the float, with the streamer, was rigged up? A This carton was about that high (indicating).

*Mr. McCarter.* About six inches.

*The Witness.* About that high, I should judge.

*Mr. McCarter.* About six inches.

*The Witness.* Six or seven inches.

Q Six inches high? A In here was a light liquid; this was floating and the candle was burning; when I put my foot on top of this it naturally threw the fumes from this gasoline or benzine—whatever it might be—and naturally confined it in that small place and the candle ig-

nited the fumes, and as soon as it did it went up along the streamers.

Q Where was the float? A On top of the liquid.

Q And was the candle? A On top of the float.

Q And this candle was lighted? A Yes.

Q When you described the liquid you said "White liquid;" did you mean it was white? A It was white, it looked white.

Q You mean the color of water? A Yes.

Q Well, water is not white, a colorless liquid? A A colorless liquid.

*Mr. McCarter.* I object.

Q Do you mean white like this? A No.

Q Now, why did you say the liquid was white? A Well, I meant a colorless liquid.

Q Did you mean colorless? A Yes, a colorless liquid.

Q (*By the Court.*) What about this streamer? A Here is the streamer here (indicating.)

*Mr. D'Aloia.* That is shown on the photograph, if your Honor please.

*Witness.* Here is the streamer that was attached.

Q Describe the way that streamer was attached to the carton. Show the jury the picture, and you have already described the carton, show the picture and how it was attached to the carton? A It was about that far away from this casing up here or where those goods are on the shelves; it came down like that (illustrating.)

Q Diagonally? A In a fashion like that, diagonally, and this was down in this (indicating.)

Q Where was the end of the streamer? A The end of the streamer?

Q Was it inside of the carton? A Well, I would not say it was inside; it was close enough to ignite, because that was the first thing that ignited after I put my foot on the carton.

*Patrick J. Donoghue, cross.*

Q What was that streamer made of? A White muslin.

Q Did you notice the condition of packages of goods on the shelf in that particular corner of the room? A Well, not at that time; after the fire.

Q Well, after the fire? A I noticed the packages up on the shelf.

Q And what was the condition of the packages? A Well, where the fire went up here it had scorched the outside of the packages.

Q Where did the streamer connect to? A Up here where the coat is.

Q What did you do with that carton? A I turned it over to the police department.

Q And the candle? A Police department.

Q And the float? A Everything.

Q Which member of the police department? A Sergeant Rottenberg.

Q When was it? A That night.

*Cross examination* by Mr. McCarter.

Q Did you go there before or after the fire, Chief? A Before; I was the first one in there.

Q How did you get in? A Through the door; this door here.

Q Was it open? A No, sir, members of 3 truck had broke it open.

Q Then you were not the first in? A I was first that arrived at the fire, but I couldn't get in until the truck got there to open the door.

Q Did you see them open it? A Yes.

Q How did they open it? A With axes.

Q Was the glass in one of the doors broken? A Yes.

Q And did you see a man put his hand in behind it to unlock the lock? A No, sir; I didn't see it.

Q Where were you standing at that time? A I was going up the stairs.

Q Going up the stairs? A Yes.

Q I think we have designated at point "O" in this so called stockroom the location of that carton? A Yes.

Q Are you sure about that? A Yes.

Q No mistake? A No, sir.

Q It was not down by the door? A No, sir.

Q No. A Just as I have described it.

Q And do you say now, or don't you say that the streamer was attached to the carton? A Yes.

Q It was attached to it? A It was connected; whether it was tied to it or set inside of the carton, I cannot positively say, but as near as my memory can recall, it was inside of the carton in the gasoline, or whatever that colorless liquid was.

Q You do not call it white now? A Well, I am no expert on colors.

Q Why did you say white? A Because I didn't know any better, counsellor, I suppose, because I am not no expert on colors; I refer to white because it was a colorless liquid.

Q Now, when you saw the carton you say the candle was afire? Was it burning? A Yes.

Q What did you put your foot on the carton for? A To extinguish it.

Q Did it extinguish it? A Yes.

Q In other words, the way to extinguish the lighted candle was to put it in what you thought was kerosene or benzine? A No, if I blew it out I would blow the fumes back and possibly cause an explosion and burn my own face, that is the reason I did not blow it out.

Q You had plenty of fire extinguishers? A Yes.

Q Why didn't you use them? A I thought I could smother it.

Q With your foot? A Yes.

*Patrick J. Donoghue, cross.*

Q You pressed right down on it? A No, I done like that (illustrating), patted down with it, with the sole of my boot.

Q Now, there were pails of water on the pillars— A Yes.

Q —in this factory, weren't there and it was those pails that were being used by the firemen? A Yes, as well as extinguishers.

Q How many pails were there there, one on each post? A Well, I could not say how many, because I was too busy there for a minute.

Q Well, there were a good many? A There were at least two; there might be four; I don't know how many there were.

Q How many were being used by the fire department? A I don't know; I was busy with an extinguisher myself.

Q How much of the roof was torn down? A Part by the skylight.

Q Extending over— A Right here where the fire was; up there was the skylight (indicating.)

*Mr. D'Aloia.* Indicating the bins marked by the three X's.

Q Didn't you know that the roof was torn down over to within a foot of the partition between the main room and the so called stockroom? A The ceiling boards were pulled down from the ceiling over here where the fire was, and when they were pulled down the whole board that extended across—the length of the board came down with it.

Q And that board reached over almost to the partition? A Over here (indicating.)

*Mr. D'Aloia.* He indicates the shelving to the back of the bin, to the south of the bin.

*The Court.* He pointed to the stockroom.

*James T. Keegan, direct.*

*Mr. D'Aloia.* He pointed to the south of the bin.

Q I asked you if the length of the board that was pulled down did not extend over to within a foot of the partition, separating the so-called stockroom from the main room? A Yes.

Q It did? A Yes.

JAMES T. KEEGAN, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Mr. Keegan, were you a member of the Newark Fire Department, on the 9th of May, 1922? A No, sir.

Q What are you a member of? A Why, I am assistant superintendent of the Salvage Corps; Underwriters Protective Association.

Q And does that particular organization respond to fires? A Yes.

Q And did it respond to fires during the month of May, 1922? A Yes.

Q Do you remember an alarm of fire about 9 o'clock on the night of the 9th of May, 1922? A I do.

Q Did you respond to a fire that night? A I did.

Q Where did you go? A Up 13th avenue and Morris; I parked my car on Morris avenue, a little around from 13th avenue; we went around to Morris avenue, because the front was locked up.

Q What corner of Morris avenue did you go to? A I stopped my car right here (indicating.)

Q Where was the fire? A The fire was coming up here (indicating.)

Q And what building was the fire in; there were four corners there; which corner was it where the building was where the fire was?

*Mr. McCarter.* There is no dispute about it.

Q Where did you go? A I brought my men around here (indicating); there is an iron gate here, and came in here and went up here.

Q Indicating the Morris avenue side of the building? A Yes.

Q The alley way next to it, to the south? A Yes.

Q And up where the fire escape is shown on S "A"? A Yes.

Q What did you do then? A Tried to get in here and couldn't get in.

Q And you indicate the door which leads from the fire escape to the loft on the southerly side of the building, and you could not get in? A No.

Q What was the matter? A Why, the door was barred; we tried to force it in and couldn't.

Q What else did you do? A We came down and came around here (indicating.)

Q Indicating on the map the front of the building on the Morris avenue side? A Yes, the main entrance, supposed to be.

Q The main entrance to the building; what did you do there? A Why, we broke in the door and got in here (indicating.)

Q On what floor? A On the first floor; the candy place.

Q Got in through the main entrance of the building to the first floor, and that was a candy place? A Yes.

Q What did you do? A Why, we worked down here and there was water coming down and we were working on the second floor spreading covers.

Q Did you get up there on the second floor? A Yes.

Q From the first floor where the candy place was? A Yes.

Q How did you go? A Came down here and up Morris avenue and up 13th avenue and up the stairway.

Q And did you get in that door? A Yes.

Q To what part of the loft did you go? A All through.

Q What did you find? A I found there was fire here (indicating.)

Q Three bins marked with an X? A Yes.

Q What did you do there? A Why, I couldn't do anything there, just looked around and had men open up the windows.

Q Did you go to any place from the bins? A No.

Q Did you get into the stockroom? A Well, that was my intention—my attention was called to that by Chief Dolan.

Q Did you go in the stockroom? A Yes.

Q And how long after you got in the loft was it you got into the stockroom? A Well, I should judge two or three—three minutes.

Q When you got into the stockroom what did you see, if anything? A I saw a carton here (indicating).

Q What do you mean by a carton? A Why, a container like you get ice cream in to carry home.

Q Where was it? A Right here, I should judge, (indicating.)

Q And you went to the southwest corner of the stockroom on Exhibit S "A"? A Yes.

Q Where was it, on the floor or on the shelf? A On the floor.

Q Now, describe it to us as you saw it when you first saw it? A It was right here on the floor and it had some kind of a liquid in it, with a candle on a float in this carton.

Q Did you see it when the candle was lighted? A Yes.

Q Now, will you illustrate with part of a carton here and this candle, and this float what you saw there? A Why, that, I guess, was about six inches—

Q Well, just show it to the jury. A —and this was lying in the oil; I should judge the carton was half full

of oil or some kind of substance—I don't know what was in it—and this way lying on top.

Q Was the candle lighted? A Yes.

Q I want you to point out on Exhibit S. 6, which shows the southwest corner of the stockroom, where that carton was half filled with liquid, with the float and with the candle on it lighted when you saw it? A Well, this streamer—

Q Indicate where you saw the carton? A Right here (indicating.)

Q Is there a mark there on that picture? A Yes.

Q Is that marked correct? A Well, pretty near correct.

Q Well, it was just where the mark is? A Yes.

*Mr. McCarter.* No, he said pretty near correct.

A Well, an inch or so out of the way.

Q Well, put your mark where you saw it with that red pencil. Now, hold the photograph so the jury can see it, and point to the spot where you saw the carton. Now, don't you look at it; let them look at it. There is where the carton was in the position you have described to us? A Yes.

Q Now, what is that white thing shown in the picture? A That is a streamer.

Q Now, tell us what you saw with reference to the streamer. A Why, that streamer came out from the wall and it was held by this carton.

Q The lower end of the streamer. Will you tell us where that was resting with reference to the carton? A Right under the streamer.

Q Right under what? A Why, right under the carton.

Q Right under it? A Yes.

Q And the upper end of the streamer where was that attached to? A Why, it was attached to the shelving way up near to the ceiling.

*Patrick S. Smith, direct.*

Q What did you do, if anything, about the carton after you saw it? A Why, I reported to my superior.

Q What was done with it; did you see anybody stamp it out? A Why, Chief Donoghue took charge of it.

Q What did he do, what did you see him do? A Why, I just saw him step on it to put it out.

Q What happened when he stepped on it? A Why, there was a flare up.

Q Do you recognize that part of it, the candle and the float, as the things you saw there— A Yes.

Q —that night? A Yes, he showed me them.

Q That night? A Yes.

Q After he had extinguished the light? A Yes.

Q And after the flare up? A Yes.

Q Do you know what became of those things and who has had them ever since? A I do not know who had them since, but I know Chief Donoghue took charge of them.

Q You saw this part of the carton that night? A Yes.

Q And you saw this float? A Yes.

Q And you saw this candle? A Yes.

Q And you saw this other piece of carton that night? A Yes.

Cross examination waived.

PATRICK S. SMITH, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Mr. Smith, were you attached to the Newark Fire Department on the 9th of May, 1922? A I was.

Q What grade? A Captain of 3 truck.

Q What is that? A Captain of 3 truck.

Q On May 9, 1922, about 9 o'clock, did you respond to an alarm of fire? A I did.

Q And where did you go in response to the alarm? A Corner of 13th avenue and Morris avenue.

Q Which corner? A On the southeast corner.

Q Where was the fire? A On the top floor of 304 Morris avenue.

Q You mean 204, don't you? A Or 204.

Q Now, look at that plan. Do you recognize that plan as the plan of the top floor of that building? A Yes.

Q Where the fire was? A Yes.

Q Will you take the pointer and point out to us where you saw the fire when you got there? A When we entered there the fire was confined to those three bins marked with X and extended to the shelving above it.

Q Which door did you enter? A This door here.

Q Indicating the door on 13th avenue side of the building at the head of the iron stairway? A Yes.

Q How did you get in? A I ordered one of my men to break the glass above the panel and another man opened the latch on the fire door and that is the way we entered.

Q Now, did you go in the stockroom? A After the fire had been extinguished we went in the stockroom.

Q What did you see when you got there? A I saw this carton there with the candle lighted and the streamer leading down to it.

Q What happened to that candle? A Why Chief Donoghue was in charge; I do not know what happened to it at the time.

Q Did you see him step on it? A No, I was in the other room.

Q I show you Exhibit S. 6 and ask you whether you see the spot where you saw the carton there that night. Turn around and let the jury see it. Where was the carton that night? A Right at that point there.

Q Indicating on S. 6 a point in the corner. Is there any mark on that photograph? A I cannot see any mark.

*Frank Eckel, direct.*

Q Well, now, put your finger there. Mark it with this pencil. A This does not mark; it is very hard; I will put an X there.

Q You say the carton was where you had put the X A Yes.

*The Court.* There are two X's.

Q Yes, two inches apart. This is where you say it is? A Yes.

Q We will call that— A An X with a little mark on the side.

Q Is that right? A Yes, that is correct.

Q Now, do you see what has been called a streamer in that picture? A Yes.

Q Now, with reference to the carton where was the streamer? A In close proximity to the carton.

Q And where did it go to? A It extended up to the shelving.

Q Do you know what became of the carton, the candle and the float? A I do not know; it was in charge of Chief Donoghue.

Cross examination waived.

FRANK ECKEL, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Do you remember going to a fire on the night of May 9, 1922? A Yes.

Q Were you a member of the fire department at that time? A Yes, sir.

Q Attached to what company? A Hook and ladder company number 3.

Q Where did you go in answer to the alarm? A Morris avenue and 13th avenue, southeast corner.

Q What floor? A The top floor.

Q Did you go to the top floor? A Yes.

*Frank Eckel, direct.*

Q How did you get in? A Broke the doors on the 13th avenue entrance.

Q How did you break the doors? A Broke the locks I meant to say.

Q How? A With axes.

Q Were the doors locked? A Absolutely.

Q Did you go in the loft? A Yes.

Q Do you know those doors leading out the fire escape on the southerly side of the loft? A Sir.

Q Take that pointer. Point out, now, where you went in. A Right here (indicating.)

Q Pointing to the door at the head of the stairway on the 13th avenue side of the building? A Yes.

Q Now, you are in. A Yes.

Q Were there any other doors that you saw .there? I mean leading upstairs? A There are two doors here (indicating.)

Q You were in those? A Yes.

Q Some other doors? A There was another door going to the loft.

Q Show me the doors going to the exterior of the building? A These here (indicating).

Q Any others? A There here (indicating).

Q Did you go to those there (indicating)? A No.

Q Did you go to the stockroom? A Yes.

Q Did you see anything there? A Yes.

Q What did you see? A A carton in the corner of the stockroom.

Q Point out where you saw it on the plan. Pointing to the southwest corner of the stockroom as shown on plan S "A." Now, look at this photograph S. 6 and point out there where you saw the carton; where that spot appears in the picture. Turn around and show it to the jury. A Right there where your finger is.

Q Is there a mark there? A Close to it.

Q What is that white thing shown there? A A streamer.

*Frank Eckel, cross.*

Q Did you see it that night? A Yes.

Q Where was it connected with reference to the carton? A The streamer was in the vicinity of the carton and it ran to the top of the shelving.

Q What was the material of the streamer? A Muslin.

Q What happened to the carton while you were there? A It exploded after Chief Donoghue stepped on it and tried to extinguish it.

Q What do you mean by saying it exploded? A Why, the fumes must have exploded.

Q Did you hear noise? A No noise.

Q Well, what do you mean by an explosion; you say it exploded; can there be an explosion without a noise? A Well, I don't know.

Q Well, why did you describe this as an explosion; did you hear anything? A No.

Q (*By the Court.*) What did you see? A I seen fire after.

Q (*By the Court.*) Spontaneous? A It was not spontaneous; no, sir.

Q Did you say it exploded or flared up? A Flared up.

Q Now, which is it? A It was a flare up after he put his foot on top of the carton.

Q Well, then it was an explosion. A Well, a slight explosion.

Q What is that? A It was a flare up.

Q And did you hear any noise? A No, sir.

Q And it was a flare up you saw? A Yes.

*Cross examination* by Mr. McCarter.

Q When the flare up took place did the streamer get afire? A Yes.

Q There was quite a fire there, wasn't there? A Well, I wouldn't call it quite a fire, no.

Q Well, they had to bring the extinguisher in to put it out? A Yes.

Q Well, what was ablaze? A Well, the streamer and some of the stock got ablaze.

Q Where was the extinguisher that was brought in to put out this fire in the stockroom? A In the so called fire in the bin; it was being used in the bin.

Q Who went out and got it? A Members of 20 engine brought it in.

Q Members of twenty engine brought it in? A Yes.

Q From the stock bin? A Yes.

Q And at the time they got in there the streamer was afire? A Yes.

Q Had the fire extended up to the boxes on the shelf? A Half way up, pretty near.

Q Half way up what? A The shelving.

Q Half the shelving was afire? A No, the fire extended half way up the streamer on the shelving.

Q Half way up the streamer on the shelving? A Yes.

Q So that at least half of the streamer was afire? A Yes.

Q And was it burned up? A Not all, no.

Q Well, what do you mean? A I wouldn't say it was burned up, because I don't think there was enough fire there to burn it up.

Q Well, it was burned? A Yes, part of it.

Q Well, can it burn and not be burned up at the same time? A Well, it might burn and not be burned up.

Q So half the length of the streamer was burned and the crew of 20 engine had to come in there with the fire extinguisher? A Yes.

Q And then they put the fire out? A Yes.

Q Was that extinguisher one belonging to the factory? A No, sir.

*James T. Keegan, re-direct.*

Q Did you see an extinguisher belonging to the factory there? A Yes.

Q That was not used? A Yes.

Q That was used, too? A Yes, not on that particular fire, but the fire in the bin.

Q So there was a fire extinguisher there belonging to the concern which was used on the fire in the bin? A Yes.

Q And being used at the time number 20 extinguisher was brought into the stockroom? A Before the extinguisher was brought into the stockroom.

Q And did you see those pails on the posts? A Yes.

Q And some of them were used? A Yes.

RECESS.

AFTERNOON SESSION.

(Appearances as before stated.)

JAMES T. KEEGAN, recalled, in behalf of the State.

*Re-direct examination* by Mr. D'Aloia.

Q On the night of the 9th of May, when you responded to that alarm with the Salvage Corps, did you have occasion to go in that stockroom shown on that map? A No, sir; I did not.

Q Where did you see the carton? A I went in there.

Q So, you went in there? A Yes.

Q You said you did not have occasion to go in there. Did you go in there? A I did have occasion to go in there after my attention was called to this thing here.

Q I am going to call your attention to this photograph, S. 6, do you see an overcoat in that corner? A Yes, sir.

*James T. Keegan, re-cross.*

Q And did it cover part of the streamer? A Why, it was along side of the streamer.

*Mr. McCarter.* Are you now speaking of the picture or the facts?

Q The facts. Where was it with reference to the streamer? A Why, right along side of the streamer, running up along side of it.

Q How close did you get to that overcoat? A Very close to it.

Q Did you or did you not smell or perceive an odor coming from the coat? A I did.

Q Was the coat wet or dry? A Why, it was kind of wet.

Q What was the odor which came from the wet overcoat? A Why, it was a gasoline smell.

Q Did you have any Salvage Corps men in charge of that place after the fire had been extinguished? A No, sir.

*Re-cross examination* by Mr. McCarter.

Q You did not testify about any smell from the overcoat when you were on the stand before, did you? A I wasn't asked.

Q You did not testify, did you? A No, sir.

Q To whom did you speak about it since you left the stand? A Nobody.

Q Nobody? A Yes.

Q What kind of an overcoat was it? A Why, it was of light material, I don't know; I don't say it was an overcoat. I would say it was a short coat.

Q You called it an overcoat twice; now, was it an overcoat or was it not an overcoat? A It did not look like an overcoat to me.

Q What? A It did not look like an overcoat to me.

Q Oh, it did not look like an overcoat to you? A No, sir.

*Joseph Berardi, direct.*

Q You were near enough to it to smell it? A Yes, sir.

Q Are you blind? A Not very much.

Q Then, you could see? A Yes, sir.

Q Well, it was an overcoat, wasn't it? A I can't say.

Q You can't say? A No, sir.

Q How close to it were you? A Right close to it; I smelled the coat.

Q Put your nose right up to it? A Yes, sir.

Q And yet you can't say whether it was an overcoat or not? A No, sir.

Q What color was it? A Why, of light material.

Q What color was it? A Grayish.

*By the Court.*

Q Was it a coat? A I don't know, your Honor, it was hanging up there.

Q Was it a coat? A Yes, sir; it was a coat.

Q You are sure of that, are you? A Oh, positive.

JOSEPH BERARDI, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you a member of the Police Department of the city of Newark on the night of the 9th of May, 1922? A Yes, sir.

Q Attached to what precinct? A Fourth.

Q Did you respond or did you attend at the corner of Morris avenue and 13th avenue to the fire on the night of the 9th of May, 1922? A Yes.

Q What time did you get there? A 9:05.

Q Were you there while the fire was being extinguished by the firemen? A Yes, sir.

Q And after the fire had be extinguished, did you remain there? A Yes, sir.

Q All night? A No, sir.

Q Until what time? A I was relieved by Officer Schweitzer at eleven o'clock at night.

Q Is Schweitzer here? A Yes, sir.

Q Now, while you were there, from the time the fire was put out until eleven o'clock, was anything removed from the place by anybody? A No, sir.

*Cross examination* by Mr. McCarter.

Q What time did you take charge on your watch? A Right after the fire was extinguished, I called into the lieutenant that the fire was extinguished under orders—

*Mr. D'Aloia.* Never mind what you said to the lieutenant.

Q Just you answer my questions. What time did you take hold and watch? A Well, something—it was 9:04 when I arrived there, the firemen were at work for about half an hour—something around the neighborhood of a quarter to ten.

Q Where had you been in the meantime? A Police lines.

Q Outside? A Yes, sir.

Q You did not go upstairs, then, until about a quarter to ten? A No, sir.

Q Who was there then? A The firemen were at work.

Q Still at work? A The firemen were at work and I established police lines, that is our duty—

Q When you went upstairs at a quarter of ten who was there? A Why, Chief Donoghue, and a few firemen.

Q The fire was out, wasn't it? A Yes, sir.

Q Did you see the carton? A In Chief Donoghue's hand.

Q That was taken away that night, wasn't it? A I don't know what became of it.

Q Why did you say something was taken away? A Why—

*Mr. D'Aloia.* He said that—

*Mr. McCarter.* Wait a moment.

*Mr. D'Aloia.* He didn't say anything was taken away before he got there, from the time he got there until he was relieved by Schweitzer.

*Mr. McCarter.* I object to counsel prompting the witness. The witness has said he saw the carton and he stated on direct examination that nothing was taken away.

*Witness.* In Chief Donoghue's hands I seen the carton. There was nothing taken away while I was there and established the police line; that's what I mean.

Q You mean downstairs? A Yes, sir.

Q Oh— A That was what he asked me, the prosecutor.

Q You don't mean to say nothing was taken away from upstairs, do you? A What do you mean?

*The Court.* Mr. McCarter, there seems to be some confusion as to the time you are referring to.

Q When you got upstairs, did you see the carton? A Yes, in Chief Donoghue's hand.

Q What became of it? A I don't know.

Q Well, didn't you say on your direct examination that nothing was taken away? A I didn't get you now.

Q Do you understand the English language? A Certainly I do.

Q Didn't you hear Judge D'Aloia ask you if anything was taken away; did you hear that? A Yes, sir.

Q And you answered "no"? A When I was there no, that's what I mean. That's what he asked me; that's what I understood.

Q What became of the carton, that you saw? A The carton was in Chief Donoghue's hands when I saw it.

Q What did he do with it? A I don't know.

Q He took it away, didn't he? A I don't know whether he did or not. I seen nothing go out of the place.

Q Did you see the float? A What float? All I seen was the carton in Chief Donoghue's .hand.

Q Did you see any other cartons around there? A No.

Q None on the shelves? A No, sir.

Q And where was Chief Donoghue when he had this carton in his hand? A Outside of the door entering into the so-called storage room.

Q Outside of the door? A Yes, sir.

Q There wasn't very much burnt, was there? A In that room?

Q Anywhere? A Well, you wouldn't call it such a big part of it, no.

Q Well, it was all out in fifteen minutes? A It was burned enough.

Q Well, it was all out in fifteen minutes, wasn't it? A Something in the neighborhood of that, yes.

Q Where did you establish police lines, Mr. Policeman? A I was the only man there and I worked both ends.

Q You were the line, then? A I walked up and down keeping everybody from interfering with the firemen. That is our duty at a fire.

Q That is what you mean by police lines? A That's what they call establishing a police line, as far as I know.

*Frederick C. Lang, direct.*

WILLIAM F. SCHWEITZER, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you a member of the Newark Police Department on the 9th of May, 1922? A Yes, sir.

Q Attached to what precinct? A Fourth precinct.

Q And do you remember eleven o'clock that night, of the 9th of May, 1922, being sent to the corner of 13th avenue and Morris avenue? A Yes, I do.

Q Did you go? A Yes, sir, I did.

Q Whom did you relieve there? A Officer Berardi.

Q Did you remain in charge? A I did, sir.

Q From what hour? A From 11 P. M., that night until eight o'clock the following morning.

Q Did anything go out of the place while you were there? A No, sir.

Q Who relieved you? A Why, Officer Lang.

*Cross examination* by Mr. McCarter.

Q Where did you stay? A Where did I stay?

Q Yes. A Why, I stood outside here on this fire escape (indicating) and at times I went inside of the building and walked around to see that everything was closed, and when I went inside I slammed that door right behind me with the latch, behind me was a latch; that door was nailed up, the windows were nailed up with boards, and other times when I was doing anything I was sitting outside.

FREDERICK C. LANG, sworn in behalf of State.

*Direct examination* by Mr. D'Aloia.

Q Were you a member of the Newark Police Department on the 9th of May, 1922? A I was.

Q And on the 10th of May, 1922, attached to what precinct? A Fourth.

*Frederick C. Lang, cross.*

Q Did that take in the corner of Morris avenue and Thirteenth avenue? A It does.

Q And on the morning of the tenth, were you sent to that corner? A I was.

Q Did you relieve anyone there? A Officer Schweitzer.

Q And did you take charge? A I did.

Q What time? A Eight o'clock in the morning.

Q And how long did you remain there in charge? A Until Schwartz and them come up there.

Q What time was it? A About eleven o'clock, half past eleven.

Q While you were there, eight o'clock until eleven o'clock, did anything leave the place? A It did not.

Q You didn't see anything go out? A No, sir.

Q Who relieved you at eleven o'clock? A A fireman.

Q What is his name; do you know? A I don't know.

*Cross examination* by Mr. McCarter.

Q Mr. Schwartz and the photographer arrived, did they? A They did.

Q And then you quit? A It was between eleven and half past eleven.

Q Then you quit when they came? A Yes, sir.

Q Who was with them? A I don't know who all was with them.

Q Well, who else, anybody? A Yes, sir; another man, with them, I believe the two.

Q Do you know who they were? A I don't know their names; they were from Police Headquarters.

Q How do you know that? A They told me they came from there up there to take a photo of the place.

Q I am talking about the two or three other men besides Mr. Schwartz and Mr. Day. A No, that's all, Schwartz and Mr. Day; those two.

Q You said a moment ago there were two or three others? A That's what I meant, the two.

Q Which is the fact; do you remember anything about it? A Just them. Schwartz and the young man who came with Schwartz.

Q When you were examined a moment ago you said other people? A I didn't say "other people"; I said two or three.

Q Well, which was it? A The two, yes.

Q You left them there alone? A Until the fireman came and then I left.

Q Now, did you see this boy Bauer there? A I did not.

Q He was not in that place finding that candle while you were there? A He was not.

Q Are you sure about that? A Yes, sir.

Q Did you quit when you gave up to the firemen and the other two men? A I did.

Q You went away? A Yes, sir.

Q So what occurred after that you don't know? A I do not.

Q And how long the photographer was there you don't know? A I do not.

Q And what he did, you don't know? A I do not.

CLIFFORD DIXON, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q On the 10th of May, 1922, what department were you a member of? A Salvage Corps.

Q And on the tenth of May, did you go to the corner of Morris avenue and Thirteenth avenue where there had been a fire the night before? A I did.

Q And what time did you get there? A A quarter after twelve.

Q Whom did you relieve? A An officer.

Q Which officer? A I don't know his name.

Q Have you seen him on the stand? A I think that was the gentleman who was just up.

Q He left and you stayed? A Yes, sir.

Q How long did you remain there? A Till seven o'clock that night.

Q While you were there was anything taken out of the place? A No, sir.

Q Nothing disturbed? A No, sir.

*Cross examination* by Mr. McCarter.

Q Well, was Mr. Schwartz there? A An officer?

*The Court.* Mr. Schwartz.

*Mr. McCarter.* From the Combustible Department.

*Witness.* Why, there were several detectives there.

Q And were you watching each one of those men all the time? A Yes, sir.

Q Each one of them? A Yes, sir.

Q Where did you sit? A I didn't sit; I was inside.

Q Well, what did you see done? A Nothing.

Q So, several people were there and you saw nothing done by any of them? A No, sir.

Q They didn't do anything? A No, sir.

Q They just stood around? A Yes, sir.

Q From the time that you got there until seven o'clock at night, there wasn't a thing done there? A Not as I seen.

Q Did you see any boxes opened? A No, sir.

Q Did you see any photograph taken? A No, sir.

Q Well, the photographer was there, wasn't he? A Not while I was there.

Q Nobody was opening boxes? A No, sir.

Q Do you know the names of any of the men that were there? A Sergeant Rothenberg and Mr. Helfrich.

Q Who is he? A He is a fireman, combustible man.

*Patrick J. Broderick, direct.*

*Re-direct examination* by Mr. D'Aloia.

Q When you left that night at seven o'clock, what time did you come back? A The next morning at seven.

Q What time? A Seven o'clock.

Q Did you remain on duty the next day? A Yes, sir.

Q Until what time? A Seven o'clock at night.

Q When you left the second day at seven o'clock, what time did you come back? A Not the next morning, the day after; my day was off.

Q So, for how many days did you go back there with the exception of the day that you were off? A I worked three days and was off the fourth.

Q And you were in charge there from seven o'clock in the morning until seven o'clock at night? A Yes, sir.

Q On three days? A Yes, sir.

PATRICK J. BRODERICK, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you attached to any particular department on the 9th of May, 1922? A Salvage Corps.

Q Did you go up to this fire at Thirteenth avenue, corner of Morris avenue, which occurred on the night of the 9th of May, 1922? A On the tenth.

Q You were there on the tenth, what time? A Ten minutes to seven.

Q In the morning? A In the evening.

Q Whom did you relieve? A Patrolman Dixon.

Q And did you stay on duty all night? A Yes, sir.

Q In charge there? A Yes, sir.

Q What time did you leave in the morning? A Why, about ten minutes of seven.

Q Who relieved you? A Dixon.

*Patrick J. Broderick, cross.*

Q Then, did you go back the next night? A Yes, sir.

Q Stay on duty all night? A Yes, sir.

Q What time did you leave the second morning? A Why, around five or ten minutes of seven.

Q He came to relieve you again? A Yes, sir.

Q Did you go back the next night? A No, sir.

Q How many nights were you there all together? A Two out of every four.

Q While you were there in charge during the night, was anything removed or anything disturbed on the loft? A No, sir.

*Cross examination* by Mr. McCarter.

Q Was there a fire there while you were there? A No, sir.

Q Not at all? A No, sir.

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

Q You were there two or three nights, weren't you? A I was there two nights out of four, the night of the 10th and the 11th.

Q And wasn't the pressing table on fire when you were there? A Not on the night when I was there, no, sir.

Q You heard about it, didn't you? A Yes, sir.

Q What night did you hear about it? A I heard—I can't exactly tell you the night now.

Q Well, now, your best recollection? A I can't recall the night I heard about it.

Q Now, just think. You remained there how long, Mr. Broderick? A Two nights out of every four I was there.

Q Well, you say that the pressing table did not get on fire while you were there? A No, sir; I wasn't on then.

Q Who was watching there when you understood it got on fire? A A man named Halpin.

Q Is he from the Salvage Corps? A Yes, sir.

Q He hasn't been on the witness stand yet? A No, sir.

Q Is he in the room? A No, sir.

Q Did he relieve you on the night that you were not there? A Yes, sir; the night I was not there.

Q Now, did you see Mr. Harris there while you were there? A I was there about the fourth or fifth night when I was there Mr. Harris and Mr. Gilpatrick—No, Mr. Gilpatrick and Mr. Umansky.

Q What? A They were in the back looking at some stock or something.

Q They were up there? A Yes, sir.

Q Did you permit them in there? A They were in there when I left.

Q That was the night you were there? A Yes, sir.

Q How long was that after the time you heard from Mr. Dixon that there had been a fire while he was there?

*The Court.* Not Dixon, Halpin.

*Witness.* Haplin.

Q How long was that when Mr. Harris and Mr. Umansky were there after— A I judge that was about two weeks after the fire.

Q Two what? A Two weeks after the fire.

Q Where is this man Halpin? A In the Salvage Corps now.

Q Beg pardon? A On the Salvage Corps.

CLIFFORD DIXON, recalled.

*By Mr. McCarter.*

Q Did you tell Mr. Harris that there had been a fire there two nights after the 9th of May or thereabouts? A Did I tell who?

Q Mr. Harris. A About a fire?

Q Now come, you understand. A I heard the ironing board was on fire.

Q Did you tell Mr. Harris about that? A Did I tell Mr. Harris about it?

Q Yes. A No, it was told to me first.

Q Did you then tell Mr. Harris about it? A It was told to me first.

*The Court.* No matter when you learned of it, the question is, did you tell Mr. Harris?

*Witness.* Did I tell Mr. Harris?

*The Court.* That is what was asked four times.

*Witness.* No.

Q You never spoke to Harris about it? A Mr. Harris told me first.

Q That is the first information you had from him? A Yes, sir.

Q Did you follow up the rumor? A Did I follow the rumor?

*The Court.* Don't repeat every question.

Q Don't you understand the English language? A No—yes.

Q You heard there had been a fire there two nights after the fire, and you say Harris told you that? A Yes, sir.

Q That is all you know about it? A Yes, sir.

Q And the only thing? A Yes, sir.

RICHARD CORLIES, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you attached to the Salvage Corps on the 9th of May, 1922? A Yes, sir.

Q And subsequent to a fire at that time which took place at Thirteenth avenue and Morris avenue, were you

on duty to watch the premises at any time subsequent to the fire? A Yes, sir.

Q What day? A May 11th.

Q What time did you go there? A Seven o'clock in the morning.

Q What time did you leave? A Seven o'clock at night.

Q Who relieved you? A Patrolman O'Brien.

Q Was anything removed from the premises, while you were there? A No, sir.

*Mr. McCarter.* I can't see the materiality of this, your Honor.

*Mr. D'Aloia.* We are leading up to the appraisal. The appraisal was made on the 12th and we want to show that everything was just as it was on the night of the 9th.

*Cross examination* by Mr. McCarter.

Q Did the building get afire while you were there? A No, sir.

Q You heard of it getting fire while Halpin was there, didn't you? A No, sir.

Q You didn't hear of that? A No, sir.

JAMES J. O'BRIEN, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q On May 9, 1922, were you attached to any particular department of this city? A I was attached to the salvage corps.

Q And after the 9th of May, after a fire at the corner of Morris and Thirteenth avenues, were you placed in charge of the premises any time subsequent to the extinguishment of the fire? A On the evening of May 11th, seven o'clock I took charge.

*Andrew W. McCabe, direct.*

Q How long were you there? A I took charge until seven o'clock in the morning, May 12th.

Q Who relieved you in the morning at seven o'clock? A Mr. Dixon.

Q Was there anything removed from there during the night while you were in charge? A No, sir.

Cross examination waived.

ANDREW W. McCABE, sworn on behalf of State.

*Direct examination* by Mr. D'Aloia.

Q Mr. McCabe, on or about the 9th of May, 1922, what was your business? A Manufacturer of ladies' underwear.

Q And how long have you been in that business? A Over twenty-five years.

Q Are you familiar with the value of stock in a manufacturing plant where they make ladies' underwear? A Yes, sir.

Q And were you about that time? A Was I familiar?

Q Were you familiar with those particulars at that time? A Yes, sir.

Q Were you familiar with the cost of equipment for a loft for a factory where they made ladies' underwear? A I believe so.

Q Well, you know so, don't you?

*Mr. McCarter.* Why don't you take the stand and testify for him?

Q Do you know it?

*The Court.* He said he does.

Q I am asking him whether he knows. Do you know the value of equipment, the cost of equipment for a place or a loft or a factory where they make ladies' underwear? A Do I know the cost of every part of equipment in there? I wouldn't say that I do.

Q You wouldn't say that you do? A No.

Q But do you feel competent to appraise a plant and the stock of a place where they manufacture ladies' underwear? A Yes, sir.

Q Did you go to the corner of Morris avenue and Thirteenth avenue on the 12th of May, 1922? A Yes.

Q Did you go to the Harris plant? A Yes, sir.

Q And did you make an appraisal of the stock? A Yes, sir.

Q Will you kindly describe to the jury on that map, or that plan, which is a plan of the loft, Exhibit S. A, what part of the loft contained machines and what part of the loft contained stock, and what kind of stock it was, and then tell us what you did? A In this room here there was contained shelving all the way around here containing laces and embroideries.

Q And in what kind of packages were they? A In paper boxes.

Q Did you appraise the goods in that room? A Yes, sir.

Q And did you appraise the goods outside in the main part of the loft? A Yes, sir.

Q Did you appraise the tables and the machines, the sewing machines? A Yes, sir.

Q Did you appraise everything that was in that place, stock and machinery? A Yes, sir.

Q Did you make notes? A Yes, sir.

Q Will you kindly tell us, from your notes— A Now, just a minute. You get rattled when you come up here. I had the notes on the way up here and I had them in this little book, and I thought, now, I will be called in a few minutes; I'd better be getting them ready but I can't find them at the moment.

Q Can you testify from memory?

*The Court.* Could you testify without your notes?

*The Witness.* I don't believe I could do that. I had them ten minutes ago, or fifteen minutes ago when I left the office, just as I made them up that day and when this last witness was called I thought it was just about time to look them up and I can't find them just for the minute. They are in that book, I think. If you will give me a few minutes I will look.

Q Yes, go ahead and look? A I have it here.

Q Now, look at your notes, please—

*Mr. McCarter.* I would like to cross examine the witness a little bit on his competency.

*The Court.* Yes.

*By Mr. McCarter.*

Q Mr. McCabe, how long have you been engaged in the manufacture of ladies underwear? A I don't like to tell how long.

*The Court.* Tell us; this is serious.

*The Witness.* Thirty-four years.

Q In Newark? A Yes, sir.

Q And you are today engaged in it also? A Yes, sir.

Q And do you have sewing machines? A Yes, sir.

Q And have you bought and sold sewing machines? A Yes, sir.

Q Where is your factory? A On the corner of Plane and Academy streets.

Q How many machines do you have? A About 160.

Q Separate machines? A Yes, sir.

Q Now, you went up there on the twelfth, did you, the twelfth of May? A I wouldn't say it was the 12th, I don't remember that exactly.

Q But you would say what you remember doing in this place? A Now, I did not make a note of the date. They called for me and I went up there.

Q Who called for you? A A couple of detectives and a man with a fireman's uniform on.

Q Yes, go on, who else? A That's all.

Q And he went up there with them to this place at the corner of Morris avenue and Thirteenth avenue? A Yes.

Q Anybody else there at the time? A Yes, there were several—it seemed like firemen. They had charge of the place and some employees; several employes of the underwear concern.

Q And how long were you there? A Oh, I will say about an hour.

Q As long as that? A Yes; about an hour.

Q Didn't you say to somebody it was only half an hour? A I don't remember saying anything like that.

Q Well, would you swear it was more than half an hour? A I think so; I will, yes.

Q Now, in that time you undertook to appraise what? A All the different boxes that were in there and embroideries and laces and made-up stock, and the machinery and so forth, raw materials around the cutting room.

Q You opened all the boxes? A I did not open all the boxes.

Q How could you appraise unopened boxes? A I don't claim that I could.

Q Most of the stuff was in boxes, wasn't it? A Yes, sir.

Q Did you see any silk manufactured or in process or in raw condition? A I don't remember seeing any silk.

Q Did you see any silk ribbons? A Yes, sir.

Q In boxes or outside of boxes? A Both.

Q Did you count the number of boxes in the place? A Yes.

Q You counted them? A We counted the boxes; yes, sir.

Q And is that the kind of appraisal that you made? A No.

Q What else did you do? A We simply counted the number of boxes and we just took and opened a number of them, right along the line and tried to get what the average would look like.

Q You assumed that the other boxes were similar to those that you opened? A We assumed that it was an average by taking them all along the line.

Q When you say 'we,'' whom do you mean? A Another gentleman in the underwear business.

Q Mr. Rosenstock? A Yes, sir.

Q So that you and he did it together, didn't you? A Yes, sir.

Q And you and he both generally appraised this thing and you and he both assumed generally that the boxes that you opened were representative of those that you did not open, is that right? A That's the idea.

Q Are there different kinds of laces, some more valuable than others? A Yes, sir.

Q Are there different kinds of embroideries? A Yes, sir.

Q Some more valuable than others? A Yes, sir.

Q Does the way that gowns are embroidered and laced, and otherwise made, make a difference in their value? A Absolutely.

Q Very decidedly, does it not? A Yes, sir.

Q A silk gown is worth more than a linen gown or a muslin gown? A Yes, sir.

Q How do you know which was silk and which was muslin, or which was linen? You don't know, do you? A Not all of them.

Q How do you know what kind of embroidery was on this gown or that gown; you don't know, do you? A I looked at them.

Q Well, those that you saw? A Yes, sir.

Q How many boxes did you open? A I would say more than half. Now, listen, it is not necessary to open all the boxes—

*Andrew W. McCabe, cross.*

Q I didn't ask you if it was necessary. We will come to that later.

*The Court.* Just answer the question.

Q You say you counted all the boxes? A Yes, sir.

Q How many were there? A I don't remember that now.

Q You don't remember that? A It was not necessary to know it.

*Mr. McCarter.* I move that that be stricken out. Now, Mr. McCabe, you answer my questions and nothing else; do you understand?

*The Witness.* Surely.

Q How many boxes did you open? A About half that were on the shelves.

Q And how many were there on the shelves? A I don't know.

Q And you were not more than an hour doing this thing, were you? A Not more than an hour.

Q Did you have any help, excepting Mr. Rosenstock, or whatever his name is? A Yes.

Q Who helped you, the fireman? A No, a couple of the young men around there would go along with me and open the boxes for me, and show me how many dozen were in this, that and the other.

Q In those boxes? A Yes, sir.

Q Was Mr. Harris there? A Yes, sir.

Q This gentleman sitting here (indicating the defendant)? A Yes, sir.

Q He saw what you were doing, didn't he? A I don't know.

Q Well, was he there? A He didn't speak to me.

Q Where did you see him? A I saw him over to one side.

Q Did you see that man there (indicating Mr. Umansky)? A Yes, sir.

Q He was there too, wasn't he? A Yes, sir.

Q Did you see Mr. Gilpatrick? A Yes, sir.

Q I suppose you know the difference between a night-gown, a skirt and a chemise, don't you? A Yes, sir.

Q How many envelope chemises were there?

*The Court.* Have you got a record there?

*The Witness.* I have just a total record.

Q How many envelope chemises were there? A I have no item of how many envelopes and how many gowns, and all that.

Q Do you know what an envelope chemise means? A I do.

Q What is it? A It is a garment that takes the place of a corset cover and a pair of drawers.

Q Well, it has a value, hasn't it? A It certainly has.

Q And, of course, the more you have, the more value, and the less you have the less value, and you haven't any idea how many there were, have you? A Not of any particular item, no.

Q Did you see any bloomers there? A Yes, sir.

Q How many bloomers were there? A The same thing about them, I haven't any item.

Q You don't know how many there were there, do you? A I can't tell you how much made up stock—

Q You don't know how many bloomers there were there, do you? A No, sir.

Q Do you think a bloomer is like an envelope chemise? A No, sir.

Q Worth the same thing? A No, sir.

Q Twice as many bloomers would occupy the same space as the given space of the envelope chemises, wouldn't they? A No, a box with a dozen bloomers in it would be about the same thing as a box of a dozen envelope chemises.

Q You mean to say that a combination like a chemise and a pair of drawers is no larger than a pair of bloomers? A It wouldn't make much difference.

Q You say it is no larger? A It wouldn't be much difference, it might be a trifle larger. If you had seen the two together, you would know.

Q Do you know girl's slips? A Girl's slips?

Q Yes, did you ever hear of them? A I heard of slips, yes. We call them "Princess Slips," I guess that's what you mean.

Q No, I mean just what I say. What is a slip, whether it is a princess or a girl. A That is a garment that takes the place of a corset cover and a skirt combined.

Q Now, how many slips? A The same answer as the other.

Q You don't know anything about that, do you? A No.

Q How many pajamas did you find? A None at all.

Q You didn't see a pajama, did you? A No, sir.

Q Didn't see a pajama, is that right? A No, sir.

Q Would you be surprised to learn that there were a great crowd of pajamas there? A Yes, I would be very much surprised.

Q Did you see any sateen skirts? A Yes.

Q How many? A Same answer.

Q You don't know, do you? A I do not.

Q What are sateen skirts? A A skirt made of sateen.

Q Sateen is more expensive than linen or muslin? A No, it might not be more expensive than linen; it is more expensive than muslin.

Q But not quite so expensive as silk? A No, sir.

Q You don't know how many of them there are, do you? A No, sir.

Q How many bloomers were there? A I don't know.

Q Did you ever hear of an assistant bloomer? A Assistant bloomer?

Q Yes. A That is a new one for me.

Q Assorted. I guess I have gotten that wrong. Did you see any assorted bloomers? A Oh, yes.

Q Do you know how many of them were there? A No, sir.

Q Did you guess there were so many or what? A Just estimated there were so many; that's all.

Q Did you see any samples, sample lines, so-called? A Yes, sir.

*The Court.* Mr. McCarter, I understood you were examining as to his competency.

*Mr. McCarter.* Yes, I want to show that he did not make an appraisal.

*The Court.* Well, assuming that he was competent, does not that go more to the weight of the evidence rather than his competency, his right to testify?

(Argument.)

*Mr. McCarter.* Will your Honor permit me to resume?

*The Court.* You may examine as to his qualifications, but you are now going more to the weight of his evidence than his competency.

(Further argument.)

*The Court.* His qualifications will depend upon his ability to make the appraisal and then when he comes to his appraised value, then you may attack that insofar as the weight of his evidence is concerned.

Q Do you know what medalions and braids are? A Yes, sir.

Q Did you see any of them? A Yes, sir.

Q How many?

*Mr. D'Aloia.* I think it is about time to stop this. I'd like to examine this witness in chief and

then Mr. McCarter can cross examine him to his heart's content.

*The Court.* I will rule that a man who has been in business thirty-four years is competent to give his opinion. Now, I will give Mr. McCarter the right of further cross examination as to how he arrived at his conclusions, but that will all go to the weight of his evidence.

*Mr. McCarter.* Then I respectfully pray an exception to your Honor permitting an expert to testify to an appraisal when he has never seen the property.

*The Court.* He can testify to what he has seen.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*By Mr. D'Aloia.*

Q You counted the number of boxes? A Yes, sir.

Q And how many of the number counted did you say you saw or opened? A Of the made-up stock I would say one-half.

Q Was Mr. Rosenstock with you? A Yes, sir.

Q Now, after you had examined that stock for one hour, what value did you find that stock to be?

*Mr. McCarter.* I object to it for the reason stated.

*The Court.* What is the question? The stock that he examined?

*Mr. D'Aloia.* All the stock in the place after his examination.

*Mr. McCarter.* As I understand that question he is now asking his opinion of the value of the whole contents, manufactured, in process and complete.

*The Court.* I sustain the objection.

Q What do you estimate the value of the stock up there to be? A Do you mean the whole thing complete or do you mean by different parts?

Q No, what you saw.

*The Court.* You may give your conclusion as to what you actually saw and give the value, and then Mr. McCarter may cross examine in detail as to how you arrived at that conclusion.

*The Witness.* Embroideries and laces, $10,000; made up stock—

*Mr. McCarter.* That is what you saw, now, as I understand it, not what you estimate the whole thing.

*The Witness.* No. Am I not allowed to tell you how I saw it, you cannot make me look almost like a fool.

*The Court.* You are not concerned with that at all and if you can't answer questions you will get off the stand.

*Mr. McCarter.* Mr. McCabe, his Honor has ruled, whether it makes a fool of you or doesn't, he has ruled, and we must abide by the ruling that you should limit your testimony to the stuff you actually saw, not what was in boxes unopened, but the stuff you saw.

*The Witness.* I didn't go about it that way, so I can't answer the question.

*The Court.* Didn't you see anything?

*The Witness.* I did.

*The Court.* Then, tell us about what you saw?

*Andrew W. McCabe, direct.*

*The Witness.* I saw a certain number of laces and embroideries and in one number that we counted, the number of boxes, we estimated that the average part of one box—

*Mr. McCarter.* One moment. I think the witness should be confined to your Honor's ruling.

*The Court.* Yes; maybe some boxes were empty.

*Mr. D'Aloia.* Then, the defendant gets the benefit of it, and I don't think there is any prejudicial about this method of appraising the stock.

*The Court.* That is not the question.

(Argument.)

*By Mr. D'Aloia.*

Q On that occasion was Mr. Harris there? A He was in the room.

Q Did he ask you to make an appraisal for him later on? A Yes.

Q Was he there while you made your appraisal? A He was.

Q Now, will you kindly pick out from those figures your estimate of the stock that you actually saw, if you can? A The total?

Q Yes. A $23,300.

*Mr. McCarter.* I object and move that it be stricken out.

*The Court.* No, he said from the stock he actually saw, $23,000.

*The Witness.* I'd like to correct that; I didn't see all of that. I estimated that. I am trying to say that and there is no use of my trying to say otherwise.

*The Court.* Then that will be stricken out.

Q From your notes and your figures there, pick out what you actually saw and give us your appraisal of what you saw? A I haven't got that.

Q Well, didn't you tell me that you saw half the boxes? A Yes.

Q Opened? A Yes.

Q Now, what is the value of half the boxes, those that you saw, opened and looked into? A Half the value would be $4,000.

Q Is that half the value of what you saw? A In the boxes where I looked through.

Q And that was half the total number of boxes there? A In one part of the factory.

Q What part of the factory? A Out in the main work room, the made up stock.

Q So that one-half that you saw of that made up stock, you will now say, was appraised by you at $4,000? A Yes.

Q Now, what other stock did you see? A Embroideries and laces.

Q Where were those, in the stockroom? A In the other room here.

Q Now, how many of the boxes in that room did you open, actually open and look into? A I didn't open a quarter of them.

Q Will you say that you opened a quarter of them? A Well, I can't accurately say it.

Q About a quarter of them? A I can't say that.

Q Well, can you give us the appraised value, estimated value, about, of what you actually saw?

*Mr. McCarter.* That would be utterly useless, your Honor, unless it appears what proportion it is.

(Argument.)

*The Court.* He call tell what he saw.

*Mr. McCarter.* But he can't tell what it is.

*The Court.* He said laces and embroideries.

Q Now, try to remember, if you can, Mr. McCabe, how much of the laces and embroideries you actually saw and

the value of what you saw? A I would say one quarter of them would be worth about $2,500.

Q Now, you did examine the machines? A Yes, sir.

Q All of them? A Yes, sir.

Q And you saw them? A Yes, sir.

Q Will you tell us the appraisal, your value? A $3,500.

Q Of the machines? A Yes, sir.

Q You saw the tables and the shelving and all the other things that were there in the loft? Now, will you give us your appraisal? A $1,800.

Q Did you see the piece goods? A That is included in what I gave you, you said everything else there.

Q And that is $1,800? A Yes, sir.

Q From your experience as a manufacturer of ladies undergarments, what is your value of the plant that you saw and examined during that one hour, including stock, fixtures, unfinished garments and raw material?

*Mr. McCarter.* I object to that.

*The Court.* On what ground?

*Mr. McCarter.* On the ground that he did not see but a quarter of the whole thing, of the stock, or the contents of the boxes and he has therefore no knowledge whatever of what is in those boxes, and that, therefore, it is impossible for him to give us an opinion as to the worth, concerning something he knows nothing about.

*The Court.* I will limit his conclusion to what he saw.

*Mr. McCarter.* Then, this question cannot be answered.

*Mr. D'Aloia.* I will take the Court's amendment to the question and reframe it.

*Andrew W. McCabe, cross.*

Q What was the value of that plant, including the fixtures and the stock that you saw and the machinery and the whole equipment? A $11,800.

Q You saw Mr. Harris about three months after the fire, didn't you? A I don't know just how long afterwards, sometime afterwards.

Q Several months after you made this appraisal? A Yes.

Q And did he want you to make an appraisal for him at that time? A Yes.

*Cross examination* by Mr. McCarter.

Q And you told him that you had not the time to do it and that no proper appraisal could be made of that stock, of that stuff in that loft in less than six days, didn't you? A That is about the time, yes.

Q And the appraisal you made was in an hour, wasn't it? A Yes.

Q And you said also that if you made an appraisal in six days you would have to have two men to help you, didn't you? A I said I would have to have two or three girls to help which we would take from our factory.

Q Now, what is this paper which you are looking at there? A (Hands paper to counsel.)

Q Will you point to me to anything on that paper that tells you how many things or articles you looked at in any given part of that room? A This is the part in where the embroideries and laces are.

Q Now, listen to my question, Mr. McCabe. What is there on that memorandum that enables you to say how many contents of boxes you examined in any place? A It is not on there. This is totals.

Q Those are totals on the whole business? A Yes, sir.

Q Then the values that you have given, of all those things you saw, is a pure guess, isn't it? A It is an estimate.

Q It is an estimate based on an assumption that you saw certain things? A Yes, sir.

Q You don't know how many you saw? A I knew at that time how many I saw.

Q I mean now you don't know; do you?

*The Court.* Are you going to use that paper in your examination.

*Mr. McCarter.* I am going to cross examine him.

*The Court.* It is not in evidence. He did not use that paper.

*Mr. McCarter.* I beg your pardon, he did use it.

*The Court.* Not for the figures.

Q Didn't you use that in giving the figures? A I used that when you made me split up my figures, I used it instead of the total.

Q When you told Mr. Harris, when he desired you to make an appraisal, and you said you hadn't the time and that it would take at least six days to do it, and then only you could do it in that time if you had two or three girls to help you, did you tell the truth? A Yes, sir.

Q How, then, did you make an appraisal in about an hour or a little less? A Can I tell, then, just what happened?

*The Court.* Answer the question.

Q No, how could you make an appraisal? A I was asked by these detectives and by this fireman, I think he is some head of some combustible department or something, to go up there and give an estimate of what I thought the value of that plant was, just give an estimate and I said I could not give any accurate estimate, and that no other living man could unless he took it down item by item and had it figured up, and I said—

Q And they told you to go ahead and do the best you could in an hour? A No, they said that what they wanted to do was to get a rough estimate of what that plant contained.

Q Who were these gentlemen that said that to you, were any insurance men there? A I don't think so.

Q Now, are you sure? A I say I don't think so, I will say no.

Q Well, were they in uniform? A In uniform.

Q All of them? A No, the detectives were not in uniform.

Q Who were the detectives? A I have even forgotten the names. There is one, sitting right here, I cannot call him by name.

Q This gentleman here (indicating Mr. Rothenberg)? A Yes.

Q Can you pick out any more? A And there is another gentleman who was in uniform.

Q This gentleman here (indicating Mr. Helfrey)? A Yes, sir.

Q Any more? A There was one more. That's him (indicating Mr. Cappadonna).

Q Are there different kinds of machines? A Yes, sir.

Q And these different kinds of machines have different values? A Yes, sir.

Q Did you recognize the different types of machines that were there? A Yes, sir; we looked them all over, the different kinds of machines.

Q Well, did you recognize the different types? A Yes, sir.

Q Are you able to tell us whether there were any number 107 W. I.? A I think there were; yes, sir.

Q How many? A I don't know that.

Q What value did you put upon the 107 W. I.? A I don't remember just what it was, now.

Q What operation does a 107 W. I. or W. 1 perform? A I just don't remember the numbers on them exactly now. I think that is a hemstitching machine.

Q Is it a zig-zag? A It may be a zig-zag machine; I don't know it by number.

Q You don't know whether it is a hemstitcher or a zig-zag? A I don't know them by numbers. That is just a designation of the sewing machine company.

Q Do you know how many 72 W's there were? A I haven't anything but the totals; that's all there is on this paper that you saw.

Q Do you know the value or price new of a 72 W.? A No.

Q Do you know— A (Interrupting) If I see that machine then I can tell, the price.

Q Did you know then, the price of the 72 W.? A Yes, sir.

Q What was it? A Now you are talking by numbers or figures which I don't claim to know.

Q I am asking you if you knew the value or price of the machine described as 72 W.? A No.

Q You do not? A We did not go through and designate how many 72 W's. and something else there was.

Q You recognize the fact that a 72 W. is a certain given type of sewing machine, don't you? A Yes, I suppose it is. There were all kinds.

Q Do you know that or don't you know? A I don't know them by number, no.

Q Do you know there is a type of machine which is described in the trade as 107 W. I., or W. 1, as I called it? A I have heard that; yes, sir.

Q Do you know another machine designated as #91, Line 1? A I know it is a Singer machine and I know it is a plain, one-needle machine.

Q All these machines have a different value and a different cost price? A Yes, sir.

Q Do you know what value you gave to the 91-1's that were there? A No.

Q Do you know how many there were? A Not now, no.

Q Do you recognize a type of machine known as a 52-15? A No, sir.

Q Never heard of them? A I may have heard of them, but I don't recognize just what it is now.

CHARLES G. ROSENSTOCK, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Mr. Rosenstock, what is your business? A Manufacturer of muslin underwear, silk and cotton underwear.

Q And where is your plant located? A We have four of them.

Q Where are they located? A One in New York, Newark, Poughkeepsie and Hackettstown.

Q Do you remember the 12th of May, 1922? A Yes, sir.

Q Did you accompany Mr. McCabe to the top loft of the building at the corner of Morris and Thirteenth avenues? A Yes, sir.

Q Did you make an appraisal? A Yes, sir.

Q How long have you been in the business of manufacturing ladies undergarments? A About thirty-five years.

Q Do you know the value of partially made up stock in that line? A Yes, sir.

Q And raw materials? A Yes, sir.

Q And made up stock? A Yes, sir.

Q Do you know the values of fixtures and machines used in a plant where such garments are manufactured? A I do.

Q Now, did you examine the stock that was on hand up there on the twelfth of May? A I examined the

gowns and the chemises, I examined about two or three hundred boxes.

Q How many boxes were there altogether? A All together, on the shelf, I should say about fifteen to eighteen hundred, and about, I should say, one-third of them were empty.

Q That would leave 1,200 boxes filled up? A I didn't count them; I looked at the top of them and looked through some of them; I looked at the number and I counted 800 boxes full, I think.

Q Would the quantity in the boxes appear outside, on the labels? A The numbers.

Q And from what you saw on the outside of the boxes, could you tell, without opening the boxes, what was in there? A After I looked at the first number in the boxes, #248, if I looked at the garment I know 248 was that value, and if there were ten dozen or twenty dozen there; I knew 248 was the same value.

Q And that is why you simply opened the top box which simply gave you the number and then you counted the rest of the boxes and you knew the value of the garments you looked at, and you multiplied by the number of boxes in that column? A Yes, sir.

Q Is that the way you made your appraisal? A Yes, sir.

Q And the outside of those boxes had the same number? A Yes, sir.

Q And you went through the whole place that way? A Yes.

Q Now, after making your examination in the manner that you described, will you kindly tell the jury now what the value of the stock made up, the stock was, that you found up there?

*Mr. McCarter.* One moment.

*The Court.* Do you want to examine as to his qualifications?

*Mr. McCarter.* Yes, sir.

*Charles G. Rosenstock, cross.*

*By Mr. McCarter.*

Q Did you know that some of these goods were silk? A There was some in a trunk.

Q Is that all? A That's all.

Q You have stated that about one-third of the boxes were empty? A Yes, sir.

*The Court.* Mr. McCarter, this examination, as I take it, is for my benefit for me to pass upon the witness' qualifications. You are now cross examining him as to evidence that he might present.

*Mr. McCarter.* Well, your Honor, of course, the witness' competency is a preliminary question for the Court, but it is only whether he has manufactured and has a knowledge of the trade that this preliminary examination is made, only to satisfy the Court, to determine whether or not he is an expert. If he has not made the examination, if cross examination elicits the fact that he just guessed—

*The Court.* Suppose Judge D'Aloia by a hypothetical question asked him whether or not he knew the value of the merchandise that has already been testified to as being in this place, and he said yes, and that he was engaged in that business for thirty-five years. I could pass on his competency from that alone, and I could do that without going into the evidence as to the specific boxes.

(Argument.)

*The Court.* I am ruling on the competency. That is the question before me.

*Mr. McCarter.* I understand that, and one of the questions of competency is whether he knows or not.

*The Court.* The question is as to his general qualifications, and if you seek to impeach his testimony, you may do it on cross examination, but

you are going to limit the examination now to questions as to his competency.

*Mr. McCarter.* I respectfully request the right to find out from this witness, before he is permitted to testify, as an expert, upon the value of these goods, how many goods he saw and how many he didn't see.

*The Court.* That goes to the weight of the evidence.

*Mr. McCarter.* Of the goods he saw, how many he saw and how many he didn't see, and how far his estimate, therefore, is based upon surmise, guess and assumption, and how far it is based on observation.

*The Court.* You may do that at the proper time, but not on the examination as to his competency. You may do that on his cross examination at a later time.

*Mr. McCarter.* I except to this ruling of the Court.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Do you know the values of machines? A Yes, but not by numbers. I heard you question Mr. McCabe on numbers and I don't know them by numbers. I could tell you when I see the machines.

Q But those machines have numbers, haven't they? A Yes, but I don't remember the numbers. I can tell you what a hemstitching machine is, a zig-zag machine, a single stitching machine and a lace running machine, and I can tell you the value of it; I can tell you what a Singer

is, what a Wheeler & Wilson is, and what a Union Special is.

Q How long were you up there, less than an hour? A About an hour.

Q And did you ever appraise, with Mr. McCabe before? A No, sir; that was the first time I ever met the gentleman.

Q And does your ability to form an estimate of the value of the goods depend upon your knowledge of what the goods are? A What they are worth, how much it costs to manufacture and what they are sold at.

Q I suppose certain kinds of garments cost more to manufacture than others? A They certainly do.

Q Depending upon the character of the embroidery and the character of the laces? A Not always. The value of the garment may be considerably lower when it comes to the value of laces, but not the manufacturing part. You could put a fine lace on a garment and still it would not cost you much to manufacture, and you can put a cheap lace on a better garment and it would cost you more.

Q Does not the value of the lace go to the cost of the article? A Yes, sir.

Q Laces have different values, haven't they? A Yes, sir.

Q Therefore, the cost of the article would depend upon the character of the laces, wouldn't it? A Not always; no, sir. There may be more work, workmanship with a cheap lace, which would cost you more to manufacture with just a plain piece of lace.

Q So it depends both upon the character of the work and the kind of laces? A Yes, sir.

Q And so with the embroidery? A Yes.

Q And so with the material? A Yes.

Q And so with the quantity of material? A Yes.

Q Now, what was it that you saw on the outside of the boxes? A I looked on the outside of the boxes—

not on the outside—I looked on the inside of a few of all the boxes, and I looked at the numbers.

Q Where were the numbers? A On the outside of the boxes.

Q Then, you saw a number on the outside of the boxes? A Yes, sir.

Q What kind of a number do you mean? A Say 1746, a style number.

Q That number, how did you know what that number meant? A Well, I looked at one or two of the boxes and then I would see about ten or twelve dozen—six dozen in them—it must be the same number or they would not have the same kind of goods in them.

Q You assume that the same number meant the same line of goods always? A Yes, sir.

*Mr. McCarter.* I respectfully object to this witness being permitted to give an opinion on the value of this stock on the ground that he has already indicated that he did not know what the stock was.

*The Court.* Objection overruled.

*Mr. McCarter.* I except to the ruling of the Court.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*The Court.* I am passing upon his competency. You may cross examine as to the weight of the evidence later.

*Mr. D'Aloia.* Please read my last question. (Question read as follows: "Now, after making your examination in the manner that you described, will you kindly tell the jury now what the

value of the stock, made-up goods, the stock was that you found up there?")

*The Court.* I assume he is going to testify to what he saw.

*Mr. McCarter.* Then, he ought to be limited to what he saw.

*The Court.* It is not for me to formulate the question.

*Mr. McCarter.* Then, I object to it.

*Mr. D'Aloia.* If the Court please, I am going to insist upon this question.

*The Court.* Give me a citation that justifies your contention.

(Argument.)

*The Court.* I am ruling on a question of law and I cannot assume anything.

Q Will you give us the value, then, Mr. Rosenstock, of what you actually saw? A About $2,000.

Q Now, assuming that the stock in that place, as appears here in the evidence of the foreman, included ladies' nightgowns, chemises, camisoles, bloomers, drawers, children's nightgowns, petticoats, pajamas and of those articles there were 2800 dozen, about, made up, what would you say was the value of 2,800 of these articles that I have enumerated.

*Mr. McCarter.* I object. How can he tell how many were pajamas, how many were silk camisoles, and how many were other things?

*The Court.* Objection sustained.

Q Can you give us the value of what you saw in the line of machinery? A Yes, sir.

Q And the fixtures? A Yes, sir.

Q Give us your estimated value? A About $3,500 worth of machinery, fixtures about $600.

Q And the stock that you actually saw you say would be worth about $2,000? A That is made up stock.

Q How about the stock that was not made up, or in the process of being made up?

*Mr. McCarter.* That you saw.

A About $200.

Q What was the value of the plant, including all the stock that you saw? A That I saw?

Q Yes, that you saw and excluding what you didn't see? A About $8,000.

*Cross examination* by Mr. McCarter.

Q How did you reach that, Mr. Rosenstock? A Well, I have taken $2,000 worth of laces, I saw. I am taking about $2,000 of made up stock and I am taking $3,500 worth of machinery and I am taking $600 for the fixtures and about $200 in process—one minute—then I seen about $1,200 worth of cotton goods that was not made up laying in a case.

Q How many made up goods do you say you saw? A Of the boxes I opened and seen, I should judge about $2,000.

Q The number I am asking you about? A How many numbers? I seen, counting on the shelves—

Q How many garments did you see that you say are worth $2,000, in numbers? A That I opened, about 100 boxes. Some were empty, some had two pieces and some fifteen pieces.

Q Well, how much value per garment? A About $2,000 I seen.

Q How much value per article are you putting on those that you saw? A I figured I seen about—

Q How much value per article? That you saw? A I averaged, I have seen different things; I seen gowns and bloomers and corset covers—

Q Well, how much value did you put on the night-gowns? A About $9 a dozen. That is the retail price.

Q How much on the bloomers? A About $3.50.

Q How much on the camisoles? A About $3.50; that is a dozen.

Q A dozen? A Yes.

Q Now, these machines. Does their age have anything to do with their value? A Yes, sir.

Q Do you know how old those machines were? A Not by numbers.

Q Do you know how old those machines were? A No, sir.

Q Do you know their first cost? A Yes, sir.

Q Now, do you know a machine by the designation 107 W. I.? A I don't know any numbers. You can tell me what it is.

Q When you buy them how do you buy them? A Well, I don't buy them.

Q You don't? A No, sir.

Q How do you know their value if you don't buy them? A Because I see the bill for them.

Q Oh, that is where you got your values? A Yes, sir.

Q Just bills that you saw? A No, my brother does the buying and I see the bills.

Q Then all the knowledge that you have of machinery is what you have seen on the bills? A Yes, sir.

Q You have never bought any machinery? A No, sir.

*Mr. McCarter.* I move that his evidence concerning the value of this machinery be stricken out.

*The Court.* No. I think a man in business that uses the machinery after it is bought and knows the prices—I think I will allow that evidence.

*Mr. McCarter.* I except to this ruling of the Court.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Do you know how many hemstitchers there were there? A I can't recall.

Q Do you know how many zig-zags there were? A I can't recall.

Q Did you count them at the time? A At the time we counted them and put a value on them.

Q How did you put the value on them? A I knew one machine was worth $35 and I knew a hemstitching machine was worth $125, and I knew another machine was worth about $40 and that's the way I figured it.

Q Which machine was worth $40? A Well, a zig-zag machine is worth $45.

Q A zig-zag machine that was up there? A Yes, sir.

Q $45? A Yes, sir. I mean a zig-zag machine is worth $35.

Q Worth $35? A Yes, sir.

Q You have never seen this plant before you went up on this occasion, had you? A No, sir.

Q Now, after you had been up there you went to see Mr. Harris and made him an offer for his stock, didn't you? A I never had seen the man in my life before. I never seen the man before; I never seen him at all, not until I got to court yesterday.

Q Repeat the question— A No, sir.

Q Did you ever seen Mr. Harris after you had been to the plant and made this, what you call an appraisal, and make him an offer for his stock? A I never seen Mr. Harris until I came to Court yesterday.

*The Court.* Can't you answer that question yes or no?

*The Witness.* No, sir.

Q You say you were up there making the appraisal that was within a very few days after the fire, wasn't it? A On the 12th; yes, sir.

Q Now, didn't you go up there again about four or five weeks later? A I had not been in Newark since until I was called over here before the Grand Jury.

Q Didn't you go up there to the factory about four or five weeks later than the 12th of May and see Mr. Harris? A No, sir; I did not.

Q And didn't you on that occasion, offer Mr. Harris $30,000 for his stock? A I never seen Mr. Harris.

*The Court.* Answer yes or no.

*The Witness.* No, sir.

Q Was Mr. Harris there when you made the appraisal? A I didn't see him; I don't know the man and if he was there I didn't know who he was.

Q Now, you were here yesterday? A Yes, sir.

Q Did you speak to that man that is standing up there (indicating Mr. Umansky) in the corridor yesterday? A I spoke to him the corridor; yes, sir.

Q After he testified? A After he testified when we were going home I spoke to him.

Q Yes. A Yes, sir.

Q What did you say to him?

*Mr. D'Aloia.* I object to that.

Q Didn't you say to Umansky after he had testified, and after you and he had left the court room yesterday, "You had better be careful how you give evidence favorable to Mr. Harris or you may get in trouble yourself for smoking," or words to that effect? A No, sir.

Q You did not? A No, sir.

Q Anything of the kind? A I said something; yes, sir.

Q What did you say?

*Mr. D'Aloia.* I object to it. It is immaterial; I don't care what he said.

(Question withdrawn.)

Q Why did you accost Umansky? A He went home with me, he came over to me.

Q He came over to you? A Yes, when we were going home.

Q And didn't you also tell Umansky, at the same time and place, out in this corridor here, that you were sore at Mr. Harris because Harris had taken a shipping clerk from you.

*Mr. D'Aloia.* I object to that.

A I will answer that, no, sir; he never took a shipping clerk from us.

Q You did not tell him that? A No, sir; I don't know anything about it.

*Re-direct examination* by Mr. D'Aloia.

Q You remember when you made this appraisal? A Yes, sir.

Q Mr. Umansky was there? A Yes, sir.

Q And he helped you? A Yes, sir.

Q And he went with you? A Yes, sir.

Q All through the stock? A Yes, sir.

*Mr. McCarter.* Are you testifying or not?

Q And did he pull out the boxes? A Yes, sir.

Q What did Umansky do for you while you made this appraisal? A Why, I told him I would figure a garment and he will figure one—

*Mr. McCarter.* I object to what he told Mr. Umansky and move that it be stricken out.

*The Court.* Objection sustained.

*Mr. McCarter.* I move that the answer be stricken out.

(Stricken out by consent.)

Q Don't you tell us what you told Mr. Umansky, but tell us what Mr. Umansky, Mr. Harris' foreman, did while you were making the appraisal to facilitate your appraisal. A He told me the price of a garment and I said to him, "Figure that—"

*Mr. McCarter.* I object.

*The Witness.* I said, "I will figure it and you figure yours and I will figure mine," and we came out ten cents difference.

*Mr. McCarter.* As I understand it, he is giving a conversation between Umansky and himself in the absence of Mr. Harris. It is incompetent and I object to it.

*The Court.* I don't think he reached that. He simply reached where he figured the garment. I will allow it to that point.

*Mr. McCarter.* It is so difficult to understand the witness that I may be mistaken, but if he is permitted, in the answer he has given, to give testimony as to a conversation between Umansky and himself, I respectfully object to it and ask that it be stricken out and pray an exception to your Honor's ruling.

*The Court.* Read the question.

(Question read and last answer read.)

*The Court.* I will allow the figures.

*Mr. McCarter.* Your Honor refuses to strike out the evidence and I pray an exception.

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

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Was he with you the entire hour, Mr. Umansky? A He was around there, yes.

Q Was he with you while you were there? A Yes, sir.

Q And did he assist you during the whole time that you were making the appraisal? A Well, he didn't assist me all the time; no, sir.

Q But part of the time he did? A Yes, sir.

Q Now, with reference to the appraisal of the stock on the shelves in the boxes, did he assist you while you made that in your appraisal of all your stock? A He went with me; yes, sir.

Q He was with you? A Yes, sir.

Q What did he do while he was with you? Don't give us any talks between you and he, but what did he do, Umansky? A He just looked at the stock as I looked at it, as I counted the boxes and he stood there with me.

Q Did he make any notes? A No, sir.

Q Did you? A Not at that time.

Q When you both got through looking at the boxes and looking at the shelves, did you figure out the notes, both of you? A I counted how many boxes I found there and how many boxes were empty and how many of them had garments in and I figured 800 boxes.

Q And did you and he agree as to the number of boxes? A No, he didn't count them.

*Re-cross examination* by Mr. McCarter.

Q Who asked you to go up there, Mr. Rosenstock? A Detective Rothenberg.

*Mr. McCarter.* The State has requested the defendant, or rather the defendant's counsel, to pro-

duce, without subpoena, the insurance policies that were upon this property.

*Mr. D'Aloia.* Let me make this statement, Mr. McCarter, pardon me. The State stipulated with the defense, and it was agreed with Mr. Ruback, of the defense, that he would produce the policies and that we need not prove them, as we are ready to do, and I said, "All right; we accept the offer." And in compensation for that I let off six men, at Mr. Ruback's request, from a certain firm of accountants.

(Argument.)

*Mr. D'Aloia.* It was stipulated between us that we shall accept those policies.

*Mr. McCarter.* Subject to their materiality and relevancy. We produce them, but we say they are incompetent and irrelevant and the reason for that is the fact that the defendant here is Abraham E. Harris, and each of these policies is to Abraham E. Harris & Company, a corporation.

*The Court.* There is proof in the case that he is a member of that corporation.

*Mr. McCarter.* He is connected with it, but what his relation is does not appear.

*The Court.* I will let the jury pass upon that.

*Mr. McCarter.* Your Honor permits the policies to go in without any further proof?

*The Court.* I wouldn't go as far as that. If you want the policies proved—

*Mr. McCarter.* I don't want them proved.

*The Court.* I know, but Judge D'Aloia has stated it was stipulated that they shall be presented here and offered subject to the materiality and relevancy and I have ruled they are material and relevant.

*Mr. McCarter.* I therefore pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*The Court.* Do you insist on them being proved?

*Mr. McCarter.* Not at all.

*Mr. D'Aloia.* Therefore, the State offers in evidence all these fire insurance policies and it is admitted that they were in force and covered the stock of A. E. Harris Company, Inc., which was contained in the top floor loft of the building known as 204 Morris avenue, City of Newark, County of Essex, on the southeast corner of Thirteenth avenue, and that the total amount of the insurance is $45,750.

Twelve policies received in evidence and marked under one exhibit number, S. 8.

(The Court admonishes the jury.)

An adjournment was thereupon taken until Monday, November 20, 1922, at 10 A. M.

THIRD DAY.

Monday, November 20, 1922.
10 A. M.

Trial continued.

Appearances as before stated.

WILLIAM A. ROWENS, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q On the 9th of May, 1922, were you attached to the Newark Fire Department? A Yes.

Q What company? A Truck Company 3.

Q On the night of May 9, 1922, about 9 P. M., did you respond to that alarm of fire? A Yes, sir.

Q Where was the fire? A On the southeast corner of 13th avenue and Morris avenue.

Q Which corner? A Southeast corner.

Q Do you remember this 13th avenue side of the building wherein the fire was? A Yes.

Q Here is a plan showing the top loft and the lower end of the plan is the 13th avenue side of the building. There is a stairway represented there. Did you go up that stairway? A Yes, sir.

Q And do you remember getting at this entrance (indicating on map)? A Yes, sir.

Q Will you please tell the Court and jury what you did at that entrance in order to get inside? A Why, the captain ordered to open the door, and I broke a light of glass nearest the lock and put my hand in—

*Mr. McCarter.* I cannot hear a word you say. Can't you speak louder?

*Mr. D'Aloia.* Begin all over again and speak loud so Mr. McCarter can hear you.

*The Witness.* Why, the captain ordered to open the door, and I broke the light of glass nearest the

lock and put my hand in and turned the latch on the lock and opened the door.

Q What did that lead you to? A It led into a vestibule, or, it led to a fire door.

Q How was that fastened? A Why, that had a padlock on with a staple.

Q What did you do with that fire door, if anything? A Why, Fireman Eckel opened it.

Q Were you there? A Yes.

Q What did he do? A He put the pick of the axe in and pulled the staple.

Q Now, the door where you broke the light of glass, and you say you turned the latch after you opened the latch, did the door open? A Yes, by turning the knob on the door.

Q There was no key? A No, sir.

Q The rim lock was not locked, was it?

*Mr. McCarter.* I object to that, it is a leading question.

(Question withdrawn.)

Q How about the rim lock, was it locked? A No, sir.

Q And you got in? A Yes, sir.

*Cross examination* by Mr. McCarter.

Q Now, the outside door, the door that was nearest the landing way, had a glass sash in it, didn't it? A Yes, sir.

Q And you broke the sash and turned, put your hand in and turned the lock on the inside? A On the inside.

Q Now, don't you remember that the door was pryed open as well? A No, it was not pryed open.

Q Now, just recall. If you go up there and see the signs of the prying would you say it was not pryed? A I certainly would, because I opened the door.

Q When was your attention, since the fire, first directed to how you got into that building that night? A That night? Why, the captain ordered us—

*Mr. McCarter.* No, read the question.

(Question read.)

*The Witness.* The captain ordered us—

*The Court.* No, you misunderstand.

Q Just pay attention to the question? A I am.

Q When did you have your attention called to the method adopted by you in getting into that fire, that building that night? A Why, the captain ordered me right there.

Q Since the fire, since that night? A No time at all.

Q No time at all? A No, sir.

Q You haven't told anybody at all how you got into that place, 'til you told us here on the stand? A That night I did, but not since then.

Q Not since then? A No, sir.

Q (*By the Court.*) Did you say that you broke the glass and turned the knob, or turned the lock? A The knob on the night latch inside of the door.

PATRICK J. DONOGHUE, recalled in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Chief, is the officer in court to whom you gave this semi-consumed carton and the candle and float? A Sergeant Powers.

*Mr. D'Aloia.* Is Mr. Powers here.

*A Voice.* Yes, sir.

Q Stand up. Is that the gentleman? A Yes.

Q Will you kindly tell the jury if you know where these two cans were found? A They were found in the outside of this alley or vestibule.

Q Well, show us on the map with a pointer, please? A About here, in this part.

Q Will you put a little mark there, just a round ring? A Yes, sir.

Q Do you know what these cans contained? A Well, they smelled like gasoline—

*Mr. McCarter.* No, no, no.

Q Do you know what they contained? A Gasoline.

Q To whom did you give these cans after the fire? A Sergeant Powers.

Q Do you know where these bottles were found? A Yes, sir; on the shelves back of these.

Q Back of the bins? A Back of the bins on the shelves.

Q There are two empty bottles here; do you know what the two bottles that are filled contains? A Gasoline, as far as I know.

Q To whom did you give them? A To Sergeant Powers.

Q This pan and this rag, do you know where they were? A That was out here also.

Q What was the condition of the pans and rag when you found them? A There was gasoline in the pan and that was set in it.

Q How about this rag? A That was there, too.

Q And how much gasoline was in the pan? A Well, it either leaked out of the kettle or just enough to cover the bottom.

Q What was in the kettle? A The same thing, gasoline.

Q How much? A I should judge about one-third full.

Q And to whom did you give these articles? A Sergeant Powers.

Q I show you a bottle labeled "Empire Pure Ammonia," where was that? A I don't know whether that

was with the original bottles here or whether it was picked up back here.

Q Back of the bins. What was in the bottle?

*Mr. McCarter.* If he knows.

A I did not smell it.

Q To whom did you give this bottle? A Sergeant Powers.

*Cross examination* by Mr. McCarter.

Q When did you give all these articles that have been produced here to the Sergeant? A That night, about 10:30, I believe, about 10:30.

Q When were they taken out? A That night.

Q That night? A Yes.

Q Did you hear the man testify here that nothing was taken out of that place? A Yes.

Q What time were they taken out? A About 10:30 or 11 o'clock; I am not positive about the time.

Q Who took them out? A Sergeant Powers and Detective McGrath.

Q Now, I will look at the tea kettle first; that seems to be the one nearest to me; how do you know that there was gasoline in it? A I smelled it.

Q Could there have been kerosene? A Well, it was not kerosene; there is a distinction between the smell; it was not kerosene; as far as my knowledge goes it was gasoline.

Q To you it smelled like gasoline? A Yes.

Q The only basis for your conclusion was the fact that it seemed to you to smell like gasoline? A Yes.

Q Now, all these articles with the possible exception of one, as I understand it, were in what we call the office, that is, the room near 13th avenue? A No, they were not all in there; those bottles were in back of those shelves here; the can and other articles were here.

Q The two cans and tea kettle? A Yes, and pan.

Q Were in the office, so called? A In this part; I don't know whether it is an office.

Q Now, the three bottles were on the shelf? A Back here; there was a partition going to here; here is where the bins were in front, burning, and those were in back of the shelf.

Q Behind the burning? A Yes.

Q These three bottles? A Yes.

Q How close? A Well, they were together; there might be a little shift, like that; about like they are now.

Q Now, your conclusion as to the contents of those bottles is the same from the smell, and you say each one had gasoline in them? A Two of them; one of them is empty.

Q Oh, I see, one was empty, and it was empty at that time? A Yes.

Q And the other two you think from their smell had gasoline in them? A Yes.

Q Now, what was in one—one of these cans seems to be empty and the other one has something in it; did you notice that at the time? A Not particularly one empty; we smelled them.

*Mr. McCarter.* I move that be stricken out.

*The Court.* Strike it out.

Q Feel this; that seems to have something in it. A Both of them seem to have something in.

Q Now, this small bottle marked ammonia, where did you say that was? A I didn't say where it was; I didn't recall that bottle.

Q Did you ever see it before? A No, sir.

Q What? A Not that I recall.

Q You do not recall having seen that? A No.

Q Now, they were taking out, all of these articles how, in a box? A The sergeant and detective brought it out, I don't know whether it was in a box or not; I was not paying no attention to them.

Q You say you saw them take it out? A Yes.

Q Well, did they have them in their arms? A Well, they had them in their arms and in the pan as near as I can recall.

Q Had what in the pan? A Kettle.

Q And the other things? A In their arms.

Q Who had them in their arms? A Sergeant Powers.

Q In their arms? A Sergeant Powers and Powers and Sergeant McGrath, Detective McGrath.

Q Some had some and some another? A Yes, sir.

Q And they did not have any basket or boxes? A No, sir; not that I recall.

*Re-direct examination* by Mr. D'Aloia.

Q Will you kindly illustrate, now, how you found this pan and kettle, to the jury? A That was standing on the floor about there (indicating on map).

*Mr. McCarter.* What is that?

*Mr. D'Aloia.* Pointing to a point on the easterly side of the office, we will call it the office.

*The Witness.* And it was standing as this is (indicating).

Q And you say at that time the kettle was two-thirds full? A About one-third full.

Q And what was in the bottom of the pan? A Like the drippings from this.

Q What color was the fluid in the teapot? A Colorless liquid.

MICHAEL J. POWERS, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you attached to the Newark Police Department on May 9, 1922? A Yes, sir.

Q In what capacity? A Sergeant.

Q What precinct? A Detailed over to headquarters.

*Michael J. Powers, cross.*

Q On the night of May 9, 1922, about 9 P. M., did you go to a fire at the southeast corner of Morris avenue and 13th avenue? A I got to the scene of the fire about twenty-five minutes of eleven, around that time.

Q Whom did you find there? A The place was in charge of a policeman from the Fourth Precinct.

Q And did you see Chief Donoghue there? A I seen the Chief over at the firehouse over on Bruce street.

Q Did you receive any articles from these premises? A Yes, I received the container.

Q The container and candle? A Yes, sir.

Q What did you do with it? A I took charge of it.

Q What did you do with it? A I took it in the automobile with me.

Q And did you take it up to Headquarters? A Yes, sir; later.

Q Now, this can you see there and these bottles, did you take those? A Yes, sir.

Q Did you take them to Police Headquarters? A Yes, sir.

Q And they have been down to Police Headquarters since that time? A Yes.

Q Since the time you received them? A Yes, sir.

Q Did you bring them to court? A Yes, sir.

Q Whom did you give them to when you brought them to court, if you recall.

*Mr. McCarter.* You need not prove that, Judge.

Q Now, they have been in your care since the night you received them? A My investigation has been followed up by—

Q No, answer my question. If they have not, tell me the name of the person in whose care they were? A No.

Q Whom did you give them to? A I turned them over in the office of Captain Daly.

*Michael J. Powers, cross.*

Q Did you have all these articles, the basin, the pan, the tea kettle, the two cans and the bottles and the container? A Four bottles, two cans; one kettle and pan and a container.

Q Any candle? A A candle; yes, sir.

Q A float? A Yes, sir.

*Cross examination* by Mr. McCarter.

Q Do I understand that this little float was given you, Chief? A Yes, with the container, yes.

Q And the candle that is in the container? A Yes, sir.

Q Well, you seem to be in some doubt about it. A No, I want to look at the candle. I have never seen it since.

Q Now, this is the candle that you picked up that night, who gave you the candle? A Well, it looks like it.

Q Who gave you the candle? A Chief Donoghue.

Q Was it broken that way? A Well, I don't know.

Q You can't say now that that was the candle, can you? A I don't remember it being broken.

Q Your impression is that it was not broken, is that right? A No, I wouldn't say that; I don't remember. I can't say whether it was broken or not.

Q Now, the little float. That looks like the float? A Yes, it looks something like it.

Q Something like it. Now, you have identified these things to Judge D'Aloia and told him, as easy as rolling off a log, that they were the articles. When I asked you about it you seemed to be a little doubtful. Now, I want the facts. This is serious, and I want you to be careful about it, just as careful as you were before. Is that the float or isn't it? A I have never seen them since the day I turned them in and it looks just like it, yes.

Q Did it have a hole in the center or don't you remember that? A Yes, it looks just like it.

*Michael J. Powers, cross.*

Q This is what everybody has been calling the partially destroyed carton. That looks like it, too, doesn't it? A Yes; pardon me; yes, that is the ticket.

*The Court.* That ticket should not go to the jury.

*Mr. D'Aloia.* That is the one he put on there.

*The Witness.* That is my writing.

Q Whose writing is this, yours? A That is mine.

Q Where did Chief Donoghue give you these particular articles? A At the firehouse. He gave me this one at the firehouse; the other things were picked up at the factory.

Q The carton, the candle and the little float were given to you at the firehouse? A Yes, sir.

Q What is your name? A Michael J. Powers.

Q I see that this card that you say is in your handwriting says, "This part of container and candle were given to me by Fire Chief Donoghue, were picked up in a stockroom by him, taken to Headquarters by Sergeant Powers," and something or other "McGrath."

*Mr. D'Aloia.* Detective McGrath.

*Mr. McCarter.* I guess that's what it is, "Detective McGrath."

Q Did you take this to Headquarters? A Yes.

Q I thought you said that it was given to you at the firehouse? A I got it at the firehouse and took it to Headquarters.

Q Now, I want to know the facts, Mr. Powers, about this; you have stated very glibly on your direct examination to the Prosecutor there wasn't any question about it, that these things, this float and this candle were given to you by Chief Donoghue that night? A Yes, sir.

Q And that you gave them to somebody else and have never seen them since until they were presented here, is

that right? That's what you said on direct examination. A Yes.

Q Now, where did Chief Donoghue give you these articles? A At the firehouse on Bruce street.

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

Q And where were these other articles given to you? A They were picked up over—

Q Where were they given to you, these bottles and tin cans? A They were not given to me at all. Some of them I picked up myself.

*The Court.* Where, at the firehouse, at the plant or any other place?

*The Witness.* At the factory.

Q Which did you pick up yourself? A Some of these bottles—

Q Well, which ones? A Well, I can't say which ones.

Q You picked them up yourself? A Yes, sir.

Q Where did you pick them up? A I picked them up at the factory.

Q Oh, did you? Well, where in the factory? A I picked them up in the factory.

Q Well, whereabouts in the factory? A Right around here (indicating).

Q On the shelf? A Here where the fire was, right around here (indicating).

Q Behind the gas stoves? A I think that is a wood partition here (indicating).

Q Well, you are pointing right behind the gas stove, aren't you? A Yes, sir.

Q Right behind the gas stove? A Yes, sir.

Q Which bottles did you refer to? A These bottles here (indicating).

Q The three of them, the three that are fastened together? A I think he picked up three there and one was picked up outside in the stockroom.

Q I only want to know the ones which you picked up. Which did you pick up? A I picked up, I think, two bottles.

Q Which did you pick up? A I can't say which ones.

Q You can't say? A I can't say which ones.

Q Then, they were not given to you by Chief Donoghue? A No, I picked them up.

Q You picked them up? Two of the bottles, did you? A Yes, sir.

Q Then Chief Donoghue is mistaken when he stated he gave them to you? A Yes, but he was with me at the time.

Q At any rate you picked up two bottles? A Yes, sir.

Q From a shelf where you indicated? A Yes, sir.

Q And where did the third bottle come from? A The third bottle was there, was also picked up by somebody else; I think Detective McGrath picked up the other one.

Q Now, which were the two that you picked up? A I can't say which is the two.

Q After you picked them up, what did you do with them? A Took them with me.

Q Did Chief Donoghue have them in his hands at all while you were there? A I think he looked at them, I guess.

Q Oh, I don't ask you to guess; I ask you to get at those things right.

*The Court.* Answer yes or no.

A No.

Q And did you carry them away, those bottles? A Yes.

Q How? A I carried them in my hands.

Q The three bottles? A The two bottles.

Q And where did you take them? A Took them to Police Headquarters.

Q Were they corked? Now, do not look at them now. A They were something similar to the way they are now, that paper.

Q Paper in all three of the bottles? A Yes.

Q Now, about these two cans, what do you know about them? A I took them to Police Headquarters, too.

Q Where did you get them? A They were got in the factory.

Q What? A They were got in the factory.

Q Where did you get them? A I took one of the cans; I remember taking one of the cans.

Q You remember taking one of the cans? A Yes.

Q Where did you take it? A I took it to Police Headquarters; I took it out with me and put it in the automobile.

Q Which one, the taller or shorter? A I couldn't say which one.

Q Chief Donoghue did not have them in his possession, did he? A No.

Q Now, where did the other can come from? A The other can—the man that was with me took the other can.

Q Who took it? A The man that was with me.

Q (*By the Court.*) What was his name? A Detective McGrath.

Q Now, where did you find the can that you took? A Do you want me to show you?

Q Well, tell us first and show us later? A Well, it was picked up—I would call it the stockroom.

Q It was picked up in what you call the stockroom? A Yes.

Q Did you do the picking up? A No, I picked up one of the cans.

Q Well, where was the can that you picked up; you say it was in the stockroom? A It was in around here;

I could not say exactly, but it was in around here somewhere.

Q Well, do you call that the stockroom? You mean the office, do you not? A I couldn't tell whether it was the office.

Q I don't want to confuse you. I will explain the situation to you, because I am anxious to find out where it was. It is quite easy to get confused by a map, and that is the reason I asked you not to look at the map. Now, of course, we have the whole floor here; we go up 13th avenue and up the iron steps and enter; now, the evidence says that in this corner was what was used as kind of an office, desk or desks in there, and there was a partition with glass above, the wooden part being about four feet high; between it and the other, which is called in this case the stockroom. Now, do you remember those two compartments? A Yes.

Q Now, I ask you, to the best of your recollection, picturing the two compartments there, what we call the office and so-called stockroom, you picked up one of those cans in which of those two compartments? A I picked it up from right around here (indicating).

Q That would be in the office? A Yes, three-eighths—

*Mr. D'Aloia.* Southeast corner of the office indicated on the map.

A Three-eighths of an inch to a foot.

Q I am asking you whether you picked it up in the office? Southeast corner, you think of the office, that is quite clear in your mind? A Yes.

Q And you didn't see the other can picked up? A No, I didn't see the other can picked up; Detective McGrath picked up the other can.

Q Detective McGrath picked up the other can, but where he picked it up you don't know? A No.

Q Now, what time was it that you found these cans—this can and picked it up and what time was it, to the

best of your recollection, when you found the two bottles and picked them up? A The bottles were picked up first.

Q Yes. A As near as I can remember.

Q I ask you what time it was? A It was about ten—5 or 10 minutes to 11.

Q So it had gotten to nearly 11 o'clock before you found or discovered either the bottles or the can, is that right? A Yes.

Q You had remained there all the time at the fire? A What do you mean; I do not understand you.

*The Court.* He testified he got there at 25 minutes to 11.

Q Oh, you didn't get there until 25 minutes to 11? A Yes, around that time.

Q And did you carry those two bottles and the one can right away or did you leave them anywhere? A No, I didn't leave them anywhere.

Q As soon as you saw them you picked them up and carried them downstairs in the automobile, is that right? A Yes.

Q And the other man, McGrath, came with you, or did he come later? A Yes, he took the bottles.

Q With you? A Yes.

Q The same time? A The same time.

Q But where he found what he had, you don't know? A Well, I couldn't tell you just exactly; no, he told me; I think—

Q Never mind what he told you. Did you ever have anything to do with that tea kettle? A Yes.

Q What did you have to do with that and the container in which it sets? A I took them to Police Headquarters, also, with the others.

Q Did you find that? A Yes.

Q Where did you find that? A I think it was the Fire Chief Donoghue picked that up.

Q Oh, you told us just now you found it? A No, I didn't find it.

Q What? A No, I didn't find it.

Q Why did you say you did? A I took it to Police Headquarters.

Q What? A I didn't pick it up.

Q I asked you if you found it and you said you did; that was a mistake? A Yes.

Q All you know it was given to you to take to Police Headquarters? A Yes.

Q Who gave it to you? A That was Chief Donoghue.

Q Did Donoghue come with you to Police Headquarters? A No.

Q And to whom did you deliver the articles that you had at Headquarters? A I turned them in to Captain Daly's office, Captain Daly.

Q You delivered that to Captain Daly? A Yes.

Q That night? A That night, yes.

Q What headquarters do you mean, the Precinct Headquarters or the Headquarters at the City Hall? A Police Headquarters.

Q At the City Hall? A Not at the City Hall, this is back of the City Hall on Franklin street.

Q Yes, down on the corner of Broad and Franklin. So they were brought down to Police Headquarters, back of the City Hall, by you, in the automobile that night and delivered in custody of Captain Daly, is that right? A Yes.

Q And you have not seen any of these things from that time to the present time, is that right? A No.

*Re-direct examination* by Mr. D'Aloia.

Q When you got to this factory at 25 minutes of 11 was Chief Donoghue there? A No, sir.

Q He was not? A No.

Q Did he come there after you got there? A We went over to the firehouse to see him.

*Michael J. Powers, re-direct.*

Q And did he come back to the factory with you? A Yes.

Q Now, these different articles that you say you found there, who pointed them out to you? A Chief Donoghue.

Q And you found the bottles on the shelves back of the burning bins because Donoghue told you they were there?

*Mr. McCarter.* I object.

*The Court.* Objection sustained.

Q Did Donoghue tell you where the bottles were?

*Mr. McCarter.* I object.

*The Court.* Yes, if he knows.

A Yes, he knew where the bottles were.

Q Did Donoghue tell you where the bottles were? A Yes.

*Mr. McCarter.* I object to that as leading.

*The Court.* I will allow the question.

Q Did Donoghue tell you where the can was and the kettle? A Yes.

Q So that when you told Mr. McCarter that you found these things you meant—

*Mr. McCarter.* I object.

*Mr. D'Aloia.* Let me finish.

Q —when you told Mr. McCarter that you found these things you mean to tell him that Chief Donoghue pointed them out to you, is that so? A Yes.

*Mr. McCarter.* I object.

*The Court.* He has answered.

Q Did you find any of these things with your own eyes? A Yes.

Q What? A Some of these bottles.

Q Well, did you find them or did Donoghue tell you where they were?

*Mr. McCarter.* I object. He cannot contradict his own witness.

Q (*By the Court.*) What did you mean by finding? When you say you found this or found that, what do you mean, that you found them without anybody showing you, or that you simply walked on them and picked them up; now, which is it? A I think we were together at the time; I think Chief Donoghue told me about the bottles and I do not know whether he seen them before or not, but we probably seen them at the same time.

Q Now, forget that you are Sergeant of Police; tell us exactly what you did up there; do not claim any of the credit if it is not coming to you; did you find any of these bottles; yes or no? A No.

Q And this container and the kettle and the float was given to you by Chief Donoghue at the firehouse? A Yes.

Q Was Detective Rothenberg at Police Headquarters when you brought these articles in? A No, sir.

Q Did you label them? A Yes.

Q All of them? A Yes.

Q And all the labels state where—

*Mr. McCarter.* I object to what the labels state.

Q Well, you label all of them. I will withdraw that. A Yes.

Q Did you see Detective Rothenberg that night while you were labeling the articles you brought at Police Headquarters? A No.

Q Did you see him at all? A No.

Q Who was at Police Headquarters while you were labeling the articles? A The Lieutenant in charge.

Q (*By the Court.*) Who is he?

*Michael J. Powers, re-cross.*

Q (*By Mr. D'Aloia.*) We want names. A Lieutenant Callen.

Q Who else was there while you were labeling these articles? A I don't remember anybody.

Q What was done with the articles after you labeled them? A They were left in the office, in the office of Captain Daly.

Q Well, who was there at the time you left them in the office with Captain Daly? A Lieutenant Callen.

*Re-cross examination* by Mr. McCarter.

Q Now, look here, you are a sergeant? A Yes.

Q Now, don't let us forget our titles, as sergeant are you intelligent enough to understand what you mean by the word "find"? A Yes, certainly.

Q Well, why did you tell me, Mr. McCarter, that you found certain articles and told Judge D'Aloia that you did not find them; which is right, which is right? A Which is right?

*The Court.* You can explain that, if you want to. Which is right? You did find them or didn't find them?

A I didn't find them from my own knowledge; I got the information from somebody else.

Q Why did you tell me that you yourself found two bottles on the shelf behind the gas range and picked them up and carried them away and that you yourself found one can in the corner of the office; why did you tell me that, Sergeant? A Well, as near as I can remember, I picked them all up from the knowledge what I got from Chief Donoghue.

Q No, you are not answering my question. Of course, the Prosecutor has reminded you of that now, but I am asking you why you told me that you yourself found two bottles behind the shelf on the gas stove and you yourself found one can in the corner of the office, why did

you tell me that? A Well, I picked them up; I don't know who gave me the knowledge.

*The Court.* No. Did you understand what was meant by "finding," or what do you mean; were you the Christopher Columbus in this or did somebody tell you?

A Well, as near as I can remember, the Fire Chief told me about it.

Q Well, you do not remember very much about it? A I do.

Q Well, why did you say "as near as I can remember"? A Well, I did not rehearse the thing.

Q No, and why did you tell me you found them? A Well, I couldn't say that; I couldn't—the Fire Chief probably gave me the knowledge.

Q Won't you please pay attention to my question; why did you tell me you found them? A Well, I was the one that picked them up.

Q Is that the best answer you can give? A Put that question again.

Q All right; once more, you are a sergeant? A Yes.

Q A big man. Why did you tell me you found them? A I don't remember telling you that I found them.

Q You don't? This morning here, you don't remember? A I don't remember telling you that I found them.

Q You do not? A No.

Q Didn't you tell us, on your direct examination, that you did not see Chief Donoghue at the fire? A I was not at the fire.

Q Well, at the place where the fire was? A No; I didn't tell you that.

Q You didn't? A No, I didn't see him when I got there first.

Q How long were you there? A About twenty-five minutes or twenty minutes; around there, twenty or twenty-five minutes.

*Michael J. Powers, re-cross.*

*Re-direct examination* by Mr. D'Aloia.

Q How far is the fire from the firehouse? A About 200 yards.

Q When you got to the fire first, Donoghue was not there, was he? A No, sir.

Q Where did you go from the fire? A To the firehouse.

Q Where did you go from the firehouse? A Back to the fire.

Q With whom? A With Fire Chief Donoghue.

Q And it was after you got there with Chief Donoghue that these articles were found, did you say? A Yes, he was with me at the time.

Q Then, did you go back to the firehouse? A No.

Q Where did he give you the carton and the candle and the float? A At the firehouse.

Q Before you returned to the factory with him? A Yes.

Q Then you went from the fire to what place, after getting these articles? A Police Headquarters.

*By the Court.*

Q Whether you discovered them or whether they were pointed out to you, were these bottles and cans and the kettle and the other pan at the plant? A At the plant; yes, sir.

Q Did you see them there? A Yes, sir.

*Re-cross examination* by Mr. McCarter.

Q Which did you get first, the carton or the bottles? A I got the container first.

Q And where did you get them? A At the firehouse, I told you that two or three times.

Q You remember that, do you? A Yes.

Q The Chief brought them around there, did he, to the firehouse? A Yes, the Chief done that.

Q Before you had been to the fire at all? A Before I had been to the fire—I told you I was never at the fire; where the fire was.

Q I mean the place where the fire was, before you had been to the place where the fire was, the Chief brought the container and the candle and the float to you there at the firehouse? A No, he didn't bring it to me there; I got it there; it was handed over to me at the firehouse, at the firehouse.

Q You mean the engine house? A Yes, sir.

Q So, that was before you had been to the factory at all? A No.

Q How many times were you at the factory? A What do you mean, how many times?

Q That night, were you at the factory? A How many times?

*The Court.* Yes.

*The Witness.* I was there twice. I went there and remained about five minutes and then I went over to the firehouse to see the Fire Chief.

Q Then you came back? A Then I came back to the factory.

Q Now, after—was it before or your first visit to the factory that the Chief gave you the carton? A No.

Q It was after your first visit? A After my first visit, yes.

Q Had you seen the bottles, then? A No.

Q Why did you leave and go to the firehouse? A Because I wanted to get the particulars of the case.

Q The particulars of what? A The particulars; I was given the case that the fire was suspicious—

*Mr. McCarter.* No.

*The Court.* Just answer the question.

Q I want to know why you went back to the firehouse after you had been to the fire.

*Mr. D'Aloia.* Not back to the firehouse. This is the first time he was to the firehouse at all.

*The Court.* If he goes to the firehouse now it will be his first time.

(Argument.)

Q Where did you go to the factory from? A Police Headquarters.

Q At City Hall? A Yes, sir.

Q And you stayed there five minutes? A Yes.

Q Then you went to the firehouse? A Yes, sir.

Q And you stayed there how long? A At the firehouse, you mean?

Q Yes. A Probably two or three minutes.

Q And while you were there the Chief gave you the receptacle and the other matters there? A Yes, sir; you say "the receptacle and other matters"—nothing—you said it very low, you say the receptacle and the other matters—I just got this container and the candle.

Q And the float? A Yes, sir.

Q At the firehouse? A Yes, sir.

Q And then you went back to the fire? A Yes.

Q To the factory? A Yes, sir.

Q Alone? A No.

Q With the Chief? A Yes, the Chief was with me.

EDWARD A. McGRATH, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Mr. McGrath, on the 9th of May, 1922, were you a member of the Newark Police Department? A I was.

Q And in what capacity were you a member of it? A Detective.

Q Where? A Police Headquarters.

Q On the night of May 9, 1922, did you have occasion to go to the southeast corner of Morris avenue and Thirteenth avenue? A I did.

Q For what purpose? A To investigate a fire.

Q Who went with you? A Sergeant Powers.

Q Did you go directly to the place where the fire had been? A We did.

Q And how long were you there? A About five minutes.

Q Then, where did you go? A Over to the firehouse.

Q Who went with you? A Sergeant Powers.

Q And whom did you find at the firehouse? A Chief Donoghue.

Q Did you talk to him? A We did.

Q Did he give either you or Powers anything at the firehouse? A He did.

Q What did he give you? A He gave us a container with a candle and a float in it.

Q Do you see it here? A I do.

Q Those three articles there (indicating)? A Yes, sir.

Q Now, after you and Powers had received them from Donoghue, where did you go? A We took Chief Donoghue in the machine over to where the fire had been.

Q Did you go up into the loft? A We did.

Q Did you examine the loft? A Yes, sir.

Q Who examined with you? A Sergeant Powers.

Q And who else was there? A Chief Donoghue.

Q Where were these cans when you got there with Chief Donoghue and Powers in the loft? A The cans were in the office.

Q Will you point out on the map where the office is and where the cans were? A The cans were right in here (indicating.)

*Mr. McCarter.* The southeast corner of the office.

Q Where was the pan and this kettle, if you recall, when you got there with Chief Donoghue from the firehouse? A That was in the office.

Q Point out again, please, where the pan and the kettle were? A (Indicates on map.)

Q Where were these bottles when you got to the loft with Chief Donoghue and Powers? A The bottles were in back of the shelves, right in back here (indicating).

Q You mean the shelving right in back of the bins that were burning?

*Mr. McCarter.* Please don't lead him.

Q Where were the bins that had been burning or had been burned? A Right back of the X's here (indicating).

Q And the bottles were on the shelving directly in back of those? A They were.

Q Where was this bottle, if you recall (indicating)? A That bottle was in the office.

Q What part of the office? A In the office with the can.

Q What was the distance between these cans and that kettle and that pan and that bottle, if any? Were they all together or apart? A Close together.

Q What was done with these articles? A The articles were taken to Police Headquarters.

Q Who took them? A Sergeant Powers and myself.

Q Who removed the cans and the pan and the kettle from the office? A Sergeant Powers and myself.

Q Who removed the bottles from in back of those shelves? A Sergeant Powers and myself.

Q And this other bottle here that was in the office; did you take that downstairs? A Yes, sir.

Q And put that in the automobile? A The machine.

Q And where did you go with them? A Police Headquarters.

Q Who was there when you got there? A Lieutenant Callan.

Q Who labelled them? A Sergeant Powers.

Q What became of them after they were labelled? A They were locked up in the office and turned over to Detective Cappadonna and Rothenberg, the next morning.

Q Who locked them up in the office? A Lieutenant Callan.

*Cross examination* by Mr. McCarter.

Q You recognize distinctly the candle? A I do.

Q Was it broken at the time? A The candle was broken.

Q It was broken? A Yes.

Q Do you recognize the float? A I do.

Q What is there about the float that you are able to recognize? A Just from its appearance it was a float exactly like that.

Q A white float? A Yes, sir.

Q And as I understand it some of the bottles, the bottles were carried by you and some of the cans, including the tea pot, some by you and some by the sergeant? A Yes, sir.

Q And did the chief go down to headquarters with you? A No, sir.

Q I notice on one of these cans, the smaller of the two, is a label, "One gallon benzine, 35¢ a quart, turpentine" and then some figures. Was that on there when you took it down to headquarters? A I wouldn't swear to that.

Q Don't you know? A I wouldn't swear to it.

Q Well, do you remember seeing that before? A No, I do not.

Q What? A I do not.

Q See if you recognize the writing; it is not the sergeant's writing, is it?

*The Court.* Referring to the small tag?

*Mr. McCarter.* The small tag on the smaller pan.

*Witness.* No, that is not the sergeant's writing.

Q What is your recollection, did you ever notice that before at all? A No, sir.

Q You never noticed it before? A I may have, but I don't remember.

Q Which of those cans did you carry? A I carried the smaller can.

Q Was it about the same weight as it is now? A Just about.

Q The larger can seemed to have more liquid in it? A I did not carry the larger can.

Q Where were you the next morning? A Police Headquarters.

Q Did you see these articles delivered to Rothenberg the next morning? A I did.

Q What time? A About nine o'clock.

*Re-direct examination* by Mr. D'Aloia.

Q Who delivered them to Rothenberg? A I opened the office door and pointed the stuff out to Rothenberg and Cappadonna.

Q You opened the office door? A Yes, sir.

Q And did you lock the office door the night before? A Lieutenant Callan did.

Q Were you with him? A I was.

Q Who had the key? A Lieutenant Callan gave me the key.

Q And did you keep it all night? A I turned it over to the lieutenant downstairs.

*Re-cross examination* by Mr. McCarter.

Q Was Donoghue there in the morning? A No, sir; not at the time I was there. He might have been there later.

*Daniel Rothenberg, direct.*

MAX WINANS, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q On May 9th, 1922, and on May 10th, 1922, were you attached to the Newark Police Department? A I was, sir.

Q What capacity? A Custodian of property.

Q On the morning of the 10th of May, 1922, did you receive the articles you see there on the desk, two cans, four bottles, a container, candle, float, pan and tea kettle? A On the morning of the 11th.

Q Whom did you receive them from? A From Detective Cappadonna.

Q Where? A In my office downstairs at Police Headquarters.

Q What did you do with them? A Placed them all in one coop, tied them up and put them away and locked them up.

Q And they have been in your custody ever since? A Up until last week when I brought them to the court house and turned them over to Lieutenant Hargan.

Q What day last week? A On the fifteenth, the day the trial started.

Q You mean last Wednesday morning? A Yes, sir.

Q And you got all these articles here? A Yes, sir.

Q And the container and the candle and the float? A Yes, sir; all these articles.

Cross examination waived.

DANIEL ROTHENBERG, sworn on behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q On May 9th, 1922, were you a member of the Newark Police Department? A Yes, sir.

Q In what capacity? A Sergeant.

Q Sergeant of Detectives? A Yes, sir.

Q Where were you located? A Police Headquarters, Newark, New Jersey.

Q Do you remember being assigned to this case? A Yes, sir.

Q When? A On the morning of May 10th, nine o'clock in the morning.

Q Was there any other detective assigned with you? A Detective Cappadonna.

Q These two cans and these four bottles, that tea kettle, and pan, this container, candle and float, did you see them on the tenth of May, 1922? A Yes, sir.

Q At what time? A About 9:30 or ten o'clock.

Q What did you do with them, if anything? A We left them there that day.

Q Left them where? A At Police Headquarters, in a room known as the lieutenant's room, at Police Headquarters on the third floor.

Q Locked in there? A Yes, sir.

Q Who locked the door? A I presume the lieutenant in charge.

*Mr. McCarter.* I object—

*The Court.* Never mind what you presume.

A The man in charge always locks the door; the lieutenant in charge always locks the door when they are through there for the day. During the night they are in charge—

Q Did you see the door locked? A I did not.

Q When did you next see these articles? A The following morning, the morning of the 11th of May.

Q And what did you do with them, if anything? A We turned them over to the property clerk, Mr. Winans.

*Cross examination* by Mr. McCarter.

Q Were you in charge of this matter? A What matter, Mr. Counselor?

Q This investigation? A Yes, sir.

*Daniel Rothenberg, cross.*

Q Who was working with you from the insurance company? A From the insurance company? There was nobody working with me, but I noticed one representative of the insurance company, some agent there.

Q What is his name? A By the name of Rutenberg.

Q Rothenberg? A Yes, sir; something like that.

Q What is your name? A Rothenberg, R-o-t-h-e-n-b-e-r-g, and his name is R-u-t-e-n-b-u-r-g. His name is almost similar to mine but we are practical strangers.

Q Was he there on the tenth?

*The Court.* Where, Mr. McCarter.

*Mr. McCarter.* At headquarters.

*Witness.* Not at headquarters; I met him at the building at Morris avenue.

Q On the 10th? A On the 10th.

Q When did you see him at headquarters? A He might have come down afterwards.

*The Court.* No, did you see him?

*Witness.* I saw him at headquarters once.

Q Weren't you with him all day? A Not exactly all day.

Q Well, the better part of the day?

*Mr. D'Aloia.* I don't want to object but I don't think this is proper cross examination. Unless this insurance agent had something to do with these articles.

*The Court.* It is a matter of defense.

Q He was with you the better part of the day? A Yes.

Q Now, do you have a regular property room down there? A We have.

Q With a gentleman by the name of Winans, whose duty it is to take charge of these things and keep them in the proper room under lock and key? A Yes, sir.

Q And these articles were not put into the property room until the eleventh, were they? A Yes, sir.

Q That is a fact, isn't it? A Yes, sir.

Q And they got down to Police Headquarters to the best of your knowledge and belief, on the evening of the 9th? A During the night of the ninth.

GEORGE H. TEMMLER, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you called in to appraise the loss of the fire of the top loft of the building at the southeast corner of Morris avenue and 13th avenue, this city? A I was.

Q What day? A I believe on the 13th or 14th; that is, I was at the premises.

Q 13th or 14th of what? A May.

Q What year? A 1922.

Q And who asked you to make the appraisal? A Why, I was requested by Mr. Leber, attorney for Mr. Harris.

Q Who is Mr. Leber? A He is the counsel.

Q Counsel for whom? A Mr. Harris.

Q Did you make an appraisal? A I made an appraisal, yes.

*Cross examination* by Mr. McCarter.

Q What did you do with the appraisal; did you give it to Mr. Leber? A I think I did; I would not say positive.

Q Is it one piece of paper? A I have a copy of it here.

Q Have you; all right produce it. This is a copy of the appraisal? A Copy of the appraisal I made.

Q (*By the Court.*) When did you make it? A I believe on the 13th or 14th of May.

Q Now, put that back in your pocket so you will not lose that. Look at the one I show you and see if that is the appraisal you delivered to Mr. Leber? A Yes.

Q And that represents your appraisal of the property that was damaged? A Only.

Q Only? A Only.

Q It amounts to how much? A On the stock $1,576.-84, and on the fixtures and machinery $148.25.

Paper marked Exhibit D. 2 for identification.

FREDERICK J. GREENBERG, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you in charge of the collection of the rents on the building on the southeast corner of Morris avenue and 13th avenue, in this city? A I was.

Q You had a lease, I understand? A Yes.

Q And you collected the rent from the Harris concern? A I did.

Q On the 9th of May, 1922, had you collected the May rent? A I did for that month.

Q What day? A I guess the 2nd or 3rd of the month.

Q Was the rent for April paid? A Yes.

Q Did you have a conversation about the collection of the rent there with Mr. Hargan of the Prosecutor's office? A No.

*Mr. McCarter.* I object.

Q You never had a conversation with him? A May rent?

Q No, not the May rent, about the rent for that place? A Yes.

Q Since the 9th of May, 1922? A I don't know whether since then.

Q Well, it was not before then? A Well, it may have been, but I am not sure about it.

Q Now, wait a minute. Did you or did you not have a conversation with Mr. Hargan, the gentleman at my left, since the 9th of May, 1922, about the top loft of the building at the southeast corner of Morris avenue and 13th avenue in this city with reference to the Harris company; yes or no? A I may have, I wouldn't say.

Q Do you know Mr. Harris? A Yes.

*Cross examination* by Mr. McCarter.

Q I do not understand there is any confusion; you say the April rent was paid and the May rent? A The rents were paid.

*Re-direct examination* by Mr. D'Aloia.

Q Did you have any difficulty in collecting them? A In the beginning, yes.

*Re-cross examination* by Mr. McCarter.

Q What part of the beginning? A Oh, when Mr. Harris first went in.

Q When was that? A Oh, January, February and March.

Q The rent was payable— A On the 1st of the month, in advance.

Q And the April rent was paid when? A Oh, I suppose around the 10th or 11th; perhaps the 15th.

Q And the May rent about the 2nd or 3rd? A I think it was paid earlier.

Q Now, isn't it a fact that during the month of December, preceding this May, the rent for January and February and March were all paid at one time in advance? A No, the two months paid in advance; that is from January to February and middle of March. Two months were paid in advance, $350, and as the lease began on the 15th it left a half a month to be adjusted.

Q Now, isn't it a fact on the 20th of December through Feist & Feist you were paid in advance two

months' rent for January and February? A That is correct.

Q So that your rent for January and February was paid on the 20th of December? A Yes, that is correct.

Q Now, when was the March rent paid? A Towards the end sometime; I should think, maybe, around the 25th, around in there; I cannot say exactly.

*Re-direct examination* by Mr. D'Aloia.

Q And it was due on the 1st of March? A It was due on the 1st.

Q And did you ask for it several times between the 1st and 15th?

*Mr. McCarter.* I object.

*The Court.* I will allow the question.

A I did.

Q Now, the April rent, what day was that paid, if you recall? A Towards the end.

Q Did you ask for it several times during the month of April? A I did.

*Re-cross examination* by Mr. McCarter.

Q Do you remember that the month in which there was some delay in paying the rent you were having a dispute with Mr. Harris concerning a proposed reduction for services of some kind? A Mr. Harris attempted to deduct it; I had no discussion with him.

Q He wanted you to deduct what? A Why, I had the lower floor of that building; I shut down this plant I was representing, and my man there apparently made some arrangements with Mr. Harris' man to take care of the furnace, I think maybe two weeks or ten days, and Mr. Harris deducted $40 for his man's services, which I would not allow; that was all there is to it.

Q Are you sure it is $40? A I think it was $40.

Q Now, that was in March. A It might have been March.

Q Now, don't you know that the April rent was paid on the 8th? A I can't tell you. If you will let me explain I will explain the whole circumstances.

Q What? A On account of the rent situation.

Q Go on? A Mr. Harris went in there on the 20th of December and paid me two months in advance, January, February, and March 1st, the rent became due; I then wanted him to pay March rent and a half month of January, because there was half a month left out, which was to be adjusted, and Mr. Harris did not pay it; I went up several times and he paid no attention to it, and I wrote him a letter according to the lease the rent was due on March 1st, and if he did not pay it I would have to begin suit; I think he did, and the next month it was the same thing and then I think I started suit in May, but at any rate Mr. Harris thought he could do that, but I wanted it on the 1st, because I had to pay my own on the 1st.

Q Have you your account here? A No.

Q Don't you know that the rent was paid in April, on the 8th? A It may be; I cannot dispute that.

Q And when was the rent paid in May? A I think the 2nd or 3rd.

Q Now, when was the month in which there was this dispute? A I think that was in March.

Q And the adjustment for half a month—I do not understand? A Well, from the 15th of January to the 1st of February was a half a month; his lease began from the middle of the month, and I wanted him to bring his rent up to the 1st of the month to make it even.

Q When did the lease commence? A 15th of January, he paid me two months, so there was January, February and March there was two months and a half there and he paid me two months and he owed me a half.

Q Why didn't you bring up your account with you? A I was not asked to bring the account.

Q When did the Harris Company take possession? A They went in about the 20th of December.

Q And they made some improvements there? A They did.

Q Were you aware of what the improvements were? A No, not what they made.

Q Is this the lease? A That is the lease.

Lease marked Exhibit D. 3 for identification.

Q Now, when was the rent due next? A The 15th of January.

Q And he was to have the possession or the company was to have possession from sometime in December until the 13th of January without rent, is that right? A That is the idea, to make their improvements.

Q And what rent did they pay on the 20th of December? A Two months; $250, I think, in advance.

Q That would be from January 15th? A No, it was two months and he paid me from January 15th to February 1st—

Q Just a moment. On December 20th, he did not owe you any rent? A Yes, he was to pay when he signed the lease, two months rent.

Q And the rent was not to commence until January 15th? A January 15th.

Q So that on or about December 20th he paid you enough to cover the rent to February 15th, didn't he? A No, he paid me two months rent.

Q (*By the Court.*) What did that cover? A Just two months, February to March, and he owed me from January 15th to February 1st; there was two months and a half due but he only paid two months.

Q If on December 20th he paid you two months rent and rent was not to commence until January 15th, I am

asking you if is not a fact he paid you rent up to the middle of February?

*Mr. D'Aloia.* March.

Q The 15th of March; how could it be otherwise? A Well—

Q What? A Because he agreed to pay me from the 1st of the month; that is what I am explaining, I was to get the rent so much per month

Q Look at that lease? A I don't know whether the lease says the 15th; that was the adjustment we made.

Q The lease provided the rent was to commence in the middle of January? A Yes.

Q And December 20th he paid you two months rent? A Two months rent, yes.

*Re-direct examination* by Mr. D'Aloia.

Q On the 1st of March how much rent was due?

*Mr. McCarter.* I object. That is a conclusion.

Q Well, how much rent under the lease was due? A Well, there was February and March.

*Mr. McCarter.* Tell us by looking at the lease how much was due.

*Witness.* On the 1st of March, according to the lease, nothing was due, but he actually owed me $75.

Q For half a month? A For half a month, yes.

Q And is that the rent you brought suit for in March?

*Mr. McCarter.* I object.

A I think for two months I brought suit for $75 and $150; that made $225; I think, I cannot say positive about that.

*Frederick J. Greenberg, re-cross.*

Q Now, after you brought your first suit in March you got your money? A He paid it to the clerk of the Court.

Q Now April? A I think I brought suit again in April.

Q And after you brought suit in April he paid the clerk of the Court? A No, I think he sent me a check.

Q Was it after you brought suit? A Yes.

*Re-cross examination* by Mr. McCarter.

Q You contend that the rent was due on the 1st and he contended it was not due until the 15th?

*Mr. D'Aloia.* I object to that.

*The Court.* I will allow the discussion between the two.

Q Wasn't that the dispute between you two, that you contended that the rent for the half month between the 15th of March and the 1st of April was due on the 1st? A There was never any discussion, I went to Mr. Harris' office and saw his foreman.

Q I didn't ask you that. I asked you if it was not Mr. Harris' contention? A I don't know what his contention was, he paid the bill.

Q Did you stand by the lease? A I stand by the lease, excepting that half a month; that was not settled between us.

Q Do you say you did not get a check for $75 on the 15th of March for rent? A No, I wouldn't say I didn't.

Q Well, if you got a check on the 15th of March to the order of S. J. Greenberg, is that your name? A Yes, that is it.

Q Newark? A Yes.

Q For $75, and he had paid the $300 on the 20th of December, even on your contention, wasn't he paid up to the 1st of April? A Yes.

*Anthony C. Helfrich, direct.*

Q He had, hadn't he? A Yes.
Q If that is a fact? A Yes.
Q Now, will you say it is not a fact? A No, I would not, I have not my account here.
Q We have our cash book here? A That is probably correct.
Q And on the 8th of April you got a check for $150? A I probably did.
Q And on the 2nd or 3rd of May you got a check for $150? A Yes.

*Re-direct examination* by Mr. D'Aloia.

Q And on the 8th of April you recall you had already begun suit? A I brought suit twice; whether it was April and May or March and April, I can't tell you, but I know I did twice and he paid each time.
Q He paid each time after bringing suit? A Yes.

*Re-cross examination* by Mr. McCarter.

Q What Court was that in? A First District.
Q Both? A Both in the First.

ANTHONY C. HELFRICH, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q On the 9th of May, 1922, Helfrich, what office did you hold, if any? A Inspector, Bureau of Fire Prevention.
Q City of Newark? A Yes, sir.
Q Did you go up to the scene of the fire on the top floor of the building located at the southeast corner of Morris and Thirteenth avenues in this city? A I did.
Q When? A May 10th.
Q Did you go into the room known as the stockroom? A Yes, sir.
Q Will you kindly take the pointer and show me where that room is, if you understand that plan. A (Indicates on map.)

*Anthony C. Helfrich, cross.*

Q Now, I show you a photograph, S. 6. That indicates the southwest corner of the room. There is portrayed there, do you see it in the picture, a coat and a streamer. A Yes, sir.

Q Was that there on the 11th of May, 1922? A Yes, sir.

Q Did you do anything with those two articles? A Yes, sir.

Q What did you do with them? A On the twelfth I took them down and took them out to this table here (indicating).

Q To that table there? A Yes. And I wrapped them up.

Q Right back of where the gas plates are? A Yes, sir.

Q What happened then? A I laid them on the table.

Q And did you have a conversation at the time, when you laid them on the table, with Mr. Umansky, Mr. Harris' foreman? A Yes, sir.

Q What did you do next? A I told him—

Q Don't tell us what you told him. A I left them there.

Q When did you go back to the place? A Two days later.

Q Was the package there? A No, sir.

Q Have you been able to find the packages since? No, sir.

*Cross examination* by Mr. McCarter.

Q Why don't you take them away with you? A I had an important investigation to go on and I was busy at the time, and I thought I would leave them in Mr. Umansky's charge and there was also a man there from the Salvage Corps.

Q How many men were up there making this investigation? A Myself, Mr. Rothenberg, Mr. Cappadonna

and a man who was assisting us from the Arson Bureau of the National Fire Underwriters, New York.

Q His name is Rutenburg, isn't is? A His name is Rutenburg and Rothenberg is a police officer of the City of Newark.

Q Now, there were five or six of you up there? A A Well, I should call us four.

Q And who told you to wrap that coat and that streamer up? A Nobody.

Q But you did wrap them up? A Yes, sir.

Q Did you deem them of some importance? A Yes, I thought it would be important.

Q Now, this was what day? A The 13th of May.

Q And how big a bundle did that make? A Oh, an ordinary bundle, about that long (indicating) and about that much around (indicating).

Q What kind of a coat was it? A Sort of a gray coat.

Q And Mr. Harris' people were there? A When I wrapped it up? No, only Umansky.

Q Umansky was there? A Yes, sir.

Q He was the only one there? A Yes, sir.

Q Was the watchman in charge? A Yes, sir.

Q Who was there? A Mr. Dixon of the Salvage Corps.

Q You didn't give them to Dixon? A No, sir; Mr. Dixon was at the other end of the room at the time, but I told him about it.

Q Now, this thing seemed of enough importance to take down, this coat, and this so-called streamer and to wrap them up, and there were four of you there, including Rothenberg and Rutenberg— A I beg your pardon—

*The Court.* He is questioning your premise, Mr. McCarter.

*Anthony C. Helfrich, cross.*

Q Well, were you there alone? A You asked me how many men were investigating the fire and I said four, but you didn't ask me how many were there when I wrapped up the bundle.

Q How many were there when you wrapped up the bundle? A Mr. Umansky and Mr. Dolan of the Fire Prevention Bureau and myself.

Q Mr. Dolan, was he one of the four? A I said, three when I wrapped the bundle.

Q Was he one of the four? A No, sir.

Q So, there were five in charge of this investigation? A I should say so, if you want to include him.

Q Were there six? A I can't recall any more.

Q The investigation was under way? A Yes, sir.

Q And you deemed this quite important, this streamer and this overcoat? A Yes, sir.

Q And you had heard that there had been some carton and a candle and a coat of that kind near the streamer, hadn't you? A Yes, sir.

Q And you had heard the coat was supposed to be saturated with gasoline? A Yes, sir.

Q And yet you deliberately and calmly left the coat and the streamer, that you had taken the trouble to wrap up, with Mr. Umansky, is that right? A Yes, sir.

Q Why didn't you give it to the officer in charge, if you couldn't carry it away? A He was at the other end of the room.

Q Too much trouble to walk to the other end of the room to give him this wonderful piece of evidence; was it too much trouble—

*Mr. D'Aloia.* I don't think this comment is right. I don't think we are concerned with what he did not do; he said what he did and that is enough.

*The Court.* Yes.

*Mr. McCarter.* Was it too much trouble?

*Anthony C. Helfrich, cross.*

*Witness.* No, sir.

Q Where did you find that coat and the streamer? A Hanging in this corner (indicating on map).

Q Hanging on the southeast corner of the stock-room? A Yes.

Q What day did you find it, the twelfth? A On the morning of May 12th, I found it there, I was first saw it there.

Q Did you leave it there? A I did.

Q And where was it the day that you wrapped it up? A In the same corner.

Q It had not been removed? A No, sir. If it had been moved, it was replaced again, it was in the same position as I have found it the first day, May 10th.

Q Now, you removed it or you wrapped it up on the 12th? A Yes, sir.

Q Were the gentlemen there making the appraisal Mr. McCabe and Mr. Something or other—Mr. Rosenstock? A No, sir.

Q What time was this on the twelfth? A In the morning about 9:30.

Q Did I understand you to say that you told Umansky to take care of that bundle? A I told him I would return for it.

Q Well, where were you going? A I was going out on another fire investigation.

Q With Rothenberg? A Rothenberg was not with me at the time.

Q Were you going with him on this other investigation?

*Mr. D'Aloia.* I object to that.

*The Court.* Objection sustained.

(Question withdrawn.)

Q Have you been up there since? A Yes, sir.

Q Did you ever see the coat there later? A No, sir.

Q You never did? A No, sir. Once I wrapped it up was the last time I ever seen it.

Q Did you ever hunt for it later? A I did, yes, sir.

Q Did you ever go in the stockroom and see if it was hanging there? A I did.

Q And it was not hanging there? A No, sir.

Q Sure about that? A Yes, sir.

Q When did you hunt for it? A Three days after I had first wrapped it up.

Q And when was the last time you hunted for it? That was the last time.

Q Who told you to wrap that up? A Nobody.

Q Who attracted your attention to it? A I saw it, nobody.

Q Nobody attracted your attention to it? A No, sir.

Q When did you first see it, what time? A May 10th about 9:30 A. M.

Q And you were there on the eleventh? A Yes, sir.

Q And was it still hanging there? A Yes, sir.

Q And it was hanging there on the tenth? A Yes, sir.

Q And it was hanging there on the twelfth when you took it down and wrapped it up? A Yes, sir.

Q How long was this streamer? A I should judge about five or six feet long.

Q Burned? A The bottom of it was, yes sir; part of it.

Q Pardon me. A Part of it was burned.

Q How wide was the streamer? A I did not measure it; I don't know.

Q Well, about how wide? A Oh, about a foot.

Q Muslin? A I should imagine so.

Q And I understood you to say that you told Mr. Umansky you would come back and get that bundle? A I did.

Q Where did you wrap it up? A On the table.

Q Was Umansky right there? A Yes, sir.

*Anthony C. Helfrich, re-direct.*

Q He saw you wrap it up? A Yes, sir.

Q Harris was not there? A I didn't see him.

Q What did Umansky say when you said you would come back for the bundle. He said, "I will take care of it and put it on the shelf."

Q Put it on the shelf, where? A The shelving along here (indicating).

Q On the outside of the stockroom? A Yes, sir.

Q And did you see Umansky again about it? A Yes, sir; I spoke to him when I came back looking for it; I asked what became of it and he said he did not know.

Q Is this the coat? A I can't swear that it is, no. It looks very much like the coat.

Q Look at it and see. Burned in the back; is that the coat? A It looks like the coat.

*The Court.* Now, is it the coat or is it not?

*Witness.* It had not been in my possession all the time and it would be hard for me to swear to it.

Q Does it look like it? A Yes, sir.

Q It was that color? A Yes, sir.

Q And it was lacerated or burned in the way that seems to be? A This coat was hanging in the room—

Q Did Mr. Umansky tell you it was his? A He did not.

Q Was anything else hanging there, any hats or coats? A I didn't notice any.

Q Did you see any hooks there for hats or goods to hang? A No, sir; I didn't notice any.

*Re-direct examination* by Mr. D'Aloia.

Q Did you see Umansky up there when you went up the second time? A Yes.

Q Did you ask him for the parcel? A Yes, sir.

Q What did he say? A He said he didn't know where it was.

*Anthony C. Helfrich, re-cross.*

Q You gave it to him when you wrapped it up? A I did.

Q And you told him to keep it for you? A Yes, sir.

Q And you told him you would come back for it? Yes, sir.

Q When did you come back for it the first time? A On the 12th of May—I want to correct that—I wrapped it up on the 12th of May and I came back two days later.

Q Did you talk to Umansky? A Yes, sir.

Q What did you say to him? A I said to him, I come to get that bundle; where is it?

Q And what did he say? A They started to look around the counter and they couldn't find it.

Q Who were there? A Him and I started looking around the counter.

Q And you haven't seen it since? A Until now.

Q Now, look at the bottom part of that coat from here down (indicating). A Yes.

Q Is that the condition that it was in when you wrapped it up? A Yes, sir.

Q Just that way? A Yes, sir; it was burned in that order.

*Re-cross examination* by Mr. McCarter.

Q What day were you back there? A The fourteenth, I should judge, two days later.

Q You are sure about that? A Pretty sure.

Q Try and think now. A It was two days after I wrapped it up.

Q Two days after you wrapped it up? A Yes, sir.

Q On the fourteenth? A I should judge on the fourteenth.

Q Is that right? A Yes, sir.

Q And you saw Umansky there? A Yes, I did.

Q And you had this conversation with him? A Yes, sir.

Q On the fourteenth? A Yes, sir.

Q Was anybody else there that day besides Umansky? A I don't remember.

Q You don't remember whether there was anybody there at all that day? A There was a man from the Salvage Corps there and a man with me, Mr. Dolan, he was with me, he was there.

Q Who? A Mr. Dolan.

Q Was anybody belonging to the factory there, besides Umansky? A I don't remember.

*Re-direct examination* by Mr. D'Aloia.

Q Will you give us an idea what that streamer looked like? A Well, it was a piece of cloth, it was hanging from the shelving.

Q How wide was it, were you able to tell? A I should judge about a foot wide.

Q And you told Mr. McCarter it was about six feet long? A Five to six feet long.

Q At the time you wrapped the streamer up with the coat and gave the bundle to Umansky to take care of, for you, was the streamer in the package? A Yes, sir.

Q Was it six feet at that time and about a foot wide? A Yes, sir.

Q Undestroyed? A Yes, sir.

Q Was any part of it burnt at all? A Possibly a little bit, scorching.

Q Which end? A The lower end near the floor.

Q But there was about six feet of it left and a foot wide? A Yes, sir.

Q You haven't seen that since, have you? A No, sir.

*Re-cross examination* by Mr. McCarter.

Q Now, what did you say your business is? A I am a fireman connected with the Bureau of Fire Prevention, Inspection Department.

Q How much of this streamer was burned? A I can't say how much was burned. It was burnt—not very much of it was burnt; very little of it was burnt, and the part that was burnt was down near the floor.

Q Well, how much was burnt? A Oh, I might say a foot or a foot and a half.

Q Actually burned off or only scorched? A I don't know, Mr. McCarter, how long that streamer was, therefore I can't say how much was burned off.

Q How do you know any of it was burned then? A Well, some of it; I could see where it had been scorched on the bottom.

Q Oh, you found some scorching, that's what you mean? A Yes, sir.

Q And how much scorching, about a foot or a foot and a half? A I believe so.

*Re-direct examination* by Mr. D'Aloia.

Q You are sure it was about six feet in length when you wrapped it up? A Yes, sir.

Q And in width it was about a foot wide? A Yes, sir.

RAEFFELE CAPPADONNA, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Were you attached to the Newark Police Department on or about the ninth of May, 1922? A I was.

Q In what capacity? A Detective.

Q And where were you attached? A Police Headquarters, Newark.

Q And were you assigned to this Harris fire case together with Sergeant or Lieutenant Rothenberg? A I was.

*Raeffele Cappadonna, cross.*

Q Did you go to this building located at the southeast corner of Thirteenth and Morris avenues in this city? A Yes, sir.

Q When? A May tenth.

Q Did you go up into the loft occupied by the Harris Company? A Yes.

Q When you got there did you find anything? A I did.

Q Did you find this can I have in my hand? A I did.

Q Will you point out on the map where you found it? A I found this can, there was a shelf here, right about here in the stockroom (indicating).

*Mr. D'Aloia.* Indicating the easterly side of the stockroom, five inches away from the entrance. Is that right, Mr. McCarter?

*Mr. McCarter.* About, I should think.

*Mr. D'Aloia.* About ten feet from the entrance.

Q What did you do with it? A I brought it to Police Headquarters.

Q Who did you give it to? A I handed it over to the property clerk, Max Winans.

*Cross examination* by Mr. McCarter.

Q That is, as soon as you got to Police Headquarters, you took it Winans? A No, sir.

Q What time did you get it to Police Headquarters? A I brought it to Police Headquarters on May 10th, on the morning of May 11th, and I turned it over to the property clerk, Max Winans.

Q Where was it in the meantime? A It was in my possession.

Q Where? A Police Headquarters.

Q Were you at Police Headquarters all the time? A I had it locked in my desk.

Q Why didn't you give it to the property clerk right away? A We used it conducting our investigation.

Q You used it in conducting your investigation? A Yes, sir.

Q What use did you make of that can? A We questioned the defendant and Mr. Umansky and others who were employed in the factory at that time, at the time before the fire.

Q Who were questioning? A We questioned Mr. Harris, Mr. Umansky and Fred Bauer.

Q Who were doing the questioning? A Myself, Sergeant Rothenberg, Mr. Helfrich—

Q What? A I say, at times myself, Sergeant Rothenberg and Mr. Helfrich.

Q How about the insurance agent, Mr. Routenberg; he was there too, questioning, wasn't he? A He was there.

Q Why did you leave him out? A Why, he may have been questioning too, but not while I was present.

Q And was anything taken out of this receptacle since? A No, sir.

Q Did it weigh about that much as it does now? A About the same.

*Re-direct examination* by Mr. D'Aloia.

Q Is that the can you gave to Winans? A Yes, sir.

*Mr. D'Aloia.* I offer it in evidence.

The same is received and marked Exhibit S. 8.

*Mr. D'Aloia.* If your Honor please, reserving the right to call Lieutenant Callan, and Captain Daly, so as to link up these articles with the delivery down to Police Headquarters, I will rest. I propose to show by calling Callan and Daly—I propose to furnish the link of that night and the next morning when these articles were left with either of them or both, and then I will offer these cans and the bottles and the pan and the tea-

kettle and the container and the candle and the float in evidence, and the contents.

*Mr. McCarter.* I would like to cross examine these witnesses a little bit. I don't make any point about the interim being filled in. I wonder if we could not adjourn now until ten minutes after one instead of from one to two.

*Mr. D'Aloia.* I have no objection at all.

*The Court.* All right; we will then adjourn until quarter after one.

The Court thereupon took a recess until 1:15 o'clock P. M.

AFTER RECESS.

GEORGE B. CALLAN, sworn in behalf of State.

*Direct examination* by Mr. D'Aloia.

Q On May 9, 1922, were you a member of the Newark Police Department? A Yes, sir.

Q What title did you have? A Lieutenant.

Q Were you on duty that night? A Yes.

Q Where? A Police Headquarters, Detectives' Bureau.

Q Do you remember Sergeant Powers and McGrath coming to Police Headquarters with these two cans—

*Mr. McCarter.* One moment. Let him say what they came with.

*Mr. D'Aloia.* Wait until I finish the question.

Q Do you remember them coming to Police Headquarters that night with these two cans, three bottles, this other bottle and that carton and candle, and float?

*Mr. McCarter.* Objected to as leading.

*The Court.* He can answer yes or no.

*Edward A. McGrath, direct.*

A I remember them coming to Headquarters with bottles and cans on that night. There was a fire on Morris avenue.

Q Do you recognize the cans? A Well, I don't know whether they are the same cans or not; they are similar cans, and the four bottles, they look like them.

Q Look at them. How many cans were there? A Two.

Q And how many bottles? A Three or four.

Q Do you remember that carton? A Yes, there was that and some kind of a kettle.

Q Was there a pan? A I didn't notice any pan.

Q Look at this. A Yes.

Q As it stands? A Yes, sir.

Q What did you do with the things they brought down? A They were left in my room there.

Q What did you do with the room? A The door was locked at seven o'clock in the morning.

Q Who locked it? A I did.

Q What time did you lock it? A Seven o'clock in the morning.

Q And you had custody of these things all night? A Yes, sir.

Q Where did you leave the key? A We generally leave the key at the desk downstairs.

Q Did you leave it there? A Yes, sir.

*Cross examination* by Mr. McCarter.

Q What became of that room during the day? A Well, it is locked up during the day, it is just a night bureau, it is used for the night men.

EDWARD A. McGRATH, recalled on behalf of State.

*Direct examination* by Mr. D'Aloia.

Q On the morning of May 10, 1922, did you go to the room where these articles were? A I did.

Q Did you unlock the door? A I did.

Q With what?

*Mr. McCarter.* It is leading.

*The Court.* Do not lead.

Q With what? A With the key to the door.

Q Where did you get it? A Downstairs from the Lieutenant at the desk.

Q At the desk? A Yes.

Q What did you do with the key? A Unlocked the door with it.

Q And tell us what was in the room of the door which you unlocked? A The articles which we had taken down from the factory the previous night.

Q And to whom were they turned over? A To Sergeant Rothenberg and Detective Cappadanno.

Two cans tied together marked Exhibit S. 10.

Four bottles taken together marked as Exhibit S. 11.

Carton, candle, float and piece of paper marked Exhibit S. 12.

Pan and tea kettle marked Exhibit S. 13.

Cross examination waived.

ALFRED J. HARGAN, sworn in behalf of the State.

*Direct examination* by Mr. D'Aloia.

Q Are you connected with the Prosecutor's office? A I am.

Q As what? A Lieutenant Detective.

Q Were you in charge of the investigation of this case? A I was.

Q On the morning of the 15th of November, 1922, did you receive these two cans, S. 10, from the custodian of the Police Department? A I did.

Q Did you receive these four bottles, S. 11? A I did.

Q Did you receive this can, S. 8? A I did.

Q Did you receive this pan and kettle S. 13? A I did.

Q Did you receive this carton and this float and piece of cardboard and candle, S. 12? A I did.

Q And have these articles been in your possession since then? A They have.

Q Until they were produced here in court? A They have.

Q Until they were offered in evidence? A They have.

Cross examination waived.

STATE RESTS.

*The Court.* What about the coat, has that been offered?

*Mr. D'Aloia.* The coat has not been offered. The coat has been produced by the other side.

*Mr. Ruback.* Called for by the prosecutor.

*Mr. D'Aloia.* No, it was not.

*Mr. Ruback.* You wanted to see it.

*Mr. D'Aloia.* I didn't want to see that; I wanted to see the streamer.

*Mr. McCarter.* If the Court please, I respectfully ask that there be a direction of a verdict for the defendant in this case because of the utter lack of proof to connect the defendant with the crimes that are charged in both of the counts in this indictment. Pursuing the same order that I pursued at the opening of the case, I will call your Honor's attention to the second count first, and that is the charge of statutory arson, burning the building of Dr. Charles A. Rosewater. There has been abso-

lutely no evidence to connect the defendant with such burning, as has been shown to take place, except the fact that he was in the factory two hours in advance of the fire. He left the place about seven o'clock. There were two others with him and there is no motive or no reason shown, to the slightest extent, which would indicate the defendant was guilty of this count. If there had been proof of overvaluation of the stock, it might be argument that he was guilty, because of his unproven connection with the Harris Company which had some insurance upon this property, but the proof upon that point utterly failed and so, we have, so far as the second count is concerned, simply this situation: That the defendant was in the building two hours in advance of a fire that occurred there. There were two others there during all the time that he was there and previous to that time there were several there, thirty-five or forty persons. No motive of any kind or character is shown, or hinted at for him to set fire to this building, and therefore, it seems to me that there is a total failure of proof from which the jury could infer, let alone conclude beyond a reasonable doubt, that the defendant was guilty of the burning.

Turning to the first count, which, of course, as we know, is based on Section 126, the essential elements of that charge, all of which must be proven, are a willful and malicious setting fire to merchandise or building, in the way the count remains, notwithstanding our objections, which was covered by insurance and with intent to prejudice the insurance companies. The facts are that someone, by the proof that is now here, must have set that carton in the shape in which it was. There isn't any reason or intent, or any reason shown or intended to be shown to prejudice the insurance companies,

for aught that appears in the case, the stock and other property of this defendant—of the company with which the defendant was connected, was worth very much more than the amount of insurance that was placed upon it. It is quite true that in the numerous cases that have been decided, under a statute similar to ours, which prevails throughout most of the States, the fact of over-insurance has been held to be an element to constitute intent to prejudice the insurance company. That would be a question for the jury as to whether or not that does not manifest the necessary intent that must be proven. I do not mean to say that in those crimes where the intent is an essential ingredient, as it is under this Section 126, that you have got to prove by seizing, getting hold of, making visible and visualizing what we call intent, but you have got to show something from which the jury can infer the intent, and as I have already stated, assuming now, as we must do, for the purposes of this motion, the accuracy and correctness of the testimony with reference to the preparation for this fire, under the second count, with which the defendant has not been shown in any way connected, but if he were interested in a company, or himself had a very large over-insurance upon this stock that was there, then you could infer the intent, perhaps, from those facts, but those facts are not here. The State utterly fell down in the proof of over-insurance, and there is not a word before your Honor or this jury now to indicate that there was a dollar's excess insurance, or that it was not under insurance. We have the proof that just before, or a few months before this fire, the company had spent a large sum of money in building over this loft, and preparing it for use, and installing expensive machinery there. They had all the preventatives of fire, fire ex-

tinguishers, water pails, and things of that kind, which were availed of by the firemen in putting out this conflagration in its early stages, and therefore, it seems to me that there is an utter failure in the first count to show the required intent, or to show anything from which the required intent, which is an essential ingredient and must be proven in the manner we have indicated, to prejudice the insurance companies.

For this reason, bearing in mind also the objection we made at the time the policies were introduced, that it does not appear what the connection of the defendant, Mr. Harris, is with this A. E. Harris Company, he is not shown to have a dollar's interest in it, he is simply connected with it in some way—not one dollar's interest is shown—he is not shown to be a stockholder; the policies are in favor of the company, so that you not only have no proof of the intent to prejudice the insurance companies, inferrable from the fact of alleged over-insurance, but you have not a word to indicate that Mr. Harris would benefit one iota by this fire, had it succeeded. Therefore, you are robbed, it seems to me—with great deference, you are robbed of the very ingredients of the crime charged in the first count, the necessary intent to prejudice the insurance company, and that being so, it seems to us, with great confidence, that there should be a direction for the defendant and we ask for it.

*The Court.* I deny your motion and grant you an exception.

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Mr. McCarter opens to the jury in behalf of the defendant.

NICHOLAS G. KAUFMANN, sworn in behalf of defendant.

*Direct examination* by Mr. Ruback.

Q What is your business? A Photographer.

Q How long have you been a photographer? A About twenty-five years.

Q Employed here in the city? A Yes.

Q What concern? A Koenig Studio.

Q How long have you been connected with Koenig? A About eight years.

Q And in the performance of your duties what do you do in connection wtih photographs? A Commercial photographs.

Q And were you thus engaged on the 9th of May? A Yes.

Q And were you thusly engaged on the eleventh of May? A On the eleventh; yes, sir.

Q Did you take any photographs of the interior of this building at the southeast corner of Morris avenue and Thirteenth avenue in this city? A Yes.

Q At whose request? A Lawyer Samuel Leber.

Q Mr. Leber, my partner? A Yes, sir.

Q What time of day was it you arrived at the plant? A About three o'clock.

Q Who was in charge? A The firemen of the city of Newark.

Q Did you gain access to the loft? A Yes, I asked permission to go in.

Q And it was granted to you? A It was granted.

Q And to what floor in that building did you go? A The top floor.

Q Is that the floor indicated on the map in evidence? A Yes.

Q And did you take any photographic views of that loft? A Yes.

Q Have you your negative with you? A I have.

*The Court.* Let him testify as to the correct reproduction of those you have.

Q I show you, Mr. Kaufmann, a photograph and ask you whether or not that is a correct print of the negative taken by you on that occasion?

*The Court.* Not of the negative. We want to know if it is a correct photograph of this place.

Q Is that the correct print of the negative taken by you on that day? A Yes, sir.

Q And what portion, if any, of that loft does that photograph indicate?

*The Court.* Do you understand the plan?

*The Witness.* Yes, sir.

A Right here (indicating).

*Mr. D'Aloia.* Indicating on the map the row of bins marked X.

Photograph marked Exhibit D. 4.

Q I show you another photograph; was that taken by you on that day? A Yes.

Q Indicating on the map in evidence what portion of the plant is shown in that picture? A This here. The camera was here, looking down here.

*Mr. D'Aloia.* He indicates the shelving to the rear of the bin.

*The Witness.* Of the bin, yes.

Q Now, indicate the point at which you had placed your camera for the purpose of taking that photograph. A About here.

*Mr. D'Aloia.* He indicates a point west of the stockroom shelving in the main loft.

*Mr. Ruback.* Alongside of the table next to the partition, between the so-called stockroom and the loft.

*Mr. D'Aloia.* Yes.

(Photograph marked Exhibit D. 5.)

Q Did you take this photograph that day? A Yes.

Q What portion of the plant does that portray? A Right here, from this point here.

Q Starting at that point? A Yes.

Q And it indicates what portion of the plant at that point? A A general view of the plant, looking west.

Q And for the purpose of taking this photograph where had you placed your camera? A Here.

*Mr. Ruback.* Indicating a point between the sewing machine table on the northerly side of the loft and the office partition.

*Mr. D'Aloia.* The northeast corner of the loft outside of the office.

Q And does this photograph also portray the line of tables and bins to the south of the line of tables already referred to? A Yes.

*Mr. Ruback.* I offer this in evidence.

The same is received and marked Exhibit D. 6.

Q Did you take this photograph that day? A Yes.

Q Indicate on the map what portion of the loft that portrays? A This here (indicating).

*Mr. Ruback.* Indicating a space, a circular space in the immediate vicinity of the gas plate, and including the gas plate table.

*Mr. D'Aloia.* And the door leading from the stockroom into the loft.

Q Indicating also the partition between the so-called stockroom? A Yes, sir.

*Mr. Ruback.* I offer that photograph in evidence.

The same is received and marked D. 7.

*Nicholas G. Kaufmann, cross.*

Q I show you another photograph and ask you whether that was taken that day? A Yes, sir.

Q And what portion of the plant does that photograph portray? A This here; a section of the stockroom.

Q Indicating the southwest corner of the so-called stockroom? A Yes, sir.

*Mr. Ruback.* I offer this in evidence.

The same is received and marked Exhibit D. 8.

Q Now, in taking the photograph marked D. 8, where had you placed your camera? A Is that the last photograph?

Q The last photograph shown you. A About here (indicating).

*Mr. Ruback.* Indicating the point shown on the map as three X's.

Q What was the range of your camera after having been placed at the point indicated, how much of the loft was within the range of your camera lens?

*Mr. McCarter.* Stockroom or loft?

Q Stockroom, how much of that stockroom was within range of your camera, placed as it was at the point marked three X's? A About from here to there, right in here (indicating).

*Mr. Ruback.* Indicating a triangular area about half of the southerly partition and running half way along the westerly partition?

*The Witness.* Yes.

Q On a line drawn from point to point? A Yes.

*Mr. D'Aloia.* Which would be the southwest corner of the stockroom?

*Cross examination* by Mr. D'Aloia.

Q How long were you there all told? A About half an hour.

Q Who was with you? A Alone.

Q Who told you to go there? A The lawyer, Samuel Leber.

Q Well, did he go with you? A No.

Q Was anybody connected with the Harris concern at the loft? A No, not as I know of.

Q Well, try to remember? A Mr. Leber phoned me to meet Mr. Harris there.

Q What portions of that place did you know to photograph if Mr. Leber did not go along and he did not speak to anybody of the Harris concern? A I used my own judgment.

Q What do you mean? A Well, I seen there was a fire there and in conversation I heard there was a party accused of setting fire to the place.

Q Had you ever been there before? A Never.

Q Did you know anything about the stockroom when you went there? A Nothing at all.

Q Did you know anything about the loft? A Nothing at all.

Q Did you know where the bins were? A I seen the bins after I got there.

Q Did you know where they were? A No.

Q Before you went there did you know what part of the loft had been on fire? A No.

Q Or what parts? A No.

Q So you didn't know a thing? A No.

Q And so you left Mr. Leber's office about what time on the 13th? A About 2:30.

Q And you got to Harris' about three? A About two thirty or a quarter to three.

Q Who did you speak to? A One of the firemen.

Q Is he in Court? A I don't know.

Q Were you here Wednesday? A Yes.

Q And were you here Thursday? A No.

Q Did you pick out the man to whom you spoke? A No.

*Nicholas G. Kaufmann, re-direct.*

Q So you got to the loft and you were all alone? A No.

Q Who was with you? A Nobody with me.

Q When you were in there and you were going around taking the pictures all alone? A Yes.

Q And you photographed the southwest corner of that stockroom without anybody telling you to do it? A Yes.

Q Are you sure about that? A Yes.

Q And you photographed those bins around the area of that stockroom without anybody telling you to do it? A I did.

Q Look at picture S. 6, what part of the stockroom does that represent? A The same as mine.

Q The same corner you photographed? A The same thing.

Q Look at this? A The same thing.

Q Look at this coat; now, on S. 6, this coat is hanging in that corner? A Correct.

Q And in your photograph this coat is not hanging in that corner? A No.

Q Look at that streamer, S. 6? A I see it.

Q Your photograph does not have any streamer on it, does it? A No.

Q And you were not told by Mr. Harris or Mr. Umansky or Mr. Leber, or the person who sent you up there to photograph the southwest corner of that room? A No, sir; nobody.

Q And you were not told by anybody to take any of the other pictures, were you? A No.

*Re-direct examination* by Mr. Ruback.

Q While you were taking these photographs were any policemen or firemen around the premises? A Yes.

Q Any in the loft? A I seen two firemen and I think one policeman.

Q They were there while you were taking these photographs? A Yes.

Q Were any in the stockroom when you were taking the photographs? A While I was taking the photographs a couple of them walked in on me and I told them to step out as I was taking a time exposure and they stepped out.

Q When you were sent to the plant you were told there was a fire there? A Yes.

Q And you knew counsel were interested in having photographs of the charred or burnt sections of the loft? A Yes.

Q Now, can you tell whether the southwest corner of the so-called stockroom, the one shown on photographs last taken by you, was any portion of the partition there burned or charred? A No.

Q I don't know whether you understand the question. You were taking photographs of so much of the plant as appeared to be burned or charred? A Yes, what I seen.

Q You took a photograph of these bins? A Yes.

Q They were burned and charred? A Yes.

Q And you took a photograph of this corner? A Yes.

Q Anything there charred? A Boxes on the floor.

Q And that is all you took or photographed, was because portions of the stockroom had been burned? A Yes.

Q And your instructions were to take photographs of what portion of the loft or stockroom were burned? A Yes.

Q What time of the day was it that you took photographs of the stockroom? A About between three and 3:30.

Q On the 11th? A On the 11th.

Q Did you know Mr. Harris at that time? A No.

Q Had you had any business transactions with him? A No.

Q Had you ever before this occasion taken any photographs for my firm? A No.

*Nicholas G. Kaufmann, re-cross.*

Q Have you had any relations with my firm since? A No, sir.

*Re-cross examination* by Mr. D'Aloia.

Q I show you Exhibit D. 5, is there anything in there that shows any portion charred or burned? A No.

Q And you took that? A Yes.

Q And yet your instructions were to take only the charred portion.

*Mr. McCarter.* I object. That is not cross examination.

*The Court.* I will allow it.

A Yes.

Q You took a general picture of the loft, too, from the southwest corner of it, just outside of the office door, didn't you? A Yes.

Q That was not for the purpose of showing anything charred, was it? A No, just a general view of the plant.

Q There wasn't anything charred in that southwest corner of the stockroom, was there? A You mean here (indicating)?

Q Yes, that is where I mean? A Yes.

Q What? A A few boxes on the floor.

Q How about the sides? A I did not notice. It was too dark in there. I couldn't see.

Q Did you have to remove the coat which was hanging there? A Nothing was removed.

Q Nothing was removed while you were there? A No; I did not touch an article.

Q Did you make a note of the time you went up there? A Yes, about three o'clock.

Q Where is that note? A I didn't keep a note—

Q Didn't make any note? A I remember that very well.

*Nicholas G. Kaufmann, re-cross.*

Q Did you make a note of the instructions that you received about taking just the charred portions of the loft?

*Mr. McCarter.* I object.

*The Court.* Read the question.

(Question read.)

*The Court.* Strike out the word "just."

*Mr. D'Aloia.* All right; I will reframe the question.

Q Did you make a note of the instructions that you were to take the portions of the loft that appeared to you to be charred? A No.

Q Were you told by Mr. Leber as to what time you were to go up there and photograph the loft? A As soon as possible.

Q Listen, were you told the time? A No.

Q What time did he first speak to you about going up there to photograph the loft? A Between one and two.

Q On what day? A May eleventh.

Q And you went up there at half-past two, didn't you? A About that.

Q Now, didn't he call you up at two o'clock? A Between one and two.

Q Well, it was nearer two than it was one? A I can't tell.

Q Well, you had your luncheon, hadn't you? A Sometimes I have—

Q No, that day, you had had your luncheon? A I don't remember.

Q And you were told to go up there right away, weren't you? A As soon as possible.

Q Well, you went up right away, didn't you? A Not exactly, no.

Q Well, you went up there as shortly after Mr. Leber told you, that you could? A Yes.

Q And you got up there about half-past two? A Yes.

Q Now, you got the message between one and two and you were there about half-past two? A Yes.

Q Did they tell you it was a loft about one hundred and some odd feet by a hundred feet in width? A No.

Q Did they tell you what kind of a loft it was going to be? A Nothing at all.

Q Did they tell you that in one portion there was a partition and in another portion there was a stockroom? A No.

Q And that there were machines and shelves and bins and tables and a shipping department away off to the westerly side? A No.

Q And they did not volunteer to come up with you, did they, any of them? A No.

Q And the reason why you tell us here, now, that you photographed this southwest corner of that stockroom was because on the floor there was a charred box? A Not that alone.

Q Well, that is what you tell me now. Is that true? A That's true, plus something else.

Q What else? A Why, on the ceiling here (indicating) I happened to see that the ceiling was burned and on this partition here was an opening about, well, I should judge, about two feet, and I took it for granted that probably some of the sparks might have gone through this partition and fell on the floor.

Q Took it for granted? A Yes.

Q Show me any part of the ceiling here, on your picture, that you took here in the southwest corner, if you can. A There is no ceiling here.

Q Show us the top of the partition on that picture that you took, about which your surmised a lot of things. A There was nothing on this photograph here.

Q So all you said about looking at that partition and looking at that southwest corner, and the ceiling, is not shown here at all, is it? A Not on that picture; another picture.

Q And this is the only picture that you took of the southwest corner of that stockroom, isn't it? A I made another one from the outside.

Q You cannot photograph the southwest corner of that room from the outside, can you? A No.

Q I mean from the inside, that is the only photograph that you took of the southwest corner? A That's all.

Q And it shows no top of the partition and it shows no portion of the ceiling? A No.

Q Therefore, your reason that you just gave me for taking this picture is no reason at all? A Not on that photograph.

Q The only reason you took this picture of the southwest corner of the stockroom is because you saw that on the floor there was a burned box? A Yes.

Q Did Mr. Leber tell you to photograph the burned box on the floor? A No.

Q You never saw that coat there, you say? A No, sir.

Q That is somewhat burned, isn't it? A It is burnt, yes.

Q And you are sure you went up there on the eleventh? A On the eleventh.

Q In the afternoon, immediately after Mr. Leber called you up? A As soon as I could get there.

Q You are sure about that, are you? A Yes.

*Re-direct examination* by Mr. Ruback.

Q Mr. Kaufmann, there is a notation on the back of this photograph "Nicholas G. Kaufmann," is that your signature? A That is mine.

Q Also under written that signature is a notation, "May 11, 1922." A That's right.

Q Is that your writing? A That is my writing.

Q When did you place your name and date on the back of that photograph? A On the twelfth.

Q After the negatives had been developed? A Developed and finished up.

Q And finished into the prints that we have now offered in the cause? A Yes.

Q And you say the same concerning all the photographs that you have identified? A Yes, all the photographs.

HANNAH ALBERT, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q You live in New York, Miss Albert? A Yes, sir.

Q Were you formerly employed by the A. E. Harris Company? A Yes.

Q In what capacity? A Bookkeeper.

Q For how long? A Almost three years.

Q And are you still employed by them? A No, sir.

Q Whom are you employed by now? A G. Merringer & Company.

Q Do you recognize the books that are before you as being the books that you kept? A Yes, I do.

Q I don't care to go into too much detail with you, Miss Albert, but generally speaking, the books before you are what? A The entire set of books.

Q The entire set of books consisting of what? A Two ledgers, one general ledger, one purchase ledger, one cash book, one trial balance, a journal and a return book.

Q Now, were those books accurately kept by you? A Yes, sir; I believe so.

Q And you recognize them as being the books that you kept? A Yes.

Q And you left them with the concern when you left? A Yes, sir.

Q When did you leave? A Around the latter part of July; the last week in July.

Q And you kept the books down to that time? A Yes.

*Cross examination* by Mr. D'Aloia.

Q How long had you been in the employ of the A. E. Harris Company? A Not quite three years.

New Jersey State Library

*Abraham E. Harris, direct.*

Q Not quite a year? A Three years.

Q Three years? A Yes.

Q Were you employed by the Harris Company in October, 1921? A Yes.

Q Do you recall a meeting of the creditors at that time?

*Mr. McCarter.* I object.

*The Court.* I will allow it to show her general familiarity with the business.

(Argument.)

*The Court.* I will sustain the objection for the time being.

*Mr. D'Aloia.* I will reframe the question.

Q Was there anything in the books that you just described to Mr. McCarter, that refers to a meeting of the creditors of the A. E. Harris Company in October, 1921? A Yes.

Q Was there anything in the books you described to Mr. McCarter, which states in that meeting there was a settlement with the creditors on the basis of twenty-five per cent, ten per cent. cash and the balance in deferred payments? A Yes.

ABRAHAM E. HARRIS, defendant, sworn in his own behalf.

*Direct examination* by Mr. McCarter.

Q How old are you? A I will be 49 on the twelfth of March, 1923.

Q Are you a married man? A Yes, sir.

Q Where do you live? A 3915 Broadway, New York City.

Q And what connection did you have with the concern known as the A. E. Harris & Company? A President.

Q Who were the stockholders of that company? A Liebshitz Lumber Company of Dallas, Texas, was one and Harry Ketcher and some other Ketcher, I don't recall his first name.

Q And you hold the balance of the stock? A Yes, I hold about twenty to twenty-five per cent. of that stock.

Q What business was the A. E. Harris Company engaged in? A Manufacturing of silk and muslin underwear.

Q How long has the company been engaged in that business? A Since 1913.

Q Where before you came to Newark was the manufacturing carried on? A 133 West 21st, New York City.

Q When did you determine to move from there? A The latter part of 1921.

Q Was there any reason for moving? A Yes.

Q What was that reason? A We were paying $4,500 for a year for 5,000 sq. ft. of loft at the destination described before and we have been trying to get that for $7,000 and could not succeed; the landlord would not give it to us for anything less than ten; we found out it would be an utter impossibility to carry on that tremendous overhead and finally decided to locate outside of New York, where manufacturing would be suitable and therefore went to Newark.

Q And you negotiated the lease— A Yes.

Q —that is here through Feist & Feist? A Yes.

Lease marked Exhibit D. 3.

Q While I have the lease in my hand; that reminds me; I observe by this lease that the rent was to commence to run on the fifteenth day of January, 1922? A Correct, sir.

Q Do you recall whether you paid down any rent at the time that lease was signed? A I do.

Q How much? A $300.

Q And monthly payments according to the lease is what $150? A $150.

Q Now, Mr. Greenberg, if that is his name, who was on the stand this morning, stated that you and he had some difference with reference to rent. Will you please explain that to the jury and then just show us just when the rents were paid by referring to the cash book. A The difference Mr. Greenberg referred to never occurred at all because it was purely understood that we were to occupy those premises the moment we engaged them and rent was to begin on the fifteenth of the following month. There is only one difference did arise between myself and Mr. Greenberg; he was supposed to supply us with heat; he had a man working for some of the early part of the time we moved in and then for some reason or another he had dismissed his man. We had to have some one to keep the furnace going and I instructed our superintendent, known as Umansky, to supply him with the necessary man and he did so by letting our porter, known as Fred Bauer, to do the necessary work in order to keep the premises warm and he has been marking down the time that he lost taking care of these stoves. As a matter of fact he was pretty near all of the time down in the cellar.

*Mr. D'Aloia.* I do not want to interrupt but he can show—

*The Court.* We can get his conclusion without going into all of it.

Q The difficulty then was with the compensation to be paid to Bauer in time spent in keeping the stove, which you say the lease required them to take care of? A Yes.

Q That was the only difficulty? A Yes.

Q Now, your books will show when the rents were paid? A Yes.

Q That is the only difficulty you had? A Yes.

Q When did you take possession, Mr. Harris, of this loft? A The latter part of December, 1921.

Q Did Umansky work for you in New York? A Yes.

Q How long had he worked for you? A As foreman and manager two years.

Q And in any capacity before that? A Yes.

Q In what other capacity? A Contractor.

Q Before that? A Yes.

Q How long did Gilpatrick work for you? A He started up about the middle of March, 1922.

Q Up to that time he had not worked for you before? A No.

Q How long had Bauer worked for you? A From the very first day we got there.

Q Up to this plant? A Up to this plant.

Q That was until about the twentieth? A It was the latter part of the month, it may have been the 26th or the 24th.

Q Now, what was the condition of the loft when you went there? A It had no exit or entrance on the southeast side of the avenue and it was also open and the interior similar to this sky light. There was a stairway leading to the floor below.

Q Inside? A Inside.

Q Go on. A And it required of us to go to work and cover the floor and build a door and exit leading to the street.

Q Thirteenth avenue? A Yes, sir.

Q —for the safety of the girls and complying with the Labor Law.

Q On Thirteenth avenue? A On Thirteenth avenue.

Q And was that iron staircase, or whatever you call it, there then leading up to the third floor? A No, sir; it was not.

Q Who put that in? A Mr. Greenberg.

Q Now, what improvements did you make inside? A We have put in the electric lights all throughout the floor; we found some very dilapidated lights there.

*The Court.* Tell us what you did.

A (continuing) We put in some electric light pipes throughout the floor, the lamp, and we equipped the floor with offices, shelves, ladies' dressing room, gents' toilet and whatever else is necessary for the operation of a plant.

Q Were there any toilets there at all on that floor when you went there? A Yes, sir.

Q What did you do in addition to the toilets that were there? A We put up some for men; there were only two.

Q Did you get bills for the expenditures that you made there fixing that loft? A Yes, sir.

Q Look at those bills and see if you recognize them and refreshing your memory from them tell us what the company paid for these alterations and improvements?

*Mr. D'Aloia.* I object to that. It is too remote.

*The Court.* I will allow it. The bills are evidential for payment only.

A Yes, we paid for that bill.

Q Who did the electric work and what did you pay for that? A Some Newark concern.

Q Well, what—there is the bill before you. A No, sir; this does not represent the electrical work; this represents the portion of the carpenter work.

Q Well, tell us from those bills what you paid for the work shown there. A We paid $600 to put up the shelving alone and this is what is represents.

Q Go ahead; what else. A We also paid $866 to the Reliable Electric Company for putting up wire throughout the place and lamps.

Q Go on. A That is all these bills represent.

Q Do you know what you paid for the plumbing? A Approximately, about $150.

Q And can you give us your best recollection of the total expenditure made by the A. E. Harris Company in preparing that loft for occupancy? A A little over $2,000.

Q Now, is that inclusive or exclusive of the bringing of your machinery out from New York and installing that? A No, sir; that is exclusive of that.

Q Do you know what it cost to bring out the machinery and install it in this plant and your stock and other matters? A $225 for the trucking alone.

Q How long were the workmen there? A From the latter part of December until the early part of February.

Q Were you there from time to time while they were there? A Yes.

Q Did you observe whether or not they used any means of artificial lighting? A I did.

*Mr. D'Aloia.* When? The time, please.

*The Court.* Fix a time.

A When? I beg your pardon.

Q When did you observe it? A Everytime that I was over there.

Q Well, about what month? A During the month of January and early part of February.

Q What did they use on those occasions? A Candles.

Q What kind of candles? A Plumbers' candles.

Q (*By the Court.*) Did you say during January and February? A During the entire month of January and the early part of February; that is, a day or two in February; as near as I can remember right.

Q Was there any method of illuminating the loft other than these candles until the electric light was installed? A No, sir.

Q What installation did you have for fire prevention in this loft? A We had pails.

Q Where? A Hung on the posts all throughout the floor.

Q How many pails? A About eighteen.

Q What did you have in the pails? A Water.

Q Anything else? A Yes, we had a very large extinguisher.

Q And that hung where? A That hung on the post right in the middle of the floor.

Q Now, you have heard the room described very often since this case commenced, and you are I suppose, familiar with the map on the easel? A I am, sir.

Q And without going into details, that generally correctly shows the situation, does it? A Yes.

Q Now, how many doors were there to the exit on Thirteenth avenue? A Two.

Q An inside and an outside? A Yes, sir.

Q What was the character of the outside door? A The outside door was a glass door, half built glass and half of wood, consisting of about six little windows, probably eight inches long and about seven inches wide.

Q You mean six lights or panes? A Six panes, yes.

Q Then, what was the other door? A The other door was a wooden door, covered with a sheet of metal.

Q On the inside or outside? A Outside.

Q On the door. A On the door.

Q How far apart were these two doors? A The width of the sill.

Q About how many inches? A It would be about six inches.

Q What were there in the way of locks on either of these doors? A Well, there was a padlock, a Yale padlock on the inside door, which was covered with sheets, and then we had two locks on the outside door consisting of what we call a morticed door lock, and also

a night latch lock, and the morticed door lock required a regular long key to open, whereas the night latch was a self closing idea, and it required no key to close, but it did require a key to open.

Q Now, look at the things that Mr. Ruback has handed you there, and tell us if you recognize them? A I do, sir. There is one more missing.

Q Here it is? A Yes, I do.

Q Now, pick them out and tell us what they are. A This is the inside door lock, known as the morticed door lock, that is the name it is called by, and this is the padlock which has to be opened with a key, and it is self closing. That was on the inside door. This is the night latch lock, which is self closing, and if, during the day, we wanted that opened, all we have to do is push this little button up and it stays closed up itself. When we want to go away in the evening or any time at all, and want to close the door it is self locking. It is called a patented night latch lock.

Q When did you take those locks off the door preparatory to bringing them here? A Last Saturday morning.

Q Now, before I forget it—it is hard to carry those things in one's mind—have you observed, whether after the fire there was any indication of the outer door having been pryed open on the sill or the side of the door jamb? A Yes.

Q What have you observed? A I have observed that in order to get—

Q No, what you just saw there? A I saw that the outer door had been pryed.

Q Pryed? A Yes, sir.

Q Does that appear on the woodwork there today? A Yes, sir.

Q And it can be seen there today if you go there? A Yes, sir.

Q How many girls did you employ there down to May 9th? A It varied at different times we have employed as many as 35, 37—somewheres from 20 up to about 40.

Q And when you moved your plant out to this place did you bring such stock and goods in process as you had in New York with you? A I did, yes, sir.

Q When did you first commence to do business there? A To operate?

Q Yes, operate? A The early part of February.

Q How often were you accustomed to go out to the factory, to the plant? A When we first started I used to come out quite often, about four times a week, until I had the thing organized to a satisfactory degree, and then I began to come in about twice a week, with the exception of special occasions, but twice a week I used to come there absolutely. That was on a Saturday, which on that day we pay all of our men, whereas on a Tuesday we have pay days for the operators, the girls.

Q As a matter of curiosity, why do you make a difference in pay day between the girls and the boys? A That has been a habit with us for the last ten years, the main reason for that was that one time was to have the girls be on hand in order to see that they complied with the necessary finishing of work.

Q At any rate when you had pay day on Saturday and Tuesday you always came out on pay day? A Yes, sir.

Q And sometimes otherwise? A Yes.

Q On May 9th, did you have any drummers on the road or salesmen? A I did.

Q How many? A Three.

Q And they were engaged in taking orders? A They were, sir.

Q And where were they? A One was in Chicago, another one was up in New York State and another one was on the coast.

Q Was any one of them connected by marriage or otherwise with you? A Yes, sir.

Q Which one was that? A Mr. Sidney M. Grabshied.

Q And where was he located? A He was in the State of New York.

Q At his work selling for you at that time, on the 9th? A Yes, sir.

Q How long had he been out? A Three weeks.

Q Did you have an office in New York? A I did, sir.

Q And that was your headquarters? A Yes, sir.

Q And where were the books kept? A New York City.

Q In the course of your manufacturing business did you do any dyeing? A We did, sir.

Q Can you produce a sample of the articles undyed and dyed? A I can.

Q Now, what part is dyed, what part of the garment you have is dyed? A The trimming part only.

Q Now, the garment which you hold in your left hand has that got the same lace on or trimming as the garment you have in your right hand? A Yes, sir.

Q And the reason that the jury and I can see the garment that is in your left hand better than the one in your right hand is that one is dyed and the other is not? A Yes.

Q Who makes the dyes for you? A The man who was in charge of the place, Mr. Umansky.

Q I don't suppose you know the great secret about that, do you? A I don't believe I do, but I could explain the thing very satisfactorily.

Q What did he mix them in, the dye, what instrument? A He would be using turpentine with a—

*Mr. McCarter.* May I ask the courtesy of counsel and the court—there is a gentleman here

from Philadelphia, who says he cannot come to-morrow. May I ask Mr. Harris to step aside for him?

*The Court.* Yes, sir.

ARTHUR W. NEWTH, sworn in behalf of the defendant.

*Direct examination* by Mr. Ruback.

Q Captain, what is your business? A At the present time I am head of the Franklin stores at Wayne, Pennsylvania.

Q In Philadelphia? A Right outside of Philadelphia, with an office in Philadelphia.

Q And you have lived in Philadelphia how long? A Well, if you can call the time I traveled back and forth between Newark, about twelve or thirteen years.

Q Well, where were you living on May 9th at the time of this fire? A In Newark.

Q And were you in business then in Newark? A I was store manager for W. W. Reid, Incorporated.

Q And that store was located where on May 9th? A Branford place, Arlington street and Market street.

Q And how long prior to May 9th had you been employed as store manager for Reid's? A January 1, 1921.

Q Do you recall that date, May 9th? A Yes, sir.

Q Were you at Reid's that day? A Yes, sir.

Q How long did you remain that day? A Why, up until about 9:30 or a quarter of ten that night.

Q What was going on on May 9th at Reid's? A That was the first day of a two-day sale.

Q A so-called dollar sale? A A dollar sale; yes, sir.

Q And what time was it that you closed your doors for business that day? A Six o'clock.

Q Now, do you know Mr. Harris, the defendant in this case? A Yes.

Q How long have you known him? A Well, from the time I went with Reid's, January 1, 1921.

Q Mr. Harris at that time had a department with Reid's? A Yes, sir.

Q A muslin and linen department? A Muslin and silk underwear.

Q In charge of which was Miss Harris, a daughter of Mr. Harris? A Yes.

Q And had you seen him at Reid's prior to May 9th? A Quite frequently, occasionally.

Q Did you see him at Reid's on May 9th? A In the evening.

Q What time in the evening did you see him there? A Well, I got back from supper along about seven o'clock, it may have been a little later, ten or twenty minutes later than that.

Q And was it after you returned from supper that Mr. Harris came to Reid's? A Mr. Harris came to Reid's.

Q How long after you had returned from supper? A Almost the same time, he had been there before I got there, he came around to the side door and I was the only one that had a key for it.

Q And who admitted him to Reid's? A I did.

Q And that was about what time that he entered Reid's? A It was a little after seven; just the exact time I am unable to state.

Q Just a few minutes after seven? A I wouldn't say any more than twenty minutes, the maximum amount.

Q And did Mr. Harris remain at Reid's for any length of time? A He was there at least a half an hour, even longer.

Q Did you see him there during that period? A I did, I had a quarrel with him.

Q Concerning some merchandise, I take it? A No, the help.

Q Now, what time was it that Mr. Harris left Reid's that night? A Why, I would say it would be about quarter to eight, perhaps eight o'clock.

Q Well, during that period of time that Mr. Harris was at Reid's, according to the time that you just fixed, eight o'clock, that he left, where was Miss Harris? A She was straightening up her stock, she had one or two other girls there, as I remember it.

Q She was also at Reid's? A Yes.

Q You know Miss Liss? A Yes.

Q Was she connected with Reid's on May 9th? A She was.

Q Was she there that evening? A She was.

Q Was she there at Reid's when Mr. Harris arrived? A Yes.

Q Did you see her there when Mr. Harris left? A Yes, sir.

Q With whom did Mr. Harris leave? A His daughter and Miss Kasen, I believe it was.

Q Who was Miss Kasen? A Miss Kasen has the sweater department in Reid's.

Q Was she there at the place when Mr. Harris arrived a little after seven? A I don't recall.

Q Was she there during the period that Mr. Harris was there at Reid's? A She was there part of the time, yes.

Q And walked out with Mr. Harris and Miss Harris? A I am not absolutely certain of that, but to the best of my recollection she was there.

Q And, Captain, they went out by what entrance? A The Arlington street entrance.

Q And do you know where they went? A I heard them say they were going to the movies.

Q You heard who say? A I have forgotten who it was.

Q And you remained at Reid's? A Yes.

*Arthur W. Newth, cross.*

Q You remained there until about nine o'clock? A Yes.

Q How long since you have been conncted with Reid's? A I left there on July 1st of this year.

*Cross examination* by Mr. D'Aloia.

Q What time did you close up at Reid's that night? A You mean the regular closing time for business?

Q No, that night, May 9, 1920. A I left there, I should imagine about 9:30.

Q What time did the place, for business purposes, close up that night? A That is what I inquired of you first, when you would not permit me, six o'clock.

Q You were going to give me an answer of the usual custom, I mean that night? A Six o'clock that day, the regular time.

Q Did you close at the regular time that night? A Yes, sir.

Q Do you remember that without referring to your regular custom? A Yes, sir.

Q And you say you did not see Mr. Harris until he came in through the little side door for which you were the only one that had a key? A I am not the only one that had a key.

Q Well, that is the door he came in? A Yes, sir.

Q And that was the door which you had to open for him? A I had to open it.

Q Did you look at the clock then? A We have—

Q As soon as he came in you looked at a clock? A No, sir.

Q Well, did you look at a clock at that time when he came in? A No, he did not.

Q You just said yes.

*The Court.* No, he misunderstood you.

Q Then you don't know what time it was when he got there? A I do for the simple reason that I knew the

girls, our regular force did not go out to supper this night they sent out and got sandwiches and cakes, and ate them there.

Q Why should that have anything to do with fixing the time? A Because we have a very loyal force of sales people—

Q Now, was it an extraordinary thing for these girls to stay there and have sandwiches? A Very extraordinary.

Q Is that why you looked at the clock because they stayed there and ate sandwiches and did not go home? A No, the store closes at six o'clock—

Q Now, wait a minute, don't let us get confused. I want to be fair with you. When Mr. Harris came in that door for which you had the key and which you opened on the inside did you look at any watch or clock? A No, sir.

Q Then you are guessing at the time he came in, aren't you? A I said in my answer a short time ago, that it was between 7 and 7:15 and 7:20.

Q And it may have been 7:30? A No, sir.

Q Let's see, you have been with Reid's, how long did you say? A From January 1, 1921, to July 1, 1922.

Q Now, in May, 1922, and on the 9th of May, 1922, Reid's place, with which you were connected, was known as a quick outlet house, wasn't it?

*Mr. McCarter.* I object to that.

*The Witness.* I have not heard of that.

*Mr. McCarter.* It is immaterial and irrelevant.

*The Court.* I will allow it.

Mr. McCarter excepts to this ruling of the Court.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Wasn't it? A I never heard it mentioned as that.

Q Well, it was a place where manufacturers like Harris, A. E. Harris & Company, or Mr. Harris could get rid of stock quickly, isn't that so?

*Mr. McCarter.* I object to that as immaterial and irrelevant.

*The Court.* Objection overruled.

Mr. McCarter excepts to this ruling of the Court.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A It was a department store.

Q Yes, but it differs from the ordinary department store a la Bamberger and Hahne & Company, doesn't it? A No.

Q Did you hire counters out to manufacturers like Harris? A We did.

Q And didn't you sell stock that came in from his plant at a reduced price? A No, sir.

Q Sort of an auction sale? A No, sir.

Q And you now say it was not known as a quick outlet place? A No, not as quick outlet, it was a department store.

Q Where was it located on the night of May 9, 1922? A Branford and Arlington street.

Q How far from Market? A Well, we had a Market street entrance.

Q What is that? A We had a Market street entrance.

Q Rather inconspicuous, isn't it, that Market street entrance? A Due to the fact that we were unable to get more space.

Q Never mind what it was due to, the Market street entrance is inconspicuous, isn't it? A I would say it was rather a conspicuous entrance.

Q You don't want to admit that this is a regular jobbing house, do you? A Why should I?

Q Well, isn't it a fact that manufacturers like Harris, who wanted to get rid of stuff for cash quickly, would use your place to do it? A Reliable manufacturers only.

Q That wanted to get rid of their stuff quickly for cash? A No, sir; we wouldn't buy from them.

Q You wouldn't buy anything from him, but whoever was in charge of the store, that concern, hired a counter to him, isn't that true? A That's it.

Q And you didn't buy anything from him at all? A Nothing at all.

Q And you afforded him that space there so he could sell his stuff quickly for cash? A Yes, and he had to maintain a certain standard there of merchandise and prices.

Q The first word of your answer was yes. A The first word of my answer—

*Mr. D'Aloia.* The first word of your answer, yes. Read the answer.

*The Court.* Read the question and the answer.

(Question and answer read.)

*The Witness.* It should be that W. W. Reid, Incorporated, leased certain space to Mr. Harris for the selling of merchandise.

Q Of Mr. Harris' merchandise? A Yes.

*Abraham E. Harris, direct.*

Q There was never any sale to you, Reid & Company, to your concern, of merchandise by Mr. Harris? A Absolutely not.

ABRAHAM E. HARRIS, recalled for further

*Direct examination* by Mr. McCarter.

Q What did he mix them in—the dye, what instrument? A He would be using turpentine with—

Q Now, the question was, what did he mix the dye in, what receptacle? A Oh, we had—

Q What did he mix the dyes in? A Yes.

Q Well, answer it. In what receptacle did he mix the dyes in? A He mixed it in a pan and he also had a tea kettle which he used to use.

Q Do you recognize the tea kettle and pan that have been marked in this case as Exhibit S. 13 as being the instruments that were used by Mr. Umansky in mixing his dyes? A Yes.

Q And where were they located from your observation for him to mix his dyes? A In the trimming room.

Q In what? A In the trimming room.

Q In what we call the stockroom? A Yes.

Q Now, let us call that the stockroom. Now, as a matter of fact, what was kept in that so-called stockroom? A Embroideries and laces.

Q You evidently did not call it the stockroom? A No, sir.

Q You called it trimming room? A Yes.

Q But embroideries and laces were stored there? A Yes.

Q Now, what were those gas stoves used for, if you know? A To boil—that is, to serve the girls for the purpose of making their teas and coffees.

Q Were there any cartons, so-called, wooden dishes in that room? A Not that I know of, sir.

Q Now, on the evening of May 9th did you come out to the factory? A I did, sir.

Q Did you have the payroll with you? A I did, sir.

Q And what time was it, to the best of your recollection, when you reached the factory? A About five-twenty or five-twenty-five.

Q How did you go up to the factory that night? A That night I went up by bus.

Q The jitney? A The jitney.

Q From the tube? A Yes, got off at Bruce street.

Q What, if anything, did you have with you besides the payroll? A Some organdie embroideries.

Q What became of them? A I had given them to the foreman.

Q Given them to the foreman? A Yes.

Q What were they worth?

*Mr. D'Aloia.* I object to that. After I got there—

*The Court.* He said he gave it to the foreman.

Q You mean Umansky? A Yes.

Q Where? A At our place of business.

Q That night? A Yes.

Q Left it with Umansky? A Yes.

Q What was this bundle? A Consisting of organdie, with the payroll together. If you will let me I will tell the jury all about what I had in my hands and how I tried to—

*The Court.* Just answer the question.

Q What did the organdie or whatever there was—what was the value? A Oh, there was around $19.85.

Q Now, was the payroll in envelopes? A Yes.

Q And they and the organdie were tied up together? A Yes.

Q And you handed the whole thing to Mr. Umansky? A Yes.

Q Where did you buy this organdie, where did you get this organdie?

*Mr. D'Aloia.* I object to that.

*The Court.* Objection sustained.

*Mr. McCarter.* I want to show that he bought and paid for that organdie that afternoon.

*The Court.* It is sufficient he brought it there. I will sustain the objection.

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

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q After you reached there, I would be glad, now, if you, to the best of your recollection, will tell everything that transpired until you left. A When I reached our plant at 204 Morris avenue, which was about 5:20 or twenty-five, I walked up the stairway leading into the place and opened the door; we had a very large bell for the purpose of attracting if anyone opened the door; no sooner than I opened the door Mr. Umansky had noticed me coming in with several of the other help; we had a system of paying our payrolls sharp at 5:30 while the operators were at their machines, in order to save them a few minutes' time; Mr. Umansky came right into me—

Q Where were you? A In the office—opened the door and stepped in the office; the office was a wide partition about four feet high and the rest of it open, was of glass, visible to the entire floor, everybody could look in, everybody could look in and everybody could look out from the office.

Q What was the character of the partition between the so-called stockroom and the office, the same? A The

same, sir. He came in and he said, "You are rather a bit too late today"—

*Mr. D'Aloia.* Wait a minute.

Q We do not want what you said. A As he come in and opened up that bundle, I gave him the envelopes which were wrapped. During all that time I still had my hat and coat on, standing up. He took the envelopes with the time cards, walked right out through the so-called stockroom into the main factory and began to distribute the envelopes to the operators.

Q Where were you in the meantime? A I was in the office. I took my hat and coat off and took my little memorandum book out of the various things that I was supposed to take up with the men, Umansky and Gilpatrick. I walked out, walked right over to Mr. Gilpatrick—

Q Where was he? A He was there in the shipping part of the floor.

Q That was the southerly side of the building? A That would be the southerly side of the building. When I came there I found him rather busy; he had shipped that day about eight or nine packages.

*The Court.* Tell us what you did; not what someone else did or told you.

*The Witness.* Yes. I saw him busy and I was not going to disturb him, because I knew I could talk to him a little later. I laid away those memorandums on his table, awaiting the time he was released from the work he was doing, so I could take up the work I had to with him at the time and continued walking down the aisle from where he was packing his goods to the cutting department.

Q Are these separate departments? A No, they are all one floor, merely different constructions, so one man could tell it was shipping—it is an open floor unob-

structed; I walked over to the cutting table and I noticed them cutting several things there which we call lingets and spoke to him a few words there asking him questions.

Q (*By Mr. D'Aloia.*) Whom did you speak to? A A man by the name of Kline.

Q Go on. A —and came back around the shelf and stood right in the center of the floor, or rather, nearer to the pressing table, looking up certain things, looking at every article that is made, which is my usual custom; I awaited the time Mr. Umansky would get through giving out his pay, and just as soon as he was through Mr. Umansky and I walked into the office; we sat down there talking about the necessary things that had to be attended to, consisting mainly of a certain amount of samples which I had given them instructions several weeks ago to prepare for me, as we were ready to put them for the June and July sale; I also took up with him the system of operation; we had what we called a sectional system of operation, a certain amount of work will be necessary for other girls that may have none, whereas other girls will have too much, and just as we sat down there and started to talk about it, Mr. Gilpatrick came into the office and he said to me, "There is a telephone call for you, your daughter wants you, Mr. Harris." Mr. Umansky and I both walked out of the office; I went over to the telephone booth which was parallel with the table where Mr. Gilpatrick was working and I picked up the wire and I found my daughter talking to me, asking me to please send her down—

*Mr. D'Aloia.* Never mind. You had a conversation with your daughter?

*The Witness.* I want to state the conversation.

*The Court.* No, tell us what you did.

*Mr. McCarter.* Counsel opened the case to the effect that Mr. Bauer was spirited away. I think

that was the language he used, and we desire, if we may, to show by this witness the reason Bauer was asked to leave was because a request had come from his daughter at Reid's, over the 'phone, sending him down there, thereby corroborating Bauer in that respect.

*The Court.* I will allow it, without going into the detail.

A She said to me, "Will you please, papa, send me someone down here to help me out to straighten up the tables?"

Q And you sent Bauer? A I said to hold the wire and I immediately went over and found Bauer somewhere in front sweeping; I said to him, "Fred, I want you to run down—"

*Mr. D'Aloia.* Never mind.

Q You directed him to go down? A I directed him to go down.

Q After that, what occurred? A I again got together with Mr. Umansky.

Q Where? A Over in the center of the floor, and we walked back into the office and finished up the various little memorandums; then we both walked back again into the floor and we took up a complaint made to us that day by Sears Roebuck & Company that a certain skirt which we were supplying them—

Q Well, we won't go into details. You had a complaint? A Yes, and in order to correct that complaint it required for me and Mr. Umansky to use a certain figure where we would hang the garment up and see why it did not hang properly; at these places we designated by a piece of paper and we kept on looking at that from every possible angle and consumed about half an hour's time.

Q Then what did you do? A We were about ready to go home.

*Abraham E. Harris, direct.*

Q Had you had any talk yet about the parcel? A No. I walked into the shipping room—

Q Do not call it the shipping room, shipping end. A Yes, where he was packing his goods, and he said to me, "Here is a package—"

*Mr. D'Aloia.* Never mind.

*The Court.* That will be stricken out.

*Mr. D'Aloia.* No conversation.

Q Never mind the conversation. A I asked him, "Have you any package for me?"

*Mr. D'Aloia.* Didn't you hear you were not to state any conversation.

*The Witness.* I had to get a package from somebody.

*The Court.* Wait a minute. You are going to answer questions.

Q How much of your time was consumed in the conversation touching the bundle, the package? A About ten or twelve minutes.

Q Where were you at that time? A Right by the shipping table with Umansky and Mr. Gilpatrick.

Q And what were they engaged in doing? A Trying to repack it for me to make it convenient for me to carry.

Q Had they already packed it? A Yes.

Q How many packages originally? A One large package, very bulky.

Q How big was it? A It was quite big, very bulky; it weighed about forty-five pounds probably.

Q What was in it? A Samples which were supposed to represent a thousand dozen goods that were in stock to be put on sale.

Q How many samples? A About fifty-five to sixty.

Q Well, when you discovered the size of the one package they had made, what next occurred? A I found it to be too heavy to carry and I told them so.

Q Now, what did they then do? A They tried to pack it into two different parcels.

Q And did they do it? A Yes.

Q They did? A Yes.

Q Had you anticipated talking those samples away with you that night? A No, sir.

Q Originally had you anticipated it? A Originally I did, sir.

Q How long before that night had you given your first directions concerning those samples? A Oh, about three to four weeks.

Q And did you take them away with you? A No, sir.

Q Why not? A I found them to be too heavy and bulky to carry.

Q So they were left there? A Yes.

Q Now, you and Gilpatrick and Umansky were all over there by the shipping table, as I understand it? A Yes.

Q Now, go ahead. A When I finally found that the packages were too heavy for me to carry I made up my mind to go home. Mr. Umansky at that time had his hat and coat on all ready while we were standing there and talking; I walked into the office; I got my hat and coat right from the table where it was lying there with a bunch of goods. I followed Mr. Umansky, instantly walked there, and I told him possibly it is getting too late and I had to go over to Reid's.

*Mr. D'Aloia.* Wait a minute.

*The Court.* Strike it out and do not repeat conversations.

A I walked over to the two men and told them it is time to go home, which we did so; we all three walked

as far as the entrance into the door, into that little alley—

Q Lobby? A Yes—and just as I was about to go out I noticed one window open leading on the Thirteenth avenue side. I said to Mr.—

Q Never mind what you said. Did you give Mr. Gilpatrick some directions with reference to the windows? A Yes, I told Mr. Gilpatrick to close that window and also look around all through to see that the rest of the windows shall be kept closed—shall be kept closed, because Fred is not here, and so he did; he walked away and walked around the place, which took him about a minute at the most and came right back and we all three left together.

Adjourned until tomorrow, Tuesday, November 21, 1922, at ten o'clock A. M.

## FOURTH DAY.

Tuesday, November 21, 1922.

Appearances as before stated.

Trial continued.

ABRAHAM E. HARRIS, the defendant, resumes the stand.

*Direct examination* by Mr. McCarter (continued).

Q Mr. Harris, I think when you left the stand yesterday we had gotten to the stage where you directed Gilpatrick to close the windows. What, in fact, did he do after you had given him that direction?

*Mr. D'Aloia.* He answered that. He said that Gilpatrick was gone a minute.

*The Court.* Yes, I think he said there was one window open and Mr. Gilpatrick closed it, and then

he told him to look around and see if there were any others.

*The Witness.* He went around the entire floor and came back in about a minute.

Q Where did he join you and Umansky? A Right at the entrance of the exit door.

Q And then you went out? A Yes.

Q Who locked the doors? A I did, sir.

Q Describe what you did in locking the doors? A I pulled the inside door towards the sill and put the padlock on, closed the other door, and then took the key which was required for the mortice lock door, locked that, and took the bunch of keys and gave them away to Mr. Umansky.

Q And then, where did you go? A Then we walked right down on 13th avenue, going east, I believe, towards the W. W. Reid store, which was at Arlington and Market streets.

Q Now, I want to ask you before we go further with that journey, whether there, that evening, or any time that day, or any other day, you set any candles or made any plan or arrangement by which that building or the stock, or any part, or either, would be set on fire? A No, sir.

Q You proceeded down 13th avenue? A Yes, sir.

Q How far did Gilpatrick accompany you? A Up as far as the Clifton car.

Q Who accompanied you the rest of the way to Reid's? A Mr. Umansky.

Q Where did Umansky leave you? A At the corner of Market and Arlington streets.

Q You went into Reid's? A I did, sir.

Q Was your daughter there? A Yes, sir.

Q How long did you remain in Reid's? A About an hour.

Q And after that what did you do? A I walked home with my daughter, walked to the Hudson tubes, reached

there about eight o'clock, or about 8:10, took the tubes, went over to New York, reached my home a little bit after nine o'clock.

Q Where is your home? A At 3915 Broadway, corner of 146th street and Broadway, New York, and had a short bite, and we went to see the movies right opposite us.

Q Who did? A Mrs. Harris and myself.

Q Went to the movies? A Yes, sir.

Q Did you meet any acquaintances going to the movies? A We did, quite several of them; yes, sir.

Q What time did you get home from the movies? A About 11:30, 11:15 to 11:30.

Q What did you do then? A Went to bed.

Q What time did you get up the next morning? A About 7 o'clock.

Q Where did you go after you had your breakfast? A I went to my office.

Q When did you first hear of a fire? A When I reached my office, about nine o'clock. I received a telephone call from Mrs. Harris.

Q From Mrs. Harris? A Yes, sir.

Q She had been notified from Newark? A She had been notified from Newark.

Q What did you do then? A I immediately—I dropped my mail and immediately ran to Newark.

Q Came to Newark? A Yes, sir.

Q What time did you get up to the factory? A I must have reached the tubes about 10 o'clock, and took a taxi cab and came up to the factory about 10 minutes after 10 around about that time.

Q Were you permitted to go in there? A No, sir.

Q Who excluded you? A Captain, or rather Detective Rothenberg, and Detective Cappandanno, and Mr. Helfrich, and an insurance agent.

Q A man by the name of Ruttenberg? A I don't know his name. I believe that was his name, I don't know.

Q Well, that day were you interviewed by anybody? A Yes.

Q By whom? A By the detective and this insurance agent and also Helfrich all day long.

Q Where? A They kept me at the police station from the time they got me until about nine o'clock in the evening.

Q You say the time they got you? A In the morning.

Q And when did you first get into the plant or factory after the fire? A On the 11th.

Q What time did you get there on the eleventh? A About nine o'clock in the morning.

Q There has been testimony in this case that on the day of the fire, on the tenth, on the eleventh and on the twelfth, a large streamer, shown in State's Exhibit No. 6, was hanging from the shelf in the southwest corner of the so-called stockroom. Did you ever see any such streamer? A No, sir; and there was not none there, sir.

Q Were you in the stockroom on the eleventh? A Yes.

Q It was not there then? A It was not there.

Q You never saw that? A Never saw that there.

Q Then you did not put it there? A I positively did not.

Q How long were you there on the eleventh? A All the rest of the day.

Q Were you there when the photographer from Koenig's was there? A No, sir—pardon me; on the eleventh I was there until about one or two o'clock and then I came back later on.

Q You did not see the photographer then? A No, sir; I did not.

Q And were the guards there that day? A Yes.

Q And did you remove any coat or any streamer on the eleventh or any other time? A No, sir; not a thing; I was not even permitted to move any place; they had a

guard in there; they wouldn't even allow me to talk on the telephone.

Q Testimony has been given in this case concerning this coat; I don't know whether it has been marked or not; has it, Mr. Ruback?

*Mr. Ruback.* I do not think so. It may have been marked for identification; it has not been offered yet.

Q Do you remember that coat? A I do, sir.

Q Where previous to that fire was the coat? A In the so-called stockroom.

Q And how soon after the fire did you see that coat? A I saw that coat until last Saturday morning all along the line; it was there all the time.

Q Where? A In the premises.

Q Whereabouts in the premises? A For a time it was in the stockroom and then when we started clearing away we put it aside and it was in another part of the floor.

Q What happened to it Saturday? A Saturday I instructed one of my men to please go and get it and he went up and got it for me.

Q And brought it down to you? A Brought it down, yes.

Q Now, come down to the period after the fire; will you describe the general nature of your stock there in that plant at the time of the fire and afterwards; what did it consist of generally? A It consisted of manufactured and unmanufactured merchandise commonly called "raw material;" we had approximately about $12,000 of laces and embroideries; we had $2,000 worth of ribbons; we had various other trimmings called medallions, organdie silk; we had about 1,800 dozen of made up merchandise; we had about three or four hundred dozen in course of construction; we have a plant of 54 machines that were in operation; we had about twelve or fifteen

machines, exclusive of those fifty-four, that were not in operation.

Q Twelve or fifteen? A Yes. We had cutting tables, cutting machines; we had two time clocks; we had a baler.

Q What is that? A Accumulating the dirt and papers and then baling them in proper bales; we had a scale to weigh goods on, we had a steel safety container to keep rags in so that no dirt would lie around the floor, if possible, besides we used the rags for sale, we had everything possible to render the plant to 100% efficiency.

Q Do you know the value of your machinery? A I do.

Q What was the value of your machinery? A About ten thousand dollars.

Q How did you reach that? A It cost me more than fifteen.

Q How long have you had it? A A period of four or five years, changing constantly.

Q Did you participate or take part in the so-called appraisal that Messrs. McCabe and Rosenstock made in less than an hour on the 12th? A I did not.

Q You did not? A No.

Q From your knowledge of this business, is it a possible thing to make an appraisal of that stock in an hour? A Not in a week, sir.

Q When had the last appraisal of that stock been made by your concern?

*Mr. D'Aloia.* I object to that.

*The Court.* You mean before the fire?

*Mr. McCarter.* Yes.

*The Court.* All right.

Q When had it been made? A The latter part of December up to the first of January, 1921, 1922, the first of January.

Q Are you able to tell us approximately how many boxes of stock you had in the factory?

*Mr. D'Aloia.* When?

*Mr. McCarter.* At the time of the fire.

*Mr. D'Aloia.* May 9, 1922?

A About four thousand dollars.

Q Now, will you describe how the goods were distributed through the boxes; in other words, tell the jury if it be a fact why it was necessary to look into each box to make a proper and competent appraisal. A Due to the fact that our line consisted of 500 individual styles and numbers and in order to keep so many dozen of merchandise and get the proper sizes starting at thirty-six, thirty-eight, forty, forty-two and forty-four, and because it was required to put a dozen in a box, and when you have fifteen or twenty dozen goods, it required twenty boxes. We had about 2,800 dozen of finished underwear, which in itself required about that many boxes—maybe less, in some cases we may have had two dozen in a box. Some cases we may have had three dozen but approximately it was around that; then we had our embroideries and laces, which must have constituted four or five hundred boxes and then we also had a supply of empty boxes on hand to take care of the daily production.

Q Now, would each box originally, after the manufacture was complete, contain the same number or a different number of garments? A A different number of garments; oh, there may be some boxes where they contained three dozen of the same number of different sizes.

Q Suppose an order comes in for different numbers, as you call them— A Yes.

Q And sizes— A Yes.

Q —that would be taken from the box? A Yes.

Q And the different boxes, of course? A Yes.

Q So that at any one time was or was it possible without counting the garments to know how many articles were in each box. Now, listen to that question.

(Question read.)

A No, sir.

Q Are you able to tell us what the merchandise in the factory on the ninth of May, in your judgment, at the least, was worth?

*Mr. D'Aloia.* Yes or no.

A Yes.

Q Do so. A A little over $40,000.

*Mr. D'Aloia.* I object to that. Here is a man lives in New York and had an office in New York and a man in charge of his factory, his foreman, Umansky. He comes over here only on pay day and he gets reports as to the conditions of his plant from Umansky. He does not know, of his own knowledge, anything about it. The testimony of him and his foreman is he came here and conferred with Umansky and told him the condition of his plant, and if Umansky told him he does not know anything about the plant.

*The Court.* By reason of his relationship I think the evidence is competent. You may answer the question.

Q You may answer that question? A Yes, I said a little over $40,000 in merchandise alone.

*Mr. D'Aloia.* Mr. McCarter makes an offer to show the status of the insurance at the different times prior to and at the time of the fire. We admit what the insurance amounted to at the time of the fire, $45,750. We do not know anything about the other conditions.

*Mr. Ruback.* Your stipulation was that you would not require any proof from the insurance agent.

*Mr. D'Aloia.* If it were material. I say it is not material, it is not competent, and it is not relevant as to what the insurance on that place may

have been in January or February, and I object to any evidence which indicates the amount of the insurance sometime prior to the 9th of May. On the 9th of May the insurance amounted to a certain stated sum, and I agree with Mr. McCarter and Mr. Ruback that that stated sum should go into the record without any formal proof.

*Mr. McCarter.* So far as that agreement is concerned it was favorable to the State to have that agreement. We agreed with him that he would not have to prove that amount, and we offered to produce the policies voluntarily, showing the amount of $45,750. Assuming that you do not have to call the insurance man, if it is relevant, I would direct my argument, for a moment to the question of the materiality and relevancy of the amount of the insurance, on the 1st of March and on the 1st of February, as opposed to the 1st of May. Namely, we deem it very material in view of the charge that is made here, to indicate to the jury, that the insurance had been reduced in amount from the amount that it was on the 1st of February to the amount that it was on the 1st of March, and that between the 1st of March and the 1st of May there was again a considerable reduction in the amount of the insurance.

*The Court.* There is nothing in the case to indicate the value of the property itself, so, until there is something shown in the evidence as to the value of the property, I don't see the relevancy of the offer of the insurance as to the other months than May.

*Mr. McCarter.* Then, I move to strike out such evidence as is in the case as to the amount of the insurance. Certainly, if the State is to be permitted to have it appear here, without comment before this jury, that there was $45,750 of insurance upon that plant—

*The Court.* If you show the value of the property, the plant, as of the months that you wish to show insurance, then I will admit those for the two months, but as it stands now, it does not mean anything.

*Mr. McCarter.* Then, your Honor does not think that my suggestion that a decreasing insurance—

*The Court.* That is true, but what is there before this jury?

*Mr. McCarter.* There is before this jury that there was $45,000 insurance.

*The Court.* That is true.

*Mr. McCarter.* And there is some evidence of the value of a certain amount of stock, and I think we ought to be permitted to show, with great deference to your Honor, the fact that the insurance on the 1st of May, which is eight or nine days before this fire, was materially less than it was on the 1st of March and on the 1st of February.

*The Court.* Suppose the stock bore an equal relation in value to the policy of insurance, and then there was a further reduction in the insurance, it would not show one thing one way or another, except probably a good business proposition.

*Mr. McCarter.* But, there stands here the naked facts in the case, that on the 8th of May the insurance aggregated $45,750, or whatever it is. That fact is there. While it is true there is no evidence of valuation at that time, so that the claim of overvaluation has disappeared from the case, nevertheless, I think you ought—and it becomes material for us to be able to prove now that that insurance was a decreasing amount, and had not been raised—it had been lowered, and any inference, therefore, that is sought to be drawn from the fact

that $45,000 upon that point, ought to be accompanied with the benefit to the defendant that that was less than it was two months before and three months before.

*The Court.* No, until you show the approximate value of the stock for these months, I will not permit the figures as to the other insurance except on May 9th.

*Mr. McCarter.* I pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Now, Mr. Harris, what effort did you make to have an appraisal made of the value of this stock after the fire?

*Mr. D'Aloia.* I think that Mr. McCarter ought to have the time fixed "after the fire."

*Mr. McCarter.* Certainly. What effort did you make to have an appraisal?

*The Witness.* Just as soon as I found out that they are accusing me of having had to do with the planning of that fire, I immediately, forty-eight hours after I got liberated from the police headquarters, I immediately began to look for someone to begin to appraise my merchandise and take inventory for us.

Q Did you finally secure a man? A I did.

Q Who? A A man by the name of Mr. Fischer, to my knowledge, he is the manager of S. Plaut & Company in this town.

*Mr. McCarter.* L. Plaut, the Bee Hive people?

*The Witness.* Yes, sir.

*Mr. D'Aloia.* You are both right, it is L. S. Plaut.

Q Did you know him before? A Never did, sir.

Q Now, I think it appears in the case, or if it does not, it will now appear, when did he commence to make his appraisal? A The early part of June.

Q Now, had any of this stock been taken away in the meantime? A Some stock out of that stock had been shipped and taken away.

Q In the meantime? A Yes, sir.

Q Was a record kept of that? A Yes, sir.

Q Had any stock been brought in in the meantime? A Yes, sir.

Q Was a record kept of that in the books? A Yes, sir.

Q A correct one? A Absolutely, sir.

Q Do you know how long a time Mr. Fischer was engaged in making the appraisal? A About four or five nights with several men of his own, besides the entire staff of ours.

Q What effect did this accusation against you have on the insurance on that property?

*Mr. D'Aloia.* I object to that.

*The Court.* Objection sustained.

Q Did your insurance upon this stock continue? A No, sir.

*Mr. D'Aloia.* I object to that, the same objection.

*The Court.* He has answered.

Q Did you cancel it? A No, sir.

*Mr. D'Aloia.* Just a moment, wait until I make my objection.

*The Court.* I sustain the objection.

*Mr. McCarter.* I offer to show by the witness that after the accusation in this case was made against him the insurance company revoked the insurance, and that left him with a stock of goods without any insurance and he was compelled to close out the plant.

*The Court.* This jury is not trying that issue, Mr. McCarter.

*Mr. McCarter.* Your Honor overrules the question.

*The Court.* Yes.

*Mr. McCarter.* I pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*The Court.* I don't know whether you have established the general value, how he arrived at his values of the stock and machinery, Mr. McCarter?

*Mr. McCarter.* I will be glad to do that.

Q Were you aware, Mr. Harris, of the extent of the additions to or subtractions from the stock between the fire, and the time that Mr. Fischer made an appraisal?

*Mr. D'Aloia.* That is not what the Judge is referring to.

*The Court.* No.

*Mr. McCarter.* I understand that, but this leads up to the thing.

*The Court.* No, I am speaking of before the appraisal by Fischer. He said there was 12,000 dozen laces, or 12,000 laces—

*The Witness.* $12,000.

*Mr. D'Aloia.* Those figures refer to the time of the fire.

*Mr. McCarter.* I am asking him if he was aware of the additions to and the subtractions from the amount of the stock between the time of the fire and the time of the Fischer appraisal. Then, suppose he went over, garment by garment, the Fischer appraisal on June 9th, and knowing what happened in the interim, thus he would know the value at the time of the fire.

*The Court.* I did not understand it that way.

(Question read.)

*The Witness.* I was, sir.

Q Were you present during the time that Mr. Fischer was making his estimate? A Yes, sir.

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

Q Will you tell the Court and jury in response to the request of his Honor, the Judge, how you reached your estimate of the value of the stock on the night of the fire? A The night of the fire?

Q Yes. You have given us an estimate of the value of your stock at the time of the fire. Now, we want to know how you reached that estimate? A We brought over with us to Newark, in the latter part of December, the inventory which is, as it was taken in New York City, and that consisted around $35,000 worth of merchandise.

*Mr. D'Aloia.* I move to strike that out.

*The Court.* I will allow it.

*Mr. D'Aloia.* He brought over an inventory, that means some figures in a book.

*The Witness.* Yes, sir; the book is here to show.

*Mr. D'Aloia.* Yes, I know the book is here to show, that's all it is.

*Mr. McCarter.* Is counsel making a stump speech?

*Mr. D'Aloia.* No, but I move to strike that answer out, "He brought over an inventory," that doesn't mean the stock, but it means that it was a book that was brought over from New York.

*Mr. McCarter.* Counsel has entirely misinterpreted the answer. He said he brought over the stock which he had upon this inventory, and the amount of the inventory appears in the book, is that right?

*The Witness.* Yes, sir.

Q And what was the value of that stock according to the inventory made at that time? A Consisting of our merchandise.

Q Well, what did it amount to? A Well, around $39,000, $38,000 and something, I would have to have the book to look at.

Q Yes, go on. A Then we brought over our plant.

Q I show you one of the books that were recognized by Miss Albert yesterday. Turn to it and see if that is the inventory that you have just referred to contained from pages 76 to 121 in this small book, which says, "Inventory," on the first page, is that the inventory? A Yes, sir.

Q And the total amount is how much? A $38,907.59.

Q Now, when was that inventory taken? A During the month of December.

Q 1921? A 1921.

Q When was that stock brought out here? A The latter part of December, 1921.

Q Was all the stock that you had in the New York plant at the time your inventory was taken, brought out here? A Yes, sir.

Q Now, go on, from January 1st? A And then we also brought over machinery.

Q Yes, we will take up the stock first. A Yes, from that time on, from January 1st, is taken an account of

what we have purchased since January 1st and May 9th and what we have sold between January 1st and May 9th, and deducting the necessary expenses of the overhead, we have arrived at the conclusion that we had a little over $40,000 worth of merchandise on or about May 9th, my books will show that.

Q What deduction did you make, or what addition did you give to the actual cost of manufacture, for what you call overhead? A Approximately about 25 per cent.

Q What is your expected gross profit? A Thirty-five, about thirty-five per cent., it depends upon the article.

Q Over and above overhead, or is the overhead included in that thirty-five per cent.? A That is the overhead included.

Q So, about ten per cent. for overhead? A Yes, sir.

Q Have you checked up from the books the sales between May 9th and June 13th? A I did, sir.

Q Look at this paper and see if it correctly states the extent of the sales or depletion of your stock between May 9th, the date of the fire, and June 13th, when Mr. Fischer took hold.

*Mr. D'Aloia.* I object to that. This list, or that paper, or that account has not been made up by this witness and he does not know, and it has not been shown that he has any knowledge, as to how those different items were arrived at.

*Mr. McCarter.* He said he checked them up.

Q Tell me what connection you have had with that paper.

*The Court.* Unless he knows of his own knowledge or having learned by recent supervision, I will not allow him to answer the question.

Q I see a lot of check marks on that paper? A Yes.

*Abraham E. Harris, direct.*

Q Now, what did you do with that paper? A This paper I checked every item.

Q What do you mean by that? A Every item on that paper I have checked personally.

Q With what? A With a pencil.

Q What did you compare it with? A With my books.

Q So the items that appear in typewriting upon this statement you have personally checked up with the books? A Yes.

*Mr. D'Aloia.* I object to that because there is no evidence that he knows the items in the books to be correct.

*Mr. McCarter.* Well, the bookkeeper has verified the books.

*The Court.* As president, or whatever he is, and if he knows the correctness of the paper there, I will allow him to testify.

*Mr. McCarter.* I will say this paper itself was prepared by a certified accountant, who, himself, did take it from the books but I want to have the duplication of proof—corroboration—and I want to prove by Mr. Harris that he himself went over the books, which books have been proven correct by Miss Albert and himself, that these items were taken from the books and there were no other sales on the books other than these.

*Mr. D'Aloia.* Mr. McCarter states that the books were proven to be correct by Miss Albert. Miss Albert simply identified the books and said they were the books of the concern

*The Court.* The books are not in evidence.

*Mr. McCarter.* I do not know whether the report of Miss Albert's testimony is here or not. You will find that she testified the books were correct and the question arose whether they would be

marked and your Honor said we would defer the marking until a later time.

*The Court.* It is here. She said this, page 327: 'Q Do you recognize the books that are before you as being the books that you kept? A Yes, I do. Q I don't care to go into too much detail with you, Miss Albert, but generally speaking, the books before you are what? A The entire set of books. Q The entire set of books consisting of what? A Two ledgers, one general ledger, one purchase ledger, one cash book, one trial balance, a journal and a return book. A Now, were those books accurately kept by you? A Yes, sir; I believe so. Q And you recognize them as being the books that you kept? A Yes. Q And you left them with the concern when you left? A Yes, sir.'' The question as to how we should mark them arose and we said we would take that up later.

*Mr. McCarter.* I offer them now, then.

*The Court.* I will allow this witness to testify, if he knows the value of that stock on May 9th, and he must show us how he knows and if the books are necessary, I will allow him to use the books, provided he knows what is in the books.

*Mr. McCarter.* I now offer in evidence the books which were produced yesterday.

*Mr. D'Aloia.* They are objected to because they are self-serving declarations and we cannot contradict any of those entries; we never had access to any of those books and the entries do not refer to anything but some time in January and sometime in June.

*The Court.* You may examine as to the books.

*Mr. McCarter.* First, may I have the books marked?

Books marked Exhibits D. 9 to 19, inclusive.

*Abraham E. Harris, cross.*

Q Now, Mr. Harris, in checking up that list of sales between the ninth—the first of January and the ninth of May, what book or books did you consult? A The purchase and sales book and the ledger.

Q And did you find that the typewritten statement with the blue check upon it, which I think is before you, correctly stated the sales that occurred between those two dates ? A Between May 9th and June 13th?

Q Yes. A Yes.

Q You did? A Yes.

Q You yourself checked them up? A Yes, sir.

Q And what do they amount to? A A little over five thousand.

Q Look at it and see; sales, now. A The net sales are $6,032.80, less credit by return of merchandise from customers, $543.60; leaves net sales $5,489.20.

*Mr. McCarter.* Now, just as a matter of convenience, I would like to offer that memorandum in evidence as a record.

*Mr. D'Aloia.* No, the figures are in the record. I object to the memorandum.

*The Court.* Objection sustained.

Q Now, did you make a similar checking or examination of the amount of goods purchased and brought to the plant— A I did, sir.

Q —between those dates and does this typewritten sheet which I show you, enable you to tell the jury just what that amounted to, the purchases? A Yes.

Q How much? A $1,298.88.

Q Were any other goods brought to the plant between those dates other than those which are designated between the figures which you have just given? A No, sir.

*Cross examination* by Mr. D'Aloia.

Q Now, Mr. Harris, you say that from forty-eight hours after the fire, from that time on you made arrange-

ments or tried to get somebody to make an appraisal; is that right? A Yes.

Q And you began on the morning of the eleventh of May? A I began on the morning of about the eleventh or twelfth of May.

Q About forty-eight hours would be the eleventh? A Around about that.

Q And you didn't get an appraisal until the thirteenth or fifteenth of June? A No, sir.

Q And in the meantime you got some goods in there? A Yes.

Q Now, you remember the last part of March, don't you, 1922? A Yes.

Q You remember you were requested for a statement of your financial condition and you declined to furnish the figures?

*Mr. McCarter.* I object; it is incompetent, irrelevant and immaterial.

*The Court.* I will allow it.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Do you remember that? A I don't.

Q You say you did not decline over your signature to furnish figures the last part of March, will you?

*Mr. McCarter.* I object.

*The Court.* I will allow it.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A If you will tell me—

Q No, I asked you this question—

*The Court.* He is entitled to know by whom the request was made.

Q You were trying to get a loan the last part of March? A I was not.

Q Well, you were making some financial arrangements and somebody wanted your financial standing and you declined to give figures.

*Mr. McCarter.* If your Honor is going to permit this subject to be investigated, he certainly should follow your Honor's ruling and state who and how, so we will be able to contradict him.

Q Do you remember the early part of January, 1922? A I do.

Q Do you remember the answer you made to Mr. McCarter yesterday as to who the stockholders of your company were? A I do.

Q Do you remember telling Mr. McCarter there was a man by the name of Ketcher who was a stockholder? A Yes.

Q In May, 1922? A Yes.

Q You told Mr. McCarter that yesterday? A I said yes.

Q Do you remember a statement you made in January, 1922, that Harry Ketcher, who had formerly been treasurer of the company, had withdrawn about six months, meaning six months before January, 1922?

*Mr. McCarter.* I object unless he states to whom the statement was made.

*The Court.* You may answer that yes or no.

A I did, sir.

Q You told Mr. McCarter that you only owned twenty-five per. cent of the stock? A I did.

*Abraham E. Harris, cross.*

Q Do you remember making a statement to the police on the day after the fire? A I do.

Q Do you remember stating this to the police: "I am the president of the corporation known as the A. E. Harris Company, consisting of myself, my wife, Rose Harris, as vice-president and Sidney Grabshied as secretary and treasurer; do you remember making that statement? A I do.

Q The day after the fire? A Yes.

Q Do you remember answering Mr. McCarter yesterday and saying that the company—the stock was owned by somebody out in Dallas, Texas? A Yes.

Q You knew that Mr. McCarter was asking you who the stockholders of that company were on the ninth of May, 1922? A Yes.

Q When you answered Mr. McCarter and said that the stock was owned by a lumber company out in Texas, and you only had twenty-five per cent. of the stock, on May 11th, you said you and your wife and Grabshied were the only ones interested in the corporation.

*Mr. McCarter.* Now, I think, counsel has misinterpreted the answer which the witness is said to have given at police headquarters a day after the fire. I don't remember hearing him read that he said they were the stockholders, he gave the officers of the company.

*The Court.* Clear it up, if there is any doubt.

Q You were asked at police headquarters who were the persons interested in the company, weren't you? A I was.

Q And in answering that question, here is your answer: "I am the president of the corporation known as A. Harris & Company, consisting of myself as president—" A Yes, sir.

Q That is the corporation, "consisting of myself as president, my wife, Rose Harris as vice-president?" A Yes.

Q "And Sidney M. Grabshied, as secretary and treasurer?" A That is wrong.

Q You made the answer, didn't you? A It is Mary Grabshied.

*The Court.* We are not concerned whether it is wrong or not. The question is did you make that statement?

*The Witness.* No, sir; not the last thing, your Honor.

Q Now, you told Mr. McCarter very plainly how that door was locked that night. Now, bring your mind back to that night. You told Mr. McCarter that you closed the inner door, that is the heavy door, and you put a padlock on? A Yes, sir.

Q And you told Mr. McCarter you then closed the outer door? A Yes, sir.

Q Which had a latch that you had here yesterday? A Yes, sir.

Q And then you told Mr. McCarter and you told this jury that you turned this key? A Yes, sir.

Q Now, was your memory better today or yesterday than it was on the 10th of May, the day after the fire? A Yes.

Q It is? A Yes, it is.

Q Were you asked about your movements that night, the night in question, about those doors, or that morning? A I must have been asked.

Q Do you remember making these answers: "I instructed Mr. Gilpatrick that he should send to me the following morning with the porter samples of various quantities of manufactured merchandise, and I had examined the payroll cards, and left the place about 6:30 P. M., walked out about a minute ahead of Mr. Umansky and Gilpatrick and one of the men, I don't know which, locked the doors." Do you remember saying that to the police the next morning, on May 10th? A May I be permitted to look at that?

Q Just answer that? A I may have.

Q You may have said to the police the next morning that you left the place first and a minute before your two men, and one of those men locked the doors? A Yes, I may have.

Q When did you correct your impression so as to testify here, under oath, that you went out last, and that you took the padlock and that you put it on the inner door and that you locked the front door and that you put the key in the mortice lock on the front door? A After I found out that they are really beginning to accuse me of that fire, I made it my business to follow my trail from second to second, and therefore, I memorized things today, better than I did the day when I was under torture.

Q You mean to tell this jury that after you made this statement, "I walked out about a minute ahead of Umansky and Gilpatrick, and one of the men, I don't know which, locked the doors, I believe it was Umansky,"—it was after this, when you made this statement, that the police brought Umansky in and Umansky had been in police headquarters, and said you locked the door, Mr. Harris, that you changed your mind, didn't you? A I positively do not understand your question on account of the hollering, I can't stand the hollering.

Q You are nervous, aren't you? A No, sir; not at all. I am sensitive.

Q Now, I am going to talk from back here. After you told the police that you walked out about a minute ahead of Umansky and Gilpatrick and one of the men, you don't know which, locked the door, was Umansky brought in to where you were down at police headquarters? A Was he brought in with me?

Q No, was he brought in after you made this statement that he shut the door? A Where to?

*The Court.* To police headquarters.

*The Witness.* Yes, sir.

*Abraham E. Harris, cross.*

Q Did you hear Umansky say in your presence that he did not lock the door but that you did? A I did not, sir.

Q Do you remember finding out during that day that Umansky said that you had locked the door and not he? A I do not, I didn't see Umansky that day.

Q Were you informed that Umansky had said that you had locked the door, and not he? A No, sir.

Q Well, will you tell the jury what reason you had for telling the police that Umansky had locked the door and not you? A Because it was his usual habit, and I didn't think much of it. There was no locking there of great importance necessary, merely the slapping the door.

Q Do you remember Mr. Umansky coming into the same room where you were down in police headquarters? A I do not, sir.

Q Don't you remember his coming in there after you had been asked by the police, after Mr. Rothenberg had asked you if you had keys to your factory and after you said no you had no keys, don't you remember Mr. Rothenberg bringing Umansky in? A I do not, sir.

Q Don't you remember, in your presence, Umansky being asked by Rothenberg if you hadn't keys to the loft, and Umansky saying, "Yes," and then, don't you remember Mr. Rothenberg demanding the keys from you and you produced these keys, a Yale lock, and a smaller key, and a Yale lock key marked Russwin, larger than the other two. Don't you remember that? A I remember two keys I gave them, not three.

Q And don't you remember you were first asked if you had keys to your loft and you said no? A I do not, sir.

Q And don't you remember that it was Umansky that was brought in there, and in your presence Umansky was asked if you had keys, and he said, "Yes, Mr. Harris, you got the keys," and then the police demanded the keys of you, and you produced them? A No, sir; that was not the keys.

*Abraham E. Harris, cross.*

Q Don't you remember taking your key ring out and defying Umansky to pick out the keys? A I do not, sir, not Umansky.

Q Who? A Mr. Rothenberg.

Q Was Umansky there? A I don't know.

Q Now, try to think. This is important to you? A Umansky and I had not met that day.

Q Didn't Umansky take these keys from your key ring in the presence of Rothenberg, after you had denied having keys to your factory loft, yes or no? A I would like to explain exactly how it took place.

*The Court.* No, you are going to answer that question.

(Question read.)

A Umansky had nothing to do with it.

Q What? A It was Rothenberg that did the taking.

Q Was Umansky present? A I don't remember that.

Q Did you deny having keys when that was done by Rothenberg? A I did not, sir; I told him I had a portion of the keys belonging to that place.

Q Sure about that? A Yes, sir; positively; I offered him the keys immediately upon his asking me, he didn't ask me anything, I said, "I have got keys here and if you can find them you are welcome."

Q Oh, "If you can find them you are welcome to them?" A Yes.

Q Now, before that hadn't you been asked about the keys and you said you had no keys? A I did nothing of the kind, sir.

Q Well, what was the occasion for Umansky being brought in there? A I don't know what occasions they had with Umansky.

Q Now, was Umansky in the same room with you at police headquarters when you first asked about keys? A I don't remember.

Q Isn't it a fact that after you had denied having keys that Umansky was brought in? A I don't know.

Q And then you said, "Here, if you can find the keys, these are the keys I have, and if you can find the keys, look at them" and Umansky looked at them and Mr. Umansky picked the two keys out, don't you remember that? A I remember giving them the keys as I described, who picked them out, I don't know anything about.

Q Now, Mr. Harris, Mr. Rothenberg was not your foreman up there, was he? A No, sir.

Q Mr. Rothenberg had never locked that door any night while you were in New York? A No, sir.

Q Therefore, when you brought out your keys and they were picked out, these keys, do you want this jury to understand that it was Rothenberg that picked out the keys and not Umansky your foreman? A It was me myself who gave them the factory keys.

Q Why, you said you didn't have any? A I said I haven't got the full set of keys.

*Mr. D'Aloia.* Where are those locks that were here yesterday.

*Mr. Ruback.* Which do you want?

*Mr. D'Aloia.* I want the Yale lock on the big door inside.

(Locks produced.)

Yale locks offered in evidence, received and marked Exhibit D. 20.

Padlock offered in evidence and marked Exhibit D. 21.

Mortice lock offered in evidence, received and marked Exhibit D. 22.

Yale key offered in evidence, recieved and marked Exhibit D. 23.

Long key offered in evidence received, and marked Exhibit D. 24.

Key with the inscription "Kell & Son," offered in evidence, received and marked Exhibit D. 25.

Q Now, I am going to ask you, for the sake of clearness, to tell the jury how these keys were gotten from you down at police headquarters? A Will you show me those two keys, please?

Q This is the one which fits the latch on the outer door, this fits the padlock on the inner door? A Where is that third one you produced?

Q No, I am just asking you about those two? A They were having me in the rooms asking me a thousand questions, and finally towards evening Mr. Rothenberg and another detective, or rather the insurance man, asked me, "Have you got any keys to the place?" I told them I had not been in the habit of carrying keys with me, but I may have some, and if I have got any it is not the full set, and you are welcome to them, and if they are on there that belong to the place, and he took the two keys.

Q Who is he? A Mr. Rothenberg.

Q How did he get the two keys out of the bunch? A By comparing them with the keys he had gotten from Mr. Umansky in the morning.

Q Was Umansky there? A I don't remember.

Q Wasn't Umansky there at the time Rothenberg got the keys from you? A He may have been.

Q Well, can you tell whether he was or not? A I said he may have been, I didn't say he was not. Pardon me, if you will let me finish my story, you asked me to tell the jury and I was telling the jury—

*The Court.* You are not going to argue at all.

*The Witness.* I was telling the jury how I showed my keys.

*The Court.* You are not going to argue with counsel about it. Did you finish your answer?

A No, sir.

Q Well, you haven't told me what I wanted to know.

*Abraham E. Harris, cross.*

*Mr. McCarter.* I think the witness ought to be permitted to explain. He was answering the question, what occurred about the keys, and he was in the midst of describing that when counsel interrupted.

*The Witness.* And Mr. Rothenberg said to me, "Will you mark these keys with your own hand," and I said, "I will be glad to do that." He gave me a knife and I made a cross on each key, and that is still somewhat visible, and those are the two keys that I gave him. No third key or no fourth key or anything else.

Q You just asked for the third key, where did that come from. Look at it? A I don't know, sir.

Q That is not your key? A I have not the slightest knowledge whose key that is.

Q Now, what time was it when you say these keys were given up by you that night? A It must have been around 5, I had no opportunity to know the time.

Q Where had you been since morning? A In one of the rooms, they had kept me in there.

Q And how many times had you been interviewed since morning? A Constantly.

Q Constantly, since what time in the morning? A Since the time they got me down to the police station, it must have been around 10:30 o'clock. I don't know the exact time.

Q From 10:30 until 5 o'clock you were constantly interrogated? A Oh, later than that.

Q Six o'clock? A Oh, later than that.

Q What time did they get the keys from you? A Sometime in the evening.

Q What time? A I had no opportunity to know the time.

Q Was it five o'clock? A I had no opportunity to know the time.

Q Was it six o'clock? A I don't know, sir.

Q Was it twelve o'clock when they first got the keys from you? A No, sir.

Q Do you remember whether you were asked about the keys at 10:30 o'clock when you were brought down there in the morning? A I do not.

Q Were you asked about the keys at 11 o'clock in the morning? A I was not.

Q What did they ask you at 11 o'clock? A I was asked about my movements.

Q Now, didn't your movements include the locking of the door, and how that door was locked, and who it was locked by? A My movements were described.

Q And you mean to tell us that at 11 o'clock you were not asked about the keys? A No, sir.

Q What were you asked at 12 o'clock—were you asked about the keys at 12 o'clock? A No, sir.

Q What was your conversation about at 12 o'clock? A Regarding my movements?

Q Well, didn't your movements include leaving that loft on the 13th avenue side the night before about 7:30? A Yes.

Q What was the conversation about at 3 o'clock in the afternoon? A About 3 o'clock?

Q Yes.

*Mr. McCarter.* If you know.

*The Witness.* I can't recall exactly what conversation took place at a certain given hour.

Q Now, at what time during the afternoon or morning on the 10th of May, did you make this statement?

*Mr. McCarter.* Well, I object to that, that is not proper.

*The Court.* What is the question?

(Question read.)

Q Do you remember making this statement, "I walked out about a minute ahead of Umansky and Gilpatrick and

one of the men, I don't know which, locked the door, I believe it was Umansky?'' A I do, sir.

Q What time during that day did you make that statement? A Around about 11 o'clock, or 11:30.

Q Around about 11 o'clock in the morning? A Around about that time.

Q Was it taken down in writing? A Yes, sir.

Q And did you sign it at 11 o'clock? A I signed it about 11:30.

Q Did you read it? A I did at the time.

Q Well, look at your signatures on both pages of this statement, at the bottom of each page. A Those are my signatures.

Q Did you read those two papers before you affixed your signature to them? A I must have read them.

Q Did you read that part where you said you left a minute before Gilpatrick and a minute before Umansky, and one of the men, you don't know which, locked the door, and you believed it was Umansky? A I stated I must have read it.

Q Did you read that part of the statement? A I must have read it.

Q And you signed it? A I did, sir.

Q And you say that was 11:30 in the morning? A Around about 11:30 or 12, I don't know exactly to the minute.

Q And those keys were not gotten from you until about 5:30 in the afternoon? A Until about 4 o'clock in the afternoon, sometime in the afternoon, I don't know exactly.

Q Now, do you remember after signing this paper and reading it, and making this your statement to the police, do you remember Umansky being brought in there? A Where to?

Q To where you were, the same room or a corridor or a corner of police headquarters? A At one time I seen him go through the main hall.

*Abraham E. Harris, cross.*

*The Court.* Answer the question.

Q After you signed this paper, both papers that you made, this statement at half-past eleven or thereabouts, do you remember Umansky being brought in to where you were? A Yes.

Q What time was it? A Sometime late in the afternoon.

Q What time about? A I don't know the time.

Q Was it about five o'clock? A I have not got the slightest idea, I do not carry a watch.

Q Was it half-past five? A I don't know.

Q Was it half-past two? A I don't know, I do not carry no watch.

Q You remember when Umansky came in, though? A I do.

Q And don't you know that immediately upon Umansky's entering the place where you were the conversation turned again to the locking of the door and to the subject of keys? A I don't remember the conversation of the keys.

Q As soon as Umansky came in to where you were on that afternoon, and after you made this statement, isn't it a fact that the conversation turned to the locking of the door the night before and that the subject of the keys, between Rothenberg and Umansky? A Rothenberg asked me at that time whether I got keys.

Q Can't you answer my question, yes or no?

*The Court.* You will be given an opportunity to explain.

A I can't answer the question, I am willing to tell you all I know.

Q Now, isn't it a fact that at half-past two or three o'clock, or the time that afternoon when Umansky came in with Rothenberg where you were at police headquarters, that the conversation immediately, the questioning, and the talk immediately, referred to the locking of that

door and those doors, and to the keys, and who had possession of the keys, yes or no? A No, sir.

Q What did you talk about, and what did Mr. Rothenberg talk about, and what did Mr. Umansky talk about, when Umansky was brought in about half-past two or three o'clock in the afternoon? A Mr. Rothenberg asked him whether I got the keys.

Q Then, the first thing that was said when Umansky came in there was keys? A Keys.

Q And that was the time we got the keys from you? A Yes, sir; that was the first time they asked me about them.

Q Do you mean to tell me that when you were being asked this story, in this part of your statement as to who closed these doors, you were not asked about the keys? A That statement was dictated by me and not asked by anybody.

Q That statement was dictated by you? A Yes, sir.

Q Weren't you being asked questions? A No, sir.

Q You are sure about that? A Positively.

Q Was Rothenberg there at the time you made it? A No, sir.

Q Who was present? A Rothenberg was there for a second.

Q Who was present if Rothenberg was not? A The insurance agent and the stenographer.

Q Which stenographer? A I don't know.

Q Anybody else there? A In and out, they may have come in.

Q Well, Rothenberg came in, didn't he? A Yes, in and out.

Q And didn't he ask you one question at all? A Not a single question did he ask me regarding the keys.

Q Not until Umansky came in in the afternoon? A Not until late in the afternoon.

Q When Umansky came in there? A Yes, sir.

*Abraham E. Harris, cross.*

Q And your voluntary statement, as you want us to believe, dictated by you at 11:30 on the 10th of May, contains this sentence, that you walked out a minute before Umansky, and Gilpatrick and one of them locked the door, and you believe it was Umansky? A If it is in there I said so.

Q Now, do you remember this night of the 9th of May, 1922? A I will never forget it.

Q Do you remember getting to the plant? A I do, sir.

Q What time was that? A About 5:20 or 25, 15, I don't know, around about that time.

Q And what time were the hands paid off? A 5:30.

Q What time did they all leave the building or the loft? A Around about a quarter of six.

Q And that left nobody there but you and Gilpatrick and Umansky? A Yes, sir.

Q Now, you say you had a conference or discussion with Umansky about business? A Yes, sir.

Q And that took place in the office, didn't it? A It took place, some in the office, some in the shipping room, at the shipping table, and some in the middle of the floor, all around the floor.

Q That office is only about ten feet square, isn't it, the widest part? A Yes, sir.

Q Did you see these cans in there? A No, sir.

(Showing witness Exhibit S. 10.)

Q You didn't see them in there? A No, sir.

Q Did you know that those cans were in the plant? A I did not.

Q You didn't know that? A No, sir; I had nothing to do with those small details.

Q When you were in that office discussing matters with Umansky, did you see this can and kettle? A Not in the office.

Q Where did you see it? A I didn't see it that night.

*Abraham E. Harris, cross.*

Q Where did you see it that night, you said it was not in the office, where was it? A In the so-called stockroom.

Q That night? A That night.

Q What time was it when you went in there and saw this? A It was there all the time.

Q What time was it when you went in the stockroom and saw it? A Around about six o'clock.

Q What part of the stockroom was it in, show us with the pointer, the little square there in the left-hand corner is the office (indicating on map)? A Right here (indicating on map).

Q In the northwest corner? A Right here (indicating), where he used to keep it.

Q Did you see it there that night? A I must have.

Q Did you, yes or no? A I am not sure, sir.

Q And you didn't see the cans? A I did not, sir.

Q Sure of that? A I am positive.

Q Now, your discussion with Umansky took place in the office and began about what time? A I should judge around six o'clock.

Q And how long did it continue? A Several minutes.

Q Well, how long? A Maybe fifteen, maybe twenty; I did not time myself.

Q Was Gilpatrick with you in the office, and Umansky? A He was once or twice.

Q Well, then, after you had the discussion with Umansky, which lasted fifteen or twenty minutes, you told him you wanted some samples to take away? A Yes, he had already known that.

Q Well, you told him that night again? A Yes.

Q And you told him you wanted to take it away with you? A Yes.

Q And when you told Umansky that was Gilpatrick in the office with you? A What?

Q When you told Umansky that was Gilpatrick in the office with you, that you wanted to take them with you

that night, was Gilpatrick in the office? A Once or twice.

Q When you said to Umansky that you wanted him to pack up the samples. A Umansky did not pack up any samples.

Q Why don't you stop talking? When you told Umansky that you wanted the samples to take away that night, was Gilpatrick in the office? A Once or twice.

Q At the time you told Umansky to pack up the samples, that you wanted to take them away that night, was Gilpatrick in the office? A I don't know whether he was there that minute; he was there once or twice.

Q Well, after you gave the order that you wanted the samples packed up, Umansky went out of the office? A I went with him.

Q Where did you go? A Right in the place.

Q Describe the course you and Umansky took out of the office; this is the office, the little square place, not the small one but the bigger one. A This is the office; we walked right through here and right through there and went into that room where Gilpatrick does his packing.

Q You and Umansky done that? A Yes.

Q Through the stockroom and over to these tables? A Yes.

Q Was Gilpatrick there? A Yes.

Q And you left Gilpatrick and Umansky? A I stayed there.

Q How long? A All the time.

Q Were you here when Umansky testified? A I was.

Q Were you here when Gilpatrick testified? A I was.

Q Did you hear Umansky say that?

*Mr. McCarter.* I object.

Q Wait a minute until I get through—did you hear Umansky say that you walked all around the room?

*Mr. McCarter.* I object.

*The Court.* I will allow him to answer yes or no.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A I didn't follow Umansky's testimony.

Q He is your foreman? A Not on testimony matters.

Q And you stayed there all the time? A I stayed about part of the time; I walked around the place.

Q What do you mean by "around the place"? A Give me that stick and I will tell you my movements. Here, I went over there and saw Mr. Gilpatrick packing my packages; I went down here to where the cutters were working and I saw them working there.

Q Well, they were not working there; do you mean to tell me they were working at 6:30? A I said where the cutters were working.

Q You mean where they had been working? A Yes.

Q Go ahead. A I got back to the center of the floor.

Q Did you go back to the office? A I did not.

Q Not at all? A No, sir.

Q How long did it take you after you left this place where Gilpatrick and Umansky were to get around here where the cutters were working during the day and get here to the middle of the loft, to the Thirteenth avenue side, where did you go from here? A Back to the office.

Q You didn't go through the stockroom again? A I did not, sir.

Q How long did it take you to go from where they were packing the samples, around to the Morris avenue side, to where the cutters had been working and to go outside the office door, more or less? A I didn't time myself.

Q Ten minutes? A Approximately.

Q And then you went back to where they were? A Yes.

Q How long did you stay there? A A few more minutes.

Q Then where did you go? A Then I took Mr. Umansky and we went around to the center of the floor.

Q How did you get from the shipping table to the center of the floor? A Either I went this way or that way (indicating).

Q Which way did you go? A I haven't the slightest idea whether I went this way or that way (indicating).

Q When did you find out that window was open? A The second I left.

Q When did you get the telephone message that they had some stuff from Reid's and to send Bauer down the next morning? A About six o'clock.

Q Did you talk to Gilpatrick about this case after the fire? A I did.

Q Did you tell Gilpatrick that your recollection was that you had told him to close the windows after you had told him to pack up your samples? A Did I tell him that?

Q Yes. A I told him that at the time when it occurred.

Q No, after the fire, did you have a conversation with Gilpatrick? A I did.

Q And did you talk about the closing of the windows that night? A I must have.

Q And did you talk with him after the fire about the fire? A Will you give me the date?

Q I don't know, after the fire? A Well, the man was working for me all the time.

Q Did you talk about the fire? A Yes.

Q Did you talk about your movements? A Yes.

Q Did you talk to Umansky? A Yes, sir.

Q Did the subject come up whether you told Gilpatrick to close the windows? A Yes.

Q I don't want to say anything more about the fire except by reference to Gilpatrick's movements, his movements, your movements, Umansky's movements; what did you say to him? A I spoke about the fire generally.

Q What did you say to Gilpatrick at a conversation you had subsequent to the fire about your movements, his movements, Umansky's movements, about the night of the fire before you left the loft? A I have spoken to every one of my men.

Q What did you say to Gilpatrick; do you understand that? A Yes.

Q What did you say to Gilpatrick at a conversation subsequent to the night of the fire about your movements, his movements and Umansky's movements, just before you left the loft the night of May 9, 1922? A When?

Q When you talked to him? A I spoke to him—

Q What did you say to Gilpatrick, subsequent to the date of the fire, about your movements, Gilpatrick's movements and Umansky's movements, the night when the fire occurred before you left that loft? A No given date?

Q When you talked to Gilpatrick. A All the time when he was working for me.

Q About the fire? A Yes.

Q Every day? A I don't know whether every day.

Q Well, you said all the time? A You asked me when I talked to Gilpatrick.

Q Well, were you talking to him all the time about the fire? A Not the fire; no, sir.

Q Well, that is what you just said; you don't mean that? A No.

Q How many times did you talk to him about the fire? A As many times as it was necessary.

Q Well, how many times was it necessary? A I suppose two or three times.

*Abraham E. Harris, cross.*

Q What made it necessary for you to discuss the night of the fire and your movements and Umansky's movements and Gilpatrick's movements? A My counsel wanted to see him.

Q Who? A Mr. Gilpatrick.

Q Well, did you talk to Gilpatrick before you went down to see your counsel? A I must have.

Q And did you talk about your movements and Umansky's movements and Gilpatrick's movements the night before you left the loft? A I must have.

Q What did you say? A I don't remember anything in particular.

Q Do you remember telling him that he should say to your counsel that he was to close the windows just as you went out, and after Umansky packed up the samples? A I never did.

Q What did you say to him about your movements? A I don't remember what I did say; I never instructed him to say anything.

Q What did you say to him? A I spoke to him about the fire in general.

Q What did he say and you say? A I spoke to him as it became necessary.

Q And it was before your counsel wanted to see or saw Gilpatrick? A Yes.

Q Now, the first time it became necessary to talk to Gilpatrick, what did you say to him? A I told him to go down to the counsel.

Q Anything else? A There may have been other things.

Q Did you say anything about the samples and closing of the windows? A I did not.

Q How many times did you talk with Umansky about his movements and your movements? A Probably the same number of times.

Q How many times? A Maybe two or three, maybe four or five.

*Abraham E. Harris, cross.*

Q Was it necessary? A It must have been; I may have spoken to Umansky ten times; he was more of an important man there.

Q What is your business? A Manufacturer of silk and muslin underwear.

Q How long have you been in that business? A Since 1913.

Q Any other business? A Yes.

Q What kind of business? A Manufacturer of embroideries.

Q What other business? A Manufacturer of underwear.

Q What other business? A That is all.

Q You never were a plumber? A No, sir.

Q You know anything about plumber's candles? A I do.

Q Do you know them sufficiently to distinguish them from other candles? A Now I do.

Q And you knew it on the 9th day of May, 1922? A I did not.

Q Well, you knew it when the carpenters came in in February or January, when they did the work on that place? A I did not.

Q Well, didn't you tell Mr. McCarter the candles used were plumbers' candles? A Yes.

Q How did you know? A Mr. Bauer gave me that information.

Q Before the 9th of January? A After the fire occurred.

Q Now, look at this picture, S. 6; on your way from the stockroom that night to the shipping table to have the samples packed, did you see that coat hanging there? A I did not.

Q Did you see that white piece of muslin hanging down? A I did not.

Q Did you see the carton not burned? A I did not.

*Abraham E. Harris, cross.*

Q In the middle of the floor or in the southwest corner with this float in it? A I did not.

Q And this candle? A I did not.

Q Do you know what kind of a candle that is? A I do not.

Q Do you know what kind of a candle this is? A I do not.

Q Do you know what the difference is between these two candles and a plumbers' candle? A I do not.

Q But you are sure the candle purchased by the carpenters in January were plumbers' candles? A Yes. Information given me by Mr. Bauer.

Q Do you know what this is? A Top of a spool of silk.

Q What kind? A Ribbon.

Q You don't mean thread, do you? A No, sir.

Q You had lots of those in your place? A Yes, thousands.

Q And this is the top of one of those spools? A Yes.

Q Did you know there was benzine around the place that night? A I didn't know particularly there was that night, sir.

Q You knew benzine had been around there for some time? A We always had a little benzine on hand.

Q You do not know where those two cans come from? A I do not, sir; I had nothing to do with small things.

Q You are sure nobody was in the factory that night excepting you, Gilpatrick and Umansky? A After the girls left?

Q Yes. Between six and seven. A I am positive.

Q You are now positive, although you were not on the 10th of May, that you locked those doors? A I said I might have locked them. You read your statement.

*The Court.* Do not argue.

*Mr. McCarter.* The question included—

*Abraham E. Harris, cross.*

*The Court.* The question does not tell counsel to look at the statement.

Q Just answer my question.

*Mr. McCarter.* I think counsel ought not to garble a statement or leave out part of it.

*The Court.* I am going to allow you to unravel everything.

Q (Question read.) Is that true? You are now positive that you locked the doors on the way out? A Yes.

Q And you are positive that preceding you out of that place both Gilpatrick and Umansky were there going out ahead of you, is that so? A No, sir.

Q Well, going out at the same time you did? A Yes.

Q And while you were on that stair landing and as you say locked the Yale lock on the inner door and shut the outer door? A I snapped the Yale lock.

Q And then you pulled the outer door shut and you turned the key in that lock as you say you did, that out here on this platform were both Gilpatrick and Umansky? A Yes.

Q And that they went down the steps with you? A Yes.

Q And there was nobody in there? A Inside?

Q Yes. A No, sir.

Q You are sure of that? A To my knowledge there was not a soul in there.

Q As you left the shipping table and you walked westward, did you notice those doors leading to the fire escape? A Yes.

Q They were locked? A Positively.

Q And every window was closed because the one you saw you wanted Gilpatrick to close? A I didn't look at the windows.

*Abraham E. Harris, cross.*

Q Didn't you say that as you came out of the door with the two men you noticed the window on the Thirteenth avenue side open? A Yes.

Q And you told Gilpatrick to close it? A I told Gilpatrick to close it and look around the entire floor to see if any were left open.

Q Well, the doors and exits and entrances to this place, so far as you know, were all closed, the doors being locked when you left? A Only the two exits in the back I knew were closed.

Q Well, these are the only two exits? A Yes, sir.

Q They were closed? A Yes.

Q And when you left you closed these? A No, sir; I didn't close anything.

Q Well, didn't you lock this door when you left? A Yes.

Q Both of them? A Yes.

Q So when you left with Umansky and Gilpatrick this door you locked was locked and secured? A Yes.

Q And you knew these were locked and secured? A Yes.

Q And you had told Gilpatrick to close all the windows? A Yes.

Q Now, do you remember Umansky saying anything to you that he wanted to go and pray for his father when he got down to Reid's? A I do, sir.

Q Do you remember saying, "What is your hurry"? A I said, "What is your hurry"? first and he told me afterwards.

Q You said, "What is your hurry"? A Yes, I said, "Come on in," and he said he had to go and pray for his father.

Q Well, it was eight o'clock? A No, sir.

Q What time was it? A A few minutes after seven.

Q And you stayed at Reid's how long? A About forty or forty-five minutes.

Q You left there about eight o'clock? A I left there about ten minutes to eight.

*Abraham E. Harris, cross.*

Q You knew Umansky had discussed the affairs with you, paid off the hands and walked down with you from the plant to Reid's? A Yes.

Q Why did you ask him to stay with you? A That was not a common occurrence.

Q Of course it wasn't. Why did you want Umansky to stay with you that night? A I asked him to come down to see the result of the sale that took place in Reid's.

Q Now, let us find out the Saturday before this date—you told Mr. McCarter that you usually paid the men operators on Saturday and the factory hands, the girls, on Tuesday? A Yes.

Q Now, the 9th of May you paid the girls off? A Yes.

Q That was Tuesday? A Yes.

Q Now, the previous Saturday had you been to the plant? A Yes.

Q And that would be Monday, the 8th, Sunday, the 7th, May 6, 1922, were you there? A Yes.

Q How late did you stay? A I don't remember, sir.

Q Did you close up? A I might have.

Q Did you? A I don't know.

Q Isn't it a fact that all the time you had that loft there you never closed up during January, February, March, April and right up until the 9th of May, 1922? A I never made it a practice to close; there was no closing there.

*The Court.* Answer this question.

Q This question is plain. Isn't it a fact that during all the time your factory was located up in this place at the corner of Thirteenth avenue and Morris avenue during the month of January and February, March and April, and up until the 9th of May, you never had locked the doors or closed the place up? A I might have closed it.

*Abraham E. Harris, re-direct.*

Q Is that the best answer you can make? A That is positively the truest answer I can give you.

*Re-direct examination* by Mr. McCarter.

Q You were shown, Mr. Harris, the statement that you made at the City Hall. Is there anything in that statement that adds to the part that was quoted by Judge D'Aloia with reference to the keys that you wanted to bring out? A I have not read the statement; I only identified my signature.

Q Yes. You may look at the statement. A I have not read the statement. I could not read the statement.

*The Court.* He said he dictated the statement.

*The Witness.* I dictated the statement.

*Mr. D'Aloia.* He said he read it before he signed it.

Q Look at it and see if there is anything you desire to add that has been quoted by Mr. D'Aloia concerning the key.

*Mr. D'Aloia.* Anything that he might desire to add?

*The Court.* I think that is too general. Suppose he starts talking about something that is not admissible.

*Mr. McCarter.* Well, if counsel has only quoted a part of what he said on the occasion of the examination at the City Hall touching the keys and the statement shows something else, I think we have a right to bring that out.

*The Court.* Well, anything that is on that statement.

*Mr. McCarter.* Surely.

*The Court.* He can read all of it.

*Mr. McCarter.* I am asking the witness to read the statement and see if the statement shows anything more about the keys than Judge D'Aloia quoted, and if you desire to do that, you may do so.

*The Court.* Read the statement to yourself first so you will thoroughly understand it.

Two keys marked in evidence as Exhibit S. 15 for identification.

Q Is there anything more in the statement that was made by you at the City Hall touching the keys than was quoted by Judge D'Aloia, which you desire to bring to the attention of the jury? I do not know whether there is or is not. A There is not a word said here about "keys," a question asked or answered.

Q Then there is nothing about the keys there? A No, sir; I was not asked, sir.

Q Now, then, I will ask you this; I want you to describe all that occurred at the City Hall that day; you told us yesterday that you arrived at the factory, went up hurriedly in a taxi and were not permitted to go in and were taken down to the City Hall, and I understood you to say that that was about ten o'clock or so? A Ten or a little after.

Q What occurred? A When I got there, as I said before, I made an attempt to go into my place of business.

Q No, after you got to the City Hall. A When I got in the City Hall Mr. Rothenberg got me into a room and said, "All I want you to do is to give me a statement of your movements yesterday." I said, "I shall be very glad to do it, Mr. Rothenberg;" and he started writing himself and a second afterwards he said, "You better do the writing;" I said I would prefer to get it typewritten to get a copy of it if it can be done; I sat

down and he brought in a stenographer and he walked away—

*Mr. D'Aloia.* Who?

*The Witness.* Mr. Rothenberg.

A (Continuing.) —and the insurance man was in and I dictated my statement and while dictating Mr. Helfrich was in and out, the Fire Department man—that gentleman over there—Mr. Cappadonna came in and out and this fellow Rothenberg was also there.

*Mr. D'Aloia.* If your Honor please, unless Mr. McCarter can show that this statement was obtained by threat, or force, or inducement, or promises, that it is not voluntary, this is not material. This witness stated to me he dictated it and that he signed it, no promises, no inducements, no threats, no third degree methods. I will offer the statement in evidence if you consent to it.

*Mr. McCarter.* I think I have a right to examine.

*The Court.* I am giving you some latitude; you may bring out anything else he said, if there is anything.

*Mr. D'Aloia.* Why doesn't Mr. McCarter direct this witness' attention to some particular episode that Mr. McCarter may consider important. It is a most voluntary statement.

*The Court.* It is not under attack at all.

Q About how long a time did that consume, the preparation of the statement? A About twenty-five minutes.

Q Then what did you do? A Then they kept me in there, constantly asking me questions, in and out, one detective after another, one fireman after another, one insurance man after another; there was a couple of more insurance men during the day there constantly pounding me from their side until I reached the stage I rebelled.

Q What time was the subject of keys adverted to? A Sometime in the middle of the afternoon; it may have been around four, 4:30, five; I didn't have no clock.

Q And what was the entire conversation between you and whomever you did talk with about the keys? A They asked me whether I had any keys to the place and my answer was if I had, I have not got the full set; whatever I have look at them, you are welcome to them; Mr. Umansky was there and whether he identified them or not, I don't know. I gave them two keys and Mr. Rothenberg said, "Mark these two keys"; no three keys, and he also asked me if I recalled were these the keys you locked the place with and I said no, I locked them with the bunch Mr. Umansky has with the padlock, and I gave that to Mr. Umansky.

Q What key that was not part of the series was on your ring? A The mortice door lock key.

Q That is the old-fashioned lock? A Yes.

Q Can you pick that key out from those in evidence? A I can, sir.

Q Will you please do it? A This one, sir.

Q What mark is that one? A D. 24.

Q Where did that key come from when it was produced here yesterday? A When Mr. Umansky left the premises we discontinued his services with us in Newark; he gave me the bundle of keys and since that time I have had it with me.

Q Well, what did you do with the keys after you locked the door on the night of the fire? A Gave them right to Mr. Umansky, gave them right back.

Q And you got them again when? A Not until about two months after, until Mr. Umansky left our service, probably two months; about six or seven weeks after.

Q He did leave your employ six or seven weeks after the fire? A Yes, about two months.

*Lucille Harris, direct.*

Q When did Mr. Gilpatrick leave your employ? A Mr. Gilpatrick left my employ about a month later than Mr. Umansky.

LUCILLE HARRIS, sworn in behalf of defendant.

*Direct examination* by Mr. Ruback.

Q Miss Harris, you are the daughter of Abraham Harris, the defendant in this case? A Yes, sir.

Q And how old are you? A Twenty.

Q You live with your parents? A Yes, sir.

Q Where? A 1539 Broadway, New York City.

Q Were you living with your folks in May of this year? A Yes.

Q Are you employed at the present time? A No.

Q When were you last employed and where? A About a week ago, at W. W. Reid's.

Q Until a week ago? A Yes, sir.

Q At Reid's here in Newark? A Yes, sir.

Q That is on Branford and Arlington street? A Yes, sir.

Q And how long had you been employed at Reid's? A A year and a half.

Q And were you employed there on the 9th of May? A Yes, sir.

Q In what capacity? A I was manager of my father's department.

Q And that department consisted of what? A Muslin and silk underwear, hosiery, corsets, bandaux.

Q Merchandise of that general character? A Yes, ladies' wear.

Q And were you in Reid's on May 9th? A Yes.

Q You know that to be the day a fire occurred at your father's factory? A Yes.

Q At what hour that day did you arrive at Reid's? A Why, I should judge a quarter after nine.

Q In the morning? A Yes, sir.

Q And you had remained there throughout the day? A Yes, sir; except when I went out for luncheon.

Q Now, Miss Harris, did you see your father on May 9th? A Yes.

Q What hour of that day? A About 7 o'clock in the evening.

Q And where did you see him? A At Reid's.

Q And were you there when he arrived? A Yes, sir.

Q Do you know who admitted him to the place? A Yes, sir.

Q Who? A Mr. Newth.

Q Captain Newth. A Captain Newth.

Q And how long did your father remain at Reid's that evening? A About three-quarters of an hour.

Q Did you see him during that period of three-quarters of an hour? A Yes.

Q What was he doing? A Why, he went over the receipts of the day and spoke to Mr. Newth and some girls who were around there.

Q Do you know Miss Liss? A Yes, sir.

Q Was she connected with Reid's on May 9th? A Yes, sir.

Q Was she there in the evening of May 9th? A Yes, sir.

Q Did you see your father engaged in conversation with Miss Liss? A Yes, sir.

Q And did you see your father constantly during that period of three-quarters of an hour, or was he absent for any length of time? A No, sir; I saw him all the while.

Q Now, what time did your father leave Reid's? A About ten minutes of eight.

Q Alone? A No, sir.

Q Who left with him? A Miss Kasin and myself.

Q Who is Miss Kasin? A She is the manager and owner of the sweater department at Reid's.

Q You all three left together at about ten minutes of eight? A Yes, sir.

Q And where did you go from Reid's? A Well, we walked down the street, down to Broad and Branford place, with Miss Kasin, and we were waiting for a bus, and Miss Kasin left to go home, and my father suggested, because a bus did not come, that we walk to the tubes.

Q Now, Miss Kasin walked with you and your father from Reid's on Branford place and Arlington street to a point at Broad and Branford, is that right? A Yes, sir.

Q And how long did you remain there waiting for a bus? A About three minutes.

Q And then did you walk to the tubes? A Yes, sir.

Q What time did you arrive at the tubes, about what time? A About five minutes after eight, eight minutes after eight.

Q Do you know what train you took? A Yes.

Q What train? A 8:10.

Q And what time did you arrive home? A A little after nine.

Q Did you go as far as Cortland street? A Yes, sir.

Q And then you transferred to an uptown express? A Yes.

Q And what time was it that you reached your apartment house where you and your parents resided? A A little after nine.

Q And did you go directly to your apartment? A Yes.

Q Who was at home? A My mother.

Q Who then constituted the members of your family living at home? A My mother, my father and myself.

Q You have a sister, have you not, Mrs. Grabshied? A Yes, sir.

Q She was not then living with your family? A No, sir.

*Lucille Harris, cross—re-direct.*

*Mr. D'Aloia.* This may all be very interesting, but I don't think it is material.

Q How long after you arrived home that evening did father remain home, after he arrived a little after nine o'clock? A About half an hour.

Q And then what happened? A My mother and father decided to go to the motion pictures.

Q And did they go? A Yes, sir.

Q And what did you do? A I wrote a letter and went to bed.

Q You remained at home? A Yes, sir.

*Cross examination* by Mr. D'Aloia.

Q How long had you been at Reid's that night, employed there? A You mean until what time that night?

Q How long before that night had you been employed there? A About a year and a half.

Q Before that night? A Yes.

Q You were not employed by the Reid concern, were you? A No, sir.

Q You were working for your father? A Yes.

Q When did he last, before the 9th of May, 1922, when did your father come down there to Reid's where you were? A I think it was the Saturday before.

Q What time was it when he came there? A I have not the slightest idea.

Q When was it, the time before Saturday, the 9th, that he came there? A I could not tell you, I did not keep track of that.

Q You are only certain of the hour that he arrived on the night of the 9th of May, 1922? A Yes, I have occasion to remember it.

*Re-direct examination* by Mr. Ruback.

Q What had been going on at Reid's during that day of May 9th?

*Mr. D'Aloia.* I object to that, it is not at all relevant to this issue, what had been going on at Reid's that day.

*Mr. Ruback.* I want to prove, your Honor, the telephone communication from this young lady to the factory asking for Bauer.

*The Court.* I will allow it.

Q What had been going on at Reid's that day? A A very successful dollar sale.

Q A dollar day? A Yes.

Q And did that sale include your particular department? A Yes, the entire place.

Q And were you busy? A Very.

Q Who, from your father's factory had assisted you in the course of the day? A My father's porter, Fred.

Q Fred Bauer? A I don't know his last name.

*Mr. Ruback.* Bauer, stand up, please.

Q Is that the boy? A Yes, sir.

Q And had he gone back to the factory in the course of the afternoon? A Yes.

Q And what, if anything, did you do with reference to getting him back to Reid's to assist you? A I telephoned to my father.

Q And did you ask that Bauer be sent back to Reid's?

*Mr. D'Aloia.* Wait a minute, I don't care what she asked, she telephoned to her father.

Q Miss Harris, you telephoned to your father? A Yes.

Q And in pursuance of your telephone call, what happened? A He sent Fred down.

Q And did Fred get to Reid's? A Yes.

Q What time? A About six o'clock.

Q And how late did Mr. Bauer remain at Reid's? A Oh, a little after seven.

*Violet Liss, direct.*

Q Assisting you in the work you had to do? A Yes, sir.

*Re-cross examination* by Mr. D'Aloia.

Q He was there when your father got there? A No, sir.

Q Well, your father came in at seven o'clock? A Well, probably—Fred had just left a few minutes before my father came in.

Q You said that Fred left after seven? A Yes.

Q Your father came there around seven? A I said my father came after seven.

Q He was there around seven? A No, sir.

Q Do you know how long after seven your father got there? A I should say ten minutes, I don't exactly know.

Q Do you know how long after seven Fred went away? A Yes, sir; just about five minutes before my father came.

Q So, if your father came in at 7:10 Fred went away about 7:05? A Yes, sir.

Q And if your father came at 7:15 Fred went away at 7:10? A Yes, sir.

Q And you went home with your father that night? A Yes.

VIOLET LISS, sworn in behalf of the defendant.

*Direct examination* by Mr. Ruback.

Q Miss Liss, where were you employed on the 9th of May? A W. W. Reid's, Incorporated.

Q Employed by Reid's? A Yes, sir.

Q In what capacity? A As head of stock, so called forelady.

Q You are the so-called forelady? A Forelady; yes, sir.

Q Were you at Reid's on that day? A I was.

*Violet Liss, cross.*

Q What had been going on in the course of the day? A Why, a dollar day sale.

Q And how late were you at Reid's place that day? A I should judge it was about 9 or 9:30.

Q Do you know Mr. Harris? A I do.

Q Had you known him before May 9th? A I had.

Q Had you ever seen him at Reid's before May 9th? A Yes, sir.

Q Did you see him at Reid's on that day, referring to May 9th? A Not that day, but that evening.

Q Now, you say you saw him at Reid's that evening, at what time? A I should judge between 7 and 7:15, or 7:20.

Q And were you there when he arrived? A I was.

Q Do you know who admitted him to the place? A I do.

Q Who? A Mr. Newth.

Q Were the doors locked when Harris got there? A Yes, they were.

Q Who opened the door for him? A Why, Mr. Newth did.

Q How long did Mr. Harris remain there? A I should judge three-quarters of an hour.

Q Did you see what he was doing there in that space of time? A I did.

Q What? A Why, he was in there, in his own department straightening out the stock and looking over the receipts of the day, and so forth.

Q Were you there when he left? A I was.

Q Did you see him leave? A Yes.

Q With whom? A Miss Kasin, and Miss Harris.

Q Did you talk to him during that period of three-quarters of an hour? A I did.

*Cross examination* by Mr. D'Aloia.

Q The first you saw him was about 7:15? A Well, I should judge between 7 and 7:15.

*Mr. Ruback.* I will call Mrs. Harris.

*Mr. D'Aloia.* We will admit, if your Honor please, the hour he got home and what he did after he got there.

*The Court.* What is the purpose of calling this witness, Mr. Ruback?

*Mr. Ruback.* To show that he got home at nine o'clock, and the fact that she first communicated to him the fact that a fire occurred.

*Mr. D'Aloia.* Well, we will admit that.

*The Court.* I think that Mr. Harris said that he received a telephone call from his wife at his office about nine o'clock in the morning.

*Mr. McCarter.* I think we probably can agree that Mrs. Harris, if sworn, would say that her husband reached the apartment shortly before nine P. M. on the evening of the 9th—

*The Court.* Shortly after nine?

*Mr. McCarter.* Yes, about that, that they had a little supper and then went to the movies, and returned and spent the night home, and he left, as usual, in the morning for his office, and she received a telephone call after he left from Gilpatrick that there had been a fire at the plant and she then telephoned the office in New York, where her husband was, to that effect, that's all.

*Mr. D'Aloia.* We cannot contradict a syllable of that, we will admit it.

GEORGE W. FISHER, JR., sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Mr. Fisher, what is your business? A Wholesale manager of L. S. Plaut & Company, Newark, N. J.

*George W. Fisher, Jr., direct.*

Q How long have you been connected with L. S. Plaut & Company? A Twenty-one years.

Q As such have you had occasion to become familiar with the value of underwear, laces, embroideries and merchandise of the character that was manufactured by A. E. Harris & Company? A I have.

Q When did you first become acquainted with Mr. Harris? A On June 12th.

Q Had you known him before that time? A I never met the man.

Q Did you make arrangements with him to make an inventory of this stock? A I did.

Q And did you go up to the plant? A I did.

Q Ever been there before? A Never.

Q Will you describe, then, what you did, in making the inventory?

*Mr. D'Aloia.* I object to any description of this witness' conduct up at that place on the 1st of June, as being too remote, and having no relation whatever with the condition of affairs up there with relation to the stock made up or unmade up, raw materials, as they existed on the 9th of May, 1922. It is fully one month and three days later, and with a plant that is in operation, and the evidence showing up to this point that goods were going in and coming out daily—

*Mr. McCarter.* Not daily.

*Mr. D'Aloia.* Well, the business was going on as usual, that is Mr. Harris' testimony.

*The Court.* Unless this witness knows what goods were there on May 9th, if he knows the goods there on May 9th, he cannot testify.

*Mr. McCarter.* We have already proven what was the value of the stuff that came in and what was the value of the stuff that went out between

May 9th and June 12th, when Mr. Fisher made his inventory.

*The Court.* Yes, but there is no proof in the case yet that this witness knew anything about that.

*Mr. McCarter.* We cannot prove everything at once, and the way that we hope to be able to establish the matter to the satisfaction of the jury, and to your Honor's good approval, is, we now propose to prove by him that on June 12th, 13th and 14th, or however long it took him, he made an inventory of all the stock that was there. We then show, by deducting and adding what had been added and deducted on June 9th, exactly what the value was on June 9th? There is no other way to do it.

*The Court.* But you have to show that this witness knew all about that. In other words, we are waiting for his testimony as to what occurred there, and if he knows of it—

(Argument.)

*The Court.* As I understand the rule laid down in *Shoemaker* v. *Elmer,* an expert's testimony is made valuable if he presents his data to the jury. In other words, first lay the foundation as to the knowledge of the goods and then get his appraisal. Now, you must, in some way or other, get before me his knowledge of the goods as of May 9th. We don't know what operation he used. You are asking him to give a statement, and then someone else's conclusion to make up his opinion.

*Mr. McCarter.* Well, of course, your Honor, the essential thing from our standpoint here is what was the value of the plant on May 9th. Now, it is beyond human possibility to show that, no one could do that then. Every instant counts, but we

do show it on June 12th or 13th, and we show what happened in the meantime.

(Argument.)

*The Court.* I will allow this man to testify as to the value of those goods on May 9th, if he knows the value. If he has formed an opinion, based upon some knowledge, unless there is before me evidence that this witness knew those goods, or knew the value of them from observation, or some other testimony, I think the rule is that he must know, either from practice or study, or study or practice—now, he must have either, and if you can meet those requirements I will allow this witness to testify.

Q Mr. Fisher, was there any difference in the value of the articles that you appraised between May 9th and June 13th? A Practically none at all.

*Mr. McCarter.* Now, that being so, I offer now to prove by this witness the value, as appraised by him, after most careful investigation, on the 13th of June—the purpose being to follow up with testimony that is already in, by calculation, to show how much should be deducted and how much should be added, if any, to the figures given by him, to get the appraisal as of May 9th. The values remaining after that being the quantity of goods that were there on the 9th of May.

*The Court.* I don't think that meets the requirements.

*Mr. McCarter.* Your Honor overrules the question, then I pray an exception.

*The Court.* I do not overrule the question.

*Mr. McCarter.* I mean my offer?

*The Court.* Yes, surely.

*Mr. McCarter.* I don't want to have any misunderstanding about this, I offer to prove what I

stated, and your Honor declines to permit me to prove that, and I pray an exception.

*The Court.* Yes, because I say I don't think you have met the requirements to show this man's knowledge of May 9th.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*Mr. McCarter.* We will have to withdraw Mr. Fisher.

SAMUEL LEOPOLD, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q What is your business, Mr. Leopold? A Certified public accountant.

Q How long have you been engaged in that business? A Over six years.

Q Do you devote your entire time to that? A Yes, sir.

Q And where do you practice? A Right here in Newark.

Q Assuming, in your business, it is desired to get the value of a stock of merchandise on any given date, and you have no inventory of that particular date, what method is employed by accountants in ascertaining the value of the merchandise on that day? A By working it forward or backward from the nearest physical inventory that was taken.

Q What do you mean by working it forward or backward? A Well, if the inventory was taken previous to the time that we wish to calculate the inventory for, why in that case it becomes necessary for us to add on

the purchases and deduct the sales up to that time; but if it was subsequent to the time that we wish to obtain the inventory for, then we add the sales and deduct the purchases, just the other way around.

Q That is the recognized method? A Absolutely a recognized method.

Q Is there any fallacy or weakness in it? A Absolutely none.

Q Is it constantly done? A It is constantly done.

Q Do you know whether or not that plan has governmental sanction in tax purposes? A I use it myself in preparing tax returns, and it has been accepted.

Q For instance, then, in the case now before us, you have examined these books, have you? A Yes, sir.

*Mr. D'Aloia.* When, I would like to get that time?

*Mr. McCarter.* Counsel seems to be anxious to know when you examined those books?

A Well, the first time I had access to those books was around the first of this month.

*The Court.* When did you examine them?

*The Witness.* I can give you the exact date on that. Why, on November 1st, November 2nd, November 11th, 12th, 14th, 15th, 16th, 20th and 21st.

Q In your judgment and opinion, as an accountant, assuming a correct appraisal was made by Mr. Fisher on the 13th of June, and assuming that the books are accurately kept, is there any difficulty in reaching a value of the goods on the 9th of May? A No, sir.

Cross examination waived.

*Mr. McCarter.* Now, I'd like to recall Mr. Fisher.

*Mr. D'Aloia.* I am going to make the same objection to Mr. Fisher's testimony.

*The Court.* Wait until he is called. I don't know what Mr. McCarter is going to ask him.

GEORGE W. FISHER, JR., resumes the stand.

*Mr. McCarter.* Prefacing my question to Mr. Fisher with the statement that we propose to follow his testimony with evidence of the character described in the testimony of Mr. Leopold, I now ask the witness to describe the appraisal that he made on the 13th of June and to tell us what was the result of that appraisal.

*The Court.* I will allow him to tell what he did, his physical action, but I won't, at this time, allow him to tell the result.

*Mr. McCarter.* I pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q What did you do, Mr. Fisher, in the course of making your appraisals, describe the whole scene. A I went to the factory with six men; took the inventory list; assigned a man to a certain style number, with instructions to count, weigh or measure and report to me what he found in that particular style. I checked up his result in my sheet. If it did not tally with my sheets, I sent him back again and if he did not arrive at the result a second time, I personally myself counted and noted the amount, actual amount of each individual style and item and entered it on my inventory sheet.

*Mr. D'Aloia.* I'd like to have the witness state what were those sheets, those inventory sheets that he had at that time.

Q You have spoken of some inventory sheets. Look at this document and tell us if they are the sheets that you refer to? A Those are not the sheets; I have the sheets with me.

Q Well, let us have them. A These are my original working sheets.

Q You produce a bundle—

*The Court.* What do you mean, "your original working sheets?"

*Witness.* The sheets I worked from, showing the style number and yardage.

*The Court.* Who made that up?

*Witness.* The Harris Company furnished me with a list of what the merchandise was supposed to be, and from those lists I prepared a physical inventory, eliminating what I could not find and correcting my quantities to what was actually counted, measured or weighed.

*The Court.* Did you know anything about the correctness of that list?

*Witness.* The correctness of that list?

*The Court.* The one that Mr. McCarter has.

*Witness.* That rough list is corrected and embodied in my official list.

*The Court.* Did you know the correctness of that list; do you know whether the goods that are mentioned there were actually inventoried?

*Witness.* Yes.

*The Court.* Were you present at the inventory?

*Witness.* Yes.

*Mr. McCarter.* May I have this marked your Honor?

The sheets referred to were received in evidence and marked Exhibit D. 26.

Q Now, Mr. Fisher, you have handed me a typewritten set of papers which have been marked D. 26, and in order to clear this up, I understand that the Harris Company handed you this statement? A It did.

Q And that acted as an index for you to ascertain how much of the things that were designated on that statement you found on the thirteenth of June; is that right? A 13th, 14th and 15th of June.

Q Have I correctly stated the use you made of this document? A You have.

Q You were given this as a sort of an index or key to the situation? A It was.

Q And you and your men took every one of those boxes and verified the things that are found in typewriting here and made corrections as appears on that statement and from that you compared the completed thing, indicating the correct situation on the 12th of June, is that right? A I did.

*Mr. McCarter.* Does your Honor understand that?

*The Court.* I understand the question and answer, but I asked this witness if he knew that was correct and he said yes. Now, I asked him how he knew it was correct and he said he checked it up. What I want to know is did he check it up, the goods with that inventory when that inventory was made.

*Mr. D'Aloia.* Can you answer that question Mr. Fisher?

*Mr. McCarter.* I don't understand that he did.

*The Court.* I want to know that.

Q You didn't do that? A I didn't do that.

*The Court.* Then you don't know anything about that inventory, only what you were told?

*Mr. McCarter.* Oh, he verified it.

*The Court.* Now, wait a minute, Mr. McCarter; there is no proof when that was taken. When was that inventory taken?

*Witness.* I don't know anything about that inventory.

*The Court.* He doesn't know anything about that inventory.

*Witness.* That is not an inventory; it is simply a list of the style numbers of the merchandise which I was to inventory; that were in the plant. From that list of style numbers I made an inventory.

*The Court.* As of June 13th, 14th and 15th?

*Witness.* June 13th, 14th and 15th, yes, sir.

*Mr. McCarter.* Now, unless there is any misunderstanding about this, your Honor, here are articles—there are, I don't know, perhaps fifty pages in this, and there are hundreds of articles on each page, and a list of purported articles in the factory is handed to this witness. He goes and sees how many of the purported articles on the list are there and makes up an inventory from that piece of investigation. This simply served as an index; he did not assume it was right, but it simply helped him to find out what to do; his index.

*The Court.* Mr. McCarter, taking that paper on which an opinion is asked— The question upon which the opinion of an expert is expressed should be so clear that the jury will not be left in any doubt about what the actual facts are upon which the witness is expressing an opinion.

*Mr. McCarter.* I think it is, after Mr. Fisher gets through with it.

*The Court.* Well, what is on that paper?

*Mr. McCarter.* It is a list of goods and he checks what is there and what is not.

*The Court.* Unless some evidence in the case shows that he knew by observation, or some other way, as to the correctness of that, I will not permit him to make an inventory as of the date of June 13th, 14th and 15th—I mean to testify as to the appraisal.

*Mr. McCarter.* Unless there be any misunderstanding in response to your Honor's statement or ruling, I understand, (and I want Mr. Fisher to correct me if I am wrong,) I understand that he simply uses that document, marked 16, or whatever it is, as an index or starter and he, with his own men, personally investigated every statement there on that document and found either the articles that are mentioned there as being there, or as missing, or as more than that there, and having this as an index and personally inspecting the goods and comparing what is there with what is on the sheet, he prepared an inventory, making the necessary corrections, and to that extent he does know what is in that document, although he did not make the statement; is that right, Mr. Fisher?

*Witness.* Yes, sir.

*Mr. McCarter.* Now, suppose I were brought in, being an expert, to inventory the contents of this court house, including all the law books that we have down in our office and in our library, there are several thousand volumes—the other day we wanted Soney & Sage to appraise that library. Soney & Sage sent somebody—I do not know who because we had no list of it—over to make a list of the New Jersey reports, New York reports and Northeastern Reporter and then Mr. Sage of that firm

came over with that list and verified it and gave us an appraisal.

*The Court.* How did he verify it?

*Mr. McCarter.* By looking at it.

*The Court.* Looking at the books?

*Mr. McCarter.* Yes, sir. Now, this man has looked at the things and he has found the goods correct, just as Soney & Sage's made an appraisal of my books, but a young man came first so Mr. Sage would not have to waste his time. Now, that is what was done here.

*The Court.* This is not standing alone; this is to be used in connection with this man's testimony relating to June 13th, 14th and 15th, and then going back to May 9th; it is not altogether the same as the book proposition.

*Mr. McCarter.* Now, your Honor involves a second question. I am prepared to discuss that, but that is a question as to whether a method described by Mr. Leopold in his evidence is a scientific and correct method of making the appraisal of the value of goods on any particular occasion. We have got to take the nearest date there was to the appraisal and then work backwards and forwards. That is different than the question here. The question here is your Honor, having permitted us to examine this witness, whether he was right in the method he pursued in using the paper handed to him, by Mr. Harris, as something to start on and check up and then made, or his men checked up several items and then as a result of that he did make an inventory, making the necessary subtractions and additions to this paper purporting to be a list. Now, I say that is a proper method to do the thing.

*The Court.* Assuming that I allow him to use the paper as you term it, as an index purpose, assuming then he arrives at a figure as of June 13th, 14th and 15th, then do you expect to offer those figures in evidence?

*Mr. McCarter.* Yes, sir.

*The Court.* Then I will allow him to use that paper for the time being.

Q Please go on and describe it having D. 26 before you, tell the Court and jury what you did. A I assigned my men to a style number with instructions to count, weigh and measure according to the amount of goods as contained therein, and report back to me what they found, comparing it with my working sheet; if it did not agree, I sent them back the second time; they reported to me again; if it did not agree then, personally, myself, I made my own count and on the result of that third count I made my inventory here specify to everything, to know as accurately as possible what was contained in each package and box.

Q (*By the Court.*) That is as of those days you were there? A Yes, sir.

Q Now, having done that in the method you described, which I think you have made very plain, did you then prepare a so-called inventory? A I prepared an inventory and made a catalogue of the different style numbers. I took a sample of every garment and took them away from this plant to my own private office, appraised them, verified my appraisal and made up my final figures, which were handed to my stenographer to put on the comptometer, verified the extensions and typewriting, and after that I prepared my statement.

Q And is the statement you now hold in your hand the inventory of the appraisal—of the value of the stock in the factory of A. E. Harris Company on the corner of

Thirteenth and Morris avenues, on the 13th, 14th and 15th of June, 1922? A It is.

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

*Mr. D'Aloia.* I object to it.

*The Court.* Objection sustained.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

An adjournment was taken until 2 P. M.

AFTER RECESS.

*Mr. McCarter.* It is stipulated between counsel that in the offer of testimony of Mr. Fisher the fact that his counters, his assistants, six men, who helped him count the articles are not produced, is not made any point of. It is an immateriality.

*Mr. D'Aloia.* It is absolutely true. I agreed with Mr. Ruback that I would not insist on the appearance of the six men.

*The Court.* So that you will not make it a point for the jury.

*Mr. D'Aloia.* No, I will not. It is understood I will not.

LOUIS MARCUS, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Mr. Marcus, you live where? A New York.
Q What is your business? A Carpenter contractor.
Q Do you know Mr. Harris? A Yes.

*Louis Marcus, cross.*

Q Did you do any work for his company up here on the corner of Thirteenth avenue and Morris avenue? A Yes.

Q What work did you do? A I had the contract for all the work, shelves, partitions, tables, to take apart and put up in Thirteenth avenue, whatever it is.

Q Did you supply the material? A There was no material to be supplied; they had all their stuff in New York and we just had to take it over here.

Q Oh, their stuff was in New York and you had to put it up here? A Put up here.

Q How long were you engaged in this factory? A Oh, three or four weeks.

Q During what month were you there? A January.

Q Was there any electric light in the building at that time? A No, sir.

Q What did you do on account of the darkness? A We used some candles.

Q What kind of candles? A Plumber's candles.

Q Where did you get those plumber's candles? A On one occasion I brought them from New York and then the next time we sent out for them.

Q Whom did you send out? A Fred.

Q Fred Bauer. How many men did you have there all together? A Oh, about eight or ten. I do not remember.

*Cross examination* by Mr. D'Aloia.

Q When did you go to work there? A We started in there around the twenty-ninth of December, I suppose; I do not remember exactly.

Q Do not suppose, have you any records? A Oh, yes, I can produce them.

Q Have you? A Not with me.

Q Have you written records of the time you do work? A Yes.

Q Was this a contract job? A Yes.

*Louis Marcus, cross.*

Q When was it you began to do the work? A Around December 29th, 28th.

Q And how long did the work last? A Well, three or four weeks.

Q Well, when did you finish? A We were working sometime in February too.

Q February what? A We were working sometime in February, too.

Q You were sometimes there two or three days a week? A The first week we worked constantly.

Q And you worked as long as the light would permit? A Well, we worked with candles.

Q You did not work with candles at noon time? A No, sir; only at night.

Q But you did work many days there—you quit early because there were no lights? A Yes.

Q And you quit while it was still daylight; is that so? A We worked there as long as we could work with light.

Q You quit day after day because daylight was gone and it was dark, didn't you? A Yes.

Q How many days during the three weeks did you quit because there was no more daylight and you could not see? A I did not get you.

Q (Question read.) A Well, we worked until five o'clock.

Q I didn't ask you that. How many days during the three weeks you were there working with your men did you quit because darkness came on and daylight was gone and you could not see to work? A Oh, about twelve days.

Q Twelve days out of three weeks? A Yes.

Q Do you remember the 9th of May, 1922? A I do not remember it.

Q You do not remember? A How could I remember it?

Q Do you remember the ninth of May, 1922? A Yes.

Q Now, after that day, when was it somebody came to you and asked you to remember if during the three weeks in December and January, while you were working there you used candles? A I don't remember nothing about it.

Q Well, can your mind go back to the ninth of May, 1922? A Yes.

Q How long after the 9th of May, 1922, was it that either Mr. Harris or somebody connected with him came over to New York to see you and said, "Now, do you remember the work you did out there in Newark?" and you said, "Yes" or something like that; "do you remember when it got dark you used candles?" When was it that that conversation took place? A Mr. Harris never came over to me.

Q Who did? A Nobody.

Q Do you mean to tell this jury that since the 9th of May, 1922, nobody was talking to you about the use of candles by you or your workmen in that loft when you did that carpenter work? A Yes, I have been talking to the lawyer.

Q To who? A Mr. Leber's partner.

Q Mr. Ruback? A Yes, sir.

Q In New York? A No, Newark.

Q When? A About five or six weeks ago, I don't remember what day.

Q Did he send for you? A Yes.

Q When you got to his office was Mr. Harris there? A Yes.

Q Then, did Mr. Harris talk to you? A No, sir.

Q Well, he was there, wasn't he? A Yes.

Q Did you say "Hello" to him? A Yes.

Q Did he say "Hello" to you? A Yes.

Q Then you did talk to him? A That is all we talked.

Q What else did he say? A Nothing else.

Q Did you say, "How is business?" A No, sir.

*Louis Marcus, re-direct.*

Q Did he ask you how is business? A No, sir.

Q Did he tell you he had a fire? A Yes.

Q Who? A Not Mr. Harris, the lawyer.

Q What did Mr. Harris say? A Nothing at all.

Q You didn't know the lawyer, did you? A No.

Q Who introduced you? A Mr. Harris, he said, "This is the carpenter."

Q Did you give your name? A Yes, sir, Marcus.

Q Then, your mind went back, after talking to Mr. Ruback, it went back to December and January, between the 28th of December and the second and third week in January and you remembered about bringing some candles from New York? A Yes.

Q How many? A I brought four with me.

Q When? A Some time in January.

Q When with reference to New Year's day? A Oh, it was around the tenth or twelfth or fourteenth, I can't say.

Q And there were used by you, weren't they? A Yes, sir.

Q And then the boy, Fred, went and got some? A Yes, sir.

Q How many did he get? A About two or three. I can't tell you.

Q And they were used up? A Yes, sir.

Q So that by the time your carpenter work was finished the candles that you had brought from New York and candles brought by the boy were used up? A Not exactly; we didn't wait until they were going to burn out.

Q What did you do with them? A Threw them away.

*Re-direct examination* by Mr. McCarter.

Q Where did you throw them? A Any place, either on the shelves or under the shelves.

*Louis Marcus, re-cross.*

Q Look at this candle that I show you and see if the candles that you were using there looked like that? A Something like that and that is what we call plumber's candle. I never measured them, about something like that; that's what we call them.

*Mr. McCarter.* I offer them for identification.

One candle marked D. 27 for identification.

*Re-cross examination* by Mr. D'Aloia.

Q Is that a plumber's candle? A That is what they call a plumber's candle.

Q They come longer than that, don't they? A Some of them come four inches and six inches, all sizes.

Q And they come thicker than that, don't they? A Sometimes.

Q What do you call other candles that are not plumber's candles. Are there any carpenter's candles? A No, sir.

Q When you threw these stumps of candles away, after using them, you did not happen to throw any in anything like this up there, did you? A I don't remember.

Q By accident under a bench? A I don't remember.

Q Did you ever see any of these things up there. A No, sir; not when I was there.

Q How many of these stumps do you remember throwing under the bench?

*Mr. McCarter.* He didn't say under the benches. He said under the shelves.

Q How many do you remember? A As much as we had, six or seven; we didn't take them with us, we had no use for them.

Q You said to Mr. McCarter and you said to me that you did not take them away? A Yes, sir.

Q And they were on the table or on a bench? A Yes, sir.

Q And you blew them out and threw them out away on the floor? A We didn't exactly throw them; we left them there.

Q How many of them did you leave? A Six or eight, I don't remember.

Q How long were they? A Some were one inch and two inches, all kinds.

Q Eight of them? A Yes, sir.

Q You never left any broken up ones like that, did you? A I did not.

Q Now, look at this one; you never left any broken up one like that and blackened up one like that? A Maybe my men did.

Q Do you know of any? A No.

Q This is smaller than this one, isn't it? A Yes, sir.

Q Is this a plumber's candle? A Yes, sir.

Q Is this? A Yes, sir.

Q They are both plumber's candles? A They are all called plumber's candles.

Q But you don't remember ever throwing one away that was broken up like that? A No.

FRED BAUER, recalled on behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Bauer, you have testified in the case already and I think you told the jury how long you worked in this place. I show you two cans that are marked Exhibit S. 10, did you ever see them around the factory? A Yes.

Q Where? A Up on the shelf in back of the gas stove.

Q How long have they been there to your knowledge? A They have been there several months.

Q And did you ever see anything done with them? A Why, I have got stuff in them.

Q What kind of stuff? A Benzine and turpentine.

Q Both of them? A Yes, sir.

Q And you put benzine and turpentine in those cans? A Yes, sir; had them put in down at the hardware store.

Q Where? A On South Orange avenue right below Wallace street.

Q And then was the benzine and the turpentine that was in these two cans used in the factory? A Yes, sir.

Q Who used it? A Mr. Gilpatrick used one and Mr. Umansky used the other.

Q Which did Mr. Gilpatrick use? A I think it was the turpentine that he used.

Q And Mr. Umansky used the benzine? A Benzine for mixing fluids.

Q Now, I show you some bottles that are marked S. 11. Look at these bottles and see if you ever saw them before? A Yes.

Q Where were they? A Also on the shelf in back of the gas range; gas stove rather.

Q How long had you noticed them there? A Why, I brought them from my own home, quite some time ago.

Q How long ago? A About four months.

Q And how did you happen to bring them from your home? A At the request of Mr. Umansky. He had fluid there and he did not want to destroy it and he asked me if I would kindly get something to put them in.

Q And you got the bottles empty? A Yes, sir.

Q And what did Mr. Umansky do with them after you brought them? A Why, I filled them after I brought them with the fluid that Mr. Umansky had.

Q Do you know what the fluid was? A Why, this dye stuff that he used for dyeing.

Q Liquid, was it liquid? A Yes, sir.

Q And after the dye was made or before? A After the dye was made.

Q After the dye was made it was then put into these bottles? A Yes, sir.

Q When did you last see those bottles? A A couple of days before the fire.

Q What was in them then? A Exactly the same stuff.

Q The stuff that looks like this that is in there now? Come around here where you get rid of this light. A Stuff that looks like this. Why, yes, that looks to be the same stuff, the dye seems to be settling to the bottom.

Q And so with the other bottle? A Yes.

Q That looks to you as if it had the same contents? A Yes.

Q And you understand that is a dye? A Yes.

Q Now, when did you say you brought those bottles— A Why, to my knowledge, about a month previous to when I had the cans filled—when I got the cans.

Q Now, did you ever see this tea pot? A Yes, that was used by Mr. Umansky for dyeing—mixing the fluid.

Q And where was it kept, according to your observation? A This is supposed to be the trimming room, is it not (pointing)?

Q The trimming room? A Yes, and it was kept off in one corner; I cannot remember exactly which one.

Q On the shelf or on the floor? A On the floor.

Q Look at the inside; come right here and look inside of this thing, does that seem to have some of the dye fluid in there now? A Yes, exactly; it looks the same to me.

Q Reddish? A Sort of pinkish, it is not reddish.

Q Now, there seems to be another can here, the gentleman says he found, marked D. 9; did you ever see that? A Why, yes; I think I brought that—I am sure I brought that from New York.

Q When? A I cannot say exactly; I do not remember exactly when.

Q Well, two weeks or a month? A A couple of weeks before.

Q What did you have in it? A Why, some stuff that they used to take spots out of the garments with.

Q Benzine? A I don't know just exactly what it was.

Q How did you happen to bring that over? A At the request of Mr. Umansky.

Q Now, here is a mysterious looking bottle, "Empire pure ammonia;" did you ever see that before? A That looks like a bottle to me as the one I bought across the street; corner 13th avenue and Broome street, in a grocery store.

Q When? A I can't just recall when.

Q Well, about how long before the fire? A Oh, about a week or two.

Q What was in it at the time you bought it? A Why, it was supposed to be ammonia; I don't know whether it is in it now or not.

Q How did you happen to buy that? A At the request of Mr. Umansky.

Q Now, I think that you testified that you were in the plant the day after the fire, is that right? A Yes.

Q What time? A Why, I think it was during the morning.

Q During the forenoon? A Yes.

Q I would be glad to have you here do your best to recall, to the best of your ability, what time; I don't mean the hour or minute, my friend, Judge D'Aloia, always insists upon that, but I don't think that is fair to bring a man down to that. A To my judgment I should say ten o'clock, it may have been a little earlier or a little later.

Q Well, now, you were down to the City Hall that day? A The day after the fire, yes; I was down to the City Hall.

Q Were you to the factory before you went to the City Hall, or after you left the City Hall? A I think it was after.

Q Now, perhaps you may be able to remember how long you were in the City Hall and that will enable you to say whether it was before or after noon that you had been down to the factory. A My knowledge is I was down there quite some time.

Q Your recollection is that you were at the factory before or after one o'clock? A I can't just recall.

Q Did you go in the stockroom? A I can't just recall that either.

Q Will you look at this map, what we call the stockroom, is this room here, that you have spoken of as the trimming room. Now, I am asking you if it is a fact that you went in that trimming room the day after the fire when you were up there? A I may have.

Q You found a candle somewhere there by the toilet? A Yes.

Q Now, didn't you tell Mr. Ruback just before recess ended that you were in the stockroom that day? A I wouldn't say for sure.

Q Didn't you tell Mr. Ruback that you were? A I did, but I wouldn't say for sure, but I figured I may be in between.

Q What do you mean in between, in between what? A I told Mr. Ruback that, and if I said I didn't—

Q No, no, no, now, come; all I want is the truth? A I am giving you the truth; exactly the truth.

Q You had a talk with Mr. Ruback just before we reassembled here? A Yes.

Q And you told him that you could recognize all those bottles? A Yes, I did.

Q And you also told him that you were up there on the day after the fire? A Yes.

Q As you have already testified in the case? A Yes.

Q And that you went in the stockroom and that there was no streamer and coat hanging down there on that occasion; didn't you tell him that? A I didn't—

Q Didn't you tell Mr. Ruback that?

*The Court.* Didn't you tell him that?

A Yes.

Q Is it true? A To my knowledge, to tell the truth, I didn't take notice of the streamer in the corner.

Q Well, do you think you could have gone into that room—I don't know whether you have seen this exhibit before; I am showing the witness S. 6, which is a photograph of that corner of the so-called stockroom—when you were in the stockroom— A Yes.

Q —after the fire whether it was the next day or the day after that was the streamer, long streamer, hanging down six or seven feet long and a foot wide, and an overcoat near it, as it appears in photograph S. 6? A I didn't see the streamer, I seen the coat.

Q But you didn't see the streamer? A I did not.

*The Court.* What date was that?

*The Witness.* The 11th.

*Mr. McCarter.* One moment.

*Mr. D'Aloia.* He has answered the question.

*The Witness.* The 10th, pardon me.

Q You remember the gas stoves that were there? A Yes, I do.

Q And did you ever see the girls make tea or coffee there? A Yes.

Q And eat any lunch in the premises? A Yes.

Q And did you ever see any cartons like that I am now showing you around the place? A They might have been there.

Q Well, I don't know; I am asking you? A Well, just at present I do not recall.

Q You do not recall having seen any cartons? A No, sir.

*Cross examination* by Mr. D'Aloia.

Q You do not recall whether you were in the stockroom the day after the fire? A Why, to tell the truth—

Q Yes or no. A Just a minute; I have been affected with a blow.

Q Does that affect your memory? A It did at the present time, yes.

Q Then you cannot tell us whether you went into the stockroom the day after the fire or not; you cannot be positive? A I cannot be positive, no.

Q You cannot say positive whether there was any coats or streamer there or just the coat and no streamer, or just the streamer and no coat? A To the best of my information I would not say.

Q On the day after the fire? A No, it may have been the day previous to the 10th.

Q And it may have been the day previous to the 9th? A It may have been.

*Re-direct examination* by Mr. McCarter.

Q Do you remember on the two occasions going into that factory through the window? A Yes, at the request of Mr. Umansky.

Q When was that? A I cannot recall just when, but at his request I went in a couple of times.

*Mr. D'Aloia.* I cannot see the materiality of that; it is immaterial, incompetent and irrelevant.

*The Court.* Sustain the objection.

*Mr. McCarter.* Counsel has made a great to do about the fact that the doors were all shut, barred and locked and triple locked. The idea intended to be conveyed is that it was impossible for anybody to get into that factory except through those doors. Now, I wish to show on two occasions this witness got in through those windows.

*The Court.* Well, there is no proof that the circumstances were the same on the 9th of May, as I take it, the windows were locked. There is no proof the day he speaks of is similar to the day of May 9th.

*Mr. McCarter.* Well, it is not proven that it was snowing or not snowing.

*The Court.* We are not interested whether it was snowing.

*Mr. McCarter.* No, but what I am trying to prove is that on two occasions that he did get into that plant on that third floor through the windows and did not have to use the doors at all.

*The Court.* All right, answer the question.

*Mr. D'Aloia.* I would like to have the time fixed.

*Mr. McCarter.* I will fix it.

*Mr. D'Aloia.* All right.

Q I understood you had done it twice at the request of Mr. Umansky? A Yes.

Q What window did you go in? A The furtherest—

Q If you understand— A I understand what you mean; this is Morris avenue.

Q Yes. A Down here; the last window in the alley.

Q Well, the alley is on the other side. A This is the fire escape.

Q Yes. A And this—this is Morris—oh, that is right; pardon me; I am wrong, I know it was the last window in the alley towards the Heinisch Shear place.

Q Where is that? A Bruce and 13th avenue; it was formerly Heinisch, but it is now J. Wiss & Son.

*Mr. D'Aloia.* I just want to know where that place is again.

*The Witness.* What is that, Heinisch?

*Mr. D'Aloia.* Yes.

*Fred Bauer, re-cross.*

*The Witness.* Corner of Bruce and Thirteenth avenue.

*Mr. D'Aloia.* That is the block below Morris avenue.

*The Witness.* A block below Morris avenue; yes, sir.

Q How did you get to the window? A Why, I borrowed a ladder from the candy people downstairs and there is a sort of a platform in the yard and I put the ladder on that platform and climbed up and went through the window.

Q And opened the window and went in? A Yes, sir.

Q Now, Judge D'Aloia wants to know when that was, as near as you can recall. A Why, I just can't recall, once it was on a Monday morning but I can't recall the date. It was on a Monday morning and then the other I think was on a Wednesday morning.

*Re-cross examination* by Mr. D'Aloia.

Q But you needed the ladder, didn't you? A Yes, sir.

Q You couldn't do it without a ladder? A No, sir.

Q You didn't go up there with a ladder on the night of May 9th around seven o'clock, or half-past seven or eight o'clock, did you? A No, sir; oh, no.

Q Do you know the difference between benzine and gasoline? A Why, I think I do.

Q What is it? A I can't exactly tell you.

Q Then you don't know? A I can't tell you only by the smell.

Q You cannot? A No.

Q And you cannot tell by the color, can you? A No, sir.

Q And you can't tell them by the weight? A I can't; no, sir.

*John Maurer, direct.*

Q Then you don't know the difference between gasoline and benzine? Do you? A No, only by the smell of it.

Q You can't tell by the smell? A By the smell.

Q Have you ever smelled both? A I smelled gasoline; yes, sir.

Q Doesn't it smell like benzine? A I can't just say.

Q Then you don't know the difference between them by smell, do you? A No.

Q When you went to this hardware store and asked for benzine and he gave you gasoline, you wouldn't know the difference, would you? A I would not.

JOHN MAURER, sworn on behalf of the defendants.

*Direct examination* by Mr. McCarter.

Q What is your business, Mr. Maurer? A Receiving clerk for the Hockenjos Paint Store.

Q How long have you been with them? A Oh, I guess about nine years.

Q Where is your place? A 829 Broad street.

Q Just below William? A This side of William.

Q It used to be below William? A Maybe years ago; that is before my time.

Q Do they keep turpentine and benzine and kerosese and gasoline? A Yes, sir.

Q Have your produced from your stock some of each of those liquids? A Yes, sir.

Q Will you produce them? A Yes.

(The witness produces four bottles.)

Q Do the four bottles that you have placed before you contain respectively gasoline, benzine, turpentine and kerosene? A Yes, sir; as far as I know.

Q Where did you get the stuff that is in those bottles? A Why, the gasoline I drew from the gasoline tank; the benzine from the benzine tank; turpentine from

the turpentine tank, and the kerosene from the kerosene tank.

Q And are the bottles marked what the contents respectively are? A Yes, sir.

Q When did you take them from those four tanks? A Well, I guess maybe about ten minute to two, something like that.

Q At whose direction? A Why, the orders of my boss.

Q Mr. Jagel? A Yes, sir.

*Mr. McCarter.* I'd like to have these four bottles marked.

*Mr. D'Aloia.* I object to these four bottles. This witness does not know what they are except what he reads on the label.

*The Court.* Do you know what was in those tanks?

*The Witness.* Why, I received it, when we buy gasoline I happen to put it in the gasoline tank—

*The Court.* I mean do you know what were in the tanks from which these bottles were made up; do you know that?

*The Witness.* Well, if the Standard Oil sells benzine, it is put in the benzine tank, and that is all I know about it.

Q Mr. Maurer, are the tanks from those four bottles were taken respectively the tanks in which you buy and sell benzine, turpentine, gasoline and kerosene are kept? A Yes, sir.

*Mr. McCarter.* Now, I submit, your Honor, that we do not have to prove a chemical analysis; that if this well known store on Broad street, Newark, the Hockenjos store, buys and puts into a tank what is known as benzine, turpentine, gasoline and what the other article is, and when it is asked to

sell them and sells them at such, that for the purposes of this suit, that is all that is needed.

*The Court.* I will allow them.

The gasoline is marked Exhibit D. 28.

The benzine is marked Exhibit D. 29.

The turpentine is marked Exhibit D. 30.

The kerosene is marked Exhibit D. 31.

*Cross examination* by Mr. D'Aloia.

Q Could you tell the difference between benzine and gasoline? A Well, no; I cannot.

Q All you know is that they are from the different tanks? A Yes, I know that.

Q That's all you know? A That's all I know, certainly; if the company buys gasoline they put it in the gasoline tank and if the company buys benzine, they put it in the benzine tank; that's what I am trying to say and that is what I draw it from.

Q Now, if a barrel comes marked benzine and you put it in the benzine tank, you don't know whether it is gasoline or benzine, except that it is so marked? A Of course, if the Standard Oil sends it to us for benzine, we put it in the benzine tank; that's all.

Q Suppose the Standard Oil man at Bayonne makes a mistake and sends a barrel of gasoline labelled benzine and you put it in the gasoline tank— A Yes.

Q And if you are sent a barrel of benzine marked gasoline, you would put it in the gasoline tank? A Yes, sir.

Q And you would sell from those tanks because they are labelled gasoline or benzine and not olive oil; is that so? A Certainly.

*Mr. McCarter.* If there is going to be any dispute about this, we will have to delay this trial and have a chemical analysis made.

*Jacob Umansky, direct.*

*Mr. D'Aloia.* Why don't you tell us the object of this.

(Argument.)

*Mr. McCarter.* Do you object to the articles going in?

*Mr. D'Aloia.* On the testimony of this witness, yes.

*Mr. McCarter.* Then I will ask leave to adjourn this case and have these articles chemically analyzed.

*The Court.* No, I will allow them to go in.

*Mr. D'Aloia.* I think that the object of the introduction of these bottles, what the defense intends to prove by them, the State is entitled to know.

*The Court.* Yes.

*Mr. McCarter.* We will disclose that in time. Now, they are admitted or not admitted. Your Honor has ruled they are in.

*The Court.* I will allow them to go in, but before you can utilize them the State is entitled to know.

JACOB UMANSKY, recalled on behalf of the defendant.

*Direct examination* by Mr. D'Aloia.

Q Mr. Umansky, I show you two cans marked Exhibit S. 10. Look at them and see if you ever saw them before this trial? A Yes, sir; something like it.

Q Where? A One can is supposed to be the benzine can and one is supposed to be the turpentine can.

*Mr. McCarter.* By the way, Mr. Prosecutor, what has become of that label that was on this can?

*Mr. D'Aloia.* It is right on the other side of the can, on that side (indicating)—between the two cans.

Q How long have those cans been in the place? A Well, we brought them over from New York.

Q And look at the labels that appears upon one of these cans; just come over here. I call your attention to one of the labels on these cans; do you know in whose writing that is? A No, sir.

Q Did you ever notice that label before? A Mine was—I don't know whose it is.

Q You do not recognize it at all, "turpentine 35c a quart," or something of that kind? A I don't know; I did not handle the turpentine.

Q Which of the cans did you handle? A The benzine can.

Q And which of those cans, if you can tell us, was the benzine can? A Why, I can't tell exactly, because I think all the cans are alike, but I know, I think the benzine can was a can smaller to this.

Q That is the one without the label? A I know one thing sure, that my can did not have a label.

Q You used, I think, as you already told us on your previous examination, benzine for what purpose? A For the purposes of making dyes for laces.

Q Now, I show you a tea kettle and pan in which it sets. Did you ever see that? A Yes, sir.

Q Did you have anything to do with that? A Yes, sir.

Q What did you do with it, what use did you make of that? A Why, in the pan I used to make the mixture of the dye, and after I got through, and if I had any surplus, I used to pour it into that tea pot, into that tea kettle.

Q To keep it? A Yes, to keep it for future.

Q Now, look into that kettle and see what that liquid is, if you can tell us what is in there? A That is called the mixture of a rose color.

Q Dye? A A dye mixture, benzine and dye of rose color.

Q Do you know when that was put into this tea pot? A Why, after I got through with my dyes.

Q You don't know when that was with reference to the fire? A I suppose a few days ago, ten or eight.

Q Now, where were you accumstomed to keep this tea pot and pan? A In the trimming room.

Q And where were you accustomed to keep the two cans which contained, respectively, benzine and turpentine? A Why, the benzine can I used to have always in the trimming room. The turpentine can belonged already on the shelf where we used to call the machinery supply shelf—that was behind the installation of the gas stove.

Q Who used the turpentine; I think you said Mr. Gilpatrick.

*Mr. D'Aloia.* He didn't say that; the boy did.

*The Witness.* Mr. Gilpatrick may have asked somebody else to use it, but I knew it was used for the purpose of making ink for marking the packages and cases.

Q Now, these three bottles. Look at them and see if you ever saw them before this trial? A I am not quite sure, it was not under my care.

Q Have you any recollection of seeing bottles of that kind in the place? A We have had several bottles. Of course, I can't tell you exactly whether these are exactly the bottles.

Q Well, did you see bottles similar, or looking like those three in the factory? A I knew we had a bottle that we used to have lemon oil in for cleaning up. I think it was a bottle, that if there was any surplus of kerosene, that the machinists used at the time of installation of the plant. Of course, I cannot specify whether this is the identical bottle or similar to it.

Q I didn't ask you that; I asked you if there were any bottles around the institution? A Yes.

Q How many? A I can't recollect the exact amount.

Q And what was in the bottles that were around the institution? A I don't know, sir.

Q You remember, however, seeing some bottles? A Yes, sir.

Q I show you a bottle without any label—without any exhibit label—

*Mr. D'Aloia.* All four bottles were marked under one number.

*Mr. McCarter.* That seems to have a label pasted on it with the words, "Empire, Pure Ammonia." Do you know anything about that bottle?

*The Witness.* Why, to my knowledge the only time we had ammonia in the place was after we were running short of the cleaning fluid we purchased from D. Blume & Company, we used to use ammonia as a substitute for cleaning the spots. Of course, whether that is the bottle of ammonia, I don't know, I never purchased any ammonia, but when we ran short of anything for factory, I instructed the porter, Mr. Fred, to supply me such.

Q Did you ever see the girls eating lunch or making tea or coffee in the plant? A Yes, sir; we installed gas stoves for the purpose.

Q Did you ever see any of these wooden cartons around the place before the fire? A Not to my knowledge.

Q Now, I want to direct your attention a moment to the night of the fire. Where were your hat and coat? A I used to keep it in a steady place at the entrance into the office. I used to have a nail and a hanger there in front of my desk.

Q And that was in the front office? A Yes, sir.

Q Do you remember the night of the fire getting your hat and coat? A Of course, I must have taken it.

Q Well, have you any recollection about it? A Surely, I wouldn't walk out without it.

Q Do you remember when you left the place where the hat and coat were to go back into the loft? A Yes, sir, the coat and hat was in the same place where I put it away and I found it every day.

Q I know, now, you got into the office, you are at the hanger in front of your desk and you found your hat and coat—had you been working in your shirt sleeves? A Yes, sir.

Q How about your coat and your hat, you are now getting your hat and coat and you are going to leave? A Yes.

Q Now, that is in the office? A Yes.

Q Now, I ask you if you remember how you got out into the loft from the office? A Yes.

Q Tell us, please? A This is exactly where the office was (indicating). And this was the spot where I used to have the nail and the hanger and my coat and hat used to hang.

*Mr. McCarter.* Pointing to a point just left of the passage way between the office and the stock-room.

*Mr. D'Aloia.* The southwest corner of the office.

*The Witness.* No, that is the corner I used to keep my hat and coat (indicating on map).

Q Pointing to the southwest corner. A And after I put my hat and coat on I walked through—this is the door again—of course, this door should be in the center, it is a little bit over—this is the door leads into the trimming room and there is a door that leads from the trimming room into the factory, and that is the way I walked out.

*Jacob Umansky, cross.*

Q That was just before you left? A Yes, after I was ready to go home.

Q At that time, as you walked through that room, did you see a coat and streamer hanging in the corner such as is shown on Exhibit S. 6? A Well, I am sure I had a coat there; the coat was mine.

Q Well, now, just answer my question. A Well, I don't know whether I particularly made it my business to look at the coat the minute I left.

Q (Question read as follows: "At that time, as you walked through that room, did you see a coat and streamer hanging in the corner such as is shown on Exhibit S. 6?") A coat and streamer? A I never witnessed any streamers, but I witness the coat all day long.

Q You never witnessed any streamers? A Absolutely.

Q Well, is that stockroom at seven o'clock at night light or dark? A Well, there is artificial lights, lamps, which we used there all day long from the time we go in until we leave.

Q Well, now, at that time that night you didn't have those lights lit? A No.

Q The place was dark? A Absolutely.

Q As you went through that room near the corner you describe, was there a lighted candle in the corner on the floor? A No, sir.

*Cross examination* by Mr. D'Aloia.

Q What time was it when you went through that room? A Why, it was ten minutes or less before we left the loft.

Q Ten minutes or less ? A Yes.

Q You are sure it was not ten minutes or more? A Maybe it was ten minutes or more.

Q And you are sure it was not fifteen or more? A No, sir.

Q Well, you went down to Police Headquarters on the 10th of May? A Yes.

Q Did you dictate your statement? A I did.

Q Look at this statement; did you sign it after reading it? A I remember so.

Q Did you read it after it was typewritten? A I did.

Q Now, read that statement; see if that is the statement you dictated, the statement that was typewritten for you; the statement that was signed by you? A I will ask for the privilege somebody else to read it for me and I will acknowledge whether it is right or not.

*Mr. McCarter.* Can you not read English?

*The Witness.* Why, it takes me too long.

Q But you did read this before you signed it down there? A I did.

Q And it met with your approval before you signed it, it was found correct by you? A I think so.

Q And you signed it because it was correct? A Why, surely.

Q On Tuesday, May 9, 1922—now, this is what you said at Police Headquarters on May 10th; this is what you dictated: "On Tuesday, May 9, 1922, Mr. Harris brought the pay roll out 5:20 P. M., after all the girls had left, myself and Mr. Gilpatrick and the shipping clerk and Mr. Harris were left alone in the factory;" is that right? A Yes.

*Mr. McCarter.* I object to that. That does not contradict a thing.

*Mr. D'Aloia.* I will come to that.

Q I will begin by this sentence, did you say this: "Mr. Harris had looked over the samples and had instructed myself and Mr. Gilpatrick to have these samples wrapped up in a bundle so that he could take them along."

*Mr. McCarter.* I object. It has not been adverted to on this occasion. All his attention has been directed to on the night of the fire has been the subject of where he found his hat and coat and how he walked out into the loft again. That is everything I have asked him with reference to the occasion of the fire. All this subject was gone into on the previous examination and the witness when called by the State testified concerning it and I do not think he has any right to go into other subjects than that upon which he was examined today when he was called as our witness.

*The Court.* Of course there are two propositions; he is your witness and subject to the same rules of cross examination. However, if he signed the statement and the statement is presented to impeach what he said, the statement must be read with reference to those parts where he thinks there is a contradiction. Just pick out what you deem a contradiction.

*Mr. D'Aloia.* Yes, sir.

Q Did you make a statement on the tenth of May so far as I have read? A Yes, sir.

*Mr. McCarter.* I object to that.

*The Court.* Objection sustained.

Q Did you make this statement: "The two of us got busy to carry out his instructions and we went into the shipping department to see that we should make the bundles comfortable for him to carry.

*Mr. McCarter.* I object. That has not been adverted to.

*Mr. D'Aloia.* I submit they went into the shipping department—

*The Court.* I will allow it.

*Jacob Umansky, cross.*

Q Did you say that? A Yes.

Q "At the time Mr. Harris was left in the office;" did you say that?

*Mr. McCarter.* I object. That was not the subject of this examination at all. The witness went through all this on his other examination. All that I asked this witness when I made him our witness concerning the occasion of the fire was how he got his hat, which he said was the last thing before he left. Now, what he did before that and to attempt to contradict him or to get before this jury as to what he said or did then, that is not cross examination of the part he had been interrogated by me.

*The Court.* I will limit the use of the statement. Of course, I will not shut you off so you have to pin yourself down, but I won't allow you too much latitude. You may cross examine this witness without reference to that statement, but if you are attempting to use the statement, then call his attention to the statement he made.

*Mr. D'Aloia.* The portion I am reading covers the period of time immediately preceding during which and after which Mr. McCarter got him to go to that office, to the southeast corner, and then back to the southeast corner where his coat was hanging and then to the stockroom and in and out of the loft of the building, and I say I have a right to examine this witness as to when he got his hat and coat and whether it was light or dark.

(Last two questions and answers of direct examination read as follows: "*Question*: The place was dark? *Answer*: Absolutely. *Question*: As you went through that room near the corner you described was there a lighted candle in the corner on that floor? *Answer*: No, sir.")

*The Court.* I will allow those questions.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Do you remember saying this; did you say to the people down at headquarters: "The two of us got busy to carry out his instructions"—by the two of you, you and Gilpatrick; his instructions, Mr. Harris' instructions —"and we went into the shipping department to see that we should make the bundles comfortable for him to carry."

*Mr. McCarter.* I object to it on the ground it is not cross examination, and pray an exception to its admission.

*The Court.* I have not ruled on it yet. I will admit it and grant you an exception.

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Did you say that? A Yes.

Q Now, did you say at that time: "Mr. Harris was left in the office?"

*Mr. McCarter.* I object to that. The same reason.

*The Court.* I will allow it.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Did you say that to the people down at Police Headquarters? A I may have said it.

Q Well, if it is here did you say it? A If it is there I must have said it.

Q After saying that, did you say: "When we got through making the bundles, myself and Mr. Gilpatrick were trying to lay out a plan what work should be attended to the following morning, meaning today, as we had on hand some orders that were to be rushed out, due for shipment"; did you say that? A Yes.

*Mr. McCarter.* I object.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q "At the same time a lot of merchandise for Sears Roebuck & Company, while we were trying to lay out our plan, Mr. Harris entered our shipping department and suggested that we should walk out;" did you say that?

*Mr. McCarter.* I object to that for the same reason.

*The Court.* I will allow the question. Did you say that?

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A Yes, but with an exception.

Q What was the exception? A The exception was that when Mr. Harris came into the shipping department

while we were discussing the question whether we shall be able to pick samples for him, as he instructed to us, and will have to neglect the shipping of the immediate due orders to be shipped then, we suggested to Mr. Harris and he looked into this matter and directed us to take care of the orders.

*Mr. D'Aloia.* Now, I say that his exception should only refer to what he said down at Police Headquarters that is not in this statement and not what happened up there in the plant that he did not say anything about in Police Headquarters.

*The Court.* That is true.

*Mr. D'Aloia.* Now, I am going to read the question again.

*Mr. McCarter.* I object again.

*Mr. D'Aloia.* Now, I am going to reframe this question. Didn't you say at Police Headquarters on the tenth of May, 1922, when you dictated this statement: "At the same time a lot of merchandise for Sears Roebuck & Company while we were trying to lay out our plan, Mr. Harris entered the shipping department and suggested that we should walk out?"

A Shortly in a few minutes.

Q Did you say that on the tenth of May, 1922, at Police Headquarters? A Yes, within a few minutes later.

Q Now, listen. Do you understand my question? A Yes.

Q Well, now, you answer yes or no? A Yes, but I see it is missing there to the statement.

Q You dictated this statement? A Yes.

Q Well, there isn't any word here or phrase like that. A I see there is not.

Q Now, did you say that Mr. Harris suggested that we should walk out? A Yes.

*Mr. McCarter.* I object.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Did you then say to the police at headquarters on the tenth of May, 1922, when you dictated your statement: "That was about 7 P. M. before we started to take the bundles of samples Mr. Harris told Mr. Gilpatrick to help him close the windows as our porter was away."

*Mr. McCarter.* I object to that.

*The Court.* Answer the question.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A Why—

Q Yes or no; no why about it. A I cannot remember, sir.

Q You dictated this statement you signed? A I did.

Q Listen to this again. Didn't you dictate: "That was about 7 P. M. before we started to take the bundles of samples Mr. Harris told Mr. Gilpatrick to help me to close the windows as our porter was away."

*Mr. McCarter.* I object.

*The Court.* Are you attempting to read the entire statement?

*Mr. D'Aloia.* No, sir; I am trying to get down to what happened next.

*Mr. McCarter.* I think this is very unfair and unjust. I am surprised that the person acting as prosecutor is doing this.

*The Court.* Is this simply a means of contradicting this witness?

*Mr. McCarter.* Has this witness testified to any of these instances?

*The Court.* You may cross examine the witness without regard to the statement whatever is proper on cross examination, so far as his testimony is concerned as a witness for the defense but you cannot introduce that statement in that way; you can point out inconsistencies.

*Mr. D'Aloia.* There is one short sentence which follows what I read up to that point and it covers this man's movements there.

*Mr. McCarter.* I object to it.

*The Court.* I am going to strike out all that testimony before.

*Mr. D'Aloia.* Does your Honor mean to say on direct examination by the defendant, Mr. McCarter can ask him about where his coat and hat was and then he can go through the stockroom and say whether it is light or dark and I cannot examine him as to his movements that night.

*The Court.* You can cross examine him as any other witness, but if you are going to use a statement as a basis for your examination as to something said outside of this court room you are going to be confined to the use of that statement to the specific incident of contradiction.

*Mr. D'Aloia.* I contend, if your Honor please, that all I have read from the beginning of the time I started to read the statement until I finished covers the movement of this witness from the time he left Harris in the office and he went to that

shipping table and he is now going to walk out of the loft in the next sentence, and it does not say a word about going into that stockroom for his hat.

*The Court.* You may ask him that.

Q Now, didn't you tell the police on May 10, 1922—

*Mr. D'Aloia.* I am going to first follow the Court's suggestion and lay the foundation.

Q Didn't you tell them on the 10th of May, 1922, from the time Mr. Harris came in until you went out of the plant you never were in the stockroom? A No, sir; I was several times in the office with Mr. Harris, working on different propositions.

Q Never mind the office, you heard my question. Read it to him, Mr. Stenographer. (Question read.) The word office has not been used there at all? A No, sir; I couldn't say so.

Q What? A I couldn't say so because I was there several times.

Q Did you dictate it in your statement? A I don't remember whether I did.

Q You don't remember? A No.

Q Now, I will ask leave to call your attention to the statement. Look at it again. You dictated it, didn't you?

*Mr. McCarter.* The witness has already stated he don't know how to read English. If you show it to me I will tell him whether it is there or not. What do you refer to?

*Mr. D'Aloia.* Read that part where he says, "Mr. Harris came in," and he left Mr. Harris in the office. "At that time Mr. Harris was left in the office."

*Mr. McCarter.* That is not the point. He has already been interrogated about that. There is not

a word in the statement, if the Court please, about what he did with his hat.

*The Court.* Read the question prior to that.

(Question read as follows:)

"Q Didn't you tell them on the 10th of May, 1922, from the time Mr. Harris came in until you went out of the plant you never were in the stockroom?"

*The Court.* I will allow that.

*Mr. McCarter.* That has been answered.

*Mr. D'Aloia.* He said I couldn't have told them that because I was there several times.

*The Court.* It is not responsive.

*Mr. McCarter.* I do not understand that is now the question before the Court.

*The Court.* This is a continuance of it in order to bring it to his mind more forcibly.

*Mr. McCarter.* What is the question before the Court?

(Question read as follows:)

"Q Didn't you tell them on the 10th day of May, 1922, from the time Mr. Harris came in until you went out of the plant you never were in the stockroom?"

Q And you say you were in the stockroom several times that night? A Yes.

Q Now, did you tell the police that you were in the stockroom several times? A That what?

Q (Question read.) A If I was questioned, otherwise I could not tell them.

Q Now, were you asked to dictate your own statement as to your movements? A Yes.

Q And you were asked down there, and you requested the privilege to dictate your own statement, didn't you? A Yes, sir.

Q And that privilege was granted you, wasn't it? A Why—

Q Yes or no, you were given the privilege of dictating your statement, your own statement? A It was given to a certain extent. I wanted to dictate several things which was called to my attention—that is not necessary.

Q Did you read that statement? A Will you accommodate me by not asking me to read it?

Q Did you read it down there? A Yes, sir.

Q How long did it take you? A It took me very long because I am a very slow reader.

Q How long? A About a half an hour or more.

Q After you had read it did it contain everything about your movements the night before in that loft?

*Mr. McCarter.* Objected to as utterly incompetent and not cross examination. This statement is not an issue, your Honor, and whether it contains or does not contain it, does not constitute anything.

*The Court.* This is brought about by the witness' statement, I take it, that he was not permitted to make a statement in the manner in which he intended to.

*Mr. McCarter.* Is not the only effect of a statement, the only purpose of a statement to contradict the witness' testimony on the direct examination?

*The Court.* Yes.

*Mr. McCarter.* Now, these matters do not concern that.

*Mr. D'Aloia.* Why not?

*Mr. McCarter.* I am addressing the Court and I am not accustomed to being interrupted, and I respectfully contend that your Honor's ruling, made a few moments ago, which has excluded a large part of this cross examination, should exclude this.

*The Court.* I have permitted one question to be answered with reference to this statement, and in response to that question and some other statement by the witness, Mr. D'Aloia is asking another question and I will allow it.

Q Did that statement contain all your movements on the night before in that loft from the time Mr. Harris arrived until you and Mr. Gilpatrick and Mr. Harris left?

*Mr. McCarter.* Do you understand that question?

*The Witness.* Yes, I do. It contains all of those movements, and maybe some that I have made that night and was not permitted for me to testify.

Q You mean that it may contain some that you have not been permitted to testify about? A No, sir; I want to say what is in that statement I must have stated, but I remember distinctly where I stated several things where I was interrupted and they said, "Never mind, that is not necessary."

Q Did you tell the people down there, or did you dictate, as part of the statement they were allowing you to dictate, that you had gone into the stockroom the night before?

*Mr. McCarter.* I object to that.

*The Court.* Objection overruled.

*Mr. McCarter.* I pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A I don't remember whether I did or not.

*Mr. D'Aloia.* Now, I beg leave to read the excerpts from the statement he has dictated, where he eliminates all reference to the stockroom, in describing his movements the night before, and I submit that it being a voluntary statement, dictated by him, that I can use it on this point to contradict his direct examination.

*Mr. McCarter.* I object to that.

*The Court.* No, I will permit you to read this statement to refresh his recollection as to something he is alleged to have made there, but you cannot introduce that statement, one way or another, as against the defendant.

(Argument.)

*The Court.* You may cross examine him as to anything he said on direct examination.

(Further argument.)

Q Now, didn't you state in the statement you made at Police Headquarters as follows: "The two of us got busy to carry out his instructions and we went into the shipping department."

*Mr. McCarter.* I object to that, as that has already been overruled by your Honor.

*The Court.* The difficulty with me is to recall to my mind just the testimony.

*Mr. McCarter.* I will endeavor to do it, or I will be glad to have it read.

(Argument.)

(Mr. McCarter and Mr. D'Aloia outlined the direct examination to the Court.)

*The Court.* Well, if you have anything inconsistent with that you may show it.

Q Did you say anything down at Police Headquarters when you dictated your statement about getting your hat and coat?

*Mr. McCarter.* I object to that question.

*The Court.* Objection sustained.

Q Did you tell anybody down there that you got your hat and coat and where it was hanging before you went out?

*Mr. McCarter.* I object to that

*The Court.* Objection sustained.

Q Now, did you make this statement down there at Police Headquarters on the 10th of May: "The same time a lot of merchandise for the Sears Roebuck & Company—while we were trying to lay out our plan, Mr. Harris entered the shipping department and suggested that we should walk out"?

*Mr. McCarter.* I object to that. It has already been ruled out.

*The Court.* I will rule it out again. I sustain the objection.

Q And did you say down there as follows after saying what I just said, "We then walked out?"

*Mr. McCarter.* I object to that.

*The Court.* I overrule the objection.

*Mr. McCarter.* I pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A Yes, sir.

Q "Mr. Harris took the lock"? A Yes.

Q "Put the lock on the door leading to the street," did you say that?

*Mr. McCarter.* I object to that.

*The Court.* Objection sustained.

Q Now, forget the statement for a moment. When did you first talk to anybody today about going into that stockroom that night before going out? A Today?

Q Today, yes? A I didn't talk over that subject with anyone.

Q When did you last do it before today? A Particularly what?

Q Going into that stockroom and not seeing the candle on the floor? A I can't remember particularly this question discussed with anybody.

Q When did you tell anybody, for the first time, after the 9th of May, 1922, that you went through the stockroom after you got your hat and coat and there was no candle on the floor lighted? A Just now while I am on the witness stand.

Q You didn't tell it to either of the counsel for the defense? A No, sir; I was not questioned about it.

Q They did not know whether you had seen a candle there or not, did they? A I was not questioned about it.

Q You did not tell the police that you had gone to the stockroom that night, did you?

*Mr. McCarter.* I object to that.

*The Court.* Objection sustained.

Q Well, did you tell the police that you went through the stockroom that night?

*Mr. McCarter.* I object to that.

*The Court.* Objection sustained.

Q Did you go to the stockroom that night? A Several times, for the time being.

Q What do you mean by the time being, beginning when? A That evening.

*Jacob Umansky, cross.*

Q What time? A The whole time while Mr. Harris was there and if he wanted me or if I wanted him, or wanted to communicate about anything, I must, in order to be able to come out into the office it would be a waste of time for me to go all around, I must pass through the stockroom, because it is leading, the door from the factory into the trimming room, and from the printing room into the stockroom, that is the most natural thing for me to do to go to the office.

Q Do you remember when you walked out to make up the samples on the shipping table with Gilpatrick? A I do.

Q Which way did you and Gilpatrick go out of the office? A I don't remember whether Mr. Gilpatrick was there with me in the office or I was there with Mr. Harris.

Q Which way did you go out of the office? A From the office again a door leading into the trimming room, and a door leading from the trimming room into the factory, that is the most natural thing.

Q And that is the time you left Mr. Harris in the office alone? A Oh, I left him there for about a minute or two.

Q You don't know how long you left him there, that is the time you left him alone? A Yes.

Q And you got to the shipping table, when you got there Mr. Gilpatrick was there alone, too, wasn't he? A Yes, I found him in front of the shipping table.

Q What is in this bottle? A I don't know what is there.

Q Take off the cork and smell it. You were the dye man up there, see if it is any part of your concoction. What does it smell like? A I don't know what it smells like, it is a funny smell, that's all I know.

Q Is it any of the things you used up there in the making of the dyes? A It would be hard to tell for me?

Q You are the dyemaker? A Well, I am not a chemist.

Q But you are the dyemaker? A Yes, sir.

Q And you hesitated here the other day, you didn't want to tell us what process you used, you did not want to divulge the formula? A No.

Q Does that smell like anything that you used in making the dye? A What?

Q Does it smell like anything you used in making the dyes? A It would be hard for me to tell.

Q Does it or not? A I don't know.

Q Smell it again? A Well, it smells this time the same as the other time.

Q I suppose it does. Does it smell like benzine? A I don't know.

Q What? A I can't tell the difference exactly.

Q Does it smell like gasoline? A Gasoline, I don't know, I never used gasoline in my life.

Q Does it smell like benzine? A I don't know.

Q Does it smell like kerosene? A I don't know.

Q Do you know what benzine smells like? A Not exactly.

Q Do you know what gasoline smells like? A Not exactly.

Q And you don't know what kerosene smells like? A Not exactly.

Q Take a smell of this one, a good smell. Does that smell like any concoction that you prepared as dyemaker at that plant? A I don't know.

Q Does it smell like gasoline? A I don't know.

Q Does it smell like benzine? A I don't know.

Q Does it smell like kerosene? A I don't know.

Q Now, take a smell of this other bottle, how does that smell? A It smells very funny.

Q Does it smell like any of the things that you mixed up when you mixed your dyes? A I don't know.

Q Does it smell like benzine? A I don't know.

Q Does it smell like kerosene? A I can't tell.

Q Does it smell like gasoline? A I can't tell.

Q Do you know how gasoline smells? A Not exactly.

Q And you are a dyemaker? A I am not a dyemaker.

Q Now take a good whiff of this inside of the kettle, does that smell like the stuff that you made your dyes with? A I don't know.

Q Does it smell like gasoline? A I don't know.

Q Does it smell like benzine? A I don't know.

THOMAS J. PATTERSON, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Where do you live, Mr. Patterson? A 3915 Broadway, New York City.

Q In the same apartment house as Mr. Harris? A Yes, sir.

Q What is your business? A I am an examiner for the City of New York.

Q In whose office? A In the office of the Board of Estimates and Apportionment.

Q How many years have you been there? A Oh, I have been with the city nearly seventeen years.

Q Do you know the reputation that Mr. Harris enjoys in the vicinity in which he lives for honesty and probity of character? A With those with whom I have come in contact; yes, sir.

Q What is his reputation?

*Mr. D'Aloia.* That last answer does not permit the question which is asked.

*The Court.* He can answer yes or no.

*Mr. D'Aloia.* That is, what is his reputation, that cannot be answered yes or no.

*The Court.* Does he know?

*The Witness.* Yes.

(Argument.)

(Question read.)

Q What is his character? A Very good.

Cross examination waived.

GEORGE L. BYRNE, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Mr. Byrne, what is your profession? A I have been a teacher for about thirty years in the schools of New York City.

Q And what is your present position? A I am in the Speyer School, a junior high school in Lawrence street, connected with the Board of Education.

Q May I ask where you live? A I live at 3915 Broadway.

Q Is that the same apartment house in which Mr. Harris lives? A It is.

Q You know Mr. Harris? A I do.

Q How long have you lived in the same house, the same apartment house? A Seven years.

Q Do you know his reputation in the vicinity in which he lives for honesty and probity? A I do.

Q What is it? A Good.

Cross examination waived.

AUGUST W. P. ALENSON, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q What is your business? A Importer.

Q Where? A 104 Fifth avenue, New York City.

Q Do you know Mr. Harris? A I do.

Q How long have you known him? A Ever since 1920.

Q Do you know the reputation that he enjoys for truth and veracity in the vicinity in which he lives? A I do.

Q What is it? A Good.

*Cross examination* by Mr. D'Aloia.

Q Have you ever heard Mr. Harris' reputation discussed by anybody? A I have not.

*Re-direct examination* by Mr. McCarter.

Q Did you ever hear it questioned before this trial? A I have not.

MEYER JACOBSTEIN, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Are you a practicing physician, sir? A Yes, sir.

Q Practicing where? A New York City.

Q How long have you practiced there? A Since 1907.

Q Do you know the defendant, Mr. Harris? A I do.

Q How long have you known him? A Since 1890.

Q Do you know the reputation that he enjoys in the vicinity in which he lives for truth and veracity and probity? A I do.

Q What is that reputation? A Very good.

*Cross examination* by Mr. D'Aloia.

Q Have you ever heard his reputation discussed by anybody? A Yes.

Q Where? A In our house.

Q What was the occasion of discussing it? A Just friends.

Q Well, did somebody question it? A No, sir.

Q Well, what was the discussion with reference to his reputation, did somebody try to contend it was not good,

and did somebody say it was? A Nobody said anything good—

Q Nobody said anything good? A Nobody said it was not bad, it was always good.

Q Where did the discussion take place, what brought it up? A In our house.

Q What made it necessary for somebody to say or state that Mr. Harris' reputation was good? A Well, it was just a friendly discussion, that's all.

Q Who was the friend who said it was not good and so made it necessary for some other friend to say it was good? A It was not a question of bad or good, it was a question of knowledge and of education.

Q You are not asked here about his reputation for being an educated man, you are asked here about his reputation for honesty and probity, as I understand Mr. McCarter's question. How was it brought up at that discussion? A There was never any occasion for this question to be called up for.

Q I am just asking you if it was ever discussed and you said yes. A It was just on the subject of education, of standing in society.

Q You are not asked at all about his reputation for educational qualities or his reputation or standing in society. You are asked what is his reputation for honesty and probity? A Good.

Q I asked you if it ever was discussed in your presence and you said yes. A I meant you had reference outside of that.

Q Was his reputation for honesty ever discussed? A Never, because there was no occasion for that.

Q Do you know that he failed in October, 1921? A He told me that himself, not that he failed, but that he had to come to an understanding with his creditors.

Q Did he tell you that he went through bankruptcy?

*Mr. McCarter.* I object to that.

A He told me that he simply made a settlement with his creditors.

Q Did he ever tell you what the terms were?

*Mr. McCarter.* I object to that.

*The Court.* Objection overruled.

*Mr. McCarter.* I pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

A No.

Q Are you his family doctor? A Yes, sir.

MORRIS A. JACOBS, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Where do you live? A 3915 Broadway, New York.

Q I think that is a familiar number, the same apartment house that Mr. Harris lives in? A Yes.

Q How long have you known him? A About eight years.

Q Are you familiar with his reputation for truth, probity and veracity in the vicinity in which he lives? A As long as I knew him.

Q What is that reputation? A Good.

*Cross examination* by Mr. D'Aloia.

Q Have you ever heard it discussed in your presence? A Never, sir.

Q Then you don't know anything about it? A I said only good.

Q You have never had occasion to discuss it? A I have.

Q With whom? A My wife.

*Anna Kasen, direct.*

Q Did your wife say his reputation for honesty and integrity was good? A No, sir; not discussed.

Q Well, did either one of you say he was an honest man? A Well, we said he was honest.

Q How many times did you say that to your wife? A I can't say.

Q Lots of times you kept repeating with yourself and wife saying that Harris was an honest man? A Oh, several years, yes.

*Re-direct examination* by Mr. McCarter.

Q Did you ever hear his reputation for truth, probity and veracity questioned prior to this trouble? A No, nothing, never.

*Re-cross examination* by Mr. D'Aloia.

Q Now, that you did not hear it discussed at any time do you know of anything that makes it necessary for your wife to tell— A No.

Q Wait. If you had never heard his reputation for honesty questioned, will you tell us now why it was necessary for you or your wife or both of you to assert from time to time to one another that Mr. Harris was an honest man? A Well, because we went out with him occasionally.

Q That is all you know? A Yes.

Q And sometimes he paid the expenses? A Well, I wouldn't say that.

Q And that is what makes you say he is an honest man? A I wouldn't say that.

ANNA KASEN, sworn in behalf of the defendant.

*Direct examination* by Mr. Ruback.

Q You live where? A 197 Johnson avenue.

Q And were you living there on May 9th this year? A I was.

*Anna Kasen, direct.*

Q What was your business on May 9th? A Department manager for W. W. Reid, Incorporated.

Q And you conducted your business where, on Branford place and Arlington street? A Yes.

Q Were you to business that day, May 9th? A I was.

Q Do you know Mr. Harris? A I do.

Q How long prior to May 9th had you known him? A Why, about a little over a year.

Q Do you know his daughter, Lucille? A I do.

Q And what was going on at Reid's on May 9th? A We had a special dollar day.

Q And were you there throughout the day? A I was.

Q How late did you stay at Reid's? A Why, until about a quarter of eight or so.

Q Was Miss Harris there throughout the day? A She was.

Q Did you see Mr. Harris there on May 9th? A In the evening.

Q At about what time? A Well, about a quarter of eight. About 7:30 he came in and I saw him all the time he came in.

Q Well, as soon as he came in, you saw him? A Yes.

Q Do you know who admitted him? A I believe it was Mr. Newth; I did not exactly see him open the door.

Q How long did Mr. Harris remain there? A He was there quite some time prior to the time we went home together.

Q What time did Mr. Harris leave there? A About five minutes of eight.

Q Did you leave with Mr. Harris? A I did.

Q And who else? A With his daughter.

Q And during the time Mr. Harris was at Reid's, was Miss Liss there? A Yes.

Q Did you see Mr. Harris at Reid's during the time he was there? A Yes.

Q What was he doing? A Well, he was going over his department and taking care of his slips, his daily business.

Q Now, did you, Mr. Harris and Miss Harris leave together? A Yes.

Q Where did you go; how far did you walk together? A Walked on Branford place as far as Broad together and left them at the corner and they crossed the street toward the tubes, waiting for a bus to go to the tubes.

Q What time was it you separated yourself from Mr. Harris and his daughter at the corner of Broad and Branford? A Well, it must have been eight o'clock or a little after.

Q What time did you arrive at your home that night? A About a quarter or twenty minutes past eight.

Cross examination waived.

MANNING MARKS, sworn in behalf of the defendant.

*Direct examination* by Mr. Ruback.

Q You live where? A 571 West 175th street, New York.

Q New York City? A Yes.

Q And where were you living May 9th? A 571 West 175th street.

Q Do you know Mr. Harris? A Yes.

Q How long have you known him? A About three years.

Q How near Mr. Harris' home did you live on May 9th? A Eleven blocks.

Q Were you in the vicinity of his home on the evening of May 9th? A I was.

Q With whom, if anyone? A My wife and my dog.

Q And your dog? A Yes.

Q And did you see Mr. Harris on the evening of May 9th? A Yes.

Q Alone? A No, sir.

Q Who was with him? A His wife.

Q And what time did you see Mr. and Mrs. Harris? A Between half-past nine and a quarter of ten.

Q And did you see where they were going? A Yes.

Q Tell the Court and jury where you saw them going. A I saw Mr. and Mrs. Harris going up Broadway and I stopped Mr. Harris and said, "Where are you going?"—

*Mr. D'Aloia.* No.

Q Where did he go? A He went in the Audubon Theatre.

Q With Mrs. Harris? A Yes.

Q Did you see him enter? A I saw him go into the vestibule of the theatre.

Q How did you know this was May 9th that you saw Mr. and Mrs. Harris go into the Audubon Theatre? A Why, two nights after, I took the dog out for a walk—

Q Two nights later you met Mr. Harris; get down to the point. A Yes.

Q And then what? A I went in to get some French pastry; he was sitting at a bench, I believe, having coffee; he had his head resting like that (illustrating).

Q Two nights later you met Mr. Harris? A Yes.

Q Did you talk about what happened to his plant on May 9th? A He did.

*Mr. D'Aloia.* I do not think that that is at all admissible.

*The Court.* You asked him why he remembers the ninth.

*Mr. Ruback.* Yes, sir; and the witness is about to state.

*The Court.* He has gone out with the dog and gone to a pastry store and yet we do not know why he remembers.

*Louise Marks, direct.*

Q In that visit to the pastry store did you meet Mr. Harris? A Yes.

Q Did you talk to him? A Yes.

Q Do you not tell us what it was, but he discussed the fire to his plant on the ninth? A Yes.

Q Did that fact place in your mind two nights later the fact that he entered the Audubon Theatre on the ninth? A Yes, sir.

*Cross examination* by Mr. Aloia.

Q What kind of a dog did you have? A Boston bull.

LOUISE MARKS, sworn in behalf of the defendant.

*Direct examination* by Mr. Ruback.

Q You are the wife of the gentleman who last testified? A Yes.

Q And how long have you known Mr. Harris? A A little over three years.

Q Did you see him on the night of May 9th? A Yes.

Q With whom? A My husband.

Q You were with your husband? A Yes.

Q And Mr. Harris was with whom? A Mrs. Harris.

Q What time of night was it you saw him? A Between 9:30 and ten.

Q Doing what? A They were going up Broadway as we were going down, and we stopped and spoke to them and they went into the theatre.

Q What theatre? A The Audubon.

Q You saw them? A Yes.

Cross examination waived.

Adjourned until tomorrow, Wednesday, November 22, 1922, 10 A. M.

FIFTH DAY.

Wednesday, November 22, 1922.
10 A. M.

Appearances as before stated.

Trial continued.

HENRY V. JACOBSON, sworn on behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q You live where? A Newark.

Q What is your profession? A Lawyer.

Q Will you please look at the candle in the carton and take this foot rule and give us the diameter of that candle? A Exactly one inch, sir.

Q Will you take the candle I now show you and give us the diameter of that? A Exactly one inch.

Q Will you give us the length of the candle? That is, the perfect candle? A Five and three-sixteenths of an inch.

Q Now, I would be glad if you would accurately, or as accurately as you can, measure what I call the radius, that is, the difference between the outside rim or edge of the candle and the wick. A Just one-half of the diameter, one-half inch.

*Mr. McCarter.* May I have that candle marked? I offer it in evidence.

Marked Exhibit D. 32.

*Mr. McCarter.* I want to set the candle up and light it.

*The Court.* What is your object, Mr. McCarter?

*Mr. McCarter.* I want to see how much of a candle, the size of this, which seems to be the same size of the other candle, will burn in two hours.

The basis of the State's case, so far as the candle feature of this case is concerned, is that before seven o'clock sometime Mr. Harris arranged that box or carton and the contents of it, and a candle, and that it burned for two hours, and that it was still burning when the Fire Department got there about nine o'clock. Now, I want to show how much a candle like the candle in question will burn in two hours, to get at, so far as we can, how much more the candle was in size when the alleged setting up occurred, than it was when it was discovered.

*Mr. D'Aloia.* I object to that, if the Court please, because the condition of the candle that the witness has in his hand does not permit of an exact measurement of diameters. Here are two candles that are supposed to be exactly alike, yet one is thinner than the other, visible to the naked eye, and yet they are supposed to be the same kinds of candles.

*Mr. McCarter.* No, they are not.

*Mr. D'Aloia.* The candle there, in the carton, cannot be accurately measured because of the condition it is in.

*The Court.* Aside from that, of course, I take it, it is within the discretion of the Court to permit experiments, and it seems to me that the conditions should be the same as they were at that plant.

*Mr. McCarter.* Of course, your Honor cannot convert this court room into a plant, but I think there should be a fair—shall I say latitude?—given to a defendant on trial for a very serious offense. Now, the charge is that after two hours this candle was still floating in this carton, on a float that was floating on the surface. We propose to show, if we are allowed, that it was a physical impossibility, and to demonstrate to this jury that it was a physi-

cal impossibility, and one step in the progress of that showing, that demonstration, is to find out how much a candle will burn in two hours. Now, we have a candle that is exactly the same in diameter as the candle in dispute. That is the reason why I did not adopt the suggestion of the Clerk and use the other candle. It is slightly larger, as Judge D'Aloia said. This candle is exactly of the same size, according to the evidence of Mr. Jacobson. Now, what I propose to do, and to follow it up by proof, by a demonstration in the presence of this jury, taking a candle that at least should have burned two hours and put it in a carton as of near the same size of the carton in question as is possible, practically the same size, filled up with any of these liquids that have been produced, and we will demonstrate to this jury that the claim of the State is a physical impossibility, and in order to do that we want to show how much more was there at the time of the setting up of this thing than was there when they discovered it. This candle evidently has been somewhat—unfortunately for everybody—broken, and it is difficult to use. We can, I imagine, judge its length somewhat. It looks to me as if it had been fastened together afterwards and I cannot understand how the candle remained in that condition.

*The Court.* That is for the jury to say.

*Mr. McCarter.* That's all right. I am not saying anything about that now, but we feel that we ought, as one step in the demonstration I have suggested, be permitted to give to the jury a demonstration of how much, in two hours, a candle of the same size of the candle in question will burn, and our proposition is to light the candle and leave it right before everybody, before your Honor's eyes and the jury's eyes—

*The Court.* I don't think the conditions in this court room are the same as they were in this plant. As a matter of fact, we all know that the air current has considerable to do with the burning of anything, and in the exercise of my discretion I will not allow that demonstration.

*Mr. McCarter.* I pray an exception.

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.

[SEAL] EDWIN C. CAFFREY,
*Judge.*

JACOB UMANSKY, recalled on behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q I forgot to ask you one question yesterday, Mr. Umansky. Some testimony has been given by Mr. Helfrich in this case that on the twelfth, I think he said, of May, he came to you with the streamer and the coat which he had taken from the southwest corner of the office and wrapped them up in your presence and left them with you, in your custody for a few days; that later he came back after a few days, two days I guess it was, and asked you for the bundle and you said you didn't know where it was; that later he found the coat but that you said you did not know what had become of the streamer; is that a fact? A No, sir.

*Mr. D'Aloia.* I would like to have that question corrected. He did not say that later he found the coat and could not find the streamer. Mr. Helfrich said he could not find the bundle which he wrapped.

*Mr. McCarter.* Leave out that part of the question which said that later he came back and found

the coat, but said he could not find the streamer. Omit that part of my question. Is that a fact?

A No, sir. I wish you would give me the privilege to—

*Mr. D'Aloia.* No. I think the witness ought to answer the question.

*The Court.* Answer the question.

Q What did occur between you and this man Helfrich with reference to a package? A I never witnessed—it is the God's honest truth—I never witnessed when and by whom that coat was wrapped up, and that coat wrapped up was never delivered into my care and my possession. About ten or twelve days or two weeks after the fire, when the embargo of the premises was taken off, and everything was delivered to us and to clean up and start operation, there were severel packages that during the time of the embargo were delivered to the place as parcels post, and other packages which were all the time in the care of the fireman, that was there all the time and we were not allowed to touch a thing, but after the embargo was taken off and the liberty was given to us to start up and start operation, and I also started—and I also come across a package that I opened it—but I didn't know what was in there—but after I opened it I found it was my coat. I didn't have the slightest idea Mr. Helfrich or Mr. Harris wrapped up that coat; I didn't have any occasion and all the goods damaged by fire I put the coat with the same identical paper with that damaged stuff. Now, Mr. Helfrich, during the embargo used to come into the place almost every day and sometimes two or three times a day. Mr. Helfrich also come in the place after we started operation and he said, "I have a package"; I said, "What kind of package?" and he said, "A coat," and I said, "Yes, over on the stove you will find a coat, too," but he didn't take it along, it remained there all the time. This is all I have to say with reference to the package.

Q Now, at the time you have referred to and described in your statement did you see any streamer there? A No, sir.

Q Now, I want to ask you a question or two. When was what you call the embargo removed to the best of your recollection? A Either in about ten or twelve days, I cannot distinctly remember how many days, but it was a considerable—at least between eight and twelve days.

Q Now, during the existence of this embargo, were officers, either firemen or policemen, constantly in the plant? A Day and night.

Q And when were you first in the plant after the fire? A Why, the same identical morning when the fire happened, I arrived at the plant about a quarter to eight; they didn't allow me permission immediately, but they did allow me permission after it was explained I was foreman; the gentleman allowed me to come into the plant and that was about a half an hour later; it must have been around half-past eight or so.

Q Where did you go in the plant that morning; do you recall? A Yes, I stepped into the plant and just the way I entered into the loft it was very visible the place where the fire happened and I seen it and I was very embarrassed and I thought what next to be done was telephone to New York, although I was sure I could not reach Mr. Harris before nine o'clock at his office, but I was very embarrassed and after I was there a minute I made it my business to walk out back of the loft, and after I was at the door all ready to walk out of the loft, the gentleman who took care of the place, he said, "Come here, listen; I want to show you something else." And he brought me into the so-called trimming room and he said there was another fire here, and I witnessed there was another fire there and he asked me, "Did you use any candles yesterday?"—

*Jacob Umansky, cross.*

*Mr. D'Aloia.* I object to these conversations unless it is stated who they were with and the time fixed.

*The Court.* I will sustain the objection.

Q Who was this gentleman, an officer? A I believe so.

Q An officer? A Either a fireman or—

Q What did you see in the stockroom that time or that morning? A After he called me over there, I seen four or five scorched boxes, scorched by fire, and I seen the coat.

Q Was the streamer hanging there at that time? A No, sir.

Q Did he point to the streamer? A No.

Q Now, what time was that? A About half-past eight.

Q Now, I do not care to go down to the City Hall with you, but after, on the 11th, the next day, were you in the plant? A Yes.

Q But you were not permitted to touch anything? A Oh, no, we were not permitted to touch anything, even merchandise on the floor was lying and I didn't dare pick up a piece of lace from the floor.

Q Were you in the plant on Sunday, the 14th of May? A No, sir. I used to leave Newark on Saturday.

Q Where would you go for Sunday? A To my home in Brooklyn.

*Mr. D'Aloia.* What difference does it make?

(Argument.)

*The Court.* Well, Mr. McCarter is entitled to ask this question as to the 14th.

*Cross examination* by Mr. D'Aloia.

Q You were there on the morning of the 10th? A Yes.

Q You were there all day after you were admitted at half-past eight in the morning? A No, I walked out and taken to the Police Headquarters about half-past nine.

Q Isn't it a fact you never came in on the 10th of May until eleven o'clock? A No, sir; the 10th of May I was there a quarter of eight.

Q Did you go into this room shown on Exhibit S. 6? A The officer brought me in there.

Q And he pointed out a separate fire there? A Yes.

Q And he told you there was a separate fire in that room with no connection with the room outside? A He did tell me there was another fire here.

Q You saw those shelves there as represented on the picture with the pasteboard taken off, you saw those boxes as they are exhibited on the photograph? A Sure, they had the boxes.

Q Look at that photograph and look at what the officer pointed out and tell the jury if that is the way the shelves looked? A That is the way they looked.

Q Did you look at the shelves? A I didn't look at every shelf.

Q Did you look at the shelves shown on this corner on S. 6, did the shelves and the boxes on those shelves look like they are shown on that picture? A There is a hundred—

Q Were you there on the morning of the 10th? A Yes.

Q Did you look in the stock room? A Yes.

Q Did the officer call your attention to a separate fire there? A Yes.

Q Did you look at the shelves? A I did.

Q Did they look as in this picture, S. 6? A They must have been.

Q Did you look at the shelves? A I didn't examine every shelf.

Q Of course you didn't, and that is why you didn't see the streamer.

*Mr. McCarter.* I object.

Q Did you look at the streamer? A No.

Q Did you look at the shelves? Look at this picture and go back to what you saw that morning when that second fire was pointed out.

*Mr. McCarter.* I do not think there is any use to bulldoze this witness.

*Mr. D'Aloia.* It is impossible to.

A I seen there where I was called attention to a few scorched boxes and the burned coat; it would be ridiculous to say whether—

*Mr. D'Aloia.* I move to strike that out, "it would be ridiculous."

*The Court.* It will be.

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.

[SEAL] EDWIN C. CAFFREY,
*Judge.*

Q On the morning of May 10th, did you say about 8:30 when you were admitted to the loft and an officer or fireman brought you into the corner of the stockroom and pointed out a fire— A Pointed out there was a fire.

Q A separate fire? A That is what he said.

Q Now, when you went there in the stockroom at that point in the southwest corner of that room, did you look at the shelves, yes or no? A Yes.

Q Did the shelves look as they look in this picture, S. 6? A About the same.

Q What was their condition? A I could not see anything different.

Q Would you swear they looked as they looked in this picture? A I couldn't do that.

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Q Then you would not swear as to whether you saw a streamer hanging alongside of your coat? A I didn't see any streamer.

Q Will you swear to that? A I will swear to that I didn't see any streamer.

Q Will you swear that the shelves and the boxes on the shelves looked as they looked in this picture, S. 6? A No.

Q Will you swear that the streamer was there? A I will swear that I didn't see any streamer.

Q Will you swear that a streamer was not there? A Not at the time I was there.

Q Will you swear the streamer was not there? A Not at the time I was there.

Q Now, will you go back to this morning again. Did you see the streamer? A No, sir; I did not.

Q Did you look for a streamer? A I didn't have no occasion to look for one.

Q You saw the coat? A Yes, sir.

Q You saw the boxes right behind it? A I did.

Q And you didn't see the streamer? A No, sir.

Q Now, will you swear that a streamer was not there? A I will swear that a streamer was not there when I was there.

Q When was that? A That was half-past eight in the morning when the officer was there, either half-past eight or five minutes before or five minutes after, when the officer brought me in there.

Q Look at the picture. Was there a shoe there in the corner? Look at the picture, do you see a shoe on S. 6 in the corner right here (indicating on photograph)? Do you see a shoe? A I can't see a shoe.

Q Look? A Yes, that is a shoe. Now, you expect me to see it in the picture?

Q Did you see a shoe? A Yes.

Q Was a shoe there in that corner that morning? A I don't know.

*Re-direct examination* by Mr. McCarter.

Q Mr. Umansky, do you recall how near to the partition between the silkroom or stockroom and the loft the roof had been pulled down? A I can't tell you any exact measurements.

Q Why not? A Because the room was fixed, and there is exactly now—if it was not painted yet, then you could see how near it was fixed.

Q Well, how near is that? A I can't tell you the exact measurements.

Q Well, I know. A I didn't make any exact measurements.

*Re-cross examination* by Mr. D'Aloia.

Q Were you there on the 11th? A Yes, sir.

Q How long did you stay? A On the 11th?

Q That is the day after you were down at Police Headquarters? A Just a minute and I will tell you exactly, on the 10th at night when I left to go home—

*Mr. D'Aloia.* Read the question.

*Witness.* I know what you are asking me, I am trying to remind myself.

*The Court.* You know that the 11th is after the 10th. Now the question is were you there on the 10th?

*Witness.* I was there.

Q Were you there on the 11th? A I was there constantly every day.

Q Were you there on the 12th? A Yes, sir.

Q Were you there on the 13th? A I must have been there.

Q Were you there on the 15th? A I must have been there.

Q Were you there on the 14th? A If it was Sunday then I was not there.

*Jacob Umansky, re-cross.*

Q I am not telling you when it was; were you there on the 14th? A I don't know.

Q Now, if the 15th was on Monday, you were there on Monday, weren't you? A If it was Monday, I was there.

Q Now, were you there on the 12th, go back to the 12th now. A Yes, sir.

Q Did you see Helfrich there? A On the 12th? I don't remember whether I saw him, but he used to come up pretty nearly every day.

Q Do you remember if you saw him there on the 12th? A I can't make distinctly a statement whether he was there on the 12th or the 11th, or the 13th, but he used to come up pretty nearly every day.

Q After the fire, on the 10th, 11th, 12th and 13th you were there every day, weren't you, except the time you spent in the Police Headquarters? A Yes.

Q Wasn't Mr. Helfrich there all the time you were there? A Not all the time, he used to come up part of the time.

Q Well, wasn't he there every day that you were there at different hours? A Almost.

Q Now, on the 15th, which was the Monday after the fire, do you remember Mr. Helfrich coming up? A I don't remember distinctly whether it was on the 15th.

Q Will you say he wasn't there that day? A I don't say he was or he was not.

Q Were you there on the Monday? A I was.

Q Were you there on the Tuesday? A Yes, sir.

Q Did he ever give you a bundle? A No, sir.

Q Did you ever see him wrap up a bundle? A No, sir.

Q What did you do with all the bundles during the embargo, what were you doing there every day, were you making up bundles? A No, sir.

Q What was the necessity of you staying there every day? A I wanted to get paid for my time.

*Jacob Umansky, re-cross.*

Q What time? A From the employer.

Q What were you doing there on the 11th? A Sitting on a chair.

Q What were you doing there on the 12th? A Sitting on a chair.

Q What were you doing there on the 13th? A Constantly the same thing.

Q Sitting on a chair? A Yes, sir.

*Mr. McCarter.* Earning his salary like your watchmen were.

*Mr. D'Aloia.* Like he is doing now. You are sitting on a chair now.

*Mr. McCarter.* I move that that be stricken out.

*The Court.* It will be stricken out.

*Mr. McCarter.* I have been practicing law much longer than Judge D'Aloia, and I have a very high regard for him as a friend and client—

*Mr. D'Aloia.* That remark was stricken out. I withdrew it.

*Mr. McCarter.* I respectfully protest and ask that Judge D'Aloia refrain from making such statements.

*The Court.* The jury, of course, will not be influenced by the remarks of either counsel.

*Mr. D'Aloia.* I have withdrawn that remark, but Mr. McCarter's comment led to it while I was cross examining the witness.

Q Look at this picture again, S. 6 and go back to the morning of the 10th. Did you see that box on the floor with these white goods in it? A Maybe I did.

Q Will you swear that it was there? A I will not.

*Sidney M. Grabshied, direct.*

SIDNEY M. GRABSHIED, sworn in behalf of the defendant.

*Direct examination* by Mr. Ruback.

Q Mr. Grabshied, you are a son-in-law of Mr. Harris? A Yes, sir.

Q Where were you working on May 9th? A I was traveling in the State of New York.

Q For what concern? A A. E. Harris & Company.

Q And how long have you worked for A. E. Harris & Company? A Six years.

Q In the same capacity? A Yes, sir.

Q Salesman? A Yes, sir.

Q What was your particular territory? A New York State.

Q And how far up New York State would you go? A Well, I would go all the way to State line, both north and west.

Q Now, the week beginning May 8th, beginning Monday May 8th, where were you? A I was in the northeastern part of the State.

Q And how long have you been on the road? A Possibly three weeks prior to that time.

Q And how long after the fire did you return to New York City? A At the end of that week.

Q What was the first information or intimation that you had of a fire having occurred at the Harris plant? A I was told by Mr. Harris.

Q When? A Saturday morning of that week.

Q The Saturday following the fire? A Yes, sir.

Q Now, during that period of three or four weeks that you were on the road taking orders for A. E. Harris & Company, did you take orders in the ordinary, normal way?

*Mr. D'Aloia.* I object to that, I don't think it makes a bit of difference in this case.

*Mr. Ruback.* I propose to show that for two or three weeks preceding the fire and that for four or five days following the fire this witness, a salesman, for the Harris Company continued to take orders in the ordinary way binding the Harris Company to the fulfillment of contracts.

*The Court.* What difference would it make?

*Mr. Ruback.* From that fact an inference may be drawn that if Mr. Harris intended to destroy this plant—

*The Court.* Now, don't testify.

*Mr. McCarter.* Your Honor, he is answering your question, you asked him what inference could be drawn.

*The Court.* No, I did not ask him what inference could be drawn.

*Mr. McCarter.* What difference would it make?

*The Court.* Yes.

*Mr. Ruback.* I propose to prove by this witness by his conduct that the business of A. E. Harris & Company was continued after the fire by this salesman taking orders from which fact the jury may draw the inference that if Mr. Harris planned this fire he would have intimated to the salesman to stop taking orders. I propose to prove that, and have stated to your Honor the object or the purpose I seek to achieve, and I think it is very competent.

*The Court.* Well, put it in, let it go in.

Q Did you continue to take orders after May 9th until your return to New York City? A Yes, I did.

Q How would you take your orders?

*Mr. D'Aloia.* I object to that.

*The Court.* I will not allow that, it is sufficient that he took the orders.

*Mr. Ruback.* (Question withdrawn.)

Q Do you know what orders you took during the week beginning May 8th? A I object to that, if the Court please.

*The Court.* I will allow him to state generally.

Q Do you know what orders you took? A By that do you mean the names of the concern that was sold?

Q Don't give them, but do you know to whom you sold during the week? A I know some of them.

Q Do you know approximately the amount of merchandise you sold during the week of May 8th?

*Mr. D'Aloia.* I object to that.

*The Court.* Overruled.

A I think I do.

Q How much merchandise did you sell during that week, during the week beginning May 8th? A In the neighborhood of $800 to $1,000.

Q And how much merchandise did you sell the week preceding the fire? A About anywhere from $700 to $800.

Q How much merchandise did you sell during that period of three or four weeks that you had been out on the road? A About $2,800, $3,000.

*Cross examination* by Mr. D'Aloia.

Q You are his son-in-law, aren't you? A Yes, sir.

*Re-direct examination* by Mr. Ruback.

Q Will you look through these orders and see if you can find any order taken on the day of the fire or the day following the fire?

*Mr. D'Aloia.* I object to that.

*Samuel Leopold, direct.*

*The Court.* Sustained.

*Mr. Ruback.* I respectfully pray an exception.

*The Court.* You may have it.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

SAMUEL LEOPOLD, recalled on behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Will you turn to the book in which the payments of rent are contained, I don't know whether it is the cash book or what you call it, and tell us therefrom when the rent was paid from the time that the Harris company took hold of this property down to the time of the fire?

*Mr. D'Aloia.* Has that not been testified to by Mr. Harris?

*Mr. McCarter.* No, it has not, we want the actual date.

*The Court.* It has been brought out on cross examination.

A Will you repeat the question?

Q The day the payments of rent occured from the time the Harris Company took hold down to the 9th of May.

*The Court.* When did they start, in December?

*Mr. McCarter.* December, I think.

*Witness.* The first day is December 20th.

Q How much paid? A $300, advance two months. March 16th, there is an entry $75 for one-half month, April 8th—

Q How much? $150. A May 4th, $150.

Q Have you, from the books prepared, for use in this case, a statement of the assets and liabilities of the A. E. Harris Company on the 9th of May, 1922? A I have.

Q How did you prepare the statement? A From the figures as shown by the books.

Q What were the assets and what were the liabilities?

*Mr. D'Aloia.* I object to that testimony, if the Court please.

*Mr. McCarter.* On what ground?

*Mr. D'Aloia.* Upon the ground that I don't think it is material or competent or admissible or relevant in this issue. Those books were not kept by anybody that we could control, those books are the books of the A. E. Harris Company. This witness made those statements up from those books, and I don't think the State ought to be bound by anything in his books or the books of the A. E. Harris Company.

*The Court.* They are self-serving declarations, aren't they, Mr. McCarter?

*Mr. McCarter.* We have evidence, may it please your Honor, of the bookkeeper in this case that she accurately kept the books. We propose to show that those books were kept by her, who by the wildest fling of the imagination cannot be considered to be *particeps criminis,* or associated, or in any way connected, in this alleged crime—kept by her accurately down to the 9th of May when this fire occurred. Now, we propose to show, from these books, kept in that manner, the assets and liabilities of this business down to that date, and I don't know how we can prove it if we don't prove it by the books. I respectfully urge that

it is entirely competent to prove to those things that way.

*The Court.* I will sustain the objection.

*Mr. McCarter.* I pray an exception.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*Mr. McCarter.* My associate, Mr. Ruback, tells me that perhaps I did not put the question as accurately as he thinks it should be put, and therefore, I will repeat the question to suit his suggestion, so there can be no mistake about it.

Q From your examination of the books, are you able to state what, according to the books, the assets and liabilities of A. E. Harris Company were on the 9th of May, 1922? A Yes, sir.

*Mr. D'Aloia.* That is objected to on the same grounds.

*The Court.* Sustained.

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.

[L. S.] EDWIN C. CAFFREY,
*Judge.*

Q Will you please turn to the books containing the inventory of January 1, 1922? A (Refers to book.)

Q Did you have that inventory before you to make a calculation of the stock of merchandise on hand on May 9th, 1922? A Yes, sir.

*Max Blum, direct.*

Q How did you do it? A Starting with this inventory after January 1, 1922, I added all of the purchases made during that period, including the purchases of labor and the overhead, as well as raw material, and from that I deducted the cost of the goods that was sold during that period and the resultant figure was my inventory at May 9th.

Q What was that figure? A That figure was $40,133.82.

*Mr. D'Aloia.* That was based on January 1, 1922?

*Mr. McCarter.* That has just been explained.

Q $40,133.82, is that right? A Yes, sir.

*Cross examination* by Mr. D'Aloia.

Q How much did you calculate the factory overhead at? A At twenty per cent.

MAX BLUM, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q Mr. Blum, what is your business? A Manufacturer of muslin underwear.

Q How long have you been in this business? A Since 1914.

Q Have you in the course of that time, 1914-1922, had occasion to become familiar with the value of machinery used in a manufacturory of underwear? A Yes, sir.

Q Do you yourself buy and sell such machinery? A At times.

Q Did you, at the request of Mr. Harris, or his lawyer, shortly after the 9th of May, 1922, go to the plant at the corner of 13th avenue and Morris avenue and inspect the machinery and other fixtures in connection with the plant there? A I did.

*Max Blum, cross.*

Q Did you make a careful inspection? A I made a list of them.

Q What day was that? A On Saturday, the 13th, in the afternoon.

Q Did you appraise the value of that machinery? A I did.

*Mr. D'Aloia.* I would like to cross examine him as to his qualifications.

*The Court.* Oh, yes.

*By Mr. D'Aloia.*

Q You said that you bought and sold machinery at times and you have been in that business since 1914? A Yes.

Q How many times have you bought machinery? A Probably fifteen or twenty times, principally at the start of business.

Q Have you started fifteen times in business since 1914? A No, I was principally—at the start of business I bought frequently and in the course of business we have had occasion to buy machinery.

Q Well, if you bought principally, mostly at the start of business, and you bought fifteen times, how many times did you start in business? A I don't get your question, I didn't say anything about fifteen times.

Q I asked you how many times you bought machinery or sold machines, because you answered Mr. McCarter that you dealt in machines at times? A Yes, when I would buy them for my business.

Q Well, how many have you bought, how many times have you bought machines? A Possibly, well, that is a hard question to answer definitely, but I can go back to 1912.

Q We don't want the price of machinery in 1912. A You want to know how many times I bought machines?

*The Court.* No, the principal inquiry is, as to your knowledge of the time you examined them.

Q Now, let us know what your experience has been in buying and selling machinery such as those that you went to appraise on the 13th of May, 1922? A Why, in 1914, I bought 65 machines for a plant I started.

Q Whose plant? A For my own, and as recently as June, 1921, I bought fifty more machines.

Q Those were the only two occasions? A No, the original plant I am telling you about, of 65 machines, was, in the course of the following six or seven years increased to 120.

Q You bought 64 machines in 1920? A No, the original plant I bought was 65, which later increased to 120, and which was added to in the course of six years.

Q Now, could you tell from your examination that you made of this machinery on the 13th of May, 1922, how long it had been in use without anybody telling you? A No, I could judge approximately the condition of the machinery.

Q Without Mr. Harris or somebody else telling you when the machinery was bought and how long it had been in use, you could tell from your experience? A I could.

Q And how long had this machinery up there been in use? A Some of it was almost new, and others showed the wear of five or six years, seven years.

Q How many were almost new? A About eighteen or twenty of them.

Q What was the total number of them? A Fifty-five.

Q About eighteen or twenty were almost new? A Yes.

Q And about thirty-five of them had been in use for a long time? A No, some of them showed some use, a few showed use of six or seven years, they showed some use, but about eighteen or twenty showed almost new.

Q Almost new, you mean used how long? A Hardly used, did not show any signs of any wear and tear.

*By Mr. McCarter.*

Q Have you a list you made up there, Mr. Blum? A Yes, sir.

Q Will you read it? A There were five Wilcox & Gibbs lace runners, one Singer featherstitch, three hemstitchers, twelve zig-zags, twelve plain sewers, one overlock, two five needles, two overlocks of another style called the Merrow, two Singer overlocks, one buttonhole machine, one button sewer, two rufflers, one elastic machine, that is a machine that sets the elastic, one sleeve setter, one cutter, that is a rotary machine, it has a rotary knife, four rufflers, one single needle, another single needle of a different make, two-one cotton machines, there were two three horse power motors, three elastic cutting knives and five tables equipped with individual motors in addition, that is included in the 54 power tables, five of the 54 were equipped with individual motors, they did not require a shaft to run them, they run individually.

Q Now, what value did you put on that machinery at that time? A About $7,500 as it stood.

*Cross examination* by Mr. D'Aloia.

Q Was Mr. Harris there at the time? A Yes.

Q Was there anybody else there? A There were several people there, firemen.

Q Was Umansky there? A Umansky was there and the fellow with the bald head.

*Mr. McCarter.* Gilpatrick?

*The Court.* The tall fellow?

*Witness.* The tall fellow with the bald head.

*The Court.* Stand up, Mr. Gilpatrick.

*Witness.* Yes, he was there.

*Fred A. Gilpatrick, direct.*

Q Did you ask questions when you come to each machine? A No, I could read the machine.

Q Well, did you ask Harris when he had bought number one and number two? A I was not interested when he bought them.

Q Well, did he follow you around as you made your notations? A Yes.

Q And didn't ask you a thing? A No, sir.

Q And Umansky was there? A No, he not around the machines.

Q Well, was Mr. Gilpatrick with you? A No, he was there in the place. You asked who was there.

Q Who followed you around to where you got to the different machines? A They were all located in one aisle.

Q Was Mr. Harris with you? A Yes. He went with me.

Q And he did not say a word? A Not with reference to the machines; I didn't need his information.

Q And you wouldn't ask him how long he had them? A No, sir; it was not necessary to ask him.

*The Court.* Well, did you?

*The Witness.* No.

FRED A. GILPATRICK, recalled in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q You, it already appears, were a shipping clerk in the factory, were you not? A I was.

Q Did you from time to time get letters in the regular course of business between the first of January and the ninth of May from the New York office, in which Mr. Harris himself was in charge? A Yes.

Q I show you a batch of letters, everyone of which I think is addressed to you; please glance through

them and see if you regularly received, in due course of business, at or about the time those letters bear date, those particular letters from Mr. Harris' office in the City of New York? What is your answer? A Why, there are some letters here to the man that had charge of the shipping there before me.

Q We will just omit any that are not addressed to you. A This one here is not addressed to me.

Q Now, after I had taken out the letters that were not addressed to you and were sent evidently before you went there, did you in due course receive, after you became shipping clerk, the letters which you now hold in your hand of the instructions and the conduct of the business from the New York office? A I received them from the New York office, some of them by mail and some of them were delivered to me personally by Mr. Harris.

Q And were those instructions carried out by you? A To the best of my knowledge they were.

*Mr. McCarter.* I offer these letters in evidence.

*Mr. D'Aloia.* I object to them on the ground they are self-serving declarations, practically Mr. Harris writing to himself. This man was in his employ. Now, Mr. Harris writing to Harris, in the person of the shipping clerk, letters will never be admitted in evidence to exculpate Harris.

*The Court.* I will sustain the objection.

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

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

*Mr. McCarter.* The letters in question are dated between March 16, 1922 and May 5, 1922.

*Fred A. Gilpatrick, direct.*

Q I know it has appeared in this case that there had been complaints from customers with reference to the goods that had been received or had not been received by the customers. Did the letter of May 4, 1922, which I show you, bring to your attention the subject of these complaints?

*Mr. D'Aloia.* I object to that.

*The Court.* Well, he can answer yes or no; I do not know what this is all about yet.

A What was the question you asked me about this letter?

Q (Question read.) A I know we had—

Q No, does that letter bring the subject of those letters to your attention? A Right at this present minute—

*The Court.* Yes.

A (Continuing)—or on that date?

Q Does that letter of May 4th, which you have before your eyes, bring to your attention the subject matter of those complaints? A It does.

*Mr. McCarter.* I now, if your Honor please, offer in evidence this specific letter of May fourth, 1922, and I will be very glad to show it to your Honor. I think its significance will appear.

*The Court.* The prosecutor may look at this.

*Mr. D'Aloia.* That meets with the same objection I made before.

*Mr. McCarter.* Now, my answer to the objection that counsel makes of that specific letter, your Honor, is this: It appears in this case that according to the evidence of Mr. Harris a considerable time was spent on the evening of May 9th, during the two hours or so that he was in the plant in discussing these complaints, and I think therefore

the fact that there were complaints, and the fact that on May 4, 1922, he referred to those complaints, and the fact that on May 4, 1922, he expressed an intention to go out to the factory on Saturday to discuss that as well as the coming in of orders and the character and extent of the business, and the necessity of bolstering it up and getting goods ready for the June shipment, all of which and more too, which I have not referred to, appears in that letter, makes the letter most material and important in discovering the mental attitude, the intent which is the gist of this alleged offense.

*The Court.* It is in evidence—uncontradicted—that Mr. Harris came out and talked about those affairs and talked to Mr. Umansky and Mr. Gilpatrick, and I think they at that time discussed the making up of certain samples. That letter is signed by the defendant himself. I will not admit the letter.

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.

[SEAL] EDWIN C. CAFFREY,
*Judge.*

*The Court.* Rather, it is a typewritten signature, "A. E. Harris?"

*Mr. McCarter.* Yes.

*The Court.* I will not admit the letter.

*Cross examination* by Mr. D'Aloia.

Q Do you remember the eleventh of May, 1922?

*Mr. McCarter.* I object.

*The Court.* Well, he can answer that.

*Mr. D'Aloia.* He asked about his business. Now, let me ask something about this business.

*Mr. McCarter.* My understanding is all Mr. Gilpatrick has been interrogated about on this examination by me has been to identify these letters, and the one question as to whether or not the letter of May 4th, which I particularly selected, referred to the complaint that had been testified to by other witnesses in the case. Now, I respectfully object to any cross examination of this gentleman outside of that particular subject matter. I have not made this man my witness for all purposes, and I do not really think he is subject to any cross examination because your Honor has not admitted the letter, but assuming that, what he did testify to about the letter does not open up any other subject and I object, therefore, to the question.

*The Court.* The question is does he remember May 11th. He can answer that.

*Mr. McCarter.* I object to it. It is immaterial and not cross examination.

*The Court.* You may answer whether you remember that day or not.

A I remember the day.

Q Do you remember when you went to work there as shipping clerk?

*Mr. McCarter.* I object to that.

*The Court.* I will allow it.

Q Do you remember when you went to work there as a shipping clerk? A Yes, sir.

Q And you went to work there with the idea of becoming a salesman?

*Mr. McCarter.* I object.

*The Court.* I sustain the objection.

*David C. Willner, direct.*

Q Isn't it a fact that business conditions were unsettled insofar as that concern on about May 9th, is concerned.

*Mr. McCarter.* I object.

*The Court.* Sustain the objection.

Q Did you state on the eleventh of May that business was unsettled and that was why you were a shipping clerk and not a salesman?

*Mr. McCarter.* I object to the question.

*The Court.* I sustain the objection at this time.

Q Do you remember making a statement on the eleventh of May, 1922?

*Mr. McCarter.* I respectfully object to that question. I hope we will not have a repetition of what transpired yesterday.

*The Court.* I will sustain the objection. I will limit this witness' examination now to what was brought out on direct.

Q I will ask him this one more question and have Mr. McCarter object before you answer; was business up in that plant settled or unsettled on May 9th, 1922?

*Mr. McCarter.* I object to the question.

*The Court.* Objection sustained.

DAVID C. WILLNER, sworn in behalf of the defendant.

*Direct examination* by Mr. Ruback.

Q You are an appraiser and auctioneer? A Yes.

Q Do you have occasion to appraise personal property in litigation? A I do.

Q Do you ever make any appraisals in bankruptcy matters? A I do.

Q Do you sell any bankrupt properties, ever? A I do.

Q Now, did you ever make an appraisal of the machinery at Mr. Harris—the plant of A. E. Harris on Thirteenth and Morris avenues, this city? A I did.

Q When did you make your appraisal? A Either the latter part of August or the beginning of September.

Q For the purpose of what? A Either buying or selling goods for him.

Q What did you finally do with the merchandise? A Sold it and disposed of it at auction.

Q (*By the Court.*) What August? A 1922.

Q Now, in what month was it that you made your appraisal of the machinery? A I cannot exactly state the date.

Q Well, what month? A Either the last day of August or the beginning of September.

Q And when was the auction sale conducted? A The 26th or 27th of September.

Q Now, did you make a list of the machinery at the plant at the time you made your appraisal? A Well, my bookkeeper did.

Q Well, did you have anything to do with the making of this? A I appraised it.

Q Well, did you have anything to do with the making of lists showing the items of machinery? A The original list I made.

Q And did you examine the machines up at the Harris plant? A I did.

Q For the purpose of determining the value of the plant? A I did.

Q What was the aggregate value of the machinery and the plant at the time of the appraisal?

*Mr. D'Aloia.* I object to that because at the time he made the appraisal conditions were not the same as they have been on May 9th.

*The Court.* I sustain the objection.

*Mr. Ruback.* I offer, as soon as this witness has testified, and subject to the next witness, to connect up the conditions that existed at the time of the appraisal on May 9th.

*The Court.* You are going to show there was no change in this condition?

*Mr. Ruback.* I am going to do that.

*Mr. D'Aloia.* Then I want to examine this man as to his expertness in appraising machinery.

*The Court.* We will assume from your question that you are satisfied with his qualifications.

*Mr. Ruback.* I beg leave to ask another question.

*The Court.* All right.

Q In your work as appraiser and auctioneer you have occasion to appraise machinery of the kind up at the Harris plant? A I do.

Q Had you prior to the time you appraised the Harris machinery appraised similar machinery elsewhere? A Yes, I did.

Q Have you sold some machinery elsewhere? A I did.

Q What, in your opinion, was the fair market value of the machinery you appraised on that date?

*Mr. D'Aloia.* I object to that.

*The Court.* You want to examine him as to his qualifications?

*Mr. D'Aloia.* Yes, sir.

*By Mr. D'Aloia.*

Q You are an auctioneer? A Yes.

Q And do you sell all articles? A I do.

Q Pictures, mattresses, bedsteads, articles, lumbers, all articles imaginable, don't you? A Not these articles you mention.

Q Well, what articles do you sell as auctioneer? A Mostly plants and merchandise at wholesale.

Q Well, you would sell a grocery plant, wouldn't you? A I would.

Q And you call a grocery store a plant? A No, I don't.

Q Well, you would sell groceries? A Yes.

Q And you would sell coffee and tea and sugar? A Yes.

Q And you would then pose as an expert in that line? A Well, I know something about it.

Q Well, you don't know anything about machinery? A I do.

Q Well, how much? A Well, from practical experience.

Q You never bought and sold machinery? A I did.

Q As an auctioneer? A Yes.

Q But you do not know any difference between one kind of twisting machine and a sewing machine? A I do.

Q What is the difference between the machine up that plant and a hoisting engine? A Well, you could not make a chemise with a hoisting machine.

Q Well, that is what you know about machinery? A No, I know a whole lot about it.

Q Well, your knowledge is you know the difference between a sewing machine and a hoisting engine? A No.

Q And do you also know the difference between a sewing machine and a shovel? A No, I know a whole lot about it.

Q Have you ever bought a sewing machine? A Lots of them.

Q Have you ever bought a hemstitching machine? A Yes.

Q Where? When did you last buy one? A Why, I bought a plant in the last three or four months.

*David C. Willner, direct.*

Q Whereabouts? A In New York.

Q In bulk? A Yes, go through every single item and then buy it up.

Q How many machines were appraised by you on the last day of August or the first of September? A Oh, about fifty-five or fifty-four.

Q Was Mr. Harris with you? A Yes.

Q At the time you went over the plant? A He was.

*By Mr. Ruback.*

Q Now, you may answer the question.

*Mr. D'Aloia.* I have the same objection because conditions were not the same as they might have been around May 9, 1922.

*The Court.* This will be received subject to connecting up.

Q You may answer the question. What was the fair market value of the machinery that you appraised in the plant in August or the early part of September, 1922? A The replacement value at that time I took it up was $7,743.

Q (*By the Court.*) August 1st? A Well, the latter part of August or the beginning of September; I have not the date with me here; possibly I may have it in the office.

Q Now, do you know the day when you effected your sale? A I do.

Q Conducted it personally? A I did.

Q And did you keep an auctioneer's list on which was entered the bid for each item? A I have.

Q What was the total amount realized at that public auction for the machinery you say was worth $7,743? A Including all the—

Q No, just the machinery. A Well, I cannot state exactly because I have it all added in together, including

the tables and shelving; about thirty-one hundred or thirty-two hundred.

Q Including the tables? A No, without it.

Q Give it including the tables. A All told $3,783.18.

Q Now, excluding the tables and shelves and bins and limiting yourself solely to the machinery, what was the approximate amount realized at the sale? A About $3,100; I would have to go through the sheets; it would take me an hour.

Q Well, was it less than $3,100? A Less maybe $25 less or over $25.

*Cross examination* by Mr. D'Aloia.

Q In your estimation as an expert, the approximate value of the machinery—reasonable approximate value of the machinery on or about the first of September was about $3,500; that is correct? A I do not understand your question.

Q (Question read.)

*Mr. Ruback.* I object to that.

A No, sir.

Q Would you say that the fixtures outside of the machinery on the first of September were reasonably worth $3,500? A Yes, they were.

Q Now, the machinery, wouldn't you say that was reasonably worth $3,500? A No, I said $7,743.

Q But you sold it for $3,100? A Yes.

Q There was not anything the matter with the machinery? A No, they were all in perfect condition.

Q And you sold them for $3,100? A Yes, sir.

Q And you would say, as an expert, the reasonable value of the machinery was $3,500? A No, I wouldn't.

Q You were appraising this machinery for Mr. Harris? A I was appraising it for myself to buy it.

Q Wait a minute. Mr. Harris had gotten you up there because he was going to sell out? A Yes.

Q And you went there for the purpose of compiling the list of assets, didn't you? A I did.

Q And that is the time you got your figures running up to $7,700? A Why, no, I figured up actually what it is worth, the cost.

Q Isn't it a fact that you were up there to compile the assets for Mr. Harris, at Mr. Harris's request, and you arrived at this figure of seventy odd hundred dollars? A Oh, no, I went there without the knowledge of Mr. Harris telling me what to figure. I made the figure what it is worth.

Q Isn't it a fact that when you arrived at that figure of seventy odd hundred dollars you were there for the purpose of compiling the assets? A No, it is not a fact.

Q You told us before you were there in order to figure up what the assets were worth? A Using my own judgment what it is worth.

Q Just for the purpose of compiling the assets? A No, to see what it is worth for replacing the value.

Q Wasn't the object of your visit there to compile the assets? A No, it was not.

Q On the first occasion? A No.

Q Wasn't it your object, after you found out what the replacement value was, to do it so you could get up a list of the assets of the firm? A I did not, no, sir, to see what it was worth.

Q Who did you give the figures to? A To myself.

Q Didn't you give it to anybody else, didn't you give Mr. Harris the figures? A No, sir.

Q And who was with you? A Well, I made the figures down in my own office.

Q And you sold that same list for $3,100 or about $3,000, or a little less than $3,000? A That remains—

Q No, you sold it for that amount? A Yes, sir.

*The Court.* You said something about you figured the cost of the machinery, is that what you said? Read about the sixth question.

*Abraham E. Harris, direct.*

(Question read.)

*The Witness.* Replacement value of course, from replacement I mean that—

*By Mr. Ruback.*

Q You say the cost of replacement, when you say that you mean replacement with new machinery or machinery in the same condition as the one you are replacing? A Machinery—as a rule when we call replacement value we mean it has been used already, but it is in good condition.

Q Your figure of $7,343 means the value of second hand machinery not new machinery? A Replacement value for the same machinery to be used in another place.

Q Not new machinery? A No.

Q Now, is it anything unusual at a public auction for machinery worth $7,700 to bring about $3,100?

*Mr. D'Aloia.* I object to that.

*The Court.* Sustained.

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

[L. S.] EDWIN C. CAFFREY,
*Judge.*

ABRAHAM E. HARRIS, the defendant recalled.

*Direct examination* by Mr. McCarter.

Q Mr. Harris, between the 9th of May and the 1st of September, or thereabouts, was there any addition made to or substraction made from the machinery in the factory at the corner of 13th avenue and Morris avenue, in the city of Newark? A No, sir.

Q No change in its condition so far as you know between those dates? A None whatsoever.

Cross Examination Waived.

MAX M. ALBACH, sworn in behalf of the defendant.

*Direct examination* by Mr. McCarter.

Q You are a lawyer, Mr. Albach? A Yes, sir.

Q And in the office of Leber and Ruback? A Yes, sir.

Q You are a graduate of Harvard College? A Yes, sir.

Q Of Harvard Law School? A Yes, sir.

Q How long have you been practicing law? A Six years.

Q In Newark? A In Newark, yes, sir.

Q During the progress of this case have you made experiments to ascertain whether a float from a spool will float in gasoline, benzine, turpentine and kerosene? A Yes, sir.

Q When were those experiments made? A The night before last.

Q What did you pour these liquids in? A A wax carton commonly used at soda fountains in drug stores.

Q I show you a carton and ask you if the one you used was similar to that? A Similar, yes, sir.

Q What did you do in the course of your experiment? A I put in enough gasoline, or whatever liquid we were using at the moment to fill half the container, approximately two inches, and then we put a float, a plain float on it to see whether it would remain on the surface, and if it remained on the surface—

*Mr. D'Aloia.* It is about time, if the Court please, for me to object. Unless this witness can procure the same liquid, of the same specific gravity of the liquid that was used in the carton that night, I don't think that these experiments made by him with pure gasoline are going to be at all revelant or material to this issue. Now, it is impossible for this witness, or any other wit-

ness, to try to get the exact conditions that existed that night in and about the carton and the liquid and the float and the candle, and therefore I say this experiment and these answers that he is making are not at all revelant, material or competent and therefore inadmissible.

*Mr. McCarter.* In answer to that objection, your Honor, I respectfully say as follows: Suppose that the liquid in question had been water, no possible question would have arisen with regard to the right of the defendant to take a carton and put water in it and make the experiment that he is trying to make, if he used a float like the float in question, and used a carton as near as possible like the carton in question. Now, water, according to its purity and its ingredients, has more or less specific gravity, but water is water and gasoline is gasoline and benzine is benzine and it does not appear, and it is not a fact, as I understand it, that there is any such difference in what counsel has called the specific gravity in these four elements or liquids as would make any difference whatever in the experiment. We cannot, of course, do the impossible. We cannot take the very identical stuff that was there and was kicked over by the officer who did the kicking. All we can do is to go to Hockenjos and buy gasoline, and buy kerosene and buy benzine and buy turpentine, which we have done, and have an experiment to see whether a float, like the float in question, will float on the top of the liquid, the four liquids mentioned, and then put on the top of the float a candle of the size and weight, or even we offer now to put on to the float the identical candle that is in issue in this case to demonstrate to this jury the fact that the alleged setup of this fire was a physical impossibility.

*The Court.* As I understand it, the experiment may be made if it will aid the jury. I am satisfied to let the jury take the exhibits, and from the exhibits and the evidence, determine the truth of the assertion. I do not see what purpose would be served by introducing another float, another carton or some liquid, any one of the liquids mentioned. It would confuse, rather than help the jury, and therefore I will decline to permit the experiment.

*Mr. McCarter.* Your Honor overruled the question as to whether or not this gentleman did—

*The Court.* I am not concerned what he did about the float, but I will overrule the offer to experiment to this jury or testimony about his experiments outside of the court room.

*Mr. McCarter.* I respectfully pray an exception to your Honor's ruling.

*The Court.* You may have an exception.

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

[SEAL] EDWIN C. CAFFREY,
*Judge.*

*Mr. McCarter.* I am so much surprised at your Honor's ruling that I don't quite understand the statement made by the Court, the reason that your Honor gives that you thought it would be confusing.

*The Court.* I am exercising my discretion, which is permissible, and in my judgment I don't think this testimony as to experiments outside of the court room will serve to any purpose to aid this jury.

*Mr. McCarter.* Suppose a witness, or two witnesses or three witnesses, testified to having seen a piece of iron float down a stream, and based

criminal liability upon that fact. Would it be possible that a man could not prove that he took a piece of iron of the same size, the same weight and the same character as the iron that is testified to, and put it on the stream and it would not float; it would sink; would that not be possible?

*The Court.* If the Court would permit it, but still and all the jury would have a right to infer from their recent experiences whether or not the iron would float.

*Mr. McCarter.* It is our contention that this is a made up story and it is not true and we propose to demonstrate—

*The Court.* The jury has heard the testimony and there are exhibits before the jury. I am exercising my judicial discretion, and I don't think that any purpose will be served by permitting testimony of something which happened outside of this court room.

*Mr. McCarter.* Well, I will make my offer. I offer to have the witness take the four bottles containing the four liquids that were produced yesterday from Hockenjos, and put the float that is offered by the State in the cartons, that are like the cartons that are produced, and fill the carton to the extent that the carton the State claims the carton in question was filled, with any of these liquids, to put the float in question in that carton and to put the candle in question on top of the float and see what happens.

*Mr. D'Aloia.* After that offer has been made, may I ask Mr. McCarter if he would accept the State's offer? Will you accept our offer?

*Mr. McCarter.* What?

*Mr. D'Aloia.* Now, you have made an offer; will you accept ours?

*Mr. McCarter.* I am not compelled to accept any offer.

*Mr. D'Aloia.* Will you modify your offer to the extent I will ask you?

*Mr. McCarter.* We will not depend upon any experiment this man made outside of the court room; he can make it before this jury; I think we are entitled to that, I don't think what the Court calls his judicial discretion—

*The Court.* That's what the cases say.

*Mr. McCarter.* Should be exercised against the defendant to prevent our demonstration.

*The Court.* Mr. McCarter, you assume from your question that there is a certain quantity of gasoline—rather than there has been testimony as to a certain amount, and there is testimony that the float was floating around in it and it was in a certain position. Now, if I recall the testimony, and I wish to be corrected, if I am in error, they said they found the float in that carton with gasoline.

*Mr. McCarter.* They said they found the carton about half full of what they called gasoline, that on the top of the surface of the gasoline was a float, floating on the surface; on top of the float was a candle, on the float, and until the officer took his foot and stepped on it, that was the situation, and the inference is that it had been that situation for two hours. Now, I wish to show by a demonstration before this jury that that is a physical impossibility.

*The Court.* I don't know what inference the jury will draw from that. You conclude that it was there two hours.

*Mr. McCarter.* Well, we will leave out the two hour business. They attempted to prove, and I

will refer your Honor to the evidence, if you have any question about it, that the carton was about five or six inches high, and that it was about half full of the liquid which they called gasoline, and that on the surface of the gasoline was a float, which they produced, and on top of the float was a candle burning. Now, I offer to make an experiment with the carton of that size, about half full of gasoline or turpentine or benzine or kerosene and to take the float in question and put the candle on it and to take another float and another candle of the same size and see if it is possible.

*The Court.* I decline to permit the experiment or allow testimony as to an experiment.

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.

[SEAL] EDWIN C. CAFFREY,
*Judge.*

*Mr. McCarter.* I offer now to prove by this witness, both from his own experiment and by an experiment in Court, with the carton before described, and by putting the float in question in the liquid, with the float itself, alone without regard to any weight on it—

*Mr. D'Aloia.* If the Court please, I don't think Mr. McCarter should keep on reiterating something we do not contend at all. This thing has been called a float by the fireman but that does not necessarily lead anybody to infer that it was floating on top of the liquid.

*The Court.* I am going to decline to permit the experiment.

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

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

[SEAL] EDWIN C. CAFFREY,
*Judge.*

DEFENDANT RESTS.

RICHARD CORLIES, recalled in rebuttal.

*Direct examination* by Mr. D'Aloia.

Q Mr. Corlies, were you a member of the Newark Fire Department on May 9, 1922? A No, sir.

Q You were a member of the Salvage Corps? A Yes.

Q Were you in this loft at the top of the building on the southeast corner of Morris avenue and Thirteenth avenue on the eleventh of May, 1922? A Yes, sir.

Q Did you see Mr. Kaufman, the photographer, who said he came from Koenig's on the stand? A I saw a photographer there; I don't know his name.

Q Did you see anyone who testified here by the name of Kaufman, were you in Court? A I was in Court part of the time.

Q Was he up there, the photographer, Mr. Kaufman? The fellow that said he was from Koenig's? A I don't know his name.

Q Never mind his name, did he say he was the photographer from Koenig's? A I don't recall that.

Q Did you recognize the man on the stand here that was there on the 11th of May? A I was not here yesterday.

Q You remember when the photographer came there? A Yes.

Q On the 11th of May? A Yes, sir.

Q Do you know what time he came there? A The early part of the afternoon.

*Richard Corlies, cross.*

Q What time? A Around half-past one or two o'clock.

Q Do you see anybody here in Court who was with him? A Yes, Mrs. Harris.

Q Yes, was Mr. Harris there? A He came later.

Q And while the photographer was still there was he there? A Yes, while the photographer was still there.

Q Was Dolan there, another fireman? A Yes, sir; from the combustible bureau.

Q Was he there? A Yes, sir.

Q Now, you say that Mr. Harris was there with the photographer? A Yes.

Q And you are sure that Mr. Harris, this defendant, came there and after the photographer had come? A Yes, sir.

Q And do you know how long Mrs. Harris and Mr. Harris was there together?

*Mr. McCarter.* It don't appear that they were there together.

Q Were there at the same time? A For a short while.

Q Well, about? A Oh, I should judge about half an hour.

Q Did you see the photographer set up his camera in any part of the loft? A Yes, sir.

Q And at the time he did was Mrs. Harris near him? A Yes, sir.

Q Was Mr. Harris near him? A I am not sure of that.

Q Was Mrs. Harris there? A Yes, sir.

*Cross examination* by Mr. McCarter.

Q Where were you standing, Mr. Corlies? A Right with the photographer.

Q Beg pardon? A Right in back of the photographer.

Q And where was that? A In the different parts of the loft.

*Richard Corlies, re-direct.*

Q Did you accompany him on all of his trips? A Yes, sir, so I could see him.

Q You didn't want him to change things or monkey with things so you watched him? A That was my idea, yes.

Q And did you see Mrs. Harris come in with him? A Yes, Mrs. Harris was there when the photographer was there.

Q Oh, she was there when the photographer was there? A Yes, sir.

Q And did he get busy right away? A No.

Q What did he do? A He was waiting for Mr. Harris.

Q Did he say so? A Yes, sir.

Q Are you sure about that? A I am sure.

Q What did he say at first? A He asked if Mr. Harris was there.

Q So he waited for Mr. Harris? A Yes, sir.

Q And after Mr. Harris got there and Mrs. Harris was there already, he then made his exposures and took his photographs? A I wouldn't swear to that, no, sir.

Q What did you see? A He waited for a while and he got tired waiting for Mr. Harris, then he proceeded with his work, and whether Mr. Harris came after he was taking his photographs or while taking his photographs, I can't say.

Q And then you left? A After he got through, yes.

*Re-direct examination* by Mr. D'Aloia.

Q Did you have a conversation with Mr. Hargan, this morning? A I was talking to him, yes.

Q Now, do you remember seeing Mr. Harris and the photographer together in that loft?

*Mr. McCarter.* I object, he has already said that Harris was there.

*Witness.* I do.

Q Did you hear any conversation between Harris and the photographer up there in that loft? A No, sir.

Q What? A No, sir; not pertaining to photography work.

Q What was the conversation? A Almost anything in general.

Q Was there anything said about pictures? A Not as I remember.

Q What do you remember he said? A I can't recall that now.

Q How many pictures were taken by the photographer after Mr. Harris arrived? A That I can't remember.

Q Were there any taken after he arrived, to the best of your recollection? A I cannot recall.

JOHN J. DOLAN, sworn in behalf of the State, in rebuttal.

*Direct examination* by Mr. D'Aloia.

Q Dolan, are you a member of the Salvage Corps? A No, sir.

Q What are you a member of? A Newark Fire Department, attached to the Bureau of Combustibles.

Q Do you remember this fire on the night of May 9, 1922, at the southeast corner of Morris and 13th avenue? A I do.

Q Were you in charge there on the 11th of May after the fire? A No, sir.

Q You were not? A No, sir.

Q When were you in charge? A I was not in charge at all, Inspector Helfrich and myself were sent up there to make an investigation.

Q Well, on the 11th of May were you there? A Yes, sir.

Q Were you there in the afternoon? A Yes, sir.

Q Did you see the photographer there? A Yes, sir.

Q Did you see that photographer in court? A He testified here yesterday.

Q Did you see him on the stand? A Yes.

Q Did you recognize him yesterday as the man you saw up there on the afternoon of the 11th? A Right away.

Q Will you tell us if at the time the photographer was there that afternoon Mrs. Harris or Mr. Harris were there? A When the photographer came Mrs. Harris was there. He asked for Mr. Harris, and Mr. Harris had left earlier in the day, so he sat down and he waited for Mr. Harris and when Mr. Harris came he said he wanted—

*Mr. McCarter.* I object to the conversation.

*Mr. D'Aloia.* Never mind the conversation. He sat down and waited?

*Witness.* Yes.

Q Then, what happened? A Well, he waited around awhile, and then he got tired of waiting and said he was sent there—

*Mr. D'Aloia.* Never mind what he said.

Q What did he do? A Well, he set up his camera, he looked around the building first, and then he set up his camera and went out on the fire escape and I was talking to Mrs. Harris, and the Salvage Corps man took charge of him, and went around with him, and in a little while Mr. Harris came along and I stayed on the fire escape with Mrs. Harris, that's where I was.

Q What did Mr. Harris do when he came along? A Mrs. Harris just spoke to Mr. Harris and we told him the photographer was in there and he went in there.

Q What did he do after he went in? A I was on the fire escape talking to Mrs. Harris.

Q Do you know whether any pictures were taken after Mr. Harris got there?

*Daniel Rothenberg, direct.*

*Mr. McCarter.* How can he know?

*Witness.* Well, from the smoke of the flash.

*The Court.* Do you know?

*Witness.* No, I do not.

*Cross examination* by Mr. McCarter.

Q Mrs. Harris remained on the fire escape with you? A Yes, sir.

DANIEL ROTHENBERG, recalled in rebuttal.

*Direct examination* by Mr. D'Aloia.

Q Do you remember the 10th of May, 1922? A I do.

Q At what time on that morning was Mr. Harris brought to Police Headquarters? A About 11 o'clock in the morning.

Q Where was he taken? A To Police Headquarters.

Q What part of Police Headquarters? A On the third floor, detective bureau.

Q Did you ask Mr. Harris questions? A I did.

Q Among the questions that you asked him did you ask him, at eleven o'clock or shortly after he arrived at Police Headquarters, whether or not he had any keys to his plant? A I did.

Q Will you tell the jury what Mr. Harris' answer was to that question at 11 A. M.? A He continuously denied he had the keys to the premises.

Q What did he say when you first asked him? A No.

Q And how many times did you ask him from eleven o'clock until noon; how many times did you ask him that question? A About five or six times.

Q And what was his answer each time? A No.

Q And beginning twelve o'clock noon and continuing until five in the afternoon when Mr. Umansky came in—do you remember that? A Yes.

*Daniel Rothenberg, direct.*

Q What time was it that Mr. Umansky was brought in? A About noon time.

Q I mean brought into the same place Mr. Harris was? A About four or five o'clock.

Q I am talking about Mr. Harris now. A Yes.

Q Up until Mr. Umansky was brought into the same room where Mr. Harris was at five o'clock in the afternoon and from eleven o'clock in the morning, how many times did you ask Harris if he had any keys to the loft? A Five or six times.

Q You told me that happened between eleven and twelve o'clock? A Yes.

Q Now, I am talking about between twelve and five o'clock in the afternoon? A I did ask him in the afternoon.

Q Well, if you asked him five or six times from eleven to twelve o'clock, the forenoon— A I meant to say during all this time until five o'clock when Umansky was brought into the room was five or six times.

Q During those five or six hours, before Umansky was brought in, you asked him five or six times did he have the keys? A Yes.

Q What was his answer? A No.

Q Do you remember when Umansky was brought in? A I do.

Q Will you tell the jury what Umansky said to Harris, what Harris said to Umansky and what you said? A We were in the press room, Mr. Harris, Detective Cappadonna and myself and Umansky, and I asked Mr. Harris to take out his keys and he took out a ring of keys and Mr. Umansky said, "Here, there is one, two, three; these three keys of your ring opens the establishment and Mr. Harris said, "If they do open the premises I didn't know their purpose—I didn't know their purpose of having them in my possession."

Q Well, say what Harris said again. A Harris said, "If they do open the shop I didn't know their purpose."

*Daniel Rothenberg, cross.*

Q Didn't know their purpose? A Yes.

Q How long before Umansky was brought in was it that you had asked Harris the last time whether he had and keys to the loft? A How long?

Q How long before you brought Umansky in? A About five minutes before.

Q What answer did he make to that question? A No.

Q Do you remember the keys that were picked out by Umansky from Harris' ring? A Yes.

Q Are those the three keys? A Yes.

Offered in evidence and marked Exhibit S. 15.

Q Do you remember asking Mr. Harris between eleven A. M. and 5 P. M. on that day, the tenth of May, 1922, who had left the place last? A I do.

Q And what did Mr. Harris say to you, that he walked out a minute ahead of Umansky and Gilpatrick? A Yes.

Q "And one of the men, I don't know which, locked the door." "I believe it was Umansky"? A Yes.

*Cross examination* by Mr. McCarter.

Q Were you talking to Mr. Harris on that day from 11 o'clock in the morning until five o'clock in the afternoon? A Not continually.

Q Well, how much of the time were you talking to him? A At different intervals; I was talking to Umansky and Harris at the same time.

Q No, you answer my question; how much of a time— A I couldn't exactly tell.

Q What? A I couldn't tell exactly how much of the time, because I didn't time myself.

Q You have these cases all the time, don't you? A No, sir.

Q I don't mean a case of this kind, but I mean your business is to do the thing you were doing that day? A Yes.

Q And you are engaged in that kind of examination most every day? A Sometimes, yes.

Q Well, generally? A Generally, yes.

Q Did you have a stenographer there? A I did not.

Q Well, Harris came down there at eleven o'clock? A About that time.

Q You at once took him in hand, didn't you? A I don't know what you mean by the question.

Q Well, you at once commenced to talk about it, didn't you? A Yes.

Q And he volunteered to make a statement, didn't he? A Yes.

Q And he made a statement? A Later on, yes.

Q What? A Later on.

Q Well, you were talking to him before he made the statement? A Certainly.

Q How long? A On and off.

Q Oh, how long were you talking to Harris? A I never timed myself.

Q Well, was it ten minutes or half an hour? A Well, sometimes ten, sometimes a half an hour.

*The Court.* Mr. McCarter does not know whether you talked to him for ten minutes at a time.

Q No, I want to know how long you talked to Mr. Harris before he wrote out his statement. A From the time he went in until five o'clock; not continuously, at intervals.

Q Well, when you were not talking to Harris, who were you talking to? A Umansky.

Q So you were talking to either Harris or Umansky constantly from eleven o'clock in the morning until five o'clock, excepting lunch time? A I wouldn't say constantly. I didn't have lunch.

Q Well, if you were not talking to Harris or Umansky, what were you doing? A Well, trying to get statements.

Q From whom? A Either Umansky or Harris.

Q Well, you were trying to get statements out of Umansky, or Harris constantly from eleven o'clock in the morning until five o'clock in the afternoon? A Well, if you want it constantly.

Q That is what you call the third degree? A No, sir.

Q What degree? A That is no degree.

Q Cool and calm? A Certainly so.

Q Certainly so? A Certainly so, and congenial, too.

Q What? A And congenial, too.

Q How long was it before Harris volunteered to make his own statement and the stenographer was called in and he dictated his statement? A Well, I should judge five or six hours.

Q Five or six hours? A Something like that.

Q Well, if he got there eleven o'clock, about four o'clock in the afternoon, then he made his statement? A About that time.

Q What? A About that time.

Q About five o'clock in the afternoon he made his written statement? A I could not say the exact time; about that time.

Q About that time? A Yes.

Q Are you German? A I am Jewish.

Q I beg your pardon? A I am Jewish, not German.

Q Well, now, when was it when you first spoke to Harris about keys? A Immediately after Mr. Harris came down with us to headquarters.

Q The first thing you asked him about keys? A Well, not the first thing; as soon as we sat down and started talking about it. I wanted to know his movements the day of the fire.

Q Well, he told you his movements? A Voluntarily?

Q Well, he did right then and there? A Yes.

Q Well, when did you talk about keys? A We asked him to state his movements and then we asked him if he closed the place and he said no.

Q I want to know when you first asked him about the keys. A About five or ten minutes after I started to talk to him.

Q Yes. A Yes.

Q You asked him if he had any keys to the factory? A I did.

Q And he said he had not? A He said he had not.

Q He had not? A He had not.

Q Now, what made you ask that question four or five times again before Umansky came in? A Because Umansky told me he had the keys to the place and he was the one that locked the place.

Q When had Umansky told you that? A About two or three o'clock.

Q But you told us that you asked him three or four times before four o'clock? A No, I corrected that.

Q No, you first said you asked him three or four times before twelve o'clock. A The stenographer has the record there.

Q And we have memories.

*The Court.* Just a minute. If the witness wants to explain his statement he may do so.

Q What explanation do you want to make? A I said during the time Mr. Harris was at Police Headquarters, I asked him five or six times about the keys and he denied having any.

Q Well, now, finally, Mr. Umansky was brought into the room where Mr. Harris was, was he? A Yes.

Q What time was that? A About five o'clock.

Q Where had Umansky been in the meantime? A He had been in the adjoining room known as the assembly room for the detectives, on the third floor.

Q And you had been going back and forth? A Sometimes.

Q And did you leave Harris alone? A Sometimes with Cappadonna and sometimes alone.

Q And again when Harris was asked if he had the keys he again said he did not have the keys and Mr. Umansky said he did? A Yes.

Q And Mr. Harris produced his ring and Umansky said, "Mr. Harris, those two rings"—if they are the ones —I don't know? A Three of them.

Q No, two of those three keys are keys to the factory. A Yes.

Q And Harris replied that if they are, I don't know it, or words to that effect? A Yes.

Q Did Mr. Harris have on his ring the key that is attached—that is marked in this case D. 24, that large key? A I couldn't say that.

Q What? A I couldn't say whether he had this key or not.

Q You could not say? A I could not say whether he had it or not; he had twelve or fifteen keys; I only asked Umansky to take out the keys that belonged to that shop, and I was not interested in any other key.

Q Have you ever experimented with any of these three keys to the shop? A I did not.

Q You never tried these keys? A No.

Q Did you say that that little key was conceded by Harris—that all those three keys were said by Umansky and conceded by Harris to be keys to that factory? A Yes.

Q No doubt about that? A No doubt about that.

Q Did you put any mark on these keys? A Mr. Harris put a mark himself, in my presence.

Q Where is that? A Right here; that little triangle; Mr. Harris marked it, and I have the numbers on the other two when I submitted it to Mr. Harris.

Q He put a mark on the large key? A Yes.

Q Did he put a mark on the other key? A No, sir; the other had numbers; one was necessary to number, and the other we had the number on the envelope.

Q And you now say that the little or other key was laid aside by Umansky to be a key to this factory? A Yes.

Q Now, I ask you whether key, Exhibit B. 24, was on Harris's ring? Can't you say? A I couldn't say.

Q You remember all this but you do not remember that? A He had a bunch—

Q You remember all this but you do not remember that? A Yes.

Q Well, if it was there why didn't you take it? A I took three keys that Umansky pointed out that belongs to the shop.

Q Now, how many cases—I mean by that, how many different investigations have you conducted from the 9th of May down to today, which I think is the 22nd of November; how many? A I couldn't say exactly, but about ten, twelve or fifteen.

Q You have not had more than ten examinations since the 9th of May until the 22nd of November? A You asked me investigations or examinations?

Q Examinations. A What examinations?

Q How many different occasions have you had with people in this same room in the City Hall or elsewhere where you have been making inquiries concerning certain matters that were suspicious? A I couldn't tell that without having my daily book.

Q Well, give us an estimate. A Well, only eight or ten.

Q Only eight or ten? A Maybe less than that.

Q What else have you to do? A I have other matters.

Q What? A Investigations.

Q About how many? A Well, possibly I have had fifty since.

*Daniel Rothenberg, re-direct.*

Q That is to say, from May until November, six months, you only had fifty? A Approximately.

Q Only that? A More or less.

Q Well, how many more? A I said approximately; I think my answer is clear.

Q You keep a memorandum? A I keep a book.

Q Have you that book here? A No.

Q Why not? A Why, that contains all investigations; that does not appertain to this case.

Q Did you make the examination of Umansky also? A I did.

*Re-direct examination* by Mr. D'Aloia.

Q I show you a paper consisting of two sheets and ask you if that is the statement made by Mr. Harris that night, or that afternoon, about 4:30 or five o'clock? A Yes.

Q Did you see him sign his name to both sheets? A Yes.

Q Did he dictate this statement? A Yes.

Q Did anybody interrupt him while he was dictating it? A Not at all.

*Mr. D'Aloia.* I offer it.

*Mr. McCarter.* I object to it as being incompetent, irrelative and immaterial.

*The Court.* I will allow it.

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.

[SEAL] EDWIN C. CAFFREY,
*Judge.*

STATE RESTS.

*Mr. D'Aloia.* Is the overcoat offered?

*Mr. McCarter.* No. I will consent that it go in.

JACOB UMANSKY, sworn in behalf of defendant, in rebuttal.

*Direct examination* by Mr. McCarter.

Q Mr. Umansky, how many keys were there to the two doors that went from the factory to the iron stairway on 13th avenue? A Three keys.

Q Will you look at the exhibits that I hand you and point out to the jury which those three keys are? A Why, one key similar to this one.

Q And which one is this? A The small one; this was similar to the one for the snap lock.

*Mr. D'Aloia.* There is the lock.

*Mr. McCarter.* I want the witness to describe the keys that were used to open and close the doors from the iron stairway to the factory on 13th avenue.

Q Now, you pointed out two keys? A Yes, the Yale key was for that hanging lock; I do not know whether there is any other name for it.

Q Well, do you recognize this? A Yes.

Q The padlock? A Yes, and this small one was for the patent lock.

Q This one? A That is it, and this one I call a skeleton lock.

Q That is the large key, Exhibit D. 24, that large key in the lock before you? A Yes.

Q And that large key in the lock was on which door? A The large key on the outside door, a wooden door with a glass window, about six windows in it.

Q Now, on the afternoon, or sometime during the day of the tenth, after the fire, were you in the room when

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some keys were produced by Mr. Harris? A I was brought into a room where I was asked by Detective Mr. Rothenberg to acknowledge certain keys, whether they will open the locks in the factory doors—

Q Yes. A I did so. I did acknowledge to the two keys.

Q Who produced the two keys that you say you acknowledged to be keys that would open the doors? A Why, Detective Mr. Rothenberg gave them to me and I carefully compared them with the keys I had on my bunch in my pocket.

Q Was this in Mr. Harris' presence? A Yes.

Q And you then identified on Mr. Harris' ring how many keys? A I don't know how many he had—

Q No, you identified as keys that opened and shut the lock? A Yes.

Q So far as they went, how many? A Two keys.

Q Two keys? A Yes.

Q Detective Rothenberg says you identified three keys, is that a fact? A It is not given to me more than two.

Q Isn't it a fact that you recognized three keys? A Two keys only.

Q Two keys only? A Two keys only.

Q Won't you stand up now so the jury can see you and point out which two of the three keys were they that you pointed out as being keys that would partially open those doors? A Why, this key is for that Yale lock, so-called latch lock.

Q Has it Yale on it? A Yes, and this small key is for that padlock.

Q Those are the two keys? A That I acknowledged would open the doors.

*Cross examination* by Mr. D'Aloia.

Q On that occasion you did not pick out this key, did you? A No, sir; this key—

Q Now, don't begin to talk about the key? A I didn't pick out any key.

Q Well, then, keep quiet. On the day that Mr. McCarter has been asking you about when you were down in Police Headquarters, when you picked out those two keys from Mr. Harris' ring, did you pick out this key marked D. 24 from that ring? A I never said I picked out keys.

Q Did you pick out this key? A I didn't pick out any keys.

Q Did you see this key that day at that time? A Not there; I had it in my pocket.

Q I mean in the presence of Mr. Harris in that room where Mr. Rothenberg was asking you to pick out keys, did you see this at all? A No.

*Mr. McCarter.* That is the large key?

*Mr. D'Aloia.* That is D. 24, that is the mortice lock key.

Q Did you see Mr. Rothenberg put the keys you picked out in an envelope? A I didn't see that.

Q When you picked this out had you made out your statement? A Before that.

Q It was before you made your statement? A It was after I made my statement.

Q It was after you had told Mr. Rothenberg, the detective, that Mr. Harris had taken the lock from the office desk and had put it on the door leading to the street? A Yes.

*Mr. McCarter.* Taken the lock?

*Mr. D'Aloia.* Yes, the lock.

Q When you dictated your statement you did not say anything about the large key, D. 24 and the mortice lock, did you?

*Mr. McCarter.* I object.

*The Court.* I will allow that.

*Mr. McCarter.* How can we be held except to contradict the witness? The objection is that conversations or statements made by this witness in the absence of the defendant are, of course, incompetent, except to contradict any statement that he has made in Court. And that whether he did not say something that now has been stated here does not contradict it.

*The Court.* I will say to the jury, statements made by this man are not binding on the defendant and if he is asked a question and he has said something prior to that that developes as an inconsistency, the jury may pass on that, simply relating to the credibility of this witness.

(Question read.)

*Mr. McCarter.* I object to that for the reason stated.

*The Witness.* I did not specify any keys in my statement.

Q Did you say there, in the presence of Mr. Harris, and in the presence of Rothenberg, this: "I then walked out, Mr. Harris having the lock, put the lock on the door leading to the street."

*Mr. McCarter.* I object to that. That is not cross examination of this witness now. This testimony has been entirely confined to the question of the keys. We are now going into the question how they walked out and locked the door.

*The Court.* Read the question.

(Question read.)

(Argument.)

*The Court.* Are you referring now to a conversation had at Police Headquarters?

*Mr. D'Aloia.* I am referring to a conversation at the time Mr. Umansky was brought into the

room to face Mr. Harris and Mr. Rothenberg took out the keys.

(Argument.)

*The Court.* I will allow the question.

*Mr. McCarter.* I pray an exception.

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

[SEAL] EDWIN C. CAFFREY,
*Judge.*

*The Witness.* Yes, sir.

*Mr. McCarter.* I find in this case a distinct issue between the witnesses for the defense and the witnesses for the State with reference to what occurred in the way of opening that door by the firemen that night, and as appears in the evidence of Mr. Harris, the door jamb, the outer door, which one witness claims he opened by simply breaking the glass, putting in his hand and pulling back the patent lock, therefore rendering it unnecessary to use the third key, the large key which was not used. We would like to have this jury sent up there to see for themselves whether or not there is not on the door jamb of the outer door a big impression where some instrument like an axe or a pry has been used to open that door, and I ask that the jury be sent up there to see for themselves.

*Mr. D'Aloia.* I object to that because there isn't anything here to assure us that when merchandise was moved in and out of that place, since the 9th of May, that that particular indentation in the door jamb has not been made subsequently.

*Mr. McCarter.* Well, we will show that.

(Argument.)

*The Court.* I don't think I should allow the jury to have a view. I think the jury can judge from the testimony if they see fit. There is testimony, as you say, that somebody opened that door with an axe, or whatever it was. I think there is sufficient here for the jury to draw their own conclusions.

*Mr. McCarter.* Your Honor declines that?

*The Court.* Yes.

*Mr. McCarter.* I pray an exception.

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

[SEAL] EDWIN C. CAFFREY,
*Judge.*

The Court thereupon took a recess until 2:00 P. M.

AFTER RECESS, 2 P. M.

*Mr. McCarter.* If the Court please, I understood you to say during my argument in favor of the offer to prove, what had happened or what would happen in the event of the experiment with the gasoline and the other liquid, and the cartons, that the jury itself might make that experiment.

*The Court.* No, I didn't say that, Mr. McCarter.

*Mr. McCarter.* I understood your Honor to say that. I was going to suggest that one of these cartons be permitted to be taken by the jury.

*The Court.* No, I didn't say that.

Mr. McCarter sums up on behalf of the defendant.

(During the summation of counsel the following took place between the counsel for the defense, the prosecutor and the Court.)

*Mr. D'Aloia.* If it was not allowed by the Court, that evidence, I don't think you ought to comment upon it and if it were allowed.

*Mr. McCarter.* How do you know I am going to say anything that is wrong?

*Mr. D'Aloia.* You have said it.

*Mr. McCarter.* What?

*Mr. D'Aloia.* You said that you were not allowed to show that the insurance was reduced.

*Mr. McCarter.* I say, against the State's objection that I should—

*The Court.* Mr. McCarter, just a moment. I don't want to interrupt you.

*Mr. McCarter.* I wish these interruptions will be taken down.

*The Court.* Yes, I hope they are. I don't want to interrupt you, but if you are going to argue inferentially, you ought to do it, and base your inference, upon evidence that was admitted, and not inferences from something which is not in evidence.

*Mr. McCarter.* Yes, sir. I will endeavor to conform to the law and your Honor's ruling.

*Mr. McCarter.* (Addressing the jury.) If you believe it was worth $600—

*Mr. D'Aloia.* He said that the fixtures were worth $600.

*Mr. McCarter.* What did he say the machinery was worth?

*Mr. D'Aloia.* The machinery was valued at $3,500—

*Mr. McCarter.* Well, you can correct me.

(Mr. McCarter made some references to the balance sheet which was offered in evidence and the Court made the following comments.)

*Colloquy.*

*The Court.* Mr. McCarter, just a moment. I kept that out, and it is not in evidence, and I am responsible for the exclusion of that evidence.

*Mr. McCarter.* Yes, but the State objected.

*The Court.* And I ruled it out, and I am responsible for that evidence being out, because I considered it incompetent and you have no right to refer to matters that are not in evidence.

*Mr. McCarter.* I said the State objected.

*The Court.* I did not allow it and it is not in evidence.

*Mr. McCarter.* I have not said a word about the figures.

*The Court.* You are telling this jury what the Court did is wrong.

*Mr. McCarter.* I didn't say what the Court did, not a word about the Court. I have referred to counsel, as I have a right to refer to counsel.

Mr. D'Aloia sums up in behalf of the State.

*Charge to Jury.*

The Court thereupon charged the jury as follows:

## CHARGE TO JURY.

CAFFREY, *J.*

Gentlemen of the jury: The defendant stands charged, under this indictment, with having, on the 9th day of May, 1922, wilfully and maliciously set fire to a certain building located at Morris and 13th avenues, in the city of Newark.

One count relates to the burning of a building and the goods, wares and merchandise, and further that the goods, wares and merchandise were insured by various insurance companies, and that the defendant set fire to the goods, wares and merchandise with intent to prejudice the various corporations which had underwritten certain policies of insurance.

The other count charges that the defendant did unlawfully, wilfully and maliciously burn and cause to be burned, and did aid, counsel, procure and consent to the burning of the building of another, to wit, Charles A. Rosewater.

This indictment will be taken by you to the jury room where you may observe it with particularity.

Gentlemen, the statute under which the State prosecutes this defendant carries with it three elements.

The act, if done, must be done wilfully or maliciously. It has been said that in a legal sense malice is never understood to denote a 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 that in the sense used in this indictment the word "malice" signifies the intent from which an unlawful and injurious act is committed and it may be inferred by law from the facts proven. Malice may be inferred by the jury from proven facts in the case.

It is necessary for the State to prove that the defendant set fire to the building with the intent to burn it. Under the law you may infer the fact of setting fire from the proof before you of the acts or conduct of the defendant, if there is evidence to support it. In other words, while there is no evidence of the actual touching of a match to ignite a fire, the actual starting of the fire, the law says that you may infer the facts from the proof of acts or conduct of the defendant—that is, of course, if the evidence justifies it, or if there is sufficient evidence in the case to justify that inference. You cannot infer that merely from the fact that there was a fire; you cannot infer that the defendant started it, but if you find that there is sufficient evidence in the case to justify it you may infer the facts 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 the circumstances in the case.

The defendant is presumed to be innocent, and the burden of establishing the defendant's guilt, beyond a reasonable doubt, rests upon the State.

Our Court has defined reasonable doubt as follows:

> "It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence 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 evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden is on the prosecution. If upon such proof there be reasonabe doubt remaining, the accused is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understand-

ing, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because if the law should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether."

At this point, gentlemen, I will say there is evidence in the case of the good character or reputation of the defendant, and if on such consideration, there exists a reasonable doubt, even though that doubt be engendered merely by his previous good repute, he is entitled to an acquittal.

It appears from the evidence that the defendant is the president, or some other officer, and a stockholder of the A. E. Harris Company, and that the building in question was owned by Dr. Rosewater.

It further appears from the evidence that on May 9, 1922, Charles Stocklein, who was standing at a point across the street from the factory at Morris and Thirteenth avenues, saw a light on the upper floor and saw sparks flying toward the ceiling. He then turned an alarm at the next corner. The firement fix the time of reciving the alarm at 9:01 P. M.

There is evidence in the case that the defendant, Harris; his foreman, Umansky, and Gilpatrick, another employee, were in this building after the other employees had left. And, if I recall correctly, the testimony was to the effect that Mr. Harris arrived there at 5:20 P. M. on that day and paid off some employees, and then about 5:30 or 5:45 P. M., Harris, Umansky and Gilpatrick were the only ones at this plant.

There is further testimony by Umansky, Harris and Gilpatrick as to happenings immediately prior to their leaving the building, and there is testimony in the case relating to leaving the building and the locking up.

Now, at this point, gentlemen, with particular reference to Umansky and Gilpatrick, both were called by the

State as their witnesses, and during their examination they were asked questions by the prosecutor under a claim of surprise. With reference to Gilpatrick and Umansky, if that was the fact, I charge you that where a party is surprised by adverse testimony of a witness called by him, proof of self-contradictory statements, previously made by such witness, is proper, not for the purpose of proving the statements, but to discredit or neutralize such adverse testimony.

Now, gentlemen, there is evidence in the case with reference to locking of the doors. I think Mr. Harris testified that he locked the doors; that he locked one door with a padlock and the other door with a snap lock, and a key, which locked one of the exhibits referred to as the mortice lock.

At this point, too, I call your attention to the evidence of Mr. Umansky, or someone else, who has testified that at the door jamb there is a mark or an indentation, showing that the door was forced. In this connection, too, I will refer you to the testimony of one of the firemen. I don't know whether it is Eckel or Rownes, or whoever it is. You will recall yourselves who testified—that he reached the scene of the fire; that he broke the glass, put his hand in, and turned the knob of this snap lock and entered the building, and that he gained entrance that way, without reference to the mortice lock. There is evidence in the case by one of these firemen, or another, that the entrance was gained past the door where the padlock is attached by pulling the staple. There you have a conflict of testimony, and as judges of the fact, it is your duty to decide which story you are going to give credit to.

Mr. Harris, Umansky and Gilpatrick further testified that when they left the factory building their destination was Reid's Department Store where Mr. Harris' daughter was in charge of a stand or a booth displaying the Harris Company wares.

There is also testimony in the case that sometime during the day Miss Lucille Harris 'phoned to the factory and requested that Fred, meaning Fred Bauer, be sent to help her out, and that in response to that telephone call Bauer was sent to Reid's.

Mr. Gilpatrick accompanied Mr. Harris and Mr. Umansky to a point which I believe he called Clifton avenue, because he said he wanted to take a Norfolk street car, and there is testimony by Mr. Umansky and Mr. Harris to the effect that they continued on their way, and when they reached Reid's Department Store, Mr. Umansky left, as he stated himself, "He intended to go to the schule." At this point we have the testimony of Captain Newth, manager of Reid's store, who testified that he saw Mr. Harris at the store and he opened the door for him, and when he entered several of the sales girls were present and Mr. Harris talked to some of them. I think he spoke of a Miss Kasen, Miss Liss, and two or three others whom you have seen on the witness stand, and who have testified to the effect that Mr. Harris was at Reid's and that they talked a while until Mr. Harris left to go to his home. If I recall correctly they fix the time of arrival at Reid's store at sometime in the neighborhood of eight o'clock.

If I recall the testimony of Miss Lucille Harris, and the defendant, they left Reid's store and walked towards the tube. Miss Kasen took a bus, and Mr. Harris and his daughter proceeded to New York on the 8:10 train and then went home to 3915 Broadway. That later, from the testimony, it appears that Mr. and Mrs. Harris went to the Audubon, a moving picture house, and in this they are corroborated by a Mr. and Mrs. Marks.

There is further testimony that after Mr. Harris returned from the movies he retired, which he fixes, I believe, at about 11:30 that night.

There has been introduced in evidence several exhibits which were found, as testified, in various parts of the

plant. The defendant testified, if I recall what he said, that in so far as relates to the carton and the streamer, he never saw them. They were not at the Harris factory on May 9th, and so far as the bottles and cans were concerned he could not recall whether they were there or not as his attention was not given up to small details.

Mr. Umansky testified that some of the exhibits were used by him in the preparation of dye for use at the Harris factory, and there is evidence to that effect also by Fred Bauer. In conjunction with Mr. Umansky's testimony, you may bring to your mind that when he was on the stand he was unable to tell the ingredients of the bottles when cross examined by the prosecutor.

The State has produced these various exhibits and has offered, in conjunction with them, certain photographs, one of which (referred to as S. 6) shows a picture of a streamer, or as referred to by witnesses, as a strip of muslin about five or six feet long, twelve inches wide, which, from the testimony, it appears that this streamer was attached to the carton containing a colorless liquid and a floater and a lighted candle, and it extended to some shelving along side of a gray coat, which was hanging on the wall of a room referred to as the stockroom, and by some as the trimming room.

The defendant, too, has introduced photographs, which are in some detail different from those exhibits offered by the State.

Patrick J. Donahue, a battalion chief, of the Newark Fire Department, was offered by the State. He testified that he responded to an alarm at the factory in question and entered the building and there he found shelving and bins burning, and he pointed out on the plan as to the shelving and bins which he saw. He further testified he walked into the room, referred to as the stockroom, and saw the carton on the floor with a liquid in it and on top of the liquid was a float and on the float was a candle. He, too, referred to the streamer shown on Exhibit S.

6 and testified that the streamer was attached inside of the carton and from the smell of the liquid in the carton it was gasoline, and that he put his foot on top of the candle and when he did so, it ignited, causing a flame which necessitated the use of a chemical stream to extinguish it.

James J. Dolan, battalion chief of the Newark Fire Department, was also offered by the State. He testified that when he reached the factory at Morris and 13th avenues, the fire was burning over the bins, in them and around them. He testified, too, that he saw the paper carton in the case, filled with liquid, with a lighted candle in it and this candle was on a spool or some wooden receptacle.

There is some testimony to the same effect by Mr. Keegan, and he has indicated on the picture (referred to as S. 6) as to where the carton and the float were, as he saw them, on the night of the fire. There is other evidence to the same point by other persons present at the scene of the fire.

Referring to the coat which was hanging on the wall, and referred to by some of the witnesses, Mr. Helfritch, and some others, testified to this coat being wet or moist and that it had an odor of gasoline. He further testified that he wrapped up the coat, together with the streamer, on or about the 12th of May, preparatory to his taking them away, and, on cross examination, I believe he said he left them in charge of Mr. Umansky. Mr. Umansky denies that the coat was given in his charge, but, I believe, he said that instead there was a package placed there but never given in his charge. The coat was produced in court by the defense. Of course, it is part of the evidence in the case, and you may take it to the jury room. Mr. Umansky further testifies that he never saw this streamer either in the stockroom or in the package, about which Mr. Helfritch has testified. The locks and keys are exhibits, both offered by the State and the de-

fense, and they, too, will be taken to the jury room by you, and there is other evidence in the case relating to the value of the goods and other properties of the defendant. There is also evidence as to the business standing of the Harris Company; there is also evidence as to the payment of rent, and there is, too, evidence in the case as to suits instituted in the District Court by Mr. Greenbaum against the Harris Company.

The State contends that this fire was the result of a criminal act on the part of the defendant. There is no direct evidence that the defendant set the fire in question. The evidence by which the State attempts to connect him with the crime is wholly circumstantial. An accused may be convicted by circumstantial evidence. But the first inquiry in an issue resting upon circumstantial evidence is whether the facts sworn to are satisfactorily proved, which involves a consideration of the credibility and the accuracy of observation and the memory of the witnesses by whom such facts are testified to. And, in the next place, presuming the facts sworn to by the witnesses are satisfactorily proved, then the further inquiry arises whether the facts proved are explained or are explainable on any other rational conclusion than that the prisoner is the guilty person; whether the inference of guilt from such facts is, in the judgment of the jurors, sufficiently strong to justify a conviction that the prisoner is the guilty person—tested by these considerations whether the facts proved are capable of being reconciled with the hypothesis of innocence. Circumstantial evidence, cautiously dealt with, in conformity with the legal principles I have stated, is frequently regarded as the most satisfactory proof jurors can rely on.

Gentlemen of the jury, it is not my province, nor is it my duty, to attempt to mould your verdict. That should come from a consideration of the entire evidence in the case. However, it seems to me, that from all the evidence there is a strong probability that this fire was of incendiary origin, but of course, that is for you to say.

*Charge to Jury.*

You, gentlemen, are the judges of the facts and must rely on your own recollections as to what the witnesses have testified to, and not upon the recollection of the Court which may be in error, nor, do I want it understood, gentlemen, that the Court is placing greater emphasis upon one part of evidence more than another.

You have a right to give such credit to the testimony as you see fit. You have a right to consider, in determining the value of the evidence, the interest that anyone has in the outcome of this trial. If you believe that a witness knowingly and wilfully testified falsely to any material fact in the case, you may give such weight to his or her testimony on any other point as you think it is entitled to. Or, you may disregard it altogether. Of course, this is not mandatory, it is rather a permissible inference that the jury may or not draw when convinced that an attempt has been made to mislead them in some material respect.

Gentlemen of the jury, the issue standing before you is one between the State of New Jersey and the defendant Harris. It is not a situation where an individual or a corporation is prosecuting him. You are to decide this issue upon the evidence before you, on any proper inference that may be draw therefrom, and your verdict should not be predicated upon something which is not in evidence, nor upon anything which was excluded by the Court, either after its admission, or at the time of its offer.

After the admissibility of evidence, regardless of the offer of the State, and regardless of the offer of the defendant, it is my responsibility to pass upon the competency, and if I have excluded evidence, you should not consider any phase or any inference that might be drawn from that exclusion. Your duty is to bring in a verdict upon the evidence, and upon just inference or proper inference from the evidence.

*Charge to Jury.*

This matter is a serious one to the defendant because he is charged with an offense against the criminal law, and to the State, because it claims a violation of the criminal law. In performing your duty you should search for the truth. You must decide the facts in the case. It is for you to determine what the real situation was. You had an opportunity to inspect the witnesses as to their demeanor on the stand, their response to the question, and, as has been suggested to you, you have a right to consider the interest which the parties here produced have in this case.

The defendant has an interest in the case, and you have a right to consider his interest in weighing his testimony, and the same rule should apply to any one else having an interest in the case.

During the course of summation, counsel has referred to some members of the fire department, I think his particularity to Fireman Helfritch, and he charged him with framing this defendant. Gentlemen, that is a serious accusation, and you have a right, in considering this case, and it is your duty to consider Mr. Helfritch's testimony, consider his manner of testimony, consider his attitude in general, and then judge for yourself as to the credibility of Mr. Helfritch.

Gentlemen, in giving this case to you, I will enjoin upon one thing—that your verdict should be based upon the evidence. Your sympathy should play no part, nor should any consideration of the probable punishment of a person guilty of an offense like this affect your deliberation. If you believe the defendant not guilty you should acquit him. If you consider the defendant guilty under the law and facts, it is your duty to convict.

I have some requests to charge.

The first request I have already charged.

The second, "There are two counts to the indictment—one charging statutory arson and the other a violation of

Section 126 of the Crimes Act. The defendant may be found guilty of either of these offenses, and if the jury should conclude under the rules contained in this charge that the defendant is guilty of either of the charges, they should state in their verdict of which of the two charges they do find the defendant guilty." I so charge you.

The third, "The first charge under Section 126 of the Crimes Act is that of burning the building and merchandise with intent to prejudice the insurance companies. Before the defendant can be found guilty of this charge it is necessary for the jury to be satisfied beyond a reasonable doubt that the defendant did wilfully and maliciously set fire to and burn the building known as No. 204 Morris avenue in the City of Newark, and the goods, wares and merchandise therein located; that said building and merchandise were insured by the companies named in the first count of the indictment and that the said fire was set with the intent to prejudice said companies. Every one of these elements is essential to the completion of the offense charged in this count and if any one is lacking then there must be an acquittal." I so charge you, gentlemen, with the exception that it does not have to be proven that every one of these companies mentioned in the indictment had insurance on the property.

I will deny the fourth request.

The fifth I will deny that and say that it is for the jury to trust to their own recollections as to whether or not the State offered any evidence as to the value of the property.

The sixth, "The mere existence of insurance on the merchandise in the factory and the proof of the burning thereof, or a part thereof, is insufficient to constitute the commission of the offense charged in the first count. In addition to these elements an intent to prejudice these insurance companies must be proved. One way in which, in ordinary cases, a jury is permitted to infer the existence of this intent is the proof of over insurance. That is to

say of insurance of a larger amount than the fair value of the property covered thereby. In determining this question the jury should weight the evidence adduced by the defense as to the value of the merchandise at the time of the fire, together with the value of the merchandise upon which the insurance existed." I so charge you.

The seventh, "Even if the jury should conclude that there was an over-valuation of the merchandise resulting from an honest mistake in reference thereto, such over-valuation would not necessarily be evidence of the criminal intent required by the statute." I so charge you, gentlemen, but like any other evidence, that may be considered by you.

The eighth I will deny.

The ninth I will deny.

The tenth I have already charged in my charge relating to reasonable doubt. Therefore, I decline to charge that.

I decline to charge the 11th and the 12th I have already charged.

Gentlemen, you may take the case, with all the exhibits, bottles, pans, keys and I think there is a statement—I don't want anything to go into the jury room that is not in evidence.

*Mr. McCarter.* May I call your Honor's attention to what I think is a mistaken fact?

*The Court.* Yes.

*Mr. McCarter.* You stated, that counsel in formation, has charged Mr. Helfritch with framing this case.

*The Court.* Framing this defendant.

*Mr. McCarter.* I think your Honor is mistaken there, I made no such charge against Mr. Helfritch. I spoke of the insurance man Mr. Ruttenberg.

*The Court.* Well, if that is so, I will stand corrected to that extent.

(The jury retires.)

*Mr. McCarter.* I respectfully except to your Honor's failure to charge the third request as requested, and as you did charge. You added something.

I respectfully except to your Honor's refusal to charge the 4th and the 5th request. I think your Honor unintentionally made an error in the effort to charge my sixth request. If I recall distinctly, the request at the last line had the word "merchandise" stricken out and "machinery" written in.

*The Court.* I took it to be merchandise.

*Mr. McCarter.* No, sir.

*The Court.* Well, do you want me to call the jury back and tell them I meant machinery instead of merchandise?

*Mr. McCarter.* Yes, I think it is important.

*The Court.* And there is no other mistake as to words, Mr. McCarter?

*Mr. McCarter.* I think that is the only one.

*The Court.* Call the jury back.

(The jury returns to the court room.)

*The Court.* Gentlemen, I have called you back in response to a suggestion by Mr. McCarter. In charging the 6th request to charge, the last paragraph, "In determining this question the jury should weigh the evidence adduced by the defense as to the value of the merchandise at the time of the fire, together with the value of the machinery—" that word, instead of saying "machinery," I said "merchandise." It should be machinery.

You may retire.

*Mr. McCarter.* I except to your Honor's failure to have charged the 7th request, except as you did charge it.

I also respectfully except to your Honor's denial or refusal to charge the 8th and 9th request respectively. I also except to your Honor's refusal to charge the 10th request, except as it had been charged. I also respectfully except to your Honor's refusal to charge the 11th request, and to your failure to have charged the 12th request, with the exception of the addition or appendix that was put upon it by your Honor.

I also take a general exception to the charge.

Exceptions noted as ground of appeal.

## DEFENDANT'S REQUESTS TO CHARGE.

1. In this case the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant is entitled to the presumption of innocense, and before that presumption is overcome the State must satisfy the jury, beyond a reasonable doubt, of the defendant's guilt. (Denied except as charged.)

2. There are two counts to the indictment—one charging statutory arson and the other a violation of Section 126 of the Crimes Act. The defendant may be found guilty of either of these offenses, and if the jury should conclude under the rules contained in this charge that the defendant is guilty of either of the charges, they should state in their verdict of which of the two charges they do find the defendant guilty. (Charged.)

3. The first charge under Section 126 of the Crimes Act is that of burning the building and merchandise with intent to prejudice the insurance companies. Before the defendant can be found guilty of this charge it is necessary for the jury to be satisfied beyond a reasonable doubt that the defendant did wilfully and maliciously set fire to and burn the building known as No. 204 Morris avenue in the City of Newark, and the goods, wares and merchan-

dise therein located; that said building and merchandise were insured by the companies named in the first count of the indictment and that the said fire was set with the intent to prejudice said companies. Every one of these elements is essential to the completion of the offense charged in this court and if any one is lacking them there must be an acquittal. (Charged.)

4. There can be no conviction under the first count so far as the building is concerned. (Denied.)

5. There is no evidence in this case, offered by the State, from which the jury could infer or conclude as to the value of the stock or merchandise in the factory at the time of the fire. (Denied.)

6. The mere existence of insurance on the merchandise in the factory and the proof of the burning thereof, or a part thereof, is insufficient to constitute the commission of the offense charged in the first count. In addition to these elements an intent to prejudice these insurance companies must be proved. One way in which, in ordinary cases, a jury is permitted to infer the existence of this intent is the proof of over-insurance. That is to say of insurance of a larger amount than the fair value of the property covered thereby. In determining this question the jury should weigh the evidence adduced by the defense as to the value of the merchandise at the time of the fire, together with the value of the machinery upon which the insurance existed. (Charged.)

7. Even if the jury should conclude that there was an over-valuation of the merchandise resulting from an honest mistake in reference thereto, such over-valuation would not necessarily be evidence of the criminal intent required by the statute. (Charged as modified.)

8. There should be a verdict for the defendant on the second count for each and all of the reasons given on the motion to quash the indictment. (Denied.)

*Defendant's Requests to Charge.*

9. The State cannot, under the second count, rely both upon an actual burning and an attempt, or the aiding, counseling, procuring and consenting to the burning of the building on the part of the defendant. These are distinct crimes set up in the same count and the State must elect upon which of the accusations they rely. (Denied.)

10. With reference to either of the offenses charged in the second count the State must prove more than the mere existence of the fire. The defendant's connection therewith must be proved beyond a reasonable doubt. It is not necessary that the defendant explain the fire, because of the fire, or account for its existence. (Denied except as charged.)

11. If the jury believe that the claim of the State that a carton containing inflammable fluid in which was placed a float on which a burning candle was located, which burnt for two hours, is impossible of occurrence, then the evidence adduced with reference thereto must be disregarded and any inference arising from such evidence must likewise be disregarded. (Denied.)

12. In weighing the evidence in this case due weight must be given by the jury to the evidence touching the character and standing of the defendant prior to this accusation. Any doubt otherwise existing as to the defendant's guilt may be overcome by such evidence (Denied.)

*Certificate of Court Stenographers.*

STATE

*vs.*

ABRAHAM E. HARRIS.

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

We, Joseph S. Fishkind (the official stenographer of the Essex County Court of General Quarter Sessions, Part II) and Harold T. Cook (the official stenographer of the Essex County Court of General Quarter Sessions, Part I), do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by us at the trial of the case of State of New Jersey *vs.* Abraham E. Harris, on Indictment No. 57, for burning, etc., which trial was held before the Hon. Edwin C. Caffrey, presiding judge of the Essex County Court of General Quarter Sessions, in and for the County of Essex, and a jury, on Wednesday, November 15, 1922; Thursday, November 16, 1922; Monday, November 20, 1922; Tuesday, November 21, 1922, and Wednesday, November 22, 1922.

JOSEPH S. FISHKIND,
HAROLD T. COOK.

Dated, December 27, 1922.

*Certificate of Judge.*

STATE

*vs.*

ABRAHAM E. HARRIS.

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

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 within 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 plaintiff-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

**ASSIGNMENTS OF ERROR.**

Filed May , 1923.

# New Jersey Supreme Court

| | |
|---|---|
| THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* ABRAHAM E. HARRIS, *Plaintiff-in-Error.* | *Assignments of Error.* |

Afterwards, to wit, on this day, before the Supreme Court of the State of New Jersey, comes Abraham E. Harris, plaintiff-in-error, by his attorneys, Robert H. McCarter, Esq., and Leber & Ruback, Esqs., and says, that in the record and proceedings aforesaid and also in the giving of the verdict and judgment aforesaid, there was manifest error, and assigns the following for causes of error:

1. Because the Trial Court, upon motion of counsel for the defendant, refused to quash the first count of the indictment (p. 10).

2. Because the Trial Court, upon the motion of counsel for the defendant, refused to quash the second count of the indictment (p. 10).

3. Because the first count was duplicitous and charged several distinct crimes, and the Trial Court, upon motion of counsel for the defendant, refused to compel or direct the State to elect which of the crimes alleged it would try (p. 10).

4. Because the Trial Court ruled that the defendant was entitled only to 10 peremptory challenges and refused to admit the defendant to more than 10 peremptory challenges (p. 11).

5. Because the Trial Court denied the defendant's peremptory challenge of juror #7 (p. 11).

6. Because the Trial Judge, over the objection of defendant's counsel, permitted the Prosecutor to read from a statement made by the State's witness Gilpatrick and over such objection permitted the State's witness to answer the following questions:

> "Didn't you say, 'on Tuesday, May 9, 1922, about 5 P. M. I saw Mr. Harris for the first time that day in the shipping department'?"
>
> "You then said, 'I walked out to the front of the factory and saw Mr. Harris and Mr. Umansky sitting in the office talking to each other.'"
>
> "Did you say that?" (p. 71).

7. Because the Trial Judge permitted the Prosecutor by a series of questions (see pp. 72 and 73 of record), put to the State's witness, Gilpatrick, to read from a statement alleged to have been made by the witness, for the alleged purpose of contradicting him, thereby getting the whole statement before the jury, which was not otherwise competent (pp. 72 and 73).

8. Because the Trial Judge permitted the State's attorney to read (p. 74) a written statement alleged to have been made by the said witness, Gilpatrick.

9. Because the Trial Judge refused to permit defendant's counsel to examine the State's witness Rosenstock (who was offered as a witness (p. 150) to prove the value of the defendant's plant, goods, chattels, merchandise and equipment), for the purpose of determining whether the said witness in fact did examine the said plant, goods, chattels, merchandise and equipment and for the purpose of determining his competency as an expert witness on the question of the value of said property.

10. Because the Trial Judge permitted the State's witness, Rosenstock, over the objection of defendant's counsel, to state his opinion on the value of defendant's stock, after

the witness had indicated that he didn't know what the stock was or consisted of (p. 152).

11. Because the Trial Judge refused, upon motion of defendant's counsel, to strike out the evidence of the State's witness, Rosenstock, concerning the value of defendant's machinery (p. 156).

12. Because the Trial Judge, over the objection of defendant's counsel, permitted the State's witness, Rosenstock, to state a conversation between himself and the State's witness, Umansky, and because the Trial Judge, after motion of defendant's counsel, refused to strike out such evidence (p. 159).

13. Because the Trial Judge, over the objection of defendant's counsel, admitted in evidence 12 fire insurance policies covering the stock of A. E. Harris Company, Inc., a corporation, all of which policies were in favor of said company as the assured (p. 162).

14. Because at the conclusion of the State's case the Trial Judge denied defendant's motion for a direction of a verdict in favor of the defendant.

15. Because the Trial Judge refused to permit defendant to prove what insurance was carried on the first of February and on the first of March last preceding the fire, for the purpose of proving that the amount of insurance was being constantly and appreciably reduced and was considerably less on the day of the fire than at any time within three months preceding such fire (p. 267).

16. Because the Trial Judge overruled defendant's offer to prove by the witness, Fisher, the value of defendant's goods and merchandise on May 9th, the date of the fire, by proof of an appraisal made by the said witness on June 13th following the fire and by following up such testimony by calculation from testimony already in the case of proper additions and deductions to be made because of sales and purchases and other conditions that occurred or existed during the interim of several

weeks between the fire and the making of the Fisher appraisal (pp. 317 and 319).

17. Because the Trial Judge overruled defendant's offer of an inventory and appraisal of his stock and merchandise made by the witness, Fisher (p. 326).

18. Because the Trial Judge refused to permit defendant's counsel to set up and light a candle similar to the State's candle exhibit, for the purpose of showing how much a candle like the State's exhibit will burn in two hours (p. 380).

19. Because the Trial Judge overruled the following questions put by defendant's counsel to the witness, Grabshied (p. 393).

> "Will you look through these orders and see if you can find any order taken on the day of the fire or the day following the fire."

20. Because the Trial Judge overruled the following questions put by defendant's counsel to the witness, Leopold (pp. 394-395).

> "What were the assets and what were the liabilities?"
>
> "From your examination of the books, are you able to state what, according to the books, the assets and liabilities of A. E. Harris Company were on the 9th of May, 1922?"

21. Because the Trial Judge excluded (pp. 401 and 403) letters sent by the defendant to the witness, Gilpatrick, containing shipping instructions, which letters were sent between March 16, 1922, and May 5, 1922, and because the Trial Judge excluded the letter of May 4th sent by the defendant to said Gilpatrick.

22. Because the Trial Judge overruled the following question of defendant's counsel put to the witness, Wilmer (p. 412).

> "Now is it anything unusual at a public auction for machinery worth $7,700 to bring about $3,100?"

*Assignments of Error.*

23. Because the Trial Judge excluded the testimony of the witness, Albach, as to the result of a physical experiment conducted by him (p. 415).

24. Because the Trial Judge refused to permit the witness, Albach (p. 418), to conduct an experiment before the jury with the liquids that were admitted in evidence, for the purpose of demonstrating to the jury that the testimony of the State's witnesses, as to the finding of a carton half filled with gasolene with a float on top of the gasolene and a lighted candle on the float, was a physical impossibility.

25. Because the Trial Court refused the defendant's offer to prove by the witness, Albach (p. 418), both from his own experiment and by an experiment in open court that the float offered in evidence by the State would not float in gasolene, even without any weight resting upon it.

26. Because the Trial Judge declined the request of defendant's counsel that the jury have a view of defendant's factory premises and of the front entrance door thereto (p. 437).

27. Because the Court refused to charge the defendant's third request as follows: "The first charge under Section 126 of the Crimes Act is that of burning the building and merchandise with intent to prejudice the insuranc companies. Before the defendant can be found guilty of this charge it is necessary for the jury to be satisfied beyond a reasonable doubt that the defendant did wilfully and maliciously set fire to and burn the building known as No. 204 Morris avenue in the City of Newark, and the goods, wares and merchandise therein located; that said building and merchandise were insured by the companies named in the first count of the indictment and that the said fire was set with the intent to prejudice said companies. Every one of these elements is essential to the completion of the offense charged in this count and if any one is lacking then there must be an acquittal" (p. 454).

*Assignments of Error.*

28. Because the Court refused to charge the defendant's fourth request as follows: "There can be no conviction under the first count so far as the building is concerned" (p. 455).

29. Because the Court refused to charge the defendant's fifth request as follows: "There is no evidence in this case, offered by the State, from which the jury could infer or conclude as to the value of the stock or merchandise in the factory at the time of the fire" (p. 455).

30. Because the Court refused to charge the defendant's seventh request as follows: "Even if the jury should conclude that there was an over-valuation of the merchandise resulting from an honest mistake in reference thereto, such over-valuation would not necessarily be evidence of the criminal intent required by the statute."

31. Because the Court refused to charge defendant's eighth request as follows: "There should be a verdict for the defendant on the second count for each and all of the reasons given on the motion to quash the indictment" (p. 255).

32. Because the Court refused to charge the defendant's ninth request as follows: "The State cannot, under the second count, rely both upon an actual burning and an attempt, or the aiding, counseling, procuring and consenting to the burning of the building on the part of the defendant. These are distinct crimes set up in the same count and the State must elect upon which of the accusations they rely" (p. 456).

33. Because the Court refused to charge defendant's tenth request as follows: "With reference to either of the offenses charged in the second count the State must prove more than the mere existence of the fire. The defendant's connection therewith must be proved beyond a reasonable doubt. It is not necessary that the defendant explain the fire, because of the fire, or account for its existence" (p. 456).

## ADDENDA TO ASSIGNMENTS OF ERROR.

36. Because the Court refused to charge the defendant's first request, which is as follows:

> "In this case the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant is entitled to the presumption of innocence, and before that presumption is overcome the State must satisfy the jury, beyond a reasonable doubt, of the defendant's guilt."

37. Because the Court charged the jury as follows:

> "Now, at this point, gentlemen, with particular reference to Umansky and Gilpatrick, both were called by the State as their witnesses, and during their examination they were asked questions by the prosecutor under a claim of surprise. With reference to Gilpatrick and Umansky, if that was the fact, I charge you that where a party is surprised by adverse testimony of a witness called by him, proof of self-contradictory statements, previously made by such witness, is proper, not for the purpose of proving the statements, but to discredit or neutralize such adverse testimony."

and because the Court failed, after charging the foregoing, to instruct the jury (explaining the reason, viz., because not given under oath and not subject to cross examination, why the evidence is so limited in effect), that they are to entirely disregard it as in any way tending to prove the truth of the facts which it asserts; and that they may, if they think it worthy of that effect, conclude that it withdraws from the case the evidence which it tends to discredit, just the same as if such evidence had never been introduced, but that beyond this they cannot give it any effect whatsoever.

38. Because the verdict of the jury was against the weight of evidence. In assigning this as error, the plaintiff-in-error avails himself of the provisions of Chapter 349 of the Laws of 1921.

*Assignments of Error.*

34. Because the Court refused to charge defendant's eleventh request as follows: "If the jury believe that the claim of the State that a carton containing inflammable fluid in which was placed a float on which a burning candle was located, which burnt for two hours, is impossible of occurrence, then the evidence adduced with reference thereto must be disregarded and any inference arising from such evidence must likewise be disregarded" (p. 456).

35. Because the Court refused to charge defendant's twelfth request as follows: "In weighing the evidence in this case due weight must be given by the jury to the evidence touching the character and standing of the defendant prior to this accusation. Any doubt otherwise existing as to the defendant's guilt may be overcome by such evidence" (p. 456).

ROBERT H. McCARTER,
LEBER & RUBACK,
*Attorneys for and Counsel with*
*Plaintiff-in-Error.*

Due service of a copy of the within Assignments of Error is hereby acknowledged this 2nd day of May, 1923.

JOHN O. BIGELOW,
*Prosecutor of the Pleas of Essex County.*

## SPECIFICATION OF CAUSES FOR REVERSAL.

Filed May , 1923.

NEW JERSEY SUPREME COURT.

| | |
|---|---|
| THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* ABRAHAM E. HARRIS, *Plaintiff-in-Error.* | *Specification of Causes for Reversal.* |

And now comes the said Abraham E. Harris, by Robert H. McCarter, Esq., and Leber & Ruback, Esqs., his attorneys, and says that, in the entire record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error and that he has suffered manifest wrong or injury and that said judgment should be reversed, and he hereby assigns the following reasons or causes:

1. Because the Trial Court, upon motion of counsel for the defendant, refused to quash the first count of the indictment (p. 10).

2. Because the Trial Court, upon the motion of counsel for the defendant, refused to quash the second count of the indictment (p. 10).

3. Because the first count was duplicitous and charged several distinct crimes, and the Trial Court, upon motion of counsel for the defendant, refused to compel or direct the State to elect which of the crimes alleged it would try (p. 10).

4. Because the Trial Court ruled that the defendant was entitled only to 10 peremptory challenges and refused to admit the defendant to more than 10 peremptory challenges (p. 11).

*Specification of Causes for Reversal.*

5. Because the Trial Court denied the defendant's peremptory challenge of juror #7 (p. 11).

6. Because the Trial Judge, over the objection of defendant's counsel, permitted the Prosecutor to read from a statement made by the State's witness Gilpatrick and over such objection permitted the State's witness to answer the following questions:

> "Didn't you say, 'on Tuesday, May 9, 1922, about 5 P. M. I saw Mr. Harris for the first time that day in the shipping department'?"
>
> "You then said, 'I walked out to the front of the factory and saw Mr. Harris and Mr. Umansky sitting in the office talking to each other.'"
>
> "Did you say that?" (p. 71).

7. Because the Trial Judge permitted the Prosecutor by a series of questions (see pp. 72 and 73 of record), put to the State's witness, Gilpatrick, to read from a statement alleged to have been made by the witness, for the alleged purpose of contradicting him, thereby getting the whole statement before the jury, which was not otherwise competent (pp. 72 and 73).

8. Because the Trial Judge permitted the State's attorney to read (p. 74) a written statement alleged to have been made by the said witness, Gilpatrick.

9. Because the Trial Judge refused to permit defendant's counsel to examine the State's witness, Rosenstock (who was offered as a witness (p. 150), to prove the value of the defendant's plant, goods, chattels, merchandise and equipment), for the purpose of determining whether the said witness in fact did examine the said plant, goods, chattels, merchandise and equipment and for the purpose of determining his competency as an expert witness on the question of the value of said property.

10. Because the Trial Judge permitted the State's witness, Rosenstock, over the objection of defendant's counsel, to state his opinion on the value of defendant's stock,

after the witness had indicated that he didn't know what the stock was or consisted of (p. 152).

11. Because the Trial Judge refused, upon motion of defendant's counsel to strike out the evidence of the State's witness, Rosenstock, concerning the value of defendant's machinery (p. 156).

12. Because the Trial Judge, over the objection of defendant's counsel, permitted the State's witness, Rosenstock, to state a conversation between himself and the State's witness, Umansky, and because the Trial Judge, after motion of defendant's counsel, refused to strike out such evidence (p. 159).

13. Because the Trial Judge, over the objection of defendant's counsel, admitted in evidence 12 fire insurance policies covering the stock of A. E. Harris Company, Inc., a corporation, all of which policies were in favor of said company as the assured (p. 162).

14. Because at the conclusion of the State's case the Trial Judge denied defendant's motion for a direction of a verdict in favor of the defendant.

15. Because the Trial Judge refused to permit defendant to prove what insurance was carried on the first of February and on the first of March last preceding the fire, for the purpose of proving that the amount of insurance was being constantly and appreciably reduced and was considerably less on the day of the fire than at any time within three months preceding such fire (p. 267).

16. Because the Trial Judge overruled defendant's offer to prove by the witness, Fisher, the value of defendant's goods and merchandise on May 9th, the date of the fire by proof of an appraisal, made by the said witness on June 13th following the fire and by following up such testimony by calculation from testimony already in the case of proper additions and deductions to be made because of sales and purchases and other conditions that occurred or existed during the interim of several weeks

between the fire and the making of the Fisher appraisal (pp. 317 and 319).

17. Because the Trial Judge overruled defendant's offer of an inventory and appraisal of his stock and merchandise made by the witness, Fisher (p. 326).

18. Because the Trial Judge refused to permit defendant's counsel to set up and light a candle similar to the State's candle exhibit, for the purpose of showing how much a candle like the State's exhibit will burn in two hours (p. 380).

19. Because the Trial Judge overruled the following questions put by defendant's counsel to the witness, Grabshied (p. 393).

> "Will you look through these orders and see if you can find any order taken on the day of the fire or the day following the fire."

20. Because the Trial Judge overruled the following questions put by defendant's counsel to the witness, Leopold (pp. 394-395).

> "What were the assets and what were the liabilities?"
>
> "From your examination of the books, are you able to state what, according to the books, the assets and liabilities of A. E. Harris Company were on the 9th of May, 1922?"

21. Because the Trial Judge excluded (pp. 401 and 403) letters sent by the defendant to the witness, Gilpatrick, containing shipping instructions, which letters were sent between March 16, 1922, and May 5, 1922, and because the Trial Judge excluded the letter of May 4th sent by the defendant to said Gilpatrick.

22. Because the Trial Judge overruled the following question of defendant's counsel put to the witness, Wilner (p. 412).

> "Now is it anything unusual at a public auction for machinery worth $7,700 to bring about $3,100?"

*Specification of Causes for Reversal.*

23. Because the Trial Judge excluded the testimony of the witness, Albach, as to the result of a physical experiment conducted by him (p. 415).

24. Because the Trial Judge refused to permit the witness, Albach (p. 418), to conduct an experiment before the jury with the liquids that were admitted in evidence, for the purpose of demonstrating to the jury that the testimony of the State's witnesses, as to the finding of a carton half filled with gasolene with a float on top of the gasolene and a lighted candle on the float, was a physical impossibility.

25. Because the Trial Court refused the defendant's offer to prove by the witness, Albach (p. 418), both from his own experiment and by an experiment in open court that the float offered in evidence by the State would not float in gasolene, even without any weight resting upon it.

26. Because the Trial Judge declined the request of defendant's counsel that the jury have a view of defendant's factory premises and of the front entrance door thereto (p. 437).

27. Because the Court refused to charge the defendant's third request as follows: "The first charge under Section 126 of the Crimes Act is that of burning the building and merchandise with intent to prejudice the insurance companies. Before the defendant can be found guilty of this charge it is necessary for the jury to be satisfied beyond a reasonable doubt that the defendant did wilfully and maliciously set fire to and burn the building known as No. 204 Morris avenue in the City of Newark, and the goods, wares and merchandise therein located; that said building and merchandise were insured by the companies named in the first count of the indictment and that the said fire was set with the intent to prejudice said companies. Every one of these elements is essential to the completion of the offense charged in

this Court and if any one is lacking then there must be an acquittal'' (p. 454).

28. Because the Court refused to charge the defendant's fourth request as follows: ''There can be no conviction under the first count so far as the building is concerned'' (p. 455).

29. Because the Court refused to charge the defendant's fifth request as follows: ''There is no evidence in this case, offered by the State, from which the jury could infer or conclude as to the value of the stock or merchandise in the factory at the time of the fire'' (p. 455).

30. Because the Court refused to charge the defendant's seventh request as follows: ''Even if the jury should conclude that there was an over-valuation of the merchandise resulting from an honest mistake in reference thereto, such over-valuation would not necessarily be evidence of the criminal intent required by the statute.''

31. Because the Court refused to charge defendant's eighth request as follows: ''There should be a verdict for the defendant on the second count for each and all of the reasons given on the motion to quash the indictment'' (p. 255).

32. Because the Court refused to charge the defendant's ninth request as follows: ''The State cannot, under the second count, rely both upon an actual burning and an attempt, or the aiding, counseling, procuring and consenting to the burning of the building on the part of defendant. These are distinct crimes set up in the same count and the State must elect upon which of the accusations they rely'' (p. 456).

33. Because the Court refused to charge defendant's tenth request as follows: ''With reference to either of the offenses charged in the second count the State must prove more than the mere existence of the fire. The defendant's connection therewith must be proved beyond a

reasonable doubt. It is not necessary that the defendant explain the fire, the cause of the fire, or account for its existence" (p. 456).

34. Because the Court refused to charge defendant's eleventh request as follows: "If the jury believe that the claim of the State that a carton containing inflammable fluid in which was placed a float on which a burning candle was located, which burnt for two hours, is impossible of occurrence, then the evidence adduced with reference thereto must be disregarded and any inference arising from such evidence must likewise be disregarded" (p. 456).

35. Because the Court refused to charge defendant's twelfth request as follows: "In weighing the evidence in this case due weight must be given by the jury to the evidence touching the character and standing of the defendant prior to this accusation. Any doubt otherwise existing as to the defendant's guilt may be overcome by such evidence" (p. 456).

36. Because the Trial Judge overruled the following question put to the witness Umansky:

"Did they have any kerosene?" (p. 52).

37. Because the Trial Judge overruled the following question put to the witness Umansky:

"Did anybody ever smoke around that place?" (p. 52).

38. Because the Trial Judge permitted the State's witness, McCabe, to appraise certain goods, chattels and merchandise after the witness on cross examination had stated that he hadn't counted all the goods, chattels and merchandise and didn't know the number of articles embraced in the appraisal nor the quality or value thereof (p. 138).

39. Because the Trial Judge permitted the State's witness, McCabe, to testify as to the value of part of the

goods, chattels and merchandise contained in defendant's plant (pp. 141-142).

40. Because the Trial Judge, after the State's witness, McCabe, testified that he hadn't seen all the goods, chattels and merchandise in defendant's plant, permitted the said witness to answer the following question (p. 143):

> "What was the value of that plant, including the fixtures and the stock that you saw and the machinery and the whole equipment?"

41. Because the Trial Judge refused to permit the jury to take with them into the jury room a carton similar to the State's exhibit, for the purpose of conducting an experiment with the State's exhibit of float and candle (p. 438).

42. Because the Trial Judge charged the jury as follows:

> "Now, at this point, gentlemen, with particular reference to Umansky and Gilpatrick, both were called by the State as their witnesses, and during their examination they were asked questions by the prosecutor under a claim of surprise. With reference to Gilpatrick and Umansky, if that was the fact, I charge you that where a party is surprised by adverse testimony of a witness called by him, proof of self-contradictory statements, previously made by such witness, is proper, not for the purpose of proving the statements, but to discredit or neutralize such adverse testimony" (pp. 443-444).

43. Because the Trial Judge charged the jury as follows:

> "Gentlemen of the jury, it is not my province, nor is it my duty, to attempt to mould your verdict. That should come from a consideration of the entire evidence in the case. However, it seems to me, that from all the evidence there is a strong probability

that this fire was of incendiary origin, but of course, that is for you to say'' (p. 448).

ROBERT H. McCARTER,
LEBER & RUBACK,
*Attorneys for and Counsel with*
*Plaintiff-in-Error.*

Due service of a copy of the within Specification of Causes for Reversal is hereby acknowledged this 2nd day of May, 1923.

JOHN O. BIGELOW,
*Prosecutor of the Pleas of Essex County.*

## ADDENDA TO SPECIFICATION OF CAUSES FOR REVERSAL.

44. Because the Court refused to charge the defendant's first request, which is as follows:

> "In this case the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant is entitled to the presumption of innocence, and before that presumption is overcome the State must satisfy the jury, beyond a reasonable doubt, of the defendant's guilt."

45. Because the Court charged the jury as follows:

> "Now, at this point, gentlemen, with particular reference to Umansky and Gilpatrick, both were called by the State as their witnesses, and during their examination they were asked questions by the prosecutor under a claim of surprise. With reference to Gilpatrick and Umansky, if that was the fact, I charge you that where a party is surprised by adverse testimony of a witness called by him, proof of self-contradictory statements, previously made by such witness, is proper, not for the purpose of proving the statements, but to discredit or neutralize such adverse testimony."

and because the Court failed, after charging the foregoing, to instruct the jury (explaining the reason, viz., because not given under oath and not subject to cross examination, why the evidence is so limited in effect), that they are to entirely disregard it as in any way tending to prove the truth of the facts which it asserts; and that they may, if they think it worthy of that effect, conclude that it withdraws from the case the evidence which it tends to discredit, just the same as if such evidence had never been introduced, but that beyond this they cannot give it any effect whatsoever.

46. Because the verdict of the jury was against the weight of evidence. In assigning this as error, the plaintiff-in-error avails himself of the provisions of Chapter 349 of the Laws of 1921.

*Copy of Letter Offered by Defense and Rejected by Court.*

A. E. HARRIS & CO., Inc.
Manufacturers Ladies' Undergarments
133-141 West 21st Street
New York

May 4, 1922.

Mr. Gilpatrick:

We have received several complaints that our shipments are too slow. Can't you speed up your shipping end so that our customers will have no kick. If necessary put in more overtime. Orders are coming in more and more every day and if we are to please the trade we must be more prompt in our deliveries. I want Mr. Umansky and you to try and catch up before the end of this month.

Have you attended to order #4790. I wrote you about it yesterday.

I will be out to Newk on Saturday and will look over orders then ready for shipment.

Very truly yours,

AEH:HA

A. E. HARRIS.

## OPINION OF SUPREME COURT.

Filed November 8, 1923.

NEW JERSEY SUPREME COURT.

No. 6, June Term, 1923.

STATE OF NEW JERSEY,

*vs.*

ABRAHAM E. HARRIS.

Error to Essex Quarter Session.

Argued June Term, 1923.

Decided November Term, 1923.

Robert H. McCarter and Leber & Ruback, for defendants.

J. O. Bigelow, for the State.

Argued before the Chief Justice, Minturn and Black, *J.J.*

*Per Curiam:*

The defendant was convicted in the Essex Quarter Session, upon an indictment which in its first count charged him with setting fire to a certain building in Newark, and the goods and merchandise therein contained with intent to prejudice certain insurance companies. The second count charged him with aiding and abetting in the burning of the building.

The first contention is raised upon a motion to quash, that the indictment was insufficient in that it was duplicitous. We do not think that question is properly before us. The refusal of the motion to quash cannot be reviewed on an assignment of error, since it is discretionary with the trial court, nor can it be reviewed under the 136th

section, since it precedes the trial itself, and is not a part thereof. It is argued, however, that it is reviewable because of the failure of the trial court to charge the following request: "There should be a verdict for the defendant on the second count for each and all of the reasons given on the motion to quash the indictment." We do not think that this request was proper in form or in substance, since it fails to state the grounds upon which the direction of a verdict should be rested.

The court is under no obligation to go back in a search for proceedings ante-dating the trial to ascertain what took place at that time; nor is the court assumed to recall accurately matters which occurred in the past, unless presented in reasonably accurate and substantial form as a basis for its recollection. We think, however, the criticism on the indictment in this respect is insubstantial and without merit.

The next point is a criticism upon the court's action in allowing the prosecutor of the pleas to examine the State's witness, Gilpatrick, for the purpose of showing that his testimony varied from a precedent statement made to the prosecutor. This ruling was competent under State *v.* D'Adame, 84 N. J. L. 386.

It is also urged that the court committed legal error in refusing to strike out certain testimony concerning the value of the machinery at the plant of the Harris Co., of which the defendant was president. The court properly refused the motion, as it came too late. Under our decided cases, the objection should have been to the testimony when it was offered. State *v.* D'Adame, *Id.* And a similar response applies to the motion to strike out the testimony of the witness Rosenstock.

It is insisted that the court committed legal error in receiving in evidence twelve fire insurance policies, covering the stock of the Harris Co. The point of this contention is that there was no proof at that time that the defendant was in anywise connected with the Harris Co.

This objection looses its relevancy, since defendant himself afterwards on the witness stand testified that he was the president of the company. That admission made the policies admissible in evidence (State *v.* Genz, 59 N. J. L. 495), and the action of the trial court became thereby harmless.

It is insisted that there should have been a direction of a verdict in favor of the defendant, because of lack of proof. We think there was proof sufficient to go to the jury, and that defendant's guilt or innocence under the testimony was not a court question.

It is insisted that the court erred in refusing to admit an inventory made by a man named Fisher. The difficulty with its admission was that the inventory was made some little time after the fire, and it was shown that it embraced goods not in the factory at the time of the fire.

The attempt on the part of the defendant to show in court by the witness Johnson the result of an experiment with a lighted candle, and by the witness Albach to show the result of an experiment out of court with a spool floating in gasolene, or other fluid, was properly excluded, since there was no proof that the conditions surrounding the experiments were similar to those that existed when the fire in question was discovered, by the public officials, who testified upon the subject. To warrant the admission of such experimental testimony it must appear that the conditions and circumstances are similar to those shown actually to have existed in the case.

Commonwealth *v.* Piper, 120 Mass. 185;
Kumly *v.* Folkerts, 84 Mich. 618;
Leonard *v.* Southern Pac. R. R. Co., 21 Or. 555;
Chicago, Etc. R. R. *v.* Champion, 9 Ind. App. 510;
Spires *v.* State, 56 Fla. 121; 10 R. C. L. 1002 and cases cited.

In any event it is within the judicial discretion of a trial court to permit experiments relevant to the issue to

be made before a jury during a trial. Permission to perform such experiments cannot be demanded as a matter of right; nor in the absence of an abuse of discretion is it the subject of review upon error.

Langdon Creasy Co. *v.* Rouse, 130 Ky. 647;
S. C. Ann. 1912 B 2 92 and notes; 10 R. C. L. 1000 and cases.

The same rule is applicable to experiments made out of the presence of the court.

Gambrier *v.* Schooley, 95 Md. 360;
Boston Hose Co. *v.* Kendall, 176 Mass. 232; 10 R. C. L. 1000 and cases.

Our examination of the remaining objections urged satisfies us that they are insubstantial. Our examination of the defendant's requests to charge, together with the charge of the trial court, satisfies us that the legal substance of the requests was substantially contained in the charge, where they were legally relevant.

The judgment of conviction will therefore be affirmed.

## REMITTITUR.

NEW JERSEY SUPREME COURT.

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| THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* ABRAHAM E. HARRIS, *Plaintiff-in-Error.* | *On Writ of Error.* *Remittitur.* |

This cause having been argued at the June term, nineteen hundred and twenty-three, of this Court, by John O. Bigelow, Esq., attorney of the defendant-in-error, and Robert H. McCarter, Esq., and Messrs. Leber & Ruback, attorneys for the plaintiff-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, November 14, 1923, on motion of

J. O. BIGELOW,
Prosecutor of the Pleas,
*Attorney of Defendant-in-Error.*

## ASSIGNMENTS OF ERROR.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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|---|---|
| THE STATE OF NEW JERSEY,<br>*Defendant-in-Error,*<br><br>*vs.*<br><br>ABRAHAM E. HARRIS,<br>*Plaintiff-in-Error.* | *On Indictment for Arson, &c.*<br><br>*On Error to the New Jersey Supreme Court.*<br><br>*Assignments of Error.* |

Afterwards, in the New Jersey Court of Errors and Appeals, comes the said Abraham E. Harris by Leber & Ruback, Esqs., and Robert H. McCarter, Esq., his attorneys, and says that in the record of the Supreme Court, and proceedings aforesaid, and also in the matters recited in the bill of exceptions, and in the giving of the verdict and judgment aforesaid, there is manifest error in this respect, to wit:

1. That the said Supreme Court affirmed the judgment of conviction of the Court of Quarter Sessions of the County of Essex, whereas said Supreme Court should have reversed said judgment of conviction.

2. Because the Trial Court, upon motion of counsel for the defendant, refused to quash the first count of the indictment (p. 10).

3. Because the Trial Court, upon the motion of counsel for the defendant, refused to quash the second count of the indictment (p. 10).

4. Because the first count was duplicitous and charged several distinct crimes, and the Trial Court, upon motion of counsel for the defendant, refused to compel or direct the State to elect which of the crimes alleged it would try (p. 10).

5. Because the Trial Judge, over the objection of defendant's counsel, permitted the prosecutor to read from a statement made by the State's witness Gilpatrick and over such objection permitted the State's witness to answer the following questions:

> "Didn't you say, 'on Tuesday, May 9, 1922, about 5 P. M. I saw Mr. Harris for the first time that day in the shipping department?' "
>
> "You then said, 'I walked out to the front of the factory and saw Mr. Harris and Mr. Umansky sitting in the office talking to each other.' "
>
> "Did you say that?" (p. 71).

6. Because the Trial Judge permitted the prosecutor by a series of questions (see pp. 72 and 73 of record), put to the State's witness, Gilpatrick, to read from a statement alleged to have been made by the witness, for the alleged purpose of contradicting him, thereby getting the whole statement before the jury, which was not otherwise competent (pp. 72 and 73).

7. Because the Trial Judge permitted the State's attorney to read (p. 74) a written statement alleged to have been made by the said witness, Gilpatrick.

8. Because the Trial Judge refused, upon motion of defendant's counsel, to strike out the evidence of the State's witness, Rosenstock, concerning the value of the defendant's machinery (p. 156).

9. Because the Trial Judge, over the objection of defendant's counsel, permitted the State's witness, Rosenstock to state a conversation between himself and the State's witness, Umansky, and because the Trial Judge, after motion of defendant's counsel, refused to strike out such evidence (p. 159).

10. Because the Trial Judge, over the objection of defendant's counsel, admitted in evidence 12 fire insurance policies covering the stock of A. E. Harris Company, Inc., a corporation, all of which policies were in favor of said company as the assured (p. 162).

*Assignments of Error.*

11. Because at the conclusion of the State's case the Trial Judge denied defendant's motion for a direction of a verdict in favor of the defendant.

12. Because the Trial Judge refused to permit the defendant to prove what insurance was carried on the first of February and on the first of March last preceding the fire, for the purpose of proving that the amount of insurance was being constantly and appreciably reduced and was considerably less on the day of the fire than at any time within three months preceding such fire (p. 267).

13. Because the Trial Judge overruled defendant's offer to prove by the witness, Fisher, the value of defendant's goods and merchandise on May 9th, the date of the fire, by proof of an appraisal made by the said witness on June 13th following the fire and by following up such testimony by calculation from testimony already in the case of proper additions and deductions to be made because of sales and purchases and other conditions that occurred or existed during the interim of several weeks between the fire and the making of the Fisher appraisal (pp. 317 and 319).

14. Because the Trial Judge overruled defendant's offer of an inventory and appraisal of his stock and merchandise made by the witness, Fisher (p. 326).

15. Because the Trial Judge refused to permit defendant's counsel to set up and light up a candle similar to the State's candle exhibit, for the purpose of showing how much a candle like the State's exhibit will burn in two hours (p. 380).

16. Because the Trial Judge overruled the following question put by defendant's counsel to the witness Grabshied (p. 393):

> "Will you look through these orders and see if you can find any order taken on the day of the fire or the day following the fire?"

*Assignments of Error.*

17. Because the Trial Judge overruled the following questions put by defendant's counsel to the witness, Leopold (pp. 394-395).

> "What were the assets and what were the liabilities?"
>
> "From your examination of the books, are you able to state what, according to the books, the assets and liabilities of A. E. Harris Company were on the 9th of May, 1922?"

18. Because the Trial Judge excluded (pp. 401 and 403) letters sent by the defendant to the witness, Gilpatrick, containing shipping instructions, which letters were sent between March 16, 1922 and May 5, 1922, and because the Trial Judge excluded letter of May 4th, sent by the defendant to said Gilpatrick.

19. Because the Trial Judge excluded the testimony of the witness, Albach, as to the result of a physical experiment conducted by him (p. 415).

20. Because the Trial Judge refused to permit the witness, Albach (p. 418), to conduct an experiment before the jury with the liquids that were admitted in evidence, for the purpose of demonstrating to the jury that the testimony of the State's witnesses, as to the finding of a carton half filled with gasoline with a float on top of the gasoline and a lighted candle on the float, was a physical impossibility.

21. Because the Trial Court refused the defendant's offer to prove by the witness, Albach (p. 418), both from his own experiment and by an experiment in open court that the float offered in evidence by the State would not float in gasoline, even without any weight resting upon it.

22. Because the Court refused to charge the defendant's third request as follows: "The first charge under Section 126 of the Crimes Act is that of burning the building and merchandise with intent to prejudice the insurance companies. Before the defendant can be found

guilty of this charge it is necessary for the jury to be satisfied beyond a reasonable doubt that the defendant did wilfully and maliciously set fire to and burn the building known as No. 204 Morris avenue, in the City of Newark, and the goods, wares and merchandise therein located; that said building and merchandise were insured by the companies named in the first count of the indictment and that the said fire was set with the intent to prejudice said companies. Every one of these elements is essential to the completion of the offense charged in this count and if any one is lacking then there must be an acquittal" (p. 454).

23. Because the Court refused to charge the defendant's fourth request as follows: "There can be no conviction under the first count so far as the building is concerned" (p. 455).

24. Because the Court refused to charge the defendant's fifth request as follows: "There is no evidence in this case, offered by the State, from which the jury could infer or conclude as to the value of the stock or merchandise in the factory at the time of the fire" (p. 455).

25. Because the Court refused to charge the defendant's seventh request as follows: "Even if the jury should conclude that there was an over-valuation of the merchandise, resulting from an honest mistake in reference thereto, such over-valuation would not necessarily be evidence of the criminal intent required by the statute."

26. Because the Court refused to charge defendant's eighth request as follows: "There should be a verdict for the defendant on the second count for each and all of the reasons given on the motion to quash the indictment" (p. 255).

27. Because the Court refused to charge the defendant's ninth request as follows: "The State cannot, under the second count, rely both upon an actual burning and an attempt, or the aiding, counseling, procuring and consenting to the burning of the building on the part of the

defendant. These are distinct crimes set up in the same count and the State must elect upon which of the accusations they rely" (p. 456).

28. Because the Court refused to charge defendant's tenth request as follows: "With reference to either of the offenses charged in the second count the State must prove more than the mere existence of the fire. The defendant's connection therewith must be proved beyond a reasonable doubt. It is not necessary that the defendant explain the fire, the cause of the fire, or account for its existence" (p. 456).

29. Because the Court refused to charge defendant's eleventh request as follows: "If the jury believe that the claim of the State that a carton containing inflammable fluid in which was placed a float on which a burning candle was located, which burnt for two hours, is impossible of occurrence, then the evidence adduced with reference thereto must be disregarded and any inference arising from such evidence must likewise be disregarded" (p. 456).

30. Because the Court refused to charge defendant's twelfth request as follows: "In weighing the evidence in this case due weight must be given by the jury to the evidence touching the character and standing of the defendant prior to this accusation. Any doubt otherwise existing as to the defendant's guilt may be overcome by such evidence" (p. 456).

31. Because the Court charged the jury as follows:

> "Now, at this point, gentlemen, with particular reference to Umansky and Gilpatrick, both were called by the State as their witnesses, and during their examination they were asked questions by the prosecutor under a claim of surprise. With reference to Gilpatrick and Umansky, if that was the fact, I charge you that where a party is surprised by adverse testimony of a witness called by him, proof of self-contradictory statements, previously

made by such witness, is proper, not for the purpose of proving the statements, but to discredit or neutralize such adverse testimony."

and because the Court failed, after charging the foregoing to instruct the jury (explaining the reason, viz., because not given under oath and not subject to cross examination, why the evidence is so limited in effect), that they are to entirely disregard it as in any way tending to prove the truth of the facts which it asserts; and that they may, if they think it worthy of that effect, conclude that it withdraws from the case the evidence which it tends to discredit, just the same as if such evidence had never been introduced, but that beyond this they cannot give it any effect whatsoever.

32. Because the Court refused to charge the defendant's first request, which is as follows:

"In this case the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant is entitled to the presumption of innocence, and before that presumption is overcome the State must satisfy the jury, beyond a reasonable doubt, of the defendant's guilt."

33. Because the verdict of the jury was against the weight of evidence. In assigning this as error, the plaintiff-in-error avails himself of the provisions of Chapter 349 of the Laws of 1921.

ROBERT H. McCARTER,
LEBER & RUBACK,
*Attorneys for and of Counsel with Plaintiff-in-Error.*

Due service of within assignments of error is hereby acknowledged as within time.

JOHN O. BIGELOW,
Prosecutor of Pleas of Essex County,
*And Attorney for Defendant-in-Error.*

## CAUSES FOR REVERSAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

| | |
|---|---|
| THE STATE OF NEW JERSEY,<br>*Defendant-in-Error,*<br>*vs.*<br>ABRAHAM E. HARRIS,<br>*Plaintiff-in-Error.* | *On Indictment for Arson, &c.*<br>*On Error to Supreme Court.*<br>*Causes for Reversal.* |

Plaintiff-in-error assigns the following reasons for reversal of the judgment of the Supreme Court sustaining the verdict and judgment of conviction in the above-stated cause, upon the whole record:

1. That the said Supreme Court affirmed the judgment of conviction of the Court of Quarter Sessions of the County of Essex, whereas said Supreme Court should have reversed said judgment of conviction.

2. Because the Trial Court, upon motion of counsel for the defendant, refused to quash the first count of the indictment (p. 10).

3. Because the Trial Court, upon the motion of counsel for the defendant, refused to quash the second count of the indictment (p. 10).

4. Because the first count was duplicitous and charged several distinct crimes, and the Trial Court, upon motion of counsel for the defendant, refused to compel or direct the State to elect which of the crimes alleged it would try (p. 10).

5. Because the Trial Judge, over the objection of defendant's counsel, permitted the prosecutor to read from a statement made by the State's witness, Gilpatrick, and

over such objection permitted the State's witness to answer the following questions:

> "Didn't you say, 'on Tuesday, May 9, 1922, about 5 P. M. I saw Mr. Harris for the first time that day in the shipping department?' "
>
> "You then said, 'I walked out to the front of the factory and saw Mr. Harris and Mr. Umansky sitting in the office talking to each other.' "
>
> "Did you say that?" (p. 71).

6. Because the Trial Judge permitted the prosecutor by a series of questions (see pp. 72 and 73 of Record), put to the State's witness, Gilpatrick, to read from a statement alleged to have been made by the witness, for the alleged purpose of contradicting him, thereby getting the whole statement before the jury, which was not otherwise competent (pp. 72 and 73).

7. Because the Trial Judge permitted the State's attorney to read (p. 74) a written statement alleged to have been made by the said witness, Gilpatrick.

8. Because the Trial Judge refused, upon motion of defendant's counsel, to strike out the evidence of the State's witness, Rosenstock, concerning the value of the defendant's machinery (p. 156).

9. Because the Trial Judge, over the objection of defendant's counsel, permitted the State's witness, Rosenstock, to state a conversation between himself and the State's witness, Umansky, and because the Trial Judge, after motion of defendant's counsel, refused to strike out such evidence (p. 159).

10. Because the Trial Judge, over the objection of defendant's counsel, admitted in evidence 12 fire insurance policies covering the stock of A. E. Harris Company, Inc., a corporation, all of which policies were in favor of said company as the assured (p. 162).

11. Because at the conclusion of the State's case the Trial Judge denied defendant's motion for a direction of a verdict in favor of the defendant.

*Causes for Reversal.*

12. Because the Trial Judge refused to permit the defendant to prove what insurance was carried on the first of February and on the first of March last preceding the fire, for the purpose of proving that the amount of insurance was being constantly and appreciably reduced and was considerably less on the day of the fire than at any time within three months preceding such fire (p. 267).

13. Because the Trial Judge overruled defendant's offer to prove by the witness, Fisher, the value of defendant's goods and merchandise on May 9th, the date of the fire, by proof of an appraisal made by the said witness on June 13th following the fire and by following up such testimony by calculation from testimony already in the case of proper additions and deductions to be made because of sales and purchases and other conditions that occurred or existed during the interim of several weeks between the fire and the making of the Fisher appraisal (pp. 317 and 319).

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"From your examination of the books, are you able to state what, according to the books, the assets and liabilities of A. E. Harris Company were on the ninth of May, 1922?"

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22. Because the Court refused to charge the defendant's third request as follows: "The first charge under Section 126 of the Crimes Act is that of burning the building and merchandise with intent to prejudice the insurance companies. Before the defendant can be found guilty of this charge it is necessary for the jury to be satisfied beyond a reasonable doubt that the defendant did wilfully and maliciously set fire to and burn the building known as No. 204 Morris avenue in the City of Newark, and the goods, wares and merchandise therein located; that said

building and merchandise were insured by the companies named in the first count of the indictment and that the said fire was set with the intent to prejudice said companies. Every one of these elements is essential to the completion of the offense charged in this count and if any one is lacking then there must be an acquittal" (p. 454).

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26. Because the Court refused to charge defendant's eighth request as follows: "There should be a verdict for the defendant on the second count for each and all of the reasons given on the motion to quash the indictment" (p. 255).

27. Because the Court refused to charge the defendant's ninth request as follows: "The State cannot, under the second count, rely both upon an actual burning and an attempt, or the aiding, counseling, procuring and consenting to the burning of the building on the part of the defendant. These are distinct crimes set up in the same count and the State must elect upon which of the accusations they rely" (p. 456).

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the offenses charged in the second count the State must prove more than the mere existence of the fire. The defendant's connection therewith must be proved beyond a reasonable doubt. It is not necessary that the defendant explain the fire, the cause of the fire, or account for its existence" (p. 456).

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and because the Court failed, after charging the foregoing, to instruct the jury (explaining the reason, viz., because not given under oath and not subject to cross examination, why the evidence is so limited in effect), that they are

to entirely disregard it as in any way tending to prove the truth of the facts which it asserts; and that they may, if they think it worthy of that effect, conclude that it withdraws from the case the evidence which it tends to discredit, just the same as if such evidence had never been introduced, but that beyond this they cannot give it any effect whatsoever.

32. Because the verdict of the jury was against the weight of evidence. In assigning this as error, the plaintiff-in-error avails himself of the provisions of Chapter 349 of the Laws of 1921.

33. Because the Trial Judge, charged the jury as follows:

> "Gentlemen of the jury, it is not my province, nor is it my duty, to attempt to mould your verdict. That should come from a consideration of the entire evidence in the case. However, it seems to me, that from all the evidence there is a strong probability that this fire was of incendiary origin, but of course, that is for you to say" (p. 448).

34. Because the Court refused to charge the defendant's first request, which is as follows:

> "In this case the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant is entitled to the presumption of innocence, and before that presumption is overcome the State must satisfy the jury, beyond a reasonable doubt, of the defendant's guilt."

ROBERT H. McCARTER,
LEBER & RUBACK,
*Attorneys for and of Counsel with Plaintiff-in-Error.*

Due service of within causes for reversal is hereby acknowledged as within time.

JOHN O. BIGELOW,
Prosecutor of Pleas of Essex County and
*Attorney for Defendant-in-Error.*

**Cross Reference**
between the number of the
**CAUSE OF REVERSAL**
in Court of Errors, and the number of the corresponding cause of reversal in the Supreme Court.

| In Errors | In Supreme |
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| 2 | 1 |
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| 29 | 34 |
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| 32 | 46 |
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| 34 | 44 |

**Cross Reference**
between the number of the
**ASSIGNMENT OF ERRORS**
in Court of Errors and the corresponding assignment in the Supreme Court.

| No. in Errors | No. in Supreme |
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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

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

*vs.*

ABRAHAM E. HARRIS,
*Plaintiff-in-Error.*

*On Error.*

## BRIEF OF JOHN O. BIGELOW FOR THE STATE.

The defendant, Abraham E. Harris, was convicted in the Essex Quarter Sessions on two counts, one for burning a certain building and chattels therein with intent to prejudice the insurers, and the other for burning the building of another. The conviction was affirmed by the Supreme Court.

The several assignments of error and specifications of causes for reversal are argued below in the same order in which they appear in the brief for the defendant.

### The Indictment.

### I.

*Assignments and Specifications Nos. 1 and 2* are based on the refusal of the trial court to quash severally the two counts in the indictment.

A motion to quash an indictment is addressed to the discretion of the court and the denial of such motion is not reviewable either on strict writ of error or under section 136 of the Criminal Procedure Act.

*State* v. *Rosenberg,* 92 N. J. L. 525 (E. & A.);
*State* v. *Riggs,* 92 N. J. L. 575 (E. & A.).

No other assignment or specification relates to the first count of the indictment. Apparently the defendant, in the Sessions was content with the refusal of the court to

quash it, for he did not question it on his motion to direct a verdict, or by motion to arrest judgment, or otherwise.

*Assignment and Specification No. 31* is based on the court's refusal *to charge as requested* that "There should be a verdict for the defendant on the second count for each and all of the reasons given on the motion to quash the indictment."

The Supreme Court disposed of this assignment on the ground that the request failed to state why a verdict should be directed.

Furthermore, I contend that the function of a charge is to guide the jury in their determination of guilt or innocence and not to direct which verdict they shall find. A request to charge should conform to this function of the charge.

Lastly, the trial court is entitled to the aid of argument by counsel, and counsel are entitled to be heard on the question whether a verdict should be directed. Under our established practice requests to charge are not argued and are not even read or shown to opposing counsel.

We contend, therefore, that the sufficiency of the indictment is not properly before this court. Assuming, however, that the contrary is correct, I proceed to consider the objections raised by the defendant.

The only objection to the first count is, "That it is duplicitous and contains in one count two distinct crimes" (Case, p. 10, l. 8).

This count charges the defendant in the words of the statute with burning a certain building and the goods, wares, merchandise and other chattels then therein, with intent to prejudice the insurer. The claim of duplicity is based on the fact that the burning of a building is a crime, even though no personal property is burned, and conversely, the burning of personal property is a crime even though the building is not burned.

It seems clear, however, that if, as appears from the evidence, the one act of the defendant in lighting a candle started the train that burned both building and personalty, only one crime was committed. If there had been two indictments, one for the building and the other for the personalty, a conviction on one would have been a bar to the prosecution of the other.

*State* v. *Bartholomew,* 69 N. J. L. 160. It was here 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.

The second count charged that defendant did "Burn and cause to be burned, and did aid, counsel, procure and consent to the burning of the building of another, to wit, the building of Charles A. Rosewater."

Objection is made that this count is also duplicitous in charging the actual burning and the counselling and procuring to be burned (Case, p. 9, l. 39).

*State* v. *Price,* 11 N. J. L. 203, 215. A charge that defendant did burn and cause to be burned, was not duplicitous.

*Crain* v. *U. S.,* 162 U. S. 625, 40 L. Ed. 1097.

It may also be noted that this count does not charge a common law felony—it does not allege a burning of a *dwelling.* Hence the rule applies that all who aid and abet are principals and may be charged as principals. The fact that the defendant is charged in both aspects does not make the count duplicitous.

It is also objected that this count omits the words "there situate," usually found in indictments for arson and burglary (Case, p. 9, l. 35).

The indictment states that the crime was committed at the City of Newark, in the County of Essex.

While the words "there situate" are usually employed, their omission does not appear to have been material, even at common law.

*2 Bishop's New Criminal Procedure,* section 41;
*Rex* v. *Napper,* 1 Moody, C. C. 44;
*Commonwealth* v. *Lamb,* 1 Gray (Mass.) 493.

*4 Chitty Cr. L.* 1128. The precedent here given for burning a stack of hay does not contain words "there situate," or any similar expression.

The last objection to this count is that it does not contain the words "not a parcel of a dwelling house" (Case, p. 9, l. 32).

This is a statutory crime based on section 124 of the Crimes Act as amended by P. L. 1919, page 257. This section covers four classes of burning:

(1) "Any barn, stable or other building * * * not a parcel of a dwelling house."

(2) "Any shop, storehouse, warehouse, malthouse, mill or other building."

(3) "Any ship, boat or other vessel * * * lying within the body of any county."

(4) "Any church, meeting house, court house, workhouse, jail or other public building."

The first group refers to the outbuildings which used to be grouped around the dwelling house. If they were connected with the dwelling or even in the same enclosure, they were parcel of the dwelling, and a burning of them was arson at common law. If, however, they stood on a different part of the farm and were not parcel of the dwelling, it was not arson; and a conviction for burning the dwelling could be sustained by proof of burning a barn which was parcel of the dwelling, even though the barn was not mentioned in the indictment. But if the indictment was for burning a barn and it was not stated therein that the barn was parcel of the dwelling, the defendant could not be convicted of arson, for it was presumed that the barn was not parcel of the dwelling.

The second group, "any shop, storehouse, warehouse, malthouse, mill or other building," does not refer to dwellings or buildings usually appurtenant thereto, but it refers to business structures, and includes the factory building of Dr. Rosewater which the defendant burned.

The statute in connection with this class of buildings does not use the words "not a parcel of a dwelling house." No reason appears why these words should be included in the indictment.

*3 Chitty Cr. L.* 1128, gives a precedent (second count) for burning "a certain building, there situate and being, called the Hole," without other description.

The New Jersey cases cited in the defendant's brief relate to the first class of buildings mentioned in the statute, such as barns. Of course, in these cases the phrase "not a parcel of a dwelling house," is used.

The cases from other jurisdictions appear to be based on statutes where this phrase qualifies the kind of building mentioned in the indictments—where, in this respect, the statutes differ from the case at bar.

*State* v. *Gedicke,* 43 N. J. L. 86, 91. On an indictment for abortion it was held unnecessary to allege that the patient did not die.

> "The general rule is that where by the statute there is a gradation of offenses of the same species, as in the degrees of punishment annexed to the offense, it is not required to set forth a negative allegation as, in this case, that she, or the child, did not die. It is no objection that it charges the minor offense unaccompanied by any averment that the aggravating circumstances did not exist. In such cases the offense charged is to be deemed the minor offense and punishable as such."

*Larned* v. *Com.,* 12 Metc. (Mass.) 240. Same rule applies to burglary.

The only real question is whether the word "building" in the indictment is sufficiently specific or whether it should have been described as "factory building" or in some

New Jersey State Library

similar manner. That question was not raised in the court below (Case, p. 9, l. 33).

If the defendant was doubtful what building of Dr. Rosewater or what kind of building was intended by the indictment, he should have asked for a bill of particulars.

The State contends that both counts of the indictment are sufficient. If, however, one is good, the conviction should be sustained.

*State* v. *Huggins*, 84 N. J. L. 254, 258 (E. & A.).

*Assignment and Specification No. 3.*

Objection is made that the trial court did not compel the State to elect whether, under the first count, it would prove an actual burning by the defendant or would prove a counselling, and procuring of a burning.

It was proper to let the jury determine from the circumstances whether defendant actually applied the match, or procured another to do so.

While indictments sometimes are quashed, if the State does not make an election, I know of no case or authority which holds that the trial court may order the State to elect. The conduct of the State's case is vested in the prosecutor and not in the court. It is therefore not error for the trial court to refuse to instruct the prosecutor how to conduct his case, or to refuse to order him to elect.

If there was any error it was in the refusal of the court to quash when the State failed to make an election. The alleged error in failing to quash has been considered above.

## Testimony of Gilpatrick.

## II.

Gilpatrick, an employee of defendant, was called to testify for the State.

"Q Now, Mr. Gilpatrick, did you close the windows before you made up those bundles of samples

or did you make up the bundles of samples before you closed the windows? A The windows were closed after the bundles were wrapped" (Case, p. 70, l. 8).

The State then claimed surprise and was allowed to examine the witness as to an alleged prior contradictory statement. This was proper.

*State* v. *D'Adame,* 84 N. J. L. 386 (E. & A.).

The following specifications relate to this examination:

*Assignment and Specification No. 6.*

The questions mentioned in this specification were not answered. If there was any error in allowing them, it was harmless.

*State* v. *Draggone,* 1 N. J. Misc. R. 84, affd. 122 Atl. 878.

*Assignments and Specifications Nos. 7 and 8.*

These specifications do not specify the rulings of the court which are alleged to have been erroneous. The only questions objected to, allowed and answered, were as follows:

"Q And did you say this, 'After awhile I went back to the office and told them I was going home?' A I don't remember that" (Case, p. 72, ll. 11 to 21).

"Q Now, I am reading it to you '* * * Mr. Harris came out and asked me to close all the windows, which I did, and returned to where Mr. Harris was and Mr. Harris then asked me to do up some samples; so I took the samples up to the shipping department and spent some time in making up two bundles of samples'—is that right? A That is right."

"Q That is the truth, isn't it? A That is the truth" (Case, p. 72, l. 22 to p. 74, l. 15).

The first of these questions was of a preliminary nature. The answer was harmless. The second related to a flatly contradictory prior statement and was clearly proper.

## Testimony of Rosenstock.

### III.

Mr. Rosenstock was called by the State as an expert to testify to the value of defendant's stock and machinery at the time of the fire.

Defendant's counsel conducted a preliminary cross examination to determine the witness' competency as an expert (Case, pp. 149 to 152).

At the conclusion of this examination no objection was made that the witness *was not qualified as an expert* (Case, p. 152, l. 20).

The witness then on re-direct examination testified, without objection, to the value of the machinery (Case, p. 153, l. 35).

*Assignment and Specification No. 11.*

> "*Mr. McCarter.* I move that his evidence concerning the value of this machinery be stricken out.
> *The Court.* No, I think a man in business that uses machinery after it is bought and knows the prices—I think I will allow the evidence" (Case, p. 155, l. 32).

Obviously the court considered this objection to be based on an alleged inexpertness of the witness, and overruled it on the merits.

However, as the defendant had failed to object, after the preliminary cross examination, to the competency of the witness, his motion to strike out was too late.

Defendant was willing to gamble that the valuation would be favorable to him, and was disappointed by the result.

> *State* v. *Hummer,* 72 N. J. L. 714 (E. & A.);
> *State* v. *D'Adame,* 84 N. J. L. 386 (E. & A.).

Furthermore, "Whether an opinion expert is qualified to testify is a question of fact to be decided by the trial

court and his finding will not be disregarded if there be legal evidence to support it."

*Ziegener* v. *Daeche,* 91 N. J. L. 634, 637 (E. & A.).

The witness testified that he had been in the same line of business as defendant for thirty-five years, that he had factories in Newark, New York, Poughkeepsie and Hackettstown and that he knew the values of machinery in such plants (Case, p. 147).

## IV.

*Assignment and Specification No. 12.*

Mr. Rosenstock had the assistance of one of defendant's employees, Umansky, in making his valuation of the stock. The witness volunteered against the admonition of the prosecutor that he said to Umansky, "I will figure it and you figure yours and I will figure mine" (Case, p. 159, l. 15).

Defendant moved to strike this out; the ruling of the court is not clear; but apparently it was not struck out.

The State contends that this testimony was harmless. The most that could have been inferred from it, was that Umansky made an independent appraisal while the witness was making his.

Testimony to that effect, by Rosenstock, would have been unexceptionable.

In fact, the brief for defendant does not contend that this testimony was harmful. The contention of the brief is directed to Rosenstock's further testimony that there was only ten cents difference between the two valuations. *No objection to or motion to strike out that testimony was made at the trial.*

## Admission of Fire Policies.

## V.

*Assignment and Specification No. 13.*

The defense, under stipulation, produced "the insurance policies that were upon this property" (Case, p. 160, l. 40). The prosecutor stated, without contradiction, "that it was admitted that they were in force and covered the stock of A. E. Harris Co., Inc." (Case, p. 162, l. 15).

Defendant now argues that it does not appear that the policies were in force, because there was no proof of the competency of the insurance companies to write insurance.

In view of the circumstances of the admission of the policies in evidence, it is not necessary to answer this argument.

The only objection to the admission of these policies in the court below was that the defendant was not the person insured (Case, p. 161, l. 20).

Plainly this objection was frivolous. The existence of insurance was one of the elements of the crime charged.

The indictment does not allege that defendant was the person insured. So there was no variance in this respect.

The statute under which the indictment was drawn does not require that the defendant be the insured. If the defendant had a grudge against the Hartford Insurance Co., and knew that that company insured my home, and if defendant set fire to my home with intent to prejudice that company, he would be guilty under the statute.

The fact that the defendant was not insured had no effect on the materiality of the policies.

The only effect it had, was on the verdict of the jury, as a circumstance which might indicate a want of motive in the defendant to commit the crime charged.

Other grounds for the rejection of these policies are urged in the defendant's brief. But they should not be considered, as they were not raised at the trial.

*State* v. *Kaskevich,* 118 Atl. 701 (affd. 121 Atl. 927);

*State* v. *Comstock,* 95 N. J. L. 321 (affd. 96 *Id.* 299).

## Refusal to Direct a Verdict.

### VI.

*Assignment and Specification No. 14.*

This motion (Case, p. 216) was based entirely on the alleged lack of evidence. If there was any evidence at all to sustain a verdict the motion was properly denied.

Without repeating the testimony, the State contends there was ample evidence.

In defendant's brief, it is argued that it did not appear that defendant knew the amount of insurance carried. This point was not mentioned in the court below. Furthermore, knowledge might be inferred from the fact that defendant, at the trial, produced the original policies.

## The Inventory of June 15.

### VII.

*Assignments and Specifications Nos. 16 and 17.*

The defense offered to prove by Mr. George W. Fisher, Jr., the value, as appraised by him on June 12, 13 and 14, of the inventory of the merchandise in the plant of A. E. Harris Company (Case, p. 316, l. 20).

The date of this appraisal was one month and five days after the fire. During that period presumably the factory had been in operation and raw material purchased, manufactured and sold as finished goods.

The defendant had testified that during that period the sales were $6,032.80, less credit by returns of $543.60,

leaving net sales of $5,489.20, and that purchases were $1,298.88, as appeared from the books of the company (Case, p. 275).

This was the only evidence of the changes in the stock of merchandise between the date of the fire and the date of the appraisal.

The defense proposed to relate the appraisal to the date of the fire by adding to it the amount of goods sold and by deducting the amount purchased in the interim, as shown by the testimony above mentioned.

It did not appear that the expert, Mr. Fisher, had examined the record of sales and purchases or that he agreed with the values at which these transactions were entered on the company's books. The proposed constructed inventory as of May 9th would not have been in any sense the expert opinion of Mr. Fisher.

The total sales and purchases during this period amounted to the large sum of $7,331.68.

Furthermore, during the month and five days between the fire and the appraisal, the factory, undamaged by the fire, was presumably operating, turning raw material into finished goods. It would be mere guesswork to say whether this operation increased the value of the inventory $1,000 or $10,000. Obviously, it was a most important element, and without this item the appraisal of June 15th was valueless.

The Court properly excluded Mr. Fisher's appraisal.

### Testimony of Grabshied.

### VIII.

This witness, a salesman for and the son-in-law of defendant, on direct examination was permitted to testify, over objection by the State, that he continued taking orders after May 9 (the day of the fire), until his return to New York City, at the end of that week; that his sales for the week beginning May 8 were in the neighborhood of

$800 to $1,000, and in the week preceding the fire "anywhere from $700 to $800" (Case, pp. 390 to 392).

On cross examination he was only asked whether he was the son-in-law of defendant.

*Assignment and Specification No. 19.*

On re-direct examination he was asked, "Will you look through these orders and see if you can find any order taken on the day of the fire or the day following the fire?"

Objection sustained.

The fire was on Monday night, May 9, 1922; the first intimation witness had of the fire was the following Saturday (Case, p. 390, l. 33).

A single order—or any number of orders—taken Monday, May 9, or Tuesday, May 10, would not tend to enlighten the jury on the issues at trial.

Furthermore, the question was not proper re-direct examination.

*1 Thompson on Trials,* Sec. 480 and 482;
*Osborne* v. *O'Reilly,* 34 N. J. Eq. 60, 66.

**Proof of Insurance on Prior Dates.**

*Assignment and Specification No. 15.*

The defendant offered to prove the amount of insurance carried on February 1 and March 1, before the fire. The court refused to admit this proof unless the defense would also show the value of the property insured as of the same dates (Case, pp. 264 to 267).

The defendant did not comply with this condition, and so the proof of the insurance on the prior dates was excluded.

The contention of defendant's counsel is in effect this: More insurance was in force March 1 than May 9. If the defendant intended by a fire to prejudice the insurers, he would have set fire to the property March 1, when

more insurance was in force, since a fire that date would have been more prejudicial to the insurers. He did not fire the property until March 1; hence, it could be inferred he did not fire it May 9.

This is too far-fetched.

The defendant may not have formed his criminal intent as early as March 1; he may not have had the opportunity to carry his plot into effect in March; and above all his stock of merchandise in March may have been more valuable than the amount of insurance then carried.

## Letters by Defendant to His Shipping Clerk.

### IX.

*Assignment and Specification No. 21.*

These letters (Case, pp. 401 to 403) were written by *defendant* to his shipping clerk between March 16, 1922, and May 5, 1922—before the fire. Whether they were written in anticipation of the fire—manufactured evidence—I do not know.

As self-serving declarations they were properly excluded. *State* v. *Unsworth,* 84 N. J. L. 22, 85 *Id.* 237.

## Assets and Liabilities.

### X.

*Assignment and Specification No. 20.*

The defendant offered to prove the assets and liabilities of the E. A. Harris Company on the day of the fire (Case, p. 394, l. 11). The offer was not limited to the assets in the Newark plant, but included assets wherever situate and of every nature. He did not offer to prove that the business was operating at a profit.

The logic of this offer seems to be as follows:

An officer of a solvent or wealthy company will probably not be tempted to commit arson; therefore the sur-

plus of the company is material. Likewise, it might be contended a rich man will probably not turn burglar. Hence his wealth is at issue.

I know of no cases sustaining this view.

*State* v. *Kaskevich,* 118 Atl. 701 (affd. 121 Atl. 927).

This was an indictment against a doctor for abortion. It was argued that evidence of the size of his practice should be received because, a successful doctor would not stoop to such an offense. This court held the contrary.

## Experiments.

### XI.

*Assignment and Specification No. 18.*

The defendant called a lawyer, Mr. Jacobson, to perform an experiment, in the presence of the court, by lighting a candle. The object was to show that the candle would be consumed in less than two hours, which, it was contended, was the time that elapsed after defendant left the factory, the night of the fire and before the fire department arrived. The Court refused to allow the experiment (Case, pp. 377 and 378).

Some candles are made of wax, others of tallow or parafine or bayberries, and some candles burn more rapidly than others, according to the material of which they are made.

Again, the rapidity with which a candle is consumed depends largely upon the size of the wick. A small wick burns slowly.

Whether the air is still or windy and whether it is hot or cold are also factors.

There was no evidence or offer to prove that the candle with which it was proposed to experiment was made of the same material as the candle found burning in the factory, or that it had the same sized wick, or that the

air currents and temperature were the same in the factory as in the court room. Such an experiment would have been entirely valueless and was properly excluded by the court.

*Assignment and Specification No. 23.*

Defendant called another lawyer, Mr. Albach, who was employed in the office of the defendant's attorneys, to testify to experiments made by him to ascertain whether a spool would float in gasoline, benzine, turpentine or kerosene (Case, pp. 413 to 415).

The State's witnesses had testified that they found at the fire a burning candle on a float or spool (Exhibit S. 12) floating in a carton on a colorless liquid. There was no proof as to what that liquid was.

Chief Donoghue of the fire department stepped on the carton to extinguish the candle and so ignited the liquid which flared up. He had it extinguished by a chemical stream, and none of the liquid was preserved.

Chief Donoghue guessed from the smell that it was gasoline (Case, p. 99, l. 8) and later referred to it as "this gasoline or benzine—whatever it might be" (Case, p. 99, l. 39).

Battalion Chief Dolan also called the liquid gasoline (Case, p. 91, l. 30), but on cross examination he admitted that he did not know whether it was gasoline—that he had not even smelled it (Case, p. 94, l. 25).

Mr. Keegan, assistant superintendent of the Salvage Corps, called the liquid "oil or some kind of substance—I don't know what was in it" (Case, p. 107, l. 1).

Another member of the fire department, Mr. Eckel, saw this liquid flare up when Chief Donoghue put his foot on it (Case, p. 112), but did not describe it or name it. There was no other evidence as to the nature of the liquid in the carton, except that it was colorless and that it burned. Obviously, none of the witnesses knew what it was.

The defendant sought to show by the testimony of Mr. Albach that the evidence of the State's witnesses could not have been true, because a spool would not float in gasoline, benzine, turpentine or kerosene.

But, as shown above, there was no proof that the liquid found by the firemen was the same as any of the liquids used by Mr. Albach in his experiment.

Furthermore, Mr. Albach did not testify that his float was of the same kind, weight or specific gravity as the float found in the burning building.

The evidence of Mr. Albach was therefore properly excluded.

*Assignments and Specifications Nos. 24 and 25.*

The defendant further offered (Case, p. 416, l. 25) to have Mr. Albach, the lawyer, employed in the office of the defendant's attorneys, repeat this experiment in open court, using the identical spool and candle (Exhibit S. 12). The court refused to allow the experiment.

The experiment would have been of most doubtful value, because of the lack of proof that the liquid to be used in the experiment was of the same kind as that found in the carton (Exhibit S. 7). The ruling of the court was therefore proper.

The conservative rule as to experiments before the jury is that the question of allowing the experiment to be made is wholly within the discretion of the trial court and is not the subject of review by an appellate court.

*U. S.* v. *Ball,* 163 U. S. 662, 673, 41 L. Ed. 300;
*Smith* v. *State,* 49 Conn. 376, 381;
*Lindell* v. *Stone* (N. H.), 94 Atl. 963;
*Rudolph* v. *P. S. V. R. Co.* (Pa.), 40 Atl. 1083, 1084.

A more liberal view is suggested by *dicta* that while the refusal to allow an experiment is within the discretion of the trial court, an appellate court will reverse if "an

abuse of this judicial discretion is clearly made to appear."

8 A. L. R. 18, 24. Note:
*People* v. *Sevine* (Cal.), 22 Pac. 969;
*Spires* v. *State* (Fla.), 39 South 181;
*Homan* v. *Franklin County* (Ia.), 68 N. W. 559;
*Thornhill* v. *Carpenter Morton Co.* (Mass.), 108 N. E. 474, 492.

It is universally held that the allowance of an experiment is a matter peculiarly within the discretion of the trial court. The only conflict is whether the appellate court will consider abuse of this discretion. *But I have found no case where there was a reversal because of the refusal to allow an experiment in open court.*

In New Jersey it seems to be generally regarded that the action of the trial court is not subject to review. I have not found any reported causes in this State considering the matter.

In the Essex Circuit it has been the long-established practice, *regardless of the circumstances* of a case, not to permit any experiment with chemicals and not to permit the exposure of any part of the person in court.

If it be considered that this court under section 136 of the Criminal Procedure Act, should review the action of the trial court in rejecting the offer of the experiment, still there should not be a reversal unless, clearly, the discretion has been abused.

I reiterate that, because of the lack of proof of the identity of the liquids, the experiment would have been of doubtful value and might have confused the jury. Even if the liquids had been the same, the experiment would not have shown that the four firemen were testifying falsely when they related the finding of the burning candle in the carton, but merely that they were mistaken in thinking that the candle was floating, while in fact it was resting on the bottom of the carton with its tip above the level of the liquid.

There was no abuse of discretion in the court below.

## Requests to Charge.

### XII.

*Assignment No. 36; Specification No. 44.*

This request was in substance charged (Case, p. 442, ll. 22 to 25).

No exception was taken to the failure to charge in the words of the request.

*Assignment and Specification No. 33.*

This request was also substantially covered by the portions of the charge recited in the defendant's brief.

### XIII.

*Assignment and Specification No. 27.*

The court was requested, in effect, to instruct the jury to acquit unless they found that the fire was set both wilfully and maliciously and that both the building and the chattels were burned.

This request was properly refused.

It is enough under section 126 of the Crimes Act if *either* wilfulness or malice is proved and if *either* the building *or* the chattels are burned.

### XIV.

*Assignment and Specification No. 29.*

The court was requested to charge that there was no evidence offered by the State from which the jury could infer as to the value of the merchandise.

It was immaterial whether such evidence had been presented by the State or by the defense. The defendant himself had testified as to the value of the merchandise.

Furthermore, inferences as to value could properly be drawn from the testimony of the State's witness, Mr. Mc-

Cabe (Case, pp. 141 to 143). Certainly it could be inferred that the value of the stock was not less than the amounts he mentioned.

This request was properly refused.

## XV.

*Assignment and Specification No. 34.*

Four reputable witnesses, Chief Donoghue, Battalion Chief Dolan, Fireman Eckel and Assistant Superintendent Keegan of the Salvage Corps, had testified to seeing the carton, containing the inflammable liquid and the burning candle.

There was no evidence that what they saw was impossible of occurrence.

Common experience does not teach it to be impossible.

Whether the candle floated or stood on the bottom was of no consequence.

There was no basis in the evidence for this request.

## The Charge.

## XVI.

*Specification No. 43.*

This was proper comment. It did not invade the province of the jury or take from them the right to decide the fact.

## XVII.

*Assignment No. 37; Specification No. 45.*

The instruction as to prior contradictory statements was a correct statement of the law.

*State* v. *D'Adame,* 84 N. J L. 386.

The defendant did not request a fuller explanation of the law, so the court was under no duty to make one.

## The Weight of the Evidence.

### XVIII.

*Assignment No. 48; Specification No. 46.*

This court does not sit as a jury and reverse unless it is satisfied, from a reading of the evidence, that the defendant is guilty.

This court is not concerned with reasonable doubt.

*State* v. *Fisher,* 117 Atl. 519, 118 Atl. 927.

The court reviews the verdict as if this were a civil case on a rule to show cause, and does not reverse unless the verdict is so clearly against the weight of the evidence as to give rise to an inference of mistake, passion, prejudice or partiality.

*State* v. *Karpowitz,* 120 Atl. 40.

The kernel of the argument on the evidence in the brief for the defendant is that the State's witnesses, Donoghue, Dolan, Eckel and Keegan all perjured themselves.

The jury, watching the demeanor of these men on the stand, hearing their testimony, believed them.

The verdict is supported by the evidence.

**The judgment should be affirmed.**

Respectfully submitted,

J. O. BIGELOW,
*Prosecutor of the Pleas.*

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| THE STATE OF NEW JERSEY,<br>*Defendant-in-Error,*<br>*vs.*<br>ABRAHAM E. HARRIS,<br>*Plaintiff-in-Error.* | *On Error to Supreme Court.* |

## BRIEF OF PLAINTIFF-IN-ERROR.

This is a review on a bill of exceptions and also on the entire record under Section 136 of the Criminal Procedure Act, of the defendant's conviction at the Quarter Sessions Court of Essex County, on an indictment containing two counts. The defendant was convicted on both counts.

The Supreme Court affirmed the conviction in a *per curiam* opinion printed in the record of the case.

The first of said counts charged a violation under Section 126 of the Crimes Act and alleged that the defendant, at the time and place in the indictment laid, did set fire to and burn a certain building known as #204 Morris avenue in the City of Newark, and the goods, wares, merchandise and chattels therein contained, with intent to prejudice certain insurance companies in the indictment mentioned. The second count of the indictment charged the defendant with burning and causing to be burned and with aiding, counselling, procuring and consenting to the burning of the building of another, to wit: the building of Charles A. Rosewater. There is nothing in the indictment which describes the character of that building or which apprises the defendant whether the said building of Charles A. Rosewater was a dwelling house or a parcel thereof or belonging to or adjoining a dwelling house or whether said building was not a parcel of a dwelling house, so that, while it may have been the intention of the Grand Jury to indict for a violation under Section 124 of the Crimes Act, there is nothing in the indictment itself which indicates that the offense charged is a violation either under Section 123 or Section 124. It will elsewhere in this brief be

contended that the second count of the indictment charges no crime under either of said sections.

We state the facts of this case in two sections, presenting first the facts alleged and proved or attempted to be proved by the State, and secondly, the facts alleged and proved or attempted to be proved by the defense.

We respectfully call attention to the fact that in this brief we have designated the assignments and the specifications by their numerical designations as used in the Supreme Court, differing in some instances from their given numbers in this Court. We have added a numerical cross reference to our state of the case for the purpose of avoiding confusion in the use of conflicting numbers.

## Facts in State's Case.

On May 9th, 1922, between 9 and 10 o'clock in the evening, the State's witness, Stocklein, who was standing on Thirteenth avenue, in the City of Newark, observed sparks coming from the second floor of a building at the southeast corner of Thirteenth avenue and Morris avenue. He sounded a fire alarm and within a few minutes fire engines arrived (State of Case, pp. 88-89). Entrance into said second floor was forced by the firemen, who discovered a small fire which was quickly subdued and extinguished with the use of chemicals (see p. 90).

The second floor of the building in question was occupied by A. E. Harris Company, Inc., a corporation (see testimony of State's witness, Umansky, p. 38), which company was engaged in the business of manufacturing ladies' and children's silk, muslin and linen undergarments. The said company occupied the loft on the second floor of said building and no other portion thereof. The company had moved from New York and taken said quarters in December of 1921, moving its machinery and equipment to its new quarters. Quite a few weeks and a large sum of money were expended in altering the said loft to suit the needs of the company's business, substantial alterations being made, electricity installed and toilet facilities and other improvements being provided. During this period of installation and before the electrical work was completed, the carpenters on the job, working after sunset, employed plumbers' candles and other candles to sup-

ply light. Some of these candles were purchased by the State's witness, Bauer, who was the porter for the company, and some were brought by him from his own home (see pp. 84-85). In January the plant was ready for operation, help were engaged and the company commenced and prosecuted its business. At the time of the fire there were employed about twenty-five operators, a foreman, Umansky; the shipping clerk, Gilpatrick, and the porter, Bauer. The defendant was not employed at the company's factory and would visit the factory only two or three times a week (p. 39). His headquarters were at #1182 Broadway, in the City of New York. The loft was partitioned off into four sections. The major portion of the loft consisted of the operating room, where more than fifty machines were situated and in which all the operators worked. Another portion was the shipping department, where Gilpatrick worked; another portion of small area was the so-called "stockroom," where, on shelves were contained both finished and unfinished merchandise belonging to the company. Adjacent to the stockroom was the company's office, also of small area, into which access was had by a door leading to a small vestibule. From that vestibule there were two doors a few inches apart, leading to a platform on the outside of the building, from which platform, stairs descended on the outside of the building to the sidewalk.

On the day of the fire, the defendant arrived at the company's premises at about half-past five in the afternoon, bringing with him the pay envelopes for the help, that day being the established pay day for the company's employees. Within a few minutes the help were paid off and all the employees left the plant, there remaining behind only the defendant, the foreman, Umansky, and the shipping clerk, Gilpatrick. They all remained together at the plant from 5:45 until 7 o'clock that evening. During that space of an hour and a quarter, the foreman was straightening out the work of that day, making his preparations for the next day and was making his reports to

Mr. Harris. Harris was examining merchandise, both completed and in the process of manufacture, and was giving to Umansky manufacturing instructions, and to Gilpatrick shipping instructions. During this time Gilpatrick and Umansky were wrapping up bundles representing some completed merchandise (see pp. 27-28). While these bundles were being made up, Mr. Harris was in the immediate presence of Gilpatrick and Umansky, watching the bundles being made up (see p. 30). It took about fifteen to twenty minutes to make up these bundles (p. 30). The bundles were not taken because they proved to be too heavy and Mr. Harris directed that they be sent over to New York the following morning with the porter, Bauer (p. 32). After the men were through making up the bundles about a half hour or three-quarters of an hour was spent by Mr. Harris discussing with Gilpatrick and with Umansky factory reports and shipping instructions (see p. 32), immediately after which Mr. Harris told Gilpatrick to see whether all the windows were closed. Generally the windows were closed every night by the porter, but that day he was assisting in a sale at Reid's on Branford place, Newark. Gilpatrick went all around the plant closing every window that he found open (p. 33). After this was finished, Umansky, Gilpatrick and Harris walked out together to the platform on the outside of the building, at which place, in the presence of Umansky and Gilpatrick, Mr. Harris locked both doors with a snap lock, a patent lock and a skeleton key, three keys being required to lock up the plant. Harris then and there gave all the keys to the foreman, Umansky This was all done while the three men were on the platform on the outside of the building, a few inches apart from each other (see ll. 10 to 40 on p. 35 and top of p. 36). All three men walked together down the stairs and continued together down to the corner of Thirteenth avenue and Norfolk street, about eight or ten blocks away, where Gilpatrick stopped to take a trolley car. Harris and Umansky continued down to the corner of Branford place and Arlington street,

where Umansky left Harris, Harris entering Reid's Department Store.

There is no evidence in the State's case nor has it been suggested that the defendant, Harris, entered the loft in question at any time on May 9th, after he, Umansky and Gilpatrick left the plant at about 7 o'clock that evening. The only theory of the State's case is that the fire in question was set by the defendant between 5:45 and 7 o'clock on the day in question. At this point we make reference to the great number of witnesses produced by the defendant accounting for the defendant's absence from the plant for the full time between the moment that he left Umansky on Branford place and the following morning.

When the firemen arrived at the plant a little after 9 o'clock that night and forced their way into the loft, they found a small fire in progress in the operating room, which fire was quickly extinguished with the use of chemicals. The cause of that fire is unknown and the State offered not the slightest evidence to account for its origin, except that such origin might be inferred from the alleged discovery in the "stockroom" of a carton. A number of firemen called by the State testified that in the "stockroom" on the floor, they discovered and observed a paper carton, six or eight inches in height, half filled with gasoline, on the top of which gasoline lay a float and on top of which float rested a lighted candle, and that in an attempt to extinguish the lighted candle, an explosion resulted which consumed the gasoline and somewhat scorched the container. The State offered and there was received in evidence the said carton, float and candle, the candle being 5 3/16 inches in length and one inch in diameter (see testimony of witness, Jacobson, p. 377, not controverted by State).

The State offered in evidence over the objection of the defendant and there were received twelve fire insurance policies made in favor of the A. E. Harris Company, Inc., a corporation, as the assured, and covering the stock of

said company contained in the top floor loft of the building known as #204 Morris avenue, which insurance totalled the amount of $45,750.

The State called thirty-two witnesses, whose testimony may be summarized as follows:

1. The first witness, Edward H. Schwartz, who testified to making a plan of the loft occupied by the A. E. Harris Company. His testimony is in no way controverted.

2. John L. Day, the photographer, who took the six photographs offered in evidence by the State as "S. 1," "S. 2," "S. 3," "S. 4," "S. 5" and "S. 6," showing various portions of said loft.

3. Jacob Umansky, who testified in detail to the movements and actions of the defendant during the period of an hour and a quarter, during which, according to the State's contention, the defendant had set preparations for the occurrence of the fire in question. Umansky and the witness, Gilpatrick, were the only witnesses produced by the State to connect up the defendant with the ocurrence of the fire. The testimony of the State's witness, Umansky, stands uncontroverted in any particular.

4. Fred A. Gilpatrick, shipping clerk of the Harris Company. He, like Umansky, was called by the State to prove the actions and conduct of the defendant during the hour and a quarter in which, according to the State's contention, the defendant set preparations for the occurrence of the fire in question. The testimony of this witness is in no particular controverted.

5. Charles A. Rosewater, who testified to being the owner of the building at #204 Morris avenue, where the fire occurred.

6. Fred Bauer, the porter, who testified to being absent from the plant in the late afternoon of the day of the fire, for the reason that he was assisting in a sale at Reid's Department Store, and who also testified to the

presence of candles in the factory brought there by himself.

7. Charles H. Stocklein, who testified to discovering the fire and sounding an alarm between 9 and 10 o'clock on the night of May 9th.

8. James J. Dolan, Battalion Chief of the Newark Fire Department, who testified that he responded to the fire alarm, that he found a fire near the bins in the main part of the loft and that that fire had no connection with the fire in the stockroom (p. 91), and that in the stockroom he saw a paper carton, half filled with gasoline and about four or five inches high, and that in the center of the carton was a wooden float with a candle on it, and that the candle was lighted and that when he saw the candle three-quarters or an inch of the candle was left unconsumed. He then identified the State's candle exhibit, which according to the measurements in open court made by the defendant's witness, Jacobson, measured 5 3/16 inches (p. 377). (See testimony of Dolan, pp. 91-92.)

9. Patrick J. Donahue, fireman. He testified (pp. 98-99) that he observed in the stockroom a carton with a liquid in it, which he thought was gasoline; that *"on top of the liquid was a float; on top of the float was a candle; the candle was lit."* He also testified to a streamer being in close proximity to the carton. He was examined in great detail as to the carton, float and candle (p. 100) and testified that the float was "on top of the liquid," and that the candle was "on top of the float," and that the candle was lighted. He also testified to finding pails of water hanging on the pillars in the plant (p. 103), for use in case of fire.

10. James T. Keegan, fireman. He testified that he observed in the stockroom a paper carton, half filled with oil or some substance and that the float was "lying on top" (see bottom of p. 106 and top of p. 107). He also testified to seeing a streamer *under* the carton.

11. Patrick S. Smith, fireman. He testified to seeing in the stockroom the carton with the lighted candle and the streamer in "close proximity."

12. Frank Eckel. He testified to seeing the carton in the stockroom with a streamer "in the vicinity of the carton."

The next seven witnesses, to wit:

13. Joseph Berardi.

14. William F. Schweitzer.

15. Frederick C. Lang.

16. Clifford Dixon.

17. Patrick J. Broderick.

18. Richard Corlies.

19. James J. O'Brien.

testified to keeping watch at the plant and that nothing was removed therefrom.

20. Andrew W. McCabe. He was called as a witness to appraise the plant, consisting of the merchandise and machinery of the A. E. Harris Company. He was unable to appraise the value because he hadn't acquainted himself with the quantity and quality of the merchandise in the plant at the time of the fire, having examined but a small portion of the merchandise in the plant.

21. Charles G. Rosenstock. He was called as an expert as to the value of the plant, consisting of merchandise and machinery, but admitted that he hadn't counted the merchandise and didn't know the full quantity and quality thereof.

22. William A. Rowens. He testified merely to the manner in which an entrance was forced by the firemen into the plant at the time of the fire.

23. Michael J. Powers,

24. Edward A. McGrath,

25. Max Winans, and

26. Daniel Rothenberg,

were witnesses called merely to prove the safe custody of the carton, float and candle.

27. George H. Temmler testified that the merchandise burned amounted only to $1,576.84, and that the damage to the fixtures and machinery amounted to $148.25.

28. Frederick J. Greenberg was called to prove that the May rent had not been paid by the Harris Company, but both on direct and cross examination, the witness stated that the May rent had been paid and that all prior rent had been paid and that the only time when rent was not paid was when a dispute existed concerning some adjustments.

29. Anthony C. Helfrich, testified to wrapping up a coat and streamer on May 12th and leaving them at the factory and returning on May 14th.

30. Raeffele Cappadonna, testified to finding a can in the plant, the presence and contents of which can was later explained by the State's witness, Umansky.

31. George B. Callan, testified to the custody of the State's exhibits.

32. Alfred J. Hargan, testified to the custody of the State's exhibits.

At the conclusion of the State's case counsel for defendant asked for a direction of a verdict for the defendant, which motion was denied.

**Facts Proved by Defendant.**

The defendant called as its first witness Mr. Nicholas G. Kaufmann, a Newark photographer, who testified to taking a photograph of the stockroom in question, which photograph was taken on May 10th while he, the witness was under observation and surveillance of the firemen guarding the plant. The photograph which was received in evidence as Exhibit D. 8 (p. 223), was taken on May 11th and does not show the streamer and the coat, which are shown on the State's photograph exhibit and which the State's witness, Helfrich, testified he removed from the place where shown on the State's photograph on May 12th.

The defendant then called as a witness Hannah Albert, who testified to keeping correctly the books of A. E. Harris Company, which books were later admitted in evidence.

The defendant then took the stand and after testifying to the cost of the installation of the plant in Newark, which amounted to several thousand dollars, and sundry other matters, stated that on the day of the fire he came to the plant about 5:20 or 5:25 in the afternoon, bringing the pay envelopes with him and bringing also with him some embroideries, which he turned over to the foreman, Umansky; that after the help had been paid off and left, he, Umansky and Gilpatrick were left alone in the plant, that he spent some time with Umansky giving him instructions and looking over finished merchandise; that he then went with Umansky into the shipping room, where Gilpatrick was making up some bundles of samples; that a bundle containing 55 or 60 items had been made up, that it weighed 45 pounds and was very bulky; that an attempt was made to make the samples up into two separate bundles and that when they proved to be bulky, instructions were left to send the bundles over to the New York office with the porter the following morning; that at that point he instructed Gilpatrick to close the windows; that Gilpatrick walked around the entire floor closing the windows and that thereupon Gilpatrick, Umansky and the defendant left the plant together (p. 258); that he, the defendant, locked the doors, using three keys in doing so, and then and there gave the keys to the foreman, Umansky; that the three walked down Thirteenth avenue as far as Norfolk street, where Gilpatrick stopped to take a trolley and that the defendant and Umansky continued down to Reid's Department Store on Branford place, about a mile from the plant in question; that at Reid's Umansky left the defendant; that he, Harris, then entered Reid's Department Store, remaining there about an hour; that about 8 o'clock he and his daughter, Lucille, left for New York, arriving at their home on upper Broadway at

about 9 o'clock, and that after a light luncheon the defendant and his wife went to the moving picture theatre and remained there until after 11 and that he first learned of the fire the following morning by telephone message. The defendant testified with great detail as to the machinery, equipment and merchandise in the plant at the time of the fire and that the machinery in the plant which had cost $15,000 was worth $10,000 at the time of the fire (p. 262) and that the merchandise in the plant at that time was worth a little over $40,000 (p. 264).

The defendant offered to prove that for several months preceding the date of the fire the insurance carried on the machinery and merchandise had been constantly reduced and that the amount of insurance carried on the day of the fire was appreciably less than at any time since the company had commenced business in Newark. This offered testimony was rejected by the Court.

Miss Lucille Harris testified to the defendant coming to Reid's Department Store at 7 o'clock of the evening of the fire, of being admitted to Reid's by Capt. Newth and of remaining at Reid's until about 8 o'clock, during which time she saw him talking to Capt. Newth, Miss Liss and Miss Kasen and that she left with her father at 8 o'clock, going directly to New York, arriving there a little after 9 o'clock and that about a half hour later her parents left for the motion pictures.

Miss Violet Liss testified to seeing the defendant at Reid's between 7 and 8 o'clock of the evening of the fire.

Capt. Newth testified to opening Reid's door for the defendant at 7 o'clock and of seeing him at Reid's until 8 o'clock.

Miss Anna Kasen testified to seeing the defendant at Reid's between 7:30 and 8 o'clock on the evening of May 9th and of walking with the defendant and his daughter to Broad street a little after 8.

Manning Marks testified that he met the defendant and the defendant's wife between 9:30 and 9:45 on the night

of May 9th going into the Audubon Theatre on Broadway, New York City.

Mrs. Louise Marks testified to the same effect.

The defendant called seven character witnesses, to wit: Thomas J. Patterson, George L. Byrne, August W. P. Alenson, Dr. Meyer Jacobstein, Morris A. Jacobs, Manning Marks and Louise Marks, all of whom testified to the defendant's excellent reputation for truth and veracity.

The witness, Max Blum, testified to appraising the machinery, which was in the plant at the time of the fire, and appraised the same at its then market value at $7,500.

The defendant then offered to prove by the witness, George W. Fisher, the value of the merchandise in the plant on the day of the fire by proving an inventory made on June 13th following the fire by offering to show from the books how much should be added and how much should be deducted from the inventory of June 13th to determine the merchandise at the plant on May 9th, which offer was rejected by the Court. The defendant thereupon called as witness, Samuel Leopold, an expert accountant, who testified that the value of the merchandise on May 9th could be determined by Fisher's inventory of June 13th by adding thereto the sales between May 9th and June 13th and deducting the purchases of stock during the interim and that such was a recognized method, constantly employed and used by the government for tax purposes. Thereupon the witness, Fisher, was recalled to describe his appraisal made on the 13th of June, which testimony was rejected by the Court. The defendant offered to prove by the said witness, Fisher, the inventory of appraisal made on June 13th, which testimony was rejected by the Court.

The defendant accounted for the presence in the company's plant of the benzine, turpentine and other inflammable chemicals and liquids found in the plant at the time of the fire and offered in evidence as State's exhibits.

The porter, Bauer, and the foreman, Umansky, testified that such liquids and chemicals were used for cleaning and dyeing purposes in the regular course of the company's business and the cans and bottles introduced by the State were identified by the defendant's witnesses as having been in the plant, having been used for some time preceding the fire.

The State's witness, Umansky, was called by the defense as a witness. He testified that on the evening of the fire immediately before he left the plant with Gilpatrick and the defendant, he walked through the "stockroom" to get his hat and coat which were hanging in the front office; that the stockroom was absolutely dark and that there was no lighted candle on the floor (p. 349). The witness also testified that several times that evening and during the whole time that the defendant was at the plant, whenever the defendant called him, he (Umansky) passed through the stockroom (p. 364).

The witness testified (see p. 383) that the day after the fire he was in the stockroom and there was no streamer hanging there at that time.

The defendant called as a witness one Sidney M. Grabshied, a salesman of the A. E. Harris Company, who testified that he was on the road in Upper New York State taking orders for said company and that he continued to take orders during the week of the fire, but the Court would not allow the witness to identify such orders taken by him on the day of the fire and the following day.

The defendant attempted to prove by an expert accountant the assets and liabilities of A. E. Harris Company on the day of the fire, as such assets and liabilities were determined from the books of account of said company, then already in evidence. Such proof was excluded by the Court below.

By means of an inventory made on January 1st, 1922, and by accounting for all purchases, sales and overhead expenses between said date and May 9th, 1922, the de-

fendant established, through the expert accountant, Leopold, that on May 9th the merchandise at the company's plant totalled the sum of $40,133.82 (p. 396).

The defendant offered in evidence a series of letters written by the Harris Company and by the defendant himself to the shipping clerk, Gilpatrick, which letters contained shipping instructions, and which letters were sent between March 16th, 1922, and May 5th, 1922, and particularly a certain letter of May 4th. These letters were offered as indicative of the state of the company's business and to rebut any inference of a motive for the alleged fire. All of these letters were excluded by the Court.

The defendant attempted to prove, by the witness, Albach, an experiment conducted by the witness, which demonstrated that the alleged setting up of the fire consisting of a carton containing gasoline with a float on the gasoline and a candle on the float was a physical impossibility. The Court barred proof of the result of such experiment. The Court also barred the offer of the defense to have the witness conduct an experiment in open court with the liquids then already in evidence in the case (consisting of gasoline, turpentine, benzine and kerosene) and with a float and candle, for the purpose of demonstrating that the testimony of the State's witness as to the alleged set-up was a physical impossibility, which offer was rejected by the Court and which experiment the Court declined to permit. The Court also barred the offer of an experiment in open court to demonstrate that the State's exhibit, consisting of a float, would not float in the liquid, without any weight resting upon it, which offer was rejected and which experiment the Court declined to permit.

## State's Rebuttal.

In rebuttal, the State recalled the witness, Corlies. He testified to being present when the defendant's witness, Kaufmann, the photographer, took the photograph "D. 8" (which showed no streamer hanging). Corlies testified that he watched the photographer with a view to seeing that no things were changed (see p. 421).

The State also called as a witness Daniel Rothenberg, who testified that he examined the defendant on the day following the fire and that the defendant disclaimed having in his possession any keys to the plant and that when asked to produce the keys on his person, the defendant produced a bunch of keys containing keys to the plant, being two in number.

The defendant recalled the witness, Umansky, in rebuttal, who testified that three keys were necessary to open the plant and that the keys which were taken from the defendant by the State's witness, Rothenberg, were only two in number and that they would not have been sufficient to open the plant. At this point it should again be repeated that it was conceded by the State that the defendant was not back to the plant on May 9th after leaving the plant at 7 o'clock that night in the company of Umansky and Gilpatrick.

Before proceeding with the discussion of the points of law, which we raise in this case, there are several facts which we desire to emphasize. They are as follows:

There was only one fire in the loft when the firemen arrived. That was in the main loft near the bins. No explanation was offered by anyone as to the cause of that fire and when the case was closed, there wasn't anything to indicate that that fire was of incendiary origin. Of course, it was the theory of the State that that fire was produced by some means similar to the alleged set-up discovered in the stockroom, but no evidence to sustain that theory appears in the case. The theory of a set-up necessarily involves the idea that the set-up was ar-

ranged before seven o'clock of the evening in question, for nowhere is it pretended that the defendant was at the plant after seven o'clock of the evening in question.

Now, in connection with that theory of the State, it should be remembered that the State's main witnesses, Umansky and Gilpatrick, both testified that before they left the plant with the defendant, they saw no signs, indications or praparations for a fire (see p. 50, and p. 68).

The defendant, when he took the stand testified, that neither on the evening in question nor at any time of May ninth, nor on any other day did he set any candles or make any plan or arrangement by which the building or the stock or any part, or either, would be set on fire (see ll. 22-27, p. 258).

## POINT I.

### ASSIGNMENTS OF ERROR 1, 2, 3.
### SPECIFICATIONS 1, 2, 3.

**The indictment is insufficient.**

The indictment in this case contains two counts, the first of which is founded on Section 126 of the Crimes Act, which reads as follows:

> "126. BURNING BUILDINGS, etc., WITH INTENT TO DEFRAUD INSURERS.—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, ship, or vessel; 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. (P. L. 1898, p. 829."

The second count is, concededly, based on Section 124, which as amended by Chapter 106 of the Laws of 1919, p. 257, reads as follows:

> "124. 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, whether it be his own or that of another, not a parcel of a dwelling house, or any shop, storehouse, warchouse, malt-house, mill, or other building, whether it be his own or that of another, or any ship, boat or other vessel, whether it be his own or that of another, lying within the body of any county within this state, or any church, meeting-house, courthouse, workhouse, jail or other public building, shall be guilty of a high misdemeanor."

Before the jury was impaneled leave was obtained to withdraw the plea of not guilty and to make a motion to quash each of these counts. The motion was made and denied (p. 9) and an exception duly taken.

* * * * * *

Turning to the indictment, the first count (p. 3, l. 22) charges that the defendant did wilfully, and maliciously set fire to and burn a certain building known, etc., and *the goods, wares and merchandise and other chattels,* therein situate, which said building and said goods and chattels had been insured by certain corporations named, with intent to prejudice said corporations, which said corporations had theretofore underwritten certain policies of insurance thereon and which policies were then in force and effect.

There was united in one count a charge of setting fire to both the building and personal property therein located with the common design to prejudice insurance companies with policies existing on both the building and personal property.

*Our claim is that this count was duplicitous, charging two distinct crimes, namely, the burning (a) of a building, and (b) of personal property, either one of which is by Section 126, a separate and distinct crime.*

See also Defendant's 8th request p. 455, l. 38; court's actio
thereon, p. 452, l. 17; 31st assignment of error, p. 464, and
31st specification, p. 471. (Assignment and Specification

In *State* v. *Lamb,* 81 N. J. L. 234, Justice Swayze, speaking for the Supreme Court on certiorari of an indictment, held that there was, in one count, a charge of two distinct crimes but declined to set aside the indictment expressly upon the ground that at the trial, upon a motion to quash, the State could be permitted to strike out one of the charges if what was left sufficed to charge a crime under Section 44 of the Criminal Procedure Act.

At page 11, line 28, the State, after it opened its case, was requested to elect upon which of the charges in this count they intended to rely "whether upon the alleged burning of the merchandise or the alleged burning of the building." *The motion was denied and an exception taken.* In this we think there was error.

Again, the second count, based, as we have seen, wholly upon Section 124 of the Crimes Act as amended by Chapter 106 of the Laws of 1919, p. 257, is, we contend, subject to the following serious criticisms:

(a) *Because the building referred to is not described as "not parcel of a dwelling house."*

Section 123 of the Crimes Act applies to the burning of a *dwelling* house, or kitchen, shop, barn, stable or other outhouse, *parcel thereof or belonging or adjoining thereto.* On the other hand Section 124 is confined wholly to buildings *not parcel of a dwelling house,* and the words "not parcel of a dwelling house" are a necessary description of the character of the building and an essential ingredient of the charge.

In *State* v. *Price,* 11 N. J. L. 203, 216, it was held that the statutory offense there charged was not complete unless the barn or building is not a parcel of the dwelling house.

In *State* v. *Fish,* 27 N. J. L. 323, it was held that the charge of burning the property "of another" was not sustained if it appears by the evidence that the accused was in possession of the property under a contract to purchase. It is interesting, however, to note how the

Court, in considering Sections 30 and 31 (now Sections 123 and 124 respectively) clearly shows that the words "not parcel of the dwelling house" are a part of the description of the offense. The Court says (p. 325):

> "The 31st section of the act under which the defendant is convicted enacts that if any person shall wilfully and maliciously burn the barn or other building 'of another' not parcel of the dwelling-house, he shall be guilty of a misdemeanor. It is suggested that the offense designated in this section is not against the possession, as in the preceding section, but against the property of another and hence title, and not possession, is drawn in question. The 30th and 31st sections of the act are not only in *pari materia,* but they are substantially parts of one and the same enactment. They both prohibit the wilful and malicious burning of the building 'of another.' The one relates to the dwelling house, and other buildings parcel thereof, the other relates to the buildings other than the dwelling house and not parcel thereof. *This is the substantial difference in the two enactments and they have been separated for the purpose of distinguishing the degree of punishment.*"

In *State* v. *Lentz,* 92 N. J. L. 17, Chief Justice Gummere, in setting out the essentials of the crime under the statute, was very careful to include the words "not parcel of a dwelling house" as an essential ingredient of the crime.

The situation is not the same as if the words "not parcel of a dwelling house" occurred in a proviso of the statute. They are an esential part of the enacting clause (*State* v. *Reilly,* 88 N. J. L. 104, 108) and constitute a part of the essential description of the offense and, of course, every essential ingredient of the offense must be set out in the indictment (*State* v. *Solomon,* 117 Atl. Rep. 216).

See also *Moreland* v. *Director General,* 96 N. J. L. 228.

In *Gibson* v. *State,* 54 Md. 447, the Court speaking of a similar charge under a similar statute, said (p. 54):

> "The burning of barns and other outhouses 'not parcel of any dwelling house' is a distinct and separate offense, described in specific language and prohibited and punished by Sec. 33 of Art. 72 of the Revised Code.
>
> Where a statute contains an exception so incorporated with its enacting clause that the one cannot be read without the other, the rule of pleading is, that the indictment must negative the exception. Kellenback & Brash *v.* State, 10 Md. 438-439; Rawling *v.* State, 2 Md. 211-212; Wharton's Crim. Law 191. It has been decided in the case of Kellenbeck that the qualifying words 'not a parcel of dwelling house' are essential parts of the description, and cannot be omitted.
>
> The first count of the indictment, in this case, neither charges an offense at common law nor under the code, the description of the property being too indefinite to bring the offense within the crime of arson, or within the statutory offense of burning an outhouse not parcel of any dwelling house."

See also the case of *Kellenbeck & Brash* v. *The State,* 10 Md. 438, where the Court said:

> "Nor can it be considered a valid indictment for an offense under the 2nd clause in the 5th section of the act of 1809, ch. 138. Were it not liable to objection in any other respect, it is so for the reason that it fails to describe the building as 'not parcel of any dwelling house.' The language of the clause referred to is 'Every person, his or her aiders, abettors or counsellors, who shall be duly convicted of the crime of wilfully burning any mill, distillery, manufactory, barn, meat house, tobacco house, stable, warehouse, or other outhouse, not parcel of any dwelling house, etc.' These latter words of exception or qualification in relation to the house mentioned, constitute part of the description of the crime and being included in the enacting portion of the statute, they should be used in the indictment. Wharton's Amer. Crim. Law 191. Rawling *v.* The State, 2 Md. Rep. 211, 212."

In 2 Ruling Case Law, at 510, we find:

> "An indictment or information charging statutory arson must show that the property burned was the subject of arson as defined by the statute under which the prosecution is instituted. Thus where a statute makes it arson to burn certain enumerated houses 'not parcel of any dwelling house' the quoted words of exception or qualification in relation to the houses mentioned constitute part of the description of the crime, and being included in the enacting portion of the statute they should be used in the indictment. But under a statute making it arson to burn an outhouse, and imposing a different punishment where the outhouse is in a city, town, or village, the indictment is not defective for failing to state whether the outhouse burned was in a city, town, or village, as that question is not material in determining the legal character of the offense but only affects the punishment."

(b) *The second count is also faulty in that it fails to locate, or in any way identify the building burned.* The sole description is "The building of Charles A. Rosewater." The building is not only not shown to be not parcel of a dwelling house, but it is given no locality whatever. The rule is as shown in *State* v. *Uvalde Asphalt Paving Co.*, 68 N. J. L. 512, that the offense must be localized in an indictment to the extent at least of having been committed in the county where the indictment is found.

*State* v. *Grossman*, 95 N. J. L. 497;
*Halsey* v. *State*, 4 *Id.* 369.

(c) *The second count is also duplicitous in charging (1) the actual burning, and (2) the counselling and procuring to be burned.*

In *State* v. *Brand*, 76 N. J. L. 267, it was held that the counselling a fire was a distinctive offense regardless of whether a fire actually occurred or not. Now, we requested that the State elect as to which of these two offenses it proposed to rely on (Case, p. 11, l. 38), and our motion

was denied and exception taken. This was erroneous (*State* v. *Lamb,* 81 N. J. L. 234).

## POINT II.

ASSIGNMENTS 6, 7 AND 8.
SPECIFICATIONS 6, 7 AND 8.

**The Court below permitted the State's attorney to contradict the State's witness, Gilpatrick, after the latter had given evidence favorable to the defendant, by calling the witness' attention to an alleged statement made on a previous occasion, on which previous occasion the defendant was not present.**

The prosecutor was permitted to ask the witness the following questions:

> "Didn't you say, 'on Tuesday, May 9, 1922, about 5 P. M. I saw Mr. Harris for the first time that day in the shipping department?'
>
> "You then said, 'I walked out to the front of the factory and saw Mr. Harris and Mr. Umansky sitting in the office talking to each other.'
>
> "Did you say that?" (p. 71).

The prosecutor was also permitted to read the whole statement before the jury by means of a series of questions, which questions incorporated the matter contained in said statement, which statement was made on a previous occasion and in the absence of the defendant.

This was done upon the claim of the State's attorney that he was "surprised" and under the alleged authority of the case of "*State* v. *D'Adame,* 84 Law, page 386." The Court permitted such testimony on the ground that it neutralized the witness' testimony. An examination of the testimony thusly sought to be neutralized will at once indicate that such was not the effect of the line of examination resorted to by the prosecutor and objected to by counsel for the defense. The previous statement of the witness was not in any material respect contradictory of the testimony sought to be neutralized and the

permitting of such statement to be read to the jury by means of questions, accomplished the result of getting into the case and before the jury the previous statement which could not be evidential against the defendant, because not made by the defendant, and not made in the presence of the defendant and not subject to cross examination by him. At this point we beg to call the Court's attention to Point in which, assuming the correctness of the admission of the aforementioned testimony, we contend that the Court committed legal error in its charge to the jury, in failing properly to limit the force and effect of the testimony of the witness, Gilpatrick, so elicited by the prosecutor under a claim of surprise, and in failing properly to instruct the jury with reference to such testimony.

## POINT III.

ASSIGNMENT #11.

SPECIFICATION #11.

**The Court below committed legal error in refusing, upon motion of defendant's counsel, to strike out the testimony of the State's witness, Rosenstock, concerning the value of the machinery at the plant of the Harris Company, after upon cross examination the witness admitted the following:**

(a) That the age of the machines had something to do with their value and that he didn't know how old they were.

(b) That he never bought any machinery.

(c) That he knew the value of machinery only by seeing bills for machines purchased, not by the witness, but by his brother.

(d) That all the knowledge that the witness had concerning the machinery is what he had seen on bills.

The witness had theretofore testified that the machinery was worth $3,500.00 (see ll. 39-40, p. 153).

His admissions made on cross examination showing a lack of competency on the subject of the value of the machinery appears in the following series of questions and answers (see ll. 8 to 32, p. 155):

> "Q Now, these machines. Does their age have anything to do with their value? A Yes, sir.
>
> Q Do you know how old those machines were? A Not by numbers.
>
> Q Do you know how old those machines were? A No, sir.
>
> Q Do you know their first cost? A Yes, sir.
>
> Q Now, do you know a machine by the designation 107 W. I.? A I don't know any numbers. You can tell me what it is.
>
> Q When you buy them, how do you buy them? A Well, I don't buy them.
>
> Q You don't? A No, sir.
>
> Q How do you know their value if you don't buy them? A Because I see the bill for them.
>
> Q Oh, that is where you get your values? A Yes, sir.
>
> Q Just bills that you saw? A No, my brother does the buying and I see the bills.
>
> Q Then all the knowledge that you have of machinery is what you have seen on the bills? A Yes, sir.
>
> Q You have never bought any machinery? A No, sir."

After the foregoing testimony, counsel for defendant moved that the witness' testimony concerning the value of the machinery be stricken out, which motion was overruled, the Court saying:

> "No. I think a man in business that uses the machinery after it is bought and knows the prices —I think I will allow that evidence."

It is clear that the witness, Rosenstock, whose knowledge was based on bills for machinery, purchased by his brother, was no more competent to testify concerning the value of machinery than the clerk who made out the bill, or the bookkeeper who received it for purposes of entry. The opinion of Rosenstock is no more com-

petent than the source of his knowledge and had he produced the bills from which he secured his special learning and skill, they would not have been competent evidence. Then again, it must be observed, that if by any process of reasoning a witness may be regarded as expert on machinery values, simply because he has seen bills for machinery purchased by another, never having purchased any machinery himself, the testimony is still inadmissible for the reason that there is nothing in the case to indicate that the bills, which were seen by the witness, were for machinery of such kind and purchased at such time as would enable the witness to testify concerning the value of the machinery of the *Harris Company,* at or near the date of the fire.

Our Supreme Court in the case of *Wheeler & Wilson Manufacturing Co.* v. *Buckhout,* 60 N. J. L., at p. 104, defines an expert witness as follows:

> "An expert witness is one possessed of special knowledge or skill in respect of the subject upon which he is called to testify. Mr. Lawson lays down the rule that one may be qualified as an expert witness by study without practice or by practice without study. Laws. Ex. & Sp. Ev. 210. He justly adds that mere observation, without either study or practice, will not be sufficient."

It is patent that the witness Rosenstock, is well without the Court's definition of an expert witness and well within the rule, that mere observation does not qualify one as an expert witness.

The objectionable testimony of Rosenstock was very prejudicial to the defendant. The defendant, by competent and persuasive expert testimony, later proved that the machinery in question was worth $7,500 at the time of the fire (see ll. 8-28, p. 399). As against this competent testimony, the jury was permitted to consider the incompetent testimony of the witness, Rosenstock.

## POINT IV.

ASSIGNMENT #12.
SPECIFICATION #12.

**The Trial Court committed legal error in refusing to strike out the testimony of the State's witness, Rosenstock, concerning a conversation had between himself and the State's witness, Umansky.**

We call attention to the following testimony of the witness, Rosenstock, upon questions propounded by the State's attorney (see p. 159):

> "Q Don't you tell us what you told Mr. Umansky, but tell us what Mr. Umansky, Mr. Harris' foreman, did while you were making the appraisal to facilitate your appraisal. A He told me the price of a garment and I said to him, 'Figure that—'
>
> *Mr. McCarter.* I object.
>
> *The Witness.* I said, 'I will figure it and you figure yours and I will figure mine,' and we came out ten cents difference.
>
> *Mr. McCarter.* As I understand it, he is giving a conversation between Umansky and himself in the absence of Mr. Harris. It is incompetent and I object to it.
>
> *The Court.* I don't think he reached that. He simply reached where he figured the garment. I will allow it to that point.
>
> *Mr. McCarter.* It is so difficult to understand the witness that I may be mistaken, but if he is permitted, in the answer he has given, to give testimony as to a conversation between Umansky and himslf, I respectfully object to it and ask that it be stricken out and pray an exception to your Honor's ruling.
>
> *The Court.* Read the question.
>
> (Question read and last answer read.)
>
> *The Court.* I will allow the figures.
>
> *Mr. McCarter.* Your Honor refuses to strike out the evidence and I pray an exception."

By means of the testimony so objected to, the witness, Rosenstock, was permitted to state the result of an alleged appraisal of merchandise made by Umansky, which result was purely hearsay and inadmissible, and with respect to which result, the defendant had not the opportunity of cross examination. By the same means, the State was able to prove that a third person, Umansky, agreed with Rosenstock's appraisal, without calling Umansky as a witness on that point and without affording the defendant the opportunity of cross examination. That the defendant was prejudiced thereby is manifest from the fact that with Rosenstock's testimony allowed to stand, the jury was able to conclude that Rosenstock's appraisal stood approved by Umansky, the defendant's own foreman, and give Rosenstock's appraisal the same weight and credence as though Umansky had taken the stand and testified to the same effect as the witness, Rosenstock.

## POINT V.

ASSIGNMENT #13.
SPECIFICATION #13.

**The Court committed legal error in receiving in evidence, over the objection of defendant, twelve fire insurance policies covering the stock of A. E. Harris Company, Inc., a corporation.**

### A.

At the time the policies were offered in evidence, it had already been established that A. E. Harris Company, Inc., was a body corporate (see l. 10, p. 38), but nowheres in the State's case, either at the time the policies were offered or at any time before the State rested, was there any connection established between the A. E. Harris Company, Inc., a corporation, and the defendant.

The general rule on the subject of insurance is well stated in Section 55, p. 574 of Volume V of Corpus Juris:

> "The fact that accused held a policy of insurance on the property burned, is admissible on the question of motive; but if the policy was not held by him, evidence of insurance is not admissible unless some connection is shown between the accused and the insured."

Nowheres in the State's case does it appear that the defendant was an officer or stockholder in the A. E. Harris Company or that he was to any extent financially interested in its property or in any insurance collectible by it. While it is true that he came to the Newark plant and gave shipping and manufacturing instructions, for aught that appears in the State's case, his connection with the company was no different or greater than that of any other employee, no different or greater than the connection of Gilpatrick or Umansky, the other two persons who were with the defendant during the period of an hour and a quarter during which, according to the State's theory, the fire in question was set. To justify an inference of an intent to prejudice insurers, it is not enough to show that the company would have collected insurance. It is indispensable to show that the defendant was so interested in the company as to make his criminal intent a matter of reasonable inference.

At this point we wish to note, that after the State rested and a motion for a directed verdict was denied, the defendant took the stand and testified that he was the president and a stockholder of the Harris Company. We respectfully submit that such testimony may not be considered on the point under discussion. The admissibility of the insurance policies must be determined on the State's case alone and not upon any testimony adduced by the defendant. We point to the case of *State* v. *Bacheller,* 89 L. 433, in which our Supreme Court considered the question, whether at the close of the State's case, there was a case for the jury, "without considering the facts developed in the defendant's case tending

to cure, if they justify such inference, the absence of proof of defendant's guilt when the motion for a direction was made" (at p. 437). The opinion in that case written by Justice Bergen, is based upon the idea, that to permit any evidence given by the defendant to cure an infirmity in the State's case "comes perilously near compelling the accused to convict himself" (p. 436). The Bacheller case was approved and followed by the Court of Errors in the case of *State* v. *Contarino,* 92 L., p. 381.

**B.**

*The policies of insurance of the A. E. Harris Company were inadmissible unless and until it first appeared that the defendant knew of such insurance or was in such position that knowledge was legally imputable to him.*

There is nothing in the State's case to indicate that the defendant knew that the policies of insurance offered in evidence were carried by the defendant company or were in existence; nor was anything shown by the State from which such knowledge could be charged against the defendant.

It cannot be contended that an intent to prejudice insurers can even be formed or be present in the mind of an accused unless knowledge of the existence of insurance be proved. Certainly, if no insurance had existed on the property of the Harris Company, the first count of the indictment would not have been found and could not be sustained. It is the fact of the existence of insurance, coupled with the liability of the insurer to respond in damages in the event of a fire loss, that is indispensable to the spelling out of a crime under Section 126. The intent to produce such loss and prejudice to the insurer necessarily involves knowledge on the part of the accused that there is in existence such insurance written by such insurers. There is not a scintilla of evidence in the State's case that the defendant, at the time of the fire, knew that insurance, if any, was carried by

the company and that the designated insurers had underwritten the risk.

*Assuming that said policies were in force, which we do not concede, there was no evidence in the State's case to prove that the defendant knew that fact,* without which knowledge an intent to prejudice the insurers could not be found. There being no evidence in the State's case that the defendant knew of the existence of any insurance at any time, it cannot be contended that it will be presumed against him that the insurance once placed, continued in force until the trial, is shown.

**C.**

There was no evidence in the State's case to the effect that the insurance policies offered in evidence were written and issued by insurers competent to write and issue policies of fire insurance, and that such insurers had been authorized by the Commissioner of Banking and Insurance of the State of New Jersey, to engage in the fire insurance business and had secured from him the certificate of authority required by Chapter 134 of the Laws of 1902 and the acts amendatory thereof and supplementary thereto. See Compiled Statutes, Section 9, referring to Domestic Corporation, and Section 59, referring to Foreign Corporation.

It hardly requires argument to indicate that if the policies in question had been written either by domestic or foreign insurance companies not duly authorized to transact business in New Jersey and cover risks in this state, such contracts of insurance were written by nonexistent entities and were unenforceable and did not constitute valid obligations, so that the insurers could not have been compelled to pay any claim under such policies and therefore could not have been prejudiced. In failing to prove the proper corporate existence and the authority to do business, the State failed to prove a condition essential to the fact that such insurers could have been prejudiced.

## POINT VI.

ASSIGNMENT #14.
SPECIFICATION #14.

**The motion of the defendant in the close of the State's case for a direction of a verdict should have been granted.**

It is perfectly well settled that the refusal of a motion to direct a verdict of acquittal at the close of the case for the State where the case fails to show the defendant's guilt is an error reviewable under Section 136 of our Criminal Procedure Act, and the right to the reversal is not waived by the defendant because he thereafter proceeds with his defense (*State* v. *Bachellor,* 89 N. J. L. 433, 98 Atl. Rep. 829). As shown in the opinion in that case unless this be the rule it would amount to sanctioning the conviction of a man by his own testimony which he ought not to have been compelled to give. The fourteenth specification of cause of reversal (under Sec. 136), raises this point and an exception was taken to the refusal of the Judge to grant when the State closed its case, the defendant's motion for a directed verdict (Case, p. 219).

It is therefore important to ascertain exactly what had not been shown at the close of the State's case when the State rested, there was no evidence to show the following:

*(a)* The character of the building at #204 Morris avenue. The only evidence touching that building was that the second floor was used as a loft for manufacturing purposes. There was no evidence as to the use of the other portions of the building and no evidence that said building was used as a dwelling house, or that it was part or parcel of a dwelling house, neither was there any evidence to the effect that said building was not a dwelling house and not part or parcel of a dwelling house.

*(b)* Any connection between the defendant and the occurrence of the fire or any act or conduct from which such action might be inferred.

*(c)* No proof of the value of the complete plant, including machinery and merchandise, of the A. E. Harris Company, from which, by comparison with the amount of insurance alleged to be carried, an inference could be drawn that there was any other insurance.

*(d)* Any evidence that the defendant knew of the amount of insurance carried by the A. E. Harris Company nor any such connection with said company as would charge the defendant with knowledge of the amount of insurance carried.

*(e)* That the twelve policies of insurance received in evidence were in force at the time of the fire and that the said insurance was valid and subsisting insurance and that the insurers therein named had the legal capacity and authority to issue such policies of insurance and that said policies of insurance constituted valid and enforceable contracts against the insurers therein named.

*(f)* That the defendant was an officer or stockholder of the A. E. Harris Company, or had such connection therewith as would indicate a motive for the commission of the crimes charged and as would justify the inference of a criminal intent to prejudice the insurers.

There was no proof whatever of the connection, if any, between the defendant and the A. E. Harris Company beyond the fact that he worked in some capacity for it, nor was there any proof of the value of the stock of the company nor any connection shown between the policies of insurance which were upon the property of the company and the defendant.

Under the first count, (*i. e.,* the burning with intent to prejudice the insurance company), the case utterly lacked any proof that the defendant even knew of the existence of the insurance by the company, and any proof to indicate that either he or anyone else so far as he knew would benefit by reason of the fire. So, with reference to the first count, the mere proof of the fire, without some evidence to manifest the presence of the essential malice under that count, is not enough.

*(g)* That the fire in the operating room (which was the only fire that occurred) was of incendiary origin or the result of some act on the part of the defendant.

Too much stress cannot be laid on the fact that the fire that was discovered and put out by the firemen was out in the main loft where there was no evidence of any setting whatever, nor was any explanation offered by anyone as to how that fire originated. On the other hand, the evidence of the State was that when the firemen went into the stockroom the candle was still burning in the carton from which, as yet, no fire had originated or been caused and that the scorching that, at the time of the trial, appeared to have occurred in the stockroom was the result of a flareup caused by the firemen in putting out the candle.

Furthermore, Gilpatrick remained all the time in the main loft where the fire actually occurred and, when called as a witness by the State, testified that immediately before he left he went all around the main loft and saw no preparations for a fire there (pp. 64 to 68). He also testified that in making his rounds he could see the bins and did see the bins, where, later, at nine o'clock, the firemen discovered the only fire that was in progress (p. 65, l. 20). This testimony of the State's witness not only fails to connect the defendant with any preparations for a fire, but definitely establishes that the fire, if of incendiary origin, was set by someone after the defendant, Umansky and Gilpatrick together left the loft.

## POINT VII.

ASSIGNMENTS #16-17.
SPECIFICATIONS #16-17.

**The rejection of the evidence of the witness Fisher as to the inventory he made on the fifteenth of June, of the stock then on hand, was improper.**

(See sixteenth assignment of error, p. 461 and sixteenth specification of causes for reversal.)

We offered to show by Mr. Fisher (p. 314) that he was an expert in the valuation of stock such as was carried by the Harris Company; that on the thirteenth of June he made a complete inventory of the stock then on hand, the value of which he offered to show. This offer was accompanied by our offer to follow it up with proof by Mr. Leopold from the books, which had been proven, of additions and subtractions for the additions and the subtractions from the stock between the date of the fire and the date of Fisher's inventory. This offer was overruled and exception taken. We think there was manifest error here. While it is true we had the evidence of Mr. Leopold as to the value of the stock, predicated upon an inventory made in the previous January, based upon additions and substractions according to the books from that date down to the date of the fire, that was only one witness and if we could have corroborated the correctness of his testimony by that of so distinguished a witness as Fisher, by working backwards from the date of his inventory, the proofs would have been practically unassailable that the stock on hand at the time of the fire was so valuable that any incentive or motive on the part of the defendant to have caused the fire was entirely absent. The Leopold statement was wholly based upon the correctness of the inventory in the books. If the jury doubted, for any reason, the correctness of that inventory, then we were entitled to have had an independent inventory made by Fisher who was totally disconnected with the Harris Company. It must be remembered that the

Court stigmatized the entries in the books as self-serving statements (p. 394), and the jury may well have given no credence to the company's own inventory.

## POINT VIII.

ASSIGNMENT #19. ALSO ASSIGNMENT #15.
SPECIFICATION #19. ALSO SPECIFICATION #15.

**The Court committed legal error in overruling the question put to the defendant's witness, Grabshied (page 393):**

> *"Will you look through these orders and see if you can find any order taken on the day of the fire or the day following the fire."*

The witness was a salesman employed by the Harris Company and testified that for several weeks preceding the fire and during the week within which the fire occurred, he was in Upper New York State taking orders for the company; several large and substantial orders were taken by him on the day following the fire. The witness is the son-in-law of the defendant and the defendant sought to put in evidence the orders taken on May 9th and 10th, as a curcumstance from which might be negatived a criminal intent, the point being that if as contended by the State, the fire was prepared by the defendant, he would not have permitted his salesmen, and particularly his own son-in-law, to continue on the road taking large orders and committing the Harris Company contractually. The action of the Trial Court in refusing to allow the witness to identify such orders was prejudicial to the defendant, in that it excluded from the case a fact and circumstance from which the want of criminal intent might have been found by the jury. Had the defendant recalled his salesmen from the road before the fire, or given them instructions to take no orders after a certain day, such conduct would have been clearly admissible to show a criminal intent. If this be so, the converse of the

proposition is equally so and the defendant should have been permitted to prove the orders of May 9th and May 10th, as conduct consistent with the hypothesis of innocence and as sustaining the legal presumption of innocence.

ASSIGNMENT #15.
SPECIFICATION #15.

For the same reason we contend, *Assignment 15, p. 461,* Cause of Reversal 15, p. 468, the action of the Trial Judge (p. 267) was erroneous in refusing to permit the defendant to prove what insurance was carried on the first of February and on the first of March, last preceding the fire, for the purpose of proving that the amount of insurance was being constantly and appreciably reduced and was considerably less on the day of the fire than at any time within three months preceding such fire. Certainly if it appeared in the case that on the first of February and the first of March preceding the fire the insurance had been greatly increased, the State would have seized upon that fact as an indication of the defendant's guilt. By a parity of reasoning the defendant should have been permitted to have shown this reduction in the insurance as conduct consistent with the hypothesis of innocence and as bearing out the presumption of innocence accorded by law.

## POINT IX.

ASSIGNMENT #21.
SPECIFICATION #21.

**Legal error was committed in the exclusion of certain letters sent by the Harris Company and by the defendant between March 16, 1922 and May 5, 1922, to the shipping clerk, Gilpatrick, which letters contained shipping instructions.**

Particularly was the defendant prejudiced by the exclusion of one of said letters dated and sent on May 4,

1922, in which letter were discussed factory complaints and the necessity of getting goods ready for the June shipment. These letters were not self-serving declarations, but were communications in the regular course of business, indicating clearly the interest of the defendant in the continuance of business and negativing the criminal intent charged against him. We call attention to the letter of May 4th, a copy of which has been annexed to the record of the case, and we respectfully submit that a perusal of that letter will indicate its admissibility.

## POINT X.

### ASSIGNMENT #20.
### SPECIFICATION #20.

**The Trial Judge improperly rejected evidence of the assets and liabilities of the A. E. Harris & Company, Inc., on the ninth of May, 1922, as appear from the books of the company.**

It must be remembered that (p. 231) Miss Albert, the former bookkeeper of the company, swore that the books which were produced and which were marked in evidence had been accurately kept by her down to and after the day of the fire. She was no longer in the employ of the company. We offered to prove by Mr. Leopold (p. 394), an expert accountant, that he had examined these books and from them made a statement from which he was prepared to show the financial condition of the A. E. Harris Company at the time of the fire. This evidence was excluded upon the ground that the books were not evidence upon this subject, being, as the Court held, merely self-serving declarations. Exception was taken (p. 395) to this ruling and error assigned (Assignment #20, p. 462).

We think this was plainly error. The financial condition of the company at the time of the fire is very important upon the question of motive. If the company was heavily in debt the inference that the fire was set

for the purpose of collecting the insurance was much stronger than otherwise. If on the other hand it was in a strong financial condition, the opposite conclusion would follow.

We conceive of no other or better way to prove the financial condition of a business enterprise at any given time than by an examination of its books which appear to have been regularly and honestly kept.

In *Meyer* v. *Sefton,* 2 Starkey (3 Eng. C. L. R. *274), Holroyd, *J.,* held, where the question was as to the solvency of a party at a particular time, the situation as collected from his books was competent evidence. There evidence was adduced to show the value of the property and a witness was produced who had examined the accounts and books of the bankrupt and it was proposed to examine him as to the result, as a means of ascertaining what the value of the property in question was. Upon this being objected to, Holroyd, *J.,* was of the opinion that the evidence was admissible; that such evidence had been admitted in a case before Lord Kenyon after it had been objected to, where the question was as to the solvency or insolvency of a party at a particular time. From the very nature of the case such an inquiry could not be made in court and, therefore, evidence on such point must be given by someone who had had the means of inquiry and who could state the result.

The correctness of this rule is recognized in *Jones on Evidence,* Section 206, note 31; and in the American note to the New Jersey edition of 1904 of Stevens' Digest of the Law of Evidence, p. 163, it is stated:

> "In this country books of account are admissible both against and in favor of the person keeping them when properly authenticated, Am. & E. Enc. of Law (2nd ed.) p. 903."

In *re Iron Clad Manufacturing Co.,* 197 Fed., at 280, upon an issue of the solvency or insolvency of the alleged bankrupt, the books of the bankrupt were examined and produced in court and the result of their examination

showed on their face an excess of assets over liabilities of about $350,000. This procedure was approved of by the Circuit Court of Appeals.

We fail to see how any other or better evidence could be offered. How could you show the financial condition of the company in any better way than from its books? Of course if they had been padded, or any falsity shown in connection with them, the situation would have been different, but books of account regularly kept in the due course of trade, because of the presumption of their being regularly and honestly kept, have always been admitted as evidence of the facts therein stated.

## POINT XI.

ASSIGNMENTS #18, 23, 24 AND 25.
SPECIFICATIONS #18, 23, 24 AND 25.

**There was a wrongful and harmful exercise of discretion by the Trial Judge in excluding the proferred testimony (a) of the witness Albach (p. 418), as to the result of an experiment made by him out of court as to the impossibility of the float offered in evidence, floating in gasolene, and (b) by the Court's refusal to permitting experiment to be made in court for the purpose of demonstrating the same thing.**

The twenty-fourth and twenty-fifth specifications for causes for reversal (p. 470) present these grounds of error in addition to the strict assignments of error on page 463.

It will be remembered that the basis for the conviction of this defendant lies in the idea that at a time more than two hours before the fire the defendant set the carton containing the gasoline with a float on which rested a candle near to a streamer, and that the candle burned down in the interim then sufficient to create the conflagration.

If it is impossible for such a thing to occur then the bottom is knocked out of the State's case. We offered to show (pp. 413-418) that Albach took a carton like the one produced by the State, filled it about one-half full of gasolene in accordance with the description of the State's witness, put a float like the float produced by the State, down, and a candle of the size of that described by the State's witness, with the result that the float and candle would sink and in fact the float without the candle would sink and we were prevented from so doing. We then offered to make the similar experiment in Court with like result. We think that certainly the refusal of the first of these offers was so plainly erroneous and such an abuse of the discretion of the Court, that a reversal should follow.

In *People* v. *Sevine* (Cal.), 22 Pac. Rep. 969, a trial for arson had taken place, at which it appeared that the fire started at about one o'clock at night in an hotel basement occupied by the defendant who was not, at the time, doing a prosperous business. His fixtures were insured for $2,500, and a few days before the fire, he tried to sell them at auction, but had failed to receive a bid of $2,000 for them. A damaging declaration by the defendant to the effect that he would have to sell his stock to the insurance company was proven. The fire was discovered behind the bar which was found to be ablaze, and the room stifling with the smell of coal oil; rags, straw and other refuse matter saturated with coal oil, were found near the fire, and the floors, counters and walls were in like condition. A small piece of candle was found burning in a locker under the counter. An experiment was made which showed that it took one hour and forty-two minutes to burn a candle down to the point to which the candle had burned. It was held that while the Court was justified in exercising his discretion in refusing to delay the trial by an experiment made before the jury as to the length of time it would take a candle to burn to the required height, evidence as to the result of such an experi-

ment made by the witness, however, outside of court, was properly admitted, and the proof of the outside experiment was offered by the State; and the opinion in justifying its admission says:

> "It would probably have admitted similar proof on the part of the defendant if any had been offered."

The case came up for re-hearing, in 24 Pac. Rep. 631, the Court then stating (p. 633):

> "The proof of the result of experiments was equally as open to the defendant as the prosecution, and if other experiments would have shown a different result from that shown by the experiment proved by the prosecution, the defendant had ample opportunity to show the fact. The books are full of authorities sustaining the court in admitting evidence of the result of experiments in chemistry, in toxicology, and particularly in the use of fire-arms, for purposes similar to that for which this evidence was admitted. It has been quite a common thing in cases of homicide to make experiments with fire-arms to determine the carrying distance, the penetrating force, and the distance to which fire will be carried by fire-arms of certain pattern and caliber, and to prove the results of such experiments at the trial, as tending to show the guilt or innocence of the accused. The experiment in this case was one of a similar character and for a similar purpose. Its result was not conclusive, but a mere curcumstance to be considered in connection with the other evidence in the cause. It was both competent and admissible; its weight was for the jury to determine."

The Trial Judge in the exercise of what he called his discretion refused both the evidence as to the result of the experiment and to permit the experiment itself upon the ground of a lack of similarity of conditions. We had a carton of the same size, a candle of the same size and a float of the same size and we offered to show that neither the float and candle, nor the float itself would float either in gasolene, kerosene, benzine or turpentine,

the four kinds of liquid which the State found in the factory, although the evidence of the firemen was to the effect that the liquid they found in the carton was gasolene. We also offered to use the float that was offered by the State (pp. 416 and 418), but our offer was rejected (l. 32, p. 416). The conditions, therefore, were as near similar as possible. Mr. Wigmore, Sec. 442, discusses this question and says in his work on evidence:

> "But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. * * * The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a *substantial similarity in such circumstances or conditions as might supposedly affect the result in question.*"

Among other cases cited by Mr. Wigmore, is *Leonard* v. *Southern Pacific Co.* (Ore.), 28 Pac. Rep. 887, which admitted an experiment as to whether a rail could have injured a wheel flange:

> "There seems to be some hesitation in receiving evidence of experiments or demonstrations, and from the liability to misconception and error there can be no doubt that the experiments or demonstrations should be made under similar conditions and like circumstances. In all cases of this sort very much must be left to the discretion of the trial court. But when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with. In the present case the things used for the purpose of demonstration were similar in size, material, and position, and were operated under conditions similar to the thing sought to be demonstrated."

See also *Brooks* v. *Chicago, R. I. & P. Ry. Co.*, 47 N. W. (Iowa 1890) 74, 76:

> "It is also urged that the testimony of Kerr, as to the experiments in placing his foot between the rails, showing where the foot would be caught

and where not, was erroneously admitted. We regard it as clearly competent. A very important fact to be known was whether, with the situation of the rails, a foot could or would be likely to be caught. We can hardly imagine testimony that would better show the fact than such experiments. The shoe that Brooks wore was before the jury, and the witness who made the experiment was there, and the relative size of the shoes worn by each could be known. The case of Klanowski *v.* Railway Co., 31 N. W. Rep. 277, is cited as authority against the admission of such evidence. The force of the holding in that case is much lessened, because of a divided court, and then the facts are so dissimilar that, if an unquestioned rule, it would not be controlling. No case to which we are cited is authority against the action of the District Court in admitting the testimony."

*Burg* v. *Chicago, R. I. & P. Ry. Co.,* 57 N. W. (Iowa 1894) 680, 683 (tests to see how far engineer could see children—also how long it took to stop a train at the rate of speed in question):

"It is urged that the conditions were so dissimilar as to render the tests incompetent. It is true that they were not identically the same, but they were essentially so. It was at the same place, on the same track; in one case with the same train, and in the other with one like it, that it is not to be seen that it would not furnish a test sufficiently correct to be an aid in determining the fact to be found in the case. It is urged that the accident occurred about noon, and that the January test was made in the afternoon, when the sun would prevent seeing an object on the track. That does not appear to have been true in fact. So far as the record discloses the opportunity for seeing at the different times was equally good. In fact, we do not discover a difference as to conditions in any substantial particular. We think these tests were proper and if fairly made, the facts thereby disclosed be of great value in reaching a conclusion.

"We think the following statement in Railroad Co. *v.* Mugg (Ind. Sup.), 31 N. E. 564, is quite to

the point: 'Under some circumstances this class of testimony may be very satisfactory, but, unless the experiments are shown to have been made under essentially the same conditions, the tendency is to confuse and mislead rather than enlighten, the jury.'

"While the conditions need not be identically the same, they should be essentially so; and the important fact to have in view in passing upon the admissibility of such testimony is, will it aid, rather than confuse, the jury in reaching its conclusions? With that as the rule, we think the testimony in this case was properly admitted. It may be added that the court, in a very appropriate instruction, guarded against ill effects from the evidence because of varying conditions."

*Smith* v. *State of Ohio,* 2 Oh. St. 512, 517. Indictment for malicious shooting:

"The prosecution having rested in chief, thereupon states the bill of exceptions 'the defendant, among other evidence to maintian the issue on his part, offered to prove that, since the filing of this indictment, the witnesses offered had, at another place than that where the crime was committed, tried experiments as near as possible to those stated above, of looking through a glass window at a person on the outside of the window, and at various distances, varying from two to fifteen feet therefrom, while a candle was burning in the room, where the witness was in such a position as to reflect its light through the window and toward the place where the person on the outside of the window stood, and that while the witness was so looking through the window, the person being outside, and looked at, fired off a pistol directed toward the witness looking out, through the window, and that the witness though he could see the person on the outside, could not distinguish and identify him; and that the flash or light from the firing of the pistol did not enable the witness to distinguish the person being looked at; nor did the light from the firing of the pistol aid his vision or enable him to see any more clearly or distinctly such outside person that he could before said pistol was fired. To the ad-

mission of which testimony, the state, by her attorney, objected; and said objection was so far sustained as to rule out said detail of facts; while the witness, as an expert, was permitted to state whether he was acquainted with the laws of light and vision, and if so acquainted, to state his opinion as to the effect of a sudden light, like that made by the firing of a gun or pistol on one's vision, and whether it will or will not, aid one looking at a person or object in the night and darkness, in distinguishing or seeing more clearly the person or object looked at. To which ruling of the court the said defendant excepted.'

We are unanimously of the opinion that, in rejecting the testimony offered as above, the court erred. Holcomb had sworn that he distinctly recognized the prisoner by the flash of the discharge of the pistol. This was a most material statement. Without it, there was no pretense of sufficient evidence to convict. Now, it was certainly lawful to to disprove this statement, by showing the impossibility, or natural improbability, of its being true. This is not denied, but it is said that it could not be done by proof of experiments. If not, how could the proof be made? No one but Holcomb was looking through the window when the crime was committed. No one but he saw the pistol fired, or the person who fired it. Direct contradiction, by eye-witnesses of the transaction, was therefore impossible and would perhaps be equally impossible in a large majority of like cases. Unless, then, proof of experiments is receivable, a man is very much at the mercy of another, who swears against him and perjury or mistake, however great, instead of incurring punishment, or being rectified, may answer to produce conviction. But it is said that the proper rebutting proof would be of the opinions of 'experts' to use the language of the bill of exceptions. Now, I apprehend, that the firing of a pistol in a man's face, at the distance of a few feet, is not quite so common an occurrence as to have raised up a class of 'experts' whose acquaintance 'with the laws of light and vision' makes their opinion, in a case like the present, the only competent testimony, or gives to such

opinions any preference over the proof of facts. It requires no scientific witness to tell a jury whether he saw the eyes and nose and white of the teeth of a man who shot at him, by the flash of the pistol that he fired. And proof that a number of men, of ordinary powers of vision, have tried the experiment, and found themselves unable thus to distinguish countenances—found that their vision was not thereby aided at all—is evidence entitled to as much, if not more, weight, than the opinions of scientific men can be; for the question whether a face can be thus told is merely one of fact, and not one of science; and any man, whether learned or unlearned, after hearing the proofs, can decide with reasonable certainty upon its probability. If a man were to swear that he distinguished the color of another's eyes, at the distance of a hundred yards, could his statement be disproved only by the opinion of some one skilled in the 'laws of vision?' Or, if he should testify that, with a lever of a given length, he moved a certain weight, would it be necessary in order to contradict him, to call a witness able to talk learnedly of the *vis inertioe* of matter and the laws of mechanical forces? Might not experiments be made by unlearned men, with such an instrument, be quite satisfactory?

But, say counsel, all these experiments are *res inter alios acta.* And pray, let me ask, what are the opinions of scientific men, but conclusions formed upon experiments that are equally *re inter alios.*

Again, it is urged that the experiments in question were not made by looking through the same window-pane that Holcomb looked through. But does that deprive them of all value? Is there such a difference, in common window-glass, that the judgment could not, in any degree, be aided by an experiment made with another pane? Suppose that scientific men had been called to give their opinions, as the court ruled was proper, would all of them have been set aside who had not experimented at that identical window? Or, suppose that that particular pane had been wholly destroyed by the shot, would it follow that no experiments could be made at all?

It is also argued that the state cannot come prepared to meet proofs of facts that are not a part of the *res gestae*. But the credibility of testimony is always in issue, and the state must come prepared to maintain the credibility of hers; and it would be a much greater hardship upon a defendant, to require him to produce scientific men to give their opinions, when such men are, in most places, so scarce, than to compel the state to anticipate that equally cogent proof will be given.

Finally, it is said that, notwithstanding the results of the experiments, it is possible that Holcomb saw what he said he did. Granted, but what of that? It was not indispensable to the defense to prove that utter impossibility of his narration. Evidence that tended to show its improbability, was competent; and such evidence if it did not convince, might, at least, have raised a reasonable doubt in the minds of the jury. And there was the more ground for supposing that it would do so, when coupled with facts to which Holcomb himself testified. He was in great fear of the prisoner, and had been for a long time. He apprehended that his life would be attempted, and so much was his imagination oppressed with this idea, on the night he was shot at, that he feared to leave the house even for a moment. While in this state of mind he was fired upon. He saw, or imagined he saw, the lineaments of his enemy in the face of the person who fired. It may be that he did, but, whether he did or not, nothing could be more natural than for him to suppose so. That he intended to testify truly may well enough be admitted, but that, under the circumstances, he was liable to be mistaken, is very evident. The evidence offered tended to prove that he was mistaken, and though, for ought we know, it may have been entitled to but little weight, it was competent and should have gone to the jury for their consideration. Judgment reversed."

In the case of *Richardson* v. *State,* 44 Atl. 999, 1002 (Md. 1899), after quoting at length from the Ohio case, the Court said:

"These observations are so sensible and just, they come from so high a source and throw so clear

a light upon the question before us—that we have felt justified in repeating them, and we are clearly of opinion that the evidence offered under the second exception was competent, whatever may be its weight, and should have gone to the jury for their consideration."

In *Chicago, St. L. & R. Co.* v. *Champion* (Indiana 1892), 32 N. E. 874, after citing the Ohio case, *supra,* the Court said:

"Evidence of this kind should be received with caution, and only be admitted where it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. In many instances, a slight change in the conditions under which the experiments is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful. In other cases, a principle may be established, by experiments made under circumstances quite different from the one under investigation, that will have an important and beneficial bearing upon the investigation. In the offer to prove in this case, many circumstances were included that were wholly unimportant, such as the fact that the same brakeman was on the car, and handled the brakes, in both instances. The important fact sought to be established by the experiment was whether or not a car moving at a slow rate of speed down a slight incline, with the brakes set, would, when the brakes were suddenly loosed, jump or spring forward. If it would do so in one instance, it would under ordinary conditions, repeat it every time the experiment was tried; for it would be the result of the operation of the laws of motion. The rate at which the car was moving, the suddenness with which the brakes were loosened, the degree of the inclination of the track, might affect the celerity of the movement, but would not affect the nature of the movement. If the question for investigation was the distance which it would jump, or the celerity of the movements, all these things might be important; but in determining whether it would or would not jump, they are comparatively unimportant. In our opinion, the circumstances

> under which the experiment was made were sufficiently similar to the facts surrounding the happening of the accident to make it admissible in evidence for what it was worth, and for this error the judgment must be reversed."

*Clark* v. *State* (Tex. Cr. App. 1897), 40 S. W. (1897) 992.

Action of assault; the testimony of prosecutrix was that the defendants got out of a wagon and walked a certain distance, made the assault, returned to the wagon and caught up at a certain point with two wagons which were just ahead of defendant's wagon when he stopped. Experiments were offered to show that the defendant could not have done all these things and then catch up with the wagons ahead within that distance. Trial Court excluded the evidence. Reversed.

On the question of similarity the Court said:

> "There are some difficulties attending the admission of this character of evidence. In the first place, in making an experiment some difficulty will be encountered in making it under the same conditions surrounding the original transaction, but it does not occur to us that that should be a reason why this character of testimony should be excluded.
>
> Of course, if the evidence regarding an experiment showed one made under circumstances and surroundnigs so dissimilar to the original transaction as that it would not shed any light upon it, there would be no error in its exclusion. See State *v.* Fletcher (Oregon), 33 Pac. 575. But if the evidence shows that the experiment was made under circumstances similar or approximately similar, to those which surround the original transaction, and such experiment would serve to shed any light upon the transaction, we can see no reason for the exclusion of such experiment, although it might not have been made under exactly similar conditions as attended the original transaction, the dissimilarity would not exclude, but would go to its weight before the jury."

In this connection we call the Court's attention to the evidence of Mr. Jacobson (p. 377) who testified to having examined the candle in the carton and produced by the State, and measured it and then producing a candle of the exact diameter and character, after which we offered to light the candle thus produced by him and while the trial progressed let the jury see how much would burn in the length of time shown to have elapsed between the time that defendant left the factory and the outbreak of the fire. This was refused by the Court upon the ground that conditions were not similar, and complaint is made thereof in the 18th cause of reversal (p. 469).

There would have been no interruption in the progress of the trial if this experiment had been permitted, the trial lasting much longer than would have been required to have demonstrated to the jury how much the candle would have burned.

Of course, if this experiment had been permitted, the argument with reference to the impossibility of the State's case would have been strengthened because the candle would have weighed just that much more at the time it is claimed it was put on the float in the carton.

Moreover it should be noted that at the close of the case our offer to have the articles sent out with the jury so that they could themselves make the experiment, was rejected by the Court (p. 438).

The reason most frequently urged against the permission of experiments of this kind in court is that they would consume a great deal of time and interrupt the regular progress of the case, but no such situation here existed. In *Carr* v. *American Locomotive Co.,* 58 Atl. (R. I.) 678, 682, the Court said:

> "The defendant introduced evidence of certain experiments made with stems and valves to show the effect of hammering upon the stem, and offered the stems and valves in evidence as exhibits. We see no reason why they should have been excluded. We

think, however, that permission to perform experiments in the presence of the jury could not be demanded as a matter of right. The presiding Judge might, in his discretion, grant or refuse such permission, being guided by the apparent importance and weight of the proposed experiment, and the time it was likely to consume, and other considerations connected with the conduct of the trial. We see no error in his refusal now excepted to."

## POINT XII.

ASSIGNMENTS #33 AND 36.
SPECIFICATIONS #33 AND 44.

**There was error in the Court's refusal to charge the defendant's first and tenth requests.**

These are found on page 454 and page 456, respectively:

First: "In this case the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant is entitled to the presumption of innocence, and before that presumption is overcome the State must satisfy the jury, beyond a reasonable doubt, of the defendant's guilt."

Tenth: "With reference to either of the offenses charged in the second count the State must prove more than the mere existence of the fire. The defendant's connection therewith must be proved beyond a reasonable doubt. It is not necessary that the defendant explain the fire, the cause of the fire, or account for its existence."

All that appears upon the subject is found on page 442:

"It is necessary for the State to prove that the defendant set fire to the building with the intent to burn it. Under the law you may infer the fact of setting fire from the proof before you of the acts or conduct of the defendant, if there is evidence to support it. In other words, while there is no evidence of the actual touching of a match to ignite a fire, the actual starting of the fire, the law says that you may infer the facts from the proof of acts

or conduct of the defendant—that is, of course, if the evidence justifies it, or if there is sufficient evidence in the case to justify that inference. You cannot infer that merely from the fact that there was a fire; you cannot infer that the defendant started it, but if you find that there is sufficient evidence in the case to justify it you may infer the facts 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 the circumstances in the case.

The defendant is presumed to be innocent, and the burden of establishing the defendant's guilt, beyond a reasonable doubt rests upon the State. Our Court has defined reasonable doubt as follows" (giving the familiar defintion):

and on page 448:

"The State contends that this fire was the result of a criminal act on the part of the defendant. There is no direct evidence that the defendant set the fire in question. The evidence by which the State attempts to connect him with the crime is wholly circumstantial. An accused may be convicted by circumstantial evidence. But the first inquiry in an issue resting upon circumstantial evidence is whether the facts sworn to are satisfactorily proved, which involves a consideration of the credibility and the accuracy of observation and the memory of the witnesses by whom such facts are testified to. And, in the next place, presuming the facts sworn to by the witnesses are satisfactorily proved, then the further inquiry arises whether the facts proved are explained or are explainable on any other rational conclusion than that the prisoner is the guilty person; whether the inference of guilt from such facts is, in the judgment of the jurors sufficiently strong to justify a conviction that the prisoner is the guilty person—tested by these considerations whether the facts proved are capable of being reconciled with the hypothesis of innocence. Circumstantial evidence, cautiously dealt with, in conformity with the legal principles I have stated, is frequently regarded as the most satisfactory proof jurors can rely on."

We contend that important elements in the requests, to which we were entitled, are omitted from the charge and that, therefore, in refusing to charge the requests, except as charged, the Court erred.

The quoted requests, particularly the first, which we think is a correct request, were designed to provoke a charge that the presumption of innocence persisted and continued until it was overcome by evidence.

## POINT XIII.

ASSIGNMENT #27.

SPECIFICATION #27.

**There was legal and harmful error in the refusal of the Court to charge the defendant's third request.** That request was as follows:

> "The first charge under Section 126 of the Crimes Act is that of burning the building and merchandise with intent to prejudice the insurance companies. Before the defendant can be found guilty of this charge it is necessary for the jury to be satisfied beyond a reasonable doubt that the defendant did wilfully and maliciously set fire to and burn the building known as No. 204 Morris avenue in the City of Newark, and the goods, wares and merchandise therein located; that said building and merchandise were insured by the companies named in the first count of the indictment and that the said fire was set with the intent to prejudice said companies. Every one of these elements is essential to the completion of the offense charged in this count, and if any one is lacking then there must be an acquittal" (see p. 454).

The first count of the indictment charges the defendant with wilfully and maliciously setting fire and burning a building *and* the goods, wares, merchandise and chattels therein contained. This, as we have hereinbefore contended, charges two distinct crimes and it was necessary for the State to prove that the defendant set fire both to the building and to the personal property with an intent

to burn the same. If the personal property was set fire to accidentally or without an intent to burn the same, then the defendant could not be convicted of the crime charged with respect to such personal property. The third request was designed as an instruction to the jury, that they must find present the same elements, whether the burning be that of the building alone or of the personal property alone. All that appears in the Court's charge to the jury on the subject sought to be comprehended in the third request is the following:

> "It is necessary for the State to prove that the defendant set fire to the building with the intent to burn it. Under the law you may infer the fact of setting fire from the proof before you of the acts or conduct of the defendant, if there is evidence to support it. In other words, while there is no evidence of the actual touching of a match to ignite a fire, the actual starting of the fire, the law says that you may infer the facts from the proof of acts or conduct of the defendant—that is, of course, if the evidence justifies it, or if there is sufficient evidence in the case to justify that inference. You cannot infer that merely from the fact that there was a fire; you cannot infer that the defendant started it, but if you find that there is sufficient evidence in the case to justify it you may infer the facts 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 the circumstances in the case" (see p. 442).

It will be observed that the first sentence of that portion of the charge lastly quoted is the keynote to the whole portion. The Court instructs the jury that it is necessary for the State to prove that the defendant set fire to the *building* with intent to burn *it* and then proceeds to discuss that such fact is inferrable from other facts and conduct. Nowhere in the portion quoted or in the whole charge does there appear an instruction that the same intent must be found by the jury with respect

to the personal property before the defendant can be convicted of setting fire to such personal property.

It will be remembered that the alleged burning of the personal property was by far more important than the alleged burning of the building. There is no evidence in the case that any insurance was carried on the building or that any insurer could have been prejudiced in consequence of a burning of the building. The only evidence as to insurance offered by the State appears on page 162 of the record and that indicates that the amount of insurance carried was $45,750.00, represented by twelve insurance policies which insured "the stock of A. E. Harris Company, Inc." The only evidence of any loss was the evidence of the State's witness Temmler, who testified (see p. 194) that the fire loss to the merchandise was $1,576.84, and to the fixtures and machinery $148.25.

It will be remembered that the defendant was convicted on both counts, which necessarily means, that in being convicted of the first count, he was convicted not only of setting fire to the building, but also to the merchandise, and it may well be that the jury found as a fact that the defendant set fire to the merchandise and personal property alone, in which case it was most prejudicial to the defendant that the jury was not under instructions to find that the setting fire to such personal property must have been with an intent to burn.

## POINT XIV.

ASSIGNMENT #29.

SPECIFICATION #29.

**There was legal and harmful error in the Court's refusal to charge the defendant's fifth request.** That request was as follows:

> "There is no evidence in this case, offered by the State, from which the jury could infer or conclude as to the value of the stock or merchandise in the factory at the time of the fire."

The only evidence adduced by the State touching the subject of the value of the stock and merchandise in the factory at the time of the fire, is the testimony of the State's witnesses, McCabe and Rosenstock. A reading of that testimony shows that McCabe confessed his inability to fix the value of such stock and merchandise for the reason that he saw but a small portion of the stock and merchandise and could form no opinion as to the value of the great bulk of the stock and merchandise which he hadn't seen, counted or examined, and which he hadn't the opportunity to see, count or examine in the course of the single hour that he spent at the factory. The witness, McCabe, admitted that an appraisal could not be made of the stock in less than six days, with the aid of two or three additional persons, and that his appraisal was made in the course of an hour. The Court limited the witness' testimony only to what he actually saw. (See bottom of p. 142 and ll. 1-25 on p. 143.) The witness also said that no living man could give an accurate estimate unless he took the stock down item by item and figured it up (see p. 144). The witness admitted that he hadn't figured up the items.

The witness, Rosenstock, who was present with McCabe, during the same space of one hour, was permitted to testify only to the value of a portion of the stock. That portion was only what the witness had actually examined and counted, and was no greater fraction of the whole stock of merchandise than was examined by McCabe.

There was, therefore, no evidence in the State's case as to the value of the whole of the stock and merchandise in question and the defendant was entitled to have the jury instructed, that the State had failed to prove the value of the whole of the stock and merchandise covered by the policies of insurance offered in evidence by the State. That was the design of the third request.

The State attempted to prove the fact of over-insurance, by a comparison of the amount of insurance carried

with a lower amount alleged to represent the true value of the insured merchandise. The testimony of McCabe and Rosenstock, proving only the value of a portion of the merchandise in question, left the State in a position, when it rested its case, where there was nothing to indicate the value of *all* the merchandise in question. The Court in declining to charge the third request left the jury free to consider the testimony of Rosenstock and McCabe in determining the value of the entire stock and merchandise and left the jury free to infer as to the value of the whole by proof only of the value of a portion, it being admitted by the State's witnesses, McCabe and Rosenstock, that the balance of the merchandise (unexamined by them) might be of different quantity, quality and value.

## POINT XV.

ASSIGNMENT #34.

SPECIFICATION #34.

**There was legal and harmful error in the refusal by the Court to charge defendant's eleventh request.** That request was as follows:

> "If the jury believe that the claim of the State that a carton containing inflammable fluid in which was placed a float on which a burning candle was located, which burnt for two hours, is impossible of occurrence, then the evidence adduced with reference thereto must be disregarded and any inference arising from such evidence must likewise be disregarded" (see p. 456).

We believe that when the jury took with them into the jury room the State's Exhibit "S. 12" which consisted of a carton, candle and so-called "float" they were in a position, from a mere examination of the candle itself and the float in question, to determine that the candle could not possibly maintain its erect position on the float either in gasolene or in any liquid. This was so because

of the great weight of the candle in relation to the size and material of the float and also because the condition of the candle was such that it could not remain erect on any surface. Without regard to the fact that the candle and float will not remain afloat in gasolene or in any other inflammable liquid and without regard to the fact that the float itself will not remain afloat in gasolene or in any inflammable liquid (proof of which was excluded by the Court below), it was patent to any person of common experience that the State's evidence relating to the candle and float presented a situation physically impossible. The eleventh request so refused by the Court was designed as an instruction to the jury that, were they satisfied by their own observation that the State's evidence on the point was physically impossible of occurrence, they should disregard such evidence and draw no inference therefrom prejudicial to the defendant. The refusal so charged left the jury free to give weight to the State's evidence on the point though the jury itself might perceive the physical impossibility of the alleged "set-up." We think that this was particularly prejudicial, because proof of the result of an actual experiment and an experiment offered in open court were both refused and the defendant was therefore certainly entitled to have the jury employ their own senses and powers of observation and reject the story of the "set-up" if in their judgment such set-up were an impossibility.

## POINT XVI.

SPECIFICATION #43.

**There was legal and harmful error in the Court charging the jury as follows:**

> "Gentlemen of the jury, it is not my province, nor is it my duty, to attempt to mould your verdict. That should come from a consideration of the entire evidence in the case. However, it seems to me, that from all the evidence there is a strong

probability that this fire was of incendiary origin, but of course, that is for you to say'' (see p. 448).

While we recognize the right of the Trial Judge to comment upon the evidence, we do not believe that the portion of the charge excepted to by us is proper comment. Had a fire occurred in the "stockroom" and at the place of fire had there been discovered the alleged set-up, it would be entirely a matter of proper comment for the presiding judge to say that there is such a causal connection between the fire and the set-up as to indicate that the fire was of incendiary origin. There isn't any evidence as to the cause of the fire which was discovered in the loft. The evidence is convincingly clear that there was no connection between that fire and the set-up in another portion of the plant. The State's own witnesses testified that the fire, and the only fire, which was discovered was in no way connected with the stockroom. The slight fire which occurred in the stockroom we are not concerned with, for that fire, if it occurred, was produced by the act of one of the firemen in his attempt to extinguish a lighted candle by discreetly forcing the lighted candle into the gasolene. The only fire that is involved in this entire charge is the fire which was discovered in the main room of the loft. The cause of that fire is a mystery and being unexplained, is in law presumed to be the result of accident. (See Section 52, of p. 572, Vol. 5, Corpus Juris.)

The Court's charge that there is a strong probability that the fire was of incendiary origin, denied to the defendant the benefit of the legal presumption that the fire was accidental. We do not believe that the effect of the Judge's charge was removed by his statement to the jury that that was for them to say. He superimposed his inference of fact as against a presumption of law, which, in this case, was of vital importance to the defendant.

## POINT XVII.

ASSIGNMENT #37.

SPECIFICATION #45.

**There was harmful legal error in the Court charging the jury as follows:**

> "Now, at this point, gentlemen, with particular reference to Umansky and Gilpatrick, both were called by the State as their witnesses, and during their examination they were asked questions by the prosecutor under a claim of surprise. With reference to Gilpatrick and Umansky, if that was the fact, I charge you that where a party is surprised by adverse testimony of a witness called by him, proof of self-contradictory statements, previously made by such witness, is proper, not for the purpose of proving the statements, but to discredit or neutralize such adverse testimony" (pp. 443-444).

The Trial Court in charging the foregoing sought to bring his instruction within the rule of the case of *State* v. *D'Adame,* 84 N. J. L., p. 386. An examination of the opinion of Judge White in that case, speaking for the Court of Errors and Appeals, indicates that the said portion of the charge excepted to by us is prejudicial in that the Court failed to instruct the jury that the statements of Umansky and Gilpatrick were to be entirely disregarded as in any way tending to prove the truth of the facts contained in such statements; and in that the Court failed to explain the reason why that is so, viz., because the statements were not given under oath and were not subject to cross examination; and in that the Court failed to instruct the jury that they could give no effect to the statements of Gilpatrick and Umansky beyond permitting them to withdraw from the case evidence which the statements tended to discredit.

We direct attention to page 397 of the opinion in *State* v. *D'Adame.* The Court of Errors and Appeals lays down the proper course to be followed by a Trial Judge where contradictory statements are resorted to under a

claim of surprise and the Court says that "in a case barren of other direct proof of the facts, which such contradictory statements would tend to prove, if admissible for that purpose, *the absence of such instructions even when not requested,* might be sufficiently injurious to warrant reversal."

We respectfully submit that the portion of the charge excepted to fell far too short of the rule laid down in the D'Adame case and that the defendant was prejudiced thereby. The mere statement of the rule of law in the D'Adame case, unaccompanied by an explanation of the reason therefor, is not a compliance with the law or the spirit of the D'Adame case and is just what was meant by the Court of Errors as "instructions which may fall upon deaf ears." It is inconceivable that the jury could so understand the charge excepted to as to neutralize the adverse testimony without believing the truth of the written statements alleged to have been made by the State's witnesses, Umansky and Gilpatrick, on the day following the fire.

## POINT XVIII.

ASSIGNMENT #38.
SPECIFICATION #46.

**The verdict of the jury was against the weight of the evidence.** Without receding at all from the position we took at the trial that there was no evidence in the State's case to put the defendant to his proof and that a verdict for the defendant should have been directed at the close of the State's case, we respectfully insist that upon the whole case, when the evidence was closed, there not only existed a grave and substantial reasonable doubt, but also the evidence greatly preponderated in favor of the defendant.

In brief, this is the State's case:

A fire is discovered at nine o'clock at night. The cause of that fire is not explained. The firemen testify that it was a small fire, extinguished with chemicals, and yet nothing is produced to show that that fire was of incendiary origin. Had it been of such origin, certainly some proof or trace of its cause would have remained unconsumed. It is, however, suggested that that fire was a result of a "set-up" because elsewhere and in another room on the same floor was discovered the alleged "set-up" of a carton, candle and float, from which carton ran a streamer to shelves in the stockroom. The State contends that that "set-up," which never took effect, was fixed and set by the defendant before seven o'clock on the evening of the fire, during a period of about an hour, when the defendant, Gilpatrick and Umansky were alone in the plant. Both Gilpatrick and Umansky testified that they were with the defendant all the time; that they saw no preparations for any fire and that all left the plant together, that the plant was locked and that the keys were handed over to Umansky, who kept them over night. There is no more reason to suspect the defendant of setting the fire than to suspect either Umansky or Gilpatrick. No motive is shown for the defendant doing the thing with which he stands charged. He was but a minority stockholder in the company which carried the insurance, having about 25% of the stock, business was good, orders were coming in faster than they could be handled and some of the help were working overtime to make shipments. There is nothing in the State's case to indicate any financial embarrassment on the part of the company and there isn't anything in the State's case to indicate that the value of the merchandise, machinery and equipment in the plant was not so much in excess of the amount of insurance carried as to make the setting of a fire an act of folly and financial suicide.

The State attempted to prove an inability to pay rent. The State's witness, Greenberg, admitted that the one-

time failure to pay rent by the company was the result of a dispute concerning adjustments and that the April and May rent had been promptly paid.

There are several very curious facts in the State's case that need but be stated to show their inherent improbability. The State's Exhibit "S. 6" shows a section of muslin in the stockroom. This muslin has throughout the case been referred to as a "streamer" and some of the State's witnesses testified that they saw it "under a carton," "near a carton" or "in the vicinity of the carton." That streamer, if it ever existed, was the most vital indication of guilt on someone's part. On the night of the fire, the carton, float and candle were most carefully guarded and their custody, down to the date of the trial, explained and accounted for by many witnesses and much proof. The streamer was not removed that night, but as the State contended, was allowed to remain where found so that a photograph could be taken of it. A photograph was taken between 9:30 and 10:30 of the morning of May tenth (see testimony of witness Day, p. 20). The photograph "S. 6" shows the streamer in the stockroom. The defendant's witness, Nicholas G. Kaufmann, took a photograph of that section of the stockroom where the alleged streamer was hanging. That streamer was permitted to remain untouched until the twelfth of May, when the State's witness, Helfrich, removed the streamer and tied it up in a bundle and handed it to the defendant's own foreman, Umansky, for safekeeping. It will be remembered that during these several days, the loft was under constant guard by firemen and policemen. Why, then, does the photograph "D. 8," taken by Kaufmann, the photographer from Koenig's, taken on May eleventh, fail to show the streamer at the precise point where it is shown on the State's exhibit taken on May tenth, and at the precise point from which it was removed by the fireman, Helfrich, on May twelfth? Koenig's man, Kaufmann, was, according to the evidence of the State's firemen, under surveillance when he

took his photograph, so that he should touch nothing. If the State's witnesses told the truth, then Koenig's photograph is a physical impossibility. It cannot be contended that Koenig's photographer removed the streamer. It is altogether more plausible that the streamer was planted by someone for the purpose of the State's photograph.

Then again, is it not curious that this streamer, so important in the case, should have been entrusted by the State's witness, Helfrich, to the defendant's own foreman? This is denied by the foreman, Umansky, who further testifies (pp. 382-383) that on the morning after the fire, at about half-past eight and before the State's photograph "S. 6" was taken, he was conducted by some firemen into the stockroom and he saw his coat hanging, but there was no streamer hanging there at that time. (See also testimony of Umansky, ll. 1-30, on p. 386.)

The State's witness, Gilpatrick, was very certain that a moment or two before he left the plant, in making the rounds to close the windows, he walked around the entire loft and could see the bins where the fire was later discovered and he saw nothing unusual or indicative of any preparations for a fire. Umansky testified that a moment before he left the plant, he walked through the stockroom to get his hat and coat, that the stockroom was absolutely dark (there being no windows in that room), and that there was no lighted candle on the floor of that room. Therefore, the only living witnesses other than the defendant, who could possibly connect the defendant with the crime charged, if the defendant had set the fire, both insisted that the defendant did nothing so much as to arouse their suspicions.

Then again, it is most improbable that a person would set two fires at the same time, one in the main room and one in the stockroom, and use materials so different in character and candles so different in size, that one candle would take effect in two hours and the other candle at the end of the same two hours have 5 3/16 inches of tallow unconsumed. Then again, the very condition of the candle

in question is such as to strain one's belief that such a candle would have been employed as a unit in the kind of set-up alleged by the State.

The defendant's testimony, in our judgment, was most persuasive. He testified that he had over $40,000 worth of merchandise (at cost) in the plant at the time of the fire, that his machinery which had cost originally $15,000 was worth about $10,000 at the time of the fire; that many orders were unfilled owing to rush of business; that business was good and that the company was prospering. He testified to the heavy cost of installation of the plant only a few months before the fire. He testified to his actions and movements on the day of the fire, in no one particular of which was he contradicted by anyone. His movements from the time he left the factory until the following morning were accounted for by a great number of witnesses, although the State had contended that the fire was set before the defendant left the factory. The presence in the factory of candles and inflammable liquids was explained by the defendant, by his porter, Bauer, by the foreman, Umansky, and by the shipping clerk, Gilpatrick. The defendant proved the amount of merchandise in his place on the day of fire by means of the company's inventory of the preceding January first, worked forward in a bookkeeping manner by the witness, Leopold, an expert accountant.

Many citizens of high standing in the community where the defendant lived testified as to his excellent reputation for truth and honor. The defendant opened the door, but not one word of criticism of his reputation appears anywheres in the State's case. He had never been convicted of crime and had never been charged with any offense. His reputation was established to be spotless.

The only possible witness to the offenses charged are the State's witnesses, Gilpatrick, Bauer and Umansky. Upon their evidence alone, the defendant entitled himself to an acquittal at the hands of the jury. Adding to such testimony, the defendant's own testimony, the testimony

of the many witnesses produced by him and the evidence of his excellent and unblemished reputation, a case is presented, where, in view of the barren case presented by the State, the evidence so greatly preponderates in favor of the defendant, that it is almost shocking to think that the liberty of a citizen never before charged with crime, can be taken from him upon what are at most only theories, speculations, suspicions and guess-work, indulged in by the jury. The Legislature of this State in enacting Chapter 349 of the Laws of 1921, was mindful of those cases where there is perhaps enough to constitute an issue of fact, but not enough to justify the deprivation of one's liberty. Such a case is the one at bar and in our humble judgment, if ever there was a conviction that warranted reversal because contrary to the weight of evidence, it is the case at bar.

**Opinion of Supreme Court.**

The Supreme Court, in its opinion, touches but a few of our contentions. With all deference to the judgment of the learned members of the Court below, we are of the opinion that all the contentions presented in our brief are of substantial merit and that each of the matters complained of constituted manifest and substantial injury to the plaintiff-in-error. We take the liberty of commenting upon the opinion of the Court below.

**A**

Our first contention that the indicement should have been quashed, is dismissed by the Supreme Court on a point of procedure. The Court holds that the denial of the motion to quash is not reviewable under Section 136, since "it precedes the trial itself, and is not a part thereof." We respectfully submit that this gives to Section 136 a narrow and rigorous construction not contemplated by the enacting power. The statute provides for the review of the "entire record of the proceedings" and

that if it appear that "in the denial of any matter by the Court, which was a matter of discretion" the plaintiff-in-error suffered manifest wrong or injury, the Appellate Court shall remedy such wrong or injury and give judgment accordingly and order a new trial. If the Supreme Court be correct in its view that the quashing of the indictment was matter of discretion, it necessarily follows that that subject of discretion is within the express scope of Section 136, and if that discretion was not rightfully or soundly exercised by the Trial Court such judicial action is reviewable under Section 136. It appears to us that this view gives to Section 136 the liberal interpretation that must have been the object of the Legislature in providing a method of review, in addition to and independent of the strict bill of exceptions.

**B**

The point is made by the Supreme Court that defendant's eighth request to charge that a verdict should be found for the defendant on the second count for the reasons given on the motion to quash the indictment, was improper in form and in substance. The reason given for this is that such request fails to state the grounds therefor and that the Trial Court is under no obligation to search proceedings ante-dating the trial, nor to recall accurately "matters which occurred in the past." We respectfully insist that substantial justice requires that where a motion to quash immediately precedes the impanelling of a jury (as in the case at bar) and is an immediate preliminary to the fact of trial itself and the motion and ruling thereon are made part of the record, that under the broad scope of Section 136, the motion should be deemed a part of the "entire proceedings" and that if there be error in the denial of such motion to quash, that the same be corrected.

C

The Supreme Court justifies the Trial Court's action in allowing the prosecutor of the pleas to examine the State's witness, Gilpatrick, for the purpose of showing that his testimony varied from an earlier statement alleged to have been made by him to the prosecutor. The Supreme Court holds that the action of the Trial Court was competent under the authority of *State* v. *D'Adame*, 84 N. J. L., p. 386. Our objection to the use of such statement is in complete recognition of the rule laid down in the case last cited. The point that we have insisted upon and here reiterate, is that no such conflict appeared as to warrant the prosecutor in resorting to such earlier statement and that, assuming the statement to have been properly resorted to, the Trial Court committed legal error in failing properly to limit the force and effect of such earlier statement and in failing properly to instruct the jury with respect to the testimony elicited by the prosecutor under a claim of surprise. We repeat what has been discussed by us in the seventeenth point of this brief that under the authority of the very case referred to by the Supreme Court (*State* v. *D'Adame*), there is present in the case at bar *"the absence of such instructions, even when not requested, sufficiently injurious to warrant reversal."*

D

The Supreme Court justifies the Trial Court's refusal to strike out the testimony of the State's witness, Rosenstock, concerning the value of certain machinery. The Supreme Court is of opinion that our motion to strike out came too late. A reading of the testimony of the witness, Rosenstock, will disclose that his direct examination was so skilfully conducted that the opinion evidence given by him concerning the value of machinery, was apparently competent. It was only upon a cross examination of the witness that his utter lack of competency

as an expert was disclosed. When that disclosure came, the motion to strike out was promptly made. We understand the rule to be that where a question is competent and the answer incompetent, a motion to strike out is the only appropriate step. If that is true concerning a single question, it is equally true concerning a line of testimony. Our objection to the witness's appraisal was made the very moment when its objectionable character became manifest and was made by the only available appropriate method, viz: a motion to strike out.

**E**

In our thirteenth assignment and in the thirteenth specification in the Supreme Court, we insisted that the Trial Court committed legal error in receiving in evidence over the objection of defendant, twelve fire insurance policies covering the stock of a corporation between which company and the defendant, the State had failed to establish any connection. The Supreme Court has met that objection by saying that it loses its relevancy because the defendant himself, on the stand, in his own defense, testified that he was the president of the company and "that admission made the policies admissible in evidence (*State* v. *Genz,* 59 N. J. L. 495) and the action of the Trial Court became thereby harmless."

It is true that the case of *State* v. *Genz,* above cited, is against us on the point we make. That case was decided in 1896. The much later case of *State* v. *Bacheller,* 89 Law, 433, decided in 1916 by the Supreme Court and followed with approval by the Court of Errors and Appeals in the case of *State* v. *Contarino* (92 Law, p. 381) decided in 1918, establishes a rule of law wholly different from that laid down in *State* v. *Genz.* In the Bacheller case the Supreme Court was of opinion that the State's case must be considered as of the time the State rested, without considering any facts developed in the defendant's case, tending to cure the absence of proof on the

part of the State. Chancellor Walker in his opinion for this Court, in the Contarino case applies the very test laid down in the Bacheller case, viz: he tests the State's case as of the time the State rested. The rule in the Genz case has the practical effect of compelling a defendant to testify against himself, while the rule in the two cases relied on by us, gives effect to the spirit and purpose of our law, that the defendant's connection with the crime charged must be established by the State without resort to the defendant's testimony at the trial.

We, therefore, respectfully insist that by reason of the later authority cited by us, the Genz case is no longer authority for the proposition for which it is stated in the opinion of the Court below.

**F**

The Supreme Court was of opinion that our motion for a directed verdict in favor of the defendant was properly denied and that there was sufficient proof in the State's case to make it a jury question. We most respectfully submit that in this view the Supreme Court is in error. An examination of the State's case will disclose nothing except that a fire occurred and that the defendant, together with a number of other persons, had been at the place of fire two hours before its occurrence and that he and those other persons left together the premises where the fire later occurred. No fact of over-insurance, no business depression, no insistence by creditors, not a single, solitary fact indicative of a purpose or motive, can be found anywhere in the State's case. There was not even established any connection between the company whose property was covered by insurance and the defendant. There was no more in the State's case to connect the defendant with the fire than any other officer or employee of the company whose merchandise was in jeopardy of destruction. Without repeating, we wish to emphasize our argument at the trial in sup-

port of our motion for a directed verdict, in which argument the barrenness of the State's case is more fully discussed.

G

The Trial Court excluded the inventory made by the witness, Fisher. The Supreme Court is of opinion that such exclusion was proper for the reason that the inventory was made some little time after the fire, and it was shown that the inventory embraced goods not in the factory at the time of the fire. While it is true that some few small bundles arrived at the factory within a few days after the fire (having been ordered before the fire) we offered at the trial to account for these bundles, so received, by deducting those articles from the Fisher inventory. The books of the company were admitted into evidence and by the witness Leopold, the exact quantity of merchandise received and shipped between the date of the fire and the Fisher inventory, was definitely ascertained and established. To insist that the Fisher inventory should have contained precisely the exact quantity of merchandise and number of articles as were contained in the factory at the time of the fire, is to deny to the defendant the only recognized method of fixing inventory in going concerns. Very few industrial concerns are able to shut down and suspend business during the taking of inventory. The universal method of determining inventory as of a given date is to make an actual physical inventory (which in itself may take days or weeks) and add to the ultimate result, merchandise taken out and deduct merchandise received. Any merchant or manufacturer will employ this method and there is evidence in the case that it has the sanction of federal agencies for taxation purposes. We confess that we know of no other or better method of fixing inventory. The view of the Supreme Court, in its effect, goes to the extent of holding that the inclusion in the inventory of a single article not contained in the factory at the time of the fire, ren-

ders the inventory inadmissible, even though that single article be accounted for and the quantity and value thereof be deducted from the inventory total. We can conceive of no view more prejudicial to the defendant's interests and to his right in all natural justice to prove that at the time of the fire the value of the merchandise exceeded the amount of insurance carried thereon.

H

We have examined the cases cited in the opinion of the Supreme Court with respect to the subject of the physical experiments discussed by us in the eleventh point of the brief. The right to conduct experiments in Court, or to offer proof of the result of experiments out of Court, was recognized in every case where the conditions and circumstances of the experiment were similar to those existing in the case.

In the case of *Kinney* v. *Folkerts,* cited by the Supreme Court, an experiment with a blower was refused because the blower was not constructed at the time of the experiment as it had been when the plaintiff was injured, it having been altered considerably in the interim.

In the case of *Leonard* v. *Southern Pac.,* 28 Pac. Rep. 887, an experiment with an injured rail was allowed, the conditions being substantially the same as those existing in the case. The Leonard case is discussed by us in our brief on page 42. In the last cited case the Supreme Court of Oregon refers to the case of *Brooke* v. *Railroad,* 47 N. W., p. 74, also discussed by us on page 42 of our brief. The Court also refers to *Smith* v. *Ohio,* mentioned on page 44 of the brief and also cites the following cases:

*Sullivan* v. *Com.,* 93 Pa. State 284;
*Boyd* v. *State,* 14 Lea. 161;
*Williams* v. *Taunton,* 125 Mass. 34.

In the Leonard case, above cited, the Court says that permitting the experiment was proper because "in the present case the things used for the purpose of the

demonstration were similar in size, material and position and were operated under conditions similar to the thing sought to be demonstrated."

In the case of *Chicago, St. L. & P. R. Co.* v. *Champion,* 36 N. E., p. 221, the Court excluded proof of the result of a test or experiment. A reading of the case at once indicates that the test was made under essentially different conditions than those existing at the time of the accident involved in that case. A track and a railroad car were involved in the accident and concerning the experiment there was no evidence that it was the same kind of car or track and no evidence that the brakes were set equally tight or equally loose and that the railroad car was kicked with the same force.

The case of *Gambrill* v. *Schooley,* (Md. 1902) 52 Atl. Rep. at p. 506, was an action for slander. The defendant denied the alleged slander. The Court considered the admissibility of a test of the human voice to ascertain if the voice of the person standing where the defendant is said to have stood when the slanderous words were uttered, speaking in a loud tone, could be heard by one standing where the plaintiff is said to have stood at the time. *The Court held that the exclusion of such test was error.*

*State* v. *Richardson,* 44 Atl. 999 (Md.) cited in the Gambrill case. In this case witnesses testified that they were sitting on a bench at the station, five minutes after the shooting, which was eight o'clock at night and a person ran down the road and as he passed under a certain street lamp, 94 feet from them, they recognized the accused whom they well knew. Evidence of witnesses with good eye sight that they were on the same bench 25 days later, at 8:45 on a clear evening, with the same lamp in the same condition and that two persons known to them passed under the lamp separately, and neither could identify them, and that, in their opinion, it would be impossible to distinguish the accused, was admissible.

*The Court held that the rejection of such offered testimony was reversable error.*

An examination of the Piper case, cited by the Supreme Court, in its opinion, will at once indicate that the experiment on a dynamometer was essentially different from the facts in the case before the Court and that the exclusion of the experiment was due entirely to essential dissimilarity in conditions.

The case of *Boston Hose* v. *Kendall,* cited by the Supreme Court and found at 178 Mass. 232, is an excellent example to sustain our point that the experiment or the result of the experiment should have been received in evidence. In the Kendall case the very eminent Chief Justice Holmes, writing the opinion for the Supreme Court, sustained the action of the Trial Court in letting in testimony of experiments conducted two or three months after the explosion of a boiler. The experiments were with a similar boiler and did not result in an explosion, as did a similar experiment with the boiler involved in the case before the Court.

We believe that it is quite correct to say that the prevailing rule is that experiments substantially similar to the facts in the case, are allowable as a matter of right, and that their denial in a proper case constitute an unrightful exercise of discretion. Some of the cases speak of the matter being discretionary but that an abuse of that discretion constitutes reversable error.

We direct attention to the fact that what we sought to establish was the fact that the State's exhibit of a float could not, *even without any weight resting upon it,* remain afloat in gasoline. The State's witnesses had testified that they saw the State's float exhibit with a candle on it, floating "on top" of gasoline. We offered into evidence gasoline which was received in evidence. We offered to prove the result of an actual experiment out of Court that a float exactly like the State's float could not remain on top of the gasoline. *That offer was*

*rejected.* We offered to prove by an experiment before the jury with articles identical to the State's exhibits, that such a float could not float in gasoline. *That offer was rejected.* We then offered an actual experiment before the jury with the State's particular exhibits and *that offer was rejected.* While it is true that there was no evidence as to the chemical analysis of the two kinds of gasoline, it must be remembered that the State did not produce the gasoline contained in the State's carton exhibit because that gasoline was no longer in existence. There was, however, nothing in the case to indicate any difference in the quality of gasoline. Our offer was to prove that the float, because of its porous composition, would not float in *any* gasoline but that it would at once drop to the bottom of the gasoline container. The importance of this offered testimony cannot be over stated. It tended to establish that the testimony of some of the State's witnesses constituted an impossible narrative and, if not completely impeaching their story, of sufficient weight to create a reasonable doubt as to the witnesses' accuracy of observation. This opportunity we were denied and this, we think, was the denial of a most important right to meet by scientific and unlying evidence the only damaging evidence offered by the State. If the Trial Court and the Supreme Court are both right in their view of our rejected offers, we may well say, as was said by the Supreme Court of Ohio in the case discussed on page 44 of this brief, that: "Unless, then, proof of experiments is receivable, a man is very much at the mercy of another, who swears against him, and perjury or mistake, however great, instead of incurring punishment, or being rectified, may answer to produce conviction."

New Jersey State Library

## Conclusion.

For each and every reason in this brief presented and discussed, we respectfully submit that the conviction under review was the result of legal error and that, by reason of the matters specified by us, the plaintiff-in-error has suffered manifest injury, all of which our Supreme Court, in legal error, failed to correct. We submit that the conviction under review should be reversed and set aside.

Respectfully submitted,

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