

Q This all happened about three years ago? A Yes.

Q In November, 1917? A In March, 1918.

Q More than two years ago? A Correct.

Q Your recollection of this affair was very fresh at that time, wasn't it? A Yes.

Q Is your recollection of this matter better to day than it was in March, 1918? A No, just as good.

Q Just as good? Did you mention the name of a single politician that you say the defendant mentioned to you, in the Magistrate's court hearing? A I did not.

Q Did you mention in the Magistrate's court hearing that the defendant said he was a deputy sheriff? A No.

Q Did you say to the Magistrate that the defendant told you that he was acquainted with many politicians, including Borough President Riegelmann? A No.

Q Did you tell the City Magistrate that the defendant told you that Borough President Riegelmann would get him out of this trouble? A No, sir.

Q Did you tell the City Magistrate that the defendant had a millionaire uncle who would get him out of this trouble? A I did not.

Q Those were some of the things which were fresh in your recollection then, but which you did not tell the City Magistrate? A Correct.

Q Did you tell the City Magistrate that the defendant's

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brother had told you that this defendant was dodging the insurance investigation? A I believe I did.

Q Will you swear that you did? A I will swear that's my recollection.

Q Will you look through the Magistrate court minutes and find that statement in there that he was dodging the insurance investigation (handing)? A It is not there.

Q Did you tell the City Magistrate anything about seeing the defendant in a Packard taxi? A No.

Q Did you tell the City Magistrate anything about the defendant's brother having married out of his religion? A I did not.

Q Did you tell the City Magistrate that the defendant's brother was a cold-blooded proposition? A No.

Q Did you tell the City Magistrate -- A (Interrupting) I told Dietch that his brother was a cold-blooded proposition.

Q Did you tell that to the Magistrate? A No.

Q Did you tell the Magistrate that he told you that his brother had broken a bottle over his head? A No.

Q You were asked in the Magistrate's court to relate the entire conversation you had? A I was not. Mr. Steuer and I had gone over --

Q Just answer that question? A No, just the fundamental elements of the crime.

Q Weren't you asked for the conversation in the Magistrate's

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Court? A I was.

Q Did Mr. Steuer, who is a well known trial lawyer in this county, say to you, "Now, will you narrate to the Judge what you said and what Mr. Dietch said and what everyone said on that occasion?" A Correct.

Q That was the form of the question that was put to you?

A That's right.

Q And none of the things that you have testified to on this examination here, to which I have directed your attention, were testified by you in the Magistrate's court hearing, were they?

A Not one.

Q Did you tell the City Magistrate that you said to the defendant: "You have broken your promise, neither you or Blumenthal called at my office?" A I was asked no question --

Q No, did you say that to the Magistrate? A No, I was asked no question about that.

MR. WASSERVOGEL: I ask to strike that out as not responsive.

THE COURT: Strike it out.

Q Did you tell the City Magistrate that you said to this defendant, "Your brother told me that the whole office was operated by you?" A In substance.

Q Did you use those words? A No.

Q You did not? How many talks did you have with the defendant? A Two.

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Q Did you talk to the defendant's wife before you talked to the defendant? A I did.

Q Did you threaten the defendant's wife that unless an adjustment was made in this matter that you would take her husband away and cause his arrest? A I did not.

Q Did you say anything at all about arresting the defendant at that time? A I did not.

Q Did Mr. Tenner in your presence do that? A No. His wife at that time was an expectant mother, and we were very careful of her feelings.

Q Yes, you were very careful? A Absolutely.

Q Is that why you took some eight or ten men up to her house that night? A The conversation I had with her was on Sunday.

MR. LYNCH: Just a moment. I object. There was no such statement about eight or ten men being there.

BY THE COURT:

Q How many people were to this place? A One detective and I was there, that's two, Fox and Tenner -- there were six.

BY MR. WASSERVOGEL:

Q And you came there about half past eleven that night? A No, we came there about seven-thirty at night and we waited there to find him. He was not home.

Q One of these was a police officer, was there more than one police officer? A One.

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Q Now, on that occasion, you also knew that the defendant's brother, H. H. Dietch, who was a member of the firm of H. H. Dietch & Company, the defendant's employer, had offered to return this premium of eighteen hundred odd dollars? A Yes. He made that offer to me.

Q Wait. I say. At the time you caused the defendant's arrest, you knew that? A Correct.

Q You knew that that money would be returned if you asked for it? A Yes.

Q And you could have it? A Yes.

Q You were in the defendant's house with a police officer and Fox and Tenner and some other people? A Not in his house. This all happened on the sidewalk;

Q And you said to the defendant: "Now, you better talk fast and better settle this thing up." Did you say that? A Yes.

Q Was a police officer there? A yes.

Q Did the police officer have a warrant? A No.

Q You told the defendant that there was a police officer there, didn't you? A Certainly.

Q And you used that police officer as a threat to settle this insurance loss, didn't you? A I did not. The police officer was there for the purpose of seeing him go along. This was a citizen's arrest for a felony. I needed no warrant.

Q Wait. You as a lawyer concluded that a felony had been

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committed? A Yes.

Q In spite of the fact that this money could be returned at any moment? A Yes.

Q You, knowing that a felony had been committed, you as a lawyer said to this young man, "You better talk fast and settle this thing up, otherwise I will cause your arrest?" A Yes, if he didn't have that cable. That's what I wanted.

Q You wanted the insurance or settlement of the insurance at that time? A Yes.

BY THE COURT:

Q Otherwise you would arrest him? A Well, I didn't say it that way, no. I told him I wanted the cable. That we did not want to arrest him. All we were after fundamentally was to collect seventy-five thousand dollars insurance.

Q What did you mean when you said you had told him he had better settle this matter? A Why, he had better come across with the cable that was shown to Tenner. If that cable was not forged, that meant there was insurance, and if there was insurance there was no crime.

Q What do you mean by settlement? A Coming across with the cables.

Q You did not expect him to give money, did you? A No.

Q To make good the loss sustained? A No, I knew he couldn't give any seventy-five thousand dollars. I wanted the insurance. That's all I was interested in. That was all I

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cared for. I knew he was not carrying seventy-five thousand dollars with him.

BY MR. WASSERVOGEL:

Q You say that you did not want the money? A No, we wanted the insurance.

Q Did you say to his Honor, Judge Rosalsky, that you did not want the money? A Correct.

Q Is that what you told the City Magistrate? A Yes.

Q Were you asked this question in the Magistrate's Court:

"Q. Did you talk to him about the return of the premium?

A. Absolutely not. I told him we did not want the premium returned, We were out seventy-five thousand dollars. That's what we wanted."

A Correct. We preferred it from the insurance company --

MR. WASSERVOGEL: I ask to strike out the last part.

THE COURT: Strike it out.

BY THE COURT:

Q Is that what you said in the City Magistrate's Court? A Yes, sir.

BY MR. WASSERVOGEL:

Q That is what you said to the City Magistrate? A I did.

Q You told the defendant that you knew his brother was ready to return this premium but you did not want the premium? A We did not want the premium.

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Q You wanted settlement of this whole insurance matter? A We wanted either the insurance certificates, \$75,000, or someone to make good as much of the loss as they could.

Q But you said to the Magistrate, "We are out \$75,000, that's what we want?" A Yes, that's what Tenner wanted.

Q As a lawyer you knew that Dietch & Company were liable at a civil action, didn't you? A Absolutely.

Q You thought it would be easier, however, to use the Criminal Courts as a means of collecting the amount? A I did not.

Q Who brought the detective to the defendant's home on that occasion? A I did.

Q You suggested the name of some attorneys? A I did not.

Q Did you talk of attorneys at all? A I certainly did. I told him to keep away from fee grabbers.

Q Were you working for Mr. Tenner or for Mr. Fox on a commission basis? A I was not. I was employed by the firm of Lambke & Stein, who were the attorneys for Fox and Tenner.

Q You know what the indictment in this case charges the defendant with, do you not? A I was informed by Mr. Lynch, Grand Larceny.

Q Well, you knew that before Mr. Lynch told you, didn't you? A No.

Q You were a witness against the defendant before the Grand Jury? A I was.

Q You know, do you not, that the indictment in this case

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charges the defendant with the specific larceny of eighteen hundred odd dollars? A I never read the indictment in my life.

Q Well, Mr. Lynch told you that? A Correct.

Q And that the sum of eighteen hundred odd dollars could have been returned to the complaining witness in this case long before the prosecution was started? A Yes, before the arrest.

Q Of course, as a lawyer, you knew that the Criminal Courts cannot be used to compel the collection of a debt? A Certainly.

Q Do you remember having a conversation with Mr. Schoen relative to the defendant? A A number of them. Had one last Friday.

Q Was this in the Magistrate's Court at the time bail was given? A In the Magistrate's Court I had two conversations with Mr. Schoen; and one with his father and mother.

Q Let us confine ourselves to the conversation you had with Mr. Schoen in the Magistrate's court. Did you say to Mr. Schoen, "There is still a chance of making a settlement in this seventy-five thousand dollar matter?" A I did not.

Q Did you say to Mr. Schoen at that time that you would not be satisfied with the return of the premium? Did you, or did you not? A No, I wouldn't care if they took ten cents.

Q Did you say to Mr. Schoen and tell him "There is still a chance to make a settlement in this seventy-five thousand

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dollar matter and if no settlement were made that you would go ahead with the criminal proceedings, did you say that? A I did not.

Q Well, if settlement had been made, would you have gone on with the criminal proceedings? A I would have advised against it.

Q If the defendant had made an adjustment with you at the time of his arrest in the presence of the police officer, you would have dropped the matter, wouldn't you? A No, there was no adjustment at all. I wanted the cable.

MR. LYNCH: Just a minute. I object to that form of examination.

MR. WASSERVOGEL: Well, question withdrawn.

Q If at the time the defendant was arrested the cables had been delivered to you, or an adjustment had been made of this seventy-five thousand dollar matter that you were discussing with him, would you have directed the police officer who was standing there to arrest the defendant? A I would not, if that cable existed, there would have been no arrest.

Q Yes, that is all.

REDIRECT EXAMINATION BY MR. LYNCH:

Q Did you say you were working for Lambke & Stein? A Yes.

Q They were representing the complainant in this case, were they? A Yes, and Tenner.

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Q Did they bring any action at all against Dietch & Company? A I don't know. I was under contract with Lambke and my contract ran out --

MR. WASSERVOGEL: I object to this, your Honor.

THE COURT: Objection sustained.

THE WITNESS: I don't know.

Q Did the defendant ever make an offer of the return of the premium of eighteen hundred and sixty-nine dollars?

MR. WASSERVOGEL: I object to that as all having been gone over.

THE COURT: Objection overruled.

A No, he said nothing. I had told him that Sunday that his brother had offered it and he said, "Why don't you take it?" I said to him, "There was a loss, not of eighteen hundred dollars but about seventy-five thousand dollars." We were interested in the insurance more than money from Dietch.

Q Was there any arrest made that night by an officer in uniform? A No, it was a citizen's arrest, made by Fox, and I said to Fox to make the arrest --

MR. WASSERVOGEL: I object to all this.

THE COURT: Objection sustained. You cannot go over that.

Q You have had some practice in the Magistrate's courts, hadn't you? A Yes.

Q You are acquainted with the procedure there, are you? A

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Somewhat. I have only had five or six cases, I wouldn't say I am an expert. You were in one with me.

Q In your testimony in the Magistrate's Court you dwelt just upon the essential facts? A yes, upon the essential facts.

MR. WASSERVOGEL: I object to this, your Honor.

THE COURT: Objection sustained.

MR. LYNCH: Well, that is all.

EDWARD CASTANO, called and duly sworn as a witness on behalf of the People testifies as follows:

(Residence: 1978 Bathgate avenue, Bronx.)

DIRECT EXAMINATION BY MR. LYNCH:

Q Are you an officer of the City of New York? A I resigned last August.

Q How long had you been an officer previous to that? A Thirteen years.

Q Do you know the defendant here? A Yes, sir.

Q Do you remember the night the arrest was made? A Yes, sir.

Q Where was the arrest made? A Seventy-second street, Brooklyn. I don't remember the number exactly.

Q Who made the arrest? A I did, in company with the complainant, Mr. Fox.

Q Did you have any conversation with the defendant there in

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the presence of the complainant? A Not that I can recall.

Q Don't you remember any conversation there at all? A
No, sir.

Q Do you remember anything at all said by the defendant?
A Well, he spoke to Mr. Fox.

Q Did you hear any part of it at all? A Only about the
placing of insurance, I think, which he failed -- he had collected
the money for insurance --

MR. WASSERVOGEL: I object unless he known.

BY THE COURT:

Q Do not guess, officer, state what you remember? A I
remember Mr. Fox telling him about an insurance or money he had
given him to place for insurance ^{and} the defendant failed to do so.

BY MR. LYNCH:

Q Well, in this conversation what did the defendant say to
that statement made by Fox? A I can't remember.

Q Do you remember anything at all that the defendant said
either there or in the station house? A Well, we took him
down to Police Headquarters.

Q Do you remember what he said there? A I couldn't
remember.

BY THE COURT:

Q When did you leave the Police Department? A Last
August, your Honor.

Q Did you preserve any record of the defendant's arrest? A

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I had a record home which I couldn't find.

Q Do you remember anything that was said at the house of the defendant or on the street? A I remember going to that house in company with Mr. Fox, and some lady was inside and slammed the door and we came downstairs and found the defendant getting in to an automobile.

BY MR. LYNCH:

Q What time of night was it? A About nine or ten o'clock, I think.

Q How many were there with you? A There was Mr. Fox and I, I don't know whether it was detective McKittrick or Carrao.

Q You don't remember anything at all that the defendant said?

A No, sir.

Q Where did this arrest take place, right out near the car?

A Right out near the automobile.

Q You remember no conversation at all? A Not with me.

Q Well, that is all.

MR. WASSERVOGEL: No questions.

MR. LYNCH: That is the People's case, your Honor. We have put in all the testimony that we have.

MR. WASSERVOGEL: If your Honor please, I ask that the District Attorney be required to elect which count of the indictment he will stand on at this time?

MR. LYNCH: We will stand on the second count of the indictment.

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MR. WASSERVOGEL: I understand, if your Honor please, that the District Attorney elects to proceed on the second count of the indictment. That being so, the first count is removed entirely from this case?

THE COURT: No, it is not removed until the Judge grants the motion. I deny the District Attorney's motion.

MR. LYNCH: I made no motion at all. He asked about this count. I think there is sufficient on both counts.

THE COURT: I will at this time decline to order the District Attorney to proceed on any particular count.

MR. WASSERVOGEL: We except. I should think, if your Honor please, if the District Attorney wishes to elect to go to the jury on one count, that he knows what he thinks he has proven?

THE COURT: Well, you have had experience in the District Attorney's office, and you know at times a District Attorney is likely to make a blunder. This case, Mr. Lynch, if it is to be submitted at all, will be submitted on the first county false pretense.

MR. LYNCH: I think there is sufficient on both counts.

MR. WASSERVOGEL: Well then, I will address myself to both counts.

If your Honor please, on behalf of the defendant, I move for the direction of a verdict in this case, on the ground that the people have failed to make out a case against the

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defendant. There is no proof in this case that the defendant was other than an employee in the firm of the H. H. Dietch & Company. There is no proof that the defendant received any part of the proceeds of the check. The check, which is in evidence, shows by its endorsement that it was deposited to the credit of the person to whom it was made payable, that is, H. H. Dietch & Company.

The indictment in this case, which I am sure your Honor has read, sets forth certain representations which it is claimed were made by the defendant, which they alleged were false representations. One of these representations is that the defendant represented that he had -- to get the exact wording -- that a contract of insurance between the firm of Dietch & Company and the firm of James Hartley Cooper, of London, effecting marine insurance in the sum of seventy-four thousand, seven hundred and sixty-five dollars, had theretofore been made and closed.

I do not think there is any proof of that alleged representation in the case. There is no proof in this case that the defendant, as a matter of fact, had not effected insurance with the firm of James Hartley Cooper.

THE COURT: How about his statement to the attorney?

MR. WASSERVOGEL: I will come to that in a moment -- other than the statements by way of alleged confessions, and I think that under the decisions with which I know your

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Honor is very familiar, that is not sufficient proof under the corpus delicti.

THE COURT: Under what decisions?

MR. WASSERVOGEL: Well, we have quite a number of them. Your Honor will probably recall the case of the People against Baker, 96 New York. Earl, J., in discussing the requisite necessary to be proved by the Prosecution in make out the crime of Larceny by false pretenses said as follows: (Reading.) I think if your Honor were to examine that case you would find that there must be distinct proof that the pretenses were false.

THE COURT: Well, the Baker case is one of Larceny by false pretenses. Your contention is that the alleged confession of the defendant with respect to his statements that he did not insure, is insufficient.

MR. WASSERVOGEL: Yes, I will come to that. I would like your Honor to send for 15 Wendell, the People against Hennessy. In that case, the defendant was indicted for embezzlement. he was a collector of assessments upon property in the City of Albany and he collected money which it is alleged he did not turn over to the proper officer, but retained the proceeds for himself, the defendant being charged with having omitted to pay over moneys collected by him and admitted the fact, and went so far as to furnish the complaining witness with a statement in his

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own handwriting showing the amount of \$260.49 collected and not paid over, and that memorandum also contained the names of persons from whom this money was received, and that was read in evidence, and the Court held (Savage Chief Judge) (reading).

THE COURT: You need not go back as far as that. There is the case of the People against Gilman, 161 Appellate Division, and what becomes of the ^{case} Brasha 193 New York?

MR. WASSERVOGEL: The facts were different in that case.

THE COURT: And how about the People against Jaehne?

MR. WASSERVOGEL: The facts were different there too. Jaehne was a member of the Board of Alderman and was charged with accepting a bribe, and they proved against him that he had meetings, and other acts which brought it right home to him.

THE COURT: Now, in this case, if there had been no proof that the defendant received money, that the defendant did not exhibit a cable indicating that he had secured insurance covering the steamer "Halifax," if there had been no presentation by the defendant's firm to Tenner of these cover certificates, if you had not had those additional circumstances, then your contention would be sound. All of those circumstances taken together, supplemented by the confession in my judgment present a ques-

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tion of fact for the jury to determine, whether this defendant, through the medium of false pretences, obtained moneys from the complaining witness, which moneys when obtained were secured for the purpose of intending to defraud this complaining witness.

MR. WASSERVOGEL: The question is, if your Honor please, as I take it, whether the insurance was effected. No proof of that has been given in this case.

THE COURT: The defendant's statement, if believed by the jury, is sufficient.

MR. WASSERVOGEL: As the case stands now, there must be independent proof of that, but if you disagree with me on that point, I will go to another point. I am about to call your Honor's attention to what I consider a very, very serious question of law, on this proposition as to whether my application for a direction should be granted. It is testified to by Fox, the person for whom Tenner acted, that the cable which it is claimed was shown to him by the defendant, was not an absolute cable -- that is, did not absolutely state that insurance had been bound through the firm of J. Hartley Cooper of London, but that what he understood at the time the money was paid over was that the insurance --

THE COURT: You mean the testimony of Fox?

MR. WASSERVOGEL: Fox, and I will come to Tenner later

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on -- that the insurance was provisionally bound. Now, that is a very serious matter. The indictment alleges in so many words that the money was paid over to the defendant on the theory that the insurance was bound, and absolutely bound. Now, what is the proof in this case? They paid over this money knowing that at that time the insurance was only provisionally bound, and we have that not only in the testimony of Mr. Fox but also in the testimony of Mr. Tenner, and I do not know whether it is necessary for me to read from the minutes.

THE COURT: I remember Tenner so testifying.

MR. WASSERVOGEL: Well, Fox so testified, at pages 31 and 32 of the record. Now, that is serious, if this insurance was only provisionally bound at that time, if they paid over the money on that theory, they have not made out the case which is charged in this indictment.

THE COURT: Well, I will deny your motion on that point.

MR. WASSERVOGEL: Now, under the second count, there is no proof that any moneys were received by the defendant, and even if they were so received, that they were not used for the purpose for which they were intended; there is no proof of any embezzlement; there is no proof that any moneys were obtained by the defendant by any device, trickery, artifice or fraud, and I call your Honor's at-

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tention to the case of The People against Ehrlich, recently decided by the Appellate Division.

THE COURT: There is no embezzlement count, is there?

MR. WASSERVOGEL: Well, it is the general common law count of Larceny.

THE COURT: By trick and device, you mean?

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MR. WASSERVOGEL: Yes, that is right. The all important point in this case is, your Honor, that in spite of the allegations in the indictment that the insurance was absolutely bound, the testimony of the People's witnesses is that it was only provisionally bound at the time the money was paid over; that this money could have been received and returned at any time prior to the making of the complaint in this case, and that the complaining witness refused the return of this money; that he wanted a settlement of the loss, which of course he could only obtain in the civil courts, and he could not use the criminal courts in order to compel the collection of a civil claim, as is being done in this case now.

Now, I think these matters present serious consideration for your Honor, because they also affect the weight of the evidence which was given by the complaining witness.

Is their testimony entitled to such weight as to warrant your Honor in sending this case to the jury?

THE COURT: But the trouble is in this case no restitution was made.

MR. WASSERVOGEL: They would not take it.

THE COURT: Now, on that point the Court of Appeals held, "The fact that the defendant intended to restore the property stolen or embezzled is no ground for defense or mitigation of punishment, if it has not been restored before complaint to a Magistrate charging commission of

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crime."

This provision appeared in our statutes for the first time in 1881 (Reading).

You see, in this case there was no restitution made. The chances are that if your client or his brother had returned the money when discovering the loss, and that in good faith he was unable to secure the insurance because there had been an increase in the rate from two and a half to five per cent, that then there would be no question that the People could not proceed against the defendant.

Of course, the fact that the complaining witness sustained a severe loss must not be taken into consideration in determining the guilt of this defendant upon the charge of grand larceny. That would be unfair, but I think there is a question of fact here for the jury to determine, whether this defendant secured the money from the complaining witness with intent to defraud, and that his purpose at that time in getting the money was to steal it, and not to insure the party, but to appropriate the money to his own use, and if the complainant through the defendant's representations relied upon the statements made by this defendant. Of course, the jury must find that he was concerned in the misappropriation.

If you can show that your client turned over the money to the firm, and that he did not directly or indirectly participate in its misappropriation, that ends the matter.

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MR. WASSERVOGEL: They must also concede that the money was offered them and they refused to take it, even up to the time the officer was there to make the arrest, that "If you do not adjust this matter now I will arrest you." Now, if that was not the use of the criminal courts for the purpose of forcing a settlement, I say that in all my experience in the District Attorney's office I never heard of a case where such means were used —

THE COURT: Well, I think that in that respect you are right. The law is very strict on that point.

MR. WASSERVOGEL: Well, did your Honor intend to reserve decision on that part of my motion, where I called your attention to the fact that the testimony of Tenner and Fox was that the insurance was provisionally bound?

THE COURT: I think that makes no difference. Of course, if the insurance was cancelled, there could not be any responsibility.

The point is, did your client turn over the money to some insurance company? Did he have the insurance? Did he insure? That is the point.

MR. WASSERVOGEL: As the case stands now the Prosecution has failed to show, even by this alleged confession, the elements of the crime as it is charged in this indictment. The indictment is controlling on the Court. Now, the alleged confession does not go into these details as alleged in the indictment.

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THE COURT: Well, any one of the false representations is sufficient.

MR. WASSERVOGEL: Is there an admission testified to by any witness in this case as having been made by the defendant, "I did not show you a cablegram?" Is there an admission testified to by any one of these witnesses, "I did not bind any insurance?"

THE COURT: It is alleged he said that to Gerson.

MR. WASSERVOGEL: Not in those words. Is there any proof outside of perhaps one or two small statements which came to us from Gerson, the lawyer, that would in any way show the commission of the crime alleged in this indictment?

THE COURT: Now, here is what Gerson testified to: "I said, 'You didn't get any insurance.' He said, 'How do you know?' I said, 'I had a talk with your brother and he told me so.' The defendant said, 'That's right, I am sorry.'" Then he proceeded further. That is his statement. Now, the probative value of that witness's testimony is for the jury.

MR. WASSERVOGEL: But is there any proof outside of that in this record?

THE COURT: There is some testimony by Tenner along those lines, but not as comprehensive as that.

MR. WASSERVOGEL: All that Tenner stated he said when he asked him about that was, "Well, what of it?" And I

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still contend, if your Honor please, that that in itself is not sufficient. There must be independent proof that the insurance was not actually bound at that time, or that that cable which was shown was a fraudulent cable.

THE COURT: I think there is sufficient on the question of fact for the jury.

MR. WASSERVOGEL: Well, I will not bother your Honor any further on that now. I will take an exception to each denial of the motions, but I ask your Honor to tell the jury that your Honor's denial of the motions does not import any opinion that you have on the facts.

THE COURT: Gentlemen of the Jury, you must not consider as to the argument of learned counsel on his motions, which were denied by the Court, that the Court has any opinion, except that there is a question of fact for your determination with respect to the guilt or innocence of the defendant. The Court does not express any opinion. Under our system of law the Court has no power to do so. The Court merely rules as a matter of law that at present there is a question of fact for you gentlemen to pass upon. We will take a recess now.

(The Court then admonished the jury in accordance with section 415 of the Code of Criminal Procedure and took a recess until 2:10 o'clock P.M.).

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(After Recess)

TRIAL RESUMED.

Mr. Wasservogel now opened the case on behalf of the defense.

THE DEFENSE.

CHARLES H. CALDWELL, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 55 Warren Place, Montclair, New Jersey).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your business, please? A Paying teller of the Metropolitan Trust Company.

Q How long have you been connected with the Metropolitan Trust Company? A Eighteen years.

Q Do you know whether one Henry H. Dietch, or Dietch & Company had an account with your trust company? A They did.

Q Whose name was that account? A Dietch & Company.

Q When was that account opened? A The card I have here is dated June 5, 1913.

Q Have you produced, pursuant to a subpoena duces tecum the original signature card? A The original card (Handing).

MR. WASSERVOGEL: I offer in evidence the signature card.

(It is marked Defendant's Exhibit A in evidence).

Q Now, subsequently was any one else authorized to sign the name of H. H. Dietch to checks on that account? A A power of attorney was issued to one Jacob Schoen.

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Q Have you got that power of attorney with you? A I have.

Q May I have it, please? A Yes (Handing).

MR. WASSERVOGEL: I offer in evidence this power of attorney.

MR. LYNCH: I do not see that this testimony has any bearing at all on the facts that we have here before the Court.

THE COURT: Are you going to show that the check given by Mr. Tenner was deposited to the account of Dietch & Company?

MR. WASSERVOGEL: Yes, sir, we certainly shall. The check is already in evidence and has the endorsement to show that it was deposited to that account, and I want to show this defendant was merely an employe of that firm and that he was not in a position to immediately return that money to these people because he did not have the right to sign checks.

THE COURT: That becomes competent. You see, Mr. Lynch, the claim now made is that while this defendant acted for Dietch & Company, you have got to show that he was concerned in the commission of a larceny.

(Marked Defendant's Exhibit B in evidence).

THE COURT: If he turned the check over to Dietch & Company and the head of the firm failed to carry out the precise arrangement, unless you can show that was a criminal conspiracy between this defendant and other members

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of the firm, how can you impute criminal responsibility to him? In that case you could not adjudge the defendant guilty unless he acted in concert with some one else.

MR. LYNCH: Well, your Honor, the situation as you explain it of course would be entirely cleared up if the defense produced the brother, and he can testify to those facts as stated. I think that would clear up the situation thoroughly, and I think that that raises enough of an issue in this situation to have an explanation of that sort.

THE COURT: Well, there is no burden upon a defendant in a criminal case. Proceed.

MR. WASSERVOGEL: Gentlemen, this is merely the usual form of power of attorney, given by Henry H. Dietch to Jacob Schoen of 6 Maiden Lane, which authorizes him, in his name, place and stead, that is, in the name of Henry Dietch, to endorse for and deposit in the Metropolitan Trust Company drafts, checks, bills of exchange, and so forth, and to draw money, and so forth, on the account of Henry H. Dietch & Company, and on the account of Henry H. Dietch, and so forth (Reading).

BY MR. WASSERVOGEL:

Q Now, subsequent to that, was there a revocation of that power of attorney filed with your bank by Mr. Dietch? A There was.

Q Have you got that with you? A I have (Handing).

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MR. WASSERVOGEL: I offer this in evidence. There are two letters here, perhaps they had better be marked separately.

(They are marked Defendant's Exhibits C-1 and C-2 in evidence).

BY THE COURT:

Q What was the balance of the account of Dietch & Company on that date, do you know? A I don't know.

MR. WASSERVOGEL: I suppose they have statements of that. I have no objection to their producing them if the District Attorney wants them, no objection at all.

Q You have not got the account here with you? A No, sir.

BY MR. WASSERVOGEL:

Q I show you People's Exhibit 4, purporting to be a photograph of the check made by the Marine Brokers Corporation, Edmund A. Tenner, President, to the order of Dietch & Company, dated November 28, 1917, for \$2,889.13, and ask you whether that check as appears by the stamp upon the back, the endorsement, was deposited to the credit of Dietch & Company, the account that you have testified about? A Well, it appears so.

MR. WASSERVOGEL: It was? That is all, you may cross-examine.

CROSS-EXAMINATION BY MR. LYNCH:

Q Did you ever see the defendant at the bank? A His face is familiar, but I couldn't swear that I ever have.

Q Do you know Henry H. Dietch personally? A No.

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Q How long had that account been there, in your bank?

A The date was given there. I don't know the exact duration of the account. The date was given of the opening of the account on the card.

Q What was the date of the opening? A The date is given on the signature card.

MR. WASSERVOGEL: Here it is, June 5, 1915.

THE FIFTH JUROR: What is the date of the power of attorney?

MR. WASSERVOGEL: October 8, 1917.

THE COURT: And this money was received when?

MR. WASSERVOGEL: November, 1917. Power of attorney was given October 8, 1917.

THE COURT: And the money was paid when?

MR. WASSERVOGEL: November 28, 1917, subsequent to the giving of this power of attorney.

That is all, Mr. Caldwell.

Now, I have several character witnesses. May I call them now, as they wish to leave the court room?

I S A A C R. THEISE, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: St. George Hotel, Brooklyn).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your business, please, Mr. Theise? A Diamond dealer, importer of diamonds.

Q Do you know this defendant? A I do.

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Q How long have you know him? A Possibly about twelve or fifteen years.

Q Do you know other people that know him? A I do.

Q Do you know what his reputation is among the people that know him for truth, veracity and honesty? A Never heard anything against him.

Q No, do you know what it is, is it good or bad? A Good, I should say.

Q Well, you know it is good? A Yes.

CROSS-EXAMINATION BY MR. LYNCH:

Q Did he ever do any work for you? A No.

Q How do you know him, socially or how? A Socially and business. I have given him goods on memorandum, as we call it.

Q Is that the way you first met him, in business engagements? A Yes, through business.

Q You never saw him socially, did you? A Well, just down town, socially, probably had lunch together or something like that. I met him on and off.

LOUIS WHITE LAW, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 409 Edgecombe avenue).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your business, please, Mr. Whitelaw? A Jeweler, diamonds.

Q Where is your place of business? A 45 John street.

Q Do you know this defendant? A Yes, sir.

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Q How long have you known him? A I know him about fifteen years.

Q Do you know other people that know him? A Yes, sir.

Q Do you know what his reputation is among the people that know him for truth, veracity and honesty? A I never heard anything bad about him.

Q Do you know if his reputation is good or bad? A It has been good as far as I know.

Q That is all, Mr. Whitelaw.

(NO CROSS-EXAMINATION).

F R A N K W A L K E R, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 610 Broadway, Brooklyn).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Mr. Walker, what is your business? A Jeweler and wholesale merchandise.

Q Mr. Walker, your business is what? A Wholesale auctioneer.

Q Where is your place of business? A 610 Broadway, Brooklyn.

Q Do you know this young man, the defendant? A Yes, sir.

Q How long have you known him? A About eighteen years.

Q Do you know other people that know him? A I do.

Q Do you know what his reputation is among the people that know him for truth, veracity and honesty? A Excellent.

Q That is all, Mr. Walker.

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(NO CROSS-EXAMINATION).

D A V I D S A F F I R, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 320 Wadsworth avenue).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q What is your business, please? A Jewelry, salesman.

Q Do you know the defendant? A Very well.

Q How long have you known him? A Fifteen or twenty years.

Q Do you know other people that know him? A Yes, sir, plenty.

Q Do you know what his reputation is among those that know him for truth, veracity and honesty? A Good.

Q That is all, Mr. Saffir.

CROSS-EXAMINATION BY MR. LYNCH:

Q What is the defendant's full name, do you know? A Sam R. Dietch.

Q Do you know his brother? A Henry?

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

Q Where did you meet him? A Why, I have known him so many years, I used to meet them at their home many years ago.

Q At their home? A Yes, sir.

J E A N R O D E N, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 322 Hart street, Brooklyn).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Miss Roden, are you employed anywhere at the present time? A I am.

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Q Where are you employed? A The Hall of Records, Brooklyn.

Q By whom are you employed there? A In the Registrar's office.

Q Doing what kind of work? A Typewriting.

Q Were you ever in the employ of Henry H. Dietch & Company? A I was.

Q Do you know this young man the defendant? A I do.

Q How long have you known him? A Since May, 1917.

Q Do you know in what way the defendant was employed in that office? A As an employe, a clerk.

Q In a clerical capacity? Who was the head of that firm? A Mr. Henry H. Dietch.

Q In the month of November, 1917, did he have any partners that you know of? A No.

Q Was he in business alone? A Yes.

Q Were you with him prior to that, when he had a partner?
A No.

Q You were not working for him when he was engaged in business with Mr. DeMay, were you? A No.

Q How long were you working for H. H. Dietch & Company?
A From May, 1917, to May, 1918.

Q Do you know when Henry H. Dietch went to Camp Upton first? A September, 1917.

BY THE COURT:

Q What kind of work did you do? A Stenographic work.

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BY MR. WASSERVOGEL:

(Q How many rooms were in that office suite, do you know?

A Three offices.

Q Where was the defendant's office? A In the office to the left, with all of the clerks.

Q How many clerks were in that office? A Four.

Q And did he have his desk outside with the other clerks?

A Yes, with us.

Q He did not have a private room? A No.

Q Did Henry Dietch have a private room? A Yes.

Q You say that Henry Dietch was sent to Camp Upton in September, 1917, is that right? A Yes.

Q After he went to Camp Upton did he at any time come to the office to transact business? A Yes, quite often.

Q How often would you say he came there every week? A On an average of twice a week in the beginning.

Q And later on? A About every week end.

Q Was he in uniform when he came in? A Yes.

Q Did he take part in any of the business matters when he came over? A Yes.

Q Did he dictate letters? A Yes.

Q Did he give instructions to the clerks? A Yes..

Q Did you ever hear him give instructions to his brother, the defendant? A Yes.

Q Did you ever receive instructions from Henry Dietch during the time he was in Camp Upton? A Yes.

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Q Did Henry Dietch ever telephone over from Camp Upton or from outside to the office? A Yes.

Q During the time he was assigned to Camp Upton? A Quite often.

Q Did he give you any instructions over the telephone at all? A Yes.

Q Did you at any time go to Camp Upton to receive instructions from him? A Yes.

Q Whom did you go with? A With the family.

Q Did you ever go there with the defendant, Samuel Dietch? A Yes.

Q Did you have a note book with you at the time? A Yes.

Q Did you take dictation from him there? A Yes.

Q During the time that Henry Dietch was in camp do you know by whom checks were signed in the beginning? A By Mr. Schoen.

Q Jacob Schoen? A Yes.

Q Did you ever know this defendant to sign checks? A No.

Q Do you know Mr. Tenner (Indicating)? A Yes, I know Mr. Tenner.

MR. WASSERVOGEL: Stand up, please, Mr. Tenner.

Q This gentleman (Indicating)? A Yes.

Q Have you ever seen Mr. Tenner at your office? A Yes.

Q Did you ever see Mr. Tenner talk with Henry H. Dietch? A Yes.

Q In between November, 1917 and the beginning of 1918?

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A I guess so.

Q He would be in there and talk with him? A Yes.

MR. WASSERVOGEL: That is all, you may cross-examine.

CROSS-EXAMINATION BY MR. LYNCH:

Q This firm that you worked for was H. H. Dietch & Company, was it? A Yes.

Q Are you sure about that? A Yes.

Q Do you remember the name on the door? A H. H. Dietch & Company.

Q Did you ever see any of the checks that Dietch endorsed at all? A Mr. Henry Dietch?

Q Yes? A Yes.

Q What was the endorsement? A Did I sign them, do you mean?

Q No, the endorsement on the back of the checks, was it H. H. Dietch? A The checks that Mr. Schoen signed?

Q No, that Henry H. Dietch signed, what endorsement did he put on the back of the checks, well, was it H. H. Dietch & Company? A Well, when he signed checks he put H. H. Dietch & Company.

Q On the back of it? A Yes.

MR. WASSERVOGEL: Now, does it not depend on what way the check was made out? Sometimes a man named H. H. Dietch might sign his name in full and sometimes otherwise.

THE COURT: Well, you may on re-direct bring that out.

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Q Wasn't there a stamp there that they used? A Why, yes.

Q Do you remember what the stamp was? A H. H. Dietch & Company.

Q Are you sure about that? A Yes.

Q I show you People's Exhibit 4, Can you see that endorsement on the back of that? What is it? A That is Dietch & Company.

Q There was no "H. H." ^{there} at all, was there? A No.

Q Just Dietch & Company?, A Yes.

Q Do you remember what the stamp was now? A Dietch & Company.

Q It had always been that, hadn't it? A Yes.

Q Did you ever see this defendant use that stamp on the back of checks? A Why, yes.

Q You saw him do it frequently, didn't you? A Well, when a check had to go to the bank, when he got a check for Mr. Dietch.

Q Do you remember any of Mr. Tenner's checks that came in? A No.

Q Did you ever see the original of that check (Indicating). That is a photographic copy of it. Did you ever see that in the office at all? A No, I don't remember. You see, I didn't always handle checks so I can't say.

Q Did Mr. Shoen ever have to come down there and stamp his on the back of the checks? A No.

Q The defendant did it when the checks came in alone?

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A Well, anybody could do it in the office. We all did it.

RE-DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Why, you yourself sometimes put the stamp "Dietch & Company" on the back of a check to make a deposit? A Yes.

Q Every clerk in the office would do that? A Yes.

BY MR. LYNCH:

Q Anybody could do it? A Why, yes.

J A C O B S C H O E N, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 430 Riverside Drive).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Mr. Schoen, what is your business, please? A Importer of diamonds.

Q Where is your place of business? A 6 Maiden Lane, New York.

Q How long have you been engaged in that business in this city? A Fifteen years.

Q You are an uncle of this defendant, are you not? A I am.

Q And of course you are an uncle of Henry H. Dietch, his brother? A Yes, sir.

Q Did you ever have any interest in the business of H. H. Dietch & Company? A Never.

Q Do you know when that business first commenced? A In the early part of 1917, to my best recollection.

Q Do you know with whom Henry H. Dietch was in business at that time? A He started with a man by the name of De Nav.

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Q (Spelling) D-e M-a-y? A Yes, I think so.

Q And that partnership was dissolved, was it not? A Later, about the middle of the year.

Q Thereafter did Henry Dietch continue his business under the name of H. H. Dietch & Company? A He went in business for himself, yes.

Q Do you know whether this defendant was ever connected in business with Henry H. Dietch? A No, sir, he has not been.

Q Was he ever in the employ of Henry H. Dietch? A He was.

Q In what capacity was he employed there, do you know?
A I really don't know what his work was, but I know general office work.

Q Clerical work? A Clerical work.

Q Now, do you remember sometime in September, 1917, that Henry H. Dietch was drafted and sent to Camp Upton? A I do.

Q At that time he gave you power of attorney to sign checks on his account in the Metropolitan Trust Company, did he not?
A He did.

Q And also to pay out all bills on that account? A To sign checks, yes.

Q When he was not in the office that you had the power to do that? A Yes, after the office signed the name I had to O.K. it with my signature.

Q And you accepted that power of attorney at that time?
A I did.

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Q That was in the month of October, 1917? A About that time. I don't exactly remember the date.

Q Subsequently and on February 1, 1918, was that power of attorney revoked by Henry H. Dietch? A Either in January or February, it was revoked.

Q Do you recall any conversation you had with Henry H. Dietch at which the defendant was present, at about the time this power of attorney was revoked? A Sam Dietch came up to my office and he told me about some business that they done and that the insurance was not accepted, and I spoke to Sam Dietch about it and I told him that if the insurance was not bound they should return the premium. Well, he told me that he had no right to do such a thing, and that Henry will come into town, and the first time that Henry came to the city he came up with Sam to my office and I had taken the matter up with him, and I told my nephew Henry that the premium should be returned at once. He told me that he will attend to that. I said, "Well, attend to it at once." About a week or two elapsed and he came to the city again and I asked him whether the matter was adjusted and he says that he spoke to the party --

THE COURT: You are speaking of the brother now?

MR. WASSERVOGEL: Yes, of Henry Dietch.

THE COURT: Well, that testimony is not competent.

MR. WASSERVOGEL: Pardon me a moment. I only wish now to show the reason why the power of attorney was re-

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Woked.

THE COURT: Yes, but you are proving a conversation here now.

MR. WASSERVOGEL: Only as to that, the reason why that power of attorney was revoked, because that has a bearing upon the question of the intent, which we will go into more fully when the defendant takes the stand. It is simply a question of order of proof now.

THE COURT: I know. Of course you have a right to show under the decisions that the party who was interested, who diverted the funds was a person other than this defendant, but you cannot call a witness to prove what conversations he had with another, in order to show that such a person was the guilty party.

MR. WASSERVOGEL: Well, it is simply not to bring Mr. Schoen back after I get through with the defendant. It simply to corroborate some things that the defendant will testify to:

THE COURT: Well, if you make no objection?

MR. LYNCH: I do object. This was conversation that the defendant was not a party to at all.

THE COURT: I will sustain the objection. I will allow you to prove the fact without the conversation, Mr. Wasservogel.

MR. WASSERVOGEL; Yes, we respectfully except.

Q Do you know a man by the name of Henry Gerson, a lawyer?
A I have met him.

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

Q Did you ever see Mr. Gerson at the City Magistrate's Court, where this hearing was first had? A I have.

Q About that time did you have a talk with him? A I had.

Q Did you go there for the purpose of giving bail for Samuel R. Dietch? A I went there for that.

Q To arrange for bail? What did Mr. Gerson say to you, do you remember? A I do.

MR. LYNCH: Now, your Honor, I object to that.

THE COURT: No, this is to impeach Mr. Gerson. That is admissible. Of course you did not question Mr. Gerson regarding it, did you?

MR. WASSERVOGEL: I did, your Honor.

THE COURT: Well, it makes no difference, if you want to prove his general hostility.

MR. WASSERVOGEL: Well, I took the trouble of doing it.

THE COURT: Well, that is admissible.

Q Go on? A He met me at the Police Magistrate's Court and he told me that there is time now to make good. I said, "What do you mean by making good?" I said, "Your premium was, as I understood, eighteen hundred dollars." I said, "You can have it, I will give you a check for it right today, if you want your premium back." He tells me, "I want \$75,000." I said, "Well, \$75,000, I know that the concern has not left over, but that the premium is still here, that I can return you the premium, because the concern was not in

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existence, and he wanted \$75,000. He told me that \$1,800 was offered him several days ago and he refused it.

MR. WASSERVOGEL: That is all. You may cross-examine.

CROSS-EXAMINATION BY MR. LYNCH:

Q You still had the power of attorney with you at that time? A No, not at that time.

Q Well, how did you come to make the proposition of offering him \$1,800? A Well, as an uncle I wanted to take chances with the boy and let the boy pay me back that amount. He was in the army and I wanted to give it because I know that the \$1,800 was offered him before that, and I had taken chances to pay it out of my own pocket.

Q Just tell us again why was that power of attorney given you, why was it revoked?

MR. WASSERVOGEL: Well, now, the Court ruled that out before, but if Mr. Lynch wants it now, give it to him.

THE COURT: Well, I ruled it out before because it was not competent proof.

MR. WASSERVOGEL: I have no objection if he wants it.

MR. LYNCH: I do want it.

Q Go on? A The power of attorney - because I told Henry Dietch that he should pay the premium back at once and Henry Dietch said he will take care of that himself, because he has spoken to the parties that asked for the insurance. I told him, "If you don't settle the matter to-day I will draw a check on your concern and return the premium."

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Q Was the defendant there at that time? A The defendant was there with his brother. It was done by the defendant's request.

Q Did you ever see that check for \$1,800?

THE COURT: Well, let him conclude his answer.

Q Go on? A My nephew then walked out from my office and said that he will take care of it himself.

BY THE COURT:

Q Now, which nephew, you have two nephews? A Henry Dietch.

Q The brother of the defendant? A The brother of the defendant. Next morning I was informed that my power of attorney was revoked. For what reason, simply that it was revoked, but I never questioned why it was revoked.

BY MR. LYNCH:

Q You never heard anything at all from Henry Dietch as to why it was revoked? A No, I didn't ask.

Q Well, previous to that revocation of your power of attorney, did you go to the complainant, Mr. Fox or to Mr. Gerson and endeavor to settle this matter? A No, I didn't know the people at all, except that Mr. Fox was once in my office buying a diamond ring. I had no other dealings with him.

Q Didn't you ever at any time make a proposition to settle this matter and give him a check for \$1,800? A At no time until in the Police Magistrate's Court, I never saw Mr. Gerson before.

Q That was after your power of attorney was revoked?

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A After my power of attorney was revoked, yes, sir.

Q For how long a period did you have this power of attorney? A To my best recollection, why, from about October, when he was drafted, until about the end of January. I wouldn't be exactly certain of the date, but that's about the time, January or February, to my best recollection.

BY THE COURT:

Q What were the circumstances under which the power of attorney was given to you? A Only to sign checks, whenever payments were made, nothing else.

Q Was that the time the young man went into the service? A ,The time the young man went into the service. In fact, he told me he wanted to give up business.

Q Did he have a large bank account? A I really don't know their balances. They had money deposited, I don't know the extent of the bank account, because I never controlled their finances that far, simply signing checks when payments were made. The check was not honored unless it was countersigned by me.

BY MR. LYNCH:

Q Well, any checks that were brought up by the defendant to you you countersigned, is that right? A Well, I would always ask for what payments they were. They would submit bills and I would look the bills over that they made out and I would sign the checks.

Q Well, then, Henry H. Dietch was down at Yaphank, wasn't he? A Yes.

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Q Weren't there certain checks drawn by the defendant here that you countersigned? A I don't think so. I don't know whether he could draw money without my countersignature. I know the office couldn't.

BY THE COURT:

Q Well, who drew the checks? A There was a rubber stamp, and I countersigned. The stamp was used by the office and I countersigned the check with my signature, but I don't know whether he could draw a check without my countersignature.

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THE COURT: Well, it is clear that a check could not be honored unless it was countersigned by him, he having the power of attorney.

BY THE COURT:

Q Did this defendant ever present a check to you? A No, sir. The office girl came up, Miss Roden, or office boy with bills, ~~he~~ I would figure up the bills, what the check was for, or they would make out a slip for salary and I would sign the checks, not otherwise, unless I saw what the check was for.

BY MR. LYNCH:

Q Do you know the handwriting of the defendant? A I think I would if I saw it.

THE COURT: You will have to show that, Mr. District Attorney, if it is your contention that although there was the power of attorney, the defendant diverted the moneys.

Q Was the body of the check sent to you, were they typewritten or written out in longhand? A I really couldn't remember whether they were written by hand or typewriter. I couldn't recollect.

Q Do you remember ever having seen any of them written in the defendant's handwriting? A No, I don't think so. If the defendant sent me up a check, the bills or the slip for what the check would be signed for would have to be told to me before I signed. I would not sign checks for anybody without the bills attached to them.

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Q Is Henry H. Dietch here in court? A No.

Q Well, that is all.

S A M U E L R. D I E T C H , the defendant, called and duly sworn as a witness on behalf of the defense, testifies as follows:

(Residence: 6831 Ridge Boulevard, Brooklyn.)

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q How old are you? A Past twenty-eight.

Q Are you married? A Yes, sir.

Q And your family consists of whom? A Wife and two children.

Q How old are your children? A One is two years and the other is three months.

Q What is your business at the present time? A Jewelry business.

Q Prior to 1917, what was your business? A I was employed by Dietch & Company.

Q And before that time? A Jewelry business.

Q Were you employed anywhere then or were you in business for yourself? A No, I was employed by Jacob Schoen.

Q When did you first enter the employ of Henry H. Dietch & Company? A Around March, 1917.

Q Of whom did that firm consist at that time? A A. J. DeMay and Henry H. Dietch.

Q Henry H. Dietch was your brother? A Yes, sir.

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Q And how long did that firm remain in existence? A Until May 1st.

Q I mean the firm of which Mr. DeMay was a partner? A Until May 1st.

Q Was Mr. DeMay a partner in November, 1918? A No, sir.

Q In November, 1917? A No.

Q So that the partnership was dissolved before October and November, 1917? A Yes, sir.

Q And at that time of whom did the firm of Henry H. Dietch & Company consist? A H. H. Dietch.

Q Of him alone? A Yes, sir.

Q Were you at any time a partner --

THE COURT: What date was that?

MR. WASSERVOGEL: November, 1917, October and November, 1917.

Q At any time in October or November, 1917, was Henry H. Dietch in business alone or in business with a partner? A In business for himself.

Q Alone? A Yes, sir.

Q Now, at any time, whether October, 1917, November, 1917, or any other time, were you other than a clerk in the employ of your brother? A No, sir.

Q You were never his partner? A No, sir.

Q You were never engaged in business with him other than as clerk? A No, sir.

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BY THE COURT:

Q What work did you do there? A I was a clerk there.

MR. WASSERVOGEL: I will come to that, your Honor.

BY MR. WASSERVOGEL:

Q Where was your desk in that office? A As you come in, to your left, as you come in there was a reception office and on the left was the work room where all the employees was and I had one of the desks there with one of the other employees.

Q How many other employees were there? A Two stenographers, a solicitor, and an errand boy and myself.

Q You all had desks in that office? A Yes.

Q You did not have a private office? A No, sir.

Q Did you at any time have a conference with Mr. Fox or Mr. Tenner in a private office in that office? A No, sir.

Q Now, what were your duties, his Honor wants to know? A Clerical work, sometimes go out and solicit for business.

Q In entrance business? A Yes, sir.

Q And general clerical work? A Yes, sir.

Q Have you ever been convicted of any crime? A No, sir.

Q You yourself entered the Army? A I did, sir.

Q When? A May 28th, 1918.

Q Where did you serve? A Over-seas.

Q Did you received certificate of discharge? A Yes, sir.

Q Is this the certificate of discharge that I now show you?

A Yes, sir.

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MR. WASSERVOGEL: I offer it in evidence.

(It is marked defendant's exhibit B in evidence.)

Q Now, after the war started, your brother was drafted, wasn't he? A Yes, sir.

Q That was before you entered the Army? A Yes, sir.

Q When was your brother drafted? A In September.

Q In 1917? A Yes, sir.

Q And he was sent to Camp Upton, wasn't he? A yes, sir.

Q When he was at Camp Upton, would he come to the office at all? A Quite often.

Q How many days a week would you say he came in there? A There were times he came in on Wednesdays and then there were times he came in every Friday and Saturday.

Q On those occasions would he attend to any of the office work? A As usual, gave all his instructions to all the employees.

Q At that time, the firm of H. H. Dietch & Company had a bank account with the Metropolitan Trust Company? A Yes, sir.

Q Were you at any time authorized to sign checks on that account? A No, sir.

Q Did you at any time sign checks on that account? A No, sir.

Q Were you at any time authorized to pay out any moneys on that account? A No, sir.

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Q Or any moneys for your brother? A No, sir.

Q You know, do you not, that your brother gave the power of attorney to your uncle Jacob Schoen? A Yes, sir.

And
Q Do you remember the occasion when that power of attorney was revoked? A I do.

Q While your brother was at Camp Upton, did you communicate with him by 'phone at any time? A Pretty near every day.

Q Would you ring him up and he ring you up? A Just as things came up in the office.

Q Would you confer with him about office business from time to time? A Yes.

Q Did you at any time go out to Camp Upton with a stenographer? A Yes, sir, on a couple of occasions.

Q Was that stenographer Miss Roden who has testified here? A Yes.

Q How long had your brother been in the insurance business before November, 1917? A He has been in the insurance business about three or four years.

Q Had you ever been in the insurance business prior to that time? A No, sir.

Q Did you know anything about the insurance business prior to the time you went in to his employ? A Nothing at all.

Q How long had you known Mr. Tenner? A About six or seven months.

Q Prior to November, 1917? A No, sir.

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Q Well, how long prior to November, 1917, did you know Mr. Tenner? A I met him about four months.

Q Where did you know him from? A Through my brother.

Q Did he have business with your brother's office? A Yes, sir.

Q Did he frequently come in to that office? A Quite often.

Q Did you ever tell him of your employment there? A I have, sir.

Q Mr. Tenner knew you were a clerk in that office? A Yes, sir.

Q And that your brother was the owner of the business? A Yes, sir.

Q When for the first time did Mr. Tenner talk to you about getting insurance on the steamer "Halifax"? A On November 2nd, Mr. Tenner, from the Marine Brokers telephone Dietch & Company and inquired if we had any insurance.

Q Did he talk to you? A Yes.

Q That was 1917? A Yes.

Q Tell us the conversation? A Mr. Tenner 'phoned Dietch & Company on November 2nd and inquired if any insurance could be had on the "Halifax," and I told him "we haven't got any but probably we can get you some, it depends on the rate." I said, "What rate can you pay?" He said, "About one and a half or two percent." I said, "I don't know that we can get anything

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at that rate, but I will cable," at which time we sent out a cable.

Q And he mentioned the "Halifax" to you then? A Yes.

Q Did you pursuant to that inquiry over the telephone send a cablegram to anyone? A There was a cable sent on November 2nd to James Hartley Cooper of London.

Q H. H. Dietch & Company had done business with that concern before? A Yes.

Q As far as the copy of the cablegram that you sent at that time, or is this a copy (indicating)? A Yes, sir.

MR. WASSERVOGEL: I offer it in evidence.

MR. LYNCH: I object to that. This cablegram is dated November 2nd, 1917. This transaction was later than that.

MR. WASSERVOGEL: He said it was earlier. This is his defense, that this started earlier. Mr. Tenner was uncertain as to the date.

MR. LYNCH: All the testimony in the People's case was that it was that it was along in the second week in November.

MR. WASSERVOGEL: Why, he says the original was sent to London and this was a copy made at the same time of the original cablegram.

THE COURT: You cannot deprive the defendant of presenting his defense. The question is one of fact, and the probative value of his testimony is a matter for the jury.

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The money was not paid over until the twenty-eighth?

MR. LYNCH: Until the twenty-eight.

THE COURT: I will allow this, or wait.

BY THE COURT:

Q Who drafted the copy of the original? A One of the stenographer's in the office.

Q In your office? A Yes, sir.

THE COURT: I will exclude it unless you first show that the original was sent through the Western Union. You have to prove that.

BY MR. WASSERVOGEL:

Q Do you know of your own knowledge that the original of this cablegram was sent by the Western Union? A Yes.

Q And you know this is a copy of the cablegram that was sent at that time? A Yes.

BY THE COURT:

Q Who took the original to the office? A That I couldn't say.

Q To whom was the original given? A We generally press a button and one of their messengers come up.

Q Well, who attended to it? A Miss Roden typewrote that, I believe.

THE COURT: You see, if the defense show that the original was sent, then this is admissible.

MR. LYNCH: Here is a firm in business, or one individual

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in business --

THE COURT: But if this is admissible, then it is for the jury to say whether this cablegram was the cablegram which resulted in this concern securing insurance on the steamer "Halifax" in the month of November.

MR. LYNCH: I think that is just what took place, but I do not think this cablegram, allowing that it was sent, I do not think it was sent with any idea as to the insurance that the complainant speaks of at all.

THE COURT: But Mr. Tenner says that the defendant told him that they had twenty thousand pounds insurance on the steamer "Halifax" and he showed him a cable.

MR. LYNCH: They may have been insuring other stock.

THE COURT: That is a question of fact; and you cannot deprive the defense of presenting proof, except that your objection is well taken upon the ground that the defense must show that the original cable was sent from there. If you insist on that proof you are entitled to it.

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MR. WASSERVOGEL: We of course have not got the original.

THE COURT: But you have to show that the original was sent.

MR. WASSERVOGEL: But he testified that in the regular course of business that a button was pressed after the cablegram was written and that it was sent in that way.

MR. COURT: You will have to show that it was delivered to some one who appeared, and that it was sent.

BY MR. WASSERVOGEL:

Q Did you yourself dictate this cablegram? A Yes.

Q And you know that a copy was kept of every cablegram that was sent out in that office at that time? A Yes.

Q You know that? A Yes.

Q Did you see this copy at that time when you saw the original? A Yes, sir.

Q And in the regular course of your business did you see that a messenger boy from the Western Union called for the cablegram? A Yes, sir.

MR. WASSERVOGEL: Well, I offer it in evidence.

MR. LYNCH: I still object to it, your Honor.

BY THE COURT:

Q You were present, you say, when the boy received the original? A Yes, sir.

THE COURT: I will allow it.

(It is marked Defendant's Exhibit E in evidence).

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MR. LYNCH: The original certainly must be on file.

THE COURT: I believe the originals are destroyed a year afterwards. In the case of Arnstein, tried by me some years ago, my recollection is that it was shown that at the end of the year they destroyed the originals.

BY MR. WASSERVOGEL:

Q Will you just explain the meaning of the word "Bordeaux" in this cable? A That is the destination where the steamer was bound for on its trip.

Q And the meaning of the initials "F P A E C?" A "Free of particular average English conditions."

Q Now, in reply did you receive a cablegram from J. Hartley Cooper? A On November 5th.

Q Is this the cable that was received at that time (indicating)? A Yes, sir.

MR. WASSERVOGEL: I offer it in evidence.

MR. LYNCH: I object to this cablegram, this alleged cablegram in reply.

MR. WASSERVOGEL: This is the original cablegram. This is the cablegram which was discussed with Tenner.

MR. LYNCH: I am objecting on the ground that this is dated November 5, 1917, and all the testimony of the People's side of the case is that this all took place about the second week in November.

THE COURT: But did either Mr. Tenner or Mr. Fox state the date of the cable?

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MR. WASSERVOGEL: They did not.

BY THE COURT:

Q Did you exhibit this cablegram to Mr. Tenner? A Upon receipt of that I telephoned Mr. Tenner and he came over to the office.

Q Did you show it to him? A Yes, sir.

Q Did you ever show Mr. Tenner a cable other than this one?

A No, sir.

Q With respect to the steamer "Halifax?" A No, sir.

Q This is the one? A Yes, your Honor.

THE COURT: I will allow it.

(It is marked Defendant's Exhibit F in evidence).

BY MR. WASSERVOGEL:

Q There is reference in this cablegram to another steamship, "Ioannina." A Yes, sir.

Q And the words "twenty-one" after "Ioannina" refer to what? A To the "Ionanina."

Q What does "twenty-one" mean? A That is the rate.

Q The rate on the "Ioannina" was to be twenty-one per cent?

A Yes, sir.

Q And the part referring to "Halifax" is the part at the bottom here (Indicating) the part which says "Halifax, 2-1/2 per cent?" A Yes, sir.

Q Signed "Hartley?" A Yes, sir.

Q When you received this cablegram did you have a talk with Mr. Tenner? A I telephoned Mr. Tenner to come over to the office.

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Q Did he come over to your office? A He did in the latter part of the afternoon, towards evening.

Q Did he come there alone or accompanied by some one?
A All alone.

Q Now tell us what he said and what you said? A I told Mr. Tenner that I just received a cable.

Q Did you show him that cable? A Yes, I took that out and showed it to him.

Q Go on? A And he told me he was going to let me know, that he don't know exactly how many thousand dollars he could ship on that boat, as he was in bad because he had so many closeouts, as far as shipments were concerned. That was the end of the conversation and we went downstairs and he took me home in his machine as far as Atlantic avenue and then I left him.

Q Was Mr. Fox present on that occasion? A No, sir.

Q Did you at any time show Mr. Fox that cablegram or any other cablegram? A Never showed him any cable.

Q Had you seen Mr. Fox prior to that occasion? A I saw Mr. Fox one time in Mr. Tenner's office. He introduced him to me. Tenner bought a bar pin from my uncle and he told me that Mr. Fox wanted to get a stone, at which time was the only time I met Mr. Fox, and took him up to my uncle's office. After that I have never seen Mr. Fox.

Q Thereafter did you have another talk with Mr. Tenner?

A After when?

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Q After you showed him this cablegram of November 5th, Defendant's Exhibit F? A Mr. Tenner said he could use about \$50,000 worth of insurance.

Q How long after was that? A That was about ten days.

Q What did he do about that, what did he tell you about that? A I told him we would cable it and get him fifty thousand. I said, "I don't see why you ask only fifty thousand when you originally asked one hundred thousand." He said, "Well, I am not sure of getting all my cargo." I said, "Shall we cover fifty thousand?" He said "Yes, I guess fifty will be about enough."

Q Did you at that time dictate a cablegram addressed to J. Hartley Cooper, London? A Yes.

Q Did you see the cablegram after it was transcribed?
A Yes.

Q Did you see a copy of it at the same time? A Yes.

Q Do you know whether a messenger boy was called at your request? A Yes.

Q Did you see the messenger boy depart with it? A Yes.

Q Is this the copy of the cablegram you then sent (Indicating)? A Yes.

THE COURT: What is the date?

MR. WASSERVOGEL: November 13, 1917. I offer it in evidence.

MR. LYNCH: I object to that, your Honor, on the same ground. I think all those cablegrams refer to some other transaction that they had in placing insurance on some

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other goods, to be sent over on the steamer "Halifax."

THE COURT: Well, if you can prove the contrary the defendant would be guilty of perjury.

MR. WASSERVOGEL: Why, of course.

THE COURT: He claims these cablegrams refer to this specific transaction.

BY THE COURT:

Q Is that correct? A Yes, sir.

Q You say these all relate to the transaction as testified to by Mr. Tanner and Mr. Fox? A Yes, sir.

Q Is that correct? A Yes, your Honor. When we do cable if there is other business we generally put all the business combined in one cable, because those cables are expensive.

THE COURT: I will allow it. If you can prove the contrary you can prosecute this man for perjury, but the probative value is for the jury.

(It is marked Defendant's Exhibit G in evidence).

THE COURT: We will take a recess now.

(The Court then admonished the jury in accordance with section 415 of the Code of Criminal Procedure and adjourned the further trial of the case until Tuesday, June 29, 1920 at 10:45 o'clock A.M.).

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THE PEOPLE v. DIETCH.

New York, June 29th, 1920.

TRIAL RESUMED.

SAMUEL R. DIETCH, the defendant, resumes the witness-stand.

DIRECT EXAMINATION CONTINUED BY MR. WASSERVOGEL:

Q I think you were about to tell us yesterday afternoon about some closing certificates or statements that you received from Tenner, do you remember that? A Yes, sir.

Q You did receive some closing statements from him, didn't you? A I did, sir.

THE COURT: Closing statements from whom, Mr. Wasservogel?

MR. WASSERVOGEL: From Tenner.

Q When you received those statements what did you do with respect to them? A I told Tenner that I could not issue those certificates right away, that I would have to get in touch with my brother first of all. I told him, "You are not sending in the final closing particulars," as he asked for fifty thousand. At the time when he sent in the closing particulars they amounted to about \$30,000, and I could not issue them right away as I would have to get in touch with my brother. So I immediately communicated with my brother, telephoned my brother and asked him to send in the closing particulars for about \$30,000, so he said, "It's all right, you go ahead, issue those certificates."

I telephoned Tenner I would have the certificates ready

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about five o'clock in the afternoon. He sent around some young man or a messenger, at which I delivered those certificates.

Q Do you say your brother said something to you before you delivered those certificates? A Yes.

Q What did your brother say? A He said he received a cable just before he left Camp Upton. He was in the office that time about three days. I was married on Monday and he came into the office at that time and he told me he received a cable, and it was all right, that I could go ahead and issue those certificates.

Q How long after that did you receive this check which was offered in evidence here? A On November 28th.

Q What did you do with that check? A I turned it over to Dietch & Company, as I did other checks that I received from clients.

Q You deposited it to the credit of Dietch & Company?
A Naturally.

Q Was any part of that check or the proceeds of that check received by you? A None whatsoever.

Q Sometime thereafter, I believe you told us that you ascertained that the insurance had not been bound. Did you talk to your brother then? A I didn't get that question?

Q (Question repeated by the stenographer). A I did.

Q What talk did you have with your brother then? A I told my brother there was a letter received from James Hartley Cooper, and that the insurance had not been placed, and I said, "You

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want to see these people and return the premium, or else turn around and get insurance." He said, "Well, that's all right, I will take care of that." That was about the latter part of December.

Q Did your brother say anything to you about insurance rates at that time? A He says that insurance rates went up.

Q Did he say anything to you about fluctuation of the market? A Yes.

Q What did he say? A Insurance rates go up and down and he ought to have no trouble getting re-insurance with some other company.

Q Did you at any time talk with your brother about the question of returning the premium to Mr. Tenner? A I did the next week when he came in.

Q Was that matter discussed with your uncle, Mr. Schoen? A It was.

Q Did you have power to sign checks for your brother? A No, sir.

Q Or for your brother's firm? A No, sir.

Q What talk with you have with your brother about the drawing of the check to the order of Tenner? A I told him that we better go up and see Mr. Schoen, as Mr. Schoen had power of attorney in the absence of Mr. Dietch from the office to pay all bills and to sign checks. I told him, "You better come up and straighten this matter out," and on going up there we discussed the matter, and Mr. Schoen said, "You better return that premium, if not, I will." So my brother said, "You will do no

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such thing, it is a matter of my own and I will take care of that matter." Later on we left the office and sometime later he revoked the power of attorney of Mr. Schoen.

Q Did your brother, Henry Dietch, at that time say he would take up the matter with Tenner himself? A He did.

Q Was there anything else you recall that your brother said to you at that time? A No, sir.

Q Did your brother say anything about taking up the question of re-insurance with London himself? A He spoke to Tenner on that subject.

Q He said he spoke to Tenner about it? A Yes, sir.

Q Now, you remember having had a talk with Tenner and Gerson at the Harmonie Club in Brooklyn? A I do.

Q Just tell us what was said at that time? A On a Sunday I was up at the Harmonie Club. This club happened to be a two-story building and I was on the second floor, and a gentlemen came upstairs and told me there were two gentlemen downstairs that would like to see me. I immediately went downstairs, it was in the basement, and I saw Mr. Tenner and another gentleman there, and I said, "How do you do, Mr. Tenner?" Mr. Tenner said, "Shake hands with Mr. Gerson." Mr. Tenner asked me, "There was some insurance placed with your concern on which you issued a certificate." I said, "That's right." He said, "My insurance was not placed." I said, "That's true." He said, "Do you know that is a serious affair?" I said, "Well, what do you want me to do? I was only an employe. I acted under instructions. I had nothing to do with that matter. You

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want to see my brother about it." He said, "I saw your brother already, at which time he offered the premium back." He said, "I don't want the premium, I want \$75,000." I said, "You don't want to bother me about that, I am only an employe. You will have to see my brother about that." Later, Mr. Gerson butted in. At that time I didn't know he was his attorney. He only introduced him as Mr. Gerson. They tried to trap me into some sort of talk at that time. Mr. Gerson said to me, "You have some lawyer, haven't you?" I said, "I have some friends by the name of Blumenthal & Levy." He said, "You better bring them down to my office and bring some cables with you, this is a very serious affair." I told him I was only an employe and didn't have anything to do with that matter. He said, "You better come down to my office," and that was the end of the conversation.

MR. LYNCH: I ask to strike out that Gerson tried to trap him.

THE COURT: Strike that out.

Q Did Mr. Gerson say that the premium had been offered in return? A Yes.

Q By your brother? A Yes.

Q Did Fox say the same thing? A Yes.

Q Did both these men say they refused to take the premium?

A Yes, sir.

Q They wanted a settlement of the \$75,000 matter? A Correct.

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Q Did you ever say to Mr. Fox that you had a great deal of political influence? A No, sir.

Q And that you would use it against them and their business? A No, sir.

Q Did you say to Mr. Gerson that you were a Deputy Sheriff? A No, sir.

Q Did you say that you, or did you tell Gerson that you were acquainted with many politicians, including Borough President Riegelmann of Brooklyn? A No, sir.

Q Did you say Borough President Riegelmann would get you out of trouble? A No, sir.

Q Did you say you had a millionaire uncle who would get you out of trouble? A Never said that.

Q Did you say that your brother had told him that you were trying to keep out of the insurance investigation, or anything to that effect? A I knew nothing about that.

Q Did you say that? A No, sir.

Q Now, Mr. Dietch, at the time of the delivery of these cover certificates by you, did you believe that the insurance had actually been covered in London? A I did, sir.

Q In accordance with the cablegram which has been offered in evidence here, the cablegram of November 5th? A Yes, sir.

Q And if you had known the insurance had not been placed, would you have issued these cover certificates? A No, sir.

Q Or received the premium? A No, sir.

MR. WASSERVOGEL: That is all. Cross-examine.

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CROSS-EXAMINATION BY MR. LYNCH:

Q How long were you working for your brother, H. H. Dietch? A Eight months.

Q Just what were your duties there? A I took care of some of the clerical work inside, also soliciting. Went out and tried to get some clients to place insurance with the firm.

Q When did your brother go down to Yaphank? A September, 1917.

Q He was down there all during the month of November, wasn't he? A Yes, sir.

Q How often did you see him during the month of November? A He used to come in on Wednesdays and come in week-ends, Fridays and Saturdays, particularly in the month of November, as I got married that month. He was in, I think, for two weeks. He asked for leave on account of some important business. I think he was in the office quite regularly, more than I was, because I was married November 13th, and I wasn't in the office for the next ten days regularly.

Q Did you ever handle any of this insurance alone while he was there with you? A Did I? Sometimes, that is, everything was under his instructions.

Q Didn't you take entire charge of the office along about the middle of October? A Never took entire charge there, but every time acting under instructions.

Q How often did you see your brother? A I seen him pretty near every week once or twice, sometimes three times.

Q Did he appear in the Magistrate's Court at all? A No,

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sir.

Q Has he appeared at any time and testified in this case at all?

MR. WASSERVOGEL: I object to that as immaterial.

THE COURT: Well, I will sustain the objection to the form of the question, upon the ground that a person charged with crime is not called upon to present any defense, but you may ask him whether his brother is here now in this case.

Q Is your brother here in this case now? A No, sir.

Q Where does your brother live? A I don't know. We are not on friendly terms ever since this affair came up.

Q Is he living here in New York City? A He might. We are not on talking terms and I don't know anything about his affairs.

Q You were acquainted with the rise and fall of this rate on cargoes, were you not? A I didn't get that question?

Q You were acquainted with the rise and fall of the rate charged on this insurance? A Familiar with the rates, rates going up and down?

Q Yes? A Sometimes. It was only natural.

Q Well, how do you account for the rise and fall of the rate? A Well, it depends upon the steamer, if the steamer is an old steamer naturally the rate is higher. The people that get into the market first, they naturally get the first preference, and if you come in late, naturally the rate is apt to go

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up, and it costs you more money. Just like the stock market, the first people that come, first served, and the rates accordingly.

Q Well, how did you protect your clients when they got in on a low rate? A I cabled for them at two and a half per cent to cover fifty thousand dollars as per instructions from Mr. Tenner.

Q Do you remember just what time it was when you first saw Tenner and Fox? A I never seen Fox, first of all. And on November 2nd Mr. Tenner, from the Marine Brokers telephoned to Dietch & Company inquiring if we had any marine insurance on the "Halifax." I told him we had none but probably could get some entirely depending on the rate. I said, "What rate can you pay?" He said "Anywhere between one and a half and two per cent." I said, "We will cable for you and see what we can do."

Q That was on November 2, 1917? A Yes, sir.

Q What time of day was it he telephoned? A Well, that I can't recall. He might have been eleven o'clock.

Q And what did you do then after you talked with Tenner? A I immediately sent a cable to the other side, to James Hartley Cooper.

Q Did you receive a reply to that cable? A I did, sir.

Q That was on November 2, 1917, when Tenner first called you up about it, was it? A Yes, sir.

Q And you immediately cabled to London, to Hartley-Cooper?

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A That's correct.

Q You received a reply to that, did you? A I did.

MR. WASSERVOGEL: We have had that three or four times, your Honor.

Q Do you remember when you received the reply from Hartley-Cooper? A November 5th.

Q Did you get in touch with Tenner at all after you received that reply? A I immediately telephoned him.

Q Did he come down to your office? A He did, sir.

Q Do you remember when he came to your office? A He came that day, when we received the cable, at between 5:00 and 5:30 in the evening, he alone.

Q Can you fix the date, the day he came down there? A November 5th. Upon receipt of that cable I immediately telephoned Mr. Tenner and told him I got a reply, and he said, "I want to come over and see the cable," because he didn't believe I could get insurance at two and a half per cent. He probably thought I could get it at two per cent.

Q When next did you see Tenner? A Tenner spoke to me on November 23rd.

Q That was the next time you saw him? A I didn't see him. He spoke to me over the telephone.

Q Did you have any negotiations with him at all between November 5th and November 23rd? A None whatsoever.

Q Didn't you see Fox at all during that time? A No, sir.

Q When was the first time you saw Fox? A I saw Fox at

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Tenner's office much prior to this "Halifax" affair. Mr. Tenner bought a bar pin from my uncle through me, knowing at one time that I was in the jewelry business, and he said to me that Fox's wife lost a stone and he said Fox wants to buy a diamond and buy it cheap, and at that time he introduced me to Fox. Then I took Fox over to Mr. Schoen's office. That was the only time I met Mr. Fox, prior or after.

Q When was the last time you saw your brother, H. H. Dietch? A I saw him when he got back from the other side. I went up there with my mother.

Q Up where? A That's over a year ago.

Q Do you remember where you did see him? A Up at this camp, Camp Dix, I think, New Jersey, where the 77th Division was when they came back.

Q When did you go into the service? A May 28, 1918.

Q Where did you first go? A I was drafted, inducted into the service. The first camp I went to was Camp Upton. From there I went to Jacksonville, Florida.

Q How old are you now? A Past twenty-eight.

BY MR. WASSERVOGEL:

Q You went abroad too, didn't you? A Yes, sir. He didn't ask me that question.

BY MR. LYNCH:

Q Did you see service overseas? A Quite some.

Q When did you go overseas? A August 14, 1918.

Q What service did you see over there? A I was over with the 76th Division.

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Q In active service? A Well, I was on active service. I had charge of a big warehouse with about 500 men under me, right behind the lines, about 50 kilometres behind the lines, outfitting divisions as they were going into action.

Q How many employees were in your brother's office when you were there during the month of November? A Four.

Q Who were they? A Miss Roden, Miss Weiss, and a young man by the name of Leslie, a boy that used to do the placing, and myself at that time. There was another man, he was a solicitor, but he happened to be out of the office. He is in and out at all times.

Q Did you have charge of the office while your brother was out at Yaphank? A No, sir.

Q Who was in charge of the office? A My brother.

Q How often did he come in from Yaphank? A Three or four times a week.

Q That was the only time you got in touch with him when he came in? A No, sir, also by telephone, telegram and letters. We were always constantly in touch, as the office was acting from instructions daily from him, as nothing was carried on without his instructions and knowledge, and nobody could supervise that business without him, as I was practically a new man, and I didn't know much about insurance.

Q Did I understand you to say that you saw Tenner on November 5, 1917? A Correct.

Q You did not see him again until November 23rd? A I didn't see him. I telephoned.

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Q On the 22nd? A Yes, sir, at least he telephoned me, to be correct.

Q Did you see him personally on the 28th? A I have, sir.

Q Where did you see him then? A I happened to go up there, he used to come up to our office and I used to go up to his office, friendly. At that time he said to me, "Dietch, I owe the firm some money." I said, "That's right." So he made me out a check for premium including the "Halifax" and another steamer.

Q Did you go to his office that day yourself? A I did.

Q What did you go there for? A Just as a friendly visit.

Q Didn't you say something about this money he owed? A No, sir.

Q Sure about that? A Positively.

Q Did you see Fox there in the office at that time? A No, sir.

Q Did you ever see Fox in that office? A I saw him a couple of times there.

Q When did you first discover that this insurance was not placed? A Some part towards the latter part of December.

Q The latter part of December? A Yes.

Q Where did you get that information? A There was a letter that was sent by James Hartley Cooper stating that the insurance rate went up and that there was no insurance covered.

Q That was in the latter part of December, 1917? A Correct.

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Q Did you get in touch with Tenner or Fox at all when you received that letter? A No, sir.

Q Did you receive that letter or did your brother receive it in the office? A The firm received it, the firm of Dietch & Company, which was H. H. Dietch.

Q Did you open the letter? A No, sir.

Q Do you remember when you were first made acquainted with the contents of that letter, from Hartley Cooper? A About that time, as I told you, the latter part of December.

Q Did your brother talk it over with you at that time? A I spoke it over with him when he came in from camp, the latter part of that week. I showed him that letter and he said, "Why, I will take care of that affair."

Q You opened the mail there, didn't you, for Dietch & Company? A No, sir.

Q Who opened the mail? A Miss Roden. She was secretary.

Q Well, you saw that letter along about the latter part of December? A Correct.

Q When your brother came in you acquainted him with the fact? A Correct.

Q Did you get in touch with Tenner at all at that time? A No, sir.

Q Just what did you say to your brother? A I told him, "Here is a letter received from James Hartley Cooper, and the insurance that was placed on the 'Halifax' was not covered, as the rate went up." I said, "Now, you better take care of this

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affair and either get reinsurance for these people or return the premium." He said, "Well, don't you worry about that, that is an affair of my own and I will take care of it." The following week he came in and I spoke to him again about it. I said, "Well, we better go and see uncle about this. I don't want to be pestered by these people, because I don't know what to do in this matter." He said, "All right, we will go up to uncle." My uncle offered to return the check at that time. He had power of attorney at that time to pay out all disbursements.

BY MR. WASSERVOGEL:

Q That was Mr. Schoen? A Yes, sir.

BY MR. LYNCH:

Q That is your uncle? A Yes. To pay out bills, salary, and so forth, as per instructions of H. H. Dietch.

BY THE COURT:

Q Was this before any attempt was made to arrest you?

A Yes, sir.

BY THE TENTH JUROR:

Q When did the "Halifax" sail? A I couldn't tell you.

BY THE COURT:

Q What was the first thing you did when you received the contract of insurance? A I immediately got in touch with my brother.

Q With your brother? A Correct.

Q And at that time how long had you been in the insurance business? A A very short time.

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Q How long? A Well, about four or five months.

Q Four or five months? A Yes, sir.

Q And you took this matter up with your brother? A Correct.

Q When was that? A This was about the first part of January.

Q And where? A At the office of Dietch & Company.

Q And thereafter when you received the check did you speak to your brother about it? A Several times.

MR. WASSERVOGEL: Your Honor, I think the dates are somewhat involved. I am afraid he is answering something else than what your Honor is speaking of.

Q I am speaking now of the initial time when the insurance was given to the concern of Dietch & Company, with whom did you take up the matter? A With my brother.

Q That was when? A That was November 23rd, I telephoned him regarding the issuing of those certificates.

Q No, no, before the certificates were issued? A That was the first cable, naturally, everything was under his instructions.

Q Did you speak to him regarding the precise insurance? A He gave me all the instructions.

Q Did you speak to him? A Correct.

Q And then when you received the check what did you do with it? A I turned it over to Dietch & Company as any one else would do.

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Q Did you speak to your brother as to that? A I don't think he was in the office at that time.

Q Did you tell him at the same time you deposited the check for the firm? A He knew that, it was only a common thing that money was received there, it went to the firm's credit.

Q Who paid salaries to employees and bills and so on? A My uncle did.

Q How much did you receive? A Twenty-five dollars a week and commission on the business that I brought in.

Q Did you have any other interest? A No, sir.

Q Now, when did you learn for the first time that the insurance was not placed to cover the "Halifax?" A Towards the latter part of December, when the letter was received from James Hartley Cooper stating that the people did not accept the offer immediately and the rate went up and they were sorry that they couldn't do anything for us.

Q Did you communicate such facts to the assured? A No, sir.

Q Why not? A It was not my duty, as I was an employee, and I was under the instructions of H. H. Dietch. It was my duty to get in touch with him first, because it was his instructions to do so.

Q Did you speak with your brother regarding the failure of the London company to cover the cargo on the "Halifax," the insurance? A I have.

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Q What did your brother say to you? A That he was going to see if he could not get reinsurance and take care of the matter himself, that I would not have to worry about it. Then there was another occasion the next week I took it up, at which time we went up to my uncle's office, Jacob Schoen.

Q Without your brother being present? A No, he was present, that was his next leave from camp.

Q What took place then? A We discussed the matter and my uncle wanted to make out a check. My brother said, "You will do no such thing, this is an affair of mine, I will take care of this matter." Then we went out of the office. They were very much aroused about it and my brother didn't want to take any dictation from my uncle.

Q Thereafter he revoked the power of attorney? A Correct.

Q Did you directly or indirectly receive any part of the insurance? A Not one penny.

Q Other than your salary? A My salary.

BY THE EIGHTH JUROR:

Q After you received the checks, do you know what steps were taken to close that insurance? A The check was turned over to Dietch & Company.

Q Yes, but you don't know what steps were taken to close the insurance with Hartley Cooper, do you know what steps were taken in your office to close that insurance? Don't you know what the ordinary procedure was in your office to get insurance

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for those cover notes? A No, my brother said he was going to take care of that. We had a cable from the other side, which we received at a late hour.

Q You had nothing to do with that? A No, sir.

BY MR. LYNCH:

Q You consulted your brother about everything there, did you, in reference to this transaction? A Correct.

Q Did you say that on November 2nd was the first day that Tenner approached you about this? A Telephoned me.

Q Did you get in touch with your brother that day? A I did.

Q Did you speak to him about this? A Correct.

Q Did you ask him about cabling Hartley Cooper? A Yes, he used to help us out in constructing the cables. He used to dictate over the telephone many times to the young lady, Miss Roden was the young lady. She used to write out the cables and send them out.

Q Did you dictate that cable or did your brother (Indicating)? A My brother dictated that cable.

Q Over the phone? A Yes, sir.

Q You are sure about that? A Positively.

BY THE EIGHTH JUROR:

Q Was your brother in the office the day you received this check? A Was he in the office?

Q Yes? A No, sir, I don't think so. I can't recall that, to be exact, I wouldn't make any statement unless I was

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really sure.

BY THE SEVENTH JUROR:

Q Did you personally deliver the cover certificates to Tenner? A No, sir.

Q They were sent by messenger? A Yes, he sent a messenger over to the office.

Q How long after that did you go to Tenner's office? A I didn't go over to the office - November 28th I happened to go over to the office.

Q How long afterwards? A This was about six days.

Q Six days after the certificates were delivered? A Two days after, because the last certificate was delivered November 26th.

Q Is it customary in that line of business to receive or ask for a check in so short a time? A Yes, it is customary to get payments upon presentation of the policies or certificates, otherwise the insurance is cancelled.

BY MR. LYNCH:

Q Do you remember just what the conversation was that you had with Tenner on the 28th of November? A I came in there and just asked him how things were, was there any business. We used to buy, when I was with them - I mean Dietch & Company, I acted as an employe, I used to go in and ask him if he had any insurance on certain steamers, and he said, "I owe you fellows some money." I said, "That's right."

BY THE COURT:

Q How many transactions did Dietch & Company have with

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Mr. Tenner during the time you worked there? A Quite a few.

Q About how many? A Maybe a dozen.

Q In which large sums were paid as premiums? A Yes, we used to buy and sell, we used to buy from the Marine Brokers and they used to buy from us.

BY THE FOURTH JUROR:

Q You say you received twenty-five dollars a week and commission? A Yes.

Q Did you receive any commission on this transaction? A Not one penny.

Q Why? A Because it was not an account of mine. It was an account of my brother's. My brother introduced me to Tenner during the summer, sometime before he was drafted. He knew Tenner and he knew the people from the old concern, the Maritime Brokers, that Tenner was connected with. He happened to come into the office and my brother said, "Meet Mr. Tenner," and at that time they commenced to do business with each other, buying and selling insurance.

BY MR. LYNCH:

Q When did you get word from Mr. Tenner to cover this cargo on the steamer "Halifax?" A To cover? There was no particular amount to be covered. November 5th he says to me, "I think I can use about fifty thousand."

Q Did your brother talk with Tenner at all in your presence at any time during the month of November? A He might have, because my brother had a private office.

Q In your presence? A In my presence, no, sir.

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Q I show you Defendant's Exhibit G and ask you to read that? A (Reading): "Ernest - London. James Hartley Cooper & Co., Ltd. Cowper's Court, Cornhill, London, E. Cover Kerlew rate indicated, omitting -- cover Halifax ten thousand pounds firm, two one half per cent. Confirm."

Q Was that cablegram that you sent to Hartley Cooper specifically covering insurance on this cargo? A Correct.

BY THE COURT:

Q What was the premium on that amount of insurance, on ten thousand pounds? A Two and a half per cent, at the rate. I couldn't tell you what the premium is.

Q Well, what was the order given you by Mr. Tenner?

A Fifty thousand dollars, that is ten thousand pounds.

Q Well, you received eighteen hundred and some odd dollars for this insurance? A Yes.

Q Is that in excess of ten thousand pounds of insurance?

A He gave me closing figures later on. The first closing figures he gave me on November 22nd for some thirty thousand dollars. On November 23rd he gave me six thousand, then on November 26th he gave me the balance of seventy-four thousand dollars.

Q You mean he did not give you the full amount at one time? A No, your Honor.

Q Now, when you cover insurance who pays the premium?

A Dietch & Company.

Q In the first instance? A Correct.

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Q So when you sent this cable your brother had to pay the money? A Yes, after we got a bill.

Q But you are bound? A Correct.

Q And you extended in the meanwhile credit to Mr. Tenner, is that right? A Correct.

Q What was the date of that cable? A November 5th.

MR. LYNCH: November 13th.

THE WITNESS: Or November 13th.

BY MR. LYNCH:

Q When was the last time you saw your brother?

MR. WASSERVOGEL: We have had that several times, your Honor.

A That was when he got back from the other side.

A Was it a year or two years ago? A A year ago.

Q Do you know where he is working now, or is he working?

A I don't know anything of his affairs.

Q Have you made any effort to have him here at all?

MR. WASSERVOGEL: That is objected to as immaterial.

Objection overruled. Exception.

Q Answer the question.

(Question repeated by the stenographer).

A We are not on friendly terms.

Q Just answer the question? A No, sir.

Q Does anybody that you know, know where your brother is? A No, sir.

MR. WASSERVOGEL: I object. Now, your Honor, this is very unfair to the defendant. We are under no duty to

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produce an unfriendly person to this defendant. The defendant has already testified that he is not on friendly terms with his brother.

THE COURT: That is a question of fact.

MR. WASSERVOGEL: Exactly, but we are not under obligation to produce anybody. We are not under obligation to even put the defendant on the stand.

THE COURT: That is true, but once he is on the stand you cannot foreclose the District Attorney from questioning him. I will overrule the objection.

MR. WASSERVOGEL: I take an exception.

Q You were here when the testimony of Mr. Fox and Mr. Tennér was given, you heard all their testimony, didn't you?

A Correct.

Q Did you hear them testify that they saw you in your office along in the middle of the month of November, 1917? A Correct.

Q Did you or did you not see them together in your office?

A Never, at no time.

Q You are sure about that? A Positively. Fox never seen the office of Dietch & Company.

Q You are positively sure that Fox was not there? A Positively.

Q Did you ever see your brother talk to Tenner at all in your office? A Quite often.

Q Did you see him at any time during the month of November,

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1918? A Well, I couldn't say I had seen him. He was in his own private office, on the right, where he received his clients.

Q Well, to your knowledge, did Tenner come down to that office along in the month, the middle of the month of November,

1917? A He might have seen Tenner.

Q Well, you can tell whether you saw him or not? A I have not seen him.

Q You did not see him? A No, sir.

Q The only time you saw him was on November 5th? A Correct.

Q You did not see him again until November 28th? A Correct.

Q You did not talk to him on the phone until November 23rd? A Correct.

Q Did you have any negotiations, any letters at all from him in any way, shape or manner, during that time, from November 5th to November 23rd? A Any letters from Tenner? I think there came a letter along in January.

Q No, I am talking about November, 1917? A No, sir.

Q Didn't you communicate with Tenner at all after you sent this cablegram dated November 13th, 1917? A Did I communicate? No, sir.

Q Did you receive any reply from James Hartley Cooper & Company, Limited? A I did not.

Q Wait until I finish the question, in reply to this cablegram dated November 13th, 1917? A No, sir.

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Q The next communication that came before you saw the letter, in the latter part of December, is that right? A That's right.

Q You did not know at all from November 13th whether Hartley Cooper & Company had covered that cargo? A I did through my brother.

Q When did you learn that from your brother? A I learned that on November 23rd. Then I telephoned my brother and he told me that he received a cable on his leave to the office. That was prior to November 23rd, that he received a cable just as he was going out, going home, then he left it that evening.

Q Did you see that cable at all? A No, sir.

Q Wasn't it left there in the office? A No, sir.

Q Didn't he keep all his cablegrams there on file in the office? A He did.

Q Did you see him carry that cablegram out? A I was not there.

Q Was that a telephone conversation with him or did you see him personally? A Telephone conversation on November 23rd.

Q Where was he, at Yaphank, when you talked to him? A Correct.

Q Do you know what time of day that was when you talked to him? A I spoke to him around three o'clock in the afternoon.

Q Had he been in the office that morning? A No, sir.

Q Did he state to you over the phone that he received a cablegram from Hartley Cooper? A Correct.

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Q Did he tell you where he received it? A He told me he received it in the office, late, just as he was leaving the office.

Q Didn't you just say he was not in the office at all on November 23rd? A Prior to November 23rd, I said.

Q Did he tell you when he did receive it? A He told me just before he left the office.

Q Was that on November 23rd? A No, sir.

Q Well, what day was it? A About the 18th.

Q And he never communicated with you at all about that until November 23rd? A No, sir.

Q Do your father and mother live in Brooklyn? A Yes, sir.

Q Where do they live over there? A 542 49th street.

Q Does your brother visit them there at all? A I can't answer that question, I don't know.

BY THE EIGHTH JUROR:

Q Did you keep books in the office? A No, sir, we had an expert accountant, and one of the young ladies used to make entries, Miss Weiss.

Q Didn't they have a record of all the insurance that was actually covered? A (No answer).

BY THE COURT:

Q Do you know where the books are now? A No, the firm went out of business. H. H. Dietch was drafted and went to the other side two days after my arrest. At that time he ordered the office closed up and all the records were taken away.

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BY MR. LYNCH:

Q How far away do you live from 542 49th street? A 6831 Ridge Boulevard, 69th street.

Q About twenty blocks away? A Correct.

Q Will you state that these cablegrams here were all in reference to the marine insurance upon the cargo that Tenner spoke about? A Yes, sir.

Q Absolutely no other cargo that you were placing insurance on at all? A Oh, there are some others there, whatever the cables state.

Q Well, I mean, were those cablegrams in reference to the business you had with Tenner? A Not only Tenner. There was some other business there besides Tenner's.

BY THE FIFTH JUROR:

Q What did you say? A Other business --

Q You say that the books were taken away by your brother?

A Yes, sir.

Q All the books? A Yes.

Q And all the correspondence too? A Yes.

Q On what date? A Around March.

BY THE EIGHTH JUROR:

Q If all the documents in this case were taken away how did you get hold of these cablegrams? A I got these from the office. I had to fight with my sister-in-law to get these. I said, "Do you realize the situation I am in?" I said "I haven't got nothing at all." They had everything confused and packed up, books, and so forth. This was all the correspondence I could

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get.

Q That was all you could find? A Correct.

BY MR. LYNCH:

Q When did you get those out of the office? A This was the day after my arrest.

Q When was that? A I was arrested in March, on a Sunday.

Q About March 23rd? A The next day, the following day.

Q Were you in the office there at that time working for your brother? A Yes, sir. At that time it was a corporation.

Q You were there all the time, December, 1917, January, February and March, 1918, were you not? A Correct.

Q You were well aware of this transaction along in the latter part of December, were you not? A Correct.

Q That no insurance was placed by Hartley Cooper on this cargo? A That was in December I found that out, correct.

Q Did you get in touch at all with Tenner at that time?
A No, sir.

Q Did you ever say anything to Tenner at all, either in the latter part of December or January or February? A The only time I spoke to Mr. Tenner that there was no insurance was at the Harmonie Club.

Q That is when they sought you out? A Correct.

Q Did you talk to your brother at all during that time?
A Quite a number of times. I spoke to him right after receiving that communication from James Hartley Cooper.

BY THE SEVENTH JUROR:

Q You have a cable there in which it says they would take

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ten thousand pounds insurance on the "Halifax?" A Yes.

Q After they send such a cable isn't that placed or can they afterwards cancel it? A They can afterwards cancel it.

Q I understand you received a cable saying that Hartley Cooper of England had placed fifty thousand dollars insurance on the steamer "Halifax." If such a thing is so, aren't they bound by that cable?

THE COURT: Aren't who bound?

THE SEVENTH JUROR: Hartley Cooper, of England.

THE COURT: As a matter of law, yes, unless cancelled.

Q Did you ever receive a cancellation? A I don't know of any cancellation. There might have been.

BY THE FIFTH JUROR:

Q But you received a letter afterwards? A I received a letter towards the latter part of December.

Q There was no correspondence between November 13th and December? A Not that I had any knowledge of.

Q Do they confirm those by letter or cable? A Letter and cable, both.

BY THE COURT:

Q And the December cable is not here? Where you say that they did not cover the "Halifax?" A Oh, no. They confirmed that by letter.

Q But wasn't there some testimony here to the effect that the firm received a communication stating that there had been

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no insurance on the "Halifax?" A No, sir, not a cable.

Q Well, what was that? A There was a letter. That is the letter I have reference to.

Q And you don't know where that letter is, do you? A No, sir.

BY MR. LYNCH:

Q Did you see that cablegram at all that was received by your brother around about the 18th of November? A No, sir.

THE TENTH JUROR: There is a letter here from Hartley Cooper, a December letter, stating that the insurance --

MR. WASSERVOGEL: I think there may be a letter. Which letter are you talking about now, Mr. Lynch?

THE COURT: My recollection is that there is some testimony about a letter.

MR. WASSERVOGEL: May I interrupt a moment?

MR. LYNCH: Yes, certainly.

BY MR. WASSERVOGEL:

Q Mr. Dietch, I call your attention to a letter headed on the letterhead, "James Hartley Cooper & Company, London," referring to a number of transactions, and also mentioning the "Halifax." When for the first time did you see that letter? A Sometime in December.

Q Do you know how long it took for letters to arrive from London during the war? A Three or four weeks, sometimes longer. Every letter had to be censored.

MR. WASSERVOGEL: This letter is now offered in ev-

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idence, if there is no objection. Do you object to it, Mr. Lynch?

MR. LYNCH: No, I have no objection.

(It is marked Defendant's Exhibit H and read to the jury by Mr. Wasservogel).

THE FIRST JUROR: There is reference there to the having "cabled accordingly." What does that mean?

MR. WASSERVOGEL: I will ask him that now.

BY MR. WASSERVOGEL:

Q Now, there are some references, "We have cabled you accordingly and now await your instructions whether you wish us to place at this rate." Was there any cable received from Hartley Cooper which was called to your attention with respect to that matter? A No, sir.

Q Did you at any time see any reference to this cancellation of insurance, other than the letter dated November 14, 1917, which you say was received in your office sometime in December, 1917? A No, sir.

Q That is the only reference that was ever made to this cancellation, so far as you know? A Correct.

BY THE COURT:

Q When did you see this letter for the first time?

A Sometime in December.

Q Under what circumstances? A It came in with the other mail and it was handed over to me by one of the young ladies. She called my attention to the fact.

Q When did you learn of the sinking of the steamer "Hali-

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ifax?" A I don't know it to this day, as that is an unproved fact. There is a difference now in the firm that chartered that steamer, whether they ever really sent that steamer across.

Q Well, when did you hear the rumors to that effect?

A Sometime around the latter part of January.

Q Of what year? A 1918.

Q This letter dated the 14th of November was received sometime in December? A Correct.

Q Was that the first time that you learned, upon the receipt of this letter, that the "Halifax" had not been covered?

A Correct.

Q There is a paragraph here, "Your friends did not accept our quotation at once and they have lost the market," is that what you mean? A Yes, sir.

Q Did you discuss this letter with your brother? A That's the first thing I showed him.

Q The first intimation that you had of it? A Correct.

BY MR. LYNCH:

Q You cabled Hartley Cooper & Company on November 13, 1917? A Correct.

Q That is the copy of the cable that you sent (Indicating)?

MR. WASSERVOGEL: We have had that half a dozen times.

THE COURT: Well, he is trying to fix a date.

A Correct.

Q And this letter dated November 14, 1917? A Yes.

Q Is that the usual way Hartley Cooper & Company transact their business? A Correct.

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Q You received no cablegram at all from them around about that time, did you? A I personally received no cable at all.

BY THE EIGHTH JUROR:

Q When you first saw that letter, weren't you interested in looking up the files in relation to the correspondence?

A Correct.

Q Well, did you look it up at all? A Correct.

Q What other documents did you find? A I found these cables here. Then when my brother came back I showed him the whole thing, and he said, "Why, I will take care of that," because he knew the insurance was not placed, and he received another cable and that was the cable he received that they could not place the insurance on account of the rate.

BY THE SEVENTH JUROR:

Q You never saw that cablegram? A No, sir.

BY MR. LYNCH:

Q Did your brother read that cable to you over the phone?

A No.

Q Just what was that conversation? A He told me, "I received a cable from Hartley Cooper, it's all right, you go ahead and issue those certificates."

BY THE SEVENTH JUROR:

Q He never asked you to go back and ask for a higher rate, did he? A No, sir.

Q Then you did not know the rate? A No, sir. This was the only cable I sent out.

MR. LYNCH: Now, your Honor, I think the witness that

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we need here is the brother of this defendant, and I am going to ask for an adjournment at this time for the purpose of locating his brother.

THE COURT: You mean you are going to try to locate the brother?

MR. LYNCH: Yes, your Honor.

THE COURT: Well, when the defense completes its case I will consider that.

BY THE FIRST JUROR:

Q Mr. Dietch, you say you were originally in the jewelry business, in the employ of your uncle? A Correct.

Q How long were you with your uncle? A About ten years.

Q Did you leave your uncle to enter the employ of your brother? A No, sir.

Q You did not? A No, sir.

Q There was a lapse of time? A Yes, there was a dull season. The jewelry business took an awful drop, especially in our line. I was selling on commission basis. I was selling watches at that time, and my brother was doing very well in his business, so my uncle suggested that I go with him.

Q Now, in the employ of your brother you say you received twenty-five dollars a week and commissions? A Yes, sir.

Q What did your commissions average up to the time of this case, weekly? A I didn't receive - you mean if I received commission on this case?

Q No, what did your commissions average weekly? A Sometimes a hundred dollars, a hundred and fifty dollars. It just

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depended on the business that I got.

Q That is all.

MR. WASSERVOGEL: That is all, Mr. Dietch.

L I L L I A N D I E T C H, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 6831 Ridge Boulevard, Brooklyn).

DIRECT EXAMINATION BY MR. WASSERVOGEL:

Q Mrs. Dietch, you are married to the defendant, aren't you? A Yes, sir.

Q How long have you been married to him? A Almost three years.

Q Do you know Mr. Tenner, have you ever seen him? A Yes, sir.

Q Did you see him at your home? A Yes, sir.

Q Was he accompanied by any one? A Yes, sir, Mr. Gerson.

Q Did you have a talk with Mr. Tenner and Mr. Gerson?
A Yes, sir.

Q Will you tell us what they said to you? A Mr. Tenner asked for Mr. Dietch. I said he was not at home and didn't know of his whereabouts, but he was expected at his mother's home for dinner that evening. Then Mr. Gerson said, "Do you want your husband?" I, being curious to know what he meant, asked "What do you mean, do I want my husband?" He said, "Had you any knowledge"--

Honor, I

MR. LYNCH: Your object to this. Dietch was not there at all.

THE COURT: The testimony is competent. Are you try-

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ing to show general hostility?

MR. WASSERVOGEL: Yes, sir.

Q Go on, please, Mrs. Dietch? A Then Mr. Gerson asked me whether I had any knowledge of Mr. Dietch signing certificates for insurance involving \$75,000. Then Mr. Tenner turned around and said, "Do you want your husband? Unless he comes across with the \$75,000 he will be placed under arrest." That was all.

MR. WASSERVOGEL: That is all. You may cross-examine.

CROSS-EXAMINATION BY MR. LYNCH:

Q Where was that, in your own home? A At my own home.

Q When was it? A This was in the month of March, on Sunday afternoon.

Q Did you know Gerson or Tenner at all? A I had never seen them before.

Q What was the first thing they said when they came to your house? A Asked for Mr. Dietch.

Q And you inquired what they wanted? A Yes, sir.

Q Can you fix that date exactly? A No, sir, I can't recall the exact date but it was in the month of March, on Sunday afternoon.

Q In 1918? A Yes, sir.

Q Anybody else with them at all? A Mr. Gerson and Mr. Tenner.

Q Nobody else but those two? A No, sir.

Q Did you tell them at that time when they came in that you were Mrs. Dietch? A They asked if I was Mrs. Dietch and

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I answered I was, and then they proceeded, when I asked what they wanted Mr. Dietch for.

Q Did Mr. Gerson tell you that he was an attorney at that time? A No, sir.

Q In your direct testimony you said something about they telling you if he didn't come across, what was that? A Mr. Tenner said that.

Q Just repeat the words as nearly as you can? A Mr. Tenner said, "Do you want your husband? Unless he comes across with the \$75,000 he will be placed under arrest."

Q "Do you want your husband?" A Yes, sir, those were the exact words.

Q What time on Sunday afternoon was that? A Well, to be exact I can't say, but about 2:30.

Q How long did they stay there? A For about half an hour.

Q Just talked to you in that half hour? A Yes.

Q Anybody else there at all? A No, sir.

Q Well, that is all.

MR. WASSERVOGEL: That is all. The defense rests.

MR. LYNCH: Now, if your Honor please, I want to make application for an adjournment. I think there is a material witness, the brother of this defendant, I think he is a material witness and should be here.

THE COURT: Are you going to offer any rebuttal proof?

MR. LYNCH: I do not know of any that we can.

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THE COURT: I will give you an adjournment, but, Mr. District Attorney, in the event of your not being able to negative what this defendant has said, you have got a serious question of law in this case.

You see, in the case of the People against McLaughlin, to which I called your attention yesterday, I find ~~that~~ this very significant statement: (Reading).

You have to show in a criminal case that there was complicity ~~on~~ the part of both brothers in this case, before you can condemn this defendant. Have you proven criminal conspiracy? Have you shown that this defendant received any part of the proceeds which you claim that he stole? Have you proven that at the time he entered into negotiations with Mr. Tenner and Mr. Fox, there was a motive which impelled and induced him to make false representations for the purpose of criminally depriving and defrauding the complaining witness of a sum of money? The indictment charges ~~that~~ he made false pretenses and at the time that he made the false pretenses there operated in his mind a desire to secure money through the medium of a criminal intent, supplementing ^{ed} ~~ing~~ by the making of false and fraudulent representations, thereby inducing the complainant to part with his money.

If you can negative what he said, then you have made out a case. My sympathies, of course, are with the unfortunate victim in this case, and it teaches every mer-

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chant an object lesson to deal with honest agents. The point is, you are charging this defendant with stealing the premium, and now you have to prove that he stole that premium.

However, I will give you time to produce the brother, if you can. How long do you want?

MR. WASSERVOGEL: In view of the statement which your Honor made, it would hardly be fair to submit this case to the jury anyway. You say your sympathies are with certain people, and it is hardly fair to the defendant to submit the case to the jury in any event.

THE COURT: Oh, no, I say my sympathies are with the poor people that lost the insurance.

MR. WASSERVOGEL: Exactly. That is not either Tenner or Fox.

THE COURT: But that does not mean that the Court expressed any opinion as to the guilt of this defendant. I said that the jury must not be influenced by the fact that the complaining witness lost here a large sum of money. That is not the issue here. The issue is purely one, whether this defendant feloniously stole the money.

You cannot help but express great regret when any one loses a large sum of money, but that cannot be visited upon the defendant.

How long do you want, Mr. District Attorney?

MR. LYNCH: If your Honor please, if we are unable to get into connection with this brother by Thursday at

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two o'clock, I think we can finish this case --

THE COURT: I think at present you have not established a case, and I think that you fully appreciate that fact?

MR. LYNCH: Exactly. That is why I am making this application at this time.

THE COURT: I will grant the adjournment, Mr. Wasservogel.

MR. WASSERVOGEL: The only thing is, that I have arranged to go out of town Friday morning, and I will not be able to be here if this case should go over. I want your Honor and the District Attorney to know that now.

THE COURT: Then I would sit Thursday night, in that event.

Well, I think the request of the District Attorney is a reasonable one.

MR. WASSERVOGEL: I have no objection to that at all.

THE COURT: Gentlemen of the Jury, you should not at this time make up your minds with respect to the guilt or innocence of the defendant, nor are you to be influenced by any of the remarks made by the Court, with respect to the application which the Court has just considered.

I am of the opinion that the request of the District Attorney is a reasonable one, and that opportunity should be afforded him to disprove what the defendant has said, if he can, and in order to afford him that opportunity, I shall continue this case until Thursday at two o'clock.

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(The Court then admonished the jury in accordance with section 415 of the Code of Criminal Procedure and adjourned the further trial of the case until Thursday, July 1, 1920, at two o'clock P.M.).

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