

we felt that those were things that struck at the very basis of the election. They are flagrant and such frauds as these ought to be prevented.

MR. EDELSTEIN: We are charged here with making a false return. We are here to meet the indictment that this return was wilfully and intentionally false. Now we submit that thus far I don't think that the People have shown that kind of evidence that is contemplated in the case of the People against Lux. And there is another case of the People against Mendelson tried before Judge Goff and the Appellate Division in that case said that because Judge Goff charged that the intention should be spelled out -- the Appellate Division reversed that particular case.

MR. ROBINSON: I am familiar with those cases. Judge Goff charged in every one of those cases that a man is supposed to intend to do what he does. He refused to charge the meaning of the words "wilfully and intentionally". There was not involved in that case at all the fact whether the District Attorney had made out a prima facie case. It was the same in the trial of all these cases of the Election frauds of 1917 where the District Attorney by simply introducing in evidence the returns and the result of the count before the Grand Jury had made out a prima facie case and that the defendants were

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entitled then to come into court and show that they did not intentionally make a false return. Even after that evidence was introduced then Judge Goff said that the jury were not to consider that, that the word intentional meant something that a man did which he did not do under compulsion.

THE COURT: In the case of the People against Ignatz Lux reported in the 192 Appellate Division this is what is said concerning the word "wilful" as used in subdivision 12 of section 761 of the Penal Law which makes it a misdemeanor "wilfully to make a false statement of the result of a canvass of the ballots cast at an election-- it means something more than an intentional act, it includes the idea of an act intentionally done with a wrongful purpose, with a design to injure another, or one committed out of mere wantonness or lawlessness". That is the construction which they gave in the Appellate Division to the word "wilful" in the statute. Now let me go back to the evidence in the case. You have two men who testify that the defendant at the bar acted as chairman; that the chairman called off, from time to time, the votes as he found them but did not make a record of the votes. There were two other officers in that board who did make the record. If these wrongful records on the tally sheet were made by this defendant that would be one thing.

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Where does it appear from the evidence in this case that he knew these were being made wrongfully or that an improper record was being made.

MR. ROBINSON: On that theory, if your Honor please, it would be a complete defense to prove that the tally clerks did not put down as the chairman read them off. That was not the evidence in this case before Judge Goff. This man signed this return and it was absolutely false. Now we have brought the box and have proved that Mr. McGowan counted the ballots correctly before the grand Jury.

MR. POMPAN: That is conceded.

THE COURT: I think the indictment in this case should have been for neglect of duty, a neglect of doing that which the Statute directed them to do. Then it occurred to me that perhaps the sending of the blanks to the County Clerk's office might amount to a false return. During the recess hour I looked up that question, and I don't think it does amount to a false return-- in fact it was no return at all.

MR. EDELSTEIN: And the duty of the Election Board was to have this Board re-convene and make a return.

THE COURT: What is the next order of proof?

MR. POMPAN: I have conceded that Mr. McGowan counted the votes before the Grand Jury.

MR. ROBINSON: I have offered this resolution of the

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Board of Elections in evidence.

THE COURT: The resolution I am not prepared to pass on now. It might be that I will take it but I don't think that it would change my view as expressed by me. The Board of Elections cannot pass resolutions which would be in defiance of the Statute.

MR. EDELSTEIN: Now we have been all over this and I understand that the State rests, is that right?

MR. CONKLIN: One other thought occurs to me, and that is even though those who had custody of the boxes might not be sanctified by a legal designation from the Board of Elections we have shown consecutive possession on the part of the people who had that sanctity of designation. In one sense we have shown a connected possession down all the way through by reputable people who testify to their possession and what difference does it make when it was for the purpose of prosecuting crime-- what difference does it make whether those people have the sanctity of designation or not.

THE COURT: I know the rule that is laid down. I am going to take the resolution in order to aid me in the determination of this case. I will only take it sub judice and it may be that on Monday morning I will determine to exclude it. Even though that resolution was passed I cannot for the life of me understand why the

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Election Board should fly in the face of the language of the statute.

MR. ROBINSON: I now offer the ballot box in evidence.

THE COURT: Then comes the question that it does not become competent until you have shown that its contents were inviolate.

MR. ROBINSON: I think we have shown that.

THE COURT: I am not going to decide this matter hastily. I am going to take until Monday. I realize that any decision I make in this case will be of vast importance. I ~~am~~ be entirely wrong, but I think that this is the first time that a Court has been asked to construe this Statute as to the right of the Election Board to tell the police to do that which they are directed by the Legislature to do -- then to take the ballots in the box and to put them in a station house where people are coming in and going out. It never was, in my judgment, the intention of the Legislature to do that. It may be said that it would involve a large expense account upon the State but elections are of vast importance, the bulwark of our liberties depends upon them. I shall take this matter under advisement until Monday.

(The Court admonished the jury calling their attention to Section 415 of the Code of Criminal procedure and adjourned the further trial of the case until Monday, De-

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ember 19, 1921, at 10.30 o'clock.)

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THE PEOPLE, etc., v. IRVING MENDELSON.

New York, December 19, 1931.

TRIAL RESUMED.

THE COURT: I understand there is a juror ill in this case?

MR. POMPAN: The defendant is willing to waive that and go on with the case.

THE COURT: No, you cannot do that in a criminal case, Gentlemen of the Jury, in consequence of the illness of one of your associates I am impelled to adjourn the further hearing of this case until to-morrow morning at half past ten.

You may go until half past ten to-morrow and do not speak about this case and do not permit any one to speak to you about it; do not make up your minds concerning the guilt or innocence of the defendant until I have sent this case to you. Return and be in your seats at half past ten o'clock to-morrow morning.

I want to hear counsel further on the law. The jury need not be present.

MR. ROBINSON: Now, may it please the Court, on the tally and the canvass of the vote, each sheet or each office is signed and certified to by each one of the canvassing inspectors. You are looking now, sir, at the return and not the tally.

THE COURT: Yes, very well.

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MR. ROBINSON: You will notice that on the first sheet is a tally that is certified to by the four canvassing inspectors, all of them signing it individually, and that is for the office of Governor. Now, if you will turn over the page you will see on the reverse side of that page another tally and statement of the result of the canvass, and that is certified to by each of the canvassing inspectors, signing it individually, for the office of Lieutenant Governor. On the next page you will find the Secretary of State and State Treasurer and State Engineer.

THE COURT: Yes, and United States Senator.

MR. ROBINSON: Now, finally, at the end you will find a statement and tally of the result of the canvass of the votes in that election District for the office of Member of Assembly.

THE COURT: Yes; 184, 72, 238 and blank 33.

MR. ROBINSON: Reiss was the candidate running on both the Republican and Democratic tickets. Waldman ran on the Socialist ticket.

Now, every one of those sheets is certified to by each individual canvassing inspector, signing it individually.

In addition to that, the law provides that they should have filed a return with the County Clerk of the County of New York, but in a great many cases the Board of Canvassing Inspectors do not file such return or sign it.

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It is in evidence that a certificate of election to any candidate may be based upon the official tally and statement of the result of the canvass of the vote certified to as this official tally and statement is, and you will notice that that document that you have in your hand is headed "Official Tally."

Now, the statute provides - 766 - that if the Inspectors of Election make a false canvass of the votes, they are guilty of a felony. It says if they make a false canvass or statement of the result of the votes; whether that statement and canvass is signed by all of the Inspectors or not, they are still guilty if they make a false canvass of the votes, and what we are charging them with in the indictment is a false canvass.

THE COURT: I understand that, yes.

MR. EDELSTEIN: If your Honor please, in the case of the People against Crissey, 91 New York, holds that where inspectors fail to sign a return that there was not any election.

THE COURT: I know, but you see what the contention of the Attorney General is, that they made a false statement to the Bureau of Elections.

MR. EDELSTEIN: Now, can it be said that they made a false statement in this sense: The purpose of the tally sheet under the Act is merely so that they may make the return. How can there be a false statement if they do not make any return? That is No. 1. No. 2, the indictment

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says "Which they filed with the Board of Elections." Under the law - that is the case of Dady against Livingston, they never filed it with the Board of Elections, and the Board of Elections never had that return. There is no return. Next, assuming for the purpose of argument that they did make a return, which they did not in this case, these returns were never held by the Board of Elections; these returns were not filed --

THE COURT: Now, where does this come from, if it does not come from the Board of Elections? It was produced by Mr. McGowan.

MR. EDELSTEIN: These papers that were produced here are delivered, as the ballot boxes are, to the station house, and thereafter forwarded to the Board of Elections. We contend, therefore, that in filing these papers in the station house in the first instance, there was no filing in the Board of Elections.

Now, the purpose of the tally is merely for a mathematical calculation. The purpose of the return is for the members of the Board to declare under oath that such and such is the result. The return is nothing more than a mathematical calculation, and it seems to us that the basis of the crime must be making a return. Now, your Honor will bear in mind that this charge is not failure to perform their duty. If that were the charge, they would no doubt be charged under another section; but they are

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here charged with doing something wilful, and under that act, "wilful," as decided in the Lux case, the Appellate Division has held that there must be a specific, wilful act, tantamount to a moral certainty.

Now, they did not make a return. We stand upon that proposition. They may be guilty of, and perhaps are guilty of another crime, but since there is no return, and since the return as it appears was not filed in the Board of Elections, they cannot be charged with the crime of failure to make a return, when the only thing that exists is mathematical figures.

THE COURT: But those mathematical figures you speak of bore the signatures of the four men who were the canvassers there.

MR. EDELSTEIN: Assuming, sir, that the signatures of those four men, instead of appearing on this sheet, appeared on another sheet, wherein they tallied, could it be charged that they violated the law? Those papers which you have before you, to which they subscribed, are nothing more than formal papers to deliver to the Board of Elections so that they may tally up. However, ^{if} they tallied those votes on a plain sheet of paper, could it be said that that was a statement? A statement means something that they should subscribe and announce publicly. As a matter of fact, the envelope is subscribed by all the members of the Board. Can it be said that if they subscribed to an envelope that they made a false return?

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MR. ROBINSON: May I correct one thing counsel said, that the official tally sheet was filed with the Police Station? It is not. It is filed with the Board of Elections, filed next morning. They deliver the ballot box with the ballots and they file the official tally sheet with the Board of Elections.

THE COURT: The evidence here is that it was in the office of the Board of Elections, and it was produced here by the Board of Elections, and the law, among other things, says that it shall be filed with the Board of Elections.

MR. EDELSTEIN: In addition to that, the statute under which these defendants are indicted, Section 751, among other things, does not apply to the tally sheet at all. It says, "a false canvass." Now, how is the false canvass going to be ascertained? It can only be arrived at by a false statement.

THE COURT: I know, but the papers before me show that the inspectors certified that a certain number of votes were cast for each person respectively. Now, on the concession that was made here concerning that which was done by Mr. MacGowan, when he counted the ballots in the ballot box, as a fact, the box disclosed more votes than the return certified.

MR. EDELSTEIN: Then the return as appears on these tally sheets, in other words, and we contend that there was not any return. If you classify the return constituting the tally sheet, yes, but there was no return as cer-

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tified. That is the proposition. The only issue on that score and not discussing the other points we have raised, is whether the Court will say that the returns were returns as made, or can be made by the tally sheet, notwithstanding that there is no written statement as per the Election Law. I am not taking at this time the other propositions heretofore urged.

THE COURT: Well, I shall hold, I am inclined to hold that the statement that reached the office of the Board of Elections was a statement of the result, as they ascertained it on the night that the votes were canvassed. Now, is there anything else to be said with respect to this particular branch of the case?

MR. EDELSTEIN: In view of the fact that your Honor has so held, I do not think any discussion is necessary on that branch of the case.

Now, I submit to your Honor's consideration the other proposition urged.

THE COURT: Now, that other proposition involved here is as to the inviolability of the ballots?

MR. EDELSTEIN: Yes, your Honor.

MR. ROBINSON: Well, that issue would arise upon the offer in evidence of the resolution of the Board of Elections delegating the Police Department as the custodian of the ballot box, although it appears that this resolution has been marked People's Exhibit 6, and also upon the of-

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fer in evidence of the box containing the ballots themselves

MR. EDELSTEIN: Those were offered tentatively, subject to your Honor's ruling.

THE COURT: Well, the question has never been directly passed upon, and any decision that I make concerning the conditions that prevail here would amount to a precedent, inasmuch as there are no other decisions on the question.

Now, is there not a question of fact here for the jury to pass upon? That is to say, that the ballots that were counted by Mr. McGowan were the same as they were when deposited in the ballot box on election day?

MR. EDELSTEIN: We contend, if your Honor please, that before you can be justified in sending this case to the jury, the condition of the ballots must satisfy your Honor.

Now, I say that they cannot in this case. . . Why? I take it that there are upwards of thousands of polling places, and all of those polling places deposit their ballot boxes in the respective station houses. To each respective ballot box there is one key that can be used by anybody in the City of New York that is connected with the station house. Then, when you come down to this particular station house, you find that those ballot boxes were in the very room to which pretty near everybody in the station house had access. The proof in the case is that the room where the ballot boxes were kept was adjoining that of the Detective Bureau, and there was one key for all of the

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boxes, and there was one key to the room. The proof further shows that the key to the room where they were kept was on a hook in the Captain's room; that the Lieutenant and the Captain had access to that particular key; further, that hundreds of people visit the Captain's room. Therefore, on that score, we hold or contend that before your Honor can be justified in sending this case to the jury, you must be satisfied as a matter of law, that these ballot boxes were kept intact, as was stated in the case of Dady against Livingston.

Now, from all the circumstances, can you say as a matter of law that these ballots were inviolate? Can you say as a matter of law that somebody might not have access to them? And the rule of law being that where there are two constructions, one of innocence and one of guilt, your Honor well knows you must give that construction of innocence to the defendant.

Now, with that situation existing here, that there is one key fitting all the ballot boxes in this great city, I say that these ballots were not inviolate.

THE COURT: Now, that establishes opportunity. There is no question about that, but was that opportunity taken advantage of by some one else?

MR. EDELSTEIN: Your Honor should not submit the case to the jury, to permit the jury to speculate, when it appears to you as a matter of law that there was opportunity,

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and once that appears, then I say that the rights of the defendant ought not to be submitted to the jury. In other words, there must be a legal case. Is there a legal case when there is untold opportunity? Think of it, sir, in this great city, one key fits all of the locks in all of the ballot boxes. Well, it can be argued and will be argued, "But what is the Board of Elections to do?" I do not know what they are to do, but the fact of the matter is that when a citizen comes before this Court, that should not be considered.

There is nothing in the Election Law as I have urged heretofore, that permits the Board of Elections to do that very thing which they did. The fact of the matter is that where the Legislature intended that the police should do a specific act, they incorporated that in the act. I go further and say, assume that the Election Law permitted, or assume that the Board of Elections under a rule of the Election Law passed that resolution, it would violate the statute; and how much stronger is it when there is nothing in the statute delegating that power? Now, I say to your Honor in all sincerity that as a legal proposition, and with the conditions as they exist, upon the record here, your Honor cannot be justified in sending this case to the jury. Not only is there doubt, but grave doubt whether persons did not access to these ballots.

Then there is the other angle, that a reasonable doubt

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in this case sometimes may become a question of law, and in this case it seems to me if ever there was a reasonable doubt that resolves itself into a question of law, it applies here, because of the circumstances. Last, but not least --

THE COURT: Well, now, the evidence in this case shows this, that from the return it would appear that Smith received 236 votes, and that Miller for Governor received 92 votes; that there were blanks, blank ballots amounting to 34. That Reiss received 202 votes and that Waldman received 266 votes. I think the figures are correct, are they, Mr. Attorney General?

MR. ROBINSON: Did you say it appears in the return that Miller received 92 votes?

THE COURT: Yes, I have Smith 236.

MR. ROBINSON: And 14 blanks?

THE COURT: Yes, not 34, 14 blanks.

MR. ROBINSON: And Reiss received 256, Waldman 238, and 33 blanks, on the return for the office of Assembly. Now, do you want the result of the count?

THE COURT: See if my figures are correct, now: Smith, 236, Miller 92, blanks 14; Reiss, 256; Waldman, 238, and blank, 33; is that correct?

MR. ROBINSON: Yes, sir.

THE COURT: Now, the contention of the Attorney General is that Miller received 86?

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MR. ROBINSON: And Smith 227.

THE COURT: Smith 227 and blank 31, and Reiss, 202;
is that correct?

MR. ROBINSON: Yes, sir.

THE COURT: And Waldman 266?

MR. ROBINSON: Waldman 266, yes, sir.

THE COURT: Now, the latter figures to which I have referred are the result of the examination that was made by Mr. McGowan, and if I understand you correctly, you concede that Mr. McGowan's examination of the ballots was correct, and the ballots which he says were in the box were actually found, showing Miller, 86; Smith 227; blank, 31; Reiss, 202 and Waldman, 266.

Now, your contention is that there is no proof here showing that the ballot boxes were kept inviolate between the time that they were taken away by the police officer, up to the time that they were counted by Mr. McGowan. Now, that is the question in this case?

MR. EDELSTEIN: Yes, and I go a bit further and say not only is there no proof, but proof that they were not inviolate, positively.

THE COURT: The proof as I looked at it, is that opportunity was afforded to tamper with the ballots, but were the ballots tampered with? I think that is a question for the jury to pass upon.

MR. EDELSTEIN: I do not think so. There is just one

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other thought that comes to my mind: Here is an Inspector calling off votes. Can he be charged as a matter of law for acts which were done by the tallier?

Now, I say all of these questions raise a question of law, and to submit it to the jury is virtually to submit a question to them and ask them to speculate, first, did they have opportunity, that is, did persons have opportunity to tamper with the ballots? Well, since opportunity appears, it is a question of law. Second, can we be charged with doing something wilful when we did not ourselves tally the vote? Now, the inviolability of the ballots is a very serious question.

THE COURT: Well, the answer to that might be this, that there were two men in the polling place on the night in question, and as they testified, they saw things and heard things there that would amount to a change; in other words, it was announced that there were certain votes cast for the respective candidates; that is to say, the man who was canvassing the vote, namely, the defendant in this case, announced that. Now, when some of those announcements were made, the evidence would indicate that there was a protest by one of the watchers who stated among other things that he was incorrect. Now, when his attention was called to that, would it not throw upon him the duty to ascertain whether the protest was correctly made, because the man who was there with a watcher's certificate

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had a right to be there?

MR. EDELSTEIN: But the witness also testified that on the two occasions that he stated, when he made the protest, that is all he did. There is no legal evidence that the Chairman did adhere to the protest. He says he made a protest. He did not say a word as to what the Chairman did. He said he continued to count and announce. The question is, can it be said that when this man said he made a protest that the Chairman wilfully disregarded the protest, and instead of counting the ballot for Waldman, counted it for Reiss?

THE COURT: Well, in the face of the protest, does it not appear in evidence here that afterwards this defendant signed this return?

MR. EDELSTEIN: Well, did he sign the return? He signed no return, he signed a tally sheet in the same manner as he signed the envelope.

THE COURT: I know, but I am going to hold, as I stated before, that the return which was brought here by the Board of Elections is the return which is contemplated by the statute.

MR. EDELSTEIN: Then I submit, your Honor, seriously, on the question of the inviolability of the ballots.

THE COURT: Well, that is the only question here.

MR. EDELSTEIN: The only question according to your Honor's ruling.

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THE COURT: Yes.

MR. EDELSTEIN: I do not see that I can say anything more than what I have said. Your Honor is familiar with the conditions. Your Honor is familiar with a station house in the active part of the city, and your Honor knows that one key fitting all of the boxes in New York City, certainly, as a matter of law, endangers those ballot boxes to an extent that it should not be submitted to the jury. That is the question before your Honor.

THE COURT: Yes, that is the only question with which I am now concerned, that is to say, the inviolability of the ballots from the time that they were placed in the custody of the police officer down to the time that these ballot boxes were opened and counted by Mr. McGowan.

MR. EDELSTEIN: Now, I say to you, sir, as I said before, to submit that, ^{to} the jury, whether somebody tampered with them or not, is speculative, and should not be submitted to the jury.

THE COURT: Well, you must remember too, that there are cases holding that that is a question which should be passed upon by a jury. It was passed upon under the rule laid down in the case of Delehanty against McIntyre. There the question was submitted to the jury.

MR. EDELSTEIN: But your Honor well knows that that was a quo warranto proceeding. This is a criminal case.

THE COURT: I know, but the principle is the same.

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MR. EDELSTEIN: Well, the principle differs, your Honor, because there the question was the result of the election. This is a criminal statute that we are arguing here. We are proceeding here under the provisions of the Penal Law, and in your Honor's case the proposition was entirely different. Can it be said that the same rule of law can apply in a so-called civil case as does in a criminal case? If you send this case to the jury, this is what you are going to have: A lot of jurors are going to say, "Well, it seems to me the police are pretty strict and they would not allow anybody to tamper with the ballots," and another might say, "Well, they might have, here with a box such as this, with one key for all the ballot boxes." So, they will merely surmise and speculate; so that I say, in a civil case as in your Honor's case, the rule can be said to have no application, because we are proceeding here under the criminal statute, which, in the very nature of things must be strictly construed in favor of the defendant.

THE COURT: Well, I am not prepared to hold in that wise now. The Attorney General argued on Friday that there was a question of fact, on the inviolability of the ballot boxes. I think that I shall deny the motion to dismiss the indictment and advise the jury to acquit. I will take the testimony of the defense, and you may renew all your motions at the conclusion of the entire case.

MR. EDELSTEIN: We respectfully except, your Honor.

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MR. POMPAH: Just one thing I want to call your Honor's attention to, the reading of the section with reference to the return: The statute provides that those tally sheets, section 373 of the Election Law, provides as follows: (Reading). Now, clearly, the statute provides for a modus operandi in every one of these elections. Whether the Attorney General likes to call this a return or not, he cannot, because the statute provides what the return shall be.

THE COURT: Well, I must say I differ with that. I intimated that I would hold that that paper which was produced here by the Attorney General, taken from the files of the Bureau of Elections, in contemplation of law, is the return.

MR. EDELSTEIN: Now, in view of the fact that your Honor has made a ruling, we urge the same objection made before, that the ballot box and this resolution are not competent evidence, because, first, the resolution was passed without any authority under the Election Law, and secondly, that the ballot boxes which are offered in evidence appear to have been placed in such a place where they might have been tampered with, and therefore we urge that they are not admissible.

THE COURT: You may renew that motion at the termination of the case. I will consider that, ^{and} as I said before, I do not regard the action of the Board of Elections as legally done, in that they designated a police officer to

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do that which they themselves should have done.

MR. EDELSTEIN: The defendant, if your Honor please, rests, and we renew the motions made at present and heretofore.

THE COURT: Well, then, if you are inclined to rest on the People's case, why I shall have to deny your motion to take it away from the jury. I thought that there would be some explanation given.

MR. EDELSTEIN: Well, if that is your Honor's view, I will withdraw the motion. The defense does not rest and we will put some witnesses on.

THE COURT: Now, we will have to let this go over until to-morrow morning at half past ten as one of the jurors as you know is ill.

MR. ROBINSON: Very well, your Honor.

THE COURT: You may come in to-morrow morning with such proof as you may deem it proper to introduce.

MR. POMPAU: Will your Honor continue the defendant on bail?

THE COURT: Yes.

(The Court thereupon adjourned the further trial of the case until Tuesday, December 30, 1921, at 10:30 o'clock A.M.).

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New York, December 20, 1921.

TRIAL RESUMED.

(Juror No. 10 still being absent).

MR. EDELSTEIN: If your Honor please, we understand that the minutes are written out. The Attorney General and the Attorney for the defendant would consent with your Honor's permission, to call another juror if the juror does not appear, and read the minutes to him.

THE COURT: I want to see whether that rule applies only to a capital case.

Now, I think the application had better be made by some one for a mistrial, and I will continue the gentlemen in the box and we will have another juror sworn and we will have the testimony read. I want this case disposed of.

MR. ROBINSON: It is not possible, your Honor, is it, for the defendant to consent to go on with eleven jurors?

THE COURT: No, that case was decided some thirty odd years ago up the State, and held that even though the defendant consented to go on with eleven jurors he could not waive his constitutional rights.

Now, I understand that counsel and the defendant consent to a mistrial?

MR. POMPAN: Yes, your Honor.

THE COURT: Now, the defendant will have to respond in the affirmative too.

THE CLERK: The defendant, please rise. Do you con-

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sent to a mistrial?

THE DEFENDANT (personally): Yes, sir.

THE COURT: A mistrial is declared. Now, we will call another juror.

(Seat No. 10 was filled by examining and swearing another juror, completing the jury).

THE COURT: Now, is it consented to by counsel for the defendant that the testimony taken in the case in which a mistrial has just been ordered be read?

MR. POMPAN: We consent to that, yes, sir.

THE COURT: Does the defendant consent?

THE DEFENDANT (personally): Yes, sir.

THE COURT: Very well. Now, Gentlemen, in consequence of the sickness of one of the jurors in the trial, we have concluded to continue by having another juror sworn in this case, and the testimony that was taken during the week will be read, instead of calling the witnesses again, and the gentleman who has just been sworn will give his undivided attention to the testimony.

MR. ROBINSON: By whom will the testimony be read, by counsel or by whom?

THE COURT: Well, it is generally done by the stenographer.

(The stenographer repeats to the jury the testimony heretofore taken in the case).

MR. POMPAN: We consent that all exhibits mentioned

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be received.

THE COURT: Yes, they will be received as exhibits as they were marked heretofore.

MR. EDELSTEIN: We ask that the motions, objections and exceptions taken may be set forth here as originally taken?

THE COURT: Yes, they may be made part of this record.

MR. ROBINSON: May I call a representative of the City Clerk?

THE COURT: Yes, call the witness.

M I C H A E L S. G I L B R I D E, called and duly sworn as a witness on behalf of the People, testified as follows:

(Residence: 401 East 29th street).

DIRECT EXAMINATION BY MR. ROBINSON:

Q Are you employed by the City Clerk of the City of New York? A Yes, sir.

Q Did you come here in response to a subpoena served upon the City Clerk of the City of New York? A Yes, sir.

Q For the production of what documents did that subpoena call?

MR. POMPAH: I think we can save a little time. I do not question these papers as coming from the City Clerk's office.

MR. ROBINSON: All right.

Q Will you take out of the envelope the documents that are

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ial Tally?" A Yes, sir, "Official Return."

Q "Official Return?" A Yes, sir.

MR. ROBINSON: I offer in evidence the official return and tally sheet and ask that it be marked as a People's Exhibit?

MR. POMPAN: At this time we object to the admission of the papers characterized by the Attorney General as a return, on the ground that there are no official returns here. That all he has produced here so far as an official return are a number of blank pages, and no proper foundation has been laid.

THE COURT: Are they signed or unsigned?

MR. POMPAN: The official return is unsigned. The official tally sheets bear signatures.

MR. ROBINSON: They are duplicates of those filed with the Board of Elections, the official tally sheets. I think that sufficiently identifies them.

THE COURT: Does either one of those papers have upon it the signature of the defendant?

MR. ROBINSON: Yes, the official tally sheet is signed for every office.

THE COURT: I will take it.

MR. POMPAN: I take an exception. I understand that the exception also goes to the point that no proper foundation has been laid in this case for the admission of these papers.

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THE COURT: Well, I understand you said you conceded they were correct?

MR. EDELSTEIN: No, the concession went to the fact that this gentleman came from the City Clerk's office with certain papers.

BY THE COURT:

Q That was taken from the files of the office of the City Clerk? A Yes, sir.

Q And you have produced them in court in accordance with a subpoena duces tecum served?

THE COURT: I will take it.

MR. POMPAN: May I request your Honor to permit me to interrogate the witness as to the manner in which he became possessed of these papers?

BY MR. POMPAN:

Q Mr. Witness, had you seen these papers from the time they were filed until this very day? A No, sir.

Q You do not know anything about it, about how they got to the City Clerk's office? A Yes, sir.

Q Of your own knowledge? A (No answer).

BY THE COURT:

Q You may answer yes or no? A Yes, sir.

BY MR. POMPAN:

Q Did you receive them? A No, sir, the Clerk alongside me received them. I receive them at the next window at the same time.

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Q Did you receive these papers? A No, sir.

Q They were not filed with you? A No, sir.

Q You do not know anything about them? A No, sir.

BY THE COURT:

Q Well, you know they were taken from the files of your office, do you not? A Yes, sir.

BY MR. POMPAN:

Q Do you know of your own knowledge how they got into your office? A By being delivered to the Clerk, and the gentleman got a receipt that delivered them.

Q He did not give the receipt there? A No, sir.

Q How many people have you in your office there? A In that one record room, one man.

Q How many men in the office in charge of receiving these papers? A Four clerks.

Q And do they have access to these papers? A No, sir. We received a sealed envelope.

Q Well, who opened the seal? A I just opened it here now in court.

Q Did you break this seal yourself? A Yes, for the Attorney General this morning in the court.

Q Did you know you had no right to open this seal at all?

MR. ROBINSON: I object to that, sir.

THE COURT: Now, the Attorney General had a perfect right to ascertain the contents of that envelope.

MR. POMPAN: I except. I do not understand the At-

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torney General has any right to open anything that is sealed.

Q How many people work in your office?

THE COURT: The opening was done here in the presence of the Court, which amounted to concurrence on the part of the Court.

MR. POMPAN: Well, your Honor evidently misunderstood. It was not opened in court. I understood it was opened before Court was in session.

THE WITNESS: Opened right here at the table.

BY THE COURT:

Q Right here at the table? A Yes, sir.

BY MR. POMPAN:

Q When, this morning? A Yes.

Q Before court was in session? A Yes, just before the Judge came in.

Q Exactly, the defendant was not here and counsel was not here? How many people have you working in the City Clerk's office? A Thirty.

Q How many people have access to this envelope? A One man after it is put in the record room.

Q Can you say whether or not a paper filled out properly known as an official return was not in that envelope at the time it was delivered to the City Clerk? A No, sir, I can't tell that.

Q You notice on this one there is no Election District or Assembly District on there? A Yes, sir. We don't receive

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then opened. We don't know what is in them.

Q You don't know whether or not an official return was removed and this substituted, do you? A No, sir.

Q You could not say that? A No, sir.

Q It is possible that it could be done, is it? A No, sir.

Q Is this kept under lock and key? A Yes, sir.

Q Who has the key for that? A The record clerk.

Q Did you get that key from him this morning? A I got to get an order from the City Clerk to go in there and ask for it.

Q Did you get an order this morning? A Yes, sir.

Q Did you go in with a lock and key? A No, sir, I sent for the man at the door and he brought it out to me.

Q He brought out this envelope to you? A Yes.

Q Do you know whether or not this particular paper was produced before the Grand Jury? A No, sir.

Q You were not subpoenaed before the Grand Jury? A No, sir, I was not.

MR. POMPAN: I object to this exhibit and renew my motion on the ground that it appears there is no evidence that the papers filed by the Election Board of the Sixth Election District were the official returns as filed, and that these are not the returns of the election.

MR. ROBINSON: Just one other question, please:

BY MR. ROBINSON:

Q Was there any other envelope filed containing an official tally for the Sixth Election District of the Eighth Assembly

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District with the City Clerk for the election of 1920? A No, sir.

Q Do you produce the only one that is on file for that district? A The only one that is filed in the record room of the City Clerk's office.

MR. ROBINSON: I offer the envelope and the contents of the envelope in evidence, and I call your Honor's attention to the fact that the official tally sheet bears four signatures on each sheet, containing the canvass of the votes for each district by each of the four canvassing inspectors, and that those signatures will correspond to the certificate of service filed by the Board of Canvassing Inspectors, as well as the signatures upon the official return.

MR. POMPAN: I object to it, your Honor.

THE COURT: Are you going to dispute that the signature upon the paper just referred to by the Attorney General is the signature of the defendant?

MR. POMPAN: No, sir, we do not question that at all, but we do question - the peculiar thing here is that they produce an absolutely clean sheet of paper that has never evidently been handled and purporting to be a return. Now, where is the original return that was filed? That is what we want to know?

THE COURT: But the other was a tally sheet to which the Attorney General referred?

MR. POMPAN: Yes, sir, I maintain for the purpose of

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preserving my record, that the law required that the tally sheet be affixed to the return, and that through somebody, somewhere, somehow, the official returns have disappeared.

THE COURT: Yes, I will take it as one of the circumstances that surround the case.

MR. POMPAN: I take an exception, your Honor.

MR. ROBINSON: May it please the Court, that official tally is an exact duplicate also.

MR. POMPAN: I object to counsel making a statement of fact, that that is an exact duplicate when he has not even examined it.

THE COURT: No, but counsel does concede, however, that the defendant signed that paper?

MR. POMPAN: We concede that the paper offered as a tally sheet was signed by the defendant Mendelsohn.

THE COURT: Very well, then I will take the paper and the jury may afterwards determine what value they will place upon the paper which is now in evidence.

MR. POMPAN: I respectfully except to your Honor's ruling.

(It is marked People's Exhibit 7 in evidence).

MR. ROBINSON: In other words, the envelope with its contents is People's Exhibit 7?

THE COURT: Yes. Now, is that the People's case?

MR. ROBINSON: The People rest, your Honor.

MR. EDELSTEIN: We renew the motions made at the close

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of the People's case, on the same grounds heretofore set forth, without repeating the argument.

THE COURT: Well, the same motion is made as was made heretofore and the same ruling that I then made I will make now and I will deny the application which you make to take the case from the consideration of the jury.

MR. EDELSTEIN: We take an exception, and in addition to the grounds urged, I want to direct your Honor's attention to the specific fact that in the argument yesterday your Honor made mention of the case of Delehanty against McIntyre - well, the point we want to make is that counsel has examined that case and gone over it very carefully, and we submit that the ruling in that case wherein the Court held that it was a matter of fact for the jury, specifically, cannot apply to this case, for the reason that there, the very question was whether the ballots could be subject to access by other persons, and here the proof on the part of the People is that they were subject to access by other persons; and therefore, I submit that there is a distinction, and proof positive in this case that these ballots could have been subject to access and they could have been tampered with, because one key could open all the ballot boxes in the City of New York.

THE COURT: Well, I know you will not be surprised to know that I have examined that case every day for five years. The Court says that the accessibility and the pos-

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sibility of tampering with the ballots is one of fact for the jury.

MR. EDELSTEIN: But that was not a criminal case, which is conceded. In other words, there the Court made that statement it did so on an application for a recount, and it was not a criminal case. This is a criminal statute, and we again repeat, should we send this case to the jury under the circumstances?

THE COURT: It may be quasi-criminal. I will not hold that it is a criminal statute, but I will hold that strict construction must be given to it.

MR. EDELSTEIN: Now, the sections under which these defendants are charged are criminal statutes and there is not any question about that. When a question arises whether you will send the case to the jury, when these defendants are charged with violating not only the Election Law, but a criminal statute, it seems to me that the ruling in that particular case, which was a civil case, can have no application here, because, outside of this particular statute, the election statute being a quasi-criminal statute, should be strictly construed. Now, as I have urged before, there are two constructions, these ballots might have been tampered with and they might not, and can you send it to the jury under these circumstances?

THE COURT: Why, if the jury arrive at the conclusion that there is a reasonable doubt concerning ^{the} inviolability

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of the ballots that are here in court, I shall tell the jury that, in the course of my charge, that if there is a reasonable doubt, the defendant must be acquitted.

MR. EDELSTEIN: Well, a reasonable doubt sometimes may have, as your Honor well knows, or may become a question of law, and the question is whether a reasonable doubt in this case is not a question of law under these circumstances.

THE COURT: Well, I will not so hold now.

Gentlemen, we will take a recess now until 2:10 o'clock p.m.

Meanwhile, do not speak about this case and do not permit any one to speak to you about it, or approach you, and do not make up your minds concerning the guilt or innocence of the defendant until I have sent the case to you, and in addition to that, I will say that there should not be permitted any expression of opinion in your presence or hearing after you leave the jury-box.

You may go until ten minutes after two o'clock.

(A f t e r R e c e s s)

TRIAL RESUMED.

IRVING MENDELSON, the defendant, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 216 East 10th street).

DIRECT EXAMINATION BY MR. POMPAN:

Q Mr. Mendelson, had you prior to this day ever acted

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as a canvassing inspector or an official of an election - or wait a minute, how old are you? A Twenty-eight years of age.

Q Are you married or single? A Single.

Q Whom do you live with? A My mother, sister and my brother.

Q Is your mother a widow? A Yes, sir.

Q And do you help to support her? A Yes, sir.

Q How long has your father been dead? A He died in 1904, December.

Q What do you do for a living? A I drive a taxicab.

Q Had you prior to this day ever served on an Election Board before? A No, sir.

Q Were you enrolled either as a Democrat or Republican in that district? A No, sir.

Q Are you a member of any political organization? A No, sir.

Q Were you at the time of this election a member of either the Republican, Democratic or Socialist party? A No, sir.

Q Do you recall the election of 1920? A Yes, sir.

Q Do you remember what time you went to work there? A Six o'clock that evening.

Q You were what is known as a substitute inspector? A Yes, sir.

Q How did you become such inspector? A Six weeks before election I went to the Republican party at 14th street and First avenue and I applied for a position. They told me that

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all the applications were filed. They asked me to come around on election morning and if there was a vacancy open they would give it to me. I came around election morning and applied or asked them if there was a vacancy open. They sent me - they asked me - they had me or told me to come around in the afternoon, rather, and I then come around in the afternoon.

Q Did you go around after that in the morning? A Yes.

Q Did you come back in the evening? A I did.

Q Did you have a conversation then with anybody? A No, sir. I come back about five o'clock and they sent me down to Public School No. 63 on Fourth street between Avenue A and First avenue. I went in and asked for Mr. Bien. The Day Chairman of the Board had me sign and swore me in and I then took over all his books and ballots and placed the ballots on the table or the ballot box, rather.

Q Let me interrupt you, were chosen Chairman? A Yes, sir.

Q How were you chosen Chairman? A By tossing up a coin.

Q Now, proceed? A I then took the ballot boxes and placed them on the table and opened them and took the ballots out and faced the ballots down on the table.

Q Now, just before you proceed, will you describe the situation of the polling place, how the tables were situated? What was your position and where were the ballot boxes and where were the talliers situated? A The table was a long table, the ballot boxes were on the floor and I placed them on the table

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Q Was the table as long as this table here (Indicating)?

A Not as long as that table, no, sir. About as long as where Mr. Robinson is sitting, in back of Mr. Robinson.

MR. POMPAN: That is about seven or eight feet?

A (Continuing) I had the corner of the table and the tally man had the other corner of the table.

Q Where were the ballot boxes standing? A On top of the table.

Q Were the ballot boxes between you and the talliers?

A No, sir, in front of me.

Q They were in front of you? A Besides - well, about three feet away from the talliers.

Q How many people were in the polling place at the time you arrived? A The place was crowded, full of men.

Q Do you recall seeing the witness Rubenstein there?

A Yes, sir, I do.

Q Did you ask the police officers any questions as to clearing out the men who had no business there? A I did, sir.

Q Did you ask Rubinstein any questions? A I asked him what he was doing in there and he says he is a watcher. I asked him for his certificate and he showed me it.

Q Did you ask him where he lived? A Yes, sir, and he told me he lived in Fourth street.

Q And after you were chosen Chairman, continue on from there and tell us just exactly what you did? A I had my ballots on the table and was calling. As I was calling this Prohibition

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party there started in interfering with me.

BY THE COURT:

Q What? A This Prohibition man started interrupting me.

BY MR. POMPAN:

Q Did he touch any ballots? A He put his hand on the ballots.

Q What did you say to him then? A I told him to take his hands off the ballots, otherwise I would place him under arrest.

Q How often did he do that? A The first time I told him I would give him another chance and he come down the second time, just twice he did it, the second time he put his hand on the ballots this way (Indicating), and the ballots flew on the floor.

Q Was that after you started again? A While I was counting or calling, rather.

Q Who picked those ballots up from the floor? A I picked them up and a couple of different men picked them up who were standing around.

Q Did you at any time call any ballots which had a mark next to the name of Waldman for Reiss? A No, sir.

Q Was there any noise or excitement during the time there? A There was plenty of noise, everybody was hollering. There was a rope around the table and they broke that rope and climbed right over to the table.

Q Did you at about 11:30 o'clock telephone anywhere?

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A Yes, sir.

Q Where did you telephone to? A I sent somebody out to call the Republican party up to come down and help me.

Q Will you please tell the Court and jury why you telephoned? A Louis Waldman come in with a bunch of men and the men says to me, "Now, you are going to do as we want you to do, we are working for the Socialist party and you will do as we tell you to do." With that a man went around my back and placed something, showed me something like a gun. I then looked for a police officer. The police officer was outside pushing those men out. It started a riot. I stopped counting.

Q How many men came in then, about? A There must have been about fifty.

Q Were you scared? A Yes, sir.

MR. ROBINSON: I object and ask to strike out the answer as calling for his conclusion.

THE COURT: I think that it is proper to allow all the prevailing conditions, as they were on the night in question to go in evidence, so that the jury may be able to determine whether a false return was the result of a mistake or fright or confusion or excitement.

Q Will you answer the question? A They came in with —

Q Will you answer the question I put you, were you scared or were you not scared? A I was scared.

Q Did you stop counting then? A Yes, sir.

Q Did anybody come down there from the club? A There was

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about three men come down, three or four men come down.

Q And did they say anything to the people around, did they ask them to leave? A Yes, sir, they asked them to leave and they wouldn't.

Q Were the police called in then? A Yes, sir, a Sergeant was called in and another police officer.

Q And did they clear every one out of the room? A No, sir, left them standing there.

Q Did you proceed then with the count or with the calling?
A I then started in calling again.

Q And did you call every name with a check mark and call out the name against whom the check mark was placed? A I called every name as I seen it on the ballot.

Q Did you on one or two occasions say, when Rubinstein called your attention to a miscall, say, "It was my mistake?"
A No, sir.

Q Did you make any mistake at all that day? A Well, the only mistake I made is when the riot started and men come in and they started moving the table, breaking the rope and shoving the table and the ballots were on the floor.

Q Did you then say that you made a mistake and did you ask the talliers to correct it? A Yes, sir, I did.

Q About how many times did that happen? A Just twice.

Q And to the best of your knowledge and belief did the talliers correct them? A Yes, sir.

Q This original crowd came in there about 11:30, you tes-

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tified? A About that.

Q Did you have a further number of men come in there later?
A Yes.

Q About what time was that? A About 1:30.

Q How many men entered the place? A About fifty or sixty men entered with Mr. Waldman.

Q Do you know, were these well dressed men or shabby looking men?
A No, they all had caps on. They looked pretty bad looking.

Q Do you know them to be members of any gangs or so-called guerillas?

MR. ROBINSON: I object to that as incompetent, immaterial and irrelevant.

THE COURT: Well, he may answer if he knows they belonged to any associations. Do not characterize them as "guerillas."

A No, sir, I don't know, but the way they were dressed they had me scared at the time they were in the place.

Q Now, while you were counting or calling off the names, did you call every name honestly? A I positively did, sir.

Q Did you give each man the call as he was entitled to it?
A Yes, sir.

Q It has been said that you called names for Waldman or for Reiss that were marked for Waldman. Is that true or untrue?
A Untrue. If I did make a mistake it was an honest mistake.

Q Did you correct that mistake when they called your at-

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tention to it? A Yes, sir.

Q Now, it was testified to by Mr. Rubinstein and Mr. Cohen that they protested against your counting certain ballots for Reiss which were marked for Waldman. Did you heed that protest and did you correct it? A Yes, sir, it was only twice.

Q And was that during the excitement? A Yes, sir, during the excitement.

Q Was there excitement from the time the polls opened there until about the time they were closed? A Yes, sir.

Q And you worked straight through the night from six o'clock at night until 8:15 next morning? A I did, sir.

Q Now, Mr. Mendelsohn, when you were calling, was your mind centred upon calling off the ballots or could you see what the talliers were putting down on these sheets (Indicating)? Could you see the strokes of their pens upon these sheets of paper in these four boxes (Indicating)? A I could not, sir.

Q Did you see at any time? A No, sir, all I had to do was just hold onto the ballots, when this crowd came in, I figured they were going to steal the ballots.

Q Did you see them put these boxes on there (Indicating)? A No, sir.

THE COURT: What exhibit do you refer to?

MR. POMPAN: Exhibit 7, the so-called official tally sheets.

Q Did you add these figures up at all or did you rely upon what the other talliers had found? A No, just what was on

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there. There was 538.

Q You did not get my question. I asked you whether you relied upon the talliers, or whether you counted them up yourself? A No, just relied upon the talliers.

Q At the time you signed this did you believe that their figures were correct? A Yes, sir.

Q At that particular place, how many lights were there in that room? A Why, there was only one light up above us.

Q And that is the school building on the south side of 4th street? A Yes, sir.

Q And the part that is on 4th street is an "H"-shape?
A Yes, sir.

Q And you were in the west wing, that is, towards the Second avenue side? A No, towards First avenue - yes, towards the Second avenue side.

Q There was only one light there? A One light.

Q What position was the table, was it in the same position as this table here (Indicating)? A No, in the opposite direction.

Q North and south? A Yes, sir.

Q Was it a pretty high ceiling, as high as this room?
A No, not as high as this room, about as high as the top of that window (Indicating).

Q And was that a single bulb, the ordinary bulb or a large bright bulb? A No, just one - no, there were three bulbs there.

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Q Was that a class room or was that part of the playground? A The playground.

Q Now, it appears among Exhibit 7, there is a paper, a blank paper in there designated "Official return of votes cast." That has not been signed. Did you know it was your duty to sign this sheet? A Yes, sir.

Q Did you know that it was your duty to sign this (Indicating)? A No, sir, I did not.

Q What time did you leave the polling place that morning? A At 8:30.

Q Where did you go from there? A To the station house, 15th Precinct.

Q Were you asked at any time to come back and correct or tally up your tally slips? A No, sir.

Q Do you remember about 1:30 that morning when Mr. Waldman appeared around the scene again? A Yes, sir.

Q Had your police returns been in? A Yes, sir.

Q And was there any dispute as to anything else? Did you offer to have a recount there? A I offered Mr. Waldman, I said to Mr. Waldman, "I would be glad to give you a recount if my police report was not in." The police officer told Mr. Waldman he can't see how I could give him a recount when the police report is in.

Q Did you ask any of the lawyers standing around whether or not you had a right to change that? A I did not.

Q Did you hear any one say that you had no right to change

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the police returns and to re-canvass your vote? A Well, there was quite a few men around there told me, once my police report was in that I can't give them a recount.

Q Did you believe that that was the law? A Yes, sir.

Q Had you ever had that question presented to you before? Before this day did you ever have such a question before you?

A No, sir.

BY THE COURT:

Q To whom did you deliver the police returns? A I brought them all to the station house. The police returns that are made out?

Q Just what did you bring to the station house? A Just the ballot boxes. The police reports I gave to the police officer and the voting poll, and they sent them right over to the police station.

Q To whom did you deliver the ballot box? A To the police station.

Q Did you deliver it personally? A Yes, sir.

Q Why did you deliver it there? A Why, the police officer told me that all the ballot boxes go to the station house.

Q So you did that which the police officer told you to do? A Yes, sir.

BY MR. POMPAN:

Q Mr. Mendelsohn, did you wilfully and intentionally make a certain false tally and statement of the result of the canvass of the ballots cast at that election? A No, sir.

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MR. POMPAN: That is all. Your witness.

CROSS-EXAMINATION BY MR. ROBINSON:

Q What is your contention or your defense in this case, that the tally clerks did not put down the votes as you read them off, or that the ballots were tampered with after election?

MR. POMPAN: I object to that as incompetent, immaterial and irrelevant. It is argumentative.

THE COURT: I think the Attorney General has a right to inquire of him what he understands his defense to be in this case. I will allow it.

MR. POMPAN: Is not that a matter of inference for the jury to find from the facts in this case?

THE COURT: Yes, to find the facts, but the Attorney General has the right to limit the defense from the mouth of the witness if it can be limited.

MR. POMPAN: I except to your Honor's ruling.

A I don't know, sir.

Q Do you know that the return or the official tally --
Question withdrawn.

Q Your signature is on every one of those ^{sheets,} isn't it?

A Yes, sir.

Q Count the number of times your signature appears upon that sheet, upon that official tally?

MR. POMPAN: There is no doubt about that, Mr. Robinson. We admit that his signature is there, "Irving Mendelsohn," there is no issue upon that.

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A Nine times.

Q Nine times? A Yes, sir.

Q Is this the official tally of the vote for Member of Assembly, is it correct? A Yes, sir.

Q That was the way you read off the vote, was it? A That's the way I called off.

Q The way you called off the vote? Consequently, if Mr. McGowan testified that when he counted the vote before the Grand Jury, and that Reiss instead of receiving 356, received only 202, those ballots have been changed since election, haven't they?

MR. POMPAN: I object to that, sir.

THE COURT: No, I will not let him testify to that.

That is for the jury to pass on.

Q And wouldn't it also be true that if that vote was changed from 356 to 202, that Reiss received 54 votes less as shown by the ballots themselves, that the cross in front of his name was erased 54 times?

MR. POMPAN: I object to that on the ground that it is argumentative. It does not ask any question and counsel is testifying.

THE COURT: Well, I do not know what he means by "change or erasure," but it is a subject of mathematical demonstration that the difference between 202 and 356 would be 54. I think that speaks for itself.

MR. ROBINSON: Yes, your Honor. This witness says, or

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he is indicted here for making a false count. He says that the official tally of votes for Assembly is correct, and that that is the way he called it off.

MR. POMPAN: That is not his testimony. I beg to differ with you.

MR. ROBINSON: It is his testimony.

MR. POMPAN: He testifies to the best of his recollection that he signed it, believing it was correct.

MR. ROBINSON: He testified on cross-examination that this official tally was correct.

THE COURT: I do not understand that he himself testified that he himself proved up the tallies. I think he said he signed and I think he said he signed in reliance of that which was told by persons who made the tallies.

Q When did you sign this official return, after or before you called off the votes?

MR. POMPAN: I object to counsel characterizing it as an official return.

MR. ROBINSON: I will change it then.

Q When did you sign this official tally of the vote for Assembly, before or after you counted the vote? A After.

Q Wasn't there a policeman in that polling place all the time during the count of the vote? A Yes, sir.

Q Wasn't that policeman's name Anthony Brennan? A I don't know, sir.

Q Has that policeman testified in this action? A Yes, sir.

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Q And he was there all the time, was he not? A Not all the time, no, sir. Another officer relieved him.

Q But either he or some other police officer was there all the time that the count was going on? A Yes, sir.

Q What did you say when this gun was placed at your back? A I didn't say anything. I was afraid if I would open my mouth that he would shoot me with it.

Q Who would shoot you? A The party that had the gun.

Q Did you get a good look at him? A I did, sir.

Q What kind of looking man was he? A I don't know, sir.

Q You did not call the attention of the policeman to the fact that the man had a gun at your back, did you? A No, sir.

MR. POMPAN: I object. Your Honor, he testified that at the time this was done the policeman was outside shoving the crowd out.

MR. ROBINSON: He did not. He testified that e-

THE COURT: Well, you may ask the question.

MR. ROBINSON: I object to counsel suggesting the answer to the witness too.

Q Did you call the attention of the policeman to the gun in your back? A At the time he placed the gun the officer was chasing the other men out.

Q Yes? You knew how to answer that question from the suggestion of your counsel, didn't you? A No, sir.

MR. POMPAN: I object to that. Counsel knows that remark is improper. The testimony will bear me out on it.

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THE COURT: But the Attorney General asked him if he did not know that the answer such as made was suggested by the objection that you made.

Q You say the policeman was chasing the other men out?

A Yes.

Q How far out had he got chasing the other men out?

A Outside the door.

Q Could you see him? A No, sir.

Q How long was he out there? A I can't remember how long he was out there. He was chasing them out.

Q How long was the gun at your back? A A second.

Q Did the man stay there after he put the gun at your back? A I don't know, sir. The place was so crowded that I couldn't say where he went to.

Q Well, then he was not there, was he? A I wouldn't say he went away. Probably he would be around.

Q You didn't tell the policeman anything about this when he returned, did you? A No, sir.

Q You were afraid to do that, weren't you? A Yes, sir.

Q Six weeks before election you went to the Republican party to apply for a position as election official, did you?

A To apply for anything I could get.

Q Whom did you see there? A There were about three or four men in the place.

Q Any of them in court to-day? A Yes, sir.

Q With whom did you talk?

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MR. POMPAU: I object to that as incompetent, immaterial and irrelevant.

THE COURT: I will allow it in. I am going to give you all reasonable latitude. I gave it to the other side.

A Mr. Kostman (Indicating).

Q Is he the man in the front row there (Indicating)? A Yes, sir.

Q How long have you lived in this district? A About six years.

Q Are you a member of the Republican Club there? A No, sir.

Q What Election District do you live in? A 8th Assembly, 11th Election District.

Q Have you voted from that district for the last six years? A I did, sir.

Q Was anything said about the election when you were there at the Republican Club? A No, sir.

Q They told you to show up the morning of election day, did they, at the polling place? A Yes, sir.

Q Did they tell you what district? A No, sir.

Q How did you know what district to go to? A They told me to come around in the afternoon, which I did.

Q Come around where? A Come around to the club.

Q And then you didn't go to the polling place in the morning? A I did, on the election morning I was at the club and they told me to come back to the club in the afternoon.

Q And you went back to the club in the afternoon? A Yes, sir.

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Q When did you vote? A I voted in the morning.

Q In the 11th District? A Yes, sir.

Q You came back to the polling place at six o'clock at night, did you? A At the 4th street school, six o'clock.

Q Who told you what polling place to go to? A Mr. Kostman.

Q What position does he hold? A I don't know, sir.

BY THE COURT:

Q Well, where did you see him? A In the club.

Q When you speak of the club do you mean the Republican Club? A Yes, sir.

BY MR. ROBINSON:

Q You knew there was a contest between Reiss and Waldman for the Assembly, didn't you, before you began counting the votes? A No, sir.

Q You didn't know that? A No, sir.

BY MR. POMPAN:

Q Do you know what the word "contest" means? A I don't know, sir.

BY THE COURT:

Q Well, did you know that Mr. Reiss was the Republican - was the candidate of one party and that Mr. Waldman was the candidate of another party? A Well, after I got my ballots I knew.

BY MR. ROBINSON:

Q You did not know it before? A No, sir.

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Q Had you attended any of the meetings that fall? A No, sir.

Q When do you work, at night or in the day time? A At night, sir.

Q How many riots were there there that night? A Well, it was a riot all day night.

Q One continuous riot all night long, is that right? A Yes, sir.

Q But the time that you stopped counting the ballots, was that the time that Waldman came in with the guerillas? A Yes, sir.

Q Fifty or sixty of them? A Yes, sir.

Q How long did you stop counting the ballots? A I stopped for about ten minutes.

Q And for what office were you counting the ballots at that time? A Assembly.

Q Counting the ballots for assembly, were you? A Yes, sir.

Q How far had you progressed in the count for the Assembly when Waldman came in? A I was all done.

Q You were all done? A Pretty near.

Q And was it at that time that Waldman asked or objected to the count? A Yes, sir.

Q And you told him that you had already sent the statement to the police station, didn't you? A No, sir, I had one more. I had a void ballot, I called that void ballot "void."

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The talley men counted up, I signed my talley sheet, signed my police report, put my police report in already and then Mr. Waldman wanted a recount.

Q That was at the time he came in, was it not, with these guerillas?

MR. POMPAN: I object to it, your Honor. He has explained in detail when it occurred.

THE COURT: Let him tell the entire story now. I have told you I was going to allow you to bring out all the prevailing conditions which surrounded, or the conditions as they were that night in that polling place. Now, I am going to give the same latitude to the Attorney General.

Q Well, this conversation that you had with Waldman, was it after Waldman came in with his fifty or sixty guerillas; was it not? A Yes, sir.

Q And that was after you had counted the vote for Member of Assembly, and sent in your police return, isn't that a fact? I mean he came in after you had counted the vote for Member of Assembly? A No, sir, he was in there before.

Q He came in before? A The guerillas was in there before. Mr. Waldman came in with the rest of the guerillas when I counted the last ballot.

Q The last bal lot for Assembly? A Yes, sir.

Q And had you at that time signed your report of the total vote to be sent to the police station? A I didn't sign it until the talley sheets was tallied up. I signed the tally

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sheet and then I signed my police report.

Q And Waldman was there all the time? A Yes, sir.

Q While you were signing the police report? A Yes, sir.

Q When did he ask you for the recount for the vote for the Assembly? A When my police report was in.

Q When the police report was - and it was immediately after you had made the count, was it? A No, sir, about five minutes after I made the count.

Q Five minutes after you had made the count? Did he say you had not counted it right? A He did.

Q You said that that didn't make any difference, that you had sent in the police report, is that right? A No, sir.

MR. POMPAN: I object, if your Honor please.

THE COURT: Well, he says he did not.

Q What did you say? A That I would be too glad to give him a recount if I didn't have my police report in.

Q And you didn't do it because somebody said that you didn't have a right to give him a recount, is that right?

A The police officer told me.

Q The police officer told you you didn't have a right to give him a recount, is that right? A Yes, sir.

Q Are you sure that Waldman didn't ask you for a recount of the ballots for Member of Assembly before you signed the police return? A I am positively sure.

Q How long after you signed the police return did he ask you for the recount? A About five minutes after.

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Q As a matter of fact hadn't you already signed the police return before you began to count the ballots for Member of Assembly? A No, sir.

Q And that all the canvassing the ^{Board} did was to put in the figures? A Two men tallied up and I signed and handed my police report over to the officer.

Q Did Waldman say in what respect the tally of the vote for Member of Assembly was wrong? A No, sir.

Q He did not? It would not have been very much trouble to have ascertained at that time if you had made a mistake, would it?

MR. POMPAN: I object as incompetent, immaterial and irrelevant.

THE COURT: I think the question is phrased badly. I will sustain the objection.

Q Well, you could have gone over the ballots in about ten minutes to ascertain if you had correctly counted the vote for Assembly, couldn't you?

MR. POMPAN: I object to it on the ground —

THE COURT: Well, the Attorney General may ask him if he could have done it in ten minutes.

A No, sir.

Q How long would it have taken you? A Probably an hour or two or three.

Q An hour or two or three? A Yes, sir.

Q To count up for one office, is that right?

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When Waldman asked you to recount the vote for Member of Assembly, this was after he had come in with his band of guerillas, wasn't it? A As I said before --

Q Oh, answer the question yes or no?

MR. POMPAN: I submit if it please your Honor, that the witness has answered three or four times.

THE COURT: He may answer again yes or no.

A The guerillas was in there at the time.

Q And these guerillas very much frightened you, didn't they? A Yes.

Q And you knew they belonged to the Socialist party? A Because they told me.

Q But notwithstanding that fact you had the courage to refuse to recount these ballots for Waldman, although he requested it, didn't you? A I did, sir.

Q Did Waldman ask you to recount those ballots after or before the man put the gun at your back? A That was after, sir.

Q Afterwards? A Yes, sir.

Q So you were not accurate when you said, ^{to} your counsel that you were scared, were you?

MR. POMPAN: I object to that. There were three different acts which he summarized as one act.

THE COURT: It is allowed.

Q When did the Sergeant of Police come? A A quarter to two, sir, or half past, about a quarter to two.

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Q Had you counted the vote for Member of Assembly then?

A Yes, sir, it was all done.

Q How long after this riot did the Sergeant of Police come? A Fifteen minutes after the riot.

Q Was Waldman there? A Yes, sir.

Q Who was the policeman that told you that you didn't have the right to recount the votes for member of Assembly after your police report was in? A The officer in the Board.

Q Was it Brennan, the man that testified here? A I don't know.

Q You don't know? Do you know the name of the other officer that was there? A No, sir.

Q Did Waldman make any reply when you told him that you didn't have the right to recount it?

MR. POMPAN: I object as incompetent, immaterial and irrelevant.

THE COURT: It bears on his intention. I will allow it.

MR. POMPAN: He said he relied upon the statement of the Police Officer.

THE COURT: Before there can be a conviction in this case it must appear to the satisfaction of the jury beyond a reasonable doubt, that he acted intentionally. Now, you went into that and the Attorney General now is seeking to establish something upon which the jury might predicate an intention to do wrong.

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MR. ROBINSON: Will you please repeat the question?

Q (Question repeated by the stenographer). A I don't remember.

Q Your counsel asked you if you inquired of any lawyers in the polling place as to whether you had a right to make a recount of the vote for Member of Assembly. Were there any lawyers there that you knew? A No, sir.

Q You say that there were only two mistakes that Cohen and Rubinstein called your attention to, is that right? A Positively.

Q Did they call your attention to the same mistakes? A Yes, the same mistake, the two of them called my attention to.

Q How many times did Rubinstein put his hands on the ballots? A Twice, sir.

Q Were those those two times? A Yes, sir.

Q And both times he was impatient, is that right? A Well, he just put his hand on the ballot that way (Indicating), and the ballots went right off the table.

Q Both times? A No, the first time I told him to keep his hands off the ballots.

Q Yes? A The second time he just placed his hands when these guerillas come in.

Q Oh, he placed his hands there when the guerillas came in? A Yes, he banged right on the table.

Q How long after the guerillas first came in did Waldman

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come in? A Well, there were guerillas there all day, all night, rather.

Q Oh, when you said that fifty or sixty came in at one time. I mean how long after these fifty or sixty came in did Waldman come in? A Waldman came in with them.

Q Waldman came in with them, did he? A Yes, sir.

Q Was it one of those men that came in with Waldman that put the gun at your back? A Yes, sir.

Q And it was after those men came in that you made the mistake that caused Rubinstein to put his hand on the ballots?

MR. POMPAN: I object to that. Counsel misconstrues the fact.

THE COURT: He is asking if that was the time that the gun was placed at his back.

Q I asked you if it was after Waldman came in that Rubinstein put his hands on the ballots and protested, is that right? A He put his hand before Waldman came in.

Q Well, did he do it after Waldman came in? A No, he put his hand on before Waldman came in.

Q He put it on twice? A Yes, sir.

Q Was Waldman there when you stopped counting? A Yes, sir.

Q In what position were you counting the ballots when you stopped counting?

MR. POMPAN: I submit the question is not understandable.

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THE COURT: Try and make it a little more plain.

What ticket was he counting?

Q For what office were you counting the votes at the time you stopped counting? You said you stopped counting after the guerillas came in, for ten minutes?

MR. POMPAN: You will recall there were two times they came in. There was one at 11:30 and another time at about 1:30. I think he should be specific as to the time.

MR. ROBINSON: Well, you keep right on and you will get your suggestion answered after a while.

THE COURT: Now, proceed without argument.

Q Did you stop counting the ballots when there was this riot at 11:30? A I did.

Q How long did you stop then? A About five minutes.

Q Did you stop counting the ballots when Waldman came in with his guerillas at 1:30? A I did, sir, after I was done.

Q You were done then? A Yes.

Q When was the time that you stopped counting the ballots for ten minutes? A When Waldman came in I was done counting my ballots.

Q You had finished the count then, had you? A Yes, sir.

Q It was 1:30 in the morning? A Yes, sir.

Q You had no more ballots to count? A No, sir.

Q You took the ballots to the police station the next morning at eight o'clock, didn't you? A 8:30.

Q What were you doing at the polling place between two

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o'clock and eight? A Fixing my ballot boxes up and calling ballots.

Q Signing up these returns? A Yes, sir.

Q Now, at the time you counted the vote for Member of Assembly it was about 1:30, is that right? A About that, sir.

Q Because that was about the time Waldman came in, was it? A About that.

Q And you had finished counting the ballots at that time, all the ballots? A No, sir.

Q Oh, you had not? What other ballots did you count after that time? A I don't remember.

Q Did you count any ballots after that time? A I don't remember.

Q How long did it take you to count one of these positions, for instance, the office of Governor? A I don't know how long it took.

Q But it would have taken you one or two or three hours to have recounted the vote for Member of Assembly, wouldn't it? A Yes, sir.

Q You were told by the Republican party or whomever you saw at the Republican Club when you went to the polling place to ask for whom? A Mr. Bien.

Q Who is he? A He is leader of that Election Board, I think.

Q Republican or Democratic? A Republican.

Q Did you ask for him? A Yes, sir.

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Q Did you have a talk with him? A No, sir. All he sent me over, to the day Chairman.

Q That is Simon that was there at the beginning of this trial, was it? A No, sir.

Q He sent you over to the day Chairman? A Yes, sir.

Q What was the name of the day Chairman? A I don't remember.

Q Did you have a talk with him? A No, sir. All he did was to sign me up.

Q Was he a canvassing inspector? A Yes, sir.

Q Did you go out and telephone to the Republican party to come down and help you? A I didn't go out. I sent somebody out.

Q Whom did you send? A I sent a party to go out and call up.

Q Wasn't the Republican Captain there at the time? A He was there at the time. I didn't have nothing to do with him.

Q Was there a Republican watcher there? A Yes, sir, there was.

Q Well, that is all.

RE-DIRECT EXAMINATION BY MR. POMERAN:

Q Mr. Mendelsohn, at the time that you finished the recount, you did not refuse to give him a recount on account of the lateness of the hour? A No, sir.

MR. ROBINSON: I object to that as incompetent, immaterial; and irrelevant.

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THE COURT: I will exclude that now.

Q When you called off the votes you had to call off each one of these names, didn't you, and the number of times set opposite the talley sheet? A Yes.

Q Now, for instance, Alfred E. Smith, you had to call his name 236 times? A Yes, sir.

Q And so on with all the names that appear upon each talley sheet? A Yes, sir.

Q And after 1:30 you had not completed all your judges yet, had you? A No, sir.

Q Did you continue calling ballots until between 1:30 and the next morning? A Yes, sir.

MR. ROBINSON: I object on the ground that counsel is leading.

THE COURT: Yes, I think the jury understands thoroughly the number of times the name had to be called.

Q Did you also have constitutional amendments that night? A Yes, sir.

Q Did you count those after the Assembly vote? A After the Assembly.

Q Did you occupy your time between 1:30 o'clock and next morning counting those? A And calling.

MR. ROBINSON: I object as incompetent, immaterial and irrelevant.

THE COURT: Well, I think he may explain that, to account for the difference in time, namely, between half

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past one in the morning and 8:30, and he may say that there were constitutional amendments that had been voted on.

BY THE COURT:

Q Is that correct? A Yes, sir.

MR. ROBINSON: Well, if your Honor please, I do not object to the question along that line. That is not leading, but for the last six or eight questions the answer has been put by the question right in the witness's mouth.

THE COURT: Yes, that is true, that is the vice of counsel's questions. Now, see if you cannot proceed without that.

MR. EDELSTEIN: Well, the question was to try to refresh the witness's recollection and account for the time from 1:30 to eight o'clock.

THE COURT: Well, you cannot do that in that way. You will first have to exhaust his recollection and then ask if he has testified to all he remembers, and then you may ask leading questions, under the rule.

Q Mr. Witness, do you remember exactly what you did between 1:30 and 8:30 in the morning, or have you exhausted all your memory? A I don't remember.

Q Did you at that time, after counting the votes for Member of Assembly, did you have to count the constitutional amendments? A Yes, sir.

Q Were there four questions or less than four questions?

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A Four questions.

Q And how many voters were there registered or voted there? A Voters voting?

Q Yes? A 528.

Q Mr. Witness, I show you a talley sheet taken from People's Exhibit 7, and ask you if you find a correction, a cross mark at the item called "Blank votes" (Indicating). Do you notice there that check mark across it? A I didn't notice that.

Q Do you notice it now? A Yes, sir.

Q Do you believe that it was on there at the time? A I don't know, sir, I can't say yes or no.

Q Does the same thing hold true on blank votes on page No. 3 of that same exhibit?

MR. ROBINSON: Your Honor, I object on the ground that the exhibit speaks for itself.

THE COURT: Why, of course, and I have been wondering why time is being consumed. There is a record which can be called to the attention of the jury. The conditions are there proven in that record. When you sum up you can dwell on those facts.

Q Mr. Witness, was your time from 1:30 to 8 o'clock in the morning occupied in your official duties as an election official? A Yes, sir.

MR. ROBINSON: I object as leading and as incompetent, immaterial and irrelevant.

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THE COURT: I will allow it to stand.

Q Well, that is all, Mr. Witness.

ABRAHAM B. SCHUMAN, called and duly sworn
as a witness on behalf of the defense, testified as follows:

(Residence: 946 East 181st street).

DIRECT EXAMINATION BY MR. POMPAN:

Q What is your business, Mr. Schuman? A Lumber dealer.

Q Where is your place of business located? A 160 West 15th street.

Q Do you know Mr. Irving Mendelsohn? A Yes, sir.

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

Q Do you know other people that know him? A I don't know.

Q Do you know people that know him and that know you?

A I have been living in the neighborhood for years, and naturally I know.

Q Do you know other people that know him and who know you?
A Yes.

Q Do you know his reputation for truth and honesty and veracity? A Yes, sir.

Q And for fair dealing? A Yes, sir.

Q What is it, good or bad? A Pretty good. I had him employed there driving my automobile at times.

Q That is all, Mr. Schuman.

CROSS-EXAMINATION BY MR. ROBINSON:

Q What is he, your chauffeur, or what was he? A Yes, sir.

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Q Do you live in the same neighborhood? A No, sir, I live in 181st street.

Q Did you live in the same neighborhood? A Yes, I did. And I lived there all my life before I was married.

Q In the 8th Assembly District? A Yes, sir, formerly the 10th Assembly District.

Q Can you mention, or have you ever discussed Mr. Mendelsohn with anybody? A No, I have not.

Q Well, that is all.

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

(Residence: 628 West 151st street).

DIRECT EXAMINATION BY MR. POMPAN:

Q Mr. Kostman, what is your occupation? A I am an attorney-at-law.

Q And at the present time do you hold any position under the Federal Government? A I do.

Q What position do you hold? A Division Chief, Internal Revenue.

Q In the year 1920 were you an officer of the Progress Republican Club? A I was.

Q Was that the official Republican Club of the 8th Assembly District in the Borough of Manhattan, County of New York? A Yes.

Q Do you know the defendant, Mr. Mendelsohn? A I do.

Q Do you know other people who know you and know him?

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A Yes, sir.

Q Do you know his reputation for honesty, truth, fair dealing and honesty in the community? A I do.

Q Is it good or bad? A It is good.

Q Do you recall a few weeks before election of 1920, did you have a conversation with Mr. Mendelsohn? A I did.

Q Did you direct him to come back for a position on election day? A He, amongst others.

Q Did you on election day direct him to go to any particular polling place? A I did.

Q What particular polling place did you direct him to go to? A The 6th Election District.

Q Where was that? A In the Public School on 4th street.

Q Were you one of the gentlemen who responded to the telephonic communication to the club? A I did.

Q Will you tell the Court and jury what you found when you got there, and what time that was? A About 11:30 I received a call that there was some trouble in the 4th street school. I went down there and I found that the place was over-run with a lot of people. I went over to the Chairman, the defendant, and I asked him what the trouble was. He said he couldn't proceed with his duties. I asked the officer to clear the room. The officer attempted to but couldn't do it. I appealed to the officer to send out word to the station house for reinforcements. I recall that there was somebody spoke in behalf of the Socialist party, I think it was a Mr. Sacken,

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and I recall he was a candidate for the Court of General Sessions and I made an appeal to him to clear or to ask his men to stay out of that polling place because it was impossible for the election officers to do their duty. I at that time counselled the Chairman not to continue doing anything until the room was cleared. I asked him whether he had any trouble before that and he said yes, he said men were standing in back of him and were leaning all over him and it was impossible to continue with the count.

Q Was there excitement when you got there, noise that you heard? A There was a lot of excitement and noise.

Q Did you subsequently go to the same polling place at a later hour? A I did, about two o'clock.

Q Will you tell the Court and jury what you found there then? A I found the same number of people, in fact a greater number of people, and I found the then candidate for Assembly, Mr. Waldman, and a Mr. Sacken, Mr. Berkman, I believe it is, I think he was Alderman representing the 6th Aldermanic District, and I heard them make an appeal for a recount to the Chairman of the Board. I took Mr. Waldman aside and I told him what I-- or I then went to the Chairman and asked him whether the official talley sheet was signed. He said "Yes." I asked Mr. Waldman and Mr. Sacken, or I took them aside, and I said, "Boys, if you ask the Board to change their return, I believe you will violate the law, because I believe under the Election Law no inspector has the right to change the talley sheet after it has

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been signed up."

Q Do you mean to say that you did not think that any election official had the right to change the returns after once they had been given to the Police Department? A I didn't even think they had a right to change them after they signed it. That was my impression of the law.

Q And did you so advise Mr. Waldman? A I advised the whole Board to be careful or they would be violating the law.

Q That's all, Mr. Kostman.

CROSS-EXAMINATION BY MR. ROBINSON:

Q What section of the Election Law would it be a violation of to recount the votes, for any officer to correct the police returns? A I really can't pick out the section, but having been connected with the State Superintendent of Elections at one time, it was my duty to go around and advise the Board.

Q Never mind that. I asked you if there was any section under the Election Law that that would be violating? A I say I don't recall it, sir.

Q Did you see Waldman there at the time you went there the second time? A I did, sir.

Q What vote was the Board canvassing at that time? A I don't know what vote they were canvassing.

Q Had they finished the canvass for Member of Assembly? A I believe they did. He asked for a recount.

Q Were you there when he asked for the recount? A Yes, sir.

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Q Did he state why he wanted the recount of the vote for Member of Assembly? A Yes, sir.

Q What did he say? A He said he thought there was some discrepancy.

Q What did Mendelsohn say to that? A Mendelsohn said, "I would be willing to give you a recount if I could."

Q How long do you know Mendelsohn? A A number of years.

Q Well, how many? A I would say about ten years.

Q Is he a worker, a political worker? A No, I wouldn't call him a political worker.

Q Has he done some work there for the Republican party? A Not before this.

Q That is the first year that he did any? A Yes.

Q That is all.

MR. POMPAN: And the defendant rests, if the Court please.

MR. ROBINSON: I will call Mr. Waldman.

- : R E B U T T A L : -

LOUIS WALDMAN, called and duly sworn as a witness on behalf of the People in rebuttal, testified as follows:

(Residence: 301 Second Avenue).

DIRECT EXAMINATION BY MR. ROBINSON:

Q You were the Socialist candidate for Member of Assembly in the 8th Assembly District in the fall of 1930? A Yes, sir.

Q Were you present at the polling place on the night of the election day in the 6th Election District? A I was.

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Q Did you go in there with fifty or sixty guerillas?

A I did not.

Q Were there fifty or sixty guerillas who were friends of yours that were there when you did go in? A There were no guerillas that I could know of, except gentlemen of the type of Mr. Kostman and myself, Dr. Goldenkranz; the Republican District leader, Dr. Silverman, Dr. Bien and a few others whose names I can't recollect.

Q Who is Dr. Bien? A Dr. Bien is the Republican - a member of the Republican Club, as far as I know, in the 8th Assembly District.

Q Is he a Republican Captain in that district? A He is not.

Q How many people were in the polling place when you were there? A I should judge about twenty or twenty-five, all in all, including the Board.

Q How many times were you there? A I believe I was there three or four times all told.

Q Were you there when the count for Member of Assembly was going on? A I came there about the middle of the count.

Q For Member of Assembly? A For Member of Assembly, in response to a call.

Q From whom? A From my watcher.

Q What is the name of your watcher? A It was not Mr. Cohen. It was the other watcher whose name I couldn't recollect.

Q Was it Rubenstein? A No, Rubenstein was not my watcher.

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Q It was in the middle of the count, was it? A About the middle of the count.

Q Did Rubenstein and Cohen protest while that vote was going on, in your presence? A No, I did all the protesting when I came.

Q Will you tell the Court and jury just what took place after you came? A I should be happy to describe it. When I arrived, I arrived in response to a call that all blank ballots and my ballots were being counted for Mr. Reiss.

MR. POMPAN: I move to strike that out. Now, you ought to know better than that, you are a law student, Mr. Waldman.

THE WITNESS: I ask the Court to be permitted to tell all that happened.

MR. POMPAN: You will tell it in a legal way. I move to strike out about a telephonic call he got.

THE COURT: I think I will let him state why he went there.

MR. POMPAN: Conversation he had with some unknown man not in the presence of this defendant?

THE COURT: Well, he was told that the blank ballots and his ballots were being counted for his opponent. I will receive that, with the statement to the jury, however, that that is not binding upon this defendant, what he was told by some one else. We only want to account for his presence there.

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MR. POMPAN: Well, I except to your Honor's ruling, and it would be a hard thing for the jury to differentiate between legal evidence and --

THE COURT: Now, do not make any mistake about this jury. I have had them all here during this term and I have got intelligent men on my panel.

THE WITNESS (Continuing): I arrived there with Mr. I. N. Sacken, my attorney, and also candidate for Judge, Alderman Beckerman, Alderman of the 6th, and if my recollection goes right, 6th Election District of the 8th Assembly is part of his Aldermanic District. I called to the attention of the Chairman when I came --

BY MR. ROBINSON:

Q That is, this defendant? A This defendant, that I received such an emergency call, and asked him if that were true, to re-canvass the ballots for the Assembly. He answered me, "Like hell we will," and proceeded with the count. With about ten people surrounding the table obstructing my view of the ballots -- I tried my best to get near it and the Chairman would call a blank ballot.

MR. POMPAN: Your Honor, I submit, this witness is going beyond -- he testified that ten people obstructed his view and yet he says the Chairman called a blank ballot.

THE COURT: Well, now, he says that ten people were in front of him and that notwithstanding their presence the Chairman called a blank ballot. Now, that is entirely

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for the jury to determine, whether such a situation could be possible or probable.

THE WITNESS (Continuing): I stated that I tried to get near the table and I did. That was my statement, not what the attorney said it was. I did get to the table in spite of the attempt to obstruct me, and I did see the ballots, and the Chairman was calling "Blank," while the tally clerk was putting it down for Reiss, and I protested. I asked the Chairman to stop and correct that error. He said, "You are interfering with the work of the Board." I protested again. He says, "All right, if you are not satisfied when the whole thing is over we will recount them." I said, "But meanwhile, count them right." He proceeded, he would not make any correction. Then a ballot for me was again called "Reiss," and marked down for Reiss. I stopped him. He says, "You are interfering with the Board, we will put you out of this polling place if you continue interfering with the Board."

Then I complained, I called the matter to the attention of the police. The police came and warned the Chairman, and at one time threatened to arrest the whole Board on my complaint.

This continued for at least fifteen or twenty times in my presence, and I made fifteen or twenty continual protests, which protest was met with the same indifferent reply.

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7 When the whole thing was over I turned to the Chairman and asked him, in accordance with his promise, in view of the various ballots that were counted very fast, that belonged to me, for Mr. Reiss, and in view of the further fact which I called his attention to, all through the count, that the blank ballots were not put down on the talley sheets, I called his attention to the section of the Election Law which said that every ballot for every candidate should be put in the column belonging to the candidate, and that every void ballot should be put in the column belonging to the void ballots, and that every blank ballot should be put in the column belonging to the blank ballots, so that when added up they would make a total equal to the number of ballots cast on that day. He refused to put any blank ballots in any of the blank lines.

BY THE COURT:

Q Who did that? A That was the Chairman's ruling.

Q But he did not make any entry, did he? A Nobody made an entry, your Honor. I protested that to the Chairman because my address was always to the Chairman.

MR. POMPAN: I move to strike out the testimony of this witness relating to what he told him to do, to make entries, because it was no duty of the canvassing inspector to make entries, because that was naturally the duty of the tallier.

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THE COURT: Well, they form part of the canvassing board, the men who kept the tally. Now, the theory is that that which was done wrongly by the tally man was directed to be so done by the Chairman, meaning the defendant.

MR. POMPAN: But there is no such testimony here excepting the fact that it was not done.

MR. ROBINSON: He signed the tally sheet after this protest, however, that the tallier's record was correct.

BY MR. ROBINSON:

Q Will you proceed? A I stated these grounds to the Chairman for my request for a recount. He said that under the law he was told that there could be no re-canvass after there was once a canvass, and that this Board was boss in the place anyhow. I read to him the section of the Election Law which provided for a re-canvass in case of irregularity.

BY THE COURT:

Q What section is that? A It is there (Indicating).

MR. POMPAN: That is only where the figures are put down on the tally sheet.

THE WITNESS: I will come to that.

BY MR. POMPAN:

Q I am not addressing you, I am addressing the Court.

THE WITNESS: Well, I am testifying just now.

MR. POMPAN: The only section that refers to the point is where it provides that where a number of votes do not

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tally with the proving of the tally sheet - that is 370.

THE COURT: Read it, will you?

MR. POMPAN: "Proving tallies," (Reading).

THE COURT: As I understand the testimony of this witness, he says he was giving his interpretation of the law to the defendant.

THE WITNESS: If your Honor please, I called the attention of the Chairman of the Board --

MR. POMPAN: Now, your Honor, I submit --

THE COURT: I will let him testify because he states that he told the defendant what he thought the law in the premises was. Now, it makes no difference whether he is right or wrong. He may state what he said to the Chairman.

MR. POMPAN: But I submit that this witness should not be arguing the question as to what his impression of what the law is. He is now testifying as to what he thought he said, not what he did say.

THE COURT: You are bringing out conversation had with the defendant, and the purpose of this examination, as I understand it, particularly that portion of it which relates to the conversation had between the defendant at the bar and the witness upon the stand, bears on the question of the intention. It does not make any difference about mistakes. It is what was the intention of this man. He might have done that which would be forbidden by law,

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but if he did that which was forbidden by law and he made an honest mistake, he would not be culpable.

THE WITNESS: I called to the attention of the Chairman that in view of the fact that he did not record the blank ballots at all, and by adding up my votes and Reiss' votes it did not tally with the total, that under this section he was bound to re-canvass it.

MR. POMPAH: If your Honor please, the witness's answer just now states as a fact that the witness, or that the adding up of his vote and Reiss' vote - he did not testify to that fact only, but it is an inferential statement he makes and what his impression is.

THE COURT: Well, I think you fail to perceive that this defendant is not being tried for neglect of duty, or dereliction of some duty that he should have performed. He is being tried here for making a false return, so I shall tell the jury that he cannot be convicted for a failure to do his duty. In other words, failure to do that which the law directs him to do in this particular respect. I have said once or twice in this case that it looked to me as if the indictment here might have alleged that the defendant in this case was guilty of misconduct. Proceed.

THE WITNESS: The Chairman answered that he is the law on election day and will not re-canvass, adding, "If you want a recount you know where you can get it, you

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wouldn't get it here." I then remained until they added both my vote and Reiss' vote, put in the difference between the vote as added and the total vote in the blank column, so that the whole thing tallied. Then I turned around and found three void ballots under the books unaccounted for. I turned to the Chairman then and I said, "If formerly you did not believe my ground was valid for asking for a recount or re-canvass of these ballots, now that I have found three ballots under your books which are void, left by you to be recorded later or for other reasons, they not having been on your tally sheet, it is sufficient ground under section 370 to give me a recount."

The Chairman said, "We will do nothing of the kind." It was at that time that I asked the police officer to arrest the whole Board. The police officer asked me that if I wanted to arrest the Board it would be advisable to call up Captain Bloom of the 15th Precinct, and inform him of what was going on. I called up Captain Bloom and I was sent a Lieutenant to the polling place. By that time Mr. Kostman, Dr. Goldenkranz, the Democratic leader, Dr. Silverman and Dr. Bien were there.

BY MR. ROBINSON:

Q Are those gentlemen all in court? A No, I saw Dr. Silverman here in the morning, and I think the Republican District Leader, I don't recollect his name, was sitting in this

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court. The other gentlemen that I see in this court now were there. By this time there must have been about thirty people. Dr. Goldenkrans - or yes, Mr. Kahn was there, the gentleman who to-day is Assemblyman of the 8th Assembly District.

BY THE COURT:

Q Now, we will have to know who it was that Dr. Goldenkrans advised with? A I will state that Mr. Goldenkrans upon being told the facts advised the Chairman to give me a recount, stating that I was entitled to a recount under those circumstances. The Police Lieutenant when he came in and I told him the facts, told the Chairman and the rest of the Board that I was entitled to a re-canvass. They refused to do it until Mr. Kostman called me and Mr. Sacken - that was my attorney - aside, and said, "I will tell you what I will do, boys, we will call up the Board of Elections, meanwhile we will stop the canvass and we will see what they say." At that time I deferred the arrest of the Board on that promise. About half an hour later Mr. Kostman told me that he was advised by the Board of Elections that I was not entitled to a recount. I then asked the Lieutenant to arrest the Board because in my presence they had violated the law, I told him. The Lieutenant then advised me and Mr. Sacken, that the whole polling place has now been infested with a very tough bunch - that was the language he used - and it would not be advisable to place the Board under arrest at this time, that we must prefer our charges next day.

It must have been then about half past four in the morn-

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ing. I couldn't do anything and I left this for the other polling place. That was all I know of this matter.

THE COURT: Now, in connection with the question that was raised here as to the right of this defendant to give what they are pleased to call a recount, this seems to be the law which has been laid down by our Appellate Courts; entitled, "Boards of Inspectors of Election have no power conferred upon them to correct - or rectify mistakes except clerical ones. Their duty is simply as to the ballots actually in the box at the close of the polls."

Now, that view has been settled in the People ex rel Blodgett against the Board of Elections, reported in 44 New York, State Reporter, at page 738; 19 New York Supplement, page 206.

MR. ROBINSON: Yes, but if your Honor please, even though it had not been done officially, they could have canvassed the vote for Member of Assembly just for the purpose of satisfying this candidate who was present, that they were right.

THE COURT: But you will remember there was a witness on the stand who testified that he stated to the defendant, that he had no power ~~and~~ in the law to do it. At the time that that witness said that to him there was a question that went through my mind whether he was correct in his view, but in examining the law I find that there is something indirectly sustaining the view that gentleman took.

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MR. ROBINSON: But, if your Honor please, he says he made that protest before the canvass was completed.

THE COURT: Yes, that part I have allowed in, but I do not want any misapprehension as to the law to creep in.

MR. ROBINSON: This is all bearing upon whether this canvass was made, any false canvass was made intentionally or not.

THE COURT: Yes, I know that.

BY MR. ROBINSON:

Q Did you subsequently apply to the Court or to the Board of Elections of the City of New York for a recount of the ballot for Assembly?

MR. POMPAN: I object as incompetent, immaterial and irrelevant.

THE COURT: Now, you mean that provision of the Election Law which provides that a party who is a nominee in an election may apply for a recount? I think that application is made to the Supreme Court, is it not?

MR. ROBINSON: Well, I will withdraw that. That is all.

CROSS-EXAMINATION BY MR. POMPAN:

Q Ms. Waldman, did you come in an automobile to this polling place on that day? A In an automobile.

Q Was that a black covered car? A I think it was black covered.

Q It was a large Packard, wasn't it? A It was not.

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Q What was it? A It was not a Packard, that is a cinch.

Q What was it? A A Dodge or something, small machine.

Q How many other cars accompanied the machine that you were in? A Not one other.

Q You traveled all alone? A Not alone, I was with Mr. Sacken, and Alderman Beckerman, I testified.

Q If you had come there with fifty guerillas, would you admit it in court? A If I did, I would.

Q You would? You never knew of such a thing as an entertainment committee, did you? A Not until I heard it from you to-day.

Q Didn't you hear your own witness Cohen, one of your Socialist watchers, testify that the entertainment committee was being entertained the night before election at the Broadway Central Hotel? A I did not. The first time I heard that was this morning.

Q Didn't you hear the testimony read at this table right here (Indicating), that Cohen so testified? A I did not hear him so testify.

Q Did you hear ^{of} anybody of the Socialist party having headquarters at the Broadway Central Hotel? A No, sir.

Q Or at any other ^{head}quarters? A At our regular headquarters, the Stuyvesant Casino.

Q How many men were stationed at these headquarters?

A Well, we had a girl at the switchboard and --

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Q I said men? A There might have been five, there might have been ten at the headquarters we had there, all day through.

Q That was a pretty exciting day that day, was it? A Like all election days.

Q It was no different from others? A No.

Q You didn't have any more people about that election day than before? A No, sir.

Q And you were out that day to vindicate the ouster, weren't you? A I was out that day to vindicate the ouster, yes, sir.

Q And the entire party was centred upon making a showing, wasn't it? A We did not center on it, no, sir.

Q Well, let us not quibble about words? A Well, then, why ask me such a question?

Q Did you have any guards to protect the Socialist candidates? A I did not.

Q Did any other candidate in your party employ any guards? A No, sir.

Q Have you ever heard of any such thing being done by the Socialistic party? A Not except from you.

Q So that when Cohen testified to that fact as a Socialist, he was not telling the truth? A If he did so testify he is not telling the truth.

Q You arrived upon the scene at that time? A I arrived upon the scene some time between two and three.

Q Do you recall hearing that the Prohibition watcher had

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created a disturbance by knocking the ballots off the table?

A I did not, I didn't hear anything of the kind.

Q And you never knew of such a thing occurring then?

A No.

Q You never heard there was considerable excitement there all night? A I heard when I came there that there was excitement.

Q You heard there was excitement all night long there?

A No, I did not. I didn't say so.

Q So there only was excitement when you arrived? A No, the excitement took place when I began to protest and they refused my protest.

Q Before that everything was quiet and meek? A No, except that mt watcher protested as he told me.

Q Outside of that everything went peaceably along? A As far as I know.

Q You had not heard anything at all about guerillas rushing the election polls there? A I had not.

Q You never saw anybody come in while you were there? A Excepting as I said Mr. Kostman, Dr. Goldenkranz and the Police Lieutenant.

Q Was there anybody else in the car with you other than Beckerman and Sacken and yourself? A The chauffeur, of course.

Q And no one else? A No one else.

Q And you traveled alone and you saw men standing in

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there and you went to every polling place that night? A That's right.

Q How long did you stay at the polling place of the 6th Election District? A I must have been there for about an hour and a half.

Q What time did you get there, you say? A I got there somewhere between two and three.

Q At that time the police return had been in? A It had not. It was in the middle of my count.

Q You remember that very clearly? A Why, of course I do.

Q What is the name of that other watcher of yours who watched and telephoned you, who was not Cohen? A I couldn't say offhand.

Q Did you think it was your duty as a member or as candidate for Assembly to advise the Board upon the Election law?

A No, I thought it was my duty to get my count straight.

MR. POMPAN: I move to strike that out.

Q I want you to answer yes or no?

MR. ROBINSON: I think that is responsive.

THE COURT: Well, strike that out. I do not think it is responsive.

THE WITNESS: Will you repeat the question?

Q (Question repeated by the stenographer). A Yes, it was.

Q And you emphatically read the law to them? A I did.

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Q And you disagreed with Mr. Kostman as to the interpretation of the law? A I did.

Q Do you remember Mr. Kostman told you that he was a former official of the Board of Elections? A I do.

Q And he told you it was his understanding of the law that you could not have a recount? A And I told him it was my understanding that I could.

Q Answer the question?

MR. POMPAN: I move to strike out the answer.

THE COURT: Yes.

A Yes, he did.

Q Do you remember him advising the Chairman to that effect? A I didn't hear him advise the Chairman anything.

Q You did not hear him talking to the Chairman at all? A No, except to us.

Q Did he plead at any time for the people to go out of the polling place? A He did not.

Q He wanted all the people to stay in there? A I don't know what he wanted.

Q What was the demeanor and conduct of the Election Board and the public there, excited, agitated or quiet?

THE COURT: He says it was very hostile.

Q You recall your entire conversation with that Board very clearly? A Yes.

Q And you were not subpoenaed to come down here to-day, were you? A No, sir.

Q You were requested over the telephone? A I was re-

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quested over the telephone.

Q When did you last refresh your recollection as to the Election Law? A Last election day.

Q And this was not your first experience in teaching Election Boards their law, was it? A I never taught any Election Board any law.

Q But you tried to tell this Board what the law was? A I tried to tell them what the Election Law was when I found my rights were violated.

Q You claim that the Election Law has been violated very often in this city, don't you?

Objected to. Objection sustained.

Q That is all, or just one question: During the entire time that you say you were in this Election District or polling place, was Mr. Kostman there during the entire period?

A No, sir, not during the entire period. He came there after I had been there already.

Q Yes, that is all.

MR. ROBINSON: We have no more witnesses, your Honor.

THE COURT: Then is the case closed upon each side?

MR. POMPAN: We rest. Now, if it pleases your Honor, we desire at this time to renew the motion made at the end of the People's case and at the close of the entire case with the same force as if the grounds were herein again set forth.

MR. EDELSTEIN: Does your Honor want to hear argu-

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ment upon the Proposition?

THE COURT: No, I do not think so. I think it is a question for the jury.

MR. EDELSTEIN: We respectfully except and ask your Honor to acquit the defendant. Your Honor denies that and gives us an exception?

THE COURT: Yes. I will leave the case to the jury.

Gentlemen, we will take a recess until half past ten o'clock to-morrow morning and meanwhile do not speak about this case to any one or amongst yourselves and permit nobody to approach you and express an opinion upon the merits of the case, and in addition to that, do not make up your minds concerning the guilt or innocence of the defendant until I have sent this case to you.

You may go until half past ten to-morrow morning.

New York, December 31, 1921.

TRIAL RESUMED.

MR. EDELSTEIN: If your Honor please, at the close of the entire case yesterday we had not any witnesses to rebut the testimony of the last witness and we did not know that we would be able to get them in such a short time; accordingly, we rested. Now we ask your Honor to re-

open the case, with a view to putting on such witnesses as we want to, in surrebuttal.

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THE COURT: Well, *who are your witnesses?*

MR. EDELSTEIN: The names that were mentioned by the last witness. Last night we sent out subpoenas to try to subpoena all those persons. We did succeed in subpoenaing some and we were unable to subpoena others.

THE COURT: How many witnesses do you wish to call?

MR. EDELSTEIN: About four or five, very short.

THE COURT: No, the case has rested now. I am not going to ask this jury to sit a week in this case. I thought you were going to call as a witness Dr. Goldenkranz and another, Dr. Silverman. If it were limited to those two, in the light of what the last witness said, I would permit that.

MR. EDELSTEIN: Would your Honor grant permission to call also Mr. Nordinger, Republican leader, who the last witness said was there?

THE COURT: Well, you may call Dr. Goldenkranz and Dr. Silverman.

MR. ROBINSON: Your Honor, may I make a formal objection after the defendant has rested and the case is closed?

THE COURT: Well, ^{the} court adjourned at a late hour yesterday and perhaps it is fair to say that the defendant could not anticipate what the last witness was going to testify to. I will allow these two people to be called, but I want it done expeditiously.

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- SURREBUTTAL -

D R. SOLOMON GOLDENKRANTZ, called as a witness on behalf of the defense, having duly affirmed, testified as follows:

(Residence: 68 St. Marks Place).

DIRECT EXAMINATION BY MR. EDELSON:

Q. Doctor, you are a physician and surgeon of the City of New York? A. I am.

Q. And have been a physician and surgeon in the County of New York how many years? A. Since 1888.

Q. Have you had occasion to occupy any public office? A. Yes, sir.

Q. What office? A. I was coroner of the Borough of Manhattan from 1902 to 1905 and State Transfer Tax Appraiser for three years.

Q. And in the capacity of physician and surgeon have you been connected with any institutions? A. Yes, the Good Samaritan Dispensaries for about 13 years.

Q. Of what institution are you a graduate? A. University Medical College.

Q. Do you reside in the Eighth Assembly District? A. Yes sir.

Q. Did you reside there in the election of 1920? A. I did.

Q. And were you the executive member of the democratic party in that district? A. I was.

Q. Do you remember having occasion to go to the Sixth

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Election District of the Eighth Assembly District somewhere around one o'clock in the morning? A I have a recollection of it.

Q Will you tell the Court and Jury just what you observed?

A The returns for the election were coming in very slowly and it got to be around one o'clock and several members of the club and myself went around to see what the cause of the delay was, and we went from one polling place to another, and finally got to this place, the Sixth Election District of the Eighth Assembly. When I got there there was a large number of people around and there was a lot of noise and disorder, and I said to the people, "Why, you ought to be ashamed of yourself to make so much noise and disorder; why don't you let these inspectors complete their work?" I said, "Now, you have got a lot of work before you and it is going to take you until away early in the morning to complete their work." Well, someone said ~~to~~ I really don't recollect who it was in particular -- said, "Why, there is a dispute there about a couple of void ballots and the whole thing ought to be counted over. So I said to the chairman of the board, "Who is the Chairman?" and Mr. Mendelsohn said, "I am." I said, "Is the count completed?" He said, "Yes", and I said, "Have the official returns been signed?" He said, "Yes." "Well," I said, "I can't interfere in that", and with that I walked away.

Q Doctor, it has been testified here by Mr. Waldman that you, in his presence, addressing yourself to the chairman, said,

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"Give Mr. Waldman a recount; he is entitled to a recount." Did you say that to Mr. Mendelsohn? A. No, sir.

Q. Or any words to that effect? A. Yes, sir.

Q. It has also been testified that in your presence then and there the chairman said, "I am the boss here. If you want a recount you know where you will get it." Did you hear the chairman say that to Mr. Waldman? A. No, sir.

Q. It has also been testified to by Mr. Waldman that he asked the policeman to arrest the entire board and the policeman refused. Did you hear any such request made? A. No, sir.

Q. How long were you there, may I ask? A. Somewheres between five and ten minutes.

Q. How many people would you say were in that polling place excluding the members of the canvassing board? A. There must have been about forty or fifty people there.

Q. What was the demeanor of the people that were there?

MR. ROBINSON: I object to that as incompetent, immaterial and irrelevant and as calling for a conclusion.

THE COURT: Well, I think I will exclude it.

Q. What was the board doing when you were there? What was the board doing? A. At that particular time I don't think -- well, they were in the process of canvassing, but at that particular time that I was there they were not doing anything; they were arguing.

Q. How large a room was this where the forty or fifty

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people were? A. That is part of the assembly room of the public school, just half of it.

Q. How large was it about? A. I should say probably as large as this room, not quite as large and not quite as long.

Q. What portion of the room was allotted for the election purposes? A. The front part as you entered from the side on Fourth Street and walked in through a side door just as you come into the doorway.

Q. That is all, Doctor Goldenkrantz.

CROSS EXAMINATION BY MR. ROBINSON:

Q. You say the Board had stopped canvassing when you came there? A. They were not doing anything in particular, they were arguing.

Q. Was Mr. Waldman there when you got there? A. I believe he was.

Q. Don't you know whether he was or was not? A. Well, yes, I think he was there.

Q. And they had completed the vote or the canvass of the vote for member of assembly at that time, had they? A. I asked them if they had completed it and they said yes.

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Q And you heard there had been a dispute about it, did you? A I heard there was a dispute about a couple of void ballots, that some one had protested that they were not void.

Q So that you don't know whether Mr. Waldman was there during the canvass of the vote for Member of Assembly, do you?

A I do not, no, sir.

Q He might have been? A He might have been, yes.

Q And he might have protested during the canvass of that vote, might he not? A He might, as far as I know.

Q Because you were not there, you don't know? A No, sir, I don't know.

Q And the Chairman might have used the language that he said the Chairman did, so far as you know? A Not during the time I was there.

Q Not during the five minutes you were there? Did you see anybody put a gun at Mendelsohn's back? A No, sir.

Q While you were there? A No, sir.

Q Did he say anything about that? A No, sir.

Q That is all.

SAMUEL T. SILVERMAN, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 320 East 12th street).

DIRECT EXAMINATION BY MR. EDELSTEIN:

Q Doctor Silverman, you are a physician and surgeon of

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the State of New York, licensed to practice as such? A Yes.

Q A graduate of what institution? A Columbia University.

Q You have been a physician and surgeon for how many years? A Since 1906.

Q Where do you reside? A 220 East 13th street.

Q Is that within the 8th Assembly District? A Yes, sir.

Q Are you a member of the Republican Party in that particular district? A Yes, sir.

Q Do you hold any office in that Republican club? A Yes, sir.

Q What office? A Chairman of the Executive Committee.

Q Did you hold such office when the election took place in the year 1930? A Yes, sir.

Q During the day you had charge of an election district, did you not? A Yes, sir.

Q And that was not the 6th Election District? A No, sir.

Q After you had completed your Election District, you returned to your club? A Yes, sir.

Q And thereafter did you have occasion to go to the 6th Election District of the 8th Assembly District? A Yes, sir.

Q What gave rise to your going there? A The report came in the club house that there was some disorder in the school over on 4th street and I went over to see what the trouble was.

Q Who accompanied you when you went there? A I went alone.

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Q When you arrived there how many people did you find in the polling place? A There was quite a crowd there.

Q When you say quite a crowd, would you say about over two hundred people?

MR. ROBINSON: I object to his suggesting to the witness.

THE COURT: Well, quite a crowd is sufficiently comprehensive.

Q Did you see Mr. Waldman there? A Yes, sir.

Q Did you see Dr. Goldenkranz there? A Yes, sir.

Q It has been testified here that in your presence and in Mr. Waldman's presence, Dr. Goldenkranz addressing himself to the Chairman said, "Give Mr. Waldman a recount, he is entitled to it," and he did so four or five times, and the Chairman said he would not?

MR. ROBINSON: I object on the ground that that is not the testimony, as I recollect it. He said that Dr. Goldenkranz said four or five times, or that he asked Dr. Goldenkranz - my recollection of the testimony is that Waldman asked the Chairman on three different occasions for a recount and stated specifically the times when he asked, but he did not address himself to Dr. Goldenkranz.

MR. EDELSTEIN: My recollection of the testimony is that --

THE COURT: Well, this witness ~~has~~ may state anything that was said to the defendant and anything that the de-

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fendant said.

MR. EDELSTEIN: But what I am trying to get --

THE COURT: I am not going to waste time on it.

Q Did Dr. Goldenkrans say anything to the Chairman about giving Mr. Waldman a recount, yes or no? A I did not hear Dr. Goldenkrans talk to the Chairman at all.

Q Did you hear the Chairman say to Mr. Waldman, "You will not get a recount, if you want it you know where to get it?"

A I didn't hear the Chairman speak to Mr. Waldman.

Q Did you hear Mr. Waldman addressing himself to the police, asking for the arrest of the Board? A I did not.

Q That is all, Dr. Silverman.

CROSS-EXAMINATION BY MR. ROBINSON:

Q Was Mr. Waldman there when you got there? A Yes, sir.

Q And was Dr. Goldenkrans there when you got there? A Yes, sir.

Q How long were you there? A I was only there a few minutes.

Q Was the canvass for the vote for Member of Assembly completed at that time? A Well, when I came there I saw--

Q Now, if you do not know, say so. Was it completed or wasn't it, Dr. Silverman? A May I answer the question in my own way?

Q If you cannot answer it yes or no? A When I came there --

Q Can you answer that question yes or no? A Well, I don't know.

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Q Can't you state whether the vote or canvass for Member of Assembly was completed or not? A I cannot.

Q All right. But Dr. Goldenkranz was there after you arrived, was he, or I mean was there when you got there? A I found him there.

Q And you found Mr. Waldman there? A Yes, sir.

Q You don't know what took place before you got there, do you? A Outside of what I heard.

Q You say that besides being Republican Executive member of that District — A I am not an executive member.

Q You are on the executive committee? A I am Chairman of the Executive Committee.

Q That you were an Election District Captain of another district? A Yes, sir.

Q What district was your district? A That time it was the 25th of the 8th.

Q And had you completed the count in your district at the time you were there? A Yes, sir.

Q And that was about two o'clock in the morning, was it? A No, it was earlier than that.

Q About one o'clock? A We got through about, well, it was before one.

Q You had completed the count, the canvass of the vote for Presidential Electors in your district and the vote on the general ballot? A Yes, sir.

Q Including Member of Assembly? A Yes, sir.

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Q And the constitutional amendments and the proposition?

A Yes, sir.

Q How long, in your opinion, should it take an efficient Board to canvass the vote for Member of Assembly? A That depends on the size of the votes.

Q How many votes were there in your District? A A little over three hundred.

Q How long did it take you to canvass, your Board of Canvassing Inspectors to canvass the vote for Member of Assembly?

A Well, I did not time the canvass of each office. All told we got through around 12:30 or thereabouts, near one.

Q So that it could not have taken, to canvass any one particular office, over fifteen minutes, could it?

MR. POMPAN: Your Honor, I object to that.

THE COURT: Exclude it. I was waiting for an objection before.

MR. POMPAN: I did not want to take up the Court's time objecting.

Q Was there any canvassing of the ballots done in the 8th Election District of the 8th Assembly District after you got there? A No, sir, it could not be.

Q Because you were there such a short time? A Well, they were doing absolutely nothing. There seemed to be a general turmoil all around, an argument, as a matter of fact. I remarked to one of the members of the Board, I don't recall who it was, that I couldn't see how they could do any work at all

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with the noise that was going on.

Q And you left it in that condition? A Yes.

Q All right, that is all.

MR. EDELSTEIN: Will your Honor permit me to call another witness just for two minutes?

THE COURT: Well, I will limit you to two minutes.

MR. EDELSTEIN: Very well, your Honor.

MR. ROBINSON: I understood that your Honor limited them to Dr. Goldenkranz and Dr. Silverman.

THE COURT: Well, the case will end with this witness.

GEORGE C. NORDINGER, called and duly sworn as a witness on behalf of the defense, testified as follows:

(Residence: 150 Second avenue).

DIRECT EXAMINATION BY MR. EDELSTEIN:

Q Mr. Nordinger, were you the executive member of the Republican party in the 8th Assembly District, in the election of 1920? A Yes.

Q On that occasion, did you have occasion to go down to the 6th Election District or the 8th Assembly District at any time that night? A Yes.

Q At what time? A Between 1:30 and two o'clock.

Q Were you present when Mr. Waldman was there and Dr. Goldenkranz was there and Dr. Silverman was there? A I was.

Q It has been testified here that Dr. Goldenkranz in your presence and in the presence of Dr. Silverman, and in the pres-

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ence of Mr. Waldman, addressing himself to the Chairman of the Board, said, "Give him a recount, he is entitled to it." Was that said? A Not in my presence.

Q What was said when you arrived? A There was nothing said.

Q What did you find there? A I found a crowd in that Board--

MR. ROBINSON: I object to that as leading and calling for a conclusion.

THE COURT: Well, he may state what he saw when he got there.

A (Continuing) When I got in that polling place the crowd that was there with Mr. Waldman was creating a turmoil and disturbing the work of the Board --

Q Well, that is all.

MR. ROBINSON: I ask that the answer be stricken out as a conclusion.

THE COURT: I will let it stand.

CROSS-EXAMINATION BY MR. ROBINSON:

Q Was Mr. Waldman there when you got there? A Yes, sir.

Q Was Dr. Goldenkranz there when you got there? A No, sir.

Q He came in after you were there? A I was there a few minutes when Dr. Goldenkranz came in.

Q How long were you there? A I was in that polling place about twenty minutes.

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Q When you got there had the vote for Member of Assembly been completed, the canvass of it? A Yes, sir.

Q Did you hear anything said about void ballots? A Not when I got in there. After I was there about ten minutes there was an argument on some void ballots. Mr. Waldman claimed there were two void ballots, and for that reason he felt that the vote should be counted over. The disorder in that place was such --

MR. ROBINSON: I object to the witness characterizing or drawing a conclusion.

THE COURT: Yes, that is excluded.

Q Were you there when Mr. Waldman stated that the total of the vote for himself and Reiss did not make the total of the vote cast in that district? A No, sir.

Q That was before you got there, was it? A If that was said it was said in my absence and before I got there.

Q Were you here on Friday, in the court room here? A I was.

Q Did you hear Rubenstein testify? A I did.

Q Did you see him there that night? A Yes, sir.

Q Did you hear Cohen testify? A I did.

Q Did you see Cohen there that night? A I don't remember seeing Cohen.

Q You went down there to straighten out this disorder, did you? A Not to straighten out the disorder, no, sir.

Q Did you leave without straightening it out? A I left

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the club house --

Q No, I mean, did you leave the polling place without straightening it out? A Well, if you please, I would like to tell you why I went to that polling place.

Q I am not interested in that, your counsel might be.
A I left the polling place in charge of Mr. Kostman, who was on my legal staff, to take care of questions of law arising at various polling places.

Q And he is here in court and has testified in this action? A Yes, sir.

Q That is all.

RE-DIRECT EXAMINATION BY MR. EDELSTEIN:

Q What gave rise to you going down to this polling place?

Objected to. Objection sustained.

MR. EDELSTEIN: Exception. That is all.

MR. POMPAN: May I ask that certain physical characteristics of the boxes be entered upon the record?

THE COURT: No, I have limited it now. We are not going to spend the balance of the year on this case.

MR. POMPAN: I will offer a sample copy of the ballot used in that election. Mr. Robinson will consent, I understand.

THE COURT: Well, do you think that these men in the jury-box require proof of that? They are all citizens and it is fair to assume that they know how to exercise

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the right of franchise.

MR. POMPAN: Your Honor, may we at this time renew the motions heretofore made with the same force and effect?

THE COURT: Yes, with the same ruling and exception. Now, go to the jury.

Mr. Edelman then summed up the case for the defense and Mr. Robinson summed up the case for the People.

The Court charged the jury and the jury found the defendant not guilty.

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