

how is that? Well, he said, I told you that Steve Baldwin was drunk last night, and he does not know yet what he is talking about. I said, perhaps that is so. Subsequent to that I began investigating to find out whether Mr. Fishman was a lawyer and I received communications from the clerk of the Court of Appeals in New York.

MR. MARKEWICH: I object to that if your Honor please.

THE COURT: Objection sustained.

THE WITNESS: I called up Mr. fishman--

THE COURT: There is no question pending.

Q did you talk with Fishman again? A Yes, sir, I did.

Q When you say you called him up? A Yes, sir, in April some time.

Q What was that conversation. A I said to him, "Fishman, I have now discovered that you are not a lawyer. Why did you hold yourself out as a lawyer. He says, "How do you know I am not admitted in some other thstate". I hung up the receiver and I did not continue the conversation.

Q when did you talk with him again? A I went over to his office one day at his request on a Saturday it must have been around this time, and he says--

Q Do you know what month that was? A It was between the 10th of March or soon after -- or a little before I dis-

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covered that he was not a lawyer. I came to his office and I told him that I took a chance in coming up to your office, Fishman, but I will take a chance with you. You called me over here telling me that you were closing a transaction in Rector street and you have got the money. I am doing this for the sake of my client. If anything befalls me as a result of coming here to your office--

THE COURT: Never mind this conversation. I think you have gone far enough.

Q You never got any money from me? A No, sir, not from him.

Q When did you get the money? A After he was indicted by the grand Jury in Kings County.

MR. MARKEWICH: I object to that and I ask that it be stricken out, and I ask for the withdrawal of a juror. I want to say now that the District Attorney knew all the time that that testimony would be brought out, both about the arrest and the indictment, and that is what I have been trying to impress upon your Honor, endeavoring to keep out what is absolutely improper. I ask your Honor for a mistrial in this case.

THE COURT: Motion denied. I will allow it to stand. It has a bearing upon the motive for which this payment was made.

MR. MARKEWICH: I ask your Honor to instruct the

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jury to disregard the fact that he is under indictment .

THE COURT: The jury know he is under indictment.

MR. MARKEWICH: He is not talking about this but about the Weiss case.

THE COURT: Motion denied. I will allow it to stand as bearing upon the motive.

Exception.

Q Now when did you get any money from Fishman or his lawyer? A Around Thanksgiving holidays of last year, 1921.

Q November, 1921? A Something around that time.

Q You never got any money until then? A No, sir, not until after this case was called three or four times for trial.

Q From whom did you receive any money? A From his attorney.

Q Who? A Mr. Silberman.

Q Mr. Silberman? A Yes, sir.

Q This gentleman? A Yes, sir.

Q How much did you receive? A \$1900.

Q How much? A \$1900.

Q That is all you ever received? A Yes, sir.

Q Did you sign a receipt, a written receipt for that money? A No, sir. Mr. Silberman did not ask for that.

Q Did you get him to sign a receipt? A Who?

Q To sign a paper, Fishman?

Objected to as immaterial. Objection sustained.

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Q Did you see Fishman again after that? A No, sir, I never saw him again after that.

CRISS EXAMINATION BY MR. MARKEWICH:

Q When did you go over with Silberman to District Attorney Lewis in Kings County? A Several weeks ago, about two or three weeks ago.

asked
Q On that occasion you ~~informed~~ Mr. Lewis or Judge Lewis to drop the case against Fishman, isn't that so?

A No, sir, not drop the case.

Q Well you asked him to let the defendant go? A Oh, no, sir, I know too much about District Attorney Lewis to ask him that, too much about his activities to ask him anything like that.

Q What was the object of going up there? A To see if in some way with the sanction of the law and in a legal fashion this controversy could not be ended by Mr. Fishman taking a plea of a lesser crime than that charged and a suspended sentence, if he made good or in any other way that the District Attorney would do it.

Q If the District Attorney wanted to drop the case?
A I didn't use that language.

Q What language did you use? A Mr. Silberman was the spokesman.

Q You were using diplomatic language to Judge Lewis?
A I wasn't using any.

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Q Did you try to convey your intention to Judge Lewis?

A No, sir.

Q Did you try to conceal it, as a matter of fact? A No.

Q Did you tell him you got the money from the defendant?

A No, sir, I didn't tell him that.

Q Didn't you think it was proper for you to tell the District Attorney that you got the money? A No, sir, not then.

Q You already had the money when you spoke to Judge Lewis? A Yes, sir, long before that.

Q You didn't think it was proper to apprise the authorities of that? A Yes, I did tell the authorities.

Q You are a lawyer how long? A Sixteen years.

Q You have practiced quite actively? A Very actively.

Q You know what extortion is do you not? A Yes, sir, very well.

Q You know what attempted extortion is under the Criminal Code? A Yes, sir, very well.

Q Did it occur to you saying to a man, "If I don't get the money from you I am going to arrest you", was attempted extortion? A With Fishman never.

Q Not with Fishman, you draw a distinction? A Yes, sir, with Fishman, yes.

Q In other words you considered it perfectly proper to say to whoever it may be, "If I don't get the money I

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am going to have you arrested? A I don,t think it is proper in every case.

Q But in this case you thought it was proper? A Yes.

Q I assume that according to your ethical training if he had given you the money that would have ended the matter?

A Why of course.

Q So the fact that he had stolen the money would not have made any difference? A Yes, sir, it would have made a difference.

Q In other words you just said if you got the money you would not have made a complaint against this man, you would not have arrested him? A I can't say that.

Q What did you mean by saying "If I don,t get the money I am going to arrest you"? A Exactly that.

Q Ddn't you say, "If you do get me the money I wont arrest you? A Surely I wouldn't arrest him if I got it.

Q What you were interested in was getting the money regardless of the ethics involved in the case? A I don't know as there were any ethics involved;

Q You know there is such a thing as a code of ethics, and you are familiar with the canons of them? A Yes, sir.

Q Familiar with the penal laws, are you not? A Yes, sir.

Q You know I assume what compounding a felony is, do you not? A Yes, sir.

Q You know that taking money under a promise that the

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Prosecution would be withdrawn is compounding a felony, do you not? A No, sir, it is not.

Q Well, can you define that for me? A At that stage of the case it was not; it could not be after information was laid before a Magistrate or some proceeding taken before a properly constituted authority, and at that time such a proceeding was --

Q When did you get the money from this defendant?

THE COURT: He said about Thanksgiving.

Q You have reference to the taking of the money?

A Yes, sir.

Q That was after the indictment, after the case was called for trial? A But there was no promise to stop from prosecuting.

Q You just went to the District Attorney for the purpose of saying to him, "Judge Lewis, I want to see what you can do for this defendant Fishman? A Well, I did not say it.

Q That was after you got the money? A I did not say that.

Q Or words to that effect? A I did not say anything in fact.

Q You just went up there to greet him? A No, sir.

Q You went there with Silberman, did you not? A Yes.

Q You went up there and you did not tell the District

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Attorney that you had the money from Silberman, did you?

A No, sir.

Q Now as a matter of fact in your talks with Fishman did not Fishman show you these papers? A I never saw these papers.

Q You never saw these papers? A No, sir.

Q Quite sure of it? A Yes, sir, quite sure.

Q Have you seen this paper "Marked for identification Defendant's Exhibit C". (No answer.)

(Another paper is marked Defendant's Exhibit D for identification.)

Q You knew did you not that your client had received a note of the defendant for the sum of \$2500? A Did I what?

Q That your client had received a note from the defendant for the sum of \$2500, dated December 28th, 1920? A Did I know that?

Q Did you know it at any time? A No, I did not.

Q You did not? A No, sir.

Q Were you a witness in the Magistrates' Court? A Yes.

Q Against Fishman? A Yes, sir.

Q Didn't you testify in the Magistrates' Court that you noticed the endorsement on the back of the check for the first time, in reference to the note, the morning after you had received the check? A I don't recollect whether I did or not, I am quite sure that I must have said that I

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noticed it when I wrote the name-- that was in the morning.

Q That was in the morning? A Yes, sir.

Q What time did you get home? A About 2 o'clock.

Q About two o'clock in the morning? A Yes, sir.

Q So that you did testify in the Magistrates' Court that you noticed that endorsement on the check the next morning that is, you mean, when you got home? A Surely I mean that morning.

Q You mean that morning? A Yes, sir.

Q Didn't you as a matter of fact testify in the Magistrates' Court that it was the defendant who called your attention to the endorsement on the check? A No, sir.

Q Positive of that? A Yes, sir, positive.

Q You want this jury to believe, do you, that you looked at the check and that you did not notice any writing on the back of the check? A Yes, sir.

Q At the time that the defendant gave it to you?

A Looking at it ordinarily the way I look at every check you could not notice it.

Q Just at the time when the defendant had written the check you told us you had stepped aside? A No, sir, I was waiting for him to write the check, but before he had finished his name his ink in his pen gave out and he wanted another pen, and I said I will get you a pen and ink, don't stop Fishman, I will get you a pen and ink.

Q Where was that check written? A In the cigar store.

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Q You got the pen and ink from whom? A Somebody gave me a pen and ink.

Q So you are trying to convey the impression, are you not, that while you were getting the pen and ink the defendant had written that on the back of the check? A Yes.

Q Is that right? A Yes, sir.

Q And then handed it to you? A I don't know, but I did not see him write that.

Q That is the impression that you are trying to create? A Well, I am not trying to create any impression; I am telling you the fact; I did not see him write that on the back of the check.

Q But it was on the back of the check, was it not? A Yes, sir, but I feel it was during that little interval that he slipped that in.

Q Well when you came back with the pen and ink you found the check was all written? A Yes, he had finished it some how.

Q Then you took it and looked at it and turned it over, and you did not notice any endorsement? A I did not turn it over the way you motioned. I would like to show you how I turned it over.

Q Well we will give you a check and you show us. A (Witness illustrating) When I took the check I held it in my hand the way I would hold any check, looked at it that way, and here is where I looked for the endorsement

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on the upper left hand corner of the check, but the endorsement was on this check where my right hand is now, and I never expected any endorsement there.

Q What was the language on that check? A "In payment of promissory note dated December 28th, 1919 of Rudolph Weiss or words like that-- promissory note to Rudolph Weiss".

Q As a matter of fact you did not place this defendant under arrest? A No, sir.

Q Until what date? A Well, I didn't place him under arrest.

Q Well when was he arrested? A It must have been three or four months after the warrant, we couldn't get him anywhere.

Q Now that is not the question? A Three or four months.

Q I am asking you for the time? A It must be either in the latter part of the summer of last year or the early part of the fall of last year; I would not have any distinct recollection, the latter part of the summer of 1921, something like that; I really could not even tell you that.

Q When did your client consult you about this? A Either the last of February or the early part of March of last year.

Q Between the time that your client had consulted you and the time the defendant was placed under arrest how many times had you seen the defendant? A I should say a half a dozen times.

Q Over a period of how long? A Up to the time of his

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arrest, three or four months.

Q During that time every time you saw the defendant it was a question of getting money from him? A Surely.

RE DIRECT EXAMINATION BY MR. WHALEN:

Q Perhaps I can refresh your recollection about when he was arrested. He was not arrested until after he was arrested by David Gerstner, was he? A My best recollection is that it was because of that arrest that we succeeded in getting the defendant after that.

Q Wasn't it the Gerstner Brothers that found him?

A Yes, ~~your~~ they got him first.

RE CROSS EXAMINATION BY MR. MARKEWICH:

Q You were in conversation with Mr. Rosenberg about the case, and about Fishman before he was arrested?

A Yes, sir, I learned who their lawyer was.

Q Was it before Mr. Rosenberg had placed this defendant under arrest that you had spoken to him about your matter? A Before Fishman was arrested in the Weiss case.

Q Before he was arrested in this case that is on trial now? A What trial is this, the Gerstner trial?

Q You talked to Rosenberg about the case? A Yes, sir I talked with Rosenberg about the case a great many times.

Q Before you had him placed under arrest? A In my case, in the Weiss case, yes.

Q Don't you know as a matter of fact that within a day or the same day that Gerstner had placed the defendant

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under arrest you had also placed him under arrest? A I don't know that.

Q In other words when he was bailed out on the charge here, as he was leaving the Tombs he was placed under arrest? A Yes, sir, I learned that the detectives told me that.

Q On your charge? A Yes, sir.

BY MR. WHALEN:

Q Have you got that check of Rudolph Weiss for \$2500?

A The District Attorney of Kings County has it.

Q Can you state when that check was paid, the check of \$2500 that Weiss gave the defendant?

THE COURT: How can he tell.

MR. WHALEN: If he has seen it.

THE COURT: That would be hearsay.

BY MR. MARKEWICH:

Q You were in the Magistrates' Court at the time the defendant was arraigned on the Gerstner charge? A No, sir, he did not show up that day. The People forfeited his bail.

Q He did not show him? A He did not come.

Q You know the defendant was bailed out? A Yes, sir.

Q And placed under arrest; after he was bailed out on the other charge? A I heard about it but I did not know.

Q The reason he didn't show up in the Magistrates' Court

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was because you had him under arrest in your charge?

A No, sir, I don't think so.

MR. WHALEN: Now, your Honor, I am going to go into another transaction of May 27th, which is a month subsequent to the date alleged in the indictment.

MR. MARKEWICH: I object to that.

THE COURT: I have looked into these authorities that you have produced, and there is only one apparently that is with you, and that is the case in the 80th New York.

MR. MARKEWICH: The Mayer case?

THE COURT: Yes.

MR. MARKEWICH: That case would not apply to a case like this.

MR. WHALEN: There is the same principle involved.

MR. MARKEWICH: You want to show what was in a man's mind at a prior time by proving a subsequent act. That is not logical.

THE COURT: I am inclined to agree with you in that. I think for the present I shall sustain the objection. In the Mayer case it was a case of getting goods by a false written statement and while the case, the bankruptcy case, was on similar goods were obtained later. In other words they were really both going on at the same time, goods were being furnished on memorandum. I think

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that is a different transaction from the one of this sort. There is undoubtedly a good deal of authority on the other side that holds that subsequent transactions are not admissible. I think for the present at least I shall sustain the objection.

MR. WHALEN: I offer in evidence this transcript from the American Trust Co.

MR. MARKEWICH: If your Honor holds now that there has been a prima facie case established then I will put the defendant on the stand and these things can be proven by him.

THE COURT: Yes, I shall hold that a prima facie case is made out.

MR. WHALEN: Then I offer this transcript of the account with the American Trust Co. between April 4th and May 14th, 1921.

MR. MARKEWICH: I do not consent to allow this to go in evidence. I would rather have the defendant testify to it.

MR. WHALEN: I would like to say to the Court that I think I can find some authorities on this question. I cannot recall them just now. There is one authority in Corpus juris, but I was not able to find it, relating to the admissibility of subsequent transactions in cases of this kind. I will close the case for

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the present.

THE COURT: There are authorities both ways, but in the absence of some further distinctive authority in New York I shall hold them inadmissible.

MR. WHALEN: The only reason the evidence was admitted in the 80th New York was on the theory of showing intent.

THE COURT: As I say in that case the final bankruptcy had consummated the transaction, the goods having been obtained by a false financial statement and the bankruptcy did not occur until after both transactions. They were, therefore, as I say, really progressing at the same time.

MR. WHALEN: They were different and distinct acts and the only distinction is that they were business acts performed by one company in one line of business. But I can show similar transactions here although the locality may be different.

MR. MARKEWICH: I object to that.

THE COURT: I have ruled for the present any way.

MR. WHALEN: The People rest.

MR. MARKEWICH: I move if your Honor please for the dismissal of the indictment upon the ground that the People have failed to establish the case.

Motion denied. Exception.

MR. MARKEWICH: I move for a direction of a verdict

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of acquittal, if your Honor, please, upon the ground that the people have failed to establish the case beyond a reasonable doubt.

Motion denied. Exception.

Mr. Markewich opens the case on behalf of the People.

(The Court admonishes the jury calling their attention to Section 415 of the Code of Criminal procedure and adjourned the further trial of the case until Monday morning, January ^{9th} ~~29~~, 1922, at 10.30 o'clock.)

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New York, January 9, 1922.

(TRIAL RESUMED.)

RUDOLPH WEISS, a witness for the People, recalled by the Defense.

BY MR. MARKEWICH:

Q Mr. Weiss, when you testified for the People you referred to a certain contrivance, or slot machine? A Yes.

Q A sample of which you had received? A Yes, sir.

Q From the defendant? A Yes, sir.

Q Where is that sample now? A I believe a detective over in Brooklyn, Detective Casey has it.

Q Is it a similar contrivance? A Yes, sir, the same thing I have. (Referring to a slot machine produced in court.)

Q Did you have a talk with Max Kessler since? A No.

Q Do you know him? A No, sir.

Q Now was there any gum shown to you which was used and manufactured by the Peerless Automatic Machine Co.? A There were about five or six pieces.

Q Similar to these? (Showing witness pieces of gum)
A Yes, sir.

Q Do you see the name "Peerless Automatic Machine Co."
A There were five or six pieces of gum in the machine, the sample that he gave me.

Q Were you told what they could be used for? A Where those machines were?

Q Yes. A They were installed in different theatres in

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Jersey and in factories.

Q They were mostly installed, he told you, in theatres against the seats? A Yes, sir.

Q Were you told that there were three kinds of machines manufactured, one for nickels, dimes and pennies? A No, sir he only told me--

Q Depending upon the different coins used? A No, sir, he only told me about the penny machines.

Q In addition to your conviction for abduction you were convicted for larceny were you not? A No, sir.

Q Did you work for a man named Weinberger? A Who?

Q Weinberger, a pawnbroker? A Yes, sir.

Q Were you sent to cash a check for the sum of \$400 by Weinberger to the bank? A No, sir.

Q Were you accused by Weinberger of stealing \$400 in cash?

MR. WHALEN: I object to that.

THE COURT: Objection sustained. You may show if he has ever been convicted or if he really did it.

Q Were you discharged by Weinberger? A No, sir; I left of my own accord.

MR. MARKEWICH: That is all.

JULIA FISHMAN? a witness called on behalf of the defendant, being duly sworn, testified as follows:

(The witness states I live at 133 St. James Place, Brooklyn, with my mother and my husband.)

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DIRECT EXAMINATION BY MR. MARKEWICH:

Q Mrs. Fishman, are you the wife of the defendant, Harry Fishman? A Yes, sir.

Q How long are you married? A Over four years.

Q Have you children? A I have one child about a year old.

Q Now did you attend the public schools in this city?

A I did. I graduated from P.S. 180 Manhattan, and then I attended the Washington Irving High School from which I graduated, and then I was graduated at the Brooklyn Training School for teachers.

Q Were you a school teacher employed by the City of New York? A Yes, sir, I was in P. S. 188, Manhattan.

Q How long were you a school teacher? A For six years.

Q Until you were married? A Yes, sir, until I was married.

Q Where did you live before you went to 123 St. James Place, Brooklyn? A I lived at 861 Eastern Parkway, there I occupied an eight room apartment.

Q How long did you live there? A Over three years.

Q You took that apartment when you married? A Yes, sir, when I was married a few weeks, then I engaged an apartment completely furnished, every single room.

Q What was the approximate cost of the furniture that you had in your apartment? A Well it was worth between eight hundred --

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Q What was the approximate cost? A Between eight and ten thousand dollars, including what he paid for our furniture and the wedding trip that we got because our place was completely furnished with rugs and mahogany furniture, American walnut, table lamps, floor lamps, pictures and also electrical appliances, cut glass and everything; that made a complete home.

Q Were you ailing or sick sometime before you moved to 133 St. James Place? A Yes, sir, a few months after I was married I had a miscarriage in the year 1918, in August and I had to be removed to the Jewish Hospital.

Q At any rate you were sick and you had to give up the apartment, on account of that? A Yes, sir ailing since the past three years, as a matter of fact still under the doctor's treatment.

Q What did you do with the furniture of your apartment?
A Well, I wasn't able to--

Q What did you do with it? A I put it, stored it in my mother's house until I would be able to get some one to buy it from me.

Q How long did you have it in your mother's house before it was sold? A Just about three months before I sold it I had it in my mother's house.

Q In the latter part of April, 1921, do you recall Mr. Gerstner coming to your apartment with your husband? A Yes, sir, Mr. Fishman brought David Gerstner in my apartment.

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Q Did you see the Gerstner in court, the one who came to your house? A Yes, sir.

Q The first time? A Yes, sir.

Q David? A Yes, sir, he came in there --

Q Which is the one you call David? A The older looking brother? David Gerstner.

Q Can you point him out? A Yes, sir. Can I go near him.

Q Yes. A Right here (indicating the witness David Gerstner.) Mr. Fishman introduced him.

Q What time of the day was it? A It was about noon time.

Q What happened when he came into your home? A Well, Mr. Fishman introduced him as the one who wanted to buy our home.

Q Do you remember the date? A About April 29th. I felt a little badly.

Q Do you recall the exact date or approximately when it was? A I know it was the end of the month about, it must have been I should say about the 29th or the end of April, this I remember, I felt badly, and almost wanted to cry, for I could not part with those things.

MR. WHALEN: I object to that.

THE COURT: Tell what happened.

THE WITNESS: Mr. Gerstner examined the furniture very carefully, looked over everything and then took out a pen and paper and put down certain figures, as he looked at the things. When

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he was all through he said, "Mr. and Mrs. Fishman what do you want for this furniture." I said, "Well, \$3500". He says, "Oh, no, I could not give you so much for it." I said, "How much is it worth to you". He looked at a paper and said about two thousand dollars. I said, "No, I couldn't let it go for that. It is a terrible great sacrifice that I have to give it up, to sell it, I couldn't let it go for that. It is easily worth between eight and ten thousand dollars. Just look at it, a silk velour suite. a library suits covered with very fine cowhide and this bedroom suite is in gold design, with chair canning and rungs and floor lamps and table lamps and an office suits, and here is a living room suite covered with fine beveled glass, very expensive you know and very artistic. How could I let it go for two thousand dollars? A "Well, he said, "I will give you twenty one hundred ." I said, "No, I can't let it go for that." And I said to him --

Q You were dickering there for some time? A Yes, sir.

Q As to the value? A The price.

Q Finally, was there any price agreed upon? A Finally I agreed to take \$2500.

Q Then what took place? A Then he agreed to give me \$2500, after I pointed out the good features of everything and so he said, "Well, Mrs. Fishman I wish you good luck and good health. I hope we will meet again and he said, "Fishman

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let us go to New York and prepare the bill of sale, and I will give you the money."

Q Then they both left? A I was happy that the thing was off my mind.

(The witness was withdrawn from the stand temporarily.)

MAX KESSLER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

(The witness states he lives at 124 West 117th street.) Z

DIRECT EXAMINATION BY MR. MARKEWICH:

Q Now, Mr. Kessler, what is your business? A I am a builder.

Q How long are you engaged in the building business? in this city? A For the last twenty eight years.

Q Do you own any property in the city? A Yes, sir.

Q You do extensive building? A Yes, sir.

Q Now do you know of the existence of a corporation called the Peerless Automatic Machine Co.? A Yes, sir.

Q Do you know who the owner of that company is, the principal stockholder? A Yes, sir.

Q Who is it? A Myself.

Q When did you buy the business? A I bought the business about three years ago.

Q How much did you pay for it? A The business stands me about \$25,000.

Q That includes what? A Includes 3500 machines and

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moulds, desks, chairs and so forth.

Q And also the patents? A Yes, sir.

Q Are you the owner of the patent now? A Yes, sir.

Q Was that assigned to you? A Yes, sir.

Q From whom did you get the assignment? A Max Manfred.

Q He is a lawyer? A Yes, sir.

Q Where is his office? A 299 Broadway.

Q He was an officer of that corporation was he? A Yes, sir, he was an officer of the corporation.

Q Where was the place of business of the corporation?
A 395 Broadway.

Q Is this the patent rights? A Yes, sir; that is what I received when I bought it.

Q Did you receive this? A Yes, sir, I received this when I bought it.

Q Now what is this? A That is the machine.

Q The machine? A Yes, sir.

Q Will you show the jury please, how you operate that?
A This model is attached to a chair in the theatre and everybody who comes in with children, if they want to buy for the children a piece of chewing gum or chocolate they give him a penny. The machine is attached in the back of this chair; (illustrating), and when you put in, when a child or anybody sees the slot machine and puts in a penny you get a piece of chewing gum. When the thing is empty and no chewing gum

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in it the machine does not collect anything, but the children could not break open this machine, but I will show you the way it is locked up automatically. They showed to me the same thing that I am going to show to you. When you put the penny in you press this and the chewing gum comes out. In other words the amounts received (illustrating) which is the whole machine and there is a little weight to the machine.

Q You bought this business for your son, did you not?

A Yes, sir, I bought it for my son.

Q And your son died? A Yes, sir, I had a son twenty years old.

Q Your son died? A Yes, sir, and I am left with it and I wanted to get rid of it. When the last piece of gum is out, that is, when you put in the last penny here, and get it out, the last piece, now if anybody puts in a penny they can't get anything; it is locked so that the public should not be fooled.

Q They also make machines of this kind for nickels and ten cent pieces? A Yes, sir.

Q For caramels and other confections? A Yes, sir.

Q Now the most valuable part of that business was the patent? A Yes, sir, the patents and the titles.

Q Where are those machines? A I got them in 520 West 118th street, stored there.

Q On or about November 10th, 1920, did you assign this paper for the defendant Fishman? A Yes, sir.

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MR. MARKEWICH: I offer it in evidence.

(Marked People's Exhibit D in evidence.)

Q On November 10th, 1920, I, the undersigned do hereby sell to Harry Fishman of 299 Broadway, 3500 slot machines of the Peerless Candy Co. together with the patent for the sum of ten thousand dollars, signed Max Kessler." Was this in the nature of an option you gave him to purchase it?

A Yes, sir.

Q You have not received any money from the defendant on account of that? A No, sir.

Q Did you have any conversation with the defendant as to what he was to get in case it was sold? A I told him I will pay him twenty or twenty five per cent, as a general rule when we used to send out salesmen on the road we gave them 25% to cover all expenses, and they sold these machines for \$1.75 or \$2.00

Q Did the defendant at any time ever talk to you about having had a purchaser for it? A He told me that he had a purchaser for it or tried to get one for it.

Q Did he give you the name of the purchaser? A No, sir. He did not..

Q Did you ever hear the name of Rudolph Weiss? A No.

Q At any rate you never received anything on account of -- this sale was not consummated? A No, sir. I had several other people who took it, and I tried to get the papers and I could not get my papers back so that I would be in a

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position to sell it to somebody else.

BY THE COURT:

Q You didn't get them back from whom? A From Mr. Fishman.

Q He never turned over any money to you that Weiss had given him? A No, sir.

BY MR. MARKWICH:

Q You never got any money? A No, sir, I never got anything from him.

CROSS EXAMINATION BY MR. WHALEN:

Q Where are these machines now? A 524 East 118th street.

Q Are they all there? A Yes, sir. They are all there.

Q How long have they been there? A They have been there for one month. We had them before in 122nd street.

Q Where? A In 322.

Q East? A Yes.

Q 122nd street? A Yes, sir, and we moved over to--

Q How long were they there? A They were there about a year and a half.

Q Were they all there? A Yes, sir.

Q Where were they before that? A Before that I had them in my own little house in East New York and I moved them over to New York.

Q All of them? A Yes, sir.

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Q Where were they before they were in your house?

A Before they were in my little house I had them in 316 Church street.

Q What is that? A That is a place of business, 316 Church street, I had them there.

Q Is that your place of business? A I had it before.

Q You had all of them there, the 3500 machines? A yes

Q Where were they before? A At 395 Broadway, the business before I bought that out.

Q The first time you saw them they were at 395 Broadway? A When I got them I got them at 316 Church street, the place of business and everything.

Q Where were those machines when you first saw them?
A 395 Broadway.

Q All of them? A Yes, sir.

Q You don't know where they were before that? A They used to bring them from Bridgeport, they manufactured them in Bridgeport.

Q Were you in Bridgeport? A No, sir.

Q Personally you never saw them at any other place?
A No, sir.

Q Did you ever see them in any theatre? A No, sir, I didn't see them in any theatre.

Q Ever see them in any factory? A I didn't see them in a factory neither.

Q You never saw them in any place in operation? A No.

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I only saw the books where they used to sell them all over the country.

Q Did you ever see Rudolph Weiss? A No, sir.

Q You never heard of him? A No, sir.

Q When you signed this paper, Defendant's Exhibit D, did you at that time turn over these machines to Harry Fishman? A I did not. How could I turn them over without the money.

Q Did you at that time turn over these papers? A Yes, sir, the papers I did.

Q He kept the papers after that? A Yes, sir.

Q You told him you would sell him the business for ten thousand dollars? A Yes, sir.

Q You paid twenty five thousand for it? A Yes, sir.

Q Why were you willing to make such a sacrifice? A Well, I didn't have any use for it; I don't know how to attend to it.

Q Did you ever try to work them? A No, sir, I bought them for my son. I wanted to establish him in business with one of the men working for the same company.

Q Did you ever tell Fishman you were willing to sell this business, all these machines for twenty five hundred dollars? A No, never.

RE DIRECT EXAMINATION BY MR. MARKEWICH:

Q At the time you had the business were there outstanding contracts all over the country? A Yes, sir.

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Q In theatres and all over? A Yes, sir, that is the way my people told me about it that I bought them from.

THE COURT: I don't see that that is material.

Suppose it was the Gillette Safety Razor Company. The question would not be whether it was a going concern. The question would be what did the defendant do with the money.

MR. MARKEWICH: The impression was created that it was a fictitious business, and that there was no such business in existence at all.

BY MR. MARKEWICH:

Q At any rate you got a complete set of books showing the standing of the business? A Yes, sir.

Q You referred to a certain slide in moving pictures showing how it worked? A Yes, sir when they turned the business over to me they also gave me a lot of these slides and explained to me I should give these to the salesman going out on the road to sell them that they should show them to the theatrical men, they should put it in the machine and when the picture shows in a place you or me or anybody else that was sitting would know there was a machine in the back of the chair, and we will drop a penny and we will get a piece of chewing gum or a piece of chocolate. They also turned these over to me and I got a lot of them. (Producing slide.)

BY MR. WHALEN:

Q You say when they showed this picture everybody would

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start to chew gum? A That is not my business.

JULIA FISHMAN, a witness for the defendant
resumes the stand.

MR. MARKEWICH: Does your Honor desire that he
should leave this slot machine here?

THE COURT: The jury have seen it. I do not see that
it is necessary to leave it.

BY MR. MARKEWICH:

Q Now will you be good enough to tell me whether after
that afternoon, David Gerstner came again to your home?

A Yes, sir, not alone, together with --

Q Alone or with somebody else? A Together with his
brother, whom he introduced to me.

Q Is he in court here, do you see him? A Yes, sir, he
is sitting right next there.

Q Sitting next to David Gerstner? A Yes, sir.
He said "I came to show my brother what I bought. I said,
Yes, I suppose you are ready to take the things out, and he
said just a moment." His brother looked at the furniture
very carefully, all over the rugs there and he said there
was a little scratch on this piece of furniture and a little
here and he scrutinized it very carefully and then he felt
a rug, and he said that isn't a genuine oriental, it is imi-
tation. They are good rugs but they are imitations.

Q They were imitations and not genuine? A Yes, sir,
imitations and not genuine. He looked at everything very
carefully, and he said, "I wouldn't give any more than five

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hundred for this junk". So I became very highly incensed.

Q What did you say to him? A Why, I said, "I wouldn't sell this for less than \$2500, that is the very least I would ever sell it for, I won't take a penny less." So they finally got into a heated argument, and I was really very much surprised at their conduct, I didn't know what to do in this matter, Mr. Fishman was absent, this all happened in his absence, and I said the best thing you can do -- I am going to meet Mr. Fishman's at Lorber's tonight and you can meet us there and see what we can do about it."

Q Did they leave then? A Yes, sir, they left then.

Q Did you tell them what time you would be at Lorber's?
A Told them in the evening.; we would have dinner there.

Q Did you tell them what particular time you would be there, or about when? A Why, I said about between seven and eight.

Q On that night were you at Lorber's? A I went to Lorber's, went there by the subway.

Q You went there yourself? A Yes, sir, all alone. I left the baby with my mother, and waited for Mr. Fishman and then he came and I told Mr. Fishman what happened.

Q Well, never mind what you told Mr. Fishman, but while at Lorber's did one of the Gerstner's come in? A A few moments later Mr. David Gerstner came alone and sat down at the table and told Mr. Fishman that "I didn't know what I will do, my brother is driving me crazy that I have over-

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paid. We are short of money, we could not part with so much money at this time. I want," he said, "the money to be returned even if we lose a hundred dollars, we would be willing to call the deal off because he was pestering him to death. Fishman says, -- I don't remember exactly the details of the conversation, but he says, "You know I sold my furniture because I needed the money. I have made out certain large checks and mailed them on the strength of the money that I received this afternoon. What do you expect me to do". So he says "Well, I know what I am going to do." BY THE COURT:

Q Do I understand they paid you that afternoon? A They paid, in the afternoon, in the early part of the afternoon.

Q I understand they paid you for the furniture? A Yes, sir, he gave Mr. Fishman a check. So Mr. Gerstner says. "Can't you give me a check or something, give me a thousand and I will wait for the rest. Mr. Fishman says "I can't draw you so much, I made out checks that I wanted to settle certain bills." Well, he said, give me five hundred." So finally Mr. Fishman agreed to give him two checks one for five hundred dollars and one for two thousand dollars, but he told him not to do anything with it, just to satisfy his brother, as long as he is able to make good that amount of money, and when money comes in he will give it to him." With that they left.

BY THE COURT:

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Q Did he give him two checks then? A Yes, sir he gave him two checks then.

Q While you were at Lober's? A Yes, sir.

Q That was done at Lober's? A Yes, sir.

Q Why did he make two checks? A Because Mr. Fishman told him he would be able to spare the five hundred dollars he would be able to cover that, but as far as the two thousand dollar check was concerned that he just gave to him to show good faith that as soon as he is able to he will return the money, but as long as the other parties are not satisfied to go into the deal he will be willing to call it off as soon as he is able to meet it.

BY MR. MARKEWICH:

Q Now after that did you see Gerstner at your home?

A Yes, sir, they called several times, and they wanted--

Q How many times were they at your home? A Aboutna half a dozen times.

Q Were they there when Fishman was there? A Yes, sir. They were there -- sometimes they didn't always meet him there-- sometimes they would speak to me, if they didn't meet him they would speak to me.

Q What was the burden of the conversation as a whole?

A Well, they said "When is Fishman going to give us the balance of the money". I said, "As soon as he is able to give it to you he will give it to you. I don,t like to see you bothering me for it. As lon g as you are not going into the

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deal you will get it as soon as he is able to give it to you.

Q Have you since then disposed of any of the furniture?

A Well after Mr. Gerstner was paid we sold a few pieces, but we have the most of it.

BY THE COURT:

Q Did you ever have this furniture in a storage warehouse?

A No, sir, never had it there.

Q In Manhattan? A No, sir, never had it in a storage warehouse.

Q Never in any storage warehouse? A No, sir, removed it directly from mine where it was originally to my mother's home.

Q That was in Brooklyn? A Yes, sir.

Q It was never in any storage warehouse here? A No, sir.

Q Did City Marshal ever had it? A No, sir, it was moved by a certain Mr. Strang, who has a storage warehouse, but he is a moving man also.

BY MR. MARKEWICH:

Q Do you know Rudolph Weiss? A Yes, sir, I know him.

Q He and his wife lived at your mother's house? A Yes, sir, they were tenants in my mother's house.

Q Do you recall when your husband had some negotiation with Rudolph Weiss? A Yes, sir.

Q About going into some automatic vending machine Co. business? A Yes, sir, I do recall that.

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Q About when was that? A That was about Christmas time.

Q Of when, 1920? A Yes, sir, 1920, a year ago.

Q Do you recall having had a conversation with Mrs. Weiss about her father's place in Monticello? A Yes, sir, I had a conversation with both of them.

Q When was that? A That was just a few days before New Year's. They told me a very sad story that the father's country home burned down and that they cannot go into this business or make an additional investment because they need the money to help out their father or else they will be ruined it is a summer resort, it has to be built up again, if they want to continue the business. Mrs. Weiss cried and I felt sorry for her, and I cried also.

Q Well after that a few days later did you receive a telephonic call from Mrs. Weiss? A I received two calls.

Q From whom? A From Mr. Weiss.

Q Mr. Weiss? A Yes, sir.

Q When? A The last one was on Wednesday when my little boy was very sick, last Wednesday, Wednesday, and also a week ago Thursday, two calls.

Q Did you recognize the voice over the telephone as that of Rudolph Weiss? A Yes, sir.

Q What did Weiss tell you? A He told me that unless the balance of the money, the six hundred dollars, was

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paid to him, he is going to see that the case is put on the calendar again, and the next day the Gerstner matter will come up -- and Mr. Weiss will testify, but if he is given the six hundred dollars within a day or two before the matter comes up he won't appear to testify in this Gerstner matter.

Q Did he leave a telephone number? A Yes, sir, he left a telephone number, 939 Williamsburg, "Let me know when to come over to my house, and we can arrange things: thing, and I have got some important things to tell you."

Q Is that the first conversation that you had -- that was Wednesday when he called you? A No, sir, a week ago last Thursday and also Wednesday.

Q Wednesday? A Yes, sir.

Q What did he tell you the first time? A The first time he told me that unless the six hundred dollars was paid that he would go to the District Attorney, and have the case put on the calendar again, but if the six hundred dollars was paid why they would not appear even if they were called they would not appear in the Kings County.

Q What did he tell you the next day he called up?
A Then on the last occasion they also said they would drop the Gerstner matter, they will simply forget everything and keep away.

Q The next time did he tell you ^{about} ~~about~~ the Gerstner matter or this matter -- did he tell you if they got the money

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they would not appear? A On both occasions they would not appear in the Gerstner matter, they always mentioned the Gerstner matter or this matter, ^a Did he tell you if they got the money they would not appear? A On both occasions they would not appear in the matter, they always mentioned the Gerstner matter. I was afraid of them --

Q Why do you say that? A Well Mr. Weiss and sometimes Mrs. Weiss would ring me up also.

Q How many calls did you get in all? A Well, I got two calls, one from her and ^{one} from him.

Q When did he call you up the first time he called you up -- did he call you up the second time? A Well, I don't remember just exactly about that, the second time, because on that morning my little one was extremely ill and I was waiting for the doctor to come.

CROSS EXAMINATION BY MR. WHALEN:

Q What was your maiden name? A Julia Lorber.

Q L-o-r-b-e-r? A Yes, sir.

Q Are you related to the people who own the restaurant, around 38th and 39th street on Broadway in this city? A Well, in a very distant way.

Q How distant? (No answer.)

Q How closely are you related to these people? A My folks said that they are very distant cousins.

Q Well do you know how that relationship is figured out or what the relationship is? A I don't know exactly

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what it is.

Q Is it a fact that you are not related to them at all? A Yes, sir, we are related to them.

Q Can you tell how closely you are related to them? A Well, as I say it is a very distant relationship. My granfather was re-married, and they have step children, and it is through the children in some way they are related.

Q There is a very vague sort of relationship? A Yes, sir, it is very distant.

Q Did you tell anybody that you were related to the Lorber's? A Why, I never mentioned it; I don't make much point of mentioning that.

Q Did you ever hear your husband say that you were a daughter of Mr. Lorber? A My husband said I was a daughter?

Q Of the restaurant man? A No, sir; I never heard him say that I was a daughter.

Q Did you ever hear him say that? A No, sir, I never did.

Q You were at Lober's that night, were you not, the 29th of April, 1921? A Yes, sir.

Q Did you have dinner there? A I did.

Q Whose automobile was that there that night? A There was no automobile there.

Q Didn't you leave there in an automobile? A No, sir, I didn't leave there in any automobile at all. We went home by train and by the subway.

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Q Did you go to Lorber's restaurant frequently? A Yes, sir, we were there frequently.

Q How frequently? A Before we were married, we often went there, and after we were married, mostly before, because we had no time on account of the little one and my illness I did not go there so very frequently.

Q Now was it the afternoon of the same day on which the Gerstners paid this \$2500 that you met them in the evening at Lorber's restaurant? A Well, only the older brother came alone; it was the very same evening.

Q The same evening? A Yes, sir.

Q Did your husband write out two checks in Lorber's restaurant? A Yes, sir, he did.

Q Do you know on what bank they were? A No, sir, I don't remember. Mr. Fishman called Gerstner aside because we were in the midst of our lunch and I kept right on eating, , but when he returned I saw him and I saw that he had two checks; I saw him writing, I saw him writing.

Q Where was he writing, at the table? A Yes, sir, at the table.

Q Was Gerstner sitting at the table there? A Yes, sir, he was sitting at the table there.

Q You say he handed those two checks to Gerstner?
A Yes, sir, he did.

Q You say he had some conversation about five hundred dollars? A Yes, he said, "I think I will be able to meet

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the five hundred dollars, as far as the two thousand dollars is concerned you know I cannot meet that. I haven't got that now. That is why I sold my furniture because I needed the money.

Q Did he take the two thousand dollar check back?

A I didn't look at the dates or anything; all I saw was the two checks. I didn't look at the details or anything at all. As a matter of fact I never examined very carefully the details of whatever Mr. Fishman was doing, but in general I notice what he does, but I think he is perfectly capable of taking care of himself.

Q I show you people's Exhibit 3, and ask you if you remember if that was one of the checks? A I don't know whether it was; I know there were two checks; I don't know whether it was that or not. I know I recognized my husband's writing, I can recognize that on any check.

Q I show you defendant's Exhibit A, and ask you if that was one of the checks? A Well, as I say the handwriting is his, and it must be the check.

Q Did he say why he dated the two thousand dollar check, April 29th and the \$500 check April 30th? A I don't know anything about the date because I didn't pay any attention to all these little details.

Q Now what time of day was it that Mr. Gerstner was over there and gave the two thousand dollar checks? A Well, I wasn't present when Mr. Gerstner gave the check to Fishman,

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because the check must have been given in Gerstner's place of business but I didn't go along. I stayed home. I don't know what time in the day but it must have been between noon time and later in the afternoon.

Q That same day? A Yes, sir.

Q Now you know Mr. Weiss for sometime, don't you, Rudolph Weiss? A Yes, sir, I do, I know him since childhood.

Q Since childhood? A Yes, sir.

Q Do you know his wife since she was a little girl?
A No, sir, I don't know her as long as that.

Q When Weiss first told you about giving this money to your husband, didn't you tell him that you were sorry he hadn't seen the man about it first? A I never made any such statement.

Q He had already given the money to your husband before he spoke to you about it, hadn't he? A Yes, sir, he had.

Q You didn't hear about it until after the money was paid to your husband? A I heard about it after the money was paid-- I heard about it.

Q Mr. Weiss did not tell you first that he was going to invest this \$2500, did he? A No, sir, he didn't speak to me.

Q He was living right in the house with you there?
A No, sir, not at that time, He wasn't; we were living at 861 Eastern parkway and I used to visit my mother's home; he knew that I came there; I didn't move into my mother's

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home until the following February.

Q 1921? A Yes, sir, February 1st.

Q 1921? A Yes, sir, right after the birth of last last child.

Q Do you still have that furniture at your home?

A Yes, sir.

Q With your mother? A Yes, sir, but I disposed of some pieces since I paid Gerstner, I was at liberty to dispose of some of them.

Q When did you dispose of the pieces? A About a few months ago. I did not dispose of the massive pieces; they are all there; just little things, pictures and rugs and a lamp or so, but the bulk of the furniture is still there.

Q You want it? A Now, I don't need the money, and I believe I am going to keep it.

Q You moved it from 861 Eastern Parkway to 133 St. James Place, and it has never been anywhere else? A No, sir, nowhere else.

Q Why did you need money at the time you wanted to sell the furniture? A Because I have been ill for three years, as a matter of fact I am being treated by Dr. Arthur A. Landsman on 86th street; I have been ill since the miscarriage of my first child; it was a drain really on my husband financial affairs.

Q So that at that time he was very much in need of money,

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wasn't he? A Yes, sir, he needed money to pay the bills incurred by my illness.

Q Did he own a house at that time in Eastern Parkway?

A No, sir he didn't own any house.

BY THE COURT:

Q Was he building a house on president street? A No.

Q Did he own an automobile at that time? A No, sir. He never owned an automobile.

Q He never owned an automobile? A No, sir. he hired an automobile once in a while to take me and the baby out and his brother and sister and so forth, an automobile party and everybody would chip in, it would amount to two or three dollars for each one, because it was less expensive that way.

BY MR. WHALEN:

Q When you sold this furniture, as you said, did your husband turn the money over to you? A No, sir, he did not.

Q Isn't it a fact he has not turned over any money to you for sometime? A I should say not. He has been continuously giving me money. He has been as generous as he could possibly be under the circumstances.

H A R R Y F I S H M A N, the defendant being duly sworn, in his own behalf, testified as follows:

(The witness states he lives at 133 St. James Places, Brooklyn.)

DIRECT EXAMINATION BY MR. MARKEWICH:

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Q How old are you? A About 33 years of age.

Q Where were you born? A New York City.

Q Did you graduate from public school? A Yes, sir.

Q Did you attend any high school? A I attended the White School and the New York University.

Q What did you study at the New York University?

A Accountancy.

Q Did you also study law? A Yes, sir.

Q You never took the Bar examination? A No, sir.

Q You studied law in connection with your accountancy work? A Yes, sir.

Q Are you a certified public accountant? A Yes, sir;
to
and I am also an attorney admitted to practice before the
Treasury Department at Washington.

Q You mean in the Income Tax matters? A yes, sir.

Q And other tax matters? A Yes, sir.

Q Where is your office? A 299 Broadway, New York.

Q How long have you been in that building? A About eight years.

Q You have a lease there? A I have a five year lease from May 1st, 1921 on.

Q That is, you were there before that? A I had a lease prior to that for three years, and I have now renewed it again for five additional years.

Q What rental do you pay there? A \$3600 per annum.

Q You have some subtenants? A Yes, sir, just a couple

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of them, doing a little work for me.

Q Now do you know the Gerstner Brothers? A Yes, sir.

Q How long do you know them? A About 5 or 6 years.

Q Did you ever do any work for them regularly?

A Well about six years ago I was called in to open a set of books at the time they were doing business I think it was under the name of the University Art Gallery. A corporation. I opened up a set of books for them at that time and kept them regularly for about three months. Then they said they could not afford to pay me my fee, and they took a bookkeeper in to take care of it for them. since

Q Since that time have you had occasion to see them?

A Well, they called at the office occasionally, and asked me for different advice with regard to the keeping of their perpetual inventory account and consignment account.

Q How often did they call to see you in that capacity?

A About a couple of times every month or so, on and off.

Q Were you paid for that? A Well sometimes I charged them fifty dollars and sometimes a hundred or twenty five; it all depends just what different advice I gave them about and the time they took up.

Q Now on or about the 28th day of April, 1921, did you call at their place of business or did they call at your place of business? A I rang them up on the telephone and

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asked them to come over and see me.

Q Who? A David Gerstner. He said what I wanted to see him about, and I said I cannot discussing with you over the telephone. Come over to my office and I will tell you what it is about.

Q Did he come over to see you? A Yes, sir, he came over in my office, and I took him in the private room and I said to him, "Mr. Gerstner I am up against it, pretty short in money, and I shall have to dispose of the contents of my home." Well, he said, "let us take a trip over there and we will look at it." We rode over to Brooklyn and he looked over all the things, the furniture, the silk velour suite we had there and a blue leather dining room suits and our American walnut suits and a living room suite, and a library suite and all the different things. He put down or jotted down on a slip of piece of paper, and he says, "What do you folks want for these things". He turned to the wife and I said, "He is the Missus, she knows best", and he says, "How much do you want," and she said "I think they are worth about thirty five hundred dollars." He sneered at her, "Thirty five hundred dollars for that " he said.

Q At any rate you were dickering about the price?
A Yes, sir, until finally he agreed to -- I asked him, I said, "How much would you give for it", and he said, "Well, can you give any better than thirty five hundred", and I said

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"No, the things are well worth that money, in view of the fact that we have quite a substantial home, and the things are easily worth between eight and ten thousand dollars, taking into consideration the articles that we have and the different outlay there." "Well", he says, "I will tell you what I will do, I will give two thousand dollars for these things." I said, "No, I would not take two thousand dollars, I would submit -- try to have somebody else look at it. Is that the best offer you have to make," and he says, "I will give you another hundred, make it twenty one hundred dollars." I said, "What is the use of dickering, I see you don't want to buy these things". I was just about to leave for New York, and I told him I was in a hurry, I got to go back and attend to work." Mrs. Fishman interposed and she said, "Will you give us three", and he said "No, I don't think we will be able to do business." He says finally, "I will tell you what I will do, I will give you twenty five hundred and let us close the deal." I said, "All right I will close the deal with you for twenty five hundred all right." He spoke to my wife also after that, and wished us both good luck, and a whole lot of talk. I can't remember the sum and substance of everything." We left for New York for his office to prepare the bill of sale. He said "I have my regular form here."

Q Was there a bill of sale prepared? A Yes, sir, prepared the bill of sale.

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Q Did you enumerate in the bill of sale just what you sold to him? A Yes, sir, he kept that piece of paper and jotted down in the bill of sale, what it consisted of.

Q Was there a notary public or somebody who purported to be a notary called in? A Yes, sir, he ran out for some young man, and he introduced him to me as a notary public and I signed the bill of sale.

Q And the notary acknowledged your signature? A Yes, sir.

Q Do you know the name of the notary? A No, sir, I don't remember who he was.

Q How were you paid? A Well, after I turned the bill of sale, Mr. Gerstner said, "You wait here. I will run over to the bank, and come back with a certified check". He goes for that certified check and I says, "Would you mind getting me a little bit cash at the same time, get me five hundred cash", and he said, "All right." He returned with the five hundred cash, and a certified check for two thousand dollars, and I turned over the bill of sale.

Q Is this the check that you received marked People's Exhibit 1? A Yes, sir, that is the check and he wrote on it, "Bought from Harry Fishman, one lot of eight room apartment furniture \$500 cash and a certified check of \$2,000, and signed it David Gerstner.

Q You also received \$500 cash? A Yes, sir.

Q Did you tell him or his brother that the furniture belonged to a client of yours? A No, sir.

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Q Did you tell gerstner or his brother that you were a lawyer? A No, sir.

Q Did you tell either one of the Gerstners or both of them at one time that the furniture belonged to a man wh had kept a woman? A No, sir.

Q And that his wife was in Europe? A No, sir.

Q And she was coming to this country and he wanted to dispose of it before his wife came back? A No, sir.

Q Did you on that day take the Gerstners over to the Biltmore Hotel? A No, sir.

Q What did you do after you got your check and cash from Gerstner? A I rode up to 147 Wes 36th street, a client of mine that I did accounting work for. He asked me where I was going, and I said "Ride up to 136th street". I will ride with you, he says "I am going to the Hays Storage Warehouse to arrange a place of r the goods and I have another man coming along wth me."

Q Who told you that? A David gerstner. I said, "Certainly, it is only a block away." He introduced me to Mr. Hays and also some stout fellow and he says "Do you see fellow he is the best singer in the world." He took me in there and I stayed in there for awhile, and I went to 36th street and continued my work.

Q After you got through with your work what did you do? A Well I was at Mr. Rapp's place that evening until half past six to seven o'clock. Then I went over to orber's to meet

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Mrs. Fishman there.

Q Now did you come to your place of business on the day in question with a Pierce-Arrow car? A No, sir.

Q Or any automobile? A No, sir.

Q Did you ever tell them you owned a Pierce-Arrow car? A No, sir.

Q Did you as a matter of fact, own a machine? A No.

BY THE COURT:

Q Did you ever tell them you owned any car? A No, sir, no car at all.

Q That you paid eight thousand dollars for? A No, sir.

Q How did you go to Brooklyn? A We rode over in the Lexington avenue train. We took it at the City Hall, and got Greene and Gates avenue.

BY MR. MARKEWICH:

Q How did you get down to the City Hall station? A We rode back in the same manner.

Q You mean from your office? A Yes, sir, 299 Broadway, together with him.

Q Now did you tell him you were building on President street? A No, sir.

Q Now did you have an appointment with your wife that day at Lorber's? A Yes, sir, I told her to go there.

Q You had an appointment? A Yes, sir, we had an appointment for dinner.

Q Did you tell the complainant that your wife was Lor-

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ber's daughter? A No, sir.

Q Did you tell one of the complainant's that your wife was Lorber's niece? A We never got into any of that discussion at all.

Q Now on that night did you meet at Lorber's? A Yes, sir.

Q What time did you arrive there? A I got there a little after seven, must have been about a quarter after seven.

Q Did you meet your wife there? A Yes, sir.

Q A short time after you were there did one of the Gerstners come in? A Yes, sir.

Q Which one? A David.

Q By the way did you go to Lorber's that night with the Pierce-Arrow car? A No, sir.

Q Was there such a car, a Pierce-Arrow car standing outside? A I beg pardon.

Q A car of yours? A No, sir.

BY THE COURT:

Q Do you know how they found out that you were there?

A Well, my wife told them that she was to meet me there.

Q She told them when they were there in the afternoon?

A Yes, sir.

BY MR. MARKEWICH:

Q You found that out? A Because my wife says to me,

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"For Heaven's sake you can't imagine after you and the Gerstners left", she says, "They both came back together, and almost upset the whole house, it was terrible, Morris is calling David all kinds of names, 'How did you come to pay \$2500 for all this junk', and they were raising all kinds of hell with Mrs. Fishman, and she told them to keep quiet that she was going to meet Mr. Fishman at Lorber's, that evening and they could thresh it all out. I have nothing to do with the transaction." David Gerstner came in probably ten or fifteen minutes later and he says to me, "For Heaven's sake, Fishman--"

Q Were you sitting at the table? A Yes, sir. He said, "For Heaven's sake Fishman get me out of this trouble." I said, "What is the matter"? He said, "Morris says that I overpaid. He is a better judge of things than I. He wants me to get the money back." I said, "For Heaven's sake if you only told me a little earlier I could probably have done something. I relied on this money and issued various checks for it, the first one I made out for a thousand dollars to be cashed the first thing in the morning. How can you expect me to return the money. This is fine business." So he says to me, "I will tell you what I will do. I will allow you a hundred dollars for your trouble." I says, "It isn't a question of trouble, I haven't got the money, I disposed of it." He kept on pestering me and annoying me and I really could not get rid of him. Finally, he says, "I will tell you

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what I will do. Give me a thousand dollars in order to keep my brother quiet, and I will arrange to wait for the balance, I know you very well, nothing to be afraid about, I will wait for the balance. " I says, "I can't give you a thousand dollars, it is impossible, I couldn't give you a check and have it come back." He said "How much can you give me" and I said "I couldn't spare him a cent", and he was quiet for sometime, and finally he said "Give me five hundred dollars." So I made out a check to his order for five hundred dollars. He said I will ask you another little thing, "Give me a check for two thousand dollars, and I will give you my word of honor I won't dispose of it, I will hold it as long as you ask me to. I want to show it to my brother in order to keep him quiet." I said, "I will tell you, you don't have to give me a hundred dollars, as long as you are backing out of the transaction, and you are going to give me time to pay this amount. I have just given you a check for two thousand dollars, but don't embarrass me at the bank.

Q Did David Gerstner tell you that he found fault with the rugs that they were not as represented Oriental? A Yes, sir, he said they are imitation, cheap rugs, in other words the entire stuff was a bunch of junk, and he wanted to get out of the transaction which is a most important thing.

Q So you made out two checks? A Yes, sir.

Q Are those the checks People's Exhibit 2 and defendant's Exhibit A, one for two thousand dollars and one for five

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hundred dollars? A yes, sir. This is the check that I gave him for five hundred dollars. I didn't receive this check he gave me cash; I don't know anything about that check at all.

Q This is his own check for five hundred dollars?

A Yes, sir.

Q People's Exhibit 3 is what I am talking about, the check for two thousand dollars, and Defendant's Exhibit A for five hundred dollars? A Yes, sir.

Q One dated the 29th of April and the other dated the 30th of April? A Yes, sir.

Q Did you give him those two checks at the same time?

A No, sir, I gave him the check for the five hundred dollars first, and about ten or fifteen minutes later, after we got through with the discussion it came to giving him the other check to show to his brother for the purpose of not annoying him. I gave it to him a few minutes later.

Q They were both written out at the table? A Yes, sir.

Q Can you explain the difference in the date, one is made out on the 29th and the other is the 30th? A Well, I am pretty sure we were together until quite late that evening. I really don't know any particular reason why one is made out on the 29th and the other for the 30th. I told him not to deposit the five hundred dollar one until the 30th. He asked me about this one the 29th, that he would not do anything

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with it, as a matter of fact he held it for a few days as his endorsement will show.

Q Now the next day what did you do with the two thousand dollar check that you got from him, the certified check?

A Well, after Mr. Gerstner had left me I communicated with Mr. Rap of Eisner & Rap, clients of mine and I asked him whether he would be in a position to loan me thirty five hundred dollars. He said "yes." I went over to his house, and I had quite some discussion with him, that was the same Friday evening, he said, "Yes, I will lend you thirty five hundred. You can come over to my place of business tomorrow afternoon and I will help you out." So on the strength of that I drew a check to my own order on the Atlantic National Bank for three thousand dollars and deposited that together with the two thousand dollar check, making a total deposit in the American Trust Company of five thousand dollars, figuring that when I would receive the thirty five hundred dollar check on Saturday and deposit it on Monday that would leave me a balance of five hundred dollars in the Atlantic National and a balance of a thousand dollars in the American Trust.

Q That is considering that the two thousand dollar check you had given to Gerstner would be met? A Yes, sir, I was thinking that I wanted to get rid of him; I didn't care to have him bothering me.

Q At that time you were financially embarrassed, you were short of funds? A Yes, sir, when I went up to Mr. Rap's

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place --

Q Did you have considerable medical bills to pay?

A Yes, sir, I had professor Louria taking care of Mrs. Fishman.

Q How long was she ill? A About three years. She is still ailing as a matter of fact.

Q Your business was that in good condition at that time? A Well my business, naturally, I could not attend to it, as well as I would.

Q Your mind was distracted because of your wife's illness? A Yes, sir, sure.

Q You were short of funds at that time? A Yes, sir.

Q It was several days thereafter that you saw David Gerstner, and his brother? A Yes, sir.

Q Where? A It happened this way. I went over to Mr. Rap's place that afternoon, and I asked him for the thirty five hundred dollars he had promised me. He said, "Well I am awful sorry I won't be able to help you out". I said, "You certainly took me in a very bad position. I really depended on it." I rang up Mr. Gerstner, and asked him, where he was going, any place that afternoon, and he said, "I am going home now." I said "Be good enough to wait there until probably five o'clock I am doing some work in a certain place, I will stop in to see you before I go home." He said, "What is it about". I said, "I will tell you when I go over there." When I came over I took out the pass

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book on the American Trust Company and I showed him I made a deposit of five thousand dollars. I said I expected to get a loan from a client of mine, and drew a check on one of my other banks, and made a total deposit in the American Trust for five thousand dollars and I am in hard luck, I didn't get the loan. He said, "What are you worrying about. I didn't put your five hundred dollar check through. I am not afraid of you. I will put them both through together whenever I will get an opportunity, as a matter of fact I don't think I will put them through till Monday, and I said, "For God's sake don't put through the two thousand dollar one." He said, "Is the five hundred dollars good," and I said, "Yes, you can go right down and certify it." He said, "I wouldn't certify your check", but he nevertheless did put them both through."

Q At the same time? A Yes, sir.

Q When the check of two thousand dollars that you had given him was returned short, did Gerstner see you?

A No, sir, he put it through several times before he saw me, as the stamp on the back will show, he dared not even face me, but when I saw him the next time he first mentioned it to me.

Q Now what did you do or say to him? A Well, when he rang me up he says, "Is your check for two thousand dollars good." He didn't tell me he put them through and I said, "Certainly not." Well, he says, "How long are you going

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to be up in your office", and I said, "I will be here for the remainder of the afternoon." He came up and then it was he said, "I put this check through and it came back." I called him down very severely for doing it without telling me about it." He says, "Can you get me some money", and I said, "I wonder be able to give you anything now but come around some time during the week, and I will try to scrape together a few hundred for you on account." He came around sometime towards the latter part of the week and he asked me for some money, and I told him I hadn't got it, and he went away. I think it was a day or two later, they both started in to phone me again.

Q Let me interrupt you. I had forgotten to ask you when you were at Lorber's, and got those two checks was there anything said about a bill of sale? A Yes, sir, he said when both of the checks go through you return my bill of sale." I figured that he would keep his promise.

Q You never got the bill of sale back? A No, sir; he never returned it to me, as a matter of fact.

Q Now what happened later when the two of them came to your office? A They started in to saying they wanted money because they are very short, business has been very poor that I should at least give them two hundred dollars give me something, I need the money. I said, "I will tell you what I will do. I will give you a check in a few days. Leave

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me alone, I have clients waiting, I don't want to be bothered about my business. Keep out of here. Don't be annoying me". Finally I got rid of them. And a few days later I mailed them a check for seven hundred and fifty dollars on the Atlantic National bank, a post dated check, and the following day he called at my office, I opened up the place and I seen David Gerstner waiting for me outside in the hall.

Q Was it in this envelope that you sent the check?

A Yes, sir, that is right, May 31st. I came into the hall, about opening up the office, and I seen Dave Gerstner standing there waiting for me. I said, "What are you doing here", and he says, "I have your check but it is dated Sunday," I said, "All right, return it to me, give it to me and I will date it Monday --" this happened to be on a Sunday date. That check is a good check and that is the most important part." He gave me back the check, and I gave him another one in substitution.

Q Is that the check People's Exhibit 4, the one that you exchanged for the other check? A Yes, sir, that is the June 7th; that is the check.

Q Well, at any rate this check was paid? A No, sir, I rang up several times prior to that, and asked him not to put the check through, because I cannot meet it.

Q Let me ask you this. You have referred to clients. Do accountants call their patrons clients as well as lawyers

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do? A Yes, sir.

Q Now it has been testified to by some witnesses for the people that sometime about the month of May, you took the complainants over to the Supreme Court, Special term, Part 3 of the County Court House. Did any such thing take place?

A No, sir.

Q It is testified to here that you had told Mr. Rosenberg, the attorney for the complainant, that you had a case before Judge Cohalan or Judge Callahan in the County Court House. Did you say any such thing? A No, sir, never had any such discussion at all. I

Q It is testified to here you showed him a Law Journal with the case of Fishman against somebody and said that you won the case, and that you would have money and so forth. Did any such conversation take place? A No, sir, never had any occasion to carry any Law Journal with me at all.

Q It was also testified that you had introduced the complainant to Marshal Greenblatt, and said he had a replevin for you, he was to replevin the furniture, and they could have it, did any such conversation take place in the presence of Greenblatt? A No, sir. Here is how that happened. I came in the office between nine and nine-thirty. They always wanted to meet me in the morning because I made it a custom to look over the morning's mail. They kept on following me and I could not get rid of them and at times I used different to tell them little things to get them out of the way at

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the time, being that clients, they were always one on one side, and I couldn't get rid of them, they were pestering me for money. I walked over to the subway and I happened to see the gentleman, Greenblatt, passing by, whom I have known for a good many years, and I said, "Hello, can you lend me a few hundred dollars," I said, "I want to give some to these Gerstner boys, can you lend me some money?" and he says, "I am in a hurry", and he walked right on. That was the whole conversation.

BY THE COURT:

Q Did you meet Mr. Rosenberg in the Supreme Court?

A No, sir, never saw him there at all, no, sir.

Q Never had any of that conversation that he testified to? A Absolutely not.

BY MR. MARKEWICH:

Q When was the first time that you had seen Rosenberg about this matter? A It was some time in June when that \$750 check was not met. Mr. Gerstner said "Come over and let me introduce you to my uncle." "Who is your uncle?" I said, "Samuel Rosenberg, an attorney at 305 Broadway." I said, "Certainly I will go with you. I went up to Mr. Rosenberg, and he introduced me, and he says "Why don't you give these boys their money back, they are up against it and are wanting to back out of the transaction." And I said, "I will give them the money back, let them have a little patience and wait, I am not running away. I am no loafer or street boy,

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I got big business down here, and I am known. I have quite a nice clientele, that won't do them any harm, I don't want to rob them of their money", and he says, "All right, Fishman, do the best you can for them." I went away.

Q When after that did you see him again? A They still kept on going after me for money, and they were pestering me terribly. I went into the Standard Lunch, a little lunch room there at 305 Broadway, the same building with Mr. Rosenberg, and I happened to meet Rosenberg.

Q Rosenberg's office^{was} at 305? A Yes, sir the same building, the opposite corner of each other.

Q The Standard Lunch room? A Yes, sir. It just takes a minute to walk over there. I met Rosenberg in the restaurant, it was in the summer time and he wore a little grey coat. He called me aside.

Q A self service restaurant? A Yes, sir, a quick lunch room. He said to me, "I thought you were going to fix the boys up, what is the matter with ^{you} out, why don't you give them some money". I said, "I was hard up against it, I will give them as soon as I will be able to", and he said, "Listen, I am going to tell you something right now. I don't want to have you think that I am acting as an attorney in this case at all. These boys are my nephews. If you have to go out to get this money by hook or crook go out and get it, or else I am going to have you locked up. " I

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said, "You will have me locked up". I said, "Why for God's sake, you know this whole transaction, why do you want to have me locked up for." I had a conversation with him, for at least for about a half an hour. Now listen here, I don't want to be annoyed downtown and have you impress different people about me, and he said, "That is just the reason I want to lock you up so you will feel embarrassed." I says, "In other words, you want to take advantage of me. Now look here, Rosenberg, if you are going to use your tactics I am afraid it will lead to very unsatisfactory circumstances." He said, "Well, why don't you give them some money." he says, "Can't you give me five hundred or three hundred, give me one hundred, give me fifty whenever you want to pay it," and I said, "I would like myself to give you fifty", and he said, "Listen here, I am going to tell you something, have a check by my place at 4 o'clock, or I am going to have you to have locked up." I said, "Listen here, I don't want you locked up if there is anything along the lines of arresting--

Q After you had the conversation with Rosenberg in the lunch room did you meet Rosenberg again? A Yes, sir.

Q Where? A I met him in the neighborhood very often, I met him.

Q Before your arrest in this case? A Yes, sir, many times.

Q Previous to the date of your arrest? A I think it

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was the latter part of June.

Q The complaint is dated the 16th of June, 1921?

A I think that was about the time I cannot remember the exact date.

Q One time you were in the Standard Lunch. How many times did you see him? A About a half a dozen times at his office, and he was at my office, he came quite frequently because he went over and arranged with the boys "they are not going to bother you -- they will go easy, not roughly after that or get anygry with you, they want their money."

Q At any rate it has been testified to here that you did telephone over to the Gerstner Brothers at a certain restaurant and that Morris gerstner came down to the restaurant and just as you were leaving the restaurant placed you under arrest? A That is absolutely untrue. That Saturday afternoon--

Q How did they come to arrest you? A That Saturday afternoon Mr. Gerstner came over to my office, and asked me for some money, and I told him I had no money. I closed up the office, and we took a walk along Broadway, and we finally stopped somewhere near Bleecker street, and we went into a lunch room there, and we had quite a little discussion.

Q Gerstner and yourself? A Yes, sir, we had quite a discussion there, and he says, "Do you know what I am commencing to think that my uncle is right, the only way to get money out of you is to lock you up. You see the officer

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across the street, I have a good mind to call him in", and I said, "Listen here, don't get excited about these things you just have a little patience, and everything will be all right," and he says, "No, am going to call a cop in right now", and I said, "Let us not do that. If That is how you feel about it we will walk over to the police station and I will go together with you. What is the use of me being dragged along the street with a policeman and so we both went to the Mercer Street station house, and I was placed under arrest.

Q What did he say to the lieutenant at the desk? A Well he said, "We are looking for this man."

Q He said you stole what? A "This man stole two thousand dollars," and he says, "the complainant is on his way over" meaning his brother, and when his brother arrived he says this man has stolen money, and he pointed to me, and I said this is ^a fine trick you played on me. I will see that this will be the last arrest you ever make.

Q Do you know whether Morris Gerstner is a member of the firm? A He absolutely is a member of the firm.

Q Did you have any conversation with David Gerstner with relation to that? A yes, sir, they both came to my office occasionally, and I came over to their place occasionally with regard to this proposition. He says when my brother used to be with us and Arthur Krutchley we got separated--

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we got into a terrible fight, and as a result he is not living with his sister, and he says, "He don't want to give her anything. We took off the name Gerstner Brothers, and we are running it under the name of David Gerstner, and I have a power of attorney, so that they won't have anything coming you know, what I would like you to advise he is this how can I be able to evade the tax return. Well, I said, I don't know just how you can do it, you may get yourself into a whole lot of trouble if you do, but nevertheless we had quite a discussion with regards to the brother drawing amounts he would charge cash \$500, \$250, and \$300-- that was charged as entertaining expenses.

Q David and Morris? A Yes, sir, entertaining expenses. I says, "You better be very careful and don't start in with the Federal authorities.

Q So as to cheat the Government? A Yes, sir. Well, Morris Gerstner went with me to the restaurant and from there to the station, that is, he went together with me. When he threatened to put me under arrest I didn't want to feel embarrassed and I walked over with him alone.

Q After you were placed under arrest did you then have a conversation with Rosenberg about the Gerstner Brothers?

A It took me quite a few days before I was able to have a conversation with Rosenberg.

Q You were bailed out? A No, sir, until I was bailed out-- when I met Gerstner in front of the Magistrates' Court,

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and he said, "Do you know who is sitting here this morning, Maxy Levine, my friend Maxy, get the money together quick, and I will arrange with these boys not to be there, no complaint filed, no complaint filed, just make a short affidavit, you know, they wouldn't come and the thing will be thrown out. Hurry up and get the money Fishman". "Well", I said, "you see you did not accomplish anything by this Rosenberg, I haven't got the money. It doesn't make any difference if I be threatened with little things or what, I haven't got it, I am really surprised that you have engineered this thing. Nevertheless the matter was put off from time to time, and there was a long adjournment for about two weeks, well I finally gave them four hundred dollars.

Q Who did you give it to? A Mr. Silberman, my counsel gave it to Mr. Rosenberg.

Q Did Rosenberg tell you why he didn't want to take the money from you personally? A He says to me, he says, "it would look like compounding a felony", he says, "I will take it from the lawyer." Then there was an adjournment once for about two weeks, and after that he rings me up, a day or two before the adjourned day, and he says, "Fishman, meet me at 257 tonight." That is at home, Hooper Street. He says "Do you want another adjournment, more money." I said, "I am afraid this time we won't be able to get an adjournment, I haven't any money." But nevertheless I was collecting about

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three hundred dollars, and I met him in front of the Magistrates Court when he was together with Gerstner, and I gave him three hundred dollars, and he says, "Come upstairs, there is the Assistant a District Attorney, and I will get you another adjournment. The thing is to keep it away from downtown." So we got another adjournment. Mr. Goodman ~~said~~ ~~not~~ objected to all these delays, and said "Why should this again be delayed for this afternoon " so Rosenberg said, "Well, I don't know, there is a witness short, we can't get the detective, he is on his vacation, and all that sort of business." Well Magistrate Corrigan was sitting there at the time, and he said, "I will only consent to an adjournment on one condition and that is that the defendant decides to waive examination on the returned day. Then naturally I did not have any other alternative and I said, all right, we will waive examination". Two weeks later, Mr. Rosenberg says, "I got you another two weeks, it isn't downtown, is it." Well, when the two weeks came up, or before the two weeks came up, he had already \$700. So we came down and he says, "Some more money", and I said, "I haven't got any more money", and he said, "It is going to go downtown", and I said, "If it goes downtown it goes downtown, and that is all there is to it." When the matter came up my counsel tried to obtain an adjournment from Magistrate Simpson.

Q You didn't get an adjournment? A No, sir Magistrate

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Simpson said, "Here what is this anyhow, what is going on here, so many adjournments, why" he says; Magistrate Corrigan endorsed on the paper, that this adjournment is given on condition that the defendant is going to waive on this date. You are held for downtown. Give a new bond." I got in touch with the bondsman, and I was released, and quite sometime after that Mr. Rosenberg got in touch with me, I mean we were very friendly until one day he rings me up, and he says he wants to see me. I met him, and he said, "You know we got a notice to appear before the grand Jury. How about the money", and I said, "The way you are going to work with me, if you are going to bother me this way I don't know how we will ever get through with this thing. Let me alone, let me attend to my work." So he says, "We have to be before the Grand Jury tomorrow morning. You come there at 10 O'clock. Well it frightened the life out of me. I went around and got together \$200, and when I arrived in the District Attorney's office, right near the entrance of the grand Jury room, he said to me, he said, "You are ten minutes late. Both of these complainants were in and they testified already in relation to you. You always come too late, at the 11th hour. If you had been here on time, we would have had the finest excuse, Petrucci is on his vacation, and could not be here for the Grand Jury, but as long as you are giving \$200 I will not appear before the grand Jury."

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Q He was not a witness before the Grand Jury? A No, sir. I met him on various occasions after that, and he said "You mustn't mind what I am doing, I want to get the money for these boys." In the meantime I met him, I very often came over to his house; we had lunch together. Whenever he saw a cigar in my pocket he took it out himself. He was very friendly with me, and he says to me one day, "Listen here, young man, you better come across with some money." I went up to see my friend Whalen, and asked him to have this case placed on an early calendar, and unless you come through with some more money". I said, "So that is how you are going to treat me after I acted as nicely as I did with these boys, and let them out of this deal". He says, "Well Whalen is going to do it for me, and I will see that this case is going to appear shortly. Several days thereafter Mr. Silberman rings me up and he says, "I got some very shocking news for you."

Q The case was preferred? A Yes, sir, when the case was preferred.

Q This was preferred? A Yes, sir, when the case was preferred I immediately got in touch with Mr. Rosenberg, and said, "I thought you were joking, I see you really did it. Here is \$200 leave me alone." He says, "Now I want the entire \$1100." I says, "Where am I going to get \$1100 now." You certainly put me in a nice fix." "Well", he says, "I am a

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lawyer." I said "You certainly are a fine lawyer." So the thing went along, and he says "That case is going to be on the trial calendar pretty soon." And I said, "All right. You put it on the trial calendar and I will worry about it then." I really was frightened, but I didn't want him to know that I was. All of a sudden I received a notice from the Bonding Company to tell me that the bond will be forfeited. I instantly opened it over at my house. My wife says that morning, "Here you got a letter", and I seen it was from the Bonding Company, and on that morning I was here when Judge McIntyre was presiding. I went and answered the case, and I saw Mr. Rosenberg and he says, "The matter is up before McIntyre, McIntyre, is all right, we will make an application and get an adjournment, and in the meantime raise the money but raise it all. Don't forget that." I managed, succeeded in getting together \$500. I went up to Silberman with the \$500, and he says he wouldn't take \$500 he wants it all. I gave him a \$500 bill, and he returned it to me. He says "Rosenberg wants all the money". And I went over to Rosenberg that night, and I said, "Rosenberg what are you trying to do any how". Do you want to ruin me completely, he says, "Get the money, get it all, and get it quick, because the District Attorney may force it on, and we won't be able to get any more adjournments by saying that the witnesses are not here. Get the money." I managed to squeeze this \$1100 together, and I went to his office, that

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Saturday right before Christmas, and I said "I have the money!" He said, "You are a liar, and I took it out and showed it to him. He said, "You have got it. Where is Silberman?" I said, "I don't know where he is, I think at the Yale Club." I tried to get in touch with him but I was unable to get him. It was Christmas day, and Mr. Rosenberg was at the Knapp Mansion, Chairman of the Schulul Lodge. He invited me over there and I came over there.

Q Did you give him the money? A Yes, sir. When I came with the money he said, "Where is Silverstein." I said, "He doesn't want to come here today? He does not want to be annoyed, he wants to be with his family." I rang up Silverstein, and he says, "For God's sake, Harry, leave me alone, you have been bothering me enough with this case. Am I your errand boy or your lawyer." I said, "Listen, I want you to do me this favor, come over and give him the money." He said, "I won't do a thing", he says, "I won't leave my family." I says, "I will come over with a taxicab." And he says, "Why should you spend money unnecessarily. I will meet you tomorrow." I told Rosenberg, I says, "Silberman won't come", and he said, "Fishman, don't you want to give us the \$1100". I says, "Yes," Silberman says he can't come over. He says, "When can he come over," and I says, "He will come tomorrow". He said, "Listen, I am attending a wedding at the Broadway Central Hotel, Dr. Feld is getting married. If you come

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there bring up Silberman with the money. I got Silberman and finally succeeded in getting him over and I had to give Silberman a hundred dollars for him to come over, because it was a holiday time and he had to leave his family. He came over and I gave him the \$1100, and we went to the Broadway Central Hotel, and we were there about half past five-- Mr. Rosenberg told me to get there-- we were in the hotel and Mr. Rosenberg did not come Silberman says are you going to keep me out all night, how do you know he will be here. Then in comes Rosenberg and his wife. Rosenberg says to me, he says, "You keep aside and you, Herman, meaning Silberman, come over here. They walked into one of the side rooms in there, and then about five or ten minutes later, Rosenberg came out to me, and smiled, and he says to me, "hereafter my name to you is Sam, and I am going to call you Harry. You don't object to that? I see you made good your promise regardless of what the outcome of this thing would be." That is what I told you, I would give you the money and he says, "I will tell you I am awful sorry I had you arrested, and I apologize, and I am going now to get David Gerstner and his brother to appear before Mr. Whalen, and tell Mr. Whalen they purchased your furniture, and in other words I am going to get them to tell the truth, and besides if the District Attorney sees he has a reluctant complainant is he going to press the case? I said, "All right.

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Go ahead and we parted warm friends. The following day when he came he said to me, "By the way, Fishman, -- Harry he called me, he says, "I forgot to ask you for a general release. " I said "general release ." I said, "By the way I noticed that case is on the calendar here this morning, how is that". He said, "Well, I will tell you, I saw Mr. Whalen again, and Mr. Whalen says to have you fellows come into this court and say that this money was stolen, do you think I will consent to that. I will do nothing of the sort. This case is to be tried. You are not going to use me in connection with this thing." I said, "I thought you told me the other day that Whalen said that everything was all right." Well", he says, "I know but I will tell you what I advise you to do. Take a small plea. " I said, "I should take a small plea, Why don,t you take a plea. Where do I come in to take a plea. My reputation is worth as much as yours as a professional man." He says, "What are we going to do, we got to go to trial,." And I said, "Certainly that's a fine state of affairs, you wanted me to give you a re-immediately lease for these people, and I ~~actually~~ got in touch with you, and I told you the situation.

Q That was on the day the case was called here?

A Yes, sir, that morning I simply said to Silberman--

Q The day when the jury was empanelled you got me?

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A Yes, sir, I didn't want to leave Silberman go ahead with the case, and I was in the lurch.

Q On that day when you retained me you met me in the Children's Court? A Yes, sir, I was running all over after you. I had to hire a taxicab to take me.

Q At one o'clock that afternoon? A Yes, sir, sure.

Q Then you and I went to the standard lunch room where Rosenberg was accustomed to eat? A Yes, sir, he generally eats there; I called him over and I said I want to call your attention to something. I called Mr. Rosenberg aside and I said to him, "I have had to retain Mr. Markewich. Now he represents me, what are you going to do. Let us have back some of that money". He says, "Oh, oh, did you ever see anything coming back from a lawyer or the cemetery." I says, "Is that the kind of a man you are. You ought to be ashamed of yourself."

Q You and I went over to the standard lunch room to look for Rosenberg? A Yes, sir.

Q You and I went up to his office? A Yes, sir.

Q In the same building? A Yes, sir.

Q While Rosenberg and I had a conversation you were asked to step out? A I was outside, talking to both of the Gerstner brothers, and they said, "We are awful sorry we could not get the District Attorney to drop it."

Q Do you know a man by the name of Rudolph Weiss?

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A Yes, sir.

Q How long do you know him? A Oh, I should judge about twenty years.

Q You know he owned that garage? A I knew that he had sold it.

Q Now just a short time before, about amonth before Rudolph Weiss sold the garage did you meet a man by the name of Max Kessler? A Yes, sir.

Q Max Kessler spoke to you about a certain business known as the Peerless Automatic Vending Co.? A Yes, sir.

Q Did you discuss the price of the business with him and conditions? A Well, he told me a very sad story, he told me that he had advanced out a whole lot of money, invested it, and he wanted to dispose of it and if I was able to get some body who would be interested in it, and I says, "I will try to see what I can do."

Q What was the price agreed upon? A Ten thousand dollars.

Q You were to get him a buyer? A Yes, sir.

Q Did he sign this card for you? A Yes, sir. (Referring to People's Exhibit D.)

Q After this card was signed, you also got the patent papers? A Yes, sir, with a sample of the machine, and he brought down the books and let me examine the books to see what kind of a concern and the possibilities of it, and so forth.

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Q You tried to get a buyer for that? A Yes, sir, I tried numerous people.

Q About Christmas time did Weiss have a conversation with you? A Yes, sir, he came in the house, and told me he had to work all kinds of hours, and asked me whether I knew of any kind of a proposition I could put him next to, and I said, "I just happened to have something for you." He said, what would it require, and I said, about ten thousand dollars. He said, "Well, I haven't got so much money, but he said my partner and I would have that amount of money. Well, he said, I will tell you what I will do, I will invest five thousand dollars -- and he will invest five thousand dollars, and I said all right-- but he says, I can't give you the five thousand dollars now, I will give you twenty five hundred and I said all right, and he gave me it.

Q Did yhe tell you who else was to go into business with him? A Yes, sir, he would get Mr. Bernstein to go in together with him, his partner, Abraham Bernstein. So he gave me this twenty five hundred dollars, and he said that a few days later he would bring the additional twenty five hundred, but what happened was that that very same evening he came in again, and he said, "Well, I just received a telegram from Monticello, New York. I said, what is the trouble. He said, "my father-in-law's farm burned out", he said, "and I would not be able to go in, I will tell you what you can do

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as long as you think that the proposition is a good one, you want me to go in for twenty five hundred, but he says I don't want you -- you really figured on me going in on the transaction and I will lend you this money", and I said, "all right." He said, "Why don't you give me some sort of security for it." I said, "What do you want", and he said, "I will take your note", and I gave him a 60 days note for twenty five hundred dollars. I was trying to get other people interested in this proposition.

Q You were to get your commissions of twenty five hundred? A Yes, sir.

Q From Kessler? A Yes, sir.

Q If you got a purchaser for him? A Yes, sir.

Q You needed, in addition to this twenty five hundred, dollars five thousand dollars more? A Yes, sir, seventy five hundred dollars more.

Q Seventy five hundred dollars more? A Yes, sir.

Q Well, now, in the meantime you were looking around for somebody else to go into that business? A Yes, sir.

Q You have not succeeded in getting any one? A No, sir.

Q When that note became due you could not meet it?

A No, sir.

Q The note for twenty five hundred dollars that you had given Weiss? A Yes, sir.

Q Did Weiss see you about the note? A Yes, sir, he

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asked me to try at least and give him something on account if I could not give him the entire twenty five hundred dollars." I told him that deal did not go through, I figured he loaned me the money and I used that money for myself.

Q Then how many times after that did you see Weiss?

A Almost every night, that is, he was working during the night, and he was home during the day time, and he was in there quite often, and he would generally see me-- he was working about half past seven or eight o'clock-- before he went to work he ~~was~~ would generally meet me.

Q Now thereafter did he introduce you to a lawyer named Altman? A ~~W~~He did.

Q Weiss? A ~~M~~rs Altman rang me up on the telephone and he says to me, "Are you Mr. Fishman that has the transaction with Rudolph Weiss? I said, yes, sir, he said, "I would like to see you." I said, "All right, if you want to see me, come over and see me." He says, "I should come over to you, you come over to me." I did not care to argue with him, and I went over to him, and I came there and he said to me, by the way, do you ^{know that} note is past due? I said, of course I know it is past due. I will pay this man. He says, "You will pay him", he says, "do you know that I know about that Rosenberg transaction in New York?" I said, "What kind of a Rosenberg transaction I don't know what you are trying to get at." I didn't really know what he meant.

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Q By that time you knew Gerstner, but you didn't know Rosenberg? A I really didn't know what he was trying to get at. He says, "Listen to me. I want a check in settlement of the note, or the money." I said, what good will it do me to give you a check, it will only come back." He says now, if you are not going to give me a check, I am going to have you locked up." I said to him, "What is the use of doing that." I said, in the first place I haven't got any check with me, and he says, "I will give you one of my checks." He tore one check out of his book.

Q Are you referring now to the first time you met Weiss or Altman. You had a number of conversations with Altman, did you not? A Several conversations, but the time he rang me over the telephone was the first time I really met him.

Q I show you this check dated the 10th of May, and see if that will refresh your recollection? A This was the check that I gave him in the early part of the month of March. I post dated the check the 10th of March, and he asked me to cross out his bank and put down my branch.

Q State the conversation you had with him. Did you have a conversation with him after you had given him this check? A Yes, sir.

Q You had some conversation with him before you had given him this check? A Yes, sir.

Q When was it you had the conversation with him in

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which he mentioned Rosenberg? A That was the time after the check was not met.

Q How long after? A That was just at the time that the Rosenberg thing was going on, and he said, "Listen here, if you are not going --

Q This is the first conversation with him. Start with the first? A The first conversation was this --

Q When was it? A It was sometime prior to the 10th of March I was at his office, and he asked me for the check. He took that blank and tore it out of his book, and I filled out the check and I put on the back of it --

Q What did he tell you if anything if you didn't give him the check? A That he would have me arrested.

Q Was he alone with you at that time? A We were together for about four or five hours, until after midnight. So I gave him that check, and I put on the reverse side of the check -- I put on the back of it in settlement of note I made out to the order of Rudolph Weiss. He said, "Come on and make the check out to me as attorney, so that I can get my fee". He tore that up so I made out another.

Q Was that a post dated check? A Yes, sir, I made this out to his order as attorney and put this same thing on that back "In settlement of such a note maturing on such a date." He kept on staying ~~in~~ with me for four hours before I gave him this check -- I had an appointment that evening with Mr. Stephen C. Baldwin whom I recommended to a certain

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case.

Q You do know Stephen Baldwin? A Yes, sir, I know him very well, and know his wife too, very friendly.

Q You had business relations with him? A Yes, sir. I brought this client of mine up to Baldwin's home at 73 Remsen street and introduced him to Mr. Baldwin, and he wanted Mr. Baldwin to go to Atlanta for him, and do a whole lot of work there that would take many months. He asked Mr. Baldwin what his fee would be --

Q Never mind that transaction? A So Mr. Baldwin told me--

Q Never mind about. That is foreign to the issue here. Get down to the issue. You went around with Mr. Altman that night? A Yes, sir.

Q What was your object in going around with him?

A Well, there was no object at all; he didn't leave me when I went to Mr. Baldwin's house, he was waiting in front of the house and Mrs. Baldwin told me that Mr. Baldwin was not at home. She told me that I would meet him at the Crescent Club or at some other club there, and I went to the Crescent Club, I think it was, I met Mr. Baldwin there, I was in there for half an hour or so, and I came out, and I met Mr. Altman again, and we were together until about midnight and finally he got this check from me.

Q What did Altman tell you if you didn't give him that check? A He was saying nothing else but arrest, going

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to have me arrested.

BY THE COURT:

Q What was the date of that check? A March 10th.

Q I understood you to say that Altman told you he knew about this Rosenberg affair? A Yes, sir, he mentioned something about this.

Q When did he mention this? A This was when the Rosenberg affair was pending.

Q It was at either of those interviews? A No, sir.

Q I understood you to say it was at one of those interviews? A No, sir, this was introduced while ^{the} Rosenberg matter was going on.

BY MR. MARKEWICH:

Q You saw him a number of times after this check was issued? A Certainly.

Q You had a conversation with him after this check was issued? A Yes, sir, he came over to my office, in fact he came with a certain Mr. Burke.

Q Now when did you give him this check dated March 10th, 1921? A Several days prior to the 10th of March.

Q Now did he on March 10th or on or about that day telephone to you about this check? A He said he presented the check to my bank for certification and they would not certify it, that I better come over to see him. I went over to see him and I told him he will have to wait for the money.

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Q Now thereafter did you see him? A Yes, sir.

Q Where? A Well I met him at his office and he came to my office some time in June while the Rosenberg matter was going, and he always insisted upon getting the money off me.

Q Was it at one of those interviews he had spoken to you about the Rosenberg matter or he knew about this Rosenberg matter? A It was at one of those interviews.

Q Well, in the month of June he had spoken about the Rosenberg matter? A You ask me that question again.

Q (Question repeated) A Yes, sir, he rang up my office, and he left his number and I rang him back and we spoke over the telephone.

Q Over the telephone? A Yes, sir.

Q What did he say to you in connection with the Rosenberg matter? A Well at that time I was arrested in his matter, also, and you see it happened this way. I had better explain it.

Q When was the first time-- what I am trying to get at is this: When was the first time that Altman had spoken to you about the Rosenberg matter? A Well I introduced the whole conversation --

Q Tell us the conversation you had with him and try and fix the time as near as possible. A It must have been about a week after I was out on bail in the Rosenberg mat-

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ter.

Q I see, you were arrested almost simultaneous on the Brooklyn charge, were you not? A Yes, sir, when I was released on bail.

Q On bail? A Yes, sir.

Q On this charge? A Yes sir; I was out there waiting in front of the building to take me over to Brooklyn, and when we got to the station house the man Altman was there already.

Q Was it then you had the conversation with Altman?

A Yes, sir. He said, "Well we got you coming and going. I would advise you to fix this thing up as quickly as you can," he says, "because each time the thing comes up in New York Court the Brooklyn people will be there and will try and fix your bail so high that you never will be able to get out. And when the matter comes up in the other County they will be there; in other words we will keep you going from one County to the other, and we will make it pretty hot for you." Well, I says, I will try to fix it up as quickly as I can, try to pay the money as quickly as I can.

Q On the same day when the case was on in Brooklyn your case was on in New York? A Yes, sir.

Q And because you were in one court your bail, was forfeited in another court? A Yes, sir; that is right; that is just what happened.

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Q Now then did you have any conversation with Altman thereafter? A Yes, sir.

Q State where and when? A Well, he got in touch with Rosenberg, and he said to Rosenberg--

Q You don't know, you were not present at the conversation? A No, sir, but Rosenberg told me that.

Q Rosenberg told you? A Yes, sir, he said to me that he is going to arrange with Rosenberg that they will have me indicted in two counties and that is the only way they will get me to pay the money quickly.

Q Who told you that? A Mr. Rosenberg told me that Altman told him that.

Q When did Rosenberg tell you that? A While it was pending in the Magistrates Court, he says "the only way to get money out of Fishman is by having him indicted, if you want to get it quick." A short time thereafter I received a notice to appear in the Kings County Court for pleading. I found out that I was indicted there too, and Rosenberg met me and he says, "Well, how are you getting along with Altman", and I says, "What difference does it make how I am getting along with him", he says "We indicted you too", and I said, "What difference does it make whether or not," and he says "You will be indicted in this other case pretty soon, don't worry."

Q By the way after you left this court on Friday you

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received a notice that your case was coming on Tuesday in Kings County? A Yes, sir, that is right for tomorrow.

Q So they do have you coming and going? A Yes, sir, here is the notice of trial.)Producing a paper)

Q What conversation did you have with Altman thereafter, I mean after your arrest. Just tell us what was the first conversation that you had with Altman? A Altman said this --

Q Where was it? A In the County Court in Brooklyn, when we were there. I had Mr. Drescher, Alexander S. Drescher of Brooklyn representing me in that matter. And this Altman said, "You better give us some money in this matter, you better get some money together very quickly." Well the case was adjourned a few times, and in the meantime I was bailed out in the New York matter and also in the Brooklyn matter.

Q Finally you gave him nineteen hundred dollars?
A Yes, sir.

Q Together? A Yes, sir, finally I go together with Weiss or with Altman, and they said, "Well you had a whole lot of trouble in this transaction, and we arranged that you spent something on the expenses for bail bonds and all of that -- and they agreed to settle that for nineteen hundred dollars. The case was marked off the calendar the 15th of November, and has been restored again until I received

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this notice here yesterday.

Q Yesterday? A Yes, sir , that it is on for tomorrow while this is going on here.

Q What did Altman tell you about Judge Lewis? A He said, "I have had a talk with Harry -- I go up to him and he calls me Harry and I call him Harry, and I simply go up there, and tell him it was a certain transaction, the complainant is away up in Monticello, New York, and does not want to be bothered, they are old time friends, you go into a scrape, and Rosenberg will say something along the same lines and we will get rid of both cases you don't have to worry. So I turned over the nineteen hundred dollars to Mr. Silberman and then Mr. Silberman gave it to Altman. He said he is afraid to take it from me.

Q Both were afraid to take the money from you? A Yes.

Q But they took it? A Yes, sir.

Q Is this the check you gave to Altman on the 10th of March, 1921? A Yes, sir.

(The check referred to is offered in evidence and marked Defendant's Exhibit E and read to the jury.)

(At this point the Court admonished the jury and took a recess until 2 o'clock.)

AFTER RECESS. 2p.m.

HARRY FISHMAN, the defendant resumes the stand.

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DIRECT EXAMINATION CONTINUED BY MR. MARKEWICH:

Q Now Fishman when was the last time you saw Altman?

A November 15th, 1921, in the County Court.

Q As a matter of fact did you go down to the Bar Association of Kings County and complain against Harry H. Altman? A I went down there and inquired for Mr. Bayer, and I didn't meet him, but I was talking with Mr. Bayer's secretary.

Q Did you make a complaint? A Yes, sir.

Objected to. Objection sustained.

MR. MARKEWICH: That is all.

THE WITNESS: By the way, Mr. Markewich, I would like to have it appear on the record that so far as the remarks passed by Harry H. Altman is concerned with regard to Mr. Stephen C. Baldwin of Brooklyn, New York I desire to say that that was wholly untrue, unqualifiedly. I regard Mr. Baldwin as a gentleman of very high reputation, and I really do consider it an honor to have his friendship, that I know him.

Q Did you ever tell Altman that Baldwin was intoxicated or words to that effect? A That is an absolute lie.

Q Did Altman say anything to you about Baldwin the night that you were out with him when you gave him that check?

A Well he happened to pass a few funny little remarks but I did not pay any attention to him.

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Q You are not a lawyer, are you? A No, sir.

Q You say you are an attorney of some kind, admitted to practice in income matters? A Yes, sir.

Q Did you receive any certificate of ^{some} kind for that? A Yes, sir.

Q Where from? A From the Treasury Department, of Washington?

Q As an accountant? A No, sir, I am list among the attorneys.

Q Did you pass an examination for that? A Well I qualified.

Q Have you got that certificate? A I have, sir.

Q Where is it? (Witness produces a certificate.)

Q This is the only certificate you have? A Yes, sir.

Q You never had any other certificate except this?

A Correct.

Q This is dated December 17th, 1921? A Yes, sir; that is right.

Q So you only got this last month? A That is right.

MR. WHALEN: I offer it in evidence.

(Admitted and marked People's Exhibit 7.)

Q Did you get that certificate in order to bear out your statement to Gerstner that you were an attorney? A No, sir the application was made out a long time prior to the time I received it.

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Q When was the application made out? A Oh, several months before that; it takes a few minths before you get it.

Q How many months before? A Oh, a few months I can't say exactly just the time, but several months before.

Q This card is dated december 17th, 1921, was it two months before? A I could not exactly tell you the exact date.

Q You have no idea? A Several months before.

Q Well was it more than three months before? A About that time, I don't know.

Q About three months before? A About that.

Q That would be about August, 1921? A About that time.

Q Now were you acting as any other kind of an attorney except as mentioned in this card? A No, sir.

Q What kind of an accountant are you. Have you any certificate as an accountant? A Yes, sir.

Q Where is that? A I have it in my office.

Q What sort of a certificate is it? A Well a certified public accountant's certificate.

Q A certified public accountant's certificate? A yes.

Q New York State? A No, sir.

Q What State? A Washington.

Q The State of Washington? A The District of Washington, the District of Columbia, Washington, D. C.

Q You are a certified public accountant in the District

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of Columbia? A yes, sir; that's right.

Q When were you made a certified public accountant of the District of Columbia? A Some time last year.

Q When last year? A In September.

Q September, 1921? A Yes, sir, that's right.

Q After the date of this indictment? A Yes, sir.

Q Have you been admitted to practice as an accountant in New York State? A No, sir.

Q Isn't a certificate required? A No, sir; I am a member of the National Association of Cost Accountants in New York State.

Q You are not a registered public accountant of New York State? A No, sir.

Q So your name does not appear among the names of registered C.P.A.'s? A No, sir.

Q Now were you an accountant in April, 1921? A Yes.

Q You had no certificate at that time? A No, sir, but I qualified.

Q Where? A I have been in practice for the last 11 years as a public accountant-- an expert.

Q You are an expert? A Yes, sir.

Q On books and figures? A yes, sir, everything appertaining to accountancy.

Q That means simply through your own course of training? A Oh, I wouldn't say that.

Q You didn't have any diploma or certificate of any

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kind? A I attended and studied at the New York University.

Q Were you graduated? A No, sir.

Q Now did you ever study law there? A yes, sir, a short time.

Q Well, how long? A Well, I did not really make an absolute study of law there, but I just studied privately in conjunction there, a specialty, I took it up with my accountancy.

Q You mean you just had a little commercial law? A That is all.

Q You were not registered in the law school? A No, sir.

Q Boys in High School study commercial law too, don't they? A I studied that at the White School, 15 West 43rd street.

Q How long did you attend the New York University School of Accountancy? A I studied there privately also.

Q You were not registered? A No, sir.

Q You used to practice your profession in the same way in Mr. Baldwin's office? A No, sir.

Q Didn't you go to Baldwin's office and receive telephone calls there, people called you up there? A In connection with a certain matter where Mr. Baldwin was to be retained by a client whom I had introduced Baldwin to-- I was to be the expert accountant in the case, but the matter did not materialize.

Q Didn't you go to Baldwin's office frequently and have people call you up there? A No, sir.

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Q Did you tel people to call you up in Baldwin's office?

A This matter was going on for two or three weeks, but it did not materialize, he certainly phoned me there.

Q So that you didn't even study accountancy at the New York University School of Accounts? A No, sir.

Q What did you mean on the direct examination when you said you attended the New York University School of Accounts?

A I studied privately there; they have several rooms there, and I took it up privately there.

Q You went there yourself and studied privately?

A Yes, sir.

Association

Q You went up to Bar ^A in West 44th street and studied privately there too, didn't you? A No, sir, I didn't study there.

Q Didn't you meet Dr. Crusing up at the Bar Association?

A No, sir.

Q Didn't you tell him to meet you there? A Yes, sir.

Q Didn't you tell him to meet you at the Bar Association in order to give him the impression that you were a lawyer? A No, sir.

Q What do you mean by studying privately at the New York University? A I don't quite understand that? A They have a library there in the accountancy department and in the law department, and any one that buys books there can sit down and read and study if they care to do so.

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Q Anybody can go in there and read? A Yes, sir; any one interested in that particular branch of the profession.

Q That is the way you studied accountancy? A I would not exactly say that. I was in practice as a bookkeeper for a good many years, and afterwards I took up accountancy.

Q The Gerstner Brothers had a place or business right near the New York University School of Accounts? A Yes, sir in Washington Square, yes, sir.

Q So while acting as bookkeeper for them you could go into the New York University and spend awhile in the library? A I didn't go there then; I was completed at that time.

Q Well over how long a period did the course extend that you took privately? A It wasn't exactly a course, but I went there -- it must have been about 11 years ago.

Q Since that time you have been calling yourself an accountant? A Yes, sir, exactly, I have been considered such by very prominent concerns here in New York and other places.

Q Do you know a great many prominent people don't you? A Yes, sir.

Q Do you know Max Steuer? A I do.

Q Didn't you tell Dr. Crusing one night that you had Max Steuer's automobile for use that night? A No, sir.

MR. MARKEWICH: I object to that if your Honor please, as irrelevant and immaterial.

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THE COURT: I will sustain the objection at the present time.

Q Now as a matter of fact Mr. Steuer doesn't know you at all? A I know him.

MR. MARKEWICH: I object to that as immaterial.

THE COURT: Objection sustained.

BY MR. WHALEN:

Q Didn't you falsely tell Dr. Crusing that you were a friend of Max Steuer?

MR. MARKEWICH: I object to that if your Honor please as immaterial and irrelevant to the issues in this case.

THE COURT: Objection sustained..

Q Now for about three months in April, May and June 1921, you hardly ever went to your office. Did you? A I go to my office regularly every day. Most of my work of course, is done outside and I am only there for an hour and towards evening for an hour. My work is done outside. If somebody wants to see me during the day time by appointment I receive them there.

Q Isn't it a fact that you called the office on the telephone and dictated letters over the telephone to your stenographer in order to keep out of the way of Gerstner?

A No, sir.

Q That is not true? A No, sir.

Q Now you testified that you opened a set of books for

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for the Gerstners, and worked for them for about three months?

A Yes, sir.

Q That was five or six years ago? A About that.

Q You testified that they would call you up or come to see you two or three times a month ever since? A That is right.

Q Did you ever do any more work for them after you left them five or six years ago? A Do you mean on their books? No, sir.

Q Did you ever do any work for them? A Yes, sir, afterwards they had some bookkeeper there and a man from an institute in accountancy.

Q Did you see their books? A Yes, sir.

Q Did they ask your advice in respect to those books?
A They were never able, they said, to strike a trial balance, and they were afraid to include in the trial balance what the exact outstandings were on account of the brother to avoid alimony on the part of his wife whom he has not been living with-- that is the difficulty that arose all the time.

Q They came and consulted you about that? A Yes, sir.

Q You said they consulted you about the income tax return?
A yes, sir.

Q What point arose in connection with those income tax returns? A They asked me how they would be able to cover these large sums that were drawn from time to time and

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charged up to entertaining expenses.

Q What were those amounts? A Large amounts about three or four hundred or two hundred dollars all cash, fifty.

Q Mention one amount specifically? A Well, if I had the books I would refresh my memory.

Q Can you remember any amount now? A If I had the books I could tell.

Q If you saw the book you would be able to tell? A Yes, I could tell.

Q Do you remember now any large amount they consulted you about? A There was always several hundred dollars.

Q Mention one specific sum? A I can't remember one sum.

Q You can't remember? A No, sir.

Q If you saw the book in front of you, you could, could you not? A Why it would refresh the entire transaction.

Q You could? A Yes, sir.

Q You testified that when you met David Gerstner on the day you were placed under arrest you had lunch with him that day? A I did not testify to that.

Q Didn't you testify you met him in a restaurant some place? A I testified that he came to my office when I closed up the place and that we both went to the lunch room together. Then he said "That my uncle Rosenberg is right in saying that the only way to get money from you is by having you arrested. I have a good mind to call that offi-

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cer from across the street and have you arrested, and the whole argument took place then and I saw he really meant what he threatened.

Q What did you do with the automobile that day? A I didn't have any automobile.

Q You didn't have any automobile? A No, sir.

Q Do you remember the name of the officer that took you over to the Mercer Street station? A No officer at all.

Q ~~Na w~~ ~~when~~ Did you see Detective Trabucci over at the Mercer Street station? A I did.

Q Didn't you afterwards ride downtown with Trabucci in an automobile? A No, sir, I was ashamed to walk through the streets so we hired a taxicab.

Q A taxicab? A Yes, sir.

Q Isn't it true that you delivered those two checks in the Biltmore Hote, People's Exhibit Nos. 1 and 2? A I delivered those checks?

Q That you received those checks? A No, sir.

Q Where did you receive those checks? A They were both bad, there was only one them that I received at Gerstner's place of business, the two thousand dollars.

Q You receive five hundred dollar's ~~case~~ at the same time? A yes, sir; at the time I turned over my bill of sale to him.

Q Where was that? A At Mr. Gerstner's place.

Q Then on the same day you gave him a check for five

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hundred dollars, and another check for two thousand dollars?

A I gave him the check for five hundred dollars first. I did not have my fountain pen with me, and you will notice this was made out with his fountain pen, and when later on he asked me to give him one for the two thousand dollars for the purpose of quieting his brother you notice this was made out in different ink entirely; they were both given to him the same evening in Lorber's restaurant.

Q At Lorber's? A yes, sir.

Q Why did you make the check for five hundred dollars dated the next day, Saturday, and the check for two thousand dollars, dated the 29th on the same day? A No special reason, just happened to make it out, one for the 29th and one for the 30th; no reason at all.

Q You testified on your direct examination that you told him not to put the five hundred dollar check through until the next day, do you remember testifying to that?

A Well he could not have put it through until the next day.

Q Do you remember testifying to that? A yes, sir.

Q Do you remember saying you told him not to put the five hundred dollar check through until the next day?

A That is right.

Q Well it didn't go through the next day, did it?

A No, sir, he deposited them both a few days later.

Q Do you know when that check was paid? A yes, sir.

Q When was it paid? A It was paid on the 3rd of May.

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Q But there were sufficient available funds in the bank in cash to meet it on the 30th? (No answer.)

Q Now do you know why Mr. Gerstner held this up until May 2nd or 3rd? A Well, he told me he was too busy to go over to the bank, and for that reason he put them through a few days later.

Q Isn't it a fact that you asked him to hold up both those checks until Tuesday morning, May 2nd? A No, sir.

Q Now what was your balance in the American Trust Co. on April 29th. Perhaps that will refresh your memory? A This statement does not indicate what my balance was on the 29th of April.

Q You are an accountant, can't you figure it out? A Well, according to this statement the balance was \$25 on the 25th. It is pretty hard to figure this, for this reason, because this statement does not show the daily balance, but only show the daily deposits and the daily withdrawals.

Q Well, the daily balance is only a matter of computation. Can't you figure that out? A According to this statement then was that Saturday about \$4.52 on the 29th of April.

Q You have not any doubt but that statement is correct then, have you? A I am pretty sure that is correct.

MR. WHALEN: I offer it in evidence.

MR. MARKEWICH: I object to that as immaterial and incompetent.

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THE COURT: He has given the figures. The paper itself is not admissible unless it is proved.

MR. WHALEN: He says the statement is correct.

THE COURT: He says he has no doubt it is.

Q Well was that your correct balance on that day, \$4.52?

A I presume so.

Q What was your balance that day in the Atlantic National Bank? A Very small.

Q How much? A I can't remember; I know it was very small.

Q What was your balance in the National City Bank? A I think it was a couple of hundred dollars.

Q Did you have an account in the Corn Exchange Bank, the Terminal Branch? A I did.

Q What was your account there on March 10th, 1921, or what was your balance? A I can't remember.

Q About what was it, your balance? A I can't remember.

BY THE COURT:

Q On what account are those two checks drawn?

MR. WHALEN: On the American Trust Co.

Q I thought you said a minute ago that on the 30th you had funds there to meet this check, the five hundred dollar check? A Yes, sir, because I made a deposit on the 30th.

BY MR. WHALEN:

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Q You had enough balance out of the Gerstner Bros. check to pay the \$500 check? A Yes, sir.

Q When did you deposit that \$2,000 check of the Gerstners, the next morning? A Yes, sir.

Q You immediately drew out a thousand dollars, didn't you? A No.

Q Well you signed a check for it, didn't you? A Yes, sir, I did that-- that was a debt I owed to some one.

Q To some one else? A Yes, sir, sure, I drew more than a thousand dollars; I drew checks for thirteen or fourteen hundred dollars.

Q The very next day? A No, sir, the same day I received this check when I sold my furniture.

Q Is that your furniture or your wife's furniture?
A Well, I think that it doesn't make any difference whether it is mine or hers; what belongs to me belongs to her; it does not make any difference.

Q Do you remember who you gave that thousand dollars to on April 30th? A I do.

Q Who? A Herman H. Gross.

Q What is his business? A Milk and creamery business 160 South 3rd street, Brooklyn, now.

Q You said you took the Gerstner brothers up to see a client of yours, a Mr. Rapp, is that right? A I didn't say I took them with me.

Q Didn't you tell the Gerstner Brothers that you were

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married to a daughter of Lorber's the restaurant man? A No.

Q Now on June 7th, 1921, the date of this check for \$750, People's Exhibit 4, what was your balance in the Atlantic National Bank? A Very small, probably about the same as it was sometime before that, very small, I didn't have much of a balance there, or else I would have given him the money right away; that is the reason I gave him a post dated check.

Q I show you a check and ask you if you ever saw that before? A Yes, sir.

Q Is that the check Mr. Weiss gave you? A Yes, sir.

Q On December 28th, 1920? A Yes, sir.

Q You deposited that check? A I did not.

Q Did you negotiate that check? A Yes.

Q When? A The following day.

Q You certified it first didn't you? A Yes, sir.

Q You had it certified on December 29, 1920? A Yes, sir.

MR. WHALEN: I offer it in evidence.

(Marked People's Exhibit 8.)

BY THE COURT:

Q What do you mean by negotiating it? A I had somebody cash it for it; that was the loan that Mr. Weiss made to me, and I gave him a note in exchange for it.

(Mr. Whalen reads People's Exhibit 8 to the jury.)

Q Who is Louis Schulenfried? A An attorney at law.

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Q Is he the man who cashed the check for you?

A I accompanied him to the Irving National bank, and it was cashed there.

Q The Irving National? A Yes.

Q In the Woolworth Building? A Yes, sir, in the Woolworth Building.

Q But you had it certified yourself before that morning? A Yes, sir; that is right.

Q Mr. Weiss gave you this check on the evening of December 28th, 1920? A Yes, sir.

Q The next morning you stopped in Brooklyn and got it certified? A Yes, sir.

Q Then later on that same day you had it cashed? A yes.

Q In the Irving National Bank? A Yes, sir.

Q The check you got from Weiss was in payment of these machines? A No, sir.

Q What was it for? A It was a loan, I gave him a note for that, for that particular sum of money.

Q You gave him a note? A Yes, sir.

Q Now I show you Defendant's Exhibit E, and I call your attention to the endorsement on the check. Is that where you usually endorse checks? A yes, sir.

Q On the right hand side? A No particular reason or place where I endorse checks, I turn it over and sometimes I endorse it in the centre or anywhere at all, any part of the check.

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Q Are you right handed or left handed? A Only right-handed.

Q You usually hold a check in your right hand? A Sometimes in the right hand and sometimes in the left.

Q Isn't it a fact that ordinarily a check is endorsed on the reverse side on the left? A No, sir, not necessarily. I can show you hundreds of checks of the New York Telephone Co. where they stamp it right in the corner or anywhere; it does not make any difference.

Q Now you were arrested June 15th, 1921, weren't you?
A I don't remember the exact date.

Q Now didn't you procure \$3150 from Dr. George Crusing of Brooklyn, a dentist on the false representation that you were a lawyer?

MR. MARKEWICH: I object to that if your Honor please as immaterial, irrelevant and incompetent.

Objection overruled. Exception.

THE COURT: A witness on cross examination may be asked as to any other offense he may have committed.

A I did not procure anything from him.

Q Didn't you tell Dr. Crusing you were a lawyer? A No.

Q Did you tell him you were an attorney? A No.

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

Objection overruled. Exception.

Q Didn't you go to Lynnbrook, Long Island on May 27th,

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1921 to have \$3150 delivered to you by a certified check to your order? A No, sir.

Q And afterwards convert that money to your own use?

A No, sir. I would like to see the check.

Q You would? A Yes, sir, with my endorsement, a check of the amount from Mr. Crusing.

Q Didn't you go to Lynnbrook, Long Island with Dr. Crusing and his wife? A Yes.

Q When was that?

MR. MARKEWICH: I object to that as immaterial and incompetent.

THE COURT: It is cross examination.

Exception.

Q When was that? A I think it was a day or two prior to Decoration Day if I am not mistaken.

Q About the 27th of May? A Yes, sir.

Q 1921? A Yes, sir.

Q Dr. Crusing sold a dental establishment down at Lynnbrook that day, didn't he?

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

Objection overruled. Exception.

A Yes, sir.

Q And the money was paid to you? A What money?

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

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Objection overruled. Exception.

THE WITNESS: What do you mean by money?

Q You know what money is, aren't you an expert on money? A What amount of money,

MR. MARKEWICH: I object to that.

THE COURT: yes, he is entitled to know the amount.

Q I will tell you in a moment -- \$1400 cash and \$500 in a certified check? A Yes, sir.

Q That was turned over to you? A Yes, sir.

MR. MARKEWICH: I object to that if your Honor please, on the ground that it is immaterial, irrelevant and incompetent.

THE COURT: It is cross examination, and a witness may be asked as to whether he has been convicted of a crime or has committed any crime. Of course his testimony is binding.

MR. MARKEWICH: These are not questions whether he has been convicted of or committed any crime.

THE COURT: As I understand it they are leading up to what the District Attorney claims was the commission of a crime.

MR. MARKEWICH: It is collateral.

THE COURT: All of it is collateral.

MR. MARKEWICH: And the District Attorney is bound by the answers.

THE COURT: That is right.

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Exception.

Q Then you received \$1900 in cash, \$1400 in cash and \$500 in a certified check to your order? A Yes, sir.

Q Didn't you convert that money to your own use?

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

Objection overruled. Exception.

A No, sir.

Q You also at that time received \$1150 in notes.

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

Objection overruled. Exception.

A Yes, sir.

Q You afterwards turned over the notes to Mr. Andrew Altrug, the attorney for Dr. Crusing?

Objected to. Objection overruled. Exception.

A Yes, sir.

Q When did you pay the money back to Dr. Crusing?

MR. MARKEWICH: I object to that if your Honor please, as being irrelevant, immaterial and incompetent.

THE COURT: I sustain the objection. There is nothing to show he was obligated to pay it back. We said he received the money, but it does not appear in what capacity he received it.

BY MR. WHALEN:

Q Didn't you tell Dr. Crusing you were an attorney,

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and you would handle that transaction for him? A No, sir.

Q Was not that the reason that the money was allowed to be placed in your hands?

Objected to. Objection overruled. Exception.

A No, sir.

Q Didnt you also tell Dr. Crusing you would handle that matter for him without charge?

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

Objection overruled. Exception.

A No, sir.

Q Now you went down to Lynnbrook with an automobile that day? A Not to Lynnbrook, to Hempstead.

Q You stated that was your automobile? A No, sir.

Q Didn't you go with Dr. Crusing to Hempstead, and didn't you take them down in your car, a Pierce-Arrow limousine on May 27th?

MR. MARKEWICH: I object to that on the ground that it is immaterial, irrelevant and incompetent.

Objection overruled. Exception.

A Yes, sir.

Q You did? A Yes, sir.

Q Now didn't you tell Dr. Crusing that you took him out in an automobile that you said belonged to Max Steuer?

A No, sir.

Q Sometime later?

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Objected to. Objection sustained.

Q You finally paid this money back to Dr. Grusing after the lawyer Mr. Louis J. Altrug was pressing you for a month or two?

MR. MARKEWICH: I object to that as immaterial and incompetent.

THE COURT: Objection sustained. It does not appear precisely what the transaction was.

BY MR. WHALEN:

Q Now you have said a great deal about the calendar here practice in this Court. Isn't it a fact that you answered this case yourself every time it had been on the calendar?

Objected to as immaterial. Objection sustained.

Q You knew where these machines of the Peerless Automatic Co. were, did you not? A Yes, sir.

Q Did you take Mr. Weiss to see those machines? A He didn't care to go into that proposition and it was unnecessary
BY THE COURT:

Q Weiss says you told him this business could be bought for \$2500? A No, sir.

Q Did you use this money to buy the business?
A No, sir.

Q He says you told him he would be able to draw \$50 a week out of the business, and have a profit of three or four thousand dollars at the end of the year? A No.

Q You never said anything like that? A No, sir.

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Q He simply gave you the \$2500 as a loan? A No, sir, originally he intended to invest that money in the business, and \$2500 additional, but later on he refused a telegram from his father-in-law.

Q He gave it to you as a loan? A Yes, sir, and I gave him my note for it.

BY MR. WHALEN:

Q Weiss had just gotten out of his garage business?

A No, sir, he was out of it already.

Q He was out of the business? A Yes, sir.

Q Was he anxious to start in business? A Yes, sir.

Q How long was this note to run for? A 60 days.

Q Now isn't it a fact you were trying to get money from Gerstner Bros. in order to pay Weiss? A No, sir.

Q Then didn't you try to get money from Dr. Crusing in order to pay Gerstner and Weiss? A I didn't get any money from Dr. Crusing?

Objected to. Objection sustained.

Q Didn't you also get money by fraudulent means from some man in the jewelry business in Brooklyn?

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

Objection overruled. Exception.

A No, sir.

Q You did not? A No, sir.

MR. MARKEWICH: Will the District Attorney be kind enough to mention the name of the man when he asks such

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knew about the Rosenberg matter, and that they would do something? A Well there were so many conversations we had with regard to the Weiss transaction and later on with the Rosenberg transaction that I could not remember those, and I cannot be particular on such matters, but certainly it must have been said when I was out on bail or else the conversation would not have arisen.

Q So that your memory is not very distinct as to when the conversation took place? A Yes, sir, it is distinct; surely it I remember now that took place after I was out on bail.

BY THE COURT:

Q Did you keep a copy of this bill of sale that you gave to Gerstner? A No, sir, he made it out on one of his own blanks, and there is no copy of it.

Q Where did you get this notary? A He went out and said he will call a notary from the neighborhood; I don't know who the man was. He introduced him to me and he took my acknowledgment.

Q Did you ever have any inventory of the furniture?
A Everything was listed by the Gerstners themselves.

Q Did you have an inventory of your own? A Yes, sir.

Q Where is that? A Well Mr. Gerstner and myself--

Q He made that out? A Yes, sir.

Q Did you ever have one of your own? A No, sir, it was the one he made out.

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Q Did you have this furniture insured? A Yes, sir by Samuel J. Tompton.

Q It was insured? A Yes, sir.

Q When was that? A A short time after we moved into the premises, that was in December, I think it was.

Q December 1920? A A \$5,000 policy.

Q 1920 or 1921? A 1920 I guess it was,-- 1917 I should say.

Q Sure it was 1917? A Yes, sir.

Q What company? A Samuel J. Tompton, 134 Broadway, Brooklyn.

Q He was the agent of the company? A The agent-- I don't remember the name of the company.

Q How much was it? A \$5,000.

Q Where is that policy? A I got that in the vault of the Irving Trust Co. in the Woolworth Building.

BY MR. WHALEN:

Q Now all of these checks, Defendant's Exhibit A and people's Exhibit 3, 4 and 6, all these four checks given by you are bad, aren't they? A Do you include this check?

Q No, that is a mistake. A Do you include this check?

Q Yes. A That was a postdated check.

Q You know what a post dated check means don't you, you know there is no criminal liability on a post dated check?

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✓
Objected to. Objection overruled. Exception.

A Of course I do.

Q You knew that you could not be held criminally liable for that check, post dated, didn't you? A Well, there was no crime ever committed, that I should have felt I would be criminally liable for. There are a lot of business men who give post dated checks, I receive them myself at times from very big business people that I do business with.

Q Now these three checks, People's Exhibits 3, 4, and 6, Exhibit E? A Yes, sir.

Q None of those checks were good at the time they were issued, on the date of issuance? A No, sir.

Q This post dated check People's Exhibit 4 was not good on June 7th, the date of the check? A He was informed the day before it would not be good.

Q Was it good? A No, sir, it was not good.

Q The only one of those four checks that was good was this check for \$500 which was paid out of David Gerstner's own funds? A Paid out my funds; it was my money after the furniture was sold; it was my money; he bought my furniture and I paid my money, not his money.

Q It was paid out of the proceeds of his two thousand dollar check? A Yes, sir, for the sale of my furniture.

Q Did you deposit it in your bank the next morning?

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A Yes, sir.

Q Now you claim that Rudolph Weiss, that you gave Rudolph Weiss a note? A Yes, sir.

Q For that \$2500? A Yes, sir.

Q You claim that you gave Gerstner brothers, a bill of sale? A Yes, sir.

Q Have you any explanation you care to make about this Gerstner matter?

^{Mr}
MR. KEWICH: I object to that as immaterial, irrelevant and incompetent.

Objection sustained.

RE DIRECT EXAMINATION BY MR. MARKEWICH:

Q Did you represent yourself to anybody as a lawyer?

A No, sir, I never did.

Q Did you represent yourself as a lawyer to Mr. Gerstner? A No, sir, as a matter of fact--

Q Did you represent yourself as a lawyer to Mr. Weiss?

A No, sir.

Q It was testified to by Gerstner that on a certain occasion you took him up to an apartment house, and told him a man by the name of Ryan had the furniture and that Ryan was out at the time? A We did not go up there.

Q Did you go with him to Ryan's place? A Yes, sir, but not for that purpose. I went up to Ryan at 409 Edgcombe avenue and inquired for Mr. Ryan intended to get a loan from him to pay them back their money; I was told that Mr.

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Ryan was at Lakewood, and they were with me and they heard that answer downstairs by the telephone operator-- Ryan don't answer, as a matter of fact he is out in Lakewood.

BY MR. WHALEN:

Q Before going up there that night you telephoned up there to Ryan, didn't you? A No, sir.

Q To whom did you telephone to at 9300 Audubon? A Nobody.

Q You just went up there on a chance? A Mr. Gerstner hired a taxicab and we went right up there, it only took up a short time.

Q Didn't you find some place and say this man is home and you would go and get the money? A No, sir.

Q Didn't you take the Gerstners up there because you knew the man wasn't home? A No, sir.

Q Now this furniture that you have spoken about was never in New York at all, was it? A No, sir.

Q It was always in Brooklyn? A That is right.

Q There was nobody at the Biltmore that had any furniture that you knew about? A I never went to the Biltmore.

Q Did you know anybody in the Biltmore that had any furniture for sale? A No, sir.

THE COURT: Gentlemen of the jury at the request of the defendant's attorney who says that some of his witnesses have not appeared I will take an adjournment now.

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(The Court then admonished the jury calling their attention to Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case until tomorrow, Tuesday morning, January 10th, 1922, at 10.30 o'clock.)

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New York, January 10, 1922.

(TRIAL RESUMED.)

MR. MARKEWICH: By consent of the District Attorney I offer these two policies in evidence.

Admitted and marked Defendant's Exhibits F and G.

MR. MARKEWICH: I also offer in evidence this storage bill.

Marked Defendant's Exhibit H.

B E R N A R D R A P P, a witness called on behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR MARKEWICH:

Q Where do you live? A 152 Lenox avenue.

Q What is your business? A Manufacturer of dresses.

Q In partnership with anybody? A No, sir.

Q Were you in partnership in the dressmaking business in the month of April and May, 1921? A Yes, sir.

Q With whom? A With a partner by the name of Eisner.

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

Q In the latter part of April, 1921, did Fishman apply to you for a loan of \$3500? A Yes, sir.

Q Did you promise to make that loan to him? A Yes, sir.

Q Did you make that loan to him? A No, sir.

Q The defendant kept books for you at that time or did accountancy work for your firm? A Not exactly at that time, at that time he did not, but prior to that time when I was

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in business for myself without having a partner. 274

Q Doing accountancy work for you now? A Yes, sir.

(No cross examination.)

MR. MARKEWICH: That is the defendant's case.

R E B U T T A L.

R U D O L P H W E I S S, a witness for the People, recalled in rebuttal.

BY MR. WHALSH:

Q Mr. Weiss, did you on December 28th, 1920 or subsequently receive a promissory note from the defendant Harry Fishman? A No, sir.

Q Never received any note of any kind? A No, sir.

BY MR. MARKEWICH:

Q By the way you know a barber by the name of Joseph Portonova? A No, sir.

Q Do you know a girl named Lillian Greenberg? A No, sir.

Q Didn't you take a girl named Lillian Greenberg to the barber shop of Portonova in Stanton street and ruin her and put her in a house of prostitution in 18th street? A No.

Q Do you remember an occasion when the 18th street house of prostitution was raided? A No, sir, I don't know Lillian or anybody by that name.

Q In the case on which you were convicted what was the name of the girl in that case? A Annie Weinstein.

Q Didn't you have another incident with a girl named Lillian greenberg? A No, sir, I was only 16 years old at that time.

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Q You don't know about Lillian Greenberg? A No, sir.

Q Which happened only recently? A No, sir.

DAVID GERSTNER, a witness for the People,
recalled in rebuttal.

BY MR. WHALEN:

Q Did you ever go to 133 St. James Place, the defendant's home to see any furniture? A I did not.

Q Wasn't that all asked on cross examination?

MR. MARKEWICH: I am pretty sure he was asked that.

THE COURT: There is no use in putting him on to answer the same questions. He has already answered that.

MR. WHALEN: The defendant in his defense said he paid a number of visits for the inspection of that furniture.

THE COURT: If on cross examination he has already stated that he did nothing there there is no use in having him repeat it. If he was not asked those questions then it is proper to ask him now. The question is was he asked? You can put it to him briefly.

Q Did you ever go to the defendant's house? A I did.

Q How many times? A Once.

Q Do you remember when that was?

MR. MARKEWICH: I object to that if your Honor please as already answered.

THE COURT: Yes, I think he said he went with an officer once.

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THE WITNESS: Yes, sir.

THE COURT: He has already said that.

Q You went with an officer? A Yes, sir.

Q Did you ever hire this defendant to do any work on your books after the time they worked for you six years ago?

A I did not.

Q Did you ever call him up on the telephone? A I did not.

Q You never consulted him at all on any matter whatsoever with reference to any income tax? A No, sir.

(TESTIMONY CLOSED.)

MR. MARKEWICH: I move to dismiss on the ground that the People have failed to establish a case.

THE COURT: Motion denied. Exception.

MR. MARKEWICH: I move for a direction of an acquittal upon the ground that it appears affirmatively by the testimony of the People's witnesses that the check given by the defendant in this case which forms the basis of the larceny was promissory in its nature, and that the complainant had agreed to hold that and not deposit it for a short while.

Motion denied. Exception.

Mr. Markewich closes the case on behalf of the defendant.

Mr. Whalen closes the case on behalf of the People.

(The Court takes a recess until 2 p.m.)

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AFTER RECESS.
2 p.m.

THE COURT'S CHARGE.

NOTT, J.- Gentlemen of the jury:

This defendant has been indicted by the Grand Jury of this County charged with the crime of grand larceny in the first degree, that is to say, charged with the larceny of an amount of money exceeding five hundred dollars in value. If an amount of that size is taken by means of a larceny that constitutes grand larceny in the first degree, the amount being over five hundred dollars.

The indictment alleges that the defendant, in this County, on the 29th day of April in the year 1921, did feloniously steal, take and carry away a written instrument, an evidence of debt, towit, an order for the payment of money of the kind commonly called a bank check of the value of two thousand dollars. The indictment also alleges the larceny of two thousand dollars but that I shall not submit to you because on the facts in this case if a larceny was committed it was the larceny of a check. The indictment alleges that the check was the personal property of one David Gerstner. Whether the defendant on that day did unlawfully steal, take and carry away that check from Gerstner is the issue that you have to decide in the case here.

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Before I come to explain to you the crime of larceny in the particular form set forth in the indictment on the proof put in by the People in their case it is necessary for me to charge you on several general principles of law that apply to all criminal cases and which the jury must have in mind in considering the evidence of a particular crime. In the first place the law requires that I shall charge you that you are the sole and exclusive judges of the facts of this case in order that you may understand your powers and duties and jurisdiction. You sit as judges of the facts exactly as much as I sit as a Judge of the law. You are just as much a judge as I am exactly, or as much as any Judge who ever sits in any case. And it is for that reason that I have been compelled by law to admonish you on every adjournment of the Court to keep your minds in suspension, merely to store your memories with the facts, to keep your judgment in suspension until you hear the whole case so that you may be in a position to intelligently, and in a judicial frame of mind, take up the evidence. The first requisite of every Judge, whether he be a Judge of the facts or a Judge of the law, is to have a fair and impartial mind, a mind not affected in the case by sympathy or by prejudice either way, a mind desirous only of ascertaining what the truth is and then establishing the truth by a righteous and just judgment.

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That is the underlying qualification of every Judge and it should be your qualification as much as that of any Judge who sits in a case. You are not in this case to allow prejudice or sympathy to mar your judgment or to affect the judgment that you render. You are here as judges of the facts to determine what happened, what the truth was. Now what has happened has happened; nothing can change it; no sympathy can change it, no prejudice can change it. The facts which happened on that day are in the past and are beyond recall and you are only to determine what they are and then apply the law to those facts and render a verdict in accordance with them and not contrary to them. As judges of the facts a very important part of your duty is to pass on the credibility of witnesses, for that you alone can do. In this case, as in most criminal cases, when you have come to a conclusion as to who is telling you the truth and who, if any one, has not, you have gone a long way towards reaching a proper verdict. The law does not anticipate in judging witnesses that you are going to leave behind you those common sense every day tests that you use in your business affairs. You have been called here from your different businesses for the express purpose -- not of leaving behind your common sense but bringing it with you into the jury box and into the jury room and applying those tests that you use

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every day successfully in your own affairs. You saw the witnesses on the stand; you heard them subjected to lengthy cross examination; you have had an opportunity of using your judgment of human nature in making up your minds what sort of persons they are. You have listened to the way they answered questions, you heard the stories they told. It is for you to say whether the manner in which they gave their testimony and their testimony itself convinces you of its truth or otherwise, whether their story is improbable or probable, whether it accords with your experience of what men do in like circumstances. You should also take into consideration the motive or interest that any witness on either side may have to depart from the truth or to adhere to it. Naturally any common sense man in hearing the story of another takes into consideration whether he has anything to gain by having that story believed; in other words whether he is an interested witness or not. That is a matter always to be considered carefully. It does not follow that because a witness is interested that he must necessarily be falsifying. That would be a very violent assumption but still a man of prudence always takes that into consideration as one of the factors to consider in making up his mind as to the truthfulness of their testimony. In this case, gentlemen, while

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my opinion should not bind you necessarily because you are the sole judges of the facts -- it is difficult for me to see how the testimony of all these witnesses who testified before you can be reconciled. Where it is possible to reconcile testimony, imputing perjury to no one, that should be done. If you can do that in this case it should be done, but as I say, it is difficult for me personally to see how it can be done in this case. If you find that from the direct contradiction of evidence in this case perjury must have been committed somewhere that adds an important feature to the case. It is certainly a matter of great concern that no verdict should be obtained, either way, on perjured testimony. On the one hand no man should be sent to prison on^a concocted and manufactured story made up of whole cloth against him. On the other hand it is equally important that if a man has committed a crime he should not cheat justice and escape the consequences of it through deceiving the Court and jury by the interposition of a false and perjured defense. Therefore, looking at the matter from either angle you see the importance of reaching a just verdict if perjured testimony has been delivered so that a court of justice shall not become a vehicle of injustice but that the wells of justice may be kept pure and naught but justice flow

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therefrom. Therefore I trust that this case will receive your conscientious consideration in every particular and that, as I said before, you will lay aside every vestige of sympathy or prejudice in making up your minds where the truth is. It appears that one witness for the People has hitherto, on his own admission, been convicted of the offense of abduction. The law allows that previous record to be put in evidence. If a witness says that he has been convicted of a crime that may be considered by the jury on the question of his veracity. It does not mean that the jury must throw his testimony out; otherwise there would be no use in putting him on the stand. The law leaves it to the good sense of the jury, in every case, to make up their minds how much that prior conviction affects his veracity. This witness, Weiss testifies that when he was sixteen years of age he was convicted of abducting some girl who, he says, ^{was} about the same age as himself, sixteen or seventeen years of age, and that he was sent to the Reformatory. That is to be considered by you on the question of his veracity, not his morality, his sexual morality but his veracity. If you think that affects his veracity as a witness you should give it the effect it ought to receive. If you think it does not you should not use it against him on the question as to whether or not

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he is a truthful witness; that is entirely within your jurisdiction.

Under our system of law the burden of proving guilt lies on the prosecution. Our law says that where an accusation is made the person who makes the accusation must make good on it and prove his case; in other words the defendant is not charged with the burden of clearing himself but the people who have accused him have the burden of proving him guilty; in other words he is presumed to be innocent until his guilt is proved. And the law says that his guilt is not to be taken as proved until proved beyond a reasonable doubt, that is to say, if a reasonable doubt of his guilt exists the benefit of that doubt goes to the defendant and entitles him to an acquittal. A reasonable doubt, gentlemen, means just what those two words say. It does not mean an unreasonable doubt. When you prove a man guilty beyond a reasonable doubt it is not the same thing as having to prove him guilty beyond every imaginable doubt. The mind of man can always imagine a doubt on every proposition that comes up. A doubt can always be conceived; a doubt is nearly always possible and, therefore, if the law said that a case had to be proved beyond every imaginable or possible doubt why the law might as well give no cause of action because that would be an impossible

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thing to do. The law never requires impossibilities; it only requires what is reasonable. It says what is a reasonable burden of proof by requiring a man to be proven guilty beyond a reasonable doubt. That is to say he must be proved guilty not to an absolute certainty, not to a mathematical certainty but to a reasonable certainty, such reasonable certainty as you would feel justified in acting on if you had to act on it in your own weighty and important affairs of life. Therefore, in this case, if a reasonable doubt as to this defendant's guilt remains he is entitled to the benefit of it and to an acquittal; but if he is proven guilty beyond a reasonable doubt then he is guilty in the eye of the law and should be convicted.

There is one other matter, gentlemen, that I wish to bring to your attention before defining to you the crime of larceny. A great deal of testimony has gotten into the case, in one way or another, on the subject of the re-payment of this money by the defendant subsequent to his indictment and shortly before the trial of this action. Now, gentlemen, you must keep firmly in mind this fact -- this is not an action brought by Gerstner against Fishman,, that is not the way this action is entitled, it is not the case of Gerstner against Fishman, it is the case of the People ^{q21} ~~against~~ the State of New York

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against Fishman. If this were an action by Gerstner to recover these funds why, of course, the re-payment would be a good defense if made any time before trial. The defense of payment could be set up but that is not the case here. This is an action by the People of the State charging the defendant with a larceny committed on April 29th. The Gerstners are merely witnesses in this case; they are not parties to the action at all; they are merely witnesses. Whether they want the case to go on or do not want it to go on is just as immaterial as whether any other witness in the case does or does not want it to go on. The parties plaintiff is the People and it is their action and, therefore, you can easily see from that that the question is was a larceny committed? If a larceny was committed on April 29th the subsequent dealings between these parties in the matter of payment or re-payment would be immaterial, if the payment was made subsequent to the indictment. Therefore, you are to consider this question: Was this defendant guilty of the commission of a larceny on April 29th? If he was, the fact that he may subsequently have seen fit to repay this money is not a defense and does not entitle him to an acquittal. On the other hand if he did not commit a larceny on that day why he is entitled to an acquittal even if he did not repay

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the money. Therefore the payment of this money is only to be considered by you on the question as to whether or not it throws any light on the fact of his guilt or his innocence. The defense claims that the payment of this money shows that the witnesses for the people were animated by corrupt motives, merely to get their money back regardless of the truth in the matter, that this is a concocted scheme on their part to give false testimony in order to compel the re-payment of this money. On the other hand the People's contention is that if the defendant's contention were true, if he really had sold his own furniture to the Gerstners and merely had consented to take it back as an accommodation to them he never would have felt obliged to repay the money at all. The people's contention is that the repayment of that money is evidence of a guilty conscience on his part and a desire to escape the consequences of his act. These two considerations must be weighed by you as to whether or not they throw light on this situation, but you must recall the fact that it is merely for that purpose it was put in evidence and that the re-payment is not, in itself, a defense. Because if a larceny was committed the subsequent re-payment is immaterial, and you can easily see why that would be so. If a person who commits a larceny were allowed to wait until he thought he was

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going to be tried and convicted and then return the money and that would be a defense why larceny would be as safe as any other business that you could imagine. A man could steal money and if he was not caught he would get the benefit of it; if he were caught all that he would have to do would be to return the money and he would be safe. That would be a monstrous proposition and, therefore, you see the reason for the rule that you must consider the case on the facts as of the 29th of April. As to the right of the parties to take this money, the law says, that "A person who takes money or other property or gratuity or reward upon any agreement or understanding, express or implied, to compound, a crime or to abstain from, or conceal or delay the prosecution or to withhold any evidence is guilty of compounding a crime." The law does not say that a man cannot take his money back if offered to him if he makes no such agreement; in other words a man always has a right to accept the return of what is his if it has been stolen from him. He commits no offense in doing so if he makes no agreement to conceal a crime or abstain from prosecuting or withhold evidence. Therefore, in this case, if this man Gerstner were offered this money and took it, without making any such agreement as that, he was within his rights and had a

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perfect right to take his money back as much as you would have to take any money that was owed you. But if he made any corrupt agreement to abstain from prosecuting the case or to absent himself as a witness, or delay or obstruct the prosecution then he would have been guilty of an offense in so doing. I am not aware that any claim is made here that he did make such agreement. The defendant, by his counsel, complains that the case was prosecuted after the taking of this money. As I say, he had a right to take the money if he made no corrupt agreement over it, and the fact as to whether a larceny was committed or not was ^{not} affected thereby. Therefore, in considering the fact of the return of this money you are to consider whether or not the Gerstners, or David Gerstner, committed any offense in taking it. If he did not then you are to consider the payment of the money in what ever light you deem it casts over this whole transaction.

Now with these preliminary matters explained to you I will define what form of larceny applies to this case.

"A person who with intent to deprive or defraud the true owner of his property or to appropriate the property to the use of the taker, takes from the possession of the true owner, or obtains from such possession

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by color or aid of fraudulent or false representations or any false token or writing, any personal property, money, evidence of debt of any sort, steals such property and is guilty of larceny."

The most material words in that definition I will read once more "A person who with intent to deprive or defraud the true owner of his property or to appropriate the same to the use of the taker takes from the possession of the true owner any money, or evidence of debt or property of any sort steals such property and is guilty of larceny". That is the definition of what is known as common law larceny. Under that definition a man must do a certain act with a certain intent in his mind, namely, he must take from the possession of the true owner certain property. That is the act. He must have in his mind an intent to defraud the true owner of his property when he takes it. That is the intent. Now as common law larceny is generally met with in court the taking from the possession of the true owner is done without the true owner's consent or knowledge. For instance, if a man picks your pocket of money he does it without your knowledge or consent. That is the taking which is presented in the ordinary case of common law larceny. But the law says that when a person instead of taking without the knowledge or consent

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of the owner takes with his knowledge and consent, ^{and} obtains that consent by trick and device, that is equivalent to taking it without his consent, that is the fraudulent trick and device takes the place of taking without consent. And the law requires one other feature in such a case, and that is that the trick and device should be used to get the property into the possession of the defendant, not as his absolute property but to hold it or do something with it, or use it for the benefit of the owner. Therefore, in this case, you are to make up your minds, gentlemen, whether this defendant obtained an evidence of debt as set forth in the indictment, namely, a certified bank check from the complaining witness. If he did, did he obtain it by means of a fraudulent trick and device. Was the consent of the owner in giving up the check induced by means of a fraudulent trick of some sort and a device. If so, then was the money paid over to the defendant not as his own property but to hold in some way as the agent of the owner and for his benefit. The People's claim is that the defendant in this case claimed that he had a certain party who wanted to sell furniture and that by a fraudulent trick and device, his representing himself as an attorney, ^{as} a well to do man, and having this client who really did

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not exist at all induced Gerstner to turn over to him voluntarily this check, and that the defendant was to hold this check and show it to the client as evidence that he had a bona fide purchaser and was not to use it until the Gerstners had seen this property and made up their minds to buy it. You are to say whether that is proved or not. In other words did this defendant obtain an evidence of debt of more than five hundred dollars in value from the owner of the check by means of a trick and fraudulent device and got it into his hands for the ostensible purpose of holding it for the benefit, as I say, of the owner? If he did then he stole that check. If he did not or if there is reasonable doubt on that question then he is not guilty.

Now there is one other thing, as a matter of law, that I must instruct you on. I spoke to you of it earlier in the case when the evidence was first adduced as to this Weiss transaction. That was sometime ago and I think I should call it to your attention again as a rule of law appertaining to what is known as similar transactions. I think that I can illustrate most simply to you the reason of that rule by taking one of the class of cases to which it applies, namely that of passing counterfeit money. Suppose a man is on trial for

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passing a counterfeit ten dollar bill and the only thing that the prosecution have against him is that he did pass on one occasion one counterfeit ten dollar bill. He sets up the defense not that he didn't pass it, he admits that he passed that bill but he says "I had no fraudulent intent because I did not know it was counterfeit". If that is true it is a good defense because a fraudulent intent must be present in passing counterfeit money. As I say if that is the only instance that the prosecution had that makes one sort of a case to submit to a jury. But the law says that in that case the prosecution may show that on a prior occasion, reasonably near in point of time, the defendant passed other similar ten dollar counterfeit bills. The law does not say that that may be done for the purpose of proving that because he passed one bill he must have passed the other. The prosecution have got to show that he passed that bill, as a physical act, they have to show that he actually took that bill and passed the bill that he is being tried on, no matter how many similar instances they put in, but on the question of his intent, whether he knew it was counterfeit, they may put in those similar instances and have the jury make up its mind whether or not the fact that he passed other similar counterfeit bills at about the

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same time throws any light on whether he knew he was passing a counterfeit bill on the day in question. That, in simply form, is the same principle that applies to this Weiss transaction. As I before told you the People are not allowed to put that in on the theory that if the defendant cheated Weiss that shows that he cheated Gerstner. The People have got to prove that. But improving that he cheated Gerstner they have got to prove that he had a fraudulent intent, that this was not a bona fide business transaction carried on in good faith, but that he meant to do what he did. On that question of intent, therefore, the People are allowed to prove, if they can, that at about the same time, or reasonably connected in point of time, the defendant did the same or substantially the same thing to somebody else on the question as to what his intent was and whether he knew what he was doing with Gerstner at the time. Therefore, you, as a I say, should not consider the Weiss transaction as proof in itself, of any guilt in the Gerstner transaction but you may consider it on the question as to whether or not he had a fraudulent intent, whether this was fraudulent trick or a bona fide business transaction that was in his mind when he dealt with Gerstner. Now, of course, the first thing for you to

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do is to determine what was the nature of the Weiss transaction. The defendant claims that that also was a bona fide and honest transaction. If it was why then it proves nothing on the question of fraudulent intent, but if you find that the defendant fraudulently induced Weiss to part with his money by getting it into his possession to invest for him in a certain business and instead of so investing it he appropriated it to his own use then you will consider whether in the Gerstner transaction his intent was honest or not, and whether it throws any light on the honesty of his intent. Of course, the defendant says that this Weiss transaction was nothing but a loan made to him on his promissory note by Weiss, that Weiss did not expect him to invest that money in this business, did not give it to him for the purpose, or at least, after he had given it to him he consented that that transaction should become a loan on his promissory note. On the other hand Weiss insists that he was told that this whole business could be purchased for twenty five hundred dollars, that representations were made as to the whereabouts of these machines and so forth, and that the money was given for that purpose and instead of being so used was misappropriated by the defendant. You are to determine what the truth of the Weiss

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transaction is and then, as I say, apply that under the rules I have laid down in making up your minds whether it throws any light on the Gerstner transaction.

That, gentlemen, I think comprises the points of law that are applicable to the case.

As to the facts I am not going into them at any length because you are the sole judges of the facts and you have heard them recently summed up. Merely to summarize -- the People's contention, as I understand it, is that the defendant, who had previously been known to the Gerstners, called upon them and expatiated on his success in life. He said he was a public accountant, a lawyer, owned real estate and a handsome car, and so forth, and finally said that he had a rich client who because of peculiar circumstances wished to part with furniture that was reasonably worth \$18,000 for a sum that he thought would not be over \$2500; that there was no use seeing this man until he could assure him that he had a bona fide purchaser; that he wished them, if they were interested in the transaction, to let him have a certified check that he could show to this contemplated vendor to convince the latter that there was a real purchaser; that he subsequently induced them to give him a further sum of five hundred dollars in cash for the same purpose. That is denied in toto by the defendant who says that

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never happened. There is therefore, an issue of veracity. The two Gerstners say they were taken to the Hotel Biltmore, that they waited up there part of the afternoon. The defendant says that never happened, they were not taken there at all, but they were taken to his home in Brooklyn. They, in their turn, deny that. The People's claim is that the defendant got this check under a false representation merely to show it for that purpose and keep it until they had an opportunity to inspect this furniture. The People's claim is that the defendant misappropriated the proceeds of that check, that instead of holding it he deposited it at once, the next day, in his own bank and used the proceeds for his own benefit. They claim that two checks were obtained from him, uncertified, as something for them to hold in the way of a receipt to secure themselves for the check which he took away from their possession. Those checks they testify were deposited and never were paid. The defendant's story is that he had furniture of a substantial amount in his apartment and that he agreed to sell it and they agreed to buy it; that he took them over for that purpose or at least he took David Gerstner over and that the money was paid for the furniture, two thousand dollars. He says that the other brother came over later in the afternoon

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and expressed dissatisfaction with this bargain. His defense is that the contract of sale he consented to rescind. Of course, there was no legal obligation on him to do so, he didn't have to rescind that contract simply because they did not like it. He says that out of good nature he agreed to rescind it and re-pay back this money although he had already drawn on it for his own use. It is for you to consider whether that is so or not. He says that he had paid out a thousand dollars of that money the next day, but that he consented that the contract of sale should be abrogated, and he agreed to pay the money back and that afterwards he went through great annoyance and trouble of all sorts to get this money and finally did get it and re-paid it after his indictment. All these facts, gentlemen, you are to take into consideration in making up your minds as to the truth of the case.

As I said before I trust you will give the case your serious attention without prejudice or sympathy in a most earnest endeavor to find out what really happened, and where the truth lies, and whether the defendant is the victim of false testimony on the part of the two Gerstners, Weiss, Rosenberg and Altman or whether on the other hand the defendant has cheated and

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defrauded those two men and he and his wife have offered false testimony to avoid the consequences of his act.

Your verdict, gentlemen, will be either guilty as charged in the indictment or not guilty.

MR. MARKEWICH: Your Honor, I believe inadvertently stated that these checks were deposited and not paid. I call your attention to the fact that the evidence shows that one check was paid.

THE COURT: Yes, that is correct. The five hundred dollar check was paid, and the two thousand dollar check was not paid.

MR. MARKEWICH: I respectfully except to that portion of your Honor's charge that the People claim that the re-payment of the money is evidence of consciousness of guilt.

THE COURT: I did not say that that is evidence of consciousness of guilt. I was then calling to the attention of the jury the opposing claims made by the defense and the people as to the re-payment of the money.

MR. MARKEWICH: I respectfully ask your Honor to charge that the defendant is not on trial under that section of the law that makes it a crime to obtain money for merchandise with bad checks.

THE COURT: Yes, that is so;

MR. MARKEWICH: And the defendant ^{that} had a legal right

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to draw a check for three thousand dollars on his own account, even if he did not have sufficient funds to meet it, so long as it was not done for the purpose of defrauding any one.

THE COURT: I so charge.

MR. MARKEWICH: I also ask your Honor to charge the jury that even if they believe the defendant is a trickster, to use the common parlance, yet if he is not guilty of this offense they must acquit him.

THE COURT: I so charge.

MR. MARKEWICH: I ask your Honor to charge that the failure of the prosecution to call the police officer may be considered by the jury.

THE COURT: I so charge.

MR. MARKEWICH: And also that the failure on the part of the complainant to report the alleged commission of a crime to the proper authorities within a reasonable time is an element to be considered by them.

THE COURT: I so charge.

MR. MARKEWICH: I ask your Honor to charge the jury that if the jury believe that the complaining witnesses or their counsel were engaged in an act of compounding a crime that it is for them to say how much credence they will give to their story.

THE COURT: I so charge.

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MR. MARKEWICH: I ask your Honor to charge that if the evidence is evenly balanced they must acquit the defendant.

THE COURT: I so charge.

MR. MARKEWICH: I ask your Honor to charge that your Honor in ruling on questions of law and in your denial of defendant's motion to dismiss the indictment and acquit the defendant must not be regard^{ed} by the jury as indicating any opinion of the Court on the facts.

THE COURT: I so charge. Those rulings were simply on questions of law, deciding that there was an issue of fact that must be submitted to the jury.

Mr. Markewich
~~THE COURT:~~ I ask your Honor to charge that it is for the jury to say, in the first place, whether Weiss was cheated and, secondly, even if he was cheated if the jury believe that in this case Gerstner had bought the defendant's furniture they must acquit the defendant.

THE COURT: I so charge.

MR. MARKEWICH: I ask your Honor to charge the jury that if the jury after a final analysis of all the facts, believe that the complainant bought the defendant's furniture they must acquit the defendant regardless of all the other circumstances in the case.

THE COURT: Yes. If this was a sale by the defendant

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to Gerstner of his furniture of course that constitutes no crime.

MR. MARKEWICH: I ask your Honor to charge that the jury must consider the defendant's own endorsement or writing on the check in evidence.

THE COURT: They should consider that with all the other evidence in the case.

(By consent the jury are allowed to take the exhibits in the case.)

(The jury return a verdict finding the defendant guilty as charged in the indictment.)

THE COURT: You may reserve your motions until Friday.

(Defendant remanded until Friday, January 13th, 1922.)

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COURT OF GENERAL SESSIONS OF THE PEACE.

CITY AND COUNTY OF NEW YORK. PART IV.

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

Before:

-against-

: HON. CHARLES C. NOTT, J.

H A R R Y F I S H M A N. :

:
-----X

Indictment filed August 17, 1921.

Indicted for grand larceny in the first degree.

New York, January 27, 1922.

MR. MARKEWICH: If your Honor please I move to set aside the verdict of the jury upon the ground that the verdict is against the weight of evidence, contrary to the facts, contrary to law, and upon all the grounds set forth in the Code of Criminal Procedure and the Civil Practice Act applicable to motions of this kind.

Motion denied. Ex_ception.

MR. MARKEWICH: I want to say, if your Honor please, that as far as sentence is concerned in this case that I do not know what your Honor's disposition in this matter is, but it seems to me this is not a case in which a long sentence should be imposed. All the complaints that your Honor has received seemed to indicate that this man did not receive any financial benefit from any one of them; he

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did return the money, I believe, in every one of these complaints or every one of these cases. In some instances he did it after complaints were made and in some he did it before complaints were made but it was not at all a profitable venture for him. He did impress me as acting peculiar in these things. It is probable that he had a certain mania, I don't know whether it has been designated by any name, perhaps it was to try and show how much brighter he is than some of his victims, and after he succeeded in accomplishing that why he is satisfied to return the money. Even in the case at bar this man has returned every dollar that he had taken from the complainant. I suppose that the jury's verdict is a finding on the facts. There was always a serious doubt in my mind as to whether the transaction had actually taken place as alleged by the complainant. Such a doubt has been left on my mind. The old saying that when the ox is down the butchers are many. I have been informed that after the conviction the complaints came to your Honor's chambers at the rate of about one or two a day and that doesn't make it anything too pleasant for the defendant. I shall ask your Honor in view of all the circumstances brought out on the trial in this case and in view of the fact that the man has returned the money and in view of the fact that he has a wife and child who after all will be the ultimate sufferers in this case and in view of the fact that the jury

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has not been able to agree and that they recommended mercy to your Honor, as a compromise, perhaps, I will ask your Honor to take all these things into consideration and be as lenient and as merciful with this defendant as you possibly can.

THE COURT: In this case the defendant after what I regard as a perfectly fair trial was convicted by the jury of grand larceny in the first degree, the evidence being that he had stolen the sum of two thousand dollars by trick and device from the complaining witness. In rendering the verdict the jury coupled with that ~~jury~~ a recommendation to leniency. I always regard these recommendations unless a case develops where facts are unearthed after the verdict that the jurors were ignorant of. In this case, as counsel has stated, I have received a large number of complaints which I have had reduced to writing to be filed with the record in the case. They certainly show a most remarkable career on the part of this defendant. He seems to have had several distinct lines that he pursued in defrauding his victims. There is one line of cases where he endeavored to get large sums of money out of attorneys representing himself to be an attorney, stating that he had brought to them a very large retainer and that as an attorney he ought to get some part of that retainer. In one case a prominent firm, one of whose then members is now on the Supreme Court in the

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City -- he endeavored to retain them in the case of a man named Kaufman and produced a certified check for \$20,000 for this retainer saying that he ought to have \$5,000. This firm communicated with the bank on which this check was drawn by the defendant, there was no such account there, and they said the certification was a forgery. He testified on the trial as being a great friend of Mr. Stephen Baldwin of Brooklyn. Mr. Baldwin saw me yesterday and he informs me that the transaction was similar in most respects to this one I have just related -- that he endeavored to retain Mr. Baldwin in the case of a man named Kaufman and offered him a retainer of 50,000 and wanted \$2,000, he being an attorney. Now another line that he seems to have pursued is representing to various parties that he was either the owner or had an option on real estate and showing the real estate to the party who would then sign a contract of sale and pay so much down. Then it would appear that the defendant had no option and was not the owner as the case may be and had nothing to sell. Another line that he seems to have pursued is in connection with certain jewelry. Then another line that he pursued would be to tell the victim that he would discount a note for them in some large amount, and that being a lawyer he would undertake it and the victim would thereupon deliver the note and this de-

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fendant would ask a certain amount for his services. The note would never be discounted. In addition to this he had miscellaneous lines, in which he was convicted was one. There are numerous cases where they did not touch on any of these well defined lines of procedure. It is quite true, as defendant's counsel has stated, that in a large number of instances he re-paid the money, but as far as I can gather he always re-paid the money by getting money in a similar method from somebody else when he was hard pushed. There is an old saying of robbing Peter to pay paul, and when he was in danger of incarceration that is what he did and that appears to have been the way he supported himself for a number of years. Now in this case there was a larceny of \$2,000 from this complaining witness and the evidence showed that he robbed a friend of his boyhood in a similar transaction, stole \$2500 from him. I understand there is an indictment pending in that case in Brooklyn and another indictment pending against him here. That I shall take into consideration in imposing sentence in this case. I think the only consideration he is entitled to is to have both the other indictments disposed of under this one. I think this man has been a danger to the community and is a danger to the community. I see no extenuating circumstances in the case. In my opinion the Warden and head keeper up there at Sing

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Sing will be fortunate if he does not trim them after he gets there. I shall sentence him to State prison for not less than five nor more than ten years.

I hereby certify that the foregoing is a correct transcript of the stenographic minutes taken by me upon the trial of the above entitled action. People against Harry Fishman.

Peter P. McLoughlin,
Official stenographer.

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