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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

-VS-

RICHARD H. LEE.
-----X

Before HON. EDWARD SWANN, J., and a Jury.

New York, April 18, 1911.

Indictment filed July 27th, 1910.

Indicted for Violation of Section 1865 of the Penal Law.

-----oOo-----

A p p e a r a n c e s .

For the People: Assist. Dist. Atty. OSWALD N. JACOBY.

For the defendant: MR. ABRAHAM LEVY.
-----oOo-----

Peter P. McLoughlin,
Official Stenographer.

(The jurors were severally called, examined and sworn.)

MR. JACOBY: I desire to call your Honor's attention to the fact that there are witnesses in court. I have no objection to their being present but if counsel for the defendant desires them to be excluded--

THE COURT: Do you think we had better ask the witnesses to leave, Mr. Levy?

MR. LEVY: It really does not make any difference.

THE COURT: Well, at any time that either side wishes them to leave let me know.

Mr. Oswald N. Jacoby opens the case on behalf of the People as follows:

May it please the Court, Mr. Foreman and you other eleven gentlemen of the jury:

Now that you have been sworn in and we are all embarked in the same boat for a brief season, it becomes my privilege as well as my duty, to enlighten you in regard to the case a little more fully than you have been thus far.

Now, I am going to outline to you in a very brief way what the charge made by the indictment against this defendant is. Of course, it is merely a charge

or an accusation like a complaint in a civil action reduced to writing so that the Court and the jury may known precisely, and the defendant himself may know precisely what he is charged with and what accusation he has to meet.

I shall briefly allude to the testimony that we shall present to you in support of the indictment so that you may be able to follow it more intelligently than you otherwise perhaps could and with less effort than you otherwise could when the witnesses and the documentary evidence is presented. Of course, if anything that I say does not correspond exactly to what the witnesses or the documentary proof tends to prove it does not mean that I am misstating it,-- it means, perhaps, that I do not understand the case thoroughly yet in spite of all the work I have done upon it, or it means, perhaps, that my memory is a little in error; but in a general way I think you may rely upon it that the people will present evidence substantially to prove, or tending to prove what I am now going to tell you.

The rules of the Dock Department of which the defendant was an employe, being a dockmaster in charge of certain docks or wharfs running along-- the exact location of them is immaterial-- but there are a number of docks and wharves that you will hear of when the

time comes in the City of New York, of which the defendant had charge. The duty of this defendant, among other things, was to arrange to provide berths for boats which might be moored to the city docks. The city owns and controls a whole lot of docks along all of the river fronts and the different dockmasters, among their other duties, have charge of providing wharfage for boats which you or I or any other citizen may bring there, and, incidentally, to collect the city's fees or charges for the wharfage of the boats. Now there is a very elaborate system of figuring how much the wharfage is depending upon the tonnage of the vessel upon the per diem (by the day) pay. It depends upon the tonnage of the vessel and upon whether she has an inside or outside berth. If a boat is moored right against the dock it pays twice as much as a boat moored against another boat.

We will show you that for one week, during February, 1909, coming up, as I recall it, to the 28th inclusive-- you will know the exact date when the time comes, for a period of seven days a certain schooner called the Nellie W. Craig was moored, berthed or wharfed at a dock between East 19th and East 20th street North River, which was one of the docks in the jurisdiction of this defendant and that this defendant

received and collected from the consignee of the cargo of that boat, Neely & Son, the sum of \$37.38 and that he delivered to Nathaniel J. Neely, a member of that firm, a ticket or voucher or receipt, whatever you please to call it, which ticket certified that the note-- the ticket showed by punch marks upon it, and by written things upon it that Neely had paid \$37.38 which we will show you was the correct charge for berthing that particular boat for the period of seven days.-- that is, paid \$37.38 to the City of New York. That ticket will be produced before you and offered in evidence at the proper time. The rule or system of that department was to have tickets folded in a book like this (indicating). Each ticket was in triplicate, that is, there was a number 1 ticket, and a number two ticket. This is only a sample I am showing you now-- and a number three ticket. These were folded together like that and in a book like that, (Indicating) with the No. 1 ticket always on top. The various punch marks upon the ticket which the witnesses will explain to you at the proper time are so arranged that the day, the date and the month and year when the boat in question was moored to the dock are punched so that he that looks at it can see at a glance are No. 1, 2 and 3 tickets, can see at a glance that this

boat was there, and also the amount of the charge is punched. There is a dollar column, a dime column and a cent column. One operation of punching punches the three tickets, 1, 2, 3, so that they show the same dates for the berthing of the boat and the same amount of charge. In addition to that there appears upon the ticket Nos. 1 and 3 of this series in question, the number being 31,433, series of 1909, the particular ticket in question, certain written memoranda, for example here on ticket No. 3 is a place for the name of the vessel. The name of this vessel is written on it. There is a place on the ticket No. 1 for the name of the vessel and the name of the vessel as written on ticket No. 1 of series 1909, 31,433, "vessel - Uncle Ben." Now, ticket No. 1, under the rules of the Dock Department must be sent by the dockmaster, delivered by the dockmaster within a very short period of time after the ticket has been punched and put in circulation, must be sent with a report to the main office of the Dock Department. Ticket No. 1 in this particular transaction instead of showing \$37.38 punched shows 50 cents punched and shows the berthing of a brick barge Uncle Ben for one day. We will show that the lawful charge for one day's berthing of a brick barge is 50 cents. So that we shall argue

to you that tickets Nos.1 and 3 were not punched simultaneously because if they had been they would then have shown 50 cents. One day only is punched on ticket No.1 while seven days is punched on ticket No.3.

Ticket No.2 under the rules of the Dock Department is kept for the dockmaster's own private benefit; he keeps that, in order, I presume, if he pleases to keep a personal record of all the transactions he has had as dockmaster possibly for his own protection or it is immaterial for what purpose. We shall show you that the system of the Dock Department required in this instance-- and the system I presume was followed in other instances-- required daily reports of all the cash and credit transactions. I forgot to say that the majority of transactions with the Dock Department are on a credit basis. Persons or firms that are known to the city have arranged for credit, they don't pay the dockmaster in cash but they get a bill, I think, once a month or something like that, but each of these daily reports shows all the cash and credit transactions had by that particular dockmaster on that day with the various persons that have moored boats to the docks in his jurisdiction. In addition to the daily reports there are also weekly reports and also monthly reports, and we shall show you that both in the daily,

weekly and monthly reports for a period quite awhile before and quite awhile after the 28th of February, 1909 there is no record whatever of any docking of the schooner Nellie W. Craig or any payment of \$37.38 on account of such dockage, but on the contrary there is an item on the ticket No. 31,433, there is an item of the docking of the Uncle Ben on March 9th. We shall at the proper time endeavor to explain to you how and in what manner only it is possible to account for the discrepancy between ticket No. 1 and ticket No. 3. Now, if at the conclusion of all the evidence in the case you reach the determination that the only way to account for the discrepancy between ticket No. 1 showing the collection of only 50 cents on account of that particular ticket and the payment of \$37.38 to this defendant, that the only way to account for that is on the theory that the defendant misappropriated it then it will be your duty to find him guilty of misappropriating moneys as a public officer which is one of the counts in this indictment; otherwise, of course, you won't have any course except to acquit him. I will call Mr. Gere.

People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JACOBY:

Q Mr. Gere, what is your occupation? A Clerk.

Q Clerk for what? A Department of Docks and Ferries.

Q City of New York? A Yes, sir, City of New York.

Q How long have you been connected with the Department of Docks and Ferries, City of New York? A About fifteen years.

Q Where is the main or principal office of that department? A Pier A, North River.

Q City and County of New York? A Yes, sir.

Q County of New York? A Yes, sir.

Q Was it also there during 1909? A Yes, sir.

Q Where it is now? A Yes, sir.

Q Were you stationed in the main office during February and March and April, 1909? A In the cashier's office.

Q In the office that you have spoken of at Pier A, North River? A Yes, sir; Pier A, North River.

Q Are you familiar with the Dock Department in a general way? A Yes, sir.

Q Do you know the defendant? A (No answer.)

MR. LEW: May it please your Honor, I should perhaps have made this motion at the close of the opening address of the learned District Attorney, but

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I think I am in time and order. This indictment, if your Honor please, charges against this defendant practically, I take it, the same offense under four different counts. I take it that your Honor has read this indictment and you will agree with me when I say that each of the counts is susceptible to a different kind and line of proof.

My motion is that your Honor instruct the District Attorney to elect under which count in this indictment he proposes to submit this case, or present this case to the jury.

The first count in the indictment charges the defendant with the crime of appropriating to his own use, without authority of law, money received by him as a public officer.

THE COURT: Evidently under a subdivision of Section 1865.

MR. LEVY: The second count charges him with the crime of appropriating money to his own use without authority of law, money received by him as a person receiving money for or on behalf or on account of a city in the state.

The third count charges--

THE COURT: Is that under the same subdivision?

MR. LEVY: practically it is under the same

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section but a different subdivision.

THE COURT: Yes, a different subdivision.

MR. LEVY: The third count charges the crime of grand larceny, what we would call the common law count of larceny, take, steal and carry away.

The fourth count charges the crime of grand larceny committed by the defendant as agent, bailee or trustee.

Now each of these counts is susceptible of a different line or method of proof, or kind of proof, and it seems to me, sir, that there should be at this time an election by the learned District Attorney so that counsel for the defense in conservation of the defendant's rights may be appraised as to what particular subject matter is charged against the defendant and not this wholesale or dragnet indictment.

THE COURT: Well, if the District Attorney feels that he can specify one out of the four counts it would effect the end that you suggest and also, probably, relieve the Court of considerable time. However, I won't demand it unless he voluntarily suggests it.

MR. JACOBY: If your Honor please, I think the evidence will develop very speedily with regard to the precise status of the defendant. If counsel will admit that the defendant at all times mentioned in the indictment was a dockmaster in the employ of the City of

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New York I will consent to eliminate the second count from further consideration.

THE COURT: You will do what?

MR. JACOBY: Eliminate the second count in the indictment which is the same as the first except instead of charging him with doing it as a public officer it charges him with doing it as a person entitled to receive moneys for or on account of the city.

MR. LEVY: What does the learned gentleman say about the third and fourth counts?

MR. JACOBY: As to the third count I don't care anything about it. As to the fourth count I desire to say--

THE COURT: In other words, the District Attorney then would consent to go to the jury on the first and fourth counts? Is that correct, Mr. Jacoby?

MR. JACOBY: Provided that the defendant will stipulate that the defendant was a dockmaster of the City of New York at all times mentioned in the first count of the indictment.

THE COURT: Of course the defendant is not called upon to admit anything.

MR. JACOBY: I am prepared to prove it.

THE COURT: He is entitled to have the case against

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him proved by the People, if proved at all. He may remain silent. At the same time if he wants to admit anything he may do so.

MR. LEVY: It is my purpose to try this case on its merits without regard to any technical advantage. I will admit that at the times mentioned in the indictment the defendant was a dockmaster of the City of New York. What I want to do is, if it be possible in the interests of economy of time, to limit the issue to be presented to this Court. Now, I make that admission, Mr. Jacoby, and then you consent to the dismissal of the second and the third counts, is that right?

MR. JACOBY: I consent to their being withdrawn from further consideration.

THE COURT: That is the same thing.

MR. LEVY: I am entitled to some disposition of the matter and not have it suspended in the air.

THE COURT: Well, the District Attorney upon the stipulation of the defendant's counsel, consents to withdraw these two counts from the consideration of the jury?

MR. LEVY: But, your Honor, it is usual, is it not, to dismiss them, to dispose of them?

THE COURT: Well, it is practically the same thing. It has the same effect. He can never be tried on them

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again. At the same time, if you think it would be more clearcut.

MR. LEVY: I think so.

THE COURT: Any objection to that?

MR. JACOBY: I think the technical procedure is to strike out the second and third counts.

THE COURT: Strike them out, that is the same thing.

MR. JACOBY: Now as to the fourth count, your Honor, I simply keep it in because if it shall later on develop and it be your Honor's judgment that there is no such crime as misappropriation of moneys as a public officer, in that event we would have to fall back upon the embezzlement charge in the fourth count. If your Honor should hold that there is such a crime as misappropriation of moneys as a public officer and find that there is enough proof to go to the jury on that I shall be perfectly willing at that time to withdraw also the fourth count and go to the jury simply on the first count.

MR. LEVY: That is satisfactory to me. I concede that at the times mentioned in the indictment the defendant Richard H. Lee was a dockmaster in the city of New York. Is that satisfactory?

MR. JACOBY: Yes, sir.

THE COURT: Assigned by the Department of Docks?

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MR. LEVY: Yes, sir.

THE COURT: The second and third counts of the indictment are dismissed by consent.

MR. JACOBY: Now there are counts one and four.

THE COURT: Yes.

MR. JACOBY: I would like that to be noted.

BY MR. JACOBY:

Q Do you know the defendant Richard H. Lee? A Yes, sir.

Q How long have you known him? A Ten years.

Q Was he in the employ-- was he a dockmaster in 1909, in the winter and early spring of 1909? A He was, yes, sir.

Q Assigned to any particular one, in charge of any docks? A Yes, sir; he was assigned to the Seventh District.

Q Where was the Seventh District, or where was it in February and March, 1909, what was the geographical location of it? A Runs from Eighth Street to 24th street, East River.

Q East River? A Yes, sir.

Q On the New York side? A Yes, sir.

Q Manhattan side? A Yes, sir.

Q What is that? A Yes, sir.

Q I show you a certain book or paper and ask you whether or not that is a book of rules and regulations of the Dock Department in force in January, February, March and

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April, 1909? A Yes, sir.

MR. JACOBY: I offer it in evidence.

MR. LEVY: May it please your Honor, the learned District Attorney offers in evidence a booklet purporting to contain the rules and regulations governing the Department of Docks and Ferries in the City of New York. I told him orally that I would admit that these are the rules and regulations duly adopted by the Department of Docks and Ferries but that I would dispute before the Court the competency, materiality and relevancy of these rules. Now, I make no technical objection concerning the admission of these rules because the District Attorney has not brought here the evidence to prove their regular adoption, but I do object to the introduction of this book in evidence upon the ground that it is incompetent, immaterial and irrelevant. Do I make myself clear, your Honor?

THE COURT: Yes. The rules have not yet been brought home to the defendant, have they?

MR. LEVY: No, they have not as yet. You see I don't dispute the fact that this printed book was issued by the authority of the Dock Department.

THE COURT: I catch your point.

MR. LEVY: I don't want my friend to go to the trouble of proving these technical matters but I claim,

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at this stage of the case, unless notice is brought home to this defendant of any liability or responsibility under these rules--

THE COURT: What do you say to that, Mr. Jacoby?

MR. JACOBY: Why, if your Honor please--

THE COURT: Let me see if I get the defendant's objection rightly. He says he does not dispute but admits that these are certain rules adopted by the Department of Docks.

MR. LEVY: That I promised to admit.

THE COURT: But that his client has not been in any way connected with them and you offer them in evidence and he objects as they are not binding on his client.

MR. JACOBY: Will your Honor permit me to say a word?

THE COURT: Yes.

MR. JACOBY: Your Honor has apprehended precisely the objection raised by the learned counsel for the defendant. In this book will be found, among other things, a series of printed rules headed "Instructions for Dockmasters." Now, we have shown that this defendant at the times mentioned was a dockmaster or a few more questions would show that he was a dockmaster. Now these rules, whether he actually had the manual possession of the rules or not, being the rules in force

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at the time, as the witness has testified, the counsel not objecting to the book on the ground that it has not been proved as being a book of rules-- these rules are binding upon him as far as they relate-- and their own internal evidence will show how far they relate to the dockmasters and their duties-- are binding upon the dockmasters whether or not we show that he had the manual possession of an exact copy of this book or not, because if a dockmaster must obey the rules of instructions-- I don't mean to imply by that that a disobedience of the rule or instruction of itself would constitute a crime or an offense that this Court might take cognizance of, but in order to show his mental attitude, that he had knowledge of certain matters and it becomes very important for the State to show what the rules were.

THE COURT: He doesn't object to that. For instance, he does not and probably would not object to your marking it for identification, but he objects to your introducing them in evidence at this time unless you can show that his client had actual knowledge of the rules that you propose to prove as binding upon him. Now, in a civil action, of course, your offering in evidence of these rules would be perfectly proper.

MR. JACOBY: There is no doubt of that.

THE COURT: But this is a criminal prosecution

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and we cannot assume that these rules were delivered to him. We will have to prove that. You will have to prove it either by his admission or by the testimony of some competent witness who saw him in possession of such rules or who gave him the rules.

MR. JACOBY: You could not bring home knowledge of the rules if your Honor adopts that rule, you could not bring home to him the knowledge--

THE COURT: Can any other ruling be adopted?

MR. LEVY: Suppose you showed that he had possession of one of these books you would have to produce a witness who actually read the rules to him?

THE COURT: No, I don't think so; I don't believe so. I don't believe you need show that he actually had the physical possession of one of these books.

MR. LEVY: There is another matter that it is my duty to bring to your attention. This little booklet held by Mr. Jacoby contains matter clearly irrelevant and clearly incompetent.

THE COURT: He only offers that portion of it which he says is headed "Instructions for Dockmasters."

MR. LEVY: Well, what page do you find that on?

MR. JACOBY: It is on pages 23, 24 and 25.

MR. LEVY: Now I respectfully contend that the instructions to dockmasters are not competent evidence

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upon this criminal charge. We are charged with violating a criminal statute, a statute of the criminal law, the penal law. Instructions given by the Commission of Docks or the Commissioners of Docks-- I don't know whether there is more than one-- are not, violations of them are not infractions of the criminal law. It may be that this man may have been derelict in the performance of his duty as a subordinate or servant of the city, but mere delinquency in the shape of omission to perform duties or in following instructions or complying with instructions is not a violation of or an infraction of the penal law.

THE COURT: I do not presume that there is any contention to that effect. The fact that they are called instructions would not take them out of the classification of rules of the Department.

MR. LEVY: Where certain bodies are given power by the Legislature to adopt certain ordinances, for instance like the Board of Aldermen of New York instructed by the Legislature, the ordinances of the Board of Aldermen would have the efficacy of law; but that means ordinances and law adopted by the subordinate body under powers delegated to it by the Legislature. Instructions are not included within that, and the rule of a department duly and regularly and properly adopted might under

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certain circumstances have the force of law, but the instructions don't have the force of law any more than if the manager of a department store were to say to a clerk, "You must not brush that bunch of rubbish into that corner, you must pick it up." That is simply an internal regulation, simply a matter of detail in the management of the office, the same as any business man would instruct his subordinate to do matters internally for the orderly conduct of his business. That is not a law. Now, if it was a rule having the force of law, the duty is upon the learned District Attorney to prove first that it was adopted and had the force and efficacy of a law. Instructions for dockmasters might be equivalent to instructions that I might give the clerks in my office to use a certain kind of paper.

THE COURT: No, I will overrule you on that point. You take an exception to that. I overrule that contention. I don't agree with you on that.

MR. LEVY: You don't agree with me on that proposition?

THE COURT: Not on that contention, no.

MR. LEVY: Now I want to point out to you, sir--

THE COURT: If he proves that these are the rules of the Dock Department and brings it home to the

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defendant, why, it would be something in the nature of an agreement between the defendant and the Department of Docks, that the defendant was to act in accordance with those rules as far as the collection of moneys was concerned.

MR. LEVY: Won't your Honor indulge me a moment please?

THE COURT: Yes.

MR. LEVY: I want to read to you from the statutes of this State concerning these rules, and this is incorporated in the laws of 1882, Chapter 410, which were subsequently amended by the laws of 1901, Chapter 724.

THE COURT: Do you refer to the Consolidation Act?

MR. LEVY: I take it that the Act of 1882 is the Consolidation Act. "The Commissioner of Docks shall by general ordinance--"

MR. JACOBY: What page is that?

MR. LEVY: That is very near the front. "The Commissioner of Docks shall by general ordinances from time to time establish all needful rules and regulations for the government and proper care of all the property placed in the charge of the Commissioner of Docks and under his control by the provisions of this chapter relating thereto. The Commissioner of Docks shall furnish a copy of such rules and regulations (I want to

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emphasize the words rules and regulations) to all the owners and occupants of said property; shall enforce such rules and regulations and shall make all needful orders necessary to carry out the provisions of this chapter relating thereto into effect and shall publish such ordinances."

Now, clearly the Legislature had in its mind the distinction between rules and regulations and the subsequently printed instructions to dockmasters. Instructions to dockmasters are separate and distinct and entirely distinguishable from the rules and regulations which the Legislature gave the Commissioner of Docks the right to make. I find nothing in the statute which makes it a law unto a subordinate in the Dock Department by which there can be any penal punishment for the infraction of an instruction to do a thing. It has no reference at all, your Honor, to these instructions. It simply provides that he may make rules and regulations. Now the instructions to dockmasters are not rules and regulations for the management or the conduct of the business of the Dock Department as prescribed by this law.

THE COURT: Well, it is pretty near it. I don't think that merely because they are denominated instructions to dockmasters would take it out of the category of rules and regulations. They don't have to call it rules and regulations. They call it instructions to dockmasters. It is practically the rules and regulations for the dockmasters.

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MR. LEVY: Let us go a trifle further if your Honor will indulge me.

MR. JACOBY: I do not regard this of great importance because the sole purpose in offering this book of rules in evidence at all was to show the method, and to make it clear to the Court and jury just how these tickets were handled. Section seven of Instructions to Dockmasters found on page 25 makes it very clear what the usual method is. Failure to follow that method would not be a crime, your Honor, it simply shows the jury what the orderly and regular method was.

THE COURT: Let Mr. Levy get his objection upon the record.

MR. LEVY: Now, with your Honor's indulgence, you will notice that that provision is the only provision in the Consolidation Act which provides for the right of the Dock Commissioner to make rules and regulations. There is not any provision in that law which puts the duty upon any subordinate of the Dock Commissioner, that is a provision to make rules and regulations violations of which are made a misdemeanor apply only to the following-- I will read them again. "The Commissioner of Docks shall by general ordinances, from time to time, establish all needful rules and regulations for the government and proper care of all property placed in the charge

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of the Commissioner of Docks and under his control by the provisions of this chapter relating thereto. The Commissioner of Docks shall furnish a copy of such rules and regulations (not to his Dockmasters) but to all the owners and occupants of said property and shall enforce said rules and regulations and make all needful orders necessary to carry out the provisions of this chapter relating thereto into effect and shall publish such orders a violation of which or disobedience to any rule or regulation or any order of the Commissioner of Docks shall be punished by fine &c." You see the only provision of law which gives him the right to make rules provides only that he should make rules for those who use and occupy the said property. Nothing is therein contained which gives him the right to make a rule which will have a penal ~~the general~~ effect if violated, for the direction of the conduct of his subordinates, the Dockmasters.

MR. JACOBY: Counsel is in error. There is no ^{such} claim and I offer no rule in evidence in order to show a violation and predicate a crime upon it. Subdivision 7 of the Instructions to Dockmasters I offer in evidence solely for the purpose of showing the usual and regular method of doing business with these punched tickets.

THE COURT: Well, we cannot introduce Section 7

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unless we can bring it home, in some way, to the defendant.

MR. JACOBY: Section 7 of the Instructions to Dockmasters is on page 25.

THE COURT: Section 7 of the Instructions to Dockmasters is on page 25 of these rules.

MR. JACOBY: Section 7 is found right near the top of page 25 of the book of rules.

MR. LEVY: The point of my objection is that it is incompetent, immaterial and irrelevant, and for the reasons stated and for the additional reason --

THE COURT: You are sustained on that.

MR. LEVY: Not brought home to the defendant, and because the defendant is not bound by any such provisions as therein contained.

THE COURT: That is sustained.

MR. JACOBY: I ask then that this book be marked for identification.

(Section 7 on page 25 of the book referred to is marked people's Exhibit 1 for identification.)

MR. JACOBY: I am not offering it in evidence. You objected to it not on the ground that I have not proved it but on the ground that the evidence is incompetent and not binding upon the defendant.

MR. LEVY: Yes, that is right.

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BY MR. JACOBY:

Q Now, Mr. Gere, what did the defendant have to do so far as collecting wharfage fees or charges for boats was concerned during January, February and March, 1909?

MR. LEVY: I object to that as not competent.

MR. JACOBY: I withdraw the question.

I ask that this paper, your Honor be marked for identification.

(The paper referred to is marked People's Exhibit 2 for identification.)

Q I show you a certain paper and ask you whether you can identify it? A I beg pardon. I didn't hear you.

THE COURT: You simply want to know if he can identify that paper.

Q Can you yes or no? A Yes, sir.

BY THE COURT:

Q Did you ever see it before. Look at the paper .

A I seen one like it; the same thing I suppose.

Q In whose handwriting is it? A It is from the Dockmaster of the Seventh District.

Q In whose handwriting if you know? A I don't know.

Q You don't know? A No, sir.

THE COURT: Then he cannot identify it, can he?

MR. JACOBY: It can be marked for identification and I will try to prove it later.

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(Marked People's Exhibit 2 for identification.)

Q Will you kindly inform me what that paper purports to be?

MR. LEVY: I object to that.

THE COURT: That is objectionable because he does not recognize the handwriting, and he could not tell us what it purports to be.

BY MR. JACOBY:

Q Isn't it something that is taken from the official records of the Dock Department?

MR. LEVY: I object to that designation or description of it. It speaks for itself. It is an official record?

THE COURT: He does not know that. He does not recognize in whose handwriting it is.

MR. JACOBY: I don't claim that he does.

THE COURT: If it is a paper certified to by a public officer, certifying that it is a public record, of course it will prove itself; but the assistant cashier of the Department of Docks can scarcely be a competent witness to tell us that, you were a clerk in the cashier's office?

THE WITNESS: Yes, sir.

BY MR. JACOBY:

Q Didn't you originally bring that paper from the Department?

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THE COURT: You can ask him if that paper was in his care and custody.

BY MR. JACOBY:

Q Was that paper in your care and custody? A It was at one time.

MR. LEVY: Won't you speak so that I can hear you?

THE WITNESS: It was at one time.

Q At that time, that was prior to the time it was delivered to the District Attorney's office or to the office of the Commissioner of Accounts? A Yes, sir.

Q At that time?

MR. LEVY: Can't you fix the time when?

BY MR. JACOBY:

Q Well, was it during the latter part -- it has a date on it? A March 10, 1909.

Q Well, was it we will say ^{from} March 11th or 12th, 1909 until months later until many months later in the Dock Department? A It was in the Dock Department, yes, sir.

Q In your care and custody? A No, sir; not in my care and custody.

Q Well that is what I asked you? A No, sir.

Q In whose care and custody if you know? A It was in the storeroom.

Q Well was it part of an official record?

MR. LEVY: I object to that.

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THE COURT: If it was not in his care and custody and he had nothing to do with it he would not be a competent witness to tell us. We would have to get some witness or person who is in the Dock Department in whose Bureau of the Dock Department that paper was filed, if at all.

MR. LEVY: We don't know that it was filed by Mr. Jacoby.

Q In whose care and custody, if you know, was that paper in the Dock Department, if it was there? A Well, we have a record room and papers when we are through using them, are put into that record room.

Q Who is in charge of the record room? A There is one key that is anybody can take it.

Q Isn't somebody in charge of the record room? A I don't think you would say that anybody was in sole charge of it.

Q Did you yourself get that paper, People's Exhibit 2 for identification from the record room at the time of its delivery to the Commissioner of Accounts?

MR. LEVY: I object to that as immaterial.

THE COURT: He could testify to that but he might have picked out of the waste paper basket, so far as the evidence shows up to date.

MR. JACOBY: We will try to find out.

THE WITNESS: I might not have taken it to the Com-

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missioner of Accounts; they might have sent a messenger into the record room.

Q Have you any record about it? A No, sir.

Q Any recollection about it? A No, sir, none whatever.

THE COURT: The witness does not know anything about it.

Q Do you know who it was, yes or no, -- do you know who, if any one it was that got that paper if it was gotten, out of the record room of the Dock Department? A No, sir, I could not tell what particular person.

Q Do you know to what person it was delivered after it was taken out of the record room?

MR. LEVY: I object to that.

BY THE COURT: Do you know of your own knowledge?

THE WITNESS: No, sir.

BY MR. JACOBY:

Q Now, I show you a certain fastened bundle of papers, the first one of which says "Daily report" at the top, and I want to ask you whether you know what that is?

THE COURT: Ask him if he ever saw it before, Mr. District Attorney. That is worth something. He probably could tell you from the label what it was, but he wouldn't know any more maybe than we do.

BY MR. JACOBY:

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Q Now Mr. Witness have you ever seen these papers before that pile of papers head "Daily Reports", is it?

A The top one is a weekly report.

BY MR. LEVY:

Q Have you ever seen it before is the question?

A I have seen that, yes, sir.

BY MR. JACOBY:

Q You have seen that paper? A Yes, sir, that one has my initials on it.

Q That passed through your hands? A Yes, sir, it has.

Q Was it ever in your care and custody? A It was temporarily until it was filed in the record room of the Department.

Q Who filed it there? A Well, after the weekly report -- it would have been filed from the auditor's office.

Q Where did it go from your hands, what did you do with it? A The weekly report goes in the auditor's office.

BY THE COURT:

Q The auditor? A Yes, sir.

Q Who is he? A Mr. Phelan.

Q Mr. Phelan? A Yes, sir, and it goes to one of his clerks.

Q Phelan? A yes, sir.

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Q What is his first name? A J.M. Phelan.

MR. LEVY: Do you mean personally or one of his clerks?

(No answer.)

BY MR. JACOBY:

Q How about the other papers? A The other papers were in the cashier's office until the accounts were finished and they were filed in the record room.

MR. JACOBY: I ask that that bundle of papers be marked for convenience, People's Exhibit 3 for identification.

(A bundle of papers is marked People's Exhibit 3 for identification.)

BY MR. JACOBY:

Q Now I ask you to compare People's Exhibit 2 for identification and People's Exhibit 3 for identification and tell me whether you can state if People's Exhibit 2 for identification was at one time the third sheet in the bundle described as People's Exhibit 3 for identification?

MR. LEVY: I object to that as incompetent, immaterial and irrelevant-- questions being put to the witness with regard to documents not in evidence.

MR. JACOBY: I cannot put them in evidence by this witness.

MR. LEVY: It is not competent at this time, it must become so later on when proper proof is given in regard to it.

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THE COURT: Let us test it in another way.

BY THE COURT:

Q Have you any personal knowledge on the subject,
Mr. Gere one way or the other?

MR. JACOBY: I think if your Honor would let him
answer my question it might refresh his recollection.
I have asked the witness as to People's Exhibit 2.
for identification.

THE COURT: He says he does not recall that he ever
saw it before. It has

MR. JACOBY: If your Honor will let the stenogra-
pher read my question.

MR. LEVY: The objection to that is that it is in-
competent and immaterial and irrelevant.

THE COURT: Would that make any difference?
Suppose it was the third or fourth sheet, this witness
knows nothing about it, and nothing about the identity
of the sheet. As I understand it the only fact he testif-
fied to is a certain weekly report, is that right?

THE WITNESS: Yes, sir, that is right.

Q Which has his initials on?

THE WITNESS: Yes, sir.

THE COURT: But the balance of the papers he
knows nothing about.

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MR. JACOBY : Well, I haven't heard that yet.

THE WITNESS: No, sir, I haven't said that.

BY THE COURT:

Q Did you say that? A No, sir, I did not say it yet.

Q What did you say about the balance of these papers in that bundle marked people's Exhibit 3 for identification?

A They have been in the records of the Dock Department; not in my possession.

Q Ever passed through your hands? A They have passed through my hands, probably, in making up the weekly accounts.

THE COURT: That scarcely would do because anything is probable, but was it so is the question. This defendant is on trial on a criminal charge, and we cannot guess at things. We must produce witnesses who know.

BY MR. JACOBY:

Q Can you swear positively that the balance of these papers forming part of the pile known as people's Exhibit 3 for identification ever passed through your hands?

A Yes, sir, they have.

Q Do you know that positively? A Yes, sir, they might have.

THE COURT: No, we don't want "must have".

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BY MR. JACOBY:

Q Did they? A Yes, sir; they did.

BY THE COURT:

Q Now, what makes you say so, why do you identify them? A I make up the weekly account of the DockMasters, and on Tuesday they come to make their settlements for the week.

Q Who are they? A They are the dockmasters.

Q Now what is there in the other papers other than the weekly report which has your initials on it that would indicate that these are the papers which passed through your hands together with the weekly report? A The total figures and each sheet compared with the weekly sheet would indicate that they were made up from the daily report.

BY MR. LEVY:

Q Is there any file mark on it? A None whatever, except the number of the district and the date.

Q I mean a file mark? A No, sir.

MR. LEVY: May I ask another question your Honor?

THE COURT: Yes.

BY MR. LEVY:

Q If these papers were separated could you identify them?

A I beg pardon.

Q If the papers were separated out of the bundles --

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MR. JACOBY: Objected to.

THE COURT: I think he is entitled to that.

MR. JACOBY: With the weekly report in the hands of Mr. Gere could he identify it.

THE COURT: That is what he means.

BY MR. LEVY:

Q If this bundle was taken out and separated could you identify the sheet, identify it by the figures?

MR. JACOBY: If you could have the weekly reports you could?

THE WITNESS: I could from the books of the Department.

BY MR. LEVY:

Q I mean independently of the one that has your initials on, could you identify it as having passed through your hands?

A Not without checking it against the books of the Dock Department.

BY THE COURT:

Q If you put that pile of papers altogether?

A No, sir.

MR. LEVY: Now, may I ask another question?

THE COURT: So if he had a pile of papers together there is nothing on the papers except that the figures that the footings happen to correspond-- that would be persuasive, but it is not probative.

MR. LEVY: Quite so, sir.

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MR. JACOBY: Well, then, if your Honor please, this is not of vital importance except to facilitate my order of proof.

THE COURT: You can withdraw this witness temporarily.

MR. LEVY: If you do recall him I will have the privilege of asking him?

THE COURT: Yes, with the privilege of cross examination.

NATHANIEL J. NEELY, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JACOBY:

Q What is your business? A Packing box manufacturer, lumber dealer.

Q What firm are you a member of? A The firm of John Neely & Son.

Q Where is their principal place of business?
A Office 741 East 9th street, New York.

Q Was that your office or place of business in the year 1909? A It was.

Q I show you a certain paper and ask you whether you ever received that, and if so, when? A Well, I can't swear that I received this particular paper, but according to

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our books we have.

MR. LEVY: I object to that.

MR. JACOBY: I will have this paper marked for identification.

The paper referred to is marked People Exhibit 4.

Q Do you know the defendant Richard H. Lee?

A From doing business with him.

Q Yes or no? A Yes, sir.

Q You know that is, who he is? A Yes, sir.

Q Did you know him in 1909? A I did, sir.

Q Will you state whether or not that sometime in 1909, there was a certain boat with a consignment of lumber for you that came up here to New York? A There was.

Q Do you know the name of that boat? A ^{The} Nellie M. Craig.

Q Might it have been the Nellie W. Craig? A We always called it, knew it to be the Nellie M.

MR. JACOBY: Well the first name was Nellie, and I presume the rule applies to boats as well as persons, that the middle initial is not material.

Q What kind of a boat was the Nellie W. Craig?

A A schooner.

Q Do you remember whether or not the schooner Nellie W. Craig was here at some dock in the City of New York between the

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19th and 25th of February, 1909? A It was.

Q Where was that dock? A Foot of Ninth street East River.

Q Mr. Neely don,t you think you can talk louder. Now then what was the name of the concern that brought this cargo up here for you? A We bought it from the Frank D. Langstroth Company.

Q State whether or not you paid any money to this defendant on or shortly after February 25, 1909? A Will you please repeat the first part.

Q (Repeated) Yes or no? A We did.

Q What was the amount that you paid him?

A 37--

BY THE COURT:

Q When you say we, did you pay it yourself? A Yes, sir we did.

BY MR. JACOBY:

Q How much? A \$37 and some odd cents; I don,t recall the amount.

Q What was that, what payment?

MR. LEVY: I object to that.

THE COURT: Objection sustained. You can ask him the circumstances under which he paid it.

Q Where was it paid? A In our office.

Q Now, tell us the circumstances under which it was

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paid. Did the defendant come in?

MR. LEVY: Fix the time. Ask one question at a time.

Q Did the defendant come into your office?

A To the best of my recollection he did.

Q What did he say? A He didn't have to say anything; he presented a ticket.

Q He presented a ticket? A Yes, sir.

Q A certain ticket? A Yes, sir; a regular wharfage ticket.

Q Did he say anything that you remember now?

A Not that I can recall.

Q What did you then do? A I went to the safe and took out the money and paid the bill.

Q Paid \$37 and some odd cents? A Yes, sir.

Q Now, state whether or not that is the only payment for wharfage that you had made up to that time during the year 1909? A To the best of my recollection it is.

Q Don't you know that that is the first wharfage you paid, didn't you look it up, didn't you look it up and refresh your recollection, didn't you look it up? A I have not lately, no, sir.

Q Didn't you look it up two or three months ago?

A Well, --

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BY THE COURT:

Q Have you any recollection at all on the subject, Mr. Neely? A I am not positive, no, sir.

BY MR. JACOBY:

Q Well is that the only payment of \$37 and any cents that you made during 1909 for wharfage? A yes, sir.

Q That you are sure of? A Yes, sir.

Q Then you received a ticket? A Yes, sir.

Q I show you this ticket again, do you understand the punchings on it? A No, sir.

Q You do not? A No, sir.

Q The defendant gave you a ticket, shaped like this?

MR. LEVY: I object to that.

Q Is that correct? A yes, sir.

THE COURT: The witness says that he gave him a ticket shaped like this.

MR. JACOBY: Exhibit 4 for identification.

BY THE COURT:

Q What did you do with that ticket, Mr. Neely?

A Well when settling for the cargo we sent this ticket to the party from whom we bought the lumber.

Q Langstroth & Company? A yes, sir, Langstroth & Company.

Q Did you put any memorandum on it; did you identify the ticket in any way? A No, sir.

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Q Where are Langstroth & Company? A They were at 68 Broadstreet.

Q Where? A New York City; 68 Broad street.
BY MR. JACOBY:

Q Now as I understand it you had to pay Langstroth their invoice for this cargo of lumber? A Yes, sir.

Q You paid the defendant this bill of \$37 and some odd cents for the account of Langstroth? A yes, sir.

Q Speak out loud? A Yes, sir.

Q So when you paid Langstroth invoice you paid them \$37 and some odd cents less than the amount of their invoice? A yes, sir.

Q And sent along the ticket that you speak of? A Yes, sir.

Q Of the same size as people's Exhibit 4 for identification, sent that ticket along as a voucher for this \$37 and odd cents? A Yes, sir.

Q Is that correct? A Yes, sir; that is right.

Q I will just ask you once more whether by looking you can tell me at the ticket/that is or not the ticket you sent to Langstroth & Company? A I cannot say.

THE COURT: He says there is nothing by which he can identify it. There is no mark on it or any way by which you can identify it.

BY MR. JACOBY:

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Q Was this payment of \$37 and some odd cents a payment for wharfage?

MR. LEVY: He has answered that.

I to

Q Now want you state-- I don't remember whether I asked you this question -- I want you to state whether or not this payment of \$37 and some odd cents was the only payment that you made during 1909, we will say during January, February or March, 1909, for the berthing of the Nellie W. or the Nellie M. Craig?

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

Objection overruled; exception.

A It was.

CROSS EXAMINATION BY MR. LEVY:

Q Mr. Neely, you do quite an extensive business, don't you? A Not so very large, sir.

Q You have quite a number of consignments of merchandise, do you not? A Probably six to eight in a year more or less.

Q Now, looking at this defendant here, Mr. Neely, and under the solemnity of your oath, will you swear that you paid him \$37 and 38 cents? A According to our records sir, yes, sir.

THE COURT: He means independent of the record, even

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if your record was obliterated, would you swear⁴⁵
to your own recollection that you paid him exactly \$37
and odd cents that you speak of at that time.

THE WITNESS: I would not swear; it was over two years
ago without some method of recording --

THE COURT: He is not blaming you for it in
any respect. He wants to know whether or not you have
an independent recollection of it outside of your books.

THE WITNESS: No, sir, I have not.

BY MR. LEVY:

Q All that you do know, Mr. Neely is that you conduct
your business as every respectable merchant does in an orderly
fashion, isn't that right? A Try to.

Q And that in the ordinary course of your business
payments are duly recorded in your books? A Yes, sir.

Q But you had dealings with the Dock department which
necessitated the payment money to the Dock Department, isn't that
so? A Yes, sir, probably.

Q You knew Mr. Lee to be the Dock master of that
district? A I did, sir.

Q Do you assume that because he was Dockmaster of that
district at that time, and that there is an entry in your
book of the payment of \$37 and odd cents that therefore you
deduce from that that you paid it to him, isn't that what
you mean? A During Mr. Lee's reign we paid him all the

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wharfage that was ever paid to the Dock Department during that time.

Q Well, Mr. Neely, this man stands here at this --

MR. JACOBY: I object to counsel --

Q (Continuing) -- bar charged with a criminal offense.

MR. JACOBY: I object to that. That is not a question.

THE COURT: No, but he may ask him-- call to the witness's attention this matter in any way that is reasonable and ask the witness if he is still positive.

Q I repeat again. This defendant stands at this bar charged with a criminal offense, and the question is whether or not he personally received that money which I have not any doubt in the world you paid, Mr. Neely. Now I ask you do you in the presence of his Honor and these twelve gentlemen swear that you paid ~~it~~ to him personally that money?

A Only as our receipt,-- that was as our invoice shows that that amount was paid.

Q My dear Sir, the question is intended to be absolutely fair, and I have no doubt you paid it. I don't doubt your word in the slightest. The question is whether it was paid to him in person, not whether it was paid into the Department. Did you personally hand him the money, if you don't know say so, if you do know for God's sake say so. Let us know the truth? A As I said before we paid all the money that was paid for wharfage to Mr. Lee during his reign as Dockmaster.

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✓ Q You simply know that in the ordinary course of business require the payment of money to the Dockmaster, isn't that right? A Yes, sir.

Q Now that was two years ago, you started to say a few minutes ago, and your memory is it clear with regard to that transaction or is it hazy? A Slightly hazy I presume.

Q Now, it becomes a matter of vital importance to this man here, and to these twelve intelligent here whether you can positively state or not that you gave him that money into his own hand. That is the question? A I can't swear to that, sir.

Q You can't swear to it? A No, sir.

MR. LEVY: That is all, sir.

MR. JACOBY: Will your Honor permit me on the re-direct.

THE COURT: Certainly.

RE DIRECT EXAMINATION BY MR. JACOBY:

Q Now, Mr. Neely, I think, perhaps we can clear this up. You remember in your head having certain transactions with Mr. Lee, didn't you? A I remember it.

Q Well, when was your attention first -- you remember these transactions were in February, 1909? A Yes, sir.

Q How long after that was your attention first directed to the question of the transaction in February, 1909?

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MR. LEVY: I object to that.

MR. JACOBY. How long after that?

A When the Commissioner --

THE COURT: You need not state how it was called to your attention.

MR. LEVY: What is the object of it, your Honor? Is it to impeach his own witness?

THE COURT: I don't know but this was a transaction that occurred in 1909 and the question is when was his attention next called to that transaction.

MR. LEVY: Isn't that immaterial? sir?

THE COURT: Well, I don't see that it is very material. I think he ought to be allowed to ask the question.

Objection overruled; exception.

Q Go ahead. A When the Commissioner--

THE COURT: No, answer the question.

Q Just give us approximately the date?

MR. JACOBY: About how long after February, 1909?

THE COURT: A year or a month or two?

A I should judge about a year.

Q About a year after? A Yes, sir.

Q It is a little over two years, February, 1909? and a little over a year ago your attention was first directed

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to the matter, is that correct?

THE COURT: "A year after the transaction.

THE WITNESS: As near as I can recollect.

Q Approximately? A Yes, sir.

Q About a year after the transaction? A Yes, sir.

Q By some one connected with some department?

MR. LEVY: I object to that.

MR. JACOBY: I withdraw the question.

Q Now, at that time did you look up your records?

A I did.

MR. LEVY: I object to that as immaterial.

Mr. Jacoby brought out on cross examination.

MR. LEVY: You are cross-examining your own witness.

MR. JACOBY: I am not cross examining him.

Objection overruled; exception.

THE WITNESS: I did.

Q Did you refresh your recollection as to the transaction with Mr. Lee?

THE COURT: That is very leading in the first place. I will have to sustain an objection to that.

MR. LEVY: I think it is clearly immaterial.

BY MR. JACOBY:

Q I will ask you one more question. State whether or not after refreshing your recollection a year ago whenever it was --

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THE COURT: He did not state that he did, did he?

MR. JACOBY: I will withdraw it, and I will ask the question differently.

BY MR. JACOBY:

Q State whether or not after looking up your records at this period that you speak of what brought back to your mind the fact that you paid \$37 and some odd cents to this defendant at the end of February, 1909?

MR. LEVY: The witness has said it brought back to his mind the fact that he paid the money and I have no doubt that he did but the counsel's question incorporates the fact that he paid it to the defendant; he couples with it a matter of identification which makes the question objectionable.

MR. JACOBY: He said he made every payment to Mr. ~~pe~~ personally that he made.

THE COURT: At the same time the witness in his testimony to Mr. Levy -- I think that under these circumstances the objection is well taken, and I will have to sustain it.

BY MR. JACOBY:

Q Well, can I ask him this question?

THE COURT: Besides it is a very leading question for you to put in that way.

MR. JACOBY: Well, Mr. Levy has brought out on

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the cross examination apparently that the witness's recollection is largely, if not entirely based upon an examination of his books. Now I desire to show that while his recollection is partially based upon an examination of his books that it also ^{is} partially a recollection refreshed by the examination of his books; in other words that by looking at his books it brings back to his mind a picture of the fact that he made this payment.

THE COURT: Well, Mr. District Attorney, Mr. Levy's objection is directed to this. You assume that a year ago his memory was refreshed. Let us assume, for the sake of argument, we will assume now that his memory was refreshed a year ago. If it is refreshed now, what difference does it make whether it was refreshed a year or two years ago or one month ago. The question is now, and Mr. Levy says what difference does it make whether it was refreshed a year ago or not. It is not germane to this question.

MR. JACOBY: I will ask him this question.

MR. LEVY: Counsel could, for instance, if he had any document or paper endeavor to refresh the recollection of the witness at this time, but you cannot go backwards like a crab and try to prove conditions that

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happened a year ago.

MR. JACOBY: He could bring his book with him.

BY MR. JACOBY:

Q What I want to ask you is this. Do you remember now, having refreshed your recollection in anyway, I don't care how, do you remember now that you paid \$37 and some odd cents to somebody on or shortly after February 25, 1909 for wharfage fee of the Nellie W. Craig for one week?

MR. LEVY: I object to that as incompetent, immaterial and not binding on the defendant and as already answered, two or three times.

THE COURT: Yes.

Q Do you remember it in your mind, in your mind?

THE COURT: Independent of the book?

MR. JACOBY: Irrespective of the book?

THE COURT: Irrespective of the books. Have you any independent recollection of the payment of that particular money?

THE WITNESS: I cannot say that I have, sir.

BY MR. JACOBY:

Q But with the aid of your books does that bring back to your mind that you did pay \$37?

MR. LEVY: I object to that.

THE COURT: I think you have quite exhausted the reliable evidence of this witness. I think he has an-

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swered it two or three times. I will have to sustain the objection.

MR. JACOBY: I would be impossible to prove a commercial transaction at all--

THE COURT: That is quite true.

MR. JACOBY: The witness repeatedly used the language in regard to refreshing his recollection -- permit me to try to exhaust him a little further.

THE COURT: I think you have rather gone the limit on that.

MR. LEVY: : This evidence is ^{the} really important evidence. This is the vital question.

MR. JACOBY: This is an important question in the case, and the second one is if he did get it what did he do with it.

THE COURT: I understood the witness to say, and let us see if I understood him correctly. The witness said that except for his books he had no independent recollection of having paid the money, but that he knows he must have paid the money because it is there in his books; that he has no independent recollection of the person to whom he paid this specific sum. He has a general recollection of the payment, he paid the money for that purpose, but no specific recollection of who he paid this particular money to; in other words

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that the transaction itself is not vivid in his mind except as his books show it.

MR. LEVY: He goes a trifle further and says that he knew the defendant to be the dockmaster of that district and in as much as his books shows he paid \$37 on a certain day he assumes that because it was paid it must have been given to the Dockmaster.

MR. JACOBY: And he says, "I made every payment to Lee personally" that he made. Did you say that?

THE WITNESS: I did sir.

Q Did you say you always made every payment to Lee personally that you paid for wharfage charges? A During his time of office.

BY MR. LEVY:

Q What I want to get at --

BY MR. JACOBY:

Q You knew the Nellie W. Craig was in on February-for those seven days? A According to our records.

Q Don't you remember that apart from your records?

A No, sir, I cannot; I remember one of those vessels in; I don't remember the names; our records shows we got lumber in from that party at that time, and that the wharfage was paid; I have other things to think of; I can't remember every vessel, the amount and date.

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Q Don't that refresh your recollection. Don't you remember telling me?

MR. LEVY: I object to that statement of what the witness told the District Attorney. That is not proper.

THE COURT: Unless you show that the witness is adverse to you.

MR. JACOBY: No, sir, he is not. I don't claim that he is adverse.

THE COURT: Then Mr. Levy's objection is well taken.

MR. JACOBY: It may appear to your Honor that he is reluctant witness.

MR. LEVY: Do you mean to say that he is a hostile witness?

MR. JACOBY: I say his reluctance amounts to hostility.

MR. LEVY: Let me ask him a question.

BY MR. LEVY:

Q Are you a reluctant or hostile witness?

MR. JACOBY: I object to the question because the witness cannot characterize his own testimony.

THE COURT: I think the test would be whether the appears so to the Court.

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MR. JACOBY: It is absolutely in your Honor's discretion.

THE COURT: I certainly am not prepared to say that this witness is adverse to either side.

MR. JACOBY: His reluctance--

THE COURT: or that he is reluctant.

MR. LEVY: He is not justified in using that word reluctant.

MR. JACOBY: It is very creditable to the witness.

THE COURT: The witness may be very careful and very cautious. The question that Mr. Levy put to him might have caused him to be particularly careful and to think whether or not he could remember the particular transaction.

MR. JACOBY: May I say a word? The witness' reluctance, if reluctance it be in the opinion of the District Attorney, does more credit to his heart because it is not a reluctance due to anything improper but a reluctance due to the desire of the witness not to harm any human being. It is not a reluctance based upon any base or mean motive at all, but it is a strong and decided reluctance amounting to hostility.

MR. LEVY: Are you through?

THE COURT: I have overruled the District Attorney.

MR. LEVY: I want to say--

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MR. JACOBY: I don't see that any argument is necessary where the Court has ruled in favor of defendant's counsel.

BY MR. LEVY:

Q There has been so much suggestion of reluctance I want to say this to you, Mr. Neely, repeating what I asked you before, after all this talk and all this discussion with the knowledge that I have tried to impart to you that the point in this case is to determine whether you did or did not pay to the defendant personally \$37 and some odd cents-- I repeat the question for the benefit of these twelve jurors here who are to decide this case, will you swear that you did give to this defendant personally that amount of money? A As I said before, only as my records show.

Q Of your personal recollection will you swear to it? A I can't swear to it.

BY MR. JACOBY:

Q Your records don't refresh your recollection? A Not to the positive payment of-- only that the payment was made according to our records.

Q Do you remember that you made a payment after looking at your records or would you remember if you looked at your records this afternoon that you made a payment to some one, would you remember that in your own mind?

MR. LEVY: I have said that I don't dispute the

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fact that the gentleman's statement is true that he paid that money. I haven't any doubt of it in the world.

MR. JACOBY: If you will concede that he paid it to somebody it will save all further trouble.

MR. LEVY: I don't need to concede it. The witness swears to it. He paid it, his books show he paid it.

MR. JACOBY: If that is conceded.

MR. LEVY: I concede nothing except that the witness swears to it. This man swore to it. I say I think he is a fair, honest man--

BY MR. JACOBY:

Q Assuming that you paid it to somebody, can you state to this Court positively to whom it was that you paid it?

A Only as I said before that all payments were made to the dockmaster direct during his reign of office.

Q You never made a payment to anybody else but him?

MR. LEVY: I object to that.

THE COURT: Any other questions?

MR. JACOBY: No, sir.

BY A JUROR:

Q Have you a cashier? A Have we a cashier? No, sir, we have not.

Q Do you pay all bills yourself? A Why, most all

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bills, yes, sir.

Q Most of them? A Yes, sir; all bills.

Q Do you pay everything that your concern pays out?

A Yes, sir.

BY THE COURT:

Q You do it yourself? A Yes, sir.

Q Haven't you any clerk or assistant that pays while you are absent? A Why, probably a little petty account that involves a few cents or a dollar or so for something that might be needed while I am away.

Q How about the other members of the firm? A Why, my father never pays any bills, hasn't paid for years--

Q You are the son of John Neely & Son? A Yes, sir.

Q But he would have authority to pay, wouldn't he?

A Positively so.

Q Well, if he had authority to pay where would he enter it? A He never made any entry. Probably he would consider we had a loose method of doing business. In regard to this wharfage we have always been in the habit of paying this wharfage as a convenience for the wholesaler. We are not entitled to pay the wharfage, we buy lumber "F.O.B. on the dock," and all expenses of any kind, the expense of wharfage we pay to save the dockmaster or the man in charge from having to go down to their downtown office or as the case may be of a firm in the South, for the convenience of

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all concerned we have always had that arrangement to pay the bill and deduct it from our invoice in sending the settlement.

BY THE TWELFTH JUROR:

Q Did you not state that you went to the safe and got the money? The District Attorney asked you and didn't you state how you paid it, you said you went to the safe and got the money? A Well, and that bill--

Q You recollect it clearly, didn't you? A When I paid--

Q Do you know how you paid it, when you got the money from the safe, have you a recollection whom you gave it to?

A I can't swear to it.

Q But you remembered you went to the safe, didn't you, and got it? A I always go to the safe when I pay a bill.

Q You stated you opened the safe and got the money at the time a similar ticket like that was presented for payment? A I always went to the safe and got money when these tickets were presented and paid them.

BY MR. LEVY:

Q You assumed because you usually got money out of the safe you must have done it that morning? A Naturally.

Q Do you go to the safe for all moneys you want to pay out? A Yes, sir, always.

Q Don't you carry money to pay bills in your pocket?

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A, Not for business bills.

BY MR. JACOBY:

Q Was that an unusually large amount for wharfage?

A No, sir; we have had larger bills than that.

Q Was that the first amount over \$10 that you paid during the year 1909?

MR. LEVY: I object to that. It is not material.

THE COURT: He may answer it.

A According to our records; according to our records the first amount that was paid that year.

Q Didn't you have a picture of this thing in your mind, going to the safe and getting out the money and giving it to Lee?

MR. LEVY: I object to that, whether he had a picture in his mind.

THE COURT: He has gone over that. We will have to get some other witness on this.

WILLIAM M. LEWIS, called and sworn as a witness on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. JACOBY:

Q Mr. Lewis, are you the manager of the Harlem Branch of the Knickerbocker Trust Company? A I am.

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

Q Is he a depositor up there? A Yes, sir.

Q Has been for many years? A Since 1906.

Q What is that thing you have there? A That is a signature card.

MR. JACOBY: I ask that it be marked for identification.

(Marked People's Exhibit 5 for Identification.)

MR. LEVY: I don't think it is material, relevant or competent.

Q Did you see anybody sign his name to that card?

A I did.

Q Whom did you see sign his name to it? A R. H. Lee.

Q This man here, the defendant? A Yes, sir.

Q Will you please indicate with an X mark in pencil opposite the place where you saw him sign? A (Witness marks.)

Q One X mark on each side of the signature? A Yes, sir.

Q Did you see him write the address East 125th street? A Yes, sir.

Q And the Harlem River? A Yes, sir.

Q The writing at the top R. H. Lee that is not the defendant's writing? A No, sir.

MR. JACOBY: I offer it in evidence as a standard

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of handwriting, comparison.

THE COURT: Any objection to that?

MR. LEVY: What is the purpose of this?

MR. JACOBY: Why, I am going to show that these various papers have the signature of R. H. Lee on them.

MR. LEVY: It is premature.

MR. JACOBY: I have got to get it in sometime.

THE COURT: This is not the right time to present it.

MR. JACOBY: I will never get it in at all if it does not go in now. I am offering it as a standard of comparison.

THE COURT: You cannot put it in unless it becomes material.

MR. JACOBY: There could be a motion to strike out later on.

THE COURT: If it becomes material you can introduce it in evidence later. You don't have to have this witness upon the stand. You can put it in evidence any time it becomes material as long as you have had it marked for identification.

MR. JACOBY: I simply have it marked for identification.

Q. I ask you whether you are familiar with the signature of the defendant? A. I am.

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Q I show you People's Exhibit 2 for Identification and ask you-- how long have you been a bank officer? Q Well, since 1903.

Q You have had a good deal of experience with signatures of people, haven't you? A Yes, sir.

Q I show you a writing near the top of this document, People's Exhibit 2 for Identification, and ask you in your opinion whose handwriting that signature is in?

MR. LEVY: I object to that as incompetent, immaterial and irrelevant and also on the ground that a proper foundation has not been laid for it.

THE COURT: If you say the proper foundation has not been laid-- has this witness testified to having seen the defendant write more than once?

MR. JACOBY: He has not seen him write more than once.

THE WITNESS: No, sir, your Honor, only once.

MR. LEVY: Well, I say the proper foundation has not been laid.

MR. JACOBY: Well, if your Honor desires any authority on that I will refer you to Article 51 of Chase's Digest of the Law of Evidence. It is a question for the jury to pass upon the value of the evidence.

MR. LEVY: Will you tell me what this has got to do with the case now? The rule is very simple, your

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Honor.

THE COURT: It is not as simple as I thought it was. The Court of Appeals holds in the case of Hammond against Varian, 54 N. Y., page 98, that having seen a defendant write once is sufficient. This affects the weight of the evidence not the competency of the testimony.

MR. LEVY: I don't know what that case is. I think it is a pretty bad rule of law and the Court of Appeals occasionally might make a mistake. The idea of a man being competent to testify to a man's handwriting because he saw him write once.

THE COURT: That was a civil case, Hammond against Varian, 54 New York. I will have to reserve my decision on that point. I will have to send for the 54 New York and read that case. Haven't you some other witness as to the signature?

MR. JACOBY: This witness is the best I have, your Honor, and then I will connect it by the testimony of the paying teller of the same bank. Your Honor sees the difficulty under which I labor. Suppose your Honor admits it.

THE COURT: We will have to look this point up.

MR. JACOBY: Suppose your Honor permits the witness to answer the question subject to a motion to strike

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it out in the event that your Honor should deem the question improper then the witness won't have to come back if your Honor decides to overrule the objection.

THE COURT: That is quite true, but it may do damage.

BY THE COURT:

Q Now, as manager of the bank you pass upon the individual checks as they pass through or does the receiving or paying teller do that? A The paying teller and the general bookkeeper.

Q And that's yourself? A No, sir, not always.

Q sometimes? A Yes, sir, sometimes.

Q Now, does the manager of the bank, or of that branch of the bank or part of the bank-- he is really I presume like a vice president assigned up there and has to do with the details of the bank and the operation of the bank by passing upon the genuineness of the signatures of the various depositors in the routine of business? A In case of any variation.

Q It would be an exceptional case, wouldn't it, to do that? A Yes, sir.

Q You say you saw the defendant write in 1906?

A 1906, your Honor.

Q 1906? A Yes, sir.

BY MR. LEVY:

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Q Once? A Yes, sir, once.

Q His signature? A Yes, sir.

THE COURT: Now it is almost impossible for the Court of Appeals to have held that, simply impossible. I shall have to look at that case. Those words are very flat, taken from that case in the 54th New York, a civil case but surely a man who has seen another write once in 1906 would not be a competent witness.

MR. LEVY: Three years before.

THE COURT: To testify to the genuineness of handwriting? It seems to me to be inconceivable that the Court of Appeals would so hold and I shall have to look at that case.

MR. JACOBY: I examined the case, your Honor, and I find it holds as sweepingly as stated there in the Digest.

THE COURT: It is a very old case, the 54th New York.

MR. JACOBY: It is still good law.

THE COURT: I doubt if it would be followed by the Court of Appeals; I doubt it very seriously. Now we will sustain this temporarily and I will look it up to night. If I find I am in error then I will give you all the time necessary to produce this witness and bring him back.

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THE WITNESS: I will have to take this card.

This is a record of our office.

THE COURT: There are other things more important than your records.

MR. JACOBY: I am afraid you will have to leave that card here. It is in the custody of the Court, impounded in the custody of the Court and you can get it at the time the case is finished.

BY MR. LEVY:

Q Has my client still a bank account with your bank?

A I think he has.

THE COURT: You will get that card back as soon as this case is finished. Now we will have to suspend until tomorrow morning.

Gentlemen of the jury we will suspend the trial of this case until 10.30 tomorrow morning. Meantime you are not to make up your minds as to the guilt or innocence of the defendant and are not to discuss among yourselves any matter connected with the trial of the case until it is submitted to you for your determination.

(The Court then adjourned the further trial of the case until tomorrow, Wednesday morning, April 19th, 1911, at 10.30 o'clock.)

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THE PEOPLE v. LEE.

New York, April 19th, 1911.

TRIAL RESUMED.

JAMES D. FERRIS, called as a witness in behalf of the People, being duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. JACOBY:

Q What is your present occupation? A Assistant Manager of the Trow Directory Printing & Bookbinding Company.

Q That is what we commonly call the Trow City Directory?
A Yes, sir.

Q You have been connected with that house how many years?
A Since 1882, that is twenty-nine years.

Q Are you a notary public in and for the County of New York? A Yes.

Q And have been such since when? A About fourteen years.

Q Were you a notary public in the year 1898? A Yes, sir.

Q I show you a certain paper which we will describe as an application paper for the New York City Civil Service and I direct your attention to the last page and ask you whether you took the acknowledgement on that page? A Yes, sir.

Q Or is it an affidavit -- an affidavit, rather? A Yes, sir, that is my signature.

Q Who, if you know, took the oath and signed that paper?

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

MR. JACOBY: I offer this as a standard of handwriting, the signature.

THE COURT: Does the witness say he saw the person who purports to sign that paper, sign it?

BY THE COURT:

Q Did you see him sign it? A Yes, in my presence.

THE COURT: What is the objection to that?

BY MR. LEVY:

Q Who was the person?

BY THE COURT:

Q Who was the person who signed that paper? A Richard H. Lee.

BY MR. JACOBY:

Q This gentleman sitting here at the table? A Yes, sir.

BY THE COURT:

Q Do you know Mr. Lee? A Yes.

Q And you knew him at the time? A Yes.

BY MR. JACOBY:

Q That signature at the bottom of that paper, the signature "R. H. Lee", was signed by him? A Yes.

Q This paper is sworn to on the 26th of September, 1898; now, how long before that, for how many years or months before

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that had you known Mr. Lee? A My acquaintance with Mr. Lee dates back for a considerable number of years.

Q Before that? A Well, yes, I could assume I knew him a considerable time before that.

Q I speak now of this defendant? A Yes.

Q Are you familiar with his handwriting? A Well, I would not want to say that I would be certain of his handwriting, because it is some years since I saw him write, but at one time he was working with me and of course I used to see his handwriting, but I would not want to --

Q You were familiar with his handwriting at that time at all events? A Yes, sir, at one time.

MR. JACOBY: I ask that this bundle of papers be marked for Identification.

THE COURT: Has he identified them?

MR. JACOBY: He has identified this signature.

THE COURT: Had you not better mark that for Identification?

MR. JACOBY: There are ten or fifteen different things in it that I am going to address the attention of the witness to.

THE COURT: I think you had better mark that signature which he says is the defendant's -- merely mark it for Identification-- you can now or later.

The paper is marked for Identification People's Ex-

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hibit 6.

BY MR. JACOBY:

Q Take the first page of this bundle of papers and tell who in your opinion wrote the written parts?

THE COURT: No, ask him if he knows what handwriting that is.

MR. JACOBY: He does not have to know. This is opinion evidence.

THE COURT: He has formed an opinion.

BY MR. JACOBY:

Q Have you an opinion as to the person who wrote the written part of the first page of this bundle of papers?

MR. LEVY: I object as incompetent, irrelevant and immaterial, and upon the further ground that the proper foundation has not been laid. This man should not be permitted to express an opinion. He is not an expert. He is not shown to be a handwriting expert.

MR. JACOBY: I am afraid that Mr. Levy has not familiarized himself overnight with the rules in regard to opinion evidence as to handwriting.

THE COURT: Wait a minute. I will look that up.

The question here is, so far as the foundation is concerned, as to whether or not this witness is sufficiently acquainted with handwriting of the defendant. Has he shown himself to be sufficiently acquainted with the handwriting

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of the defendant so as to express an intelligent and sufficiently sure opinion as to any writing alleged to have been made by the defendant which he did not see the defendant write.

I understand the paper which the District Attorney now shows to the witness, the witness did not see that paper written.

BY THE COURT:

Q Is that right, the last paper he showed you? A I did not examine it, but I say to the best of my opinion --

Q Do not say that -- just answer my question -- show him the paper and ask him if he saw that written.

MR. JACOBY: I did not ask him that, because I admit that he did not see him write it. I do not claim he saw him write it.

THE COURT: I assume that he did not.

MR. LEVY: Before you rule I would like to examine the witness in regard to his knowledge.

THE COURT: I think that would be proper.

MR. JACOBY: I have no objection.

BY MR. LEVY:

Q How many years ago is it since you have seen the defendant write? A Must be a matter of about seven or eight.

Q You have not seen him write in seven or eight years?

A No.

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Q This paper that has been shown you purports to be dated sometime in the year 1898? A Yes.

Q Thirteen years ago? A Yes.

Q Are you in a position, of your independent recollection, to express any opinion with regard to the person who wrote that, thirteen years ago, or do you simply base your statement --

THE COURT: Say yes or no to that.

BY MR. LEVY (continuing):

Q Or do you simply base your opinion upon the fact that you see your own signature and you assume that in the natural course of events, the regular course of events, that he must have written it? A Yes.

Q That is the only reason? A Yes.

Q It is not because you have any recollection of having seen him write it, is it? A No, I could not say that. My recollection would be that I see my signature there and see his, and of course I generally, when I execute jurats have the party to sign the name at the time I execute it, in my presence.

Q In the regular course of your duties as a notary, you assume that because you see your own signature at the bottom of a paper, that name written there, you assume to have been written by the person whose name is there? A Yes, sir.

Q Therefore you have no independent recollection of the actual writing of that thing, have you? A No.

Q Now, Mr. Ferris, if you were shown that signature with-

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out the attachment of your own signature to it, could you identify it? A Well, not positively; I would not be certain of it.

Q Not positively? A Of his signature.

Q That is what I talk about.

THE COURT: He says not positively.

MR. JACOBY: He does not have to be positive of it. If it is his opinion that it is his signature, that is sufficient. It is a matter of opinion evidence.

MR. LEVY: I feel that he is disqualified.

MR. JACOBY: Mr. Levy has not asked him a single question as to his familiarity with the handwriting of the defendant, and that is the point your Honor permitted him to examine him upon, and I fail to have heard him ask him a single question as to the extent of his familiarity with the defendant's handwriting.

MR. LEVY: I have shown this paper was written thirteen years ago, and he has not seen him write in seven or eight years, and that if he saw the signature without his own signature attached to the paper, he is not positive he could identify it.

THE COURT: Proceed to see what other knowledge he has of the defendant's handwriting.

MR. JACOBY: If you will permit me to ask him that, I will question him.

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BY MR. JACOBY:

Q Did you ever see the defendant write or get letters that he told you he had written to you or acknowledged having written to you? A I have seen him write.

MR. LEVY: That is too general.

THE COURT: Yes.

MR. JACOBY: I withdraw the question.

BY MR. JACOBY:

Q Have you seen him write? A Yes.

Q How many times? A Several hundred times.

Q What connection did you have with him at the time you used to see him write? A He used to be a canvasser in the City Directory, taking names and information in regard to various people in business.

Q Working side by side with you for years? A In the same building, yes.

THE COURT: Do not lead the witness.

BY MR. LEVY:

Q Do you regard yourself qualified to give an opinion?

MR. JACOBY: I object. That is improper because it is a question of law.

THE COURT: It is calling for a conclusion and operation of the witness's mind, but the witness is here for the purpose of giving opinion evidence, if he gives any, which is of course somewhat in that nature.

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MR. JACOBY: It is of course for the jury to pass upon.

THE COURT: Yes, that is true, but I think the jury would like to know what the witness's own opinion of his powers in that regard may be.

MR. JACOBY: May I frame the question?

MR. LEVY: Let me finish my question.

BY MR. LEVY:

Q Do you feel you are qualified now to express an opinion with regard to the identity of the individual who wrote that signature which has been pointed out to you? A No, I would not state I could. I don't think I could.

THE COURT: You asked him another question, whether he regarded himself as qualified, generally.

BY MR. LEVY:

Q If you do not believe that you could --

MR. JACOBY: I object to the form of the question.

THE COURT: Yes. Ask him if he regards himself qualified to pass upon the genuineness of the handwriting of the defendant, or any words to that effect that you may wish to express it in.

BY MR. LEVY:

Q Do you regard yourself as being qualified to express an opinion as to the identity of the person who wrote the writing which was shown to you by the learned District Attorney?

A I do not.

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BY MR. JACOBY:

Q Now, Mr. Ferris, you have seen him write hundreds of times, you say? A Yes.

Q I ask you to give me your opinion -- you have not got to say it positively.

MR. LEVY: I object as argumentative.

MR. JACOBY: I want to know whether in your opinion.

THE COURT: The trouble about it is, Mr. District Attorney, if the witness feels, as he has so testified that in his own mind he would not like to believe his own opinion as to the genuineness of the handwriting of the defendant, I do not see how the jury could be called upon, in any event, to base their verdict or found it upon the witness's testimony. That was a dangerous question for Mr. Levy to ask, because it might have been answered detrimentally to him. I would not have dared to ask it and you would not have dared to ask it. I would not have asked it, because I would have been reversed had I done so, or had I asked such a question as that; but Mr. Levy boldly asked that question and the answer came, which seems to be rather convincing. Of course Mr. Levy ran the risk of this witness being very self-opinionated and saying yes, he could tell. The witness has answered the question I assume, as Mr. Levy hoped he would, but still at the same time it was a very brave and bold act.

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MR. JACOBY: Will you permit me to demonstrate that it was not?

BY MR. JACOBY:

Q You are friendly with the defendant, are you not, do you not feel friendly towards the defendant? A Yes.

Q You know him well?, A Yes.

Q You were talking with him in court this morning? A Well, just a few minutes.

Q You were talking with him? A Yes.

MR. JACOBY: I do not see as there was such boldness on the part of Mr. Levy as your Honor seems to think.

THE COURT: He might not have been so bold.

BY MR. LEVY:

Q Did you talk about this case this morning? A No.

Q Just passed the social amenities of the day? A That was about all.

MR. JACOBY: About this question of the opinion evidence, I objected with whatever strenuosity I am capable of, to the witness being permitted to answer the question you spoke of Mr. Levy being bold enough to ask him, because I was quite convinced the answer would be as it was, if he were allowed to ask him that question.

THE COURT: I think it was his right to ask the question, if he took the chance, and he took it.

MR. JACOBY: I think there was no chance or risk.

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THE COURT: I did not know that.

MR. JACOBY: I think it is for the jury, if the witness says he has seen the defendant write hundreds of times, it is for the jury, if the witness is willing to express an opinion, that certain papers I am about to show him are in the handwriting of the defendant or certain signatures are the signatures of the defendant.

THE COURT: No, I think this -- that the witness's testimony would be this: The witness said practically this: I do not feel I am competent to testify regarding it; I can give a pretty good guess at it; that is practically all; and guessing would not be of any service to the jury or to the Court. We can guess as well as he, but we do not want guesses.

MR. JACOBY: He may think he is not qualified and yet if he saw him write hundreds of times the jury may differ with the witness's own modest opinion of his own capabilities.

MR. LEVY: If the witness's testimony has no probative force to himself, how can it have any with the jury?

THE COURT: I think that settles this witness as a witness. I do not see how it could aid the jury except as one guessing, and the jury can guess as well as he, and I can guess and you can guess.

MR. JACOBY: If you saw a man write hundreds of times,

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your modesty might make you think you were not a very competent witness as to the identity of his handwriting and yet I may show you a paper and you might say the defendant wrote that though I don't think anything of my opinion, you might say that in modesty, but the jury might think your opinion was very valuable.

THE COURT: I probably have seen the clerk write a thousand times but it has never been my duty to compare his signature or be particular in regard to the genuineness of it. I know that belongs to somebody else, the chief clerk. I have seen him write, but I have paid no attention to it. I know that the chief clerk of this court attends to that, and yet although I have seen him write thousands of times, I would be no judge whatever of the genuineness of his signature. If it were my duty, my primary duty to pass upon his handwriting and the genuineness of it, I would be very much better qualified to testify as to whether or not in my opinion the signature was genuine.

MR. LEVY: Let me make another suggestion. The object of this interrogation on the part of the District Attorney is to get admitted into evidence a standard of comparison. It is well established by every adjudication I have been able to read, that in order to put in evidence a standard of comparison, the evidence must be unimpeachable and unequivocal, and when you put in doubtful and uncer-

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tain testimony with regard to the writing, it does not come up or measure up to the requirements of the cases.

THE COURT: That is a good point of law, as an abstract point of law I guess you are absolutely right, but it is not exactly the question before us now. It seems to me that we cannot have the testimony of this witness. You will have to produce another witness, Mr. Jacoby.

MR. JACOBY: Do you rule that in respect to the handwriting that I am going to offer or that I intended to offer, do you rule out the testimony as to the signature?

THE COURT: As I understand it, he says he has no independent recollection of that.

BY MR. JACOBY:

Q Do you not know, Mr. Ferris, that a person who swears to a jurat before you must say that that is his signature, even if he did not sign it in your presence, yes or no?

MR. LEVY: He won't say yes or no -- that is simply a statement of law. The witness is not called upon to make any statement in regard to it. It is incompetent, irrelevant immaterial and argumentative.

MR. JACOBY: I withdraw the question.

BY MR. JACOBY:

Q Will you or will you not swear that you either saw this man sign his name to that paper, that jurat, People's Exhibit 6 for Identification, or that if he brought it to you signed he

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said "That is my signature"?

MR. LEVY: I object as incompetent, irrelevant and immaterial and not proper evidence.

THE COURT: I shall have to sustain the objection. The witness has stated, as I understand it, that he has no independent recollection of that.

MR. JACOBY: I do not think he said so.

THE COURT: I will put it to him myself so that we may not have any misunderstanding.

BY THE COURT:

Q Referring to the first paper the District Attorney showed you, wherein your name appears also at the bottom of it, can you testify that you have an independent recollection of having seen that signature signed in your presence? A I could not positively swear it was signed in my presence.

Q Or that you saw it signed at all, have you any independent recollection of it other than the paper itself?

A Not at all.

Q Have you any independent recollection of it other than your signature there? A No, sir.

Q Can you recall to us now the circumstances under which, that is, independently, from your own recollection, any circumstances connected with the signing of that paper, if it was signed in your presence? A No, sir.

Q Can you tell us when and where it was signed exactly?

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A No.

Q Have you any independent recollection of it? A No.

Q I do not mean to say where you think it must have been signed, but have you an independent recollection of just the place that signature was made, if it was made in your presence?

A No, sir, I have not.

BY MR. JACOBY:

Q Have you any recollection that either it was signed in your presence or that the defendant at the time he swore to it said he had signed it?

THE COURT: Have you any independent recollection of either of those things, and if so, tell us? A No, sir, I have not.

BY MR. JACOB:

Q Did you ever take an oath or acknowledgement or an affidavit in your life, where the person who proposed to swear or acknowledge, did not either sign in your presence or tell you that was his signature?

Objected to as immaterial.

MR. JACOBY: If he answers it no, that would include this one.

MR. LEVY: That is not proper what he did on other occasions or what he ever did do.

MR. JACOBY: If he never did it, that would include this case.

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MR. LEVY: The law does not require that a notary public should ask any such question. The law does not require any such procedure to be gone through.

THE COURT: Is there any authority on that, Mr. Jacoby?

MR. JACOBY: The law does require a notary public to know positively, either from observation or inquiry, two things, first, the identity of the person who swears or acknowledges, and secondly, that that is the signature of the person. If he sees him sign, he knows it is his signature. If the person acknowledges and says that is his signature, he also knows it is his signature, provided he knows the identity of the person.

MR. LEVY: Was this an acknowledgement or an affidavit?

MR. JACOBY: An affidavit.

MR. LEVY: The law does not require that a notary public should ever know the person who signed a paper. If an acknowledgement is taken, he must say "he personally came before me", but if it is an affidavit there ^{need} not be any personal acquaintance.

THE COURT: What is this, an affidavit?

MR. LEVY: An affidavit.

MR. JACOBY: A commissioner or notary who does that takes his life in his hands.

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MR. LEVY: In an affidavit it is not required.

MR. JACOBY: I have been a commissioner of deeds many years and I would not take ten thousand dollars to take an affidavit of a person that I did not know to be the person whose name is signed to the affidavit.

MR. LEVY: You have been very scrupulous and careful but I know that persons in banks and other places who will take affidavits without having seen the person.

THE COURT: But not an acknowledgement?

MR. LEVY: Not an acknowledgement.

THE COURT: Because, in the acknowledgement the person certifies that the individual is known to him, and in the affidavit it does not so state.

MR. JACOBY: Here is a witness who knew the person.

THE COURT: I think, in a case of this kind you had better get a better witness. Better get a witness that is more certain and sure, because there is too much guess work and too much uncertainty about it. I will give you all the time you want.

ROBERT F. BURNS, called as a witness in behalf of the People, being duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. JACOBY:

Q Where do you reside? A 46 West 131st.

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Q What is your present occupation? A I am a clerk employed by the Knickerbocker Trust Company.

Q What kind of a clerk? A General bookkeeper and bank teller.

Q In which particular one of the banks or branch banks of the Knickerbocker Trust Company are you attached? A Harlem Branch.

Q Do you know the defendant, Richard H. Lee? A I do.

Q Has he been a depositor in the Harlem Branch of the Knickerbocker Trust Company for some time? A He has.

Q Is he a depositor there now? A He is.

Q I show you a certain card, which was marked People's Exhibit 5 for Identification, and I ask you whether that is the identification card of this defendant? A It is the signature card.

Q I mean the signature card? A The signature card.

Q Mr. Lewis, the gentleman who was here yesterday, is the manager of that branch of the Knickerbocker Trust Company?

A He is.

Q Are you familiar with the signature of this defendant?

A I am.

Q I show you a certain paper marked People's Exhibit 3 for Identification, consisting of a number of white sheets, I will give you the exact number -- consisting of eight white sheets headed "Daily Report" in print, and excluding for the present

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certain small tickets that are pinned between the white sheets, and ask you to take the first one of them and tell me if you can recognize the signature or writing near the top of that page. That simply calls for yes or no, whether you recognize it?

MR. LEVY: I desire to examine the witness first as to his qualifications to answer that question, before he be permitted to answer it, because practically that is putting the same question and asking for opinion in a different form.

THE COURT: What is the objection to Mr. Levy examining him?

MR. JACOBY: My only objection is that every time he has examined a witness so far it has been found that he is unsatisfactory. Otherwise I have no objection at all.

THE COURT: We had better find it out early than late.

MR. JACOBY: Yes; I have no objection.

THE COURT: Proceed, Mr. Levy.

BY MR. LEVY:

Q How many times have you ever seen the defendant write?

A I have never seen him write.

Q You never saw him write? A No.

Q You did not see him write his name upon that paper which was shown you just now by the District Attorney? A I did

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not.

MR. LEVY: I submit that he is clearly disqualified.

THE COURT: Not necessarily. You will have to go further than that.

BY MR. LEVY:

Q You never saw him write, and what information have you regarding his signature other than that which some one else told you? A None.

Q So you act upon the assumption that the paper shown you first, the signature card, you act upon the assumption it is the defendant's signature because some one told you it was his signature? A Yes, sir, exactly.

Q Do you regard yourself that as being hearsay somewhat? A Yes, certainly.

Q You do not think a man who has been told something can positively swear to a fact unless it has been in his own personal knowledge? A No.

Q And you would not, would you, unless you personally knew and saw the person write, you could not testify to the fact that he did write it? A Certainly not.

BY MR. JACOBY:

Q How many times has this man come to the window to your bank with checks to be cashed?

MR. LEVY: That proves nothing.

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BY MR. JACOBY:

Q How many times have you cashed checks for him?

Objected to as immaterial. Overruled. Exception.

A I cannot say that I ever cashed a check for him.

Q What? A I cannot say that I ever cashed a check for him.

Q How many times have you passed on his signature on checks?

MR. LEVY: I object. He does not know it is his signature. You have not proven any signature.

BY MR. JACOBY:

Q Have you got some of his checks in your pocket? A I have.

Q Bring them out, please?

MR. LEVY: I object to the production of any checks. A banking institution is sort of a confidential agent of every depositor, and it has been held that in the trial of a criminal, proceeding documents in the possession of an agent are constructively in the possession of the defendant, and no person shall be permitted or allowed to give evidence or furnish evidence orally or in writing against himself, and we protest and object to the bank producing our confidential communications.

MR. JACOBY: I have never heard of that decision. I have heard of doctors and lawyers.

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THE COURT: That has never been extended as far as that, Mr. Levy. There has been some discussion as to getting a Legislative Act embodying that proposition, but it has not passed. There is no confidential communication in that sense, such as there is between a lawyer and client, or patient and physician.

MR. LEVY: Will you permit me to do this, to request him as counsel for my client to allow me to have those papers in my hand?

THE COURT: He has not offered them in evidence.

MR. LEVY: Independently, I ask the witness to give to me, as counsel for the defendant, the papers he has in his possession.

THE COURT: He has not offered them in evidence yet, so that that could not be done.

BY THE COURT:

Q Did you ever show the defendant any of those papers you have in your hand, did you ever exhibit them to him, to the defendant? A No, I cannot say that I have.

Q Did you ever have a discussion with the defendant in regard to those papers in your hand? A No, sir.

THE COURT: How do you bring home to the defendant the papers that the witness has now in his hands?

MR. JACOBY: Let the witness tell us.

THE COURT: He would not understand the technical

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meaning of that.

MR. JACOBY: I can only bring it home by having the witness testify it is the same signature as on the Identification card, which the witness Lewis testified was signed in his presence by the defendant, and that they have been paying checks on that signature for years and years. That is the only way I can bring it home to the defendant. I do not care about the checks in his pocket, except to have the witness testify by counting them how many times he has cashed checks with that same signature as is on the identification card, to show that he is familiar with his signature.

BY THE COURT:

Q You never saw the defendant write his name? A No.

Q Did you ever receive a letter from him? A No.

BY MR. LEVY:

Q All you have done is to act upon information that somebody else imparted to you? A Yes.

THE COURT: Merely for the sake of discussion, suppose the witness had casually seen a man write his name, just the name, but never received a letter from him or never had seen any other of his handwriting, that is, the ordinary handwriting. As an actual fact a man sometimes has a peculiar way of signing his name. Assume, as a proposition of law would such a person be qualified to express an opinion as to the general handwriting of the defendant?

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MR. LEVY: I do not think so.

MR. JACOBY: I do, as to his signature. If he has seen the name.

THE COURT: I was just merely bring that out, because from this witness, even if he knew the signature of the defendant, it would be your object probably to prove by him some other writing.

MR. JACOBY: No, only the name R. H. Lee. That is all I hope to prove by this witness -- that is the signature.

MR. LEVY: The witness is not qualified to answer to question put to him, because he did not see the writing. He did not see the defendant write. He is acting upon hearsay and information somebody else imparted to him.

MR. JACOB: He is familiar with his signature.

MR. LEVY: In order to allow proof with regard to the genuineness of a standard for comparison the evidence, as I said before, must be indisputable and unequivocal as to the identity of the individual who made the writing. He was told by someone that is Mr. Lee's signature. He is acting upon hearsay. Can they not produce a witness who saw the defendant write.

MR. JACOB: A witness swore that that was the writing of the defendant, People's Exhibit 5.

THE COURT: Did that witness testify he had any in-

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dependent recollection of that.

MR. JACOB: Yes, he said he saw him write it. Lewis said he saw the defendant write that and he also saw him write East 125th and Harlem River on the card.

MR. LEVY: Why are you reading that Exhibit when it is not in evidence.

MR. JACOBY: What I have just said is in evidence. I ~~xxxx~~ refreshed my recollection and what I state is in the typewritten evidence.

THE COURT: I want to see what the witness said.

MR. LEVY: Page 61, your Honor will find it.

THE COURT: There was no cross examination of that witness as to whether or not he had any independent recollection

MR. LEVY: The reason for that was because you ruled it was prematurely presented.

MR. JACOBY: You said it was admissible up to that time -- he said he saw him sign the name.

THE COURT: Yes, he says very flatly he saw him sign it.

MR. LEVY: You did not admit the paper and there was no need for it -- that was the reason there was no cross examination.

MR. JACOBY: There has been cross examination before I offered any paper in every other instance.

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BY MR. JACOBY:

Q You used to see the defendant at the bank? A I did.

Q Right up to the present time? A Yes.

Q What did you always do when you saw him, did you ever talk to him?

Objected to as immaterial.

Q Did you ever talk to him? A No.

Q Never talked to him in your life? A No.

Q How did you know it was this defendant, because you see him here now? A I believe on one occasion he was pointed out to me by the manager as being Mr. Lee of the Dock Department.

Q Do you ever act as paying teller? A I have.

Q On none of those occasions did he ever personally present a check to be cashed? A Not that I can recall.

Q You have seen this signature as being his signature --

Objected to.

Q The signature People's Exhibit 5 you have seen, haven't you, yes or no.

Objected to.

THE COURT: What is the ground of the objection.

The question is repeated.

MR. LEVY: I have no objection to that.

THE COURT: And if so, when?

THE WITNESS: I have had that in my possession for

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a number of years.

Q And seen it upon several occasions? A Several occasions.

Q Have you ever compared it with other signatures with the words R. H. Lee on them, on checks?

Objected to as incompetent, immaterial and irrelevant.

MR. JACOBY: I do not say the defendant's signature -- I say with the R. H. Lee on checks.

MR. LEVY: You have to prove the signature first.

MR. JACOBY: I want to show his familiarity with the signature R. H. Lee.

THE COURT: He may answer yes or no.

MR. LEVY: I except.

THE WITNESS: I have.

BY MR. JACOBY:

Q Many times? A Many times.

Q Assuming that the signature on this identification card, People's Exhibit 5 were written by this defendant, with that assumption can you say that you are familiar with the signature of this defendant?

Objected to.

Objection sustained.

MR. JACOBY: He does not know that was written by the defendant because he did not see it, but another

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person saw it, and it has to be put in that hypothetical form. There is no other way I can put it to this witness and I cannot put it to the bank manager, because he only saw the defendant sign the name once.

MR. LEVY: I do not think the Court can help you in that regard. You have to prove your case properly.

MR. JACOBY: I ask your Honor to reconsider --

THE COURT: I will put it so as to see it covers another case.

BY THE COURT:

Q. Have you ever received any writing of any nature from the defendant in answer to any letter or document of any kind which you have addressed to the defendant? A I have not.

Q. Have you in the ordinary course of business ever submitted to the defendant any writing or document of any nature or description which purported to have been written by the defendant? A I cannot recall that I have. It is just possible he may have come in and asked to see his checks, but I cannot recall it.

THE COURT: Now, I tell you Mr. Jacoby, I have covered all of the points that were raised here in Stephen's Digest.

MR. JACOBY: If I show that this was the only Richard H. Lee that was a depositor there during these years and

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that they have been paying out upon checks and that this gentleman has been passing upon the signatures R. H. Lee on checks many times as he has testified -- paying out money on them, and this was the depositor, I think it is a fair assumption that the ^{signature} ~~man~~ R.H. Lee on those checks was the signature of this defendant, because nobody else could have been doing it.

THE COURT: The trouble about it is this, that you state a possibility of producing such evidence, but this is not the witness to prove that by. I have asked this witness everything as to which Stephen's in his digest says that a witness may testify as to the genuineness of handwriting, and he has answered in the negative every one of those conditions.

MR. JACOBY: My claim is this, on the assumption that this signature on the card, People's Exhibit 5 for identification, on the assumption that that signature is the genuine signature of the defendant, with that one thing assumed, and we have evidence of its being a fact in the record -- with that one thing assumed then this witness can testify that he is familiar with the signature of the defendant. He is familiar with the signature R. H. Lee, and if that R. H. Lee on People's Exhibit 5 is in truth and fact the signature of the defendant, then he is familiar with the signature of this defendant.

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MR. LEVY: You cannot go on assumption here. You cannot assume anything in the trial of a criminal case.

MR. JACOBY: I have proved that is the signature of R. H. Lee by the witness Lewis.

MR. LEVY: This witness has never seen him write and never had any communication with the defendant. This witness has acted upon information given to him by another. He assumes it was this defendant because this defendant was pointed out to him on one occasion by the manager of the bank, and that is all there is to his testimony.

THE COURT: But, that is not the matter that troubles me at all. It is this fact, that this witness has never on any occasion spoken to the defendant. He has never ~~if~~ on any occasion submitted any of these papers to the defendant. He has never got an admission from the defendant directly or indirectly that the papers which passed through his hands were genuine. He has never had any correspondence with the defendant. He has never received any reply from the defendant, or any communication whatever. There is the trouble and so, I want the District Attorney to know very candidly what I think, and I shall have to sustain the objection of the defence.

MR. JACOBY (To the witness) You may go and kindly have Mr. Lewis here again at two o'clock.

BY THE FIFTH JUROR:

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Q If this gentleman came with one of those checks to you, to the bank, would you cash it.

THE COURT: You cannot ask him that.

MR. LEVY: Now, if your Honor please, I ask that those papers be surrendered to the defendant that this witness has.

MR. JACOBY: I object to that.

THE COURT: He has been subpoenaed to produce them and you must get them in some other way, in the regular course.

MR. LEVY: XI can send a subpoena up to the bank myself.

MR. JACOBY: I have them under subpoena now. This witness is regularly under subpoena.

THE COURT: He may go. He has the right to the protection of the court in ~~xi~~ coming from the bank and returning thereto.

JAMES GANNON, called as a witness in behalf of the People, being duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. JACOBY:

Q What is your present occupation? A Laborer.

Q By whom are you employed? A Department of Docks & Ferries.

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Q Did you ever have to talk to a captain on board a boat?

A Very seldom.

THE COURT: Assume the boat is 60 feet away and you are shouting to it. Talk up so that we can hear you.

BY MR. JACOBY:

Q How long have you been employed by the Department of Docks of the City of New York? A 19 years.

Q Do you know the defendant Richard H. Lee at the bar?

A Yes.

Q How long have you know him? A Six or seven or eight years.

Q You did know him during the months of January, February and March, 1909? A Yes.

Q Were you employed under him at that time? A Yes.

Q Where? A 22nd street and East river.

Q Did you have a sort of a little office there? A Yes, sir.

Q He was the man who gave you orders? A Yes.

Q How long had you been working there under him? A A little over a year.

Q Were you and are you familiar with his handwriting?

A Well, I have not seen very much of it.

Q You have seen him write? A Off and on, at times, at the telephone.

Q I show you People's Exhibit 3 for identification and I

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ask you whether in your opinion portions of that that are in writing are in the handwriting of this defendant?

MR. LEVY: I object upon the ground it is immaterial, irrelevant and incompetent and no proper foundation has been laid and I desire to cross examine the witness as to his qualifications.

THE COURT: I think that is proper.

MR. JACOBY: He says that he saw him write.

THE COURT: Yes, but that is a very vague statement. I think he said something about sometimes when he was at the telephone or something of that kind.

MR. JACOBY: Let me examine him. I have the right to qualify my own witness.

THE COURT: Let the District Attorney examine him first.

BY MR. JACOBY:

Q You say for little over a year, before January, 1909, in other words from about January, 1908, you were working under this defendant at those docks where the office was at the foot of 22nd street; isn't that right? A Yes.

Q Now, were you the only one working under him? A Yes.

Q And what were the duties that you and he used to perform? A I was there --

MR. LEVY: I object as immaterial.

MR. JACOBY: It must develop --

THE COURT: Yes, objection overruled. He can state

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what his duties were.

BY MR. JACOBY:

Q And what the defendants were so far as you knew?

THE COURT: So far as he saw.

MR. LEVY: That is a matter of regulation of the head of the Dock Department.

BY MR. JACOBY:

Q What he saw him do?

THE COURT: He can testify what he saw with reference to himself.

MR. JACOBY: What he saw him do.

BY THE COURT:

Q What did you see him do?

MR. LEVY That is a different question, and when.

THE COURT: And when.

BY MR. JACOBY:

Q What did you see him do during the period from January 1st, 1908 up to March 1st, 1909 down there at the dock? A I used to go there in the morning and open up the office.

Q And then what did you do? A In January the first thing I would do was light the fire and then sweep out the office and dust it.

Q What time did Lee use to get there in the morning?

A 9 o'clock.

Q You would be in the office with him every day, would

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you for some period of time? A Yes, sir.

THE COURT: Let us get his duties. He came down and opened up the office and swept it out and dusted it.

THE WITNESS: And answered the telephone, in case the Dockmaster was not there, be around when he would go out and answer it, and when he would be out on his district.

BY MR. JACOBY:

Q You mean the Dockmaster, Mr. Lee? A Yes, sir.

Q During the course of the period, did you use to be in the office with this man quite often, yes or no? A Yes, sir.

Q Sometimes for hours at a time? A Sitting there reading, yes.

Q Did you ever see him writing during that time? A Only when I would go to the telephone to answer it.

Q Didn't you ever see him write when you did not go to the telephone? A At the desk when I was sitting behind him or alongside of him.

Q You have seen him write? A I have seen him write there.

Q You have seen him write daily reports, haven't you?

MR. LEVY: I object.

THE COURT: You will have to ask him what they were.

BY MR. JACOBY:

Q What is a daily report, if you know?

Objected to.

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BY THE COURT:

Q What did you see him write.

BY MR. JACOBY:

Q Tell us some of the things you saw him write? A Making out his tickets and reports and whatever writing he had to do.

BY THE COURT:

Q Would you read over those things as he wrote them?

A No, sir.

BY MR. JACOBY:

Q Did you ever? A Read over his reports.

Q As he was writing?

BY THE COURT:

Q As he was writing did you look over his shoulder and what read/he was writing? A At the telephone, probably looking down at the desk.

BY THE COURT:

Q Do you remember you ever did it? A I guess I did.

BY MR. JACOBY:

Q You do remember? A Yes. When I was standing answering the telephone and waiting for a call I would probably be looking at the desk, standing alongside of him.

BY THE COURT:

Q How near? A A half a foot or a foot.

Q Can you see without your glasses -- you are wearing them now? A Yes, I can see, but I cannot see writing very

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plainly.

Q You can see but could not see writing -- how near can you see -- I show you a page, one of the Law Journals, let us see how much of that you can read, three feet away, can you read that? A I cannot read nothing but the top of it.

MR. JACOBY: He said half a foot away.

BY THE COURT:

Q Half a foot? A I said I was standing in front of the desk, but he was sitting down and I was standing up.

Q How far away would that be, just show us, you take this Law Journal of today and show us how far the writing would be from you when you saw him writing -- you understand? A Yes.

MR. EVY: Stand up.

BY THE COURT:

Q Put this anywhere you wish and let the Law Journal be just about where his writing paper was and then show us how far your eyes were from that when you saw him write-- would that be fair.

MR. JACOBY: I would rather you take the monthly report, the thing that is like what he saw him writing on.

THE COURT: I just want him to test his sight.

BY THE COURT:

Q Proceed and take that paper, the Law Journal and put

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that in a place which corresponds approximately with where the defendant was doing the writing which you saw him write. Pick it up and put it anywhere you wish? A I was standing like this (indicating)

Q You were standing like that (indicating)? A Yes.

Q Now read me something at the top of the second column there, of the writing there? A I cannot read it now without my glasses.

Q Put on your glasses, stand up there and read it with that? A No, sir.

Q That is about three feet off from you, how near would you have to get that before you could read those words?

A Have to hold it up in front.

MR. LEVY: Read a few words at the top.

BY THE COURT:

Q Read for us, we will say beginning at the top of the second column, how does that read? A Interpression have fixed a proper meaning.

THE COURT: Read it again.

THE WITNESS: Interpression have fixed a proper meaning.

THE COURT: Interpretation has fixed its proper meaning -- you read that two feet from you?

THE WITNESS: Yes.

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Q You have handled these reports written by the defendant frequently in the usual course of business and sometimes put them in envelopes and mailed them to the Dock Department, haven't you? A They would be in the envelopes.

Q You have seen him put them in envelopes? A I saw the dockmaster.

Q Hasn't he sometimes handed them to you unsealed and asked you to put them in an envelope and mail them?

THE COURT: Do not lead the witness.

MR. JACOBY: He has worked a year and a half under him and they were the only two people working there.

THE COURT: I would rather that he did the testifying himself.

MR. JACOBY: I think I have qualified him sufficiently.

BY MR. LEVY:

Q What schooling have you had? A Public school and parochial.

Q Can you read and write? A Not very good.

BY MR. JACOBY:

Q Can you write? A Yes, I can write.

BY MR. LEVY:

Q At any time you saw the defendant write, did you look at what he was writing close enough to be able to say what he was writing? A What he was writing?

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THE COURT: If you don't understand the stenographer will read it again.

(The question is repeated by the stenographer)

A At times, I was standing there and I could see he was making out his reports and making out his tickets.

Q Could you see what he was writing; you knew he was doing that, but what particular matter he was writing you did see? A No.

BY THE COURT:

Q Did you see the words he wrote, could you read the words that he wrote? A No.

BY MR. LEVY:

Q Do you think you are qualified to be able to identify the handwriting of Mr. Lee? A Well, no, sir, I would not say-- I would not be able to say I would be perfectly or perfect in being able to say it was his.

BY THE COURT:

Q You see the clerk of the court writing there now?

A Yes.

Q Now if you were here you would see him writing that about every day in your life that you were here; could you tell what he was writing or identify his signature or know his handwriting from that? A I might have an idea but could not say positively it was his.

BY MR. LEVY:

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Q Could you swear to it is what the judge wants to know?

A No.

Q You could not? A No, I could not swear to it.

Q You were not there to help in any writing -- you were there to take care of the office? A Yes.

Q And do odd jobs around the place? A Yes.

Q And go on errands? A Yes.

Q And obey orders? A Yes.

Q From the Dock Department? A Yes.

Q You were in the Dock Department? A Yes.

Q You cannot give an opinion of this man's writing, can you or can you not? A No, sir, not.

Q What? A No, sir.

MR. LEVY: He is disqualified.

BY MR. JACOBY:

Q Look at that paper you have in your hand; haven't you got an opinion?

THE COURT: I do not think it would aid the jury very much.

BY MR. JACOBY:

Q Didn't you use to write out some of those reports yourself sometimes when he asked you to? A When he would ask me?

Q Yes? A No, sir.

Q Didn't you ever write out any daily report? A Not for

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Mr. Lee.

Q Did you ever for anybody else?

Objected to as immaterial.

MR. JACOBY: I want to show that he is familiar with these dock papers.

MR. LEVY: It is immaterial.

THE COURT: Ask him a question.

BY MR. JACOBY:

Q Did you ever write out any daily reports of the dock department? A No.

Q never in your life? A No.

Q Did you ever do any writing at all while you were working for the Dock Department? A No, sir, only just to practice.

Q I ask you to open that paper, put your glasses on your nose, open that paper and look at the first page of it -- are you looking at it? A Yes.

Q I want to ask you -- do not answer this question until Mr. Levy has an opportunity to object -- I want to ask you whether you have any opinion as to who wrote the written part of that paper -- I want an answer yes or no on that?

MR. LEVY: I object.

Objection sustained.

BY MR. JACOBY:

Q Were you not familiar with Mr. Lee's handwriting in

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the course of a year and a quarter you worked under him in that little shanty, yes or no -- haven't you looked at it with your glasses on close, frequently, yes or no --

MR. LEVY: I object. 1

Q Had you not looked at Lee's handwriting with your glasses on close to your eyes often, yes or no?

THE COURT: Defendant's counsel objects to that I presume for the reason --

MR. JACOBY: I have not heard him object.

MR. LEVY: Yes I did. b

THE COURT: I presume his objection is based upon this, that there is nothing there to indicate who told him it was Mr. Lee's signature.

MR. JACOBY: I did not say the signature, I said the handwriting.

THE COURT: The handwriting, or, how the alleged handwriting was brought home to Lee.

MR. LEVY: There is no connection between the proposed testimony and any act of the defendant. The witness has said he was a laborer.

THE COURT: That is what I understand the objection to be. It is rather a bald proposition without anything to show how the witness knew it was the defendant's handwriting.

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MR. JACOBY: I will reframe the question.

THE COURT: Yes, because if you ask him if Lee ever showed him anything with his handwriting on it and told him it was his, or indicated in any way that was his handwriting or signature, that would be a different proposition.

MR. JACOBY: If I see a man writing two feet away from me and do not know what he has been writing and he takes up what he has been writing and hands it to me and I look at it, I know that I am looking at his handwriting.

MR. LEVY: You did not ask him that question -- did he ever show you any of his writing.

BY MR. JACOBY:

Q Did Mr. Lee ever hand you any of the stuff you saw him writing on, yes or no? A Not none of these reports.

Q What? A Once in awhile might look over his books.

Q What? A I may look over his book once in awhile.

Q The book he had written in? A Yes.

Q Did he hand you such a book? A Might look over it, yes.

Q After you saw him write in it? A We would give it to me at the end of the month and I would look over it.

Q And tell you what? A To see if I could find an error in it.

Q And that was a writing you saw him write?

THE COURT: What?

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THE WITNESS: It was his book.

BY MR. JACOBY:

Q Was it his handwriting? A Monthly book.

Q Was it his handwriting.

BY THE COURT:

Q Did you see him write in it? A I couldn't say I saw him write it all. I saw him write in the book.

BY MR. JACOBY:

Q I will show you such a monthly book, if I can find it -- here is a monthly book purporting to be for the month of March, 1909; is that the kind of book, is that one of the books? A Yes.

Q You have handled that book before? A Not this book-- I don't know if I handled this book.

Q But a book for a month like that? A Yes.

Q Look at the writing in that book, look at it very carefully.

BY THE COURT:

Q Can you read it, can you read the writing in it? A I am looking over it.

Q Can you read the writing? A Yes.

BY MR. JACOBY:

Q Whose writing is that in that book that you hold in your hands, if you know -- in your opinion whose handwriting is in that book that you are looking over now, if you have any

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opinion on the subject?

Objected to as incompetent, irrelevant and immaterial and upon the ground the witness is not qualified and that no proper foundation has been laid.

MR. JACOBY: He worked for him a year and a quarter and he has seen him write frequently.

MR. LEVY: This is argument on the part of the District Attorney and I have made my objection.

THE COURT: I do not think this witness has sufficiently stated or testified that he has ever read any of the writing he has seen the defendant write. I have seen this clerk write here for three years, sitting right here, I have seen him write every day I have been here, but at the same time I would not know his signature and would not know his handwriting unless he told me it was his signature or his handwriting.

MR. JACOBY: You are not working under him as a subordinate. He knows your signature well.

THE COURT: He is working under me, and it might be I ought to be in a position to know his handwriting.

MR. JACOBY: He knows your signature.

THE COURT: My signature is rather of a distinctive kind.

MR. LEVY: The witness is an ordinary day laborer.

MR. JACOBY: He is not an ordinary day laborer. He

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was not a hodcarrier -- there are certain ranks or grades in the Dock Department and a certain grade called laborer.

THE COURT: He said his duty was to open up the office and sweep it out and dust it and if the defendant was absent he would answer the telephone.

MR. JACOBY: He has said the defendant used to have him check up his monthly reports and that is not a laborer's work.

THE COURT: That is true.

THE WITNESS: I did not say check it up.

BY MR. JACOBY:

Q What did you say? A I said look over the book in case he made a mistake to see if I could find it.

BY THE COURT:

Q Did he ever tell you that he had written up these books? A No, he never told me.

MR. JACOBY: It went without saying.

MR. LEVY: Wait a minute.

BY THE COURT:

Q Can you testify that he handed you a book and asked you to look over the report and that that was a book that you had seen him writing in himself, can you say that? A He would hand me the book which was his monthly book -- he would hand me

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the book and say there was a mistake and see if I could find where the mistake was.

MR. JACOBY: Will you repeat the Court's question.

(The stenographer repeats the question of the Court as follows: Can you testify that he handed you a book and asked you to look over the report and that that was a book that you had seen him writing in himself, can you say that?

A Yes.

MR. JACOBY: I submit that the witness is qualified to express his opinion as to the handwriting of this defendant.

THE COURT: Yes, I think he has brought himself now under the rules of evidence, and now the only question is as to the value of that opinion and that is for the jury-- as to the value of that opinion.

MR. LEVY: I except.

BY MR. JACOBY:

Q We will take this thing first, look at it, at the first sheet of People's Exhibit 3 for identification and I ask you to give your opinion as to who wrote all the written part of that paper?

MR. LEVY: I object.

THE COURT: The first question is, can you by looking at it give an opinion as to in whose handwriting it is,

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yes or no.

MR. LEVY: I object.

Overruled. Exception.

MR. LEVY: Before the witness is permitted to answer let me ask this question of the witness.

THE COURT: We had better have it out now and not later. He wants to examine the witness preliminarily in regard to his qualifications.

BY MR. LEVY: That is my purpose.

BY MR. LEVY:

Q Are you able to call to mind any special writing that you saw Mr. Lee make?

Objected to as incompetent, irrelevant and immaterial.

THE COURT: It merely goes to the weight.

MR. JACOBY: That is for cross examination and not for the voirdire.

MR. LEVY: It goes to the qualification.

MR. JACOBY: I object to it.

THE COURT: I will allow the question.

(The question is repeated)

A No, sir.

BY MR. LEVY:

Q Are you able to bring back to your mind and recollection any writing at all that you saw, when standing at the telephone and Mr. Lee was sitting at the desk writing? A No, sir.

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Q no you by reason of the fact that you saw him write believe that you are qualified now to express an opinion as to whether he did or did not write this paper which I show you?

A I do not think I am qualified to answer it.

Q You do not think you are qualified to answer it? A No.

Q Will you tell me in your own way why you do not believe that you are qualified to express an opinion as to whether or not Mr. Lee wrote this paper which I show you, in your own way, explain why you do not ~~know~~ think so? A I do not think I have got the training or the schooling.

Q Do you think you had opportunity to observe his writing closely enough to be able to qualify to express an opinion, do you understand that question.

(Question is repeated)

THE WITNESS: No, sir.

Q All you did have the opportunity of seeing was the man writing, and you saw that casually, is that so? A Yes.

MR. LEVY: I press my objection.

BY MR. JACOBY:

Q Look at the first page of People's Exhibit 3 for identification and I now ask you whether you have formed an opinion as to who wrote the written part of that paper, yes or no.

MR. LEVY: Will you instruct him to answer yes or no.

THE COURT: Yes.

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BY THE COURT:

Q Have you formed an opinion from an inspection of that paper, the first page of that paper, have you formed an opinion as to who wrote that paper--I do not mean a guess--any of us can guess, but I mean have you formed an opinion in your own mind, yes or no? A Yes.

BY MR. JACOBY:

Q Now, who is the person who in your opinion wrote it?

MR. LEVY: I object as irrelevant, incompetent and immaterial, and upon the ground the proper foundation has not been laid and the witness is not qualified. The witness says that in his own opinion he is not qualified to give an opinion.

MR. JACOBY: The man is modest.

MR. LEVY: He said he did not have opportunity to inspect the writing closely enough, and he was asked to give his reasons why he did not think he was qualified and he said he did not think he had schooling enough to be able to judge, and that is his estimate of himself. One other witness this morning was precisely in the same position. Expressed the opinion that he was not qualified to testify.

MR. JORDAN: The facts that came out with his statement that he was not qualified were such as were very persuasive to his Honor as well as to the rest of us, while the facts here are very persuasive the other way, in the

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direction that he is qualified.

MR. LEVY: May I ask the witness this question.

BY MR. LEVY:

Q A minute ago you said that you did not think you were qualified to express an opinion as to who wrote or as to whether or not the defendant wrote the paper which you hold in your hand; why do you now say that you believe that you can form an opinion?

MR. JACOBY: I submit that the examination as voir dire relating to this witness has proceeded far enough.

BY THE COURT:

Q In answer to Mr Levy's question I believe you said-- he asked you this question, do you believe that you are competent to express an opinion as to the genuineness of the handwriting of the defendant?

MR. JACOBY: As to who wrote.

BY THE COURT:

Q (Continuing:) The genuineness of the handwriting or as to--

MR. LEVY: As to whether the defendant wrote it or not.

MR. JACOBY: As to whether the defendant wrote it.

BY THE COURT:

Q (Continuing:) As to whether the defendant wrote a certain paper or not, and you answered to him that you did not think that you were qualified to testify to that, is that cor-

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rect? A Yes.

THE COURT: That being the case, would his testimony have any prohibitive force whatever?

MR. JACOBY: I have contended repeatedly and still urge upon your Honor that the witness' own opinion as to the value of his testimony is irrelevant. Suppose a witness should go on the stand and say I am the greatest handwriting expert in the universe and never mistaken, are the jury bound to accept his extravagant opinion of his testimony? But, if on the other hand he says I am a poor fellow, I am not educated, my opinion is not worth much, but I have an opinion, then, could not the jury take his opinion for what it is worth in their judgment.

THE COURT: How can they take an opinion that the witness says practically is not worth anything?

MR. JACOBY: He says in his judgment.

THE COURT: That is boiling it down, he says he is not qualified to judge, and I fear that the witness does not distinguish between an opinion and a guess.

MR. LEVY: That is possibly the case.

MR. JACOBY: I believe that ~~the~~ man knows as surely as I know you, in whose handwriting that is.

THE COURT: I cannot assume that, but I have to assume that the witness means exactly what he says. I do

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not think, Mr District Attorney, if the witness insists upon that, I do not think the jury would be justified in taking him at any greater appraisal than he puts upon himself. Of course, the jury might decline to consider the high appraisal a man puts upon himself, but I doubt if they can give more than what he regards his par value.

MR. JACOBY: In my opinion, I never believed that it was permissible to ask a witness what he thought of the value of his own testimony--you think you are an expert or do you think you are not an expert--particularly an opinion evidence witness.

THE COURT: He may be asked that in the nature of cross examination, and that was in some respects in the nature of cross-examination, because it was preliminary so as to qualify the defendant's counsel to properly frame an objection.

MR. JACOBY: May I ask him one question before we finally end this matter?

THE COURT: Yes.

BY MR. JACOBY:

Q Listen very closely to me--now, Mr Gannon, do you think you are able to form and express an opinion of some little value at least as to whether or not that paper that is in your hand was written by the defendant?

MR. LEVY: I object as incompetent, irrelevant and

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immaterial.

THE COURT: I do not think that such testimony as that, even if he said he did, would be of any value.

MR. JACOBY: Your Honor permitted Mr Levy to ask him a similar question.

MR. LEVY: He cannot say of little value.

MR. JACOBY: I will leave that out.

(The question is repeated by the stenographer.)

MR. LEVY: He cannot say or some little value.

THE COURT: Let us go back and read my question and Mr Levy's also. I do not think he asked him to that extent. He asked, if I recall it, if he thought that he was qualified to judge of the genuineness of the defendant's handwriting.

MR. JACOBY: The witness would not understand that question.

BY THE COURT:

Q Do you understand that--the District Attorney thinks you do not understand a certain question put to you and I want to ask you if you understand it. Mr Levy asked you whether or not in your opinion you thought you were qualified to judge and testify as to the genuineness or not of the defendant's signature, and you answered you did not think you were. Did you understand the question? A Yes.

Q Did you understand me when I asked you over again?

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A Yes.

The question is repeated as follows:

Q Do you think you are able to form and express an opinion as to whether or not that paper that is in your hand was written by the defendant? A No, sir.

THE COURT: Really, I think that ends this witness' testimony. That is enough. Step down, Mr Witness.

MR. JACOBY: May I cross-examine the witness. I believe the witness is more than a reluctant witness.

THE COURT: If you can show that the witness is adverse to you, you may do so.

MR. JACOBY: May I try to refresh his recollection, even before I show he is adverse.

MR. LEVY: I object.

MR. JACOBY: I will try to refresh his recollection. In order to refresh his recollection I am going to ask him this question.

BY MR. JACOBY:

Q In order to refresh your recollection I am going to ask you whether you did not tell me up in my private office that you were very familiar with the handwriting of the defendant and had often seen him write and that in your opinion all of these papers People's Exhibit 3 for Identification, were written by the defendant?

MR. LEVY: I object. This is impeaching his own

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witness who has not been shown to be hostile. He has not established the foundation upon which he can cross-examine or attempt to impeach his own witness. He has presented him and therefore vouches for his credibility.

MR. JACOBY: I am not attacking his credibility. I am trying to refresh his recollection as to whether he is familiar with the handwriting of the defendant.

MR. LEVY: It is not something to refresh his recollection upon. If it was an act that was done, that would be a different proposition. If a man said on a certain day he saw a man do a thing, say the 24th of March, and had forgotten about it, he could refresh his recollection as to whether he did not say he had seen the man, but to ask him if he did not before express an opinion, he cannot attempt to refresh his recollection in regard to that. It is a matter to go before the jury now that his present opinion is that he is not qualified to testify. His view then stated not under oath cannot be given in evidence in this case.

THE COURT: Suppose we suspend now. We will adjourn until 15 minutes after two.

The Court admonishes the jury in accordance with section 415 of the Code of Criminal Procedure, and takes an adjournment until 2:15.

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AFTER RECESS.

MR. JACOBY: I shall withdraw Mr. Gannon and place Mr. Lewis back upon the stand.

W I L E I A M F. L E W I S , witness for the People, recalled.

MR. JACOBY: Now, Mr. Levy, do you wish to cross-examine Mr. Lewis as to the signature R. H. Lee?

MR. LEVY: Yes.

CROSS EXAMINATION BY MR. LEVY:

Q Mr. Lewis, I have a few questions to ask you. Yesterday you were shown a card, a so-called signature card, People's Exhibit 5 for identification, and you were asked as to whether or not you saw the person sign his name to that card. You said you did? A Yes, sir.

Q Now the R. H. Lee signed to this, you identified the defendant as being the one who signed it -- do you recall that? A Yes, sir.

Q Independently of the card, Mr. Lewis, of your independent recollection, and not because the signature is written upon the usual card kept in your bank, can you recall the circumstances of his signing his name?

THE COURT: If so state to us the circumstances under which he signed it.

MR. LEVY: Quite so.

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THE COURT: The place that he signed it, the circumstances and so forth, that is provided you have any independent recollection of the defendant signing it other than the card itself.

THE WITNESS: Why, it was signed in the office of that company.

THE COURT: First you have an independent recollection of his coming in six years ago and signing that card?

THE WITNESS: No, sir.

BY MR. LEVY:

Q All that you have in your mind, I take it, Mr. Lewis, is that in the ordinary course of business, in the regular channels of business, men come in and make deposits or open accounts and sign a signature card, isn't that so? A That is right.

Q As a general thing do you or did you during the past six years or seven years take the signatures yourself of all, do you think? A Whenever I am in the office.

Q Whenever you are in the office? A Yes, sir.

Q Are you prepared to say, Mr. Lewis, that you were in the office when the person who signed that signature card R. H. Lee, -- are you prepared to say that you yourself were in the office when that person signed that card? A Yes, sir.

Q What brings that to your recollection? A Well my

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writing on the card.

Q Your writing on the card? A Yes, sir.

Q Are you able to now, under oath, sir, independently of that card, not because of the card itself and the fact that your writing is on it, independently, that the person whom you saw write that R. H. Lee is this defendant. Do you understand my question? A Independently of the card I could not.

Q Of course you have a very large quantity of business in the Knickerbocker Trust Company, you did have for seven years at least? A Yes, sir.

Q A great many depositors, I suppose? A Yes, sir.

Q Can you estimate approximately about how many depositors in round figures? A In our office about three thousand.

Q A man's individuality unless there was some circumstance connected with it, would not impress itself upon your memory, that is to say, the personality of the individual, so as to keep fresh in your recollection the appearance of the person who signed that card, is that so? A I don't quite understand that.

Q What I mean is this, in the ordinary course of business when men come in to open accounts they go through the process of making deposits, you take their signatures, you file the signature card away. That is done in the ordinary routine of

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business? A Yes, sir.

Q Unless some extraordinary circumstance happens to particularly fix the individual in your memory there is not anything about it by which you could separate one depositor in your mind from another? A Well, there is a certain difference in all depositors.

Q Now, in this case you know you have a card here with R. H. Lee's name on it? A Yes, sir.

Q You know you wrote the other matter on that card, other than his signature? A Yes, sir.

Q There is not anything about that card, of your independent recollection, other than the card that would lead you to say that you would be sure that this defendant did write that? A I can swear it was written in my presence.

Q I don't know, sir, that a man did write that, wrote it in your presence because there is some writing in it in your own handwriting? A Yes, sir.

Q In the ordinary course of business, the pursuit of your business, you would not write anything on it unless the individual opening the account was in your presence? A No, sir, not unless satisfied of the man's identity.

Q You never knew R. H. Lee before? A No, sir, not before.

Q You are not prepared to say now that it was this defendant, that it was this defendant that opened that ac-

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count and wrote that name, are you? A Why certainly, that is the gentleman.

Q You base that upon the card itself, don't you?

A Yes, sir, certainly.

Q I am talking of independent recollection A Oh, I couldn't swear to that outside of our record.

Q You simply assume that because it bears the signature R. H. Lee that it was he who wrote it? A Yes, sir.

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

BY THE COURT: /

Q Do you mean now that it was some person who presented himself there at your bank and introduced himself as Lee, was that the way? A He satisfied me of his identity.

Q Whoever it was? A Yes, sir.

MR. JACOBY: He said six times it was this man.

BY MR. JACOBY:

Q By refreshing your recollection from that, can you state whether or not you remember, in your own mind, that this was the man, this defendant here was the man that opened that account with you under the name of R. H. Lee? A That is the man.

BY MR. LEVY:

Q Of your own independent recollection?

MR. JACOBY: I am asking a question.

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

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THE COURT: Did the witness state what part of the card was in his own handwriting.

MR. JACOBY: Yes, sir. He said the "R. H. Lee, East 125th street and Harlem River" was written by R. H. Lee in his presence.

THE COURT: The rest was written by the witness?

MR. JACOBY: Part of it by the witness and part of it by some other person.

BY THE COURT:

Q What was written by you? A "Dockmaster" and the date.

MR. LEVY: The point I want to make, your Honor, is this: The witness testifies to the writing of the name and bases his statement upon what had been the usual routine of his business. In the course of business men come there, open accounts, sign their signatures and he assumes that because R. H. Lee appears there with some writing on that card which he himself wrote that it must have been R. H. Lee, this defendant, who did write that card.

BY THE COURT:

Q How many times before that had you seen R. H. Lee, who wrote that signature? A Well, I haven't any recollection of ever seeing him before.

Q How many times since that have you seen him? A Well, that would be hard to say.

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BY MR. JACOBY:

Q Say the last number? A Maybe fifty or seventy-five times.

MR. LEVY: You saw what?

MR. JACOBY: Since this account was opened.

MR. LEVY: You have seen what.

A R. H. Lee.

Q You have seen him? A yes, sir.

BY MR. LEVY:

Q Did you ever see him before he gave that card to you?

A No, sir.

MR. JACOBY: He said he six times.

MR. LEVY: Let me say it again.

THE WITNESS: Not to my recollection.

Q Who besides yourself wrote on the card and the man who wrote Lee? A The top was written -- the name on the top was written by the filing clerk.

Q Do you know his name? A I could not tell you, no, sir.

BY THE COURT:

Q Do you recognize his handwriting? A I do not.

BY MR. LEVY:

Q Well, is there any other person in that bank authorized to receive accounts? A Yes, sir.

Q I want to ask you now, putting the card aside, do you

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know whether you took that account yourself of your own independent recollection? A The record of the card shows that.

THE COURT: He means outside of the record of the card.

THE WITNESS: No, sir, I cannot remember back in 1906.

Q If any accounts were taken in the bank during that period by anybody else during your absence they would report to you, wouldn't they? A The cards would show.

Q They would report to you, wouldn't they, of the taking of the account? A I would see the cards when I would return.

Q You would have to pass upon it, wouldn't you as the manager of the bank? A Yes, sir, certainly.

Q Upon the acceptance or non-acceptance of such accounts?
A Yes, sir.

Q You would make some record or memorandum upon the card concerning it? A Not necessarily.

Q But would you at times? A No, sir.

Q Are you prepared to testify now, of your independent recollection, as to when it was that you wrote what is written upon that card in your handwriting, as to when it was that you wrote that?

MR. JACOBY: I object to that as being immaterial, incompetent and irrelevant. It does not matter whether

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he could do it of his independent recollection or not.

THE COURT: What do you say about that?

THE WITNESS: I can only say what the card shows.

Q If that card were not before you you would have absolutely no recollection of the transaction, your mind would be a blank concerning it, wouldn't it, without the card?

A On the day on which the account was opened --

THE COURT: He is talking about this signature card, the particular transaction of signing that signature card. Counsel asked you if you had any independent knowledge of that other than the card itself?

A Not other than the card.

Q Now, witness, suppose you were absent from the bank at sometime, and that a new depositor came in and signed a signature card, would that be presented to you? A When I returned.

Q By the person who took it? A Yes, sir.

Q What would you do with that? A Well --

Q With the card? A Well, I simply pass it over to the filing clerk, have it filed.

Q Would the filing clerk put the name on the top just as the filing clerk has in that case? A Yes, sir.

Q What did you do with it besides that? A Nothing, sir.

Q What is that? A Nothing.

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Q Well, would you make any memorandum in regard to the occupation or otherwise? A Well, that is all done --

Q And the date? A That was done by the person who opened the account.

Q You testified you never on any occasion put the date on the card where the signature had been taken by somebody else, some other officer or clerk in the bank? A It is finished by the person that opens the account.

Q It is all finished by the person who opens the account? A Yes, sir.

Q That one was not finished by the person who opened the account? A Yes, sir, certainly.

Q What about the date there? A I put the date in.

Q That was finished by the person who opened the account? A Yes, sir, I opened the account.

Q You mean you opened the account? A Yes, sir.

Q I see, you don't refer to the depositor as the person who opens the account? A No, sir, I mean I represented the bank.

Q You represented the bank that took the account?

A Yes, sir.

BY MR. LEVY:

Q Is it usual always to have the depositor or the man intending to open an account write his signature in your presence? A Certainly.

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Q Always, or would it be written sometimes not in your presence? A If it is written not in our presence it must be guaranteed by someone that we know -- to be the signature.

Q You take in accounts, as I have done, of persons who did not come to the bank to write their names, isn't that so? A It is done, yes, sir.

Q Where is an invalid or a man doesn't want his wife to know, or something, you get a card like that with the signature on it? A Yes, sir.

Q Would that be a duplicate card? A No, sir.

Q Similar to that? A No, sir.

Q I want to ask you did you ever see this defendant other than the circumstance or time which we have been talking about as far as that card is concerned -- did you ever see him write? A That I could not swear to.

MR. JACOBY: If we can get a ruling upon the question as to whether this card may go in evidence -- we have had enough cross examination -- think on the voir-dire. The questions now relate to cross examination touching the credibility and importance of the witness's testimony. If your Honor has made up your mind as to whether the signature and writing immediately below it is admissible as a test of handwriting I would like to continue my direct examination before the cross examination?

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MR. LEVY: I am not cross examining. I am not cross examining with regard to the main facts. I am cross examining him with regard to the ability of this witness to qualify sufficiently to justify the admission of this paper in evidence as a standard of comparison.

THE COURT: I think we had better finish with that now.

MR. JACOBY: The last question does not relate to the qualification of the witness in my opinion.

MR. LEVY: I asked as the last question whether you had ever seen this defendant write upon any other occasion.

MR. JACOBY: He said yesterday that he had not.

MR. LEVY: Let him say it again. It won't hurt him.

THE WITNESS: Not to my recollection.

Q Have you ever received communications purporting to be in the handwriting of this defendant? A That I could not say.

MR. LEVY: Now then, I very respectfully submit, your Honor that my objection made yesterday must prevail today because there is no change in the status today from that which prevailed yesterday.

THE COURT: Your point yesterday was whether this witness would be competent as to whether or not any other writing was in the handwriting of this defendant and I

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held that --

MR. LEVY: As to whether this writing, this one, is the handwriting of the defendant and he says now that independently of the card he has no recollection, his mind is a blank.

MR. JACOBY: With the card he remembers.

MR. LEVY: By looking at the card he assumes because his writing is upon it it must have been written in his presence.

MR. JACOBY: He didn't say that exactly.

MR. LEVY: Isn't that what you said, because of the fact you had in your hand a card which bears upon the face of it some of your handwriting and the signature R. H. Lee that you assume that the R. H. Lee was or must have been written in your presence, under your observation and because of the fact that you knew or believed the defendant had an account in your bank you assumed that it was he who wrote that. Am I right or wrong.

MR. JACOBY: I object to that as containing five questions.

MR. LEVY: To save time I will put separate questions.

MR. JACOBY: In other words you withdraw the question.

BY MR. LEVY:

Q You assume the signature R. H. Levy was written in

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your presence because upon that card there is written some of your own handwriting,, is that not right? A I am positive it was written in my presence.

Q Because of the fact of your writing being upon that card? A Yes, sir.

Q Is that right? A Yes, sir.

BY THE COURT:

Q Now, is that the only reason you testify it was written in your presence? A That is the reason, yes, sir.

BY MR. LEVY:

Q That is the only reason? A Yes, sir.
only

Q The reason is because some of your handwriting is on that card? A Yes, sir.

Q But you have not any independent recollection of it? A No, sir; no independent recollection.

Q And because you know the defendant having had business at your bank, do you assume that it must have been this defendant who wrote that R. H. Lee, is that clear to you? A That was the gentleman that wrote the R. H. Lee on this card.

Q Because of the fact that you have that card before you?

MR. JACOBY: object to that as repetition.

THE COURT: It is very important. He may ask the question.

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Question repeated as follows: Do you assume that it must have been this defendant who wrote R. H. Lee because of the fact that you have that card before you?

A I can simply say that that was written by R. H. Lee in my presence.

Q Are you able to identify on your independent recollection, not from the card -- A I told you before I have no independent recollection.

Q By this you can identify the individual who wrote R. H. Lee? A It was written by R. H. Lee in my presence.

Q That is not my question, independently of that card, are you able to testify as to the identity of the individual who wrote the R. H. Lee on that card? A My memory does not take me back that far.

BY MR. JACOBY:

Q But with the card before you you remember it was this defendant that did write it and wrote this "East 125th street and Harlem River"? A Yes, sir.

MR. JACOBY: I offer that in evidence, the portion of People's Exhibit 5 for identification containing the words and signature R. H. Lee" with the two little x marks to the right and left of it and the portion "East 125th street and Harlem river" as having been testified to by this witness, in his personal observation, to have been written by the defendant.

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THE COURT: Now, let us see. Witness, did you ever have any conversation with the defendant in regard to that signature card, and the name which appears thereon since the date of the writing, and if so what was it and when?

THE WITNESS: I have often talked to the defendant when he has been in our office.

Q Did you see him do anything in regard to that signature or show it to him? A No, sir.

Q Did you ever tell him you had the signature card?

A Oh, no, sir.

Q Did he ever refer to the signature card and if so what did he say?

MR. JACOBY: I will admit he did not, your Honor, refer to the signature card. why should he?

THE COURT: I don't know why he should at all, but I am trying to find out just what the status was.

MR. JACOBY: I don't think I have ever talked to my bank president about my signature.

Q Now I think you testified that that signature card was one of about 3,000 that was in the, probably, the card index system that you have there? A Yes, sir.

Q Is there any circumstance in your recollection of anything that was said or done by the individual who wrote R. H. Lee on that card that brings back to your recollection the

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circumstance of the opening of that account and the writing of that name? A My memory does not serve me that far back.

BY MR. JACOBY:

Q Well, this writing January 8th, 1906 and the words "Dockmaster" on that card, does that bring back to your mind any recollection of the transaction with this defendant?

A Yes, sir.

Q Sure of that? A (No answer)

Q So aided by that writing on this card you have a recollection in your mind that on January 8, 1906, the defendant wrote that writing R. H. Lee, East 125th street and Harlem river? A He did.

MR. JACOBY: I submit that that portion which I have indicated may go in evidence because where a witness remembers when refreshed by a writing or document it is the same as though he remembered without being refreshed.

THE COURT: Well, I will tell you, the trouble about it is that that is so inconsistent with everything he has answered to Mr. Levy, thoroughly inconsistent with everything the witness has testified to in answer to Mr. Levy. He tells you that his name and the date that he put on that card now refreshes his memory distinctly on the fact that the defendant came in and wrote that card. Now that is what he told the District Attorney, but you have told Mr. Levy so many times that the District Attorney

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complained of the repetition that nothing on the card of any nature or description refreshes your recollection of the transaction itself. Now, isn't that so. You said that at least six times.

A No, sir; the card itself --

Q All that you know about it is that it must have been so because the card says so, isn't that about it? A Well, I got my information from the card.

Q What is all there is about it? A Yes, sir.

Q Now then, if that is so, that the only information that you have in regard to it is the card, and that you have no private or independent recollection of the transaction whatever in your own mind -- now how in the world can you tell the District Attorney that because of the date on that card it refreshes your memory that it was the defendant, and that you remember that it was the defendant who came in and signed that card? A Well, when he signed it he satisfied me as to his identity.

Q Yes, you assume that that must be so, but you told the District Attorney that that date on that card gives you a clear distinct recollection that it was the defendant that came in; that is so inconsistent with what you told Mr. Levy six times that I would like to know if you understood Mr. Levy's question and the District Attorney's question and if you did, explain it to us? A Well, I don't quite understand your

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Honor. I said that that signature card was written in my presence; that signature on the card written in my presence by R. H. Lee.

BY MR. JACOBY:

Q By this man sitting here at the table? A Yes, sir.

Q No you mean that?

MR. LEVY: He does not say that.

Q I asked you the question whether or not you can identify this gentleman here at the table, the defendant, as the man who wrote that and you said, without the card no, isn't that write, did you say that? A I understand you went back to 1906, not at the present date.

Q I am going back to the time this account was opened. Now, are you prepared to swear that the man who wrote ~~as~~ R. H. Lee on that card -- are you prepared to swear that the man who wrote R. H. Lee upon People's Exhibit 5 for identification was this man, the defendant? A In 1906?

Q Let us get the question?

BY THE COURT:

Q Now the question is, are you prepared to swear absolutely that it was, or do you mean to say it must have been he? A I swear to the best of my knowledge and belief.

THE COURT: Well, that won't do here. The question is do you swear that you remember that back in 1906 the man who wrote that name on that card was the defendant, Richard H. Lee, or is your testimony that you think it

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must have been he because of or on account of the little memorandum you made on that card, the date that you wrote on the card.

A Well, the man that wrote that signature card, the signature on the card satisfied me that he was Richard H. Lee,
BY MR. JACOBY:

Q Is that this man here? (No answer)

BY MR. LEVY:

Q You are aware that you are not expected to testify to what you believe it must have been because it was in the regular course of business, but whether you remember it to be so from your recollection? A I have no recollection as far back as that.

MR. LEVY: He has no recollection.

BY MR. JACOBY:

Q Don't you know that man there at the stand? A I know him as Richard H. Lee.

Q Is your recollection when aided by looking at this card, does it come back to your mind that the man sitting at the table there, the defendant with the reddish necktie, was the man who wrote R. H. Lee on that card in 1906, yes or no. Does looking at that card bring back to your recollection that the defendant was the man who wrote R. H. Lee on that card in all 1906. Looking at the card and the memoranda upon it state whether or not it brings it back to your recollection? A I

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say he was the man.

BY MR. LEVY:

Q What do you base that on, your recollection or because it was in the regular course of business? A Regular course of business, he satisfied me as to his identification.

Q Do you remember his being there? A Not individually, no, sir.

Q Do you remember his being in your place? A Not in 1906.

Q Do you remember his signing any name in your presence in 1906? A Not other than that card.

Q Do you remember his signing that card? A Yes, sir.

Q What do you remember about it? A By the card.

BY THE COURT:

Q Are you not substituting the card for your own memory?

A My memory does not take me back so far.

Q Counsel asked you that -- you see you vibrate. Now you think it over and you can testify just as you think right, but your testimony is so vacillating to Mr. Levy, you say you have no recollection of the transaction whatever, that whatever is there in the dead letter of that card, -- that your memory is a blank in regard to the matter because there are so many of them; then to the District Attorney you say that the card refreshes your memory that it was the defendant. Now don't you see how inconsistent that is. To Mr. Levy your reply is

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practically that the card does not refresh your memory at all.
Do you understand? A Yes, sir.

Q What the card does not take you back to 1906; it does not refresh your memory and the only thing you know about it is that there was a card with a signature and your name on and the date in your handwriting on it, and therefore the inference would be that you therefore feel it must have been the defendant. Now is that the size of it or not. Now just as you think is right? A Well, July 8, 1906, a gentleman came into our office to open an account; his name was R. H. Lee and he satisfied me as to his identify, but if I had never seen the man from that day to this I could not identify him from his face, only from his signature.

BY MR. LEVY:

Q So that you cannot identify the defendant at the bar here as being the man who came into that place on that day in 1906? A No, sir, not on that day.

BY MR. JACOBY:

Q If you had not seen him since, but you have seen him 75 times; can you identify him as being the man who came in there in 1906 and signed the card R. H. Lee. Can you identify him with the aid of that card?

THE COURT: We don't mean any guess work.

Q With the aid of that card to refresh your recollection having seen this man, the defendant, 75 times since 1906,

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can you identify the defendant as being the man that wrote the name R. H. Lee on that card, People's Exhibit 5 for identification? A Yes, sir.

Q Sure of that? A Yes, sir; that he is the man.

BY THE COURT:

Q I would like to know what you mean by refreshing your memory. What do you understand that to mean? A Back in 1906 I had never seen the defendant --

Q The District Attorney has asked you whether that card refreshes your memory. Now, that, of course, means, that it takes your memory right back to the transaction itself and that you can summon up and recall that particular transaction in your mind? A No, sir, I understood the District Attorney to say from my knowledge of him since that day.

Q No, it means that particular time. Can you take your mind -- without that card or anything on it -- take your mind, not your guess, but your mind right back to that particular transaction so that you can summon it up in your memory and remember the time, the circumstances of the person coming in and signing the name R. H. Lee? A Had I never seen the man since I would not have been able to recognize him from that one transaction.

Q If you had not seen him since (No answer.)

Q That is not what we want to get at. We want that one transaction. What is your memory, if any, in regard to that

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one transaction.

MR. JACOBY: Based upon everything that has happened.

THE COURT: Based upon nothing, based upon his memory is what we are trying to get at. Now, what is his independent recollection and memory in regard to that particular transaction, if any, that is about it.

MR. JACOBY: May I have incorporate in that question "refreshed by the card".

THE COURT: It may be that the witness does not understand the word "refreshed". He can refresh it by anything on God's earth, present or absent, jogging his memory if he can, and if he cannot why say so. Reflect and think, do you recall from anything that has been said or done or shown you, does it bring back your memory to the transaction, or do you only think it must have been so because you find a memorandum here.

A I have no recollection of the transaction other than that card.

Q Now, shall we put it this way. All you know about it is the card, haven't I got it down to plain English?

A Yes, sir.

BY MR. JACOBY:

Q what his Honor was trying to -- what his Honor was asking you, in substance, was this question: After looking at that card, you have been looking at it several times this

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morning and yesterday, you understand? A Yes, sir.

Q After looking at it and looking at it again and now if you want to, and considering everything else that has happened from the time that that card was written in 1906 up to the present, including anything you remember about subsequently seeing the defendant, in other words, with all the information and jogs to your memory that there may have been, including looking at this card today and yesterday and again now if you want to, does that bring back to your mind a picture of the fact, if fact it be, that this defendant came into your place in 1906 and signed the name R. H. Lee and the address on that card, yes or no?

MR. LEVY: Does it bring back to his memory a picture of the man coming into the place.

THE COURT: If so paint a word picture of it for us.

THE WITNESS: That day in 1906? No.

Q You don't have any recollection of his coming in there?

A No, sir.

Q Not even looking at the card? A I know he must have been there.

THE COURT: That is all he knows; he thinks he must have been there.

MR. JACOBY: He says he knows he must have been there

THE COURT: He says so.

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BY MR. JACOBY:

Q Let me ask you a question. supposing you had a memorandum book written by yourself in which it stated that on the first of January 1890 I came into your place and signed my name to a paper. supposing twenty years later you were asked about it, and looked in that memorandum book, wouldn't the memorandum refresh your recollection so that you would remember seeing me.

MR. LEVY: I object to that.

THE COURT: It is hypothetical.

MR. LEVY: And speculative.

THE COURT: And not within the issues of this case. Besides it is so problematical that he could not tell. We might think our memory was all right and yet it would not be.

Q Don't you put absolute confidence in your own memorandum?

Objected to.

Q Does not the part of that paper, People's Exhibit 5 for identification, that is written by you, doesn't that jog your memory so that with the aid of that you do remember that this defendant was in your place at the time that signature was signed and signed it?

MR. LEVY: I object to that.

THE COURT: That means does it cause you to form a

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mental picture of the transaction, that is about it.

MR. LEVY: That is what it means.

THE COURT: He has answered it so often he may answer it again.

MR. JACOBY: Will you let the stenographer read it to him again, your Honor.

THE COURT: Yes.

Question repeated as follows: Does not the part of that paper People's Exhibit 5 for identification that is written by you, doesn't that jog your memory so that with the aid of that you do remember that this defendant was in your place at the time that signature was signed and signed it. Do you understand that?

A It is only my knowledge of him since; not that day, January, 1906.

Q Can you answer the question yes or no, Mr. Lewis, that I asked you.

MR. LEVY: He cannot.

Q Will you try to answer it yes or no? A No, sir.

MR. JACOBY: No further questions. Step down.

THE COURT: Do you want to put the expert on the stand.

MR. JACOBY: I don't know that I have any material for him, your Honor. I would like to confer for a moment with the chief examiner of the office of the Com-

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missioner of Accounts. I desire now to offer this card in evidence as a standard of handwriting under the third subdivision of the People against Molineux.

THE COURT: You had better get this case. I think it is 168 N. Y.

MR. LEVY: To which I object upon the ground it is immaterial, irrelevant and incompetent and upon the ground that the proper foundation therefor has not been laid.

WILLIAM F. LEWIS, recalled.

THE COURT: Now the proposition was that you offer that under the People against Molineux.

MR. JACOBY: I think it is the third subdivision of methods of establishing a standard.

BY MR. JACOBY:

Q Mr. Lewis, can you state whether or not this is the card that in the regular, or in the exclusive use, I will say, by your bank, is the signature card of the person R. H. Lee who has been a depositor with you for four years? A Yes, sir.

MR. JACOBY: He says it is the card of the person R. H. Lee and it has been used in the bank as the signature card in the regular course of business.

Q Now then the next question follows: Is the only R.H.

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Lee.-- state whether or not the only R. H. Lee who has been a depositor in your bank since January, 1906, whether you know the only R. H. Lee -- whether you can identify the only R. H. Lee who has been a depositor in your bank during those four years?

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

THE COURT: There are three thousand accounts?

THE WITNESS: Yes, sir. We never have two of the same name.

Q Sure of that? A yes, sir, sure of that.

Q Now do you know the individual whose account is kept in your bank under the name of R. H. Lee?

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

THE COURT: He has already testified that R. H. Lee has an account in his bank, this defendant.

MR. JACOBY: Is he acquainted with the person who has that account under the name of R. H. Lee.

MR. LEVY: I don't regard that as competent.

THE COURT: He has already testified that this defendant has an account in his bank, hasn't he?

MR. JACOBY: Yes, sir. And that is the only R. H. Lee -- that is what I want to get at.

MR. LEVY: That is your statement.

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MR. JACOBY: I am trying to get that in, but if your Honor thinks it is in already --

BY THE COURT:

Q Can you tell me of your recollection --

THE WITNESS: We only have one account on our books of R. H. Lee.

Q Have you searched the office for the purpose of inquiring? A We never have two.

BY MR. JACOBY:

Q Do you know that is the only R. H. Lee who has an account in your bank? A That is the only account in the name of R. H. Lee.

BY MR. LEVY:

Q Did you search the accounts, Mr. Lewis?

MR. JACOBY: I object to the question.

Q Did you go through your three thousand accounts to see the names of the depositors? A It is a rule of our institution never to have two accounts of the same name, the same initials.

Q Well, do you mean to say that if two Abraham Levys were to come into your place and want to open accounts you would not take them? A No, sir, how could we keep our books.

Q They do it in other banks?

MR. JACOBY: I object to that as a statement. It is not a question.

BY THE COURT:

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Q Let us get at it now. Do you mean to say that if a depositor came who was otherwise a good customer of ~~bank~~ the bank, but because he happened to have the same name as some other depositor you would refuse him? A Yes, sir.

Q Would not take his account? A Well, we might take the better of the two.

Q You don't mean that? A Certainly

BY MR. LEVY:

Q Wouldn't you designate one ~~and~~ as No. 1 and the other as No. 2? A Of two individuals? No, sir.

BY MR. JACOBY:

Q Two John Smiths? A No, sir.

BY MR. LEVY:

Q You wouldn't take two accounts in the same name? A No, sir, the risk is too great.

Q Is the Knickerbocker Trust company still in existence? A It was this afternoon.

BY MR. JACOBY:

Q Now I want to ask you this question if we are through with jocularities. Is the R. H. Lee who has an account in your bank -- do you see that R. H. Lee in this room?

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

THE COURT: Oh, no, it is relevant and competent.

If the witness is competent to testify to it.

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A I say that the gentleman who has done business in our office as R. H. Lee is sitting at that table.

Q I describe him as the defendant? A Yes, sir.

Q That is the man? A Yes, sir.

Q Now have you paid checks on the account of R. H. Lee during the period from 1906 up to the present signed as this signature card is?

Objected to. Objection sustained.

MR. JACOBY: Now, your Honor, I press this writing "R. H. Lee, East 125th street and Harlem river" and I offer it as a standard.

MR. LEVY: I object to it upon these grounds. It is incompetent, it is immaterial, and it is irrelevant. A standard of comparison must be prove to be genuine beyond peradventure. A standard of comparison is something, particularly where expert testimony is intended to be given, which must be established and proven so that no doubt can be entertained either by the Court or the jury as to the genuineness of its origin. The testimony offer by this witness establishes the fact only that an account was opened by someone whom he does not recollect, who gave the name of R. H. Lee. He does say that he knows the defendant; that the defendant has done business with this bank but he has no recollection independently of the card and what is upon it, and he can, under no circumstance

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identify the defendant as the one who did the writing. Now just as it is impossible to create an offence by construction, just so is it impossible to admit in evidence as a standard of comparison a document surrounded with so much haze and doubtfulness.

MR. JACOBY: I understand that your Honor is prepared to make a ruling on the offer of this card, that is, that portion of it that has the signature R. H. Lee on it with the two little cross marks on each side of it. I offer it in evidence as a standard of comparison.

THE COURT: The defence objects it.

MR. LEVY: I do.

THE COURT: I will have to sustain the objection.

MR. LEVY: I have stated the grounds.

MR. Jacoby: If your Honor please, I know of no other method -- I have exhausted every method that I know of to establish the standard of the signature of R. H. Lee. I feel that while I might call another officer of the bank that may have paid checks of this defendant, I know that that officer of the bank will not be able to testify that he has ever seen the defendant write his name. We may; I don't know that he won't be able to so testify; I don't know it of my own knowledge, but I feel persuaded that that is so. It will be impossible to procure the attendance of the paying teller of the bank

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whose name is Duncan until tomorrow morning. I will ask your Honor to take an adjournment at this time until tomorrow morning. I will communicate with Mr. Duncan, the paying teller, and if I find that he cannot identify the signature R. H. Lee either on the card or on some check so as to establish a standard why I will then be compelled, of course, to cease further efforts to prove this case. But in view of the fact that Mr. Duncan is not here and I only learned from Mr. Lewis just now that Mr. Duncan could be here to furnish that testimony, I will ask your Honor to grant us an adjournment until tomorrow.

THE COURT: I think that is reasonable, Mr. Levy.

MR. LEVY: Yes, sir, that is reasonable.

THE COURT: Gentlemen of the jury, we will suspend until 10:30 tomorrow. Meantime I ask you not to make up your minds as to the guilt or innocence of the defendant and do not discuss the case among yourselves until the matter is submitted to you.

(The Court then adjourned the further trial of the case until tomorrow Thursday, April 20th, 1911, at 10:30 o'clock.)

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People vs. Lee.

April 20, 1911.

Trial resumed.

MR. JACOBY: If it please the Court, the People are unable under the rulings of your Honor, which quite properly I fear excluded the various bits of testimony, by means of which the People intended to establish a standard of comparison so as to prove certain documents are in the handwriting of the defendant to bring home to him the alleged crime charged against him in the indictment. The People are unable to establish any standards of comparison and for that reason the case must fall. There remains therefore nothing for me to do except to suggest to your Honor that you direct a verdict of acquittal.

THE COURT: Very well. There is no objection to that on Mr. Levy's part?

MR. LEVY: None that I am aware of.

THE COURT: Gentlemen of the jury, under the circumstances of the case I direct a verdict of not guilty.

The jury rendered a verdict of not guilty by direction of the Court.

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