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A jury was duly empaneled and sworn.

It is hereby stipulated by the attorneys for the defendant and the Assistant District Attorney that the defendant herein, Benjamin Brenner, was on the 20th day of March in the year 1900 in the Court of General Sessions before Hon. Warren W. Foster duly convicted of the crime of petit larceny under the name of Benjamin Brown upon a certain indictment then and there duly pending against him; said Benjamin Brenner, otherwise called Benjamin Brown, by the name and description of Benjamin Brown as aforesaid and that he was imprisoned in the Penitentiary for a period of one year.

Mr. Appleton opens the case for the People.

L A F A Y D A V I D S O N, called as a witness on behalf of the People, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. APPLETON:

Q What is your business? A The Universal Cloth Examining, Sponging and Refinishing Company.

Q Are you a member or were you on the 21st day of June 1907 a member of any firm or co-partnership? A Yes, sir.

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Q Will you please state the name of that firm or co-
partners of which you were a member on the 21st day of June,
1907? A The Univerreal Cloth Examining, Sponging and Re-
finishing Works.

Q You have filed in the County Clerk's office the affidavit
setting forth that you gentleman are doing business under the
Cloth
firm name of the Universal Examining, Sponging and Refinishing
Company? A Yes, sir.

Q Who were your partners on that occasion?
A Alfred Lindner and Raphael Fabish.

Q On the 21st day of June, 1907, where was your place
of business? A 97 and 99 East Houston street.

Q On that day did you have a driver by the name of
Sugarman in your employ? A Yes, sir, Max Sugarman.

Q Did you see Max Sugarman load any goods on one of your
trucks that day? A Yes, sir, 63 rolls.

Q Right in front of your store? A Yes, sir.

Q Do you know the value of the 63 rolls of cloth that
were on that truck on that occasion? A \$5326.

Q Will you describe to the Court and jury what those
rolls of cloth consisted of, that is the kind it was and &c?
A Woolens, dark woolen, mixtures, broadcloth and &c., used
for manufacturing purposes.

Q Did you ever see that cloth again after that day?
A No, sir.

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Q Was it delivered to the respective customers?

A No, sir.

BY THE COURT:

Q How do you know it was not delivered? A I had to pay your Honor for the goods.

Q Of your own knowledge, you don't know whether they were delivered or not; why do you say "Yes", they said it was not delivered; that is all you know about it, isn't it?

A No, sir, your Honor, at three o'clock in the afternoon on that day I got a ---

Q The people to whom you had sent them told you they had not received them? A No, sir.

MR. APPLETON: With the permission of the Court, I withdraw that question, and ask that the answer be stricken out.

THE COURT: Strike out the answer.

BY MR. APPLETON:

Q Did you ever see that horse and truck again?

A Yes, sir.

Q Where did you next see it after you saw it in front of your premises on the 21st of June, 1907? A The following morning on North 13th street and Kent avenue Brooklyn; the truck was empty, the truck and horse was there at the corner.

Q Was there anything out of the ordinary concerning that

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truck? A Yes, sir.

Q What was it? A One of the hind wheels were broken.

Q Which hind wheel was broken?

THE COURT: How is that material?

MR. APPLETON: I will withdraw that question.

CROSS EXAMINATION BY MR. McMANUS:

Q Were those your goods? A No, sir; they are in my care, I am responsible for them.

MR. McMANUS: I ask that that part of the answer be stricken out as not responsive.

THE COURT: Strike it out.

Q Was that horse and truck yours? A We hire them; I am responsible for them.

MR. McMANUS: I ask that that part of it be stricken out.

THE COURT: Strike it out.

MR. McMANUS: That is all.

BY MR. APPLETON:

Q Those 63 rolls of cloth were in your care and custody, were they not? A Yes, sir.

Q Until they had been delivered to the persons who consigned them to you for certain work?

MR. McMANUS: That is objected to as a conclusion.

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THE COURT: Objection overruled.

MR. McMANUS: Exception.

A Yes, sir.

Q From whom did you receive these 62 rolls?

A Do you want the names of the customers?

Q Give each one of them, if you remember?

A Frankel Brothers, 122 Fifth avenue.

Q How many rolls? A Thirty-eight. Twenty rolls from Benjamin Levy, broadcloth they were; I don't know their number; they are on 17th street near Sixth avenue, Twenty pieces; three pieces from M. Schiff & Brother; those were stripes. He is on 16th street near Fifth avenue, and two pieces belonging to the Wiener Cloak & Suit Company on 15th street between Fifth and Sixth avenue, I believe that is all.

Q For what purpose did you have those rolls of goods in your custody? A To examine and shrink them.

Q After you had done that, what were you to do with the goods? A Deliver them back to the customer.

Q They were then in your care and you were responsible for them until they were delivered back?

MR. McMANUS: Objected to as calling for a conclusion.

A Yes, sir.

MR. McMANUS: It is a question of law.

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THE COURT: I will overrule the objection.

MR. McMANUS: Exception.

BY MR. McMANUS:

Q In the Police Court, you signed a complaint in this Toplitzky case, did you not (handing paper to witness) is that your signature? A Yes, sir, it looks like it.

MR. McMANUS: I offer that paper in evidence.

Q You know whether that is your signature or not?

A Yes, sir.

BY THE COURT:

Q You haven't any doubt about it, have you? A No.

BY MR. McMANUS:

Q I offer the paper in evidence.

BY THE COURT:

Q Which paper do you mean, the whole bundle?

MR. McMANUS: Just the complaint in the police court in the People against Toplitzky.

MR. APPLETON: I object, if your Honor please, on the ground that that complaint is made, the greater part of it on information and belief and some of the information is set forth in the complaint and the corroborating

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affidavits are attached thereto and on the further ground that it has not been connected with this case and not shown to be material.

MR. McMANUS: I offer it in evidence for the purpose of impeaching this witness, if the Court please.

THE COURT: I will allow it. Mark it in evidence, please.

MR. APPLETON: That is, if your Honor please, the first four sheets of paper.

THE COURT: No, no; one sheet of paper, signed by the witness.

MR. APPLETON: Won't you offer the corroborating affidavits?

MR. McMANUS: I offer the affidavit made by the witness.

The paper is marked in evidence Defendant's exhibit A. of this date.

Q In that complaint, will you read whose property you swore those goods were? A The property of the Universal Cloth Examining, Sponging and Refinishing Company; it is my property while it is in my care.

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MR. APPLETON: Do not volunteer; answer his question and then stop.

THE COURT: You just answer the questions, please remember that.

BY MR. McMANUS:

Q The property of the Universal --- A The property of the Universal Cloth Examining, Sponging and Refinishing Works.

Q And that is your concern? A Yes, sir.

MR. McMANUS: That is all.

A B R A H A M T O P L I T S K Y , called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. APPLETON:

Q What is your name? A Abraham Toplitsky.

Q How old are you? A 19.

Q Where are you now, in any place of detention? A City Prison.

Q Otherwise called the Tombs? A Yes, sir.

Q How long have you been there? A Since the 4th of December, 1907.

Q You pleaded guilty to an indictment charging you with the crime of grand larceny in the first degree? A Yes, sir.

Q Do you know where the Universal Cloth Examining and

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Refinishing Works are? A Yes, sir.

Q Where? A On Houston Street between the Bowery and Chrystie.

Q On the 21st day of June, 1907 did you see a truck load of goods go from the Universal Cloth Examining and Refinishing Works? A Yes, sir.

Q Do you know the name of the driver who was on that truck? A Yes, sir.

Q What was his name? A Max Sugarman.

Q Did you follow that truck? A Yes, sir.

Q Where did you follow it to?

MR. McMANUS: I object; that is leading the witness. Let him tell his story.

THE COURT: Ask the question.

Q Where did you follow it to? A I followed it to 17th Street between Fifth and Sixth Avenue.

Q Was there anybody else on the truck besides Max Sugarman? A Yes, sir, there was a boy there.

Q Did you see Max Sugarman on that truck at any time? A Yes, sir.

THE COURT: Ask him what happened, what took place.

Q Whereabouts was the truck when you saw Max Sugarman leave it?

MR. McMANUS: I object, if the Court please.

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This is clearly leading. This is the circumstance as to which the witness can tell every detail if he wants.

THE COURT: Ask him what took place. Let him state what took place. Your questions, without any intention on your part, certainly suggest answers.

MR. APPLETON: When I get to the time when it is crucial, I will do that.

THE COURT: The question is objectionable. I sustain the objection. Ask him what happened.

Q What happened at 17th Street? A The driver left the truck and went up into a large building. When I saw him get on the elevator and was upstairs, I went over and told the wagon boy that the driver wanted to see him upstairs, when he went off the truck.

Q Who do you mean by "he"? A When the wagon boy left the truck and went up on the elevator I jumped on the truck and drove away with it.

Q Where did you go with the truck? A The street was crowded on 17th Street towards Fifth Avenue and I could not turn around and I drove towards Seventh Avenue, down Seventh Avenue to about 11th or 12th Street, I don't remember; then I went east with the load down to the foot of 10th Street.

Q Did anything happen at the foot of 10th Street? A At

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the foot of 10th Street, no, sir. I met Mr. Brenner there, with a fellow named Joe Sugarman.

Q What happened at the foot of East 10th Street? A Mr. Brenner and Sugarman got into conversation and Brenner left.

Q Wait a minute now. You say you met Mr. Brenner, who is Mr. Brenner? A The defendant at the bar.

Q The defendant? A Yes, sir.

Q At the foot of East 10th Street? A Yes, sir.

Q Who spoke first, you or Brenner, on that occasion?

A They both says hello to me.

Q What did you say? A I says hello.

Q Who spoke next? A Mr. Brenner.

Q What did he say? A He called this Sugarman aside, I could not hear what they said, it was a private conversation.

Q After they went aside together, did either of them speak to you? A Sugarman told me to wait there until the boat comes in.

Q Was Brenner there when Sugarman told you that? A No, sir, he had gone away.

MR. McMANUS: I ask that that be stricken out, if the Court please.

MR. APPLETON: I consent.

Q Did you say anything to Brenner at the foot of East 10th Street?

MR. McMANUS: Objected to as already answered.

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THE COURT: Let him answer again.

A I asked him what he is going to do; he told me he expected another wagon there.

Q Who is he? A Mr. Brenner expected a wagon to come there and he waited there a while and he seen the wagon didn't come and he says a few words to Sugarman.

Q I didn't ask you what he said to Sugarman. I want to know everything that Brenner said to you at the foot of East 10th Street in the County of New York on the 21st day of June, 1907, I don't want you to say about anything else except that.

A He told me he ~~was~~ expected another wagon there.

Q Is that all Brenner said to you? A Yes, sir.

Q What did you do next? A I waited there until the boat came in.

Q Then what? A The boat was crowded and a lot of wagons ahead of me and I could not get on and Sugarman told me to wait until the other boat came in.

MR. McMANUS: I object to that and move to strike it out.

THE COURT: Strike it out. Ask the questions in such a way that he will answer properly.

Q What happened next? A I drove on to the ferry, on the boat.

Q Then what happened? A When I got on the other side, at Brooklyn, I drove up as far as Kent Avenue and I turned to

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my right and I went and come to a kind of a bridge, small bridge. I crossed this bridge and pulled to the right, being the load was very heavy, the wheel broke.

Q What wheel? A The wheel of the truck.

Q The hind wheel?

THE COURT: What difference does that make?

A The hind wheel of the truck.

THE COURT: Does it make any difference?

MR. APPLETON: It is a corroboration of an event.

BY THE COURT:

Q Do you know which hand wheel it was? A No, sir, I don't remember.

BY MR. APPLETON:

Q What happened next? A Sugarman was there with me and he told me to wait.

Q What happened next, did he say something to you? A No, sir, just told me to wait there.

Q He said something to you, didn't he? A He told me to wait.

Q Answer my question yes or no, did Sugarman say something to you there? A Yes, sir.

Q After Sugarman said something to you, what was the next thing that happened? A He left me and I waited pretty near an

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hour and a half and I waited there and a double truck come along, looked like a fruit truck, with racks on it and Mr. Brenner was on there, Brenner and the driver and this Mr. Sugarman, and they backed up to my truck, that had the woolens on it; they took it off and I got onto my truck while this Brenner and the driver was there, put their load off onto the other truck. After it was on they covered it up with a canvas.

Q Who covered it up with canvas? A The driver.

Q Did this defendant Brenner do anything on that occasion?

A They helped this driver.

MR. APPLETON: I consent that that be stricken out.

Q Just what did he do, when you say he helped? A He loaded the goods.

Q He handled goods himself? A Yes, sir.

Q Then what happened after the goods were taken from the original truck onto this fruit truck? A Then what happened, they covered them up with canvas and then they drove off.

Q Who drove off? A This driver with Mr. Brenner on the truck.

Q Did you see the defendant Brenner again at any time?

A I seen him in the evening.

Q Of the same day? A Yes, sir.

Q 21st day of June, 1907? A The 21st day of June, 1907.

Q Where did you see him? A At Lifkowitz's cafe, on

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Houston Street, opposite Suffolk.

Q Who was present? A Mr. Brenner, Mr. Sugarman and a man named Sam Arnold and my brother.

Q What is your brother's name? A Michael Toplitsky.

Q Who went to this cafe with you? A Mr. Arnold and my brother.

Q When you got there, did you see the defendant? A He was standing in front of the cafe.

Q Did you go any particular place in this cafe? A We walked towards the back of the cafe.

Q Then what did you do? A We sit there, ordered some ice cream.

Q While you were sitting at this table was anything said?
A I asked Mr. Brenner, how is the stuff and he says all right; I asked him how many pieces of goods was there; he said 54.

Q Who said 54? A Mr. Brenner.

Q The defendant? A Yes, sir. I asked him what he was going to pay me for it and he said \$10 a roll and I argued with him, and he told me his expenses were \$300. I told him to let it go at that.

Q Did he give you anything on that occasion? A He paid me \$540.

Q Was that money? A Yes, sir.

Q Did you give any of that money away right then and there?
A I give Mr. Arnold \$40 and I give my brother close to \$50.

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Q Did you see this defendant Brenner at any time before you saw him at the foot of 10th Street, East 10th Street, on the 21st of June, 1907? A Yes, sir, at noon on June 20th I came at Lifkowitz's cafe at the foot of Suffolk Street.

Q Same cafe? A Yes, sir, and I told him I would try to get a load of woolens and he told me to meet him at that house, at his house that night. I got up there kind of late, it must have been one o'clock in the morning; I went up there, 280 and 282 East 10th Street.

Q That is where the defendant lived? A That is where the defendant lived at that time. I went upstairs to the first floor and I rang the bell and he come out in his night clothes and asked me to come inside and I went in there and sit down at the table with him.

Q Wait a minute. I want you to tell the Court and jury: everything you said and everything the defendant Brenner said on that occasion as nearly as you can remember it, not exactly in exactly the exact words but as near as you can remember it? A He asked me if I was going to do that and I told him I would try to, if I got it, I asked him what I should do with it and he told me to meet him at the foot of East 10th Street with Sugarman. I sit there for about 15 or 20 minutes and I left him. Well, that day, about noon. I walked up to Mr. Davidson's place on Houston Street between Chrystie and the Bowery and I seen this fellow loading up this stuff at about 12.30

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and I left him and followed to 17th Street.

Q The place on 17th Street where you started away with these goods was in the City and County of New York, wasn't it?

A Yes, sir.

Q And the foot of East 10th Street, that is in the City and County of New York? A Yes, sir.

Q And the defendant's house where you had your conversation with him between 12 and one o'clock in the morning of this day, the 21st day of June, 1907 is in the City and county of New York? A Is in the City and County of New York.

CROSS EXAMINATION BY MR. McMANUS:

Q How old are you? A 19.

Q What had been your business prior to this conviction?

A Clerk.

Q Where? A I worked for a firm on Broadway.

Q Who? A The American Beet Company.

Q Where? A Between Spring and Prince Street on Broadway.

Q How long did you work for them? A About eight months.

Q Before that? A I worked for a ribbon house on Broadway, Prince Street.

Q Were you ever convicted of stealing anything before?

A No, sir.

Q Did you ever steal anything before you stole these goods? A No, sir.

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Q You were an honest boy up to the time you stole these goods, were you? A Yes, sir.

Q You met this defendant first you say on the 20th of June in connection with this larceny, is that right? A I did before this thing happened but I have seen him before that.

Q I say, in connection with this larceny you met this defendant first on the 20th of June? A Yes, sir.

Q You had a conversation with him? A Yes, sir.

Q And you met him again on that night? A Yes, sir.

Q At his house? A Yes, sir.

Q You were there about one o'clock in the morning?

A Yes, sir.

Q And the next day about noon you went around ~~xxx~~ to Davidson's ~~xx~~ place, is that right? A Yes, sir.

Q And those were the goods that you intended to steal, is that right? A Yes, sir.

Q The goods from Davidson's place? A Yes, sir.

Q The truck was in front of Davidson's place, standing in front of Davidson's place, is that right? A Yes, sir.

Q And the load of goods on it? A Yes, sir.

Q You followed the truck? A Yes, sir.

Q Did you know where it was going? A No, sir.

Q How did you follow it? A I followed it up Third Avenue, I went up past Cooper Square until I got to 17th Street.

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Q Cooper Square? A Yes, sir.

Q And you went from there to 17th Street? A Yes, sir.

Q How did you get to 17th Street? A Crossed the park towards Broadway.

Q You went right in from Union Square park? A Yes, sir.

Q Did you walk up? A Yes, sir.

Q And were able to follow this truck all through this episode that you have testified to, is that right? A Yes, sir.

Q Now you got to 17th Street and Fifth Avenue? A Yes, sir.

Q Following this truck? A Yes, sir.

Q What number 17th Street was it the truck stopped at?

A I don't remember.

Q Was it east or west of Fifth Avenue? A West, between Fifth and Sixth.

Q On which side of the way? A It is on the uptown side of the street.

Q Nearer Fifth Avenue or nearer Sixth? A About the center of the block.

Q Do you know what the name of the building was in front of which it stopped. A No, sir.

Q Do you remember testifying in the police court on this hearing on these charges? A I think I do.

BY THE COURT:

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Q Do you remember or not? Did you testify in the police court? A I did testify in the police court, yes, sir.

BY MR. McMANUS:

"Q. Did you see Mr. Davidson's truck anywhere on the 21st of June? A. Yes, sir, I seen it between 12.30 and 1 at the Houston Street address, between Bowery and Chrystie and I followed this truck, yes, sir." Is that right? A Yes, sir.

Q You testified to that? A Yes, sir.

Q "Q. Where did ~~it~~ you follow it to? A. I followed it up to Fifth Avenue", is that right? A I followed it to Fifth Avenue and 17th Street.

Q And you went up Fourth Avenue? A I went up Fourth Avenue.

Q To Broadway, didn't you testify? A I went up Fourth Avenue up to 17th, up Fourth Avenue and I crossed over to Broadway, past the park.

Q You mean to say what you testified to there in the police court, "I followed it up to Fifth Avenue", means that it went up some avenue? A It didn't go up no other avenue, no, sir.

Q Did it go up Fifth Avenue, the truck? A No, sir.

Q Now tell me just which way the truck went after it left Cooper Square? A It went up Fourth Avenue.

Q How far? A Up to 17th Street.

Q Where did you go through the park, at what street?

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A At 17th Street, 17th or 16th, I don't remember; it is some time ago, you know.

Q You don't know what street you went through? A No, sir --- oh, I went through 17th Street, I followed the truck.

Q What street did you go through the park? A Through the park?

Q Yes. A At 17th Street.

Q You said a minute ago it might have been 16th? A It might have been 16th or 17th; I am not positive.

Q Did you go into the park to get across? A No, sir.

Q You didn't? A No, sir.

Q Then you were not in Union Square Park, is that right?

A I passed Union Square Park.

Q So when you testified on your direct examination that you went through the park, you were testifying to something that was not the fact, is that right? A You might have misunderstood me; I says I went up Fourth Avenue, up past the park.

Q All right, I will let it go at that, if that is what you said; all right.

BY THE COURT:

Q You are sure you said that? A Yes, sir.

BY MR. McMANUS:

Q Now, a truck stopped in front of this building, is that right? A Yes, sir.

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Q And the driver went upstairs? A Yes, sir.

Q What did he take up with him? A He took one or two pieces of goods up with him; I didn't notice.

Q Where were you at the time the driver got off the truck? A The other side of the street.

Q On the downtown side? A Yes, sir.

Q Then what did you do, how long was the driver away before you did anything else? A About five minutes.

Q He was five minutes away and were you standing directly across the street? A Yes, sir.

Q And you came from there to the truck, is that right?
A Yes, sir.

Q And you spoke to the boy? A Yes, sir.

Q Is that boy named Rabinowitz, is that boy here, Rabinowitz, he is outside, you spoke to him? A Yes, sir.

Q What did you say to him? A I told him the driver wanted to see him upstairs.

Q Is that all you said? A Yes, sir.

Q And the boy went upstairs and you got on the truck and drove away? A Yes, sir.

Q How did you go to the ferry? A I drove towards Seventh Avenue, being that the street on Seventh Avenue was about ---

THE COURT: Do not give any reason. State the fact.

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THE WITNESS: I drove down Seventh Avenue.

BY MR. McMANUS:

Q About how far? A About 11th or 12th Street, I don't remember.

Q Where did you go then? A I drove over as far as Second Avenue.

Q As far as Second Avenue? A Yes, sir.

Q From there where did you go? A Turned down Second Avenue as far as 10th Street.

Q Went through 10th Street to the ferry? A Yes, sir.

Q Then you say you saw the defendant Brenner? A Yes, sir.

Q Is that right? A Yes, sir.

Q You say that there at the ferry he made this statement to you that he expected another wagon, is that right? A Yes, sir.

Q Did you testify to any such thing when you were called as a witness in the police court? A Did I testify?

Q You heard my question. A It didn't happen to come into my mind; I couldn't think of everything all at once.

Q Weren't you asked to give all the conversation you had with this defendant Brenner when you went into the police court? A I was.

Q Did you in the police court make any statement that he made any such statement to you? A I didn't think of it at

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the time.

Q So you didn't. A No, sir.

Q Now, you have testified you were an honest boy up to the time of this affair, is that right? A Yes, sir.

Q And you were, were you? A I was.

Q Never stole anything? A No, sir.

Q Do you remember these questions being put to you at page 32 on the hearing in the police court, "Q. Do you know a man by the name of Folk? A . No, sir. Q. Did you ever any use goods as children's clothes and suits? A. No, sir. Q. How long have you been stealing this kind of goods? A. About a year." Did you make that answer? A I don't remember making that answer.

BY THE COURT:

Q Did you make it or not? A I did not.

BY MR. McMANUS:

Q Then if it is so stated in the stenographer's minutes, you say the stenographer is not correct in taking it down, is that correct? A I say I did not make that statement.

Q Answer my question, --- read the question, Mr. Stenographer.

(The question is read.)

Q Is that right? A I don't know.

Q Were you also asked this ---

THE COURT: Wait one minute.

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THE WITNESS: I might have misunderstood the question.

BY MR. McMANUS:

Q Let us see if you misunderstood the next one, "Q. Where did you steal the first carload of goods? A. I don't remember", was that question put to you? A I don't remember.

Q Do you know whether you gave answer, "I don't remember"? A I do not.

Q Will you say that that is wrong? A I won't say anything.

Q "Q. Now, do you remember this being put to you, how many truck loads of goods have you stolen in the last year?

A. I don't remember", was that question put to you and did you give that answer in the police court? A I do not remember the questions that were put to me in the police court.

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

BY THE COURT:

Q How long ago was it? A Seven months, now.

Q It was after this happening? A Yes, sir.

Q Were you ever examined in a police court before?

A Yes, sir.

Q You had been in a police court before that time?

A On the same charge, the same case.

Q On the same case? A Yes, sir.

Q That is the only case you were ever in a police court?

A No, sir, the case was adjourned.

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Q It didn't impress you at all what questions were asked you? A I might have misunderstood.

Q It was a pretty important occasion, wasn't it? A Yes, sir.

Q It ought to have made an impression upon your mind, don't you think so? A Yes, sir.

Q You could understand English then as well as now?

A Yes, sir.

BY MR. McMANUS:

Q You don't remember being asked whether you had been a thief before or not, is that right? A Yes, sir.

Q And you don't remember admitting you had been a thief for over a year, is that right? A Yes, sir.

Q And that is not a very important circumstance to your way of thinking, is it? A Yes, sir.

Q This man Arnold that you testified accompanied you to the cafe Lifkowitz? A Yes, sir.

Q He is a thief too, isn't he? A No, sir.

Q Isn't he also known as Baker? A Yes, sir, he is known as Bkaer..

Q He has got more than one name, is that right? A That is only a nickname they called him.

BY THE COURT:

Q Is his business that of a baker? A No, sir, his business is jewelry, dealing, buying and selling jewelry.

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BY MR. McMANUS:

Q Then you went over to Brooklyn? A Yes, sir.

Q Brenner left you long before you got on the ferry, didn't he? A Yes, sir.

Q He was not there when you went on the ferry? A No, sir.

Q You lost a boat, didn't you, you have testified? A Yes, sir.

Q And you had to wait for another boat? A Yes, sir.

Q And that took some considerable time? A Yes, sir.

Q Now, you went right ahead over to Brooklyn? A Right ahead over to Brooklyn in the second boat, after the second boat come in.

Q Who was on the truck with you? A On the truck with me?

Q Yes. A Myself.

Q Alone? A Yes, sir.

Q How did you go after you got over to Brooklyn? A I drove up about three or four blocks, I am not positive, and I turned to my right, Kent Avenue.

Q You drove up three or four blocks and turned to your right? A Yes, sir.

Q ~~On~~ What way did you go then? A I turned to my right and went straight ahead.

Q Straight ahead? A Yes, sir.

Q Down Kent Avenue, is that right? A Yes, sir.

Q In the direction of the Brooklyn Bridge? A The direction of the new bridge.

Q Do you mean the Delancey Street bridge? A Delancey Street bridge.

Q And is Delancey Street bridge lower down at this point than the 10th Street ferry, is it further south? A I cannot tell you that.

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Q How do you know you were going in the direction of the Delancey street bridge? A I could see the bridge.

BY THE COURT:

Q You were driving towards the bridge, is that right?

A Driving towards the bridge, yes, sir.

BY MR. MCMANUS:

Q You went across the 10th street ferry, is that right?

A Yes, sir.

Q Don't you know as a matter of fact that the Delancey street bridge comes in, in Brooklyn, north? A To tell you the truth, I don't know much about Brooklyn.

Q You were going to Kent avenue? A To the best of my knowledge.

Q You knew where Kent avenue was? A Yes, sir.

Q And you went down to Kent avenue? A Yes, sir.

Q How many times had you been in Brooklyn prior to that?

A I don't know.

Q How many blocks did you go? A Three or four blocks.

Q You went down to Kent avenue? A Went down to this bridge.

Q What kind of a bridge was it? A It is a small bridge.

Q What kind of a bridge? A It is some kind of a bridge there.

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Q How big a bridge? A It was not very large, about from there (indicating the north wall of the court room) to where the Hon. Judge is sitting.

Q About that far, is it wood or what? A Wood.

Q Wooden bridge, over the ditch? A Yes, sir.

Q There you broke down? A Right after I got across the bridge.

Q How long were you there? A Pretty near an hour and a half.

Q And at that time the defendant Brenner came up on a truck? A Yes, sir.

Q And the goods were taken off, is that right?

A Yes, sir.

Q And you went away, is that right? A Yes, sir.

Q Now then you saw Brenner that night --- I withdraw that last question ---

BY THE COURT:

Q Did any policeman or anybody else pass you in that hour and a half? A No, sir; it is a very quiet neighborhood.

Q You didn't see anybody in that whole hour and a half?

A A lot of people passing.

BY MR. McMANUS:

Q In the police court were these questions also put to you: "Q. You know this man Baker, don't you? A. Yes,

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sir." Is that right? A Yes, sir.

Q "Q. Otherwise known as Arnold", and did you answer, "Yes sir" is that right? A Yes, sir.

Q "Q. And your brother was in this place with you? A. No, sir", is that right? A Yes, sir.

Q "Q. Had nothing to do with that? A. No, sir", is that right? A No, sir.

Q "Q. Receive any of the proceeds? A. I gave him part of the money", did you give that answer? A Yes, sir.

Q "Q. How much did Arnold get? A. I gave Arnold \$40 and I didn't give my brother the right amount that he ought to get; I just gave him a few dollars", is that right? A I made that statement?

Q Did you make that statement in the police court? A Yes, sir.

Q And you didn't give your brother the right amount that he ought to get, is that right? A I made ---
BY THE COURT:

Q Did you say that? A I don't remember saying that.

Q You said at first you did and now you say you don't remember? A The question was put to me in the police court so quick that they didn't give me a chance to think.

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BY MR. McMANUS:

Q Why didn't you take your time to answer them?

A Why didn't I?

BY THE COURT:

Q You don't have to think of the truth? A No, sir.

Q Don't you know the truth as soon as you are asked a question? A Yes, sir.

Q You didnot have to think to answer my questions, did you? A No, sir.

Q You didn't have time to make up a story? A No.

Q You just said you did say that in the police court and now you say you do not remember. Which is true, you must tell the truth? A Yes, sir.

BY MR. McMANUS:

Q Do you realize you are under oath? A Yes, sir.

Q Do you know what perjury is? A Yes, sir.

BY THE COURT:

Q What is it? A False swearing.

Q Do you know the penalty for it? A Yes, sir.

Q What is it? A I don't know.

Q Don't know anything about it? A No, sir.

Q No offense at all, is it? A It is an offense but I

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don't know what it falls for.

Q Not a very serious one? A I don't know.

Q It is merely an offense against the law, is that all?
Is that what you understand? It is merely an offense
against the law, it would be all right to commit perjury if it
was not for the law saying it was wrong, is that your idea?

A No, sir.

Q What makes you think it is wrong? A It is a
crime.

Q What do you mean by saying it is a crime?

A It is doing something you hadn't ought to do.

Q What hadn't you ought to do it? A Because it is an
offense.

Q Never heard of God, did you? A Yes, sir.

Q You called on God to witness that what you say is
true? A Yes, sir.

Q That is what makes it an offense, isn't it?
A Yes, sir.

Q Why didn't you think of it? What you have in mind is
the number of years you will get if you are caught at it,
is that it, is that what you keep in mind? A Yes, sir.

BY MR. McMAHUS:

Q Now, you say you didn't have time to think at the time
you made this answer, is that right? A Yes, sir.

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Q Here is the next question that was put to you, right succeeding that last one, "Q. You didn't give your brother the right amount that he ought to get, that was right? A. No, sir, I didn't give him as though he was in it", is that right?

A Yes, sir.

BY THE COURT:

Q You remember that? A Yes, sir.

BY MR. McMANUS:

Q Now, after this leaving the property over in Brooklyn, you came to Lifkowitz's cafe that night? A Yes, sir.

Q Is that right? A Yes, sir.

Q And you saw Brenner there that night, is that right?

A Yes, sir.

Q And you had a conversation with Brenner there, is that right? A Yes, sir.

Q And Brenner said there were 54 pieces, is that right?

A Yes, sir.

Q Now know that 63 are that are charged in this indictment, don't you? A Yes, sir.

Q You know that? A Yes, sir.

Q And he said there were 54 pieces of goods?

A Yes, sir.

Q Ten dollars a roll, is that right? A Yes, sir.

Q Did you make that agreement there with him that night?

A I don't know.

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Q What do you mean? A I didn't make any agreement, he told me he would pay me ten dollars a roll for them.

Q Did he tell you that that night? A On the night of June 21st.

Q On the night you stole these goods, is that right?
A Yes, sir.

Q Didn't he give you the money that night?
A Yes, sir.

Q Do you remember testifying in the police court as follows, page 21, "Q. Tell what happened ~~xx~~ the next time you saw Brenner? A. I seen him the same night about eleven o'clock at Lifkowitz cafe, Suffolk & Houston street", is that right, did you say that in the police court? A In the police court?

Q Yes? A I don't remember.

Q When were you in the police court on this case, weren't you examined twice in the case in the police court?
A Yes, sir.

Q Wasn't the last examination only in January?
A January.

Q And you don't remember? A No, sir.

Q You remember everything about this larceny and this alleged receiving of stolen goods, thought, don't you?
A Yes, sir.

Q And that was away back in June. Now, do you remember

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this being put to you, "Q. What happened there? A. I met him, he told me to come two days after", is that right, did you make that answer in response to that question? A I did.

Q Now you say you got it the same night, which is true? A May I say a few words, your Honor?

THE COURT: Answer the questions, please.

Q Which is true? A The same night.

Q So when you testified in the police court two months ago that he said come two night later you were testifying to something that is not the fact? A I called Mr. Goldsmith's attention ---

Q Answer that question? A Yes, sir.

Q Now, "Q. Didn't you then testify that you did meet him two nights later"? A I did.

Q You did? A Yes, sir.

Q Wasn't this question then put to you, "Q. What happened at that time? A. I came around and told my brother about it, I told my brother there was another fellow standing there, Sam Arnold, told him to take a single truck, we went there, he came with the money and I gave my brother a couple of dollars.

Q. Where did you get the money? A. Off Brenner. Q. When?

A. Two days afterwards I think it was. Q. Where? A. Lifkowitz's cafe", did you make those answers? A Your Honor, may I say a few words?

THE COURT: Answer the question.

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BY MR. McMANUS:

Q Answer me, whether you made them or not? A I did.

Q Now, were you present when the goods were transferred over in Brooklyn? A Yes, sir.

Q Didn't you know how many pieces were on there then? A No, sir.

Q Didn't you count them? A No, sir.

Q Were you willing to leave it to Mr. Brenner as to how many there were there? A Yes, sir.

Q To trust to his honesty as to these stolen goods, is that right? A Yes, sir.

Q And you don't know how many were on the truck? A No, sir.

Q After you broke down what was the next thing you did? A I wanted there.

Q You simply waited? A Yes, sir.

Q And the next thing you know Brenner came up with another truck? A Yes, sir.

Q Is that right? A Yes, sir.

Q You were there an hour and a half, you testified, before anybody came there? A Yes, sir.

Q When did you get the money, two days after, you testified in the police court, or on the same night, June

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21st that you have testified here, if you ever got it at all?

A I got it on the same night.

Q Got it on the same night? A Yes, sir.

Q And you were in the police court when you heard your brother testify, weren't you? / I was in the police court?

Q Yes? A I was sitting in the back.

Q But you know now that your brother testified in the policecourt that this was on the night of June 21st?

A I don't know what my brother testified.

Q Haven't you had any talk with him, haven't you had any talk with him? A Certainly, yes, I talked with him.

Q About this case? A Not in particular.

Q You have been over in the Tombs together for how long?

A Over three months.

BY THE COURT:

Q In the same cell? A Right next to each other.

BY MR. McMANUS:

Q And you haven't talked to him much about this case?

A No, sir.

BY THE COURT:

Q This case didn't bother you at all, did it?

A Didn't bother me really ---

Q You were talking about the weather, I suppose, were you? A Some part of the time, yes, sir; we were reading

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most of the time.

Q Reading, eh? A Yes, sir. Your Honor may I explain?

THE COURT: The District Attorney will give you a chance to explain.

BY MR. McMANUS:

Q Didn't bother you much, did it? A No, sir.

Q And you had been there three months? A Yes, sir.

Q You got \$540., is that right? A Yes, sir.

Q And you got it on the 21st of June? A Yes, sir.

Q Had you ever got as much as that before in one lump?

A In what?

BY THE COURT:

Q In one sum, at one time? A No, sir.

BY MR. McMANUS:

Q You gave \$40 to your brother? A \$40 to Arnold.

Q You gave \$50, was it, to your brother? A Close to \$50. to my brother.

Q Did your brother know that this money was the proceeds of a theft? A He did, after I told him.

Q He did after you told him? A Yes, sir.

Q When did you tell him? A I told him when we were coming out.

Q You didn't tell him until you got the money?

A Well, he understood it.

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BY THE COURT:

Q Your brother understood it was the proceeds of a robbery?

A Yes, sir.

BY MR. McMANUS:

Q Your brother understood it was the proceeds of the theft when you gave him the money? A Yes, sir.

Q And he knew that you went there to get your theft, as you call it? A No, sir, he didn't know that.

Q Didn't he know what you went there for? A I didn't tell him until we got close to the place.

Q You told him when you got close to the place? A Yes, sir.

Q Then what did you tell him? A I don't remember what I told him.

BY THE COURT:

Q Didn't Brenner hand you the money in his presence? A Yes, sir.

Q Rightout openly? A Yes, sir.

Q In the presence of Arnold and your brother? A Yes, sir.

Q Didn't make any bones about it? A Yes, sir.

BY MR. McMANUS:

Q This was a big cafe? A Yes, sir.

Q Great big place? A Yes, sir.

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Q One hundred tables there, probably? A I don't think there are 100.

Q Well 25 or 50, a big cafe, where people go there for amusement? A Yes, sir.

Q Crowded there all the time, every night?
A Yes, sir, crowded not exactly every night.

Q Was it crowded this night? A I don't remember whether it was.

BY THE COURT:

Q You don't remember how many people were in there?

A They generally sit at side tables there, play cards, they don't notice anybody coming in there.

BY MR. McMANUS:

Q What did you do with the balance of this money?

A Gambled it.

Q Gambled it? A Yes, sir.

Q I thought you were an honest boy before that?

MR. APPLETON: That is objected to.

MR. McMANUA: I withdraw the question.

Q Where did you gamble it? A Grand and Forsythe streets.

Q When? A I lost a little every night.

Q That is all you got out of it? A Yes, sir.

Q Just gambling? A Yes, sir.

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Q Didn't give any to anybody else? A No, sir.

Q When were you arrested first? A When was I arrested first?

Q Yes. A It was June 23rd.

Q The 23rd? A About the 25th, I don't remember.

Q It was later than that, wasn't it? A I don't remember the date.

Q It was several days after the larceny? A It was quite some time after the larceny, about five weeks.

Q The larceny was on the 21st, and it was quite some time after that that you were arrested first? A Yes, sir.

Q You and your brother were arrested, isn't that a fact? A Yes, sir.

Q For the theft of these goods, is that right? A Yes, sir.

Q You were arraigned in the police headquarters, weren't you? A Yes, sir.

Q And you were stood up in line, is that right? A Yes, sir.

Q You and your brother, is that right? A Yes, sir.

Q And there were about how many people in that line? A Well, there was two lines there.

Q Two lines? A Yes, sir.

Q How many people in the two lines? A Might have been about 30 or 35.

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Q Now a boy named Rabinowitz was brought in, wasn't he?

A Yes, sir, Rabinowitz.

Q Rabinowitz was brought in there? A Yes, sir.

Q Your brother was on one of these lines? A Front line.

Q And this witness Rabinowitz passed over you and took out your brother as the boy who stole those goods, didn't he?

A He picked out my brother.

Q And he said too your brother was the boy who came and notified him on 17th street, didn't he? A That is what he says, yes, sir.

Q And you were in that same room? A Yes, sir.

Q And that boy also said that your brother had come to him one week before, didn't he? A Yes, sir.

Q On 17th street? A Yes, sir.

Q And told him that time the driver wanted him?

A Yes, sir.

Q And the boy didn't go up, is that right?

A I don't know whether that was right or not.

BY THE COURT:

Q Do you remember it? A I don't remember it.

Q Don't you remember whether that boy said that or not?

A I don't remember.

THE COURT: He does not remember. Go on.

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BY MR. McMANUS:

Q Do you remember this, that Mr. Lindner picked your brother out as the boy who was on his truck about a week before, is that right? A Yes, sir.

Q And you remember too that this boy went on the stand and swore that your brother was the one that he had seen there tell him to go up in the building on 17th street?

A Yes, sir.

Q Now you say that that boy is mistaken, is that right?

A That is what I say, yes, sir.

Q And that you and not he, your brother, is the thief?

A Yes, sir.

Q Were you the boy who was on 17th street the week before and asked this witness to --- told this witness that the driver wanted him? A Yes, sir.

Q So the boy is again mistaken in stating that that was your brother? A Yes, sir.

BY THE COURT:

Q Did your brother dress like you? A The same thing.

Q Same suit? A Yes, sir.

Q How old is your brother? A Past twenty-one.

Q He is older than you are? A Yes, sir.

Q Does he look like you? A Well I got my hair cut off.

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Q What? A We did resemble each other a good deal but I cut my hair off.

Q Where did they cut your hair off? A Over in the City Prison.

BY MR. McMANUS:

Q Was ^{it} you or your brother that Mr. Lindner saw on this truck a week before? A It was me.

Q Where was it that he saw you? A On Fifth avenue.

Q Well now, if Mr. Lindner testified it was down on Houston street, which was it? A That I don't know.

Q In other words you are here to save your brother, aren't you? A I certainly am.

Q You want to take all this responsibility on your shoulders for the benefit of your elder brother?

A Because he is innocent of the charge, yes, sir.

Q He is innocent? A Yes, sir.

Q And all these other people are mistaken, is that right? A Yes, sir.

Q And they swear falsely, when they say that he and not you was the thief, is that right? A Yes, sir.

Q Now, you have sworn that you didn't know that this fellow Franka had been convicted, is that right?

MR. APPLETON: One moment. I call for Michael Toplitsky.

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Michael Toplitsky enters the court. At the request of the District Attorney and by direction of the Court the witness on the stand and Michael Toplitsky stand side by side facing the jury and then turn facing the Court.

BY MR. McMANUS:

Q That is the brother who was in line at Police Headquarters, is that right? A Yes, sir.

Q And the brother who has been identified by these people as the thief? A Yes, sir.

Q And he is not the thief, despite that identification, but you are, is that right? A Yes, sir.

Q Now you testified that you didn't know that this Baker had ever been convicted, did you? A Yes, sir.

Q Do you remember these questions being put to you, "How do you mean, better known as Baker? A. They called him Baker, that is all, yes, sir", is that right? A Yes, sir.

Q (Reading) "Q. That is the name under which he was convicted? A. Yes, sir", did you give that answer in response to that question? A No, sir.

Q No. A I don't remember, no, sir.

Q So the ~~xxx~~ stenographer is again wrong if he so entered it upon his minutes, is that right? A I don't know.

Q All you know is that you didn't answer that?

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A No, sir.

Q Now again, with respect to the money and the distribution of the money which you now say was on the 21st? A Yes, sir.

Q Do you remember this question, "Q. On the same night the goods were stolen, did you go to the cafe? A. Yes sir", is that right? A Yes, sir.

Q "Q. With your brother? A. Yes, sir", is that right?

A Yes, sir.

Q "Q. And at that time you received ---" then did you break in and say, "It was not that time, it was two days afterwards"? A I wanted to call your attention.

Q Now answer that, A I don't remember saying that..

MR. McMANNUS: You do not remember. That is all.

BY MR. APPLETON:

Q What is your explanation about that two days later?

A That two days later is when Mr. Brenner told me to come around and said if the goods were all right he would see me. I called Mr. Appleton's attention to that in the police court.

M I C H A E L T O P L I T S K Y, called as a witness on behalf of the People, and being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. APPLETON:

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Q How old are you? A Twenty-two.

Q Where did you live prior to the 23rd day of July, 1907?

A Prior to that, I think we lived in 77 Eldridge street.

Q Don't you know where you lived? A Oh, 28 Market street, we lived.

Q On the 25th day of July, were you arrested that day?

A I was arrested on the 23rd day of July, on the corner of Grand and Forsythe streets.

Q And you have been in the City Prison since then up to now? A Yes, sir.

Q Did you ever see this defendant at the bar and your brother together at any time or place? A Well, I testified --

Q I don't ask you that, I ask you to answer the question, to answer my question? A Yes, sir.

Q Did you ever see this defendant and your brother Abraham Toplisky together at any time or place? A Yes, sir; I recollect of seeing them several times in the neighborhood of Grand and Forsythe streets.

Q Did you ever see them at any particular place that you can now recall? A No, sir --- well, only on the corner there of Grand and Forsythe streets.

Q Did you ever see this defendant and your brother together with any other person, I don't limit you to just those two, but anybody else, there at any other place besides the corner of Grand and Forsythe streets? A Any other place, or any other people.

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Q Just answer the question, I asked any other place?

A No, not that I remember.

Q Were they outside or inside the place at Grand and Forsythe street? A On the corner, on the outside.

Q Did you ever see them inside, anywhere? A I don't remember seeing them inside.

Q Did you ever see this defendant inside of any building?

A Yes, I saw him inside of Lifkowitz's cafe.

Q When was that? A That was in June, on the night of June 21st.

Q What year? A 1907.

Q Who else was present besides this defendant when you saw him on that occasion? A Another fellow by the name of Sugarman, another fellow by the name of Samuel Arnold and myself.

Q Anybody else? A That is all.

Q We have got Brenner, Sugarman, Samuel and yourself?

A And my brother.

Q What is your brother's name? A Abraham.

Q Now state what happened? A I met my brother on the corner of Grand and Forsythe street, and he asked me to walk up to Houston street with him, as somebody ~~had~~ owed him some money up there. We went up to Lifkowitz's cafe, met Brenner and another fellow named Sugarman. We went to the rear and sat at a table,

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Brenner, the defendant ordered ice cream. We started to eat ice cream, so my brother asked Brenner if everything was all right. Brenner said yes, everything was all right, safe. Well, my brother says, how much is the stuff worth? " Brenner says "The best I can give you is ten dollars a roll and my brother was not satisfied with that and argued with him and Brenner said, "If you ain't satisfied with the price, my expenses in handling this I think is \$300. Give me the \$300 and I will show you where the stuff is, you can go get the stuff back". Finally my brother consented to accept the money and he handed over the money and we sat there a few minutes and we walked away. We walked to Forsythe street. I, Sam. Arnold and my brother, there, and my brother left us there, and I walked away.

CROSS EXAMINATION BY MR. McMANUS:

Q Is that you you know about it? A Yes, sir.

Q You were convicted of stealing these goods? A I was.

Q After a trial? A Yes, sir.

Q You were arrested with your brother? A I was.

Q You were identified by the complainant, or one of the complainants, Lindner, as the man whom he had seen on his truck, weren't you? A Yes, sir.

Q Were you the man? A No, sir.

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Q Mr. Lindner's statement then is false? A Positively.

Q It was your brother? A Yes, sir.

Q How do you know? A I know because it was not me.

Q How do you know it was your brother? A How do I know it was my brother?

Q Yes, sir. A Well, my brother has ever told me he has been on the wagon.

Q Oh then your brother told you that he was the one that was on the wago? A Yes, sir.

Q Then, is that right? A It must have been, because it was not me.

Q Did he ever tell you he was the man who was on the wagon and whom Lindner saw? A Yes, sir.

Q When? A When I was -- well --

Q When? A Well, after I was identified by Lindner as the fellow being there on the wagon, I knew that I was not on the wagon and I saw my brother in the Tombs and I said, "Were you ever on the wagon?" and he said yes.

Q After you were convicted? A Yes, sir.

Q You remember the boy Rabinowitz testifying against you on your trial? A I do.

Q Rabinowitz said, did he not that you were the man who tried to get him off that wagon a week before, the 17th, didn't he? A I don't remember him saying that?

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Q You were in court while your trial was going on?

A Yes, sir.

Q He was there, called there as a witness? A Yes, sir.

Q Didn't you hear him testify to that fact? A I don't remember now hearing him testify. He might have testified, but I don't remember now.

Q Well, he identified you as the man who was there and who sent him up there on the day the goods were stolen?

A Yes, sir.

Q You remember that? A I do.

Q He was mistaken? A He was.

Q He swore to it, he swore to a fact that was not true?

A Yes, sir.

Q So that is two people who have sworn to a fact that is not true against you, is that right? A Yes, sir.

BY THE COURT:

Q Did you know Rabinowitz and Lindner at all?

A No, sir.

Q He had nothing against you, had he? A Not as I know of, no, sir.

BY MR. McMANUS:

Q You were arrested on July 23rd? A I was arrested on July 23rd.

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Q Did you know anything about the larceny? A Yes, sir.

Q What did you know about it? A I knew my brother had committed the crime.

Q You knew when you were arrested that your brother had stolen the goods? A Yes, sir.

Q You did not tell anybody? A I did not.

Q Your brother had told you he was a thief before his arrest? A Before his arrest?

Q Yes, sir. A We were both arrested at the same time.

Q Your brother had told you before you were arrested that he was the thief? A At the time we went up and he got the money.

Q You were up in line, up at Police Headquarters?

A Yes, sir, he stood behind me; I was in front.

Q There were two lines, about 30 or 40 men?

A I don't know how many there were.

Q Was there a large crowd? A Two lines, yes, sir.

Q And both Lindner and this boy picked you out as the man who had sent him up in this building? A I beg your pardon, Lindner did not pick me out; it was only the boy.

Q Excuse me, I stand corrected. It was the boy who picked you out as the man who had sent him up in the building?

A Yes, sir.

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Q And you were not the man? A No, sir.

Q Did you tell anybody then you were not the man, it was your brother? A I didn't at the time, no, sir.

Q You never said a word about this until after you went and stood trial on this charge? A I did, yes, sir.

Q And you were innocent? A I was.

Q And you knew who the thief was? A I did.

Q And you never told about it, A No, sir.

Q You thought you were doing your duty as a respectable citizen under the circumstances? A I knew well enough I was not doing my duty, but in order to save ~~you~~ my brother.

Q In other words, if you had got away with this you would never have said a word about it? A I don't know whether I would or not; I didn't get away with it, so I could not tell whether I would or not.

Q You mean to say that if you did get away, you might have possibly come in and told it was your brother who was the thief? A That might have been possible.

Q It might have been possible? A Certainly.

Q Would you have been likely to do that? A I don't know as I told you, I didn't get away, so I cannot tell what I did afterwards.

Q So you never said a word about this business until after you were convicted, is that right? A Yes, sir.

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Q Then you thought it was pretty near time for your brother to come to the front, is that right? A Yes, sir.

Q You have not yet been sentenced? A No, sir.

Q Neither has your brother? A No, sir.

Q Do you expect that the testimony you are giving here will be considered in determining what sentence or what action shall be taken in respect to your case? A That I don't know; I have not had any promise from anyone.

BY THE COURT:

Q You have hopes, A I have hopes, well, I naturally would have.

BY MR. McMANUS:

Q Did you know that these goods were stolen at the time you testified as a witness upon your trial?

MR. APPLETON: That is objected to as already answered, his brother ---

BY THE COURT:

Q You did, did you? A Yes, sir.

BY R. McMANUS:

Q You did, A Yes, sir.

Q Do you remember being called as a witness of your own trial? A I do.

Q In this building, A Yes, sir, in this building.

Q Do you remember answering as follows, "I told him, Davidson, the complainant, absolutely that I did not know any-

thing about the stuff", is that right? A I could not say.

Q Didn't you have a conversation with Mr. Davidson, the complainant in this case over at the Tombs? A I did, yes, sir.

Q Before your trial? A Yes, sir.

Q Didn't Mr. Davidson say on the stand that you had told him that if he would let up on you you would tell him where the stuff was? A Did I tell Mr. Davidson that?

Q Didn't Mr. Davidson say that? A I think he testified to that effect, yes, sir.

Q You would open up, if he would promise not to prosecute you, didn't he testify to that? A I think he did, yes, sir.

Q Did you have such a conversation with him in the Tombs? A I had a conversation with him in the Tombs, yes, sir.

Q Did you make that statement to him? A I don't remember whether I did or not, now.

BY THE COURT:

Q How long ago was that conversation?

MR. McMANUS: That was in July 1907, wasn't it?

THE WITNESS: I don't remember what time of the month it was.

BY THE COURT:

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Q When were you tried? A I could not say, your Honor, when I was tried.

BY MR. McMANUS:

Q You were tried in August, 1907, weren't you, August 12th? A I could not tell you, I don't remember the month.

Q And how the conversation was a short time before your trial, wasn't it. A The conversation was before I had my last examination in the Tombs.

Q You had a conversation with the complainant which you don't remember now just what it was? A That is right, I remember having a conversation with him, yes.

Q Did you make any such statement as that to him at any time, that if he would not prosecute you, you would let him know where the stuff was? A I don't know whether I did, not to my knowledge.

BY THE COURT:

Q What did you talk to him about? A He came to me in the Tombs and asked me if I would tell him what I knew about the stuff, where was his goods, he would try and get me out.

Q What did you say? A Well, I cannot remember exactly the words, what I did say to him at the time.

Q What was the substance?

MR. McMANUS: The jury cannot hear this.

THE COURT: Read that, Mr. Stenographer.

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The last three questions and answers are read by the stenographer.

BY THE COURT:

Q What was the substance of what you told him, you remember what he said pretty well, why don't you remember what you said? A I might have told him that.

Q What might you have told him, speak out, so the jury can hear you? A I might have told him I didn't know anything about the stuff.

BY MR. McMANUS:

Q Now, you remember this, you heard Mr. Davidson testify in this case? A Yes, sir.

Q Did you hear him say this, "I made no promise when I came back to him. He said if you go to my attorney and give me in writing that you won't prosecute me, that you won't go against me, I will get back your goods, I will take you to the man who has got them and give you ~~what~~ all the satisfaction you are looking for". Did you make any such statement? A I don't think I did.

Q Don't you know? A I am pretty sure I didn't.

Q Are you in the habit of stealing goods? A No, sir.

Q Wouldn't you know whether you had such a conversation and wouldn't you remember it? A I think I would.

Q Did you or did you not have such a conversation?

A I cannot remember hearing the words that you repeated, no,

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sir.

Q What do you remember that you did say? A Well, when he come to me and asked me that question I might have denied knowledge of the goods, certainly, why wouldn't ~~it~~ I, anybody else would do the same in my place.

Q You were an innocent man, is that right?

A I knew that my brother had stolen the goods, yes I knew it.

Q You were an innocent man? A Yes, sir.

Q And you say anybody else would do the same thing under the circumstances, is that right? A When a brother is concerned, in my case, yes.

BY THE COURT:

Q When a brother is concerned in the case you mean you would commit perjury for your brother? A No, sir.

Q What do you mean by saying that? A I mean I didn't care to say anything when I knew my brother was a guilty party.

Q Do you mean to say that M. Davidson was lying on the stand about it? A I don't remember whether he was lying or not.

Q When you hear that testimony, it does not refresh your recollection at all? A No, sir, not the last few words.

Q You heard all of Davidson's testimony? A Yes, sir.

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Q He went to you and you told him if he would give your attorney a promise in writing not to prosecute you you would give him back his stuff, A Yes, sir.

Q Did you hear that? A Yes, sir.

Q Did you say that, or did you not say it?

A I cannot remember that I did say it, I hardly did.

Q Well, what did you talk about? A He came after me, he came to me.

Q He came to you to get his goods, didn't he?

A He came to me for information.

Q That is what he wanted? A Yes, sir.

Q And you didn't exact any promise from him at all?

A I don't remember making any promise.

Q You would not be likely to do that? A I don't know.

Q Isn't it more likely that you would do that than that you would commit perjury for your brother, wouldn't you try to save your own skin in that way? A Well, I might.

BY MY. McMANUS:

Q He came to see you twice in the City Prison, didn't he before the trial? A Yes, sir.

Q Do you remember him testifying to this, "He said to me --- Lindner --- you said to me, the complainant if the officer-- if Charley Landers, which was the officer -- will come here

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Monday morning, I will open up everything", did you say that?

A I don't remember saying that, no, sir.

Q You didn't say that? A I don't hardly think I did, no, sir.

BY THE COURT:

Q You know Charley Landers, don't you? A Yes, sir, I do.

BY MR. McMANUS:

Q He is the officer? A Yes, sir.

Q Do you remember going on the stand yourself and saying this, with relation to the conversation you had with the complainant in the City Prison, "He was accompanied at that time by Samuel Arnold", is that right, he came to see you with Arnold? A Yes, sir.

Q Arnold is a thief too, isn't he? A Arnold is no thief, that I know of.

Q Don't you know he has been convicted? A Who has been convicted?

Q Has been convicted --- not of this? A Arnold has been convicted?

Q Yes? A I think you are mistaken.

Q He is known as Baker, too, isn't he? A Yes, sir.

Q You knew him as Baker and Arnold? A Yes, sir.

Q He is a friend of yours? A I thought he was, anyway.

Q Davidson said to you -- "Me, listen, I know well enough that you did not take that stuff, but you have an idea who did take it; if you will tell me who took that stuff, I will give you \$500 and guarantee to release you within 24 hours, I told him absolutely that I did not know anything about that stuff", did you?

THE COURT: You swore to that on your trial, what he has just read?

A I think I did.

Q When you swore to that you were lying when you said you knew nothing about that stuff? A (No answer.)

Q Why do you hesitate? Why, don't you know whether you were lying or not then? A (No answer.)

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Q Answer the question.

THE COURT: Don't you understand the question?

THE WITNESS: No, sir.

THE COURT: The stenographer will read the question.

Q (Question read)

THE COURT: Do you understand it now?

THE WITNESS: Yes, sir.

THE COURT: Answer it.

MR. McMANUS: You were lying, weren't you?

MR. APPLETON: I object, it is evident to the

jury ---

BY THE COURT:

Q Do you know whether you were lying or not? A I suppose I was, your Honor.

BY MR. McMANUS:

Q And you, an innocent man, were lying, and you were innocent? A I was innocent, yes.

Q You got how much as your share of the proceeds of this larceny? A My share? I didn't get any share at all.

Q Didn't you get any money from your brother? A I did, yes, sir.

Q How much did you get? A I think \$30, 30 or \$40.

Q If your brother says 50, does that refresh your recollection? A He gave me \$30 when we left the place and I gave the \$30 to Arnold.

BY THE COURT:

Q You gave the \$30 to Arnold? A Yes, sir, he was with us.

Q Didn't your brother give him anything? A My brother gave him some also, I think \$40, or so.

BY MR. McMANUS:

Q You say you don't know that Samuel Arnold was ever convicted under the name of Baker or any other name? A No, sir.

Q Do you remember, police court, page 16, and you had been knowing this man Arnold three or four or five years?

A. Some years, I don't remember. Q. Tell the Judge his right name? A. Samuel Arnold." Did you give those answers in response to those questions in the police court? A I suppose I did.

Q Don't you know you did? A Well, I --- yes, sir.

Q "Q. Was he known by any other name? A. Sometimes known by the name of Baker", did you give that answer in response to that question? A Yes, sir.

Q "Q. Was he convicted under the name of Baker? A. Yes", did you give that answer? A No, sir.

Q So you too say the stenographer is wrong if he puts it down so in the minutes? A I don't see now ---

Q Answer that question. A I never said he was convicted.

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Q Then the stenographer is wrong if it so appears in the minutes of your testimony, is that right? A I don't think I ever said he was convicted.

Q Answer my question. I ask the stenographer to repeat it. A I understand the question.

Q Did you so testify to that effect in the police court?
A That Arnold was convicted?

THE COURT: Not of this crime, but of some other crime?

A (Continued) I understand. I never said he was convicted because he was not; I am positive.

Q What was Arnold's business? A Jewelry dealer.

Q Where? A Well, he was not in business, he simply bought goods and sold them.

BY THE COURT:

Q From thieves? A No, sir, auction.

MR. McMANUS: Had no place of business.

THE COURT: He attended auctions.

THE WITNESS: I know a firm of Rose, and a jeweler named Cohen he bought stuff from there and he bought stuff from another jewelry house on Canal and Wooster, on the first floor. He would take the stuff on memorandum.

BY THE COURT:

Q And sell it for them? A Yes, sir, I don't know what he would do with it.

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BY MR. McMANUS:

Q What is your business? A Shipping clerk.

Q Where? A I worked for Loewe Brothers on Broadway.

L A F A Y D A V I D S O N , recalled:

BY MR. APPLETON:

Q Did you ever have a conversation with this defendant at the bar? A Which defendant?

A There is only one, Brenner? A Brenner?

Q Yes, sir. A I did, on one occasion, on the 2nd of January.

Q State to the Court and jury what Brenner said and what you said?

MR. McMANUS: That is objected to unless the time and place is specified.

Q What time? A On the 2nd day of January.

Q Whereabouts? A Right downstairs on the stoop, as we go out of this building.

Q What time of the day? A After we had the hearing in front of Magistrate Butts.

Q What was said?

THE COURT: What hearing do you refer to?

MR. APPLETON: The hearing of this defendant.

A As I was just passing out of the door, Brenner and his wife went up to me and they grabbed me and they says "Davidson?",

and I says, "Yes, that is me". He says, "How much of the stuff that was on that truck, how much was it worth?" I said, "\$5300 worth", he says, "\$5300", I says, "Yes", I says, "Brenner, since you spoke to me about it, you know where the stuff is, why don't you let me that stuff, there has been several men offering me--"

MR. APPLETON: I object. If you cannot answer my question I withdraw you as a witness.

A (Continued) So he says, "\$5300?", I says, "Yes, \$5300 worth of stuff", so he says, "Are you sure?", I says, "Yes, I am sure". He laughed and says, "I wish you good luck", and he walked away.

Q Did Brenner ever say anything else to you outside of what you just said? A Never, and I never spoke to him.

Q On any other occasion? A No, sir.

BY MR. McMANUS:

Q And you have sent how many people to me and asked me to settle this case? A I never sent anybody.

Q How many have you sent to Mr. Goldsmith? A Nobody.

Q Who is your lawyer? A In this case, none.

Q Who is your general counsel? A I have no general counsel.

Q Do you know Mr. Cohn of Goldfogle, Cohn & Linde? A I certainly do.

Q Didn't you ask him to call on me in reference to this case? A No, sir.

Q Is he your attorney, isn't he? A He is not, always.

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Q Is not he your attorney? A No, he is not my attorney.

Q Has he been your attorney? A No.

Q Didn't you come with him to this building only the ~~xx~~ other day? A I did not, no.

Q Did your partner? A That might have been, my partner came to this building with him; he is a good friend of my partners. Mr. Cohen has been a friend for 30 odd years of my partner's.

MR. McMANUS: I ask that the testimony be stricken out as not connected with this transaction and not relative to it in any way, and has no bearing that I see on the charge.

THE COURT: You didn't object to it at the time. I do not see how it bears on the charge, what Mr. Brenner asked him, as I understand it,, how much stuff was taken. That is all there is to it.

MR. APPLETON: I have one more witness.

THE COURT: Then we will take a recess until two o'clock. Gentlemen of the jury, you will be careful not to discuss this case with anyone or among yourselves nor to come to any conclusion about it finally until it is submitted for your consideration. Come back at two o'clock.

The court then took a recess until two o'clock p. m.

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AFTER RECESS.

MR. APPLETON: If your Honor please, while this jury was brought into the box, Mr. McManus and I stipulated that on the 20th day of March, in the year 1900, this defendant at the bar, Benjamin Brenner, was convicted in the Court of General Sessions, before the Honorable Warren W. Foster, a Judge of the Court of General Sessions, under the name of Benjamin Brown, of the crime of petit larceny, and that, thereafter, this said defendant was sentenced to imprisonment in the Penitentiary for the term of one year.

MR. McMANUS: In 1900. I consent that that go on the record.

MR. APPLETON: The People rest.

THE PEOPLE REST.

MR. McMANUS: I move to dismiss, or for your Honor to direct the jury to acquit upon the ground that there is absolutely nothing for the jury to consider upon the question of the guilt of this defendant. Taking the testimony at its best, an extraordinary situation is presented. We have two men, both convicted of the larceny

of these goods, and not a suggestion of an attempt to corroborate any of their statements, such as the law requires. If on a story such as they have told a man is to be put in jeopardy, there is no doubt that no man is safe. One of the witnesses says that he, and not his brother, is the thief. That, in the face of the fact that three people have positively identified the brother. He testifies to a story which is absolutely ridiculous, when compared with the story that his brother tells upon the stand. He assumes the responsibility for being at every place where the witnesses say his brother was. His brother was there at all the times. There is no need to go into the evidence. There is not a word of corroboration under section 399 of the Code of Criminal Procedure, such as the law requires. That states that unless the testimony of accomplices is corroborated, no conviction can be had. Now, there can be no question in any event of these men being accomplices.

THE COURT: Are they accomplices, technically?

MR. McMANUS: The first defendant says that this man counselled, advised, induced and procured him to commit that larceny

THE COURT: He does not state that.

MR. McMANUS: Yes, he met him before the day of

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the offense, and that at that time he thought he could get these goods, and defendant said "get them and I will take them from you." I believe that is the testimony.

THE COURT: The defendant here is not charged with larceny.

MR. McMANUS: It is the one transaction. Again, take it further than that, it is receiving stolen goods. We have the further fact that he took these goods to the ferry, and then the defendant is there present. Now, that completes the evidence in one aspect. Then, following out directions, he gets there, he aids the defendant in taking those goods and concealing those goods and removing them to Brooklyn.

THE COURT: There is no evidence of that.

MR. McMANUS: He met him down there.

THE COURT: It does not appear how these goods got to Brooklyn.

MR. McMANUS: He said he drove them over there, and that the other man was standing there at the time, and that the other man told him to drive them while defendant went away; and he helps the defendant, in Brooklyn, to remove them from one truck to another. That is in evidence. Now, he is an accomplice in that event. Every defendant participated in the fruits of that crime. He

got part of the money, knew that it was stolen money, and he took it as representing the proceeds of those stolen goods.

Now, I take it that the principle of law which governs in this case should be identical with that as controlled in the case of the People against Bissert, in 71 App. Div. There, the defendant, a police officer, was convicted of accepting a bribe. The testimony upon which he was convicted was that furnished by the bribe giver. The bribe giver is punishable under another and different section of the Code than the one under which the defendant was punishable. Now, what was the reason the Appellate Division reversed the conviction? It says, in its opinion, that the bribe giver was an accomplice whose testimony had to be corroborated. It says: "If she paid to the defendant this sum for the purpose specified, she was equally guilty with the defendant because she aided and abetted in the commission of the crime." She was an accomplice. Now, how can that case and those facts be distinguished in point of determining the question of what constitutes an accomplice from that of the case at bar?

In People against Ammon is another case somewhat in point. In that case, the principle evidence was

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furnished by the thief, Miller. The point was there made that the evidence of the accomplice-- that the thief was an accomplice, and that it had to be corroborated, and the Court, the Appellate Division, treats it in this fashion. It says: "It is not clear that Miller can be said to be an accomplice, but assuming, however, that he was an accomplice, it does not follow that all his testimony must be corroborated." ^{It says} that those elements are sufficient to establish the necessary corroboration. Now, I take it further. This proposition is presented; that we are practically in the situation where the only evidence is that of a confession.

THE COURT: It is not a confession of this crime. My impression is that the thief is not an accomplice in the crime of receiving stolen goods.

MR. McMANUS: Does this authority of People against Bissert affect this situation? Does not that necessarily hold where the party, the briber, was guilty of a crime punishable by another section of the Code, does not the reasoning seem to be clear that is that suggestion with respect to the briber and the bribe taker. The situation between the bribe-giver and the bribe-taker is absolutely the same; and I state that the situation between the thief and the receiver is the same as in that case.

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Now, what have we got here. We have got merely the word of two convicted thieves-- not a particle of proof of the corpus delicti. There is not a suggestion of proof that this man ever saw these goods. There is the mere statement of one of the defendants, the man who says he stole them. There is not a suggestion that he ever received a yard of these goods in the County of New York. There is not a scintilla of evidence that at any place, other than the mere statement of the man that he did get them, that the defendant ever received the property. Now, if there is any rule well settled as to a confession, it is that there must be other evidence tending to connect the defendant with the commission of the crime.

THE COURT: What have you got to show, Mr. District Attorney, on that point, that the crime was committed in Brooklyn?

MR. APPLETON: Mr. McManus has not exactly quoted the testimony of Abe. Toplitsky. Abe. Toplitsky went to the defendant the day before and told him that he thought he could get a truck load of goods and could this defendant dispose of them. And he said then that there is not a scintilla of evidence to show that this defendant knew what particular goods were going to be taken. The

defendant is not a person guilty of the larceny of the goods. He did not aid, or abet, or assist in the commission of the larceny. Now, then, if I am correct, the minute those goods were taken by Abe. Toplitsky on ~~the~~ 17th Street, just at that time the crime was committed.

THE COURT: There is no question about that.

MR. APPLETON: Then, this defendant had arranged to meet Abe. Toplitsky at the foot of 10th Street.

THE COURT: There is no evidence of that that I know of.

MR. APPLETON: Abe. Toplitsky testified to that fact, if your Honor please.

THE COURT: No, I think not.

MR. APPLETON: I think he did, your Honor.

THE COURT: There is some testimony that he there saw Brenner and Zuckerman, and that Zuckerman spoke to him and Brenner went away.

MR. APPLETON: I understood Abe. Toplitsky to say that Brenner told him that he would meet him at the foot of East 10th Street the next day.

THE COURT: Well, the stenographer will straighten that out for us.

MR. APPLETON: Unfortunately, the same stenographer who took that portion of the case is not here now.

THE COURT: Why don't the stenographer remain here. This is the second time this thing happened. I want the stenographer that comes here in the morning to stay here all day. If he has got too much business to attend to -- a man has no right to drop a case in the middle of it.

MR. APPLETON: The crime was partly committed in the County of New York and partly in the County of Kings.

THE COURT: You mean to say that if Brenner had nothing more to do with these goods, after that time, that he can be convicted? The fact that he took those goods in Brooklyn made a crime. There is no doubt about that.

MR. APPLETON: I think the crime could be said to have been committed in either county. That was a matter for the Grand Jury. If the crime of receiving-- if this defendant did receive those goods, the crime was committed partly in New York and partly in Kings.

MR. McMANUS: There was not a suggestion that he had anything to do with it in New York.

THE COURT: I think there is no evidence of that. How could we imagine that Brenner was at 10th Street? He did not know what goods were going to be taken or when they were to be taken. Are we ^{to} suppose that Mr.

Brenner was to go to 10th Street and wait there for him?

MR. APPLETON: It would take some time to get the stenographer here. We might call Abe. Toplitsky. I am quite satisfied that so far as this question of jurisdiction is concerned, that the crime was committed partly in New York.

THE COURT: On the question of the accomplice, it takes two people to commit the crime of receiving stolen goods.

MR. APPLETON: There are many decisions, your Honor, that the thief is not an accomplice of the receiver. It is the law that if a person commits a larceny, the jury cannot convict him of the receiving. Now, if a person cannot be convicted of receiving, he then cannot be an accomplice in the crime, because an accomplice is a person who aids in the commission of the crime. Now, if your Honor please, the case of the People against McGonegal was an abortion case, and the Court of Appeals ruled that the woman who accompanied the girl to the abortin^oist was not an accomplice of the person who performed the abortion.

THE COURT: That is absolutely distinguishable here.

MR. APPLETON: And even in the Ammon case---

THE COURT: How about the woman upon whom the abortion was committed in the McGonegal case. They could

not convict on her testimony alone.

MR. APPLETON: She was guilty under another section of the Code.

MR. McMANUS: The Bissert case is much later than those cases.

MR. APPLETON: The Ammon case is directly in point; and, if the law is unsettled, we ought to have a decision, and I think this would be a good case to take up.

MR. McMANUS: I do not see any reason why they should ask this tribunal to establish law for us at the expense of this defendant.

MR. APPLETON: Mr. Jerome says that where there is a doubt upon the law, it should be given to the People and where there is any doubt upon the facts, it should be given to the defendant.

THE COURT: I believe the latter proposition, not the former. I think a man's guilt ought to be proved beyond all doubt.

MR. APPLETON: I am satisfied with whatever your Honor does.

THE COURT: I will overrule the attorney for the defendant for the present, with leave to renew later.

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C H A R L E S W. A P P L E T O N, sworn as a witness on
behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. McMANUS:

- Q You are an Assistant District Attorney? A No, I am not.
I am a Deputy Assistant District Attorney.
- Q You are a Deputy Assistant District Attorney and have been
connected with the District Attorney's office for some
years? A Since the 17th of August, 1903.
- Q And as such you prosecuted the defendant, Michael Top-
litsky? A I did.
- Q And secured his conviction for grand larceny? A Hewas
convicted.
- Q You were the Assistant District Attorney who prosecuted
him? A Deputy Assistant District Attorney.
- Q Who prosecuted him? A Yes.
- Q You also appeared in the police court in this case? A I
did.
- Q You have interviewed this defendant, had conversations--
with the complainant witness? A I have.
- Q You have also talked with the defendant, Toplitsky?
A Which one?
- Q Michael Toplitsky? A I have.
- Q Would you believe that man under oath, Michael Toplitsky?

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

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THE COURT: Sustained.

Q Have you made that statement in the police court in this case?

MR. APPLETON: I object as incompetent, immaterial and irrelevant what my opinion may possibly be. It is a fact for the jury to determine.

THE COURT: Sustained.

Q Did you not state that in the police court?

MR. APPLETON: I object to it.

THE COURT: Sustained.

Q Was this question not put to you by the court, "Is this man" meaning the witness Michael Toplitsky--

MR. APPLETON: I object as incompetent, immaterial and irrelevant, what occurred in the Magistrate's Court.

THE COURT: Sustained.

Q Did not the court put this question "Why not?" and did you not answer "Because I did not believe his story and that is ---

MR. APPLETON: I object to the question on the ground that it is incompetent, and ask the Court to instruct counsel not to ask questions as to what passed between the magistrate and the deputy assistant district attorney, on the ground that it is absolutely

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absolutely incompetent, irrelevant and immaterial.
This is the Court that determines the issue.

THE COURT: Sustained.

MR. APPLETON: At this point, I ask your Honor to instruct the jury to pay no attention to any question put that has been ruled out.

THE COURT: I decline to so instruct them.

Q Did not the Court say to you, page 33 --

MR. APPLETON: At this point, I ask your Honor to instruct the counsel for the defendant to discontinue that line of questioning with respect to any question or discussion between the learned Magistrate and the deputy assistant district attorney on the ground that it cannot possibly be relevant to this issue here.

THE COURT: I decline to so instruct him.

MR. APPLETON: I again ask the Court to instruct the jury that the questions asked by the counsel and ruled out are in no manner to be considered by the jury and they are to pay no attention to any of the questions asked.

THE COURT: Those questions and answers are on the stenographer's minutes and the jury may give them such consideration as they please.

MR. APPLETON: There are no answers.

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THE COURT: There are no answers~~and~~, therefore, no evidence that those statements were made.

MR. APPLETON: And then it would follow that they should not regard them, and I ask your Honor to instruct them as to that.

THE COURT: I decline to instruct them further than I have.

A L B E R T L I N D N E R , sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. McMANUS:

Q Mr. Lindner, you are a partner of the complainant in this case? A Yes, sir.

Q You saw the defendant, Michael Toplitsky in court? A Yes, sir.

Q You testified as a witness upon the trial of Michael Toplitsky? A I did.

Q You identified him on that trial, did you not, as the man whom you saw upon your truck about a week before this larceny? A Yes, sir.

Q And you swore to that? A I did.

Q And he is the man that was on that truck? A I expect he is, yes.

Q He is the man you picked out in Police Headquarters? A Yes-- no, not at Police Headquarters.

- Q Did you see him at Police Headquarters? A I did not.
- Q Where did you see him? A In the Magistrate's Court.
- Q And you picked him out then as the man you had seen on the truck? A I did.
- Q Now, that is Michael Toplitsky, the last one of those two defendants? A Michael Toplitsky.
- Q That is the man you identified as the man on the truck (pointing to Michael Toplitsky)? A Yes, sir.

MR. McMANUS: I will ask the District Attorney Rabinowitz to concede that ~~Rabinowitz~~, on the trial of the case of Michael Toplitsky, identified the defendant Michael Toplitsky, as the man whom he had spoken to on 17th Street, about a week before this larceny, and as being the same man who on the day of the larceny told him that the driver wanted to see him, Rabinowitz, upstairs.

MR. APPLINTON: I will concede that that is a fact.

MR. McMANUS: And that the witness would so testify.

THE COURT: That is in evidence.

THE PEOPLE REST

THE DEFENDANT RESTS.

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MR. McMANUS: I renew my motions, if the Court pleases, to take this case from the jury upon the ground that there is absolutely no evidence before the Court upon which the case should be sent to the jury; upon the ground that there is no evidence in corroboration of the testimony of the defendants Toplitsky, the confessed thieves herein, and upon the ground that under section 399 such evidence is required-- section 399 of the Code of Criminal Procedure; and I also ask your Honor to take the case from the jury or direct them to acquit upon the ground that there is no proof of the corpus delicti other than the statements of the confessed thieves; and upon the further ground that there is absolutely no proof of the commission of the crime in the County of New York.

THE COURT: I will deny the motion for the present.

MR. McMANUS: Exception, if your Honor please.

(Mr. Appleton and Mr. McManus then waived the right to make any summing up, and agreed to submit the case upon the charge of the Court.)

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C H A R G E O F T H E C O U R T .

Mulqueen, J.:

Gentlemen of the Jury, the prisoner at the bar has been indicted by the Grand Jury of this County under section 550 of the Penal Code of the crime of criminally receiving stolen property. The definition of that crime, under the law, is that a person who buys or receives any stolen property, knowing said property to have been stolen, is guilty of the crime of receiving stolen property. You will notice that there are two elements in the crime; first, there must be stolen property, property which has been the subject of larceny or of a burglary in some way, in violation of the provisions of the Penal Code. Secondly, the defendant must know that that property was stolen or bought with that knowledge--there must be a felonious intent in receiving the property. A man who innocently receives property, without that felonious intent, could not be convicted of the crime; and that crime must occur in some part, either in its inception or its completion, in the county of which the Grand Jury and this Court has jurisdiction, namely the County of New York.

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The allegation is, therefore, that at the County of New York, on or about the 21st of June, the defendant received from Abraham Toplitsky certain goods consisting of cloth of various kinds, in the County of New York, knowing that those goods had been stolen, and that he intended to receive them, notwithstanding that knowledge. Those are the elements of the crime; and it is necessary for each of those elements to be established to your satisfaction beyond what is known in the law as a reasonable doubt. No matter what has occurred in the police court, and notwithstanding the fact that the prisoner has been indicted by the Grand Jury of this County, when he comes to this bar, he is presumed to be innocent. You must not consider in any way the fact that he was held for trial by the trial justice, or that he was indicted by the Grand Jury of this County. No inference of guilt is to be drawn from either circumstance. They are merely steps in the criminal jurisprudence of the County by which men against whom there is a charge of a crime are brought before this tribunal for trial.

Now, remember that when he stands here at the beginning of this trial, he is clothed in the robes of innocence. The presumption is that he is innocent, and that presumption remains in his favor all through the trial.

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It never shifts from him, and the only way that he can be convicted is by the production of evidence here in open Court, in his presence and in the presence of his counsel, and your presence, strong enough to overcome that presumption of innocence and to convict him of every element of the crime, notwithstanding that presumption.

Now, that evidence must be so strong and so clear that it will not only create a suspicion of the guilt of the defendant in your minds, however strong-- Men are not convicted on suspicion-- It must not only be strong enough to create the thought in your minds that he ^{is} possibly or probably guilty, or that the chances are that he is guilty, but that evidence must be strong enough to convince every member of the jury that he is guilty beyond a reasonable doubt. It becomes necessary, therefore, for the Court to define for you what in our law is meant by a reasonable doubt.

Our system of jurisprudence, following the English system, and differing from other systems, does not require a man to prove himself innocent, but requires the State to prove him guilty beyond a reasonable doubt. Now, the evidence must be so strong to create in the mind of each juror a fixed conviction to a moral certainty of the guilt of the prisoner; and that conviction must be so

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strong that the juror would be willing to act on it and to base his own actions on it as he would in the more weighty and important affairs of his own life.

Now, after a consideration of all the facts and circumstances, in a calm dispassionate manner, without bias against the prisoner or prejudice in his favor, if the evidence produces in your minds a fixed conviction to a moral certainty of his guilt, then it is your duty to so declare it, because, under those circumstances, you have no reasonable doubt. If the effect of the evidence on your minds does not produce that fixed conviction to a moral certainty, a conviction so strong that you cannot be actuated by it and act on it as you would in the weighty and more important affairs of your own life, then your mind is in a state of reasonable doubt.

Now, a reasonable doubt is not based on whim, or caprice, or prejudice. It should not be resorted to to avoid doing a disagreeable duty, because you are sworn here to do your duty, and your duty is to take and decide the facts. You must take the law from the Court. The definition of the crime and the amount of proof required to convince you of guilt beyond a reasonable doubt you must take from the Court. But you are the sole and exclusive judges of the facts. Facts must be established

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by credible witnesses, that is, witnesses whom you believe. You are the sole judges of the credibility of the witnesses, and the facts must be established by witnesses of that character sufficient to convince you on every essential element of the crime, namely that there was a larceny by Abe. Toplitsky, that the prisoner knew of that larceny, and that, knowing of that larceny, he freely and willingly bought those goods from the thief. Now, that is the law, and that is the burden on the State in this case. The question is for you to say whether they have met that burden or not.

There is no artificial rule for the weighing of evidence. When you enter the jury box, you do not leave your common sense and your good judgment behind you. You are taken from the representative citizenship of this County, and are performing one of the most important duties of the citizen. You are an essential part of our criminal jurisprudence. You must not usurp the functions of the Court. You must observe your own functions, namely, to decide the facts, and the question for each juror to ask himself is, what facts has that witness established to my complete satisfaction? What facts has he testified to that I would be willing to base my own action on in the more important and weighty affairs of my own life.

Now, if you believe that any witness has committed perjury, if his testimony differs with testimony given on another occasion, and you believe that that contradiction is a willful one and that he knowingly testified falsely; in other words, that the contradiction is not accidental or unintentional, of course, you must reject such perjured testimony, and you also have the right to disregard all the other evidence given by such a witness, that is, all the statements that are not shown to be tainted with perjury. You should ask yourselves, as reasonable men, whether you can safely believe any statement made by such a witness or not. If you cannot believe the witness, if you come to that conclusion, you may disregard all his testimony, as well as the perjured statements. If you believe that you can believe some of the statements made by him, you can then consider them, and they may be considered by you in connection with the other facts in the case.

Now, the evidence here and the only evidence is practically the evidence of two thieves. The evidence of the complaining witness simply establishes the fact that he lost his property; that that property was in his custody and that it was lost. He does not know how it was lost or where it went. He cannot give any such testimony. The testimony as to how it was lost is given by one man, who confessed here that he was a thief, and by his brother who has been convicted of the very crime of stealing those

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goods. Now, there is the evidence.

The jury must remember that the truth sometimes comes from a foul source. These men may have committed perjury on everything else except the important facts of this case. It is for you to say whether they have or not. Those are the only rules. Apply the common sense that God gave you, taking care that the rights guaranteed to the prisoner by our law are observed, and that the proof of facts which are proved to your satisfaction are strong enough to overcome the presumption of innocence and to create in your minds that fixed conviction to a moral certainty beyond a reasonable doubt. That is what you must do before you can find the defendant guilty.

If that is the state of your mind, after a consideration of all the testimony of the witnesses, and you credit and believe them, then bring in a verdict of guilty. If, on the contrary, your mind is not in that state, then it is the duty of the juror whose mind is not in that state to bring in a verdict of not guilty, and each juror must decide these questions for himself. A man is entitled to a trial by twelve jurors, and the rule requires that every mind should meet on that proposition; not that one or two or three should make up the mind of the jury, but each juror is to decide what he thinks reasonable. That does not mean that a man should unlaw-

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fully and unreasonably resist the arguments of the others, but your state of mind must be made up solely from a consideration of the evidence, not from any question of the policy of the State, or what will happen if this man is convicted or acquitted, but solely from the evidence.

If you can reconcile all the testimony, that is all the facts proven to your satisfaction, facts exclusively based on testimony, untainted by perjury, with any reasonable theory of innocence, it is your duty furthermore to do so. If the only reasonable hypothesis that you can deduct from all the facts that have been proved to your satisfaction is one of guilt, then you must bring in a verdict of guilty, as charged in the indictment; otherwise, you must bring in a verdict of not guilty.

Are there any requests?

MR. McMANUS: I ask your Honor to charge the jury that the mere fact that the defendant happened to be in the company of the thieves at Lefkowitz's cafe is not sufficient to justify a conviction.

THE COURT: I so charge.

MR. McMANUS: I ask your Honor to charge the jury that they cannot find the defendant guilty unless, in their opinion, there is testimony to corroborate the story of the defendants as to the crime charged.

MR. APPRETON: It is not properly worded. He said "defendants" where he meant "witnesses". We ought

to have it straight.

THE COURT: I charge the jury that the thieves are not accomplices of the defendant in the crime of receiving stolen property.

MR. McMANUS: I except to your Honor's charge.

MR. McMANUS: I ask your Honor to instruct the jury that the fact that your Honor has denied such motions as I made at the close of the People's case and at the close of the whole case is not to be taken into consideration in determining the question of the guilt or innocence of the defendant.

THE COURT: I so charge. The burden on the Court is to see that all his rights are protected, and that he receives a legal trial, and the rulings of the Court are based on the law. The Court is the sole judge of the law applicable to the case. After the judge has defined the law to the jury, as it has endeavored to do, it is for the jury to say whether facts have been proved by the testimony of unperjured witnesses on each element in the case which satisfies you beyond a reasonable doubt that the prisoner has violated the law as charged by the Court. It does not make any difference to the jury what opinion counsel for the defendant may have, or what the opinion of the District Attorney is, or what the opinion of the Court is on the facts. You are

the sole and exclusive judges of the facts. You must say what witnesses you will believe and what you will not believe, or whether you will believe any of the witnesses, and you must not make any inference against the defendant by reason of the fact that he was formerly, eight years ago, convicted of the crime of petit larceny. That is merely for the Court's information, if it should become necessary to impose a sentence. That has no bearing on this case, except so far as the punishment to be meted out, if your verdict should require it.

You may now retire.

The jury retired at 3:06 P. M.

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People vs. Benjamin Brenner, Continued.

New York, March 11th, 1908.

THE COURT: The motion before the Court is to set aside the verdict in this case.

MR. APPLETON: The District Attorney, if your Honor please, takes the position in the matter, that under our system of procedure the Court rules on the questions of law and the competency of the evidence and in this case at bar the Court ruled, and I believe correctly, I think the Court will so hold now, on all points of law, and the Court instructed the jury most exhaustively on the points of law involved in this case. The Court went further and instructed the jury minutely on the tests and rules with respect to credibility of witnesses.

And then, after that, the Court submitted to the jury a question of fact, and it is, under our system of procedure, that the jury are the sole judges of the facts in the case. That is our method of procedure and this jury at once went out, and as I am informed, on the very first ballot, they found unanimously at the defendant at the bar was guilty of the crime of receiving stolen goods. That means that this jury who decided this case believed that Abraham Toplitsky and Michael Toplitsky told the truth. Now it seems to me, if your Honor

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please, that this is not a case for your Honor to set aside the verdict. It does not come within any one of the reasons set forth in Section 465 of the Code of Criminal Procedure, which permits the Court to set aside the verdict.

Now, we have, fortunately, a safety valve on such things as this, and that is the pardoning power of the Governor. If the Court and the District Attorney believe that that pardoning power should be exercised in a case like this, they could state so to the Governor, but the question of fact in this case has been decided by a jury, pursuant to the Court's instruction on the law, and the Court instructed correctly on the law, and had jurisdiction on the subject matter, therefore the District Attorney contends this motion should not be granted.

THE COURT: The Court grants the motion for the reason that the verdict is clearly against the weight of evidence. The Court is of opinion that it erred in not directing a verdict of acquittal at the conclusion of the People's case. The Court was led into this error through inadvertence, for the reason that the only legal question that seemed to have arisen or to have been discussed during the trial was as to whether the thief is an accomplice of a receiver of stolen goods. The Court ruled on that question that in its opinion the thief cannot be considered the accomplice of the receiver, and the Court still believes that that decision was right, but the attention

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of the Court was distracted from the evidence itself to some extent by this discussion, and by other business which was presented to it of a routine character during the course of the trial. The Court expressed its opinion when the motion was made to set aside the verdict that it had a very strong impression that such a motion should be granted, but gave the District Attorney until to-day to submit reasons why this should not be done and to make a more careful investigation of the testimony .

This case presents the most extraordinary circumstances. The crime of grand larceny was committed in broad daylight in the streets of New York on the 21st of June last, nine months ago. One Mike Toplitsky was arrested for that crime. He was indicted by the Grand Jury and placed on trial. Reputable citizens went on the stand and identified him positively as the thief. A reputable witness in Brooklyn, an employee of the City Government, positively identified him as the person whom he had seen in charge of a truck which had broken down on the highway in Brooklyn, and conversed with him. Mike Toplitsky himself testified in his own behalf and swore that he knew nothing of the crime.

A verdict of guilty was rendered on the testimony of honorable and decent men to whom no motive but a desire to tell the truth could be imputed. In my opinion

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this is an adjudication which is binding on Mike Toplitsky and on this Court.

Subsequently one Abe Toplitsky, the brother of the defendant, who had been a frequent visitor to his brother in the Tombs, who had been ranged in line with his brother and thirty other people when his brother was identified as the thief by reputable men, after the conviction of his brother, either surrendered himself as a thief or was arrested on the charge of being guilty of the larceny of which his brother Mike had been convicted and declared that the defendant at this bar had received the stolen goods from him. In order to convict this defendant it is necessary to find that Abe Coplitsky committed the larceny and sold the goods to the receiver. If this be so, it will set aside the verdict rendered against Mike Toplitsky, because it would not be consistent with justice to punish Mike Toplitsky for the crime of which a jury has found him guilty, but of which a subsequent jury finds his brother guilty.

Now, surely no one will claim that the conviction of Mike Toplitsky should be set aside on the mere statement of his brother, Abe; nor can anyone claim that the legal presumption of innocence could be overcome by the statement of a man like Abe Toplitsky. But, how has he been corroborated in this case? Why, by his brother,

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Mike, who swore on his own trial that he knew nothing about this case but in the present trial swears that he knows all about it.. Furthermore, Mike Toplitsky swore in his own trial that the complaining witness visited him in the Tombs with his brother Abe or with one Arnold and offered him five hundred dollars and a guarantee of freedom if he would confess that he committed the crime and tell where the stolen goods were. The complaining witness denies this, but how can we refuse credit to this statement if we credit any of the statements of Mike Toplitsky ?

Now, Mike Toplitsky was convicted and it is not a violent assumption that the pressure and temptation has been continued. There is no doubt that the complaining witness visited him in jail before his trial. The testimony of a keeper in the tombs was given to that effect in the first trial. Now, where has Mike Toplitsky been since his conviction last November ? He has not been sent to State's Prison, although the verdict of a jury adjudged him guilty of a crime, of a most serious offence on testimony of the strongest character, the testimony of witnesses of unblemished reputation and entire disinterestedness. Since December last his brother Abe has been kept in the tombs with him occupying an adjoining cell.

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The brothers admitted that they had talked together, but said that they only talked about the weather.

I do not believe the testimony of a man kept in the Tombs so long after conviction is entitled to any credence under the circumstances of this case. It must be given in the hope, there is no other preclusion possible than that it is given in the hope, and further with a positive knowledge that if the defendant at this bar is convicted, Mike Toplitsky's conviction cannot stand.

In other words, this confessed perjurer, Mike Toplitsky, the convicted thief, is given the opportunity of regaining his own liberty by further perjury by the simple statement of a few words, "I saw Brenner pay my brother for the goods." Under the circumstances the testimony of a man who has committed perjury as to this very crime when he was on trial for it, himself, who has solemnly denied any knowledge of this crime, who now comes into this court and admits that he committed perjury as to the facts of this case, when the court must take notice of the fact that he will benefit enormously by his testimony, is not entitled to a featherweight. He does not claim that his conscience has been awakened. He pleads no change of heart, but even in the present case admits that he would commit perjury to save his brother. How much more quickly would he commit perjury to save himself?

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Abe Toplitsky, the brother of the convicted thief and confessed perjurer, Mike Toplitsky, after the conviction of Mike, alleges that he was the thief. Will we allow men of such character to trifle with the court, to make a mockery of verdicts? Why did he not come forward when his brother was on trial and endeavoring by perjury to escape conviction? He comes afterwards, at a time when he could not be convicted unless he pleaded guilty, for every witness who could give corroborating evidence has sworn that Mike Toplitsky and not Abe Toplitsky was the man who committed the crime.

I do not believe under these circumstances that either of the Toplitsky's can be believed, for it is established beyond the shadow of a doubt that both of these men have previously sworn to a state of facts which contradicts other testimony in this case, and are therefore guilty of perjury and that the perjury related to the facts of this very case.

The Court is now asked to let a convicted thief, a man devoid of every moral sense, who actually admits that he is a perjurer, regain his liberty by the simple expedient of swearing that he committed perjury in the case in accusing another man of crime.

Especially is this true when the false swearing was not on immaterial matter or on questions uncon-

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nected with this case. The perjury is on the very essential facts of this case. How can it be said that such testimony outweighs any legal presumption, however slight ?

How can it outweigh the fundamental principle and one of the strongest presumptions of American law, the presumption of innocence, and the express enactment of our law that the testimony must be so convincing and so weighty as to leave no reasonable doubt of the guilt of the person accused of crime ? If the Court were to deny this motion it would be compelled to assert what the court expressly desires to deny in the most emphatic manner, and would put a premium on perjury, a crime which strikes at the very life of our system of criminal law.

Abe Toplitsky admitted on this trial that when he first charged Brenner with this crime of receiving stolen goods he said that Brenner paid him two days after the alleged theft. Surely, if he were the thief, he could not forget the only thing in the whole transaction that interested him, namely, the receipt of the reward of his crime, but when his brother Mike called to corroborate him and testified that the payment was made on the same night, the very night on which the crime was committed, then Abe changed his testimony and claimed that he had made a mistake.

Now, who was more likely to know when the money

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was paid ? Why certainly, the man who stole the property. Only the thief could have that fact burned into his memory. The thief could not be mistaken on that point, and when we remember that these brothers had constant intercourse, that Mike Toplitsky was in the toms from July until November, a period of several months until he was tried and convicted, and that the brothers had ample time to agree to any proposition to implicate another man in this crime or to evolve a scheme of their own, their testimony is not entitled to any charitable interpretation.

As the Court of Appeals has said in one case , "Guilt in such a case cannot be established beyond a reasonable by the testimony of such a witness, who is evidently either from moral or mental defects, irresponsible ". If one witness who is a moral monster, if one incompetent witness cannot convince a person of crime, how can two such witnesses have any more weight.?

The Court believes that these men are dead to every sense of morality. They have not the faintest notion of any moral principle. They are actuated solely by the hope of gain and no man's liberty would be safe if such testimony would be allowed to convict him under the circumstances which exist in this case.

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The learned District Attorney claims that I have no right to set aside this verdict. I believe that I have the same power to do so now which I would have had to direct a verdict or to have taken the case from the jury at the completion of the People's case.

I believe that what the court has done is for the best interests of the community. If I had directed an acquittal, the defendant would go free, and could not be tried again, whereas now he can be held. Surely, if this man is guilty, one man of good character can be found who can testify on the material facts in the case or can connect the defendant with the crime to slight extent. It is alleged that the money was paid in a public restaurant in Grand Street at a time when the place was crowded. Let them produce one reputable witness who saw Brenner pass the money. Let them produce one reputable man who saw Abe Toplitsky on the wagon which contained the stolen goods. Let them corroborate these two thieves and perjurers in any respect by creditable and honest witnesses. I believe I cannot allow this verdict to stand, because it would make a mockery of the law, it would discredit our system of jurisprudence, which resulted in the conviction of Mike Toplitsky and would bring deserved contempt on our trials and make a mockery of our boast that no

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man can be convicted without a fair trial and on credible evidence.

If the Court, as we have stated, had exercised its undoubted power to direct an acquittal, the defendant would be free and could not be tried again, but by this ruling the prisoner does not go free. I shall remand him to prison. If the diligence of the police and the industry of the complaining witness have not succeeded in eight or nine months in securing the slightest item of credible testimony to connect the defendant with the crime, let them continue their investigations, keep the prisoner in custody. I shall hold him, or I shall hold him in bail.

For these reasons, I grant the motion to set aside the verdict on the ground that it is clearly against the weight of evidence.

MR. APPLETON: If your Honor please, the prosecution has endeavored for months to get some evidence in this case, and we cannot do it.

THE COURT: It is the business of the prosecution and not of the court to get evidence. The Court's duty is to see that the prisoner has a fair trial. In some instances good may result from the detention of prisoners in the Tombs, but the development of this trial

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convinces me that such a practice is a very doubtful advantage. Mike Toplitsky was convicted of grand larceny in the first degree months ago. He is still in the Tombs, under conditions that breed perjury. His brother Abe is in an adjoining cell. They can both be approached every day and spoken to very easily. They have charged that the complaining witness approached them after the trial. It is not unreasonable to suppose that he has continued his importunities since the conviction of Mike Toplitsky, and that Mike Toplitsky finally yielded to those importunities in a last desperate effort to regain his own liberty.

MR. APPLETON: I suggest that your Honor consult with your own associates on the Bench.

THE COURT: It is my duty to decide this matter myself. It is not necessary for me to consult anyone. I know that every Judge of this Court is animated solely by the desire to inspire respect for the law and to administer it without fear or favor to the best of his ability, but even if my associates should differ with me in my opinion of this case that would not affect my opinion as to the propriety of my action in this matter. The law guarantees a fair trial to every man accused of crime. Convictions based on the testimony of a perjured witness,

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animated solely by the desire to escape the punishment of a crime of which he has been convicted on unimpeachable testimony, a man who freely admits that he committed perjury in this very case and that he believes that it is right to commit perjury, cannot with my consent in this way, open the door of his own cell and thrust another man in his place.

Such methods may be approved in despotic Russia. They were practiced not so long ago in Ireland, but in America, before a man can be convicted of crime, there should be some scintilla of evidence in the case free from the taint of perjury and free from the suspicion and the conviction that it is inspired by the hope of immunity as undoubtedly it is in the present case.

No claim is made that Mike or Abe Toplitsky have the slightest remorse for their perjury. They are incapable of such feelings. I regard the whole thing as a clever scheme on their part to cheat the law, to gain advantage for themselves and to render the Court ridiculous.

MR. APPLETON: Your Honor--

THE COURT: You do not believe yourself the testimony of either of these men.

MR. APPLETON: I certainly do not. There is no

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doubt of that. May I address your Honor just one moment ?

THE COURT: You may.

MR. APPLETON: In view of this trial, of your Honor's action in setting aside the verdict, I now state, as a representative of the District Attorney of this County, that I have endeavored to the best of my ability to obtain corroborating evidence of the testimony given by the two Toplitskys and I have been unable to do so. Therefore, I have no further evidence that I could offer to another jury to try this case; I have nothing further to submit to any other jury, and I see no reason why your Honor, granting the motion, should not also discharge the bail and end this case here and now.

THE COURT: On the motion of the District Attorney I will discharge the prisoner on his own recognizance. I do not want my action in this case to be misunderstood. I have great respect for the District Attorney and for all the gentlemen of his staff I have met. I think that it is a high tribute to Mr. Appleton's ability as a prosecutor that he secured a conviction in this case.

But the Court cannot approve the verdict or lend its sanction to it.

The verdict is set aside and on the motion of the District Attorney the prisoner is discharged on his own recognizance.

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