

**START**

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**CASE**

# 53

-: I N D E X :-

	<u>DIRECT</u>	<u>CROSS</u>	<u>RE-D.</u>	<u>RE-C.</u>
J. Bennett Southard	2	8		
Richard J. Flynn	11	14		
Chester Smith	15	37	43	
Samuel Hertzog	44	54		
Michael Ingrisich	55	64	66	
Frank C. Oles	68			
Arthur Naylor	75			

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#53

COURT OF GENERAL SESSIONS OF THE PEACE,  
CITY AND COUNTY OF NEW YORK, PART IV.

-----X  
THE PEOPLE : Before:  
-against- : HON. JOSEPH F. MULQUHLEN, J.,  
HERMAN FLECKENHEIMER. : and a Jury.  
-----X

Tried, New York, April 13th - 14th, 1909.

Indicted for grand larceny in the second degree.

Indictment filed November 24th, 1908.

A P P E A R A N C E S :

ASSISTANT DISTRICT ATTORNEY WALTER B. HOWE, for the  
People.

T. S. MORGAN, Jr., for the Defense.

Frank S. Beard,

Official Stenographer.

## THE PEOPLE'S TESTIMONY.

J. B E N N E T T S O U T H A R D, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOWE:

Q You are County Judge, sir, of Putnam County? A I am.

Q And also an attorney and counselor at law? A Yes, sir.

Q And you have acted as the attorney for Chester Smith, of Cold Spring, New York, the complainant in this case?

A Yes, sir, many times.

Q And you, on the 9th of April, of this year, Good Friday, were his attorney? A Yes, sir.

Q Did you come around that day to see the defendant Fleckenheimer? A I saw the gentleman who is sitting there, yes, the defendant (indicating).

Q Indicating the defendant? A Yes, sir.

Q Where was it that you saw him? A At 65 Fifth avenue, Room 10, New York City.

Q Was the complaining witness there? A Yes, sir.

Q Chester Smith? A Chester Smith was present.

Q Was he present during your whole interview with the defendant? A No.

Q Was any one else present? A There was another gentleman with Mr. Fleckenheimer.

Q Another man, who came with Mr. Fleckenheimer? A Yes;

his name now I don't recall.

Q Was the matter of a gray horse discussed there?

A The matter of the purchase of a horse by Chester Smith from the defendant was discussed between all parties.

Q And was there a discussion of money there? A There was.

Q Did the defendant give you \$150? A He did.

Q And did you give that to the complainant, Chester Smith? A I gave it to Mr. Smith, and he signed a receipt, and the receipt I mailed to the defendant.

Q Now did you hear of a conversation that lead up to the giving of that \$150? A Yes, sir.

Q Can you state the substance of that conversation?

A Might I go back a day or two before, so as to lead up to it?

MR. MORGAN: Now, I object, if your Honor please, to anything that took place in reference to the matter subsequent to the date named in the indictment.

THE COURT: Well, this may be a statement of an admission by the defendant, that would have to be subsequent to the date of the transaction. When was the indictment? The 24th of November?

MR. HOWE: Yes, sir.

THE COURT: I will allow nothing to be testified to, except what took place in the presence of the defendant,

4  
so far as admissions are concerned. This testimony seems to be that of an admission.

MR. HOWE: That is what it is offered for, an admission by the defendant.

THE COURT: Well, only testify to what was said or done by the defendant, or what was done or said by you or anyone else in his presence. I will overrule your objection, Mr. Morgan, and give you an exception.

MR. MORGAN: I take an exception. X

MR. HOWE: I withdraw that question, for the present.

BY MR. HOWE:

Q Had you seen the defendant Fleckenheimer before that day? A Never.

Q Well now if you will state please, at this time, what conversation--what Fleckenheimer said, and what conversation there was in Fleckenheimer's presence, about the \$150 that was finally given? A My best recollection is that Mr. Fleckenheimer and his friend met Mr. Smith at my office by appointment.

BY THE COURT:

Q Where is your office? A At Fifth avenue, No. 65. And a general discussion took place between all of the parties present, as to the question of a delivery of this horse to Mr. Smith, or the payment of the money which Mr. Smith had paid to Fleckenheimer, and his additional expenses, whatever he

might have been put to.

Mr. Fleckenheimer finally offered--first, Mr. Fleckenheimer offered to split the difference between the \$110 horse and a \$75 horse, another horse. To that Mr. Smith demurred, saying that, of course, that wouldn't repay him for even the money which he had given the defendant.

Mr. Smith finally figured out the value of the horse, and the value of keep of this other horse, on which he claimed he had lost money, and his railroad fares, being compelled to come to New York several times and his hotel bill, at something over \$200. My impression is that I took the pencil, and, adding the figures together, suggested that there be a split, that the difference be split.

Mr. Smith made this claim for expenses, and Mr. Fleckenheimer said that he was willing to repay him for what he paid for the horse and his expenses. Mr. Fleckenheimer would not agree to that. Said that was more money than he could raise, more money than he had, and I think said that the money--that, if he could adjust this matter, he would have to borrow the money and, finally Mr. Fleckenheimer and Mr. Smith agreed that \$150 would be the figures which would reimburse Mr. Smith for the \$110 that he had given the defendant, and the expenses that he had been put to in connection with the horses.

Q Now, in the course of the interview, were the events

at the time of the sale of that horse, that gray horse, were they discussed, in your hearing, between Mr. Smith and Fleckenheimer? A Well, I don't exactly understand the question.

Q Did you hear Mr. Smith say anything to Mr. Fleckenheimer about the condition of that gray horse?

MR. MORGAN: Oh, if your Honor please, I forgot. Will you have the other witnesses excluded while the Judge is testifying?

THE COURT: They are all out. They have been excluded. It is my rule to exclude all witnesses, in every trial before me.

Q (Question repeated by the stenographer)? A Well, there was some talk between Mr. Fleckenheimer and Mr. Smith, sort of--if I might use the expression--kidding each other, upon the fact that they were both horse dealers, and that Mr. Fleckenheimer said that Mr. Smith shouldn't feel bad, if he had got bit in a horse trade--something of that character. That is my recollection. And my further recollection is that Mr. Smith asked Mr. Fleckenheimer what was the matter with the horse, and I couldn't say positively--

BY MR. HOWE:

Q Well, state the substance of your recollection then?

A The substance is that Mr. Smith asked Fleckenheimer something about whether he had used sponges on the horse stating that, in some instances, they were placed in the horse's nostrils.

and Fleckenheimer said no; and then he further, in the general conversation, made some reference--I couldn't definitely say what it was--that there was something in the horse's neck.

BY THE COURT:

Q Who said that there was something in the horse's neck? A Mr. Fleckenheimer. That is my recollection of it.

BY MR. HOWE:

Q Was there anything said in the conversation as to whether or not Fleckenheimer had the gray horse still, at the time of the conversation, on Good Friday? A Yes; Mr. Fleckenheimer said, I think, that he still had the horse.

Q Now what other matters in that conversation do you recall? A Well, I couldn't remember definitely, unless you recalled it to my mind.

Q Did Mr. Fleckenheimer say anything about what he used that gray horse for? A Not that I remember.

Q Now, Judge, on the Wednesday preceding that Good Friday, did you come to the District Attorney's office? A Yes, sir.

Q And did you there see Mr. Nott, the acting District Attorney and myself? A Yes, sir.

Q And did you have a conversation with us? A Yes, sir; I did.

Q Was there at any time during that conversation on Good Friday, at your office, any promise made by anybody not to prosecute in this case? A No, sir.

BY THE COURT:

Q Was that Good Friday of this year? A Yes, sir; last week.

CROSS EXAMINATION BY MR. MORGAN:

Q Judge, you say that it is a fact that this man, your client was a horse dealer? A Yes, sir.

Q And has been for quite a number of years? A Well, my recollection is, knowing him very well, he has been a dealer for the past five or six years, anyway.

Q For the past five or six years? A Yes, sir.

Q You say you have represented him a good many times. I suppose it was with reference to horse trades, in certain instances? A Never before but once.

Q But once? A Yes, sir; in relation to a horse deal.

Q In reference to a horse deal? A Yes.

Q But in several other litigated matters you represented him? A Yes. He has property. I have represented him in property interests.

Q Did you ever see any of his advertisements of horse sales up there? A Oh, I have seen them, but not to recognize them or remember them; but I would say that, if his name was printed at the bottom of a bill for an auction sale of horses, it was one of his horse bills.

Q Well, he also deals in live stock, cows and sheep and so

on? A Yes; I should call him a general live stock dealer.

Q And then you would not call him a farmer; would you?

A Oh, yes, he has extensive farming interests.

Q Well but beyond that he has commercial interests?

A Yes.

Q Now, you say that after this money was paid, there was a jocular period of conversation between Smith and the defendant, joking each other about one horse dealer getting the best of another horse dealer? A That is true, sir.

Q And it was in the course of this joking, and after the money had been paid over, and everything was agreeable, that Smith said, "Did you put some sponges in the horse's throat?" Or something of that kind in a jocular way? A Well, I couldn't speak of it in that manner, but it was after the adjustment of their differences that the conversation as to what was the matter with the horse took place.

Q Now, as I understand it, Judge, your client had bought two horses, practically at the same time, a bay horse and a gray horse? A He had so told me.

Q And he had taken up the bay horse with him, and was thoroughly satisfied with it? A Well, that I couldn't say, sir.

Q Well, he had taken it with him? A Yes.

Q And he was thoroughly pleased with that bay horse?

MR. HOWE: I wish to suggest your Honor, that I asked

him nothing of this kind in the direct examination, but I only put him on to prove matters in the nature of admissions.

MR. MORGAN: Then I am through. I don't care to ask any more questions.

(The Court then admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and adjourned the further trial of the case to Wednesday morning, April 14th, 1909, at 10:30.)

## TRIAL RESUMED.

New York, April 14th, 1909.

R I C H A R D J. F L Y N N, a witness called on behalf  
of the People, being duly sworn testified as follows:

DIRECT EXAMINATION BY MR. HOWE:

Q You are a member of the Police Force of New York  
City, are you not, Flynn? A Yes, sir.

Q Did you see the defendant Fleckenheimer, on the 31st  
day of August, 1908? A I did.

Q And at the stable 300--

MR. MORGAN: Now, don't lead him. I object.

BY MR. HOWE:

Q Well, where did you see him? A 304 East 95th.

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

Q Who, if anybody, was with you when you went to that  
stable? A A gentleman by the name of Chester Smith.

Q Whom you know to be the complainant in this case?

A Yes, sir.

Q Well, what was said and done there in the presence of  
the defendant Fleckenheimer?

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

THE COURT: Well, I will overrule the objection,  
for the present. This is laying the basis for the proof.

If it is not material and relevant, it will be stricken out, but we will hear it now.

MR. MORGAN: Exception.

BY MR. HOWE:

Q Now state what was said and done at that stable, in the presence of the defendant Fleckenheimer, on that day? A This complainant, Chester Smith, came to me--

Q No. Now wait a second, Officer. Don't state anything that was said and done when the defendant was not there. You met Smith? A Yes, sir.

Q And went with him to the stable? A Yes, sir.

Q And what was said and done after you got to the stable, after you got into the presence of this defendant Fleckenheimer? A Chester Smith, the complainant, in the presence of the defendant, asked for the return of his money. He refused.

Q The defendant refused? A Yes, sir.

MR. MORGAN: Your Honor understands I object to all this?

THE COURT: Yes.

BY MR. HOWE:

Q Now, go on, Officer? A And then Chester Smith, the complainant, asked for the horse, and the defendant said that there was six dollars expenses due for the keep of the horse, and Chester Smith, the complainant, as near as I can remember--it is quite a while ago--refused at first to give the

six dollars, but, in about three or five minutes, he agreed to give the six dollars. Then the defendant refused to take the six dollars.

Q Did Smith offer six dollars? A Yes, sir, he offered the six dollars, and then the defendant refused to take the six dollars.

Q Did you see any horses there? A Yes, there were several horses.

Q What did Smith do, if you know? A Smith went up to the stall of one--to one of the stalls, and placed his hand on the horse.

Q And what did the defendant do? A That I don't know.

Q That you don't know? A I don't know what he done then.

Q Well, were you there? A Yes, I was there.

Q Well, is it a case of not remembering what you saw or of not seeing? A I don't believe I seen him do anything.

Q You saw the complainant go up and place his hand on a horse? A Yes, sir, but he went on the off side from me.

Q And where was the defendant when Smith went to that stall? A He was right close to him, at the stall.

Q Right close to Smith? A Yes, sir.

Q And did you see Smith get either any horse or any money?

A No, sir.

Q And what did you say to the defendant Fleckenheimer, if

anything? A Well, simply what I have just stated.

Q Well, what did you say to Fleckenheimer? A I said, "This man claims that he bought a horse here, and he wants it," and he said, "He owes me six dollars livery." Then, if I recollect rightly, I said to Mr. Smith, the complainant, "Pay the six dollars livery," and, after a few minutes, he took out the six dollars to pay, and Fleckenheimer, as I said before, refused the six dollars. Then I said to the officer--to the defendant, "You will either give him the horse or the money," and he refused, and then I placed him under arrest.

CROSS EXAMINATION BY MR. MORGAN:

Q You knew nothing yourself about the transaction itself, Mr. Officer? A Sir?

Q (Question repeated)? A No, I didn't witness the transaction, the sale of the horse.

Q This complainant met you on the street, about where was it? A Between 94th and 95th streets, on Second avenue.

Q And told you--how long before did he say he had this transaction with the defendant? A Three days, I believe.

Q About three days before that, he had the horse transaction? A Yes, sir.

Q And you went to this stable with him, and you told this defendant that he must either give him back the horse--

A That's right.

Q Or give him back the money? A That's right.

Q You were sitting in judgment upon this--

MR. HOWE: I object to the question.

MR. MORGAN: I withdraw the question.

C H E S T E R S M I T H, a witness called on behalf of the People, being duly sworn testified as follows:

DIRECT EXAMINATION BY MR. HOWE:

Q Mr. Smith, will you keep up your voice, so that all these gentlemen can hear your answers? Where do you live?

A Cold Spring on the Hudson.

Q In Putnam County, New York State? A Yes, sir, in New York.

BY THE COURT:

Q Well, what County, he said? A Oh, Putnam County.

Q New York State? A Yes, sir.

BY MR. HOWE:

Q Did you ever see this defendant? A Fleckenheimer?

Q Yes? A Yes.

Q When did you first see him? A I think it was on the 27th of August, of last year.

Q 1908? A Yes, sir.

Q Where did you see him? A Well, at a stable that he pretended to be the proprietor of.

Q Now wait a second. We'll strike that out. Where was that stable? A I think it was in 95th street.

Q East or West? A East.

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

Q Do you recollect the number? A I think it was 304.

Q You subsequently visited that same stable, with Officer Flynn? A Yes, sir.

Q And it was the same stable? A Yes, sir.

Q Now what time of day did you go there, on the 27th, Mr. Smith? A It was before dinner, in the forenoon sometime.

Q In the forenoon? A Yes, sir.

Q And what did you say to the defendant and what did the defendant say to you, on the 27th? A Well, I went in the stable--I had saw an ad<sup>39</sup> in the paper that he had some horses to sell--and I went in and asked for the proprietor or the boss, and the man said he would be in in a minute; and, while I stood there, why, this Fleckenheimer, and the man said, "There is the boss," and I said I saw his ad in the paper, and wanted to buy some horses, and asked him what he had to sell, and he showed me several horses.

Q Go on? A He showed me several horses, and I priced several, and I picked out one gray horse, and I finally bargained for it, for \$110.

Q Did you agree upon the price with the defendant Fleckenheimer for the gray horse? A Yes, for \$110. He recommended the horse to be--

MR. MORGAN: Now, wait a moment. If your Honor please,

I would like to ask the witness a preliminary question, at this time.

THE COURT: You may do so.

BY MR. MORGAN:

Q Wasn't the contract entered into between you and this defendant reduced to writing? A (No answer.)

Q Didn't he give you a receipt for the \$110, stating the terms on which he sold this horse to you, and wasn't that receipt turned over to the Magistrate? A Not that I am--

THE COURT: Let him answer the question.

BY THE COURT:

Q Did you understand the question? A No, sir.

Q Did you get a receipt from him when you bought the horse? A Yes, sir.

MR. HOWE: Now, I don't see what difference the receipt makes.

MR. MORGAN: Of course, it does. It states the terms of the contract between the two men, your Honor, and that is the best evidence.

THE COURT: I will overrule your objection for the present.

MR. MORGAN: I take an exception.

MR. HOWE: I will straighten this all out, at this time by one or two questions.

X

THE COURT: Well, that question is not objectionable.

MR. HOWE: No, sir, but I will ask him another question.

BY MR. HOWE:

Q But you got a receipt mentioning that gray horse from Fleckenheimer? A I got a receipt, there and then, yes.

Q Now, how long did you keep that receipt? A Until the next day.

Q And then where did the receipt go? A I bought another horse.

Q Well, where did the receipt go? A He took it back.

Q He took it back? A Yes, sir.

Q And you agreed upon the price of \$110? A Yes, sir.

Q Did you pay the defendant Fleckenheimer? A I gave him five dollars in cash, and my check for \$105.

Q Where was your check drawn upon? A Upon the National Bank, at Cold Spring, on the Hudson.

Q That was for \$105? A Yes, sir.

Q And then what was the understanding? A I wrote a receipt myself, saying, "Received of Chester Smith \$110, for one gray horse, warranted to be true in all harness and good wind," and Mr. Fleckenheimer signed it, and gave it to me.

BY THE COURT:

Q And that is the receipt you say was lost? A No, sir,

not lost. I gave that back to Mr. Fleckenheimer, the next day.

Q Well, have you seen it since? A No, sir.

BY MR. HOWE:

Q And what conversation was there about that check which you gave him? A Well, after I gave him my check, and he gave me this receipt, and I put it in my pocket, I was ready to take the horse, and this man says--

Q This defendant? A This defendant says, "You are a stranger, and I don't know whether your check is any good or not," and I said, "Very well. I'll come back in the morning and bring you the bills, if you give me the check back, and I will give you the money." And so I went away, and went home. Next morning, I went to the bank, and drew out \$500, and I came down, and went to the stable, and Fleckenheimer was there.

Q Now you left that gray horse in the stable, overnight?

A Yes, sir.

Q In Fleckenheimer's stable? A Yes, sir. And I said to him, "I have got the money. Give me the check, and I'll give you the \$105," and he says, "Your check is all right," and spoke about some more horses.

Q Now, you didn't give him any more money for the gray horse? A No, sir.

Q He accepted your check? A Yes, sir.

And I looked over some horses, some which I saw, yesterday-- or the day before, rather--and I finally bought one of them for \$75.

Q And what kind of a horse was that? A Well, it was a bay horse. It was a little lame, but--

Q Now never mind that. We will get to that later. What kind of a horse was it? Was it a bay horse? A Yes. It was a bay horse, and a little lame, but warranted to be true in all harness and good wind, and I paid him \$75 in bills for the second horse, the second day.

"Now," he says to me then, "Give me that receipt that I signed yesterday, and I'll put them both in one receipt," and so I handed it to him, and then he wrote the receipt that I gave the District Attorney, and he wrote it part in German that I couldn't read it, and I said, "What does this read?" I could read the top of it, but not the bottom. And I said, "Is that true in all harness and good wind?" And he said, "Yes. That's German, I can't write that in English." And so I accepted it in that way.

Q And is that the receipt that you got at that time (indicating)? A Yes, sir.

MR. HOWE: I offer that receipt in evidence.

MR. MORGAN: Let me see it, please.

MR. HOWE: Certainly.

(It is admitted and marked People's Exhibit 1.)

THE COURT: You had better have the interpreter read it.

THE NINTH JUROR: Your Honor I can read that.

THE COURT: Well, will you let the juror act as interpreter, and read it, Mr. Morgan?

MR. MORGAN: Certainly, yes.

THE NINTH JUROR: This isn't German. All I can make out is "Sold".

THE COURT: Well, we had better get the interpreter.

THE JUROR: It is English words, but German writing. It isn't German letters exactly. It is simply written in some German letters, and some in English, "Sold a gray and bay horse, for the sum of \$125. In full payment. Horses free of all ailments."

MR. MORGAN: Free of all claims, is it not, Mr. Juror?

THE JUROR: No, of all claims.

THE COURT: Go on. Which is it? Free of all claims or all ailments.

THE JUROR: Free of all claims I think it is, and I can't make out the rest of it, and I don't think anybody else can. "Chattels", I think it is.

THE COURT: Is it "Chattels"?

MR. MORGAN: "And if not satisfactory, will be exchanged," I think it is.

THE COURT: Is it not "Chattels", Mr. Juror?

THE JUROR: I don't know, sir. I can't understand it very well, and I don't think anybody can.

MR. HOWE: Well, your Honor, the agreed reading is this:

"New York, 28 Aug.

Sold one gray and one bay horse, for sum of \$185.

In full payment. Horses is free of all claims." And  
then the word, "Chandel," the agreed translation of that  
word being, "gentle." "If not, can be  
exchanged at any time.

H. Fleckenheimer, 304 East 95th street."

That is the agreed translation.

MR. MORGAN: Yes, sir; we agree upon that.

BY MR. HOWE:

Q Well, then what happened after you got this receipt from him? A Well, now, as I said here, that he told me that writing said, "True in all harness and good wind."

MR. MORGAN: Now, if your Honor please, I object to this, and move to strike it out.

THE COURT: Motion denied.

MR. MORGAN: Exception.

THE COURT: He said he did not understand the writing. That is for the jury to say, whether he did or not.

MR. MORGAN: But my contention is, your Honor, that the contract was reduced to writing, and its terms cannot be varied by parol evidence.

THE COURT: We are not attempting to determine a contract now. We are entitled to have all the transaction. The principle is not properly stated by the counsel, in a criminal case.

MR. MORGAN: Your Honor, of course, will give me an exception, with all respect to the Court?

THE COURT: Yes. The whole contract is not in writing, according to his statement.

BY MR. HOWE:

Q Well, then, after this receipt was given to you what happened, Mr. Smith? Go on further please? A I said to him that I wished to put the horses aboard the Ramsdell Line, at the foot of Franklin street, that lands at Cold Spring, and asked him if he would furnish men and a rig so that we could leave the horses there, and he said he would.

And so he had two men, with a horse and wagon, a heavy wagon, brought up. I think he stood on the street at the time. And he put one of his other men to lead one horse and I the other, and we sat in the hind part of the wagon, to lead the horses, and started for the boat.

Q Still another horse was hitched up to the trap, and the others were led behind? A Yes; the two horses that I

bought were leading behind, with a halter.

Q And you all started off for the boat? A Yes. And I hadn't got a block before I saw that there was something the matter with the gray horse.

MR. MORGAN: Well, now, I object to this if your Honor please, and move to strike it out.

THE COURT: The motion is denied.

MR. MORGAN: Exception. X

BY MR. HOWE:

Q Now, what did you see the gray horse doing? A Well, his wind was about gone. He acted as if he couldn't go, and I didn't say anything at that moment--

MR. MORGAN: I object, and I move to strike that out, as a mere opinion of this witness.

MR. HOWE: No; I think that is a fair description of the horse's action, if your Honor please which he says he saw at that time.

THE COURT: He is giving his impression of the action of the horse at the time. You can contradict it if you like. Anyone can say whether a horse can go or not. It does not require an expert to testify to that.

THE WITNESS: I can swear that his wind bothered him so much--

THE COURT: No, no. Strike that out. If I see that

a horse is in trouble, and cannot move well, I can say that much about him, without giving any expert opinion on the subject.

MR. MORGAN: But he has not qualified as an expert your Honor, to give any opinion whatever.

THE COURT: No, he is not testifying as an expert. He is giving a layman's impression of the appearance and conduct of the horse at the time, and you may cross examine him as to the accuracy of his description of the horse at that time. Objection overruled.

MR. MORGAN: Exception. 

BY MR. HOWE:

Q Go on, Mr. Smith? A And we went a little bit further, part of a block, and the horse was short of wind, and couldn't get his breath, and was just ready to fall down.

MR. MORGAN: Now, I ask that that be stricken out.

MR. HOWE: And I object to having it stricken out.

BY THE COURT:

Q Well, just state what took place, and not your opinion of the horse. What did you do? A Well, the horse couldn't go any further.

MR. MORGAN: I object to that as the opinion of the witness.

THE COURT: Objection overruled. I have stricken out, that he was short of wind.

MR. MORGAN: Exception.

A (Answer continued) And we couldn't go any further, and I said to the man--

MR. MORGAN: Objected to. I object to what he said, in the absence of the defendant.

THE COURT: Objection sustained.

BY MR. HOWE:

Q Now right there, Mr. Smith, you stopped, I presume?

A Yes, sir.

Q Were you leading the horse at the time? A Yes, sir.

Q What was he doing at the time he stopped? A He was trying to get his breath.

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

THE COURT: Objection sustained. Strike that out.

BY MR. HOWE:

Q Now state what he looked like. What was he doing, not what he was trying to do? What was he doing? A Well, he was standing right still, with his feet braced right out (illustrating), and wouldn't go any further.

Q Well, did you notice whether or not he was breathing?

A Yes, sir.

Q Well, now what did you notice about his breathing?

A That he was heaving.

Q Heaving? A Couldn't get sufficient wind.

MR. MORGAN: I object to that if your Honor please.  
The witness is not qualified so far to express any opinion.

THE COURT: I will strike out the last answer.

BY MR. HOWE:

Q He was heaving? A Yes, sir.

Q Well, how was he heaving? A Well, his flanks was moving, and his nostrils was extended. And I have seen horses before that was heaving.

MR. MORGAN: I object to the last part of the answer, and move that it be stricken out.

THE COURT: Objection sustained. Motion granted.

BY MR. HOWE:

Q Well, we will not get to that for a moment. I want you to give me the best description that you can of what that horse looked like, and was doing, at the time you stopped there. Now give me the best description you can? A Well--

Q You say he was standing there with his legs out, and he was heaving? A Yes; he was trying to--

MR. MORGAN: Objected to.

THE COURT: Sustained.

BY MR. HOWE:

Q Well, how hard was he heaving? A Well, he was heaving real hard, that is, he couldn't get wind enough to go any further, I thought.

MR. MORGAN: Objected to.

THE COURT: Objection overruled.

MR. MORGAN: Exception.

Q You say you thought the horse couldn't go any further?

MR. MORGAN: Objected to.

THE COURT: Overruled.

MR. MORGAN: Exception.

A Yes, sir.

Q Now, what did you do then, when this horse couldn't go any further.

MR. MORGAN: Objected to.

MR. HOWE: Question withdrawn.

Q Well, how far had you gotten from the stable then?

A Well, I think in the neighborhood of three blocks, about that distance.

Q And then what did you do? A I handed the halter to the man, and told him to try to get him back to the stable.

Q No, I don't want that. I consent that that be stricken out. What did you do? A I handed the man the rope, and took the other horse.

Q And what did you do then? A Went on with the other one.

Q On foot or in the rig? A I went on, on foot.

Q You got out of the wagon, and went on, leading the bay horse by the halter? A Yes.

Q And when did you next see the gray horse which you left there with the man, how many days later? A About three days, I think.

Q And where did you see that gray horse? A In the stable of Fleckenheimer.

Q What did you do with the bay horse? A Took him to the boat.

Q And took him to Cold Spring? A Shipped him to Cold Spring.

Q Have you got that bay now? A No, sir.

Q How long did you keep that bay? A Until the 7th of this April.

Q Now when did you next see the defendant? You left the defendant there, at the stable, when you drove off. When did you see him next? A The following Monday, I think, the 31st of August.

Q Now, before we go on to there, what is your occupation? A I own two farms, farming, and I sell a few horses and a few cows.

Q Well, how many horses do you think that you have bought and sold in your whole life? A I wouldn't like to say.

Q Well, give me some idea. Have you bought and sold three horses and cows? A Yes.

Q Or 3000? A Oh, no, sir.

BY THE COURT:

Q Would you say 100? A Yes; I would say that. I would

say at a rough estimate, I have sold maybe five or six hundred horses.

BY MR. HOWE:

Q And have you bought and sold other animals? A Yes; I sell cattle of all kinds.

Q Have you seen horses with the heaves? A I have.

Q Many of them? A A good many.

Q And do you know what the symptoms of the heaves are?

A Yes; some of them.

Q How long have you been in the horse business, or how long have you traded in horses? A <sup>38</sup> Ever since I was 21.

Q How long have you lived in Cold Spring? A All my life, with the exception of a few months at a time.

Q And how long have you been a farmer? A All my life.

Q This gray horse, at the time you left him, or when you say he couldn't go any further, that gray horse, in your opinion, did he have the heaves? A He did.

MR. MORGAN: I object. Well, I will withdraw the objection.

THE WITNESS: Or some other similar wind trouble.

BY MR. HOWE:

Q What? A He had the heaves, or some other similar trouble that badly affected his wind.

Q Well, was his wind badly affected? A It was. 43

Q Well, now did you believe--did you rely on the defendant's representation to you that that horse was sound

of wind?

MR. MORGAN: I object to that, if the Court please.

In the first place, it is leading, and it calls for a conclusion, and it isn't in proper form, and is immaterial.

THE COURT: Objection overruled.

MR. MORGAN: Exception. X

A I did.

BY MR. HOWE: :

Q And, relying on that representation, did you give the defendant five dollars and your check for \$105? A Yes, sir.

Q Is this the check that you gave the defendant (indicating)? A Yes, sir.

Q At the time that you gave the defendant the check, was there any endorsement on the back of the check? A No, sir.

Q That is your signature (indicating)? A Yes, sir.

MR. HOWE: I offer this check.

MR. MORGAN: No objection.

(It is admitted in evidence and marked People's Exhibit 2.)

BY MR. HOWE:

Q You say you came back, three <sup>29</sup> days later? A Yes, sir.

Q Did you go to the stable where you had met the defendant?

A I did.

Q That stable is in the City and County of New York; is it not? A Yes, sir.

Q Now, did you see Officer Flynn, that day? A I did.

Q But did you see Officer Flynn before or after you arrived at the stable? A Before I went into the stable.

Q You made a communication to Officer Flynn? A Yes, sir.

Q Now, did you see Fleckenheimer at the stable? A Yes, sir.

Q Now, what happened there, that day, in Fleckenheimer's presence? What did he do and what did you do, and what was said?

MR. MORGAN: Objected to, as before.

THE COURT: Allowed.

MR. MORGAN: Exception. 

A Well, I had the officer to come with me, I stated my case, and asked him to go to the stable with me, and he went with me.

And I saw Mr. Fleckenheimer, and told him that the horse wasn't as represented, and asked him to give me my money back, and he said, "You won't get your money," and I said, "Well, give me my horse," and he said, "There is six dollars keep on that horse," and I said, "That's pretty steep for three days keep, six dollars," but, after thinking perhaps 30 seconds, I offered him six dollars.

Q You produced six dollars there? A Yes; a five dollar bill and a one dollar bill, took it out of my vest pocket. (illustrating), and he refused to take it, and I said, "I want my horse," and stepped into the stall, to untie him, and bring him out.

Q Now wait a second. Did you see, on that day, the same horse, that you saw on August 27th? A Yes, sir.

Q The same gray horse? A Yes, sir.

Q Was it that horse that you approached? A Yes, sir.

BY MR. MORGAN:

Q And that was the horse you demanded back? A Yes, sir. And, in the meantime, when I first went into the stable, the officer and I, there was an old gentleman just had some money out, counting it over, and when I asked Fleckenheimer for my horse, this old gentleman says--

MR. MORGAN: Now, one moment. However, go on.

I don't object.

A (Answer continued) And the old gentleman said, "That's my horse, and I am just paying him the money for it. I bought it." And the officer said to him, "That horse is this man's horse," putting his hand on me, "Put your money in your pocket," and the old man put the money back in his pocket, and I didn't see what became of him after that.

And Fleckenheimer wouldn't <sup>take</sup> the money, when I offered it, and I was going to drop it on the floor, but I put it back

in my pocket, and stepped up to untie my horse, and he come up in the stall by me, and caught me by this arm, I think, the right arm (indicating), and jerked me out of the stall. And then the officer said, "Well, if you won't let him have his horse or his money, you will have to go with me," and he arrested him, and took him to the station house, where I made a charge against him.

Q Now you know Judge Southard, who was called as a witness here yesterday? A Yes, sir.

Q He is your attorney? A Yes, sir.

Q Did you, when you were in company with Judge Southard, see this defendant, on the 9th of this month, April? A Yes, sir.

Q Where? A At 65 Fifth avenue, I think it is.

Q Here in New York City? A Yes. The Judge has some business there.

Q Well, was anybody else there? Did anybody else come with Fleckenheimer? A Yes, there was another man with him.

Q Now will you state please, what was said and done at that interview, when the defendant was present?

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

THE COURT: Only give what was said and done concerning this horse, this transaction. Objection overruled.

MR. MORGAN: Exception.

BY MR. HOWE:

35  
Q Now, what was said and done there in the presence of the defendant?

MR. MORGAN: Objected to.

THE COURT: Overruled.

MR. MORGAN: Exception.

A Fleckenheimer wanted to pay me back my money and my expenses.

Q Did he say so? A Yes, sir.

BY THE COURT:

Q What words did he use? A He said he wanted to straighten the business up; that, if he had knew I was a dealer in horses, he would never have fooled me that way; and that he wanted to pay my money and expenses, and let it end; and I -- well, Southard always does my business, and I let him do the talking. I didn't say much.

BY MR. HOWE:

Q Well, let us have the conversation. That means anything that was said there in the presence of the defendant.

A Well, Southard and Fleckenheimer and the other man figured up \$110, and asked me about what my expenses would be, and I roughly estimated it at about \$50, and they figured up \$110 and \$50 would be \$160, and they said they would go and get the money, and give me the \$160.

Q Who said that? A Fleckenheimer. And they said they would be back in half an hour or so. Well, I was on

some other business here, and I went down to Washington Market, to do some business, and I couldn't be back in the half hour. So I telephoned to Southard that I couldn't be back.

Q Well, wait. Did you go back in half an hour?

A No, sir.

Q Did you get \$160? A Yes.

Q And you got that from Judge Southard? A Yes.

Q Now was there any talk there about this gray horse?

A Yes, sir.

Q Well what, if anything, did you say to the defendant about the gray horse, and what did the defendant Fleckenheimer say to you?

MR. MORGAN: That's under my objection, if your Honor please.

THE COURT: Objection overruled.

MR. MORGAN: Exception. 35

A He said, "If I had knew you were a dealer in horses, I would never have tried to work you. Bring me down some customers, and I'll give you \$25 apiece," and I said, "When would I get my money?" And he said, "Just as soon as I get the dough."

And we were all talking, and Fleckenheimer said, "We are all thieves," and I said, "What was the matter with that gray horse, any way, Fleckenheimer? He looked all right when you led him out to me," and he said, "Well, that's a trick

42  
horse. He's got a tube in his throat. You didn't see that.  
And, when he goes a little way he'll fall down, and, when  
they come back with the horse, I don't give them the money, and  
they go away disgusted." That's what he told me in the presence  
of Southard.

Q Well, what did you say about that time? A Well, I  
couldn't say much.

Q Well, did you say anything about sponges? A I asked  
him -- when I asked him what was the matter with that horse,  
I said, "Did you have sponges up his nose, or something like  
that?" -- I had heard of that -- and he said, "No; he had a  
tube up in his throat. That beats sponges."

BY THE FOREMAN:

Q At the time you purchased this gray horse, did you  
trot him around, or did he? A He didn't trot him. He just  
led him out on the floor for me to look at him.

Q Did you examine him? A Well, just looked him over.  
He didn't stir him up, so that you could notice him heaving.  
I took this fellow to be an honest man, and took his word.

BY MR. HOWE:

Q Did the defendant say whether or not he had that gray  
horse still? A Yes, sir; he said he had him yet.

CROSS EXAMINATION BY MR. MORGAN:

Q Mr. Smith, you deal quite extensively in horses up  
in your neighborhood, do you not? You are engaged in buying

and selling horses? A Well, I buy and sell some, yes; not very extensively.

Q Well, the place where you live doesn't allow you to be very extensive, but you are as extensive as you can be in the place where you live? A Why, I try to sell all the horses I can.

Q And you say you have been engaged in the horse business since you <sup>30</sup>were 21, buying and selling horses? A More or less.

Q More or less? A Yes, sir.

Q Well, is it more more, or less less? A Well, I generally sell every year more. My business has increased a little.

Q And are you also engaged in auction sales of horses; are you not? A I sometimes have little sales, yes.

Q Now this paper which I hold in my hand (indicating), do you recognize it as the advertisement of one of your sales, up there? A I was the partner of another man that had sales there.

Q Mr. Leonard J. Cox? A Yes, sir.

Q And how often did you have those sales? A Well, I've had two little sales, counting this one, and I had one of my own, on my own hook.

Q And you also buy cows, sheep and all kinds of live stock? This is your card, is it not (indicating)? A Yes, sir.

Q That is your card? A Yes, sir.

MR. MORGAN: I offer this advertisement and the card in evidence, if your Honor please.

MR. HART: No objection.

THE COURT: Well, he admits that he buys and sells horses and other animals. However, they may go in, as there is no objection.

(They are admitted and marked Defendant's Exhibits A and B.)

BY MR. MORGAN:

Q Now you say you went to this defendant's place by virtue of seeing his <sup>16</sup>advertisement in the paper? A Yes, sir; I was in that neighborhood, and I went in.

Q And you went to his place, and examined the stock he had on hand? A Looked them over.

Q Looked them over? A Yes, sir.

Q And did you pick out this particular horse as the one that you wanted to purchase? You selected that as your own selection; did you not? A Yes, after looking them over. He priced that one at near what I thought he was worth, more than any of the rest.

Q And this horse was brought out on the floor of the stable? A Yes, sir; near the door.

Q You had every opportunity to examine the horse, at that time; did you not? A Why, nobody hindered me from

looking at him.

Q Nobody prevented you from looking at him thoroughly, or examining him thoroughly, as a trained horseman? A Well, he didn't let me trot him, or anything that I could see him.

Q Did you ask him to let you trot him? A Yes, I asked him to put a boy on him, and trot him in the street, so that I could see him trot.

Q And what did he say? A He said he ain't got no boy there.

Q When did you first see the horse? A On the 27th of August, sometime before 12 o'clock, before dinner time.

Q When was the horse actually turned over to you?

A Well, the next day, in the afternoon.

Q In the afternoon? A Yes, sir.

Q Between the time that you made the deposit of \$5, and the time you got the horse, were you around the stable at all? A I was around the stable a few minutes after I had given the check and the bills, and then I was around the next day, buying the bay horse, before they undertook to take him away.

BY THE COURT:

Q Well you never made a deposit of \$5, did you?

A The minute I offered him \$110, he took it, I give him \$5.

Q And then wrote out a check for the balance? A Yes, sir. And then he tried to sell me some more horses, and I wouldn't buy any more, and then I wrote him out a check for the \$105.

Q But you didn't give \$5 on account, did you? A No, sir.

BY MR. MORGAN:

Q Now this check of \$105, you gave it on August 27th?

A Yes, sir.

Q Now you purchased this -- the next time you came back there, you say you purchased the bay horse? A Yes, sir.

Q For the consideration of \$75? A Yes, sir.

Q In the first instance, this defendant had given you a receipt, simply dealing with the gray horse transaction?

A Yes.

Q But when you purchased the other, the bay horse, why he took up his first receipt, and gave you a receipt covering both? A Yes, sir.

Q Both of the horses? A Yes, sir.

Q Now who was it that was driving with you towards the ferry, at the time you claim the horse stopped? A I didn't know his name.

BY MR. HOWE:

Q There were two men? A One man to do the driving, and the other to help me lead the horses.

BY MR. MORGAN:

Q Now you say that in the conversation with your lawyer, you say that the defendant claimed that this was a trick horse, and that some tube had been put into his throat; is that

37  
correct? A He told me, "There was a tube in his throat, the day you bought him, but you didn't see it."

Q In other words, his statement to you and your lawyer was that there was nothing wrong with the horse itself, but that something had been done to make him breathe that way?

A No, sir. I asked him what was the matter with the horse, that day, that I couldn't move him, and he said, "Why, he had a tube in his throat that you couldn't see, and naturally, when you began to exercise him, he couldn't get wind enough, and it dropped down."

Q Well then something was done to make him look not sound, though he was sound? A Well, I couldn't swear to that. I thought he had the heaves. I couldn't see the tube in the throat.

Q But he said what was the matter with the horse was that some tube had been put in his throat to make him breathe in this peculiar way?

MR. HOWE: Now, I object to the question. The witness has answered as to what was said.

THE COURT: Allowed.

A He told me that.

Q And since that time you have never examined that horse to see whether he was sound at the time of the sale or not; have you? A No, sir.

Q And before that you didn't examine him to see whether

30  
43

he was sound or not; did you? You say you replied upon his statement purely and simply? A Yes, sir; that the horse was sound in wind.

Q And so that you don 't know personally whether the horse was sound or not at that time; do you? A Well, I say he wasn't sound. His telling me that he had the tube in his throat didn't alter my opinion. To the best of my opinion, when I moved that horse on the street, he was wind broken in the worst way.

Q Now you never examined him then? A No, sir.

Q And never examined him since? A No, sir.

Q Now you went up, you say, and demanded the horse at the time that the policeman, Flynn, was with you? A Yes.

Q Claimed it as your property at that time? A Yes, sir.

RE-DIRECT EXAMINATION BY MR. HOWE:

Q Oh, Mr. Smith, on last Good Friday, the 9th, was there anything said about the bay horse that you got? A Well, he wanted to buy the bay horse off me.

Q Well, what did he say on that subject? A He said that he was another one of his trick horses, and that he would give me \$100 for him back; he would go up to Gold Spring, and if he was fat and in good condition, he would give me \$100 for him. And that horse, when we hooked him up to a load, he wouldn't pull; he wouldn't pull, he wouldn't work.

BY MR. MORGAN:

Q What became of that horse? A I sold him, the other day, at that auction.

Q For how much? A \$47.

Q Now what did you represent him to be, when you sold him? A I sold him at the end of the halter, with no guarantee.

Q But you sold him and got \$47 cash? A Yes, sir.

Q You never undertook to return it to this man, this defendant? A No, sir.

Q Or to claim that there was any false representation about that horse, and you wanted your money back; did you?

A Why, he had one of them, and he wouldn't give me the money for that one back, and there was no need of asking for the other.

SAMUEL HERTZOG, a witness called on behalf of the People, being duly sworn, testified as follows:

MR. HOWE: If the Court please, this witness speaks German. He also speaks some English, but I am quite sure we would go ahead faster, if we had an interpreter.

THE COURT: Well, the interpreter is busy in another part. I believe there is only one German interpreter.

MR. HOWE: If your Honor please, Mr. Spiegel, who is associated with Mr. Morgan, is here, and he says he speaks German, and I have no objection to his interpret-

ing until we can get the regular interpreter.

THE COURT: Well, perhaps we had better wait for the regular interpreter.

MR. HOWE: Well, if your Honor please, both sides have no objection to Dr. Stern acting as interpreter, and he expresses his willingness to serve.

THE COURT: Then let him act.

(Dr. Jacob L. Stern is sworn as interpreter, and the witness was examined through the interpreter).

DIRECT EXAMINATION BY MR. HOWE:

Q Where do you live, Mr. Hertzog? A Winthrop, Connecticut.

Q That's near Saybrook; is it not? A In Saybrook Town.

Q What's your business? A I have a farm.

Q And how long have you been a farmer at Winthrop, Connecticut? A Next September it will be two years.

Q Do you know this defendant, Herman Fleckenheimer?

A I've known him before, only through the advertisement in the paper; I heard of him that way, and then became acquainted with him through the transaction in buying a horse.

Q When did you see this defendant? A I can't say the day exactly. The end of August.

Q At the end of August of what year? A In the year 1907.

Q Where was it that you saw the defendant? A 304 East 95th street.

Q In the city and county of New York? A Yes, sir.

Q You say you saw an advertisement in the paper?

A Yes, sir.

Q And you went to the stable in response to that advertisement, and there you saw the defendant? A Yes, sir.

Q Now will you state what you said to the defendant and what the defendant said to you, and what you did there at that stable, on the 27th day of August, 1907?

MR. MORGAN: Now, that's objected to. It's a year before this transaction, and it is objected to as immaterial, irrelevant and incompetent. And, if your Honor has any doubt upon it --

THE COURT: I will overrule the objection.

MR. MORGAN: Your Honor will not listen to an argument on the subject?

THE COURT: It is not necessary.

MR. MORGAN: I take an exception.

THE COURT: We will strike out the testimony, if it is not in reference to the purchase and sale of horses.

MR. MORGAN: A year before this transaction?

THE COURT: Yes, in the same place of business. It is allowed merely to prove the intent of the defendant.

MR. HOWE: It is in that class of evidence that I



put it, when I offer it, sir.

MR. MORGAN: Will your Honor note my exception?

THE COURT: Yes.

A I told him I came in consequence of the advertisement, and I wanted to buy a horse.

BY MR. HOWE:

Q Go ahead. A I then went into the stable, and looked at the horses, and one of them pleased me, and I bought it from him.

Q What color was that horse? A A black horse.

Q What did the defendant say to you about that horse?

A He said it was a very good horse, and had been only unhitched half an hour ago, and he praised it very highly, that it was a good horse.

Q Well, what was the price agreed upon for that horse, please? A He asked \$125, but I offered him \$100, and he agreed.

MR. MORGAN: Now, I object to this further, if the Court please, on the ground that it was a contract in reference to property over the value of \$50, and should have been in writing.

THE COURT: No, it was an immediate sale. That would be a valid defense to an action to enforce a contract that was <sup>not</sup> in writing.

MR. MORGAN: Exception.

THE COURT: This is merely offered to the jury for the purpose of showing the intent of this person, and the general scheme of his business.

MR. MORGAN: Yes, sir, I understand. Will your Honor allow me to make this suggestion? It is true, as far as it being an executed sale is concerned. If that were the only question involved, there would be no writing necessary. But this witness is trying to read into the contract what was intended by the Statute of Frauds to prevent a verbal contract.

THE COURT: But the Statute of Frauds is a defense to an action on contract; that is all. That does not apply to criminal cases. If you wish to have a contract that you can enforce in a court of law, you must have it drawn in accordance with the statute of frauds; that is all. But here is an allegation of an act tending to establish, it is claimed, a criminal intent, a criminal scheme on the part of the defendant, an act or transaction similar to the one with which he is charged in the indictment.

MR. MORGAN: Exception.



BY MR. HOWE:

Q Did you pay him any money? A I gave him \$25, the same evening, as money in hand, and we agreed that I would try out the horse, the next morning, and I would give him the rest.

Q What time was it that you made this bargain in the evening, as you say? What time in the evening was it, about?

A Probably it was about seven o'clock in the evening.

Q Did you go back, the next day? Did you return, the next day? A Yes, sir, in the morning early, I came back again, I went there.

Q And did you see the defendant? A Yes, sir; I saw him.

Q What time in the morning was it that you went there?

A Perhaps eight o'clock.

Q Did you pay the defendant Fleckenheimer any money, that morning? A I paid him \$75, and I wanted the horse.

Q Did you get any receipt for your money? A Yes, he gave me a receipt.

Q Is that the receipt he gave you (indicating)?

A Yes, sir; that's the receipt.

MR. HOWE: I now offer this receipt in evidence.

(It is admitted in evidence and marked People's Exhibit 3).

MR. MORGAN: Of course, the same objection applies, your Honor, here?

THE COURT: Yes. Objection overruled.

MR. MORGAN: Exception.

MR. HOWE: I think we can agree on a reading of this thing, if your Honor please.

THE COURT: " Before you translate it, ask him who wrote that paper.

BY MR. HOWE:

Q Who wrote that receipt? A He himself.

MR. HOWE: I will now read this:

"New York, 28th A." -- the abbreviation for August--  
"1907.

"Sold one black horse to Mr. Hertzog, for the sum of \$100. In full payment. Horse is free of all claims. If not suit, can be returned back in exchange money, in three days time.

H. Fleckenheimer,  
304 95th street."

BY MR. HOWE:

Q Where was the horse to be kept according to the terms of your agreement during the three days' trial? A I arranged with him - I told him I had a friend here, who has a butter and egg store, and I was to take the horse there, and he would try him out for me.

Q Well, did you agree that you should keep the horse at this good friend's of yours during the three days? A There was no such agreement. If I had seen, the first day, that the horse was good, I might have sent it home to the country then.

Q No, I asked you if you agreed with the defendant that

you should keep the horse at the butter and egg man's place for three days, for the trial? A Yes.

Q Now when was that arrangement made? Was it on the evening of the 27th or on the next day, when you paid him the \$75? A Already in the evening that was agreed.

Q Now, after you had paid him the balance of \$75, and after you had gotten this receipt, on the morning of the 28th of August, what happened? A After he had locked away the money, the defendant went back to his man, and told him to bring out the horse and harness it.

Q And was it the same horse that you had seen brought out, the night before? A Yes, the same horse.

Q Was that horse hitched up? A Yes; that horse was hitched up.

Q Now then just tell us what happened? A The first thing he did, he laughed at me, and told me that he had more trouble with this horse than with any twenty others. Then they brought the horse out, and hitched him up, and he said, "I'll drive up with you." Then he changed his mind, and he said, no. And there was a man there -- I don't know who he was -- possibly a neighbor -- and he said, "This man will go with you."

Q Go ahead. A And then we went up in the wagon, and the other man took the lines, and we went to start to driving. The horse wouldn't move from the spot. On the contrary, he

pushed back.

Then I went up to the wagon, and took the horse by the harness, and led it with my hand about three or four houses away, about the length of three or four houses. Then it seemed that the horse couldn't breathe any more, and I turned him around, and went back to the stable.

Q Well did you succeed in getting him back to the stable? A Oh, to the stable he went back. I brought him back to the stable all right.

Q Well then what happened, Mr. Hertzog? A Then I told him, "What have you done? What kind of horse have you sold me? What shall I do? I want my money back."

Q Well, what did he say? A He laughed then at me. And there was another horse standing there, which certainly was 30 years old, and worth about \$15, and he said, "You can have this one for \$130."

Q That you could have that horse, instead of the one that you had bought? A Yes, sir.

Q Well then what happened? A And, seeing that nothing was to be done there, and he was laughing at me, I went away to a friend, for advice as to what I might do.

Q And did you go back with your friend? A I then came back with my friend, Martin Kratsch, and the defendant was standing outside of the stable, and, when he saw us coming --

MR. MORGAN: I object to that.

THE COURT: Objection sustained.

BY MR. HOWE:

Q Now, when you came there, what did the defendant do?

A He ran in, and locked himself into his office.

Q Did you have any talk with him after that? A There was a man standing there, and I asked him, "Where is the boss?" And he said, "The boss isn't here," and I said, "I've seen him go in there."

Q Well, did you have any talk with the defendant, after a while, after that? A Mr. Kratsch then came there, and told him he might come out.

Q What was that? Please repeat that, Mr. Interpreter?

A Then he came out, and Mr. Kratsch said to him, "What do you mean by doing this, to sell this man that kind of a horse?" And he laughed again, and insulted Mr. Kratsch.

Q Well, did you ask him for your money back or for your horse? A No, I wanted my money. I didn't want the horse. I couldn't use it any way.

Q Well, have you since that time received either the horse or the money? A I've had nothing to do with him since, and never spoke to him, except --

Q Now will you just answer that question. Have you since that time received either your horse or your money?

A No.

Q Were you going to take that horse to use on your farm

at Winthrop, Connecticut? A Yes; I wanted to use it for myself, on my farm.

MR. MORGAN: Now, at this point, I move to strike out all the evidence, if your Honor please, all the testimony of this witness, as immaterial, irrelevant and incompetent. This was a transaction absolutely foreign to the one on trial, and casts no light of any description upon this case.

THE COURT: Motion denied.

MR. MORGAN: Exception.

MR. HOWE: We will have now the regular interpreter, Mr. Rosenthal, if your Honor please.

THE COURT: Well, Dr. Stern might have continued.

CROSS EXAMINATION BY MR. MORGAN:

Q You were a complainant in this court, weren't you, growing out of the transaction that you speak of? A Not in this court.

Q In the General Sessions?

MR. HOWE: I have no objection to the question, if it is pressed.

A I was once before the Grand jury.

BY MR. HOWE:

Q You were once before the Grand jury? A Yes, sir.

MR. MORGAN: Let me see the indictment.

MR. HOWE: Which indictment?

MR. MORGAN: In the Hertzog case.

MR. HOWE: Here it is.

MR. MORGAN: I want the original.

MR. HOWE: Oh, I haven't got that. I have only a copy. Mr. Gallagher, the counsel asks for the original of the indictment, No. 61,856, in which Mr. Hertzog is the complainant.

THE CLERK: Here it is.

MR. MORGAN: That's all.

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

DIRECT EXAMINATION BY MR. HOWE:

Q Where do you live, Mr. Ingrisch? A College point.

Q Did you ever live in Connecticut? A Yes, sir; one time ago.

Q One time ago? A Yes, sir.

Q What was your occupation there? A I worked on a farm.

Q And whose farm did you work on? A My father's.

MR. HOWE: Send for Mr. Ingrisch, the old man.

Q Where was that farm in Connecticut; is that your father (indicating)? A Yes, sir.

Q This is your father; is it not? A Yes, sir.

Q Where was that farm? A In the town of Killingworth, between Clinton and Madison.

Q On the Shore Line, near the Shore Line Road, near the New Haven Railroad? A Yes.

Q Did you ever see this defendant here, Fleckenheimer?

A Certainly I did.

Q Where was it that you saw Fleckenheimer? A In 95th street.

Q In New York City? A In New York City.

Q East or West 95th street? A East.

Q When was it that you saw him? A It was in the month of April, but I can't exactly say when. In the first part of April of last year.

Q With whom did you go to that stable? A With my father.

Q With the old man who just came to the rail here?

A Yes, sir.

Q Oh, did you see an advertisement? A Yes. We saw an advertisement in a paper, in the Morning Journal.

Q Now what did you and your father have to do with the defendant there? A Well, we followed his advertisement, and we went there, and wanted to buy some horses.

MR. MORGAN: Now, I object to that, that it was the defendant's advertisement, and I move to strike that out.

THE COURT: Yes. Strike that out.

BY THE COURT:

Q You saw an advertisement? A Yes, sir.

Q Relating to what place? A To this, Mr. Fleckenheimer's.

Q Referring to what place? A A stable in 25th street.  
I can't remember the number any more.

Q And in answer to the advertisement you went there?  
A Yes, sir.

Q And who did you see there? A Mr. Fleckenheimer and  
some foreman of his.

BY MR. HOWE:

Q What time of day did you get there? A What day?

Q What time of the day, what hour? A Well, it was in  
the morning, something around nine o'clock, or about nine  
o'clock.

Q Well, did you see any horses there? A Certainly I  
did.

Q Well how many horses did you see? A Well, I can't say  
exactly. There was quite some horses in that stable.

Q Well, did you and your father pick out any horses?  
A Yes, sir; two horses.

Q What was the color of those two horses?

MR. MORGAN: Now, I object to this as incompetent,  
immaterial and irrelevant, if your Honor please. And,  
to save time, if your Honor will allow it, I will make  
now a general objection.

THE COURT: I think you had better object to each  
question.

MR. MORGAN: Then I object to it as immaterial,

irrelevant and incompetent.

THE COURT: Objection overruled.

MR. MORGAN: Exception.

BY MR. HOWE:

Q What color were the horses? A There was a black horse and a gray horse.

Q Well, was it a gray horse or a gray mare? A It was a mare. And the black horse was a horse. The gray horse was a mare.

Q And what price did you agree upon for the mare and the horse? A Well we offered \$200 for the both horses.

Q And did he agree to take \$200? A Yes, sir.

Q And how much did you pay him then? A We paid him \$60 deposit.

Q Who paid him that money? A My father.

Q And was anything said as to when you were to pay the rest of the \$200? A Yes, sir. That was Saturday, and on Monday I went over and got the horses, and paid \$140.

Q It was agreed on Saturday that you were to pay the rest of the money on Monday? A Yes, sir; as soon as I got the horses.

Q Well, did you get a receipt, on Saturday, for your \$60? A Yes, sir, I got it.

Q Is that the receipt you got (indicating), on Saturday?  
A Yes, sir; that's the receipt I got.

MR. HOWE: I offer this in evidence.

MR. MORGAN: The same objection, if your Honor  
please.

(It is admitted in evidence)

MR. MORGAN: Exception.

(It is marked People's Exhibit 4)

MR. HOWE: I will read this to the jury:

"N. Y., April 11th, 08.

Sold to Frank Ingrisch one team of horses, harness,  
blankets, for the sum of \$200. Paid \$60 deposit.

Balance \$140 when taken away at 304 East 95th street.

Both parties satisfied. Received payment.

Herman Fleckenheimer,

Frank Ingrisch."

BY MR. HOWE:

Q Did you return, on Monday? A Yes, sir; I returned  
on Monday morning.

Q Was your father with you? A No, sir, I was alone.

Q Did you see the defendant at the stable there?

A Yes, sir.

Q Now what happened that morning, that Monday morning?  
Did you pay him any more money? A Yes, sir, I paid him the  
\$140 down, the balance.

Q Did you get a receipt? A Yes, sir.

Q Is that it (indicating)? A Yes, sir.

MR. HOWE: I offer it in evidence.

MR. MORGAN: I make the same objection, your Honor,  
to this paper.

THE COURT: Objection overruled.

MR. MORGAN: Exception.

(It is admitted in evidence and marked People's  
Exhibit 5).

MR. HOWE: I will read this to the jury:

"New York, April 13th, 08.

Sold to Frank Ingrisch one team of horses, harness,  
for the sum of \$200. Paid in full. If horses doesn't  
suit, can be exchanged at any time. Both parties satis-  
fied to above agreement. Rec. payment.

H. Fleckenheimer

Frank Ingrisch."

THE WITNESS: That's my name on that.

BY MR. HOWE:

Q Well, did you sign that for your father? A No, sir,  
I just signed my name there.

Q Well, who signed that, do you know? (Indicating)

A Yes; I signed that.

Q You signed your father's name there? A Yes, sir. I  
thought that was my father's name.

Q Your name is Mike Ingrisch? A Yes, sir.

Q Well, after you got this receipt, what did you do, er

what happened there? A He brought me to the place where the horses were standing, having paid the deposit on the horses on Saturday.

Q Well, did you see the horses that you paid the deposit on, on Saturday? A No, sir; they were different horses altogether.

Q Well, were they the same color? A They were the same color, but they were not the same horses.

MR. MORGAN: Now, if your Honor please, I object, on the ground that there is absolutely no similarity between the two transactions.

MR. HOWE: I think Mr. Morgan is a little premature in that objection. I will be only too glad to have it stricken out, if the similarity between the transactions is not shown.

THE COURT: Allowed, for the present.

MR. MORGAN: Exception.

BY MR. HOWE:

Q Now what happened when you saw these different horses?

A Yes, sir. And he said, "Them are the two horses that you paid the deposit on, on Saturday," and I said, "No, they are different horses altogether. They are not the horses," and he said, "Oh, you are crazy," and I said, "I want my money back."

And I didn't take the horses out of the stable, but handed

52

them to another man, and the foreman took the whip, and chased them out of the stable, and I didn't take the horses myself at all until at the 99th street ferry.

Q Now you paid a deposit, on Saturday evening, on a gray mare and a black horse? A Yes, sir.

Q On Monday, the defendant showed you a gray and a black? A Yes, sir.

Q Now did he show you a gray mare or a gray horse, on Monday? A A gray horse.

Q You are sure about that? A Certainly, I am sure about it.

Q Now did you take that gray horse and the black horse that he showed you, on Monday? A Yes.

Q He showed them to you after you had paid him the \$140? A Yes, sir.

Q Did you take them away to Connecticut? A I took them over to College Point, to show to my father.

Q Did you bring them back? A Certainly.

Q That same day? A Yes, the same morning.

Q Who came back with you then? A My father.

Q And then what happened when you got back there? A We saw the man --

Q You saw the defendant Fleckenheimer? A Yes. And we brought them there, and told him to give us the right horses, and he told me they were the right horses. And he said, "If

you make much monkeydoodle business, you won't get the harness or blankets." And so I tied them to the lamp-post, and went to the station house.

Q And did he show you, on that day, the horses that you had paid the deposit on? A No, sir; they wasn't there, that day, when I went for the horses.

Q Well, did you afterwards get either of the horses that you paid the deposit on? A Yes, sir; one of them; the gray horse.

Q Now what did you do with that gray horse?

A We wanted to take the both horses. That was after that day we had him pulled in, and we left for Connecticut.

Q Now after you had him pulled in, you wanted to get both horses? A Yes, sir; and he gave us the gray horse, but not the black one, and he said -- he claimed that the black horse was no good for us, because it was wind broken.

Q And was that the black horse that you had paid the deposit on? A Yes, sir. And so I hitched it up in the wagon, and the horse breathed hard to beat the band, and the horse was wind broken, to beat the band.

Q Well, what did he do to keep you from taking the black horse? A He wouldn't give it to us. And, at the last, he claimed that was his wife's horse, and he darsent sell that horse.

MR. MORGAN: Now, if the Court please, I move to

strike out the testimony of this witness with reference to the transaction he is supposed to have had with the defendant, on the ground that it is incompetent, immaterial and irrelevant, and it can,t be, even under the widest stretch of the imagination, said to be included in the similar transaction rule.

THE COURT: Well, perhaps my imagination is more elastic than yours, but I differ with you, and I overrule the objection.

MR. MORGAN: And I except.



CROSS EXAMINATION BY MR. MORGAN:

Q. You came back with your father? A Yes, sir.

Q. How long after you first made the purchase of these horses; how many days? A How many days?

Q. Yes. A Well, I am not quite sure about it. I think it is about a week.

Q. About a week or so afterwards? A I ain't sure about it. I think about that.

Q. Well, when you saw the defendant, when you and your father were there, you received two horses? A Yes, sir.

Q. They are now in your possession, are they? You have them now; haven't you, these two horses you got from the defendant? A Yes, sir; but one of them croaked.

Q. Yes, but so would people croak, sometimes.

MR. MORGAN: I move to strike that out.

MR. HOWE: I object.

THE COURT: Well, it is an answer to your question, I think. Motion denied.

MR. MORGAN: Exception.

BY MR. MORGAN:

Q Well, you got the two horses? A Yes, sir.

Q And that is your receipt, isn't it, that you gave (indicating)? A That's right.

Q You seem to know the New York language pretty well. You come down very often to New York from Connecticut?

MR. HOWE: Well, I don't think that I would saddle New York with that language. I think it is language that is generally used throughout the country.

A Well, I think they are the biggest horse thieves in New York, any way.

BY MR. MORGAN:

Q Now that was the receipt you gave at the time you received those two horses? A Yes, sir.

MR. MORGAN: Is there any objection to this. I offer it in evidence.

MR. HOWE: I have no objection at all. (It is admitted in evidence and marked Defendant's Exhibit C).

BY THE COURT:

Q Who wrote that receipt? A Receipt?

Q Yes, who wrote it? A The lawyer, Mr. Henry Levy--

not he, but the man working for him.

Q It was not the defendant who wrote the receipt?

A No.

MR. MORGAN: I will read it to the jury:

"Received from Mr. H. Fleckenheimer two horses,  
one black horse and one white mare, and a double set of  
harness.

Frank Ingrisch.

Mike Ingrisch."

THE COURT: What is the date of it, of the receipt,  
Mr. Howe?

MR. HOWE: The receipt is undated.

BY MR. MORGAN:

Q I understood you, Mr. Witness, to say that this receipt was given at the time that he gave you the pair of horses, the last pair of horses? A Yes, sir.

RE-DIRECT EXAMINATION BY MR. HOWE:

Q Now, did you get -- which was the black horse which this receipt mentions? Is that the one that was wind broken? A Yes, sir; that one was sure wind broken, too. But he didn't claim it. He said that horse was healthy and everything.

Q The black horse that you bought was wind broken?

A Yes, sir.

BY THE COURT:

Q You never got that horse, the one that you bought?

A No, sir; this is a different black horse.

BY MR. HOWE:

Q And was this receipt given before or after you had the defendant arrested? The defendant Fleckenheimer was arrested, wasn't he? A Yes, sir.

Q Now did you sign that after Fleckenheimer was arrested?

A Yes, sir; but he was out then.

Q He was out on bail? A Yes, sir.

THE COURT: Gentlemen of the jury, the Court will now take a recess until 2 o'clock; and be very careful not to discuss this case among yourselves, and not to allow any one to speak to you about it, and do not come to any conclusion concerning it until it is finally submitted to you for your determination.

After recess.

F R A N K C. O L E S, a witness called on behalf of the  
People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOWE:

Q Where do you live, Mr. Oles? A Spencertown, Columbia  
County, New York.

Q And what is your occupation? Louder, please.

A Well, miller, and feed business and farmer.

Q Did you see the defendant here in New York? A Yes,  
sir.

Q What day and what month and what year? A The 2<sup>nd</sup>  
of September, 1907.

Q Where? A At his office.

Q And where was that? A In 95th street, I think.

Q East 95th street? A East 95th street; 302 or 304.

BY THE COURT:

Q What kind of a building was it? A Well, a low shed,  
stable.

Q A stable? A Yes, sir.

BY MR. HOWE:

Q Did you see any horses there? A Yes, sir.

Q Did you pick out any horses? A Yes, sir.

Q Did you come to any agreement as to the price with the  
defendant? A Yes, sir.

MR. MORGAN: I object to this, if the Court please,

on the ground that it is immaterial, irrelevant and incompetent, and sheds no light upon the transaction in issue here.

THE COURT: objection overruled. I will strike it out, unless connected.

MR. MORGAN: Exception.

A Yes; for a pair of iron grays.

Q Did you pay any money on the 20th? A No, sir.

Q And what time of the day did you go there on the 20th? Morning or afternoon? A I think it was about noon, along about noon, the first day, the 20th.

Q Well, the arrangement on the 20th was that you picked out this pair of grays, and said you would take them?

A Yes, sir.

Q was there a price fixed? A It was fixed at \$250.

Q Did you return on the 21st? A Yes, sir.

Q The next day? A Yes, sir.

Q What time did you go back there, the next day, about, Mr. Oles? A Well, afternoon some time. It might have been one or two o'clock; sometime around there.

Q That was on the 21st? A Yes, sir.

Q Did you see the defendant on that day? A Yes, sir.

Q Did you see those gray horses? A Yes, sir.

Q Now tell us what happened there, Mr. Oles? A I went in the stable --

MR. MORGAN: Your Honor understands, of course, that my objection applies to all this testimony?

THE COURT: yes.

BY MR. HOWE:

Q Go on, Mr. Oles. A He says, "Your horses have gone, the gray team. Mr. Naylor bought them."

Q Did you see a man named Arthur Naylor there?

A Yes, sir; he was there when I went there.

BY THE COURT:

Q The first time? A No, sir; the next day. And I said, "All right. Let them go," and he said, "I have another team here that I can sell you."

BY MR. HOWE:

Q At that time, to be perfectly fair, you had not concluded your bargain for the grays, the first day? A No, sir. And he said, "I have another team here, a bay and a gray that I'll sell you." And he had a young man there in the stable, and he went back -- Fleckenheimer went back in the office, and I asked the young man what he wanted for them, and he said, "\$300."

MR. HOWE: No, I consent to strike that out, what was said in the absence of the defendant.

BY MR. HOWE:

Q Did you come to an agreement with Fleckenheimer as to the price of the bay and the gray? A Yes.

Q What was it? A \$250.

Q And what were the terms of the agreement? A I was to pay \$50 down, and have a week's trial.

Q And when was the balance to be paid? A If the horses proved satisfactory.

Q If the horses proved satisfactory? A Yes, sir.

Q In a week? A In a week. The team I was to take home, and a man in there hired to take it to the boat.

Q And you paid \$50, did you? A Yes, sir.

Q And did you get a receipt? A Yes, sir.

Q Have you got that receipt still? A Yes, sir.

Q The receipt for the \$50 down? A Yes, sir.

Q Is that it (indicating a paper)? A Yes, sir.

Q Who wrote that; do you know? A His man there, Fleckenheimer's.

Q Who signed it? A Well, I think this -

BY THE COURT:

Q Who signed it? A This man Fleckenheimer signed it, I think.

MR. HOWE: I offer this in evidence.

MR. MORGAN: Objected to, as before.

THE COURT: Objection overruled.

MR. MORGAN: Exception.

(It is admitted in evidence and marked People's Exhibit 6).

X

MR. HOWE: I will read it:

"N. Y., September 21, 1908.

Sold to Mr. Oles one gray horse, one bay horse,  
for the sum of \$250. Paid \$50 deposit. Balance \$200  
within one week's time. Good workers, single, double.  
Received payment.

H. Fleckenheimer."

BY MR. HOWE:

Q Now, after you had given the \$50, and gotten that re-  
ceipt, what happened then Mr. Oles? A Well, we talked  
around there. Mr. Naylor was there. They were talking about  
getting the team ready, and it was getting along towards time  
to take the team to the boat, and I gave this other man \$5 --

Q Not the defendant? A No, sir, the other man; to  
take the team to the boat, and Mr. Naylor and I were going on  
the same boat, and he said, "It's pretty near time to start for  
the boat."

Q You and Naylor were to take your horses up on the same  
boat? A Yes, sir. He says, "You can't take these horses,  
unless you pay down the rest of the money."

Q He said that to you, the defendant? A Yes, sir.

Q The defendant said that to you? A Yes, sir.

BY MR. MORGAN:

Q Was it the defendant that said that to you? A Yes,  
sir.

Q Fleckenheimer, the defendant? A Yes, sir.

BY MR. HOWE:

Q Well, go on. A And we talked matters around, until finally they wouldn't let us have the horses. When they wouldn't --

Q Now don't say they. Say who you mean? A Well, he wouldn't. He said that the horses couldn't go out of the stable until the rest of the money was paid.

Q He said that the horses could not go out of the stable until the rest of the money was paid? A Yes, sir.

Q The defendant said that? A Yes, sir.

Q And then what happened? A Well, we couldn't get the horses, and we went down to Police Headquarters, and come back.

Q Did you ask for your \$50 back? A Yes, sir; and I couldn't get back the \$50 or the horses.

Q And then what did you do? A We went down to Police Headquarters, and got a summons for him.

Q You got a summons for him, you think? A I think so. And went back to the stable, and Mr. Fleckenheimer was gone.

Q You could not find Mr. Fleckenheimer? A No, sir.

Q And when next did you see Fleckenheimer? Where was he when you saw him next? A Well, I went with an officer, and arrested him.

Q Were you present at the time the officer arrested him?

74  
A Yes, sir.

Q And he was taken to court, I presume? A Yes, sir.

Q Have you gotten your horses or your \$50? A No, sir.

Q To this day? A No, sir.

CROSS EXAMINATION: None.

MR. MORGAN: Now, if your Honor please, I move to strike out all this testimony, on the ground that it is immaterial, irrelevant and incompetent. According to the witness's theory, if your Honor please, his testimony was that he had agreed to pay \$250 for a pair of horses. He had only paid \$50 on that pair of horses, and this man simply told him that he could not take the horses out of the stable until he paid the other \$200.

THE COURT: He said he was to pay the \$250, with the understanding that he should have the horses for a week on trial. The receipt is in evidence.

MR. MORGAN: But the receipt doesn't so state.

MR. HOWE: Here is the receipt, your Honor. It states that pretty plainly, I think.

MR. MORGAN: Of course, this defendant is not an expert writer.

THE COURT: I will deny the motion.

MR. MORGAN: Exception. 

75

A R T H U R N A Y L O R, a witness called on behalf of  
the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HOWE:

Q Mr. Naylor, where do you live? A Goldspring, Putnam County, New York.

Q What is your occupation? A Real estate and insurance.

THE COURT: Speak out louder, please. The jurors must hear you.

BY MR. HOWE:

Q Did you see this defendant in New York? A Yes, sir.

Q What day was that? A September 21st, 1907.

Q At the same time, did you see a Mr. Oles, Mr. Frank C. Oles? A Yes, sir.

Q Where did you see the defendant? A Down at 304 East 95th street.

Q In a stable there? A Yes, sir.

Q Did you see some horses there? A Yes, sir.

Q Did you bargain with the defendant for horses? A I did.

MR. MORGAN: I object to this, if your Honor please, as immaterial, irrelevant and incompetent.

THE COURT: Objection overruled.

MR. MORGAN: Exception.

BY THE COURT:

Q How did you happen to go to that ~~in~~ stable?

76  
A I see an advertisement in the Telegram, advertising horses for sale.

Q And you went there in answer to that advertisement?

A Yes, sir, I did.

THE COURT: Now, go on.

BY MR. HOWE:

Q And what horses did you pick out, Mr. Naylor?

A A pair of grays.

Q And did you come to an agreement about the price of the grays? A Yes; he agreed to sell them to me for \$300, and I was to pay \$70 down, and have a week's trial.

Q And when was the balance to be paid? A When I had a trial of the horses, and they proved satisfactory.

Q And did you pay down \$70? A Yes, sir, I did, and took a receipt for it.

Q Is this the receipt (indicating)? A That's the receipt; here.

MR. HOWE: I offer it in evidence.

MR. MORGAN: The same general objection, your Honor.

THE COURT: Overruled.

MR. MORGAN: Exception. X

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

MR. HOWE: I will read it to the jury:

"N. Y., September 2, 1907.

Sold to Mr. A. Naylor one team of horses, harness,

blankets, for the sum of \$300. Paid \$70 deposit.  
Balance \$230 to be paid on one week's time. Free and  
clear of all claims. Guaranteed to be all right, good  
workers. If not, can be returned to Herman Fleckenheim-  
er, 304 East 95th street."

BY MR. HOWE:

Q Well, after you had gotten that receipt, what happened  
Mr. Naylor? A After I got that receipt?

Q Yes. A Well, Mr. Oles came along about that time.

Q Well, tell us about that? A And Mr. Oles came along  
about that time, and he wanted to buy a pair of horses, and  
Mr. Fleckenheimer told me to wait until he got through with  
him, and I had my horses then all prepared to take away, and  
so he went with Mr. Oles, and they settled upon buying another  
team of horses, a gray and a bay, or a black.

And after he got the deal all made, he talked to me about  
sending them on the boat. I telephoned down to the Central  
Hudson, to see whether they could take them up, that day.

Q And you and Mr. Oles were to take up your horses on  
the same boat? A Yes, sir. And, after we got all prepared  
to take the horses to the boat, Mr. Fleckenheimer wouldn't let  
me have them, and said that he wanted me to pay the \$250 down.

And I said, "I told you at the start that I didn't have  
all the money with me, and, if you are not going to carry out  
your agreement, let me have the \$70 back," and he refused to

78

do it, and it got so late in the afternoon that we couldn't get the horses to the boat in time. And I went and saw the policeman about it and he told me --

Q Never mind that. When he said that he wouldn't let you have the horses without the \$230 being paid down, what did you say, finally? A I told him that I would be down, on Monday, with the money, and I had it in my pocket, on the Monday following. And then his man wouldn't let me take them out of the stall.

MR. HOWE: I object to that, what the man wouldn't let him do.

THE COURT: Objection sustained. Strike that out.

BY MR. HOWE:

Q Well, did you see the horses on the following Monday?

A Yes, sir.

Q But, on the 21st he refused to let you have the horses, unless you paid the \$230 down? A Yes, sir.

BY THE COURT:

Q Well, when did you next see the defendant, Fleckenheimer? A I didn't see him again until he was arrested. It must have been pretty nearly a week. I don't know just the date of that.

Q A week later? A Well, pretty near that; when I saw him uptown, in the court, in 121st street, I think.

BY MR. HOWE:

Q Have you ever received your \$70 back? A No, sir.

Q Or have you ever gotten the horses? A No, sir; I never got anything. He got my \$70, and kept it.

MR. HOWE: That is all.

MR. MORGAN: No questions. I move to strike out this testimony on the ground that it is immaterial, irrelevant and incompetent.

THE COURT: Motion denied.

MR. MORGAN: Exception. 

MR. HOWE: The People rest.

MR. MORGAN: Now, if your Honor please, I move that your Honor dismiss this case, and direct the jury to find the defendant not guilty, on the ground that there has been no case made out in law; and to instruct them to acquit the defendant, on the ground that there is not sufficient evidence to hold this defendant for further trial in this matter; and that there is -- on the further ground that there is a reasonable doubt in this case as to the guilt of the prisoner, as matter of law, the evidence not having been sufficient to establish any crime against him; that the evidence does not show facts sufficient to constitute a crime.

THE COURT: The motion is denied.

MR. MORGAN: Exception. May it please your Honor, and gentlemen of the jury -- 

THE COURT: Well, are you going to sum up now, or

open?

MR. MORGAN: I am going to sum up. We rest right now. We rest on the People's case.

MR. HOWE: Didn't you want to put in that card and that advertisement, Mr. Morgan?

MR. MORGAN: Oh, yes, I would like to offer them -- to read them to the jury, these two exhibits of the defendant.

MR. HOWE: No objection. And they may be considered as having been admitted and marked at the proper point in the testimony, when you referred to them, and offered them in evidence.

THE COURT: Yes, they may be so marked, and read now by counsel.

(Mr. Morgan reads the exhibits, Defendant's Exhibits A and B to the jury).

MR. MORGAN: Now, at this point, if your Honor please, the defendant renews his motion to dismiss, to advise the jury to acquit, on the grounds already stated.

THE COURT: Motion denied.

MR. MORGAN: Exception.



THE COURT'S CHARGE.

MULQUEEN, J.:—

Gentlemen of the jury,

The defendant has been indicted by the Grand Jury of this county for the crime of grand larceny in the second degree, which, it is alleged, was committed as follows: That, at the Borough of Manhattan, City and County of New York, on the 27th day of August, 1908, Herman Fleckenheimer, this defendant, did feloniously, fraudulently and falsely pretend and represent to one Chester Smith that a certain horse which the said defendant was then offering for sale to the said Smith was sound in wind, and that by reason of this false representation and pretense the said defendant did then and there feloniously and fraudulently obtain from the possession of said Smith \$110, lawful money of the United States of America, and that said \$110 was the property of Smith; and that Fleckenheimer took this money from him in that way, with intent to deprive and defraud Smith of the money, and of the use and benefit thereof, and to appropriate it to his own use, whereas, in truth and in fact, the said horse was not sound in wind, but was unsound and wind broken, and whereas, in truth and in fact, the pretenses and representations so made by the defendant to Smith were then and there false and untrue, and that

the defendant at the time of making them, knew them to be false and untrue; and that, therefore, the Grand Jury charged the defendant with stealing, by the means aforesaid, the said money of the complaining witness Smith, and that this act was done feloniously, and against the form of the statute in such case made and provided.

In order that you may be enabled to decide whether or not the defendant has violated any law of this State, I will briefly call your attention to the statute, which has been made by the legislature for the guidance, and observance and protection of all the people of this State.

The crime of larceny is defined as follows:

"A person who, with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or any person other than the true owner, takes from the possession of the true owner, or obtains from such possession by color or aid of fraudulent or false representation or pretense, any money or property, steals such property, and is guilty of larceny."

You will notice the elements of the statute. The subject of the statute is personal property, and what the law forbids is the felonious taking of that property by one person from another, the crime consisting in the intent, not an accidental taking, or a taking properly un-

21

der the forms of law, but a criminal or felonious taking, with a criminal intent, with a felonious intent to deprive or defraud the true owner of his money, and to appropriate it to the use of the taker or any other person than the true owner. And then the means referred to in the statute are, by means of fraudulent and false representation or pretense. That combination of acts and circumstances is what the law forbids, and to that combination it gives the name of the crime of larceny.

Larceny is divided into degrees, according to the circumstances under which the taking is accomplished, or the amount of the property taken; and, under the circumstances alleged in this indictment, if any crime was committed, it would be grand larceny in the second degree, because the law says that the felonious taking of personal property worth more than \$25, and less than \$500, is grand larceny in the second degree. Therefore, if this defendant is guilty of any crime, it is the crime of grand larceny in the second degree.

You will keep the elements of the crime in mind. First, there must be a taking. Was there any taking proved in this case? Has it been established to your satisfaction that the money of the complainant was taken by the defendant? If so, then the question arises as to whether there was a felonious intent in the taking,

24

whether it was a legal taking or a felonious taking. Was it done with the intent to deprive the true owner of his property, and to appropriate to the use of the taker, and was it done, as charged in the indictment, by aid of false or fraudulent representation or pretense?

The false or fraudulent representation must be proved as set forth in the indictment, namely, that a certain horse, then and there being for sale to the said Chester Smith, was sound in wind, whereas, in fact, the horse was not sound in wind; and whereas, in fact, this statement was known to the defendant at the time to be false, and that the complaining witness relied on that statement, and parted with his money on the faith of that statement. In a charge of larceny by false pretense, it is necessary to establish not only that the alleged false statement was, in fact, false, but that it was known to the person who made it to be false; that it was made with the felonious intent to deprive the true owner of his property; that the person who parted with his property relied on it, and acted on it in parting with his property; that that false pretense was the moving cause, the means by which the money or property passed from the possession of the true owner to the person who made the false representation, with the intent of obtaining it. You will have to find that all those ele-

ments are established, before you can find that the charge set forth in the indictment is proved.

Now, you have been in court for some time, and you know the principles defining your duties as jurors. The fact that the Grand Jury charges a man with a crime is, in itself, no evidence of crime. That is a mere action by a body which hears only one side of a case, and whose duty it is, when it is convinced that the statements made before it are true, from what the grand jurors have a chance to see, to determine that the person charged with crime should be brought to trial. It is a mere step in the criminal procedure, and in consequence of that indictment the defendant is arraigned here at the bar for trial. He has never been tried; he is on trial now. So that the use of the indictment is merely to supply you with the charge and the elements of the charge. You have to keep that in mind. The question presented to you here is whether this indictment is true or false, whether the defendant is guilty or not guilty as charged.

The presumption on which the American procedure is based is called the presumption of innocence. That means that the defendant is presumed to be innocent. He is not obliged to establish his innocence; that is taken for granted, that is assumed to be true. That assumption or presumption of innocence exists in his favor all through

36  
the trial, until you are satisfied by evidence that that presumption is not true in his case; that, instead of being innocent, as the law assumes him to be, you are satisfied from the evidence that he is, in fact, guilty.

The burden of proving that evidence is on the State. The defendant is not obliged to establish his innocence. The burden of establishing guilt, of proving that the presumption does not exist in this particular case, is on the State, organized society, who make these laws, through its representatives, for the protection and guidance of every member of society, every citizen or resident of this State, every person within the borders of the State. Every person residing permanently or temporarily in this state is protected by these laws, and every one coming within the state is forbidden to violate them; and there is no question of knowledge or ignorance of the law, because ignorance of the law is no excuse. Every man is presumed to know the law, and that is an absolute presumption.

The question for you to decide, therefore, is whether the State has met the burden which our law imposes upon it. The statute is explicit in saying that the evidence must be sufficient to satisfy you of the guilt of the defendant beyond a reasonable doubt.

Therefore the question arises as to what is meant

by reasonable doubt. The terms explain themselves. Doubt means confusion, or perplexity, or uncertainty of idea, of mind, and a reasonable doubt means reasonable uncertainty, reasonable perplexity, and is such a doubt as a reasonable man would properly entertain upon all the facts and circumstances of the case.

The term reasonable shows the quality of mind that a juror must devote to the consideration of the evidence, his reason. You must have neither prejudice nor bias in a criminal case. You are not to decide the case because you do not like the complainant, or you do not like the defendant. You were sworn to consider only the evidence. Your likes or dislikes are a matter of no consequence. You are sworn to take the law from the Court, and the Court has endeavored to tell you what the law is, and, whether the Court is right or wrong, you must not question the law as laid down by the Court, because that is your oath, that you will take the law from the Court.

Now, that means that you must take the Court's definition of larceny. You must not make your own definition of larceny. There is not a definition of larceny for a horse-dealer, and a different definition of larceny for a bond broker, or a clothing dealer, or a merchant, or any kind of professional man. The definition of larceny

is for every citizen of the state, and you must keep that in mind; and the question for you to decide is whether or not the crime of larceny has been committed by this defendant, and you must determine that upon the facts deduced by you from the evidence presented before you.

When it comes to the facts in the case, you are the sole judges. Your obligation as jurors requires you to bring into the jury-box your best intelligence, your best judgment, your closest attention, just what you employ in the most important affairs of your own life; and, weighing the evidence in that way, and watching the witnesses, and considering the evidence as it falls from their lips, the question for you is, what impression it makes upon your minds. If it satisfies you to a moral certainty, if it produces a firm conviction in your mind, that the defendant did what the indictment charges him with doing, it is then your duty to say so by a verdict of guilty as charged; because then you have no reasonable doubt; such a mind as that is made up; it is not in doubt, that is, not in reasonable doubt.

The law does not require that every trace or shadow of doubt, that every possible doubt, should be removed from your mind; for it is questionable whether a mind exists where, in any phase of human life, there is not room for a lurking doubt on any subject, an imaginary

doubt. But a reasonable doubt is one that is based on reason, for which you can assign a reason, a doubt that a reasonable man would have under all the circumstances of the case as developed by the evidence.

If the evidence fails to impress you to that extent, if it fails to satisfy you, to create a moral certainty in your mind that the defendant did as charged in the indictment, then your mind is in a state of reasonable doubt. The evidence must produce more than suspicion on your mind that he is guilty. If it merely creates a suspicion of guilt, no matter how strong that suspicion may be, or creates the thought that he is probably or possibly guilty, then the State has failed to sustain its burden, and the defendant is entitled to the benefit of that doubt, for that is a reasonable doubt.

The question for you to ask yourselves, is, therefore, whether the defendant has been shown, beyond a reasonable doubt, to have represented to the complainant, Smith, that this horse was sound in wind; and, in the second place, whether the State has shown that the horse was not sound in wind; in other words, that the representation made by the defendant was false, in fact; and, next, whether the defendant himself knew that the horse was not sound in wind, was unsound; that he made that statement knowing that he was not stating the truth,

knowing that the statement was untrue; and that it was not made accidentally or through ignorance, but knowingly, wilfully and feloniously, that is, with the felonious intent of deceiving the complainant, and of taking from him his money, \$110; and, next, whether the complainant believed that statement, was deceived by it, and parted with his money on the faith of that statement; or whether he parted with his money for some other reason. Unless he parted with his money on account of that false pretense, then the indictment fails. All these facts must be established to your satisfaction by the evidence; and then, if he parted with \$110 under all the circumstances charged, the offence of grand larceny in the second degree would be complete.

The evidence in this case is somewhat unusual. You have heard the evidence given by the complainant as to what happened to him in his dealings with the defendant, and the Court has allowed other persons to testify before you as to what happened to them in their transactions with the defendant; and the Court, in ruling on the question of the admission of that testimony, did not pass upon the guilt or innocence of the defendant of the specific charge against him. You are dealing with only one charge here, the charge that he, by false representations, was guilty of larceny so far as the complaining witness,

Chester Smith, was concerned, the larceny of \$110 from Chester Smith, on the 27th of August, 1908, and the reason why the Court admitted the other evidence was not to prove him guilty of this charge, but to show criminal intent, which is an essential element in the crime of larceny.

In this connection I will call your attention to a statement of the Court of Appeals, in the case of the People against Peckens reported in the 163rd New York, in discussing this question of the testimony of similar offences:

"On the trial of an indictment for obtaining property by false representations or pretenses --" that is, such an indictment as we have before us now -- "the allegation that they were made with an intent to defraud may be proved by transactions with other parties which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon the complainant--" that is, if you believe that this complainant was cheated, that false representations or pretenses were made by the defendant, and that he relied upon them in parting with his money, if you are satisfied of that by the evidence, the intent may be proved by the other transactions -- "provided the dealings are sufficiently connected in point of time and character to authorize an inference

that the transaction was in pursuance of the same general purpose. Such representations may be proved, although no property was obtained, where the evidence tends to show that, at the time, the defendant was engaged in a fraudulent transaction. While this testimony is not admissible upon the question whether the alleged representations were made --" that is, the testimony of the other witnesses is not admitted to show that he actually made representations to Smith, the complaining witness in this case -- "it is admissible as tending to show a motive to obtain the property in pursuance of a general fraudulent scheme."

The Court of Appeals has, also, held as follows on this subject in the case of Watson vs. The People, reported in the 87th New York:

"When there is an absolute representation, false and untrue and known to be such," -- that is, if the defendant made a false representation here, and knew it to be false -- "the purchaser has a right to rely upon it." I call your attention to this, because the counsel has referred to the maxim of the civil law, caveat emptor, "let the buyer take care." But it is not the maxim of the criminal law, and a man who makes false representations, knowing them to be false, and if the person to whom he makes them believes them to be true, and relies upon them, and

parts with his money on that reliance, violates the law, the Court saying there very clearly "When there is an absolute representation, false and untrue and known to be such --" that is, known to the maker of the representation -- "the purchaser of the property has a right to rely upon it."

"Where a statement is made," the Court proceeds to say, "as the evidence establishes in the case at bar --" that is, the case they were discussing - "that a horse is sound, kind and true, and it is not apparent that it is not, and that immediately afterwards it appears that it was utterly worthless, broken down so as to be incapable of being delivered, a representation is made which is capable of defrauding on its face, and the party is no more bound to take out the horse and try him, for the purpose of ascertaining whether the representation is true, than he would be to try any other article of personal property he is about to purchase, which was apparently whole and yet so defective that it might fall to pieces upon being moved. He has a right to rely upon the representation, and common honesty and morality demand that the fraudulent dealers should not screen themselves by the excuse that the party could have detected the fraud if he has not relied on the representation made."

That is the interpretation of this law by the highest

Court of this State. Therefore, you are to find from the evidence whether or not there were representations made by the defendant to the complainant, and whether or not they were true, and whether or not they were known to this defendant to be untrue; and, if you find that such representations were made with the intent of depriving the complainant of his property, his \$110, and that the complainant absolutely relied upon those representations, and parted with his money on the faith of them under the circumstances set forth in the indictment, you have only one duty to perform, and that is to say that the defendant is guilty as charged. If you are not satisfied beyond a reasonable doubt upon every one of these points, it is likewise your duty to render a verdict of not guilty, and give the defendant the benefit of that reasonable doubt. You are not dealing with the policy or the wisdom of the law. You are to decide solely on facts. Your reason will tell each one of you what impression the facts as he believes them makes upon his mind, and no one can tell you what to believe and what to reject, for that is your sole duty. You are the sole judges of the facts; and, if you believe any facts, it is for you to decide what impression those facts make upon your mind, and then your conscience requires you to proclaim it, without any question of whether or not you

are in sympathy with the law, whether or not you are in sympathy with the complainant or the defendant. You have nothing to do with sympathy, or with any question but an honest, earnest effort to find the truth, and then your conscience will let you know whether you are proclaiming your impression of the evidence or not.

Any requests, Mr. Morgan?

MR. MORGAN: If your Honor please, I respectfully except to the portion of your Honor's charge wherein you read from the two decisions quoted. And I ask your Honor to charge the jury that the fact that the defendant did not take the stand should not be used against him by them.

THE COURT: I so charge.

MR. MORGAN: That's all, sir.

MR. HART: No requests on the part of the District Attorney, sir.

THE COURT: You may pass out, gentlemen.

(The jury found the defendant guilty of grand larceny in the second degree, as charged in the indictment).

THE COURT: Well, Mr. Morgan?

MR. MORGAN: Will your Honor remand the defendant, say, until Monday? I reserve my right to make the motions at that time, your Honor.

THE COURT: I will remand him for a week. That will be next Wednesday, the 21st.