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CASE # 3068

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

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-----X
THE PEOPLE OF THE STATE OF NEW YORK :

-against-

:

Before:

IRVING MENDELSON, impleaded with :
HERMAN KATZ, ALEX MANDEL and :
JACOB TEPLITZ. :

HON. JOHN F. McINTYRE, J.

and a jury.

-----X

Indictment filed January 6, 1921.

Indicted for violation of Section 766 and 751 of the Penal Law .

New York, December 16, 1921.

A P P E A R A N C E S.

FOR THE PEOPLE: DEPUTY ATTORNEY GENERAL CHARLES P. ROBINSON.

FOR THE DEFENDANT: MESSRS. POMPAN, PRICE & LIPPMAN and

MICHAEL EDELSTEIN, ESQ.

Peter P. McLoughlin,
Official stenographer.

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EDWARD J. McGOWAN, a witness for the People,
being duly sworn, testified as follows:

(The witness states he lives at 470 West 143rd street.)

DIRECT EXAMINATION BY MR. ROBINSON:

Q What is your official position? A Clerk in the
Board of Elections.

Q How long have you been employed by the Board of Elec-
tions of the City of New York? A Around 15 years.

Q Was there an election on November 2nd, 1920? A yes.

Q What was that election for? A An election for
presidential electors, an election for State and City ticket--
not a complete City ticket but different State officers and
an election for different amendments; otherwise there were
three ballots used

Q One ballot for presidential electors? A Yes, sir.

Q Another ballot for the State officers? A Yes, sir.

Q And the local offices?? A Yes, sir.

Q Did that ballot for the State offices include the
candidates for the State of New York? A Yes, sir.

Q Who were the Republican and democratic and Socialist
candidates for Governor of the State of New York at that elec-
tion? A Miller for the Republican party, Smith, Democratic
and the Socialist I have forgotten who he was.

Q On that general State ballot did there appear the names
of candidates for member of Assembly? A Yes, sir.

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Q Was there an election in the Sixth Election District of the Eighth Assembly District in the County of New York?

A Yes, sir, there was.

Q Who were the candidates for the Assembly in the Sixth Election District of the Eighth Assembly District?

A Reiss was the candidate of the Democratic and Republican party and Waldman was the candidate of the Socialist party.

Q Were the candidates for Governor and those candidates you have mentioned for Member of Assembly voted for in the Sixth Election District of the Eighth Assembly District-- voted for by the electors? A Yes, sir, they were.

Q Have you here the oath book containing the oaths of the canvassing board of inspectors of the various election districts of the City of New York? A I have.

Q Is there one page upon which you have pasted the oaths of the Board of Canvassing Inspectors of the Sixth Election of the Eighth Assembly District? A Yes, sir.

Q May I see it? A Yes, sir; three that were sworn in at the polls and one regularly appointed.

MR. ROBINSON: I ask that the so-called warrant of appointment of substitute for absent canvassing inspector which is signed Irving Mendelsohn of the Sixth Election District of the Eighth Assembly District sworn to before Samuel Simon be marked for identification.

(Marked People's Exhibit 1 for identification.)

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S A M U E L S I M O N, a witness called on behalf of the
People, being duly sworn, testified as follows:

(The witness states he lives at 514 Sixth street, Manhattan

DIRECT EXAMINATION BY MR. ROBINSON:

Q You acted as chairman of the day Board of the Sixth
Election District of the Eighth Assembly District in the
County of New York at the election of 1920, didn't you?

A Yes, sir.

Q Is this your signature on People's Exhibit 1? A Yes.

Q Did you take the oath of Irving Mendelsohn to that
certificate? A Yes, sir.

Q Is that the man whose oath you took, the defendant in
this case? A Yes, sir.

MR. ROBINSON: I offer this warrant of appointment
of substitute canvassing inspector in evidence.

MR. POMPAN: No objection.

(Received and marked People's Exhibit 1.)

CROSS EXAMINATION BY MR. POMPAN:

Q This appointment which you have identified was what
is known as a substitute appointment? A yes, sir.

Q That was not the regular inspector that was sworn in
but he took the place of the regular inspector? A Yes, sir.

Q On that particular day, as you recall, there was dif-
ficulty in obtaining inspectors? A There was.

Q And it was necessary to take the first man who came
along? A No, sir.

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MR. ROBINSON: I object to that.

THE COURT: He says no.

EDWARD J. McGOWAN, recalled.

BY MR. ROBINSON:

Q Have you there the certificate of service of the Board of Canvassing Inspectors of the Sixth Election District of the Eighth Assembly District? A Yes, sir.

MR. ROBINSON: I offer it in evidence.

MR. POMPAN: No objection.

THE COURT: What does that show?

MR. ROBINSON: It shows that these four men served as canvassing inspectors in this district.

(Received in evidence and marked People's Exhibit 2.)

BY MR. ROBINSON:

Q Have you the tally sheets, the returns made by the Board of Canvassing inspectors of the Sixth Election District of the Eighth Assembly District? A Yes, sir.

Q Turn to the return on the tally sheet for the office of Governor. (No answer.)

Q Are those the only tally sheets and returns that were filed with the Board of Elections for the Sixth Election District of the Eighth Assembly District? A They are.

MR. ROBINSON: I offer them in evidence.

THE COURT: Show what they show, what do they claim ^{the returns} show.

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THE WITNESS: For Governor it shows Smith 236,
Miller 92, Cannon, 146.

Q Who was Cannon? A Cannon was the Socialist candidate.

Q For what? A For Governor.

BY MR. ROBINSON:

Q How many blanks? A Well blanks 14, void 9, the total vote for that district was 528. Quinn, Social Labor, one and Dudley Field Malone, Farmer Labor, 30, making a total vote of 528.

Q Smith's vote was what? A 236.

Q And the Miller vote? A 92, and Cannon's 146, Quinn Social Labor, one and Malone, Farmer Labor, 30- blanks 14, void 9, total 528.

MR. ROBINSON: I ask that the tally sheet be marked People's Exhibit 3- the tally sheet of the general ballot.

(Marked People's Exhibit 3.)

Q These returns are signed by each of the members of the Board of Canvassing Inspectors of the Sixth Election District of the Eighth Assembly District for each office, are they not?
A Yes, sir.

Q And Irving Mendelsohn signed the return or the tally sheet for Governor and also for Assembly, did he not?
A Yes, sir, his name is on there.

Q Now have you the returns? A Yes, sir, the official

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return of the votes cast is supposed to be copied from the tally sheet and it was not filled in; there were no figures at all on it.

Q Have you produced here the ballot box containing the ballots? A Yes, sir.

Q Of the vote cast in the Sixth Election District of the Eighth Assembly District? A Yes, sir.

BY THE COURT:

Q You say the official return contained no figures?
A None at all, your Honor, the official returns, the tally sheet is made out and that showed the individual strokes,-- afterwards the official return is supposed to be made up containing the total. The official return contained no figures at all.

MR. ROBINSON: I offer the ballot box containing the ballots of that Election District in evidence.

MR. POMPAN: I object to it as incompetent, and immaterial. So far as the testimony goes there has been no official return. There is no evidence here as to whether those ballots were the ballots referred to in the tally sheets or in the official returns or that they are in the same condition as they were on the night of the election.

MR. ROBINSON: I will prove that they are in the same condition.

THE COURT: Is there any allegation in the indictment

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charging dereliction of any duty as a public officer?

MR. POMPAN: No, there is not. Of course the law requires that the returns should be filled out and filed.

MR. ROBINSON: But Section 766 of the Penal Law refers to making a false canvass of the vote as well as a false statement, and the fact that the tally sheet was made out is a false statement of the canvass of the vote.

THE COURT: I was wondering if you were going to depend entirely upon the count charging a felony or whether there was another count in the indictment charging a misdemeanor by reason of dereliction of duty.

MR. ROBINSON: No, sir. We intend to stand or fall on the indictment for a felony.

THE COURT: Upon the felony count.

MR. POMPAN: If you do then where is the proof of the charge that they made a false official return.

THE COURT: Now I understand the Attorney General has offered in evidence the original ballots that were cast on the day in question and by that infer that the Attorney General will make an effort to show that there were more votes cast for the Socialist candidate than the returns would indicate. He says, in substance, that a false return was made and he wants to show the false return.

MR. POMPAN: The trouble is that the evidence shows

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that there had been no return made. How could there be a false return if no return was made-- there cannot certainly be a false return when there is no return at all.

THE COURT: I will take the evidence and determine that matter later on.

BY MR. ROBINSON:

Q Is a certificate of election issued to a candidate upon the return as shown by the tally sheet even though the official returns are not filled out? A Yes, sir.

Q In a great many cases the official tally sheet or canvass is filled out from the Board of Elections, is that the fact,

MR. POMPAN: I object to that, Counsel is testifying.

THE COURT: I will exclude that.

MR. POMPAN: I want to take a general exception to all reference to the word return or to any return or to any reference to it.

THE COURT: As I understand it the return was filed but that return contained no figure.

MR. POMPAN: The law provides for a return and specifies what the return shall be. The mere filing of a blank paper is no return.

THE COURT: It is characterized as a return and it is an official return furnished to the inspectors by the Board of Elections. It would appear here from what has

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been testified to thus far that there were no figures at all upon the return. Now why wouldn't that amount to a false return?

MR. POMPAN: Because there is nothing in it which is false.

THE COURT: The record as I understand it shows that Reiss as the Democratic candidate received 184 votes, and Reiss as the Republican candidate received 72 votes and Waldman, the Socialist received 238 votes.

MR. POMPAN: That was the contention of the Attorney General that the return contained such figures, but as an actual fact what Mr. McGowan has produced is nothing more than an ordinary scratch paper on which to keep a record of figures as the votes are being figured. These are not the returns because the Statute provides two different methods. It provides that when the vote is counted a calculation shall be kept, and that one of the men shall put a stroke for every vote called. Then it provides for an official return. Now here the Attorney-General has confused the issue by taking the tally sheet, the figuring sheets as we may call them. They are not the returns and cannot possibly be the returns.

THE COURT: I will take the testimony.

MR. POMPAN: I object to it.

THE COURT: I will have to determine here, as a matter of law, whether the returns filed as required by

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law contained no figures when, as a matter of fact, there were figures upon another piece of paper and whether that amounted to a false return.

MR. POMPANE: May I at this time say that I object to your Honor's ruling as to any testimony referring to the tally sheets as a return. I move to strike out the testimony with reference to any calculation figures upon the ground that no basis has been laid for its acceptance. There is no evidence of any calculation figures made by these officials.

MR. ROBINSON: The statute may it please the Court, does not state that any inspector who attempts to make a false return-- it says "Any inspector who intentionally makes or attempts to make a false canvass". I refer now to people's Exhibit 3 which states at the head of it, "Official Tally of the Votes Cast for the Office of Governor", and it is signed by the Board of Canvassing Inspectors for that office. The making out of that official tally constitutes a false canvass of the vote. From that official tally the Board of Elections has the authority to issue a certificate of election to any candidate who is shown to be elected by the official tallies filed by the Board of Canvassing Inspectors. I refer now to file 8 of the indictment.

THE COURT: The question is whether there was a false canvass of the ballots in the way referred to in

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the indictment.

MR. POMPAN: If my friend will read the indictment-- this is a superseding indictment, if your Honor please, he will notice that the recital clause, or the indicting clause does not differentiate. It says at the bottom of the page, "Did make a certain false tally or statement of the result of the canvass." Not of the calculation but of the result.

MR. ROBINSON: A false statement of the result on this official tally sheet.

THE COURT: The result is determined by the canvass.

MR. POMPAN: The statute provides that these are only calculating sheets -- it provides what shall be figured on

THE COURT: Let me read the language of the Statute (reading). I will take the testimony.

MR. POMPAN: I except.

MR. ROBINSON: I offer the ballots in evidence, subject to its being shown that they are in the same condition as they were on the night of the election.

MR. POMPAN: I ask that that reservation be divided into two parts so that I can take the proper exception.

THE COURT: They have got to show before the ballots will become competent evidence that they are in the same condition now that they were on Election night. I will take them tentatively.

MR. POMPAN: I object to them at this time.

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BY MR. ROBINSON:

Q Were those ballots counted before the Grand Jury?

A yes, sir.

Q Of the Sixth Election District of the Eighth Assembly District counted before the grand Jury? A Yes, sir, they were.

Q By you and two of the Grand Jurors? A Yes, sir.

MR. POMPAN: I object to that at this time.

I think there ought to be a more orderly method of proof. There is a rule of-law that the foundation must be laid before any such testimony can be received.

THE COURT: That is quite true unless there be an agreement between counsel that the proof may be taken subsequently.

MR. POMPAN: There is no such agreement.

MR. ROBINAON: Are you willing to take the count before the grand Jury or do you want this jury to count for itself?

MR. POMPAN: You know how to try your case.

MR. ROBINSON: Do you want to save that time?

THE COURT: I won't take the count before the grand Jury, I will take the count here.

(The ballot box referred to is marked people's

Exhibit 4. *(identification)* x

CROSS EXAMINATION BY MR. POMPAN:

Q On Election night how many names were upon the ballots voted on. I am referring to all the candidates for

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office? A On the presidential ballot there were 45 electors.

Q 45 from each party? A yes, sir, I think there were something like six parties.

Q And how many in addition to those on the ballot?

A On the general ballot there were six names for Governor, six names for Lieutenant Governor, six for Secretary of State, six for Comptroller and six for State Treasurer and six for Attorney-General and five for Engineer and Surveyor, and none for Associate Judge of the Court of Appeals, six for United States Senator, three for Justices of the Supreme Court, three for Justices of the City Court, four for Justices of the Court of General Sessions, two for Congress, two for State Senator, four for Member of Assembly and in addition to that there was an amendment ballot containing one amendment, and one proposition with four answers.

Q Now you say there were 45 for presidential electors?

A Yes, sir.

Q Do you recall the size of the presidential ballot that year? A Why I should imagine it was perhaps one-half or one-third as long as this sheet here (indicating).

Q That is about 24 inches? A Yes, sir; I would say about 18 inches in length or whatever you would call it.

Q You recall at that particular election the election machinery practically broke down? A No, sir, it did not.

Q Afraid of a reflection on the Board? A I am not afraid, but it isn't true; it did not break down.

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Q You know there were Boards that worked until 12 o'clock the next day? A Yes, sir.

Q Quite a difficult task because, under the Statute, each name you had to read off? A yes, sir.

Q And tally each name as tallied? A yes, sir.

Q So that you would have for presidential electors three times 45? A Not in all cases because the presidential elector is different from the general ballot for the presidential ballot it is a party column ballot and where there was no splits you wouldn't have to do that.

Q Where there were splits you would? A Yes, sir.

Q If you multiply all these names by 528 you would get the number of times that the inspectors of election had to call that night excepting where there were straight votes in presidential electors? A I wouldn't say-- there were a few exceptions to the presidential ballot. I want to be right with you and tell you what is coming.

Q Suppose we say ^{one-} half of those were correct as to presidential electors? A Yes, sir, -- they were absolutely correct.

Q Do you know at this time how many people handled these ballots from the time they left the polling place on the night of Election? A Yes, sir, I will say that because the ballots are delivered to the police precinct on the night of Election by the inspector; they are then kept sealed in the custody of the police precinct until they were brought into the

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Grand Jury room and opened by me and counted by me, and there were two of the Grand Jurymen making the count with me; they sat next to me while we were doing it.

Q You say they were kept where? A In the police precinct

Q From the time of the closing of the polls until brought to this Court? A Yes, sir.

Q How many days was that? A Well, I don't remember when they were brought to the Grand Jury but the minutes will show that.

Q I haven't got the minutes, but approximately? A That I don't remember. I think about three or four months or whatever it was -- two months was it?

Q How long were they in the precinct before they were brought to Court? A I think that was sometime in December they were brought to the Grand Jury room.

Q About two months? A I imagine so.

Q Who had the keys to the boxes? A The box keys are in the precinct.

Q Do you know whether a key hung on the wall next to the Lieutenant's desk and was accessible to people walking in and out? A No, sir, they are not as far as I know but these are things that can be testified to by the people in the precinct better than I can.

Q Why do you say they are not. I want to know whether or not there was a possibility of somebody opening that lock, and who had the key, wasn't it possible for somebody who had a

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key to open them? A That is something that the people in the precinct will testify to.

Q The boxes were held in the station house there for a few months? A Yes, sir.

Q Now from the time that they left the Board of Elections until the present time in whose custody had these boxes been in? A The same police precinct.

Q They had not been in the Board of Elections? A No, sir, taken from there to the Grand Jury room, and back to the police precinct by one of my men and an officer.

Q And the keys to that box was in the hands of the Police Department? A Yes, sir.

THE COURT: I take it that what you are trying to show now is under the rule laid down in the case of Livingston against Dady, the Brooklyn case. You have a right to show accessibility, or such access on the part of others from which the inference can be drawn that there was opportunity to tamper with the ballots.

BY MR. POMPAN:

Q Are you acquainted in that precinct? A No, sir.

Q Do you know the locality? A No, sir.

Q Did you ever live there? A No, sir.

Q You know that the Sixth street police station is a very active police station? A yes, sir, I do, I have been in it.

Q Do you know where these boxes were held, was it right in a public place? A No, sir, I do not.

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Q You do not? A No, sir.

Q Did you see them there at all? A No, sir.

Q Did you go to get them? A No, sir.

THE COURT: That could hardly be expected. Mr. McGowan's duties required his presence elsewhere. I don't think anybody will dispute the fact that he is a very competent man in the position that he occupies.

MR. POMPAN: I appreciate that.

THE COURT: I have very grave doubt about the right of an inspector to put a ballot box in the hands of police officials and have the police take them to the station house. The statute says they must be returned to the Board of Elections.

MR. POMPAN: Here they are retained for two months in the Police Department before they are brought to Court, and are accessible to anybody.

THE COURT: In the Livingston case which was a contest over the office of Sheriff of Kings County years ago it appeared that the ballot boxes were taken to a station house; they were placed in a receptacle in the station house. It appeared in that case that people had access to the place where the ballot boxes were, going in and coming out. In addition to that it appeared that the key was in some commanding officer's desk and it appeared also, in that case, that there were other keys like that key and that all the keys in other places

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would fit the lock of the ballot box in the Dady-Livingston contest. Now it was held there that that afforded some evidence from which the inference might be drawn that the ballot boxes had been tampered with or were tampered with. Now you have in Colorado another decision almost precisely on the same lines as the one that I have just mentioned. Then I think you will find in my own case that there was evidence which was submitted to the jury by Judge Sawyer, from the upper part of the state, that the ballot boxes were accessible,-- that the keys were easily obtained and then, as you may remember, there was the broader proposition which was laid down that the boxes should have been returned to the Board of Elections and not the police department. This is a question that comes squarely up to me, and I am inclined to hold that way.

BY MR. ROBINSON:

Q Who brought the ballot boxes from the police precinct to the Grand Jury? A One of the employees of the Board of Election, Michael Gusack who handed them over to me.

Q Did he bring with him at the time the key for the ballot box so that you could open it? A I think he did not; I had one.

Q And with that key you opened it in the Grand Jury room? A Yes, sir.

Q After they were counted before the grand jury did you

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put them back into the box yourself? A Yes, sir, I did.

Q Did you lock the box? A Yes, sir.

Q Did you seal it again? A No, sir, just locked it.

Q What did you do with it after you locked it?

A Gave it to Cusack.

Q What did he do with it? A Brought it back to the precinct.

Q Who brought the ballot box here today? A Cusack.
this

Q Has ~~he~~ been down here before? A Down here several times for this trial.

Q Who brought it here? A Cusack.

Q Who took it back? A Cusack.

Q Is Cusack in court? A Yes, sir.

Q On the presidential ballots that have been referred to are there many split ballots for presidential electors?

A Not many.

Q Can you state approximately how many there would be about 500 ballots? A That would only be a mere guess; I should imagine that the presidential electors that there are not more than -- well -- ten to 15 per cent.

Q As many as that in a presidential election? A Ten per cent I guess especially down in this district. You find a distinction in some district where the Socialist vote is big, certainly not more than 10 per cent.

Q The Election Law provides, does it not, that the presidential ballot may be separated into straight and split?

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A Yes, sir.

MR. POMPAN: Objected to.

THE COURT: You opened the door for some of this.

I took it for granted, and therefore I allowed you to conduct your cross examination along that line-- I don't think you are going to dispute that law.

Q The presidential ballots they were placed in a separate box? A Yes, sir.

BY MR. POMPAN:

Q Can you testify of your own knowledge that from the night of election until these boxes were brought into court that the lieutenant or some police officials who had a key did not open that box? A Of course not.

Q How many keys did you deliver with these boxes on the morning of Election? A They was supposed to be in each precinct a key for every box where an election is held at any polling place.

Q Are those keys interchangeable? A Yes, sir.

Q So that any key could open any box? A Yes, sir.

Q You testified that you were the only one that handled the ballots? A I said I counted them.

Q Who handled them? A I did, before the Grand jury and two of the grand jurors helped me count them; they sat right next to me.

Q Did any one other than yourself handle any one of those ballots? A Yes, sir, these two grand jurors.

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Q Were those ballots before the Board of Canvassers?

A No, sir.

Q They were not? A No, sir.

Q Will you say that more than those two grand jurors handled these ballots? A Yes, sir.

Q As far as you know? A Yes, sir.

Q But you don't know what has happened in the station house right after election? A Of course not.

M I C H A E L T. C U S A C K, a witness called on behalf of the People, being duly sworn, testified as follows:

(The witness states he lives at 189 Greenwich street.)

DIRECT EXAMINATION BY MR. ROBINSON:

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

Q How long have you been employed by the Board of Elections of the City of New York? A 15 years the 5th of July last.

Q Did you bring this ballot box which Mr. McGowan is sitting on to court this morning? A Yes, sir.

Q Did you bring it to court this morning? A Yes, sir.

MR. POMPAN: I will concede that Mr. Cusack will corroborate Mr. McGowan to the effect that on the order of the Board of Elections he took this box from various places and brought it back and forth.

MR. ROBINSON: Will you concede that Mr. Cusack carried that ballot box from the 25th Police Precinct,

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where he got the box, to this Court and produced it before the Grand Jury in the County of New York?

MR. POMPAN: Certainly.

MR. ROBINSON: And that he took it back the same day?

MR. POMPAN: Yes.

MR. ROBINSON: And that he has produced that same box in this courtroom from the precinct, the 15th Police Precinct?

MR. POMPAN: Yes.

MR. ROBINSON: I will ask this question-- will you also concede that did not go out of his possession from the time that he had it?

MR. POMPAN: Yes. I will concede when he had it in his possession it was in his possession.

BY MR. ROBINSON:

Q From the time you got this ballot box containing ballots from the 15th Police Precinct until you took it back to the 15th precinct, with the exception of the time that Mr. McGowan had it before the grand jury were you right with the ballot box?

MR. POMPAN: I will concede that he was-- that he was with the Ballot box when he took it from the precinct.

THE WITNESS: I have produced that box before the grand Jury room on December 6th, 1920, and that box has been brought right back after that to the 15th

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Precinct about 2 o'clock on the afternoon of December 6.

Q December 6th? A Yes, sir, December 6th, 1920.

Q On the various days that you took that box, or got it from the police precinct until you took it back to the police precinct was it constantly in your sight? A Yes, sir, except the time I was barred out of the Grand jury room, of course, outside the door.

Q Except when you delivered it to Mr. McGowan? A Yes,

Q Inside of the Grand Jury room? A Yes, sir.

Q You took it from the hallway of the Criminal Courts building into the Grand Jury room, and it was constantly in your sight? A Yes, sir.

Q Did anybody open it in your presence? A No, sir.

Q Did anybody do anything to it? A No, sir.

Q Were the ballots taken out of it? A No, sir.

Q From whom did you get it in the police precinct station? A From the lieutenant.

Q What is the name of the lieutenant? A I could not tell you.

Q Is he in court? A I don't know, sir.

Q Lieutenant Lennon -- is that the man from whom you got it? A It looks like him.

CROSS EXAMINATION BY MR POMPAN:

Q Did you get the key at the same time that you got the box? A What key?

Q For the box. On the day when you brought it down

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to the Grand Jury did you also get a key for it? A No, sir, I did not, that is I brought a key for the purpose of opening it.

Q You brought another key? A Yes, sir.

Q From the Board of Elections? A Yes, sir; there is only one key brought for that purpose.

Q You brought that one from your office? A Yes, sir.

Q And gave it to Mr. McGowan in the Grand jury room?
(No answer.)

Q There was another key in the station house? A Yes.
There was another key in the station house.

Q The keys that you had could open any box in the City?
A Pretty near.

Q So that was true of every other box and every other key? A The keys are supposed -- one key is supposed to be for the locks on these boxes.

BY MR. ROBINSON:

Q Do you know what room you took it out of in the station house? A A room upstairs for that purpose, nothing in it but election material.

Q Was it locked? A Yes, sir, and sealed the door there with paper seals.

Q Did a policeman unseal it for you? A The policeman did not break the seal until I went up there with them.

Q Did he break the seal then? A Yes, sir, and opened the door.

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Q You got the box? A Yes.

Q When you returned it did you put it back in the room?

A No, sir, I didn't go upstairs this last time because the man who gave it to me and who broke the seal first off brought it up for me, but it was safely landed in the same room again.

ANTHONY BRENNAN, a witness called on behalf of the people, being duly sworn, testified as follows:
(The witness states he is a police officer attached to the 15th precinct.)

DIRECT EXAMINATION BY MR. ROBINSON:

Q Were you at the polling place of the Sixth Election District of the Eighth Assembly District on the night of November 2nd, 1920? A Yes, sir.

Q Did you accompany the Board of Canvassing Inspectors to the police precinct of the 15th Precinct with the ballot boxes containing the boxes? A yes, sir about half past eight in the morning.

Q About half past eight in the morning? A About half past eight.

Q The next morning after the election? A Yes, sir.

Q Did you carry the ballot boxes yourself? A No, sir.

Q Who carried them? A The Board of Canvassers.

Q Was this defendant with you at that time? A yes, sir.

Q What did you do with the ballot boxes containing these ballots? A Well I was with him only for his protection; they

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carried the boxes.

Q How did they carry them? A Under his arm, to help one another along, they carried two boxes -- there were five or six boxes and only four men on it.

Q Where did you put them after you got into the police precinct? A In the room assigned for that purpose.

Q Where is that room? A One flight up.

Q What do you call that room? A No name for it except that it is a store room for that purpose.

Q For the purpose of storing election material, ballot boxes and supplies? A Yes, sir.

Q Did you see it put into that room? A yes, sir, I was upstairs.

Q Was the ballot box sealed at the polling place?
A Yes, sir, in the public school.

Q Did you see it sealed? A Yes, sir.

Q Would you recognize the seal if you saw it? A yes, sir.
BY MR. POMPAN:

Q This room in which these boxes were put also had shelves for various supplies? A I don't know that it has any shelves; that I can't say.

Q papers and things of that kind in it? A No, sir.

Q What other supplies were there? A I don't know of any other.

Q Didn't you testify there were supplies in that room?

MR. ROBINSON: May I finish my direct examination?

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Q What did this seal have on it that was placed upon the ballot box? A The regular Board of Elections seal.

Q For the Sixth Election District of the Eighth Assembly District?

MR. POMPAN: I object to counsel testifying.

Q Did you lock it with a key? A Nobody locked it. The chairman of th Board locked it.

Q What did you do with the key? A I had the key all the time.

Q What did you do with it? A I turned it in to the station house.

Q To whom? A To the lieutenant at the desk.

Q What is his name? A Diamond I think.

Q Was this room in the police precinct station house locked at that time? A No, sir, there was a man assigned there to receive all the ballot boxes and the ballot material which was brought in.

Q What was his name? A Snyder, I think, John Snyder.

Q Is he in court? A Yes, sir.

CROSS EXAMINATION BY MR. POMPAN:

Q Where is this room with reference to the station house, is it on the first floor or the second? A One flight up at the head of the stairs.

Q Is that on the same floor ^{that} of the Detective Bureau of that precinct is on? A The Detective Bureau is to the right.

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Q On that particular floor-- isn't there a large number of people who come to make complaints to the Detective Bureau? A Well, that is so; the Detective Bureau is to the right.

Q This precinct has how many patrolmen assigned to it? A About nearly 100 men.

Q They have nearly 100 men? A Yes, sir.

Q Each one of those men going to the dormitory pass through there? A Yes, sir, they have to pass through there, by the door of the room but not through the room.

Q By the door of the room? A Yes, sir.

Q So during the day a large number of people are passing in front of this room? A Yes, sir.

Q Did you see the man assigned to that room yesterday? A No, sir, I had not been there; I had been on the sick list.

Q A week ago you didn't see any policeman standing by the door watching it? A No, sir.

Q The only time they have a man at that room is on Election day? A Yes, sir; that is all I seen.

JOHN L. SNYDER, a witness called on behalf of the people, being duly sworn, testified as follows:
(The witness states he is a police officer attached to the 15th precinct.)

DIRECT EXAMINATION BY MR. ROBINSON:

Q What duty were you assigned to at the last election?

A Election duty; to receive all the paraphernalia used at

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the Election.

Q That is the Election of 1920? A Yes, sir.

Q You were assigned to that duty in the station house of the 15th Police Precinct? A Yes, sir, I was.

Q Were the ballot boxes from the Eighth Assembly District brought there? A They were.

Q What did you do as they were brought into the station house? A The boxes are brought to the station house by the entire Board of Elections of the district and they are examined by me to see that the seal is placed there on, there is a seal over the whole so that nothing can be taken out or placed therein. They are directed to be brought to a room on the second floor. Usually the whole election Board goes accompanied by the officer assigned to the polling place.

Q On the morning after the election of November, 1920, did you go into this room where these ballot boxes were? A I did.

Q Did you see whether the ballot boxes from all the election districts were placed there? A Well at 8,15 a.m. November 3rd, the boxes of the Sixth Election District of the Eighth Assembly district arrived there.

Q Were you there when it arrived? A Yes, sir.

Q Did you see it placed in this room? A Yes, sir, Patrolman Brennan accompanied the Board upstairs and I remained downstairs.

Q Did you see the box up there afterwards? A After the

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election canvass was completed the boxes were returned. I went up into that room and counted every box in the room to see if they tallied with the boxes sent out prior to the election and they did.

Q The boxes were all there? A Yes, sir, the boxes were all there.

Q All the boxes from every Election District in the 8th Assembly District? A Yes, sir.

Q What did you do then? A I waited until the captain came down and he in turn accompanied me to the Second floor but before that I typewrote a piece of paper stating "This room locked and sealed by order of the captain. I took that piece of paper to the second floor accompanied by him, with a jar of mucilage and pasted that seal upon the door, locked the door and placed that seal upon the door.

Q The door of the room in which the ballot boxes of the 8th Assembly District were? A Yes, sir.

Q What did you do with the key to that room? A The key is placed on the key rack, in the captain's room.

Q In the captain's room? A Yes, sir, the captain's room is a small room adjoining the desk in the station house about, I might say, directly off from the desk. The lieutenants have access to that room as well as the captains

Q Was the room sealed all the time? A The room had been sealed as far as I know until the boxes were taken out on order of the Board of Elections.

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Q Did you go by it from time to time? A I had to pass that room practically every day except on the 7th day. My orders were from the captain to see that that room was locked and sealed at all times. I never did insert a key in it but the seal had never been touched except on order of the Board of Elections.

Q Except on the day on which Cusack took the ballots?
A Yes, sir.

Q Could the door be opened without breaking the seal?
A No, sir.

BY THE COURT:

Q What floor was it on? A Second floor, one flight up.
BY MR. ROBINSON:

Q Is that true up to today? A Well, there are different boxes in there now.

Q All these boxes have been in there in that room locked and sealed up to the present time?

Objected to.

A That I could not answer, I don't know, the last time when I made a tally of the boxes and placed a seal thereon I did not compare the boxes-- for this election.

CROSS EXAMINATION BY MR. POMPAN:

Q This seal which you say you used was an ordinary piece of paper? A Yes, sir.

Q You typed a slip of paper that is commonly used in station houses? A Yes, sir, regular paper used for commu-

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nicating with the station house.

Q There is a lot of that paper? A Yes, sir.

Q What words did you put on it? A This room locked and sealed by order of the captain, and the captain signed his name thereon.

Q How did you fasten that on the door? A With mucilage on the back, pasted it on such a manner as to form an "E"

Q How many windows in that room? A Two windows but these windows cannot be seen going up the building.

Q I ask you a simple question. A Two windows.

Q How often have you tested that door? I I never did try it, but I have seen the seal always the same.

Q How many times did you try that door from election day until the time these boxes were removed? A I never did try it.

Q On the day when these boxes were brought into the premises you say you were downstairs? A Yes, sir.

Q How long was the room open and unmanned that day, for how many hours? A This was 8.15 and around noon we closed and locked the door; this door had been closed when I got there but not locked.

Q So for four hours any person on that floor could have entered that wanted to? A Yes, sir, they could have.

Q Now when was the last box put into the room, the last election box put into that room on that day? A I don't just remember that, I just do recall that from notes made of

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the last time the 6th Election District box was brought in.

Q Now on that particular day there were some boxes arrived later than the 8th district? A Yes, sir, I remember--

Q I just asked you if there was. Answer the questions. There were more boxes brought into that room? A yes, sir.

Q After the 6th Election District boxes brought in?

A I am not sure.

Q From 8 to 12 o'clock, will you swear there were no other boxes brought into that room? A No, sir, I will not.

Q Do you recall that there was an overflow of boxes that day? A No, sir, no overflow in the 15th precinct.

Q Did you have any boxes standing downstairs before taking them upstairs until you arranged the space? A When the canvassing Board arrived there, may be two would arrive at the same time and they would place their boxes on the floor and it would be sometime before their being placed upstairs-- if that is what you mean.

Q So that for a certain period of time a lot of these boxes were waiting in the main room or what you call the desk floor of the station house and they were accessible to a lot of people? A Not more than two minutes.

Q How many boxes did you have standing downstairs about 8 o'clock on the morning of that day? A None.

Q Do you remember that very clearly? A Yes, sir.

Q Do you remember now how many Boards turned their boxes over to you about 8:15? A I think there was one more besides

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the 6th Election District of the 8th Assembly District; I think that was next to the last Board.

Q Don't you know that one Board came in after 12?

A 12.02 is on my record.

Q What other duties did you have other than keeping track of these boxes? A Prepared all the election material to send to the Board of Elections.

Q You do that downstairs at the desk? A Yes, sir.

Q You were a clerical man? A Yes, sir.

Q During the time you were doing that there was nobody ^{is} in the room? A The doorman assigned upstairs?

Q Will you positively swear there was somebody in that room all the time? A Yes, sir.

Q When they were received? A Yes, sir. The man upstairs could see the boxes when the officer would bring them up.

Q I asked you whether you are willing to swear during all the time from midnight of election night until the next day at 12 o'clock there was a man constantly on duty in that room. Will you swear to that? A No, sir, I will not swear to that; that is not so.

Q That is there was not a man there? A No, sir.

Q Did you put in all the election boxes in that room?

A Did I place them therein? I did not.

Q Were all the boxes of that election district the 8th district put in one room in the 15th Police Precinct? A If I remember correctly there is one election district of the 8th

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Assembly district not in the 15th Precinct; one district of the 8th is not in the precinct.

Q I asked the simple question whether all the boxes that were brought to the 15th were placed in one, two or three rooms? A I beg pardon. You did not ask me that question before.

Q I am asking you now. A Whether all the boxes from all the polling places located in the 15th Precinct -- they were all placed in this room.

Q No overflow? A No, sir.

Q There was no time when two or three Boards arrived at the same time? A Downstairs there were two boards or probably three that might have come in in the lapse of five or ten minutes and they would stand there while I examined the seals and directed the patrolman to place them in the room.

Q In addition to the patrolmen who entered that room? A The canvassing inspectors.

Q Were all the Boards that brought boxes into that room? A Yes, sir.

Q So in addition to the patrolmen all the canvassing inspectors from the various Boards were going in and out of this room? A Yes, sir, that is right.

Q You said the key was placed in the captain's room. What persons had access to that room, lieutenants? A Yes, sir.

Q Anybody else? A The clerical men and the cleaners.

Q Who else? A I don't know of anybody else.

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Q Anybody selt in by the lieutenant? A An inspector or any superior officer.

Q The doorman? A He is the cleaner.

Q You also have women cleaners come in there? A No, sir, no women cleaners in the 15th precinct.

Q That is a pretty big station house? A yes, sir.

Q This particular room is right adjoining the Detective Bureau's room? A Yes, sir, adjoining the Detective Bureau.

Q A large number of people come in there daily? A Yes.

Q Go to and from there? A yes, sir.

Q Do you make a round of inspection of that door every day? A Every day I was working my orders were to see that the seal was properly on that door.

Q You were a clerical man? A Yes, sir.

Q Did you make an entry upon the police blotter of certain days you inspected the seal on the door? A No, sir.

Q You might have missed a couple of days? A I said the days I was working; I get a day off every seventh day.

Q You don't know what may have happened on that 7th day? A I would see if the seal was broken.

Q Assuming that somebody had placed something up underneath the glue, you could have put a knife in there and then replaced it? (No answer.)

BY MR. ROBINSON:

Q Were there any other boxes in this room besides the

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boxes containing the boxes of the election of 1920 at the time these particular ballots of the 6th Election District of the 8th Assembly District were produced? A There were some other boxes in the room.

Q Besides the election of 1920? A Yes, sir.

Q What election was that? A I don't just recall; I think there were some boxes-- it may have been in the Delahanty-McIntyre contest.

Q The windows of that room we have referred to. Will you describe the condition of the windows? A In entering the building, the 15th Precinct, and going upstairs the windows are not visible from the stairs, in the interior of the building; they are on a sort of a skylight to the next building, or an airshaft.

E D W A R D J. L E N N O N, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ROBINSON:

Q How long have you been connected with the 15th Precinct?

A Close on to 13 years.

Q Have you been there continuously since the election of 1920? A Yes, sir.

Q During the three years have you been there continuously? A Yes, sir.

Q Did you see this room that has been testified to where the ballot boxes were placed? A Yes, sir.

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Q That is up to the present time except when the ballots were placed in there and taken out has it always been locked and sealed? A Well to the best of my recollection it has been sealed.

Q Did you see the seal? A I saw the paper on the door.

Q Where was the key to the room? A At that time it was on a key board in the captain's room.

Q Did you see it from time to time? A No, sir, I did not only had occasion when Mr. Cusack came with a Court order to return the ballots of the 6th Election District of the 8th Assembly District over to Mr. Cusack to be presented to the grand Jury.

Q Those are the only times that the door was opened?
A To my knowledge, yes, sir.

Q Now, from time to time does the Police Commissioner of the City of New York issue orders? A yes, sir, general orders.

Q Are those general orders printed? A Yes, sir.

MR. POMPAN: Objected to.

THE COURT: I don't know what it is leading up to.

Q Are those orders numbered? A yes, sir.

Q I show you a document signed in printing Richard E. Enright, Police Commissioner which purports to be general orders, No. 39 dated October 19th, 1920, and I ask you if that order was issued and delivered to your precinct?

Objected to.

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THE COURT: Are you going to dispute that such a general order was made by the Commissioner?

MR. POMPAN: What effect has it upon this question? How is it binding here that the Police Commissioner told somebody to do something else.

THE COURT: From what I read I should judge that the orders are directly in conflict with the Election Law.

(Admitted and marked People's Exhibit No. 5)

Q Are the orders of the Police Commissioner obeyed?

A Yes, sir.

Q Were these orders obeyed? A As far as I was individually concerned they were, yes, sir.

CROSS EXAMINATION BY MR. POMPAN:

Q You have been on desk duty for a long while there?

A Yes, sir.

Q That is one of the busiest precinct in the city?

A One of the busiest.

Q In other words people walk up to the Detective Bureau?

A Yes, sir.

Q And officers pass the door where these boxes were?

A Yes, sir.

Q You were not charged with the duty of examining that door every day, and you can't say that sometime or another that door might not have been opened by the captain? A No, sir.

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

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Q As far as you know somebody might have walked in there?

A I don't know anything about that.

Q The captain had this key on a key rack in his room near the door? A yes, sir.

Q That is only a short distance from the door -- you could put your hand in and take the key out? A No, sir; right directly behind the door.

Q But not so that a distance of a hand could not reach behind the door? A Yes, sir.

Q The captain has a lot of people coming in there to see him? A Yes, sir.

Q Police officers have occasion to go in there? A yes.

Q Somebody could possibly take the key and replace it after using it? (No answer.)

Q The captain isn't there all the time? A During the captain's absence nobody has access to this room outside of the lieutenant, the clerical man and the cleaner.

Q The cleaners could have replaced that key-- there was opportunity if anybody wanted to do something? A Yes.

Q Can you tell us how many people enter the captain's room a month? A No, sir, I could not.

Q You can't estimate that at all? A No, sir.

Q Complainants and officers? A No, sir.

Q But a considerable number of people? A Yes, sir.

Q You would say more than 50 a month? A Yes, sir, probably a couple of hundred, different representatives of

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the Labor Union and other people might have gone in there.

Q So during the month a couple of hundred people go in and out of the room? A Yes, sir.

BY MR. ROBINSON :

Q Counsel said there was opportunity to get that key. I ask you if there was opportunity to get that key and open the door of this room. Would you say that the opportunity, from your experience, was an open opportunity or one that was rather remote?

MR. POMPAN: I object to that.

THE COURT: The question is badly framed.

Q Outside of those who were complainants who were permitted to go into the captain's room? A Only the lieutenant, the clerical man and the attendants.

Q And the cleaning women? A Well, that is the attendants as we call them.

Q Outside of these people that you have spoken of, that is the lieutenant and the attendant, was there opportunity for anybody else to get that key and open the room and get the ballots out?

Objected to. Question excluded.

Q How far was this door from the captain's room?

A Which door?

Q The door to where the ballot boxes were kept? A On the second floor.

Q The captain's room was on the first floor? A Yes, sir.

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Q But in order to get into that room a person would have to get the key from the captain's room, go upstairs and open the door, would he not? A Yes, sir, he would have to do that.

Q The key is hanging on the captain's desk, isn't it?

A Right there, yes, sir, the key has since been changed.

Q The key to that room has been on the captain's desk?

A Yes, sir.

Q Isn't it likely that the captain would have noticed that that key was gone for any period of time?

Objected to. Question excluded.

BY MR. POMPAN:

Q When was the lock on that door changed? A The lock was not changed; the placing of the key was changed.

Q I understand you to say the placing of the key was changed? A Yes, sir.

Q Where has it been kept the last two months? A Since the last election it is kept in front of the lieutenant.

Q Since November, 1920 or 1921? A Since the new commander has arrived.

Q The key is now in front of the lieutenant? A Yes.

Q Or in back of him? A No, sir, right directly in front of him.

Q That is near where? A A cubby hole, as you call them; it hangs right there.

Q A man looking from behind the lieutenant's desk could

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readily see that key? A No, sir.

Q It was a secret previce? A No, sir, not a secret crevice, but so situated that you can't see it unless you are behind the desk.

Q That was changed because of the fact that the lieutenant wanted greater protection for the key? A No, sir, because the commanding officer--

Q That is, the comanding officer thought the key was in the wrong place before this? A I don't know what he thought.

Q So now he put it where nobody can see it? A Nobody has access to it but the lieutenant.

Q But prior to now that key was where everybody that is, the class of people you specify, could see it?

Objected to.

Q I say that those who had occasion to go into that room for any purpose might have seen it? A It hung on the keyboard.

BY MR. ROBINSON:

Q How many other keys were on the keyboard there?

A Probably 60.

Q Was there a tag attached to this key? A Yes, sir to each and every key.

Q How was that tag written out, what did it state?

A Key to the ballot room door-- every key is distinctive, to the ballot room, fire room and so forth.

Q The words "Key to the ballot room" were they suffi-

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sufficiently large that a person standing three or four feet away could tell that that was the key to the ballot room? A No, sir; that would be impossible.

Q He would have to go up and look at these particular keys and take them off the rack and examine each particular tag? A yes, sir.

Q He might have to examine 60 before he got to the key of the ballot room?

Objected to. Objection sustained.

BY MR. POMPAN:

Q But those who were acquainted with the keys or who had taken the keys from the office -- A Those who were acquainted?

Q Or got those from the officers who had occasion to handle them? A Yes, sir.

BY THE COURT:

Q On what floor was this room in which the ballot boxes were placed? A The second floor known as the lieutenant's dormitory.

Q Do you mean by that that a number of people meet there? A Only the lieutenant; they have quarters by themselves.

Q How many doors are there that enter or open into that room? A One.

Q Is there a transom over that door? A No, sir, the door is built without a transom.

Q Are there windows? A Two windows.

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Q The windows are about how high from the surface of the street? A Well, I should say about twenty feet, eighteen to twenty feet.

Q And these ballot boxes which were enclosed in that room at the time about which we are speaking -- who were those ballot boxes furnished by? A Furnished by the Board of Elections.

Q And they were furnished when? A The day prior to election, trucks deliver them to the various polling places in each precinct with a representative of the Board of Elections.

Q That is an officer from the Board of Elections?

A Yes, sir, an officer from the Board of Elections and a police officer from the station house goes along with them.
BY MR. ROBINSON:

Q Has anybody besides police officers connected with the 15th Precinct occasion to use these keys, anybody else besides those? A No, sir.

DANIEL O'CONNELL, a witness called on behalf of the people, being duly sworn, testified as follows:

(The witness states he resides at 1206 5th avenue, N.Y.)

DIRECT EXAMINATION BY MR. ROBINSON:

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

Q What is your position there? A Clerk.

Q Have you come here in response to a subpoena duces

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tecum? A I have.

Q Served upon you? A Yes, sir.

Q For the production of what documents did that subpoena duces tecum call? A The official return of votes cast and for the tally sheets-- November 2nd, 1920.

Q What you got the returns on the tally sheet in the envelope? A I have the returns here, the presidential tally sheets--- no tally sheets.

Q Is the envelope signed? A Yes, sir.

Q By whom? A Irving Mendelsohn, Herman Katz, Alexander Mandel and Jake Teplitz.

Q Does it state who Mendelson is? A Chairman.

Q The official return filed by this Board at your office is blank, is it not? A Yes, sir.

MR. ROBINSON: I offer the envelope and contents in evidence.

MR. POMPAN: Objected to on the ground that the envelope was evidently sealed. There is no evidence here that it is in the same condition as when it was delivered and I object on the further ground that no proper foundation has been laid and it is irrelevant, incompetent and immaterial.

THE COURT: I will take it, but I will say to the Attorney-General that he must establish that this record as well as the ballots have been kept inviolate.

MR. POMPAN: I might point out that my objection is

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on the ground that that which is offered in evidence is not an official return but only as I said before some sheets containing figures which cannot be characterized or taken for ^{the} official return.

THE COURT: He said it was signed by the defendant and three others. Do you dispute that?

MR. POMPAN: I hold, your Honor, that that official return has not been signed and therefore it is not an official return.

BY MR. ROBINSON:

Q Does that bear the signature of any inspectors?

MR. POMPAN: I object to that.

THE COURT: This is an official record produced in obedience to a subpoena duces tecum, and it is taken from the files of your office.

THE WITNESS: Yes, sir.

THE COURT: I am going to take it.

MR. POMPAN: I specifically object to the admission of any return on the ground that no return has been filed-- the return is unsigned.

THE COURT: I will take it for what it is worth.
(Marked People's Exhibit 6 -- a blue envelope.)

BY MR. ROBINSON:

Q Have you charge of these documents? A Yes, sir.

Q When were they filed with the County Clerk of the County of New York? A I don't know whether the 3rd or 4th

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day, our receipts will show that. They come in the day after or the following day, sometimes we have to wait four or five days for returns from election districts.

Q Where did you put them when they were received?

A These papers were tied together in Assembly districts and we put them in our room upstairs where we hold these papers or these envelopes until the Board of county Canvassers meet to canvass the votes.

does

Q When, the Board of county Canvassers canvass the vote?

(No answer.)

Q Did you get them from that room when you produced them here today? A No, sir.

Q Where did you get them today? A We had those envelopes sometime in December before the Grand Jury with the void and protested ballots from that Election district and you asked me to put them away in a safe place and I put them in our safe in the office with the void and protested envelopes.

Q They have been there ever since? A yes, sir.

Q That is since December of last year? A Yes, sir.

Q In addition to the official return is there an official tally sheet which is filed with the County Clerk?

Objected to. Objection overruled.

A Yes, sir, as a rule they should file a tally sheet and statement in that envelope.

Q After the official tally sheet is filed and is produced before the Board of County Canvassers is it put back

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into that envelope? A Yes, sir.

CROSS EXAMINATION BY MR. POMPAN:

Q Are you the only person in charge of these envelopes?

A The only person, yes, sir, myself and Mr. Halpern.

Q Is he in Court? A No, sir.

Q Then you are not the only one? A No, sir.

Q Will you swear it is in the same condition as when delivered from the Board of Elections at the County Clerk's office, and as it was when delivered to the Grand Jury?
(No answer.)

Q Will you swear that this envelope contains the same contents and the contents were the same? A yes, sir.

Q You don't know whether Mr. Halpern ever touched it?
A No, sir; he never touched it.

Q Sure of that? A Positive.

Q You are perfectly willing to say he never held it in his hand? A I would not say that; I know he never handled it.

Q How do you know that? A Because it was in the safe and he don,t go to the safe.

Q Now, Mr. Witness from the day that you got this until the day you produced it before the Grand Jury will you now say that no one handled this envelope with its contents?

A No, sir, I will not because the Board of County Canvassers handled it.

Q Did you produce this before the Board of County Canvas-

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sers? A Yes, sir, certainly, and it was handled by the Alderman for the district.

Q Did you personally produce it? (No answer.)

Q Have you any employees under you in that department?

A Mr. Halpern.

Q He is the only one, no other clerks? A No, sir.

Q I understood you to say that you and not Mr. Halpern produced it before the County Canvassers? A We also.

Q He did it? A Mr. Halpern is there to help me; I don't know whether he carried that envelope or I did.

Q So it was possible? A He might have carried that Assembly district in the bundle, yes.

Q What is your designation over there? A Clerk.

Q You are chief clerk, head of any division? A No, sir, just a general clerk.

Q Assigned to any specific duty? A Any duty I am assigned to I do.

Q You had other duties than handling these envelopes?

A Yes, sir.

Q What other duties do you have? A Well, subpoenas, go out with subpoenas.

Q When you are out with subpoenas these envelopes are kept where? A These are held in the safe, by order --

Q Not this particular one, all that you receive? A We put them upstairs in our room which we have specially for this purpose.

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Q Who is in charge of that room? A Nobody goes there but me.

Q Is there any person in charge of it? A No, sir, it is under lock and key.

Q Who has that lock and key? A I carry the key and the lock is on the door.

Q Has the County Clerk got a key? A Yes, sir, certainly.

Q Who else has got a key? A Nobody else, only one key for the door upstairs.

Q You keep that key? A It is kept in a drawer, in the cashier's drawer.

Q Won't you tell me who kept that key? A That is in the cashier's drawer where I put that key.

Q He is the custodian of that key? A Yes, sir.

Q The cashier? A Yes, sir.

Q He could give it to anybody he chooses? A If he wishes

Q There are other records in the rooms where these are kept? A Yes, sir.

Q That is the top floor of the County Court House?
A There are no records there.

Q What else is kept there? A Supplies.

Q Every time you want supplies you got to that room?
A Yes, sir.

Q You use the same key? A Yes, sir.

Q A person going in to get out some supplies could han-

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dle some of these envelopes if they wanted to? A Yes, sir, if he wanted to.

Q Are these kept in a steel locker or in a compartment in a safe with a tumbler and figures on it? A These are kept in the safe.

Q But before that? A They are only kept upstairs in the supply room under lock and key.

Q You mean the door is locked with a key? A yes, sir.

Q These envelopes are put in shelves or compartments?
A Tied in bundles and put on a table.

Q Tied in bundles and any one who walked into the room can readily see where they are? A yes, sir.

Q This key you said is the key to the supply room?
A yes, sir.

Q The only thing kept in there are those election things and supplies? A Yes, sir.

Q Any old dockets or record of judgments? A No, sir.

Q Could you use the same key for the judgment record room? A No key for that.

Q Could you use that key for any other part of the building? A No, sir.

JOSEPH RUBENSTEIN, a witness called on behalf of the People, being duly sworn, testified as follows.

(The witness states he lives at 2028 East 17th street, Brooklyn.)

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Q Where were you on the night of election of 1920?

A I was on, I think it was East 4th street, in a school there, as a watcher sent there by the Honest Ballot Association.

Q Did you have a watchers' certificate? A I had a Prohibition certificate.

Q Did you see there this defendant? A Yes, sir, I did.

Q Will you state to the Court what he did there?

A The chairman from the time I came in there --

Q From the time you came in there? A Yes, sir.

Q Tell us what you observed? A When I came in there, I was there during the day and in the evening when he was sworn in by the chairman of the day board I was standing there and he wanted to know who I was. I told him I was a watcher from the Prohibition party sent in by the Honest Ballot Association. He wanted to have me ejected. I refused to go out. So we had an argument and finally I gained my point, and I was there as a watcher. When he began for the Board to assume his duties he began to count the ballot.

Q He was chairman of the Board? A Yes, sir, he was chairman.

Q Who were the other member of the Board? A Well I think Mandel, Katz and Teplitz, I don't remember exactly.

Q State what he did as chairman? A Why he called off the votes for each party, I mean for the officers and had some one stand at his side who looked at the ballots, and the two

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others marked them.

Q Do you remember what two marked them? A I don't remember.

Q Two other members of that board? A Yes, sir, I don't remember their names, but if I should see them I could probably tell you.

Q If you saw them you could recognize them? A Yes, sir.

Q Was it one of the other members of the Board who would call them off? A Yes, sir.

Q When you say he marked do you mean he marked on the tally sheets? A Yes, sir.

Q Do you mean he marked on a sheet like that? (Referring to People's Exhibit 3) A Yes, sir.

BY THE COURT:

Q Who did the marking?

THE WITNESS: One of the Board of Canvassers.

Q You don't know which one? A There were two of them; they both looked alike; every time a name was called out they would check that off.

Q Where was the defendant? A He was the chairman of the Board and he was calling the vote.

Q There were two others doing the marking? A Yes, sir, there was somebody else sitting next to him, watching the way he was calling them.

Q Were you there when the vote for Governor was being canvassed? A Yes, sir.

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Q Will you state what took place at that time? A Well, he called, the chairman called for Governor -- well there was some change from Smith to Miller, he called some that were for Smith for Miller.

BY THE COURT:

Q How do you know he did that? A Because I objected at that moment.

Q Could you see what the ballots contained? A Yes, sir, absolutely; that is about all.

BY MR. ROBINSON:

Q What did he do in reference to the blanks? A Well I don't remember exactly on the case of the Governor; I could not tell you.

Q Coming down to the count for the Member of Assembly will you state how the votes were called off? A Well there was Reiss and Waldman, two members, wasn't there? When they came to the Assembly he called quite a few of Waldman's votes for Reiss and he split or made the great majority of the votes for the -- I am a little twisted -- he gave the majority of the blanks to Reiss.

MR. POMPAN: I move to strike out that he gave the majority of the blanks to Reiss?

THE COURT: Yes, that is too general. Strike it out.

BY MR. ROBINSON:

Q How many of those votes for Waldman did you hear him call off for Reiss? A Why, I will tell you -- I did not

keep track, but I kept protesting so often that they paid no attention to me and then finally I quit protesting.

Q What did you say when you protested? A I just said "I protest that vote".

Q Did you state why? A In fact I told him it was not a Waldman vote it was a blank.

Q What did he say? A Well, when I pinned him down to it, he would say "mymistake" or words to that effect.

Q At other times did he make any reply?

MR. POMPAN: I object to that.

A I don't remember.

Q What do you mean by "When you pinned him down to it"?

A Why I noticed at first in going over the votes of the earlier offices that when I said, "I object" he paid no attention to me, but when he came down to the others he did it so openly why I put my hands down on the ballot, and said, "I object to that vote" and held the ballot or held my finger on the ballot so he could not pick it up or turn it over face downwards on the rest of the pile.

Q Were you able to put your hand down on the ballot and call a halt on all the votes for Assembly that you saw him call off wrong?

MR. POMPAN: I object to that. If he did so he violated the law.

THE WITNESS: I don't understand that question.

Of course I was not able to put my hand on every ballot.

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A Not when I saw it was useless.

MR. POMPAN: I move to strike the answer out as not responsive and not binding on the defendant.

BY THE COURT:

Q Did you put your hand on every ballot? A Do you mean on every ballot that I--

Q Until you determined that it was useless to put your hand on the ballots? A I don't quite understand that question. This is the first time I am up here and I really don't understand.

BY MR. POMPAN:

Q You understand his honor's simple question, don't you understand English? A Yes, sir, but I am a little bit rattled, and I don't quite understand what he means by it. If I remember correctly I did not say I put my hand on every ballot I said I put my--

MR. POMPAN: Try to remember ot straight.

THE WITNESS: That is what I am trying to do.

MR. POMPAN: That is what you are to do not to recite it.

THE WITNESS: When I got up there and saw there was something going on why I said, I object and at first he refused me and in order to hold down the proof I put my hand on a ballot to hold it so that he should not turn it over; that is the gist of the thing.

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BY MR. ROBINSON:

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Q You didn't do that in every case? A No, sir.

MR. POMPAN: I object to the Attorney-general testifying.

MR. ROBINSON: I object to my examination of the witness on direct being interfered with.

BY MR. ROBINSON:

Q At the time you state that you objected -- I am referring now to the canvass of the vote for Member of Assembly-- will you tell me just what you saw on the ballot that you protested and what happened immediately prior? A Well the chairman would call off the vote as he read it there-- I was standing right in front of him and he would just gaze down on the ballot sheet and when I saw that he called off one for Reiss which was marked Waldman I said I protest that vote or ballot.

Q Now a few moments ago you stated that ~~there was~~ on some of those occasions when you protested you put your finger on the ballot and he would say "That is my mistake"? A Yes, sir; that was in the beginning early in the evening, but later when it became so flagrant that there was nothing--
Objected to.

THE COURT: Strike that out.

Q At first he didn't say it is my mistake? A Yes, sir.

Q When you refer to votes what do you mean by votes?

A I mean the way that they were marked in the box or in the square opposite the name.

Q Did you see on the ballot where a cross was marked in front of Waldman that this defendant called a vote off for Reiss? A Yes, sir.

Q Was that on a number of occasions? A Quite a number.

Q Did you protest at first? A At first I protested, yes, sir.

Q Did he respond to your request every time, to your protest every time. I am asking you did he respond to your protest or didn't he? A I don't know exactly.

(The Court admonished the jury and took a recess.)

AFTER RECESS.

JOSEPH RUBENSTEIN, a witness for the People, recalled.

DIRECT EXAMINATION CONTINUED BY MR. ROBINSON:

Q You said you were there when they started to count the vote? A Yes, sir.

Q Will you state where the ballots were when they started to count the votes? A The ballots were in the ballot box.

Q Who took them out of the ballot box? A The defendant.

Q What did he do with the ballots after he took them out of the ballot box? A He placed them faced downwards on the table.

Q As he announced the vote for each office what did he do then? A Why he first counted the presidential ballot,

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after that he went to the State ballot and started counting the ballots of each office.

Q What did he do as he counted the ballots? A As he counted the first--

MR. POMPAN: I object to that and move to strike out "counted".

THE COURT: He called off.

THE WITNESS: That is what I mean he called off, the chairman called off and he checked them up.

BY MR. ROBINSON:

Q At what was he looking when he called off and checked them up? A Well first he started with governor of the state and then proceeded down the line until every --

Q You say he proceeded down the line. These ballots were face down on the table? A Yes, sir.

Q What did he do? A Turned them over and read them off.

Q How many at a time? A One at a time.

Q Having picked up one ballot and read off the result for that office what did he do? A placed it face down in the same pile on the table.

Q Then where were you standing? A Well when he first started to count I was standing right behind his shoulder and he said I annoyed him. So I objected to a certain count and he said afterwards I annoyed him again and I went around to the front of the table where I still could see him.

Q Could you see the checks on the ballots? A Yes, sir.

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Q Now having counted the various offices until he came to the vote for Member of Assembly -- where were you standing then? A Right in front of the table all the time.

Q Was he seated or standing? A He was seated.

Q Did he continue doing the counting of the vote for Member of Assembly in the same method he did when you said he counted the votes for the other candidates -- called off the vote for Governor? A Yes, sir, he continued to call them off.

Q Did he pick up each ballot separately? A Yes, sir.

Q The ballots at the time he counted the votes for Member of Assembly were still face down on the table? A That I don't remember.

Q What is that? A I don't remember.

Q Was there a place on the ballot for Member of Assembly? A Yes, sir.

Q Were there marks in front of the candidate who were candidates for Member of Assembly, on the ballot, some of them? A Yes, sir, there were marks.

Q Were there some marks in front of the name of Morris D. Reiss? A Yes, sir.

Q Were there some marks in front of the name of Louis Waldman? A Yes, sir.

Q Did he always in counting the votes for Assembly read off those marks as they were on the ballot? A Not all of them?

Objected to. Objection overruled. Exception.

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Q What is your answer? A Not all of them.

Q What mistakes did he make?

Objected to. Question withdrawn.

Q When there were marks in front of Waldman's name did he call the votes for Waldman? A No, sir, not always; sometimes he called that for Reiss.

Q What did you say when he called a Waldman vote for Reiss? A I objected.

Q What did he say? A Well sometimes he would correct correct himself and other times he would simply pass it over, only turn the ballot down on the pile after he counted it, face down on the table.

Q And he did not correct himself? A No, sir.

Q What is your answer? A No.

BY THE COURT:

Q There were two other men there who were recording that which was called off by the defendant? A Yes, sir.

Q This defendant did not have the pencil or the paper upon which the entries were made? A No, sir, he did not.

Q He called off? A Yes, sir.

Q And the entries were made? A Yes, sir.

BY MR. ROBINSON:

Q When you protested as you say you did, did you speak in a tone of voice so that those who were marking down could hear you?

MR. POMPAN: I object to that as irrelevant.

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THE COURT: That is improper. You might show the relative positions of each, and then the jury can determine whether there was opportunity to hear.

Q How far away from the chairman of the Board were the other members of the Board of Canvassing Inspectors? A Well they were seated about three or four feet away.

Q Well in what tone of voice did he speak? A Quiet, when I said I objected I spoke out clearly.

Q In what tone of voice did he speak? A Why sort of underneath his breath, mumbled.

Q Then what he mumbled was unintelligible to you?

A It was intelligent to me, I understood it, because I was standing right beside him.

Q How many times did you make an effort to enforce your objection?

Objected to.

Q How many times did you in your effort to enforce your objection put your finger down on the ballot to call his attention to his mistake?

Objected to. Question allowed.

A I don't remember.

CROSS EXAMINATION BY MR. POMPAN:

Q Mr. Watcher, where did you live at the time you acted as watcher for the Honest Ballot Association in the cause of the prohibition party? A I lived in Brooklyn.

Q What street in Brooklyn? A 2028 East 17th street.

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Q Did you know you were violating the law, if you lived in the County of Kings you could not be a watcher in the County of New York?

MR. ROBINSON: I object to that as immaterial.

MR. POMPAN reads Section 352.

Q Did you know that was the law? A No, I did not.

Q Were you a Prohibition watcher or an Honest Ballot watcher? A I was an honest ballot Watcher, but when they sent me to the district that I was supposed to watch at they handed me a Prohibition watcher's certificate.

Q Who did that? A The gentleman in charge there.

Q Did you know that in order to be a Prohibition watcher you would have to be a member of the Prohibition party?

A No, sir, I did not.

Q Now did you ever enroll? A In my district.

Q What party did you enroll with? A The Democratic.

Q Did you tell him you were an enrolled Democratic voter? A Who do you mean?

Q When you went to the Honest Ballot Association?

A They did not ask me.

Q They made no inquiries where you lived? A No, sir.

Q Don't you recall a policeman saying to you that you could not watch in except if you have a duly certified watcher's certificate? A I had a certificate.

Q Don't you remember changing your residence to Manhattan then? A No, sir, absolutely not.

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Q What time did you arrive at this particular place?

A I was there all day.

Q I asked you what time you arrived there? A In the morning about--

Q What time? A About 6.30.

Q What time did you leave the next day? A I left about a quarter after one in the morning.

BY THE COURT:

Q Were you ever a member of the Prohibition party?

A No, sir.

Q How did you manage to get a watcher's certificate of the Prohibition party? A I went up to the Honest Ballot Association because I heard that they wanted men to watch the poles, and when I went up there to apply for a position they told me that everything was O.K. and they handed me this certificate.

Q Who was it signed by? A That I could not tell you.

MR. ROBINSON: I don't think that the law provides that a watcher must be of that political party. I think they may designate anybody.

THE COURT: It says however, that he should be a resident of the County.

BY MR. POMPAN:

Q You left there at 1.15? A Around that time.

Q Do you remember the Socialistic committee arriving there in two automobiles, the so-called entertainment committee?

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A I don,t know about auttomobiles because I was inside.

Q Do you remember any number of people rushing into that place? A Yes, sir.

Q Do you remember about 20 or 30 Socialists candidates and watchers and guerillas running into the place? A I don,t know what they were.

MR. ROBINSON: I object to the guerillas.

THE COURT: They are commonly called guerillas on Election night. They are persons who disturb the conduct of the duly designated officials. There would have to be in this case evidence showing an intent on the part of the defendant to make a false return. If he made it on consequence of error of judgment or of mistake or of something that happened in there on that night why it would be an answer to the inditment. You will observe when you read the section that it must be intentional.

BY MR. POMPAN:

Q Do you remember these men rushing into the place?

A I remember them coming in.

Q About how many were there? A I could not tell you exactly because there were also someRepublican and Democratic leaders of the district coming down with a couple of men; I couldn't tell you anything about them.

Q About one o'clock that night two automobiles pulled up there? A I was not outside.

Q Did you know Waldman, the Socialistic candidate?

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A No, sir.

Q Do you remember when he came in and announced he was the socialistic candidate for Assembly? A I don't remember.

Q Don't you remember seeing him in there? A Do you mean previous to that time? A That very night? A Yes, sir I saw him there.

Q You saw him come in? A Yes, sir.

Q Heard him announce himself? A I don't remember whether he did or not.

Q How did you know who he was? A Because I saw him going to the chairman of the Board afterwards they conferred with the precinct captain.

Q At the very time when he came in wasn't he accompanied by twenty or thirty men? A I couldn't state that.

Q How many men will you say he was accompanied by? A I didn't take any account of how many came in there; it was none of my business who came in.

Q Do you remember that there was considerable excitement? A Yes, sir, there was considerable excitement.

Q And a considerable amount of noise? A Lots of noise going on.

Q The policeman had to call out the lieutenant, didn't he? A Well I don't know whether the policeman called out the lieutenant or whether the lieutenant was just making his round then and happened to walk in.

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Q You recall the conversation then had between the lieutenant and the chairman of the Board and Mr. Waldman, I want an answer yes or no? A Not exactly.

Q Now than how many times did you put your hand on a ballot? A I couldn't tell you.

Q Well was it ten times? A I couldn't tell you.

Q Was it twenty? A I don't know.

Q It might have been forty times? A I couldn't say; I didn't keep any track.

Q Don't you remember the chairman of the Board said to you it was a violation of law to put your hands on the ballot? A Yes, sir, I do and when he did I cur it out, I stopped absolutely.

Q You persisted and he threatened to have you arrested for interfering with the ballots? A I stopped.

Q Who else was the man who put his hands on the ballot? A I don't know; I can only speak for myself.

Q Was there a man standing next to you, any Communistic watcher standing alongside of you? A No, sir; as I remember there was no Communistic watcher there.

Q Socialistic? A There might have been.

Q Don't you know there was one there standing alongside of you? A I don't know whether alongside of me or not; I know they tried to put him out.

Q Don't you remember you were subpoenaed jointly before the grand Jury? A Yes, sir.

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Q He was the man that was standing alongside of you when handling the ballots wasn't he? A I don't remember whether handling the ballots or not; I can only speak for myself.

Q Is that man's name Abe Cohn? A Yes, sir, it is.

Q Now you know him already? A Yes, sir, now I know him;

Q Is he in court now? A Yes, sir.

Q How many times did he handle the ballots? A I don't know.

Q Don't you remember that the chairman told you because you fellows handled the ballots he would not be responsible-- he would have you arrested? A No, sir; I do not remember that.

Q You do remember he threatened to arrest you? A No, sir, he told me it was illegal, and I stopped after that.

BY THE COURT:

Q You did profess to know something about the Election Laws when you assumed the duty of being a watcher? A Yes, sir.

Q Well now didn't you know you had no right to place
No sir.
your hand on a ballot? A This is the first time I had ever been a watcher and probably the first time I had been at a polling place.

BY MR. POMPAN:

Q You had a book of instructions? A The chairman of the Honest Ballot Association gave us one.

Q Don't you remember having it in your hand?

Objected to.

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Q Did you get a book of instructions? A Yes, sir.

Q Did you read that book of instructions? A Yes, sir.

Q Didn't you know from reading the book of instructions that you had no right to handle a ballot? A When you have to read about twenty or thirty pages closely written and read it two or three times you can expect a man to remember everything on it; I do not recollect.

Q Didn't you know as the first element that no one except officials could handle the ballot? A I don't recollect that passage.

Q Do you remember also having a tally sheet or memorandum book given to you by the Honest Ballot Association?

A No, sir.

Q Didn't you have a pencil in your hand that night at all? A No, sir, I did not.

Q Did you have any pencil on your person? A Probably I did.

Q Did you make any memorandum? A No, sir.

Q As to what happened? A No, sir, I did not.

Q You are testifying now absolutely from memory? A Yes, sir, as far as I can remember.

Q Now can you tell us the position of the table in that polling place? A There was two tables, one was a short one, two or three or four feet long or probably as long as this table and the other one was a very long table about as long as the one there (indicating). This was placed at the

head and this was lengthwise (illustrating)

Q The polling place was in a public school on 4th street running to Third street? A Yes, sir.

Q The shape of that building is an "H"-- as you entered through 4th street there is a court and you have on one side an entrance to the polling place? A Yes, sir.

Q As you enter from 4th street? A I don't remember.

Q But you do remember what you said to the chairman, don't you? A I remember that too.

Q In regard to what you have testified here? A Absolutely.

Q But you don't remember how the boxes were placed there? A Do you mean the ballot boxes? I remember--

Q Do you remember when the chairman was calling the ballots that the boxes were standing in front of him? A Do you mean after they took the stubs in already?

Q During the count? A Not in front of him, standing beside him.

Q So that these boxes stood between him and the talliers? A No, sir, the talliers were alongside of the long table.

Q The long table was placed the length of the place? A About there.

Q The talliers were on the other end of it? A No, sir, they were right near him about three or four feet away.

Q How tall are you? A About 5 feet 9.

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Q You had no difficulty when standing up behind him to see what was on the ballot? A No, sir.

Q What time was it when you began to protest? A About the timewhen--

Q The hour? A About an hour or shortly after he had started counting the ballots.

Q And the first thing you started to count was the presidential ballot? A Yes, sir.

Q There was something like 700 names to call off there or to be exact six times 45. The testimony here is that there were 45 names of the presidential electors and there were six parties so that during all this time you were objecting? A No, sir, I was not objecting to anything on the presidential ballot.

Q Didn't you say you started in objecting shortly after he started the count? A Yes, sir.

Q And the first thing was the presidential count and that took until nearly 11.30? A It might have.

Q So what was your first objection? A On Governor, the office of Governor.

Q You want to correct your statement that you did not object at the beginning of the count. The first time you objected, you said, was on the Governor? A I didn't say I objected during the presidential ballot.

Q You said originally you began protesting immediately when the count started? A I said shortly after the count

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started.

Q Do you consider three hours shortly after? A I did not know it was three hours; I was not timing myself.

Q Do you remember the exact words you used when you said you protested? A I said I protest that vote.

Q Did you protest any void ballots? A I think I did.

Q Don't you remember the chairman then when you protested a void ballot marked that void on the other side and endorsed it protested? A No, sir, I don't remember that.

Q Don't you know the only protest you made was as to these protested ballots? And they were marked protested?

A Not all of them.

Q How many of them were marked protested by this chairman?

A I don't know.

Q Were there a dozen? A I don't know.

Q Two dozen? A I couldn't tell you.

Q Three dozen? A I told you I couldn't tell you.

Q There might have been more than that-- more than 36 you protested that way? A That were marked protested; I doubt if there were 36.

Q How many would you say there were? A I don't know; I could not tell you exactly.

Q But he marked every one of those did he? A No, sir, not every one.

Q Some one of those-- there was a question as to the marking on them? A Yes, sir.

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Q And the Board disagreed with your objection as to whether a ballot should be a void ballot or not? A I had nothing to say then.

Q Do you remember after you protested the Board said it was a void or a good ballot? A It might have occurred.

Q You did not stay until they finished, until 8 o'clock in the morning? A No, sir, I did not.

Q It was a pretty strenuous time counting these ballots, there were a large number of them? A Quite a few.

Q Quite a task? A Yes, sir.

Q Quite a noisy place? A Yes, sir.

Q A lot of people around? A Well in the evening there was.

Q Mobs coming in and out? A I wouldn't say mobs.

Q Large numbers of people? A No, sir, I wouldn't say that.

Q Do you remember the Socialists saying they were going to send for the entertainment committee? A I don't remember that. As far as I know there was no such remark passed.

Q Well as far as you know there might have been? A Yes, sir, there might have been behind my back; I couldn't be all over.

Q Shortly after that do you remember a number of men coming upon the scene? A Newcomers, yes, sir.

Q They were pretty roughly dressed, pretty tough look-

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ing gentlemen, weren't they? A Some of them looked pretty tough.

Q Do you remember them saying, "We are here for Mr. Waldman, we are going to carry this district? A No, sir, I don't remember any such conversation.

Q Do you remember what they did say when this particular bunch of rough dressed men, or this entertainment committee came in. Do you remember one word that they said?

A Well, being that I was a stranger there nobody passed any remarks to me, and I could not tell you anything.

Q But in general? A Not even in general.

THE COURT: Was there any re-count ordered in this case?

MR. ROBINSON: No, sir there was not.

THE COURT: And the Board was never re-convened?

MR. POMPAN: No, sir. It was duty of the election officials as the returns had not been signed -- it was the duty of the election Board to re-convene the Board to make out the official return.

THE COURT: That could have been done by a mandamus. When there was a discrepancy discovered was there any effort made by anybody then to mandamus the Board for the purpose of correcting the return?

MR. POMPAN: No, sir, nothing whatsoever.

BY MR. POMPAN:

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Q Now do you remember the chairman saying to the police officer that a man had put up a gun against him and a mob had surrounded him? A No, sir, I do not.

Q Do you remember seeing a gun in anybody's pocket? A As far as I know nobody carried a gun.

Q You would not say that none of these men that came in with Waldman didn't carry guns? A I didn't see any of them carry guns.

Q Looked like gentlemen who would carry guns? A I don't know.

Q Well they looked pretty tough didn't they? A You can't say about toughness and a man carrying a gun.

Q What do you classify as tough? (No answer.)

Q How long have you been in the City of New York? A Pretty near all my life.

Q You know what we refer to in the City of New York as tough looking gentlemen? A A man may be well dressed and still be a tough at the same time.

Q Is he as a rule? A I don't know.

Q Now, Mr. Witness, do you recall the name of a man whose vote you challenged that day? A That I protested?

Q Challenged? A I don't recollect challenging anybody.

Q Didn't you challenge several votes on behalf of the Prohibition party? A No, sir.

Q That you said were entitled to vote? A No, sir.

Q Did you challenge Dr. Glass of Second avenue? A I

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did not.

Q Were you present when he was challenged? A I don't remember, even an individual that was challenged. I had to go home to vote and to go home for my supper and some one else took my place.

Q Who was the person that took your place from the Honest Ballot Association? A He was a fellow called the captain, there was a captain who had to look after a certain number of Election Districts and he was supposed to be around there when anybody did go out to supper and take their place until they came back.

Q Was he also a Prohibition Honest ballot watcher?
A I could not tell what he was.

Q Did you challenge Judge Snitkin? A No, sir, I didn't challenge anybody.

Q Were you present when he was challenged? A No, sir.

Q Was it also an honest ballot Watcher that challenged him? A I don't know.

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

Q Don't you know as a matter of fact that it was a Prohibition Honest Ballot watcher who challenged Judge Snitkin?

A I don't know anything about it; I can only speak of what I saw there. I did not challenge anybody.

Q You did not hear a single challenge made? A No, sir, I did not.

Q If you were there you would have remembered it now,

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wouldn't you? A Just a minute. I would know whether I challenged anybody or not, but I did not challenge anybody.

Q Do you know how to challenge somebody? (No answer.)

Q You were a prohibition watcher and an Honest Ballot man and you don't know how to challenge anybody? A Well, I don't remember now.

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

Q Didn't you see a list called a challenge list with the name of voters who were not qualified to vote in that particular district? A No, sir, I did not.

Q Weren't you instructed to examine such a list to see those who were entitled to vote? A Probably I was.

Q You know that you examined such a list? A I don't remember seeing the list.

BY THE COURT:

Q On the 2nd day of November, 1920, was there a prohibition ticket then being voted? A Yes, sir, there was.

Q What was it? A Well, I don't know just who was on it. I remember that there was a prohibition ticket voted.

BY MR. POMPAN:

Q They had no candidates for local offices there at all? (No answer.)

Q Mr. Witness before starting out on your mission of a Prohibition and Honest Ballot Association worker were you told at all what your duties were? A Yes, sir.

Q Do you recall a gentleman addressing you and telling

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you what to do, if anything? A I can't remember exactly.

Q Do you remember being addressed by this gentleman?

A Yes, sir, I do.

Q But you do not remember what he said to you? A No.

Q Not a single word? A No, sir. I do not. Don't forget that this took place 14 months ago.

Q But you remember perfectly well what the chairman said to you 13 months ago and you don't remember what instructions you received? A I made it a point to remember what he said

Q Why did you make it a point to remember what he said?

A Because I was watching there when I challenged votes and they overlooked them.

Q You challenged votes? A I mean when I protested votes

Q You did challenge some votes? A Protesting.

Q You want to change that to protesting? A Yes, sir.

Q Let us see if we can't find out whether you challenged anybody. Do you remember a single word of the instructions you received the day before Election from the Prohibition Honest Ballot Association, one word? A I do not.

Q But you clearly remember everything else that happened to you over there? A Yes, sir.

A BRAHAM COHAN, a witness called on behalf of the People, being duly sworn, testified as follows:
(The witness states he lives at No. 8 St. Marks Place.)

DIRECT EXAMINATION BY MR. ROBINSON:

Q Is that in the Borough of Manhattan, City of New York?

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A Yes, sir.

Q Were you a watcher at the polling place of the 6th Election District of the 8th Assembly District in the County of New York in the Election of November, 1920? A yes.

Q Were you a watcher while the votes were being canvassed? A I was a watcher from the beginning until about 2 o'clock in the morning.

Q Were you a watcher and ^{did} you watch the votes for Member of Assembly while it was being canvassed? A I was watching from the beginning.

Q I ask you if you saw the counting of the votes for Member of Assembly in that district? A I did.

Q Who were the candidates that were voted for in that district for the Assembly? A Morris peiss and Louis Waldman.

Q Who was chairman of the Board? A I really don't remember his name.

Q Is it the defendant in this action? A I believe so.
BY THE COURT:

Q Do you know whether it was or not, do you know whether he was chairman or not? A Yes, sir, he was the chairman of the 6th Election District.

BY MR. ROBINSON:

Q Where were the ballots when they started the Board of Canvassing Inspectors, canvass the vote for Member of Assembly?

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A In the ballot boxes.

Q Who took them out of the ballot boxes? A The chairman

Q Were they in the ballot boxes when they started to canvass the votes for Member of Assembly? A Yes, sir.

Q Did they put them there after they canvassed the vote? A I know when they started out to call the vote off they took the votes out of the ballot box and placed them out with the faces down and started to call from the beginning, from president on to the others.

Q After they called the vote for president what vote did they call next? A Governor, I believe.

Q Well after the vote for any particular office was canvassed did they put the ballots back into the ballot box before they canvassed the next vote? A No, sir.

Q Well immediately prior to the time the vote for Assembly was canvassed were the ballots in the ballot box?

A For the Assembly then the whole--

Q I ask you -- did they canvass the vote for state offices at that time? A Yes, sir.

Q Now after that did they put them in the ballot boxes before they canvassed the vote for the Assembly? A Yes, sir, they did.

Q Now state what you observed when -- how did they canvass the vote for the Assembly? A Well, the vote for the Assembly they called out the vote for the Assembly, and I was

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a watcher for the Socialist party.

Q Did you have a certificate? A Yes, sir.

Q And appointment for the Socialist party? A Yes, sir, I did. They called out.

Q The ballots were on the table, were they? A Yes, sir, and they called out the president--

Q Did he pick up one at a time? A Yes, sir.

Q The ballot face down? A Yes, sir.

Q As he picked up one what did he say? A He called whatever it was, what it was, and a few blanks, I didn't object to the blanks-- he called them for Reiss -- that is all I said.

Q He called the blanks for Reiss? A Yes.

Q What do you mean by blank vote? A Well a void ballot, blank.

Q While counting the votes or canvassing the votes for Member of Assembly did you see the ballot? A Yes, sir, I did.

Q In the bracket containing the names of the candidates for Assembly did there appear the names Morris Reiss and Louis Waldman? A Yes, sir.

Q Were there pencil marks in front of those names as the voter wanted to express his wish? A Yes, sir.

Q Did you see some of them marked for Waldman? A I did.

Q What do you mean by marked for Waldman? A Marked voted for Waldman, and before Waldman was a cross.

Q Where was the cross? A Right at Waldman's name on

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the ballot.

Q Where Waldman's name was? A Yes, sir.

Q Where was it, at the side? A No, sir, on some of the void ballots that way --

Q Where the voter voted for Waldman? A Well on the first line or the end of the line or before the name.

Q Where did the voter who voted for Reiss where did he vote for Reiss? A In the same place.

Q What is a blank vote? A A blank vote is not voted at all.

Q No mark on it for that office? A Not marked, some of them were marked for all the Assemblymen, and some of them were marked in the wrong place, or something like that and some of them in ink; they were void ballots.

Q How did he count those that were marked for all the candidates for Assembly?

MR. POMPAN: I object to that. There is no such testimony here.

THE COURT: He may state what they did.

THE WITNESS: Some of them he had passed for Reiss, and they were so hurried I could not notice at all. I merely done--

Q By that you mean to say that in consequence of anybody being hurried you could not state what was being done?

A I seen some, and if I objected they covered it up, and I didn't have no chance to make my claim good.

Q What language did you use when you say you objected?

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A I said "I object, I want you to give everybody a square chance, a square deal."

Q When there were no marks in front of any name of any candidate for the Assembly how would the chairman of the Board call it off? A No marks at all-- blank.

Q He would call it blank? A Yes, sir, some of them.

Q Did he call them blank every time when there were no marks for any candidate? A Well, there was very few blank ballots.

Q I asked you if he called it a blank every time there were no marks in front of any candidate for the Assembly? A I will tell you the truth I objected a few times and then I didn't pay any attention.

Q Did you observe some of the ballots with no marks in front of the candidates for the Assembly? A I guess so.

Q How does the chairman call those off? A Reiss.

Q How many votes for Waldman did you hear the chairman call for Reiss? A Well I tell you exactly I didn't keep track of how many votes he called to any place, perhaps about 20, votes or 80, and I know that after the ballots were counted --

Q How many if you recollect Waldman votes did he call for Reiss? A Well about quite a few, I can't exactly remember how many.

Q How many blanks did he call for Reiss? A As many as there was; I don't know how many there had been.

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Q How many times did you protest? A About a half a dozen times.

Q What reply did they make to your protest? A Well they made fun out of me; didn't pay any attention to me.

Q Where were you standing? A Right across the table.

Q Were you standing near Rubenstein? A Across from the table, facing him -- I don't know who Rubenstein is.

Q That is the last witness? A Well, he was facing the tally clerk protesting and he got away and it was all mixed up.

Q Where were you while the vote was being canvassed, and where was Rubenstein, and where was Rubenstein as referred to you while the votes for Assembly were being canvassed? A While the votes for Assembly were being canvassed we were together; he was first by the tally clerk and then there and he came over; there was a little excitement, and he came over and told them that they should give a square chance, that he was from the Honest Ballot Association, and he wants everybody to get a square chance.

Q Where were the tally clerks seated during the time while the votes for Member of Assembly was being canvassed? A Across from the chairman.

Q How far away from him? A About two paces away. From here to that place there (illustrating). It was a long table like that about five or six feet away.

Q How far were you from the tally clerk when the vote for Assembly was being canvassed? A I was about three feet

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away.

CROSS EXAMINATION BY MR. POMPAN:

Q Were you standing next to Rubenstein when the challenges were made? (No answer.)

Q Were you the man who challenged Judge Snitkin?

A I just said that I objected; I did not challenge anybody.

Q I am asking you a simple question. Did you challenge anybody at all?

MR. ROBINSON: He doesn't understand what a challenge means. I think counsel should distinguish between them.

MR. POMPAN: I will distinguish them for you.

Q Were you ever told what your duties were as a watcher?

A Well I got a little book, I got instructions.

Q You knew your instructions? A I had been quite a few years a watcher.

Q What branch of the Socialistic party do you belong to, the left or right wing? A I don't know whether left or right. I am with the Socialist party -- not now but I was.

Q Weren't you one of the men who were instructed by the Socialistic party the night before election? A I was instructed?

Q Yes or no. A Yes, sir.

Q Were you one of the men who slept with the rest of the committee at the Broadway Central hotel? A I wasn't sleeping there because I have a home.

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Q Along with the rest of the watchers they had a committee on entertainment sleeping in the Broadway Central Hotel; you know that? A Certainly I did.

Q You knew the entertainment committee was having its headquarters at the Broadway Central Hotel?

Objected to.

Q Yes or no. A Yes, sir.

Q You knew that the headquarters of the entertainment committee was at the Broadway Central Hotel? A Yes, sir.

Q MR. ROBINSON: May I ask counsel to define the entertainment committee?

MR. POMPAN: It is a well known term in the Socialistic party. You know what an entertainment committee is used for, don't you?

THE WITNESS: I don't know what they use it for, I know we got instructions in Headquarters.

Q You know the entertainment committee is to protect the leaders, you know that, don't you? (No answer.)

Q Now honestly, be honest with me? A I am honest.

Q You know that is the fact? A I don't entertain anybody.

Q But I didn't say you did. Don't hesitate to tell the truth? A I know everybody has got it.

Q You mean got an entertainment committee? A Yes, sir.

Q How many men on that entertainment committee were riding around in automobiles that day in the Eighth Assembly

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District? A They didn't ride in automobiles.

Q Or on foot? (No answer.)

Q You know a fellow named Mankey that came around there?

A I don't know him.

Q Do you remember that night about twenty fellows coming to the polling place -- when you testified there was some excitement? A To tell you the truth--

Q There was excitement there? A Yes, sir.

Q And a whole lot of it? A Yes, sir.

Q That excitement was caused by people running in and out? A Yes, sir.

Q Is that right? A Yes, sir.

Q Everybody was mixed up and you were excited that day?

A I was excited and I went over to see --

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

Q Don't you know that the count for Assembly wasn't in until much later than that? A The Assembly was about the time the excitement was.

Q Do you remember Waldman coming in there. You know Waldman well, don't you? A yes, sir.

Q How many men accompanied Waldman at that particular time? A I really didn't count them, I don't exactly know.

Q There were as many as twelve weren't there? A Well, I really don't know, I know there was an officer and a captain and some more police.

Q Don't you know there were more than twelve men there?

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A There was about fifteen in the whole plade.

Q Exactly. A Not with Waldman but with everybody.

Q When the excitement started you remember the officer sending for the police lieutenant? A Waldman sent for the police lieutenant.

Q Do you remember the only argument you had was on the question of what was a void ballot and what was not a void ballot? A I tell you the truth I did not argue at all; I objected a few times and wasn't used right and I quit.

Q Do you remember them marking certain ballots which you protested as void? A He didn't mark any ballots.

Q He didn't mark a single ballot protested? A I didn't see him mark them at all; he just did the-counting.

Q Did you see anybody write or use a piece of paper? A I did not see the tally.

Q Rubenstein stood and watched the chairman? A I got so mixed up I didn't see anything.

Q That was the same thing with Rubenstein? A We kept on objecting and it was useless.

Q Now you say you objected a few times then you stopped? A Yes, sir.

Q You got all mixed up? A Yes, sir; I didn't pay any attention any more.

Q You are only guessing at it? A I remember some of it, I remember I was present at the time, and I remember the excitement.

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Q Do you want the jury to understand that you objected only twice? A I objected more than twice.

Q How many times did you object? A I can't tell you exactly, about four or five or six times.

Q That is all, isn't it? A Yes, sir.

Q And you stopped? A Yes, sir.

Q Were you watching all the time the talliers or the chairman? A I was watching the chairman only.

Q You stood right in back of them? A In front of them.

Q Did you at any time put your hand upon the ballots?

A No, sir.

Q Did you see Rubenstein put his hand upon the ballots?

A No, sir, I didn't see him.

Q You didn't see him put his finger upon them at all?

A I kept saying I object.

Q See him touch any ballots? A I didn't see that.

Q Do you remember the pile of ballots after he did that flying up? A No, sir; I don't remember that; he slammed on the table and he said I object.

Q He did it pretty hard? A Yes, sir.

Q You could hear him all over the place? A He was excited.

Q You could hear him shout throughout the place, couldn't you? A Yes, sir, sure, that is true.

Q Now, Mr. Witness, you are in good standing as a member of the Socialistic party? A No, sir.

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Q Up to what time were you a Socialistic member? A I was there a couple of weeks.

Q Were you on election day? A On election day what do you mean?

Q This last election day? A I did not-- since then I quit the whole business I had too much trouble going to court.

Q Do you remember whether you were on the left wing or the right wing-- you don't know what wing you are on? A I am not a politician.

Q Have you got a green ticket? A No, sir, I have not.

Q Don't you hold a green membership card? A No, sir.

Q Did you hold a red one? A No, sir.

Q You didn't have any? A No, sir, three weeks I was a member, and they sent me that I should come and help them watch. If I was sent for from the Democratic party I would come to them.

BY MR. ROBINSON:

Q Was the vote for Assembly counted in its regular order?

Objected to.

Q Was it taken up out of its regular order after the Governor and some other offices? A No, sir.

Q Did they count all the offices for Governor and Assembly? A A few ~~for~~ ^{after} the Governor they skipped and they went to the Assembly they wanted to get that.

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Edward
JOSEPH J. MCGOWAN,

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a witness for the People,
recalled.

BY MR. ROBINSON:

Q When the vote was being counted by the Grand jury did you make a memorandum of the result of the count at that time? A I did.

MR. POMPAN: We will concede that Mr. McGowan counted the vote, and that what he counted was what is found. I will concede that he correctly counted the ballots which were in that box.

Q Have you got that memorandum with you? A Yes, sir.

MR. ROBINSON: Will you concede what the result of his count for Governor was.

THE WITNESS: Alfred E. Smith 227; Nathan L. Miller 86, Joseph E. Cannon, 150; blank 31; that is for Governor. For Assembly, Morris D. Reiss vote on both parties -- I did not segregate it, 202, Louis Waldman 266 blank 58.

Q Have you got in your possession a letter addressed to the Police Department by the Board of Elections of the City of New York? A I have a copy of the resolution here that the Board transmits to the Police Commissioner.

Q What is that resolution? A The resolution is --

MR. POMPAN: I object to that as irrelevant, immaterial and incompetent. No resolution, no matter from what Board, can defeat the Statute, or the provisions of the Statute.

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THE COURT: The statute is mandatory. There can be no question about it. The Board of Elections has no power to delegate its powers. I suppose you are trying to establish that? I am inclined to take the bull by the horns in this case. Reading the statute, I cannot for the life of me, conceive how on earth the Board of Elections could tell the Police Department to do that which the Board of Elections should do.

MR. CONKLIN: I have not been in this case but this seems to be to be a very important matter. Undoubtedly the Legislature does not intend that the individual members of the Board of Elections shall discharge all of the duties of the Board. Now, of course the duties have to be imposed or delegated by the Board to some one. Some of the duties are imposed upon Mr. McGowan and others on other employees there. Now it is not a matter of compensation that determines it; It is a matter of delegation or authorization or specification by the Board as to who will take charge of these boxes as well as to all the other things that the Board must do. Now the simple matter that the police are not subject to the orders of the Board of Elections does not govern. They must delegate it to some one and for this purpose they specify the police as those who will take charge of the boxes. It is exactly the same as if they told Mr. McGowan to take them and put them in some room.

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THE COURT: I want to get the Statute now.

MR. CONKLIN: Section 199 of the Election Law specifies that it shall be the duty of the police to aid the Board of Elections.

THE COURT: That is simply for preserving the public peace.

MR. CONKLIN: And then render all practical assistance in the enforcement of this chapter.

THE COURT: Let us see just what the Statute says. Section 374 in respect to the preservation of the ballot reads as follows: (Reading) In addition to that they furnish the boxes into which the ballots are placed on Election Day. Now what I am curious to learn is where the Board of Elections gets its authority to tell the police of this city to take these ballots to the station house and there to be the custodian of them.

MR. CONKLIN: Well the Board of Elections transmit these ballot boxes to the various Election Boards through the police. Now would it be expected that the Board of Elections would themselves, being four members, take every one of those boxes to the polling place and take them back again. Why, the Board of Elections could select this building across the way and put whomever it pleased, it could put me without one cent of compensation, over there and as long as that was the place designated by the Board of Elections, and I was the man

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designated to look after them it would be constructively, within the meaning of the Election Law, within the possession of the Board of Elections. Now what difference does it make whether it is Mr. McGowan or whether it is the police or anybody else outside of the four members of the Board of Elections who took possession of these boxes. This chapter must be construed reasonably.

THE COURT: It is a criminal Statute, and it calls for a strict construction.

MR. CONKLIN: Well even a criminal statute could not be so construed as to make it part of the duty of the four members of the Board of Election to physically sit down and watch these ballot boxes.

MR. EDELSTEIN: I take it that when we are considering a question of criminal law we are not dealing with expediency. The law places this matter in the hands of the Board of Elections and whether it might be expedient to have the Police Department look after the matter does not change the situation. Now in examining the Election Law where it intends specifically to authorize the Police to do an act there is a distinct provision. Section 372 says that a statement of the canvass is to be delivered to the police and therefore it means that the Election Law, in every instance where it wants the police to take charge distinctly says so. Now nothing in the stat-

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ute permits the Board of Elections to make rule and regulations delegating its power to the police. Assuming for the purpose of this argument that the Election Law permitted the Board of Elections to make rules and regulations those rules and regulations as your Honor well knows, could not be such as to defeat the Statute. Now here the Election Board attempted to defeat the Statute. However inconvenient it might be for the Election Board to act or however important it might be for the purpose of expediency to have the Police Department handle the boxes is beyond the mark. The question is that the Election Law distinctly says when the Police Department may act or may not, and since there is nothing in the Election Law permitting that which was done in this case we hold that the Board of Elections had no more authority than your Honor would have.

THE COURT: It raises this question: Were these ballots preserved as required by law?

MR. EDELSTEIN: We contend that they were not.

MR. CONKLIN: Reading Section 199 it shows that it was the duty of the police to render all practicable assistance in enforcing this chapter. (reading) Now irrespective of that how is the Board of Elections going to take physical possession of these boxes when there are only four members of the Board?

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THE COURT: They have a right to properly conduct the Department and the State has a right and should make appropriations from time to time to cover these exigencies. The question here is have these ballots been preserved as the law contemplates that they should be?

I have given a great deal of thought to this question and I can readily see that the day has come for the voting machine in this State. The evidence here clearly shows that these ballot boxes containing the ballots which were marked were kept in the police station house. They was accessibility to them; there can be no question about that. There was, if I figure correctly from the number of voting places more than 500 keys any one of which would open a ballot box. Now there is just one observation I wanted to make. Your contention is that the Police Department on Election Day was an adjunct to the Board of Elections. I cannot find anything in the law upon which you base that theory. The proposition that the ballots had not been preserved is made by the other side, as required by law and it amounted to a duty on the part of the Bureau of Elections to preserve those ballots. I contend that those ballots should have been in the custody of Elections after they were counted and not kept in the station houses of this county. Now you can readily see what a gross miscarriage might follow. These ballots

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are thrown about from pillar to post as I said a minute ago, put into rooms not thoroughly secured and the keys to which are accessible almost to anybody. People may go in and out. The ballot boxes are not examined from time to time according to the evidence in this case. Now there is a case that squints this way concerning the custody of ballots. The places were easy of access, places where other persons other than the Police department frequently attended; that the supervision was not as strict or as scrupulous as it should be. They were in rooms keys to which existed, many of them and unidentified people had access to those rooms coupled with the fact that one key would open every ballot box and that upwards of 5,000 of those keys were scattered throughout the city without any attempt to keep track of them. This jury might find that the ballot boxes were not free from the possibility of access. Now that has been said by some very excellent lawyers and I am inclined to agree with them. Now, mark you, I am not deciding this case now. I am only giving my views.

MR. CONKLIN: It would almost defy imagination to conceive of any way in which this great mass of solid boxes could be absolutely secured against any possible tampering with unless they should build an enormous steel

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and have it under observation so that nobody could possibly secure access to it. If it is not sufficient to have the door locked and sealed under the case of the police why you cannot imagine that even if they were in the office of the Board of Elections somebody could not, by some remote possibility get access to the room.

THE COURT: A certificate of election is presumptive evidence. That, however, is not final and conclusive evidence by any means. The contents of the boxes has been said to be the best evidence after having been opened and counted but before the boxes can be received in evidence it must be shown that the boxes and their contents are inviolate. Now have you done that in this case? Wasn't it possible, assuming that the law which I have quoted is correct,-- isn't it clearly shown that the boxes were not inviolate; on the contrary doesn't it affirmatively appear that there was accessibility, that others could have got to those boxes and tampered with them.

MR. CONKLIN: Within the realm of the miraculous, not within the realm of probability but possibility. So it might be if they were in a steel vault or drawer it is conceivable to the imagination that they might be tampered with, that there might be a possibility that some one will get in there in some way and would tamper with them or somebody would have access to them. There have been con-

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victions, of course, under this Statute; there have been convictions in which there was exactly the same set of circumstances that are here as far as accessibility is concerned. These cases have been presented to a jury to permit them to determine whether, in the realm of human experience there could be a probability or a possibility that some one could go in there and have the time and opportunity to open the boxes and make an alteration not only in the ballot but in the count.

MR. EDELSTEIN: It seems that my friend has not given close attention to the evidence. The officer stated here that the key which closed the room wherein these ballots were was in the office of the captain, hanging on a wall and that over a hundred people would go into the captain's room. In addition to that the evidence is that one key could open any of the ballot boxes. Now when you treble the number of ballot boxes used in one Election District his argument it seems to me falls by the wayside. The next proposition, as to the expediency, as I said before, when we are considering a criminal Statute we are not interested in expediency. The proposition is where the Legislature intended that the police should be charged with a duty it distinctly states it in the Election Law. If it is not there we ought not read anything into the Election Law. We stand entirely on the Statute. Now as

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to the probability or possibility the fact is that this room where these ballots were kept was right close to the office of all the detectives in that particular precinct so not only is there a possibility but there is a probability and since the rule of law is that where there are two constructions, one of innocence and one of guilt the construction favorable to the defendant should be given him. As your Honor stated a criminal Statute should be construed strictly. The argument is not based on sound legal reasoning, but is more or less theorizing. You are told here to take a steel vault, a big vault and keep the ballots in that. If these ballots were kept in a warehouse and the man in charge of that warehouse were a sworn officer from the Board of Elections that would comply with the Statute. In this case it affirmatively appears that it has been the uniform practice followed for years to leave the ballots in the hands of the police.

THE COURT: I say that in my judgment they have been violating the law in this County for years, and ultimately it will have to go before the Court of Appeals so that there may be no question about it. I do not feel that I shall change my view of it in any way. In making these remarks, however, it does not mean that I am now going to dismiss this indictment.

MR. CONKLIN: We all feel that the voting machine must arrive. Everybody agrees as to that and it will do

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away with the possibility of fraud.

MR. POMPAN: We except to that remark.

THE COURT: There is no ambiguous language in the Statute. It says that after the count has been had the ballots shall be replaced in the ballot box, sealed, by an inspector designated for that purpose and delivered to the officer or Board furnishing it.

MR. POMPAN: Furnishing what?

THE COURT: The ballot box.

MR. POMPAN: Who furnishes it?

THE COURT: The Board of Elections.

MR. EDELSTEIN: The legal proposition is as to what the duties of the Police Department are. There is not a word giving the Police Department that power, that is, in the sense that they intended that they should be the custodian of the ballot boxes.

THE COURT: I want to see that envelope which Mr. Robinson showed to the County Clerk when he was here. The question is this: Whether the forwarding of a paper such as I am referring to would not amount to that which is called in law a false return. There is a duty imposed upon the inspectors to make a correct return of the ballots counted by them. That duty by law is imposed upon them. There was another thought that occurred to me and that is if an indictment could lie in this case for a failure to

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do that which the statute directed them to do. Might it not be said that if he was guilty of a neglect of duty that there was a dereliction on his part in the performance of his public duty. When I examined the indictment this morning and listened to some of the evidence I did feel that the indictment should have been for neglect of duty-- one is a misdemeanor and the other is a felony.

MR. ROBINSON: We have not felt like presenting a case of technical neglect that any Board of Elections might commit. We only presented cases where there was an actual fraud involved.

THE COURT: These cases are highly important because an election is the bulwark of our institution and they depend upon the strict application of the Election Law.

MR. ROBINSON: There is not an Election Board in town but makes some violation of the Election Law during the taking of the vote or in the counting of it. Some of them don't turn the ballot face down; they count them face up, but that is through carelessness and not through viciousness, but we felt where there is a discrepancy such as is shown in this case between the return as filed, or the tally sheets as filed with the Board of Elections and the condition of the ballots themselves as shown a month later when produced before the Grand Jury, when there is a difference of 80 votes in one Election District

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