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COURT OF GENERAL SESSION OF THE PEACE

City and County of N. Y. - Part 1.

The people of the State of New York

-against-

New York, January 16th, 1907.

Before:

Hon. Warren W. Foster, and a Jury.

Indictment filed December 4th, 1906.

Indicted for Grand Larceny in the Second Degree.

Appearances:

For the people, Assistant District Joseph E. Corrigan.

For the Defendant, Edward Hymes, Esq., and Louis

H. Saper.

Peter P. McLoughlin, Official Stenographer.

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The jurors were examined, empanelled and sworn.

**THE COURT:** Gentlemen, do not talk about this case nor permit anyone to talk with you about it, nor form or express any opinion thereon until the case shall be finally given you in charge.

(The Court then adjourned the further trial of the case till tomorrow morning, January 17th, 1907, at 10;30 o'clock.)

New York, January 17th, 1907.

TRIAL RESUMED.

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

During the opening address the following took place:

MR. HYMES: I ask that counsel shall not state, in his opening, anything that he knows is not competent and that is not within the issues here. He is now talking about this defendant posing as a physician. If he means that he is going to try to prove that this defendant was practicing medicine without a license I submit that it is absolutely incompetent, and counsel knows that it is.

THE COURT: Of course I will make a ruling, but I don't know how I can enforce it.

MR. HYMES: Will your Honor now direct the jury to disregard the statement.

THE COURT: If the District Attorney says things he knows are wrong I don't know how I can prove that he knows they are wrong.

MR. HYMES: I ask that your Honor direct the

jury to discard from their the statement of the District Attorney.

THE COURT: Yes. If you object to any particular statement I will rule upon it.

MR. HYMES: I object to the statement made by counsel that this defendant was posing, up in the Bronx, as a physician.

THE COURT: I will instruct the jury to disregard entirely the statement of facts made by counsel in their opening unless they are sustained by evidence afterwards received.

MR. HYMES: Now, I ask, in addition to that, that your Honor now instruct the jury that a statement of that kind, made by counsel, should be disregarded absolutely, as such evidence must be incompetent.

THE COURT: I will not do that at this time.

Exception.

MR. CORRIGAN: (Continuing) -- Cary went inside and McCafferty stood on the rear platform and got into conversation with the defendant. My belief is that there were more or less guesses passed upon the condition of a very stout woman on board of the car, which led up to the statement, by the defendant,

that he was a physician. McCafferty and Cary then placed the defendant under arrest and had a conversation with him. At first he strenuously denied --or aid that he was Dr. Ostro, a practicing physician, and strenuously denied all knowledge of the facts; but afterwards, when he was talked to again, he admitted that he had stolen from the Cornell University Medical School not only the lenses, which he sold to Kruskal, but many other things. He told the detectives where they would find some of the articles, for instance, he told the detectives, as I shall show you, that he pawned a number of them with a certain broker. The detectives went to the pawn shops and found the lenses there and the pawnbroker fully identified the defendant, Ostro, as the man who pawned the lenses. The detectives then took Ostro to Headquarters. He repeated certain of the statements there as I will prove to you in this case. I expect to show, first of all, that the defendant had the opportunity to steal, because he was in the Laboratory; secondly, that the defendant stole these lenses, which were the property of the laboratory, to Dr. Kruskeal, and these lenses are identified by Dr. Ewing. Dr. Kruskal knows the defendant and identifies him, The reason

Dr. Kruskal knows the defendant is because Dr. Kruskal was in the habit of obtaining, from the defendant, or from the college, through the defendant, media for planting bacteria. They have something called media, I believe it is a composition which they make in the college, and, in that way, Dr. Kruskal's acquaintance with the defendant began. The pawnbroker knows the defendant and will identify him because the defendant frequently pawned things, sometimes pawned lenses and then came and took them out again, and besides we have the confession made by the defendant to the two detective sergeants and the confession corroborated by finding the things in the very places where the defendant said they would be found, that is, in this pawn shop. If these facts are borne out I shall ask you for a verdict of guilty in this case.

## THE PEOPLE'S CASE.

JAMES EWING, M. D., a witness for the People, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. CORRIGAN:

MR. HYMES: If the Court please, I move that the witnesses for the prosecution be excluded while one witness is on the stand and not come into court until they are to testify.

THE COURT: So ordered.

MR. HYMES: I have told Mr. Corrigan that it is barely possible that a witness may be called for the defense, and perhaps it is fair that he should be excluded. It is the young man sitting yonder.

(The witness referred to leaves the court room.)

BY MR. CORRIGAN:

Q Where do you live, Dr. Ewing?

A 256 West 57th St.

Q What is your occupation?

A I am director of the Department of Pathology in Cornell University Medical College.

Q Where is the Cornell University Medical College situated?

A First Avenue and 28th Street.

Q City and County of New York?

A Right.

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Q As such director have you charge of the different articles in the laboratory?

A I Have.

Q In your custody and care?

A They are in my charge; not in my direct custody, and yet that is a question of the interpretation of the word custody. I have general charge of the work and of the apparatus in the department.

Q Do you know the defendant Ostro?

A Yes sir.

Q How long have you known him?

A I cannot exactly say, but he went to work in the department, as a helper in the bacteriological room in 1904, I think.

Q How long was he employed there?

A Well, probably a year or more; I have not the exact date.

Q Was he employed there on or about the 7th of September, 1905?

A Yes sir.

Q On or about that date did you miss anything from the department?

MR. HYMES: I object to that as sailing for a conclusion, not for a fact.

MR. CORRIGAN: I think it is a fact, if your Honor please.

THE COURT: He may answer.

Exception.

A Yes sir.

Q What did you miss?

A On the 7th of September or

the 8th of September, 1905, or a day or two about that time, as it required a certain time to ascertain the extent of the loss --

MR. HYMES: I ask that this be stricken out, "as it required a certain amount of time" and so forth.

THE COURT: Strike it out.

Q Continue?

A We discovered the loss of thirteen oil immersion lenses.

MR. HYMES: I ask that that answer be stricken out on the ground that it is a conclusion of the witness; it involves his mental operation.

BY THE COURT:

Q You made an examination of the oil immersion lenses?

A Yes sir.

Q You say you discovered thirteen of them gone?

A Yes sir.

Q How many were there originally?

A I cannot say exactly.

Q How do you know there were thirteen of them missing?

A Because I had a record of the lenses in a certain and on the 8th of August, -- on the 7th of September I found that of these lenses thirteen were gone.

THE COURT: I will allow it to stand.

MR. HYMES: I ask that the last part of this answer be stricken from the record, upon the ground that it is not responsive, upon the ground that it states no fact, upon the ground that it is clear that a record made with regard to the 8th of August cannot be competent evidence, that it is a conclusion of the witness. We don't know who made the record, and we don't know whether the record was accurate.

THE COURT: I will instruct the jury to disregard that statement. It was made for my benefit.  
Exception.

BY MR. CORRIGAN:

Q You say there were thirteen missing?

A We found thirteen missing lenses of one type; we found fourteen missing lenses of another type and six or seven of another, besides quite a list of property of different sorts, all more or less valuable.

MR. HYMES: I ask that this be stricken out, "other property of more or less value and of different sorts".

THE COURT: Strike that out.

BY MR. CORRIGAN:

Q To whom did these lenses belong?

MR. HYMES: I object to that as calling for a

conclusion and not a fact.

THE COURT: He may answer that.

Exception.

A To the Cornell University Medical College, Department of Pathology.

Q Is that a domestic corporation?

MR. HYMES: I object to this as incompetent.

MR. CORRIGAN: Will you concede it?

MR. HYMES: If it is true I will, of course, but you have not given me any evidence of its truth.

MR. CORRIGAN: I assure you that it is true.

MR. HYMES: Do you know of your own personal knowledge?

MR. CORRIGAN: I have only read the certificate. If you do not want to make the concession, very well.

MR. HYMES: What is the concession?

MR. CORRIGAN: That the Cornell Medical School is a domestic corporation. It is as well known as New York City.

MR. HYMES: Is it any part of the corporation at Ithaca?

MR. CORRIGAN: Yes, it is a branch of it.

MR. HYMES: I did not know that; I did not know

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that there was any part of it in New York until now.

MR. CORRIGAN: Will you concede it?

MR. HYMES: Yes.

MR. CORRIGAN: It is conceded that the Cornell University is a domestic corporation.

(The Court then admonished the jury, calling their attention to Section 415 of the Code of Criminal Procedure and took a recess until 2 o'clock.)

AFTER RECESS.

JAMES EWING, a witness for the people, resumes the stand.

DIRECT-EXAMINATION CONTINUED BY MR. CORRIGAN:

Q Now, doctor, after you discovered the loss of these lenses, what did you do?

A Nothing for a time.

Q Did you have any conversation with any police officers?

MR. HYMES: I object to that as incompetent.

MR. CORRIGAN: I am not asking him to state the conversation. I am only asking him for the fact.

MR. HYMES: We are not even bound by the fact, we contend.

THE COURT: It is preliminary. He may answer and it may be stricken out if it is not connected.  
Exception.

A Yes sir, shortly thereafter I did.

Q With whom was that conversation?

A Detective McCafferty.

Q About a year after that did you have a conversation with Dr. Jaches?

A Yes sir.

Q After that conversation with Dr. Jaches did you have

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another conversation with McCafferty?

A I did.

Q Now, do you remember when the defendant was arrested?

A When he was arrested?

Q Yes.

A Yes sir.

Q In November?

A I cannot give the date.

Q November, 1906, wasn't it?

A About that time.

Q After that did you see Dr. Kruskal?

A Yes sir.

Q Did Dr. Kruskal show you these two articles which I show you now (handing witness two lenses). Just examine them please, doctor?

A Yes sir.

Q What are those articles?

A These are two lenses, microscopical lenses, one No. 7 lens so-called and the other an oil immersion lens so-called.

Q Had you ever seen those lenses before Dr. Kruskal showed them to you?

A Yes sir.

Q When did you see them last the last time before that?

A On August 7th, 1906.

Q 1905 or 1906?

A 1905.

Q Where were they at that time?

A They were in my room at the Cornell University Medical College.

Q Whose lenses were those?

MR. HYMES: I object to that as calling for a conclusion, and not a fact.

Objection overruled.

Exception.

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Q If you know?

A They belonged to the Department of Pathology, Cornell University Medical College.

Q Are those two of the lenses you mentioned as having been missed from the Department?

A Yes sir.

MR. CORRIGAN: I ask that they be marked for identification People's Exhibit 1 and 2.

THE COURT: Yes.

(The two lenses referred to are marked people's Exhibit 1 and 2.)

BY MR. CORRIGAN:

Q Now, Dr. Ewing, I show you two other lenses and ask you if you can identify those?

A (Witness examining the lenses). This lens I can identify as one of those which we had in our possession on August 7th.

Q And the property of the Cornell University Medical College?

A Yes sir; the property of the Cornell University Medical College.

Objection overruled.

Exception.

MR. CORRIGAN: I offer the one which the doctor can identify. I ask that it be marked for identification.

The lens last referred to is marked People's Exhibit No. 3 for identification.

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Q Can you identify the other lens I show you?

A Only in a general way.

Q Now, where did you last see the lens Exhibit No. 3 for identification? After you saw it in the possession of the Cornell Laboratory?

A Detective McCafferty brought it to me.

Q Showed it to you?

A Yes.

Q When was that, doctor?

A I can't remember the date.

Q Was it before or after the arrest of the defendant?

A I cannot say that.

Q Now, I show you this lens and ask you if you can identify it?

A Yes sir.

Q As the property of the Cornell University Medical College?

A Yes sir; as the property of the Cornell University Medical College.

Q That lens you saw in the University on August 7th?

A Yes sir; August 7th, 1905.

MR. CORRIGAN: I ask to have this lens marked for identification.

(The lens last referred to is marked People's Exhibit 4 for identification.)

Q Now, doctor, I show you this lens and ask you if you can identify that?

A Only in a general way.

Q Well, can you testify that it was the property of the Cornell University?

MR. HYMES: I object to that upon the ground that the witness has already stated that he cannot.

MR. CORRIGAN: He says "in a general way" and we are trying to find out if he can.

THE WITNESS: I think it is the property of the Cornell University Medical College.

MR. HYMES: I move that the answer be stricken out.

THE COURT: Don't think. You may give your best recollection. Strike that out.

Q According to your best recollection, is it or is it not?

A Well, there is no way of identifying this lens, your Honor, I cannot identify it.

MR. HYMES: I must object to the question.

BY MR. CORRIGAN:

Q I show you this lens and ask you if you can identify this one?

A That is another lens.

Q To whom did that lens belong?

MR. HYMES: I object to that as sailing for a conclusion.

THE COURT: He may answer.

Exception.

THE WITNESS: Belonging to Dr. Schults, one of the assistants in the department.

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Q Dr. Schults, who is now a Coroner's Physician?

A Yes sir.

MR. HYMES: I ask that the answer be stricken out on the ground, irrespective of any other reason, that it is not part of the subject matter of this indictment.

THE COURT: It only tends to identify an individual.

MR. HYMES: Your Honor will observe the allegation in the indictment and the force of my objection will become entirely clear.

THE COURT: It is a preliminary question. I don't know what the District Attorney is going to prove. It is quite immaterial whether this was owned by one man or another at this time. If the District Attorney does not connect it we will strike it out.

MR. HYMES: Even if he did connect it we contend that it is not within the issues we are trying and because of that I object.

THE COURT: Subject to a motion to strike out I will leave it.

Exception.

Q Where was that lens when you last saw it, before you saw it in the court here?

A It was in Dr. Schults's private

room in the Department.

Q Of what department?

A Department of Pathology, Cornell University Medical College.

MR. CORRIGAN: I ask that that be marked for identification.

MR. HYMES: I object to that being marked for identification, upon the ground that it cannot clearly be within the issues of the indictment we are trying.

THE COURT: Mark it for identification.

(The lens last referred to is marked People's Exhibit No. 5 for identification.)

Q Now, doctor, I show you this lens and ask you if you can identify this?

A No sir.

Q Can you identify this one (handing witness another lens)?

A No sir; these lenses were all of a general type which have no distinguishing mark on them.

Q I show you this one and ask you if you can identify that?

A A little better than the others, but not absolutely.

Q You are not absolutely sure of that?

A No sir.

MR. CORRIGAN: Then I won't offer, it.

Q I show you this one and ask you if you can identify this, which is a combination of lens and reflector as nearly

as I can make it out.

MR. HYMES: I object to that question.

THE COURT: Don't characterize it.

A The same class of article of which they are all a part.

Q You cannot positively identify it?

A No sir; I cannot positively identify that.

Q I show you this lens, doctor, and ask you if you can identify this one?

A Yes sir.

Q To whom does that lens belong?

A Cornell University Medical College, Departments of Pathology.

Q When was the last time you saw it before Sergeant McCafferty showed it to you?

A August 7th, 1905.

Q Where was it at that time?

A In my room at the college.

MR. CORRIGAN: I ask that that one also be marked for identification.

The lens last referred to is marked People's Exhibit No. 6 for identification.

BY MR. CORRIGAN:

Q Did you have any conversation with the defendant at any time after his arrest, doctor?

A No sir.

Q Are you familiar with the value of lenses?

(No answer.)

Q Have you bought and sold lenses in the market?

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A Yes sir, constantly.

Objected to.

Objection overruled.

Exception.

Q Are you familiar with their market value?

A Yes sir.

MR. HYMES: I object to that, asking the witness to pass upon his own competency, and therefore it is incompetent and immaterial.

THE COURT: He may answer.

Exception.

A Yes sir.

Q Will you state the value of People's Exhibit No. 1 for identification?

MR. HYMES: I object to that upon the ground that the witness has not shown himself to be competent to swear as to the market value of any lenses or instruments of this kind. His position is that of a Professor in some department of Cornell College. He has not indicated his competency.

THIS COURT: Do you want to qualify him further.

MR. CORRIGAN: It seems to me that he testified that he bought and sold lenses.

THE COURT: I heard his testimony.

MR. CORRIGAN: I think that is sufficient.

THE COURT: Do you wish to cross examine him touching his competency?

MR. HYMES: No sir; my objection is upon the record.

THE COURT: Into so. I am asking a question of you?

MR. HYMES: I don't think that under the state of the record as it is now that that is necessary.

Objection overruled.

Exception.

MR. HYMES: And now, having excepted, I ask for permission to examine the witness on cross examination.

THE COURT: You may do so.

BY MR. HYMES:

Q Just about this particular point -- were you ever in the business of selling lenses?

A No sir,

Q Were you ever employed by any one who has in the business of selling lenses?

A No sir.

Q Either retail or wholesale?

A No sir.

Q What is your specific profession, doctor?

A Pathologist.

Q Eh? Pathologist?

A Yes sir.

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Q For how long?

A Seventeen years.

Q Has your specialty been pathology for seventeen years?

A Yes sir.

Q How long have you been particularly engaged in investigations in bacteriology?

A Seventeen years.

Q Who is the purchasing agent of the Cornell Medical College?

MR. CORRIGAN: I object to that.

Q Are you the purchasing agent?

A Yes sir.

Q Since when?

A Since I became director of the department of pathology.

Q How long have you been the director?

A Since 1898.

Q A period of seven, or about eight years?

A Yes sir.

Q During that time how many lenses have you bought for the department?

A I cannot say exactly.

Q Approximately?

A Probably five hundred.

Q Five hundred lenses?

A Yes sir.

Q Where have you bought them?

A Mostly from E. Leitz & Co. of Wetzlar, Germany, and partly also from Bouch & Lome, of Rochester, New York State.

Q You have mentioned two firms?

A Yes sir, and from Zeis, also of Germany.

Q That is three firms you have mentioned?

A Spencer

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& Co. -- a lens company of Rochester also, I think.

Q That is four?

A That is enough.

Q Is that all?

A I don't know.

Q Look at lenses No. 1, 2, 3, 4, 5 and 6. Have you them in memory?

A I know them very well.

Q How many of those lenses are of the same type or kind?

A Four.

Q Is the Schultse lens of the same type as the three others?

A No sir.

Q Then there is one, that is an oil immersion lens, I think you called it, is that true?

A One is.

Q Then there is one lens, which we may call the Schultse lens and one which we may call an oil immersion lens, and there were four others which are of the same type or kind?

A You are mistaken.

Q Which is correct?

A Four of the lenses are oil immersion lenses.

Q Four are oil immersion lenses, one is a Schultse lens, and what kind of a lens is that (handing witness another lens)?

A That is a micrometer lens, used for measuring the dimensions of microscopic objects.

Q And what is the other one?

A That is a low power lens, commonly called a No. 7 lens.

Q How many micrometer lenses have you bought?

A 1

don't remember how many; we don't need more than one or two in the laboratory.

Q Have you bought more than one or two?

A No sir.

Q How many of the kind that you call oil immersion lenses have you bought say within the last two or three years?

A None.

Q How many of these low power No. 7 lenses have you bought within the last two or three years?

MR. GORRIGAN: I object to the limitation being put on the doctor.

MR. HYMES: You are asking for the market value.

THE COURT: He may answer.

THE WITNESS: I don't think any of them were bought -- just excuse me, I beg to alter the answer to the last question regarding the oil immersion lenses. I have bought ten, I remember now. Last year I bought top lenses to replace the ones that were stolen from the department and also fourteen No. 7 lenses.

MR. HYMES: I ask now that the portion of the answer beginning with the word "which" be stricken from the record. I submit that "ten lenses" was the only part that was responsive.

THE COURT: Strike it out.

Q You bought ten oil immersion lenses last year?

A When, I cannot say.

Q Where?

A E. Leitz & Co., New York.

Q How many low power lenses have you bought in the last two or three years?

A I don't remember any in the last two or three years.

BY MR. CORRIGAN:

Q Now, doctor, I ask you what is the value of this oil immersion lens?

MR. HYMES: That is objected to upon the ground that the witness has not indicated his competency, and that the examination shows that he is not competent to state the market value of any of these articles at the time of the alleged larceny or at the present time. I submit that it would be carrying the doctrine so far that we have no adjudicated case in line with it, to say that because a man has bought ten immersion lenses within the period covered by the indictment that he is an expert to tell the market value of these lenses. There is no indication of his knowledge of the cost of manufacture, of his buying the same things wholesale, there is no indication of the source from which he derived

his knowledge and because he bought ten to allow him to testify then as an expert is stretching any doctrine beyond breakage.

THE COURT: I will receive it for what it is worth.

Exception.

MR HYMES: The point being that the witness is not duly qualified as an expert.

BY MR. CORRIGAN:

Q Now, what is the market value of these oil immersion lenses?

A About forty dollars.

Q A piece?

A A piece.

Q What is the market value of these micrometers lenses?

MR. HYMES: Objected to upon the ground that the gentleman testified that as to micrometers he does not remember ever having bought more than one or two. My objection is on the ground of the incompetency of the witness.

THE COURT: He may answer.

Exception.

A Ten dollars.

Q What is the value of the low power, No. 7?

MR. HYMES: That is objected to upon the ground that the witness's entire competency is indicated by

his answer that during the time covered by the indictment he hasn't even bought any.

Objection overruled.

Exception.

A Ten dollars.

CROSS EXAMINATION BY MR. HYMES:

MR. HYMES: May I go inside so that I can look at these exhibits and examine the witness about them?

THE COURT: Yes.

Q Won't you tell me first which are the oil immersion lenses?

MR. CORRIGAN: You are misplacing them

THE COURT: There were certain lenses received in evidence? Those which have been received in evidence are open for your examination.

MR. HYMES: None have been received in evidence as yet.

MR. CORRIGAN: I have offered none in evidence.

THE COURT: I was mistaken.

MR. CORRIGAN: I will offer them in evidence at the present time. Dr. Ewing is able to identify them as the property of the University. I now offer

them in evidence.

MR. HYMES: We object to that on the ground that no competent foundation has been laid thus far.

THE COURT: To a certain extent it is preliminary, but I am going to receive them at this time with leave to connect. If the People fail to connect them we will strike them out. I receive them to the end that you may cross examine the witness concerning them.

MR. HYMES: I make it a ground of my objection to their reception in evidence that no foundation, sufficient to connect them with the defendant, or any issue that we are litigating here, has been laid, and on the ground that they are incompetent.

THE COURT: I will receive them.

MR. HYMES: My point is that the burden should not be laid upon the defendant afterwards of having overlooked to move for their elimination from evidence.

Exception.

Q What is No. 5, doctor?

A A micrometer.

Q You say that is the property or was the property of Dr. Schultse?

A Yes sir.

MR. HYMES: Does your Honor permit that lens to

go in evidence, the property of Dr. Schultse?

THE COURT: No; I did not so understand it.

MR. CORRIGAN: I withdraw that.

THE COURT: Let me understand this. Why are you offering this lens of Dr. Schultse? I have not examined the indictment before me, but I assumed that the larceny laid in the indictment charged the property as the property of the Cornell University.

MR. CORRIGAN: I withdraw my officer of People's Exhibit No. 5 for identification.

MR. HYMES: I move to strike out all evidence given by this witness with respect to People's Exhibit No. 5 for identification.

THE COURT: That is Dr. Schultse's lens

MR. HYMES: Yes, sir.

THE COURT: Now, Mr. District Attorney, I will receive it subject to your promise to connect it and subject to a motion to strike out unless connected. I don't wish to rule against you if you are going to connect it with this case. We are not trying the defendant for stealing Dr. Schultse's lens.

MR. CORRIGAN: The only ground upon which this lens could properly be put in evidence is showing similar transactions. That is the ground for offering

it in evidence.

THE COURT: I don't see any reason for proving similar transactions here.

MR. HYMES: I must except.

THE COURT: I see no reason for proving similar transactions here. If the defendant took these away it does not require the proof of similar transactions. That is a question for the jury to pass upon, but I think, as a matter of law, I must rule that similar offenses are not necessary to be proven here.

MR. HYMES: I would like to have entered upon the record my objection to the District Attorney's statement as to the ground upon which he believed these things were admissible in evidence.

THE COURT: That was for my benefit, not for the jury's, and they will not regard it.

MR. HYMES: I wish to have my objection noted to it, but as there is no adverse ruling I cannot take an exception in that connection. Now, then, all evidence in relation to Exhibit No. 5 is out of this case?

THE COURT: Yes, that is the Schultse exhibit.

BY MR. HYMES:

Q People's exhibit No. which I hold in my hand, doctor, what is it?

A What we call a No. 7 lens.

Q Where was that bought?

A E. Leitz & Co., New York.

Q What is E. Leitz?

A E. Leitz is an optician, a German optician.

Q Manufacturing lenses where?

A Wezlar, Germany.

Q An agency in this country?

A Yes sir.

Q Whereabouts?

A East 18th Street.

Q Is that the only one in this country?

A I am sure I don't know.

Q This is not a very unique sort of an instrument that I hold in my hand, is it, Exhibit No. 2?

A No sir.

Q Many of those bought and sold in the course of a year?

A Yes sir.

Q Other institutions than your own ever use them?

A Yes sir.

Q Just tell me what identification mark there is that makes you able to tell us that this particular instrument is one which you saw on the 8th of August in your laboratory, 1905?

A I did not say that.

Q Did you say on the 8th of August or the 7th of August?

A Well, the 7th was the date we used.

Q Let us use the 7th. What distinguishing mark, if

any, is there upon People's Exhibit No. 2 which serves to indicate that it was in your possession, or in the possession of the laboratory, or of your college on the 7th of August, 1905?

A No absolutely distinguishing mark on that lens.

Q You testified, did you not, -- I err correct me --that People's Exhibit No. 2 is the property of Cornell University?

A I did not positively identify that particular lens.

Q Are you able to swear, or do you wish to be understood as swearing that that exhibit No. 2, which I hold in my hand, is the property of Cornell University?

A No sir.

MR. HYMES: I ask that all evidence with respect to People's Exhibit No. 2 be stricken from the record, and that the exhibit itself be stricken from the record upon the ground that we evidently misconceived the doctor's answer as to Exhibit No. 2.

THE COURT: What is that?

MR. HYMES: May I state the purport of his last answer?

THE COURT: Yes.

MR. HYMES: He says that with respect to Ex. No. 2 he does not wish to be understood as swearing that it is the property of Cornell University,

that there is no distinguishing mark upon it by means of which he is able to pay it was the property of the University, or was in their possession at the time in question.

THE COURT: I think that motion should be granted.

MR. HYMES: That motion is granted?

THE COURT: Yes.

MR. CORRIGAN: I should like to straighten this matter out as to the exhibits.

THE COURT: Yes.

BY MR. CORRIGAN:

Q I show you this lens and ask you if that is one that you identify positively as the property of the Cornell University?

A I identify all these lens, but you have get them on the wrong cards.

Q Which of the two lens did you get from Dr. Kruskal?

A This is not one of them -- so that an error.

Q Now, is this one you got from Dr. Kruskal?

A No sir.

Q Is this one from Dr. Kruskal?

A No sir.

Q Is this one from Dr. Kruskal (showing witness the lens marked Exhibit No. 6)?

A Yes sir.

Q That is a lens from Dr. Kruskal, People's Exhibit No.

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6?

A Yes sir.

MR. CORRIGAN: Me states that People's Exhibit No. 6 is one which he obtained from Dr. Kruskal.

Q Now, where did you get Exhibit 3 from, doctor --from Detective Sergeant McCafferty?

A Yes sir.

Q This lens, No. 7, you were not able to identify?

A Not positively.

BY MR. HYMES:

Q Now, we will take up this one. We have now three lenses which have been marked People's Exhibit 1, 2, 3 and 6. What kind of lenses or articles are these?

A We call them oil immersion lenses.

Q And No. 6 is an article which you say you obtained from Dr. Kruskal, some time subsequent to August 7th, 1905?

A Indirectly from Dr. Kruskal.

Q You told Mr. Corrigan that you obtained it from Dr. Kruskal. What did you mean by that, that some one told you he got it from Dr. Kruskal?

A Yes sir.

Q Now, what we wanted to know, or I assume what your questioner wished to know, was, from whom you got it?

A Well, I haven't got it all; it was given to me by Mr.--

Q Did you ever get it from anybody after August, 1905?

A I got it from McCafferty.

Q That is No. 6?

A I have seen it.

Q You did tell Mr. Corrigan that these other three articles, exhibits 1, 2 and 5, you obtained them from Sergeant McCafferty, is that correct?

A Yes sir.

Q Why did you make a distinction between No. 6 and Nos. 1, 2 and 3 if you got them all from McCafferty?

A That will be apparent later.

MR. HYMES: Now, I move that that answer be stricken from the record.

BY MR. HYMES:

Q Can you tell me any reason why you distinguished, in answering Mr. Corrigan, as between lenses 1, 2 and 3 upon the one hand and lens No. 6 upon the other hand, and state that you got one of them from Dr. Kruskal and the other three from Detective McCafferty, when you say now you got them all from McCafferty?

A I can tell you.

MR. CORRIGAN: I object to that question.

THE COURT: Objection overruled.

THE WITNESS: I can tell you why -- because Detective McCafferty came to me with a lens and said he got it from Dr. Kruskal and asked me if I could identify it and I identified it.

Q That is No. 6?

A Yes; that is No. 6.

Q Now, what about the other three?

A Well, I simply got them from Detective McCafferty.

Q And you didn't know where he get them from, is that

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it?

A No sir; I don't know where he got them from.

Q Now, take No. 6 alone and tell me how it is that you recognize that as one of the articles that was in the possession of your college on the 7th of August, 1905?

A By the manufacturer's number on the lens.

Q Now, let us see about that. What is the number on this lens?

A I don't know now.

Q What lens is it, what number?

A It is No. 6.

Q You said that was in the possession of your laboratory on the 7th of August, 1905. What number is on that lens?

A 28,273.

Q Show me where the number is?

A I don't believe you can see it if I do point it. It is in very fine letters.

Q On which one of these three pieces of brass is that number?

A Right there (indicating).

Q What number do you say it is?

A 28,273.

Q Do you recognize it by any other mark than that number?

A No sir; that is enough.

MR. HYMES: I object to the "that is enough" and ask that it be stricken from the record.

THE COURT: Strike it out.

BY MR. HYMES:

Q What distinguishing mark is there upon Exhibit No. 1 that makes you conclude it was in the possession of your

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college on the 7th of August, 1905?

A The manufacturer's number.

Q What number?

A I don't remember now.

Q Well, what mark is there upon People's Exhibit No. 2 which indicates to you that it was in the possession of your college?

A The manufacturer's number.

Q What is that number?

A I don't remember now.

Q Is your answer the same with respect to Exhibit No. 3?

A Yes sir.

Q The only member that you remember now is the one that you gave me on No. 6?

A Yes sir.

Q Is that correct?

A Yes sir.

Q When you were interrogated by Mr. Corrigan you answered -- if I err correct me -- that Nos. 1, 2 and 3 were the property of the college and in the possession of the college, at the laboratory, on the 7th of August, 1905, when you looked at the lenses when they were handed to you by Mr. Corrigan, what things did you see upon the lenses which served to identify them to you?

A The manufacturers numbers.

Q But you say you don't remember the numbers?

A No sir; I don't remember now.

Q Will you tell me now the numbers you saw on lenses you saw on the 7th of August, 1905?

A No sir; with the exception

of this 28,273.

Q Now, how is that you were able when you looked at Exhibit No. 3, although you didn't know the number, to say that it was in your possession on the 7th of August that this was the same number?

A Why, by the refreshment of my memory, by seeing these numbers thereon. There are five figures in these numbers.

Q But you don't remember the numbers of any of these lenses with the exception of this one?

A I cannot repeat them now, but when I see these numbers it recalls to my mind the impression that I have had many times of these particular lenses and that serves to refresh my memory.

Q And I suppose that if you look at these now and see the numbers you will be able to tell me that that is the number, won't you?

A Yes sir.

Q On the 7th of August, 1905, did you look at the various lenses that were in your department?

A Yes sir.

Q Did you at that time take a record -- I saw you looking in your pocket -- or make a record of the lens numbers that you had?

A We verified the record.

Q Answer my question. Did you at that time make a record of the numbers of the lenses that were then in your establishment?

A Yes sir.

Q You personally did?

A I personally made that.

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Q How many lenses did you then make a record of?

A Of all the immersion lenses in the department.

Q How many were those?

A I don't know.

Q What did you do with that record?

A Left it in my private drawer at the college.

Q Where is that record?

A It is in my pocket.

Q You have it here -- you brought it here for the purposes of this trial, did you not?

A Certainly.

Q Where has that list been since you made it?

A In my possession.

Q Did you make it on the 7th of August?

A Yes sir.

Q What did you mean a moment ago by saying that on the 7th of August you verified a list, and did not make one?

A It depends upon what you mean by making a record.

Q What did you mean by saying you didn't make one?

A I meant that I took a list of the manufacturers' numbers on the various immersion lenses in my possession. I identified those numbers with the lenses then in my possession and found that they tallied. These lenses were then set aside and I kept the record in my drawer.

Q Is the record in your own handwriting?

A It is in typewriting.

Q Who made the record?

A I made it.

Q When did you make it?

A On the 7th of August,

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1905.

Q Let me see it?

MR. CORRIGAN: I object to that unless counsel puts it in evidence.

MR. HYMES: If you have any right to do anything that I aid you in you will get that right.

THE COURT: If you desire to see it you must put it in evidence. You cannot examine it without putting it in evidence.

MR. HYMES: The rule of law is if I look at it I am then compelled to put it in evidence and your Honor can compel me to do it. I am not going to make any promise to do anything. I don't recognize it as a rule of law. Your Honor can warn me and I suppose I take it at my peril, after the warning.

BY MR. HYMES:

Q In whose handwriting is it so far as it is in handwriting?

A Well, I think it is in Dr. Letchworth Smith's handwriting, the man who preceded the present incumbent in the Department of Bacteriology in the Institution, but there may be marks of other writing.

Q When was that handwriting placed upon that paper?

A I don't know; there is a date on that paper, it says February, something, 1904.

Q Who actually typewrote these numbers?

A The typewriter in the Department.

Q Did you dictate it?

A No sir.

Q Did this doctor do it as far as you know?

A I don't know who dictated it; I think Dr Letchworth Smith dictated these particular numbers.

THE COURT: Don't think. You may give us your best memory.

THE WITNESS: That is my best memory; that is what I meant when I said "I think".

BY MR. HYMES:

Q Who was present when you examined the oil immersion lenses on the 7th of August, 1905?

A Patrick Dunn.

Q Anybody else?

A No sir.

Q You told me a moment ago that on the 7th of August you made a list in typewriting?

A I told you nothing of the sort.

Q Didn't you tell me that?

A No sir.

Q What list did you make on the 7th of August, 1905, of the oil immersion lenses?

A I did not make any list; I never told you that I made a list.

Q Any marks on this paper in your handwriting?

A I cannot say.

Q Don't you remember whether on the 7th of August,

1905, you made any marks upon any paper?

A No sir.

Q Did you have this paper with you on the 7th of August, 1905?

A I did.

Q Who is Patrick Dunn of whom you just spoke?

A He is the general janitor of the department.

Q I notice that upon this paper there are in the neighborhood of forty numbers. Does each one of those numbers correspond to an oil immersion lens that you had?

MR. CORRIGAN: I object to that question and to any question in reference to the paper that Mr. Hymes holds in his hand unless the paper itself is offered in evidence.

THE COURT: Yes, Mr. Hymes, that is a proper objection. Let the paper come in evidence.

MR. HYMES: I assume that my question is incompetent according to your Honor's ruling?

THE COURT: I will receive the paper in evidence.

MR. HYMES: I am not offering the paper in evidence.

THE COURT: Then you cannot question concerning it unless it is in evidence.

MR. HYMES: I have not asked for the contents of any part of this paper. The witness has testified that he made a record of the oil immersion lenses

on the 7th of August, 1905. He said he had the record in his pocket, and he produced this paper as the record. I now am simply asking him to verify what he told me on my cross examination, whether or not each number here corresponds to an oil immersion lens, that is all I am asking of him.

THE COURT: If you desire to question him concerning the paper put it in evidence.

MR. HYMES: I will withdraw the question in the form just put and ask the doctor this question: Does each number upon the paper which you handed me correspond to an oil immersion lens?

MR. CORRIGAN: I object to that question on the grounds already stated, that it refers to a paper which is not in evidence.

THE COURT: Objection sustained.

Exception.

MR. HYMES: Take back your paper.

MR. CORRIGAN: --

MR. HYMES: I am not yet through with the witness.

BY MR. HYMES:

Q How many lenses did you examine on the 7th of August, 1905?

A I examined -- I cannot tell you the exact number;

I examined all the lens that were in use in the class in bacteriology and were in a certain case which I kept in my room.

Q Won't you tell us, doctor, something about the arrangement of the floors in your college, was there a bacteriological department?

MR. CORRIGAN: I object to that question. Is it a question as to the floors or whether there was a bacteriological department?

THE WITNESS: This building extends from 27th to 28th Streets, all along the block, and the various rooms in the department occupy the entire front-age of the building on First Avenue.

Q How many floors are there to the building?

A Six.

Q Now, what floor is the bacteriological floor?

A The fourth.

Q That would be counting the ground floor as one --that would be the fourth?

A Yes sir.

Q Now, there is a clinical department, isn't there?

A Yes sir.

Q What floor is that on?

A The first and second on one side of the building.

Q Lenses used in that department, too, are there?

A No sir.

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Q Now, what is on the third floor?

A The department of chemistry.

Q Any lenses used there?

A None of this type.

Q When you say "this type" you mean the oil immersion lenses?

A Yes; the oil immersion lenses.

Q The only ones of which you took a record on the 7th of August were the oil immersion lenses?

A Yes sir.

Q What is it that fixes the 7th of August in your mind?

A Patrick Dunn went away for a month's vacation on that day and before he left one of his duties was to see that all the property, so far as he knew, was on hand.

Q Did Patrick Dunn make that typewritten list?

A No sir.

Q Did you have as many oil immersion lenses in your establishment at that time as are indicated by the numbers upon the paper that you showed me?

MR. CORRIGAN: I object to that question on the grounds already stated. It refers to a paper not in evidence.

Objection sustained.

Exception.

Q Did you put down the number of any other lens than oil immersion lenses?

MR. CORRIGAN: I object to that upon the same

ground.

Objection sustained.

Exception.

THE COURT: I suppose you mean put down on that paper?

MR. HYMES: Yes sir, upon the paper shown to me by the witness.

THE COURT: I will sustain the objection.

Q You had a vacation that August, did you not, doctor?

A No sir.

Q That year?

A No sir.

Q None at all?

A No sir; I don't have vacations.

Q Were you away out of the city in August?

A No sir.

Q You are quite sure of that?

A I am sure.

Q Do you remember what day of the week it was?

A No sir.

Q When this list was consulted?

A No sir.

Q Do you know Dr. Elzer?

A Yes sir.

Q Weren't you away with him for some time, that summer, for a couple days hunting?

A I was not I already said that I had no vacation.

Q You did not go away from Saturday till Monday evening?

A I did not come to the laboratory on Sunday.

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Q Did you go out of town Saturday or Sunday?

MR. CORRIGAN: I object to that question.

A No sir.

Q Upon the 7th of August this examination of the lenses was had?

A Yes sir.

Q When was it you discovered that lenses were missing?

A Shortly after the 8th of September.

Q How shortly?

A On or after the 8th of September.

Q How shortly after?

A I cannot say, within a day or two.

Q Prior to the 7th of August, 1905, had your attention been called to the condition of any of the Instruments in the laboratory?

A My attention is constantly called to the condition of the instruments.

Q Present or absent?

A Yes sir.

Q How long before the 7th of August?

MR. CORRIGAN: I object to that question; "How long before the 7th of August" -- I object to that on the ground that it is incomprehensible.

MR. HYMES: Well, you know, you must not judge other people's comprehension by your own.

THE COURT: His remark was addressed to the Court.

Question repeated as follows:

"How long before the 7th of August?

A How long what, now?

Q You don't understand the question?

A No sir; it has been so long since you put the question, so many things have been said.

Q It has quite escaped your memory, has it, doctor?

A (No answer.)

Q Your memory, in some respects, is rather short, isn't it, doctor?

A You say so.

Q Haven't you just told me that so many things have happened since I put the question?

Objected to.

Objection sustained.

THE COURT: Proceed with your next question.

Exception.

BY MR. HYMES:

Q How long before the 7th of August, 1905, has your attention been called to the precentor absence of certain instruments in connection with your laboratory?

MR. CORRIGAN: I object to that question on the ground that it is incompetent, immaterial and irrelevant, and on the further ground that the class of instruments are not stated.

THE COURT: He may answer.

A I cannot state the exact periods when my attention was called to the condition of instruments.

Q Prior to the 7th of August, 1905 did you have any talk with the defendant about the presence or absence of any instruments in your laboratory?

A I don't remember I did.

Q Did you have any talk with the defendant, in September of 1905, about the absence of instruments?

A Yes, sir.

Q When I say instruments I include lenses?

A Yes, sir.

Q The defendant was there under a monthly salary, wasn't he?

A Yes sir.

Q What was his specific occupation?

A He helped in the bacteriological room.

Q What doing?

A Making media, culture media for bacteria; that was one of his duties and the other was to take charge, after the classes, of the apparatus with which the students worked, some microscopical lenses which were given out during that time and receive them after the end of the classes, and, in general, he was to assist instruction in bacteriology.

Q Now, in the summer, say beginning in August who were the employees of your college, who were employed in any of the

departments to which I have already made reference, I mean the clinical, the chemical, and the bacteriological departments?

A I have nothing to do with the other departments, I don't know.

Q How about the bacteriological department, what other employees were there outside of Patrick Dunn and this defendant?

A I don't remember any in that department; there may have been a small boy there who washed the test tubes; I don't think so--I think he was discharged when the college closed.

Q Who was that boy?

A I don't know.

Q Now, these floors are not disconnected from one another excepting in the usual way, I mean there are so locked doors between them?

A No, sir.

Q The employees on one floor have access to the other floors, haven't they?

A They can go from one floor to another.

Q But you have no knowledge at all of the employees upon any floor other than your own and the bacteriological floor?

A Yes, sir; I have knowledge of them but I don't know their names.

Q About how many employees were there on the floor below the bacteriological department in the summer of 1905?

A To the best of my knowledge about two.

Q But you cannot tell me their names?

(No answer).

Q How about the department below that, the floor below that, how many employees were there in that summer?

A One or

two.

Q Take the floor above your own, how many?

A None definitely located there.

Q Where were these oil immersion lenses kept when not in use?

A It depended upon the season of the year.

Q Take the spring or summer season first off.

A At that time they were kept in my room, in a locker in my room.

Q Now, in July of 1905 where were these oil immersion lenses kept?

A In that room, in my locker.

Q Was your locker on the bacteriological floor?

A Yes, sir.

Q People go in and out of that room?

A Yes, sir.

Q The room I take it was not kept under lock?

A Oh, no.

Q Where was the key of that locker kept, or was there more than one key, tell me that?

A The key of the locker was kept in the private drawer in my desk.

Q During the session, when the students were there, where was the key kept?

A In the same place.

Q Who would get the key whom the lenses were about to be used?

MR. CORRIGAN: I object to that question. I don't see how it is material.

Q If you know?

THE COURT: You may answer.

A Either Patrick or David Ostro to the best of my knowledge.

Q Suppose you were not there at the time, who would get it, as far as you know who was instructed to get it?

A David Ostro or Patrick.

Q You personally, I assume, were many times not in your office when the lenses were procured for use by students?

A Sometimes I was absent.

Q Now, during the summer what bacteriological classes were there?

A None.

Q What was being done with the lenses between the close of the summer season, which I take it is in June or along in June and the 7th of August?

A Nothing.

Q Kept presumably in the locker?

A Presumably kept in the locker.

Q Is that a closed locker or is it a glass locker?

A A closed locker.

Q When I say closed I mean not transparent, had a glass door so you could see through?

A No, sir; wooden door.

Q Wooden door?

A Yes, sir.

Q Was Ostro employed during the months of June and July and the early part of August?

A Yes, sir.

Q Did he have a vacation that you recall?

A He had a vacation, I don't know just when it was.

Q Was Patrick there all the time?

A Not during his vacation; otherwise he was there.

Q How many weeks would his vacation last?

A About four weeks, one month.

Q You spoke of a boy who was discharged, -- upon that floor?

A Our rule is to keep a boy for washing test tubes during the active part --

THE COURT: Give us your best recollection as to whether there was a boy employed there and when he was discharged.

THE WITNESS: My best recollection is he was discharged about the time the college closed.

BY MR. HYMES:

Q That would be when?

A That is the 1st of June.

Q Did anybody take his place after the 1st of June?

A I think not.

Q Was he discharged simply because you no longer had use for him?

A I had no use for him.

Q He was discharged?

A No, sir --- yes, discharged, certainly, because we had no further use for him.

Q There was no specific act on his part that called for his discharge, that is what I am trying to get at?

A You are right.

Q In September you had a talk with the defendant?

A Yes, sir, I did.

Q About these lenses?

A Yes, sir.

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Q How long did the defendant remain in the employ of the college after this time?

A Till his month was up, the 1st of October, I think, I am not certain.

Q Do you remember whether or not his month ran from the 1st to the last?

A No, sir.

Q You don't remember that?

A No, sir.

Q At the time you had this talk with the defendant how many oil immersion lenses had you missed?

A 13.

Q Were those 13 included in the number that you had seen on the 7th of August?

A Yes, sir.

Q Did you personally make the discovery that there were 13 lenses missing?

A Yes, sir.

Q Or were you informed of it by someone?

A I have answered your question.

Q When was your fall season to begin?

A The 1st of October.

Q So as early as the 7th or 8th of September would you examine the lenses and get them in shape for the fall season?

A No, sir.

Q When did you begin to examine the lenses for that purpose?

A About the 1st of October.

Q Did you on the 7th, or about the 7th of September examine the locker in which these lenses were kept?

A Yes, sir.

Q Who was there when you first examined them?

A I think Patrick Dunn, to the best of my knowledge.

Q Did you call his attention at that time to the missing lenses?

A We were together when the locker was opened and the discovery of the loss was made.

Q Who opened the locker?

A I don't remember; I think probably I did.

Q What was the occasion of opening that locker at that time, the 7th of September?

A A suspicion that some of the lenses might be missing.

Q Had anything happened between the 7th of August and the 7th of September --

A That is a very vague question.

Q When I say anything I mean in connection with lenses. My question was very vague and the criticism is correct.

A That is also very vague.

Q Had you looked at these lenses at any time between the 7th of August and the 7th of September?

A Yes, sir.

Q How many times?

A I don't remember.

Q Had you checked them up?

A Yes, sir.

Q Prior to the 7th?

A The 7th of what?

Q Of September?

A Yes, sir.

Q On the 7th or thereabouts of September did you tell the defendant that as lenses were missing from a department with which he was connected, and as to which he had a certain

degree of custody, he would have to pay for the lenses, or ought to pay for the lenses?

A I don't remember any such statement.

Q Substantially that?

A I think hardly -- I would not likely have made such a statement on account of the value of the lenses and the impossibility of ---

Q You don't recollect anything of that sort?

A No, sir; I don't remember.

Q Did you talk with him about the missing lenses on or about the 7th of September?

A Yes, sir.

Q Did you ask him whether he know what had become of them?

A Yes, sir.

Q What did he say?

A He said he know nothing about them.

Q Did you say anything to him?

A I did.

Q Did you toll him you suspected him?

A I did.

Q What did he say?

A Not much; he had very little to say.

Q Did he say anything about severing his connection with the college or quitting his work, if he were under suspicion?

A I don't remember.

Q As a matter of fact, however, in the early part of October he did quit?

A He was discharged.

Q Well, his work ceased there?

A His work ceased.

Q About what time in October?

A I think it was the 1st

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of October.

Q He was paid for the month of September, wasn't he?

A Yes, sir.

Q And after the 1st of October, 1905, and for a year continuously thereafter did you see the defendant and have any talk with him?

A No, sir.

Q Did you see him?

A I never saw him, to the best of my knowledge.

Q And do you know his brother whose name is Lee?

A I know a brother, a man who said he was his brother at least, but his name I don't know.

Q Did you see him in the summer of 1905 before David lost his job?

A Yes, sir.

Q Was he employed there by you or by the college in any way?

A No, sir.

Q This brother?

A No, sir.

Q When I say employed, I mean did he do any work whether paid or not?

A No, sir.

Q Do anything at your suggestion?

A No, sir.

Q Did you have a talk with him about the loss of any lenses, the property of the university?

A Yes, sir.

Q His brother?

A Yes, sir.

Q After you had such a talk with him did you see him and have another talk?

A I don't know that there was more than

one talk.

Q Did he make any report to you about any investigation that he made in that connection?

A If I remember rightly he told me one day in October, or about that time, that he has been around to pawnshops to inquire if there were any of our lenses to be found and that he had failed to find any.

Q That was the only report of any kind that you got from him, that you remember?

A We had a half an hour conversation.

BY MR. CORRIGAN:

Q Let us have the conversation, Doctor.

A And this matter was mentioned and I don't consider it or did not consider it in the light of a report of any sort, but we had that conversation.

BY MR. HYMES:

Q You did have a talk with him about the less of lenses prior to October, 1905?

A I cannot state the dates.

Q Sometimes during that summer of 1905?

A I cannot State those dates.

Q You had some talk with this brother, and when I say this brother I mean this person who said his was a brother relative to the missing of lenses, didn't you?

A I did.

MR. CORRIGAN: I object to the question on the ground that it is immaterial.

THE COURT: It is already answered.

Q Did, either at your suggestion or with your consent,

this brother undertake to make an investigation in this regard?

MR. CORRIGAN: I object to the question on the ground that it is not clear whether he means suggestion or consent. I also object to it on the ground it is incompetent, immaterial and irrelevant.

Objection sustained. Exception.

MR. HYMES: As I don't know what question has been ruled out I will ask it again. May I ask him again, your Honor? Perhaps my question was not in proper form and I think I can remedy that defect.

BY MR. HYMES:

Q Now, did you and this brother prior to October of 1905 have a talk in which the missing lenses were discussed and at your suggestion was an investigation of the missing lenses to be made by this brother?

MR. CORRIGAN: I object to that question.

BY THE COURT:

Q Did you ask this so-called brother to make an investigation concerning the loss of the lenses?

A I did not.

BY MR. HYMES:

Q Did he say that he would?

MR. CORRIGAN: I object to that question.

THE COURT: Objection sustained.

Exception.

Q Did you know from what he told you that to was about to

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make such an investigation?

Objected to. Objection sustained Exception.

Q Did he tell you that he would?

Objected to. Objection sustained. Exception.

Q Do you remember that in the summer of 1905 he told you that he had gone around to various shops and had not found any of your lenses?

MR. CORRIGAN: I object to that question.

Q Did he come to see you at your request, a request made before the time he gave you this information?

A No, sir; I never sent for him.

Q How many times in all did you see him and talk with him?

A I don't remember, not more than once, possibly not more than once.

Q Tea stated in answer to one of my questions, early in your examination, that you were informed by Detective McCafferty, that he, McCafferty, had obtained either a lens or lenses from Dr. Kruskal, do you remember that?

A I was.

Q When did McCafferty give you that information?

A Some time after the 1st of October.

Q Of what year?

A 1906.

Q How many lenses did McCafferty tell you he had gotten from Dr. Kruskal?

MR. CORRIGAN: I object to that question as hearsay.

THE COURT: He may answer.

A Two, I think.

Q Did you know Ostro's address in New York City?

A No, sir.

Q Didn't you have it at the college?

A The college had it, I think, but I did not.

Q Did you know that he was a member of the 22nd Regiment?

A I heard that he had been.

Q Where did you hear that?

A Oh, I don't know, it was generally stated, indefinite information about which I could not bother.

RE-DIRECT EXAMINATION BY MR. CORRIGAN:

Q Let me have that paper, the record of the lenses?

A (Witness produced a paper)

MR. CORRIGAN: I offer this paper in evidence, if your Honor please.

MR. HYMES: I object to it as incompetent and not within the issues.

THE COURT: This is the paper in respect to which you examined the witness.

MR. HYMES: Yes.

BY THE COURT:

Q Yes made this yourself, Doctor?

A No, sir; I used it as a reference in making out a list of lenses in my possession

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on the 7th of August, 1905.

Q Do you know that it was a correct list?

A Yes, sir; I do.

THE COURT: I will receive it.

(Paper referred to is marked People's Exhibit No. 7.)

UK. HYMES: I take an exception, the ground of my objection being that it is incompetent and not binding upon the defendant.

THE COURT: You brought it out and examined the witness touching it.

Exception.

BY MR. CORRIGAN:

Q Now, Doctor, on August 7th, 1905 did you compare the numbers on this list with the lenses, the oil immersion lenses then in your laboratory?

A I did.

Q Did you compare them again on September 7th, 1905?

A I did.

Q And on September 7th how many of these lenses were missing?

A 13.

Q And among those 13 were the four lenses which you have identified here?

A They were.

Q Did you say you had a talk with the defendant Ostro after September 7th?

A Yes, sir.

Q What was that conversation. Just give us the conversation, please.

A In general it consisted in a charge on my

part that he had taken these lenses; that the evidence was very strong, that no one else in the laboratory could have done it, taken them all, and I presented him with this evidence and urged him to acknowledge the theft. I also discussed with him other matters which had arisen from time to time, called his attention to the danger of some of these procedures if there was every evidence to believe that he was engaged, in general, I attempted to correct his general habits and to make him acknowledge this theft.

MR. HYMES: I object to this and ask that it be stricken out.

THE COURT: Yes, you are giving now your opinion of what was said, and your conclusion as to what was said. You may tell as whatever you said to him directly.

BY MR. CORRIGAN:

Q Give us the substance of it, Doctor, as well as you remember?

A Do you mean the exact words used?

THE COURT: As near as you can recall.

MR. CORRIGAN: As a substance, if you cannot recall the exact words. Now, as I understand it, you have given as the substance so far as the lenses are concerned. Now, give us the substance of the balance of the conversation about his habits and so forth.

MR. HYMES: I submit that is incompetent and I object to it.

Objection overruled. Exception.

THE WITNESS: I said to Dave, "Dave, there has been, from time to time, received at this laboratory indications that you are not on the level. This evidence consists, first, in the receipt of telephone messages asking for Dr. Ostro, and indicating that you are posing as a practitioner of medicine."

MR. HYMES: I object to it, if the Court please, as incompetent and not within the issues.

THE COURT: It is receivable only for the purpose of showing what the defendant said in reply to it.

MR. HYMES: I submit that it is not within any issue we are trying and has nothing to do with the alleged theft of lenses.

THE COURT: For the purpose of showing the defendant's conduct and his remark.

Exception.

THE WITNESS: In regard to the lenses I said "Dave, here are several pieces of property in different portions of the laboratory and located under conditions which, I think, are not familiar to any one else except you and Patrick and myself. "I pointed out to him a glass case in which some 21 microscopes were found, which had been under his possession, from which, -- from the back row of which all the lenses had been removed, while in the

front row that faced the glass all the lenses were intact to take which would require great familiarity ---

MR. HYMES: Objected to.

THE WITNESS: This is my conversation with Ostro.

MR. HYMES: You told him "to take which would require and so forth".

THE WITNESS: Yes -- to take which glasses would require three-quarters of an hour an or an hour time, familiarity with the line of microscopes, with the practice of inspection of microscopes which he was familiar with, and probably with the location of the key kept in a secret place and for the opening of that case. I pointed out that in the histological room a lens had been taken from a microscope located in the room of which the key laying in a secret place known only to himself, to Patrick and myself and the doctor who used the microscope. I pointed out the loss of Dr. Schultz's micrometer lens and which lay in a certain drawer in Schultz's place, which no one not familiar with the laboratory knew of and, in general, I said "Dave, all these things point so clearly to you that there is no use in your denying it and the best thing for you is to acknowledge it."

Q What did Dave say to that?

A He said he knew nothing about the lenses.

Q Was that when you discharged him?

A No, sir.

Q When did you discharge him?

A I discharged him on the 1st of the month.

Q The 1st of the month?

A Yes, sir.

Q I understood you to say in answer to Mr. Hymes' question that Patrick left on the 7th of August upon his vacation, or about the 7th of August?

A Yes, sir.

Q After the 7th of August was the defendant, David Ostro, in charge of the work while Patrick was away?

A Yes, sir; he was.

Q What month was that?

A That was the month intervening between the 7th of August and the 7th of September.

BY MR. HYMES:

Q Just a question, Doctor. Now, will you answer my question about the numbers upon that slip of paper which has been introduced in evidence?

A Yes, sir.

Q Does each one of those numbers represent an oil immersion lens?

A All the numbers containing five figures do, but there are some numbers here which refer to other objects.

BY THE SECOND JUROR:

Q If yes thought he took these things why didn't you discharge him at once?

A I thought I would observe him, see what he did, get some information about his habits and so forth. I wanted to make sure that we knew his address; I thought probably that --- the chief reason was I thought that

he would make up his mind and confess. The evidence seemed to be so strong I thought that on a repetition he would certainly acknowledge the theft.

MR. HYMES: I have no further questions.

NICHOLAS KRUSKAL, a witness for the People, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. CORRIGAN:

Q Where do you live, Doctor?

A On Henry Street, but I have my laboratory at No. 329 Grand Street.

Q That is your laboratory?

A Yes, sir.

Q What is your occupation?

A Chemist and bacteriologist.

Q How long have you been a chemist and bacteriologist?

A I have my laboratory for four years, but I am a chemist for about 15 or 16 years.

Q Do you know the defendant, David Ostro?

A Yes, sir.

Q How long have you known him?

A Well, 1905.

Q How did you first meet the defendant?

A He came to my laboratory.

Q Did you have a conversation with him?

A Yes, sir; he came up to me and offered me a microscope or a lens for sale.

Q How did you first meet him?

A He used to sell me media.

Q What do you mean by that?

A For planting bacteria.

Q How long had you known him as selling you media before you had this conversation about the microscope?

A I guess it must have been a month or six weeks.

Q Can you fix the date when he came up and talked about the microscope?

A Not exactly the date; I guess it must have been about September, 1905, I don't know the exact date.

Q 1905?

A Yes, sir.

Q What was the conversation?

A He offered me a microscope for sale; he told me that he is sick with tuberculosis and he was advised to go to Denver and he had a microscope pawned and he would like to sell all the stuff what he had. So he let with me these two lenses, one oil immersion and one No. 7. I gars him \$10. as security and he should bring me the microscope. I looked at the microscope and found out and I telephoned to Leitz the maker of the microscope and they told me that the microscope ---

Q Never mind what they told you. I show you this lens, People's Exhibit No. 6, and I ask you if that is one of the lenses that the defendant sold you for \$10.?

A He did not sell it to me.

Q He left it with you. Here is a magnifying glass if you want to use it?

A Yes, sir.

Q Is that the one?

A Yes, sir.

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Q I show you this low power No. 7 lens, People's Exhibit 2 for identification.

A This is a No. 7.

Q Do you know whether or not that is the one the defendant left with you?

A Yes, sir.

Q Can you identify that?

A It is No. 7; I had a No. 7--there is no number on it.

Q But you can identify it?

A No, sir.

Q Where did he say he get this lens that you have identified?

A He told me he bought them.

Q Where did he tell you he bought them?

A He said ---he did not tell me.

Q He did not tell you?

A No, sir.

Q Did you telephone to Leitz?

A Yes, sir; I telephoned to Leitz.

Q The maker of the lenses?

A Yes, sir.

Q Is that a Leitz lens?

A Yes, sir; that is a Leitz lens.

Q Did you have a conversation with Leitz ever the telephone?

A Yes, sir.

Q After that conversation with Leitz did you have a conversation with Dr. Jaches?

A Yes, sir; I had a conversation with Dr. Jaches.

Q Did you have a conversation with McCafferty, the detective sergeant?

A That was along about ---

Q When did you have the conversation with McCafferty?

A It must be about a couple of months, I guess.

Q 1906?

A Yes, sir; 1906.

Q In the fall of 1906?

A Yes, sir.

Q Was that after the defendant was arrested?

A Well, it was before.

Q Did you then give Officer McCafferty this lens, People's Exhibit No. 6?

A Yes, sir.

Q Was the lens you gave McCafferty the lens that the defendant left with you?

A Two lenses.

Q Two lenses?

A Yes; sir.

Q You are sure about No. 6 on account of the number?

A Yes, sir.

Q That lens which you gave McCafferty is one which the defendant left with you?

A Yes, sir.

Q That is People's Exhibit No. 6?

A Yes, sir.

**CROSS EXAMINATION BY MR. HYMES:**

Q When did you take a memorandum of the number of Peoples' Exhibit 6?

A I took it right away when the microscope with the lenses were brought to me.

Q When he left it there?

A Yes, sir; he left the lenses.

Q When did he leave it there and when I say him I mean the defendant?

A It was in September, 1905.

Q What time?

A In the daytime.

Q What time of the month?

A Well, I couldn't tell you exactly what time in the month.

Q Give me an idea whether it was before or after the 15th?

A I could not tell you.

Q Was it nearer October than it was August?

A I could not tell you.

Q Any idea?

A No, sir.

Q What fixes September in your mind?

A I think it was about September.

Q Might it have been August?

A I think it was September.

Q Won't you please tell us --- that is about all be cause you think it is September?

A Well, I could not tell you, I kept in my mind all the time September.

Q How many times had you seen the defendant before he brought you these two lenses you are talking about?

A A couple of times.

Q What had he sold you before that?

A Media.

Q That was in line with what had been produced at the college, what they made at the college?

A Yes, sir.

Q Yes had known him in a professional way?

A Yes, sir.

Q Two or three times you had seen him before that?

A Yes.

Q When had you seen him first?

A About a couple of months before he brought me the microscope.

Q Where is your place?

A 329 Grand Street.

Q Anyone ever introduced him to you?

A Himself introduced himself.

Q When did he first talk to you about any lenses or microscopes?

A In September, 1905.

Q That is the very day he left the lenses with you?

A Yes, sir, he left a microscope, the lenses with the microscope and the following day he came back for the money or for the microscope and I gave him the microscope back and the lenses were left because he hadn't my \$10.; I asked him for the \$10. and he said he would come in a couple of days and give me the ten.

Q You asked him for the ten?

A Yes, sir.

Q You wanted your \$10. back?

A Yes, sir.

Q He declined to give it and said he would come back, is that correct, don't you understand me?

A No, sir; not exactly the question.

Q When you don't understand don't answer. So came the day after he first left the microscope and you asked him for your \$10. back?

A When he came, yes, sir.

Q He said he would bring it back to you in a day or two but he didn't come back?

A Yes, sir.

Q That is all you know about it?

A Yes, sir.

Q When did you have your talk with Dr. Jaches?

A A couple of days later.

Q How many days later?

A Well, I don't know exactly how many days.

Q Who is Dr. Jaches?

A He is connected with Cornell College.

Q Where do you know him from?

A Oh, I know him for many many years.

Q Doing business with him?

A No, sir; no business at all.

Q In what way have you known him?

A We are good friends, we are acquainted and good friends for a long time.

Q When did you telephone to Leitz?

A On the same day when he brought me the microscope.

Q Sure of that?

A Sure.

Q Do you remember what time of day it was he brought you the microscope?

A It was in the daytime but I don't remember exactly.

Q What time of day did you telephone to Leitz?

A After he left.

Q Right after, wasn't it?

A Yes, sir.

Q Did you know Dr. Swing?

A Yes, sir.

Q You have met Dr. Ewing, haven't you?

A Yes sir.

Q Telephoned to Dr. Swing?

A No, sir.

Q Anyone else did you telephone to connected with Cornell University excepting Dr. Jaches?

A None.

Q And Dr. Jaches?

A Dr. Jaches I told you that before.

Q Do you remember when this boy was arrested?

A Well, I don't know exactly the day when he was arrested.

Q You remember that he was arrested?

A Yes, sir.

Q You remember he was at Jefferson Market?

(No answer)

Q You were at Jefferson Market, weren't you?

A Yes, sir.

Q The court house there?

A Yes, sir.

Q You had already met Detective McCafferty, hadn't you?

A Yes, sir.

Q Did Detective McCafferty bring you to where the boy was and ask you whether you recognized him?

A In police headquarters.

Q That was at police headquarters?

A Yes, sir.

Q Do you remember seeing some pawnbrokers at Jefferson Market when this boy was under arrest?

A Yes, sir.

Q Do you remember some talk that was had among the pawnbrokers is the crowd in which you were about whether or not they could identify this boy?

MR. CORRIGAN: I object to that question.

THE COURT: He may answer yes or no.

Q Answer yes or no.

A Yes, sir.

Q Did you make any statement as to whether or not you

identified this boy as the one who sold you, or tried to sell you two lenses -- if you made any statement as to whether or not you identified the defendant as the young man who had sold you or tried to sell you two lenses?

A I made the statement to the detectives.

Q Do you remember at that time when the pawnbrokers were around making statements as to whether or not you could identify this boy as the boy who had sold you lenses or tried to sell you lenses?

A I don't remember.

Q Don't you remember, as a fact, that at the Jefferson Market, when there were several pawnbrokers around you, and you were one of the group which they formed, saying that you could not identify this boy, you did not know whether or not this was the boy who sold you any lenses?

A No, sir; I did not say anything.

Q You did not say anything?

A No, sir.

4 How long after that had you the telephone message with Mr. Jaches, two or three days after?

A I didn't telephone to Mr. Jaches.

Q The day that this boy left the microscope with you ---how many other conversations did you have with Mr. Jaches during the year next preceding?

A In regard to this microscope?

Q Yes.

A Probably once or twice.

Q How many conversations did you have with Leitz after that?

A None at all.

Q None at all?

A No, sir.

Q And the talks that you told us about are the ones you had about this transaction, the ones you have already told us about are the only ones?

A I had talk here.

Q Do you mean in court here?

A Yes, sir.

Q You had talked with Mr. Corrigan, of course?

A I have talked to Professor Ewing.

Q And Detective McCafferty?

A Yes, sir.

Q And Detective Carey?

A Yes, sir.

Q And Mr. Corrigan?

A Yes, sir.

Q Were you over in the habit of having lenses?

A No, sir; I was never in the habit.

Q You know something about lenses in your business?

A Yes, sir.

Q I think that you stated to Mr. Corrigan that you did not tell the boy you would buy either the microscope or the lens but that you would give him some money on deposit and he should call back?

A I told him I wanted to buy the microscope; he didn't have the microscope but he left me these two lenses and I gave him \$10. that he should bring me the microscope.

Q In other words you did not consider it a sale?

A I wanted to buy the microscope if it had been his property.

Q But that is the reason you only paid a deposit?

A I did not pay a deposit; I gave him security.

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Q You wanted to investigate, isn't that it?

A Yes, sir.

Q Now, when was it that Detective McCafferty found these things in your possession?

A Probably six weeks ago, I don't remember exactly.

Q Six weeks ago?

A Yes, sir.

MR. HYMES: That is all.

JAMES McCAFFERTY, a witness for the People, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORRIGAN:

Q McCafferty, you are a member of this Municipal Police Force of the City of New York, are you not?

A Yes, sir.

Q What is your rank in the Police Department?

A Detective Sergeant.

Q How long have you been a detective Sergeant?

A Over nine years.

Q Attached to the Central Office at Headquarters?

A Yes, sir.

Q The Detective Bureau?

A Yes, sir.

Q Did you make the arrest in this case?

A I did, together with Detective Sergeant Arthur Carey.

Q Arthur Carey?

A Yes, sir.

Q Is he your partner?

A He is in this case, yes, sir.

Q Now, will you just tell the jury ---

A Not this case

alone, other cases.

Q When did you first come into this case, McCafferty?

A Well, as near as I can recollect as or about the 13th of October, 1905.

Q When was the arrest made, in November, 1906?

A The arrest was made in November, 1906.

MR. HYMES: Is that the correct date, or does he mean 1905?

THE WITNESS: Yes, that is correct.

MR. CORRIGAN: The arrest was made November 20th, 1906.

MR. HYMES: I just wanted to know if that was the correct date.

BY MR. CORRIGAN:

Q Now, just tell the jury the circumstances as under which you arrested the defendant?

A Well, at the time that I got into the case, and at the time the complaint was made by Dr. Ewing.

MR. HYMES: I object to that and ask that it be stricken out.

Q When was the time?

A On or about the 13th of October, 1905, and from that time until October of last year I accomplished nothing in the case until Dr. Ewing informed me.

MR. HYMES: I object to that.

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Q Until you had a conversation with Ewing?

A Until I had a conversation with Dr. Swing and as a result of that conversation with Dr. Ewing --

MR. HYMES: I move that that be stricken out. Let us get a ruling.

THE WITNESS: That conversation occurred --

Q When was that?

A Do you mean the original conversation?

Q No, in 1906.

A I cannot give you the date, but it was some time in the month of October, 1906.

Q After that conversation with Dr. Ewing in the month of October, 1906 what did you do in referents to this case?

A The gether with Detective Sergeant Carey I went to the laboratory of Dr. Kruskal.

Q The last witness here?

A I believe he was the last witness.

Q Well, that gentleman sitting over there?

A Yes, sir; and I was shown a lens by Dr. Kruskal --- I was shown two lenses and I had a conversation with Dr. Kruskal.

Q Now, wait before you go any further. I show you now people's Exhibit No. 6 and I ask you if that is the lens that Dr. Kruskal showed you on that occasion?

MR. HYMES: Is that the one that Kruskal identified?

MR. CORRIGAN: Yes.

MR. HYMES: I will concede it is the lens.

Q Did you leave a conversation with Dr. Kruskal?

A I did, yes, sir.

Q After that conversation with Dr. Kruskal what did you do?

A After that conversation with Dr. Kruskal Carey and I went back and we saw Professor Ewing, and we also saw another gentleman a Dr. Jaches. After seeing Professor Ewing and Dr. Jaches we undertook to find David Ostro.

MR. HYMES: I ask that that be stricken out "we undertook to find David Ostro".

THE COURT: Strike it out.

THE WITNESS: Well, we looked for David Ostro.

MR. HYMES: I ask that that be stricken out.

THE COURT: You may say what you did.

BY MR. CORRIGAN:

Q You looked for David Ostro and what else?

MR. HYMES: No, I ask that that be stricken out.

THE COURT: You may say what efforts you made, and what you mean by saying "We looked for".

Q Explain everything you did. You went to some place and made inquiries, tell us what you did.

A We tried to locate him for the purpose of arresting him.

MR. HYMES: I ask that the entire answer be stricken out "We tried to locate him for the purpose of arresting him".

THE WITNESS: We went to this Armory where ---

THE COURT: Tell us what you did.

MR. HYMES: I object to the central statement that ha tried to locate him for the purpose of arresting him and ask that it be stricken out.

THE COURT: Yes.

BY MR. CORRIGAN:

Q Now, McCafferty, counsel wants you to tell us everything you did in the way of looking for David Ostro, where you went to look. Now, when looking for him give us the full description of what you did and what you found.

MR. HYMES: I object to the question as absolutely incompetent and not within the issues.

Objection overruled. Exception.

THE WITNESS: We went to an armory where we were told that this man or at least where there was a regiment with which this man was connected as a bugler.

MR. HYMES: I must ask that this be stricken out as incompetent. I don't like to take an objection every minute, but counsel should frame his questions in proper form.

THE COURT: What do you want stricken out?

MR. HYMES: His entire answer "We went to an armory where we had been told something". If your Honor declines to strike it out in total then I shall ask that the motion be granted from where the answer starts "where we were told".

THE COURT: Strike out the latter part.

Q You want to an armory?

A Well, we saw the defendant coming out of a house one morning in November, the date is November 20th, or November 16th, I don't know which, it is on the papers anyhow.

Q The day of the arrest?

A Yes, sir.

Q The 16th?

A Yes, sir and not being sure ---

Q That was 1906?

A Yes, sir, 1906. We saw the defendant coming out of a house at 1452 Wilkens Avenue. Carey and I were together. We followed him over to Boston Avenue which is a short distance from there. He started to go down Boston Avenue then turned and went up and got on a car about a block ahead of where I was standing. When the car came up to where I was I also got on. I called the conductor and I said "Hold on, there is a man back there that wants to get on", that was to enable Carey to get on the car. Carey got on the car ---he went inside. Not being sure whether the defendant was David Ostro or not I was looking for an opportunity to engage him in conversation.

MR. HYMES: I object to this.

THE COURT: I sustain the objection.

THE WITNESS: Well, as a matter of fact, I engaged the defendant in conversation. I said to him, "It looks as though all the fat women in the Bronx are getting on this car, doesn't it"; he said "Well, you know, everything

swells up in the Bonx"; I said "Do you help to increase the swelling"; he said "No, I take it down"; I said "What do you mean by that?"; he said "Why, I am a physician;" I said, "You don't mean to say that a kid like you is a physician"; he said "Hell, yes, I am a physician"; he put his hand in his pocket and he pulled out a book.

MR. HYMES: I object to this conversation and the recital of any incidents unless they bear upon the issues we are now trying. I submit the interrogations should be limited to that matter.

THE COURT: Yes.

MR. HYMES: I am perfectly willing to have the witness led up to what was said about lenses.

THE COURT: Yes.

MR. CORRIGAN: I submit, if your Honor please, that I am entitled to know what the defendant pulled out of his pocket.

THIS COURT: I have not forbidden that. The objection is that the testimony should relate to this case.

THE WITNESS: He pulled a book out of his pocket which contained a number of prescription blanks.

MR. HYMES: If the Court please, I ask that that be stricken out.

THE COURT: Yes.

MR. HYMES: I ask that both witness and counsel be

directed to confine themselves to the issues we are trying.

THE COURT: All we want to know is what information you have touching these lenses.

THE WITNESS: I asked him what his name was and he said "David Ostro"; I said "Where are you going"; he said "Going to attend a patient"; by that time the car had gotten to 161st Street and Third Avenue. He jumped off the car; and I followed him; I caught hold of him and I said "Hold on, I don't think you will attend to any patient to-day, I guess you will be my patient on this occasion". Just then Carey had come up and I said "You are under arrest, we are policemen, detective sergeants, you know what you are being arrested for, don't you"; he said "No"; I said "For stealing a large number of lenses and other articles from the Cornell Medical School where you were employed"; he said "No, I never stole anything from there"; I said "Oh, yes, you did, you need not deny it because we have got the evidence"; he said "You have got no evidence against me"; I said "Oh, yes, I have."

MR. HYMES: I object to any further conversation in this regard upon the ground it appears, affirmatively now that the defendant was under arrest and in custody and was not apprised or warned of his rights,

Objection overruled. Exception.

THE WITNESS: I said "Do you know a man Grand Street by the name of Kruskal, a chemist"; he said "No"; I said "Yes, you do, you certainly know Kruskal, he knows you, you have been there a number of times, you have sold him media"; and I said "You also sold him, or tried to sell him a couple of lenses which we know all about"; he said "No, I did not"; I said "Yes, you did, now you better tell us all about this"; so then he said "Well, I did sell those lenses to Dr. Kruskal"; I said "What else did you take"; he said "I didn't take anything else"; I said "Oh, yes you did, you took a great many things, now tell us about some of the things you have taken and where you have put them. As long as you have told part of the truth you might as well tell it all"; I said "Didn't you dispose of some things in some pawnshop on Second Avenue" and he said "Yes". I said "Where is the pawnshop"; he said "Second Avenue near 24th Street". I asked him what he put in there -- I am not sure about this but I think he said he put half a dozen pieces in there. We took him down to Headquarters and sent for Dr. Kruskal who identified him at the time.

MR. HYMES: I object to that and ask that it be stricken out on the ground that it is a conclusion and not a fact. I move that the answer be stricken out from

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the words "who identified him at the time".

**THE COURT:** Yes.

(The Court then admonished the jury calling their attention to Section 415 of the Code of Criminal Procedure and adjourned the further trial of the case until to-morrow, Friday morning, January 18th, 1907, at 10:30 o'clock.)

New York, January 18th, 1907.

TRIAL RESUMED.

JAMES McCafferty, a witness for the People, resumes the stand.

DIRECT EXAMINATION CONTINUED:

BY MR. CORRIGAN:

Q Now, Sergeant, you were telling me yesterday, when we adjourned, that you took the defendant down to Headquarters and sent for Doctor Kruskal, and he came up there?

A Yes, sir; I did.

Q Now, did you confront Doctor Kruskal with the defendant?

A Yes, sir.

Q What Kruskal say in the presence of the defendant?

A He said, "That's Dave".

Q What did Dave say?

A "That's the young man who stole the" -- or at least, who brought me the lenses.

Q That is what Doctor Kruskal said?

A Yes, sir.

Q What did the defendant say, if anything?

A The defendant said that he did not know him; and then, in the presence of Doctor Kruskal, he said, "Why, he wanted to sell me a lense" -- that the Doctor wanted to sell him a lense.

Q The defendant said that?

A Yes, sir.

Q What else happened, what other conversation took place there between them?

A That is all that I recollect at that moment.

Q Well, after that, what occurred?

A Well, I forget now whether I stated about having been up to the pawn shop or not.

Q No, you have not come to that. We have the defendant at Headquarters now.

MR. HYMES: Was this the same day as the rest?

MR. CORRIGAN: Yes.

BY MR. CORRIGAN:

Q You said you brought him down to Headquarters, and I will refresh your testimony by reading the testimony.

MR. HYMES: No objection at all.

Q "I said, 'do you know a man on Grand Street by the name of Kruskal, a chemist, he said no'. I said, 'Yes you do, you certainly know Kruskal, he knows you, you have been there a number of times, you have sold him media,' and I said, 'You also sold him, or tried to sell him, a couple of lenses which we know all about; he said, 'no, I did not;' I said, 'Yes you did, and now you better tell us all about this'; so then he said, 'Well, I did sell these lenses to Doctor Kruskal.' I said, 'What else did you take'. He said, 'I didn't take anything else.' I said, 'Oh, yes you did, you took a great many

things, now tell us about some of the things you have taken, and where you have put them. As long as you have told part of the truth you might as well tell it all.' I said, "Didn't you dispose of some things in some pawnshop on Second Avenue," and he said, 'Yes'. I said, "where is the pawnshop"; he said, 'Second Avenue near 24th Street'; I asked him what he put in there, and I am not sure about this, but I think he said he put a half a dozen pieces in there. We took him down to Headquarters and sent for Doctor Kruskal".

A In addition to that statement about the two lenses, he also said he sold Doctor Kruskal a microscope.

Q That was while Doctor Kruskal was there, was it?

A No, sir; that was up on Third Avenue and 161st Street.

Q Before you brought the defendant to Headquarters?

A Yes, sir; before we brought the defendant to Headquarter?

Q Now, after you brought the defendant to Headquarters and confronted him with Doctor Kruskal, and had this conversation which you have just related, what did you do, if anything?

A Cary and I went to Reifs Pawnshop.

Q Where is that situated?

A Second Avenue, one door south of 24th Street, on the East side of Second Avenue.

Q What did you do at Reifs pawnshop?

A We went in there and asked the young man, one of the young man that we saw there.

Q You had a conversation?

A Yes, sir.

Q Did you see Mr. Reif?

A No, sir, not at that time.

Q You saw a young man?

A Yes, sir.

Q Have a conversation with the young man?

A Yes, sir.

Q Did the young man show you anything?

A Yes, sir.

Q What did he show you?

A He showed me several articles.

Q Did he show you this article, (handing witness a lense)?

A Yes, sir, he showed me that.

Q And this, (handing witness another lense)?

A Yes, sir.

MR. HYMES: We can save some time now. If these articles have been kept in the same custody since the time they were taken or received from Reif, why I will concede they are the same articles. If Mr. Corrigan states that to me I will concede it.

MR. CORRIGAN: Yes.

BY MR. CORRIGAN:

Q Did you afterwards see Mr. Reif?

A I did.

Q Did you confront this defendant with Reif at any time?

A Over in the Jefferson Market Court.

Q Did Reif say anything to you in the presence of the defendant?

A Yes, sir; he did.

Q What did he say?

A He said that was the man that pawned these things; he knew him; that he had been in the

habit of coming there.

Q Referring to these articles here?

A Yes, sir.

MR. CORRIGAN: I offer these five articles in evidence.

MR. HYMES: I object to them as not being within the issues made by this indictment. There has been no identification of these articles, as any articles mentioned in the indictment or covered by the indictment.

THE COURT: I will receive them.

Exception.

(The articles referred to are marked People's Exhibit 8, 9, 10, 11 and 12).

Q Did you find this article also (handing witness another lens)?

A Yes sir.

Q At least?

A Yes sir; I did.

Q Under the same circumstances?

A Yes sir.

MR. CORRIGAN: I make the same offer with regard to this article.

MR. HYMES: I have not had a ruling upon my former objection and if I have I have not heard it.

THE COURT: I thought you took an exception.

I nodded that I would receive it.

MR. HYMES: I did not interpret your Honor's nod. Now, we object to the introduction of this last article upon the ground that it is not covered by any of the issues made by the indictment and plea here.

THE COURT: That was not the objection the last time.

MR. HYMES: Yes, sir.

THE COURT: Were these articles named in the indictment, the last exhibits?

MR. CORRIGAN: They are all lenses. The indictment says merely "fifteen lenses" and all of these are, properly speaking, lenses.

THE COURT: I will adhere to my ruling. Are these lenses which you claim the defendant stole?

MR. CORRIGAN: They are.

THE COURT: I will receive them. But, remember, yesterday, I made a ruling, and I will adhere to it, that you cannot offer evidence of other crimes. You must hold yourself within the crimes specified in the indictment.

MR. CORRIGAN: It was on that ground that the Schultse lens was ruled out.

MR. HYMES: My objection goes simply to these six lenses which have been offered in evidence. They have not been identified as any of the articles mentioned in the indictment. There has been no identification by Dr. Ewing who knows something, at least, about the identification of these lenses. He has not made any attempt so to do, and I submit that they are not within the issues here.

THE COURT: They must show that they are the lenses referred to in the indictment.

MR. CORRIGAN: I submit that I have shown that now by the confession of the defendant, repeatedly made to officer McCafferty, that these are some of the articles stolen from the Cornell University.

THE COURT: I will receive them at this time.

MR. CORRIGAN: I withdraw from the evidence --as I put it in inadvertently -- the micrometer which concededly belongs to Dr. Schultse.

(Exhibit No. 8 is withdrawn from evidence.)

Another lens referred to is marked People's Exhibit No. 13.)

THE COURT: These are all lenses that the District Attorney claims are the subject of the larceny and he claims that he has identified them. Now, I will receive them at this time.

MR. HYMES: This Court is not bound by the claim of the District Attorney. There has not been a suggestion of identification of these lenses. No one has gone upon the stand, even by suggestion, to say that these are the property of the Cornell University. I think we are entitled to some rights as to the order of proof.

THE COURT: There is no question about that.

MR. HYMES: Now, I ask that that order be maintained.

MR. CORRIGAN: My contention is, your Honor, that my proof of the identity of these lenses with the lenses mentioned in the indictment is the confession of the defendant to officer McCafferty, that he stole these lenses from the Cornell University and pawned them with Mr. Reis.

THE COURT: You say he stole these lenses. How did he identify the lenses.

MR. CORRIGAN: He stated he stole six lenses and that he had pawned six lenses which he had taken from the Cornell University at Mr. Reis's pawn shop.

Officer McCafferty went to the pawn shop as specified and found there these six lenses. I will afterwards put Mr. Reis on the stand to testify that the

six lenses which he showed officer McCafferty were the six lenses pawned with him by the defendant.

THE COURT: Now, the objection is well taken. My first impression was to receive them subject to a motion to strike out unless they were connected but, strictly speaking, it is not the proper way. You identify these six lenses.

MR. CORRIGAN: I will only ask to have them marked for identification at the present time.

THE COURT: Yes, I presume this ruling appears of record, and so, of itself, it revokes the other ruling.

BY MR. CORRIGAN:

Q Now, continue?

A At the time that I saw Mr. Reis, after seeing these lenses here, Detective Sergeant Cary and I asked to have his entry books?

MR. HYMES: Of whom?

BY MR. CORRIGAN:

Q Was the defendant present?

A No sir; the defendant was not.

Q You cannot give any conversation except what occurred in the presence of the defendant?

A I don't intend to give any conversation. I intend to give facts.

MR. HYMES: I ask that this intendment of the officer be stricken from the record.

Objection overruled. Exception.

THE WITNESS: An examination of the book revealed the fact that each and every one of these lenses --

MR. HYMES: I object to that and ask that it be stricken out.

THE COURT: Strike it out.

MR. HYMES: I submit to the Court that questions ought to be asked of this witness now instead pieces being allowed.

Q I show you this book. Is this the entry book that Mr. Reif showed you?

A I could not tell that without an examination of it; I assume that it is.

MR. HYMES: What is this question.

MR. CORRIGAN: Is this the entry book which Mr. Reif showed you?

THE WITNESS: I would have to get a memorandum which detective

MR. HYMES: No. Answer the question yes or no.

THE WITNESS: I cannot tell till I make an examination.

THE COURT: You may make the examination.

THE WITNESS: I ask permission to get a memorandum of entries made at the time.

MR. HYMES: I object to the witness indulging in any speeches. He is here to answer questions.

Objection overruled. Exception.

MR. HYMES: That is the only purpose for which witnesses are called.

THE COURT: I have ruled.

MR. HYMES: I only wanted to indicate the ground of my objection. I thought that was the only purpose for which witnesses were called.

THE WITNESS: It is merely the saving of time.

MR. HYMES: I ask that that be stricken from the record.

THE COURT: I don't wish to say anything further, but one of you talks to the other --

Now, there is one question, and that is whether that is the book. You can satisfy yourself as to whether it is or not and then ask the question.

THE WITNESS: If you give me time, your Honor, I will.

THE COURT: We are giving you the time and there is nothing else for you to do but look at the book.

THE WITNESS: (After examining the book.) Yes sir; this is the book.

MR. CORRIGAN: I ask to have this book marked for identification.

THE COURT: What do you want it marked for.

MR. CORRIGAN: For identification merely.

THE COURT: Very good.

MR. CORRIGAN: As a book shown to the detective by --

MR. HYMES I object to that.

(The book referred to is marked for identification people's Exhibit 14.)

BY MR. CORRIGAN:

Q After examining this book, what did you do next?

A I looked to see under what name these entries --

MR. HYMES: I ask that that be stricken out.

MR. CORRIGAN: I will consent that it shall be stricken out.

Q Afterwards, what did you do, after that?

A Served a subpoena on Mr. Reif, if I recollect, to appear in Jefferson Market Court.

Q When did you next see the defendant?

A I am not sure whether it was the following morning or not.

Q Did you have any further conversation with him at any time?

A With the defendant? No sir.

Q You have now stated all the conversations with the

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defendant?

A As near as I can recollect.

Q Did you afterwards see Dr. Doherty?

A No sir; Cary saw Dr. Doherty and I saw Dr. Herslika.

Q Did you receive from Dr. Herslika any lens?

A Yes sir.

Q Which lens was that?

A I will have to refer to my memorandum. No. 22,585. Detective Sergeant Cary was present at the time.

MR. HYMES: Won't you please confine yourself to answering the questions? I submit that this witness has been told that once. The question was this: "Which lens did you receive from Dr. Herslika and that admits of a categorical answer as to the number.

BY MR. CORRIGAN:

Q Look and see if this is the lens?

THE COURT: Don't address the witness, Mr. Hymes. Address the Court.

BY MR. CORRIGAN:

Q Is that the lens you received from Dr. Herslika?

A I will have to take it to the light to look at the number.

MR. HYMES: To save time, can't he in some way look at it afterwards?

THE COURT: You may examine the lens and answer the question.

BY MR. CORRIGAN:

Q Pick out the one that you received from Dr. Herslika and take them all over there and look at them?

A Here is the lens.

Q You identify people's Exhibit No. 2 as the lens you received from Dr. Herslika?

A I do.

Q Now, where did you get People's Exhibit 1 and 3?

A I did not get them; detective sergeant Cary get them.

MR. CORRIGAN: That is all.

THE WITNESS: I also asked Dr. Herslika --

MR. HYMES: Didn't you hear counsel say that is all, didn't you?

THE WITNESS: No sir.

BY MR. CORRIGAN:

Q Did you have any conversation with Dr. Herslika?

A I did have a conversation with Dr. Herslika.

Q Was the defendant present?

A He was not.

Q After that conversation, what did you do?

A I went to a place kept by a man named Sam Trieter.

Q Where is that?

A Third Avenue between 9th and 10th Street.

Q Did you have a conversation with Trieter?

A Yes sir;

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I did.

Q After that what did you do?

A Shall I repeat the conversation?

Q No, not unless it was in the presence of the defendant?

A After that I did not do anything.

MR. CORRIGAN: That is all.

CROSS EXAMINATION BY MR. HYMES:

Q Didn't you hear Mr. Corrigan say "that is all" just a moment ago?

A Yes sir; I heard him saying it now.

Q Did you hear him say it before?

A He may have said it.

Q Did you hear it?

A No sir; I heard him say something.

Q You stated under oath that you did not hear him. Is Mr. Reif in Court?

A Is he in Court? I believe you excluded all the witnesses; I think he is outside.

Q Won't you answer my question?

A I can't tell you.

Q Look?

A I don't know.

Q Look?

A I don't see him.

Q Thank you. Will some officer, at the direction of the Court, be kind enough to ask Mr. Reif to step in so that he may be identified. Is that man who now approaches Mr. Reif (referring to a person entering the court room)?

A He is.

Q You had a conversation with the defendant wherein he admitted, finally, to you that he had, sold or tried to sell lenses to Dr. Kruskal?

A Not tried to sell, sold.

Q Before you got to Police Headquarters on the 16th of November, didn't you?

A Yes sir.

Q Detective Cary was with you at the time?

A Yes sir; he was.

Q Before you got to Police Headquarters, after some urging by you, some questioning by you, the defendant told you that he had pawned, as said you recall, six articles with somebody on Second Avenue, -- substantially that?

A He told me that he had pawned --

Q That is substantially correct, isn't it?

A Yes sir; it is.

Q He told you that he had stolen those things from the Cornell University, didn't he?

A Yes sir.

Q He told you that the two pieces he pawned with Kruskal he had stolen from the University?

A Yes sir.

Q So you wish us to believe, from your testimony, that you discovered the pieces in Reif's place through the information that you got from the defendant?

A I do.

Q You didn't know where they were up to that time, did you?

A No sir.

Q It was because he told you that you were enabled to

find the place where they were, correct or not?

A In the main, yes sir.

Q Now, detective, will you tell me if that is true --

A Everything I say is true.

Q Tell if that is true why --

A Everything I say is true.

Q Won't you let me finish my question?

A You have so many.

Q Just this one. Now let us get along fairly easy. If it was true the information that you derived from the defendant that you went to Reif's pawn shop and get these six lenses why is it that you said to him "You know that you pawned some stuff on Second Avenue".

A Because I was informed by Dr. Ewing and his assistant, Patrick Dunn, after the finding of the lenses at Kruskal's that he had heard --that they had heard that this young man, the defendant, was acquainted with some pawnbroker on second Avenue.

Q Where is Reif's place with respect to the college?

A The college is situated corner of 28th Street and First Avenue, the southwest corner and Reif's pawn shop is --

Q Let me get that in my head. 28th Street and First Avenue?

A Yes sir; and Reif's place is one door south of the southwest corner of 24th Street and Second Avenue.

Q That is four blocks down and one block east?

A Yes sir; one block west.

Q The stuff was gotten from Dr. Kruskal in October, was it not?

A Well, as near as I can recollect I think it was the latter part of October.

Q The arrest was made on the 16th of November, was it?

A I believe so.

Q You had this information about the stuff from the college that had been pawned on Second Avenue and you got that when the stuff was taken away from Kruskal, that is right, isn't it?

A No sir; that is not.

Q Didn't you say that a moment ago?

A I did not say anything of the kind. You are making the time fit.

Q Officer, please answer my questions. I think you said -- and if I err you will correct me -- that it was after the stuff was gotten from Dr. Kruskal that you were informed that the defendant had pawned stuff on Second Avenue; yes or no?

A So it could be exactly, but not immediately, not the same day, not the same week.

Q All right. I will ask you how long afterwards was it?

A I cannot fix the time.

Q How many days about?

A I think it was the very day of the arrest, as near as I can remember.

Q You understand, don't you, officer, that it would be rather peculiar if, after you had been informed in October that there was stuff belonging to the University at the pawn

shop on second Avenue that you had not discovered it up to that time?

A I understand that there is nothing peculiar about the case except about your manners.

Q Answer my question. You do realize that, don't you?

A I don't realize anything that you claim.

Q No matter what I claim you are against me?

A Yes sir; you are here to acquit your client if you can.

Q You had not been to any pawn shop on Second Avenue before having arrested the defendant with an intent to get lenses, property belonging to the University, had you?

A Not that I can recollect.

Q When was it you went to Reif's place?

A I told you a moment ago.

Q Tell it to me again, please?

A I think -- I am pretty sure it was the day of the arrest.

Q After or before?

A After.

Q Was the defendant already in Headquarters?

A As near as my memory will serve me I think so.

Q You did not take the defendant there with you?

A No sir.

Q Some days after the arrest Reif with you was at the Jefferson Market Police Court?

A He was there after the arrest.

Q Some days after the arrest?

A I cannot recollect

that; I would have to look up the dates.

Q A few days afterwards?

A He was there after the arrest of necessity.

Q You were with him?

A Yes sir.

Q Was that the first time, so far as you know personally, that Reif had been brought to look at the defendant to see whether he could identify him or not?

A I cannot recollect that.

Q You stated, in your direct examination, that at Jefferson Market, after the arrest, Reif said, speaking of the defendant. "that is Dave; that's the boy that pawned the lenses with me", or words substantially to that effect?

A As I recollect it, yes sir.

Q How many times did he do that, on one occasion in Jefferson Market or some other time?

A Well, once I can recollect, but he has repeated it ever since.

Q I am talking about in the presence of the defendant?

A I could not tell you.

Q You don't remember whether it was twice or forty times?

A I could not tell you whether it was once or fifty times.

Q That is an answer. Who was present at the time, in the Jefferson Market Police Court, when Reif said "That is the boy that pawned the lenses with me".

A I could not

tell you that because the court room was crowded.

Q Was detective Cary there?

A I assume he was.

A If you don't know say so?

A He was in the court room but whether he stood at my side I can't remember.

Q Did you take Reif up to the defendant or into the vicinity of the defendant and say "Is that the boy"?

A No sir; I did nothing of the kind.

Q Who did?

A Nobody.

Q How did he happen to go to him and say "That's the boy"?

A He saw him sitting on the seat.

Q It was not at your suggestion that he went anywhere near him, was it?

A No sir.

Q You hadn't even asked him to come there for that purpose?

A He didn't have to go there for that purpose.

Q You had just subpoenaed him, that is all, isn't it?

A I had subpoenaed him to come there.

Q Was that right?

A I subpoenaed him to come there, yes, sure.

Q You just happened to be within carshot of Reif when he walked over to the boy who was sitting on the bench and said "That's the boy who pawned lenses with me"; is that true or not?

A I don't say I was just within car shot; it was my duty being present there --

Q If that isn't so say so?

A Repeat it please.

Q (repeated as follows): You just happened to be within carshot of Reif when he walked over to the boy who was sitting on the bench and said "That's the boy who pawned lenses with me"; is that true or not?

A I am always within carshot when an identification is made of that kind.

Q I concede it. You mean an identification of this sort, is that it?

A An identification where I bring somebody as a witness to identify a man I must, of necessity, be within carshot and eyesight.

Q You don't point out a boy, do you, to be identified or don't look at him, is that so?

A The man knew him.

Q Is that what you did?

A No sir; never do anything of the kind.

Q Never did?

A No sir; never. He did not have to be pointed out, he knew him.

Q "No never" is your answer, isn't it?

A It is, exactly.

Q Kruskal you sent for, on the day of the arrest, to come to Headquarters, didn't you?

A Yes sir.

Q Who was present at the time Kruskal came to Headquarters?

A I don't remember who was present other than the defendant and Kruskal and detective sergeant Cary and myself; there may have been others present.

Q You remember those?

A Yes sir, naturally we --

Q Now, that very same day the defendant told you that he had stolen two lenses from the University?

A Yes sir.

Q And had sold them to Kruskal when he knew?

A Yes sir.

Q He told you that?

A He did.

Q But when Kruskal came down the defendant said, in your presence and detective Cary's presence, that he did not even know him?

A He did, and immediately said that Kruskal had tried to sell him a lens.

Q He said "I don't know him" but Kruskal tried to sell me a lens; is that what he said?

A No sir; it is not.

Q Is that what you just said?

(No answer.)

Q What did you just say?

A You repeat what you think I just said and I will tell you whether it is right or not.

Q Now, you have had a moment's time to think. Will you tell us whether or not the defendant did not deny knowing Kruskal and yet, at the same moment, declared that it was Kruskal who tried to sell him lenses. Yes or no?

A He said that he did not know Kruskal, and then he said Kruskal tried to sell him lenses and then he said he had pawned the lenses but another boy named Max Kalkowsky had stolen them.

Q You did not say that in your direct?

A No sir; it

was not brought out, never thought of it until you brought it out.

Q It is a new thought?

A No; he told a different story about every five minutes.

Q About what time of day was it that you made the arrest?

A As near as I judge it was around -- it was about eleven o'clock in the morning.

Q Where was it with respect to Third Avenue that you and detective Cary and the defendant first started the conversation about the lenses, the property of the University?

A Where was it? 161st Street and Third Avenue.

Q You had never talked with this boy, so far as you know?

A Never saw him before that morning.

Q Detective Cary, so far as you know, was unacquainted with him?

A No sir; never saw him before.

Q You both declared yourselves to be detective officers, and that he was under arrest, before he made these statements as to this larceny?

A What is that?

(Question repeated)

A Yes sir.

Q You were first spoken to                    about property belonging to Cornell University away back in October of 1905?

A Exactly.

Q I think that you stated, in direct examination,

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that you had a talk with Dr. Ewing?

A Yes sir.

Q Can you recall about what time in October, 1905?

A I think I can.

Q About?

A About the 13th of October.

Q Do you know whether or not prior to the 13th of October any member of the force had been on this case?

A I could not tell you that.

Q You don't know anything about that?

A No sir.

Q You have not any information which would enlighten me as to that, have you?

A No sir; none whatever.

MR. HYMES: That is all for the present. I don't want the detective to leave.

RE DIRECT EXAMINATION BY MR. CORRIGAN:

Q McCafferty, in reference to this identification by Mr. Reif, how did Mr. Reif identify the defendant?

A By saying "There is the young man over there that pawned these goods with me; I know him for a long time."

Q Had you indicated to Mr. Reif before that who the defendant was?

A I had not.

Q There were other people about in the same room where the defendant was?

A There must have been fifty or seventy five people inside of the rail on that day; there was a great many people there.

Q Where was the defendant standing?

A He was not standing; he was sitting on a bench.

Q Sitting on a bench?

A Yes sir; at the extreme western end of the court room, inside of the enclosure where the prisoners sit.

Q Other prisoners sitting there?

A Yes sir.

Q How many others?

A Well, I could not tell you; the seat was full, probably eight or ten.

Q Did you do anything in any way to indicate to Mr. Reif that this was the defendant?

A I did not.

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

Objection overruled; exception.

Q Now, about this conversation at Headquarters --did I understand you to say in response to questions of counsel for the defense that the defendant denied knowing Dr. Kruskal and, in the same sentence, or at the same instant of time, stated that Dr. Kruskal had tried to sell him the thing, or did some interval of time elapse between the two conflicting statements?

A Only long enough --

MR. HYMES: Objected to as immaterial what Mr. Corrigan understood.

THE COURT: It is not a proper form of question.

BY MR. CORRIGAN:

Q Where the two statements made by the defendant, first, that he did not know Dr. Kruskal at all, and, secondly, that Dr. Kruskal had endeavored to sell some articles. Were those two statements continuous or was there some appreciable interval of time between the two statements?

A Only long enough for Dr. Kruskal to turn around as though he was about to walk away.

Q And then the defendant changed his story?

A Yes sir.

RE CROSS EXAMINATION

BY MR. HYMES:

Q Just one second. Was Kruskal present on the same day that Reif identified this defendant in the Jefferson Market Court?

MR. CORRIGAN: I object to that as not proper re-cross examination.

THE COURT: He may answer.

A I cannot recollect whether he was in the court room the same day or not; he certainly was present at the time the case was set down for examination.

Q You don't recollect then?

A No sir; I cannot recall that.

Q About how many times have you talked with Dr. Kruskal

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about this case?

A I have spoken to Dr. Kruskal and everybody else every time I have seen them.

Q About this case?

A Certainly.

Q Do you know of anything having been said to Dr. Kruskal about immunity if he testified in this case, yes or no. Don't laugh?

A I never heard of such a thing.

Q This is a very serious matter if not to you to the defendant?

MR. CORRIGAN: I will put the District Attorney on record as saying that no such offer was made to Dr. Kruskal nor was any such intimation made to him.

MR. HYMES: I am asking a question and I am interrupted.

MR. CORRIGAN: I object to the question on the ground that sergeant McCafferty is not the person to testify about immunity. The District Attorney's office are the only people who can offer immunity as I understand the law of this case. I understand that we have the right, under certain circumstances, to permit a witness to turn State's evidence. I also wish to state upon the record that there was never any such intimation to Dr. Kruskal --

MR. HYMES: I am asking a question.

THE COURT: The question seems to be entirely

proper whether he knew of anything having been said to him about it. It is a preliminary question and he may say yes or no.

THE WITNESS: I never heard of any such thing.

Q Do you know of the subject ever having been discussed?

A No sir; because there was never any reason.

Q Never mind any reason. You don't know of the subject having been discussed?

A No sir.

BY MR. CORRIGAN:

Q Did you ever hear of any intimation, in any shape or form, that Dr. Kruskal required imunity?

A No sir; I did not.

ARTHUR A. CARY, a witness called and sworn in behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. CORRIGAN:

Q You are a member of the Municipal Police Force of this city, are you not?

A I am, sir.

Q What is your rank in the Police Department?

A I hold the rank of Detective Sergeant.

Q How long have you been a Detective Sergeant?

A Since 1897.

Q Attached to the Detective Bureau at Headquarters?

A Yes sir.

Q You and officer McCafferty worked together on this case?

A We did.

Q Now, I show you these two lenses, People's Exhibit 1 and 3, and ask you where you obtained them?

MR. HYMES: Are these the ones that McCafferty testified he got from a particular place?

MR. CORRIGAN: They are the ones that he testified that Cary got from Dr. Doherty and another doctor and are the ones identified yesterday by Dr. Ewing.

Q From what doctor did you get them?

A I will tell you after I look at the numbers.

Q Is that a memorandum of the numbers?

A Yes sir; that is a memorandum of the numbers.

Q That you and McCafferty made?

A No sir; that memorandum of these numbers was made at the Cornell University and handed to McCafferty.

Q Is that the memorandum McCafferty just gave you now?

A Yes sir it is, and I put certain marks on it. That lens with that number on it (indicating).

Q That is People's Exhibit 3?

A Yes sir.

Q Who did you get that from, Exhibit 3?

A That card came from J. H. Doherty's, Surgical Supplies, at 409 West 59th Street.

Q Where did the other one come from?

A That came from a doctor by the name of Benglas, 2 Kast 120th Street, corner of Fifth Avenue.

No cross-examination.

JOSEPH H. REIF, a witness called and sworn in behalf of the People, testified as follows:

BY MR. CORRIGAN:

Q Where do you live?

A 414 Second Avenue.

Q What is your occupation?

A Pawnbroker.

Q How long have you been a pawnbroker?

A Nine years.

Q Where is your place of business?

A 414 Second Avenue.

Q Corner of what street?

A Between 23rd and 24th Street.

Q Do you know the defendant, David Ostro?

A Yes sir.

Q How long have you known him?

A About a year and a half or so.

Q Did he ever pawn anything with you?

A Yes sir.

Q I show you these five lenses here and ask you if the defendant pawned these articles with you?

MR. CORRIGAN: These are the five lenses which were marked for identification which officer McCafferty testified that he recovered at this man's

pawn shop.

A They were pawned by him with the exception of one that is under a different name, but I could not positively state whether it was he that pawned it or not.

Q Do you keep a pawnbrokers' book?

A Yes sir.

Q See if you can find the entries in that book?

MR. HYMES: I object to that as indefinite, vague and not binding upon this defendant and as incompetent.

THE COURT: The question is to see whether he can find a certain entry. I will sustain the objection.

Q Is that a book that you keep in the regular course of business, Mr. Reif?

A Yes sir.

Q Did you make the entries in that book yourself?

A Not always.

Q Do you know whether or not you made the entries referring to the goods that you have testified were pawned by David Ostro, the defendant?

A Well, the book will show that.

MR. HYMES: I object to that.

THE COURT: Strike it out.

MR. CORRIGAN: By consent.

Q By examining the book can you tell whether the entries in that book, referring to People's Exhibits 8 to 12,

which you have testified were pawned by David Ostro, were made by you?

MR. HYMES: Objected to as immaterial.

THE COURT: The gist of this objection is that you are seeking to introduce this book and Mr. Hymes contends that you have not proven it sufficiently to offer it in evidence.

MR. CORRIGAN: It is merely preliminary. I assume the witness may look at the book and see whether he made the entry or not.

THE COURT: He may look at the entry, certainly.

MR. HYMES: This witness is called upon to swear --

THE COURT: Won't you put your question.

BY MR. CORRIGAN:

Q Do you know under what name the defendant, David Ostro, pawned these articles with you?

MR. HYMES: Objected to as immaterial.

BY THE COURT:

Q Did the defendant pawn these articles with you?

MR. CORRIGAN: He has already testified that he did, your Honor.

THE WITNESS: Yes sir; with the exception, as I

said before, that there was one under a different name and that I could not state whether it was he or somebody else pawned it.

Q Now, the question is whether or not --

THE COURT: You may say under what name.

BY MR. CORRIGAN:

Q Under what name did the defendant pawn the five articles?

MR. HYMES: I think that is a fair question and therefore I do not object.

THE COURT: Then don't talk.

Q Under what name?

A Four of these five pawned under the same name, Ostro, with the exception of one.

Q There were six articles altogether. I am asking you only about five?

A One of those six that was found in my possession was pawned under a different name.

Q How many had been pawned under the name of Ostro?

A The rest of them -- five.

Q You knew the defendant for some time "before he pawned them?

A Yes sir.

CROSS EXAMINATION BY MR. HYMES:

Q How long have you known this defendant before he pawned anything in your shop?

A I had not known the de-

defendant at all.

Q That is the first time you ever knew him?

A Yes sir.

Q How many times did he pawn things in your shop?

A Lots of times.

Q Now, show me the entries with the name of David Ostro for four of these articles?

A One is No. 9972.

Q Let us have it -- now, let me have it to put a pencil mark on the entry?

A 9972 is the book number.

MR. CORRIGAN: I object to Mr. Hymes' questioning in regard to this book unless he offers the book in evidence. He is questioning the witness in regard book produced by us.

Objection sustained.

Exception.

MR. HYMES: Do I understand that the Court denies my request to have the witness place an A or some mark of identification opposite the entry to which reference has been made?

THE COURT: I do not do that. He may do it.

MR. HYMES: That is all that I asked, your Honor.

THE COURT: Yes; that is a preliminary question.

BY MR. HYMES:

Q Now, show me, or find the entry where the defendant,

under the name of David Ostro, pawned four were of these articles?

MB. CORRIGAN: I object to that question on the ground already stated, that it refers to a book not in evidence.

THE COURT: He may answer.

A I wish to state that, as a rule, I don't as a rule enter the first name of the man that pledges things, only the last name; but I can find the others which are pledged.

Q Is the one that you have just referred to pledged in the name of David Ostro?

A Not with the first name.

Q I withdraw that part of the question which has reference to the first name. Find the entry with respect to four of these lenses under the name of Ostro and put a B opposite the next one?

A Well, I will mark them in rotation, A, B, C and so forth.

Q Yes. I wish you would keep note of the pages so that we won't have any difficulty in finding them.

A The number is right on the book. You can find it by the pledge number.

(The witness marks another entry D. and another entry E.)

THE WITNESS: There is the five; there is one here pawned under the name of Wilson.

Q Mark an F opposite that one?

A Yes sir.

Q There are six entries in all?

A Yes sir.

Q What is the date of the first entry?

MR. CORRIGAN: I object to that question unless the book is offered in evidence. The book is the best evidence. He is calling for the contents of document.

A May 15th, 1905.

Q That is the first one?

MR. CORRIGAN: I object to that question unless that entry is offered in evidence.

MR. HYMES: I have asked the date when the first entry was made. Mr. Corrigan objects upon the ground that my question is not competent unless I first permit the entry or the book to go in evidence.

MR. CORRIGAN: I think I can state my own position. I object to the witness answering the question unless the book is put in evidence.

MR. HYMES: I have not asked him to read any entry.

MR. CORRIGAN: The entry speaks for itself.

THE COURT: He may look at the book.

THE WITNESS: I know when the first entry was made, but I could not --

BY MR. HYMES:

Q By looking at the book could you tell when the first entry was made?

A The book shows.

Q Do you know anything about it except what the book shows?

A That is all.

Q Look at the first entry?

A The first entry of these here?

Q Just look at it, in whose handwriting is it?

A This is in my counter man's.

Q What do you mean by that?

A My counter man.

Q Look at the second entry?

A The same.

MR. CORRIGAN: I object to that question and ask that the answer be stricken out unless the entry be put in evidence. I object to Mr. Hymes questioning the witness about a document offered by us without the document being put in evidence.

THE COURT: (rejection sustained.)

MR. HYMES: Isn't this the best way of attacking the in competency of a document by showing in whose handwriting it is. My friend would have to lay this foundation himself in order to get it in.

MR. CORRIGAN: Do I understand Mr. Hymes to say that he has no objection to its going in evidence?

MR. HYMES: Anything that is competent --

THE COURT: We will withhold a decision on the question of its reception in evidence now.

MR. HYMES: I Am laying the foundation that Mr. Corrigan, skilled lawyer that he is, would insist upon having laid.

BY MR. HYMES:

Q In whoso handwriting is the second entry?

MR. CORRIGAN: Objected to on the grounds already stated.

Objection overruled.

Exception.

A My man's.

Q Look at the third one?

A The same.

Q Look at the fourth one?

A Mine.

Q Look at the fifth. Pardon me, can you tell by looking at any memorandum that you please what date the fourth entry was made?

A No sir; I could not.

Q Now, by looking at any memorandum that you please, can you tell me what date it was made?

A Yes sir.

Q What date?

A May 22nd, 1905.

Q Now, look at the fifth entry?

A Do you want the date?

Q No, in whose handwriting is it?

A My own.

Q What date?

A July 5th, 1905.

Q Whose is that?

A My man's writing.

Q Now, what other entries have you in that took under the name of Ostro?

A Well, I could not say.

Q What is the date of the first entry?

MR. CORRIGAN: I object to that question.

THE WITHERS: You mean the first entry of these years?

THE COURT: Wait a moment. This question was put once before. Now, if you want the entry you must put the book in evidence. I am not clear as to whether or not it is in evidence as to when the first entry was made.

MR. CORRIGAN: It is not.

BY THE COURT:

Can you state of your own memory when the first entry was made?

A You mean of these?

BY MR. HYMES:

Q Of those that you have just given me, these six?

A No sir; I could not.

Q Can you by looking at any memorandum of any kind?

A The only memorandum is this book.

Q Well, that is a memorandum if it refreshes your memory. Tell us, by reference to any memorandum, when the first entry was made?

A May 15th, 1905.

Q When was the last One in point of time made, referring to any memorandum that you please, either a book or anything?

A July 5th.

Q How often, since September of 1905, have you seen the defendant?

A I could not state.

Q Have you seen him since September, 1905 to your knowledge?

A I would not be positive about that.

Q What is his first name?

A I don't know; I never ask for that.

Q Did you see him in the fall of last year, of 1906?

A No sir.

Q Anywhere?

A No sir.

Q Sure of that?

MR. CORRIGAN: Do you refer to before he was arrested or afterwards?

MR. HYMES: I submit to the Court that I am entitled to ask my question.

THE COURT: I am not interfering with you.

BY MR. HYMES:

Q When, if at all last fall did you ever anywhere see the defendant?

A In the Jefferson Market Court.

Q How many times?

A Once or twice.

Q Which is it, once or twice?

A Well, I would not be positive because I have been called on so often.

Q You were called down there several times, were you?

A Yes Sir.

Q You think you saw him once or twice?

A Yes sir.

Q That was sometime in November or December of 1906?

A A couple of months ago, I can't exactly tell the date.

Q It was after his arrest?

A Yes sir.

Q Where was he so far as the court room is concerned, when you first saw him?

A He was inside the railing.

Q What was he doing inside the railing?

A Just sitting down.

Q Whereabouts?

A Well, there is a bench behind the railing.

Q Who pointed him out to you?

A No one in particular. As I turned around I happened to see him sitting there on the bench.

Q Just by accident, wasn't it?

A Yes sir.

Q You did not know you had been brought there for the purpose of identifying him, did you?

A No sir; in reference to this case I was brought.

Q You were not brought there for the purpose of finding whether you could recognize a man as the person who pawned articles with you?

A That very likely was the intention.

Q You were not told that?

A No sir.

Q Before you went to the court room you had seen detective McCafferty?

A Yes sir.

Q Also Detective Cary?

A Yes sir.

Q You had gotten a subpoena?

A Yes sir.

Q To come to court?

A Yes sir; to come to court.

Q You didn't have any thought as to what you were wanted for, did you, until you got to court?

A No sir; that I was wanted down there in this case.

Q But for what particular thing you didn't know or had not been told?

A No sir.

Q How long had it been since you had seen the defendant prior to the time that you saw him in Jefferson Market?

A That I could not exactly state.

Q Give us your best idea?

A I don't think I saw him after this last pledge was put in, after that date, that was --

Q After July 5th?

A Whatever the date was.

Q So far as you know July 5th?

A Yes sir.

Q Didn't anyone at Jefferson Market say to you "there is the defendant over there. Go and see if you can identify him".

MR. CORRIGAN: I object to that. The question has already been answered, several times.

THE COURT: Has this witness answered it?

Why do you ask it again?

MR. HYMES: I submit that that is merely the District Attorney's suggestion. Mr. Corrigan says it has been answered three or four times and then the Court asks me why do I ask it again, assuming infallibility on the part of Mr. Corrigan. The witness did say that he saw this man and went over and recognized him. Now, I am asking him specifically whether anyone said "There is the defendant over there, see if you can identify him". This is the first time that Question has been asked even approximately in that form.

MR. CORRIGAN: The stenographer's record will bear me out. He asked questions before and the witness testified that nobody pointed out the defendant, that he saw him sitting there.

THE COURT: The objection being simply to its repetition, it may be answered again anyhow.

MR. HYMES: I assume there will be no question about the answer now. I would rather withdraw the question. There won't be any doubt about the answer now.

BY MR. HYMES:

Q From July of 1905 until the fall of last year did you

ever display to anyone the lenses which had been pawned in your shop, the six lenses?

A I did not display them to anyone in particular.

Q Do you recall any occasion when lenses were inquired for by anybody during the time I have in mind and when you displayed these lenses?

A Yes sir.

Q Prior to the fall of last year and subsequent to the pledging of them?

A No sir; not prior.

Q Not prior?

A No sir.

Q To whom did you first display them?

A I showed them to the officers.

Q McCafferty and Cary?

A Yes sir.

Q About when was that?

A Well, I could not exactly remember the date or month that it was; I think it was some time in October or November.

Q You remember being down at court, don't you?

A Yes sir.

Q About how long before that did you first display these pledges to the officers?

A Only a few days before.

Q A few days before?

A Yes sir.

Q How many days?

A I think only two or three.

Q You remember the time when you were in court and recognized the defendant you have testified to, you remember that, do you?

A Yes sir.

Q How long before then was it that you had first shown these goods to the officer?

A Well, I recognized it at the same time when I showed them -- only two or three days before I came down to court.

Q How long had the boy been arrested before you showed these things?

A I don't know anything about that.

Q You say your best recollection is that it was some time in October or November when you displayed the goods?

A I think that was the time.

Q How many times have you talked with the officers about this case, and when I say officers I mean either Cary or McCafferty?

A I haven't spoken any time to them except they were in court and I was subpoenaed down there.

Q Except when you came to court?

A No sir.

Q Did you talk with either of the officers this afternoon?

A Yes sir.

Q Which one?

A Well at one time and only one, after the other officer was called in.

Q When one officer was called in you talk to the other one, did you?

A Yes, sir.

BY MR. CORRIGAN:

Q Did Dave Ostro ever pledge anything with you besides these articles you mentioned?

A Yes, sir.

Q How many other things did he pledge with you?

A Sev-

eral different lenses.

Q What kind of leases?

A Something similar to these.

Q Did he pledge any with you after July 6th?

A Well, I don't think -- if the book doesn't show it, there was no pledge made.

Q Will you look in the book and find the latest pledge made by Ostro?

A The latest is from these here in evidence now.

Q I don't mean the ones in evidence -- I mean the latest or all?

A There could not be any more after that, because there is none in my possession.

BY MR. HYMES:

Q Can you tell me, Ormann, in whose handwriting the Wilson entry is?

A My man's.

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

DIRECT EXAMINATION BY MR. CORRIGAN:

Q Where do you live?

A 38 Third Avenue.

Q What is your occupation?

A I keep a second hand store?

A First floor, 38 Third Avenue.

Q Now, did you have these lenses, People's Exhibits 1,

2 and 3 in your possession. Just look and see if you ever had them in your possession?

A I had similar to these, of course I can't swear to these; I had similar to them.

Q What did you do with them?

A I sold them to a doctor.

Q What was the doctor's name?

A I can't think of it.

Q Herlitzka?

A Yes.

Q Where did you get the lenses?

A I took them out of pawn.

Q Where did you get the pawntickets for them?

A I bought them from a young man who came to the store.

Q Who was the young man?

A He gave his name to me as David Block.

Q Look at the defendant and see if he is the young man according to the best of your knowledge and belief?

A I could not swear to it.

Q According to the best of your knowledge and belief?

A According to the best of my knowledge I cannot swear.

**CROSS EXAMINATION BY MR. HYMES:**

Q Whom can't you identify?

A The man who sold me the tickets.

Q There is no one in this courtroom whoa you identify, is there?

A NO, sir; not identify --- but I can positively swear to as being the person.

BY MR. CORRIGAN:

Q Did the person who sold you the tickets sign any paper in your presence?

A He did, sir.

Q Have you got that paper with you?

A Yes, sir.

Q Let me have it, will you please?

A Here it is.

Q Is that his signature "David Block"?

A Yes, sir.

MR. CORRIGAN: I ask to have that simply marked for identification.

(The paper referred to is marked People's Exhibit 15 for identification.)

BY MR. HYMES:

Q You said something about these lenses. De you identify these lenses you have ever had in your possession?

A I said somewhat similar.

MR. HYMES: I ask that the testimony of this witness be stricken out, if the Court please, on the ground that the witness said "something similar to these".

MR. CORRIGAN: If I do not connect this I will consent that it be stricken out. I expect to connect it by the following witness.

THE COURT: I will hold it for the present.

MR. HYMES: Upon the theory of a promise to connect

you could get anything in evidence. What right can be protected if that principle befollowed. He may promise to connect anything and then afterwards it is up to me to move to strike it out.

THE COURT: I will withhold my decision.

MR. HYMES: I submit, if the Court please, that upon the witness' testimony now that these lenses are somewhat similar to these he had in his possession obtained on pawntickets which were bought by him --- I submit that that evidence should be stricken from the record.

Exception.

LOUIS HERLITZKA, a witness for the People, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORRIGAN:

Q Where do you live?

A 145 Second Avenue.

Q What is your occupation?

A Physician.

Q Now, did you buy three lenses from Sam Trigger, the last witness?

A I did.

Q When did that take place?

A I bought them the end of April, or the beginning of May.

Q Of what year?

A Two different occasions, 1906.

Q I show you these three lenses, People's Exhibit 1, 2 and 3 and ask you if these are the lenses you bought from

Sam Trigger?

A I can positively identify one lens because I have the number down of that; the other two lenses I sold to other people and they have kept record of these lenses.

Q Which one do you positively identify?

A This is the lens I have had in my possession.

Q That is People's Exhibit No. 2?

A Yes, sir.

Q What did you do with that lens?

A That lens I kept for my personal use.

Q Who did you finally give it to?

A I gave it finally to the detective.

Q To McCafferty?

A Yes, McCafferty or Cary.

Q You said you sold the other two?

A Yes, sir.

Q To whom did you sell them?

A One to Dr. Vinglas and one to Mr. Dougherty.

CROSS EXAMINATION BY MR. HYMES:

Q How much did you pay for them?

MR. CORRIGAN: I object to that as incompetent, immaterial and irrelevant. The witness says he bought them at a second hand store.

MR. HYMES: The price he paid may be some evidence whether he did or not.

THE COURT: We will receive it.

Q How much did you pay for them?

A I paid for the three lenses \$30.

Q You have the number of one of them?

A Yes, sir.

Q When did you put that number down?

A That number was put down when the detective came to call for the lenses; it was down em the receipt that they gave me for the lenses which they took.

MR. CORRIGAN: That is all.

THE COURT: We will have to suspend have as I have to take up one or two other matters, Gentlemen of the jury, do not talk about this case or permit anybody to talk with you about it and do not form or express any opinion thereon until the case is finally submitted to you. I think we can begin on Monday morning at 11 o'clock.

(The Court then adjourned the further trial of the case until Monday morning. January 21st, 1907, at 11 o'clock.)

New York, January 21st, 1907.

TRIAL RESUMED.

JAMES C. DOHERTY, a witness sworn for the People, testified as follows:

DIRECT EXAMINATION BY MR. CORRIGAN:

Q Where do you live, Mr Doherty?

A I live in Greenwich, Connecticut.

Q What is your occupation?

A I am a dealer in microscopes and surgical --- physicians' supplies.

Q Where is your place of business?

A 409 and 411 west 59th street.

Q City and County of New York?

A Yes, sir.

Q I show you People's Exhibit No. 3, and I ask you if you ever saw that before?

(It is conceded that Mr. Doherty received this lens from Dr. Herlitzka and turned it over to Detective Sergeant Cary.)

Q When did you get that, Mr Dougherty?

A I got that lens on the 4th day of June.

Q This year or last year?

A 1906.

JOACHIM BRENGLOSS, a witness called on behalf of the People, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORRIGAN:

Q Mr. Brenglass, where do you live?

A 2 West 120th street.

Q What is your business?

A Physician.

Q Now, do you know Dr. Herlitzka?

A Yes, sir.

Q I show you this article, People's Exhibit 1, and ask you if you got it from Dr. Herlitzka?

A Yes, sir, I did.

Q Did you afterwards turn it over to Detective Sergeant Cary?

A Yes, sir.

Q What date was it you got it from Dr. Herlitzka?

A I can't exactly recollect; it must have been some day in may or June, 1906.

CROSS EXAMINATION BY MR. HYMES:

Q How long have you been a physician?

A Four years --- three years.

Q What were you before that? A druggist?

A Yes, sir.

MR. CORRIGAN: The People rest.

MR. HYMES: Won't you call back Mr. Reif. I ask, before the People rest, the privilege of asking a question or two of Mr. Reif.

JOSEPH H. REIF, a witness called in behalf of the People, resumes the stand.

MR. CARRIGAN: That Reminds me of something that I feel I ought to say to the Court. When I put Mr. Reif on the stand and asked him to testify, my belief was that the lenses which Mr. Reif would produce were part of the lenses covered by the indictment. It was for that reason I put him on, but upon examining his book I found that all these leases were pledged before the date of the alleged larceny, and consequently they could not be the lenses mentioned in the indictment. I feel that I ought, in justice to the defendant, call that to your Honor's attention, and move that that testimony be stricken from the record. It was put in under an error.

THE COURT: I think it was received subject to a motion to strike out if it was not connected.

MR. CORRIGAN: I have absolutely failed to connect them.

MR. HYMES: I am not making any motion, sir.

THE COURT: I think we will strike it out.

MR. HYMES: We very strenuously object to counsel opening evidence which he promised to connect, and then making a motion himself to strike it out. It is up to me if I want to do that, but I want it in the record.

THE COURT: I shall instruct the jury to disregard

it. As far as the record is concerned, of course, it may stay there, to give you an opportunity, if you please, of reviewing it when you come to review the case in the Appellate Court.

MR. HYMES: We expect never to be compelled to do that, sir.

THE COURT: I do not insinuate that you will.

MR. HYMES: I want my exception noted to the Court's suggestion, as to "When you come to review this case before the Appellate Court.

THE COURT: The Court suggests nothing except the propriety of leaving it of record. I instruct the jury to disregard all that I have said. It was not addressed to the jury. Now, Mr. District Attorney, does this relate to all the testimony of this witness?

MR. CARRIGAN: It does, your Honor.

THE COURT: Now, Gentlemen, the District Attorney has introduced testimony of Mr. Reif. It was received on his promise to connect it. He has failed to connect it, and he asks the Court to strike it out. The Court instructs you to disregard all of the testimony of Mr. Reif; pay no attention whatever to it, and forget that it was in the case. Now, Mr. Reif is recalled.

MR. HYMES: We respectfully except to the ruling of the Court in that regard, and to the direction of the

Court upon motion of the District Attorney. The motion is not to be raised from this record, but upon a promise unfulfilled this was injected into the record.

BY MR. HYMES:

Q Now, Mr. Reif, look at that book that you have?

A What do you want me to look at?

Q Look at the first entry opposite to which you put the mark of identification "An?"

A I will have to get these lenses in order to do that.

Q Haven't you any other memoranda?

A Only the book. It will show what has been marked A and so forth.

Q Find the ones you have already marked?

A I have the one that is marked A.

MR. HYMES: I offer that in evidence --- the entry in evidence.

(The entry referred to is marked Defendant's Exhibit A.)

MR. CORRIGAN: I would like to ask him a preliminary question. What is that in reference to, which one of these lenses?

THE WITNESS: This one has been marked A.

BY MR. HYMES:

Q By whom was that lens pledged?

A Ostro:

MR. CORRIGAN: I have no objection to its going in.

(Marked. A.)

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Q Read it please?

A Lens, \$3, name Ostro.

Q What else, is that all?

A That is all.

Q When was that article pledged?

A The date at the head of the sheet there.

Q May 22nd?

A Whatever it is there.

Q May 22nd?

A Yes, sir.

Q You have a pretty busy pawnshop there, haven't you?

A Yes, sir.

Q May 22nd, all loans upon that day is where my finger now is on lage 107?

MR. CORRIGAN: I object to that question. I don't see that it is material, how far May 22nd runs.

A Yes, sir.

Q Down to the stamp, "May 23rd, 1905" are indicated all of the pledges that were taken in your establishment on the 22nd of May?

MR. CORRIGAN: I object to that question on the ground that it is incompetent, immaterial and irrelevant and not within the issues here.

THE COURT: We will receive it.

MR. CORRIGAN: Does your Honor receive that question?

THE COURT: Yes.

A Yes, sir.

Q Tell us approximately how many pladges were received

in your place on that day?

A The book will show that.

Q Look over my shoulder?

A About one hundred and forty-seven.

Q About a hundred and fifty?

A Yes, sir.

Q Now, then, without asking you with every other entry, can you tell me generally, whether or not that is about the number of pledges that your concern would take in in a day?

A Yes, sir.

Q Why is the first entry, May 26, 1906, erased there opposite that pledge?

A Oh, that was an error in cancellation; the lower number ought to be cancelled, and that is the reason that is erased there; that recancellation.

BY MR. CORRIGAN:

Q Does it refer to the entry in evidence?

A Cancelled there by mistake. It was stopped for recancellation.

BY MR. HYMES:

Q You will observe that the date May 26th, 1905, is under the heading "Redeemed". What does that mean?

A Pledges which were taken out.

Q That pledge was redeemed on the 26th of May, 1905?

A No, sir.

Q What does it mean?

A It is stamped to be in my possession only there is an error in cancelling -- the upper number has been cancelled instead of the lower one.

Q What does May 26th, 1905, mean, then?

A Goods

Q Now, you have got a Claim there headed "Redeemed", haven't you?

A Yes, sir.

Q There are various dates opposite various pledges under that column?

A Yes, sir.

Q Until a pledge is redeemed that column is vacant opposite the pledge? or should be?

A Yes, sir.

Q Now, you have "May 26th, 1905" cancelled here opposite Exhibit A?

A Yes, sir, that is what I explained, it has been cancelled instead of the lower number and therefore has been stricken out; the lower number ought to be cancelled but by mistake ---

Q Now, let us see, in the first place No. 71 was redeemed or not?

Objection. Question withdrawn.

BY MR. CORRIGAN:

Q Does this entry here, which you have marked A, does that refer to one of these articles on the table?

A Yes, sir.

Q To which article?

A This one here (indicating).

Q Was that article ever redeemed?

A It might have been redeemed and repledged, I don't know.

Q At all events it was still in your possession when the detectives took it?

A Yes, sir; this has not been redeemed since the time it has been pledged under that heading.

BY MR. HYMES:

Q Find me Exhibit B in this book if you can? (Witness indicates).

Q Sometime in the fall of 1905, did you have any inquiries in your shop as to whether or not any lenses had been received by you in pawn?

A Not to my knowledge.

Q Do you know a young man named Leo Ostro, a brother of this defendant?

A I don't know.

Q Do you think you would recognize him if you saw him?

(No answer.)

Q Do you know that young man (pointing to a young man in the court room)?

A I don't know him.

Q Any recollection of him at all?

A Any more than I seen him here in the court house.

Q Don't you remember that some time in September or October, some time in the fall of 1905, this young man entered your pawnshop and asked whether or not any lenses, so far as you know, had been received by your shop in pawn, and that you answered that, so far as you knew, none had been?

A I don't recollect, to my knowledge, having any inquiries.

Q Have you any better recollection of it?

A I have not, no, sir.

Q Now, you are talking with reference to this young man?

A Yes, sir.

Q How about any other young man?

A I don't remember anybody inquiring in reference to lenses being pawned.

Q Do you recall his face at all?

A No, sir; only from seeing him in the court house.

Q I mean from having seen him in your pawnshop at any time?

A No, sir.

Q You don't swear he was not there inquiring -- you only swear you have no recollection?

A Yes, sir; that is all.

MR. CORRIGAN: The People rest.

MR. HYMES: Now, if the Court please, in the first place I ask that the prosecution elect upon which account in this indictment they wish to go to the jury.

THE COURT: Will you hand me the indictment. I have made no ruling as yet. I am going to look at the indictment. The first count charged is Grand Larceny in its first degree. As I take it common law larceny. The second charge is criminally receiving stolen property. Well, Mr. District Attorney, what say you about the second count of the indictment?

MR. CORRIGAN: Well, so far I have proved nothing but the first count, your Honor.

THE COURT: I don't know that you have any proof under the second count.

MR. CORRIGAN: Not at all.

THE COURT: Then there is an election by the withdrawal of the second count.

MR. CORRIGAN: I take it that at this time it will be unnecessary for me to ask any instructions with regard to the first count, I mean in regard to the degree. Your Honor will reserve that?

THE COURT: Yes.

MR. HYMES: We ask, if the court please, that the Court direct and advise an acquittal in this case upon the ground that the People have failed to establish a case; upon the ground, particularly, that they have failed successfully to establish the larceny of any property. Secondly that they have failed to establish the larceny of any property in evidence. Upon the further ground that the allegation in the indictment is a larceny on the 7th of September, 1905. We submit, if the court please, that there is no direct proof as to the date when any larceny was committed by any one. We submit that we are entitled before meeting any issue made by the indictment, to have fixed at least an approximate date. That seems to me to admit of no further argument. If, for example, we are led to believe that the 7th of September, by the indictment, is the date upon which the larceny is predicated -- the reason we must have an assurance in the indictment is, for example, that the

issue may be properly met. If, it is alleged that on the 7th of September, we might be led to prepare for that issue, and that would be the only issue that it would be fair to ask us to meet. The only thing claimed now by the prosecution is that on the 7th of August there were certain articles in the possession of the complainant, and on the 7th of September there was not?

Motion denied. Exception.

Mr. Hymes opened the case on behalf of the defendant.

DAVID L. OSTRO, the defendant, called and sworn as a witness in his own behalf, testified as follows: DIRECT EXAMINATION BY MR. HYMES:

Q Mr. Ostro, how old are you?

A Twenty-two.

Q You are the defendant in this case?

A Yes, sir.

Q You were arrested on the 16th of September, 1906?

A Yes, sir.

Q In the year 1905 where were you working?

A Cornell Medical College.

Q When did you go there to work?

A In October, 1904.

Q When did you cease working there?

A October 3rd, 1905.

Q Where had you been employed before that?

A Before I came to Cornell I was employed by Max Solomon, skirt

manufacturer; before I came to Max Solomon I was employed by Stern Brothers.

Q How old were you when you went to work?

A When I first started in to work I think I was fourteen years of age.

Q With whom were you living at the time of your arrest?

A My mother.

Q Any other members of your family?

A Brothers and sister, all the whole family.

Q Whereabouts?

A 1452 Wilkins avenue, Bronx.

Q In October of 1905, when you lost your position with Cornell, what did you do, if anything after that?

A Well, I worked with a few doctors as an orderly, going around on cases, attending to people who was sick; my occupation is with doctors.

Q Where were you working after you left Cornell?

A My main -- the first thing I did was employed by doctors as an attendant.

Q When was your first job?

A I believe it was in October.

Q With whom?

A With --- I forget the doctor's name now - I was in the Manhattan State Hospital.

Q Where is that?

A Ward's Island.

Q Anywhere else besides the Manhattan State Hospital?

(No answer).

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BY MR. CORRIGAN.

Q As a patient?

A No, sir. I was at the Suydenham Hospital.

BY MR. HYMES:

Q Where is that?

A 116th street, between First and Second avenues.

Q Any other position?

A Yes, sir, I worked in New Brunswick, New Jersey, in a drug house up there, S. Russ & Company, a drug house.

Q How long have you been out of the city since you left Cornell?

A Two weeks.

Q That is the time you were in New Brunswick?

A Yes; that is the time I was in New Brunswick.

Q Can you state the time that you were in New Brunswick?

A In September.

Q What year?

A 1906.

Q And you always lived at the same place?

A You mean up at the Bronx? No, sir; we lived at St. Nicholas avenue, 454, for a year.

Q What address did you give when working at Cornell?

A 454 -- 120 West 135th street, and from there we moved to St. Nicholas avenue, and from St. Nicholas avenue to the Bronx.

Q At the time you left Cornell where were you living?

A 454 St. Nicholas avenue.

Q That is the address the college had?

A I believe they did have it -- I believe they did have it, yes, sir, because we have to change our address when we leave ---

Q What was your duty when you were at Cornell?

A Laboratory helper.

Q What did you do?

A I had to assist the doctor in taking culture media, did all the technique around there, pathological work.

Q You had access to some of the instruments in the bacteriological department?

A Yes, sir.

Q In what way?

A When the classes came to -- when the classes were up to put on the microscopes for the students.

Q Now, there have been four lenses marked in evidence, People's Exhibits 1, 2, 3 and 6, which have been called oil immersion lenses. Were such lenses as that in your custody?

A No, sir.

Q In whose were they?

A Patrick Dunn. They were kept in Dr. Ewing's room.

Q Who is Patrick Dunn?

A He was the janitor on my floor where I was employed.

Q Was he your superior there?

A Yes, sir.

Q Was he there when you got there? I mean to say, was he employed when you first became employed?

A Yes, sir.

Q Now, that floor is the bacteriological floor?

A It is called the bacteriology, histology and the library

and a few doctor's rooms up there.

Q Was Dr. Ewing's office on that floor?

A Yes, sir.

Q You knew Dr. Ewing, Of course?

A Yes, sir.

Q Was he the man that employed you?

A Patrick employed me.

Q After your employment there did you often see Dr. Ewing?

A Every day.

Q When was the first time anything about lenses that were missing or claimed to be missing?

A In March, the year 1905.

Q Who told you about it?

A Patrick.

Q At that time who else was working on that floor?

A There was a boy doing my cleaning there, cleaning test tubes; his name was a Max. And we had a Syrian there who cleaned up one of the other room and we had a Dig boy there, Bernard Stager.

Q There were employees upon the other floors?

A Yes, sir.

Q All of them had access to the pathological floor?

A Yes, sir.

Q And you say that Patrick, some time in March, 1905, told you something about lenses that had been missing?

A Yes, sir.

Q Don't repeat the conversation. Did you after that have any talk with Dr. Ewing about lenses that were missing?

A No sir.

Q Bid you work there all summer?

A Except then I had my vacation.

Q When did you have your vacation?

A Well, I was away at the Camp with the regiment from June 13th to the 20th; I remember that date, 1905; then I had another week in July, and I went away over labor Day to camp down at Sea Cliff, Long Island with one of the companies of the regiment.

Q That makes how many weeks in all?

A I should judge about three weeks.

Q Was Patrick Dunn away?

A Yes, sir, he was away.

Q How about Max?

A Well, Max was discharged; Max was discharged in July or August 1st, he left -- Max was discharged.

Q Well, Dr. Ewing said that the boy that did the cleaning whose name he did not recall, left the employ of the college about the first of June, of that year, because there was nothing more for him to do.

A No, sir.

Q He left the first of August?

A He was discharged the 1st of August.

Q Do you know what for?

A Yes, sir.

Q What was that?

A He was caught going down in the elevator with a quart bottle of alcohol. He was sent down to the New York City Morgue to get six human kidneys which we are in the habit of getting for the college for student's specimens.

they told him to bring six human organs up to ---

Q He was discharged for taking alcohol?

MR. CORRIGAN: Objected to.

Q Dr. Ewing said that this boy left because there was nothing more for him to do on the 1st of June. It is a lapse of memory, that is all. Now, after the boy was discharged who was there left upon your floor?

A There was Patrick and Bernard Stager.

Q I don't get the name?

A Patrick there, and they had a fellow called Stager.

Q They remained throughout the summer?

A Yes, sir.

Q Now, where were these oil immersion lenses kept?

A They were kept in a little chest, about that big (illustrating) in Dr. Ewing's room. Looked up in Dr. Ewing's room.

Q Where was this chest kept?

A In Dr. Ewing's room.

Q Who had the key or keys to it?

A Patrick.

Q Where was the key kept, do you know?

A Why, I know during the classes Patrick kept it in his pocket.

Q Was it kept in a drawer on a desk or in a desk that you know of?

A No, sir.

Q Do you know Whether any one else had a key to it besides Patrick?

A I don't know.

Q Whether or not there were duplicate keys you do not know?

A No, sir.

Q Did you have a key to it?

A No, sir.

Q Who took out the lenses from that chest when they were required by the students?

A When they were required by students Patrick would bring them out from there; we would count them, take them out of the cases, and then the students would set them.

Q Then after the students were through with them what would happen?

A I put them back into the cases there, and then Patrick would count them, and take them into Dr. Ewing's room.

Q Did you see him do that?

A Yes, sir.

Q Did you take them into Ewing's room?

A No, sir.

Q When was the first time you had any talk with Dr.

Ewing about lenses that were missing or supposed to be missing?

A Why, about September -- between the 10th and 13th Patrick came back from his vacation the 8th, and it was two or three days after that.

Q In the early part of September, 1905?

A Yes, sir.

Q Tell us what happened, what led up to that conversation?

A The conversation ---

Q Just right before that, so that we can understand it?

A Well, when Patrick came back from his vacation, the next day he said, "Eh, we will have to get at these microscopes, clean them out, to get them ready for the students", that is to say, "Wait, I will get the keys" They were kept in a glass closet there. We looked around

for the key, could not find it, so he said, "Well, we will have to get them out some way;" there are glass doors about an inch and a half, wood work, frame work.

Q That was not the glass door behind which the oil immersion lenses were?

A No, sir, that is where the microscopes were. The lenses are attached to the microscopes so we couldn't get them, so I say, the best thing to do, we will have to open it up, and I got one of those mallets which we have ---

Q You opened that door?

A Yes, sir.

Q That is, you and Patrick together?

A Yes, sir, Patrick and I together.

Q What did you find?

A We pulled out two or three microscopes, pulled out the case and found one lens missing out of it.

Q How many did you find that were missing?

A Two outside of three that were missing in March.

Q Three missing in March?

A Yes, sir.

Q Were those oil immersion lenses?

A No, sir; they are not kept on the microscopes.

Q When did you first hear from Dr. Ewing, about the missing of lenses?

A It was in the afternoon of that day.

Q Now, what happened?

A Dr. Ewing came to me and said, "Dave, there are some lenses missing here." He said, "We

have had trouble like this, you know", or something like that, "and I decided that if there were any lenses missing in any department, the man should pay for them"; I said, "I don't should pay for anything when I am not responsible for it; I have got to go out every day to the hospitals, to the Health Department, and all these things, I can't look after things." He said, "You will have to pay for it." I said "I won't pay for it." He says, "What are you going to do?" And I said, "I will sever my connection with the college." He didn't say anything any more.

Q Did he tell you who was under suspicion?

A No, sir. he did not say anything; he told Patrick the same thing that he would have to pay; we would both pay half.

Q Do you know whether Patrick contributed toward that or not?

A No, sir.

Q You do not?

A No, sir.

Q That was the early part of September?

A Yes, sir.

Q Was there anything said about oil immersion lenses missing?

A Was there oil immersion lenses there? It was microscopes; the lenses were all right. The oil immersion lenses that were there were kept in a case; there was one to every microscope, and they were all there on our floor.

Q How about this case in which the oil immersion lenses were kept?

A We looked at the chest and the oil immersion lenses were there.

Q At the time when you went through the cheat were all the numbers compared? Did you see any Blip upon which the numbers were?

A No, sir.

Q Who went through that chest?

A Patrick and myself.

Q Did Dr. Ewing tell you anything about oil immersion lenses being missing?

A No, sir.

Q Well, after he told you that you ought to pay and you said you would not, what happened, did you continue on?

A I continued to work.

Q Now, between the 7th, 8th or 9th of September and October, did you have any further talk with Dr. Ewing, or anybody about these lenses?

A No, sir.

Q Were you told anything about being under suspicion?

A No, sir.

Q Except in so far as you have already stated?

A Yes, sir.

Q Were you paid from month to month?

A Yes, sir.

Q When was your salary day?

A \$35 a month.

Q When was your salary day?

A The first of the month.

Q Were you paid for the month of September?

A Yes, sir.

Q Now, was there a substitute hired there for you?

A Well, the first of the month came, there was a man came there.

Q October?

A Yes, sir, October 1st. Dr. Ewing asked me if I would not show him the work, and so I showed him the work, and Dr. Elser told him --- I was employed under Dr. Elser,

in that department, that he would be under the orders of Patrick unless Dr. Elser was there. He said, "I wouldn't work under Patrick if they gave me fifty dollars a month", and so he left; that was about the 2nd, and I left after that.

Q Now, that brings us to the beginning of October, 1905?

A Yes, sir.

Q You have heard the testimony of Dr. Kruskal?

A Yes, sir.

Q He said that sometime in September of 1905, August or September, 1905, you brought two lenses to him for sale, is that true?

A No, sir.

Q You knew Dr. Kruskal?

A Yes, sir.

Q Who is Dr. Kruskal?

A He is a chemist down on Grand street.

Q How do you know him?

A He used to telephone up to the college for some culture media.

Q What is that?

A That is what they cultivate bacteria on.

Q Made by the college?

A Yes, sir.

Q Well, he used to telephone up there?

A Yes, sir.

Q Did you go down to see him?

A He telephoned up about the 9th, 10th or 11th of August, somewhere around there and he wanted some beef broth tubes; I told him he would have to see Dr. Ewing before I gave it to him. Dr. Ewing wasn't there. I went to the office of Dr. Hastings, in the

Clinical Laboratory, and he said it is all right to give it to him. And when I go down there he asked for a typhoid culture. He telephoned again and he wanted some blood serum; I didn't have any blood serum, it is very hard to make it during the summer time. Dr. Hastings gave me a letter for Dr. Park of the Department of Health for fifty tubes; I had went down to the Health Department first, and brought them to the college, put the balance in the ice chest, and took ten tubes of blood serum and five of Beef broth to Dr. Kruskal.

Q When you got to his place you gave him those?

A Yes, sir.

Q How many times did you go to Kruskal's place?

A Twice.

Q What was the other time?

A The first day I was down there he gave me some tubes to sterilize and make swabs, so that he could use these culture tubes, and could use the swabs; he gave me the tubes and said his man was leaving him, and he would like to have me sterilize them, and he would pay me for it. I brought them back to the college, sterilized them, and the next day brought them down there.

Q On either of these occasions did you have any microscopes or lenses with you?

A No, sir.

Q He says that you left two lenses there, and he paid you ten dollars, is that true?

A No, sir.

Q He says that you called there one day and left two lenses and said that you had a microscope?

A It is not true.

Q Which you would bring, and that he told you to call the following day and handed you ten dollars on deposit?

A No, sir.

Q Is any of that true?

A No, sir.

Q After that second visit to Dr. Kruskal, when did you next see Dr. Kruskal?

A I did not see him except in Police Headquarters.

Q You remember having seen him at police headquarters last fall, November, I think it was?

A Yes, sir.

Q When you were arrested?

A Yes, sir; I saw him there.

Q What happened there?

A Well, Detective Sergeant Cary came down to the cell and brought me up there, and he says to me, he says, "Dave, do you know this party here?" I did not recollect him. He said, "Well, this is Dr. Kruskal". I said, "Well, if that's him I might know him, but I don't recollect him." He asked Kruskal if he could remember me, and he said, "I am not positive. Cary says, "That's David Ostro, you ought to know him", and he said, "Yes, I know him."

Q Did Kruskal at that time say, "That's the boy that sold me or tried to sell me two lenses?"

A No; he just said that he knew me, that is all.

Q When did you first find out that Kruskal claimed that

you had sold him two lenses?

A At Jefferson Market Police Court.

Q That was after your arrest?

A Yes, sir, when I was arraigned.

Q You have heard Reif testify, haven't you? Reif says that he knows you from having come into his pawnshop in the summer of 1905. Were you in his pawnshop?

A No, sir; never in Mr. Reif's pawnshop in my life.

Q Well, he produced a hook here in which there are four or five pledges in the name of Ostro. Did you ever pledge any goods in his place?

A No, sir.

Q Under the name of Ostro?

A No, sir; never pledged any goods at all, of any kind, in Mr. Reif's place.

Q When did you first see Mr. Reif, so far as you know?

A In police headquarters.

Q Police headquarters?

A I mean in Jefferson Market Police Court.

Q What happened there?

A Well, I was sitting or standing over there talking to Mr. Mark Alter, my attorney at that time, and I saw this Detective Sergeant McCafferty, pointing the man to me, and so the man shook his head "No"; I did not know his name at the time.

Q Did you hear what he said?

A No, sir, I did not hear; I was talking to Mr. Alter, and when I got up from there this man pointed his finger at me -- I didn't hear any other word

said, there was such a crowd there.

Q That man Reif that testified here this morning, the party that had the pawnbroker's hook -- you did not hear him say anything to McCafferty?

A No, sir.

Q Before the examination?

A No, sir.

Q Detective McCafferty says that in the police court, Reif came over to you, you were sitting on a bench by yourself, and said "There is Dave, that is the boy that pawned half a dozen articles or lenses with me". Did he say that?

A No, sir; I was talking to Mr. Mark Alter in that hall. I was looking out, I thought my case was called. I saw that officer brought that man to me, and that man shook his head "no".

BY MR. CORRIGAN:

Q How do you know what he meant when he shook his head?

A He sais no.

Q Did you hear him say no?

A I saw the man was Reif,

and there was another party did the same thing there. That was a party who called himself Mr. Berger while you were talking to me. Then when my case was called this man deliberately went on the stand and swore that I Sold him the same lenses --BY MR. HYMES:

Q Or pawned the same lenses?

A Yes, sir.

Q You were arrested on the 16th of November; between the 16th of November, 1906, from the time that you had left the college in October, 1905, about fourteen months before,

had you heard anything about missing lenses between the 16th of November, 1906, and the 1st of October 1905? (No answer).

Q Dr. Swing had not sent for you or anything of that sort?

A No, sir.

Q Detective McCafferty had not seen you or talked with you?

A No, sir.

Q The 16th of November is the first time?

A Yes, sir.

Q Did you know Detective McCafferty before that?

A No, sir.

Q You did see him on the 16th of November,?

A Yes, sir.

Q Was he in company with Detective McCafferty?

A Yes, sir.

Q What happened?

A Well, I left my house about nine o'clock, or nine thirty. I got on a car at Boston Road; I was going to transfer at 161st street and Third avenue. when I got down to about 165th street, this officer hands out a dollar bill to the conductor, and the conductor didn't have change, and so I says, "Maybe I can accommodate you". He says, "I am much obliged." I accommodated him, gave him a dollar in change. When I got off the oar he asked me to come and have a drink. I said "I never drank in my life." He says, "I want to pay you, where are you going, what is your business?" I said, "At present I am a real estate agent in 135th street. He says, "Maybe you can sell me some real estate." I says, "I can't sell you any real estate, but I can

rent you a flat, if you want me to." "Never mind, you are under arrest," "What for?" He said, "You will find out. We will take you down to Cornell." Then we started in to talk together, and he said, "No, I think I will take you down to police headquarters." Then going down in the car he asked me knew Dr. Kruskal, and I said "Yes." He asked me if I had any idea about a robbery at Cornell, and I told him I hadn't the slightest idea. Then he asked me if I knew Kruskal, and I said I knew him just from going down there, bringing media to him, that is all. He said, "You are under arrest for stealing some microscope and lenses from the Cornell Medical College." I said, "I am innocent of this charge, I didn't steal anything." He said, "That's all right; you come down there", and they brought me down to head quarters and put me in a cell.

Q McCafferty says that you, after he had called your attention to two lenses that Kruskal had in his possession, that you said, "I sold those, or took those from Cornell University, and I sold them to Kruskal"?

A No, I did

Q McCafferty says that after you had told him that you had stolen two lenses and sold them to Kruskal, you also said that you had sold six or thereabouts from Cornell, and pawned them with a pawnbroker on second avenue?

A No, sir.

Q He said to you, "Didn't you put up or pawn some

goods with a pawn dealer or pawnbroker on Second avenue?", and that you then said, "Yes. I took them from the University and pawned them with a man named Reif, corner of 24th street"?

A No, sir.

Q Anything of that kind?

A No, sir, not a thing of that kind.

Q Have you ever been in trouble before?

A No, sir; never locked up before.

BY THE COURT:

Q I suppose your counsel meant to ask you whether you had ever been convicted?

A No, sir; never been locked up.

Q Never been even arrested?

A Never arrested before.

CROSS EXAMINATION BY MR. CORRIGAN:

Q How old did you say you were?

A Twenty-two.

Q You say you left Cornell University about the 1st of October, 1905?

A The 3rd of October.

Q Where did you work then?

A What is that?

Q Where did you go next?

A I believe that I worked for a doctor, attending an insane patient.

Q What was the doctor's name?

A Allison.

Q Where is his office?

A 99th street.

Q Dr. Allison in 99th street?

A Yes, sir.

Q Whereabouts in 99th street?

A I don't know just the

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number.

Q How long did you work for him?

A Two months with him.

Q Do you mean to say you worked with him two months and don't know the number?

A He was called to the house.

Q Where did you work with this insane patient?

A What number? I think it was 33 West 97th street, 33.

Q That was the patient's number?

A Yes, sir.

Q And the doctor was in 99th street?

A I don't know his number, he was called there.

Q Dr. Allison?

A Yes, sir.

Q In West 99th street?

A Yes, sir, West 99th street.

Q What was the patient's name?

A Pirkner.

Q In West 97th street?

A Yes, sir.

Q What number in West 97th street?

A 33 West.

Q So you worked there during the months of November and October, 1905?

A Yes, sir.

Q Is that correct?

A Well, I am not sure of the exact date; it was around there somewhere. I was idle about two or three weeks; I disremember. I do not recollect what date it was, because in my position, if I get a case for a doctor, attendant. I don't take the time; I get my salary, and that is all I know.

Q Don't you know how long you worked?

A No, sir; it is such a long time, I forget about It.

Q Do you mean to say you don't know how long you worked?

A No, sir, I don't know how long I worked.

Q Was it a day?

A I don't know.

Q Was it a week?

A Well, it was over a week, I know.

Q Was it a month?

A I could not swear to that just now.

Q Didn't you say a moment ago it was two months?

A I said I worked there two months.

Q With Dr. Allison?

A Yes, sir.

Q Did you work two months for Dr. Allison?

A Yes, sir; I remember working two months for him.

Q What at?

A As an attendant.

Q For whom?

A For the doctor -- an insane doctor.

Q What is that?

A For an insane doctor.

Q At 33 West 97th street?

A Yes, sir.

Q You are sure you worked there two months?

A Yes, sir; sure I worked there two months.

Q Why did you tell me you did not remember?

A I was not sure to the exact day. I can just say approximately two months.

Q It was more than one month?

A Yes, sir.

Q And less than three?

A Yes, sir.

Q Was it more than six weeks?

A I don't know. It is about two months, you could say.

Q Was it more than six weeks?

A I wouldn't say

positively; I don't want to swear to anything I am not sure of.

Q You only know it was more than one month and less than three?

A I will say about two months.

Q Six weeks?

A I won't swear to anything unless it is true; I don't keep count of that.

Q Do you know how long you worked there?

A I said about two months.

Q And isn't six weeks about two months?

A No, sir.

Q What do you mean by "about two months"?

A I said about two months.

Q (Repeated)

A Well, closely on to two months. I know I worked a whole full month, and I don't know how much of the next month I worked.

Q Three weeks of the next month?

A About two months

Q you worked about six weeks for Dr. Allison?

A Yes, sir.

Q You were idle about three weeks, were you, after leaving the university?

A I don't know how long I was idle. I do not just know. I never bothered to start out and could tell you just where I had been if you give me a little more time.

Q I will give you all the time you want. That is what we are here for. Your movements are very interesting to me. About how long were you idle?

A About two weeks.

Q That would bring it, roughly speaking, to the middle of October, 1905?

A Yes, sir.

Q You worked for Dr. Allison up to about the 1st of December, 1905?

A Yes, sir; that is right.

Q Where did you go after that?

A The first of December?

Q Yes.

A I worked for the Cubanos Guitar Company, selling around the city.

Q Where is their place of business?

A I think they were on 42nd street. I think they gave up business now.

Q How long did you work for them?

A How long I was there -- in January.

Q January, 1906?

A Yes, sir.

Q You were under your own name at this place?

A Yes, sir.

Q You did not travel under an alias at all?

A No, sir.

Q So that I will have no trouble at all in verifying your statements?

A They might get my name Ostroker, but since my father died I was under the name of Ostro.

Q Never Oster?

A No, sir.

Q Are you a trained nurse?

A No, sir.

Q When you were working for Dr. Allison were you working as a trained nurse?

A No, sir; only as an attendant.

Q To an insane man?

A Yes, sir.

Q Was this man violent?

A No, sir, he was not violent.

Q Now, you worked for the Cubanos Guitar Company during January, 1906?

A Yes, sir.

Q Then where did you work?

A The Manhattan State Hospital.

Q As an attendant there?

A Yes, sir.

Q For how long?

A I worked there February and March.

Q 1906?

A Yes, sir.

Q Then where did you work?

A After that I went to -- I think I was idle a couple of months then.

Q You were idle during April and May?

A No, sir; I went to Suydenham Hospital; I might have been idle a week or two or three weeks, but I know I was in the Suydenham Hospital.

Q For how long?

A I don't know, I am sure, I think it was -- I was there May 30th, Decoration Day.

Q Were you there during June?

A I was there in June; I am not positive of the date. I know I was there July 4th. I know I can remember that occasion.

Q When did you leave?

A I haven't any idea what date I left.

Q Where did you go when you left?

A I was idle. That is, you see I was an orderly in the operating room, and then when I went to leave I was waiting for two or three weeks until a boy left in the dispensary ---

Q You know you were at the Suydenham Hospital July 4th, 1906?

A Yes, sir.

Q Where did you go after that?

A I didn't do anything in August.

Q Where did you go in September?

A I was out in New Brunswick, New Jersey.

Q For how long?

A Two weeks.

Q What did you do out there?

A Drug department out there.

Q Drug department of what?

A S. Russ Drug Company.

Q S. Russ?

A Yes, sir; S. Russ Drug Company.

Q You have been there for two weeks?

A Yes, sir.

Q What were you doing there?

A Just a junior down there; junior druggist.

Q A junior druggist

A Yes, sir.

Q Did you ever study pharmacy?

A No, sir.

Q How did you get a position there?

A Under the registered assistant.

Q After that what did you do?

A I worked -- I think I was idle a couple of weeks and I worked for a concern up in 135th street, a real estate concern.

Q Who did you work for?

A Mr. Blumenkron.

Q As what?

A As renting agent. My brother had charge of the Bronx house, and he let me have charge of that in 135th street.

Q Where was Mr. Blumenkron's place of business?

A I don't know.

Q You worked for a man and don't know where his place of business is?

A I understood he bought Hackett, Carhart & Company out; I think he is connected with Hackett, Carhart & Company.

Q I thought you said he was a real estate man?

A Anybody can be a real estate man and can have his business too.

Q Where is his real estate office?

A No, sir; he hasn't got any real estate office; my brother was the agent.

Q What were you?

A Assistant renting agent.

Q Working for your brother?

A Yes, sir, under Mr. Blumenkron.

Q Did your brother pay your wages?

A No, sir, Mr. Wood-worth paid me.

Q Who is he?

A He is an agent; my brother got me it; I was working under my brother.

Q Were you working under Mr. Woodworth, or your brother?

A Working under my brother, through my brother.

Q Woodworth represents Blumenkron?

A Yes, sir.

Q Why did you give that up?

A I was arrested.

Q Did you leave New Brunswick because you had to?

A No, sir.

Q Did you get in trouble with a woman out there?

A No, sir.

Q You are in the real estate business?

A Yes, sir.

Q When did you study medicine?

MR. HYMES: I object to that.

A I never studied medicine.

MR. HYMES: I object to it as immaterial. The witness has not stated that he ever studied medicine.

Objection overruled. Exception.

Q When did you study medicine?

A I never studied medicine.

Q You remember the Jefferson Market Police Court, don't you, Mr. Ostro?

A Yes, sir.

Q You remember some questions being asked you there?

A What is that?

Q Do you remember some questions being asked you there?

A In the Jefferson Market police Court they never asked me any questions.

Q Asked you your name, age, and so forth, didn't they?

A Yes, sir.

Q At all events you signed your name there to this paper, didn't you, "David L. Ostro"?

MR. HYMES: I object to that as entirely immaterial and irrelevant. Counsel cannot contradict this witness upon a collateral matter. I cannot see what his

purpose is.

Objection overruled. Exception.

Q Is that your signature?

A Well, it doesn't look like my signature.

Q Look at it and see. Is that your signature?

A Well, I won't swear to that. I am not sure of it.

Q Why, you know that that is your signature in the Jefferson Market Court, you know that you signed it in the Jefferson Market Court, didn't you?

A Well, I am not sure about it. It is such a time --- it looks familiar to me. If I did sign it I might have been nervous in signing it. It does not look like my signature.

Q Will you write your signature for me now?

MR. HYMES: I object to this as irrelevant and not within the issues we are trying.

Objection overruled. Exception.

Q Will you write your signature for me now?

MR? HYMES: I object to that as immaterial, and not within the issues which we are now trying.

Objection overruled. Exception.

Q Go ahead and write your signature, if you will. Give him a pen or something so that he can write.

MR. HYMES: I call your Honor's attention to a case absolutely in point as to a question of this kind being inadmissible. I think the Molyneux case laid down

specifically that this is not one of in which such a thing is permissible.

THE COURT: We will determine that when we get to it. I do not think it has arisen yet.

Exception.

BY MR. CORRIGAN:

Q Now, will you look at the signature to this paper, -- look at both of these.

MR. HYMES: I object to this as immaterial. He is asking this witness to be an expert as to whether or not some document, the purport of which we know nothing about, some document which has not been produced in ---

THE COURT: He may answer the question.

A It does not look much the same, no, sir.

MR. CORRIGAN: I offer this signature which was written by the defendant in the presence of the Court as a standard.

MR. HYMES: Objected to as irrelevant and not within the issues we are here trying.

THE COURT: Of course I do not see its relevancy at this time because it is not connected.

MR. CORRIGAN: Very well.

BY MR. CORRIGAN:

Q Now, I understand you to say, Mr. Ostro, that you

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never studied medicine?

MR. HYMES: I object to that as already answered and immaterial, as well.

Objection overruled. Exception.

Q Is that right?

A I never studied medicine.

(The Court then admonished the jury, calling their attention to section 415 of the Code of Criminal Procedure and took a recess until 2 o'clock.)

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AFTER RECESS.

DAVID L. OSTRO, the defendant, resumes the stand.

CROSS EXAMINATION CONTINUED BY MR. CORRIGAN:

Q Who else lived in that house?

A (No answer).

Q Where did you say you lived?

A 1452 Wilkins avenue.

Q Who else lived there?

A The whole family.

Q What is that, an apartment house?

A Yes, sir.

Q Did you have a telephone?

A Yes, sir.

Q What was the telephone number?

A I don't know what the telephone number is; I think it is 3586 R. Melrose.

Q Was that your number?

A I am not sure whether it was the right number or not.

Q To the best of your recollection was that your telephone in your flat?

A Yes, sir, in our flat.

Q Who else lives in your flat besides yourself?

A My brothers, sisters and mother.

Q How many brothers?

A Four boys in the family, besides myself and three sisters.

Q Is one of your brothers a doctor?

A No, sir. Objected to. Objection si stained.

Q You remember the day of your arrest, don't you?

A Yes, sir.

Q You were engaged at that time in the real estate

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business?

A Yes, sir.

Q Were you engaged in any other business?

A No, sir.

Q Did you have this article which I show you on your premises the day you were arrested?

MR. HYMES: I object to that as immaterial.

MR. CORRIGAN: I have not shown the article yet.

MR. HYMES: The detectives arrested this boy on the 16th of November. Whatever was germane to that arrest evidently has been placed before the Court. I do not know the purpose of this proof. It seems to me perfectly clear that anything taken from this defendant that was material, should have been produced in evidence.

THE COURT: He may answer.

Exception.

A I believe I had.

Q Was it yours?

A Yes, sir; it is mine.

Q Do you use that in the real estate business?

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

A No, sir.

THE COURT: It is already answered.

Q Do you know what it is?

MR. HYMES: I object to that, if the Court please, as immaterial, irrelevant and not within the issues.

THE COURT: He may answer.

Q Do you know what it is?

A I believe they call that a stethoscope.

Q Don't you know it?

A Yes, sir; that is a stethoscope.

Q Are you sure about it?

A Yes, sir.

Q It was yours?

A Yes, sir.

Q Did you use that in the real estate business?

MR. HYMES: Objected to. Is there any question about the stealing of this stethoscope, or any larceny of that charged in the indictment? I submit that if that is not claimed this evidence is not admissible.

Objection overruled. Exception.

Q Did you have this article in your possession the day you were arrested?

MR. HYMES: I object to that as immaterial and irrelevant and not within the issue; it is not claimed that there was any larceny of the stethoscope.

THE COURT: This is cross examination and goes to the credibility of the witness. I will allow the question.

Q What is this?

A That is a pair of scissors.

Q Surgeon's scissors for cutting bandages?

A No, sir;

I used to have that sometimee to out the top of my cigars off; cut a paper, or something.

Q You mean to say you were carrying these for the purpose of cutting the top off your cigars?

A Yes, sir.

MR. HYMES: Objected to as immaterial, irrelevant, and not within the issues we are trying.

Objection overruled. Exception.

Q I show you this book, is this yours?

MR. HYMES: Give it to him and let him find out.

MR. CORRIGAN: Do I understand counsel to object?

THE COURT: There is no objection.

Q Is this your book?

A I will look at it.

Q Read the name in front?

A That is my name on it.

Q Did you write that?

A Yes, sir.

MR. CORRIGAN: I offer that in evidence, "D. L Ostro."

MR. HYMES: One moment. I am entitled to some rights in this court. Your Honor has ruled, repeatedly against me in this trial, that I have no right to state the contents of a document which is not introduced in evidence. Mr. Corrigan has not offered this in evidence and he proceeds to read from it.

THE COURT: Your objection is well taken.

MR. CORRIGAN: I offer this in evidence, on the

ground the defendant carried this in his pocket, and admits he wrote it.

MR. HYMES: You have offered it in evidence now, and we object.

THE COURT: Let me see it.

MR. CORRIGAN: I claim I have laid a foundation.

MR. HYMES: It may be some memorandum of an appointment to meet a lady. There are lots of things in my diary that you could not get hold of.

THE COURT: Your conversation is entirely but of order, because it is within the hearing of the jury.

MR. HYMES: I object to it as entirely immaterial and irrelevant, and not within the issues we are now trying.

THE COURT: I will receive it.

MR. HYMES: It is directly within the inhibition of the Dolan case which came down from the Court of Appeals within the last two or three months.

A JUROR: Are these scissors in evidence?

MR. CORRIGAN: I will offer them in evidence simply as affecting the credibility of this witness.

THE COURT: They are not in evidence until they are offered and received. They have not been offered until this moment.

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MR. CORRIGAN: I stethoscope in evidence.

MR. HYMES: What is now in evidence, under your Honor's ruling?

THE COURT: The memorandum book.

MR. CORRIGAN: The front page of the memornadum book.

MR. HYMES: I think my objection and exception have been noted.

THE COURT: Yes.

MR? CORRIGAN: I will read the front page of this make that offer: "D. L. Ostro, M. D., 1452 Wilkins avenue, telephone 3583 R. Melrose, Bronx." I now offer the stethoscope and the scissors in evidence.

MR. HYMES: I object to them as immaterial, irrelevant, and not within the issues we are trying and not competent here.

THE COURT: The jury have seen them, and I don't know that they are exactly part of the case. However, they having been seen, I will receive them.

(The scissors and the stethoscope are marked respectively People's Exhibits 17 and 18.)

MR. CORRIGAN: These are offered simply on the question of credibility.

BY THE SECOND JUROR:

Q Where did you get these scissors?

A I bought them.

Q What for?

A I used them sutting my nails, cigars and various things. I carried them. Sometimes the doctor wanted a doctor wanted a bandage cut and I could cut it right away, and the stethoscope, probably a doctor needs a stethoscope, and I handed it to the doctor, and he can have it without running all through the hospital.

BY MR. CORRIGAN:

Q Now, I show you this card and ask you if this was found on you the morning you were arrested?

MR. HYMES: I object to that as immaterial. A I don't know.

Q Do you know. A I don't know.

MR. HYMES: I once more call the Court's attention to the fact that the two detectives who arrested this man have been upon the witness stand, and there was no suggestion made at that time of offering any of these things in evidence.

THE COURT: He says he does not know whether it was or not.

Q Do you know whether you had this card or not?

A I don't know whether I had that card.

THE COURT: Then how can I receive this card in evidence?

Q Did you have any similar card?

A No, sir.

Q Do you know you didn't have this one?

A I know I didn't have that one.

Q Do you know whether you ever had any cards like that?

A No, sir.

Q Do you know whether you did or not?

A No, sir.

MR. HYMES: I object to that as immaterial and irrelevant, and I ask your Honor to examine it before the question is passed upon.

THE COURT: I am not receiving it in evidence, it is not before me; but the question is on cross examination, and goes to the witness's credibility, therefore I will receive it.

MR. HYMES: I submit, if the Court please, it cannot go to his credibility, it being upon a collateral matter. He could not be contradicted.

Q Did you ever have any cards "Dr. D. L. Ostro"?

A Not to my knowledge.

MR. HYMES: Objected to as immaterial and irrelevant. We cannot try three or four or five cases here under the issues that are presented.

Objection overruled. Exception.

Q Did you ever have any cards printed "Dr. D. L. Ostro, Telephone 3586 R. Melrose, New York"?

A No, sir.

Q Do you swear to that?

A Yes, sir.

Q Now, Ostro, do you know a man named Shiels, - (Is Shiels in court?) -- do you know a man named Shiels?

A Yes, sir, I do.

Q Did you prescribe for him as a physician?

MR. HYMES: Objected to as not within the issues, and irrelevant.

Objection overruled. Exception.

A Well, he was sick one day when I was up there.

Q Answer the question yes or no?

A Yes, sir.

MR. HYMES: I submit that his answer is a conclusion.

Objection overruled. Exception.

THE WITNESS: He was sick.

Q And you gave him some medicine?

A Yes, sir, I told him ---

Q Did you write out a prescription for him?

A Yes, sir.

Q How did you sign it?

A I don't believe I did sign it.

MR. HYMES: I object to this as not within the issues that we are trying, and as immaterial and irrelevant.

THE COURT: As to his credibility, he may answer.

Exception.

Q Is that Shiels over there (pointing to a man in the Court room)?

A Yes.

Q You identify him as a man you prescribed for?

A I don't know; I think that's him.

Q What is that?

A I believe it is him.

Q Are you sure?

A Yes, sir; that's him.

Q You prescribed for him?

A Yes, sir.

Q How did you sign the prescription?

A I don't remember.

MR. HYMES: I object to that as immaterial and incompetent, and as calling for the contents of a written instrument. It is not the best evidence.

Objection overruled. Exception.

Q Don't you remember how you signed it?

A No, sir.

Q I show you that and ask you if that is your signature? (Hands witness a paper)

A Yes, sir.

Q Is that the prescription you wrote for Shiels?

MR. HYMES: I object to that as not within the issues.

Objection overruled. Exception.

A Yes, sir.

MR. CORRIGAN: I offer it in evidence.

MR. HYMES: I object to it on the ground that it is not within the issues, irrelevant and immaterial.

(Marked Exhibit 19.)

Mr. Corrigan reads People's Exhibit 19 to the jury. "It is signed D. L. Ostro, M. D."

Q Now, do you know Mrs. Mitchell?

A Yes, sir.

Q Did you prescribe for her?

MR. HYMES: Objected to as immaterial and not within the issues and irrelevant.

Objection overruled. Exception.

MR. HYMES: And as also calling for a conclusion. Objection overruled. Exception.

A I don't remember.

I will show you this and ask you if it refreshes your memory? Is that your signature?

A Yes, sir.

Q Is that a prescription you wrote for Mrs. Mitchell?

A If it is down there it is.

Q Is it?

A Yes, sir.

MR. CORRIGAN: I offer it in evidence.

MR. HYMES: I object to it as irrelevant and immaterial, and not within the issues.

Objection overruled. Exception.

(The paper referred to is marked People's Exhibit No. 20.)

MR. CORRIGAN: This calls for some pulverized compound and is signed "D. L. Ostro".

THE COURT: Let the jury examine it. It has been received in evidence.

BY MR. CORRIGAN:

Q Now, Ostro, I ask you if you wrote this prescription?

Same objection, same ruling. Exception.

MR. HYMES: May I have a ruling all the way through upon this line of evidence? May the stenographer note my objection and exception, so that I will not have to jump up every moment and make myself objectionable to the jury?

THE COURT: If you will be good enough to objects, I will ask the stenographer to note your exception.

I do not know how long this will continue.

MR. CORRIGAN: I have only a few more questions.

THE WITNESS: That was for myself.

Q You wrote that paper?

A For myself.

Q That is "Dr. L. Oster, 1452 Wilkins avenue, Bronx, New York"?

Objected to as immaterial, and irrelevant.

Objection overruled. Exception.

(The paper referred to is offered in evidence and marked People's Exhibit 21.)

Q Can you explain to this jury how it is that you don't know Dr. L. Oster, M. D., 1452 Wilkins avenue, New

York, telephone 3586 R Melrose," when you wrote a prescription for yourself on his pad?

A Oh, well they were sent to me.

Q Who sent them to you?

A I don't know.

MR. HYMES: Perhaps we can save time. I think it is fair now, in as much as the defendant has already testified over my objection and exception, that he has not studied medicine, that he is not licensed to practice medicine, that he has already testified that his name is signed to prescriptions, that he has been guilty of a violation of the law in that regard; I think that is fair.

THE COURT: The incident is now closed because I shall not receive any more evidence on this point because it is stimulative. I hold that this is quite enough.

BY MR. CORRIGAN:

Q So when you told me a few moments ago that you had never practiced medicine, you were not telling the truth?

A I never took any money for practicing medicine.

Q It did not ask you that.

A Well, I did not practice medicine.

Q Do you mean to say you did not write these prescriptions?

A I don't deny I did not, but I did a favor for friends; they are friends of mine, to do it as a favor, that is all.

Q But you never practiced medicine?

A I don't know if you call that practicing medicine -- the law part of it.

Q Do I understand by your answer that you never had these cards printed?

A These things were sent to me, I didn't give any order to print any card.

Q You had them in your possession?

A I don't remember.

Q Do you remember whether you had them in your possession?

A I won't swear to it, because it is such a long time since I have been arrested, and so many cards were taken out of my pocket.

Q They were sent to you?

A They might have been sent to me.

Q Did you say might have been, or they were which?

A I say they might have been sent to me.

Q Did you say a moment ago that they were sent to you, that you did not order them but they were sent to you?

A I said prescription blanks were sent to me.

Q How about these cards?

A I don't know about them.

Q Did you have any card "Dr. D. L. Oster" in your possession?

A I don't remember.

Q Do you want to swear you did not?

A I don't remember.

Q Did you ever write to a company asking them to get you up prescription blanks, yes or no?

A I don't remember.

Q Is that the best answer you can make?

A Yes, sir;

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that is the best answer I can make.

Q Well, I will refresh your recollection again. Did you ever write to Davis, & Solomon, Harlem Specialty Store, 161 East 125th street?

A I don't remember.

Objected to. Objection overruled. Exception.

Q Did you ever receive from Davis & Solomon Company, a letter addressed, "D. L. Ostro, 1452 Wilkins Avenue, Bronx"?

A I don't remember. So many things were taken out of my pocket, I don't remember.

Objected to. Objection overruled; Exception.

Q Do you know whether you ever received such a letter?

A I am not sure; I don't see all my letters up there.

Q Will you swear this letter wasn't taken out of your pocket the day you were arrested?

A I won't swear because I didn't have a list of what was in the pocket.

Q Do you know you received such a letter?

A I don't know; it might have come that day. I was arrested right that day, and it might have been put in my pocket. Where did you live when in New Brunswick?

A 96 Patterson street.

Q Did you ever receive letters there addressed "David L. Ostro"?

MR. HYMES: I object to that as immaterial and not within the issues and not competent.

Objection sustained.

Q Did you pose as a physician in New Brunswick?

Objected to. Objection sustained.

Q Now, is this your pad?

A I don't remember; it was something like that sent to me by mail the day I was arrested.

MR. HYMES: Objected to. I ask the Court to examine this.

THE COURT: Objection overruled. I will allow it.

MR. HYMES: I made a concession upon this record, if the court please.

THE COURT: I remember it distinctly.

Q Is that your pad?

A Well, something like that was sent to me, as I said before.

MR. HYMES: I object to this question on the ground it is cumulative.

THE COURT: I have allowed it.

Q You do remember, Ostro, a while ago I asked you if you knew anybody named Oster?

A I don't remember. I told you that they were sent to me. I don't know who sent them, the day I was arrested, they were found in my pocket, and I wanted to find out that day.

MR. HYMES:

One moment. You have not been asked any questions. Just answer Mr. Corrigan's question. He won't take my concession that you are guilty of a violation of law, and wants to rub it in.

BY MR. CORRIGAN:

Q You had this in your possession the day you were arrested?

Objected to as immaterial. Objection overruled.

Exception.

A I said something like that I had, that same day, like that, I am not sure if this is the same pad.

Q What is the difference?

A I don't know, this ruling on the top, something on that line.

MR. HYMES: I object to this question on the grounds already stated,

MR. CORRIGAN: I will offer it in evidence then.

MR. HYMES: Objected to on the ground that it is immaterial, irrelevant and not within the issues we are trying. It is also cumulative and comes within your Honor's former ruling upon this branch of the case, as to which I made a clear and complete concession.

Objection overruled. Exception.

(The pad referred to is admitted in evidence and People's Exhibit No. 22.)

(Mr. Corrigan exhibits the pad to the jury.)

BY MR. CORRIGAN:

Q Now, have you ever had any trouble with Dr. Kruskal?

A Any trouble?

Q Yes.

A No, sir.

Q Do you know of any reason why Dr. Kruskal should wish

to do you harm?

A Well, I don't know.

Q Did you ever have any trouble with Mr. Reif?

A Never met Mr. Reif in my life before.

Q You never saw him until you saw him in the Jefferson Market?

A No, sir, never saw him until I saw him in the Jefferson Market.

Q Didn't you go to Reif's pawnshop?

A No sir.

Q Never went there?

A No, sir, never went to his pawnshop.

Q When Patrick went away on his vacation, did you go away also?

A Well, I was away every other day, that is, I mean, when I was employed there, I was going around doing various messages.

Q But you were Patrick's assistant, weren't you?

A No, sir, I was not Patrick's assistant.

Q Who was Patrick's assistant?

A He had a boy there doing his cleaning. I was assistant to Dr. Elser.

Q Didn't you tell us on direct examination that you were Patrick's assistant?

A I said he was janitor of the floor there, and I was working under Dr. Elser.

Q Didn't you testify that Patrick Dunn was your superior in the hospital?

A Not in the hospital. He was my superior surely, but I was not an assistant to him. I didn't do any help with him.

Q Who hired you?

A Patrick hired me, but I was working

for Dr. Elser.

Q When Patrick wasn't there you had Charge of things?

A No, sir; only my own department.

Q Didn't you have charge of the immersion lenses, etc., when Patrick was not there?

A No, sir.

Q You knew where the key was kept?

A No, sir.

Q Do you mean to say you do not know where the key was kept?

A Except in Patrick's pocket.

Q When Mr. Hymes asked you this morning where the key was kept didn't you start out and say "yes, it was kept in a little", indicating a box?

A No, sir, I did not.

Q And then say in Patrick's pocket?

A No, sir, I said this little "box was kept in a closet, and the key was kept in Patrick's pocket.

Q The lenses were kept in a little box?

A Kept in a box and put in the closet.

Q Why did you not tell the truth in reference to practicing medicine when I asked you?

A Well, I didn't think it was -- that I was practicing when I didn't take any money for any service.

Q Is that the best answer you can make?

A That is the best answer I can offer. I do my friends a favor. I didn't think I was doing any harm, or guilty of anything, if a man was sick in the street why I would try to help him, and I have done it.

Q Why didn't you make that explanation to me?

A Well, I am telling it now; if a man was sick ---

Q Why did you deny that you posed as Dr. Oster?

A I do not deny that I posed as Dr. Oster.

Q Do you admit that you posed as such?

A I don't even admit.

Q What do you do if you do not admit or deny it?

A I ---

Q Why did you have these cards D. L. Oster, M. D.?

A I didn't have any cards.

Q Why did you deny, first of all, having possession of these cards?

A I did not have possession of them as far as I know; there was so many cards taken out of my pocket, friends of mine, I don't know what I had.

Q Did you know any other Dr. D. L. Osteri who lives at 1452 Wilkins avenue, Bronx, with the same telephone number as you had?

A They could have "been printed; somebody else could have printed them for me.

Q Do you know of any charitable institution in New York, that goes around printing cards? A I don't know.

MR. CORRIGAN: That is all.

RE-DIRECT EXAMINATION BY MR. HYMES:

Q You said, Ostro, that you did write this prescription for Mrs. Mitchell?

A Yes.

Q Who is Mrs. Mitchell?

A A friend of mine.

Q You say a friend of yours, to what extent?

A Well, a personal friend; I used to go with her sister-in-law from Boston.

Q How did you come to do that?

A What is that?

Q How did you come to write that?

A She was sick one day, and she knew I was not a doctor, and she asked me if I could not help her out, and I didn't know it was anything wrong by writing this out.

Q One moment. I want you to be perfectly fair with us and with this jury. You have testified that, in a number of instances you have written prescriptions. Didn't you know that that was against the law?

A No, sir.

Q You didn't know that?

A No, sir, if I knew it was against the law I would not have written them.

Q Didn't you know it was a violation of the law?

A I never knew anything about the law.

Q You knew you were not a doctor?

A I knew that.

Q How long have you been in the employ of hospitals and by physicians?

A I judge about, altogether, since 1900.

Q That is a matter of six or seven years?

A Six years.

Q Now, let me see that prescription?

A That is simply for a heading, that is all.

Q What is it?

A Acetanylid.

Q What is acetanylid?

A That is a powdered prepara-

tion and contains a little sodium, bicarbonate, and a little casein?

Q I just wanted to find out?

A It is simply for a heading.

Q Is that a patent medicine, acetanylid?

A They can put it up in patent medicine, they can.

Q Now, here is another one for Shiels, who is in Court. What is that?

A That is something for a little pain here in the back.

Q Tell me what it is?

A Sodium salicylate, a salt preparation, that is all.

Q Where did you get your information from with which to write that?

A It is only patent medicine.

Q How did you happen to write that?

A Because I knew in the hospital, they had given that in the hospital.

Q Did you know Shiels?

A Yes, sir.

Q A friend of yours?

A Yes, sir, I worked in his place. His mother was janitress.

Q He complained of a pain and you gave him that?

A Yes, sir.

Q Whom did you prescribe that for?

A This is for myself.

Q What is that?

A That is bichloride to wash out -- and also a little zinc salve.

Q Is that something that you came in contact with in the hospitals very often?

A Every day.

Q Those are the three prescriptions. Tell us fairly how much of this have you done; how many prescriptions have you written?

A I don't know.

Q Don't be afraid, tell us?

A Three or four; that is all I have ever written.

MR. CORRIGAN: I went into this matter simply to test his credibility.

THE COURT: Yes, and he has a right to explain it. I will receive it.

THE WITNESS: I believe I only wrote out four, that is all that I wrote.

Q When was the first one you wrote out?

A Just since I have been up in 135th street; inside of two weeks.

Q Inside of what?

A I have been employed two or three weeks up there; it is only up in that place there ---

Q Did you write any prescription when in New Brunswick?

A No, sir, I never wrote a prescription.

Q You stated to Mr. Corrigan, when he showed you that card, that you didn't know whether that card was in your pocket or not. Now, did you or didn't you see cards of that kind somewhere, they didn't spring up, over night, did they?

A Well, I don't remember; they took so many cards out of my pocket.

Q Don't you remember the name of any card you had with the name of Dr. Ostro on them, yes or no?

A I believe --

Q Now, tell me?

A I am not sure; I would not swear there were any in my pocket or not.

Q Do you get cards printed without knowing it?

A I didn't get any printed.

Q Did somebody get cards printed for you without telling you about it. Did you ever hear of that in your life?

A No sir; they might have been in my pocket; I won't swear to it.

Q Where were they printed -- who printed them, don't you know, you don't mean to say that some one else printed them for you without your consent or knowledge. If you do say so and that's all?

A I can't just recollect; it is such a long time; I don't recollect.

Q You say you have been doing this only for a couple of weeks?

A I can't swear to that.

Q You said you hadn't done anything of this sort until you went to 135th Street and that it lasted only for a

couple, a few weeks. Is that so long ago?

A Well, that is in November.

Q That is only two or three months ago, isn't it?

A Yes sir; but I don't recollect about the card.

Q See if I can refresh your recollection about something else. This was taken from your possession. You have admitted that?

A Yes sir.

Q Do you know where it came from?

A It was sent to me.

Q By whom?

A I think that the druggist who gave these prescription blanks was the man who sent them to me.

Q What druggist?

A Amsterdam Avenue, Sachs.

Q What is his first name?

A J.

Q What part of Amsterdam Avenue?

A Fear 135th Street.

Q How did he happen to do that?

A I suppose that he --

Q How did he happen to do it?

A He thought I was a doctor and sent them to me.

Q Without your asking for them?

A He said to me "I will send you some prescription blanks"; he said he would and I am not sure whether he sent them to me or not.

Q You knew he was going to do it?

A Yes sir; but I wasn't sure whether he was going to send them or not.

Q That is what I am trying to get at. If you are not frank with us, Ostro, we won't know what to do?

A I can't

swear whether he sent them to me or not; I knew he was going to do it.

Q You knew that?

A Yes sir.

Q You had a talk with him?

A Yes sir.

Q He was going to send you some prescription blanks and you said "All right" and they came?

A Yes sir.

Q Why did you do a thing of that sort, getting your name printed "M. D." when you were not one, why?

A I don't know.

Q What is that?

A I don't know how I came to do it.

Q Now, Ostro, you say that you have only in a very few instances, I think you said four, wrote prescriptions -- I don't know how many prescriptions Mr. Corrigan has that he has not shown. Are you willing to stick by that statement absolutely. Now I want you to stick. Did you hear my question?

A Yes sir; I could not swear whether there was any more than three, four or five.

Q Give yourself enough room now, Ostro, give yourself enough room because you don't know how many Mr. Corrigan has?

A I don't think there was any more than three or four or five, that is all I know of.

Q Will you swear it was not ten?

A I won't swear to anything I am not sure of.

Q Will you swear it wasn't one hundred?

A I know

it wasn't one hundred; I swear it was not that.

Q Will you swear it was not fifty?

A Yes sir.

Q Will you swear it wasn't thirty?

A I will swear it wasn't thirty.

Q You want to bind yourself to that?

A It isn't understand will swear to that.

Q Is it not more than ten?

A No sir; not more than ten.

Q These drugs contained in these prescriptions. Do you know whether or not they can be obtained at druggists by persons who are not physicians?

A Certainly.

MR. CORRIGAN: I object to that question as incompetent.

Q Do you know that of your own knowledge?

A Yes; I know that of my own knowledge.

Q Is each one of these a common article, a common ordinary drug?

A Yes sir.

Q Used for pain?

A Yes sir; used for pain.

Q One of them used for a salve or a wash I think you said?

A A salve or a wash.

BY MR. CORRIGAN:

Q One of these drugs is bichloride of mercury, isn't it?

A Yes sir.

Q That is a deadly poison?

A A washout.

Q Is that a deadly poison or not?

A Not in solution form.

Q Is it a poison?

A Yes sir.

Q You were carrying a box of it in your pocket that day?

A I had one tablet which I always carry to wash my hands.

Q Is that all you had, one tablet?

A Yes sir.

Q You always carry that with you?

A Yes sir; always carry one with me; I marked it "poison" on the top of the box.

Q So you were prescribing a poison?

A No sir; I had it in my packet; I had it for myself.

Q Mr. Hymes asked you if you posed as a doctor in New Brunswick. I show you this and ask you if you received this letter?

A Yes sir; that letter was from a lady friend of mine and she just addressed me that way, jollyng me as a doctor.

Q That was addressed to you as doctor?

A Yes sir as doctor and "Dear Friend Dave" -- nothing else pertaining to the doctor.

THE COURT: There is no objection to this. I have ruled it out once.

MR. CORRIGAN: I think Mr. Hymes laid the foundation for it and that is why I took the liberty of asking this question.

THE COURT: If a person receives a letter through the mail addressed to him by some stranger that doesn't, prove anything at all.

MR. HYMES: I will concede that he was doing something he should not have done.

Q Now, you remember the morning you were arrested?

A Yes sir.

Q Did you tell McCafferty that morning you were a doctor?

A No sir.

Q So that the conversation McCafferty had with you is untrue?

A Yes sir.

MR. HYMES: Objected to. McCafferty did not say that he said he was a doctor.

THE COURT: Is there anything more of this witness?

MR. HYMES: That is all.

MR. CORRIGAN: One more question that I wish to ask this witness.

Q I show you this paper here and ask you if that is your signature at the bottom?

A No sir.

Q Didn't you write that paper?

A No sir.

Q Now, will you look at that and compare it with your handwriting and see whether you wrote that? A I never wrote anything in such a hook like that.

Q You are prepared to swear that without looking at it?

A Yes sir.

Q Without looking at it?

A Yes sir without looking at it.

MR. CORRIGAN: That is all.

LEWIS H. SAPER, a witness called and sworn in behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HYMES:

Q You are an attorney, aren't you?

A Yes sir.

Q You have just been admitted a year or so ago?

A About a year ago.

Q You reside where?

A 119 West 138th Street.

Q You have known the defendant, have you?

A For some little time.

Q And some members of his family?

A I have.

Q Were you present at Jefferson Market Police Court when the witness Kruskal was there?

A I was.

Q Did you hear the witness Kruskal say anything about the identification of David Oetro?

A I did.

Q To whom did he say it?

A To my best recollection at the present moment he was talking to Mr. Reif.

Q Are you sure was Reif?

A I did not at that time know his name, but now I know his name.

Q Well, are you sure he was the man who has been sworn in court and who has given his name as Reif?

A I am.

Q What did Dr. Kruskal say?

MR. CORRIGAN: I object to that question as ir-

relevant, immaterial and hearsay.

THE COURT: Was the foundation laid in the direct examination?

MR. HYMES: It is on the question of identification.

THE COURT: I will let him answer.

A He said that he could not identify Ostro while he was looking in that direction and Ostro was sitting at that time.

CROSS EXAMINATION BY MR. CORRIGAN:

Q Kruskal said that?

A Yes sir; Kruskal said that.

Q Are you sure it wasn't Reif?

A Now, the difference between these two gentlemen is that Mr. Kruskal is smaller and I recognized more.

Q Quite sure it wasn't Reif then?

A I am positive of Mr. Kruskal.

Q I ask you if you are sure it wasn't Reif said that?

A I am positive of Kruskal.

THE COURT: Just answer the question.

Q The question is perfectly plain?

A I am sure that it was not Mr. Reif.

Q Sure of that?

A Yes sir.

Q Did you know Dr. Kruskal before?

A I never knew him but at that time a person having been arrested after one year -- a year after the commission of the crime, one of

the inferences would be that the identification --

Q You are not summing up this case, counsellor; you may be a lawyer but you are not summing it up now.

Q (Repeated)?

A Not before, only at the time; that is all, I saw him in Jefferson Market.

Q Had you ever seen Kruskal before?

A No sir.

Q Ever seen Reif before?

A No sir.

Q Where were you standing when this conversation took place? A Standing inside the railing where lawyers usually stand.

Q Which side were you standing on?

A They were on the right, facing the Judge.

Q What day was it?

A It was on a Tuesday afternoon, I think, November 20th if I am not mistaken.

Q November 20th?

A Yes sir.

Q Kruskal and Reif were holding this conversation?

A Well, in fact, most all the witnesses were there, but Mr. Kruskal and Mr. Reif were standing and facing Mr. Ostro after he had been brought down.

Q You are a friend of Ostro's, aren't you?

A Well, not a friend of his, I have been with his brother a good deal.

Q Which one of his brother were you with?

A I was with Julian Ostro.

Q Did you ever work for him?

A No sir.

Q Did you ever work with him?

A Well, I was associated with him, yes sir.

Q In what business?

A In the law business.

Q Is he a lawyer also?

A No sir; not to my knowledge.

Q What is he?

A He is a student, I understand.

Q Is it your habit to eavesdrop around courts and find out what witnesses are talking about?

A No sir; the only thing is --

THE COURT: Eavesdrop is hardly a proper word.

MR. HYMES: I am willing to have him characterise it as he wants to. I have not objected. He may insult him all he pleases.

MR. CORRIGAN: I don't wish to insult anybody.

Q How did you come to overhear this conversation?

A Well, simply only that as an attorney, a man having been arrested one year after the commission of a crime --

Q I didn't ask you that?

MR. HYMES: I submit that is responsive.

BY THE COURT:

Q You were in court?

A Yes sir.

Q Interested in the case and listening to it?

A Well, in a certain.

Q Were you, yes or no?

A Yes sir; I was.

BY MR. CORRIGAN:

Q Where was McCafferty at that time?

A He was near

the witness, on the platform, approaching the stand towards the Magistrate.

Q Where was Cary?

A That I don't know, anything about him, I never had much with Mr. Cary --

Q Is that all the conversation you heard?

A That is all I cared for.

Q I didn't asked you what you cared for. That is immaterial to me. Is that all that you heard?

A That is all I cared for; I didn't pay attention to anything else.

Q Is that all you heard?

A I don't know, everything dropped my mind -- I didn't care for anything else, and that is sufficient.

Q That is all you remember?

A That is all I wanted to remember.

Q Is that all you remember of the conversation?

A Yes, I will say yes.

Q Is that true?

A Yes sir.

Q You seem to have some doubt about it?

A It is true; I would not testify to it if it was not.

Q You seemed to be in doubt about it, you are quite sure that is all you heard?

A Well, lots of things they talked about, but that was the only thing I cared for.

Q That is all you remember?

A That is all I remember; that is all I cared for.

Q It didn't interest you why they should go into this nefarious plot?

A I didn't hear the question.

Q Weren't you interested in knowing why they should go into this plot?

MR. HYMES: Objected to, because at that time there wasn't any plot. He was on the level then.

Objection sustained.

Q Did you ever hear Dr. Kruskal identify the defendant in Jefferson Market?

A Testify here?

I don't think I was present at the time.

Q Did you hear him testify in Jefferson Market?

A He did not testify in Jefferson Market.

Q Didn't he testify in Jefferson Market?

A Not to my knowledge.

Q Didn't Mr. Reif testify there?

A Not to my knowledge.

Q Was there an examination there?

A There was a form of examination.

Q May I ask you what you mean by a form of examination?

A Magistrate Barlow, if I am not mistaken, was sitting at the time. The defendant was brought there to the stand and Mr. Reif made some form of a statement, stating that the Cornell University was the owner of the lenses.

Q Mr. Reif?

A No sir; Dr. Ewing.

Q Dr. Ewing?

A Yes sir; stated that he was --

Q Nevermind what he stated, did Mr. Kruskal testify?

A Mr. Kruskal did not testify to my knowledge.

Q Did Mr. Reif testify?

A He did not.

Q Did Mr. Kruskal identify the boy in court, the defendant?

A He was not called upon to.

Q I did not ask you that?

THE COURT: You are asked whether he did or did not.

THE WITNESS: I cannot state what the evidence was. I cannot answer that question.

Q Did you read the complaint?

A No sir; he was first merely held on a short affidavit made by the detective sergeant

Q He was not held on a short affidavit and then sent down here?

A Then afterwards, on Tuesday, there was a form of complaint made out; I did not see that.

Q What date was Tuesday?

A The 20th of November.

Q Is that the day you heard this conversation between Kruskal and Reif?

A Yes sir.

Q Didn't you know that Kruskal swore on that day that he took the lenses from the defendant?

A I did not.

Objected to as immaterial: objection sustained.

Q Did you make any complaint against Dr. Kruskal for perjury?

A I did not.

Q Ostro is a friend of yours?

A You asked me that before and I answered your question.

Q When you found that Dr. Kruskal was making a false statement about the defendant, didn't you take any means to rectify that?

A When a person makes a false statement --

Q (Question repeated)?

A There is a distinction between making a false statement and perjury. I don't quite understand what you mean.

Q Did you take any means to have Dr. Kruskal indicted for perjury?

A I didn't know that he had committed perjury.

Q You didn't know it?

A No sir.

Q You didn't know that he had identified him in court?

A I don't know what transpired here -- what his testimony was not here.

Q If you did not know, that is the reason?

A That is all.

LEO E. OSTRO, a witness called and sworn in behalf of the defendant, testified as follows.

DIRECT EXAMINATION BY MR. HYMES:

Q You are a brother of the defendant?

A I am.

Q In the fall of 1905 did you visit the pawn shop of this man Reif?

A I did.

Q Did you have any talk with him?

A I did.

Q Before that time had you talked with Dr. Ewing relative to lenses that had he en claimed to have seen missing?

A I had.

Q What conversation did you have with Reif?

MR. CORRIGAN: I object to that conversation, if your Honor please, as incompetent, immaterial and hearsay. All of Mr. Reif's testimony has been stricken out on my motion. I don't see what this has to do with this case at all.

MR. HYMES: My friend wanted to get rid of Mr. Reif. I object to its going out.

THE COURT: I have directed the jury to disregard it.

MR. HYMES: But it is in the record.

THE COURT: Therefore, it is not before this is not in the case as far as the jury is concerned; that being so this testimony is merely hearsay and not contradictory of anything. I will

sustain the objection.

MR. HYMES: I think your Honor directed that the testimony should remain in the record.

THE COURT: I said that it might remain, but that the jury were instructed to disregard it. It will not be physically stricken out, but so far as the jury is concerned it is stricken out.

MR. HYMES: Then I will take the further time to state for what purpose this witness is called. He is called simply to testify with regard to a conversation with Mr. Reif as to which Reif's attention was directed upon his cross examination, namely, that some one came to see Reif, in the Fall of 1905, asked him whether any lenses had been pawned in his shop and Reif stated that none had been, so far as he knew.

THE COURT: Well, Mr. Hymes, I have stricken out all of Mr. Reif's testimony, so far as the jury I ought to have asked whether there was, in his testimony any original matter, or new matter which you wished to retain.

MR. HYMER: I wanted it all retained, sir.

It was against ray objection that it was stricken out.

THE COURT: If you had confined yourself strict-

ly to cross examination then, of course, I will strike it out. If you developed any new matter, in your cross examination, you may very properly ask to have that kept in.

MR. HYMES: I think I stuck strictly to cross examination.

THE COURT: Then I will adhere to my ruling.

MR. HYMES: Then I will ask for an exception.

MR. CORRIGAN: If your Honor please I think that Mr. Hymes has unintentionally mistaken the testimony of Mr. Reif. After your Honor struck that out he still retained Mr. Reif on the witness stand, having recalled him.

THE COURT: I am perfectly well aware of that.

MR. CORRIGAN: He put one page in evidence.

THE COURT: That was in cross examination. Of course, Mr. Hymes, what followed after my ruling that remains before the jury. That portion of the testimony is not stricken out, because my ruling was before your examination was concluded. Therefore, I struck out all that preceded and none that followed my ruling.

MR. HYMES: Then so that I shall not be under any wrong impression, your Honor holds differently

with respect to the testimony that was brought out this morning?

THE COURT: That is in the case. It is not stricken out. There was no motion to strike that out.

MR. HYMER: Then as to this question, what is going to be done. Is the objection to be overruled as to the present question, namely, a conversation had between Reif and this witness in the Fall of 1905?

THE COURT: That does not relate to the subject before me; that was put in at the close, after my ruling.

MR. HYMES: I asked him, specifically, this morning, about a conversation that Reif had with some one who inquired and I asked him if this young man inquired in 1905.

THE COURT: Then I had better receive it. I was under take misapprehension.

BY MR. HYMES:

Q What was that conversation?

A I went in; I asked for Mr. Reif; Mr. Reif presented himself and I said, "Mr. Reif", I says, "did you ever get any lenses pawned here"; he says "No." "Well", I says, "would you mind looking at

your books and see if there was any"; he says "I am sure there was none pawned here."; he says "you can go to one of my men and see if they got any"; I says "then you don't know anybody that pawned any lenses in here, do you"; he said "No". I then went to one of his men and he was a young fellow there, I don't think I would remember his face; I asked him did he get any lenses and he said that he remembered two of them being pawned there; well I says, do you know who brought them in. He says, that I could not swear to. I says, if I gave you a description of this man would you recognize him? Well, he said, I hardly think so. Well, I says, if he looks like me --

Q Is this a conversation with Reif?

A No sir.

MR. CORRIGAN: I object to it.

Q With whom was this?

A He turned me over to the other young man, one of his clerks.

THE COURT: Objection sustained.

Q Anything further with Reif?

A All that he says was, that he did not know that any lenses were pawned there.

Q Did you visit any other pawn shops?

A No sir; I did not.

Q With whom had you had a talk before that?

A Dr. Ewing.

Q Can you fix the time about?

A Why, yes, it was, I

think it was about three days after Labor Day; I just came back from a case I was working on.

Q After that visit to Reif's pawn shop did you see Dr. Ewing?

A I did.

Q And had a talk with him?

A Yes sir.

MR. HYMES: That is all.

CROSS EXAMINATION BY MR. CORRIGAN:

Q You say you had come back from a case you were working on. What is your occupation?

A Private detective.

Q Licensed by the State?

A No sir; with the Metropolitan Secret Service Bureau.

Q Who has charge of that Bureau?

A Robert L. Woolley.

Q Who else?

A Henry C. Nicholson.

Q You have worked for the police, haven't you?

A I have done work, yes sir.

Q You have gotten evidence against disorderly houses for the police, haven't you?

MR. HYMES: I object to that as immaterial.

MR. CORRIGAN: That goes very much to a man's credibility.

MR. HYMES: You think it is wrong for a man to get evidence against disorderly houses?

THE COURT: What is the question?

(Question repeated.)

THE COURT: I think that is enough, without going any further.

Q Is that true?

A For one Captain.

Q What is that?

A For one party, a friend of mine, yes sir.

Q What was the Captain's name?

A Captain Shaw and Captain Hodgkins.

Q Did you ever get evidence against gambling houses as well?

A No sir.

MR. CORRIGAN: That is all.

LESTER L. ROOS, a witness called and sworn in behalf of the defendant, testified as follows.

DIRECT EXAMINATION BY MR. HYMES:

Q Dr. Roos, you a duly licensed physician, are you?

A Yes sir; I am.

Q Practicing medicine for how long?

A Six years.

Q Look at these three prescriptions, doctor?

A Yes sir.

Q Can you state from your own knowledge whether or not the drugs indicated by these prescriptions are obtainable at any druggists without a prescription?

MR. CORRIGAN: I object to that question as im-

material, irrelevant and incompetent.

THE COURT: Objection sustained; exception.

Q What are those drugs?

MR. CORRIGAN: I object to the question on the same grounds.

Objection sustained.

Exception.

Q What are they for?

Objected to; objection sustained; exception.

THE COURT: You have them in evidence now.

Exception.

MR. HYMES: I take it that that is ruled out upon the ground of repetition?

THE COURT: Precisely.

Exception.

Q Now, doctor, assuming that you know what these drugs are for, do you know whether or not druggists sell these without prescriptions in this city?

MR. CORRIGAN: I object to that question.

A They do.

Q They are simple things, are they, doctor?

MR. CORRIGAN: To that question I object. Don't answer that question.

MR. HYMES: The witness has already testified

that they are obtainable from druggists without a prescription.

MR. CORRIGAN: There is no such testimony.

MR. HYMES: He says he knows whether they are so obtainable.

Q Are they?

MR. HYMES: There is a question and answer as follows: "Do you know whether or not these drugs are obtainable at druggists without a prescription." The answer is "I do." Now I ask, "Are they".

MR. CORRIGAN: I object to that.

THE COURT: Let him answer.

Are they obtainable at druggists without a prescription?

A Yes sir; they certainly are.

Q These are very simple medicaments, are they?

A Yes sir; they are.

Q How long have you known the defendant?

A Oh, about six or eight months.

Q Have you known him to any extent or eight months?

A Well, I have seen quite a little of him, yes sir.

Q Have you met others that have known him?

A Yes; I have.

Q Many others?

A Quite a few.

Q What has been his reputation for decency?

A Good.

Q Uprightness?

MR. CORRIGAN: I object to that question.

Q Among those who know him whom you have met?

A Good.

Q You never heard anything, against him except this present trouble?

A That is all.

CROSS EXAMINATION BY MR. CORRIGAN:

Q Did you ever talk about him with anybody?

A No sir; I did not.

Q Then you don't know what other people think about him?

A About him, yes sir, I do.

Q Who else have you talked about him to?

A Lots of people that I know.

Q With whom did you discuss him?

A Let me see, a man by the name of Shea.

Q A private detective?

A No sir; he lives up around my way somewhere; I don't know what his business is.

Q Is that a man named Shea who used to be down here?

A I don't know.

Q Where does Shea live?

A I don't know that.

Q You discussed the defendant's character with Shea?

A Well, yes sir.

Q What phase of the defendant's character did you discuss with Shea?

A Well, he knew the defendant and I knew him and I said to Shea, many times, that I thought that Ostro was a pretty nice kind of a fellow; I saw a good deal of him during the summer, saw him very frequently.

Q Did you know he was practicing medicine?

A I did not.

Q Did you know he was carrying stethoscopes and surgical scissors and prescription blanks in his pocket?

A He told me that he might study medicine.

Q He might study medicine?

A Yes sir.

Q Did you know he had given himself a degree without passing any preliminary examination?

A I did not.

ISAAC J. COHEN, a witness called and sworn in behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HYMES:

Q Mr. Cohen, what is your business -- what business are you in?

A I am buyer and general manager for Max Solomon, in charge of Max Solomon's, 11 West 19th Street.

Q How long have you been in that business?

A Eleven years.

Q Have you been with Mr. Solomon all that time?

A Eleven years.

Q Do you know the defendant, Ostro?

A I do.

Q He was employed by your firm, was he?

A He was.

Q For how long, do you know?

A For about seven or eight months.

Q Did he come under your personal supervision during that time?

A Under my personal supervision.

Q Have you known others that know him?

A I have not.

Q Do you know whether or not you have seen him since the time he was employed there?

A I have.

Q Have you ever heard anything against his reputation?

MR. CORRIGAN: I object to that question as absolutely inadmissible.

THE COURT: He may answer that.

MR. CORRIGAN: If your Honor please, did you hear the question?

THE COURT: I did, sir, perfectly.

A I have not.

Q His leaving your employment was in a perfectly business like way?

A Yes sir.

Q Do you know his family at all?

A I do not.

Q About how long ago was he in your employ?

A I don't know know exactly but I believe it is about a year and a half since, possibly two years.

Q Do you know in what capacity he was employed?

A He

received goods when they came in, checked them from their invoices and O. K'd hills of merchandise -- that tallied with the invoices.

CROSS EXAMINATION BY MR. CORRIGAN:

Q How long ago did you say it was?

A I think about two years.

Q Was it 1904, 1905 or 1906?

A I really don't remember positively; I would not commit myself by saying positively.

Q Well, according to your best recollection?

A Well, I believe it was 1904.

Q What part of 1904?

A On or about April.

Q He was there for how long?

A He was there about seven or eight months, I believe.

Q Beginning in April?

A I am not positive of it.

ARTHUR M. PLATO, a witness called and sworn in behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HYMES:

Q Mr. Plato, where do you reside?

A 215 West 121st Street.

Q Your business is what?

A Publisher.

Q Do you know the defendant, ostro?

A I do.

Q Well, how long have you known him?

A Fifteen years.

Q Ever since he was a boy or a child?

A Yes sir; since five or six years old.

Q Do you know his family as well?

A I know his mother and I knew his father.

Q Has he come under your personal notice during those fifteen years?

A In his home life, very often.

Q Do you know others that know him?

A Oh yes.

Q You have met others that know him?

A Yes sir.

Q What is his reputation for honesty and uprightness among those that you have met?

A Hood.

Q And you, yourself, personally know of nothing against him?

A Nothing.

MR. CORRIGAN: I object to that question.

THE COURT: It is already answered.

Q To what extent has your contact been with him or his family?

A Personal visits to the house.

Q Social?

A Yes sir; social, -- not specially social, but in his home; he visits my house and I have visited theirs. I know the family from his infancy.

Q Ever since childhood you say?

A Yes sir.

CROSS EXAMINATION BY MR. CORRIGAN:

Q Have you visited them socially or professionally?

THE COURT: I think this concludes your character witness, you having had three:

BY MR. CORRIGAN:

Q I say were your visits to his family made socially or professionally?

A I have no profession.

Q What do you do for a living, sir?

A I had a business.

Q Business?

A Yes sir; in speaking of a profession mean yours.

Q I don't mean that you are a member of one of the learned professions. Did you call on his family in a business or social way?

A Social, personally.

MR. HYMES: I want to call another witness by whom this defendant was employed.

THE COURT: You have had three character witnesses.

MR. HYMES: He has spoken of several places where he was employed, if the court please.

THE COURT: This is the last one. Call but one more.

EDWIN B. BENNETT, a witness called and sworn in behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. HYMES:

Q Mr. Bennett, your business is what?

A Clerk in a

woolen house.

Q Whereabouts?

A 18th Street and Fifth Avenue.

Q The name of the firm?

A S. Stein & Co.

Q Do you know the defendant, Ostro?

A I do.

Q Is he employed by your house?

A He was.

Q Did he come under your personal notice?

A He did.

Q Do you know others who know him?

A Yes sir.

Q What is his reputation for honesty, as far as you know?

A As far as I know, perfectly good.

Q How long did he work for your house?

A A little over twelve months, fourteen or fifteen, I think.

Q In what capacity employed?

A Clerk under me.

Q Did he leave in a regular business like way?

A Yes sir.

Q To get some other employment?

A Yes sir.

CROSS EXAMINATION BY MR. CORRIGAN:

Q How long ago was that?

A In 1902.

Q Have you seen much of him since then?

A No sir; not much.

Q So that what you know about him is the kind of a man he was in 1902?

A Yes sir; exactly.

Q This present difficulty is the only one you have known of?

A Yes sir.

Q His present trouble is the only thing you have known against him?

A Yes sir.

MR. HYMES: Will your Honor pardon me for attempting to call another witness as to the defendant's character?

THE COURT: I will decline to hear more.

MR. HYMES: That is exactly the point. Your Honor declines to hear any more?

THE COURT: You have now had four character witnesses. I said some time ago that you could have three. Now you have had four and we will stop here.

MR. HYMES: I respectfully take an exception to your Honor's declination to hear any more testimony in this regard. We have others in court.

Exception.

REBUTTAL.

JAMES MC CAFFERTY, a witness for the People, recalled in rebuttal, testified as follows.

BY MR. CORRIGAN:

Q You made the arrest in this case?

A I did, in connection with Detective Sergeant Carey.

Q Did you search the defendant?

A I did.

Q Did you find this on him (handing witness a card)?

MR. HYMES: I object to that as not in rebuttal.

MR. CORRIGAN: It is one of these cards which the defendant denied having had.

MR. HYMES: I have not seen it yet.

THE COURT: Just wait. I will sustain the objection.

MR. CORRIGAN: Your Honor sustains the objection?

THE COURT: Yes.

MR. CORRIGAN: Is the objection to the form of the question or the substance?

I sustain the objection. It is too late in the day now.

MR. HYMES: I have been informed, if the court please, by a Judge of this Court that there are a number of rules made by Judges of this Court, one of which is that the District Attorney or his Assistant shall not prepare his case in open court.

That is a formal rule that has been promulgated by the Judges of this Court. If I be right and my information correct, I respectfully protest against this exhibition.

THE COURT: Your information is quite right.

MR. CORRIGAN: If your Honor please, it ap-

pears that there is some intimation as to my conduct here and I would like to know what it is. I am not preparing ray case in open court. I am inquiring about a witness whom I do not see in the court room.

MR. HYMES: I did not know that.

THE COURT: Proceed and call the witness.

MR. CORRIGAN: Mr. Reis. That is not the witness about whom I was inquiring. I was inquiring about another witness who is not here.

MR. HYMES: The proper way is to call out his name.

JOSEPH H. REIF, a witness for the People, recalled by Mr. Corrigan.

Q Mr. Reif, did you have a conversation with Dr. Kruskal in the Jefferson Market Court?

A No sir.

MR. HYMES: Objected to.

Q What is that?

A No sir.

MR. HYMES: I object to this as not in rebuttal. This witness was examined on direct examination.

THE COURT: Yes or no.

MR. HYMES: This witness swore on direct examination that he had no conversation with anybody

relative to the identification of this defendant.

THE COURT: He may say yes or no.

A No sir.

Q Did Kruskal say anything to you about the defendant?

MR. HYMES: Objected to as hearsay and not in rebuttal.

THE COURT: Objection sustained.

MR. CORRIGAN: If your Honor please Mr. Hymes' assistant went on the stand and testified to overhearing a conversation between this gentleman and Dr. Kruskal and it was for this reason that I asked the question, the foundation having been laid by Mr. Hymes.

THE COURT: The witness says no.

THE WITNESS: I had no conversation.

MR. COPRIGAN: That is all. I will rest here.

MR. HYMES: We rest. If the Court please, I renew the motion made at the close of the prosecution's case, we now having arrived at the end of the whole case, that an acquittal be advised upon the grounds therein mentioned, and upon the further ground now that inasmuch as the entire case is over the prosecution has not sustained that burden of evidence affirmatively which it is incumbent

upon the prosecution to sustain in order to raise a question of fact upon which the jury can pace.

Motion denied.

Exception.

MR. HYMES: I know your Honor's custom of not ordinarily sitting later than four o'clock.

THE COURT: Well, there is time for the summing up perhaps. We will use up our time. How long do you want to sum up?

MR. GORRIGAN: About ten minutes will be enough for me.

MR. HYMES: There is considerable that I desire to review, but I do not want to bore the jury, and yet I don't wish your Honor to limit me. I will be as brief as I can. One thing is sure and that is that we cannot both sum up this afternoon.

THE COURT: We will make what progress we can.

You may proceed with your summing up.

MR. HYMES: Addressed the jury, until four o'clock.

THE COURT: The time has come when there is always some other business for the court to attend to. Gentlemen, do not talk about this case or permit anyone to talk with you about it nor form

or express any opinion thereon until the case is finally submitted to you. If you will take your seats I will try as near eleven o'clock as possible to go on with this case.  
(The Court then adjourned the further trial of the case until tomorrow morning, January 22nd, 1907, at 10:30 o'clock.)

New York, January 22nd, 1907.

TRIAL RESUMED.

Mr. Hymes concludes his summing up.

Mr. Corrigan addresses the jury. During the summing up of the District Attorney, defendant's counsel stated: We object to this entire line of argument as to the fact of getting evidence by police, as to whether any decent policeman in New York will get evidence against a disorderly house or not. I want the court to instruct the jury that that is not improper, and is not undignified. It is the duty of a policeman so to do and that it does not discredit him and that these remarks are absolutely without foundation.

THE COURT: This is a good common sense jury.

MR. HYMES: I must object to the remark of the District Attorney that the Penal Code says that you cannot get a conviction on the evidence of a private detective alone.

THE COURT: The jury must determine the credibility of the witnesses after hearing the arguments addressed by counsel. You may go on and confine

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yourself to the evidence.

MR. HYMES: I must interrupt again. I ask the Court to direct the jury to disregard the remark. It is not even the law in the class of cases to which counsel refers.

THE COURT: I would not refer to that. The jury are men of good common sense.

MR. HYMES: I don't mind how he perverts the facts, but I think it is against the dignity of this court to let him misstate the law.

THE COURT: Proceed.

Mr. Corrigan concludes his summing up.

## THE COURT'S CHARGE.

Foster, J.

Gentlemen of the Jury: the defendant, David ostro, is charged by this indictment with the crime of grand larceny in its second degree. Though there has been much evidence in the case, the law that applies to it is very simple indeed, and it is necessary, therefore, for me to say but a few words in charging you.

Larceny is a crime that, in common parlance, may be termed stealing. Its legal definition is as follows: "Whosoever with intent to deprive the true owner of the use and benefit of any personal property takes it from the possession of such true owner steals it and is guilty of larceny."

Larceny is divided into different kinds and into different degrees. So far as this case is concerned, gentlemen, the distinction is dependent upon the value of the property stolen. If the property stolen was worth more than twenty-five dollars it is grand larceny in the second degree; if worth

is petit larceny.

The People claim that this defendant, who was employed at the Cornell Medical College, concededly a corporation, though I have not attempted to give its legal name -- that when he was so employed he had access to the alleged stolen property, and having access to it did steal it and take it away, pawned it, appropriated it to his own use, intending to deprive the owner of its use and benefit. If he did, gentlemen, take away this personal property, intending to deprive the medical college of its use and benefit he stole it, and under the law, is guilty of larceny. He is guilty of grand larceny in the second degree if he stole more than twenty-five dollars worth of property. That is all there is in the case, gentlemen; but when you come to determine whether or not he did steal then you meet this mass of testimony, all of which you must take into consideration. One of the things you must consider is, first of all, did he take away the property. If he did take it away, why did he take it away?

To use it for his own benefit? If so, then the intent necessary to be proven or inferred to constitute larceny is made out completely against him.

Now, when you are considering the question

whether or not, he did steal the property and took it away with intent to deprive the owner of its use and benefit, you may very properly consider the evidence touching the defendant's character. witnesses have come here and testified that they have known the defendant for lo these many years; that his character has been good and that he has enjoyed an excellent reputation in the speech of people.

That does not excuse the commission of a crime. If this defendant did steal these lenses he is guilty, no natter what his character has been; but when you come to consider whether or not he did steal them then take into consideration the evidence touching his character. The law says that some@@ times evidence of good character will he suffi@@ cient to create a reasonable doubt where, without it, there would be no such doubt. The weight of this evidence is for you. You are expected to use your own good sense in considering all the evidence and in determining the case. The defendant was on the stand and told his own story. You are to receive it and give it the weight and the credence you think it ought to have. In his cross examination I admitted, against

the objection of his counsel, many questions tending to show, as the District Attorney claims, that the defendant was holding himself out as a physician. This evidence has no bearing upon the main issue, whether or not the defendant was guilty of larceny here, but it has a bearing upon the question of his credibility, and it was for that reason alone that it was received and is before you for consideration. When you weigh this testimony you may take into consideration all the facts developed in cross examination; but they should not be considered by you for any purpose other than to establish the credibility, or the lack of it, of the defendant.

I have brought to your attention, gentlemen, all the law that I deem necessary to enable you properly to determine the issues in this case.

The defendant has asked that I make certain charges to you. If I have not covered them to his satisfaction I will permit him to read them to you. They are all consented to by the District Attorney except the fifth which I have indicated in pencil. Have you a copy, Mr. Hymes?

MR. HYMES: Yes, sir.

THE COURT: I have charged some of them, in

substance.

MR. HYMES: I would like your Honor to charge them as requested. They are very short.

THE COURT: You may read them, Mr. Hymes.

MR. HYMES: The only property mentioned in the indictment, and the only property which the jury may consider in connection with this defendant is the one oil immersion lens found in the possession of Dr. Kruskal. I understand your Honor so charges?

THE COURT: You may read them all except the fifth.

MR. HYMES: The only property of the complainant with which the evidence, in any way, connects the defendant, is the one immersion lens found in the possession of Dr. Kruskal.

There is no evidence in the case to connect the defendant with the three oil immersion lenses, People's Exhibits 1, 2 and 3, sold by Trigger, the second-hand dealer, for thirty dollars.

That the jury must entirely disregard all evidence with respect to People's Exhibits 1, 2 and 3.

On the question of value the jury should not consider the evidence of Dr. Ewing at all, if they are convinced that he is not competent as an expert

on the market value of lenses at the time in question.

There is no evidence at all in the case what the market value of an oil immersion lens of the kind in question was at the time of the alleged larceny.

MR. CORRIGAN: I must ask your Honor not to charge that. I passed that over inadvertently.

THE COURT: You consented to all of these. The seventh do not consider as yet.

MR. HYMES: Do I understand your Honor to decline to charge the seventh?

THE COURT: I will consider that later. At present I do not. All are to be considered by the jury except this last request.

MR. HYMES: If the jury deem that the evidence, is reasonably consistent with any other theory than the theory of the guilt of the defendant they must acquit.

It is not the duty of the defense, in order to be entitled to an acquittal, to point out who actually did commit the larceny, assuming that one was committed; it is sufficient if there be a reasonable doubt as to whether or not the defendant committed the act.

Now, will your Honor pass on the seventh?

THE COURT: The seventh, gentlemen, in substance is -- I will read it, not in substance but literally: There is no evidence at all in the case what the market value of an oil immersion lens of the kind in question was at the time of the alleged larceny.

Now, there being an objection to this by the District Attorney, I shall decline to charge it. It is for you to remember the evidence for yourselves. If there is evidence consider it; if there is not of course you will not consider it.

MR. HYMES: We except to your Honor's declination to charge as requested and to the modification as charged. We also except to your Honor's declination to charge No. 5.

THE COURT: Is that all?

MR. HYMES: Now, we also ask, in the light of the declination, that your Honor charge that the only question of value in this case, should that question come up for consideration by the jury, is the question of the market value of one lens, the Kruskal lens.

THE COURT: Is that all? Do you consent to

that, Mr. District Attorney?

MR. CORRIGAN: I don't think I shall consent to that.

THE COTTON: Gentlemen, the question of value is for you to determine. It is for you to determine, first of all, whether property was stolen; if so, what property was stolen. When you determine what property was stolen it is for you to determine what its reasonable market value was at the time. Its market value, not the cost, though cost may be evidence of market value. You will take into consideration all the evidence touching value and from that, as a whole, you will determine the question.

MR. HYMES: We except to your Honor's declination to charge as requested and to the modification as charged, and it is only fair for me to the court at this time to call the attention of the court to the concession by the District Attorney to my other requests which it seems to me entitle me to that request, namely, that there is only one lens in this case.

THIS COURT: Your charges have all been charged to the jury by consent of the District Attorney. They are before the jury and it is not necessary to repeat them.

MR. HYMES: We except then to that portion of the courts charge in which it says, the question for the jury to determine is whether these lense--

THE COURT: Were there any lenses, gentlemen? I did not by my charge intend to say that any lenses at all were stolen -- but if any lenses were stolen you are to find that fact, and you are to find, as a fact the value of the stolen lens or lenses.

MR. HYMES: We except to the charge as made and ask the court to charge that the only question before the jury is as to whether that lens was stolen by the defendant.

THE COURT: Do you consent to that, Mr. District Attorney?

MR. CORRIGAN: I do not.

THE COURT: I leave it to the jury to determine.

MR. HYMES: We except to the declination of the court to charge as requested and to the modification as charged. We ask the court to charge that in connection with detective officer Carey that if I, on cross examination, had interrogated him with respect to admissions or statements or conversations with the defendant I would have made him my witness

for that purpose and would have been bound by his testimony.

THE COURT: I don't think it necessary. I decline to charge that.

MR. HYMER: We except to your Honor's declination so to charge, and ask the court now to instruct the jury that the failure of the District Attorney to interrogate officer Carey as to the material parts of this case entitles them to come to the conclusion that if interrogated his testimony would have been adverse to the People.

THE COURT: You may weigh his testimony, gentlemen, for what you deem it worth. I decline to charge except as I have charged.

MR. HYMES: I except to the declination of the Court to charge as requested and to the modification as charged. Exception.

The jury returned to court and stated that they found the defendant Guilty of Petit Larceny.

(The defendant was remanded for sentence until January 30th.)