Return to
FILE COPY
Supreme Court of Appeals
Richmond, Va.

209 VA 789

Record No. 6958

In the
Supreme Court of Appeals of Virginia
at Richmond

ELMER M. CHALLENOR

v.

COMMONWEALTH OF VIRGINIA

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6958

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 23rd day of April, 1968.

ELMER M. CHALLENOR,

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

From the Hustings Court of the City of Richmond
Samuel B. Witt, Jr., Judge

Upon the petition of Elmer M. Challenor a writ of error and supersedeas is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 21st day of August, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony; but said supersedeas, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

AFFIDAVIT

* * * * *

This day personally appeared before me, Elsie S. Ferguson, a Notary Public in and for the City of Richmond, State of Virginia, in my City and State aforsaid, Elmer M. Challenor, to me personally known, who made oath as follows:

Under the provisions of Section 19.1-289, Code of Virginia, 1950, as amended, I do hereby certify, affirm, and aver, that I am the Plaintiff in error in an Appeal filed with the Clerk of the Supreme Court of Appeals against the Commonwealth of Virginia, known as Case No. 6958, and I do hereby further certify, affirm, and aver, that I am unable to pay or secure to be paid the cost of printing the record in my appeal, which costs are estimated at $325.00 by Mr. Howard G. Turner, Clerk, Supreme Court of Appeals of Virginia, as set out in his letter of August 6, 1968.

Elmer M. Challenor

Sworn to and subscribed before me this 16th day of August, 1968.

Elsie S. Ferguson
Notary Public

My Commission expires: Nov. 16, 1971

* * * * *

CERTIFICATE

I, Samuel B. Witt, Jr., Judge of the Hustings Court of the City of Richmond, do hereby certify that I have investigated the matter of the indigency of Elmer M. Challenor and I am of the opinion that he is unable to pay or secure to be paid the cost of printing the record in his appeal to the Virginia Supreme Court of Appeals from the judgment of this Court.

8/19/68

Samuel B. Witt, Jr.
Judge

RECORD

* * * * *

page 1 }

VIRGINIA:

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

City of Richmond, to-wit:

The GRAND JURORS of the Commonwealth, for the body of the City of Richmond, on their oaths present that Elmer M. Challenor within thirty months prior to the finding of this indictment at the said City, and within the jurisdiction of the Hustings Court of the City of Richmond.

Twenty-one thousand one hundred thirty-nine dollars and thirty-three cents of United States currency, of the United States currency and property of the City of Richmond, Virginia, a municipal corporation, then and there being found, did then and there unlawfully and feloniously steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia.

John R. Waller
Raymond L. Malloy

Witnesses sworn and sent by the Court to the Grand Jury to give evidence.

Thos. R. Miller

* * * * *

page 2 }

* * * * *

Pleas at the Courthouse of the City of Richmond, before the Hustings Court of the said City, on the 20th day of November, 1967.

Be it remembered that heretofore, to-wit: on the 6th day of March, 1967, the following order was entered:

Frank Heindl, Foreman, Chas. E. Talley, Henry Taylor, R. A. McGrath, Robt. Dandridge, Russell Rabb and H. Watkins Ellerson, were this day sworn a Special Grand Jury of inquest in and for the City of Richmond, and having received

their charge were sent out of Court and after some time returned and presented,

"Commonwealth vs. Elmer M. Challenor an indictment for a felony, a true bill,"

* * * * *

page 5 }

* * * * *

MOTION

To the Honorable Judges of Said Court:

Now comes the defendant, Elmer M. Challenor, by counsel, and moves the court as follows:

Granted

I

To require the Commonwealth to state in writing under what statute the Commonwealth intends to rely upon in asking for conviction of the said defendant named in said indictment.

Granted

II

That the Commonwealth make available to counsel for the defendant all tangible evidence in the possession of the Commonwealth or its agents concerning the charge in said indictment.

O/R

III

That the Commonwealth file a "Bill of Particulars" setting forth the nature of the charge against the defendant, with particularity to include the following:

1. Over what period of time the alleged $21,139.33 of United States currency was received by the said City of Richmond, Virginia, a municipal corporation.

page 6 } 2. Over what period of time the said $21,139.33 of United States currency was allegedly stolen from the said City of Richmond.

3. The specific dates, and the respective amounts of United States currency aggregating $21,139.33, as set out in said indictment, were received by the City of Richmond.

4. The specific dates, and the respective amounts of United States currency, aggregating $21,139.33, as charged in said indictment, were stolen from the said City of Richmond.

Elmer M. Challenor

By Joseph J. Williams, Jr.
Of counsel

Received & Filed May 17, 1967 Hustings Court Clerk's Office LAS Deputy Clerk

* * * * *

page 7 }

* * * * *

And at another Hustings Court held for the City of Richmond, at the Courthouse, on the 23rd day of May, 1967, the following order was entered:

* * * * *

The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City and was represented by Attorneys Joseph J. Williams, Jr., and W. G. Purcell and James B. Wilkinson represented the Commonwealth. And the Court having heard arguments on motions filed with this Court on May 17, 1967 doth rule as follows: Motion No. 1 granted; Motion No. 2 granted; Motion No. 3 denied, to which denial the said defendant notes an exception. And thereupon the said defendant moved the Court to quash the indictment, which motion the Court doth overrule and the said defendant notes an exception. And for reasons satisfactory to the Court this case is continued to June 26, 1967 for trial by jury and the said defendant is released on continuing bail.

* * * * *

page 8 }

* * * * *

BILL OF PARTICULARS

Now comes the Commonwealth of Virginia by its Attorney, James B. Wilkinson, and states as follows:

1. In this prosecution the Commonwealth of Virginia will rely on Sections 18.1-109 and 18.1-110 of the Code of Virginia, 1950, as amended.

2. The Commonwealth of Virginia will rely on either or both of the above mentioned statutes in this prosecution.

Commonwealth of Virginia

By James B. Wilkinson

* * * * *

Received & Filed Jun 16, 1967 Hustings Court Clerk's Office

.....Deputy Clerk

* * * * *

page 12 }

* * * * *

And at the same Hustings Court held for the City of Richmond, at the Courthouse, on the 29th day of June, 1967, the following order was entered:

* * * * *

The said defendant this day again appeared and was set to the bar in the custody of the Sergeant of this City and was represented by Attorneys J. Williams, Jr., and W. Griffith Purcell and James B. Wilkinson and J. R. Davila, Jr., represented the Commonwealth. And also came the jurors sworn on June 26, 1967, for the trial of this case, according to their adjournment. And having heard the arguments of counsel, the jurors retired to their room in the custody of the Sergeant of this City to decide upon a verdict. And after some time they returned into Court and presented a verdict

in the *follwoing* words, to-wit: "We, the jury, find the accused guilty as charged in the indictment and fix his punishment at two years confinement in the Penitentiary." William H. Gillette, Jr., Foreman

And thereupon the said defendant by counsel moved the Court to set aside the verdict as being contrary to the law and to the evidence and grant him a new trial. And for reasons satisfactory to the Court, this case is continued to July 27, 1967, at 2:15 P.M. for arguments on said motion and the said defendant is released on continuing bail to appear on said day.

* * * * *

page 14 }

* * * * *

MOTION

Comes now the defendant, by counsel, and moves the Court to set aside the verdict of the jury finding him guilty, on June 29, 1967, on the following grounds:

1. The indictment failed to lawfully charge that the defendant did feloniously steal, take and carry away United States currency, which was property of the City of Richmond. (*Pine* v. *Comm.* 121 Va. 812; *Andrews* v. *Comm.* 135 Va. 451)

2. The indictment unconstitutionally and illegally did not sufficiently inform the defendant of the cause and nature of the accusation against him, or the offense charged, and the defendant was thereby prejudiced in making his defense as said illegal and inadequate indictment failed to give the information necessary to enable the defendant to concert his defense.

3. The indictment, all in one count, made a blanket charge of an unidentifiable alleged offense, within thirty months prior to the finding of said indictment, without information as to times or circumstances, which prevented the defendant from properly preparing his defense.

page 15 } 4. The defendant moved, pursuant to Va. Code §18.1-109, and the Court ordered that the Commonwealth state in writing under what statute the Commonwealth intended to rely upon in asking for conviction of the said defendant, however, the Commonwealth failed to comply with said order by stating in writing that it would rely upon two sections of the Va. Code, namely §18.1-109 and §18.1-110,

such being contrary to §18.1-109, which limits the Commonwealth to proceeding only on a singular section of the Va. Code.

5. The defendant moved that the Commonwealth file a "Bill of Particulars" setting forth the nature of the charge against the defendant, with particularity to include the following:

(a) Over what period of time the alleged $21,139.33 of United States currency was received by the said City of Richmond, Virginia, a municipal corporation.

(b) Over what period of time the said $21,139.33 of United States currency was allegedly stolen from the said City of Richmond.

(c) The specific dates, and the respective amounts of United States currency aggregating $21,139.33, as set out in said indictment, were received by the City of Richmond.

(d) The specific dates, and the respective amounts of United States currency, aggregating $21,139.33, as charged in said indictment, were stolen from the said City of Richmond.

The Court ordered the Commonwealth to comply
page 16 } with said "Motion for Bill of Particulars" in part,
as shown by the record, but the Commonwealth failed to comply, which prevented the defendant from properly preparing and defending the charge against him in said indictment, and thereby deprived the defendant of his rights under Va. Code §19.1-168, which provides in part that "in a prosecution against a person accused of embezzling money, etc., it shall be lawful in the same indictment to charge and thereon proceed against the accused for any number of distinct acts of such embezzlement which may have been committed by him *within six months from the first to the last of the acts charged in the indictment.*" In the present case the indictment made only a blanket presentment that the defendant within thirty months prior to the finding of the Indictment, $21,139.33 of U. S. currency, property of the City of Richmond, then and there unlawfully and feloniously steal, take and carry away. Nevertheless, the Commonwealth's own evidence showed that there were various contended distinct acts of embezzlement claimed by the Commonwealth to have been committed at intervals of more than six months, which was contrary to the said provision in §19.1-168, and prejudiced the legal and constitutional rights of the defendant. The contended acts of embezzlement during the said period covered by the Commonwealth's evidence extended in excess of six months prior to the beginning of the said thirty month period, prior to the indictment dated March 7, 1970; the Com-

monwealth's evidence showing that $18,571.12 of the said alleged total embezzlement of $21,139.33, had accumulated as of January 31, 1965, and that said $18,571.12 could have accumulated more than six months prior to the said thirty month period, hence said alleged embezzlement was not a continuous scheme, so as to constitute a single offense

page 17 } chargeable in a single count, and were not includable under §19.1-168, because they occurred more than six months from the next act charged in the count, and such evidence should have been stricken. *Webb* vs. *Comm.* 204 Va. 24., *Pine* vs. *Comm.* 121 Va. 812.

6. That the refusal to Quash the said Indictment upon Motion of the defendant, upon the foregoing grounds, was prejudicial to the rights of the accused and deprived him of his legal and constitutional rights.

7. That the verdict of guilty rendered by the jury, is contrary to the law and the evidence, and without legal weight to support same.

8. That the defendant's Motions to Strike the Commonwealth's Evidence made by the defendant at the conclusion of the Commonwealth's evidence, and again renewed at the conclusion of all the evidence should have been sustained, as there was insufficient evidence to establish a prima facie case against the accused.

9. The verdict of the jury was unsupported by the evidence, which was only circumstantial and failed to overcome the presumption of innocence (*Webb* vs. *Comm.* 204 Va. 24).

10. The Commonwealth's Attorney, in his closing argument before the jury, stated to the jury that seven members of the Grand Jury had sufficient cause to indict the defendant, thus prejudicing the defendant's case before the jury and violating and depriving the defendant of his constitutional rights.

Elmer B. Challenor

By Joseph J. Williams, Jr.
Counsel

Filed 8/21/67 BH

* * * * *

page 19 }

* * * * *

And at the same Hustings Court held for the City of Richmond, at the Courthouse, on the 21st day of August, 1967, the following order was entered:

* * * * *

The said defendant this day again appeared and was set to the bar in the custody of the Sergeant of this City and was represented by Attorneys J. Williams and W. G. Purcell and James B. Wilkinson represented the Commonwealth. And upon mature consideration of the motion made by the said defendant on June 29, 1967, to set aside the verdict of the jury of June 29, 1967, as being contrary to the law and to the evidence and grant him a new trial, the Court doth this day overrule said motion and to which action of the Court in overruling his said motion, the said defendant notes an exception and time is allowed him not to exceed sixty days in which to file his bills of exception.

Whereupon it being demanded of the said defendant if anything for himself he had or knew to say why the Court should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay thereof, it is the judgment of this Court that the said Elmer M. Challenor be confined in the State Penitentiary for a term of two years, this being the period by the jury ascertained. And it is ordered that the Sergeant of this City do, when required so to do, deliver the said defendant from the jail of this City to the Superintendent of the Penitentiary, in said Penitentiary to be confined and treated in the manner prescribed by law; said term to be credited by the time spent in jail awaiting trial.

And the said defendant then moved the Court to suspend the execution of the said sentence to allow him to appeal his case to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas, which motion the Court doth grant and the execution of the said sentence is suspended to October 27, 1967, and his bond is set at twenty five hundred dollars. And the defendant having this day filed with the Court an *affadavit* of poverty, he is declared a pauper and the Court doth appoint J. Williams, a competent attorney practicing before this Court, to assist the defendant in perfecting his appeal to the Supreme Court of Appeals.

And thereupon the said defendant entered into a recognizance in the sum of twenty five hundred dollars with Karl L. Williams, Agent for United Bonding Insurance Company, as surety therein, conditioned that if the said defendant shall abide by and perform the judgment of this Court in the event the Supreme Court of Appeals of Virginia shall refuse to grant him a writ of error and supersedeas, or if granted it be later dismissed and appear before this Court on October 27, 1967, and in the meantime shall keep the peace and be of good behavior and violate none of the laws of this Com-
page 20 } monwealth, then the said recognizance to be void else to remain in full force and virtue. And thereupon the said defendant is released.

* * * * *

page 24 } INSTRUCTION NO. 4

The Court instructs the jury that the fact that an indictment has been found against the accused is not to be considered as any evidence of guilt.

G.

S. B. W. Jr.

* * * * *

page 30 } INSTRUCTION NO. 10

If you believe from the evidence, beyond a reasonable doubt, that the defendant wrongfully appropriated for his own use and benefit money in excess of $100.00 entrusted to him by reason of his employment with intent to permanently deprive the City of Richmond thereof, then you shall find the defendant guilty and fix his punishment at confinement in the penitentiary for not less than one nor more than twenty years or at confinement in jail not exceeding twelve months or by fine not exceeding $1000.00, either or both.

G.

S. B. W. Jr.

* * * * *

page 33 } INSTRUCTION NO. P.

The Court instructs the jury that before they can find the accused guilty of the crime alleged in the indictment they must believe beyond all reasonable doubt that he knowingly, feloniously, and with an intent to defraud the City of Richmond, misused, misappropriated, or disposed of otherwise in accordance with law the $21,139.33 of funds of the City of Richmond as alleged in the indictment.

R.

S. B. W. Jr.

* * * * *

page 41 }

* * * * *

NOTICE OF APPEAL

The defendant, Elmer M. Challenor, gives Notice of Appeal from the judgments of this Court rendered herein on August 21, 1967.

ELMER M. CHALLENOR

By Joseph J. Williams, Jr.
Counsel

Received & Filed Oct. 11 1967 Hustings Court Clerk's Office LAS Deputy Clerk

* * * * *

page 42a }

* * * * *

ASSIGNMENTS OF ERROR

The defendant, Elmer M. Challenor, hereby assigns the following errors, he having previously filed his Notice of Appeal herein:

1. The Court erred in permitting the Commonwealth to prosecute the defendant under an indictment alleging em-

bezzlement over a thirty (30) month period from the first to the last of the acts charged and not under five separate indictments of six (6) months each as required under Section 19.1-168, Code of Virginia, 1950, as amended.

2. The Court erred in refusing the defendant's request for a Bill of Particulars as to the period of time involved in the alleged receipt by the City of Richmond, Virginia, of the money involved, the specific dates of the alleged loss, and the respective amounts allegedly taken.

3. The Court erred in permitting the Commonwealth to prosecute the defendant without specifying which Section of the Code of Virginia, 1950 as amended, it relied on in asking for a conviction.

page 42 } 4. The Court erred in permitting the jury to hear and consider evidence on an amount ($18,000.00 of the $21,000.00 alleged to have been stolen) admittedly lost prior to the date of the Commonwealth's investigation.

5. The Court erred in permitting improper argument by the Commonwealth's Attorney to the jury, when the Commonwealth admonished the jury that the Grand Jury had found sufficient cause to indict the defendant, and this should be borne in mind in reaching their verdict.

6. The Court erred in failing to set aside the verdict of the jury as being contrary to the law and evidence in that guilt must be proven beyond a reasonable doubt.

Respectfully,

ELMER M. CHALLENOR

By Joseph J. Williams, Jr.
Of Counsel

Received & Filed Nov. 15 1967 Hustings Court Clerk's Office
LAS Deputy Clerk

* * * * *

page 43 }

* * * * *

NOTICE

TO: James B. Wilkinson, Esquire
Attorney for the Commonwealth
City Hall
Richmond, Virginia

Please take notice that on Monday, November 20, 1967 at 9:00 a.m., or as soon thereafter as counsel can be heard, the undersigned, counsel for the defendant herein, Elmer M. Challenor, will appear before the Honorable Samuel B. Witt, Jr., Judge, to present the record herein, to ask that the same be corrected and certified.

ELMER M. CHALLENOR

By Joseph J. Williams, Jr.
Of Counsel

Received & Filed Nov. 17 1967 Hustings Court Clerk's Office LAS Deputy Clerk

* * * * *

page 44 }

* * * * *

And at another Hustings Court held for the City of Richmond, at the Courthouse, on the 20th day of November, 1967, the following order was entered:

* * * * *

The transcript of the evidence adduced, the objections to evidence and other incidents in the trial of the above case therein recorded, said transcript was this day signed and sealed by the Court and hereby made a part of the record in this case.

* * * * *

page 3 }

* * * * *

Mr. Williams: If Your Honor please, before we consider the motion in writing, I have another motion I would like to make orally.

The Court: All right, sir, we'll just let the record show that this is proceeding, procedure in the case of *Commonwealth of Virginia* against *Elmer M. Challenor,* and that the defendant is present in Court. All right, sir.

Mr. Williams: If Your Honor please, I'd like to
page 4 } move at this time to quash the indictment and dismiss the defendant upon this ground: It charges within twenty—within thirty months prior to the time of this indictment that he did take, steal and carry away thirty—twenty-one thousand, one hundred and seventy-nine dollars. That indictment is faulty, I believe, because it doesn't allege at any particular time or whether he took it over one day or over a long period of time more than thirty-one months and certainly is not the type of particularities that a defendant faced with a charge like this should be confronted with. He was—there was no warrant gotten against him, he was just indicted, and he read this in the newspaper, and that's all it says, within thirty months prior to the finding of the indictment he stole that money.

The Court: Within thirty months?

Mr. Williams: Within thirty months—within thirty months prior to the filing of this indictment.

The Court: What does the Commonwealth have to say about that?

page 5 } Mr. Wilkinson: Well, Judge, I think in all cases of this type the indictment has to be drawn that way, but Mr. Williams didn't state to the Court that we have given to the defendant a full auditor's report of the City of Richmond which specifies with particularity the nature of the crime—

The Court: And the date on—

Mr. Wilkinson: I'm not saying that this defendant is guilty, I'm saying that this matter was presented to the Grand Jury, but I don't know how we *coud* be any more particular than we have in this case and, of course, this Court has had the case, if you recall, the case of *Commonwealth* v. *Waitt,* the same issue was raised, which went to our Court of Appeals and I think that they resolved that issue in this case, they—certain types of things and not being specific on that particular case, we couldn't be specific as to the exact date—

The Court: Well, is it—I recognize your statement as being correct, but I just—you Gentlemen have seen the audit?

Mr. Williams: If Your Honor please, we have
page 6 } seen an audit that starts out with an eighteen thousand dollar shortage, and the audit doesn't tell us—begin to tell us who stole the eighteen thousand or when it was stolen. The audit itself doesn't know that, the only thing, they claim that somebody that left some things—or somebody put some lapping over on this man's book—

The Court: Well, that's a question of proof, I think—I mean it's no question about the fact that the Commonwealth can't claim that he took something that somebody else may have taken, but they've got to prove—convince the Court or the Jury that he is the person who embezzled it, but on the motion to quash the indictment, in view of the fact that the Commonwealth has made available to you the evidence so far as the records of the Company show with the specific dates on which there occurred a discrepancy I'll be—I'm disposed to overrule your motion.

Mr. Williams: Your Honor please, I'd like to except.

The Court: Certainly.

Mr. Williams: Note exception.

* * * * *

page 13 }

* * * * *

The Court: I mean if the Commonwealth don't prove, of course, that within thirty months the City of Richmond received this amount of money or a certain amount of money which he is accused of embezzlement, embezzling—

Mr. Williams: Your Honor please, let me read just one paragraph in that report, we found there was a cash shortage of eighteen thousand five hundred and seventy-one dollars
and twelve cents on January the 31st, 1965, now,
page 14 } that's—they don't go back a date beyond that in this audit, but they tell us was eighteen thousand dollars five hundred and seventy-one—a shortage on that day, they said it cost too much money to go back any further than that—

Mr. Wilkinson: Well, Judge, I think that's a question of proving the amount, over a hundred dollars—

The Court: That's to prove the amount, but I don't think that—I'm not prejudging the case either from your stand-

point or the Commonwealth, but if the Commonwealth says there was a shortage on such and such a date, unless they connect the defendant with it, that isn't any evidence against him. That's the view I take of it. In other words, it is a question primarily and fundamentally of proving that they received the money while he was—while he was there, but I mean if—if the shortage occurred before they were charged within the thirty months, then, of course, it's not evidence against him, because they don't charge him with that.

page 15 } Mr. Purcell: Your Honor please, under 168.1-168, provides that in a prosecution against a person accused of embezzling or fraudulently converting to his own use money, notes and so forth, it shall be lawful in the same indictment, or accusation, charge, thereon proceeded against the accused for any number of distinct acts of such embezzlement or fraudulent conversions which may have been committed by him within six months from the first to the last acts charged in the indictment. Now, if we don't have a first act charged in the indictment, we don't have a last act charged in the indictment and we don't know how we could apply 19.1-168 in the six months provisions, and without this information—

The Court: Well, doesn't the audit show when—

Mr. Purcell: Judge, I'll have to answer, in my opinion it does not, but I will reserve the right to . . . an accountant,

The Court: Well, what does the Commonwealth say about this?

page 16 } Mr. Purcell: but I believe that the Court of Appeals says that the indictment—and, of course, a bill of particulars is granted, is to tell the defendant in plain, intelligent layman's language what he's charged with,

The Court: Well, I agree with you about that, I think that's proper.

Mr. Purcell: and this audit report, speaking as a layman, does not do that as far as I can see, Judge, and I've been over it twice, trying to fathom just when the alleged defalcation started, when it stopped, and it doesn't ever—

The Court: Well, of course, you don't—Mr. Wilkinson, you don't charge that he is—or indict him for any embezzlement prior to the thirty months, do you?

Mr. Wilkinson: Sir? No, sir, it's a short—it was a shortage that they picked up at that time, thirty months at eighteen thousand and some dollars. Of course, the ultimate amount is twenty-one thousand dollars, but if they want that, I'll just have—Judge, tell the City they'll have to go all the way

back to the account—I have no objection, I'm not
page 17 } trying to keep anything from the defendant—

The Court: I understand that.

Mr. Wilkinson: I have the facts here, these facts were presented to the Grand Jury, the Grand Jury found the indictment—

The Court: What I'm trying,

Mr. Wilkinson: and we can amend the indictment.

The Court: what they want to know is what period of time, when the shortage first started.

Mr. Wilkinson: Sir?

The Court: As I understand it, want to know when the shortage first started and when it ended, I think that they are entitled to that, I'll say yes, that the City should do it.

Mr. Wilkinson: I don't object to that, Judge.

The Court: Well, I know, I'm not—

Mr. Wilkinson: I think this—I think, Judge, all we have to do is show the defendant to have embezzled over a hundred dollars, that it's grand larceny.

page 18 } The Court: Well, that's true, but he's got to—if you are not—you are alleging that he stole twenty-one thousand

Mr. Wilkinson: That's right.

The Court: dollars and he—

Mr. Wilkinson: But, the—

The Court: and you only prove a hundred dollars or six hundred dollars, that's all the offense—the amount of his offense and what they want to know is, according to your indictment, you say he's got twenty-one thousand, they want to know when it started and the specific dates on which the—

Mr. Wilkinson: Judge, I've never tried an embezzlement case yet, I'm quite sure that the Court's in the same position, where the amount in the indictment is ever found—

The Court: Well, I recognize that.

Mr. Wilkinson: the defendant, even if he pleads guilty in an embezzlement case, will plead guilty to everything but the amount, the sum over a hundred dollars.

The Court: I understand.

page 19 } Mr. Wilkinson: Now, I don't think in the trial of the case or the instructions to the Jury that the Court can say the Jury must believe beyond a reasonable doubt that twenty-one thousand was—

The Court: Well, as a matter of fact, there's a two-fold angle to it, I mean I'm not—that's not—doesn't make any difference to this defendant nor—but it does to the City, if the City can prove probably twenty-one thousand the insur-

ance company would probably be liable for the twenty-one thousand, and that's the reason that most of the defendants—what ones that I recall in embezzlement, won't plead guilty to any distinct sum, the insurance company is not going to let them do it, or I mean they prefer that they do not do it, I don't mean that they coerce them to do it, but I'm going to direct that you give them what information that—what period of time the alleged amount of money was received by the City of Richmond, I mean I don't—I mean I think that when it starts out with—what date did it start out with?

Mr. Wilkinson: The audit?

page 20 } The Court: Uh, huh.

Mr. Wilkinson: February the 1st, '65 to May the 7th, '65.

The Court: February the 1st, '65?

Mr. Wilkinson: Yes, sir, May the 7th, '65.

The Court: May the 7th, '65, in that period of time the City received this amount of money, twenty-one thousand?

Mr. Wilkinson: No, what they did, Judge, I understand in the audit they went back and they found the shortage to be eighteen thousand and some dollars and then they covered this five-month period or the four-month period and then they added to—

The Court: Well, what I want—what I think we should give them—

Mr. Wilkinson: What you want to know is where the eighteen thousand dollars comes from.

The Court: Well, I think this, I think that if you charge and the audit report shows that it would be February 1st, '65 and May the 7th, '65, how much was the individ-

page 21 } ual—the shortage from February 1st to May the 7th, '65, how much was it?

Mr. Wilkinson: Well, that's what the audit would show, that's what—the audit shows that.

The Court: Well, that is the point—you can't convict him of anything back beyond that anyway, I don't think.

Mr. Wilkinson: I'm not saying, Judge, that the Commonwealth's proof would come up to the twenty-one thousand, but the Commonwealth's proof might come up on the two thousand, might not come up to any—

The Court: Well, that's what I say—

Mr. Wilkinson: but if it comes over a hundred dollars,

The Court: I recognize that.

Mr. Wilkinson: then we would be entitled to an instruction if they believe beyond a reasonable doubt—

The Court: Well, here's the point that I'm making, it isn't

directly—I mean it's bound to have some weight
page 22 } with the Jury, here's a man that is charged with embezzlement of twenty thousand dollars and that gets to the Jury, that the things were short twenty-one thousand dollars previous to February the 1st, from February 1st to May—just take a figure out of their head, say it was seven hundred dollars, it does have—they are human beings, the Jury, of course, would say well, he took seven hundred and fifty dollars, so I think that the—you can give them the period of time because you know it was prior to February the 1st, 1965, this other shortage appeared, you can give them that information that prior to February the 1st, '65, there appeared a shortage of so and so and what that period of time covers.

Mr. Wilkinson: Well, we have—I don't mind going back on that—we decided we are going to rely on the twenty-one thousand dollars, then it puts a different light, but if we decide we are only going to rely on, say, roughly three thousand dollars, then that's all that's necessary, it's a matter of evidence—

The Court: Well, what do you say about that?
page 23 } Mr. Purcell: Judge, I think we could—we'd be glad to confer with Mr. Wilkinson on that, the Commonwealth's Attorney, and all we want to do is box in when it's alleged they received the money and when it's alleged the money was taken, because we just—

The Court: Well, Mr. Wilkinson has frankly told you that—

Mr. Purcell: Yes, sir, that's what we want.

The Court: that February 1st to 19th of May was what they are primarily relying upon, but the period of time that—the eighteen thousand you want that for what he's not relying on there.

Mr. Purcell: That's right, Judge, we don't want to face an eighteen thousand dollar shortage which we, of course, contend this man didn't take, but at the same time we don't know how to defend him.

Mr. Wilkinson: Well, Judge, I don't think the Commonwealth should be on terms to try their case on motions, just like a murder charge, we come in and indict a man
page 24 } for murder, I don't think the defendant can come in before the trial and say the Commonwealth's evidence is not going to show over manslaughter, so we have to *to* to—we have to go the case on manslaughter.

Mr. Purcell: If the indictment wasn't sufficient to charge murder, that would be correct and it—

Mr. Wilkinson: This certainly charges embezzlement.

The Court: It says there the acceptance was in thirty months and the other, the statute provides—

Mr. Wilkinson: Suppose we didn't know the date of the murder, Judge?

The Court: Well, that's true.

Mr. Wilkinson: Suppose the man was killed on today and we didn't find the body for three and four months?

Mr. Purcell: I might add on that, Judge, under a late Virginia case on it, it discusses this embezzlement question about a continuous act or acts and where there is a gap
page 25 } between the allegations or the evidence that if they are separate acts cannot be charged in a single indictment.

The Court: Well, what I'm going to do, Gentlemen, is at the present time, I'm going to overrule your motion with respect to ground number three and take under consideration that matter when the evidence is offered in this particular case. I would like to have your—I'm fairly familiar with embezzlement cases, but I don't know everything about them, I haven't given them much study and I'd like to have your authorities, if you'll give me—

Mr. Purcell: We have them here and I'll give them to you—

The Court: All right.

Mr. Purcell: Judge, may we respectfully object and except.

The Court: All right, sir.

Mr. Purcell: to the ruling.

* * * * *

page 30 }

* * * * *

The Clerk: Gentlemen, are you now prepared to go forward, Mr. Purcell? Mr. Wilkinson for the Commonwealth, you are prepared?

Mr. Wilkinson: Yes, sir.

The Clerk: *Commonwealth* v. *Elmer M. Challenor,* Mr. Challenor, will you stand, please.

Mr. Challenor, you stand indicted, in that within thirty months prior to the finding of this indictment, in the City of Richmond, Virginia, twenty-one thousand one hundred thirty-nine dollars and thirty-three cents of United States currency, of the United States currency, and property of the City of Richmond, Virginia, a muncipal corporation, you did then and there—then and there being found, you did then and

there unlawfully and feloniously steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia, how do you plead to this charge?

The Defendant: Not guilty.

The Clerk: Do you wish a jury trial?

The Defendant: Yes, sir.

* * * * *

page 32 }

* * * * *

J. R. WALLER, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

* * * * *

page 48 }

* * * * *

Q. All right. Now, I am going to hand you an envelope which includes certain items, I believe Mr. Williams and Mr. Purcell have seen these.

The Court: Mr. Williams, have you seen these?

page 49 } Mr. Williams: Is that dealing with the $18,000.-00 that we started out with?

Mr. Wilkinson: Yes, sir.

Mr. Williams: Your Honor please, we'd like to be heard.

The Court: All right, Gentlemen, you may retire to your room.

NOTE: At this time, the Jury retired from the Courtroom.

The Court: All right.

Mr. Williams: Your Honor please, when we argued the motion some while ago, we brought to Your Honor's attention

that they started out here with eighteen thousand and some dollars and they don't begin and he's not going to begin to testify when that money was taken, and the statute says it has to be taken within, I believe—within six

page 50 } months of each other, so we object to all the evidence as to that $18,000.00—he has no idea of when the money was taken. We object to any evidence coming in as to that and we thought that we were going to—in our other bill of particulars, we thought Your Honor would require them to give us details of when that money was taken, so we haven't as yet gotten any details of it at all. They started with an $18,000.00 shortage with no details as to when it occurred, when it was actually stolen.

The Court: The way we understand I thought that this was just an opening regardless—less—what is—

Mr. Williams: Well, if Your Honor please, here is what he is preparing to testify. We found that there was a cash shortage of $18,571.12 on January 30, 1965.

The Court: January 30th—

Mr. Williams: January 31, 1965. They said it was too expensive in this report, and he's going to testify to that, it was too expensive for them to go back and find out when that was actually taken.

* * * * *

page 62 }

* * * * *

Q. Yes, sir. I'm not an accountant and some of my questions may be confusing to you as some of the figures are confusing to me. We start off with an alleged shortage of $21,139.-33 as of May the 7th, 1965. Of that figure is included a sum of $18,571.12, which accumulated prior to February the 1st, 1965. Now, I'm trying to determine over what span of time the alleged $18,571.12 accumulated?

A. Between January the 18th and January the 31st of '65.

Q. Then that would not include the $11,434.63 which accumulated in December, '64?

A. No, the check for $11,434.63 was dated in December, but it is the item of January the 18th, '65.

Q. Then that item is reflected in these figures subsequently found by you?

A. The $11,000.00 item?

Q. Yes?

A. Yes.

Q. So do I understand correctly that of the total sum of $21,139.33, that $18,571.12 accumulated prior to February the 1st, 1965?

page 63 } A. That the total sum of $21,139.33—$18,571.12 was the amount of a shortage at January 31st. Now, those particular items were repaid or the customer given credit for them prior to April the 16th.

Q. In fact, all of those items were given credit to the customer in February of 1965, were they not?

A. Yes, that is correct, they were given credit in February.

Q. So this eighteen thousand plus item was credited to the proper customers during February of '65, and were the checks and payments, insofar as your records are concerned, that these customers were given credit for, were they deposited to the credit of the City of Richmond?

A. All of these checks were deposited to the credit of the City of Richmond.

Q. So the $18,571.12, the customers received credit for it—correct?

A. There were credits given but not on the day list.

Q. But credits were given for those amounts, and the City of Richmond actually received that $18,571.12?

A. on the dates that we show.

page 64 } Q. Yes. So we have the validation, plus the receipt by the City, of the sum of $18,571.12?

A. (No response is heard)

Q. Now, what teller received credit, or what teller was charged with the $18,571.12?

A. What teller was charged with it?

Q. What teller, well, one, two, three or four?

A. Teller No. 2.

Q. That was who?

A. Mr. Elmer Challenor.

Q. And the $18,571.12 that Mr. Challenor is charged with is included in the total of $21,139.33?

A. No, sir. It was not included in there because it has been—it was repaid.

Q. By who?

A. The validations were made on Mr. Challenor's tape.

Q. In other words, they were actually validated, but not on the date of receipt?

J. R. Waller

A. They were validated but not on the day that the check was used.

Q. Yes, sir, but the customer actually did receive credit for the payment?

page 65 } A. At some time considerably after the payment rather than at the time of the payment.

Q. And the City of Richmond actually received that amount of money?

A. This $18,000.00?

Q. Yes?

A. They did.

Q. Now, Mr. Challenor—pardon me, Mr. Waller, you mentioned that this $18,571.12, of course, accumulated prior to February the 1st, 1965, I believe—that's the same where we—Now, I will ask you one question and I believe I will be finished: This type of an examination as conducted by your office is quite a complicated examination, is it not?

A. Yes, it was rather *complcated* because of conditions.

Q. And it is a very expensive type of examination, is it not, sir?

A. It's expensive.

Q. And do I understand for that reason that because the examination was unusually difficult and because of the expense of extending the examination that it could not be justified prior to February the 1st, 1965?

A. I believe you are quoting something from my report.

page 66 } Q. I believe it is on page three, the last two lines in the next to the last paragraph.

A. Yes, that's right.

Q. That's correct, is it, sir?

A. It is on page three.

Q. The last three lines, next to the last paragraph—

The Court: He quotes it correctly, doesn't he?

A Voice: Oh, yes.

The Court: Well, that's what the question was.

* * * * *

page 81 } Mr. Wilkinson: That would be No. 3-D, I believe.

The Court: Yes.

J. R. Waller

Q. All right, sir, what is that?
A. This is a photo copy of a check from Strother Drug Company of Richmond, Incorporated. It's dated December 31, 1964 for $489.77, is payable to the Department of Public Utilities. The sheet attached is the copy—photo copy of the back of this same check showing endorsement January 25th, '65, Teller 2.

Mr. Wilkinson: Judge, we have the original check—

Q. Is that the same check?
A. Yes, it is the same check No. 4472.

Mr. Wilkinson: All right, sir, we'd make that 3-E.
The Court: All right.

Q. What else?
A. I have a photo copy of a check from Albemarle Paper Manufacturing Company.
Q. What is the amount of that?
A. $3,693.17, and it's check no. 79152.
Q. And what appears on the back of that?
page 82 } A. Endorsement stamp Teller 2, dated January 25th, 1965.

Mr. Wilkinson: We also have the original of this check, Your Honor, so we move to introduce this as 3-F.
Mr. Williams: If Your Honor please, I object to the witness saying endorsement, these things are not endorsed, they are just stamped with a rubber stamp, I object to him using the word endorsement.
The Court: Well, don't use that—just show the back of the thing shows endorsed.

Q. What is the next item?
A. This is a check from Cauthorne Paper Company, dated January 20th, '65 for $482.07 payable to City of Richmond, Department of Public Utilities.
Q. All right, sir, what day was that on?
A. January 25th, '65—it was stamped January 25th, '65, Teller 2.

* * * * *

J. R. Waller

page 127 }

* * * * *

A. I have a County of Henrico check dated February 12th for $37,806.62, payable to the City of Richmond, Department of Public Utilities, and stamped on the back February 26th, '65, Teller 2.

Q. Now, what does the County of Henrico send with their check, do they have more than one account, the County of Henrico in the City of Richmond?

A. Yes, they send a vendor's invoice which they prepare. With this check there were two vendor's invoices, one covered a gas account for $5.40 and the other for $37,801.22 covered several water accounts—six water accounts.

Q. How about explaining to us, you said a vendor's invoice, what do you mean by that?

A. This is an invoice which the County itself prepares from the bills that are given to them, the page 128 } utility bills and they make this up for their record.

Q. In other words, the City of Richmond wholesales to Henrico County water?

A. That's right.

Q. And in turn, the County of Henrico sells it to citizens in Henrico County?

A. That's right.

Q. All right, sir, now when they send the bill in to the City, they prepare this invoice themselves?

A. That's correct.

Q. And would you get over here in front of the Jury and show how this invoice is made up?

A. This is a small gas invoice, $5.40. It shows the consumption and the period.

Now, this is for the water and that is furnished wholesale and we have six items. Each of these items is a separate account on the books of the Department of Public Utilities, and these items total $37,801.22, and this amount, plus the $5.40, will equal $37,806.62, which is the amount of the Henrico check.

Q. All right, now, let me ask you this—now, was that full amount credited to Henrico County?

A. No, it was not credited on this date.

page 129 } Q. Was any part of it credited to Henrico

County on that day, which would be February 26th, '65?

A. Yes, the $5.40 was properly credited; $23,386.48 was also; so was $536.56; $3,318.74; and $661.36. Two items were not credited, one was for $7,098.00 and the other for $2,800.08.

Mr. Purcell: Mr. Wilkinson, I wonder if we can just ask two question to save some time.

Mr. Wilkinson: All right.

Mr. Purcell: Just two questions.

By Mr. Purcell:

Q. Was the $37,806.62 check actually cash and *depostited* to the credit of the City of Richmond?

A. It was credited—it was deposited to the credit of the City of Richmond.

Q. The City, of course, got that $37,806.62. One more question.

Mr. Wilkinson: Wait a minute, Mr. Purcell, let him answer that question.

Mr. Purcell: Oh, I thought he had.

A. The check was deposited—

Q. The check was cashed? Deposited to the credit of the City and the City received that money?

page 130 } A. This check was cashed and the difference between $37,806.62 was credited to the customer at that time and the $98.08—

Q. But the $37,806.62 was actually stamped to the credit of the Utility Department of the City of Richmond?

A. Yes, sir.

Q. So the City actually received that money from the County?

A. They actually got this check in the deposit.

Q. Got that money. One more question: was that before or after the $62,000.00 overcharge to the County which was later adjusted by the City and their bill was reduced by $62,000.00?

A. I'm not aware of the $62,000.00 overcharge, Mr. Purcell.

Q. Well, $62,—

A. There were some adjustments totaling about $62,000.00 which were charges to Henrico as, I believe, the result of a stopped meter.

J. R. Waller

Q. But they were allowed a $62,000.00 adjustment or credit?

A. Not a credit, no.

page 131 } Q. Adjustment?

A. They were charged with some $62,000.00—

Q. Their bill was reduced by $62,000.00?

A. I don't have any record or any recollection of a reduction of $62,000.00, I have a recollection of the charge—several adjustments totaling approximately $62,000.00, which were added to the Henrico account.

Q. But then they were allowed that adjustment or reduction?

A. I'm afraid that—

Q. They were allowed an adjustment—adjustment was made of $62,000.00?

A. It was a debit adjustment or an increase, Mr. Purcell.

Q. That's because the meters were out of order, I believe?

A. The meter was stopped and since there was no record of what the meter reading was, it was necessary to bill Henrico on an estimated basis and there were several adjustments which totaled some $62,000.00.

Q. That's all I have. Thank you, sir.

* * * * *

page 161 }

* * * * *

This is a check from the County of Henrico for $29,631.09, dated April 19th, 1965, and is stamped on the back April 27th, 1965, Teller 4. They are photo copies of two County of Henrico invoices, one for $3.25 and the other for $29,627.84, the total is the amount of the check.

Mr. Williams: If Your Honor please, I don't see that this has a thing in the world to do with this defendant—

Mr. Wilkinson: Well, if you will just wait a minute, Mr. Williams, we will show you.

The Court: I'll let it in subject to being connected with—

Q. Now, that invoice covered the check, do the invoices and the check total the same amount?

A. Yes, they do.

J. R. Waller

Q. Now, what else did you find in Teller 4? Was all of that money credited to the County of Henrico that they paid on that invoice there?

page 162 } A. No, it was not.

Q. Was any of it properly credited?

A. Yes, $21,139.33 was not credited, the difference was credited properly.

Q. That would be $8,491.76?

A. Whatever the difference is.

Q. All right, now, what did you find—where was the other money credited?

A. $209.68 was credited to two accounts of Friendship Baptist Church.

Q. And who—had the City received a check for that amount from Friendship Baptist Church prior to this?

A. Yes.

Q. And whose settlement was that check in?

A. The check was in the settlement of Teller 2 on April 13th, '65.

Q. All right, sir, what other stubs did you find?

A. Two stubs for C. E. Buchanan, trading as Buchanan Swift, one for $2.70 and one for $30.81, making a total of $33.51.

Q. And when was—was the check received

page 163 } by the City in payment of those?

A. Yes, it was in the cash settlement of Teller 2 on April 13th, '65.

Q. All right.

A. I have three stubs from Atlantic Bitulithic Company, totaling $162.86.

Q. Well, had the City received the check from those prior to this?

A. Yes, the check for that amount was in the settlement of Teller 2 on April 16th, 1965.

Q. All right, sir?

A. Two checks—two stubs from Terrace Hill Nursing Home, totaling $177.60.

Q. And was that—the check received for that amount prior to, or any time by the City?

A. Yes, the check for that amount was in the settlement of Teller 2 on April 16th.

Q. All right, sir?

A. Two stubs for Henrico County, one for $561.20, the other for $19,994.48, the total is $20,555.68.

J. R. Waller

Q. Had the City received the check for that amount?

A. In the settlement of Teller 2, on March 26th,
page 164 } there was a check from Henrico for $32,124.34, of which $20,555.68 was not credited to Henrico.

Q. All right.

A. And the $20,555.68 is the total of these two stubs.

Q. What was the total of all of those credits that are made to the accounts here on April 27th, 1965, Mr. Waller?

A. The total was twenty—to the accounts was $21,139.33, which is the amount that was not credited to the account of Henrico in the check of $29,631.09, which was in the work of April 27th.

Mr. Williams: I wonder for the sake of clarity, could I ask just one question at this point?

The Court: All right, sir, that's all right.

By Mr. Williams:

Q. For Teller 2, did the records indicate he did any work at all down there on April 27th, or do the records indicate he was absent?

A. The records do not indicate that he was absent at any time between January 1st, '65, and May 7th, '65,
page 165 } which was his last day at work. There is no validation tape or settlement for Teller 2 on April 27th, '65.

Q. Does the record indicate that he went to the doctor that day? I believe that—

Mr. Williams: Sorry to take this out of order, but I do think—

The Court: If it isn't confusing to the Commonwealth or the Jury, it's all right with the Court.

A. I do not see it on this leave record, Mr. Williams. Leave of less than four hours would not be posted to this. I think that I have a note in my report that he did have a physical examination, but I'm not sure of the date. Let me check that. (pause) Yes, on April 27th he had an appointment for a physical examination at three o'clock.

The Court: All right, Mr. Wilkinson.

J. R. Waller

By Mr. Wilkinson:

Q. Now, Mr. Waller, you testified there, does the record show that he missed any days during the date of this audit covered?

A. No, it does not.

Q. And on the 27th, he had a physical at three o'clock.

page 166 } A. That's—no, that is not shown by this record since leave of less than four hours is not posted.

Mr. Williams: Nothing was posted on Teller 2 for that day?

A. No, there was nothing on here from Teller 2 on that day.

* * * * *

page 173 }

* * * * *

By Mr. Wilkinson:

Q. Now, we are back, Mr. Waller, to the $21,139.33, how was this brought about to your attention?

A. We make an audit of the Department of Public Utilities and during the audit for the year that ended June 30th, 1966, I was examining the billing—some of the billing registers, going through those and noticing the balances in accounts, the condition of the billing register, and one of

page 174 } the accounts that I noticed was an account for Henrico County. This was an account for water delivered to Henrico at wholesale rates for re-sale. This account had a balance, as I recall, in the neighborhood of $200,000, which was very large. I inquired as to the reason. I was told that there had been a number of large adjustments, which aggregated some $62,000, to the account because of a stopped meter. It was, therefore, necessary to estimate the billing and these adjustments represented the estimated billing. I inquired from Mr. Weaver, who is Chief of the Billing and Collecting Division, if Henrico had agreed to these adjustments. He told me that they had not and, as the adjustments were made in the early part of the year that we were examining, I suggested—and were unpaid—I suggested that he contact Henrico and secure an agreement with them as to the amount of these adjustments and the amount that was due by Henrico. He later told me—

J. R. Waller

Mr. Williams: If Your Honor please, I object to—I hate to object but I don't think that's evidence, what he told him—

The Court: I don't think so either. All right.

Q. Well, what did you do?

The Court: As a result of what he told you, what did you do?

page 175 } A. As a result of this conversation, I examined some cash listings and photo copies of some cancelled checks and then made an investigation on which I rendered a report on March the 6th of this year.

Q. Did you discuss with the representative of Henrico County this particular $21,139.33?

A. Yes, I did.

Q. And who was the representative of Henrico County?

A. Dan Shreve.

Q. Did you examine the documents presented to you from Henrico County relative to the payment of their bill and cancelled checks?

A. Yes, we obtained photo copies of the can—of several cancelled checks and the accompanying invoices.

Q. And did you, on behalf of the City, and Mr. Shreve, on behalf of Henrico County, come to any agreed figure?

A. We came to an agreed figure of $21,139.33 as the amount by which the City had not credited Henrico County for payments which they could substantiate by cancelled checks or by a cancelled check.

page 176 } Q. Now, this adjustment they made, apparently, somewhere along the way, and yesterday was brought up as shortage or something of $62,000, could you explain that to the Court and the Gentlemen of the Jury?

Mr. Williams: If Your Honor please, I wonder if I could ask him just one question right along here for the purpose of clarity?

Mr. Wilkinson: Now, Judge, I think we ought to follow on—

The Court: Just a minute, I think so too, I think that the Commonwealth ought to be permitted to go through with their examination. Go ahead, Mr. Wilkinson.

A. There was some question yesterday as to whether these

adjustments were debits or credits to the account of Henrico. I have three adjustments, one for $39,248.32, which shows that it is an increase in accounts receivable; I have another adjustment, this one was dated July 26th, '65, this one is also dated July 26th, '65, and is for $32,409.50. That is also an increase in the accounts receivable. I have another adjustment dated September 22nd, '65 for $9,372.99. That is a decrease. The total of the two increases, minus the $9,372.99 decrease, is $62,284.83.

Q. Does Henrico County have more than one account with the City of Richmond, Department Public

page 177 } Utilities?

A. Yes.

Q. All right, was it or was it not unusual for Henrico County to run an arrears?

A. Run an arrears?

Q. Yes, sir?

A. No, it was not at all unusual for Henrico to run an arrears. The account customarily showed an arrears because of the method that Henrico used in checking the utility bills submitted by the City.

* * * * *

page 194 }

* * * * *

CROSS EXAMINATION

By Mr. Purcell:

* * * * *

Q. Mr. Waller, I believe you just stated that your audit covered a period from February the 20th—from February the 1st, 1965, until May the 7th, 1965, when you speak of audit that means that you examined the records during that period of time for the various credits received and validations made and so forth, is that correct on those?

A. Perhaps I should clarify that a little, Mr. Purcell. When we speak of an audit, we mean examination of accounts and records, in this case, of the Department as a whole. What we

have here is an investigation of a shortage, and
page 195 } the investigation covered the period from February the 1st to May the 7th.

Q. And did that investigation cover only Teller No. 2?

A. No, it did not, we made test checks of the other tellers' records sufficient to satisfy ourselves that there were no discrepancies in the accounts of those tellers.

Q. You said you made test checks, were those test checks as extensive as the check you made on Teller No. 2?

A. They were as extensive, Mr. Purcell, but they did not cover the same period. We examined the records of Teller 2 for every day, we did not examine the records of the other tellers for every day, but we examined a sufficient number to deter—to satisfy ourselves that there were no discrepancies in the records of the other tellers.

Q. Before the investigation, Mr. Waller, were you familiar with the procedures and the internal control in that particular office or department?

A. Mr. Purcell, I believe that I was familiar with what the procedures were supposed to be, there may have been variations from the procedures.

Q. Had you previously advised a change in
page 196 } various procedures in internal control in that office and in that department of utilities?

A. Are you speaking now of the period in 1965, Mr. Purcell?

Q. Well, prior—well, at that time and any time prior to that, had you made a recommendation that the internal control be tightened up and that various procedures be changed?

A. No, I do not recall that I had made recommendations, the procedures that were in force—the procedures that were supposed to be in force were sufficient to provide reasonable control.

Q. Well, you—do I understand you were satisfied with the internal control and the procedures in that office prior to this particular investigation?

A. I believe that in general I was satisfied with the procedures and the internal control as long as the procedures were carried out. Now, one of the procedures, of course, is that the processing of mail should be divorced entirely from the processing of cash.

Q. And that was the procedure in that office?

A. It developed that—that there had been exceptions to that procedure.

page 197 } Q. Who was the mail teller, what number
A. Ah—

Q. don't even have to tell me the name, just the number?

A. The machine was number four, and it was referred to as Teller 4, although several people have operated the machine.

Q. Then do I understand that as far as Teller 4, the mail window, was concerned that any of the tellers in the office could process mail?

A. It is—that is correct to this extent, that at various times when the person who did not—who ordinarily processed the mail was absent someone else would operate the machine and I believe that Mrs. Conley—Miss Conley, who was the cashier, made that assignment.

Q. Was a particular teller primarily assigned to the mail window?

A. Yes, there was.

Q. And do you know which teller?

A. Mr. Purcell, I don't believe we should say the mail window, but to the mail machine.

Q. Well, the mail machine, thank you?

A. because it wasn't at the window.

page 198 } Q. Was any particular window primarily assigned to the mail machine?

A. Yes.

Q. And which teller was that?

A. That was Mrs. Ivey.

Q. Now, I believe you said that at times other tellers also worked the mail machine?

A. Yes,

* * * * *

page 204 }

* * * * *

Q. Now, when various tellers were absent from their windows, with the proper internal control and where proper procedure is being followed when their machines were exposed and unlocked with case, checks and tapes in the machine laying on the desk, in the drawers, and so forth being left—

A. Mr. Purcell, I'm not aware that such a condition existed, I believe that the Supervisor in the office should be asked that.

J. R. Waller

Q. As an expert witness, Mr. Waller, would you consider that proper internal control and proper procedure?

A. I would never consider it proper procedure for money to be left lying around when the money was in the custody of someone else and—or some individual was responsible, I would never consider it proper for him to walk off and leave the money.

Q. Then I understand that it would be improper internal control and procedure for those records and
page 205 } money and checks to be laying around as described and accessible to others, would it not?

A. Mr. Purcell, if that happened your teller or cashier was very lax and I'm not aware that this—I'm not aware that this happened—

Q. Well, I'm really asking you as an expert witness on an assumption of facts?

A. Let's try again on that one.

Q. As an expert witness, Mr. Waller, which you have qualified as such, and we admit your qualifications, would it be proper internal control or proper procedure for a teller in one of the windows in this particular office to leave his machine and be absent and when, in his absence, his machine is unlocked, tapes are in it, cash, checks and other records are laying on the desk near the machine, some in the drawer, some on the outside and accessible to others?

A. I don't believe that that is a matter of internal control or procedure, if that existed I'd say that it was due to the stupidity of the teller.

Q. Assuming that the teller was stupid, as you mentioned, would his stupidity leave him wide open and at the mercy of other people that were accessible to that window to take the funds?

A. If he were that stupid, probably.

page 206 } Q. We would have a case of incompetency here instead of a defalcation, wouldn't we?

A. No, sir, we would have both, I believe.

* * * * *

page 211 }

* * * * *

Q. I believe Mr. Challenor left that job on May the 7, '65, did he not?

A. May the 7th, '65, was his last working day.

Q. And I believe immediately thereafter his records were checked, were they not, by your Department?

A. We made an audit, Mr. Purcell, of the Department of Public Utilities for the year that ended June the

page 212 } 30th, 1965. That encompassed a great deal more than a check or an investigation of the tellers. We did not discover the shortage in that audit.

Q. And was that in June, '66 or '65? I believe it was '65—he left in May, '65?

A. He left in May, '65, now, we made an audit for the year that ended June 30th, '65, and—

Q. In that audit, Mr. Waller, were his records checked?

A. We checked the total cash receipts as recorded and compared those with the credits to customers' accounts and to other accounts, we did not make the type of investigation that we made for the period from February the 1st to May the 7th.

Q. Did Challenor's records come out clean and accurate on June the 30th, '65?

A. We had no evidence of a shortage, I wouldn't—we did not discover the shortage.

Q. Were his records checked in the June 30, 1966, audit also?

A. During the course of the audit for the year ending June the 30th, '66, matters were discovered which have been discussed here and the investigation resulted from that audit.

Q. Now, that audit was different from

page 213 } the previous audit of June 30th, '65, was it not?

A. I do not know that there was any material difference in the two audits, we simply found—we noticed the two hundred thousand dollar, some such amount, in Henrico in the '66 audit.

* * * * *

page 218 }

* * * * *

Q. Assuming, Mr. Waller, that the checks and

page 219 } the monies were put in the little tin boxes by the various tellers and put in the safe, and that the keys to the metal boxes were kept in unlocked open drawers

in the various teller windows, would that be proper internal control?

A. Again, I don't know that it's a matter of the control, it's a case of the teller not exercising proper responsibility for the funds under his control, Mr. Purcell. If he is going to walk away and leave the box unlocked or leave the key where someone can get it, it seems to me that the teller has the responsibility to see that no one has the opportunity to gain access to his cash.

Q. Assuming that all tellers did that and put the little boxes in the safe and at least three tellers had the combination or key to the safe, would your answer be the same as to all tellers?

A. That I don't know—yes, that would be my answer for one teller or all tellers, that they were not exercising proper control of the funds for which they were responsible.

Q. And if that system or procedure or so-called internal control or lack of control was permitted by the supervisor, whose responsibility would that be?

A. Of course, if conditions were permitted by the supervisor that should not have existed it would

page 220 } be the supervisor's responsibility,

Q. That condition—

A. however, I'm not aware that some of these conditions existed, Mr. Purcell.

Q. But assuming that they did exist, these would be your answers? Now, assume that that condition existed, then at least three people would have access to all of these funds, would they not?

A. If there were three people that had the combination to the safe and there were three people that had keys or access to the keys to the three boxes, then obviously they would have access, provided that they could gain admittance to the building.

Q. And did your investigation also disclose, Mr. Waller, that the door to this particular office was seldom, if ever, locked, even at night?

A. No, it did not disclose that, Mr. Purcell—the door to the building?

Q. Yes, to this office where the teller windows are located?

A. The room?

Q. Yes, sir, room?

A. My recollection is that locks were placed—

page 221 } were not placed on the doors to that room until

fairly recently, however, the street door was locked.

Q. And anybody that got in the building could go in and out of that office each night?

* * * * *

page 224 }

* * * * *

Q. Now, since Mr. Challenor left that office in May of '65, I believe your Department has made other
page 225 } checks in that Department, has it not?

A. In—

Q. The Utility Department?

A. We are presently engaged in an audit for the year ended —or which will end June the 30th, '67.

Q. Is it true, Mr. Challenor, oh, pardon me, Mr. Waller, in May of 1967, two years after Mr. Challenor left that Department that a shortage of four thousand three hundred and seven dollars has been found in that very same Utility Department?

Mr. Wilkinson: We will admit, Your Honor, that there was a theft in the safe of four thousand three hundred and whatever—

The Court: All right, well let him answer the question.

Mr. Wilkinson: I don't know if he's familiar with it.

A. I am aware of it—yes, four thousand three hundred and seven dollars was removed from the safe on the night of May the 11th.

The Court: Nineteen and what?

A. 1967.

The Court: All right.

page 226 } Q. Did your investigation show that there was was no breaking in that safe?

Mr. Wilkinson: Let's ask him first, Mr. Purcell, if he investigated.

Q. Well, did you—

Mr. Wilkinson: The Police Department investigated.

A. No, I did not investigate that, it was a theft from the safe and was not a subject for investigation by me.

Q. Did the Police Department find out the shortage before the Auditing Department or vice versa?

A. This four thousand three hundred and seven dollar theft was found by an Acting Cashier when the safe was opened on the morning of May the 12th, and that was reported to their supervisor, or to her supervisor, and eventually to the Chief of the Administrative Bureau. The Chief of that Bureau called me and informed me of what had happened.

Q. Then obviously the safe was not broken?

A. That is correct, the safe was not broken.

* * * * *

page 227 }

* * * * *

page 228 } Q. Now, since Mr. Challenor—I believe he was transferred and given a promotion on May the 7th, '65, was he not, sir?

A. Yes, Mr. Challenor was transferred to the Richmond Nursing Home and assumed his duties there on May the 10th, '65, as an office manager.

Q. That was a promotion, I take it?

A. Yes, it was a substantial promotion.

Q. Now, were his records checked out there?

A. We made an audit of the Department of Public Welfare and we checked the records of the Richmond Nursing Home at the time.

Q. Did he come out clean and accurate then?

A. We found no shortage that we could attribute to Mr. Challenor at that time.

* * * * *

page 245 }

* * * * *

Q. Mr. Waller, going back in your records account, let me ask you when did this alleged lapping begin?

J. R. Waller

A. Mr. Purcell, I doubt that anyone at this time can determine when it began. The first evidence that we have is on January the 18th, '65.

Q. And that was the date of the check for $11,434.63 from General Shale Products Corporation?

A. That's correct.

Q. And you said it could have gone on prior to that time?

A. Yes.

Q. And for how long prior?

A. Mr. Challenor came to work on—well, I could not say how long prior.

Q. I think he came to work in December of 1960?

A. That's my understanding.

page 246 } Q. It could have started back before then?

A. No.

Q. Could it have started as late as January, '61 or as early as January, '61?

A. That would be conjecture, Mr. Purcell.

Q. Then as to when the lapping first began, we would have to use conjecture to determine when it first began, would we not?

A. Yes, to determine when it began, the first evidence that we have is of January the 18th, '65.

Q. It could have been back as far as 1960, couldn't it, sir?

A. It is possible.

Q. In other words, that would—that could extend it back as far as, say, five years approximately?

A. Yes.

Q. And we have no way of telling?

A. No, we have no way of telling when it began.

* * * * *

page 247 }

* * * * *

Q. When did the $11,434.63 item, when was that taken out of the assets of the City of Richmond?

A. A portion of it, Mr. Purcell, could have been taken on January the 18th, it is an accumulation at that point.

Q. Would that be by conjecture again, sir?

A. I have no facts to support that that have not been introduced—

Q. This is just surmise or by conjecture, is that correct, sir?

A. That is correct.

page 248 } Q. Now, would that also apply—it's on page four, on the bottom—if I asked you the same questions, referring to the additional six items on page four and the top of page five of your report, would your answers be the same?

A. Yes, I think that my answer would necessarily be the same, that we have no means of determining when the actual cash represented by these seven items left the City Treasurer.

Q. What is the total of those items?

A. $18,571.12.

Q. Who—do you know who in the office handled the daily bank deposits?

A. Miss Conley handled the deposits.

Q. Did your investigation disclose, Mr. Waller, that at times—the processing of the mail payments at times was behind as much as two weeks?

A. No, sir, it did not.

Q. You did not find that?

A. No, not as much as two weeks.

Q. How far did you find the payments were late in being processed?

A. We found that—on one occasion I recall four days late in opening the mail. There may have

page 249 } been others—other occasions in which it may have been longer, but four days is my recollection.

Q. The fact that the mail was opened four days late, would that necessarily mean they would be processed within four days or could it have been longer?

A. No, it would not necessarily mean that if it were four days late in being opened it might be processed on the fifth day.

Q. I see. Did your investigation show that—I believe you have already testified—that Mr. Challenor's window had processed more of the payments than the other windows, did your investigation also show that on many occasions that other tellers had to help Mr. Challenor in adding up his tapes and processing his work?

* * * * *

Mary Conley

page 282 } MARY CONLEY, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

Q. Would you please state your name and occupation to the Court and Gentlemen of the Jury?

A. Mary Conley, Cashier, Department of Public Utilities.

Q. How long have you been with the City?

A. Seventeen years.

Q. Are you still with the Department of Public Utilities?

A. Yes.

Q. How long have you been with the Department of Public Utilities?

A. All of the seventeen years except about a year.

Q. And what was your position with the Department of Public Utilities?

A. Cashier.

page 283 } Q. Over what department, I mean whereabouts, you say cashier?

A. The Teller Section.

Q. Did the defendant work in that Section?

A. Yes, he did.

Q. And from what years were you cashier, and I believe now recently you have changed positions with the City?

A. From, I think, '51 up to January of this year.

Q. All right, at any time did the defendant work as a teller in your particular department?

A. Yes.

Q. And how many employees were under you as cashier?

A. Seven.

Q. Would that include the defendant in those seven?

A. Yes.

* * * * *

page 285 }

* * * * *

Q. And I believe—now, as far as the internal control of the office, what,—suppose the teller went to lunch, what was he to do with his money and stubs?

Mary Conley

A. He was to lock it until his return.

Q. Would he lock it in the drawer or exactly what would he do, where would he lock it?

A. Well, we had a metal box in which the cash was put away. The stubs, checks and all documents would

page 286 } be locked.

Q. In the metal box?

A. In the box.

Q. And where would that box be kept?

A. It would be kept at his counter under his counter.

Q. Was it put in the safe during the day?

A. No.

Q. Who had the keys to this—to the lockbox that the teller would use?

A. The teller.

Q. Were there any other keys in existence?

A. I had a key which could be used, if necessary.

Q. And where did you keep this key?

A. I kept them hidden away in a—my desk.

Q. Did anyone else know where they were?

A. No.

* * * * *

page 294 }

* * * * *

CROSS EXAMINATION

By Mr. Purcell:

Q. Mrs. Conley, I believe you stated that at times the various tellers in the office would help others to process some of the payments?

A. Yes.

Q. When one teller would help another teller to process his or her payments, whose stamp or signature would be used on those processed payments?

page 295 } A. Anything done by a teller was done on their own machine.

Q. And anyone who helped them would be using that machine and that stamp?

A. Well, now, I don't know exactly what you mean by helping?

Mary Conley

Q. Well, at time—I believe at times your office would get rushed at time for settlement and so forth?

A. Not to settle.

Q. Well, it would get rushed at times?

A. At times on account of mail.

Q. I see and at that time, you would have to transfer one teller from his job to another job, would you not?

A. Yes.

Q. Now, if you transferred one teller from his job to another job, would he or someone else sign all the papers in that job or put a stamp on it?

A. Well, the kind of help that they might be doing, possibly, would be preparing the mail for validation, which is not stamped until after it's validated.

Q. Would they help to add up some of the items at times?

page 296 } A. You mean items like checks?

Q. Yes?

A. Not usually.

Q. At times would they?

A. At times if a teller was rushed, maybe they were out, say, ten dollars, they might ask somebody, they'd run their checks and say verify this for me, see if you get the same total.

Q. Now, when they verified those, did they handle the checks when they verified those things?

A. Well, they couldn't verify them without handling them.

Q. So the helper would have to handle the checks to verify them.

A. Yes, you'd have to look at the checks.

* * * * *

page 308 }

* * * * *

Q. Yessum, and so if they got the key to the box anybody could open the box, I'm not trying to be facetious, but I just want to go through these steps?

A. Oh, yes, if they had the key, of course, they could open the box.

Q. Open the box, they could take out the cash or the checks?

A. Yes.

Mary Conley

Q. And wasn't it customary for the tellers just to keep their keys loosely in the open—unlocked drawer?

A. I think they did.

page 309 } Q. So, really, the key didn't—wasn't too much security, was it?

A. Well, yes, it was.

Q. But the keys were usually left right in the unlocked drawer?

A. Yes.

Q. And everybody in the office knew that?

A. I don't know about everybody, but most people—

Q. It was fairly generally known that the keys were always kept in the unlocked drawer in the little desk in a little table?

A. Yes.

Q. And the box was left on the top?

A. During lunch period.

Q. Yes, ma'm. Now, at nighttime, after the settlements were made, each teller would put their work—what would they put into the little box after they lock up at night?

A. They would put all of their cash items, everything that was validated, all the checks, all the coin, all the currency.

Q. And they would lock the box?

page 310 } A. That's right.

Q. And put the key where, back in the little drawer?

A. Yes.

Q. In the unlocked drawer?

A. Yes.

Q. And then after all that was done, they closed the safe?

A. Yes.

Q. All right, now many people had the combination to the safe?

A. I believe at that time about three, outside of Mr. Weaver.

Q Outside of who?

A. Mr. Weaver.

Q. And in addition to Mr. Weaver, who had the combination?

A. I think Mr. Challenor, Mr. Jones and Mrs. Ivey and myself.

Q. It would be five altogether, wouldn't it?

A. I think that's right.

Q. And who is Mr. Weaver?

page 311 } A. Mr. Weaver is the Chief of the Customer Relations Section, my immediate supervisor at the time.

Mary Conley

Q. He worked in the same office?
A. Well, in Utilities, yes.
Q. Now, I don't believe this office had a lock on the door, did it?
A. On the outside doors, yes.
Q. You mean the outside door of the building?
A. The buildings.
Q. But inside the building, this office was a separate office, was it not?
A. Yes.
Q. Did that door to the separate office have a lock on it?
A. No, there were no keys.

* * * * *

page 314 }

* * * * *

The Court: Mrs. Conley, I believe you were testifying.

Q. I believe Mr. Challenor left your office on May the 7th of '65?
A. Yes.
Q. And did he leave for a promotion
A. Yes, it was.
Q. that he voluntarily applied for?
A. Yes.

* * * * *

page 322 }

* * * * *

RECROSS EXAMINATION

By Mr. Purcell:
Q. I have one more question, if I may, Mr. Challenor left that office on May the 7th, 1965, that's correct, I believe, is it not, and I believe there was a complete audit made of your office on June the 30th, '65, which checked out all right,
A. Yes.
Q. is that correct? And in that audit his records were checked completely?

A. Well, I wouldn't be in a position to say anything about the audit, 'cause I don't know anything about that.

Q. But your office was audited?

A. The cash—

Q. On June the 30th, '65?

A. The cash was counted, the cash and the pay-

page 323 } ments—

Q. Your office got a clean bill of health?

A. Yes.

Q. And his records were included in the audit?

A. Yes.

Q. That's all, ma'm

* * * * *

page 327 } DANIEL SHREVE, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

Q. Will you please state your name and occupation to the Court and the Gentlemen of the Jury?

A. My name is Dan Shreve, I'm Utility Auditor for Henrico County Utility Department.

* * * * *

page 331 }

* * * * *

CROSS EXAMINATION

By Mr. Williams:

Q. Mr. Shreve, you said you noticed that the City was sending you an awful large bill around January of this year, is that correct?

A. Yes.

Q. Well, why didn't you notice that they were sending you a rather large bill of January of last year?

A. Well, generally speaking, I am not concerned necessarily with the past-due portion of the bill, I am only concerned with

Daniel Shreve

the current amount because in the past this has just been more or less in transit.

page 332 } Q. Why did you get so concerned about this one in January of '67, when they testified that this thing occurred, if it did, in April of '65?

A. I just didn't notice it.

Q. You didn't notice it at all?

A. No, sir.

Q. The City and the County have been feuding over who owes what right many years over these water bills, haven't they?

A. Not the water bills as such, perhaps rates, but not—

Q. Well, have you got it all straight now, right as of today, are you straight, do you know what you owe the City or what you don't owe them?

A. Yes.

* * * * *

page 333 }

* * * * *

Mr. Williams: I take it back.

Q. Suppose I—would you change your testimony if I told you that Mr. Waller said that he gave you some credits and you gave him some credits?

page 334 } A. Well, what the situation was, the total bill amounted to approximately $71,000.00. We got with the City and agreed on a net payment of somewhere around sixty-some thousand, the credit was taken sometime ago, but the—but the seventy-one thousand dollars had not been paid until just recently.

Q. And even with all that and the twenty-one thousand alleged shortage existing since May 7th, '65, and you were down there, that didn't arouse your suspicion at all?

A. Well, I knew that it was approximately sixty-some thousand, yes, sir, but—

Q. You didn't know about this?

A. but when the total amount of the arrears amounted to somewhere around a hundred and sixty-some thousand and then that's when I began to investigate.

Q. A hundred and sixty-some thousand?

A. Yes, sir.

Daniel Shreve

* * * * *

page 335 } REDIRECT EXAMINATION

By Mr. Wilkinson:

Q. Now, you said something about the—you are not primarily concerned with the arrears, what do you mean by that?

A. Well, what I meant by that is that the process of payments in transfer has always occurred because there is about a month or perhaps in some cases two months lapse between the time that we receive the bills and they are credited by the City, and so there is always a fairly large balance of arrears in our bills, and so when we get the bills, we are just concerned with the current amount.

Q. Uh, huh, and it—but this had gotten so large that you were concerned?

A. Yes.

Q. Why is it arrearage run—the County and the City, why is it an arrearage?

A. Why is there arrears?

Q. Uh, huh?

A. Because there are payments in transit.

Q. In other words, the check—do you all re-check the amount of the City charge by the amount of water that you all send?

page 336 } A. Yes, we do this as best as we possibly can, there's always a certain amount of water lossage due to fires and due to breaks and this nature, but we—we try to determine the bill as accurately as we can.

Q. Would that appear to be one reason why the arrearage doesn't particularly bother you?

A. Oh, no, no, that wouldn't have any effect.

Q. All right. Let me ask you, do you have more than one account with the City?

A. Yes.

Q. Approximately how many accounts?

A. Six accounts.

Q. Six accounts?

A. Yes.

Q. All right, sir.

* * * * *

page 390 }

* * * * *

RICHARD M. JONES, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Purcell:

Q. Please state your name, age and occupation, please, sir?

A. Richard M. Jones, 37, 7515 Westfield Road, and Collection Agent with the City Tax Office.

Q. Mr. Jones, were you at any time connected with the Department of Public Utilities here in Richmond?

A. Yes, sir.

Q. And over what period of time?

page 391 } A. From September, '58 until March of '65.

Q. During that period of time, did you have occasion to work practically every day in that office with Mr. Challenor?

Q. Mr. Challenor came to work later on, I forget the year.

Q. But from the time he came into the office,

A. Yes, sir.

Q. would it be about 1960?

A. About sixty, I believe.

Q. And during that period of time you had almost daily contact with him?

A. Yes, sir.

Q. And you are familiar with him?

A. Yes, sir.

Q. And you are familiar with the people who knew him?

A. Yes, sir.

Q. What is his reputation among those people for being a person of honesty, integrity and being a law-abiding person and citizen?

A. He was very well liked and got along

page 392 } with everybody.

Q. And what was his reputation for honesty, integrity as being a law-abiding citizen?

A. Very good, sir.

Q. All right, and what was his reputation for truth and veracity, a man that will tell the truth no matter what?

A. Very good.

Richard M. Jones

* * * * *

page 400 }

* * * * *

Q. Now, these little windows, each man, teller one, two and three, and the mail teller had a window, I believe, did they not?

A. Yes, sir.

Q. And were these windows, are these tellers, did they have separate little offices or did all work just along together there?

A. They just worked together.

Q. And each teller's window was accessible by not only people in the office but accessible by anybody that might be in the office, is that correct?

A. Yes, sir.

Q. And anyone could come in or go out at will?

A. (No response is heard)

Q. And in each one of those teller's windows, the teller's stamp would be there, rubber stamp, wasn't it?

A. Yes, sir.

page 401 } Q. And his checks would be there, wouldn't they?

A. Yes, sir.

Q. And his cash would be there, would it not?

A. Yes, sir.

Q. And he had a little drawer, I believe, there—was it a table or a desk that each little window had?

A. Well, it was just a cash drawer.

Q. Cash drawer?

A. that pulled out.

Q. And that's where he kept the money?

A. Yes, sir.

Q. And at times the checks would be piled up on this little table or counter, I believe, would they not?

A. (No response is heard)

Q. And at time the vouchers would be piled up in another pile?

A. Yes, sir.

Q. And that would occur in all of these windows there, one, two, three and four?

Richard M. Jones

A. That's right.

page 402 } Q. And at time that various tellers would come in and out to help each other to balance their checks and their vouchers and their cash?

A. That's right.

Q. It was all—in other words, it was sort of an over-all operation, unified operation, was it not, sir, everybody worked together?

A. Yes, sir.

Q. Now, each little window had a little drawer, I believe, did it not?

A. That's right.

Q. And each teller had a little tin box?

A. Yes, sir.

Q. And that little box was kept where during the day?

A. During the day it was kept in the cage in the office.

Q. On the little table or desk?

A. On the table down below.

Q. And then at night what was done with the little box?

A. It was locked and put in the vault for the night.

Q. And where would the key—would each teller have a key to his little individual tin box?

page 403 } A. Yes, sir.

Q. And where would that teller keep the key?

A. They usually kept them in the—in the empty cash drawer in case the cashier needed to open the box, if they were absent.

Q. I see, in other words, each key from each teller from each box was kept in the little cash drawer, was that locked?

A. No, sir, I don't believe it was.

Q. And all the tellers and everybody in the office knew that if it was necessary to get into the cash box or little tin box of another teller that they could get the key from the little cash drawer,

A. That's right.

Q. which was there? And then in the evening when the settlements were made and each teller deposited his little tin box, then it was put in the safe?

A. That's right.

Q. And the safe was closed about what time?

A. About—soon after five o'clock.

Q. All right, and then, I believe, five or six people had the combination to the safe?

page 404 } A. Yes, sir.

Richard M. Jones

Q. And was the safe combination written down or just—did these people have it by memory,
A. It was
Q. or did you all have it written down?
A. written down.
Q. And where were the written combinations kept?
A. Well, I think it was only one written combination
Q. And—
A. and Miss Conley had that, but she told us—
Q. I see,
A. if we needed to know it she would get the combination.
Q. I see, and where was the written combination kept, do you know?
A. Miss Conley kept it, I'm not—
Q. And I believe she also had a master key to the little tin boxes, did she not?
A. Well, she had a key, I guess that she used the same key
Q. I see.
page 405 } A. that each teller used.
Q. Now, the office that we speak of, Mr. Jones, from February the 1st, of '65, 'til May—until the present time, is that located in the Annex, old City Annex?
A. Yes, sir.
Q. Do you know when they moved out of the old Home Beneficial Building?
A. I believe it was August of '64, but I'm not sure of that.
Q. Were you working there when they moved out?
A. Yes, sir.
Q. When they moved out they transferred all the records from that office to this office, didn't they?
A. Yes, sir.
Q. It was quite a mixup at that time, wasn't it?
A. We had to get straight.
Q. Huh?
A. We had to straighten things out.
Q. Things were right mixed up and confused when they moved from the old Home Beneficial over here to this office and set up an entirely new office?
page 406 } A. Yes, sir.
Q. And they had different help in straightening out some of the records at that time, I believe, did you not?
A. Well, we had to put things in a new place.

* * * * *

page 449 }

* * * * *

PERCY M. SMITH, JUNIOR, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

page 450 } Q. Mr. Smith, tell the Jury your name and your age, and your residence and your occupation?

A. My name is Percy M. Smith, Jr., I'm fifty-nine years old, I live at 308 Charmain Road, and I'm Vice-President of Southern Title Insurance Corporation.

Q. Are you a certified public accountant?

A. Yes, sir.

Q. How long have you been a certified public accountant?

A. Since 1931.

Q. How long have you practiced accounting, say, on your own?

A. Twenty-one years for myself and seven or eight years for other people.

Q. And what was your firm's name when you were an accountant, what was the name—

A. I was with the firm of Mitchell, Wiggins and Smith, I subsequently practiced under the name of Percy M. Smith, Jr., and Brydon, McRae and Smith.

Q. And when did you give up that and go with the Southern Title?

A. January the 23rd, I severed my connection with Brydon, McRae and Smith on December 31, 1966.

* * * * *

page 451 }

* * * * *

Q. You have heard the testimony of Mr. Waller and Miss Conley on Monday and Tuesday, is that right, Mr. Smith?

A. Yes, sir.

Q. I'd like for you to express your opinion on this question,

whether or not someone else having access to these records and to the mail could have did this lapping and the defendant do what you've heard they said he did here and not know about?

Mr. Wilkinson: Your Honor, we object to the question, it is a hypothetical question, and the sole issue to be determined by the Jury, an expert witness cannot testify as to facts, invade the province of the Jury, and we cite as
page 452 } our authority *Webb* v. *Commonwealth,* 204 page 24.

The Court: What have you got to say, Mr.—

Mr. Williams: Your Honor please, certainly this expert witness can testify that—in defense of this man that other people—he doesn't say that this—he's not going to say that this man did or didn't do it, he's going to say that other people, he's going to tell the Jury that other people, from the evidence here, could have done it.

The Court: Well, Mr. Williams, that's true of most anything that—is the witness to be just conjecture or guess as to how this matter took place?

Mr. Williams: He's heard the evidence here, I'm asking him from hearing—from hearing the evidence to give—tell this Jury whether or not someone handling the checks and having equal opportunity to do this, could have done it.

By the Court:

page 453 } Q. As an accountant, are you in a position to answer that as an accountant?

A. I think I am, Judge.

Q. I say as an accountant from what you have heard, are you in a position to tell the Jury that there's a possibility that this could have been done by someone else?

A. Yes, sir.

Q. All right, sir, go ahead and answer.

By Mr. Williams:

Q. All right, go ahead and tell the Jury.

A. Excuse me, will you rephrase your question, I've forgotten exactly what you asked?

Q. Well, I'm asking the *Jury*—from what you heard here, is there a possibility of anyone having access to the mails and having access to the other records could have done it and if you say yes, explain it to them how they could have done it?

A. The answer, from the testimony which I have heard, is yes. The mail—I believe the process of lapping has been poorly explained to the Court and to the Jury. A person handling the mail or any other documents that were turned over to a window teller would have had exactly page 454 } the same opportunity to lap to the window teller that the window teller had to lap to the head teller, with the added advantage that at no point would any identifying mark appear on any document to show that the person who turned the work over to the window teller had handled that document.

Q. That's all, witness with you.

CROSS EXAMINATION

By Mr. Wilkinson:

Q. Well, now, Mr. Smith that's purely a surmise on your part?

A. From experience and training.

Q. I'm not talking about experience, I'm talking about in this case that's purely surmise on your part?

A. As to the opportunity it's not a surmise, sir, the opportunity would be a fact.

* * * * *

page 467 } ELMER M. CHALLENOR, the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

* * * * *

Q. When did you start working for the City of Richmond?

A. I've had split service, the last time I went back December, '60, 1960.

Q. And when did you work in Utilities Department, worked from December, '60 up until what time?

A. Four and half years, approximately, this time.

Q. And when did you leave Utilities?

A. Last working day was May 7, '65.

Q. And where did you go from there?

Elmer M. Challenor

A. Promotion to a better job with the Richmond Nursing Home.

page 468 } Q. How much were you paid at the Utilities?

A. When I left I believe it was eighty dollars a week.

Q. And how much did you get at your present job?

A. I'm not positive, in my own mind I can remember approximately a sixty-five percent increase, which I think would have made it around a hundred and—I don't know—thirty seven or forty dollars.

Q. Did you leave Utilities of your own accord—

A. Let me answer if I may please, because I started to say something else. I left on my own accord and not being facetious and I don't mean to be rude, I tried to leave from the very first moment I was eligible to leave, meaning after six—after six months on the job I applied for better positions and I was not successful in getting them, but I did leave on my own.

Q. How many times did you try to get a better job when you worked over there?

A. I would have to say I took at least four competitive exams in this approximately four year period.

* * * * *

page 476 }

* * * * *

Q. Have you ever been arrested for anything in your whole life?

A. No, sir.

Q. I don't believe you were arrested in this case—I mean, don't go into—

A. I don't want to go into detail,

Q. You were not arrested?

A. but I was not arrested.

Q. Have you ever stolen anything in your life?

A. Mr. Williams,—

Q. City of Richmond or anybody else?

A. this is something that I thought would be asked of me.

page 477 } I'm going to answer you now, I want to elaborate, if I may, no, I have never. I want to sit before this Court and in the presence of Almighty God, I did not do this, no, sir.

Q. You tell the Jury that you haven't stolen anything?

A. No, sir, if, as the—I'm not a man of words, if, as the allegations say this was done, and if it was done through my work, it was done by someone else, not me.

* * * * *

page 481 }

* * * * *

ELMER M. CHALLENOR, being recalled, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

* * * * *

page 484 }

* * * * *

A. When we moved the the new—no, sir, to answer you, there was no cage—when we moved to the new location I think most of us were surprised in that they bought the old counter with them. At the old location it was an L-shaped counter, so the workers got in there on the, I believe it was a week-end, and split it and brought it down and straightened it out to one continuous line. If you approached the counter, it had a little—the top was here and had a little shelf here, and bars, a line of something like four bars down the complete top. What I'm trying to say is, if you walked in there and presuming there was no one standing directly behind the counter, you wouldn't know where the window was, so that from the outside there was no separation as to the—

page 485 } Q. All you all worked just side by side?

A. We—not going into distances, three of us were confined, I would say, approximately one-third on the length of the thing. In other words, if it was as long as this table, three of us were at one end in a third of that section, pretty close, there was no separation, no more than the black

counter that you worked on had a board to that extent, but it didn't come out, there was no such thing as a door or a cage or what have you.

* * * * *

page 486 }

* * * * *

Q. So while you went to the rest room or to the lunch anybody could have run anything they wanted on your machine, couldn't they?

A. Yes, sir, there was opportunity. To tell you how close we were—now, I am in no way accusing anybody of anything—but my cash drawer was on one side and the teller next to me, her cash drawer was next to mine on the opposite side of her body, which would leave them just a few inches apart. I could have reached over in her drawer and taken money out, I mean as far as the physical doing and she could have done the same thing. We worked elbow to elbow.

Q. Elbow to elbow?

A. Yes, sir.

Q. All right, now, let me ask you this, what about your cash, where did you keep your cash during the day that you took in?

page 487 } A. We had each one hundred and fifty dollar reserve assigned to each teller, excepting, of course, the mail teller, but I believe Miss Conley had one and the other four—other three tellers. You would work during the day and, of course, depending on how busy you were, if your money start piling up, we'll just say, twenty dollar bills, ten dollars or fives, you would, if it was convenient, try to band them and throw them in your box because it would overflow to the floor, or if you didn't have quite that much trouble, I mean, time, you'd try to count it one time and put a rubber band on it, so anything—well, it could have been a couple of thousand dollars, we'll say, in a drawer but we try as best to throw bundled money into the box, which was in relation to it on the floor or on the lower part of the table next us.

Q. What would happen to your cash box when you went to the restroom or went to lunch?

A. Just sit there.

Q. Was it locked?

Elmer M. Challenor

A. No, sir.
Q. Did you ever lock it?
A. I don't recall in my life ever locking mine.
Q. Just set there while you went—all the times you were out?
page 488 } A. Yes, sir.

* * * * *

page 491 }

* * * * *

Q. Now, where is one of those checks—This is stamped paid, I believe, Teller 2, isn't it, or credit Teller 2, that's just a manual stamp, isn't it?
A. This is just a rubber—
Q. Rubber stamp. Where was that rubber stamp kept while you had breaks and went to lunch?
page 492 } A. Well, all the tellers just left them on top of the desk, either lying on top of the ink pad or lying beside it.
Q. No precaution to hide those at all, is that right?
A. It wasn't any precaution to hide it, no, sir.
Q. Now, when—when you went to—when you went on those breaks, did you put a pencil mark on your machine, did you ever do that, anybody ever tell you to do that, put a pencil mark to say where you stopped when you left?
A. No, sir. I heard this morning and to answer you, I never knew this. I was never instructed to mark by pencil or any other means, the last number. I was never instructed to remember validating numbers for the last ones. I do not say that other tellers may not have done it on occasion, I never did.
Q. Well, when you were over there, did you trust these other people, your co-workers?
A. Of course, I trusted them, I was with—well, four and a half years I would say they are people I was really associated with, meaning teller and supervisors, of course, tellers, we were all there, the same bunch, you know.
page 493 } Q. Did you have any idea that your co-worker or somebody having access to that machine at night would do this lapping on your books that's been testified to here today?

Elmer M. Challenor

A. No, I—if you are asking me if I suspected something, no, sir.

Q. Did you ever suspect anything was wrong over there at all?

A. No, that—it was so, the work was such a volume and the confusion was such. No, I daresay that if you ask any of the other co-workers I was with they would say the same thing. I don't say that on occasion they may not have locked a box, but if they did, it was not a general practice.

* * * * *

page 495 }

* * * * *

Q. Who was Teller 4?

A. That was the mail teller.

Q. The mail teller?

A. Uh, huh.

Q. And who was the mail teller?

A. Well, this is what I was just trying to tell you, it was Mrs. Ivey for the last few years.

Q. Uh, huh, did she handle cash?

A. She was not supposed to handle cash, perhaps if *thing* were so that she tried to open some mail, she might run into cash then and would give it to the window clerk.

page 496 } Q. Did she have access to your window, everybody had access to everybody else's window?

A. Yes, sir.

Q. What about the—when you'd come back from—when you'd come back from lunch, what would you find on your desk?

A. Well, almost daily there would be some work for me to run.

Q. Large or small?

A. Could be both, could be a couple of pieces, could be packs.

Q. Suppose you had come there and say a stack of checks here for you to run, you'd run them through your machine and stamp them with that stamp, is that right?

A. This goes back again to the time of day whether I would actually stamp them myself. If they were run through—I've seen checks taken from me, and by this I mean in helping to settle, they would add the checks for me and stamp the ones

that weren't stamped, and just tell me how much money was involved in checks.

Q. Stamp them on your machine?

A. My rubber stamp.

Q. Rubber stamp?

A. Yea.

page 497 } Q. That—

A. I can't, excuse me—

Q. That went on practically daily, is that right?

Mr. Wilkinson: We object, Judge, that counsel is leading the witness.

Mr. Williams: Well, I don't want to lead him—

Q. How often does that happen?

A. Almost daily.

Q. Explain to the Jury, in your own words now, and you heard the testimony of the witnesses, how that could happen on your stamp and on your machine without you knowing about it, now take your time and explain to them carefully.

A. Now, do you—are you asking me, sir, how—how any transaction could be done on my machine?

A. Yes, and without you knowing about it?

A. The logical one, in my opinion, would be involved in the —this extra work I was given to run. I daresay that someone could insert a check, remove cash from my drawer or box. I might actually, physically, print the bill and maybe stamp the check.

page 498 } Q. And sign the voucher?

A. Well, I'll get to signing the voucher in a minute, without knowing what I was doing, it's a possibility, but I'd like to repeat, I—I, in no way, am trying to dispute that something was going on, lapping, I believe they call it. I'll just mention this, when I first found out what lapping was is when I read the Auditor's report.

Q. Had you ever heard of lapping before that?

A. I don't know what it was—I did not know what it was, I have a general understanding now what lapping is.

Q. Did you knowingly do any of that lapping that they tried to talk about after you understand what they were talking about, lapping, did you knowingly do any of that?

A. This is what I tried to tell the Gentlemen of the Jury a moment ago. If it was done by me, it was unknown to me. I did not do it, now knowingly, and I did not steal any money.

Elmer M. Challenor

Q. You never took a dime's worth of cash away from that place at all?

A. No, sir.

page 499 } Q. How far did you go in school, Mr. Challenor, or Elmer?

A. Finished high school, went to—beg your pardon, finished high school, went in the Service, after about twenty months came out of the service, and I believe it was something like May, I got out in September and started—went to Randolph Macon College in Ashland. I think I only got credit for about a year, I tried going a year and a half—

Q. Where is that?

A. Randolph Macon in Ashland, but I fell in love, started courting, had an old car, used to commute back and forth to school, and I loved baseball, football, so my day was pretty well wrapped up, and, frankly, the financial situation of my family, that being my mother and father, I ran out all my GI bill benefits as far as education.

Q. Have you had any account—have—you ever studied accounting?

A. I went to T. C. Williams Night School to take Accounting I, I don't believe I passed it or got credit for it.

Q. Do you know enough about accounting to do this lapping here now that you understand what they are talking about by lapping?

page 500 } A. I didn't do it then, I wouldn't have insides enough to do it. I don't think I have knowledge to do it. I believe—I believe that it has been verified that I kept busy most of the day, I do three or four different jobs, but I would rather be busy than just sitting.

Q. Did you ever go back down there at night after you finished your work?

A. No, sir, to my recollection I believe—it may have happened once or twice—that Miss Conley and myself and one or two others may have worked for a few hours on a Saturday. I don't recall, myself, ever working after hours, I mean I know I was never in there alone.

Q. I'm asking you again, Elmer,

A. Yes, sir.

Q. you are under oath, to tell this Jury whether or not you have done any lapping or stolen any money *whasoever* from the City of Richmond, look at the Jury now?

A. Yes, sir. I intentionally have done no lapping, and I have to put it this way, because of part I just told you. May-

be in me validating bills and accepting checks I had been had, but didn't know it. I have never stolen a nickel. I don't have this money, because I never had it, and if it was page 501 } done, if the money is missing, as they say, and if it was run through my work, it was without my knowledge, I did not steal it.

Q. Why does your wife work?

A. Why does my wife work—

Q. She's been working at Franklin Federal since—why does she work?

A. When—yes, sir—when we first got married I was twenty and six months, she was nineteen and six months, and I got my first real job, I thought it was a big thing, well, it was to me then, so we wanted children and due to little physical troubles, it was about four and a half years after we were married before our first child was born. Well, by the, I wasn't —we had attempted to buy two homes and it was just stripping me, I mean, I just couldn't make ends meet, so she went to work, she thought she'd go part time, and the poor thing, I think only time she's been out since then is because of pregnancy.

Q. She worked all the time?

A. All the time.

Q. If you had twenty-one thousand dollars or a substantial part of it, would you like your wife work like she's doing now and keep house?

A. No, if I had twenty-one thousand dollars, page 502 } I wouldn't even put my life—my wife's life in jeopardy by driving her in the car I'm driving her in. My children would suffer for nothing, I don't know that I would dress to be a dude, but if I thought that I had twenty-one thousand dollars, I never would have left the job I was working on asking for a promotion to go to a better job.

Q. And if you had done this lapping over there as you are accused of, wouldn't you have stayed on there and kept on lapping?

A. If business had been that good and I understood fully what lapping was, and I could have gotten away with it all this time, I would still be there doing it, I certainly would not have volunteered to leave.

Q. Well, wouldn't you have stayed there and kept on lapping so they couldn't catch you?

A. Of course, I would, until they caught me, I'd be foolish.

Elmer M. Challenor

* * * * *

CROSS EXAMINATION

By Mr. Wilkinson:

* * * * *

page 510 }

* * * * *

Q. Now, you were notified of this on February the 24th, I believe?

A. Notified of what, you mean the charge—

Q. The report and so forth?

A. I was notified that there was an investigation on that date.

Q. And pursuant to that, did you ever come back to the City or anybody and say anything about it?

A. I talked to Mr. Herbert Ross, I believe, at least three times, Mr.—my immediate Supervisor, Mr. Robert Gordon, once on the phone and I could get nowhere. Mr. Ross informed me I would have to talk to Mr. Waller. Well, Mr. Waller was not the one that suspended me and I was questioning who Mr. Ross, my suspension, the basis for it, well, he said it was just something that I would have to clear up page 511 } with Mr. Waller. It seems that—I, of course, don't know how many times Mr. Ross and Mr. Waller and several others, you know, got together for a meeting, I think, you know, to discuss this thing. Again, this was after this period, see, but I was able to get nowhere, if there's such a thing as even suspecting the seriousness of what it came out to be, I did not—I read it in the newspaper, sir, but I was informed, as you said, of an investigation.

Q. What were you informed of investigation?

A. That there were discrepancies in the procedure.

* * * * *

page 514 }

* * * * *

Q. But you were not, as we usually think of arrest, picked up at home on the street or something?

A. No, sir, may I mention how it was done?

Q. All right, sir?

A. This is a beautiful thing to go home at 5:20 in the afternoon and find your name on the front page of a newspaper. I immediately set down with my wife and we talked about this thing, It's a wonder we didn't both go through the ceiling. Well, to shorten the story, contact was made—contact with an attorney, contact was made with a bondsman. I set at home, didn't go out of the house from 5:15, approximately, when I came in with the newspaper, until about quarter to two in the morning. I talked to my children and that about killed me, talked to my bondsman and attorney, they told me what to do, just sit and wait to be arrested. I got two or three phone calls from 5:30 until 1:30 in the morning, so I just about passed out and I went to bed at quarter to two and I got a phone call the next morning. I had not been noti-
page 515 } fied, but I was expected to appear in Court, I believe it was ten o'clock, or something, as you say the next morning, which I did, and, as you say, I was handed a piece of paper or something, what it was, again I know not —yea—well, see I'm not trying to change—

Q. I'm trying to help—

A. I was taken back here.

Mr. Williams: We got him here before the capias got to him.

A. Yes, I was served something, they tell me, in the Clerk's Office—

Q. Well, then you were bonded?

A. Yes, sir, that's correct.

Q. Well, that's all I want to know.

A. O. K.

Q. When did you read a copy of the City Auditor's report?

A. When did I read a copy—can you tell me the date on the front, approximately?

Q. March, 1965.

A. Yea, March, 1965.

Elmer M. Challenor

Q. You mean the day?
A. No, it's just March and the date. Yea, the date of the—
Q. The letter is March the 6th,
page 516 } A. March the 6th.
Q. to the members of the City Council, so I imagine it would be the first part of March—Well, let me ask you, did you get—
A. I suppose—
Q. did you get, did you get a copy from Mr. Williams, your attorney?
A. He let me read it, yes, sir.
Q. I mean that's where you got it from?
A. Oh, yes, sir.

Mr. Wilkinson: Mr. Williams, do you recall that date?
Mr. Williams: Oh, it was, I'd say about three weeks, two or three weeks after the indictment.
Mr. Wilkinson: Well, that's all I want to establish, Judge,—
The Court: All right, sir.

Q. You said, if I recall, in your direct examination you suspected that something was wrong because of the work being pushed and the confusion and so forth, why did you suspect something wrong or did I misunderstand you?
page 517 } A. Mr. Wilkinson, I do not believe I made such a statement as I suspected anything—now, wait a minute, please, would you again repeat what you said, please?
Q. As I recall, on your direct examination that you suspected something was wrong because of the pressure of the work and of the confusion?
A. No, sir, I made no such statement—

The Court: Well, let him answer it, let him explain it.
Mr. Wilkinson: That's what I want.
The Court: Let him correct it or answer it the way it's proper.

Q. I have no further questions.

* * * * *

Elmer M. Challenor

page 519 }

* * * * *

Q. Well, let me go into one other thing, on April the 27th when they accused—this final lap occurred and the twenty-one thousand Henrico check was not credited, do you—did—the records show that you went to the doctor for a physical examination that day, do you remember doing that?

A. I'm not positive about this, but I believe or could it have been, correct me, Friday the 27th, I know the date—

Mr. Williams: See if the 27th was on Friday.
The Court: The 27th—
Mr. Williams: '65, yes?
The Court: 1965? The 27th of April was a Tuesday.

A. Yes, I did have a physical examination for the new job that I was going to.

Q. And you went to the doctor for a physical examination for the new job with the City, is that correct?

A. That's correct, uh, huh.

Q. And how long did you—what time did you go to the doctor's that day and how long did you stay?

page 520 } A. The appointment was for three and as a rule Miss Conley pushed you out of there earlier so you wouldn't have to be in such a rush or nervous or what have you, I would have to say between 2:30 and quarter—twenty minutes of three I started to the Employee Medical Center.

Q. And what doctor did you go to?

A. Oh, golly, I believe, now, I may be wrong, Dr. Bailey may have been the one at this time.

Q. How long did you stay there?

A. It seems that his hours were three—I had quite a wait if I recall, now I'm sorry I cannot give it to you in hours or what, but I, like a lot of doctors, had to wait.

Q. Did you ever get back to work that day on April the 27th after you went to the doctor?

A. Honestly, I do not know, I would think that more than likely I walked back to work, yes.

Q. About what time did you get back there?

A. It really is hard to say, 3:30, 4:00, I do not recall really.

* * * * *

page 539 }

* * * * *

LOUIS A. RYAN, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

* * * * *

A. Louis A. Ryan, I'm 56, I live in Richmond, but actually in Henrico County.

Q. And what's your occupation?

page 540 } A. I'm a certified public accountant.

Q. How long have you been a certified public accountant?

A. Since 1938.

Q. And what firm are you with now?

A. Andrews, Burket and Company.

Q. How long have you been with that firm?

A. Since 1934.

Q. And you have been practicing accounting since that time, is that right?

A. Except for a brief recess to be in the Marine Corps in World War II.

Q. Mr. Ryan, have you had occasion to read the Auditor's Report of the municipal account rendered to the City of Richmond in connection with an alleged case against Elmer Challenor?

A. Yes.

Q. And you are familiar with the allegations in that report, are you?

A. Yes.

Q. I'd like to ask you this, Mr. *Andrews,* you are familiar with what they term lapping in that report?

page 541 } A. Yes, I am.

Q. Suppose this hypothetical question, Mr. *Andrews,*—or Mr. Ryan, suppose it was in evidence that the vault that the records were kept in overnight, the combination

was known to four or five people, that the machines that they render accounts on were unlocked, that the cash box, while maybe locked or unlocked, was accessible to various other people in the office, that the stamp that they stamped the checks with was laying on the desk and available to various other people in the office, would it be possible, in your opinion, for other people in the office to lap these checks onto Mr. Andrews'—I mean on to Mr. Challenor's machine and he turn them in not knowing that there had been any lapping on his machine?

A. That all those—

* * * * *

page 543 }

* * * * *

Q. The question, *Mr. Andrews,* yes or no?

A. In my opinion, yes.

* * * * *

page 667 }

* * * * *

Mr. Wilkinson:

* * * * *

page 686 } Did we go down there and tell Mr. Shreve what to do and what to say? He came up here and he told you on this stand, under oath, that around 1966 it was more than one account with Henrico, it was four accounts, but one of them particularly came up to his attention, was getting unusually large and he started investigating. The City, at the same time, was investigating and they both went to Mr. Weaver, who was in charge of it, then they got together and they said here's our check, here's our bill, we haven't been given credit for it. And isn't it strange it would come to $21,139.33? How much more exacting can you get? I submit you cannot be any more exact than that.

The expert witness called by the defendant, Mr. Percy S.

Smith, and Mr. Louis Ryan, well, certainly they came up and gave their opinion, but there are opinion wasn't based on fact. I don't question their competence as a CPA or in their work, but for anybody to ask the Jury here to give a decision we have to give you facts, and if I recall correctly both of the Gentlemen said they had never examined

page 687 } the City records, not even the exhibits put in the case and yet, though, they come up, get on the stand and give you an opinion and in an instruction the Court says that you can give what weight and credit you want to what witness. How would they be in a position to give an opinion, we didn't ask Mr. Waller's opinion, all we did with Mr. Waller was this: is for him to relate to you facts, and that's what it is here. So I submit that their opinion could not be given the great—the weight that Mr. Waller, when they hadn't even examined the facts.

And it's—we come—a lot has been said here that the defendant was never arrested, that a Grand Jury indicted him, and, you know, that's another law that's come down to us a long time, the Grand Jury is sorta the wall, so to speak in the early English law, the Grand Jury was the wall or the force between the King and the people. Now, they can criticize me for his procedure, that's part of my job to take criticism, I have nothing to do with it, but it does perturb me a little bit when seven honest and true citizens come up

page 688 } and sit on a grand jury—

Mr. Williams: If Your Honor please, I object to that and ask the Jury to disregard it.

The Court: Well, you brought it up, you brought it out, I think it's proper.

Mr. Wilkinson: You've been talking about it, Mr. Williams—

Mr. Williams: We note exception.

The Court: All right, sir, I overrule your motion.

Mr. Wilkinson: And the facts presented to them, they only find, they don't say guilt or innocence, and the Court's instructed you as to that, and you should follow that instruction, they don't say that, but they come in and they say direct me—

The Court: Right there, Mr. Wilkinson, I do want to tell—the Court has instructed you that the finding of an indictment is not a fact to militate against the defendant, but he—the reference that he made is purely in connection with the statement of the defendant that he wasn't aware, you understand that?

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Affidavit of Poverty	2
Certificate of Judge	2
Record	2
Indictment	3
Order of Indictment	3
Motion of Defendant	4
Order—May 23, 1967	5
Bill of Particulars	6
Order—June 29, 1967	6
Motion of Defendant	7
Judgment—August 21, 1967	10
Instructions	11
Notice of Appeal and Assignments of Error	12
Notice of Tender of Record to Trial Judge	14
Order—November 20, 1967	14
Proceedings	15, 22, 72
Witnesses:	
J. R. Waller	22
Mary Conley	44
Daniel Shreve	49
Richard M. Jones	52
Percy M. Smith, Jr.	56
Elmer M. Challenor	58
Louis A. Ryan	71