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-: I N D E X :-

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

----- x
THE PEOPLE

against

GILBERT POWERS indicated with JOHN
DORGAN.
----- x

Indictment filed 21st day of June, 1920.

Indicted for Robbery in the First Degree, grand Larceny
in the Second Degree, Assault in the Second Degree
and Receiving in the First Degree.

For the People, ASSISTANT DISTRICT ATTORNEY RORKE.

For the Defendant, MR. MOORE.

Tried before HON. JOHN F. MCINTYRE, JUDGE and
a Jury on the 27th day of July, 1920.

JAMES GALACHER, called as a witness in be-
half of the People, duly sworn and examined, testified
as follows:

(Residence 412 West 55th Street.)

DIRECT EXAMINATION BY MR. RORKE:

Q Where do you live? A 412 West 55th Street.

Q What is your business? A Bartender.

Q How long have you been a bartender? A About five
years.

Q Where are you employed at present? A 99th St.

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and Third Avenue.

Q What is the number of that place? A 1,786 Third Avenue.

Q And by whom are you employed there? A By Edward Roth.

Q How long have you been employed by him there?
A About three months.

Q And you are employed there as bartender? A Yes.

Q Were you employed there on the morning of June 6th, 1920, this year? A Yes.

Q That place is in the City and County of New York? A Yes.

Q Did anything happen there about 1:40 on the morning of June 6th, 1920? A A knock came to the side door, about 1:45 A. M. on the 6th of June -- asked to come in, and I told him it was after hours. So, the door was forced in.

Q Which door? A The side door.

Q The side door is on what street? A On 99th Street.

Q Is that east or west of Third Avenue? A It is west of Third Avenue.

Q Is it on the north or south side of the street?
A It is on the south side -- the north side -- about

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six fellows entered when the door was forced in and I got hit in the face and knocked down and kicked around the floor, and I don't remember anything after that.

Q Were you rendered unconscious when you were knocked down? A Yes.

Q And who was in the place at the time beside yourself? A The boss was there at the time I went to the side door.

Q By the boss you mean whom? A Edward Roth.

Q Was there any money in the place at the time?

A Yes, sir, there was some money there.

Q Where was the money? A In the cash register.

Q How much money was in the cash register? A I couldn't exactly say what amount.

Q Had you been at the cash register that night or prior to that morning? A Yes, sir, I was at the cash register before I went to the side door.

Q How long before you went to the side door?

A About ten minutes.

Q How much money was in there at that time? A I don't know -- I don't know how much money was in there.

Q Have you testified before anywhere as to the amount of money that was in the register at that time?

A Yes, I have, up in the Harlem Court.

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Q In the Harlem Court how much money was in the till at that time? A I figured there was about \$250 when I left the machine.

Q Did you at any time go to the cash register after you became conscious? A No, sir, I did not.

Q Where were you when you became conscious? A I don't remember where I was.

Q You became conscious sometime, didn't you, after you had been unconscious? A I became conscious, but I cannot exactly say now whereabouts.

Q Where were you, up on the roof or on the floor or down in the cellar when you became conscious.

THE COURT: Answer that question.

A I don't know exactly where.

BY MR. RORKE:

Q Have you testified before today anywhere as to where you were when you became conscious? A In the saloon, I guess.

Q In the saloon you guess, -- this Court and this jury and the defendant do not want guesswork -- all we want from you is the truth, not guesswork? A I don't know exactly what place I became conscious.

Q Was there anybody present at the time you became conscious? A The only that I remember is to see the af-

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ficer with two men in the back room.

Q What? A The only thing I remember is to see the officer with two men in the back room.

Q That is the first thing you remember? A Yes.

Q When was that that you saw the officer with two men in the back room? A That was after, that was about a half an hour after or three-quarters of an hour after.

Q Who was the officer? A Officer Michael Potter.

Q Of the 29th Precinct? A Yes.

Q Who were the two men that you saw? A I did not know them.

Q I did not ask you whether you knew them or not, I say, who were the two men you saw with the officer?

MR. MOORE: If he did not know he could not tell.

THE COURT: If he knows he may state.

Q Any of those two men in court today that you saw with the officer? A I don't know.

Q Suppose you look around this court room, look at the jury and look at everybody else and tell us whether you see in the court room any of the two men you say were there with the officer. A That gentleman there was there. (Indicating)

Q Tell us who that gentleman there is? A Powers.

Q Put your hand on the gentleman you claim was the

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gentleman? A Powers.

Q Do you mean by Powers anybody here at this table?

A Yes.

Q Which person do you mean? A The man sitting in the center. (Indicating the defendant Powers.)

Q This man sitting to the left of Mr. Moore, the attorney? A Yes.

Q You saw him there? A Yes.

Q Did you see anybody else there with the officer besides this defendant Powers? A There was another man.

Q Do you know what the other man's name is? A I heard his name was Dorgan.

Q How were you knocked down? A I was hit in the face and knocked down.

Q With what, do you know? A I think it was a kick in the face.

Q Were you cut in any way or did you bleed or anything? A Yes, I did bleed.

Q You bled from where? A From the mouth.

No cross examination.

EDWARD ROTH, called as a witness in behalf of the People, duly sworn and examined, testified as follows:

(Residence 1786 Third Avenue.)

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DIRECT EXAMINATION BY MR. RORKE:

Q Tell the jury your business? A Cafe and restaurant.

Q Where? A 1786 Third Avenue.

Q That is in the City and county of New York? A Yes.

Q How long have you owned that business there?

A About from February.

Q What year? A 1920.

Q On the morning of June 6th, 1920 were you in the place of business? A I was.

Q Was there anybody else there besides you at the time? A Gallagher.

Q Gallagher is whom? A The man that works for me.

Q What work does he do for you? A Bartender.

Q Was he bartender for you on that day? A Yes.

Q Did anything happen out of the ordinary at your place that morning? A After -- we closed our place at one o'clock sharp and started to clean up. After we were pretty near half done there came a knock on the side door. I said, Who is there. A name was mentioned, and I answered him, I said, I don't care who it is the place is closed until six o'clock in the morning, and I went back to do my work in the front. That was in the rear, where the side door is. I was mopping up the floor, cleaning up and there was a knock on the door.

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Q Go on. A There was breaking in the door.

BY THE COURT:

Q What is that? A There was breaking in of the door.

Q The door was broken in? A Yes. No light in the rear. It was dark, because the rear was all cleaned out. I was cleaning there -- the door was knocked down off the lock from the frame. Gallagher hollered for help. Two men came in in the front.

BY THE COURT:

Q What do you mean by the front? A From the rear.

Q Two men came in the front? A Yes, one behind the bar and one on the side of the bar.

BY MR. RORKE:

Q So that we won't have any mistake about that, when you say two men came in the front what do you mean?

A They walked behind the bar and opened the register.

Q Where did they come from? A From the rear of the room.

Q Into the front part of your saloon? A Yes.

Q Now, two men came in the front part of your saloon, go on? A One went to the register and the other one was standing on the side.

Q Standing on the side of what? A Of the bar.

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Q Inside or outside of it? A Outside the bar and he told him "Take it all."

Q Who said, "Take it all." A The man who stood outside of the bar and while he hollered, "Take it all", I ran out to get help.

Q Help for whom -- you ran out to get help for whom? A To help Gallagher in the rear.

Q Go on? A I went out and notified Officer Cotter.

Q Who were the two men that were in your saloon, one behind the counter and one in the front? A One man who was behind the counter, as I have said, I am not positive sure if it was -- what is his name?

Q I ask you who the two men were, the man that was behind your counter and the man outside? A That was what I want to say, who it was, the name -- what is his name? The two defendants -- but I said I am not positive sure if they are the men.

Q Do you see any of those men in the court room now? A I see one gentleman that I am not sure if that is he.

Q Who is the gentleman you say you are not sure of? A Right there. (Indicating the defendant)

Q Right where? A Sitting right there, but I am

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not sure if it is him.

Q Where is he sitting, there are three here? A In the center.

Q The man at the left of Mr. Moore? A Yes.

BY THE COURT:

Q You are referring to the defendant Powers? A Yes.

BY MR. RORKE:

Q Have you testified in this case before? A I did.

Q At the magistrate's court? A I did.

Q Did you state in your evidence at the magistrate's court that this defendant Powers was the man who was standing outside the bar?

Objected to as incompetent, irrelevant and immaterial. Overruled and exception.

BY THE COURT:

Q You answer that question. A I did, but I said I am not sure.

Q Answer the question yes or no. A I did.

BY MR. RORKE:

Q You did not say in the magistrate's court that you were not sure? A I did.

Q Have you had any reason to change your testimony since you were in the magistrate's court? A No, sir.

Q Have you been threatened by anybody? A No, sir.

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Q Since you were in the magistrate's court? A No.

Q Have you any reason to fear testifying against the defendant Powers or Dorgan in this case? A No, sir.

MR. MOORE: I object.

THE COURT: As far as the examination goes, I allow it to stand. You made no objection to it, Mr. Moore, when the question was being propounded.

BY MR. RORKE:

Q Did you see Gallagher get beaten up? A No.

Q Did you not testify in the magistrate's court that you saw Gallagher beaten up by the two defendants? A No, sir, I said I heard him holler.

Q What? A I heard him holler while I was in the front.

Q You ran out and left him, though? A I did. I had \$1400 in my pocket -- I had \$1398.

Q How much money was in the till at that time that you saw the two men come into the place in the front part of the saloon? A Originally there was more than I said because --

Q How much I ask you. A According to the register it showed \$267.75.

Q Did you go to the till before you saw the two men in the front part? A No, sir.

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Q Did you go there after you saw those two there?

A When I came back.

Q How long after you saw them there did you go back? A About twenty minutes.

Q Did you go to the till then? A Yes.

Q How much money was there? A \$17.25.

Q Any bills there? A Not a single bill.

Q This was silver and copper? A Silver only.

Q Do you recall being asked this question and making this answer when you were under oath, in the magistrate's court: Q To help the bartender? A To help the bartender while I called the officer; I went out and hollered for help."

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

THE COURT: You are asking him that question with a view to refresh his recollection?

MR. RORKE: Yes.

THE COURT: I will allow it. exception.

BY MR. RORKE:

Q Do you remember, answer me, do you remember being asked this question: "Q To help the bartender", and you making this answer, "To help the bartender while I called the officer. I went out and hollered for help."

Do you remember testifying to that in the magistrate's

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court?

MR. MOORE: I object to it as immaterial.

THE COURT: I will allow it. Exception.

A I went out and got Ryan in front of the store, and Ryan went inside while I went out.

BY THE COURT:

Q Was he a police officer? A No.

Q Who was he? A A private citizen.

BY MR. RORKE:

Q Do you remember making the answer I just read to you in the magistrate's court? Yes or no? A I went out to get help.

Q I did not ask you that, I ask you if you made that statement in the magistrate's court that I just read to you? A What statement?

MR. MOORE: He has already made it.

THE COURT: Answer yes or no.

MR. MOORE: I object to it. The witness already stated that was what he did this morning. I take an exception.

MR. RORKE: I will waive that question to save time.

BY MR. RORKE:

Q Do you recall being asked this question in the

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magistrate's court: "Q Which one? A This man here was on the outside. Q The first man or the second man? A The first man. The Court: (To the defendant) Q What is your name? The Defendant: A Powers." Do you remember those questions being asked?

MR. MOORE: I object.

THE COURT: There is a question there interposed by the Court in the magistrate's court.

BY MR. RORKE:

Q Do you remember being asked this question and making these answers? Q Which one. (Mr. penaldi) Q Which one? The Witness: A This one here was on the outside. (Meaning Powers) Do you remember being asked that question?

MR. MOORE: I object.

THE COURT: It is not proper to say, meaning Powers. Eliminate that.

MR. RORKE: That portion is withdrawn.

MR. MOORE: I object as incompetent and inadmissible and as cross examination of their own witness.

THE COURT: Do you offer this testimony only with a view to refresh the recollection of the witness.

MR. RORKE: Yes.

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THE COURT: I will take the testimony. Exception.

BY MR. RORKE:

Q Do you remember being asked those questions and making that answer? A I don't remember.

Q In the magistrate's court did you see this defendant Powers there? A I did.

Q Did you see the other one, Dorgan there? A I did.

Q Do you not recall being asked those questions by Mr. Renaldi? Q Which one, and you making the statement, this man here was on the outside.

Objected to as incompetent, irrelevant and immaterial. Overruled and exception.

BY MR. RORKE:

Q Do you remember that question being asked you and you making that answer, yes or no? A I don't remember.

Q You don't remember if you were asked that question and made that answer, is that right? A That is right.

Q Do you remember making this statement in the magistrate's court: "A This man was on the outside of the bar and the second man jumped inside the bar." Do you remember making that statement -- does that refresh your recollection?

Objected to.

THE COURT: It is only for the purpose of re-

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freshing his recollection. However, it does not appear to which man he was making reference at that time, but he refers to this man.

MR. RORKE: Yes.

THE COURT: But, if it will aid his recollection I will permit the question to be put.

BY MR. RORKE:

Q Do you remember testifying with regard to the co-defendant Dorgan under the name of Doyle, "This man was on the outside the bar and the second man jumped inside of the bar?"

MR. MOORE: I take a general exception to all this line of examination.

THE COURT: Yes. That which relates to Doyle or Dorgan I will exclude. He is not here on trial, but you may interrogate him concerning anything which appears in the record relating to the defendant now at the bar.

BY MR. RORKE:

Q Do you remember this question and this answer: "Powers said what? A To the other man. Q Powers said to Doyle? A I don't know their names. He said to the other man, take out all the money there is" -- do you recall those questions and those answers? A I said that.

Q Do you remember these questions and these answers:

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"Q Which man, the first man told the second man? A Yes.

Q That would be Powers told Doyle? A Yes, take out all the money out of there." Do you recall those questions and answers?

THE COURT: Did you say that in the magistrate's court?

THE WITNESS: I said the man in front of the bar said, Take all the money in the register."

BY MR. RORKE:

Q Do you remember that question being put to you and that answer, Q That would be Powers told Doyle? A Yes, take out all the money out of there." Do you recall that? A I do not -- repeat that.

Q Do you recall that question and answer in the magistrate's court?

MR. MOORE: He said he did not.

THE COURT: You may answer again.

THE WITNESS: What is the question?

BY MR. RORKE:

Q Do you remember being asked in the magistrate's court this question and you making this answer: Q That would be Powers told Doyle? A Yes, take out all the money out of there." Were you asked that question and did you make that answer? A The man in the front of the

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bar --

Q I ask you if you were asked that question and if you made that answer in the magistrate's court -- did you understand it when I asked it? A I don't remember.

Q Have you been threatened that if you came here as a witness to testify in this case that your previous record would be thrown up against you in this trial?

MR. MOORE: I object as an improper question.

Objection sustained.

Q What is there in the front part of your saloon, the front part of the saloon proper? A Horseshoe bar -- inside or outside?

Q Outside. A An oyster house.

Q And is that right on the street or on the avenue?
A On the avenue.

Q Is that right at the corner? A No, sir.

Q How far back from the corner? A Ten feet.

Q What connection is there between that restaurant or lunch place and your saloon? A There is -- it is all closed except a small door on the side and that is closed from the inside.

Q What? A There is a small door on the north side of the place and that is locked from the inside.

Q Any slide there? A No slides.

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Q Any holes in that partition? A There is a ~~hole~~ small broken glass there about three and a half by four.

Q What did these two men, the one that was outside of the counter and the one that was inside of the counter do, when you saw them there at that time? A One man got behind the bar and went to the register and I went out.

Q Which one was that? A He is not here. I am not sure, but that man is not here. I do not see him.

Q When did you last see him? A Last -- the man I saw last -- the man that has been behind that register, alongside of the register, I saw him on Third Avenue.

Q Did you see him in the magistrate's court? A No.

Q What did he do behind the bar? A Opened the register.

Q Then what happened after he opened it? A I don't know, I went out.

Q Did you see him take anything out of it? A He put his hand in there.

Q You saw him put his hand in? A Yes.

Q How long did he keep it in? A I went out to get help.

Q How long did he keep his hand in there? A I don't know.

Q Did you see him take his hand out? A No.

Q What did he have his hand on when he put it in

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the register? A I could only see his back. I could not see what he was doing in the front.

Q Did you see his hand in the register? A I saw him put his hand in the register, but --

Q What did he put his hand on when he put it in the register? A I don't know.

Q What did the other man do while he was putting his hand in the register? A Standing on the side.

Q Were they armed at all or unarmed? A I did not see anything.

Q Then what happened after you ran out? A I got out and hollered for help and I saw Officer Cotter and I told him there was a hold-up. I went on 100th Street corner to get more help. Until I came back everybody was gone.

Q After you saw the officer you went to get more help? A Yes.

Q When you got back to your place everybody was gone? A Yes.

Q How long a time, between the time you left the place and got back there -- how long were you out of your place before you came back? A I don't know, I knocked at another man's place until he --

Q I don't care about that, about how long a time

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elapsed between the time you left your place to get help and got back? A Must have been twenty or twenty-five minutes.

Q When you got back what did you see there? A I found nobody in the place.

Q Did you see Officer Cotter after you got back?
A Officer cotter, I saw him.

Q Where? A On the avenue.

Q What part of the avenue? A I don't remember what part of the avenue it was.

Q Did the officer come to your place after you got back there? A I don't remember that.

Q Did you see the officer at any time with this defendant Powers? A I did.

Q Where? A In the station house.

Q Did you see him with Powers at any time before you saw him with him in the station house? A No.

Q Did you see the Officer with Dorgan or the fellow called Dorgan? A No, not before except in the station house.

Q What did you do with the change you say was left in the register? A Put that in a bag and took it over to the station house and they told me to count it.

Q Did you? A I did.

Q You had how much money? A \$1735.

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CROSS EXAMINATION BY MR. MOORE:

Q There is no question but that it was not the man that looked like Powers that went to the register and opened it? A No.

Q The man you say that looked like Powers, but you are not certain it is Powers, was on the outside of the bar at all times? A Yes, sir.

MR. RORKE: Will you direct the witness to stay in the court room.

THE COURT: (To the witness) Remain in court.

S A M P H I L L I P S, called as a witness in behalf of the People, duly sworn and examined, testified as follows:

DIRECT EXAMINATION BY MR. RORKE:

Q What is your business? A A little lunchroom, little restaurant.

Q Where is your place of business? A 1784 to 1786.

Q Third Avenue? A Yes.

Q City and County of New York? A Yes.

Q What street is that on? A In 99th Street.

Q How long have you been there? A Been there three months.

Q To whom do you pay rent? A To Roth.

Q The witness who was on the stand before you?

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A Yes.

Q Were you at that place of business around 1:40 or 1:45 on the morning of June 6th, 1920? A Yes.

Q What connection is there between your place of business and Roth's saloon? A No connection. Had a little window and got the window in front of the saloon and just a frame partition locked up.

Q What kind of a partition is that? A Partition with glass and wood.

Q Anything out of the ordinary occur in the premises of the saloon that morning? A I did not get that.

Q Anything happen in the saloon that morning? A Yes.

Q Tell what occurred? A I heard a scream and a fellow hollering.

Q You heard someone hollering? A Yes.

Q From what direction? A Towards the bar, towards the inside.

Q What did you do? A I had a little hole in there through my place and I looked through in there.

Q Speak a little slower and loud? A I looked through in the hole, a little bit of a small hole in my place that connects with the saloon and I saw a man lying on the floor there.

Q Who was lying on the floor? ~~Gallagher~~ A I think it was Gallagher.

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Q Who is he? A The bartender.

Q Go on. A And that is all I saw of him, and then I saw one man inside the bar and one man outside, and the man inside he was getting the money from the register and the fellow outside was telling him "Go ahead, take them all."

Q Did you see the fellow inside take the money out of the register? A He did take out, but I did not know it was money or paper. He took something out.

Q You saw something in his hands? A Yes.

Q Who were the two men that you saw there at the time? A Two men there, I don't know them. These two men I saw in there, they did not have no shirts on at all.

Q At the time you saw them? A Yes.

Q What did they do after the man took the money or took the stuff out of the box? A I don't know, they got away, I did not see them. I could not see them.

Q When was the next time you saw them? A When the officer had them.

Q Who were the two men the officer had? A They say it was the two men that robbed the place.

Q Do you see any of those two men in court now?

A No, I cannot see them.

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Q Look around? A I cannot see.

Q Did you ever see this man before? (Indicating the defendant) A No, I never saw him.

Q Never saw him before? A No.

Q Did you see him with the officer that night, was that man with the policeman that night? A No, I never see him. I don't remember if he was the man or not.

Q Were you in the magistrate's court? A Yes.

Q You went to court and did you testify in the magistrate's court? A Yes.

Q Was that man in the magistrate's court?

THE COURT: Yes or no.

A I cannot recognize him.

BY MR. RORKE:

Q Take a good look at him. (The defendant stands up) Did you see that man in the magistrate's court?

A I am not exactly sure that is the man.

Q Did you see that man that day in the magistrate's court?

THE COURT: Yes or no.

A I thought I saw him, yes.

Q I ask you if you saw this man in the magistrate's court, was he in the court when you were there? A I think he was up there, yes.

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Q Did you see the other man in the court room that day? A I saw two men together.

Q Were those two men that you saw together in the magistrate's court -- when had you seen them before, those two that you saw in the magistrate's court? A I never saw them before.

Q Didn't you ever see those two you saw in the magistrate's court, in the saloon? A I don't believe they were. When I saw them in court they had shirts and collars on, but the men I saw had none.

Q Did you testify in the magistrate's court that the two men who were there in the court were the same two men you saw in the saloon?

Objected to.

THE COURT: Are you referring to the record taken or made in the magistrate's court? If you are, you may call his attention to the testimony that he gave elsewhere, or something that happened elsewhere with a view to refresh his recollection and only for that purpose.

BY MR. RORKE:

Q Do you remember in the magistrate's court being asked this question and making this answer: "Q And what did you see? A I see the bartender laying -- Were you

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asked that question and did you make that answer?

MR. MOORE: I object. He has said that here.

THE COURT: I think so.

BY MR. RORKE:

Q Were you asked this question in the magistrate's court: Q And did you see these two men there? A I see the men -- Q Did you see the two defendants? A Yes." Were you asked those questions and did you make those answers in the magistrate's court?

Objected to as incompetent, immaterial and irrelevant. Overruled and exception.

THE COURT: Answer yes or no.

A If I see them men?

BY THE COURT:

Q Were you asked that question in the magistrate's court? A I did not answer not in court over there that I see the men.

Q Did you get on the witness stand in court? A Yes.

Q And were you sworn to tell the truth? A Yes.

Q You took your oath there? A Yes.

Q I ask you do you remember they asked you in that court this question: Q Did you see the two defendants? A Yes. Q These two defendants? A Yes." Were you asked those questions in the magistrate's court and did you make those answers?

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BY THE COURT:

Q Do you remember those questions and those answers just read to you? A I didn't remember seeing them over there, those fellows or not.

BY MR. RORKE:

Q Were you asked those questions and did you make those answers in the magistrate's court? A I did make answers, yes.

Q Was that true when you testified to that in the magistrate's court? A True what? About those men that was in there, in court?

Q Yes. A They had two men in court, yes.

Q Listen to me, were you asked this question and did you make this answer in the magistrate's court?

What were they doing when you saw them? A One fellow the other side. Q Doyle? A He ran to the register and the fellow came outside -- came from outside of the bar to the side door; there is a swinging door in the bar and he ran over and told him to take all the money from the register. Q Did you see the money in their hands? A Yes, I saw the money in their hands. By Mr. Einfeldt:

Q In whose hands? A Dorgan. Q Dorgan? A Yes."

Were you asked those questions? A I did not know who the man was.

Q Were you asked those questions and did you make

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those answers in the magistrate's court? A Yes.

Q "Q What did you see this other man do? A This man was outside from the register. Q Outside in the saloon? A Outside in the saloon." Were you asked that and did you make those answers in the magistrate's court? A Yes.

Q When you saw the two men in the saloon, after you saw the man inside the bar, take the money from the register, what did they do? A Those two men got away.

Q Ran away? A Yes.

Q When did you next see them? A I saw them right after the office had them.

Q How long after? A About ten or fifteen minutes afterwards.

Q What officer did you see them with? A Cotter, I guess.

Q Where did you see them? A He fetched them in the saloon.

Q In the saloon? A Yes.

Q Where was Gallagher at that time? A I don't remember Gallagher seeing him in there.

Q Did you see Gallagher's face? A I saw him after he had gone up to Police Headquarters.

Q That same morning? A Yes, same morning.

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Q What did he look like? A He looked like beaten up, cut up.

Q He was cut up, where was he cut? A I don't remember exactly where he was being cut.

Q Did you see any ink on him or whitewash on him or red paint on him or anything? A I didn't see nothing.

Q Did you see any blood upon him? A No, I see the lips were cut.

Q His lips were cut? A Yes.

CROSS EXAMINATION BY MR. MOORE:

Q I understood you to say the two men you saw in the saloon had their shirts on, by that you mean they were in their shirt sleeves? A They did not have shirts on.

Q You mean they did not have any coat? A No, shirts, didn't have shirts on.

Q Didn't have anything but naked skin? A They had underwear.

Q That is they had an undershirt but not an outer shirt? A No.

Q You saw ~~XXXXXX~~ this man brought back there shortly after, he was not dressed like the man you saw in the saloon, was he? A No.

Q He had a shirt on? A He had a shirt and tie on.

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Q And coat? A Yes.

Q There is no question but that the two men you saw in the saloon had no ties and no outer shirt on? A No, not those in the saloon.

REDIRECT EXAMINATION BY MR. RORKE:

Q Did you see anybody break in the door of the saloon?

A I did not see it.

Q You don't know how many men broke in the door of the saloon, do you? A I do not.

Q You don't know whether there were four men that stayed outside the door? A I do not.

Q When the door was broken in? A I don't know, I did not see any.

Q Do you know if they were holding any coats or any hats for anybody at that time? A I do not.

M I, C H A E L C O T T E R, called as a witness in behalf of the People, duly sworn and examined, testified as follows:

39th Precinct.

DIRECT EXAMINATION BY MR. RORKE:

Q You are an officer of the Police Department of the City of New York? A Yes.

Q How many years have you been in the department?
A Fourteen.

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Q Can you tell us whether or not you were on duty anywhere on the morning of the 6th of June, 1920 A Yes.

Q Where was your post at that time? A From 96th to 100th Street on Third Avenue, half a block east and west.

Q Can you tell us whether or not somewhere around 1:45 or 2 o'clock that morning anything attracted your attention to the premises of Roth's saloon? A Yes, sir, shouting.

Q Face the jury and tell what you heard and what you saw and what you did? A On June 6th, 1920 at about 1:45 a.m. I was standing at 98th Street and Third Avenue. I heard shouting for help. I ran up to 99th Street and as I got to the corner I saw the defendant Powers leaving the side door of the premises 1786 Third Avenue and run west on the north side of the street. I went in pursuit of him and as I approached him he threw the money that he had in his left hand into the street and I continued on and in front of premises 163 East 99th Street I apprehended the said defendant. I took him into custody and went back to the premises 1786 Third Avenue and went in through the side door. It was then I learned what had occurred. The complainant Edward Roth, the proprietor, stated that the defendant --

Objected to.

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BY THE COURT:

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Q Was Powers there? A Yes, sir, in my company, in my presence.

MR. MOORE: I object as incompetent and inadmissible and a self-serving declaration. He was under arrest at that time.

THE COURT: As I understand it it was something said in the presence and hearing of the defendant.

MR. MOORE: Yes, but in any case it is a self-serving declaration and is incompetent.

MR. RORKE: I won't press him upon that --

BY MR. RORKE:

Q Do not state at the present moment what was said. You say you saw Powers throw money away as you were running after him? A Yes.

Q Was he walking, running or what? A He was running very swift.

Q Did you see a person called Dorgan there? A Yes.

Q State what you saw? A When we got to the corner, I was in company with a Sergeant by the name of Bloom attached to the precinct I am attached to at the present time. We were both together. Dorgan was running east at 99th Street and Third Avenue. I could have apprehended him, but the Sergeant got Dorgan, and he took him in possession and I pursued the defendant Powers west on 99th

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Street.

Q Where was Dorgan when you came back to the saloon with Powers? A On the street in the custody of the sergeant.

Q Did you go in the saloon with Powers? A Yes.

Q Did the Sergeant go in with Dorgan? A Yes.

Q When you got in the saloon who was in the saloon?

A There was James Gallagher, Edward Roth and Samuel Phillips and several other men.

Q Did you at that time observe the appearance of Gallagher? A Yes.

Q Can you describe what he appeared like? A He did not know what he was doing. He had a long stick -- it was a pick handle that he used for packing the ice on the bar, and when he came from the bar to the rear room where I had the defendant Powers in custody he wanted to assault Powers.

MR. MOORE: I object to that as immaterial.

THE COURT: Strike that out.

THE WITNESS: He was excited. His hair was all mussed and he was bleeding from the mouth and the trouser leg was cut and he was in great frenzy. He did not know what he was doing.

Q You say Roth was in the saloon when you brought these two men in? A Yes.

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Q You say Gallagher was there? A Yes.

Q Phillips was there? A Yes.

Q Did they see these two men at that time? A Yes.

Q How close were these two men to the two defendants in the saloon when you brought them in? A Standing right by me, two feet away.

Q Now, yes or no, was there a conversation between you and Roth, Gallagher and Phillips in the hearing and presence of the two defendants at that time when you brought them back, yes or no? A Yes.

Q After that conversation what did you do with the two defendants, Powers and Dorgan? A Placed them under arrest.

Q Where did you take them? A To East 104th St. station.

Q Did anybody go along with you? A Yes.

Q Who went with you? A The complaining witness, Phillips and Gallagher and Roth directly afterwards.

Q After that were you in the magistrate's court?
A Yes.

Q Do you remember what magistrate's court it was?
A The fifth district.

Q Was there a hearing there? A On the morning of June 6th there was an adjournment for 48 hours. On the

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morning of June 8th there was an examination.

Q Subsequently there was an examination? A On June 8th, in the Fifth District Court.

Q Were the defendants Dorgan and Powers there in the magistrate's court? A Yes.

Q Can you tell us whether Roth and Phillips and Gallagher testified in that proceeding in the Magistrate's Court? A Yes.

MR. MOORE: I object as incompetent, inadmissible and entirely immaterial.

THE COURT: The District Attorney will put another question.

BY MR. ROPKE:

Q At the time you arrested Powers, when you caught him, when he was running, did you have any conversation with him that night? A Yes.

Q State what it was? A When I apprehended him and was taking him into custody I asked him what he was running about, for I had not known a crime had been committed at the time. He refused to answer and so I accompanied him back to the premises that I saw him running from.

Q Did you at any time have any conversation with him afterwards? A He would not answer any questions.

BY THE COURT:

Q Where did you see the defendant Powers for the

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first time on the day in question? A Leaving the side door of the premises 1786 Third Avenue, which is the northwest corner of 99th Street and Third Avenue.

Q Was that side door the entrance to Roth's premises?

A One of the entrances on the side street.

Q When he was leaving, did you notice if he was running or not? A He was running in a hurried state and when he saw my presence he started to run.

Q How was he dressed? A Cap and a brown suit.

Q In what direction did he run? A West on the north side of the street, on 99th Street.

Q How far had he got from the side door to which you refer when you saw him throw something away? A About 50 or 75 feet.

Q How much beyond that was it that you caught him?

A I should judge about 50 feet more.

Q Did you shout to him to stop? A Yes, I had my revolver drawn.

Q Did he stop? A No.

Q Did you fire any shots? A No.

CROSS EXAMINATION BY MR. MOORE:

Q When you first heard the disturbance where were you? A Southeast corner of 98th Street and Third Avenue.

Q Your attention was attracted to the northwest cor-

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ner of 99th Street by hearing this noise? A Yes.

Q Did you run over there? A Yes.

Q And just where were you when you first saw Powers as you say? A On the corner of 99th Street.

Q Which corner? A The southwest.

Q How wide is that street? A Approximately, I cannot answer it accurate, but I guess it is about --

Q A rather wide street? A About 40 feet I guess.

Q Isn't it much more? A I answered your question that I cannot accurately answer.

Q Is it not over sixty? A I don't know.

Q Put your mind back to it and give your idea of the distance, see if it is not pretty near sixty feet?

A I do not know the distance of the street and cannot answer.

Q I do not want anything only your judgment? A Well, I should judge about 40 or 50 feet.

Q So that when you first saw this defendant powers, according to your story, he was at least 40 feet away from you? A Yes.

Q You arrested Powers within 100 feet of Third Avenue, didn't you? A I had not arrested him then.

Q You stopped him? A Yes.

Q How old are you? A 36.

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Q How tall are you? A Five foot nine.

Q How much do you weigh? A About 220 pounds.

Q Do you think you can run twice as fast as this young lean boy? A I won't say I can run faster, but I am very able.

Q In order to overtake him just where you did, from where you first saw him, you would have to go about twice as fast as he did? A I was going rather fast.

Q You went twice as far as he did, according to your story -- you say he was running? A Yes.

Q Anybody else running that way? A No.

Q Nobody else on the street going west except you and this man? A Yes, there was somebody walking and somebody going east.

Q Some people passed you going east while you were chasing Powers? A Yes.

Q And some people passed you going west? A Yes.

Q Was there a lot of people around that corner at that time? A Yes.

Q As matter of fact, when you got there there was quite a gathering of people on the corner? A Yes.

Q You say you saw Powers throw away the money? A Yes.

Q Just before you got to him at this lightning speed you were going? A Yes.

MR. RORKE: I object to the characterization

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"Lightning speed" and ask to strike it out.

THE COURT: I will let it stand.

BY MR. MOORE:

Q Now, did anybody run between you and Powers when you was chasing him in that manner? A No.

Q So that as you ran there was not anybody in between you? A No.

Q And about 50 feet before you overtook him you saw him throw away a roll of bills? A I don't know if it was a roll. I saw him throw some money.

Q You arrested him and walked him right back past the place where you say he threw away the bills? A Yes.

Q You did not stop to pick up the bills, did you?

A No.

Q You left them right there in the street? A Yes.

Q You did not think they would be worth anything as evidence if you saw him throw them away? A I do not pick up things when I am in pursuit of anybody.

Q Don't you always search if you see a man throw away something? A After you apprehend a person you are in pursuit of.

Q You apprehended him? A Yes.

Q And you did not look to see what it was he had thrown away? A On the way back, yes.

Q You just a moment ago said you did not do it?

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A No, I said I did not stop to see what it was when I was in pursuit of him.

Q When you stopped him, did you stop to see what it was? A I walked back, yew.

Q You did not look for what he had thrown away, did you? A Yee.

Q Didn't you tell me a moment ago you did not do that when you apprehended him? A I looked to see where he had thrown it, but it was not there when I came back.

Q You told me a moment ago that there was nobody between you and this man at the time you saw him throw this roll of bills that he had in his hand away? A I said there was not anybody between him, but there was people walking on the street.

Q I was quite particular to ask you if anybody passed between you and him in that last fifty feet of the race and you said no. A They walked upon the side of me. They did not pass in front of me.

Q You would go the fifty feet in a very short space of time? A I don't know how long it would take me.

Q A half a minute or a minute at the outside -- you certainly could run fifty feet in a minute, fat as you are? A I am very able as I answered before.

Q You could do it in a minute? A I don't know how long it would take me. I was never a runner. I

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Q You told the District Attorney you saw him throw away a roll of bills? A I did not say a roll of bills and I still say I saw him throw money from his hand.

Q And yet you did not stop with him to search for the money? A I did on the way back.

Q Didn't you tell me you did not? A I did not stop when I was in pursuit of him.

Q Nor on your way back, you did not stop with this man? A Yes.

Q You could not find him? A No.

Q You did not see anybody in between you in the meantime? A There was quite a few had left the corner when I was on the way back -- not in between.

Q We are now on 99th Street west of Third Avenue while you are chasing this man. A I do not look back when I am running forward after anybody.

Q Was there anybody chasing you during the time you were -- A There were other men that run in the direction I did in the rear of me to see what I was running for.

Q There were other men chasing you? A Not chasing me but running.

Q Running behind? A In the direction that I was.

Q As soon as you stopped this man did you look around?

A I first observed his condition before I looked around

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to see if he was safe to take into custody by me for my own safety.

Q That was over in a minute? A Not always -- it takes a couple of minutes. I gave a superficial search to see if everything was safe for me to take him into custody.

Q See if everything was safe? A Yes, sir, I did not know if he was armed.

Q That did not take long to see if he had anything in his hand? A Sometimes a few minutes.

Q For or five minutes? A Well, may take, if you want to be careful about your person.

Q The whole thing, from the time you saw him throw away that roll of bills until the time you arrested him was less than half a minute? A Well, I won't say how long it was.

Q Did you when you arrested him and found nothing in his hand turn around to see whether the money was still there that he had thrown away? A When I came back.

Q Did you? A Yes.

Q I do not ask about when you came back -- I ask when you turned -- did you turn around after you arrested him to see if the money that was there, if somebody was stealing it? A No, I did not. I was taking him into

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custody.

Q You were not interested to see if the money was in the gutter or not? A I was interested in the defendant at the time.

Q Were you also interested in seeing whether the money that he had thrown away was still in the gutter? A Yes, when I came back.

Q Did you look around after you arrested him to see if it was there?

A Yes, after I arrested him -- I did not arrest him. I was taking him into custody.

Q When you apprehended him, did you look around to see if the money was there then? A After I had seen he was safe to take into custody I brought him back and then looked.

Q Did you look before you brought him back that fifty feet? A Yes.

Q Did you see anybody picking up the money? A No.

Q Did you see anybody there at all? A Yes.

Q Where? A Walking.

Q But you did not see anybody stoop over? A No.

Q Which way were those people that you say were walking within fifty feet of the place where you arrested him? A Some walking west and some east.

Q You mean to say there were people going both ways?

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A Yes.

Q How many were going west? A Two.

Q How many going east? A Three or four.

Q This was 1:30 in the morning? A 1:45 a.m.

Q Pretty busy street that hour of the morning?

A Always. It has a station there, an elevated station.

Q Where? A At 99th Street and Third Avenue.

Q This man at the time you arrested him had a collar and shirt on? A No.

Q What? A No, sir.

Q Wasn't he dressed the same as he is now? A No.

Q Don't you know he has been in jail ever since with that same suit on? A I don't know anything about how he has been attired since he was in jail. I am testifying as to his presence on the night I took him into custody.

Q I ask if he was not dressed exactly the same?

A No.

Q How was he dressed differently? A He had not any shirt or collar on. His shirt was torn from his body.

Q His shirt was torn from his body? A Yes, and he got his shirt from the other defendant Dorgan to wear.

Q Did the other defendant have a shirt and collar on?

A Yes, a khaki shirt.

THE PEOPLE REST.

MR. MOORE: I move for the discharge of the

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defendant upon the ground that the People have failed to establish a case against him.

Motion denied and exception.

GILBERT POWERS, the defendant, called as a witness in his own behalf, being duly sworn and examined, testified as follows:

(Residence 184 East 95th Street)

DIRECT EXAMINATION BY MR. MOORE:

Q How old are you? A 23.

Q How tall are you? A About six foot.

Q How much do you weigh? A From 170 to 175.

Q Are you in good physical health? A Yes.

Q And you were on the 6th of June last? A What is that?

Q You were in good physical health on the 6th of June last? A Yes.

Q You have seen your codefendant Dorgan since you were arrested? A Yes.

Q When was the first time you ever saw him? A The first time I ever saw him was Third Avenue after I had been apprehended by the policeman.

Q By Policeman Cotter? A Yes.

Q Where do you say you live? A 184 East 95th Street.

Q That is in this vicinity? A On the corner of

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Third Avenue and 95th Street.

Q The L, one is at 99th Street, is it? A Yes.

Q And where is the nearest L, is that the nearest L to 95th Street? A Yes, sir, it is nearest to 95th.

Q Will you tell the Court and jury just what you did upon this night that you were arrested, at the time you were in the vicinity of Roth's saloon? A Yes, sir, in the afternoon around 5 o'clock --

Q Never mind that, come down to this. A 9 o'clock I went home to my house and stayed in the house until half past one, around that time, after one o'clock anyway, and I had a little time up in the house.

Q What? A A little time, we had a little party, sort of a party, and at one o'clock the party broke up and everybody went home, and I had been drinking that night a little bit and I -- there was a lot of smoke in the room and I thought I would go downstairs and get a little air, and I went down to the door, and thought I would take a walk, and I walked up Third Avenue and got as far as 99th Street and I saw a crowd of people around 99th Street corner, the northwest corner, and I saw there was some trouble going on and I walked over to see what it was about, curious. When I got over there I saw two fellows run out of the place and run towards

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Lexington Avenue, and I stood there watching them running, and the next thing I know I turned around and Officer Cotter grabbed me, right almost in front of the door. I asked him what he wants me for. He said come here, I will find out myself -- you will find out -- so he walked me to the corner and back again to the side door of the saloon and inside, and then I was arrested and taken to Police Headquarters. I did not know -- I knew I was being blamed for something down there, but I did not know what was done.

Q On what street was it that Office Cotter approached you? A 99th Street.

Q How far from the corner of Third Avenue was it he approached you? A Well, it was about thirty feet or twenty-five.

Q Were you running? A No.

Q And just before he saw you did you throw away a handfull of bills which you were carrying in your hand? A No.

Q Were you in the saloon that night? A No.

Q Were you one of themen that went in there and stood in front of the counter while the other man went back of it? A No, I did not, I was not in the place at all.

Q You have told all that you know with regard to

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the transaction? A Yes, sir, that is all, everything.

Q You have been convicted of crime? A Yes.

Q When? A 1917.

Q What was the crime? A Robbery.

Q What punishment was meted out? A I was sentence to Elmira Reformatory.

CROSS EXAMINATION BY MR. RORKE:

Q How many times have you been convicted? A Twice, I think.

BY THE COURT:

Q Why do you say twice, you think, cannot you tell if it is twice or more? A Convicted twice, one of a felony.

BY MR. RORKE;

Q What is your real name? A John Bigby.

Q Why did you give the name of Gilbert Powers when you were arrested? A Why, I was arrested before and I knew that if I gave my right name, I figured these policemen up in 104th Street house would give me a beating if they tried to find anything from me I did not know anything about -- would not believe me and would try to insist upon forcing me to tell them.

Q You also used the name Callahan on former occasions? A Yes.

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Q Were you sentenced in 1916 as John Bigby to the Reformatory for using a blackjack? A Not for using -- no. I was sentenced there for carrying it. They said I carried it, but I did not. I was found guilty, but that means a conviction, of course.

Q Were you sent to the reformatory in 1917 as John Callahan on a charge of assault and robbery? A Yes.

Q Have you used any other names besides Gilbert Powers, John Callahan, and John Bigby? A No.

Q Did you ever meet this fellow Dorgan when you were in the Reformatory? A No, I never saw him.

Q You don't know anything about Dorgan? A I never saw him before that night.

Q Do you know that Dorgan has other names besides Dorgan? A I couldn't tell you, I don't know.

Q Do you know that in the magistrate's court when you were there with Dorgan, that he had other names?

Objected to. Excluded.

Q Did Officer Cotter bring you back to the saloon when he arrested you? A Brought me to the saloon, yes.

Q Brought you in the saloon? A Yes.

Q And was the other officer there at the same time with Dorgan? A Yes.

Q And Roth was there, was he not? A I don't know

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whether Roth was there.

Q The man who was on the stand who gave the name Roth this morning, the proprietor of the saloon, was he there at that time that you were brought back? A I did not see him.

Q Did you see the other witness, Gallagher, the bar-keeper when you were brought back to the saloon? A I saw someone that looked like him, might be Gallagher, that came at me with a stick.

Q Was that a man that had a cut mouth? A I did not notice if his mouth was cut.

Q Was the other witness Phillips there at the time?
A I did not see Phillips.

Q Did you see them at the police station? A I did.

Q Did you see them in the magistrate's court?

A Yes.

Q You say you were not running? A I was not, ^{no} sir.

Q You say you did not throw anything away? A No, sir.

Q And that the policeman did not run after you?

A He came towards me and picked me up. I suppose he ran from the corner to where I was standing.

Q Do you say your shirt was not torn off you?

A No, sir.

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Q At the time the officer arrested you? A No.

Q And that you don't know anything about Dorgan?

A No.

Q You were quite surprised to find yourself arrested? A I was.

Q You gave a wrong name when you were arrested?

A I did, because --

BY THE COURT:

Q You say on the night in question you went to your house, is that correct? A Yes.

Q At nine o'clock? A Yes.

Q Where is your house? A 184 East 95th Street, Third Avenue and 95th Street.

Q And you remained in your house until half past one o'clock? A I couldn't say as to the exact time but it was after one o'clock.

Q Did you not say in the course of your direct examination that between the time that you went to your house and the time that you left your house there was a party
party
a ~~party~~ there you had been drinking? A Yes.

Q And then you went where? A Went downstairs and took a walk up Third Avenue to get some air, and when I got to 99th Street I walked four blocks.

Q Between what avenues is your home? A Right on

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the corner, southwest corner of 95th Street and Third Avenue.

Q You walked in the direction of Roth's place, did you, at that hour? A Yes, walked north.

Q Did you turn west? A No, I walked right north up Third Avenue to 99th Street and saw the crowd outside of that saloon there in 99th Street corner and I saw there was something going on and walked over curious to see what it was about. While standing watching it, I was sort of half dazed from the drink I had, and the next thing I know I was arrested.

Q Were you drunk or sober? A I was not sober.

Q The officer says that you ran? A I did not run. I was standing right in front of the door.

Q The officer says that you had a shirt partly torn when he caught you? A That is not right.

Q Did you see Roth when you were taken back to the saloon? A I don't remember seeing him.

Q Did you see Gallagher? A I saw Gallagher. The fellow that came at me with a stick. He said it was Gallagher.

Q He came at you with a stick? A I was in the custody of the officer.

BY THE COURT:

Q You say Gallagher came at you when he saw you

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and had a stick? A He was dazed -- supposed to be --

Q Didn't you say he came at you with a stick?

A Yes, he did, he came to the officer and I, I don't know if it was me or who it was, but he was coming across the room in that direction.

Q Did he say anything to you? A No.

Q Did you say anything to him? A No.

Q Did you say anything to anybody? A No.

Q Did the officer ask you any questions? A No, sir, he did not.

Q Did you tell the officer that you had been in your house until 1:30 in the morning and that you felt as if you would like to go out and get some air, that you were under the influence of liquor, did you say anything like that to the officer? A No. He just arrested me and did not ask me any questions and I did not answer.

Q Did you say to the officer that you did not in any wise participate in the alleged robbery? A I as much as said that.

Q Did you say that to him? A I said what have you arrested me for.

Q Did he tell you? A No -- "Come with me" he said.

Q When were you sent to Elmira? A 1917.

Q By Judge Gibbs in the Bronx? A Yes.

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THE DEFENCE RESTS

PEOPLE REST.

TESTIMONY CLOSED.

MR. MOORE: I ask your Honor to withdraw all the counts in the indictment from the consideration of the jury except the first count for robbery.

THE COURT: I will allow robbery in the first to remain, grand larceny in the second degree to remain, assault in the second degree to remain, and the charge criminally receiving stolen property I will take from the consideration of the jury.

MR. MOORE: Do I understand you to say that you will hold they can find him guilty of all three?

THE COURT: No, I do not say that, but I will submit all three.

The Court admonishes the jury in accordance with Section 415 of the Code of Criminal Procedure and takes an adjournment until tomorrow morning, July 28th, 1920, at 10:30 o'clock.

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THE PEOPLE VS. POWERS.

55a

Rothery¹⁰

THE COURT'S CHARGE.

Thomas W. Osborne,
Official Stenographer.

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New York, July 28th, 1920.

Trial resumed.

THE COURT'S CHARGE.

McINTYRE, J.

Gentlemen of the Jury: The defendant now arraigned is being tried for robbery in its first degree. He was indicted by the Grand Jury of this county. Hence, this judicial inquiry.

The accusation, that is to say the indictment, carries with it no presumption of guilt. He is not required under our system of jurisprudence to establish by proof his innocence. The burden of proving his guilt beyond a reasonable doubt is upon the People of the State of New York, his accuser in this case.

The law, in its wisdom, has said that an accused person is presumed to be innocent, and so in this case, this defendant is presumed to be innocent until his guilt is established to your satisfaction and beyond a reasonable doubt. Then, and in that event, the presumption falls. It is destroyed.

The evidence in this case, as in all cases, whether it be direct or circumstantial, must show that sufficiency to satisfy the mind and consciences of the members of this jury, that the defendant did the act charged in the indictment. If it fail, a reasonable doubt must follow, or in other words, it may be said that the People

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have failed to make out a case.

The State's case here does not rest on direct evidence only. There is some circumstantial evidence in this case, and it is for you to say, after having examined all the evidence that has been adduced, whether the evidence is believable and whether it establishes the guilt of the defendant beyond a reasonable doubt.

As I said an instant ago, the accusation here, namely, the indictment, charges this defendant with having done that on the 6th day of June this year, which, in law, would amount to robbery in its first degree.

Robbery, at common law, ^{was} ~~is~~ the felonious taking of money or goods of any value from the person of another, in his presence, against his will, by violence or by putting him in fear, or the demanding of money with menace. It was then, as it is now, regarded as a great crime.

Robbery in the State of New ^{York} ~~is~~ as I will read to you. I shall give you the precise language of the statute: The unlawful taking of personal property from the person or in the presence of another against his will by means of force or violence or of fear of injury, immediate or future to his person or property or to the person of a relative or a member of his family or of anyone in his company at the time of the

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robbery.

The indictment charges robbery in its first degree. To constitute robbery the force or fear must be employed to obtain possession of the property or to prevent or to overcome resistance in the taking.

It will be for you to say whether or not the force or fear was employed to obtain the property belonging to Edward Roth, or to retain possession of the property or to prevent or to overcome resistance in the taking.

Robbery in its first degree is defined by our Penal Law as follows: Robbery in the first degree is the unlawful taking or compulsion, if accompanied by force or fear, when committed by a person being armed with a dangerous weapon or being aided by an accomplice actually present.

You will recall that in this case there is some evidence tending to show that this defendant, together with one other, was in the premises used and occupied by Roth and the witness Gallagher.

The theory of the State is that this defendant with one other forcibly entered the premises used and occupied by Roth with the intent of perpetrating a crime within those premises, and that at the time the defendant was in those premises on the morning of June

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6th, about 1:30 a.m. he had with him another man, and that the other man and this defendant acting in concert with the same felonious intent assaulted Gallagher, a witness in this case, and that the purpose of that assault was to commit the crime of robbery in its first degree.

In other words, the People contend that this defendant was aided and abetted on the morning of June 6th, 1920 by another man in the commission of the crime of robbery.

You will remember the language of the statute to which I an instant ago addressed your attention, namely, robbery in the first degree under the law of our state is the unlawful taking or compulsion, if accomplished by force or fear when committed by a person being armed with a dangerous weapon or being aided by an accomplice actually present.

One of the questions here for you to decide will be, Was the man whom it is said was with this defendant in those premises on the morning in question an accomplice of this defendant, acting in concert with him, aiding, abetting, helping in the commission of the crime?

Briefly, I will call your attention to some of the evidence upon which the State relies.

It would seem -- and it is for you to say whether

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it be true, that a knock was heard at the door of the store used and occupied by Roth as a saloon and cafe. That when the door was opened, two men entered and they immediately accosted Gallagher who was an employe of Roth and that he was beaten, thrown down and rendered unconscious. The evidence goes on that while Gallagher was prostrate upon the floor, one man stood by the counter and the other of the two men went behind the counter; that there was a cash register on the back bar; that one man said to the other, "Take it out," using other expressions indicating that he was directing the opening of the cash register. There is evidence here tending to show that at that time, in that cash register, there was a sum of money exceeding \$250. There is evidence here tending to show that one of the two men who was in those premises on the morning in question was seen to place his hands or hand in the cash register, and that when the cash registered was examined some silver coins were found but that ^{the} sum of \$250 was missing; that the amount indicating the contents of the cash register showed at the time that the cash register was examined a sum exceeding \$250 in the cash register. The evidence disclosed also that when there was some commotion and some alarm given, a police officer ran to the scene and among other things the officer

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testifies that he saw this defendant leaving the side door, running in the highway, and while he was in pursuit of this defendant saw him throw something away.

If that which has been testified to, that is to say that to which I have just address your attention be true, if you believe that which I have just recited, and it is for you to say whether it be true or not, you may convict this defendant of the crime of robbery in its first degree.

Circumstantial evidence is legal evidence. It is evidence that should not be disregarded by a jury.

Our law exacts a conviction wherever there is legal evidence to establish ones guilt beyond a reasonable doubt, and the Court of Appeals of our state has frequently stated that circumstantial evidence is legal evidence.

If the evidence in this case convinces you that this defendant is guilty under this indictment, you may convict him, as I stated to you a few seconds ago.

The law requires, in a case where the evidence is circumstantial, that the circumstantial evidence must exclude every other hypothesis but that of the guilt of the party being tried.

A little while ago I stated to you that the theory of the prosecution was that this defendant was

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acting in concert with another; that they were acting jointly, their purpose being to commit the crime of robbery in its first degree.

I will give you the law predisesely covering the situation such as has been pictured to you by the learned District Attorney.

It is the law that a person concerned in the commission of a crime, whether he directly commits the act constituting the offence or aids and abets in its commission is regarded, under our law as a principal. If this defendant aided and abetted in anywise, by his and presence or otherwise, /the other man who entered the premises in question with this defendant, did the physical act of robbery, he would be just as guilty as the one who took the property from the cash register.

The indictment in this case charges this defendant Powers and one Dorgan in doing the act mentioned, and as I said an instant ago, the learned District Attorney argues that Powers and Dorgan acted together, their view being to commit the crime of robbery in the premises described and mentioned in the testimony; that one aided and abetted the other, and if that be so, I want to say once more it matters not who took the money, if they were acting together, one would be just as guilty as the other if the money was taken by force or violence.

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The indictment charges also the crime of grand larceny in the second degree.

Larceny generally defined, is as I will read: A person who with the intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or any other person, takes from the possession of the true owner or of any other person or obtains from such possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing, or secretes, withholds or appropriates to his own use or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

Larceny is divided into three degrees.

We have larceny in its first degree, larceny in its second degree and larceny in its third degree, sometimes called petty larceny.

Larceny in its second degree is as follows:

A person is guilty of grand larceny in the second degree who under circumstances not amounting to grand larceny in the first degree, in any manner specified in this article, steals or unlawfully obtains or appropriates property of the value of more than \$50 but not

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exceeding \$500 in any manner whatever. That provision applies to this case.

Under the evidence in this case, if you believe it, you may find this defendant guilty of grand larceny in the second degree.

In this indictment there appears to be an assault count. The count charges assault in the second degree. Assault, as defined by the Penal Law of our state is as follows: A person who under circumstances not amounting to the crime specified in Section 240, which section defines assault in the first degree, assaults another with intent to commit a felony or to prevent or resist the execution of any lawful process or mandate of any court or officer or the lawful apprehension or detention of himself or any other person, is guilty of assault in its second degree.

The same section states: "A person who wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon, or wilfully and wrongfully assaults another by the use of a weapon or other instrument or thing likely to produce grievous bodily harm, is guilty of assault in the second degree.

Under the evidence in this case you may convict this defendant of assault in its second degree, if you

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believe he is guilty in that respect beyond reasonable doubt.

If the evidence in this case convinces you that this defendant acted with another on the day in question and did that which amounts in law to robbery in its first degree, you may convict him, as I said, of that degree of crime.

The defendant has taken the stand in his own behalf and he states that on the day in question he left his house at about one thirty a.m.; that he walked in the direction of the premises used and occupied by Roth; that he was hazy and that he had been drinking some; that his sole and only purpose in going out upon the highway was to get some air, and that when he came in close proximity to Roth's premises his attention was attracted by noises and a crowd; that he went in that direction and there stood for a minute; that he saw an officer approaching; that he started to go away and did go away; that he did not act in conjunction with anybody. That he did not act in concert with anybody; that he did not enter the premises in question; that he in no wise participated in the crime charged in the indictment.

If that story told by him be true, he has committed no crime and it will be your duty to acquit him,

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if you believe that story.

Is the story told by this defendant a probable story? Do you believe that which was testified to by this defendant? It is for you to say. When, upon the stand, the District Attorney interrogated him concerning his past life, he was asked if he at one time had not been convicted. The defendant responded yes; that heretofore he had been convicted of robbery and assault, and that he had been sent to the New York State Reformatory at Elmira, and I think the evidence also disclosed that on some other occasion he had suffered conviction. The Court did not allow that testimony for the purpose of showing that he was guilty of this particular crime for which he is now being tried, but only for the purpose of affecting his credibility.

When you come to analyze the testimony given by this defendant in his own behalf, you may take also into consideration his previous conviction as bearing upon the credibility of the story that he told by way of defence.

A previous conviction does not establish guilt. It would be unfair if that were the theory of the law. Many, many men have been unfortunate and have transgressed the law and have been sent to prison, and subsequently have come out of prison and led righteous lives. So

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in this case I want to warn you now not at all to feel that because he has been charged with robbery and assault once before, that this is evidence amounting to his guilt in this case. I want to say to you once more that we only received it for the purpose of affecting his credibility or as bearing upon his credibility.

This is a most serious case. It is a case that requires your careful attention and scrutiny. Robbery is almost as serious in the eye of the law as murder.

If you conclude from the evidence that this defendant did not speak the truth in his own behalf when upon the stand, you will then ask yourselves whether the evidence in this case as given by the People of the State of New York convinces you of his guilty beyond a reasonable doubt.

Every man accused of crime is entitled to the benefit of a reasonable doubt. If a reasonable doubt springs out of the evidence in the case, it becomes the property of the one accused and the law requires that he should be acquitted.

If a reasonable doubt exists in this case in your minds concerning the guilt of this defendant, you should acquit him. A reasonable doubt is not a guess. It is not a speculation. It is not a surmise. It must be based on the facts adduced. A jury is not permitted

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to go outside of the evidence in order to find a reasonable doubt. You must find it in the evidence before you. A reasonable doubt means just what the words themselves mean in their every day use. It is such a doubt for which you can give a reason and assign a reason. It is not speculative nor is it a guess. A jury should never use a reasonable doubt as a subterfuge in order to avoid the performance of an unpleasant duty.

If a jury feels that a man's guilt has been established beyond a reasonable doubt, a jury should find a verdict consistent with the evidence, be the consequences what they may.

As I said a little while ago this is a case that is a very serious one. That is to say the accusation made against this defendant is most serious, but it will be for you to say whether the evidence in this case has supported the allegations in the indictment to such a degree as to make you feel that the evidence establishes his guilty beyond a reasonable doubt.

As you sit in this jury box today you are the conservators of the peace and the law, as far as you have to deal with the law after having been instructed upon it.

The enactments of our Legislature defining various crimes have been made from time to time to pro-

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test society. You have a perfect right to dwell in your homes assuming that the marauder will not enter in the dead hour of night and do violence to your person and take from your possession your property. Our law says to do that is unlawful, ^{and} ~~but~~, there can be no enforcement of the criminal law of our state without the cooperation of a jury.

If a juror will fail to do his full duty because he might feel that perhaps some serious penalty will follow, or if he permits his judgment of the evidence to be influenced by commiseration, sympathy or pity, if he abstains from doing his duty for that reason you can well understand how the criminal law of our state would be set at naught.

When I make these observations I do not want you to feel for an instant that I am indicating an opinion, nor that I am telling you that this defendant is guilty. You are the sole judges of the facts. It is not for the Court to pass upon the facts. The responsibility is up to you. As you sit there in that box you are just as important in the administration of the criminal law as I am. You are judges in this court today. You are judges of the facts. I am simply a judge of the law. There can be no verdict except through the lips of the jurors.

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Your verdict will be, Not Guilty, or Guilty of Assault in the second Degree, or Guilty of Grand Larceny in the Second Degree, or Guilty of Robbery in the First Degree. You may retire.

MR. MOORE: I desire to except to that portion of your Honor's charge where your Honor says that if they believe the story of the defendant they must acquit him. In that connection I ask you to charge the jury that they may entirely disregard the story of the defendant and still acquit him, if they have a reasonable doubt as to the truthfulness of the police officer.

THE COURT: Mr. Moore, I will so charge, but I want to say to you that I said substantially the same thing in the course of my charge.

MR. MOORE: You did in another part of your charge, but --

THE COURT: Then, in the language of counsel for the defendant I so charge.

MR. MOORE: In determining whether or not they will accept as truthful and beyond reasonable doubt the story of the police officer, they must take into consideration all of the surrounding circumstances including the place where the officer was at the time the robbery was committed.

THE COURT: I so charge. That is the law.

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MR. MOORE: Also the fact that it was the alleged accomplice who was the man who took the money and not this defendant. There is no proof in the case the money was in the possession of the defendant at any time.

THE COURT: That is substantially what was testified to here, but in that connection I will say to you gentlemen once more; it is the law that a person concerned in the commission of a crime, whether he directly commits the act constituting the offence, or aids and abets in its commission, is regarded in our law as a principal, and in that connection you will remember that the evidence is, among other things -- it is for you to say whether it is believable, that one of the two stood outside of the bar and told the man inside at or near the rear bar to, Take it out, or words to that effect.

MR. MOORE: I do not ask you to charge as requested upon the theory that the one who aided and stood outside the bar was more or less guilty than the man who actually took the money, but I do ask that you charge as bearing on the probability of the truthfulness of the officer's story when he says that he saw this man throw the money away.

THE COURT: That is true. You will take that into consideration.

MR. MOORE: I also ask you to charge the jury

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that in determining whether the story of the officer is true, that he ran from across the street and captured this man in a short distance, the jury have a right to take into consideration the physical build, appearance and age of both the officer and of this defendant.

THE COURT: I so charge.

MR. RORKE: I have just one request; that your Honor charge the jury that the case depends upon the evidence of all the witnesses and not upon the evidence of any one witness. It is on the entire case that the question of a reasonable doubt must arise.

THE COURT: I will say to the jury that they must consider the evidence in the entire case.

You may retire.

The jury retire.

Later, the jury rendered a verdict of guilty of robbery in the first degree.

I hereby certify that the foregoing
is a true & correct transcript
of all the proceedings taken
in the above entitled action
Between Belcher & Powers
vs. The State of Ohio
Official Stenographer

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Hon. John F. McIntyre.

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Justice.

-----X

For the Defendant.

MR. MOORE: I desire to make a formal motion to set

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aside the verdict on the ground it is contrary to law, contrary to the evidence, and upon the exceptions taken to your Honor's rulings during the trial.

THE COURT: The motion is denied.

MR. MOORE: Exception.

THE COURT: There are four convictions standing here.

MR. MOORE: I know. I want to say just a word, Judge; I realize that this is a serious offense, and I also realize that the defendant has been convicted before, and I honestly think Judge, that as much upon his record as anything he was convicted. I have pondered ~~gone~~ over the story of the police officer and I cannot reconcile it with common sense; without that witness, there would be no case to go to a jury on. Now then, this police officer saw this man throwing away this money, which must have been small bills could have vanished within that momentary time -- I think it would not take anybody five minutes to pick up those bills. It was dark, the middle of the night; I cannot believe there was this running match; the officer not pulling his gun; not firing a shot; I cannot believe that the officer saw him come out of that door fully illuminated, it was only a block between 98th and 99th, and he was on the opposite corner.

Of course the jury found him guilty, but the Court

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must pass sentence, and I do think there should be some consideration for what I regard as uncertainty in the testimony; I do believe if the boy had not been before that jury with that record, he would ~~not~~ have been found not guilty. I know and your Honor knows they must not consider that, but somehow it does creep into the minds of the jury. He is still a young man; he has been to Elmira -- sometimes that might be an occasion for his being here -- instead of being a reformation, it is a destruction.

While it is in your Honor's discretion to give him a long or a short sentence, I submit that when all the circumstances are taken into consideration, I don't think the evidence was very reliable upon which he was convicted. I ask your Honor to consider his youth although he does have a record--

THE COURT: He has been convicted of robbery in the first degree. Every night there are hold-ups and stick-ups in this City with robberies and burglaries.

This fellow is a desperate character; the only thing I was surprised at a weapon was not found on his person.

MR. MOORE: There was no weapon used.

THE COURT: They knocked a man down and went to the till and took \$240. from the register. I am very reluctant to impose severe sentences upon young people

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where a man is a first offender, I go as far as I can to save one--

MR. MOORE: Assuming that he is guilty, it is remarkable that they found no money either upon him or the other man--

THE COURT: The jury found him guilty of robbery.

MR. MOORE: Wasn't it as much upon his record as upon the evidence? The police officer to my mind, I have analyzed it intelligently, it didn't hold water according to my analysis of it. The jury found him guilty, and I think it was as much on his record--

THE COURT: He is a desperate man.

MR. MOORE: There was nothing desperate in regard to this; he didn't go there armed with a knife, provided he is guilty--

THE COURT: I will have to make an example of him; we cannot allow these hold-ups every night. Two or three months ago I was constrained to give one man a long sentence, I have determined I will not allow any of these fellows to get away who hold up people.

MR. MOORE: I am only asking that not the extreme penalty be imposed which is very great; he is a young man, I don't think it would require the extreme--

THE COURT: The sentence which I am about to impose upon him in this case I do with great reluctance; I don't

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feel like imposing severe sentences; it is the hardest work I have to do here. Here is a fellow, a reprobate; highway robber, a fellow that will take human life if necessary. The sentence of the Court is that he shall be confined to State prison at hard labor for a period of eighteen years.

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