

Q Having read you these two questions and answers, does that bring your mind back to the occasion when this group of men were in front of Rogers' Saloon on that afternoon, and does that bring up to your mind that Patrick Donovan was searching him? A I did not see no group of men there.

Q How many people were in between you and Donovan? A People were passing back and forth all the while.

Q How many people would you say passed back and forth while Donovan and Rumore were face to face, and Donovan was talking to Rumore. Did anyone pass between them? A They passed between me and them.

Q How many people? A I should judge about seven people.

Q You can remember that, can you? A Not exactly.

Q Do you remember anybody passing between you? A I remember people.

Q You remember some people passing up and down between you that day. Don't you remember just what happened there that day, and didn't someone say, "Watch out for a gun?" And then Donovan took hold of the man Rumore and searched him and he said, "No, he ain't got any gun." Don't you remember that at all? A No, sir.

Q When Rumore came up and spoke to Donovan and Donovan said, "You are a peaceful man," and to go away, what was the next thing that happened? A Rumore turned around and he spied Martin Burke standing in the vestibule of the saloon.

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Q Were there any people standing between Rumore and the defendant, Martin Burke, - I mean besides Donovan. Donovan was standing a little to the right of Burke, you said, do you remember? A I am trying to think.

Q This is the first time you everheard of a man being shot that you knew, isn't it? A Yes.

Q And you happened to be there in that neighborhood that day, didn't you? A Yes.

Q Doesn't it stand in your mind clearly? A No, sir.

Q What did you see Burke do there? A When this man saw Burke in the doorway, he turned around and went for Burke.

Q Who grabbed Rumore when he went for Burke? A I did not see anyone grab him.

Q What happened? A As he went for Burke, the next thing I know, he was near on top of Burke, and there was a shot.

Q What did Rumore do, did he do anything? A I didnot wait to see.

Q Before the shot was fired, did he do anything? A Oh, yes.

Q What? A He went at Burke, and he muttered something in Italian. He went at Burke with a vengeance like.

MR. NEARY: I move to strike out about the vengeance.

THE COURT: Strike it out.

A (continuing) He went after Burke like he wanted to hurt

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him or do something.

MR. NEARY: I move to strike that out.

THE COURT: Strike it out.

Q Tell us what he did? A Rumore was standing there and Donovan was trying to pacify him and he spied Burke and went after Burke, and as he did he muttered something in Italian, and went like this towards his pocket (indicating) and the next thing I knew I heard a shot.

Q Which pocket did Rumore go to? A I am not sure. I could not answer that truthfully.

Q If you cannot answer it truthfully, do not answer it. You do not know? A I don't remember.

Q What did Burke do? A I could not see what Burke done.

Q Is your memory quite clear on that. Let me ask you, did Mr. Hennis ask you this question (reading): "Q Well, who did the shooting? A Well, I saw Burke.

"Q You saw him do it? A Yes, sir."
Did you make that answer to Mr. Hennis at the station house?
A I don't remember.

Q Don't you remember him asking you that question?
A No, sir.

Q What? A No, sir.

Q Doesn't the question and answer I just read to you now refresh your recollection and bring back to you what happened there? A I don't remember making that answer.

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Q "Q What did you see Burke do? A I saw him just shove a gun through the crowd and that was all."

Do you remember Mr. Hennis asking you that question? A No, sir, I don't remember.

BY THE COURT:

Q Did you see a gun in Burke's hands? A No, sir, I did not.

BY MR. NEARY:

Q Does that question bring back to you any recollection of what he did there that day? A No, sir.

Q Does the answer you made to Mr. Hennis bring that back to you? A No, sir.

Q And the further question (reading): "Q What hand did he have the gun in? A I could not swear if it was the left or right hand.

"Q Can't you remember? A If I ain't mistaken, I think it was the left." Do you remember those questions, and making those answers? A I don't remember that.

Q Does that bring back the fact to you of what you saw him do that day? A (No answer).

Q "Q And you say he shoved the gun through the crowd? A Yes, sir.

"Q What do you mean, that he just shoved his hand through? A He shoved it through the crowd while the crowd was around the man and he shot the man." Do you remember Mr. Hennis

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asking you those questions and your making those answers?

A I don't remember anything like that.

Q Having called your attention to those questions and answers, to refresh your recollection, does that bring back to you what you saw there that day; and the further question: "Q Did you see a flash come out of Burke's hand?

A No, sir, I didn't see the flash because I didn't want to be anywhere near the man because I was on friendly terms with the man and the man knew me from going in and getting shaved and haircutted, so I didn't want to be anywhere near the man, and so I stood on the curb on the outside of the crowd." Did you say that to Mr. Hennis. You did tell him you were standing on the outside of the crowd, didn't you? A I know I was standing there.

Q You told that to Mr. Hennis? A I don't remember telling him that.

Q "Q But you did see Burke shove the gun through the crowd? A I saw him shove the gun through the crowd.

"Q How many shots did you hear? A I know I heard one and then I ran." Now, having read to you those questions and answers, can't I get your mind back to just what took place on that day? Does that help you to remember what took place there? A I remember some facts that happened that day.

Q Tell me just what facts you remember that took place on that corner? What were they? When you saw Burke there

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tell me the facts you remember? A I remember the first fight.

Q You testified about the first fight. What else do you remember? A I remember the man going away and coming back again.

Q You told us about that? A And I remember the shooting.

Q Who did the shooting? A That I could not swear to, who done it.

Q I was trying to refresh your recollection as to the statement you made on the 16th of February, four days after the shooting. Your memory was pretty clear on that day then?

A I guess it was.

Q Can't you remember now what took place on that corner?

A (No answer).

Q You testified before the grand jury, didn't you? A Yes, sir.

Q When you heard the first pistol shot, did you notice about where the sound of the shot came from? A Yes, sir.

Q And where did it come from? A It came from the direction of Burke.

BY THE COURT:

Q How do you know that? A There is where the man was, towards him.

Q How far away were you at that time? A (No answer).

Q Are you guessing? Did you see any gun in Burke's hand?

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A No, sir.

Q You mean you heard a shot near where the two men were? A Yes, sir.

Q How far away were you at that time? A From about here to the end of that table (witness indicates about fifteen feet).

BY MR. NEARY:

Q And how many shots did you hear? A I heard one.

Q Is that all the shots you heard? A (No answer).

Q Did you hear more than one shot? A Not that I remember.

Q What did you do when you heard the first shot? A I ran.

Q Where did you run to? A Down through 19th street.

Q Did the defendant Burke run with you? A Not that I remember.

Q Did you see the defendant Burke that afternoon after the shooting? A No, sir.

Q Where did you go? A Ninth avenue, between 19th and 20th streets - 157.

Q Have you a brother who lived in West 19th street?

A Yes, sir.

Q What number? A 424.

Q Is it down near a garage? A Yes, sir.

Q Did you go into 424 West 19th street after the shoot-

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ing? A About four hours after.

Q Who went with you? A Myself.

Q Anyone else? A No, sir.

Q Did you meet the defendant Burke there? A I did not see him.

Q Did you meet the defendant Burke there? A No, sir.

Q Have you a brother names James Dowling? A Yes, sir.

Q Was he there? A He was there at the time I went.

Q Was Burke there at that time? A I did not see him.

Q Was that the first time you had been back to your brother's house since the time of the shooting? A Yes, sir.

Q Your brother is married and does not live with you?

A That is right.

Q Where did you see Bergen go after the first fight?

A I don't remember seeing Bergen after the first fight.

Q You saw Bergen fighting with Rumore? A Yes.

Q Did you see where Bergen went? A No, sir, I did not take notice.

Q (reading) "Q Where on the avenue after Rumore went up to his shop, where did Bergen go? A Bergen went into the ginmill." Did you say that? A I don't remember.

Q Did Mr. Hennis ask you where the defendant Burke went?

A Not that I remember.

Q (reading) "Bergen went into the ginmill. Where did Burke go? A Home." Do you remember that? A No, sir.

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Q And did Mr. Hennis ask you if you knew for what purpose Burke went home. Do you remember that question being asked you? A No, sir.

Q You said you only heard one shot. Is that so? A Yes, sir.

Q Now I ask you this: "Q And how many shots did you hear? A I heard three more. When I got around the corner I could hear bing, bing, bing." Does that refresh your recollection what you actually heard that day? A I only really heard one shot and then I run.

Q Did you hear any other shots after you began to run? A No, sir, I did not hear. I really only heard one shot.

Q You say Patrick Donovan was standing talking to Rumore? A Yes.

Q Did Donovan touch Rumore? A Not that I remember seeing.

Q Do you recall making the statements that I have read to you about the defendant Burke pushing his hand through the crowd. Don't you recall making those statements to Mr. Hennis? A No, sir.

MR. NEARY: I think that is all.

CROSS EXAMINATION BY MR. FITZPATRICK;

Q You were taken to the station house on the evening of this alleged crime, on February 12th, weren't you? A No, sir.

Q When were you taken to the station house? A I was

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taken to the station house on the 14th.

Q That was two days after. A No, sir, on the 15th, on a Tuesday.

Q By whom? A By Officer Corcoran.

Q Anyone else? A No, sir.

Q When you arrived at the station house, what happened?

A When I arrived at the station house they took me upstairs and sat me in a little room, and Captain Carmody came in and he said to me --

MR. NEARY: I object to what Carmody said as immaterial.

THE COURT: Objection overruled.

A (continuing) So he said to me, "What do you know about this?" I said, "I don't know anything about it." So that was all, he let me alone. So they held me there for about two hours and Officer Corcoran came in and said, "All right, you can go." He took my name and address and let me go.

Q Did you go to the station house again on another occasion? A Yes, sir, on the following day.

Q Who took you over there then? A Officers Callahan and Hooks.

Q How long did you remain there at that time? A I am not sure about the time but I think it was some time about half past two, and it was about eleven o'clock when I came out that evening.

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Q What happened, if anything, during that time? A Well, when I got taken in there, I went upstairs and they showed me all around the different rooms, the fellows that they had.

Q What do you mean? A The fellows that were arrested.

Q You mean witnesses in this case? A Yes, sir.

Q Or other defendants? A Witnesses.

Q People that you knew? A Yes, sir.

Q Had they been witnesses here? A Not that I know of.

Q Who were they? A Just the men he had, that the District Attorney had.

Q Courtney and Troy? A No, Devlin and Kondrup, and Breslin.

Q Was Sullivan there? A Yes, sir, Sullivan that is here, yes.

Q What happened? A They took me by someone's room, I don't know who, and the first thing I know I got punched on the jaw. That was all right. Then they put me in the lavatory and I was in there for about an hour or so and a couple of detectives came in. They just asked me questions and they went out again. Then Officer McNamara came in. He started to threaten.

Q What did he say to you? A "I am going to kill you. And you will not get out of here alive." And things like that, and he started in beating me. He had a rubber hose in one hand, and he had a lead blackjack in another hand.

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Q Did he hit you with a blackjack? A Yes, sir, with a blackjack on the legs and with a rubber hose he hit me across the head and on the ear.

Q What happened to your ear? A It was very painful. After I came out I went to see the doctor the next night and he said something about internal injuries that were done to my ear.

Q What doctor did you go to? A Dr. Fisher.

Q How long did he treat you?

MR. NEARY: Objected to as immaterial.

MR. FITZPATRICK: It goes to the circumstances of these statements. I think I can go into that.

THE COURT: He said he made no such statements. The jurors have no right to accept what the District Attorney has read as proof of any facts. The Court merely allowed the District Attorney to question this witness, and the other witnesses, as to statements purporting to have been made by them, for the purpose of refreshing their recollection. When a witness says that his recollection is not refreshed, the jurors have no right under the law to draw any inference against the accused, or against the witness because of the subject matter contained in the question and the answers purported to have been made by the witnesses. That law is clear.

MR. FITZPATRICK: But the damage is done when those

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questions are asked, and I think I can show the circumstances under which this happened.

THE COURT: No juror has a right to infer that a witness testified to something concerning which he said he had no recollection. That is the law. I can not deprive the District Attorney of the right of trying to refresh the recollection of a witness. He is entitled to do that under the law.

Q When, for the first time, did you see Burke on the corner of 19th street and Ninth avenue on February 13th? A When this Rumore came back after a fist fight, that was the first time I saw him.

Q What was he doing? A Just standing.

Q Did Burke have any conversation with the deceased in this case? A Not that I know of.

Q Did he say a word to him? A No, sir.

Q Did the deceased say anything to him? A No, sir. He just went at him, that was all.

Q I thought you said he said something in Italian.

A I could not understand what it was.

Q Then he did say something? A He muttered something.

Q You said he went at Burke? A Yes, sir.

Q And Burke was inside of the vestibule door of the saloon at that time? A Yes, sir.

Q Of the saloon on the corner of Ninth avenue and 19th

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street? A Yes, sir.

Q What did the deceased do when he went at the defendant? A He made a leap for Burke. He muttered something and he hollered at Burke and went to his pockets with his hand, and with that he was on top of Burke and the next thing I knew I heard a shot.

BY THE COURT:

Q What do you mean, that he was on top of Burke? A He was right close to him.

Q Did he have hold of Burke? A Not that I could see.

BY MR. FITZPATRICK:

Q Then you ran away? A Yes, sir.

BY THE COURT:

Q How soon after the deceased made, as you say, a leap at Burke, did you hear the report of a pistol shot? A I judge about two minutes.

Q What was he doing during the two minutes? Just illustrate by clapping your hands, what you mean by two minutes. Indicate the first clap when the deceased made a leap at Burke, and the second clap the firing of the revolver. A (Witness indicates as requested).

Q You say that is two minutes? A I judge about a minute.

Q Now do it over again. A (Witness does as requested). (The jurors estimate the time as four seconds by their watches).

Q How many seconds elapsed between the time of the firing

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of the first shot and the second shot? A I don't remember the second shot. I don't remember hearing them.

Q Four seconds after the deceased made a leap at Burke you heard the report of a pistol shot? A Yes, sir.

BY MR. FITZPATRICK:

Q Did you see anything in the hand of the deceased at that time? A No, sir.

Q Did you see anything in Burke's hand at that time?
A No, sir.

Q The deceased was quite a large man, wasn't he? A Yes.

Q Much larger than the defendant Burke? A Yes, sir.

Q And when he got in front of the defendant, you could not see what the defendant was doing, could you? A No, sir.

BY MR. NEARY:

When
Q /this man made for Burke, what did Burke do? Tell me all that Burke did? A I could not see what Burke was doing. When he went for Burke he was right in front of Burke.

Q Right in front of you? A In front of Burke.

Q How deep is the storm door in front of Rogers' saloon? It is a sort of small wooden house coming out, is it? A Here is the doorway and there is the storm doors (indicating)? When they are closed it shuts it entirely. The storm doors were thrown back, just like that (indicating). Here is the street, and to go into the saloon you have got to walk maybe a distance from here to there before you are in (indicating).

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Q From here to where? A From here to about there before you are inside (indicating about four feet).

Q You would have to go four feet past the storm door before you get to the second door that goes into the saloon? A Yes, sir.

Q Did Burke go back toward that second door? A Not that I could see.

Q Did Rumore have hold of Burke? A I could not see. He made a grab for him but I could not see.

Q He made a grab for him, and then you heard a shot? A Yes, sir.

Q And you say you heard the shot as you indicated by clapping your hands, just after Rumore grabbed Burke, is that right (Question withdrawn).

Q You have indicated by two claps of your hands, to show the time that elapsed between Rumore seizing Burke and the first shot, is that right? A Yes, sir.

Q Now, was that saloon open that day? A Yes, sir.

Q Had you seen people go in and out there? A Yes, sir.

Q And did they come in and out through the door on Ninth avenue where the storm doors were? A Yes, sir.

Q In fact, that is the only entrance to that saloon? A No.

Q There is a side entrance, is there? A Yes, sir.

Q There was not any door or hallway right next to that

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saloon? A Not that I know of.

Q Isn't the entrance to that building in which Rogers' saloon is located, down on 19th street? A The entrance to that building, yes.

Q It is a saloon on the ground floor, with people living above? A Yes.

Q And the entrance for the tenants who live above the saloon is on the downtown side of 19th street, a few doors from the corner? A Yes.

Q How long was it before you saw Burke standing in the doorway of that saloon, that you had seen someone coming in or out of that saloon? A I don't remember.

Q Had you been in the saloon? A No, sir.

Q Had Bergen been in the saloon? A Not that I know of.

MR. NEARY: I think that is all.

P A T R I C K D O N O V A N , of 411 West 18th street,
a witness called and sworn on behalf of the people, testified as follows:

DIRECT EXAMINATION BY MR. NEARY:

Q What is your business? A I am business agent on the docks, on the piers along the riverfront.

Q How long have you worked along the river front? A About five years this January.

Q Where did you say you lived? A 411 West 18th street.

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Q Do you know this defendant, Martin Burke? A Yes.

Q How long have you known him? A Well, almost since childhood.

Q You live in the same neighborhood in which he lives?

A Once I did as youngsters.

Q Did you see Martin Burke on the afternoon of February 12th, 1921? A No, sir.

Q On the afternoon of February 12th, 1921, you did not see him? A No, sir.

Q Were you in the neighborhood of 19th street and Ninth avenue? A Yes, sir.

Q Who did you see there? A Well, I saw a lot of the boys that were there at the time of the accident.

Q Who were they? A Well, there was the Dowling boy, and the Bergen boy, and several other boys there.

Q What was going on when you first saw those boys? A On the afternoon of this fatal accident I took my youngster for a walk. I was walking up Ninth avenue. When we hit 19th street there were three longshoremen there that belonged to that particular local that I represent.

Q Did you see the man there who kept a barber shop, known as Rumore? A Yes, sir.

Q Who was near Rumore when you saw him? A The Bergen boy.

Q Anybody else? A No, sir.

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Q Did you see the Dowling boy, who just left here, that afternoon? A Yes, sir.

Q Where was he standing? A I could not exactly say where he was standing at the time.

Q Did you see a boy named Sullivan standing there? A No, sir.

Q Did you see Kearney there? A No, sir.

Q Did you see the two Kearney boys standing there? A No.

Q Did you see Troy there? A No, sir.

Q When did you first see Rumore? A When I was talking to those three longshoremen, that attracted my attention to him, to the fight. They were asking me about a ship on the dock.

Q Did you see someone fighting? A Yes, this man with the Bergen boy.

Q Was anybody else fighting with him? A No, sir.

Q Was Dowling fighting? A I did not see him.

Q How long did the men fight? A It was only a question of about a minute, I believe.

Q Where did Rumore go then? A I seen him walking up Ninth avenue at quite a fast pace.

Q Did you see him come back again? A Yes, sir.

BY THE COURT:

Q You say you saw the fight. State what you saw. A I just saw the man and the boy fight.

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Q What man and what boy? A This Rumore and the Bergen boy.

Q What did you see them each do? A I just saw them. There were a couple of clinches exchanged, and then it was all over, and it came to a talkative argument. What it was about I was not near enough to hear.

BY MR. NEARY:

Q Did you see Rumore when he was near 18th street and Ninth avenue? A Yes.

Q Did you see him come from the direction of 18th street and Ninth avenue, up to Rogers' saloon? A Yes.

Q Did you go over to Rumore? A No, sir. After the argument stopped, the policeman on beat came along and asked the boys, as far as I know, what the trouble was, and they told him, saying that it was just a fistic encounter, and he went away. Then when this man came back he went towards 18th street looking as though --

Q Never mind. He went towards 18th street? A Yes, sir.

Q Then he came back from 18th street? A Yes, sir.

Q When he came back from 18th street, did you go anywhere near him? A No. He came over to the boys and he said, "Where did he go?" Then I spoke up and I told him, "Listen, you are no boy, you are a man advanced in years. You have got the biggest majority of these boys' trade." I tried to pacify the whole thing, explaining to him where he was wrong, that he

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was fooling with a lot of youngsters.

Q Where were you standing at the time that you were telling him that he was fooling with a lot of youngsters? A By Rogers' Saloon, by the corner.

Q Were you against the saloon or near the curb? A Between the curb and gutter.

Q You were between the curb and gutter? A Yes, right in the middle of the sidewalk.

Q I am going to show you a diagram, People's Exhibit 4 in evidence, and call your attention to the saloon; this is the saloon (indicating), at the southwest corner, with a bakery next door. Now will you put a little mark with your initials at the point where you were standing? A I was standing right there (indicating by marking with initials P.D.).

Q Please put a mark on here and show me where Rumore was standing, and mark it? A He was standing in front of me towards the saloon/^{door} right directly in front of me.

Q Put a letter "R" there. A (Witness indicates by making an "R").

Q He was not right within the entrance to the saloon door, was he? A Right outside of it. Here is like the entrance, and he was standing here (indicating), and I was standing here speaking to him (indicating).

Q Where were the others standing; put a series of dots on the diagram where the other people were standing. A They

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were standing right around here (indicating).

Q Was there anybody back of Rumore? A No, sir.

Q According to your marks you were practically surrounded by other people? A Yes, and on the side of me.

Q And in back of you? A Yes.

Q How far away was Rumore standing from you when you were talking to him? A Right directly in front of him. We were just having a peaceful talk amongst us.

Q How far, indicate. A Standing in front of me like that (indicating).

Q Indicate by some object in the courtroom? A Just like that.

Q As far away as what? A This railing here (indicating).

Q About a foot and a half? A Yes, sir.

Q And there was no one between you and Rumore? A Not exactly between us. We were just talking there.

Q What was the next thing that Rumore did? A While we were trying to explain - in fact, there were about five or six or seven of us standing there. Everybody was trying to tell the man where he was wrong and everybody was trying to tell him where he was wrong. The next thing he must have seen somebody come outside, at least he looked over the shoulders of everybody and he made a lunge for him.

Q Did he make a lunge to go past you? A Past everybody in the crowd.

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Q Did he go past you? A I guess he must have pushed up against me.

Q He was still in front of you, trying to get past you? A Just about between us.

Q What did you do when he went like that to get past you? A Everybody fell back.

Q What did you do? A Fell back with him, just naturally when you get pushed you get back.

Q Did you grab hold of him? A No, sir.

Q Do you recall having a conversation with me upstairs yesterday in the homicide bureau? A Yes, sir.

Q I sat you down on one side of the table and I sat at the other? A Yes.

Q Will you try to recall what you said to me at that time? A Yes, sir.

Q Did you put your hands on Rumore when he tried to get past you? A Just naturally tried to hold him off.

Q Did your hands touch his body? A I may have touched him.

Q There was not anybody standing between you and Rumore when you were talking to him and telling him he was wrong? A No, sir.

Q You were only a foot and a half from him? A Yes.

Q And he saw someone in back, and he tried to get past you? A Yes.

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Q Did he jump like that, towards you? A Not towards me, but towards something in back.

Q Did you put your hands up? A I guess naturally I did.

Q Doyou remember whether you did? A I could not exactly say.

Q Just as he jumped, what happened? A As he jumped he uttered some words in Italian. What they were I do not know. Next thing I know, there was a sort of scuffle and a shot followed.

Q Will you please indicate by clapping your hands, - the first clap indicating when Rumore tried to get past you, and the second clap indicating when the first shot was fired.

A When he made an attempt to get past me, then whatever he said in this language - it was right about, I don't think it was a second expired, when he made a lunge for somebody. He made an attempt to grab somebody and then the shot followed. There were a couple of words, whatever he said, and he made an attempt to pull his hand out of his pocket.

BY THE COURT:

Q Did you see him make an attempt to pull his hand out of his pocket? A Yes.

Q How far away were you? A Just as he came in front of me.

Q You say you saw him make a lunge at somebody? A Yes.

Q Who that somebody was you could not see? A No, sir.

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Q When you saw him making the lunge, did you look at him? A Yes, I was standing directly in front of him.

Q When he made a lunge his back was towards you? A No, sir, when he made the lunge he lunged towards me.

Q He made a lunge at you? A No, at somebody because he attempted to get over me at somebody in back.

Q What did you do? A I naturally backed away.

Q Then what became of Rumore? A He went out for him.

Q Illustrate that with the officer, assuming the officer represents you and you Rumore? A When we were trying to explain to this man --

Q The officer now represents you. A When we were trying to explain to this man how wrong he was and everything, he sees someone in the back - whether he mistook him for somebody I do not know but he uttered these words in Italian, and he made a lunge over the top of me (indicating).

Q Was Rumore taller than you? A Yes, sir, he was a big man. He made an attempt to pull his hand out of his right hand pocket.

Q What did you do? A I naturally fell back.

Q When this man Rumore made a lunge at a man who was behind you, Rumore put his hand over your shoulder? A Yes.

Q What hand? A It must have been the left hand.

Q Not what it must have been. A It was the left hand, because he had his right hand in his pocket.

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Q And you saw him actually with his right hand in his pocket? A Yes. He came down the avenue with his hand in his pocket.

Q Did you take hold of him then? A No, sir. Naturally I threw my hands.

Q You got out of his way? A Yes, sir.

Q Did you look at Rumore at that time? A I was right in front of him. I had to look at him naturally.

Q What did you see him do with the hand he had in his pocket? A Make an attempt to pull it out. (indicating)

Q Did he pull it out? A I could not say, I don't remember.

Q Was the shot fired at the time he had the hand in his pocket? A Well, he was trying to get it out. The shots followed when he made the lunge.

Q While he was trying to get the hand out of his pocket? A He made a lunge and the shots followed.

Q While Rumore had his hand in his coat pocket, is that right? A Yes.

Q You say the shot was fired? A No, while he was trying to get it out.

Q Did he get it out? A I could not remember.

Q Did you see any part of his hand out of the pocket?

A No, sir.

Q Did you see the hand in the pocket? A In the pocket.

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Q And at the time that his hand was in that pocket, you heard the shot? A Yes.

Q What did you do? A I was so frightened, I walked across the other side.

Q Before you walked to the other side did you hear any more shots? A No. There were two shots I heard.

Q But you are sure that when the first shot was fired Rumore had his hand in his pocket? A Yes, sir.

Q One hand? A Yes, sir.

Q And one hand was exposed? A Yes, sir.

Q And who shot you did not see? A I could not see who shot him because he was to the back of me.

BY MR. NEARY:

Q Where did the shot come from? A From in back of me.

Q Which side of you? A Directly in back of me, I imagine. I could not see.

Q If you do not know, please tell us, and do not imagine. They came from behind you? A Yes.

Q You were standing with your back towards the curb?
A Yes, sir.

Q And everyone behind you was nearer the curb than you?
A Yes, sir.

Q And beyond it there was no railing or building of any kind, immediately behind you? A Yes, a building was behind me -- no, not behind me but in front of me.

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Q The only thing behind you was the Ninth avenue elevated post? A Yes.

Q On the other side of the street? A Yes, sir.

Q You touched this man's pocket to see if he had a gun, didn't you? A I don't think I did. No, I did not do that.

Q Didn't someone say "Look out that he ain't got a gun?"
A I cannot remember.

Q Did someone say that? A They may have said that.

Q Didn't you say to Rumore, "You haven't got a gun, have you?" A No, I did not ask him that.

Q Did you feel his pockets? A No, sir.

Q Do you remember making a statement? A Yes, sir.

Q And you made that statement to Mr. Hennis in February, didn't you? A Not about searching him.

Q I am just trying to refresh your recollection. Did you make a statement to Mr. Hennis? A Yes.

Q The statement was taken down in narrative form. I will not read it all, but just this (reading): "There was some talk mentioned about a gun." Do you remember saying that to Mr. Hennis? A Yes, sir, there was some talk mentioned about it.

Q "Q Look out he ain't got a gun?" Then these words, "I said, you have not got a gun, have you?" (To Rumore) but I felt his pockets, and then we were talking and trying to explain where he was wrong." Do you remember saying that to Mr. Hennis? A I could not exactly say. It was some talk about some-

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body saying he has got a gun.

Q But they were in back of you then? A Yes, sir.

Q And Rumore was then within a foot of you? A Yes.

Q Didn't you put your hand out and touch his pockets quickly, to see if he had a gun? A Maybe when he made the lunge I did. Maybe that is what they have reference to.

Q Didn't you pat him on the shoulder and tell him to go away about his business? A Yes, sir.

Q So you did touch him? A Yes, sir.

Q The shots were fired from behind you; when the shots were fired, what did you do? A I got all excited and walked away.

Q Where did the crowd go? A I guess they went in every direction.

Q Did you see Burke run? A No, sir.

Q Did you see Burke there that day? A No, sir.

Q Burke was not standing in the vestibule of the saloon, was he? A I believe he was, as far as I hear. I did not see him.

Q I ask what you know yourself? A No, I did not see him standing in the saloon.

Q You were facing the saloon, were you? A Yes, sir.

Q Was he standing there? A I did not see anyone standing there. I did not see Burke all that day at all.

BY THE COURT:

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Q You say you have known Burke since childhood? A Yes, born and brought up around that neighborhood.

BY MR. NEARY:

Q How many shots did you hear fired? A Two shots, that is all.

Q When Rumore was standing talking to you, and you were just a foot and a half away from him, where were his hands?

A One hand was in his right hand pocket. The other hand was down by his side.

Q The other one was by his side, the left one? A Yes.

Q And it was the left hand that he reached over the crowd with? A Yes.

Q And he kept the right hand in his pocket? A Yes.

Q And as he reached over with his left hand, right away the shot came? A Not exactly. He made an attempt to pull the hand out.

Q How quick after he reached over the shoulder did the bullet sound? A About a second or so.

Q Now just indicate by clapping your hands once to show when he reached over with one hand, and the second clap when the shot sounded? A That is when his hand went over (witness clappinghands), then a few words were uttered --

Q The first clap you indicate when he went over with his hand. A That is the first one.

Q I ask you not to waste time talking. Just clap the

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first clap to indicate when the left hand went over, and the second clap to indicate the first shot (witness clapping hands twice).

Q Please do that again. A (Witness does as requested, clapping his hands twice, and the jurors estimate the time between claps as three seconds by their watches).

Q Did you hear anyone in the crowd back of you say anything to Rumore while you were talking to him? A Everybody was trying to talk to him and pacify him.

Q Rumore said nothing except he said something in Italian? A Yes.

Q That man spoke English, didn't he? A I did not hear him.

Q Hadn't you ever been in his barbershop? A Once.

Q Did he speak English then? A I did not speak to him.

MR. NEARY: I think that is all.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q You were present, as you already testified, when the first fight occurred between Bergen and the deceased, weren't you? A Yes, sir.

Q And that lasted about how long? A About a minute.

Q And then you discussed the argument? A Yes.

Q What had been the trouble, do you know, that started this fight? A I could not exactly say what the trouble was, but as far as I could guess it --

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Q Never mind what you heard. After a very short while the deceased left and went back to his barbershop, isn't that correct? A Yes.

Q What did he have on at the time he had this fist fight with Bergen? A He just had a small coat on him.

Q Did he have a hat or cap on? A I can't just remember.

Q When Bergen hit him, he hit him pretty hard, did he?
A I believe he did.

Q Don't you know? A Yes, I saw him hit him. He hit him pretty hard.

Q He went to the barbershopp, and how long did he remain in the barbershop? A He did not remain very long at all. He came right back again, just rushed in and rushed out. He was almost on a run.

Q He went past the corner that time? A Past the corner down 18th street, looking to see where a policeman was.

MR. NEARY: I move to strike out the last, as a conclusion.

THE COURT: Strike it out.

Q Was Bergen standing on the corner when he came back from the Barbershop? A I believe he was.

Q Did you see him there? A Yes, I think Bergen was on the corner.

Q And where was he standing? A Standing right on the corner.

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Q Did this man say anything to him then? A No, sir.

Q And how far down toward 18th street did he go? A Right to the corner.

Q Then what did he do? A Locked down to see where the policeman was.

MR. NEARY: I move to strike that out.

THE COURT: Strike it out. He can not tell what was in the mind of Rumore. He may state he was looking in that direction.

Q When he had returned from the barbershop he had his hand in his pocket? A Yes.

Q In which pocket? A The right hand pocket.

Q He had the right hand in the right hand pocket? A Yes.

Q After his return from 18th street he came over and spoke to you, is that correct? A Yes.

Q What did he say? A He asked me where he went to.

Q Where who went to? A He did not mention any names.

Q What did you say to him? A He just said in broken English and I explained to him that he was no child, and the least he could have done was to go to his barbershop, to stop all this fooling, that they were only a bunch of boys, and he had the biggest majority of their trade.

Q Where were you standing? A By the corner, by the saloon.

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Q Was he toward 18th street or 19th street at the time? A He was right in front of me.

Q And the crowd were around you? A There were three longshoremen talking to me. All of them tried to explain to him, and the crowd naturally gathered around to explain.

Q The crowd did not all remain behind you? A No, some were on the side of the man.

Q While you were talking to him you say he made a lunge.
A Yes, sir.

Q In which direction? A Right over all our heads, in the back of me.

Q As he made that lunge, you stepped back? A Yes.

Q Could you see where his hand was, his right hand, at that time? A It was sort of coming out of his pocket. It was in his right hand pocket. He stood there all the time talking with his hand in his right hand pocket.

Q So you saw his right hand in his right hand pocket because he stood there with his hand in the pocket? A No.

Q Did you see his hand as he started towards the people in back of you? A Yes.

Q Did you see what happened to his hand? A The left hand went out as though he wanted to grab somebody in back of us.

Q What happened to the right hand? A It was coming out of his pocket. (Indicating)

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Q How far out did he get the right hand? A About to the wrist.

Q Then directly after that the shot followed? A Yes.

Q And you went away? A Yes, sir.

Q And the rest of the crowd dispersed? A Yes, sir.

Q And during all this talk you at no time saw this defendant there, is that correct? A That is correct.

MR. FITZPATRICK: I think that is all.

REDIRECT EXAMINATION BY MR. NEARY:

Q As his right hand came out of his pocket, about half way to the wrist, did you see it? A To the wrist.

Q Show the jury? A Just the way the hand came out, like that (indicating to the middle of the fingers).

Q And then when his hand got that far out of his pocket the first shot sounded? A He uttered something in Italian, when the lunge was made.

Q After his hand got over the crowd and the right hand partly out of the pocket, is that the time the first shot was fired? A That is the first shot I heard.

BY THE COURT:

Q Did you see anything in his hand? A No, sir, I did not.

BY MR. FITZPATRICK:

Q You were standing on this side of him when he moved back? A Yes.

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Q And his right hand was over here(indicating)?

MR. NEARY: I object to that. There is no testimony he was aside of him. He said he stepped back.

THE COURT: Yes.

Q Did you step back straight from him? A Just exactly pushed back you might say.

Q Did you go from one side to the other when you came back? A To the side I went and he went sort of past me.

Q To which side of him did you move? A I could not remember.

Q His right or left side? A I think it was the left side if I ain't mistaken. That is just the way I walked after the thing happened.

Q You moved from his left side back, is that correct?
A Yes.

Q Then his right arm was on the further side from you?
A Yes, sir.

BY MR. NEARY:

Q You don't remember exactly which way you turned when you came back quick, with a man jumping over you? A I must have went to the left because I walked to the left.

Q I am asking you what you remember. Do you remember, when this man made some motion over you, that you turned a little to the right or to the left? A I don't remember that.

MR. NEARY: That is all.

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NATHAN BIRCHALL, JR., a witness called
and sworn on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. NEARY:

Q Mr. Birchall, please tell me what your business is?

A Stenographer.

Q Are you attached to the Homicide Bureau of the District Attorney's office? A I am.

Q How long have you been a stenographer? A About sixteen years.

MR. FITZPATRICK: I will concede Mr. Birchall's qualifications as an expert stenographer.

Q Do you recall seeing the defendant, Martin Burke, on the 12th day of September 1921? A Yes, sir.

Q Where did you see him? A In the office of Mr. Hennis in this building.

Q Mr. Hennis is assistant District Attorney? A Yes.

Q Do you recall who else was present at that time? A Officer McNamara, Officer Porter, of the 18th Precinct, and Mr. Raftis, a friend of Mr. Hennis's, myself, and the defendant and Mr. Hennis.

Q At that time did the defendant make a statement?

A He did.

Q Have you the stenographic notes which you took at that time, of the defendant's statement, with you? A I have.

Q Did you transcribe the stenographic notes taken on

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that occasion accurately? A I did.

Q Have you a transcript of the notes with you? A Yes.

Q Will you look at them, please? A (Witness looking at paper).

Q And after transcribing these stenographic notes did you compare the transcript copy with the stenographic notes taken on that occasion? A I did.

Q Is the transcript a correct copy of your stenographic notes? A Yes, sir.

MR. FITZPATRICK: I have no objection to Mr. Birchall reading from the copy that he has transcribed.

THE COURT: In other words, you do not press the District Attorney to have this witness testify from recollection before he refers to the notes.

MR. FITZPATRICK: I just as leave have him refer to the notes.

Q Then proceed to read what you have there, please.

A "BY MR. HENNIS:

"Q What is your fullname? A Martin Bernard Burke.

"Q How old are you? A Twenty-three.

"Q Where do you live? A 338 West 19th Street.

"Q Are you married? A No, sir.

"Q What is your occupation? A I work in the market - produce market.

"Q Where? A Driving a Mack truck, loading.

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"Q Where? A Downtown, in Washington Market.

"Q I wish you would talk out louder. I am Assistant District Attorney Hennis; I want to inform you that anything you say can be used against you. Do you wish to make any statement relative to the killing of Peter Rumore on February 12th, 1921? A Do I want to make any statement to the relatives?

"Q No. I say, do you want to make any statement regarding the killing of Peter Rumore, on February 12th, 1921? Do you wish to make any statement about the killing of Peter Rumore on February 12th, 1921? A I wasn't in the place, you know, when the argument started; I wasn't inside in the baker's shop.

"Q Well, tell me whatever you have to say. I would like to know what place you are talking about, and who were there, and when you got there and when the dead man got there and all about it. You just go ahead and tell me whatever you have to say. I don't know the number of the baker shop.

"OFFICER McNAMARA: 143.

"THE DEFENDANT: From what I know about it, the argument started in the baker shop with this man, and this Martin Bergen, and I was outside, and when he come outside he started to fight.

"Q Well, where is that baker shop? A I don't know.

"OFFICER McNAMARA: 143 Ninth avenue.

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"Q And what time did the argument start there? A Just before the man was shot.

"Q Well, was the man Rumore? A This Peter Rumore.

"Q And was the argument between Rumore and somebody else? A Between this Martin Bergen.

"Q Martin Bergen? A Yes, sir.

"Q You weren't known as Martin Bergen? A No, sir.

"Q Martin Bergen was another person? A Yes, sir.

"Q You say an argument started between Martin Bergen and the dead man in the bakery? A Yes, sir.

"Q About what time would that be? A What time was the shooting?

"OFFICER McNAMARA: The shooting was about 3:40.

"THE DEFENDANT: Well, about fifteen or twenty minutes before that.

"Q Did you see the argument between Rumore and Bergen? A No, sir.

"Q Well, how do you know there was an argument between them? A Well, I seen them when they came out in the street, and they started to fight.

"Q Outside the bakery? A Yes, sir.

"Q What way did they fight? A With their fists.

"Q And what happened after that? A Well, the way it started, after the argument in the baker shop they come out and this Joseph Dowling and Martin Bergen started to beat

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the fellow.

"Q Where was that? A This was outside the baker shop.

"Q Well, did Rumore and Bergen come out of the baker shop together? A The whole bunch that hung out in the place come out.

"Q They all came out together? A Yes.

"Q And first the argument started between Rumore and Bergen and then Dowling joined in; is that right? A Yes, sir.

"Q And then what happened? A Well, then he told them, he says, 'Wait here; I'm coming right back.'

"Q Who said that? A This barber.

"Q Is that Rumore? A Yes, sir.

"Q Yes, and then? A So when he come back the first one he picked on was me, and he had a razor.

"Q Where did he tell them to wait, in front of the baker's? A He says, 'Wait here; I'll be right back.'

"Q And did they wait there? A Yes, sir.

"Q And how near is the baker to the corner? A Right next to the saloon.

"Q The second house from the corner? A Yes, sir.

"Q And they waited there for him to come back? A Yes, sir. So he come down 9th Avenue from the barber shop across the street to the corner where the saloon was, right next to the baker shop, and they all started bunching together,

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and I come out of the saloon, out of Rogers' saloon right on that same corner.

"Q Is that the first you knew about it, when you came out of the saloon? A I had seen it and I went in like to the toilet, see.

"Q In the saloon? A Yes, sir; and when I come out the first one he made for was me; and from what I learned --

"Q What did he do then? A He pulled out the razor and he had hold of me by the coat here, and so I shot him. And from what I learned after I was away, that he took me for Dowling.

"Q Well, as soon as he grabbed you by the coat, did you shoot him immediately? A Yes, sir.

"Q Was the razor open? A Yes, sir.

"Q What hand did he have the razor in? A This hand here (indicating right).

"Q The right? A Yes, sir.

"Q Was he trying to slash you with it? A Well, he could if he had got a chance, I guess.

"Q Where had you gotten the gun you shot him with? A I had it on me for about three months.

"Q Why were you carrying a gun? A Well, I'll tell you how I come to have it on before."

MR. FITZPATRICK: I ought to object to this line of examination.

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THE COURT: That is not a proper question.

MR. FITZPATRICK: I object to it.

THE COURT: Objection sustained. Strike that out, that last answer, and the jury will disregard it.

"Q Yes, and then? A Then I had the gun on me over there, for that. They come down two or three times after that, looking for me again."

MR. NEARY: I agree to strike that out. It has nothing to do with the case.

THE COURT: Strike it out. You had better go over this with your associate and not allow things in that are incompetent:

"Q Well, when you came out of the saloon, how close to you was the barber? A Why, he had hold of me.

"Q No, but when you came out, how close was he to you? A I came right out of the vestibule, you know, the front of the saloon, and I had stepped right up to the crowd that was there.

"Q How near were you to the crowd when you came out of the saloon? A I was right there - they were standing right around the vestibule when I walked out.

"Q You walked out right beside him? A Yes, sir. See, I had a derby hat on and a brown overcoat, and this Dowling had a derby hat and brown overcoat.

"Q Did he say anything to you as he came up to you with

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the razor? A Didn't say a word.

"Q Did you make any effort to tell him that you weren't Dowling? A He didn't give me a chance.

"Q Where did you have the gun? A I always had it in my coat pocket, little coat pocket.

"Q Which side? A This side here (indicating).

"Q The left? A Yes, sir.

"Q The lower left coat pocket? A You know, in this coat, not the overcoat.

"Q Yes; in the lower left coat pocket? A Yes; I had an overcoat on at the time.

"Q Did you fire with your left hand? A Yes, sir.

"Q You did? A Yes, sir.

"Q Did you fire through the coat? A No, sir.

"Q You took the gun out of the coat? A Yes, sir.

"Q What kind of a gun was it? A .32.

"Q What make? A I don't remember the make of it.

"Q Well, what was he doing while you were drawing the gun out of the coat? A I seen him coming, you know; he stepped into the vestibule and he had it out of his pocket already.

"Q Well, did this thing occur on the sidewalk or in the vestibule? A Right in the vestibule.

"Q Right in the vestibule, off the sidewalk? A Yes, sir.

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"Q Well, how did he come to walk into the vestibule if all these fellows were standing on the sidewalk? A Well, it was like, see here was the vestibule and I was standing right here, and as he come like that, why I backed into the vestibule.

"Q Oh, you backed up a little? A Yes, sir.

"Q Well, didn't he say something when he took hold of your coat? A He didn't say a word. I don't really understand - he mumbled something, but I don't know what it was.

"Q Did he cut you at all? A No, sir.

"Q Cut your clothes? A No, sir.

"Q Did any of these other fellows on the corner tell you to shoot him? A No, sir.

"Q Any of them know you were going to shoot him? A Well, I don't know; they might have had an idea.

"Q Did you tell them you were going to shoot him? A No, sir.

"Q Anybody else join in the fight, then, between you and the dead man? A Oh, they all run then.

"Q After you shot him what did you do? A I walked around and down 19th street."

MR. NEARY: Just skip the next four lines. "What did you do with the gun?" Please read from there.

A (reading): "What did you do with the gun? A This Dowling's brother had it; I don't know what happened to it after that.

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"Q You gave it to Dowling's brother? A Yes, sir.

"Q How did you come to do that? A Well, that was the house we run in.

"Q I don't hear you. A I say that's the house we went in.

"Q When did you go in thathouse? A After the shooting.

"Q You went in there? A Yes, sir.

"Q Where? A I don't know what the number is - four something, down near the garage.

BY OFFICER McNAMARA:

"Q It ain't Joe Dowling's house, is it? A Jimmie Dowling.

BY MR. HENNIS:

"Q Did all the crowd on the corner go in there too?

A No, there was only four or five went in there.

"Q With you? A Yes, sir.

"Q What is the name of Dowling that you gave the gun to?

A James Dowling.

"Q Where does he live? A I don't know the number."

MR. NEARY: Just skip the next question.

A (continues reading) "Q What did you tell Dowling to do with the gun? A Well, to hold it. They figured someone was coming up.

"Q You gave them the gun as soon as you went in the house? A Yes.

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MR. NEARY: Just omit the next four questions and answers.

A (continues reading): "Q Did you ever have any trouble previously with the dead man? A No, sir.

"Q Did you know the dead man by sight before that? A I knew him from coming in and out of the baker shop. We used to eat there.

"Q You never talked to him, though? A Never spoke to him before."

MR. NEARY: Omit the next question. Read the second question on page 57.

A (continues reading): "Q And then you say you killed him in self-defense? A Yes, sir.

"Q Did you have any permit for the gun? A No, sir."

Objected to. Objection sustained.

THE COURT: Strike out that answer.

A (continues reading): "Q How many shots did you fire?

A Twice is all I remember.

"Q Why did you fire twice?"

Objected to. Objection overruled.

"A Well, in the excitement, I don't know, to tell you the truth, I didn't know what I was doing."

MR. NEARY: Now I offer in evidence People's Exhibit 1 for identification, which is the lead bullet taken from the left cerebella of the deceased by Dr.

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Norris,

MR. FITZPATRICK: No objection.

(Bullet marked in evidence People's Exhibit No. 1).

MR. NEARY: I offer in evidence People's Exhibit 2 for identification, which is the bullet found in the body of the deceased by Dr. Norris.

THE COURT: It may be received.

(Bullet marked People's Exhibit No. 2 in evidence).

MR. NEARY: The People rest, your Honor.

MR. FITZPATRICK: If your Honor please, I move to dismiss the indictment on the ground that the People have failed to make out a cause of action.

THE COURT: Motion denied.

MR. FITZPATRICK: Exception.

I ask your Honor to direct the jury to acquit the defendant on the same ground.

THE COURT: Motion denied.

MR. FITZPATRICK: Exception.

(Mr. Fitzpatrick opened the case to the jury on behalf of the defendant as follows):

MR. FITZPATRICK: May it please the Court, Mr. Foreman and Gentlemen of the Jury, the defense in this case will be very brief. The witnesses that were called on the stand are practically all the witnesses that could have been called under the circumstances. The People have

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been fortunate in gathering these witnesses, and they have produced all the witnesses available. You heard the testimony of those witnesses, and in conjunction with that testimony the defense will put the defendant on the stand, and he will tell you that on the day in question he had been in his house up to about three o'clock; that he came out and went into a baker shop - or rather came out and went into the saloon, and before that he had seen this fight out in the street. He went inside and when he came out a few moments later the deceased came along, and he was only there a very few seconds when the deceased came toward him, pulled his hand out of his pocket, did get his hand out of his pocket, and that he saw something shining, that he did not know what it was; that he had this gun in his pocket, and the defendant will explain why he had that gun in his pocket, and therefore, through fear of being cut, or in actual fear of bodily harm, this defendant fired the shot that killed the deceased. There is no argument about that at all. We admit that, but we say it was done for the purpose of defending the life of this man on trial. We will also tell you where this defendant went and what he was doing, that he was working at the time and worked thereafter. He will tell you the circumstances under which the arrest was made, and you gentlemen

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have already heard the statement made by this defendant here through the stenographer, which will probably be corroborated by the defendant on the stand, and on those facts I am going to ask you gentlemen to acquit this defendant of the crime charged in this indictment.

THE COURT: Gentlemen of the jury, do not discuss this case among yourselves, nor permit any person to talk with you about it, nor form nor express any opinion as to the guilt or the innocence of the defendant until the case is finally submitted to you. Please be in your seats at ten-thirty o'clock Monday morning.

(Whereupon an adjournment was taken until Monday, January 9th, 1932, at 10:30 a.m.)

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New York, January 9, 1922.

Trial continued as pursuant to adjournment.

MARTIN BERNARD BURKE, the defendant, called as a witness on his own behalf, having been duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. FITZPATRICK:

Q You are the defendant in this action, are you? A Yes.

Q How old are you? A Twenty-three years old.

Q On or about the 12th day of February, 1921, were you in the vicinity of 19th Street and 9th Avenue? A Yes sir.

Q At about what time? A About three o'clock or a quarter after, in the afternoon.

Q What were you doing there? A I was standing in the vestibule of 147 9th Avenue.

Q You will have to speak louder so the jury can hear you; near where is that? A Right off the corner.

Q Before you were in the vestibule on that afternoon where were you? A In the saloon.

Q And before that did you see the witnesses here, those who have appeared here to testify? A No sir.

Q Did you see any of those witnesses? A No sir.

Q Did you see Martin Bergen there? A Yes, after I came out of the saloon I seen him.

Q Tell us in your own way what happened there on that after-

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noon. Just start at the beginning and tell us. A I came out of the house about three o'clock and I walked west on 19th Street and went into the saloon at 147 9th Avenue. I was in there about fifteen minutes when I came out and stood in the vestibule. A man came over and grabbed me by the coat and pulled (indicating) something out of his right hand coat pocket.

Q What did you do? A So I took the gun out of my left hand pocket and I don't remember what happened then.

BY THE COURT:

Q You say you stood in the vestibule? A Yes sir.

Q And that a man came over and did what? A Grabbed me by the coat (indicating), and pulled something out of his right coat pocket.

Q Did you see what he pulled out? A No sir. All I seen was a flash.

Q What did it look like? A I don't know what it was; I don't remember.

Q What did he do; you say the man pulled something out from his coat. What did you do; you do not remember, you say? A Yes sir.

Q Do you remember what you did then? A No; I know I pulled the gun but I can't remember what happened.

BY MR. FITZPATRICK:

Q Do you remember firing the gun? A No sir.

Q Afterward where did you go? A I ran down 19th Street to, -

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I don't remember, four hundred something, the house was.

Q Do you remember running? A I was in the house so I must have.

Q Do you remember whether you ran or not? A No sir.

Q You said before that you ran into the house. Do you recall that, or are you now guessing? A I must have went there.

Q We don't want you to guess or to draw deductions but we want you to state what you recollect? A All I remember was a kid came up the stairs and he said to some lady, "There is a man shot on the corner".

Q What did you do with the gun? A I put it in the drawer up in an old bureau on the dresser up in the hall of this house.

Q Then what happened? A Then I went out and went home.

Q You went home? A Yes sir, I went home.

Q How long did you stay home? A Till Thursday morning.

Q Tell us what happened on that day? A On a Saturday.

Q You stayed in the house till Thursday? A Not in the house. I lived home till the day the detectives came after me. Then I went to Jersey.

Q How long did you remain there? A About seven months.

Q You were arrested after that? A Yes sir.

Q Where? A On a northbound train at 50th Street station.

Q And taken where? A To West 68th Street station house.

Q Where were you arrested? A On the 9th Avenue L at the 50th Street station.

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Q Were you working at the time? A Yes sir.

Objected to as immaterial. Objection overruled.

Q Where? A For a man named Costa, Angelo Costa.

Q Where is that place of business? A 247 Washington St.

Q What kind of business is it? A Truckman, in the produce market.

Q How long did you work for him? A About for three and a half months.

Q Peddling? A Yes sir.

Q Did you work while you were over in Jersey? A Yes sir.

Q For whom? A For a man by the name of Isaac Rosenblum.

Q During all the time you were over there? A No sir.

Q How much of the time? A About four months I worked for him when I first went over there.

Q You stated that this man caught hold of you? A Yes sir.

Q What did he do? A When he grabbed me I sort of came back. There was about a two-inch step on the front of this vestibule and he sort of pushed me back into the vestibule.

Q Are there doors in that vestibule? A Two doors, storm doors, on the vestibule, I think hooked back some way, and then there is two doors inside leading into the saloon.

Q Were those doors open or closed at the time? A Closed.

Q Where were you standing? A Right on the front of the vestibule.

BY THE COURT:

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Q Were the doors locked or were they simply closed?

A Just closed.

Q Were they swinging doors? A No sir.

BY MR. FITZPATRICK:

Q Were you near the outside or the inside part? A The outside part.

Q Just near the street? A Yes sir.

Q But within these storm doors? A Yes sir.

BY THE COURT:

Q What led from the vestibule to the saloon? A I had come out of the saloon and stood in the vestibule.

Q By leaving the saloon you went into the vestibule? A Yes.

Q Was that a storm door that you entered? A No sir. The storm doors were hooked back.

Q The storm doors were open? A Yes sir.

Q They were not closed? A Yes sir.

Q But they were hooked back? A Yes sir.

Q So that the doors that were closed were the doors leading from the vestibule into the saloon? A Yes sir.

BY MR. FITZPATRICK:

Q How long were you standing in that vestibule before this man moved towards you? A About two or three minutes.

Q Had you heard anything or did you see anything before that? A No sir.

Q Did you see a crowd there? A There was a crowd there, yes sir.

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Q Did you recognize any of those people in the crowd?

A Yes sir.

Q Who were they? A Joseph Dowling and Martin Bergen, Frank Dowling and James Laffen. I can't remember who the rest were. I know there were about twenty of them there all together on the corner.

Q Did you see Donovan there? A I don't remember seeing him there.

Q Where was this crowd with respect to the vestibule; was it up 9th Avenue or down 9th Avenue or out near the curb? A I can't tell you. If you give me the card maybe I can tell you.

Q I show you the diagra, People's Exhibit 4 in evidence. Here is the saloon and here is the southwest corner of 9th Avenue and 13th Street. Where were you standing? A Right here (indicating corner of the vestibule).

Q Where was this crowd? A All around here (indicating). There is a lamp post and mail box here on the corner (indicating).

Q Where was the crowd? A Right around here on the corner in front of the vestibule (indicating).

Q Where was the man; did you see the man before he started at you? A I did not see him at all. He was right here (indicating).

Q And when he came towards you did you notice his face?

A No sir.

Q Did you know the man before? A No sir.

Q Had you ever seen him before? A Not that I remember.

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Q What did he do with respect to you, as he came towards you? A All he done was, he grabbed hold of me and pulled something shiny out of his righthand pocket.

Q With which hand did he grab you? A The left.

Q Do you remember that he grabbed you with his left hand?

A Yes sir.

Q Did you remain stationary when he took you with his left hand? A He sort of pushed me back against the inside of the vestibule.

Q At that time did you know that there had been a quarrel between Martin Bergen and anybody in the neighborhood? A No sir.

Q You did not know anything about a quarrel? A No sir.

Q Did you subsequently find out something about a quarrel? A Yes sir.

Q When and where?

Objected to as immaterial and incompetent.

Objection sustained.

Q You made a statement at the time of your arrest, didn't you? A Yes sir.

Q You made the statement to Mr. Hennis of the District Attorney's office? A Yes sir.

Q Does this refresh your recollection; I am reading from page 4 of your statement. You were asked by Mr. Hennis (reading): "Q Well, how do you know there was an argument between them"?

MR. NEARY: I object; there is no need to refresh his

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recollection. He does not show he is a hostile witness.

THE COURT: Have you exhausted the witness' recollection.

MR. FITZPATRICK: That part of the statement was read to the jury. The whole statement was read to the jury by Mr. Birchall.

THE COURT: Do you remember there were certain questions excluded. If this matter was not excluded and it is before the jury, I shall allow you to examine the witness concerning it.

A Yes.

Q (Reading) "Well, I seen them when they came out in the street and they started to fight". Do you remember saying that? A No sir.

Q When you made this statement to Mr. Hennis were you telling him something that you had actually seen or something you had heard? A That I had heard.

Q And where did you hear it? A In Dowling's house right after the shooting had happened.

Q From whom? A I don't exactly know who it was. There were four or five there.

Q And they told you about the fight at that time? A Yes.

Q And you say that is why you told Mr. Hennis the story with respect to the fight, what you heard about it? A Yes sir.

Q You have been convicted before, have you? A Yes sir.

Q Convicted of what? A Of petty larceny.

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Q When was that? A In 1914.

Q And in what court? A The Children's Court.

Q What happened to you? A I was sent to the New York House of Refuge.

Q And how long did you remain there? A Sixteen months and a half.

Q And you were sent there from the Children's Court?

A Yes sir.

Q How were you dressed on that occasion? A I had a green suit on, a black derby hat and a brown overcoat.

Q Was there anything said by the deceased at the time that he took hold of you? A Yes sir. He mumbled something under his breath; I don't know what it was.

Q Was it in English? A No sir.

Q Stand up. (The witness stands up.) How tall are you?
A 5 feet 6 inches.

Q And how much do you weigh? A 115 pounds.

Q You say now you have no recollection of having fired any shot at all? A I must have fired them but I don't remember how many I fired.

Q Do you remember firing any? A Yes sir.

Q Do you know how many you fired? A No sir.

BY THE COURT:

Q Do you remember pulling the gun? A Yes sir.

Q Do you remember whether you fired any shot? A No sir, I don't remember what happened after that.

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Q How many cartridges did you have; how many bullets did you have in the gun? A Five.

Q And when you put the gun away did you notice how many were discharged? A No sir, I never looked at it.

Q Never examined the gun? A No sir.

Q You have heard the witnesses state that they heard four shots and you have no recollection whether you heard any shots discharged from your revolver? A No sir.

Q Where did you have the revolver? A In my left hand jacket pocket.

Q Outside? A Inside the jacket pocket.

Q What do you mean by the jacket pocket? A The small coat.

Q Did you wear an overcoat that day? A Yes sir.

Q And you carried your gun in the left hand jacket pocket?
A Yes sir.

BY MR. FITZPATRICK:

Q Was your overcoat open or closed at that time? A Open.

Q Did you have this gun at the time you left the house?
A Yes sir.

CROSS-EXAMINATION BY MR. NEARY:

Q You went frequently into this bakery for your meals, didn't you? A No sir.

Q Didn't you tell Mr. Hennis in the station house that you often went in there for your meals? A I did not speak to Mr. Hennis in the station house.

Q I mean upstairs in the Homicide Bureau of this building.

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did you speak to Mr. Hennis? A Yes.

Q Did you tell Mr. Hennis when you were in the Homicide Bureau in this building and he asked you if you had ever been in that restaurant you said yes, you went in there once in a while for your meals? A I said once in a while, not frequently.

Q That is, not everyday in the week, but probably three or four times a week, for coffee? A Yes sir.

Q You knew this man, Mr. Rumore, that died? A No sir.

Q You have seen him in there? A No sir.

Q Didn't you tell Mr. Hennis when he asked you if you knew Rumore, you said you saw him in there once in a while and took his meals there also? A No sir.

Q You did not tell him that? A No sir.

Q I will read to you from page 3 of your statement made to Mr. Hennis. Well, I will withdraw these questions and come back to this later. You saw Bergen come out of the place that afternoon, didn't you, out of the bakery? A No sir.

Q Did you see Bergen fighting with the deceased Rumore? A No sir.

Q Did you see Dowling fighting with him? A No sir.

Q I will try to refresh your recollection. Was this question asked you by Mr. Hennis (reading): "Q Well, how do you know there was an argument between them? A Well, I seen them when they came out in the street and they started to fight?"

A I told Mr. Hennis that I heard that in Dowling's house after

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the trouble had happened.

"Q Did you see them fighting in the street? A No sir.

Q Outside the bakery? A Yes sir. Q What way did they fight?

A With their fists. Q And what happened after that? A Well,

the way it started, after the argument in the baker shop they

came out and this Joseph Dowling and Martin Bergen started to

beat the fellow. Q Where was that? A This was outside the

baker shop. Q Then, did Rumore and Bergen come out of the baker

shop together? A The whole bunch that hung out in the place

came out". Do you remember Mr. Hennis asking those questions

and you giving those answers? A I told Mr. Hennis the way it happened.

Q Do you remember Mr. Hennis asking you those questions and you making those answers to the questions? A No sir.

Q (Reading) "Q They all came out together? A Yes." Do you remember saying that to Mr. Hennis? A I told Mr. Hennis that is the way it happened.

Q Do you remember saying that to Mr. Hennis? A I told him that is the way it happened but I did not tell him I seen it.

Q Did you hear this man Rumore tell these men to wait there and he would be back? A No sir.

Q Did Mr. Hennis ask you this question (reading): "Q Where did he tell them to wait, in front of the baker's? A He says, 'Wait here, I'll be right back'." Did you hear him say that, "Wait here, I'll be right back"? A No sir.

Q Did you tell Mr. Hennis that you did? A No sir.

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Q Where is the baker's, south of the saloon, or where?

A South of the saloon, right next door.

Q Had you been in there that day? A No sir.

Q Were you on the street that day when Bergen was fighting with Rumore? A No sir.

Q Didn't you see Bergen fight with Rumore? A No sir.

Q Didn't you see Dowling holding Bergen's coat? A No sir.

Q Where were you before you went in the saloon? A I came from the house.

Q You lived in 19th Street; did you have to cross the avenue to get to the saloon? A Yes.

Q You crossed the avenue to get to the saloon? A Yes.

Q Did you see anyone when you came out of your house and went towards the saloon? A No.

Q Nobody on the corner at all? A No sir.

Q No one on that corner at all? A No sir.

Q The corner was empty? A Yes sir.

Q At half past three in the day time? A About a quarter after three when I came from the house.

Q And no one was on the corner? A No sir.

Q And Bergen or Dowling were not there? A Nobody.

Q And the Kearneys were not there? A Nobody.

Q Where did they all come from? A They were there when I came out of the saloon.

Q Did you see patrolman Orlowsky in uniform come down past the saloon? A No sir.

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Q How long had you been in the saloon? A About fifteen minutes.

Q And then you came out? A Yes sir.

Q How long had you been carrying the pistol? A Three months.

Q Did you have a permit to carry the pistol? A No sir.

Q What pocket did you carry the pistol in? A Left hand jacket pocket.

Q What kind of a pistol was it? A A 32-caliber.

Q What make was it? A I don't remember; I never looked at it close enough to see what make it was.

Q You loaded it, didn't you? A Yes sir.

Q You looked at it in the toilet of the saloon that day, didn't you? A No sir.

Q When did you last look at that pistol before you used it? A When I had left the house.

Q What did you do with the pistol when you left the house? A I put it in my left hand jacket pocket.

Q Did you keep it in the drawer in your house? A No sir.

Q Where did you keep it? A When I came home at night I would leave it under the mattress and then take it out from the bed when I went out.

Q Didn't you know the make of the pistol? A No sir.

Q You had it for three months? A Yes sir.

Q Now, you know Pat Donovan, don't you? A Yes sir.

Q How long have you known him? A About ten years.

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Q Did you see him on that corner when you stepped out of the saloon? A No sir.

Q You say you were in the baker shop? A Yes sir.

Q You say you did not see Bergen fighting with this man this afternoon? A No sir.

Q Did you tell Mr. Hennis that you did? A I told Mr. Hennis that is the way I heard it in Dowling's house.

Q You heard a great deal about this case and had a great deal of it told you when you were away? A No.

Q Did you write any letters to anyone when you were in Jersey? A Only my own family.

Q Did you write Bergen? A No sir.

Q Did you write Dowling? A No sir.

Q Did you write Donovan? A No sir.

Q Did they go over to Jersey to see you? A No sir.

Q Did you come to New York and meet them by appointment or discuss this case with them? A No.

Q Did you ever talk about this case with these men, Bergen, Dowling or Donovan? A I never seen them till the day in court.

Q Or Troy? A I never seen Troy.

Q Or Kondrup? A No sir.

Q Where were you living when you were in Jersey? A At 151 Spring Street, West Hoboken.

Q Did you come to New York every day? A Not every day.

Q How often? A About once a week for the first four months I was there.

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Q Where did you go when you came to New York? A I used to go to see friends of mine in 519 West 52nd Street.

Q Did you ever meet Bergen at 519 West 52nd Street? A No.

Q Did you ever meet Dowling there? A No sir.

Q Did you ever meet Pat Donovan there? A No sir.

Q Or did you send any messages to these men, Dowling, Donovan or Bergen, by your friends in 52nd Street? A No sir.

Q You never wrote or said anything to them about this case?
A No.

Q You came out of the saloon about 3.30? A Yes sir.

Q Was anyone on the corner when you came out? A Yes.

Q Who was there? A About twenty fellows.

Q Who were there? A Joey Dowling, Marty Bergen, James Laffen and Frank Dowling, that I know.

Q Did you see Pumore when you stepped out of the saloon?
A No sir.

Q When you stepped out of the saloon didn't you walk right over to where Bergen, Dowling and the others were and talk to them? A No.

Q What did you do? A I stood there in the vestibule of the doorway.

Q Did you stand inside or outside the vestibule door?
A Yes, right at the threshold.

Q You were not inside it, were you? A Yes sir.

Q Inside the storm door or right out of the storm door where it meets the street? A Right inside, standing like that.

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This is the street here (indicating).

Q This table line is the street and you were inside the storm door? A Yes.

Q And you did not step past that storm door at all? A No.

Q Are you positive of that? A Yes sir.

Q Do you remember being asked this question by Mr. Hennis and making this answer (reading): "Q No, but when you came out, how close was he to you (meaning Rumore)? A I came right out of the vestibule, you know, the front of the saloon, and I stepped right up to the crowd that was there". Do you remember making that answer to Mr. Hennis? A No sir.

Q As a matter of fact doesn't that question refresh your recollection and recall to your mind that when you came out of the saloon you saw Donovan, Dowling and Bergen there and didn't you see Rumore, and you walked over to Donovan, Dowling and Bergen? A No sir, I did not speak to anyone that day.

Q Didn't you walk over towards them? A No sir.

Q You were on good terms with them, were you? A Yes sir.

Q You were friendly with them? A Yes sir.

Q You had seen them a couple of days before? A Yes sir.

Q But you did not walk over to them? A No sir.

Q You just stood inside the vestibule? A Yes sir.

Q Why didn't you go over to them? A I seen them all gathered around. I knew, I figured there was something the matter because I heard them arguing from the inside of the saloon. That was what attracted my attention to come out.

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Q All you could hear them arguing while you were inside the saloon? A Yes.

Q That brought you out? A Yes sir.

Q And you were eager to see what was going on? A I could not see what was going on and I came out to see what was the matter.

Q When you came out you walked right out quickly and went over and looked in and wanted to know what it was? A No sir.

Q Did you have your gun on you then? A Yes sir.

Q Did you go in that toilet to see if the gun was properly loaded? A No.

Q You did not take the gun out of your pocket in the toilet? A No sir.

Q Did you go in the toilet? A Yes sir.

BY THE COURT:

Q When had you last loaded the gun? A It was loaded about three months; I never even took the bullets out.

Q At the time you drew the gun did you know it was loaded or not? A No sir.

Q You did not know? A Unless somebody could have taken them out.

Q Did you know whether your gun was loaded? A No sir.

BY MR. NEARY:

Q No one else had that gun but you in those three months?

A No sir.

Q You kept it in your pocket all day and put it under your

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mattress at night? A Yes.

Q And you did not unload it? A No sir.

Q You knew when you took it out it must have been loaded? A It must have been loaded.

Q You were not taking an empty gun out of your pocket?

A No.

Q When you got out of that saloon isn't it true you stood right there near the side of Donovan? A No sir.

Q It is not true you stopped near Donovan? A No sir; I did not see Donovan that day.

Q And are you saying that because Donovan said on the witness chair that he did not see you? A No sir.

Q Are you saying it because you really did not see him?

A I did not see him.

Q Did you see Dowling? A Yes sir.

Q You heard the witnesses testify in this court and you heard Donovan testify that he was standing closest to this Italian, Rumore, talking to him? A Yes sir.

Q And that he, Donovan, was standing facing Rumore, isn't that so; you heard him say that? A Yes.

Q And you heard Donovan say that the shot came behind Donovan, didn't you? A Yes.

Q Rumore's back was towards that saloon, wasn't it, when he was talking to Donovan? A I did not see him speak to Donovan.

Q Do you mean to say you stood in the vestibule of the saloon and did not see Donovan and Rumore talking? A Yes.

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Q You did not see them talking? A No sir.

Q You had just come out of that saloon, hadn't you? A Yes.

Q You say Rumore came towards you? A Yes sir.

Q Did he say anything to you? A Just mumbled something under his breath when he grabbed hold of me.

Q Had you been in his barber shop? A No sir, never.

Q And he grabbed hold of you with what hand? A The left hand.

Q Now, can you remember distinctly he grabbed you with the left hand; are you sure of that? A Yes sir.

Q Are you positive of that? A Yes sir.

Q Where was his right hand? A When he first came over he walked like that over (indicating).

Q Where was his right hand? A Up like that (witness raising hand to about the level of the chest). That is all I remember, seeing the flash when he grabbed hold of me.

Q Where was his right hand when he grabbed you with the left hand? A He was taking it out of his coat pocket. He was taking something out of it.

Q Was his hand in his pocket or out of his pocket?

A Out of his pocket.

Q How far up was it raised? A He had it about that far (indicating raising his hand to about the level with the chest).

Q Was that the time you fired the first shot? A Yes sir.

Q He had you by the collar, - by the coat, and his hand was raised about that far (indicating), and you fired the first

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shot? A Yes.

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Q You did not see what he had in his hand? A No sir.

THE COURT: Indicate how high the hand was raised.

(The witness stands up.) THE WITNESS: About like that it was. (Indicating about level with the breast.)

Q You are not sure what he had in his hand? A No sir.

Q How close was he to you? A There was about a foot or a foot and a half, I suppose, between us.

Q When he grabbed you like that and he raised his hand, you shot him, is that right? A Yes sir.

Q Did you throw yourself aside or duck under him? A It happened so quick.

Q Did you do that? A No sir.

Q Did you move back and duck to the saloon door and push and try to get in? A No sir.

Q You engaged before in boxing contests, with fists, or boxed around with boys? A No sir.

Q You never put your hand up to fight a boy, that is, boxing with him? A Yes sir.

Q You never engaged together in these ordinary boys' fights, as boys will? A Not that I remember.

Q As a boy around New York? A Oh, yes.

Q You know how to swing away from a boy and to duck?

A It happened so quick.

Q Don't you know that? A Yes sir.

Q And on this occasion you shot before you did either?

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A I did not have a chance to.

Q You shot before you did either? A No sir.

Objected to. Objection overruled. Exception.

Q You had your overcoat on, didn't you? A Yes sir.

Q How long is your overcoat, - how far down does it go over the knee? A It comes to about the knee.

Q And on that day you remember your overcoat was open? A Yes.

Q And when you came out of the saloon where were your hands? A At my sides.

Q They were not in your pockets? A No sir.

Q When this man took the first step towards you did you put your hand right into your left pocket? A No.

Q What did you do? A I did not put my hand in my pocket till he had grabbed me. I sort of stumbled on a step at the inside of the vestibule. There is about ^{or} two/three inch step there.

Q You say there is a two or three inch step inside that storm door? A Yes.

Q At Rogers Brothers saloon? A Yes sir.

Q When he grabbed hold of you you put your hand in your pocket? A Yes.

Q It took a second or so to get that pistol out, didn't it? A Yes.

Q This was how large a pistol? A It is about that big (indicating about five inches).

Q Where did you point the pistol when you took it out?

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A I can't remember what happened then.

Q Do you know where the bullet was found on this man, it went right through the skull, from here back through there (indicating); you heard the doctor tell about it? A Yes.

Q Do you recall just taking and pulling that gun out and firing it straight into his head? A No sir, I don't remember anything that happened then.

Q And do you remember running down the street and going into Dowling's house? A No sir.

Q Didn't you tell the Court a few minutes ago that you went into Dowling's house and put the gun in a drawer there?

A Yes; but I don't remember running down the street.

Q You did go into Dowling's house? A Yes sir.

Q What did you do with the gun? A After I put it in this drawer.

Q Did you give it to James Dowling? A No sir.

Q Now, are you sure of that? A Yes sir.

Q Do you recall being examined by Mr. Hennis (reading):

"Q What did you do with the gun". Do you recall Mr. Hennis asking you that question? A Yes sir.

Q And you made this answer (reading): "This Dowling's brother had it. I don't know what happened to it after that."

Q You gave it to Dowling's brother? A Yes sir." Did you give those answers? A No, I put it in a drawer in the hallway.

Q Did you make those answers to Mr. Hennis's questions?

A No sir.

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Q (Reading) "Q I don't hear you? A I say that the house we went in. Q When did you go in that house? A After the shooting. Q You went in? A Yes. Q Where? A I don't know what the number is - 4 something, down near the garage", and Officer McNamara asked, "It ain't Joe Dowling's, is it", and you said "Jimmie Dowling's". Do you remember that? A Yes sir.

Q As a matter of fact, you did see Bergen come out of the bakery, didn't you? A No sir.

Q Did Bergen stand right up against the storm doors of the saloon when you came out? A I don't remember just exactly where he was standing.

Q Did you see him? A Yes, I remember seeing him.

Q You remember where everybody else was standing because you told the District Attorney where the crowd was; where was Bergen standing? A I don't remember exactly where he was standing.

Q Didn't he talk to you? A No sir.

Q Didn't he stand right alongside of the storm doors?
A No sir.

Q As a matter of fact after this fight didn't Bergen and you have a talk and you said, "We will get that Guinea"? A No sir.

Q Didn't you go home first to get your gun? A No sir.

Q You were on 16th Street and 9th Avenue, weren't you, when they had the first fight? A No sir.

Q And the policeman came along and scattered the crowd?

A No sir.

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Q Then you went home and got a gun and came back? A No.

Q You did not come out of your house till 3.30 that afternoon? A It was about three o'clock, I went to the saloon, or a quarter after.

Q Was Bergen in the saloon? A No sir.

Q Was Dowling in the saloon? A No sir.

Q Were the Kearneys in the saloon? A No sir.

Q None of those men? A No sir.

Q Why did you run away from the scene of the shooting?

A The only thing I figured, I will get a beating if I went to the station house.

Q So you stayed in Jersey for three or four months and came back to New York where you were caught in the elevated station when Officer Shevlin picked you up in the house?

A Going to a friend of mine's house, 19 West 52nd Street.

Q Weren't you afraid the police would see you? A I did not think any of them would know me.

Q When he brought you to the station house you were not beaten, were you? A No sir.

Q So the only reason you ran away was because you were afraid you would be beaten? A Yes sir.

Q Didn't you think it would be better, since you claim you shot this man in self-defense, to have gone to the station house that night and it would have helped your case? A I don't think they would have believed me.

Q You had been in trouble before and you knew the police in

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the precinct? A Not all.

Q Officer McNamara? A No sir.

Q You knew Officer Shevlin who arrested you? A Yes sir.

Q And you knew Officer Sullivan of 20th Street? A No sir.

Q You knew Officer Porter, didn't you? A No sir.

Q What officer did you know up there?

Objected to as immaterial. Objection sustained.

A I did not know any of them, in fact.

Q Well, you went down to this house and you talked about this shooting immediately after it happened? A No sir; immediately after it happened Detective Devine came to that house.

Q When he came there you were up on the roof, weren't you?

A No sir.

Q Do you remember the District Attorney asking you this question (reading): "Q What did you tell him to do with the gun (referring to Jimmie Dowling)? A This Detective Devine came up in the house and I was sitting up on the roof and the rest of them, whoever was in Dowling's house was in there. That's why he did not see me." Weren't you up on the roof when Detective Devine came in? A No.

Q Didn't you tell Mr. Hennis you were? A No sir.

Q (Reading): "Q What did you tell him to do with the gun (referring to the boy)? A This Detective Devine came up in the house and I was sitting up on the roof and the rest of them, whoever was in Dowling's house, was in there, that's why he did not see me."

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BY THE COURT:

Q Do you say you never made any such statement to Assistant District Attorney Hennis? A Yes sir.

Q Is that your answer? A Yes sir.

Q You never made any such statement? A No sir.

Q Did he ask you that question? A Yes sir.

Q Do you remember that? A Yes sir.

Q You are clear on that, are you? A Yes sir.

Q Do you remember what answer you made? A I told him I was in the closet in the hallway.

Q Is that all you told him? A Yes sir.

Q The rest of the matter as read by the District Attorney was not given by you in your answer to Mr. Hennis? A Yes sir.

BY MR. NEARY:

Q You did not tell Mr. Hennis that you were up on the roof when Officer Devine came looking for you? A No.

Q As a matter of fact you were up on the roof, weren't you? A No sir.

Q When Devine was in that house looking for you weren't you on the roof and weren't the others in Dowling's house?

A No sir.

Q What time did you leave Dowling's house on the afternoon of the shooting? A Right after Detective Devine left.

Q Did you see Officer Devine? A No sir.

Q They told you that Devine had been there? A Yes.

Q Someone came up on the roof and said, "He is gone" and then

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you went down, is that it? A No sir.

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Objected to. Objection overruled. Exception.

Q After you left New York did you communicate with Dowling or Bergen or anyone at all? A No sir.

Q This man that you say took his hand out of his pocket and raised his hand about so high (indicating), - did you tell me that just as he raised his hand that high you fired the first shot? A I don't remember what happened.

Q How many other shots did you fire? A I don't remember.

Q Don't you remember pulling the trigger? A No sir.

Q Is that a double-action revolver? A No sir.

Q Do you know what a double-action revolver is? A No sir.

Q A revolver where you press the trigger and the hammer comes back and then goes down, - and not one where you have to pull back again with your finger? A That is the kind it was.

Q How often did you pull the trigger? A I don't remember.

Q You remember distinctly you saw something in his hand?

A That is all I remember. I don't remember what happened after that.

Q Did you see Rumore fall? A No sir.

Q Why were you carrying a revolver for three months?

A We had some trouble in Hoboken with some fellows. We were riding grapes out of there.

Q You had some trouble in Hoboken when? A About three months before this trouble happened.

Q You were carrying a revolver on Lincoln's Birthday in New

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York City when you were not going to Jersey? A Yes sir.

Q You were not carrying that revolver then because you were afraid of people in Hoboken, were you? A They had come over from Hoboken.

Q But they were not there that day? A No sir.

Q You were right with your own crowd, in your own neighborhood? A Yes.

Q And still you carried that gun; now you denied on the stand here that you had any knowledge of the quarrel at all between Bergen and this other man, so I will try to refresh your recollection by reading this (reading): "And they were waiting there for him to come out? A Yes sir. Q So he came down 9th Avenue from the barber shop, crossed over to the corner where the saloon was, right next to the baker shop, and they all started punching him and I came out of the saloon, out of Rogers' saloon right on that same corner". Do you recall being asked that question and giving that answer? A No sir.

Q (Reading): "Q Is that the first you knew about it when you came out of the saloon? A I had seen it and I went in like to the toilet, see". Do you remember Mr. Hennis asking you that question, "Is that the first you knew about it"? A No sir.

Q Do you remember giving that answer, "I ^{had} seen it and I went in like to the toilet, see"? A No sir.

Q Didn't you tell that to Mr. Hennis? A No sir.

Q (Reading) "Q In the saloon? A Yes sir. And when

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I came out the first one he made for was me". Do you remember making that answer to Mr. Hennis? A No sir.

Q You did make it, didn't you? A Not that I can remember.

BY THE COURT:

Q When you left the saloon and stood in the vestibule did you see Rumore at that time? A I had seen him coming from the corner of 19th Street.

Q How far away was Rumore from you when you saw him for the first time that day? A About five feet.

Q You said you had seen him coming from the corner? A Yes.

Q How far was this vestibule from the corner? A About 10 or 15 feet.

Q And you want this jury to understand that as you came out of the saloon he was 5 feet in front of you? A That way, from the vestibule (indicating sideways).

Q From the vestibule he was 5 feet? A Yes sir.

Q But how many feet from where you were? A He was about 5 feet.

Q Assume the officer is Rumore; show this jury where Rumore stood and where you were at the time? A He was about there and I was in the vestibule standing here. He was about 5 feet off that way (indicating).

Q Were there any person or persons between you and Rumore?
A They were all mingled.

Q Were there any persons between you and Rumore when you saw Rumore for the first time, at a distance of 5 feet away from

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you? A No sir.

Q There were no persons at all between you two? A No sir.

Q Were there any persons near Rumore? A They were mingled all around.

Q How many? A About twenty or twenty-five fellows.

Q Do you remember who they were? A No sir.

Q Do you know whether Donovan was there? A No sir.

Q Do you know whether Dowling was there? A Dowling was there.

Q You are sure about Dowling? A Yes sir.

Q Was Bernard Sullivan there? A I don't remember seeing him.

Q How far was Dowling from Rumore at that time? A I can't just remember.

Q Was he near him? A I don't remember.

Q You say there were about twenty persons around Rumore, but no one between you and Rumore, is that right? A Yes.

Q Now, at that time did Rumore have anything in his hand?
A He was walking and came over like that (indicating).

Q He came towards you? A Yes sir.

Q Did he walk slowly? A No sir.

Q Did he run? A No sir.

Q Did he make a leap? A Made a motion like that (indicating).

Q And when you saw him coming towards you what did you do?

A I don't remember doing nothing till he grabbed me.

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Q At what point did you see something in Rumore's hand?

A As he pushed me toward the back of the vestibule.

Q Did you see anything in his hand? A He was putting the hand in his right hand coat pocket. He put his hand in his pocket.

Q You say he was coming towards you and leaving the twenty men; do you remember putting your hand in your pocket then?

A I don't remember exactly.

Q What time elapsed; you say this Rumore was five feet away from you and that he made a quick pace towards you; did you at the time that Rumore was coming towards you, leaving the twenty men that were near to him, draw your revolver? A No sir.

Q Are you sure? A Yes sir.

Q Do you remember at what particular point you drew your revolver? A At the vestibule. There were fellows sort of standing around.

Q Who was standing there? A I don't know who they were exactly.

Q There was somebody standing in the vestibule? A No sir, around it; they were mingled around the outside.

Q Did any of those men make any attempt to get hold of Rumore? A No sir.

Q Not one of them? A No sir.

Q Did anybody hold Rumore? A No sir.

Q Did anyone say, "Look out, he has got something"? A No.

Q What did the something look like to you? A I could not

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exactly say what it was.

Q You say Rumore took hold of you with his left hand?

A Yes sir.

Q And then what did you do? A When he grabbed me like that I went like that (indicating).

Q You say when Rumore took hold of you with his left hand you saw something in his right hand? A Yes.

Q When he took hold of you with his left hand did you have your gun out of your pocket? A I can't remember.

Q You don't remember that? A No sir.

Q Did Rumore make a slash at you? A I can't remember what it was.

Q At what time were you able to get the gun out of your pocket, if Rumore had hold of you by the shoulder with his left hand? A He had me right in front here (indicating).

Q He had you by the lapels of your coat? A Yes sir.

Q Did his right hand remain stationary, fixed? A When he grabbed me like that, I sort of stumbled on this step that was inside, and I went down like that (indicating toward the side), and that is when the trouble happened.

Q You kind of fell back? A Yes sir, my heel kind of caught in this step that was inside.

Q But at what point did you draw your revolver? A When he pulled his hand from his pocket.

Q When he pulled his hand from his pocket, -- did you see him pull his hand from his pocket? A Yes.

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Q Did you not say he put his hand up in a horizontal position, his right hand was outstretched? He was drawing it up that way (indicating).

Q And at that time you pulled out your gun? A Yes sir.

Q You do not remember how many times you discharged the gun? A No sir.

Q Did you have any trouble with Rumore that day? A No sir.

Q Did you know Rumore? A No sir.

Q You never met him before? A No sir.

Q Did you see any fighting between Rumore and Bergen?

A No sir.

Q Or any trouble between Dowling and Rumore? A No sir.

Q Did you hear Dowling speak to Rumore? A No sir.

Q Trying to pacify him? A No sir.

BY MR. NEARY:

Q You say you were standing in the vestibule and you saw Rumore coming back from 18th Street? A No sir, he came from 19th Street corner.

Q Are you sure that Rumore came from 19th Street? A Yes sir.

Q And after Rumore came down from 19th Street was that the time you went into the saloon? A No sir, I was coming out of the saloon when he came from 19th Street.

Q When you came out of the saloon he was coming down 19th Street? A Yes.

Q When you came out of the vestibule wasn't Pat Donovan talking to Rumore? A I did not see Pat Donovan that day.

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Q Are you sure you were at the place where the shooting took place? A Yes sir.

Q Do you know Officer McNamara of 20th Street station?

A I did not know him till the night I was arrested.

Q You and he had a little conference that night at the station house? A Yes.

Q And he asked you what you knew about this shooting, didn't he? A Yes.

Q And didn't you tell him that at the time of the shooting you were not there at all, - you had been playing cards in a house with a girl friend, May Waters at 127 Perry Street? A Yes.

Q You told the officer that? A No sir. I told him I had been there the night before that playing cards.

Q Didn't Officer McNamara say to you to this effect, "Come now, tell us all about this shooting", and didn't you say that at the time that the crime was committed, about half past three on Lincoln's Birthday, February 12th, you were at the house of May Waters at 137 or 127 Perry Street? A Ellen Waters.

Q What is the address of that house, by the way? A 127.

Q Did you tell the officer that? A No sir. I said I was there the night before that playing cards.

BY THE COURT:

Q Do you mean that on the day of the shooting, at 3.30 in the afternoon, that you were at the home of May Waters, 127 Perry Street? A No sir.

BY MR. NEARY:

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Q You did not tell him that, did you? A No sir.

Q How many times did you say you were convicted? A Twice.

Q You said once for petty larceny, didn't you? A Twice.
Once from the Children's Court and once from Special Sessions.

Q The first conviction was in the Children's Court, you told your counsel, and that is the only conviction you told him about? A The only one he asked me about.

Q How many times were you convicted? A Twice.

Q Once was for petty larceny? A Petty larceny in 1914.

Q And you were sent to the House of Refuge? A Yes sir.

Q What did you steal?

THE COURT: You cannot go into those things. You cannot investigate the nature of the conviction.

Q Now, were you convicted a second time? A Yes sir.

Q That was January 6, 1917? A Yes sir.

Q And that was for petty larceny? A Yes sir.

Q And were you sentenced on the charge and sentence was suspended? A I was returned for violation of parole.

Q Did you serve your sentence? A Yes sir.

MR. NEARY: I think that is all.

ANGELO COSTA, of 11 East Hamilton Place, Jersey City, New Jersey, a witness called on behalf of the defendant, having been duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. FITZPATRICK:

Q What is your business, Mr. Costa? A Truckman.

Q Do you know this defendant, Martin Burke? A Yes sir.

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Q And how long have you known him? A About four years.

Q Did he work for you at any time? A Yes sir.

Q How long? A About three or three and a half years ago.
Between me and my father. He worked for my father first when I
was truckman.

Q Do you know other people that know him? A Yes sir,
lots of people in the market.

Q Did you discuss him with other people? A Did I talk
about this?

Q Did you talk about this defendant on different occasions?
A Did I talk to him.

Q Did you talk about the defendant with the other people
that knew him? A While working?

Q Yes. A Certainly.

Q Do you know what his reputation is in the market, in
the neighborhood? A Yes.

Q What is his reputation for peace and quiet, good or bad?
A Good all around the market.

BY MR. NEARY:

Q Did he have any trouble in the market? A No sir.

Q Did he have occasion once there to hit somebody there
with a hatchet? A No sir.

Q While he was working for you? A No sir.

Q Do you know that he was carrying a gun because he was
afraid of those people in the market that he had had this trouble
with? A No sir.

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Q You did not know that? A No sir.

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BY THE COURT:

Q Did you know hat he had carried a pistol for three months? A No sir.

BY MR. NEARY:

Q If you knew he carried a pistol for three months and knew he had trouble in the market there at one time and that he struck a man with a hatchet, would you still say that his reputation for peace and quiet was good? A No sir.

Q Did you know that he had been convicted of a crime?

A No sir.

Q Did you know that he had been convicted for crime twice?

A No sir.

Q You did not know him very well, did you? A Yes sir.

Q How well? A Driving.

Q You do not discuss your drivers with different people in the market? A No.

Q How many drivers have you working for you? A At the present time I have only my brother.

Q Well, three or four years ago? A Fifteen, with my father.

Q Prior to September, 1921 how often had you seen the defendant? A He worked for me a year before Thanksgiving, not this year but last year.

Q A year before Thanksgiving? A Thanksgiving was the last he worked for me.

Q In 1920, do you mean? A In 1920.

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Q Did you see him from Thanksgiving of 1920 up to the time of his arrest? A Yes sir, after that.

Q How often? A I seen him a few times in the yard looking for work.

Q You say he was looking for work there? A Yes.

Q In what month? A In the busy season between April and June, I suppose, 1921; in the yard I seen him, in the yard looking for work.

Q He was not working for you then? A Not then.

BY MR. FITZPATRICK:

Q What was his position with you? A Driver.

Q Did he also do some loading? A Yes sir.

Q In that market the men go in to look for jobs at loading at different times? A Yes.

Q And that is what you mean when you said he was looking for work? A Yes.

Q Did you hear of any trouble that he had had? A He had had trouble, yes.

Q I mean while he worked for you? A Yes; we were loading grapes and he had trouble in Hoboken.

Q Do you know what that trouble was? A They tried to steal some grapes and then they came there in front of the store and hit him; some fellows came there.

Q Over at your place? A Yes sir.

Q On how many occasions did they come over there? A I did not see them at all but my boss told me.

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MR. NEARY: I move to strike out what the boss told him.

THE COURT: Strike it out.

Q Of your own knowledge do you know that he had any trouble? A No sir, not outside of what the boss told me.

MR. FITZPATRICK: That is all; the defendant rests.

MR. NEARY: The People rest.

MR. FITZPATRICK: I renew my motion to dismiss the indictment. The People have failed to make out a case.

Motion denied. Exception.

MR. FITZPATRICK: I also renew the motion to direct a verdict of acquittal.

Motion denied. Exception.

Mr. Fitzpatrick sums up his case to the jury.

The Court takes a recess until 2.05 P.M. after admonishing the jury according to law.

2.05 P.M.

Mr. Neary sums up his case to the jury.

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THE PEOPLE v. MARTIN BURKE

THE COURT'S CHARGE TO THE JURY

THE COURT (ROSALSKY, J.): Gentlemen of the jury, it is the duty of the Court to present for your consideration the rules of law which shall govern you in determining the guilt or the innocence of the defendant. Likewise it is the duty of the jury to accept the law as declared by the Court. It is essential to the due administration of justice that you shall not question the correctness of any rule of law laid down for your guidance. The jurors are just as sovereign with respect to all questions of fact as is the Judge with respect to all questions of law. It is your duty upon your oaths to apply the law to the facts and to determine whether or not the evidence establishes beyond a reasonable doubt the allegations set forth in the indictment.

An indictment is an accusation in writing charging a person with a crime, and the mere finding thereof by the Grand Jury is absolutely no evidence of the guilt of such person. The People are required to establish the allegations of the indictment beyond a reasonable doubt before you will be justified in rendering a verdict of guilty.

The defendant in a criminal action is not called upon to establish his innocence. The burden of establishing the

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guilt of the defendant rests upon the People throughout the entire case.

The indictment filed by the Grand Jury against the defendant charges him with the crime of manslaughter in the first degree. It is therein alleged that on the 12th day of February in the year 1921 the defendant did feloniously and wilfully make an assault upon one Pietro Rumore with a certain pistol which was then and there charged and loaded with gunpowder and leaden bullets, the same being a dangerous weapon, which pistol the defendant held and discharged against and upon the person of the said Pietro Rumore; that the defendant feloniously and wilfully did shoot off and discharge said revolver upon the said Pietro Rumore; that the defendant did then and there wilfully and feloniously discharge the revolver against the body of the said Pietro Rumore; that the said Pietro Rumore sustained mortal wounds from which he died, and that the Grand Jury therefore accuse the defendant of the crime of killing and slaying said Pietro Rumore against the form of the statute in such case made and provided.

Homicide is the killing of one human being by the act, procurement or omission of another. Manslaughter in the first degree is defined by our statute as follows:

Such homicide is manslaughter in the first degree, unless it is excusable or justifiable, when committed without

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a design to effect death, in the heat of passion, but in a cruel or unusual manner, or by means of a dangerous weapon.

In manslaughter in the first degree it is necessary to prove that the killing of a human being was done without a design to effect the death of the person killed and that it was done in the heat of passion but in a cruel or unusual manner or by means of a dangerous weapon.

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant as alleged are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt. The corpus delicti, that is the body of the crime, is made up of two things. First, that a human being was killed, and that must be established by direct proof. Second, the existence of criminal and human agency as the cause of death, and that must be established beyond a reasonable doubt. The term "direct proof" means direct proof of the fact of killing. That is, that the death of a human being, and in this case, the death of Pietro Rumore, was due to violence of a criminal character and was produced by human agency, and that it was not due to accident or mistake, or to a self-inflicted wound.

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The proof of the identity of the body and that the defendant committed the crime may be established by circumstantial evidence beyond a reasonable doubt. It is claimed by the People that when the defendant was apprehended several months after the alleged killing of Pietro Rumore, he made a statement to an Assistant District Attorney in which he stated that he killed Rumore because he took hold of him with one hand and with the other he held an open razor, ^{that he} and was in the act of inflicting serious personal injury upon him. The defendant does not dispute the fact that he killed Rumore but he says, "My act was not criminal because it was justifiable in law". You will remember the testimony given by the defendant this morning. He testified among other things that he heard some argument among persons on the sidewalk, that he left the saloon and stepped out near the vestibule; that Rumore was a distance of five feet away from him; that Rumore made a leap and with one hand took hold of the defendant by the lapels of his coat and that with the other hand he saw Rumore have something in his hand of a shiny substance, but whether it was a razor or not he was unable to say; that he had carried a revolver on his person for several months, which revolver on that day he carried in the left pocket of his jacket or coat; that he remembers pulling the revolver while Rumore held him in the manner

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that I have described, but does not remember discharging the revolver at him; that he had never known Rumore before that day; that he had never seen the man according to his knowledge and that he had had no quarrel with Rumore on that day or on any other occasion; and that when this defendant was apprehended he had a conversation with Officer McNamara.

Officer McNamara testified that the defendant told him that on February 12, 1921, on the afternoon of that day, at about 3 or 3.30 he was away from the scene of any shooting and that he was at the home of a young woman named May Waters who then lived at 127 Perry Street, in the borough of Manhattan, county of New York. This testimony the defendant denies. He says, he told McNamara that he had played cards at the home of the girl on the night before the alleged shooting. It is important for you to take into consideration the testimony given by both the defendant and Officer McNamara with respect to the whereabouts of the defendant on the afternoon of February 12th, 1921. If you believe that Officer McNamara is telling the truth it is important for you to consider, if you find such statement of the defendant to be false, with a view to determining what light is shed upon the nature of the defense interposed by the defendant. It is very important, gentlemen, for you to ascertain from the evidence what were the true circumstances in connection with the shooting of

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Rumore. Did Rumore approach the defendant with an open razor in the manner described by him, or did Rumore approach the defendant with his hand in his pocket and in such a manner as to convey to the defendant that Rumore was prepared to inflict a serious injury upon him and that he was in imminent danger of being subjected to serious violence at the hands of Rumore. If so, were the circumstances such as to justify the defendant in shooting Rumore four times? The People called several witnesses. Several of them were questioned by the District Attorney concerning alleged statements made by them to one of the Assistant District Attorneys of this county. Several of the witnesses testified that they had no recollection of having given such testimony to the Assistant District Attorney. Now, gentlemen, you should only consider the statements made by the witnesses with respect to their present recollection of the facts. You have no right to draw any inference whatsoever against the defendant because the District Attorney purported to have read from a paper certain statements concerning which it is claimed the witnesses made to an Assistant District Attorney. Under the rules of law the District Attorney was permitted to attempt to refresh the recollection of these witnesses, but inasmuch as these witnesses having stated that their recollection of the events was not refreshed, therefore you must not

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directly or indirectly draw any unfavorable inference against the defendant, or permit yourselves to conclude that these witnesses have made certain statements read to them by the District Attorney. You are bound by what these witnesses have said with respect to those statements and therefore I caution you that you must obey the Court's instructions and see to it that no extraneous matter should withdraw your attention from an honest and conscientious performance of your duty. You must only consider the legal testimony admitted in evidence, and if any suggestion is conveyed to you by the questions read by the District Attorney to these witnesses you must resolutely refuse to be moved by any such suggestion. But you should hold fast to the proof given by witnesses under oath.

One of the witnesses called by the People was a young man named Martin J. Bergen. He testified that he and Rumore had some controversy which resulted in this witness striking Rumore, and Rumore returned the blow; that he saw Rumore hold Burke with his left hand and that at that time Rumore's hand was behind his back. Burke was then in the doorway. Rumore made a lunge at him and then the witness heard the firing of four shots. He testified that he did not see who shot the deceased but he said that the shots came from the direction where Burke was standing.

Bernard Sullivan, a bartender by occupation, testified

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that he saw Rumore near the storm door; that Burke was about five feet away from him; that he saw Rumore's hands to his side; that he heard the report of four pistol shots. A second or so elapsed between the firing of each of the shots.

Joseph Dowling testified that he saw a fist fight between Rumore and Bergen. The defendant Burke was in the doorway of the saloon and his back was towards the doorway. This witness saw Rumore leap at Burke, that Rumore muttered something, that he went toward his pocket, that he could not see what Burke did or whether Burke had anything in his hand, and that four seconds after Rumore leaped at Burke he heard a pistol shot.

Patrick Donovan testified that he had known the defendant since childhood; that he was talking to Rumore who was at a distance of about a foot or a foot and a half away from him; that Rumore uttered some words and made a leap towards some person, but who that person was he was unable to observe; that Rumore had his right hand in his pocket and at the time the shot was fired he saw the wrist of Rumore out of his pocket, but he did not see whether or not Rumore had anything in his pocket. He said that Rumore made an attempt to pull his hand out of his pocket, and that he then went away, and that he did not see the person who fired any of the shots.

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Gentlemen, while I referred to some of the salient features of the testimony given by some of the witnesses called by the People, you are by no means controlled by my references to the testimony of these witnesses, as you are the final arbiters of the testimony adduced by each and every witness called by the People and by the defense. It is your duty to consider all of the evidence and not isolated portions thereof, with a view to arriving at a just result. Upon you rests the responsibility and the obligation to determine from all of the evidence presented in this case whether the defendant is guilty or not guilty.

The defendant interposes what is termed in the law the defense of self-defense. You must apply the law of self-defense as the Court declares it, and you must accept, as I said, the law of self-defense as declared by the Court.

Homicide is also justifiable when committed in the lawful defense of the slayer, when there is reasonable ground to apprehend a design on the part of the person slain to do some great personal injury to the slayer, and there is imminent danger of such design being accomplished. The law does not justify homicide upon the theory of self-defense unless two facts exist; first, there must be reasonable ground to apprehend the design on the part of the person slain to do some great personal injury to the slayer.

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Second, there must be imminent danger of such design being accomplished. The question is not merely what did the accused believe, but also what did he have a right to believe under the circumstances. Any person committing violence in his personal defense must not only believe that he is in danger of personal violence but he must in fact have reasonable ground to apprehend that he is in imminent danger. When one who is without fault himself is attacked by another in such a manner and under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do some great bodily harm and there is reasonable ground for believing the danger imminent, and that such design will be accomplished, he may safely act upon the appearance and kill the assailant if that be necessary to avoid the threatened danger, and the killing will be justifiable although it may afterwards turn out that the appearances were false and that there was in fact neither a design to do him serious injury nor danger that it would be done. He must decide at his peril and upon the appearances of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt if the appearances prove false, which would be innocent had they proved true. Before a party can justify the taking of life in self-defense, he must, as I have said,

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show that there was reasonable ground for believing that he was in great peril, that the killing was necessary for his escape and that no other safe means was open to him. When one believes himself to be attacked by another and to receive great bodily injury it is his duty to avoid the attack if in his power to do so, and a right of attack for the purpose of self-defense does not arise until he has done everything in his power to avoid the necessity. Under the general rule of self-defense it is the duty of a person charged with the taking of human life where he interposes such defense to show that the killing was necessary for his escape, that no other safe means was open to him and that he could not have avoided the necessity of the attack. But if you find that the situation justified the defendant as a reasonable person in believing in good faith that Rumore was about to inflict great personal injuries upon him, that he was in imminent danger of such design being accomplished, then the defendant was not bound to retreat if by so doing he would have imperilled his own safety. In these circumstances he had a right to stand his ground. The defendant of course must have had reasonable ground for believing that he was in imminent danger of being subjected to great personal injury at the hands of Rumore and under such circumstances he would be justified in believing that to retreat or to turn his back and run away was to add to the

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imminent danger in which he was placed. If you reach the conclusion that Rumore approached the defendant with an open razor or while he had his hand in his pocket and was about to draw the razor, although he did not succeed in opening it, or attempting to cut the defendant with it and that the circumstances were such as to furnish the defendant with reasonable ground to apprehend that the appearances and conduct of Rumore indicated a design on his part to do him some great bodily injury, and there was imminent danger of such design being carried into effect, that the defendant had no opportunity to make his escape in safety, that retreat was dangerous for him, and that he could not have avoided the necessity of shooting the deceased, then in law his shooting of Rumore was justified and it is your duty to acquit the defendant. But on the other hand, if you reach the conclusion that although Rumore had a razor in his pocket, he made no attempt to take it from his pocket and use it feloniously upon the defendant, that he leaped upon the defendant or approached him under circumstances where there was still time and opportunity for the defendant to make his escape, that he could have avoided the necessity of shooting the deceased, that he was not in imminent danger of being subjected to great personal injury at the hands of the deceased, that he did not have reasonable ground for believing that he was in any such danger,

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but that the defendant, as Rumore approached him, under those circumstances shot him four times, which act occurred in the heat of passion, then you will be justified in convicting the defendant of the crime of manslaughter in the first degree.

The taking of human life is a matter of such serious import that there must always exist justification for the act. It is equally true that a person taking human life which may be justified, depending on how such circumstances are viewed, is entitled to the benefit, fairly and fully, of every exculpatory circumstance.

The burden is upon the People throughout the trial to establish the crime charged beyond a reasonable doubt, and if upon the whole case, considering all the testimony given by the prosecution and by the defendant there arises a reasonable doubt of the defendant's guilt, he becomes entitled to an acquittal. And this doubt applies to the question of justification as well as to every other question which is essential to be proved in order to establish the commission of the crime charged against the defendant.

It is claimed by the People that directly after the killing of Rumore the defendant fled this jurisdiction and kept away from the police for several months. The demeanor, conduct and acts of a person charged with a crime such as flight, a desire to elude discovery, are always proper subjects of consideration as indicative of a guilty mind

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in determining the question of the guilt or the innocence of the person charged with crime. Under our law evidence of flight is competent, because when unexplained it tends to show a consciousness of guilt, although standing alone it raises no legal presumption of that. When the crime is proved, but the identity of the wrongdoer is in doubt it bears somewhat on the question of identity. Ordinarily it is of slight value and of none whatever, unless there are facts pointing to the motive which prompted it, and hence any explanation of the accused should always be considered in connection therewith. If you find the defendant shot Rumore it will be for you to say what was the true motive that prompted him to leave this jurisdiction and to avoid his apprehension by the police authorities. Did he leave New York, as he said, because he feared he would be handled roughly by the police, or did he leave New York because of a consciousness on his part that in shooting the deceased he did so without any legal justification? You must determine all those questions and in passing upon those questions it is important for you to take into consideration the explanation offered by the defendant.

The defendant is presumed to be innocent until he is proved guilty beyond a reasonable doubt. That presumption rests with him throughout the case until the moment when the jurors are convinced from the proofs submitted to them

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that the defendant is guilty of the crime charged. Then the presumption of innocence is destroyed. The defendant is entitled to the benefit of every reasonable doubt arising from the evidence in the case. A reasonable doubt is not a mere whim, guess or surmise. Nor should it be regarded as a mere subterfuge to which resort may be had in order to avoid the performance of a disagreeable duty. A reasonable doubt is not a mere speculative doubt because everything relative to human affairs that is based upon evidence may be open to some possible or imaginary doubt. It must be a doubt arising from such fact or facts in the case as lead you as intelligent men, acting impartially upon the evidence, to the conclusion that you are not wholly satisfied in your minds that the defendant is guilty of the crime charged against him. It must be a doubt based upon the evidence. It is such a doubt as after careful consideration of all the evidence leaves your minds in such a state that you cannot say that you are convinced to a moral certainty of the truth of the charge against the defendant. If you have a reasonable doubt as to the guilt of the defendant it is your duty to give him the benefit of such doubt and to acquit him.

There is also testimony here to the effect that the defendant had heretofore been convicted of a crime. A person convicted of a crime is a competent witness, and the

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People have a right to prove his past lapse from rectitude for the purpose only of affecting his testimony as a witness and for that reason the law says that in weighing the evidence you may consider the fact that he had heretofore been convicted of a crime, only for the purpose of determining whether or not his testimony is to be affected. Do your duty here fearlessly and conscientiously. If you believe the People have made the case against this defendant beyond a reasonable doubt do not hesitate to convict him. On the other hand, if you believe that there is a reasonable doubt as to his guilt, acquit him.

It is the duty of each juror, while the jury are deliberating upon their verdict, to give careful consideration to the views and opinions of his fellow jurors. A juror should not stop his ears and stubbornly stand upon the position he first takes, regardless of what might be said by the other jurors. You should discuss the case together and compare views and reasons, but before you make up your verdict each juror without reference to the other jurors should be satisfied in his own mind of the guilt or the innocence of the defendant. It is the duty of each juror to reason with his fellow jurors with an honest desire to arrive at a verdict, and with a view to arriving at a verdict either for the People or for the defendant. It should be the object of all jurors to arrive at a conclusion and to

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that end to deliberate together with calmness. It is your duty to agree upon a verdict, if that be possible, without a violation of conscientious conviction. You may render one of the following verdicts, - guilty of manslaughter in the first degree, or not guilty.

Have you any requests to charge?

MR. FITZPATRICK: If your Honor please I request you to charge the jury that your Honor's denial of the motions made by defendant's counsel is no indication that you have an opinion one way or the other in the case.

THE COURT: I so charge. I will submit the form of the verdict with your consent.

MR. FITZPATRICK: Yes sir.

THE COURT: Your verdict will be either guilty of manslaughter in the first degree or not guilty. The exhibits may be presented to the jury, on consent.

MR. FITZPATRICK: We have no objection, your Honor.

The jury retire at 3.15 P.M. and return at 3.45 P.M.

THE CLERK OF THE COURT: Gentlemen of the jury, have you agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK OF THE COURT: How say you, do you find the defendant at the bar guilty or not guilty?

THE FOREMAN: Guilty of manslaughter in the first degree.

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THE CLERK OF THE COURT: Hearken to your verdict as it stands recorded through your foreman. You find the defendant guilty of manslaughter in the first degree. So say you all.

MR. FITZPATRICK: I move to set aside the verdict on the ground that it is against the evidence and against the law.

Motion denied. Exception.

MR. FITZPATRICK: Your Honor, defendant is ready for sentence now, with the provision that commitment be held up for a few days. We waive the usual two days' time.

THE CLERK OF THE COURT: Martin Burke, what have you now to say why judgment should not be pronounced against you according to law.

THE COURT: Martin Burke, you were fortunate in the fact that the Grand Jury indicted you for the crime of manslaughter in the first degree. The evidence in this case justified your conviction of the crime of murder in the second degree. The proof against you was overwhelming and the jury rendered a signal service to justice in convicting you of the crime of manslaughter in the first degree. The maximum sentence should be imposed in this case.

Defendant is sentenced to State Prison for not less than ten years and not more than twenty years.

(One week's stay granted to defendant.)

L. LUTZ.

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