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Writ of Error to Supreme Court.

WRIT OF ERROR.

Filed May 13, 1921.

New Jersey Court of Errors and Appeals

10

NEW JERSEY, ss.

The State of New Jersey, to our Justices of our Supreme Court of Judicature, GREETING:

Because in the record and proceedings, and also in the giving of the judgment upon a certain indictment which was in our said Supreme Court of Judicature, before you, between the State of New Jersey, defendant-in-error, and Matthias Andres, plaintiff-in-error, on a writ of error issued out of our Supreme Court of Judicature to the Judges holding the Court of Oyer and Terminer, constituting the Court of General Quarter Sessions in and for said County of Essex, as is said, manifest error hath intervened to the great damage of him, the said Matthias Andres, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Matthias Andres, do command you that if judgment be thereupon given, then you send distinctly and openly, under your seal, the entire record proceedings and indictment aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, before the Judges thereof, on the ninth day of May next, and this writ, that the records and proceedings aforesaid being inspected, we may cause to be done thereupon what of right and according to law ought to be done.

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30

WITNESS, Edwin Robert Walker, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, this 22nd day of April, nineteen hundred and twenty-one.

THOMAS F. MARTIN,

Clerk.

40

McDERMIT & McDERMIT,

Attorneys.

Return to Writ.

RETURN.

10 The answer of the Justices of the Supreme Court of the State of New Jersey within named, the record and proceedings whereof mention is within made, with all things touching and concerning same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J.

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WRIT OF ERROR.

New Jersey Supreme Court

NEW JERSEY, ss.

(SEAL)

The State of New Jersey to our Judges of our Court of Oyer and Terminer of the County of Essex, constituting the Court of General Quarter Sessions in and for the County of Essex, GREETING: 10

Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey against Matthias Andres, for carrying concealed weapons in the City of Newark, in said County of Essex, found in our Court of Oyer and Terminer and in and for said county heard and determined, manifest error had intervened to the great damage of him, the said Matthias Andres, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice may be done to him, the said Matthias Andres, do command you, that if judgment be thereupon given, that then you do send the record and proceedings aforesaid, with all things touching and concerning the same, to us under your seal, distinctly and openly, and this writ, so that we have them before our Supreme Court of Judicature, at Trenton, on the third day of February next, that inspecting the record and proceedings aforesaid we may further do thereupon for correcting the error that which of right and according to law shall be fit to be done. 20 30

(SEAL)

WITNESS, William S. Gummere, Chief Justice of our Supreme Court at Trenton, the fourteenth day of January, in the year of our Lord one thousand nine hundred and twenty.

ENOCH L. JOHNSON,

Clerk. 40

McDERMIT & McDERMIT,
Attorneys.

Indictment.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

10 I, William P. Martin, Judge of the Court of Common Pleas, Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey, the indictment, judgment record and proceedings, together with all things touching and concerning the same, together with the entire record of the proceedings had at the trial, as by the within writ to me directed, I am commanded.

In Witness Whereof, I have hereunto set my hand and the seal of said Court at Newark, N. J.,
 (SEAL) this 11th day of May, A. D. 1920.

WM. P. MARTIN,
Judge of the Court of Quarter Sessions,
Essex County, New Jersey.

20

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

30 Be It Remembered that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, on the third Tuesday in September, in the year of our Lord one thousand nine hundred and nineteen, by the Honorable William S. Gum- mere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of Edward E. Gnichtel, I. Seymour Crane, Moses Rosen- stein, Jos. J. Haupt, Stephen Stetson, Louis Dresdner, Morris Snyder, John P. Lee, Wallace L. Clark, Rudolph Levi, Frederick Fischer, August J. Miller, Thomas H. Hickey, Max Oppenheimer, James C. Stevens, Charles Goldingay, Thomas E. Kearns, Sydney
 40 J. Millingan, Lewis J. Burgesser, Harry F. Bliss, Louis A. Hasselmayer, Harry W. Picking, Joseph S. Shoyer, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to inquire in behalf of the State of New Jersey, in and for the said County of Essex, it

Plea.

is presented in manner and form following, to wit: Essex Oyer and Terminer, September Term, A. D. 1919.

Essex County, to wit: The Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, upon their oath, present that Matthias Andres, late of the City of Newark, in the County of Essex aforesaid, on the thirty-first day of October, in the year of our Lord one thousand nine hundred and nineteen, with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this Court, unlawfully did carry a revolver, concealed in and about his person, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

10

J. H. HARRISON,
Prosecutor of the Pleas.

20

On the eighteenth day of November, A. D. nineteen hundred and nineteen, on which day the said indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, in and for said County of Essex, and then and there the said indictment was duly delivered and duly filed by the Clerk of said Court and an entry of such order and delivery and filing was there and then made in the minutes of said Court at the same time, pursuant to the statute in such case made and provided.

30

And afterwards, that is to say, on the twentieth day of November, A. D. nineteen hundred and nineteen, at the Court of Quarter Sessions holden at Newark, in and for the County of Essex, before the Honorable William P. Martin, presiding Judge of the Court of Common Pleas, Matthias Andres, in the custody of John R. Flavell, Sheriff of the County of Essex aforesaid, and the said Matthias Andres being brought before the bar in his own proper person and forthwith being demanded, specified and charged upon him, how he would acquit himself thereof, says he is not guilty thereof, and therefor for good and evil he puts himself upon the country, &c., and J. Henry Harrison,

40

Judgment Record.

Prosecutor of the Pleas of said State, for said County of Essex, in this behalf doth the like.

Therefore, let a jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex, on the third day of December, A. D. nineteen hundred and nineteen, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said Matthias Andres to recognize upon their oath whether the said Matthias Andres is guilty of the premises in the said indictment specified or not guilty, because the said J. Henry Harrison, Esq., Prosecutor, &c., as the said Matthias Andres puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

And now, that is to say, the sixteenth day of December, nineteen hundred and nineteen, to which date the trial of said issue was postponed, at the same Court of Quarter Sessions holden before the Honorable William P. Martin, Judge of the Court of Common Pleas, comes the said J. Henry Harrison, who prosecutes as aforesaid, and the said Matthias Andres, and the jury of whom mention is before made, and by the said John R. Flavell, Sheriff of the County of Essex, for this purpose enpanelled and returned, to wit: After the following number of challenges were exhausted. By the State 1. Samuel A. Turner, Robert Stewart Wendell, Wilson J. Smith, Gustave Martinson, John E. Wright, Harry V. Cole, John Francis Burrows, Louis Bateman, Leslie Voorhees, Samuel H. Crawford, William J. Zenson, Spencer G. Ayres, who, being called, were sworn upon that jury, who to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued until the sixteenth day of December, nineteen hundred and nineteen, when the jury returned into court in charge of the officer sworn to attend them, and then and there, in the presence of the prosecutor, defendant and Court, do say upon their oath they find the said defendant Matthias Andres guilty in the manner and form as charged in this indictment, and recommend the defendant to the mercy of the Court, and so they say all.

Judgment Record.

Judgment signed
Jan'y 12, 1920.
Wm. P. Martin,
Judge.

Whereupon all and singular, the premises being seen and by the Court now here fully understood, it is on this twelfth day of January, A. D. nineteen hundred and twenty,

ORDERED and adjudged that the said Matthias Andres be committed to the County Penitentiary of this County for a term of ten months at hard labor upon this conviction and stand committed until the costs are paid, which said costs are taxed by the Clerk at the sum of forty-six dollars and the defendant be in mercy, etc.

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George Smith, direct.

ESSEX COUNTY COURT OF QUARTER SESSIONS.

Tuesday, December 16, 1919.

10	STATE <i>vs.</i> MATTHIAS ANDRES.	}	<i>Indictment No. 14.</i> <i>December Term, 1919.</i> <i>Concealed Weapons.</i>
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Before Hon. William P. Martin, Judge, and a jury.

For the State appears Wilbur A. Mott, Esq.

For the defendant appears Frank McDermit, Esq.

(Jury drawn and sworn.)

20 Mr. Mott opens for the State.

GEORGE SMITH, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Where do you live? A 584 South Orange avenue.

Q In Newark? A Yes, sir.

Q On the morning, I guess it was, of the 31st of October last, did you see the defendant anywhere? A I did.

Q Where? A In a saloon down Neck; I do not know just the name of the street.

30 Q You mean over the Pennsylvania Railroad. A Yes, sir.

Q How far beyond that? A I should judge about six blocks below the Pennsylvania Station.

Q Did you know the defendant at that time? A I never saw him before.

40 Q Just what occurred? A That morning me and two other fellows happened to go in a saloon, and we asked for a drink; the bartender said, "What will it be?" And I said beer, and the other two fellows said beer. I said, "Is this two and one-half or one-half of one per cent.?" The bartender said, "2.75," he said, "It is 2.75"; and this man standing alongside of me said, "If you want good beer," he said, "come up to my place, and," he said, "I will give you five per cent.," he said; "Your carfare will be seven cents"; and I said, "What do I want to go to your house for"; I says, "Your wife might shoot me."

George Smith, cross.

So I turned talking to the other two fellows that was with me, and he said, "No, she won't do that; if anybody shoots you I will shoot you"; and he pulled something out of his pocket and placed it against my side, and he kept on pressing it closer to me, and he said, "Do you see it?" And I said, "Sure, I see it."

Q What did you see? A I saw the revolver right up against my stomach. 10

Q Who was holding it? A The man sitting there (indicating).

Q Then what happened there after that? A After that we sat there awhile longer, and the other fellow who was with me bought one round, and this man was pushing in toward us, and he said, "Where is my beer?" And I said, "Nobody will tell where your beer is"; and I didn't know whether it was safe to step out of the door, so I stood there awhile, and I seen his back turned, and I easily moosed out of the door. 20

Q What do you mean? A I went out as easily as I could.

Q You left him in the saloon? A I did.

Q Where did you go? A I walked up to Broad street and Market to see if I could see an officer there from the First Precinct, and I did happen to meet a traffic officer, and I asked him—

Mr. McDermit. I object to the conversation.

The Court. Sustained.

Q Where did you go after you saw an officer; then, where did you finally go? A Down to the Third Precinct. 30

Q And you reported there what occurred? A I did.

Cross examination by Mr. McDermit.

Q What kind of a per cent. was that stuff? A I couldn't swear what it was; it was beer, anyhow.

Q How many did you have? A Three.

Q Had you had any before you went in there? A No, sir.

Q What were you doing at two or three o'clock in the morning—what time of day was it? A About 8:15 or 8:30 in the morning. 40

Q Then it was early in the morning—about half-past eight.

A Yes, sir.

Q You are sure it was a pistol you saw? A It was that; yes, sir.

Q You had not had any words with him at all? A No, sir.

George X. Messner, direct.

Q He seemed to be intoxicated? A Yes, sir.

Q He was intoxicated? A Yes, sir.

Q In fact, he was very badly intoxicated? A I should think if a man is intoxicated so bad he would not be able to walk; he was just about staggering along.

10 Q You remained about five or ten minutes after the episode with him? A Yes, sir.

Q And he wanted some more drink, and you thought he had enough and would not give him any? A I was not in his company.

Q Well, he tried to mix in and you wouldn't stand for it? A Yes, sir.

Q He did not resent that by pulling a gun on you? A This was after this occurrence of pulling the gun; this was after he butted into our company; he had already pulled the gun on me.

20 Q This was how long after? A Five minutes after.

Q And when you refused to give him more to drink he did not pull the gun? A He had already pulled the gun.

Q He did not pull the gun then? A He did not; no, sir.

Q That was really the only thing that looked like any argument? A That was all.

Q The fact that he was trying to get in your company and to celebrate with you? A I do not know what it was, but he tried to get into it.

30 Q Well, he did not get in? A No, sir.

GEORGE X. MESSNER, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are connected with the Newark Police Department? A Yes, sir.

Q What precinct? A Third.

Q Do you know the defendant? A No; only by sight.

Q When did you first see him? A The 31st of October.

40 Q About what time? A I saw him in the First Precinct about 11:10.

Q Before you saw him—do you know Mr. Smith here; do you remember when you first saw Mr. Smith? A Yes, sir.

Q Where? A At the precinct.

Q On that same day? A Yes, sir.

George X. Messner, cross.

Q After you saw Mr. Smith, where did you go? A I went to Napoleon street and Wilson avenue.

Q And then did you finally find the defendant somewhere?
A I found him in the First Precinct, in the rathskeller, at Washington and Market streets.

Q What time? A About 11:10. 10

Q In the forenoon? A Yes, sir.

Q Were you alone? A No; I had Officer Knothel with me from the First Precinct.

Q When you went into the rathskeller what did you do? A I met Officer Knothel at the corner of Market and Washington streets; we went down in the rathskeller and I approached the waiter and bartender, and Mr. Andres was sitting in the restaurant compartment at a table, in a dozing position; I went over to him and I shook him, and he got up; Officer Knothel got hold of the left hand and I got hold of the right; I felt of his hip pocket and took the revolver out of it—the right hip pocket; I asked him what he was doing with that gun in his pocket; he said, “I don’t know; somebody gave it to me.” I asked how he came to be there, and he said, “I don’t know, just come in.” He had nothing to drink in front of him and nothing to eat. 20

Q I show you a revolver and ask you if you can identify it?

A Yes, sir.

Q What revolver is that? A 38 calibre.

Q I know, but what is it; what revolver is that? A The revolver I took from Mr. Andres. 30

Q Was it loaded or unloaded at the time? A It was loaded.

Q What did you do with the cartridges? A The cartridges were in the revolver and I took them out.

Q Can you tell whether or not those are the cartridges? A They are.

Q In whose possession has that revolver and the cartridges been? A My possession.

Q You brought it to court? A Yes, sir.

Cross examination by Mr. McDermit. 40

Q You had it locked up? A Yes, sir.

Q You haven’t carried it around with you all the time? A No, sir.

Q Where did you have it locked up? A In our cabinet.

Q How many keys are there to that cabinet? A Only one.

George X. Messner, cross.

Q Where is that key? A In the captain's possession.

Q So the captain has access to that closet, and everybody else the captain wanted to send there? A Yes, sir; I put the revolver in the cabinet and locked it and turned it over to the captain.

10 Q And did you mark the revolver? A I did.

Q Is it marked now? A Yes, sir.

Q Is there a mark on it? A Yes, sir.

Q Whereabouts? A My own initials on it.

Q What is your initial? A M, Messner.

Q How do you know that is the same pistol you put the M on? A Because I know my mark, and I had a piece cut out on the butt.

Q He was non-resistible? A No.

Q He was pretty well in? A Yes, sir.

20 Q He was sound asleep in the chair down at the rathskeller?

A I wouldn't say he was sound asleep, because as soon as I touched him he got on his feet.

Q Did he stagger any? A Yes, sir.

Q He was pretty drunk; you know what a drunken man is?

Q (*By the Court.*) He was pretty drunk? A Yes, sir.

Q (*By the Court.*) You know what a drunken man is? A Yes, sir.

30 *The Court.* Mr. Messner, you take the full time that is necessary to complete your answer, regardless of whether the next question is asked or not.

Q How did you manage to get to the police station from the corner of Washington and Market streets? A We walked over.

Q Was he in the center? A He was in the center.

Q How did he feel after he got down there?

Mr. Mott. I object.

The Court. Sustained.

40 Q What was his condition after he got down there, sobered up? A Not in the least.

Q Got drunker all the time? A No.

Q Did you search him down to the police station? A I did not.

Q Did anybody search him in your presence? A No.

Henry Knothel, direct—cross.

Q Do you know whether or not he had a large amount of money with him? A I know he did, after the doorman had searched him.

Q He was searched? A He was searched.

Q For knives and everything else? A Yes, sir.

Q You were present while he was searched? A No, sir. 10

Q You do not know whether he was searched or not? A I do not know that.

Q Who was the doorman? A I cannot recall; I think it was —no, I cannot recall.

Q Do you know whether or not he was taken from the First Precinct subsequently to the Third Precinct? A The following day.

Q He was held at the First Precinct over night? A Yes, sir.

Q Held there on account of his condition? A He was held on the concealed weapon charge at the First Precinct, and I had made another complaint the following morning for assault and battery on Mr. Smith. 20

Q He was still in a stupid condition? A No; sober.

Q (*By the Court.*) Where did you take the revolver from him, in the rathskeller, when he was arrested? A In the rathskeller; yes, sir.

HENRY KNOTHEL, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are a member of the Newark Police Department? A Yes, sir. 30

Q Were you present when the defendant was arrested in the rathskeller? A Yes, sir.

Q After you got into the rathskeller, just tell what you and Officer Messner did? A Officer Messner walked over to the bartender; after a conversation with him he walked over to where the defendant was sitting; he was sitting in a stupor there, and I took hold of him by the left hand and Messner by the right hand; Messner felt of his right hip pocket and pulled out a 38 calibre revolver from it; it was fully loaded with five shells in. 40

Cross examination by Mr. McDermit.

Q You use the words "he was sitting there in a stupor"; what do you mean? A He looked as though he was sleeping.

Henry Knothel, re-direct.

Q What was his condition as to sobriety; was he drunk? A I would say he was drinking pretty heavy, because he seemed as though he had enough.

Q After you got him down to the police station, had his condition changed any, as to his condition of sobriety? A No, I don't say he did, because he was that way until the afternoon; he was still in that same condition; he was in no fit condition to be out.

Q Could he talk intelligently? A No.

Q Couldn't get any expression out of him? A He would not talk intelligently to different questions that were put to him; he would never answer them.

Q He seemed to be, during the entire time you were in company with him, he was in a condition of stupor; he had no control over his faculties? A No, sir.

20 *Re-direct examination by Mr. Mott.*

Q How did you get him from the rathskeller? A We walked him.

Q Could he walk? A We each had hold of them.

Q Did you talk to him? A He kept on saying, "What you doing; what you doing"; that was all he would say.

Q (*By the Court.*) Did you carry him or did he walk? A We had to brace him up, your Honor.

30 *Mr. Mott.* I offer in evidence the revolver and the cartridges.

Mr. McDermit. I do not think the proof is sufficient to allow that revolver to go into evidence, and I want to make an objection to it, whether or not it is the actual pistol.

The Court. The objection is overruled.

Defendant's counsel prays an exception to this ruling of the Court.

40 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

STATE RESTS.

Motion to Direct Verdict of Not Guilty.

Mr. McDermit. I ask the Court to direct a verdict of not guilty on the evidence here. The evidence shows that something which purported or looked like a pistol from which the inference could be drawn was a pistol was utilized or attempted to be utilized in the Napoleon street saloon at half-past eight o'clock in the morning; there is nothing to show it was a pistol; there is nothing to show by complete evidence which could be submitted to the jury that it was a pistol; secondly, there is nothing to show that when the man was arrested he was found to be in a stupor; that it is not incumbent upon him to show how he came into possession of a revolver in a public place in the condition in which he was found, because it is shown by the testimony that he was entirely insensible to his surroundings; had absolutely no knowledge whether he had or not a revolver. Under all the circumstances in the case it is not a case for the jury. The State has failed to sustain the burden of proof. I call your Honor's attention to this law on concealed weapons and I say now and insist that you cannot take away the question of intent; you cannot say just because a man has a concealed weapon in his possession that is *prima facie* violation of the law; the question of intent must be established.

The Court. To do what?

Mr. McDermit. To violate the law; to commit a crime.

The Court. I do not understand what you mean, a man has got to say in addition to carrying a concealed weapon, I am going to violate the law?

Mr. McDermit. The carrying of a concealed weapon must put him in such shape that the defendant was in possession of a concealed weapon at a time when he knew what he was about; in other words, when a man was in a stupor anybody might have shoved a revolver in his pocket, or anybody might frame him up; that a man in that condition is unable to give any reason why he had a revolver at that particular time.

The Court. The evidence in this case is that at a saloon at a quarter-past eight in the morning, October 31st, 1919, located five blocks down Market street below the railroad and slightly off Market street somewhere, Smith went in

James A. McRell, direct.

10 with two friends and asked for a drink from the bar-keeper and this defendant came up and told them that if they wanted a drink of a proper kind of beer he would take them home and Smith passed a remark jokingly that his wife or somebody might object and he said "if there is any shooting to be done I will do it," and pulled out a revolver and pushed it at the side of this man Smith, and he then put it in his pocket, and he was found later at the rathskeller at eleven o'clock in the morning, which was some blocks away and described in the evidence as in the center part of the city, probably some ten or twelve blocks away from the other place, with a revolver concealed in his pocket. The presumption is that it was in his pocket from the time he went from the place over the railroad to the center of the city. I do not know what
20 more there is.

Mr. McDermit. I think your Honor's recollection of the pistol—identification of the revolver is open to question as far as the testimony itself is concerned; he thought it was a revolver and it was placed up against him, but how could he know it was a revolver?

The Court. He saw it and the defendant said, "If there is any shooting to be done I will do it."

Mr. McDermit. I ask for the direction of a verdict.

The Court. Motion denied.

30 Revolver marked Exhibit S. 1 and bullets marked Exhibit S. 2.

Mr. McDermit opens for defendant.

JAMES A. McRELL, sworn in behalf of defendant.

Direct examination by Mr. McDermit.

Q You are police commander of the First Precinct, Newark?

A I am.

40 Q Do you remember the day of the arrest of the defendant, Andres? A I do.

Q Will you kindly describe to his Honor and the jury just what condition he was in when he got there?

Mr. Mott. Fix the time.

James A. McRell, direct.

Mr. McDermit. I think it was in the neighborhood of about eleven o'clock. Do you know about what time it was?

A Approximately about eleven o'clock.

Q When he came in there was he searched? A Yes, sir.

Q And what was the charge against him? A Charged with carrying concealed weapons. 10

Q Was there anything found in his possession besides the weapon that was taken away? A \$208 in bills and 80 cents in change.

Q Who took that? A Doorman O'Rourke took it from his person.

Q Who was the money given to? A Lieutenant Seiffert.

Q When was the money taken away from the defendant?

Mr. Mott. I object. 20

The Court. Sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

WM. P. MARTIN,

Judge.

Q What was his condition? A He was intoxicated.

Q And to what extent was he intoxicated? A Very much so. 30

Q And had the matter of this intoxication any relevancy to the taking away of the money? A It did.

Q And why did it? A I have a standing rule in my precinct that when a man is brought in and he is under the influence of liquor to the extent that he is not responsible for his actions to a certain extent that all his property is taken from him, money, jewelry, and so forth, and tagged and put behind the desk and returned to him when he is sober; for this reason—

The Court. Never mind the reason. 40

Q That was done in this particular case? A Yes, sir.

Q Do you know as a point of fact when this \$208 was returned to him? A The next morning.

Q And do you know where he had been confined during the period of his arrest? A In the cell, First Precinct.

Matthias Andres, direct.

Q Did you see him yourself? A Only when he was brought in.

Q You did not see him when he was transferred to the jail?
A The next morning.

10 Q What was his condition then? A He showed indications of having been drunk, but he was all right at that time.

Cross examination by Mr. Mott.

Q This man was charged with crime when he came in? A Yes, sir.

Q Don't you search all prisoners charged with crime? A Absolutely; every prisoner that is brought to the precinct is searched.

Q Then did you search this man because he was charged with crime? A Did I search him?

20 Q Or was he searched because he was charged with crime?
A Yes, sir.

Q Was the defendant searched because he was charged with crime? A Yes, sir.

Re-direct examination by Mr. McDermit.

Q How many years have you been in the police department?
A Over twenty years.

Q How long have you been captain of the First Precinct? A A year last September.

30 MATTHIAS ANDRES, defendant, sworn in his own behalf.

Direct examination by Mr. McDermit.

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

Q And how long have you lived in the city of Newark? A Three years and three months.

Q Are you a married man? A Yes, sir.

Q In October last year did you keep a saloon on New street near Morris avenue, on the corner? A Yes, sir.

40 Q And you remember this night when you left the place up there, the night in October? A Last October, this year.

Q I will withdraw that question. Can you explain to us—no, I will withdraw that question. I show you a revolver. This revolver was taken from your possession under the evidence at Market and Washington streets some time during the early

Matthias Andres, direct.

morning of October 31st; is that your revolver? A Possibly.

Q (*By the Court.*) What do you say? A It is, possibly.

Q You found yourself under arrest in some police station?

A Yes, sir.

The Court. Let him testify.

10

Q Do you know how you got to the police station? A I know that I walked with a couple of men there; I think one is a detective; I do not know if the other one is or not.

Q Do you know anything about the night before? A Yes, sir; I do.

Q What time did you close your place of business? A I was not home; I did not close up; my wife closed up.

Q How about the night before?

The Court. He just told you he did not close up.

20

Q Well, when did you leave your house up there before the time that you met these two men that took you to the police station? A I left my house around two o'clock in the afternoon.

Q And did you have any money with you? A No; I had a couple of dollars; I don't know exactly what I had.

Q Where did you go after that? A I went up—I do not know positively what number it is, Hawthorne avenue, some place; there is a saloon there by the name of Keller.

Q How long did you stay there? A Stayed there until about eleven o'clock in the evening.

30

Q Where did you go after that? A I went on Belmont avenue at 123 or 121, I ain't sure what number it is.

Q How long did you stay around there? A Until he closed up, one o'clock.

Q Then where did you go? A Then I went with another man home.

Q Who was this other man? A I do not know his name.

Q Then what did you do? A Well, I was talking, and took the money out of the cash register.

40

Q Go along slowly from that point. You tell the Court and the jury the same story you told me.

Mr. Mott. I object.

The Court. Sustained.

Matthias Andres, direct.

Q What did you next do there? A Well, I took the money out and counted it; there was around \$230, then next morning—

Q Now, you took out the \$230. Wait a minute. You took that out? A Yes, sir.

10 Q How about the revolver? A I took the money and then I wanted to fix the money up for the collector the next morning on account if I wouldn't be up early enough my wife pay him, and then it comes in my mind I need some more change for Saturday, I am going to keep that and put a check out, and my check book is in the drawer behind the bar; I opened that and it was a big checkbook, and the revolver was laying on it, so how I do every night I done the same thing and put the revolver in my pocket and lifted the check book out, and I wanted to take the money in my bedroom, the same as I do every night.

20 Q Then it is your practice, from what you have just testified, that you would take your money and your revolver every night into your bedroom?

Mr. Mott. I object to that question. Counsel cannot summarize the testimony of a witness in his own way and say then it is your practice. The witness has not used the word practice at all.

The Court. I think that is so. Sustained.

Defendant's counsel prays an exception to this ruling of the Court.

30 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

WM. P. MARTIN,

Judge.

Q (*By the Court.*) Did you write the check out yourself? A Yes, sir.

Q (*By the Court.*) You mean that you filled in the name of the person to whom it was payable and the amount and signed your own name? A Yes, sir.

40 Q (*By the Court.*) And the stub, too, of the check, when you write the check you always write the check out here and then you write down here in the stub what the check is for. Did you fill that up, too? A I am not sure now whether I did at the same time or not, because the bill come the next day and I—

Q (*By the Court.*) Did you look at the bill. A I looked at my beer bill so as to know what to pay.

Matthias Andres, direct.

Q You closed your place of business what hour that night on this particular night? A Yes, sir.

Q You closed your place of business this morning or night at what hour. You had gone to your drawer and had got your check book and the revolver was on the book, and you took out \$230. What time of morning was that? A It was between one and two. 10

Mr. Mott. He did not take the money from the drawer; it was from the cash register, and then went to the drawer and got the check book.

Q (*By the Court.*) Where did you say you took the check book from? A Out of the drawer.

Q Well, you had taken some money out of the cash register drawer? A Yes, sir; I took the money out of there. 20

Q How much money did you take out of the cash register drawer? A \$230.

Q And what time o'clock was that in the morning when you took it out, if it was in the morning? A Between one and two.

Q What did you do with the \$230 after you took it out of the cash register? A I tried to count it for the beer collector when he comes the next day, and then I think it over and I put it in my bank account; I need the change, I am going to put a check out.

Q Then you opened the drawer where the check book was? A Yes, sir, and the revolver was laying on it; there isn't much room there, just laying on, and I put the revolver in my pocket the same as I had every night before I go to bed, and then I put the check out and talk some more with the man that was with me, and the first thing we decided to go in the restaurant; I had the revolver in my pocket—my right coat pocket. 30

Q (*By the Court.*) Which pocket do you mean? A This one.

The Court. Side pocket of your outside coat.

Q Now, then, you started out with this man? A Yes, sir. 40

Q Where did you go? A Went in a restaurant.

Q What time in the morning was that when you went in the restaurant? A About two o'clock.

Q Whose restaurant? A I don't know.

Matthias Andres, direct.

Q What street was the restaurant on? A On Washington street.

Q What part of Washington street? A That is in the block between Market street, right-hand side of Market street.

10 Q How long did you stay in the restaurant there? A I can't say.

Q What did you have down there, spaghetti or seltzer water?

The Court. What difference does it make?

Mr. McDermitt. Whether he was drunk.

The Court. If he started out in possession of his faculties with a revolver in his pocket, why have you not proved enough to show he is guilty?

20 *Mr. McDermitt.* No, I do not agree at all with your Honor. There is all the difference in the world. The question of intent, the man going towards his room with his revolver and he changed his mind.

The Court. An act voluntarily done is sufficient. If he was under duress of some character so that he did not know what he was doing, you might plead that as an excuse, but he was in possession of his faculties and voluntarily carried a concealed weapon about his person.

30 *Mr. McDermitt.* I desire to take an exception to your Honor's ruling and I desire to ask at this time that that be assigned as error on the record and thereby finding as a matter of fact that he was guilty of crime.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Q Then where did you go? A I do not know any more where I go.

40 Q Do you remember being down in the Bowery or down in Napoleon street? A I have a slight idea I was there, because I wanted to go there the day before; Newman, who died two months ago, was a friend of mine, and I wasn't there since his funeral, so I possibly was there, but I am not sure.

Q Do you remember about any altercation with a man by the name of Smith and pulling a revolver? A No.

Matthias Andres, direct.

Q Do you know how you got into the corner of Market and Washington streets where you were taken out by the officers?

A I remember I went down; I feel a little better at that time and I wanted to go to the toilet.

Q Have you any idea about what time of day it was that you went into this place at Market and Washington streets? A No.

Q What was the name of the man you started to go to the restaurant with? A I cannot tell you.

Q Was he a customer of yours? A Yes, sir.

Q Why didn't you go in your bedroom after you had counted your cash and had placed your revolver in your pocket and taken out your check book; why didn't you go into your bedroom with your money and your revolver? A He said he thinks he is going to eat something and I didn't eat anything either and I didn't want to wake my wife up and I said, "I cannot miss nothing if I go with you."

Q That was after you had placed your money in your pocket and your revolver in your side coat pocket? A Yes, sir.

Q The conversation took place with this man about going to the restaurant? A Yes, sir.

Q You had not intended to go to any restaurant at the exact time you put your money and revolver in your pocket? A No.

The Court. Do not answer.

Mr. Mott. I object and ask that the answer be stricken out.

Q (*By the Court.*) How long have you been in this country? A Seventeen years.

Q Are you a citizen of the United States? A Yes, sir.

Q Do you understand the English language? A Pretty good.

The Court. When the Court directs you not to answer a question don't answer until you are allowed to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

WM. P. MARTIN,

Judge.

Matthias Andres, cross.

Q How long after you had placed your revolver in your pocket and had counted your money, or attempted to count it, was it you started to go out of the saloon with this man to the restaurant? A Maybe a half an hour.

Cross examination by Mr. Mott.

10 Q You say that you took \$230 out of the cash register? A Yes, sir.

Q How do you know you did? A I counted it.

Q And how much change did you take out? A I did not take the change out of my cash register.

Q You drew the check; what was the amount of the check that you drew? A I am very sure it must be around \$180.

Q That was for a bill, to pay a bill? A Yes, sir.

Q You had a bill before you? A No.

20 Q How do you know what the amount of that bill was? A I have a beer book and every driver when he brings beer he puts it in the beer book and I know so many halves, and that is what the bill is.

Q You did this morning figure it out and found the amount you owed was about \$180 and you drew the check for that amount? A Yes, sir.

Q You are sure you went to the place on Belmont avenue first, that is the first place? A The first place was Keller's on Hawthorne avenue.

30 Q How far is that from Morris avenue and Bank street? A Nearly two miles.

Q How did you get down there? A Street car.

Q How long did you stay at Keller's place? A About eleven o'clock in the evening.

Q Well, when did you go to the place in Belmont avenue, after Keller's? A After that.

40 Q Then you were in Keller's place all day long from about two o'clock in the morning? A No, afternoon; it was the day before; it was the afternoon before; I went the afternoon out and came home one o'clock in the morning.

Q At the time you got the revolver and the \$230 where was the first place you went to? A I guess it was down in Washington street in a restaurant.

Q Did you go out alone then or did your friend go with you? A My friend.

Matthias Andres, re-direct.

Q He went with you? A Yes, sir.

Q You went right from your place down to Washington street? A Yes, sir.

Q You left your place at what time in the morning? A Two o'clock; a little before.

Q How long had your friend been a customer of yours? A 10
He was only a few times in my place; I met him on Belmont avenue a few times.

Q You say you do not remember being down over the railroad at all? A I don't know anything positively after I was in that restaurant; so much I know I went upstairs in the restaurant and I ain't sure what house it is, because it wasn't me that showed the place; it was the man that was with me, so I didn't pay attention where we go.

Q You do remember that the day before you wanted to go down to Napoleon street to see somebody where there had been a funeral in the family? A Yes, sir. 20

Q Do you not remember from that you did go down there to Napoleon street? A No.

Q You say you don't remember, or you say you didn't go? A I don't say I didn't go, but I don't remember I did go there.

Re-direct examination by Mr. McDermit.

Q The prosecutor has asked you about Keller's, about two o'clock on the day preceding your leaving the saloon in the morning; what were you doing there in Keller's? A He is a friend of mine, just talking, passing the time, and playing euchre. 30

Q Were you drinking? A Yes, sir; we had a little cider and near-beer.

Q How many glasses of near-beer? A I can't tell.

Q How many glasses of cider? A I can't tell that.

Q Where did you go from Keller's? A I went on Belmont avenue.

Q Whose place on Belmont avenue was that? A Near-beer.

Q What is his name? A I guess his name is Miller; there is a different sign on the window than his name is; his name is Miller. 40

Q Does he have a saloon, too? A Yes, sir.

Q How long did you stay in there? A About one o'clock, near one o'clock.

Matthias Andres, re-direct.

Q What did you drink there? A Near-beer; I don't remember positively every drink I had.

Q You drank something else? A Possibly.

Q Do you remember how much you drank there that afternoon and evening, between Keller's place and this last place you were in? A I do not know.

Q Quite some?

Mr. Mott. I object.

The Court. Sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

WM. P. MARTIN,

Judge.

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Q You had been away from your place of business from two o'clock the afternoon before and been only in those two saloons up to the time that you came back to your own place at one o'clock to close up? A Yes, sir.

Q Was this man who you say subsequently went out of the saloon with you, was he there to Keller's, or over to this other place on Belmont avenue? A I met him on Belmont avenue.

Q And he accompanied you home? A Yes, sir.

Q How many drinks did you and he have? A I don't know.

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Q About? A We had quite some; I can't tell, though.

DEFENDANT RESTS.

Mr. McDermit sums up for defendant.

Mr. Mott sums up for the State.

40

Charge to Jury.

CHARGE.

MARTIN, J.

Gentlemen of the Jury: The function of the Court is to instruct the jury in reference to the principles of law governing the case. The principles of law as charged should be accepted as a correct statement of the law. The jurors, however, are the sole judges of the facts, weight of the testimony, credibility of witnesses, inferences to be drawn from the evidence and the ultimate conclusions to be reached upon all the facts. 10

The law presumes that the defendant is innocent and this presumption can be overcome only by evidence showing beyond a reasonable doubt the guilt of the defendant. The burden of proving the guilt of the defendant beyond a reasonable doubt is upon the State and does not shift from the State throughout the whole case. Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. 20

The defendant is presented here upon an indictment found by the Grand Jury, charging him with the commission of the offense commonly referred to as carrying concealed weapons. It is that Matthias Andres did on the 31st day of October, within the jurisdiction of this court and in the city of Newark, unlawfully carry a revolver concealed in and about his person, contrary to the form of the statute in such case made and provided. 30

The act in question is in substance as follows:

“Any person who shall carry any revolver, pistol, firearm,” enumerating other things, “concealed in or about his clothes or person, shall be guilty of a misdemeanor.” 40

It must be shown that the instrument which is exhibited here to you is a revolver and that this defendant did carry the same concealed about his person.

The State contends that this defendant did, upon his own evidence and upon the evidence of Smith, Knochel and Messner,

Charge to Jury.

10 leave his saloon at the corner of Morris avenue and New street somewhere in the neighborhood of two o'clock on the morning of October 31st; that he had in his coat pocket this revolver; that he carried it to a restaurant and from there to some other place; that he went down over the railroad to Napoleon street and from there to the rathskeller, which is said to be near the center of the city, and that throughout that entire period the revolver was concealed.

20 In order to constitute sufficient proof to show the guilt of this defendant under this indictment, as to the question of carrying a weapon, I will say that the defendant had a right to carry this weapon in his pocket in and about the premises which he owned or leased, or where he carried on his business, but when he stepped outside of those premises onto the public street, if he did, with the revolver concealed in and about his person, by putting it in his pocket, where it was not seen by others, then that constitutes, the State contends, sufficient evidence to show the guilt of this defendant. This is a crime which is described and defined by the statute. It does not say that a person shall be guilty only if he carries concealed about his person a weapon when he intends to violate the law. It says, as the Court has already read to you, that any person who shall carry any revolver, pistol or firearm concealed in or about his clothes or person, shall be guilty of a misdemeanor. The Court is charging you it is not necessary for you to find a specific intent to violate the law. It is true that no person can be held guilty of a crime unless he voluntarily does the act which constitutes that crime. If a pistol were thrust into the pocket of a person without his knowledge, there could be no guilt. But if a person, knowing that he has a revolver in his pocket, concealed about his person, goes out onto the street, then he may be said voluntarily to act.

30 The defense to this indictment is that this defendant did not intend, when he put this revolver in his pocket, to violate the law, but did intend to go upstairs and stay in his own house, which would have been a perfectly lawful thing to do, with respect to the revolver. The defense is that the defendant forgot about the revolver, or was so drunk he could not think about the revolver, and that when he left the house and up to the time that he was arrested, did not know that he had the revolver, and the argument is that the defendant, therefore, did

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Exception to Charge.

not voluntarily act, that it was a mere inadvertance, without a conscious act, that the revolver was in his pocket.

Of course, if the defendant carried the revolver, knowing it, outside of his place of business, on a public street, even for a block, or for a short time, the law was violated.

The State contends, in answering, or in attempting to answer the contention of the defendant, that this defendant drank some cider and some near-beer and other light liquors, and that at one o'clock he came home, that he examined the deliveries of beer to his place, that he added up the amount that was due to the brewery, that he took out \$230 from the cash register and counted it, that he concluded that instead of paying the bill to the brewery, \$180, in cash that he would draw a check, and that he did so, that he talked with his friend for half an hour, that a suggestion was made that they go to a restaurant for something to eat, that they started out to go to the restaurant. Therefore the State contends that the defendant had ample and sufficient knowledge, not only to know that he had a weapon in his pocket when he went out of the place, but shortly before that did undertake to transact some business of a character which was probably of the utmost importance to him.

Gentlemen of the jury, if, upon all the facts in this case you reach the conclusion that this defendant is guilty, beyond a reasonable doubt, then your verdict should be guilty; otherwise, of course, it must be not guilty.

(Jury retires.)

Defendant's counsel prays a general exception to the charge of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Certificates of Judge and Stenographer.

STATE,

vs.

MATTHIAS ANDRES.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

I, Harold T. Cook, the official stenographer of the Essex County Court of General Quarter Sessions, Part I, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of the State of New Jersey *v.* Matthias Andres, concealed weapons, which trial was held before the Honorable William P. Martin, President Judge of the Essex County General Quarter Sessions Court in and for the County of Essex, and a jury, on Tuesday, December 16, 1919, at Newark, New Jersey.

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HAROLD T. COOK.

STATE,

vs.

MATTHIAS ANDRES.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

I, William P. Martin, Presiding Judge of the Essex County Court of General Quarter Sessions and the Judge who presided over the aforesaid cause, certify that the above printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiff-in-error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

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Dated April 26, 1920.

WM. P. MARTIN,
*Presiding Judge of the Essex County
Court of General Quarter Sessions.*

ASSIGNMENT OF ERRORS.

New Jersey Supreme Court

STATE OF NEW JERSEY,

*Defendant-in-Error,**vs.*

MATTHIAS ANDRES,

*Plaintiff-in-Error.**On Writ of
Error.**Assignment of
Errors.*

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Afterwards, to wit, in the Supreme Court of Judicature comes the said Matthias Andres, by McDermit and McDermit, his attorneys, and says, that in the record and proceedings aforesaid and also in the giving of the verdict and judgment there is manifest error in this to wit:

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1. In that upon the trial of said cause, the Court permitted Exhibit S.1 to be admitted in evidence.

2. In that upon the trial of said cause the Court permitted Exhibit S.2 to be admitted in evidence.

3. In that the Court refused to direct a verdict for the defendant.

4. In that the Court sustained the prosecutor's objection to the following question put to the defendant by his counsel:

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“Q Then it is your practice from what you have just testified, that you would take your money and your revolver every night into your bedroom.”

5. In that the Trial Court ruled in the presence of the jury, in answer to defendant's counsel: “If he started out in possession of his faculties with a revolver in his pocket, why have you not proved enough to show he is guilty?” and further ruling: “An act voluntarily done is sufficient. If he was under duress of some character so that he did not know what he was doing, you might plead that as an excuse, but he was in possession of his faculties and voluntarily carried a concealed weapon about his person.”

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6. In that the Court sustained the prosecutor's objection to the following question put to the defendant by his counsel:

Assignment of Errors.

“Q You had not intended to go to any restaurant at the exact time you put your money and revolver in your pocket?”

7. In that the Court refused to permit defendant's counsel to proceed with his examination in chief to bring out the fact as to how much the defendant had drunk on the night in question in order to follow up the defendant's answer that he did not know, and counsel questioned “Quite some?” and the Court then sustained the prosecutor's objection.

8. In that the Court charged the jury: “In order to constitute sufficient proof to show the guilt of this defendant under this indictment, as to the question of carrying a weapon, I will say that the defendant had a right to carry this weapon in his pocket in and about the premises which he owned or leased, or where he carried on his business, but when he stepped outside of those premises onto the public street, if he did, with the revolver concealed in and about his person, by putting it in his pocket, where it was not seen by others, then that constitutes, the State contends, sufficient evidence to show the guilt of this defendant.”

9. In that the Court charged the jury: “The Court is charging it is not necessary for you to find a specific intent to violate the law. It is true that no person can be held guilty of a crime unless he voluntarily does the act which constitutes that crime. If a pistol were thrust into the pocket of a person without his knowledge, there could be no guilt. But if a person, knowing that he has a revolver in his pocket, concealed about his person, goes out onto the street, then he may be said voluntarily to act.”

10. In that the Court charged the jury: “Of course, if the defendant carried the revolver, knowing it, outside of his place of business, on a public street, even for a block, or for a short time, the law was violated.”

Plaintiff-in-error, Matthias Andres, prays that the judgment aforesaid be reversed and altogether held for nothing and that he may be restored to all things that he has lost by reason of the said judgment, &c.

McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

Service of a copy of the within assignment of errors is hereby acknowledged this 10th day of May, A. D. 1920.

J. H. HARRISON,
Attorney for Defendant-in-Error.

*Specification of Causes.***SPECIFICATION OF CAUSES.**

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY,

*Defendant-in-Error,**vs.*

MATTHIAS ANDRES,

*Plaintiff-in-Error.**On Writ of
Error.*

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*Specification
of Causes.*

Matthias Andres, the plaintiff-in-error, by McDermit and McDermit, his attorneys, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

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1. Because the Court refused to direct a verdict in favor of the defendant on the ground that there was no evidence showing that the defendant was guilty of the crime charged.

2. Because the Court ruled in the presence of the jury during the progress of the trial to the defendant's manifest injury, that the defendant had started out in possession of his faculties with a revolver in his pocket, and that defendant's counsel had proved that defendant was guilty, and that the defendant voluntarily carried a concealed weapon in and about his person, thereby the Court finding the defendant guilty to the prejudice of his defense and before the whole case was submitted to the jury, contrary to his presumption of innocence guaranteed to him by law.

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3. Because of the Court in charging the jury: "In order to constitute sufficient proof to show the guilt of this defendant under this indictment, as to the question of carrying a weapon, I will say that the defendant had a right to carry this weapon in his pocket in and about the premises which he owned or leased, or where he carried on his business, but when he stepped outside of those premises onto the public street, if he did, with the revolver concealed in and about his person, by putting it in his pocket, where it was not seen by others, then that constitutes, the State contends, sufficient evidence to show the guilt of this defendant."

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Specification of Causes.

4. Because of the Court in charging the jury: "The Court is charging, it is not necessary for you to find a specific intent to violate the law. It is true that no person can be held guilty of a crime unless he voluntarily does the act which constitutes that crime. If a pistol were thrust into the pocket of a person without his knowledge, there could be no guilt. But if a person, knowing that he has a revolver in his pocket, concealed about his person, goes out into the street, then he may be said voluntarily to act."

10. Because of the Court in charging the jury: "Of course, if the defendant carried the revolver, knowing it, outside of his place of business, on a public street, even for a block, or for a short time, the law was violated."

McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

20 Service of a copy of the within specification of causes is hereby acknowledged this 10th day of May, A. D. 1920.

J. H. HARRISON,
Attorney for Defendant-in-Error.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed April 15, 1921.

NEW JERSEY SUPREME COURT.

November Term, 1920.

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STATE OF NEW JERSEY,

vs.

MATTHIAS ANDRES.

Writ of error to Essex Quarter Sessions.

Argued before Gummere, Chief Justice, and Justices Bergen and Katzenbach.

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For plaintiff-in-error, Frank M. McDermit.

For the State, J. Henry Harrison, prosecutor of the pleas, and Wilbur A. Mott, assistant prosecutor.

Per Curiam:

The plaintiff-in-error (the defendant below) was convicted upon an indictment charging him with carrying a revolver concealed about his person, contrary to the statute.

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The first ground of reversal argued by counsel is that it was error for the Trial Court to refuse to direct a verdict for the defendant at the close of the State's case. A motion to direct should always be refused when evidence has been submitted on the part of the State tending to support the charge laid in the indictment. In the present case there was ample evidence to support the charge. The plaintiff-in-error, therefore, can take nothing by this ground of reversal.

Next, it is said that the conviction should be reversed because the Trial Court in ruling upon a matter of evidence improperly adjudged that the plaintiff-in-error was guilty of the crime of carrying a concealed weapon. The matter came up in this wise. Counsel for the defendant asked his client, while on the witness stand, the following question: "What did you have down there?" (referring to a restaurant that the plaintiff-in-error vis-

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Opinion of Supreme Court.

ited) "Spaghetti or seltzer water?" In ruling upon the competency of this question the Trial Judge, in explaining the reasons which led him to exclude it, made the statement to which the present objection is directed; but it is entirely settled that it is immaterial whether the reasons given by a trial Judge for his ruling are sound or not. The only question to be considered on review is whether the ruling was proper; and that it was so in the present case cannot be doubted, for the question was absolutely irrelevant.

Next, it is said that the Court improperly excluded testimony offered by the plaintiff-in-error as to what his intention was with relation to putting the revolver in his pocket just before leaving his saloon and going upstairs into the living part of the building. This question was properly excluded, for it made no difference what his intention then was, the matter in issue being whether he, after putting his revolver in his pocket, went out about the town, and his doing this was not denied.

A further ground of reversal is that the Court improperly excluded testimony as to how much the defendant had drunk on the night in question, the argument being that the evidence was relevant to show that the defendant was in such a condition of intoxication as to be unconscious of what he was doing. But the question normally did not call for an answer having a tendency to show any such condition. It was therefore properly excluded.

Next, it is said that the Court erred in instructing the jury as follows: "In order to constitute sufficient proof to show guilt, I will say that the defendant had a right to carry this weapon in his pocket in and about the premises which he owned or leased, but when he stepped outside of those premises onto the public street, if he did so, with that revolver concealed on or about his person, where it was not seen by others, then that constitutes, the State contends, sufficient evidence to show the guilt of this defendant." Whether the legal proposition contained in this statement is sound or not is not properly before us for determination, for the statement of the Court was not the expression of a legal principle laid down for the instruction of the jury, but a mere recital of the claim of the State, and this, of course, was unobjectionable.

Lastly, it is said that the Court erred in telling the jury that it was not necessary for them to find a specific intent to violate

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the law, and that if a person, knowing that he has a revolver in his pocket, concealed about his person, goes out onto the street, then he may be said to act voluntarily; that if he carried a revolver knowingly outside of his place of business on a public street, even for a block, or a short distance, the law was violated. The primary objection to this portion of the charge is that there is a great deal of redundancy in it, because an act voluntarily and knowingly done presumes intent. This is true so far as the presumption is concerned; but the intent presumed is to do the act—not to violate the law. We find no redundancy in the instruction, and if we did, we should not consider that its presence constituted legal error. 10

The judgment under review will be affirmed.

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*Remittitur.***REMITTITUR.**

NEW JERSEY SUPREME COURT.

10	THE STATE OF NEW JERSEY, <div style="text-align: right;"><i>Defendant-in-Error,</i></div>	}	<i>On Error to Essex County Court of Quarter Sessions. Remittitur.</i>
vs.	MATTHIAS ANDRES, <div style="text-align: right;"><i>Plaintiff-in-Error.</i></div>		

20 This cause having been duly submitted at the November Term, nineteen hundred and twenty, of this Court, by J. H. Harrison, Esquire, attorney of defendant-in-error, and Frank H. McDermit, Esquire, attorney of plaintiff-in-error, and the Court having considered the same and finding no error in the record and proceedings of the Essex County Court of Quarter Sessions;

It is thereupon ordered and adjudged that the judgment of the Essex County Court of Quarter Sessions, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the Essex County Court of Quarter Sessions to be proceeded with in accordance with the judgment and the practice of said Court.

Entered April 20, 1921.

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On motion of

J. H. HARRISON,
 Prosecutor of the Pleas,
Attorney of Defendant-in-Error.

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the Court in the above-stated cause.

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In testimony whereof I have set my hand and the seal of said court at Trenton, this ninth day of May, A. D. nineteen hundred and twenty-one.

(L. S.)

ENOCH L. JOHNSON,
Clerk.

*Assignment of Errors.***ASSIGNMENT OF ERRORS.**

Filed.

New Jersey Court of Errors and Appeals

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STATE OF NEW JERSEY,

*Defendant-in-Error,**vs.*

MATTHIAS ANDRES,

*Plaintiff-in-Error.**On Writ of
Error.**Assignment
of Errors.*

Afterwards to wit, on the return day of said writ in the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes of the State of New Jersey comes the said Matthias Andres, by his attorneys, McDermit & McDermit, and says that in the record and proceedings aforesaid and also in the giving of judgment aforesaid there is manifest error in this, to wit:

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1. In that upon the trial of said cause, the Court permitted Exhibit S. 1 to be admitted in evidence.

2. In that upon the trial of said cause the Court permitted Exhibit S. 2 to be admitted in evidence.

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3. In that the Court refused to direct a verdict for the defendant.

4. In that the Court sustained the prosecutor's objection to the following question put to the defendant by his counsel:

“Q Then it is your practice from what you have just testified, that you would take your money and your revolver every night into your bedroom.”

5. In that the Trial Court ruled in the presence of the jury, in answer to defendant's counsel: “If he started out in possession of his faculties with a revolver in his pocket, why have you not proved enough to show he is guilty?” and further ruling: “An act voluntarily done is sufficient. If he was under duress of some character so that he did not know what he was doing, you might plead that as an excuse, but he was in possession of his faculties and voluntarily carried a concealed weapon about his person.”

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Assignment of Errors.

6. In that the Court sustained the prosecutor's objection to the following question put to the defendant by his counsel:

"Q You had not intended to go to any restaurant at the time you put your money and revolver in your pocket?"

10 7. In that the Court refused to permit defendant's counsel to proceed with his examination in chief to being out of the fact as to how much the defendant had drunk on the night in question in order to follow up the defendant's answer that he did not know, and counsel questioned "Quite some?"

20 8. In that the Court charged the jury: "In order to constitute sufficient proof to show the guilt of this defendant under this indictment as to the question of carrying a weapon, I will say that the defendant had a right to carry this weapon in his pocket in and about the premises which he owned or leased, or where he carried on his business, but when he stepped outside of those premises onto the public street, if he did, with the revolver concealed in and about his person, by putting it in his pocket, where it was not seen by others, then that constitutes, the State contends, sufficient evidence to show the guilt of this defendant."

30 9. In that the Court charged the jury. The Court is charging it is not necessary for you to find a specific intent to violate the law. It is true that no person can be held guilty of a crime unless he voluntarily does the act which constitutes that crime. If a pistol were thrust into the pocket of a person without his knowledge, there could be no guilt. But if a person, knowing that he has a revolver in his pocket, concealed about his person, goes out onto the street, then he may be said voluntarily to act."

10. In that the Court charged the jury: "Of course, if the defendant carried the revolver, knowing it, outside of his place of business, on a public street, even for a block, or for a short time, the law was violated."

40 Plaintiff-in-error, Matthias Andres, prays that the judgment aforesaid be reversed and altogether held for nothing and that he may be restored to all things that he has lost by reason of the said judgment, &c.

McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

Specification of Causes.

SPECIFICATION OF CAUSES.

Filed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

MATTHIAS ANDRES,

Plaintiff-in-Error.

*On Writ of
Error.*

*Specification
of Causes.*

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Matthias Andres, the plaintiff-in-error, by McDermit & McDermit, his attorneys, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

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1. Because the Court refused to direct a verdict in favor of the defendant on the ground that there was no evidence showing that the defendant was guilty of the crime charged.

2. Because the Court ruled in the presence of the jury during the progress of the trial to the defendant's manifest injury, that the defendant had started out in possession of his faculties with a revolver in his pocket, and that defendant's counsel had proved that defendant was guilty, and that the defendant voluntarily carried a concealed weapon in and about his person, thereby the Court finding the defendant guilty to the prejudice of his defense and before the whole case was submitted to the jury, contrary to his presumption of innocence guaranteed to him by law.

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3. Because of the Court in charging the jury: "In order to constitute sufficient proof to show the guilt of this defendant under this indictment, as to the question of carrying a weapon, I will say that the defendant had a right to carry this weapon in his pocket in and about the premises which he owned or leased, or where he carried on his business, but when he stepped outside of those premises onto the public street, if he did, with the revolver concealed in and about his person, by putting it in his pocket, where it was not seen by others, then that consti-

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Specification of Causes.

tutes, the State contends, sufficient evidence to show the guilt of this defendant.”

10 4. Because of the Court in charging the jury: “The Court is charging, it is not necessary for you to find a specific intent to violate the law. It is true that no person can be held guilty of a crime unless he voluntarily does the act which constitutes that crime. If a pistol were thrust into the pocket of a person without his knowledge, there could be no guilt. But if a person, knowing that he has a revolver in his pocket, then he may be said voluntarily to act.”

5. Because of the Court in charging the jury: “Of course, if the defendant carried the revolver, knowing it, outside of his place of business, on a public street, even for a block, or for a short time, the law was violated.”

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McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> <i>vs.</i> MATTHIAS ANDRES, <i>Plaintiff-in-Error.</i>	}	<i>On Error to New Jersey Supreme Court.</i>
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BRIEF FOR DEFENDANT-IN-ERROR.

There are ten assignments of error and five causes specified (pages 37 and 39). Each and every one of the ten assignments of error specifically allege error by the Trial Court, and each and every one of the five causes specified allege error by the Trial Court.

There is no assignment of error alleging, or suggesting, error in the Supreme Court, and there are no causes specified alleging or suggesting error in the Supreme Court.

We therefore respectfully insist that the plaintiff-in-error has not entitled himself to be heard in this court. Indeed, we go further and respectfully insist that the Court cannot consider this case, because there is no assignment of error alleging error in the Supreme Court.

State v. Belkota, 113 Atl., p. 142.

The plaintiff-in-error was tried and convicted of carrying a revolver concealed in and about his person.

George Smith, a witness called on behalf of the State (p. 6), testified that he was in a saloon about 8:15 or 8:30 in the morning (p. 7, l. 10). He says:

“Q Just what occurred? A That morning me and two other fellows happened to go in a saloon, and we asked for a drink; the bartender said, ‘What will it be?’ and I said, beer, and the other two fellows said beer. I said, ‘Is this two and one-half or one-half of one per cent.?’ The bar-

tender said, '2.75'; he said, 'It is 2.75'; and this man standing alongside of me said, 'If you want good beer,' he said, 'come up to my place, and,' he said, 'I will give you five per cent.,' he said; 'your carfare will be seven cents'; and I said 'What do I want to go to your house for?' I says, 'Your wife might shoot me.' So I turned talking to the other two fellows that was with me, and he said, 'No, she won't do that; if anybody shoots you I will shoot you,' and *he pulled something out of his pocket and placed it against my side*, and he kept on pressing it closer to me, and he said, 'Do you see it?' And I said, 'Sure, I see it?' "

"Q What did you see? A *I saw the revolver right up against my stomach.*"

"Q Who was holding it? A The man sitting there (indicating).

Officer Messner testifies (p. 8), that on the 31st of October he saw Mr. Smith at the First Precinct, about 11:10 in the forenoon. He went to the rathskeller at Washington and Market street, about 11:10 in the forenoon, saw Mr. Andres sitting in the restaurant, arrested him *and took from his hip pocket a 38-calibre loaded revolver* (p. 9, l. 30), and being shown the revolver which was subsequently introduced in evidence, Messner testified that the revolver shown him was the revolver he took from Andres (p. 9, l. 30).

The revolver was admitted in evidence (p. 12).

At the end of the State's case, counsel for the plaintiff-in-error moved to direct a verdict of not guilty (p. 13). The Court denied this motion.

Andres testified in his own behalf, and he did not deny that the revolver which was admitted in evidence was his revolver, or that it was taken from him during the morning of October 31st (p. 16, l. 45).

The plaintiff-in-error testified (p. 18), that before he left his place he took the money out of the cash register

and counted it, and there were \$230. He says (p. 18, l. 8):

“I took the money and then I wanted to fix the money up for the collector the next morning on account I would not be up early enough my wife pay him, and then it comes in my mind I need some more change for Saturday. I am going to keep that and put a check out, and my check book is in the drawer behind the bar; I opened that and it was a big check book, and the revolver was laying on it. *So how I did every night I done the same thing and put the revolver in my pocket and lifted the check book out and I wanted to put the money in my bedroom the same as I do every night.*”

Thereupon (p. 18, l. 19), counsel asked the witness this question:

“Q Then it is your practice, from what you have just testified, that you would take your money and your revolver every night into your bedroom?”

This question was objected to and the objection sustained.

We respectfully submit that this question was improper, first, because it is leading; second, because it is an attempt to summarize the testimony of the witness already given, and, third, because it characterizes the testimony already given as a “practice,” a word which the witness had not used. The language of the witness was: “*So how I do every night, I done the same thing and put the revolver in my pocket and lifted the check book out.*”

This statement of the witness remained in the record.

We submit that counsel had no right to characterize this evidence as a “practice.”

The plaintiff-in-error testified (p. 22, l. 1), that about a half-hour after he counted his money and put his revolver in his pocket he left the saloon with a man to go

to a restaurant. And he further testifies (p. 22, l. 20), that before he left his saloon he figured out the amount due for beer, found that he owed \$180 and drew a check for that amount and left it for delivery to the driver the next morning.

The Seventh Assignment of Error alleges that the Court refused to permit defendant's counsel to proceed with his examination-in-chief to bring out the fact as to how much the defendant had drunk on the night in question. This assignment rests wholly on two questions that were asked the plaintiff-in-error. The first question (p. 20, l. 8), arose as follows:

“Q How long did you stay in the restaurant there? A I can't say.”

“Q What did you have down there, *spaghetti or seltzer water?*”

We respectfully submit that this question was frivolous, and was properly overruled.

The other question arose as follows (p. 20, l. 5):

“Q Do you remember how much you drank there that afternoon between Keller's place and this last place you were in? A I don't know.”

“Q Quite some?”

We respectfully submit that this question, “quite some?” after the defendant had just said he didn't know, was leading and improper, and was properly excluded.

In any event, it was entirely immaterial how much the defendant drank after he left his saloon with his revolver in his pocket. The evidence shows that the defendant was in the possession of his faculties at the time he left the saloon, knew what he was about, figured up accounts, drew checks and counted his money. The more he drank after he started out with a loaded revolver in his pocket the more he aggravated his crime.

Considerable is said in the brief for the plaintiff-in-error to the effect that the State had not proved that the defendant intended to violate the law. No such

proof was necessary. The statute prohibits the carrying of concealed weapons, and a person who carries a revolver concealed in and about his person, *ipso facto*, violates the law.

The charge of the Court relating to what constitutes a violation of this law will be found on page 26, beginning at line 12.

We respectfully submit that there is no error in the record, and that the judgment below should be affirmed.

Respectfully submitted,

J. H. HARRISON,
Prosecutor of the Pleas.

WILBUR A. MOTT,
Assistant Prosecutor.

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

MATTHIAS ANDRES,

Plaintiff-in-Error.

*On Writ of
Error.*

BRIEF OF PLAINTIFF-IN-ERROR.

Plaintiff-in-error was indicted and charged with carrying concealed weapons. The theory of the State was, that defendant left his saloon at corner of Morris avenue and New street at about two o'clock on the morning of October 31st, and that he had in his coat pocket the revolver, which he carried to a restaurant and from there to some other place concealed on and about his person.

The theory of the defendant was, that he did not intend to violate the law, but that he closed his saloon, counted his cash, put the revolver in his pocket and go upstairs and stay in his own house; that defendant when he left the house forgot about the revolver, and that when he left the house and up to the time he was arrested did not know that he had the revolver, it being a mere inadvertence, without a conscious act that the revolver was in his pocket.

The case was brought before the Supreme Court on assignment of errors and specification of causes for reversal, which sustained the conviction, and plaintiff-in-error now brings the cause to this court for review.

Specification of Errors.

1. Refusal of the Court to direct a verdict for defendant.

Exception, p. 14.

Assignment No. 3.

Specification No. 1.

2. The exclusion of the testimony on direct examination of defendant as to what his practice was every night in taking his money and revolver into his bedroom.

Exception, p. 18.

Assignment No. 4.

3. The ruling of the Court excluding testimony as to whether or not defendant was drunk "If he started out in possession of his faculties with a revolver in his pocket, why have you not proved enough to show he is guilty. An act voluntarily done is sufficient. If he was under duress of some character so that he did not know what he was doing, you might plead that as an excuse, but he was in possession of his faculties and voluntarily carried a concealed weapon about his person."

Exception, p. 20.

Assignment No. 5.

Specification No. 2.

4. The exclusion of the testimony on direct examination of defendant as to whether or not he intended to have gone to any restaurant at the time he put the revolver in his pocket.

Exception, p. 21.

Assignment No. 6.

5. The exclusion of the testimony on direct examination of defendant on the inquiry as to how much defendant had drunk on the night in question.

Exception, p. 24.

Assignment No. 7.

6. The charge of the Court as follows: "In order to constitute sufficient proof to show the guilt of this defendant under this indictment, as to the question of carrying a weapon, I will say that the defendant had a right to carry this weapon in his pocket in and about the premises which he owned or leased, or where he carried on his business, but when he stepped outside of those premises onto the public street, if he did, with the revolver concealed in and about his person, by putting it in his pocket, where it was not seen by others, then that constitutes, the State contends, sufficient evidence to show the guilt of this defendant."

Exception to charge, p. 27.

Assignment No. 8.

7. The charge of the Court as follows: "The Court is charging it is not necessary for you to find a specific intent to violate the law. It is true no person can be held guilty of a crime unless he voluntarily does the act which constitutes that crime. If a pistol were thrust into the pocket of a person without his knowledge, there could be no guilt. But if a person, knowing that he has a revolver in his pocket, concealed about his person, goes out onto the street, then he may be said voluntarily to act."

Exception to charge, P. 27.

Assignment No. 9.

8. The charge of the Court as follows: "Of course, if the defendant carried the revolver, knowing it, outside of his place of business, on a public street, even for a block, or for a short time, the law was violated."

Exception to charge, p. 27.

Assignment No. 10.

BRIEF OF ARGUMENT.

1. The whole theory of defendant's case is based on the fact that he did not intend to violate the law. That he closed his saloon, counted his cash; the revolver laying in the drawer on his check book, took it and placed it in his pocket, to go upstairs to his rooms, and stay in the house; that when defendant did go out, he did so unconscious that he had the revolver with him and that up to the time that he was arrested defendant did not know that he had the revolver with him. All of which is borne out by the State's case, in that when he was arrested and searched money to the sum of \$208 was found upon him (p. 15, l. 40); there was no proof on the part of the State that defendant had the revolver on his person on the streets, nor how he come to have possession of it. But proof of the State shows defendant to have been drunk at the time of his arrest.

The Court denied the motion for direction on the ground that it should be presumed that defendant was in constant possession of the gun concealed in and about his person, inasmuch as it is found on him at the time of his arrest, regardless of his presumption of innocence. It is submitted that the Court erred.

2. The evidence of the fact as to what the practice of the defendant was every night when he closed his saloon, in the counting of his money and taking of his revolver with him to his rooms every night, was relevant, to establish a course of practice on the part of the defendant, to show the lawfulness and intention of his act, when he placed the revolver on his person, to offset the presumption of carrying a concealed weapon in and about his person on the public streets.

3. The ruling of the Court was the finding and adjudging; that defendant was guilty of the crime of carrying a concealed weapon, before the conclusion of the case, to the prejudice of the defendant's defense and was an invasion of the province of the jury, to the prejudice of the defendant.

The fact under inquiry at the time was, if whether or not the defendant was drunk at the time.

The record of the exception is as follows (p. 20):

“Q How long did you stay in the restaurant there?

A I can't say.

Q What did you have down there, spaghetti or seltzer water?

The Court. What difference does it make?

Mr. McDermitt. Whether he was drunk?

The Court. If he started out in possession of his faculties with a revolver in his pocket, why have you not proved enough to show he is guilty?

Mr. McDermitt. I do not agree at all with your Honor. There is all the difference in the world. The question of intent, the man going towards his rooms with his revolver and he changed his mind.

The Court. An act voluntarily done is sufficient. If he was under duress of some character so that he did not know what he was doing, you might plead that as an excuse, but he was in possession of his faculties and voluntarily carried a concealed weapon about his person.

Mr. McDermitt. I desire to take an exception to your Honor's ruling and desire to ask at this time that that be assigned as error on the record and thereby finding as a matter of fact that he was guilty of crime.

Exception allowed and sealed.”

I submit that this exception is well taken and prejudicial error has intervened to the prejudice of the defendant, as the Court adjudges the defendant guilty to the prejudice of maintaining his defense before the whole case was submitted to the jury, contrary to his presumption of innocence guaranteed to him by law, which presumption stands with the accused throughout the whole trial until the verdict is brought in and is a piece of evidence in favor of the accused which the jury must consider with the evidence in the case in conjunction with the reasonable doubt which may arise in the jurors' minds, but this was all foreclosed from the jury's consideration by reason of the Trial Court in adjudging the guilt of the defendant during the progress of the trial.

This is not an incident where the Trial Judge, in ruling on the question, erroneously rules in his reason on the question, but is a situation where the Trial Judge makes a remark uncalled for

in stating his reasons for his opinion—whether the defendant had been proven guilty or not was not involved in the question then present for the Court's ruling.

The Supreme Court in deciding (Case, p. 34, l. 9): “ * * * it is entirely settled that it is immaterial whether the reasons given by a trial judge for his ruling are sound or not. The only question to be considered on review is whether the ruling was proper, and that it was so in the present case cannot be doubted, for the question was absolutely irrelevant”—does not decide the point presented by this assignment—because we are not complaining as to the Trial Court's ruling in sustaining the objection, but it is to the statement of the Court adjudging the defendant guilty—which was uncalled for when ruling on the question.

It is respectfully submitted that such ruling is prejudicial to the defendant, on the ruling on a question as follows:

“Q What did you have down there? Spaghetti or seltzer water?”

The ruling on this question did not call for the Trial Judge in adjudging the defendant guilty. The remark was prejudicial to the defendant, whereby he suffered manifest wrong and injury.

4. The evidence as to the fact whether or not defendant intended to have gone to some other place than directly upstairs to his rooms at the time he put the revolver on his person, is deemed to be relevant, because, it tends to show the voluntary or involuntary act on the part of the defendant to carry a concealed weapon contrary to the statute, it is as important to show his practice, every evening to take it up to his rooms with him after closing his place of business; in order to show inadvertence.

5. The inquiry as to how much defendant had drunk on the occasion in question was relevant to show that the defendant was continually in a stupor unconscious of the fact that he had a revolver on his person, it being there by mere inadvertence.

6. The error in this charge is that the Court makes no distinction between a person voluntarily placing a revolver in and about his person to go out into the public streets, and one who does it lawfully to remain on his premises, but goes out in the street unknowingly as to the revolver being on his person. For example “A” conceals a revolver in and about his person, intending to go out onto the public streets of the community. Here “A” is guilty of carrying a concealed weapon.

But where "A" is carrying a concealed weapon in and about his premises not intending to go out onto the public streets, but inadvertently happens to do so he would not be guilty. So in the case at bar, defendant, because of his usual practice every evening upon closing his saloon, counted his day's receipts, put them in his pocket, on this evening being \$208, and the revolver laying on the check book at the time, takes it with him intending to go upstairs to his rooms, but walks out and goes to some restaurant, inadvertently not thinking of the revolver, being in and upon his person at the time, defendant is not guilty. The intent of the defendant is an important factor, the charge eliminates these questions from the consideration of the jury, to the prejudice of the defendant and his defense.

7 and 8. The error in both of these charges is that the Court charges the jury in the beginning that it is not necessary for them to find a specific intent to violate the law. Then he charges that no person can be held guilty unless he voluntarily does the act which constitutes the crime, and again charges that a person who knowingly has a revolver on his person is guilty.

I respectfully submit that in these charges there is a great deal of redundancy.

An act voluntarily done presumes intent, and knowingly doing an act presumes intent but an act involuntarily done does not presume intent, inadvertence is a defense.

The defense was that the defendant had the revolver on him unknowingly, it being inadvertently with him, without a conscious act on his part that the revolver was in his pocket. I submit that the charges of the Court was prejudicial to the defendant's defense and was prejudicial error, as the jury were at a loss to fully understand correctly what the Court really meant to charge as to the law on the case.

Respectfully submitted,

JAMES R. McDERMIT,
Attorney for Plaintiff-in-Error.

CHARLES E. S. THORNE,
Of Counsel.

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