INDEX.

	Page
Writ of Error to Supreme Court	i
Return to Writ	ii
Writ of Error to Essex Quarter Sessions	1
Return	2
Indictment	3
Plea	4
Judgment	4
Verdict	6
Motion to Quash Indictment	7
Motion for Direction of Verdict	111
Charge to Jury	112
Exceptions to Charge	119
Defendant's Requests to Charge	119
Motion in Arrest of Judgment	122
Certificate of Court Stenographer	123
Certificate of Judge	124
Assignments of Error	125
Specification of Causes and Reasons for Reversal	132
Opinion of Supreme Court	135
Remittitur	139
Assignment of Error	140

TESTIMONY.

For the State.

Amzi E. Berla,	direct examination		8
	cross	"	8
John P. Enderweis,	direct examination		8
	cross	"	15
	re-direct	"	21
	re-cross	"	22
	further direct	"	23
	further cross	"	24
	(recalled) further cross	"	34
	re-direct	"	35
John G. Yeager,	direct examination		24
	cross	"	29
	re-direct	"	33
	(recalled) further direct	"	44
	cross	"	44
	re-direct	"	45
Peter Lynch,	direct examination		35
	cross	"	37

New Jersey State Library

		PAGE
Mrs. Anna Marie Klein,	direct examination.....	38
	cross "	40
Edward Schaub,	direct examination.....	40
	cross "	41
John H. Manning,	direct examination.....	42
Joseph J. Kenny,	direct examination.....	43
Dr. Albert E. Edel,	direct examination.....45, 73	
	cross " 74, 77	
	further direct " 75, 81	
	(recalled)	83
	further cross "	110
	further direct "	111
Dr. Benjamin Edward Kaplan,	direct examination.....	46
	cross "	47
Bart J. Freeman,	direct examination.....	51
	cross "	54
	re-direct "	58
	(recalled) by the Court	61
Alfred J. Hargan,	direct examination.....	58
Robert Siskind,	direct examination.....	59
Dr. George L. Warren,	direct examination.....	64
	cross "	68
	re-direct " 71, 72	
	re-cross " 71, 72	
Harry Morel,	direct examination.....	73
For Defendant.		
Dr. Ernest Ellsworth Smith,	direct examination.....82, 84	
	cross "	84
	(recalled) further cross " 94, 95	
	further direct "	95
Jeremiah Premo,	direct examination.....	85
	cross "	92
John Menchner,	direct examination.....	93
	cross "	94
George W. Brien,	direct examination.....	96
	cross "	96
Samuel Solomon,	direct examination.....	96
	cross "	98
	re-direct "	104
Mrs. Mollie Solomon,	direct examination.....	105
	cross "	106
State's Rebuttal.		
John P. Enderweis,	direct examination.....	109

Writ of Error to Supreme Court.

WRIT OF ERROR TO SUPREME COURT.

Filed August 17, 1921.

New Jersey Court of Errors and Appeals

NEW JERSEY, *ss.*

THE STATE OF NEW JERSEY, to our Justices of (L. S.) our Supreme Court, 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 before you, between the State, defendant-in-error, and Samuel Solomon, plaintiff-in-error, on a writ of error issued out of the Supreme Court, to the Judges constituting the Court of Quarter Sessions in and for the County of Essex, as is said, manifest error hath intervened to the great damage of the said Samuel Solomon, 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 Samuel Solomon, do command you that if judgment be 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 19th day of August, and this writ, and that the record and proceedings aforesaid being inspected we may cause to be further done what of right and according to law ought to be done.

WITNESS, Hon. Edwin Robert Walker, Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the first day of August, in the year of our Lord, one thousand nine hundred and twenty-one.

THOMAS F. MARTIN,
Clerk.

EDWARD SCHOEN,
Attorney.

Return to Writ.

RETURN.

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 the 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.

WRIT OF ERROR.

Filed.

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 said County, GREETING:

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 one SAMUEL SOLOMON, for unlawfully keeping in his possession for barter and sale certain spirits, to wit: two gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol, and for unlawfully keeping in his possession for barter and sale certain spirits, to wit: two gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit: wood alcohol, in the City of Newark, in the said County of Essex, found in our Court of Oyer and Terminer, and in and for said County, heard and determined, manifest error hath intervened to the great damage of him, the said Samuel Solomon, as for his complaint we have received information, we being willing in that behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Samuel Solomon, do command you that if judgment be thereupon given that then you do send the record and proceedings aforesaid, together with all things touching and concerning the same, to us, under seal, distinctly and openly, and this writ, so that we may have them before our Supreme Court of Judicature, at Trenton, on the third day of July next, that inspecting the records 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.

Return.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, the fourteenth day of June, in the year of our Lord, Nineteen Hundred and Twenty.

ENOCH L. JOHNSON,
Clerk.

EDWARD SCHOEN,
Attorney.

RETURN.

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

I, William P. Martin, Judge of the Court of Quarter Sessions in and for 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
(SEAL) hand and the seal of said Court at Newark, N. J.,
this 18th day of August, A. D. 1920.

WM. P. MARTIN,
Judge of the Court of Quarter Sessions, Essex Co., N. J.

Presented in open court this 14th day of June, A. D. 1920.

WM. P. MARTIN,
Judge.

Bail fixed $7,000. W. P. M.

Indictment.

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

Be it remembered, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the second Tuesday of December in the year of Our Lord One Thousand Nine Hundred and Nineteen, by the Hon. William S. Gummere, Chief Justice of the Supreme 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 Arthur L. Phillips, William M. Halsey, Adolph Vogel, Frank E. Clayton, Harold C. Grant, Patrick J. O'Connor, Mark Hancher, George Bierman, Charles G. Hollister, William L. Fox, Frank L. Kramer, William G. Rockwell, George F. Hewson, LeRoy M. Ludlow, A. Eugene Geiser, Thomas H. Brooks, Frederick W. Nieder, Charles H. Pascoe, Robert Levy, Ralph B. Schmidt, Jr., Wilson L. Jenkins, Andrew W. McCabe, Harold W. Hack, good and lawful men of the said county of Essex, duly commissioned and then and there duly sworn and charged to enquire in behalf of the State of New Jersey in and for the said County of Essex it is presented in manner and form following, to wit:

Essex Oyer and Terminer.

December 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 Samuel Solomon, late of the City of Newark, 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 keep in his possession for barter and sale, certain spirits, to wit, two gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol, contrary to the form of the statute in such case made and provided, and against the peace of the State, the government and dignity of the same.

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex upon their oath aforesaid, do further Present that the said Samuel Solomon, late of the City of Newark in the County of Essex aforesaid, on the twenty-third

Judgment.

day of December, 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 keep in his possession for barter and sale, certain spirits, to wit, two gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit, wood alcohol 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.

J. H. HARRISON,
Prosecutor of the Pleas.

On the second day of March A. D. Nineteen Hundred and Twenty, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for the 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 then and there made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

And afterwards, that is to say, on the fourth day of March A. D. Nineteen Hundred and Twenty, at a 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, Samuel Solomon, in the custody of John R. Flavell, Sheriff of the County of Essex aforesaid, and the said Samuel Solomon being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is not guilty thereof, and therefore for good and evil he puts himself upon the country &c. and J. Henry Harrison, 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 twenty-fourth day of March, A. D. Nineteen

Judgment.

Hundred and Twenty, 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 Samuel Solomon to recognize upon their oath whether the said Samuel Solomon is guilty of the premises in the said indictment specified or not guilty because the said J. Henry Harrison, Esquire, Prosecutor, &c. as the said Samuel Solomon puts himself upon the jury and the same time is given to the parties aforesaid at the same time.

On this day, being the twenty-fourth day of May, A. D. Nineteen Hundred and Twenty, to which day the trial was postponed, and at this stage of the proceedings, Edward Schoen, attorney for the defendant Samuel Solomon ask the Court to allow the defendant Samuel Solomon to withdraw his plea as he desires to make a motion to quash the Indictment, which was consented to by the Court, the Court after hearing the Motion and Argument of Counsel denied the motion, whereupon the defendant Samuel Solomon was again placed to the bar to plead to said Indictment before mentioned.

Whereupon said defendant, Samuel Solomon, being placed before the Bar pleaded Not Guilty to said Indictment, which plea was re-entered by the Clerk of said Court and trial was proceeded with before the Hon. William P. Martin, Judge of the Court of Quarter Sessions and also comes the said J. Henry Harrison, Prosecutor of the Pleas, and Jury of whom before mentioned.

And afterwards, that is to say, the twenty-sixth day of June, A. D. Nineteen Hundred and Twenty to which day the trial of aforesaid indictment was continued, 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 Samuel Solomon, and the jury of whom mention is before made, and by John R. Flavell, Sheriff of the County of Essex, for this purpose empanelled and returned to wit: After the following challenges were exhausted by the State 3, by the defendant 3; John J. Quinn, Hasell H. Howells, Josiah S. Thatcher, William S. Clarendon, John Kingston, Clifford M. Lindner, Julius Koch, Arthur Kornfeld, George H. Bird, Ernest Meyrowitz, William Bender, I. Maurice Stokes,

Judgment.

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 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, Samuel Solomon Guilty, in manner and form as charged in this indictment, and so they say all.

And afterwards, that is to say on the fourteenth day of June, A. D. Nineteen Hundred and Twenty motion in arrest of Judgment was made by Edward Schoen, counsel for the defendant Samuel Solomon, which motion was denied.

Whereupon all and singular, the premises being seen and by the Court now here fully understood, it is on this fourteenth day of June, A. D Nineteen Hundred and Twenty ORDERED and ADJUDGED that the said Samuel Solomon be committed to the State Prison of this State for a term of not less than two years and not more than three years at hard labor and pay a fine of One thousand dollars and the costs upon this conviction and stand committed until said fine and costs are paid, which said costs are taxed by the Clerk at the sum of One Hundred and twelve dollars and seventy-five cents and the defendant be in mercy, etc.

Judgment signed June 14, 1920.

WM. P. MARTIN,
Judge.

Motion to Quash Indictment.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Monday, May 24, 1920.

STATE *vs.* SAMUEL SOLOMON.	Indictment No. 16. April Term, 1920. Wood Alcohol.

Before Hon. William P. Martin, Judge, and a jury.

For the State appears Wilbur A. Mott, Esq.
For the defendant appears Edward Schoen, Esq.

Mr. Schoen. May I withdraw the plea in this case for the purpose of moving to quash?

The Court. Yes.

Mr. Schoen. I move to quash the indictment in this case upon three grounds, first, the indictment contains no allegation of criminal intent of any kind; secondly, that it contains no allegation of knowledge on the part of the defendant; third, that the indictment does not charge the commission of a crime, in that there is no allegation that the alleged spirit mentioned in the indictment was to be used as a beverage; fourth, that the indictment does not set out an indictable offense against the defendant, for the same reason that there is no allegation that the spirits mentioned in the indictment were to be used as a beverage.

The Court. Denied.

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.

Defendant pleads not guilty.

Jury drawn and sworn.

Mr. Mott opens for the State.

John P. Enderweis, direct.

AMZI E. BERLA, sworn in behalf of State.

Direct examination by Mr. Mott.

Q Where do you live? A Fifteenth street, Newark, New Jersey.

Q What public office or position do you hold? A Clerk in the Excise Board and clerk in the City Clerk's office.

Q As clerk to the Excise Board do you have charge of the records of the issuing of licenses for the sale of liquor in the city of Newark? A Yes, sir.

Q Can you tell from your records whether on the 23rd day of December last Samuel Solomon had a license to sell liquor? A He did.

Q At what place? A 210 Belmont avenue.

Q When was that license issued? A That was granted on the 30th day of June, 1919.

Q And it was in force at that time? A Yes, sir.

Q And in December? A Yes, sir.

Q And is still in force? A Yes, sir.

Q Granted for one year? A Yes, sir; for one year.

The Court. Is that for the sale of intoxicating liquors at retail and not wholesale?

Witness. Retail.

Cross examination by Mr. Schoen.

Q Did you say that it was a license for the sale of intoxicating liquors? A To sell spirituous, vinous, malt or brewed liquors.

RECESS.

JOHN P. ENDERWEIS, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Where do you live? A 678 Hunterdon street.

Q Newark? A Newark.

Q What is your business? A Saloon business.

Q Where is your saloon? A 703 Hunterdon street.

Q That is near the corner of what street? A Corner of Bigelow and Hunterdon.

Q How long have you been in the saloon busines? A About seven years.

Q Have you a partner? A I did have.

Q What was his name? A John Yeager.

Q When did he cease to be your partner? A The first of the year, after this trouble.

Q The first of January, you mean? A Well, about the first of January, around there somewhere.

Q Do you know the defendant, Samuel Solomon? A Not personally, no, sir.

Q Do you know where his place of business is? A Yes, sir.

Q Where is it? A Belmont aveune and Waverly, I believe; the number I do not know.

Q Did you go to his place of business on or about the 23d of December last? A Yes, sir; I did.

Q What day was it? A The 23d of December.

Q What did you do there? A Purchased two gallons of whiskey.

Q How much did you pay for it? A $22 a gallon.

Q Where was the whiskey delivered to you?

Mr Schoen. I object, until the defendant is connected with the transaction. The witness answered the first question too soon for me to make an objection; I do so to this question.

The Court. Sustained.

The Court. When you say you purchased two gallons of whiskey did you talk with this defendant himself?

Witness. No, sir; I spoke with Mrs. Solomon.

Q Did you see him there? A When I got there he was there.

Q To whom did you actually pay the money? A To Mrs. Solomon.

Q Where was the liquor delivered to you?

Mr. Schoen. I object.

The Court. On what ground?

Mr. Schoen. The defendant has not been connected with it yet; he says he spoke to Mrs. Solomon and paid her.

The Court. He says the defendant was there when he went there.

Mr. Schoen. But he has not connected it in such a way as to create any inference of knowledge of what was going on.

Mr. Mott. I have shown that this was his saloon; I do not think it makes a particle of difference whether it was bought from him directly or from a bartender or Mrs. Solomon; it was his place and he had the license.

Mr. Schoen. This is not a question where the ownership of the place is involved; this is not an indictment for keeping a disorderly house, because he is the proprietor of the place. It is for a crime that he committed, if it was committed at all, outside of the saloon or anywhere. It is not based or predicated on the ownership of a saloon, it is for keeping in his possession adulterated liquor that he had anywhere, whether he has a saloon or not.

The Court. That does not exclude the idea of anybody else making the sale on the premises?

Mr. Schoen. Certainly not.

The Court. Is not there something in it if it is a license issued for one man that nobody else has any license on the place and he is in charge of it?

Mr. Schoen. That goes merely to the ownership of the place or of the license, but it does not go to the acts of any other person or persons in that place in the perpetration of a crime.

The Court. He had a license to sell liquor in his place; that gave him control of the place. It is something by way of evidence tending to show that. He was in the place at the time this witness says he went in there.

Mr. Schoen. He has not yet connected it as I say. He had no dealing with Mr. Solomon.

(Question read.)

The Court. That calls for a conclusion.

Q (*By the Court.*) When you went into the place what did you find it to be? You say you went, you think, to a place on Belmont avenue, at the corner of Waverly avenue, to the best of your recollection? A Yes, sir.

Q (*By the Court.*) What was that place? A A saloon.

Q (*By the Court.*) Was there a bar there? A Yes, sir.

Q (*By the Court.*) Where was this defendant? A Well, they were both behind the bar when I got there.

John P. Enderweis, direct.

Q What did you say to anybody? A I didn't say anything at the time; I stood there and had a few drinks.

Q (*By the Court.*) Who served you? A Mrs. Solomon.

Q (*By the Court.*) Where was Mr. Solomon when you were served? A He was behind the bar at the time I was served.

Q (By the Court.) Was there anybody else in the place? A Oh, there was quite a few there.

Mr. Mott. Your Honor, this indictment does not charge Solomon with selling this liquor. It simply charges him with keeping it in his possession for sale.

The Court. Your question is where were the goods delivered. That is a question of fact and law both.

Q Did you get the whiskey? A I did.

Q How did you get it? A From Mrs. Solomon, at the side kitchen; I should judge it to be the kitchen; I do not know what that room is.

Q What was it in? A A two-gallon jug.

Q What did you do with it?

Mr. Schoen. I object to all this as not being competent or binding upon this defendant.

The Court. The objection is too late.

Mr. Schoen. The question has not been answered yet.

The Court. Your objection to all this is too late.

Mr. Schoen. I am objecting to this one question.

The Court. No, but the form of your objection is, I am objecting to all of this.

Mr. Schoen. No.

The Court. You have just stated in open court, "I object to all of it." If you object to this particular question I will deal with it.

Mr. Schoen. I object to this particular question.

The Court. What is the ground?

Mr. Schoen. That it is not binding upon this defendant and is incompetent.

The Court. The converse of that is not true at all; it is not considered binding. It is a mere circumstance to be considered by the jury. The objection is overruled.

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 did you do with it? A I took it back to the place of business.

Q How did you take it? A In a two-gallon jug.

Q When you got it to your place of business what did you do with it?

Mr. Schoen. I object.

The Court. Overruled.

Mr. Schoen. Does your Honor want my ground?

The Court. You better state them, I overruled it because I understood your grounds were as you have urged before.

Mr. Schoen. I object to this question as attempting to show the acts and conduct of this witness with respect to something in the absence of the defendant, without any proof that there was any concert of action between this defendant and this witness.

The Court. Overruled; and it will be stricken out if it is not connected.

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 did you do with it? A Took it to the place of business.

Q Then after you got it there what did you do with it? A I don't know; Mr. Yeager, whatever he done with it, put it in bottles; I was not working then.

Q You didn't see Mr. Yaeger do that? A No; I put it in the back room and what he done with it I could not say.

John P. Enderweis, direct.

Q Did you have any whiskey in your saloon at all at the time you brought this whiskey in from Solomon's? A No, sir; I did not.

Q After this whiskey was brought in by you to this place did you sell any whiskey? A I did, yes.

Q From what did you take it?

Mr. Schoen. I object for the same reason.

The Court. The same ruling.

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 From what did you take the whiskey? A From bottles.

Q Under the bar? A In the rear of the bar.

Q Is that what you call your working bottle, or would call it? A Yes, sir; working bottle, quart bottle, one-fifth of a quart.

Q Did you know a man by the name of Klein, Edward Klein? A Yes, sir.

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

Q Did he come to your place after you took this whiskey there? A I just worked mornings that week, so I could not say whether he did or not, that particular week I bought the stuff.

Q Was this the only whiskey you had in your place? A Yes, it was.

Q Up to when? A Up to the time of this trouble; when I went for that whiskey we were all out of it; therefore I went to the nearest place I thought I could get it and bought it.

Q Had you ever bought whiskey of Solomon before? A Ouly once, and that was a half a gallon.

Mr. Schoen. I object as not being material in this case. This is an indictment for having a certain quantity of whiskey in his possession on a certain day and there has been no time fixed in this question. This is not so closely related to the time stated in this indictment to make it competent. He is not on trial for having sold whiskey.

The Court. Did you see Mr. Solomon on this prior occasion?

Witness. No, sir, I did not; Mrs. Solomon.

The Court. I do not see how that is competent.

Mr. Mott. Only for the purpose of showing he bought it there.

Q Did you sell any whiskey to Edward Klein? A I did not, no, sir.

Q Well, on Saturday afternoon after you got this whiskey did you see Klein? A Yes, sir; I did.

Q Where did you see him? A At our place of business.

Q What did you do with him? A We had four, or five drinks; three, four or five or six; I could not say just how many.

Q Of what? A Whiskey.

Q What whiskey? A The same whiskey I purchased from Solomon.

Q Who served those? A My partner.

Q What did Klein drink? A Whiskey.

Q What did you drink? A Whiskey.

Q What did you do subsequently, if anything, with the jug in which this two gallons of whiskey was brought there? A Well, they were evidently all emptied out into these bottles; what became of the jug after that I do not know.

Q What was done, if you know, with the whiskey that came from Solomon that was not sold over the bar? A That I could not say, because I was not working at the time; I only worked mornings that week; I could not say how much of it was left or what was done with it; there couldn't have been very much of it left.

Q The police subsequently came to your place? A The first I seen the police, they came to my house, my home.

Q And then did you see them at your saloon? A I went over there with them; yes, sir.

Q When was that? A Well, that was about ten minutes after they came to my place.

Q When did they come to your house? A In the morning, between ten and eleven.

Q On what day? A On that Monday; I believe it was the 28th or 29th; in the morning.

John P. Enderweis, cross.

Q What did you do when you got to the saloon? A I went to the back room with them and took whatever bottles I saw, whatever bottles we were handling the stuff in, and gave them the bottles that we put the stuff in.

Q The whiskey bottles? A The whiskey bottles that had the stuff in.

Q Do you remember who the police officers were that you gave them to? A Kinney and Manning—no, I am wrong, Kinney and Reilly, I believe, of the Sixth.

Cross examination by Mr. Schoen.

Q You say that when you came to this saloon you saw Mr. Solomon there? A Yes, sir.

Q What time of day did you come to the saloon? A It was between two and four, to the best of my knowledge.

Q How long did Solomon stay there after you got there? A Five or ten minutes.

Q And during that five or ten minutes did you talk to him about buying any whiskey for your saloon? A I did not speak with Mr. Solomon at all.

Q Did you see Mr. Solomon go away? A I seen him leave the door; he was in the rear of the bar and he went out; where he went I do not know; I waited about half an hour for him and I asked for him.

Q After you saw him go out you waited a half hour before you talked to Mrs. Solomon again? A No.

Q Up to that time did you mention anything about wanting to buy two gallons of whiskey? A No.

Q And it was after Mr. Solomon had been away for half an hour that you broached the subject to Mrs. Solomon? A I should judge it was about half an hour.

Q Do you remember exactly what you said to her about buying whiskey? A My exact words I could not repeat.

Q Well, about, the substance. A I asked her for Mr. Solomon and she said he was out.

Q Why did you ask her for Mr. Solomon when you seen him go out and knew he had been out a half hour? A I thought he would come back.

Q Well, you asked her whether he was coming back? A Well, I could not say that exactly; I just forget the words.

Q Now, isn't that what you asked her? A I asked for Solomon and she said he was out.

Q You told us you saw him in there when you came in? A Yes.

Q He was there five or ten minutes after you got there and that then he went away and that you waited a half an hour? A Yes, sir.

Q After that you broached the subject of buying whiskey to Mrs. Solomon; you don't want to say now that you asked for Mr. Solomon? A After waiting half an hour I asked for Mr. Solomon. I knew he was not behind his bar, but I did not know whether he was in the building.

Q You wanted to be sure he was not in the building? A Well, I asked for him and Mrs. Solomon said he went out.

Q Isn't it the fact that you wanted to make sure he was out of the building? A Well, not exactly.

Q You didn't want to ask for any whiskey while Mr. Solomon was there, did you? A Well, I would have asked him.

Q You had an opportunity when he was there and you didn't take it? A Well, I didn't think he was going out.

Q You did not think you would get it from him? A Well, not exactly, no.

Q What do you mean by not exactly? A I did not know whether he would or not.

Q But you knew Mrs. Solomon would? A I thought she would.

Q And you thought Mr. Solomon would not let you have any? A Well, I did not just exactly think that.

Q Well, you had an idea he would not? A No.

Q Well, you waited half an hour after he was gone before you asked Mrs. Solomon to sell you some? A That is a fact.

Q What did you ask Mrs. Solomon, whether she had any whiskey? A I asked her if she would sell me some whiskey.

Q And she agreed to do it? A She agreed to give me some.

Q Did she tell you how much she had? A No.

Q Did you sample the whiskey you bought before you bought it? A She told me it was the same I was drinking.

Q Did you buy it for a sample? A I did.

Q You wanted to try it before you bought it and took several drinks? A Yes, sir.

Q And Mrs. Solomon was serving you with it? A Yes, sir.

John P. Enderweis, cross.

Q Do you know where she went to get it? A Some room off the bar; what it is I do not know.

Q Did you go with her A No.

Q Do you know whether there was any more than just the jug that you got? A I could not say; I wasn't in that room.

Q You never talked to Samuel Solomon about buying any whiskey at any time from him? A No, sir.

Q And you have been in his saloon several times? A Yes, sir.

Q Never broached the subject at any time? A No, sir; I could never catch him there; he would be in there and out.

Q Mr. Solomon has not been in the saloon to your knowledge when you have been down there? A Not in the afternoon when I went there, no.

Q So that you have never asked him to sell you any whiskey and he has never offered to sell you any? A Mr. Solomon, no.

Q Now, on the 23rd, the day you say you bought two gallons of whiskey, did you ask Mrs. Solomon where Mr. Solomon was? A After waiting there about a half hour.

Q What did she say? A She said he went out.

Q Did she say where he went to? A No.

Q Did she say something about him being down town? A No.

Q Did she say something about not looking after the business any more; he was looking after his garage? A No, I didn't hear anything about him; she only said he was out, so I asked for some whiskey.

Q Did she say anything when she gave you the whiskey? A No, sir; she wrapped it and I paid her for it. She stooped down in back of the bar and put it in her stocking and said "Shut up."

Q Did she say anything about Mr. Solomon? A No, no more than to keep my mouth shut.

Q How did she say it? A Well, no more than to keep mum, put her finger up to her mouth.

Q Did she say anything about not to say anything to her husband? A No, she only told me to be quiet about it and say nothing.

Q Didn't she put her finger up to her mouth and say "Now, mum, don't tell Solomon anything about this; that is going to be pin money"? A I do not know.

Q Did she say anything like that? A To the best of my recollection she put her finger to her mouth and said "be mum."

Q Was there anything said about pin money? A She may have said that.

Q Is your memory poor on these details? A Well, that is so far back now, she told me to be mum and put her finger to her mouth.

Q You never told Solomon about it? A No, sir.

Q You never told him you got some whiskey in his place from his wife until the trouble came on? A No.

Q Now, the whiskey that you got from Mrs. Solomon you say you took to your place of business? A Yes, sir.

Q And you began to sell it over the bar? A Yes, sir.

Q That is, first you took it out of the jug in which you received it and you then transferred it to other bottles; how many other bottles did you use? A Two, as a rule.

Q What kind of bottles were they? A Quart bottles or one-fifth.

Q Whiskey bottles? A Whiskey bottles.

Q Did you sterilize those bottles before you poured the whiskey from the jug into those bottles? A We only used them for whiskey.

Q Well, did you sterilize them? A No, we did not.

Q So that there was nobody who bought whiskey at your place who got it out of the original jug that you received it in from Mrs. Solomon? A Not out of the original package, no.

Q It was transferred from the jug to other bottles which you had in your place and sold out of those bottles? A Yes, sir.

Q You had a number of those drinks yourself with Mr. Klein out of that whiskey? A Yes, sir, I did.

Q And how long have you know Mr. Klein? A Seven years.

Q Was he a steady customer? A Yes.

Q Was he a heavy whiskey drinker? A Yes.

Q About how many whiskeys did he drink a day? A Well, during the day he never stopped at our place; at the time he went to work in the morning we were closed.

Q When did he stop? A In the evening.

Q How many whiskeys did he drink in the evening? A Two or three.

Q Every evening? A Every evening, as a rule.

John P. Enderweis, cross.

Q Didn't he drink any whiskey before breakfast? A I could not say; he never stopped to our place; we were not open.

Q Did you drink with him on Saturday afternoon? A Yes, I did.

Q On this Saturday afternoon after you had gotten the whiskey from Mrs. Solomon? A That following Saturday I did, yes.

Q You got it on the 23rd? A Yes; that was on Tuesday.

Q (*By the Court.*) What was the day that you saw Klein in there and drank with him? A Saturday, the same week; it must have been the 28th, or 27th.

Q (*By the Court.*) The 29th was Monday? A Well, it must have been the 27th.

Q You say you drank with Klein the Saturday following the Tuesday when you bought the whiskey? A Yes, sir.

Q Did you see Klein have a bottle with him at that time? A He had a small sample bottle with him; yes, sir.

Q Did it have anything in it? A Something the color of whiskey, yes; amber color.

Q Well, where did he have that? A In his pocket.

Q What kind of a bottle was it? A Small bottle, with a long neck and big container; I do not know what you call it.

Q And he carried it in his pocket? A Yes, sir.

Q And it was filled with a liquor of some kind? A Some liquor of some kind.

Q What color? A Amber color; the same as whiskey.

Q How did you know he had that with him? A He brought it up and showed it to us.

Q Did you ask him to open it? A I did.

Q What did he say? A Told me to go to hell; he wanted it himself.

Q Did he tell you where he got it? A He said he had it twenty years or more.

Q Klein was an ex-saloonkeeper? A Yes.

Q How many years ago? A He didn't say.

Q Did he say anything about tell you how to make the stuff? A No, he did not.

Q And you say now that at the time you received the two gallons of whiskey from Mrs. Solomon, Mr. Solomon had been out of his place for over half an hour?

Mr. Mott. I object; he has already answered that question.

The Court. 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.

Q Can't you recall a little more in detail exactly what Mrs. Solomon said to you at the time you gave her the money? A No, not any more than her telling—

Q About mum and pin money? A No more than her telling me to keep quiet and putting her fingers to her mouth; I cannot remember anything else.

Q That is pin money, don't tell her husband? A She may have said that, but if she did I did not take any notice to it; she put her hand to her mouth and told me to keep quiet.

Q Will you say now she did not say to keep mum to her husband? A If she did I don't remember.

Q Will you deny she said that? A I won't deny she said anything; after she handed me the change I went out.

Q All you remember is the word mum? A That is all.

Q And you won't deny that she did not say not to tell her husband? A I do not know.

The Court. You are asked what she said in your presence.

Witness. I answered that she told me to be mum.

The Court. You are asked the question what she did say in your presence.

Witness. Told me to be mum.

Q And is that all you remember? A That is all I remember; I walked out at the time.

Q And you do not say she did not say keep mum to my husband, this is pin money? A I could not answer that, because I don't know if she did say it or not.

John P. Enderweis, re-direct.

Re-direct examination by Mr. Mott.

Q Did you hear her say at that time keep mum? A All I remember, she said keep mum, and put her finger to her mouth.

Q Did she say anything to you about not telling her husband? A If she did I did not hear it.

Q Did she say it to you? A I did not hear it.

Q Did she say anything to you about pin money? A She put her finger—

Q Please answer the question. Did she say anything to you about pin money? A No, sir.

Q Why did you wait there half an hour after he went out? A Expecting Mr. Solomon to come back.

Q And you were expecting him and waiting for him to come back for what purpose?

Mr. Schoen. I object to his stating any purpose he had in his mind. It is not at all binding upon this defendant; it cannot in any way bind the defendant what purpose he might have had which was not expressed or communicated to this defendant.

The Court. You asked if he did not stay for the express purpose of waiting until after Mr. Solomon had gone out and then he asked Mrs. Solomon for the whiskey. Have you not opened the door for the State to show what the witness stayed there for?

Mr. Schoen. I do not think so.

The Court. Why not?

Mr. Schoen. He cannot bind the defendant.

The Court. But you opened the door by your cross examination.

Mr. Schoen. He has denied it, because he said he did wait there for the purpose of seeing him.

The Court. Why may he not say it? Overruled.

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.

John P. Enderweis, re-cross.

Q Why did you stay there? A Waiting for Mr. Solomon to come back.

Q For what? A To ask him to sell me some whiskey.

Examined by the Court.

Q Who else was behind the bar when you went to the place beside Solomon and his wife? A That is all to my knowledge; that is all I remember, Mr. Solomon and Mrs. Solomon.

Q Did you see anybody else? A No, I did not.

Q What time of day was this? A Between two and four.

Q Who furnished the two gallon jug in which you took the whiskey away? A Mrs. Solomon.

Q Did you carry any jug over there? A No, I did not.

Q Did you see Yeager or anybody else pour any of the contents of the jug into any of the other bottles? A No, I did not.

Q When you say there was no whiskey there and that is the reason you went to buy some, had you personally been active in the business, in your own business? A Yes, sir, I had.

Q Did you serve from the bar? A Yes, sir.

Q You served drinks? A Yes, sir.

Q On December 23rd, up to two o'clock, had you done anything in the bar room? A I opened up mornings, worked from eight o'clock in the morning until one.

Q Was there any whiskey sold between eight and one that you know of? A After the 23rd?

Q You worked from eight to one on the 23rd day of December? A Yes, sir; that morning we had no more left.

Q And you worked behind the bar? A Yes, sir.

Q Did you serve any whiskey that morning? A Not that morning.

Q Did you see any whiskey there? A On the 23rd; no, sir.

Q You quit work at one o'clock; who went to work then? A Mr. Yeager, my partner.

Re-cross examination by Mr. Schoen.

Q Did you testify at a preliminary examination which was held in this matter before the Third Criminal Court on the 22nd of January last? A Did I testify?

Q Yes. A Yes.

Q Did you say at that examination in response to the following question: "Whom did you see there? A Mrs. Solomon."

John P. Enderweis, further direct.

Did you say that? A No, Mr. and Mrs. Solomon was there; Mrs. Solomon and Mr. Solomon.

Q How is it you did not state at that examination that Mr. Solomon—that you had also seen Mr. Solomon there? A Well, if the question was put that day I did.

Q Now, let me ask you—I will read a little more of this, so that you can understand it.

Mr. Mott. Perhaps you had better read it all.

Q I will ask you this question; at that examination were you asked the following and did you give the following answers: "Where were you on the 23rd day of December last? A I worked in the morning and in the afternoon I went to Solomon's. Q Where is Solomon's? A Belmont avenue. Q What business is he in? A Saloon business. Q Belmont avenue and any other street? A I believe it is Waverly avenue. Q Whom did you see there? A Mrs. Solomon. Q What did you do? A Purchased two gallons of whiskey. Q From whom? A Mrs. Solomon." Now, I ask you again whether you were asked those questions and made those answers?

The Court. Answer that question yes or no.

A Yes.

Q And today is the first time which you say you also saw Mr. Solomon in the saloon when you came in, isn't it? A It is the first time that question has been put to me.

Q Don't you think this question, "Whom did you see there?" was big enough, broad enough to include every one you saw there? A Well, it would have to include everybody in the saloon at the time.

Q Yes. You were asked that question at the time of the examination, "Whom did you see there?" and your answer was, merely "Mrs. Solomon." A I do not remember that.

Further direct examination by Mr. Mott.

Q What did you understand the question, "Whom did you see there?" to mean?

(Objected to.)

(Objection sustained.)

John G. Yeager, direct.

Q You say you were asked at the police station this question: "Whom did you see there," and that you made the answer, "Mrs. Solomon." Have you any explanation to make of that? A Well, I said that no doubt; I figured that I got the stuff from Mrs. Solomon and I mentioned Mrs. Solomon; I do not think the question was put to me about anybody else outside of Mrs. Solomon.

Q You mean whether you saw anybody but Mrs. Solomon. A Yes.

Further cross examination by Mr. Schoen.

Q Did you say you do not think the question was put to you whether you saw anyone else? A Yes, sir.

Q Then this question was asked: "Whom did you see there?" Is that your explanation, that that was not broad enough to include everyone who saw there? A Maybe my explanation is right.

Q (*By Mr. Mott.*) Well, there were quite a number of people in the saloon, you said? A Yes, sir.

JOHN G. YEAGER, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Where do you live? A 237 Ellis avenue, Irvington.

Q What was your business in December, last year? A I was in the liquor business.

Q With whom? A Enderweis.

Q Where was your place? A Bigelow and Hunterdon; 703 Hunterdon street.

Q The license was in both your names? A It was.

Q What part of the business did you attend to? A Well, we both attended to the same duties, one week on and one week off; that is, the week I worked in the morning I would have the afternoon and the evening off, and the following week I would have the afternoon and evening to work.

Q On the 23rd of December last what time were you in the saloon? A I believe that week I was working afternoons and nights.

Q Do you know whether or not you had in your saloon any whiskey in the morning of the 23rd of December last? A I do not believe we did; if we did I did not know it. We may have

had some whiskey but not whiskey sold at the bar, like Jamaica rum, which there is little call for.

Q Did you see Mr. Enderweis come into the saloon in the afternoon? A I did not; oh, he came in in the afternoon; you had reference to him coming with whiskey?

Q Yes. A I did not.

Q When did you first see the jug of whiskey? A He told me it was back there and I went back with the bottle.

Q Did you find the jug there? A Yes, sir.

Q What sort of jug? A Two gallon jug.

Q What was in it? A Whiskey.

Q What did you do with it? A Put it in the working bottle.

Q I show you these two bottles and ask you what you call them? A That is a full quart and that is a fifth (indicating); that is the working bottle there.

Bottles marked Exhibits S. 1 and S. 2 for identification.

Q I show you Exhibit S. 1; you say that is what you call the working bottle? A Yes, sir, the bottle we have the whiskey in.

Q That is, you mean the bottle you had under the bar? A Yes, sir.

Q What is the other bottle? A I am not sure we had wine in that, sherry wine.

Q What did you do with the whiskey that was in the jug that Mr. Enderweis spoke about? A What particular time?

Q Why, the first time you saw it. A I filled the bottle.

Q This working bottle, Exhibit S. 1? A Yes, sir; that is, filled the bottle from the jug.

Q And what did you then do with the bottle? A Brought it down and set it behind the bar so we could hand it out to customers.

Q Do you know Edward Klein? A Yes, sir.

Q Did you see him on Saturday following the 23rd? A I did.

Q Did you sell him anything? A I did.

Q What? A Whiskey.

Q What whiskey? A The bottle.

Q This working bottle? A Same bottle, yes, sir.

Q What time of day was he in there? A Well, I cannot recall; I do not know; I never paid any particular attention to any customers.

Q Well, about what time? A I have not the remotest idea; I cannot say.

Q When did you next see him? A I do positively remember, because I had reason to remember, Sunday morning.

Q What did you do then? A Sold him whiskey.

Q Out of what bottle? A The same bottle.

Q How many drinks did you give him on Sunday morning? A Two.

Q Do you remember how many he had on Saturday? A No.

Q Well, did he have just a few, or quite a number? A I could not say; even approximately; I could not say how many he had.

Q Did you fill this bottle more than once from the jug? A Yes, sir.

Q How many times? A Every time it was empty.

Q Well, that would be about how many times? A Well, you could easily figure it out; two gallons and a fifth—that could be figured up; I filled up the last bottle full, that was on Sunday.

Q Then you had used the whole two gallons? A Did not use it all until Sunday morning; there was a little left in each bottle; that is, the wine and whiskey.

Q Some in the wine bottle? A Some in the wine bottle, yes, sir.

Q Did you put some of the whiskey in this Exhibit S. 2? A No, sir.

Q Then it was wine? A That was wine.

Q Did you hear something about Klein? A I did.

Q When did you hear that? A Monday morning.

Q Then what did you do? A I got excited, of course, like anyone would be when Mr. Reilley came up—

The Court. You are not asked what you said.

Q What did you do with the whiskey you had? A After Mr. Reilley spoke to me about Mr. Klein?

Q Yes. A I simply threw the whiskey that was left in the working bottle away.

Q Was there any left in the jug at that time? A No; there was not; that was the last in the jug that went in the bottle Sunday afternoon.

Q Did you pour all the whiskey out of the bottle? A In the morning?

Q Yes. A All that was left.

Q Well, there was some left in the bottle? A Yes, sir; there was some left in the bottle.

Q And was the whiskey that was left in the bottle Monday morning a part of the whiskey that you had taken out of the jug?

Mr. Schoen. I object; leading question.

Mr. Mott. I suppose it is, yes. All right.

Q Where did you get the whiskey from that was in the bottle on Monday morning? A Out of the jug.

Q (*By the Court.*) Is that the whiskey you say you threw away Monday? A After I poured it from the jug into the bottle what whiskey was left Monday morning I threw away.

Q (*By the Court.*) Was there any whiskey at all left that had ever been in that jug? A Yes, sir.

Q (*By the Court.*) What whiskey was it? A The whiskey I had taken out of the jug.

Q (*By the Court.*) On Monday morning, as I understand it, you heard something about Klein and you threw the contents of the bottle S 1 for identification away? A I did.

Q (*By the Court.*) Now, then, later on did you put some whiskey in there? A I did not.

Q (*By the Court.*) And there was not anything left in the jug? A No, sir.

Q (*By the Court.*) And there wasn't anything in the bottle? A No.

Q Do you mean that there was not anything left in the bottle?

Mr. Schoen. I object.

The Court. Overruled.

Q Didn't you say a minute ago there was some whiskey left in the bottle? A No, how could there be.

Q Don't you know there was some in the bottle when you turned it over to the police?

Mr. Schoen. I object; that is a leading question. This is a State's witness.

The Court. Objection overruled.

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

John G. Yeager, direct.

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

WM. P. MARTIN,
Judge.

Q Don't you know there was some whiskey, a quantity of whiskey in this bottle when it was turned over to the police? A I do not; they told me there was and it was shown at the trial, the hearing, or somehing or other, and he said that there as a spoonful that they made an analysis of.

Mr. Schoen. I object. This witness has testified about some other member there and I ask that it be stricken out of the record.

The Court. Granted.

Q Did you put whiskey in that bottle from the time you poured it until the time you turned it over to the police? A I did not.

Q Did anybody else, as far as you know? A Positively no, because I turned the bottle over to the police.

Q So, from the time you poured the whiskey out of the bottle until the time you turned it over to the police there was nothing put in the bottle? A There was not.

Mr. Schoen. I object.

The Court. Objection sustained.

Mr. Schoen. I ask that his answer be stricken out.

The Court. Granted. Do not answer until you are allowed to do so.

Q So from the time you poured the whiskey out of the bottle to the time you turned it over to the police, was anything put in the whiskey bottle?

The Court. Answer that; nobody has objected to it.

A From the time I poured the whiskey?

Q To the time you turned it over to the police, was anything put in the bottle? A No, sir; there was not; the bottle was in my care all the time.

Q (*By the Court.*) Then the bottle was empty at the time you turned it over to the police? A Yes. sir.

John G. Yeager, cross.

Q (*By the Court.*) And you are talking about this bottle S. 1 for identification? A Yes, sir.

Q Is this bottle empty now? A Yes, sir.

Q This is what you mean by an empty bottle? A Yes, sir; as I can see; I will put my glasses on; possibly I do not see very well; yes, that is what I call an empty bottle.

Q Isn't there something in there? A Yes, but we would not call that anything.

Q Well, that is what I am trying to get at. A Yes, sir. May I talk?

The Court. No, you may not. That is the trouble with you. You talk too much. If you answer the questions you will be all right. Go on and finish your answer.

Witness. What I meant to say is that pouring the whiskey out, whatever was left on the inside of the bottle would run down and that we call an empty bottle.

Q What did you mean when you said that the bottle was empty when you turned it over to the police? A That I simply had thrown the contents out.

Q All the contents? A Threw it all out; all the contents that was in the bottle.

Q Do you know whether or not there was any whiskey in the bottle when you turned it over to the police? A No more than is in there now; that is what would run down after I emptied it.

Q (*By the Court.*) You mean inside or outside? A Inside.

Cross examination by Mr. Schoen.

Q You said that when you heard about Klein you got excited; is that what you said? A Yes, sir.

Q And you took what you had left in the bottle and poured it out? A Yes, sir.

Q Will you show the Court and jury—or, first, I withdraw that question. Did you pour the contents of the bottle into any other receptacle? A Down the sink.

Q Will you show the Court and jury how you poured the contents of the bottle away; what did you do with the bottle; first, did you take the cork out? A Took the cork out.

Q Then what did you do? A And into the sink.

John G. Yeager, cross.

Q Did you hold the bottle in the position that you are now holding it? A Yes, sir.

Q Did you hold the bottle until all the contents were out?

Witness. May I talk, your Honor?

The Court. Yes.

Witness. The idea is I cannot hold it there until every drop got out; at least, I didn't after it stopped running I turned it up.

Q After it stopped running you turned it up? A Yes, sir.

Q And you didn't turn it up until you saw it stop running? A I did not.

Q I presume at the time you took this bottle to pour the contents away, after having heard something about Klein, that you felt you were in some way responsible for the situation, for whatever happened to Klein? A Well, a man in my position at that time, naturally would feel like that.

Q Was it your idea in throwing away the contents of this bottle, that you would destroy whatever you had left of it? A That is, the evidence, you mean?

Q Was that your idea in attempting to throw this away?

Witness. May I speak?

The Court. Yes.

Mr. Schoen. You can answer that yes or no.

The Court. No; that is not proper.

Mr. Schoen. I will withdraw the question.

The Court. No, you cannot withdraw the question.

Mr. Schoen. I submit I have a right to withdraw it.

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.

The Court. You answer the question. When counsel asks a question and instructs the witness to answer yes or no, and the Court rules that his instruction is not proper, he cannot then withdraw the question.

John G. Yeager, cross.

Q (Question read.) A When Mr. Reilley came in and spoke of that—

Mr. Schoen. I do not think that that is at all responsive, your Honor. I ask that the answer be stricken out.

The Court. Granted.

The Court. What is the answer? You cannot tell us something that somebody said.

Witness. I threw the whiskey out because I suppose it was on account of the evidence, through the excitement of the moment.

The Court. You mean the evidence against you?

Witness. Yes, sir; I do.

Q And that being your purpose you intended to get rid of all of it that was in the bottle, didn't you? A No more than throw it out.

Q And you did succeed in doing that, didn't you? A As I thought; yes sir.

Q Now, when you began to transfer the whiskey from the jug into what you call the working bottle, was Mr. Enderweis present? A He was not.

Q Did he ever point out the jug to you? A No, we always knew the jug.

Q What do you mean by knowing the jug? A Well, through handling, through being there, handling it every day, we knew the jug.

Q Did you handle the jug before the 23d of December? A No, handling it from that time on, from the time the jug was brought in.

Q I am talking about when the jug first got into your place; did you see Enderweis bring it in? A I did not.

Q Didn't you see your partner Enderweis bring it in? A No; I did not.

Q You don't know then whether the jug you used to fill your bottles was the jug Enderweis brought or not? A Oh, yes, I do.

Q You do know? A Of course I do.

Q You did not see Enderweis come in with it? A No; he told me it was back in the stock room.

Q And you did the pouring, or at least the transferring of this whiskey from the jug into the bottle? A I did.

Q And you do the bar tending? A In the afternoon.

Q And did you sell the entire contents of this two-gallon jug over your bar? A I did not.

Q How much of it

Mr. Mott. One minute. You mean by "you" him personally.

Mr. Schoen. Him personally, yes.

A No.

Q Did Enderweis sell some of it? A Yes, sir.

Q Do you know whether, as a matter of fact, all of the whiskey that was in the jug was sold over the bar at the time you heard about Klein; had been sold over the bar? A No, sir; there was some left in the bottle.

Q All you had left was about half of this bottle S. 1? A I do not think there was a half.

Q So that the entire contents of the jug, with the exception of less than half of what was in Exhibit S. 1, had been sold either by yourself or Enderweis over your bar? A Yes, sir.

Q And about how many people had had some of that? A Well, I could not say.

Q About how many? Ten or fifteen? A I could not say.

Q A good many customers? A No, we didn't have many customers.

Q Did you have many customers that drank a little or a few that drank a lot? A They did not drink so much; there was not much whiskey sold at our place.

Q Well, you sold all the two gallons except half of this bottle? A Yes.

Q And that has been consumed by human beings over your bar? A Yes, sir.

Q Have you heard from those people since? A Spoken to them?

Q Yes. A Yes.

Q Seen them alive? A Yes, sir.

Q Heard of any of them having ill effects from it? A No, sir.

Q Did you see your partner Enderweis drink any of it himself? A I did.

John G. Yeager, re-direct.

Q (*By the Court.*) Who was there when you served Klein with whiskey? A A friend of his he introduced me to by the name of Lynch and another party by the name of Premo.

Q (*By the Court.*) Do you know where Mr. Enderweis was at that time? A No; he was off that day; that was my day on.

Q (*By the Court.*) I am not speaking of Sunday morning; I am speaking of Saturday some time? A I do not remember about Saturday; we were too busy Saturday afternoon.

Q How many days did it take you to consume, or sell, the contents of that two-gallon jug, all except that small quantity you say was left in S. 1? A I just cannot recall.

Q You say you got it on the 23rd? A Well, then it was the following Monday I threw the rest of it away.

Q Do you recall what day? A The 29th.

Q So that you were selling that stuff over your bar for about six days to various people? A About six days.

Q (*By the Court.*) You commenced to sell on Tuesday, December 23d? A I just cannot recall the date, your Honor, just as soon as he brought it in.

Q (*By the Court.*) Well, the day you found it there. A Yes, sir; I began to sell it right away.

Q Have you pleaded to an indictment charging you with the sale of intoxicating liquors contrary to law, in this court? A In this court?

Q Yes. A No; I have never been indicted.

Q Or have you pleaded to an indictment charging you with the death of Edward Klein? A I have never been indicted.

Q You have never been indicted for your part in this thing at all? A No, not to my knowledge, I have not been indicted.

Q Is that why you are testifying for the State? A I have been summoned to testify; that is the reason I am testifying.

Re-direct examination by Mr. Mott.

Q Coming back again to S. 2, tell us, do you call that an empty bottle? A I would call that an empty bottle.

Q That is what you mean by an empty bottle? A Yes; that is what I would call an empty bottle.

Q Do you know where that bottle was kept? A In the back of the bar; in what we call the ice box, or cooler.

John P. Enderweis, further cross.

Q What did you say was in that bottle? A I am most sure sherry wine was kept in there; I am not positive, but I am most sure; it is in my mind that we kept sherry wine in there.

Q You are sure you put none of the whiskey in that bottle? A I am not sure, but I am most sure that we kept sherry wine in it.

Q Now, I am trying to find out and I am asking you whether or not you put any of the whiskey that came from the jug into that particular bottle? A Well, I cannot under oath say I did or did not, for I simply do not recall, but I know we did in the other, but I was under the impression that it had sherry wine in that and port wine in another; we kept whiskey, sherry and port wine in three bottles.

Q (*By the Court.*) Did they all come from the same jug? A No, sir.

Q (*By the Court.*) Why did you empty the sherry wine bottle if you had not put any whiskey in it? A I say, in the excitement of the moment, I emptied every bottle; I knew I had done wrong a little while after.

Q (*By the Court.*) Did you have a gin bottle? A We did not have any in a good while.

Q (*By the Court.*) I am asking you if you had a gin bottle? A Yes, sir.

Q (*By the Court.*) Did you empty that gin bottle? A No, sir; that gin bottle was not used; that was not there; they were the only three bottles we had there.

JOHN P. ENDERWEIS, recalled.

Further cross examination by Mr. Schoen.

Q Have you answered to an indictment in this court for the sale of intoxicating liquors contrary to law? A No, sir.

(Objected to.)

(Question withdrawn.)

Q Havbe you been called to plead to an indictment charging you with keeping in your possession whiskey adulterated with spurious ingredients, to wit, wood alcohol? A No, sir.

Q Have you been called to plead to an indictment charging you with the death of Edward Klein? A No, sir.

Peter Lynch, direct.

Re-direct examination by Mr. Mott.

Q I show you Exhibit S. 2. Did you turn that bottle over to the police?

Mr. Schoen. Is that cross examination on my omitted questions?

The Court. It is not re-direct examination on your cross examination.

Mr .Mott. Well, then I will bring him back.

Mr. Schoen. Well, I do not object to that.

Q Did you turn this over to the police? A I believe I was there at the time that was turned over.

Q Well, don't you know? A Yes, sir; that is one of them.

The Court. That is S. 2 for identification.

Q Were you there at the time S. 1, the working bottle, was turned over? A Yes, sir.

Q Where was S. 2, this bottle? A In the stock room in the rear of the saloon.

PETER LYNCH, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Where do you live? A 50 Eckert avenue.

Q What is your business? A Japanner.

Q Did you know Edward Klein? A Yes, sir.

Q Do you know Mr. Yeager and Mr. Enderweis? A No, sir.

Q Do you know where the Two Jacks saloon is? A Well, I just about know where they are located and that is all.

Q Do you know the saloon on the corner of Bigelow and Hunterdon street? A Yes, sir; one night I was in it and that is about all.

Q Who was with you? A Mr. Klein.

Q Do you remember when that was? A The 28th of December.

Q Last? A Last.

Q And that was what day of the week? A Sunday night.

Q What time did you go in there with Klein? A Well, I would say about a quarter after seven.

Q And what occurred after you and Klein got in there?

Peter Lynch, direct.

Mr. Schoen. I object. This is not binding upon this defendant at all. He cannot be charged with anything that occurred in a saloon at the corner of Hunterdon and Bigelow street over which he had no control or with which he had no connection whatever.

The Court. Suppose what he sold had wood alcohol in it. Suppose what the defendant had for sale contained wood alcohol.

Mr. Schoen. Well, that is another theory.

The Court. Well, that is the theory I am allowing it in evidence under.

Mr. Schoen. There is no evidence that anything sold over their bar is in the condition that it came in from Mrs. Solomon. That is the evidence thus far. It has not been connected with this defendant in any way, even the original sale has not been connected with him, and besides that the evidence is that the whiskey sold over the bar in the Two Jacks saloon was sold in receptacles other than the one which came from Mrs. Solomon, even if you want to give the case the widest latitude and allow the evidence to come in because Mrs. Solomon sold the whiskey; even if you do that, there is affirmative evidence of the State that the whiskey sold over the bar in the Two Jacks place was sold out of another bottle that had not been sterilized, and I say we are not responsible, nor can any inference be drawn from the use of that whiskey in the Two Jacks place; first, that it came from the defendant, and second, that it was sold in different form than it was received from him. Now, quite the contrary appears in this case so far, and for that reason I do not think any evidence of who drank the stuff or what effect it had, in the Two Jacks place, is competent.

The Court. Overruled.

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.

Peter Lynch, cross.

Witness. To my recollection we had either four or possibly five drinks; the first was whiskey, and upon his insisting upon me taking whiskey I took whiskey, thinking he knew what he was taking; I only had one and I took beer the next time.

Q What did he take? A Beer, the first was whiskey and beer after that.

Q How many drinks did Klein have? A Four, that I can remember; it might possibly be five.

Q And it consisted of what? A Three drinks of whiskey and one beer.

Q Where did you meet Klein? A In his own dwelling.

Q What time? A I would say about a quarter after seven.

Q In the evening? A In the evening.

Q Where was his dwelling? A Corner of Bergen and Bigelow.

Q That is about a block from this saloon? A Just about on the next corner.

Q Did you have anything to drink with him anywheres else? A No, sir.

Q While you were with him did he drink anything anywheres else? A No, sir.

Q Where did you and he go? A We left the saloon directly and went up and stayed in his kitchen.

Q How long did you stay with him there? A Well, we stayed there possibly half an hour; not over forty minutes.

Q Then what? A I went—I was home by nine o'clock.

Q How long did it take you to go home? A Fifteen minutes.

Q You left there at eight-forty-five? A Yes, sir.

Q When did you next see Klein? A I never seen him.

Cross examination by Mr. Schoen.

Q You say you met Klein at his home at what time? A I would say a quarter after seven.

Q In the evening? A Yes, sir.

Q That was the first you saw him that day; you were not with him in the morning or afternoon? A I had not seen him for twenty-five years before that.

Q And did you see any of his home-made stock? A No, sir.

Q Did he show you any of his home-made wine or whiskey? A Nothing was mentioned at all of any such thing.

Mrs. Anna Marie Klein, direct.

Q You walked home from the Two Jacks saloon with him at what time? A I was home in my house by nine o'clock.

Q How far did you live from his house? A About fifteen minutes.

Q And you started from his house at a quarter to nine? A No, we must have gotten to his house by half-past eight; I didn't notice the clock; I didn't know I would need it.

Q Was he intoxicated? A No, sir.

Q Acted well? A Acted well.

Q Sober, as far as you could see? A Yes, sir.

Q And complained of no illness? A No, nothing at all.

Q And that was what time? A About 8:15.

MRS. ANNA MARIE KLEIN, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Mrs. Klein, are you the widow of Edward Klein? A Yes, sir.

Q How old a man was he? A He was fifty-six when he died.

Q Have you children? A No, pardon me! He was fifty-five.

Q Have you children? A Yes, sir.

Q How many? A I have four children alive.

Q Do you know Mr. Lynch, the gentleman who was just on the stand? A Yes, sir.

Q Do you know whether or not he was at your home on the 28th of December last? A Yes, sir, he came in in the evening.

Q And where had your husband been during that afternoon or the day, so far as you know? A He was not home all day; he slept all afternoon, took a nap in the afternoon, and got up about four o'clock, and about five o'clock, I believe, he went down to the Two Jacks and had a drink.

Q Do you know who went with him? A He went alone and came right back and did not stay but about five minutes, he came right back; we had supper and after supper Mr. Lynch came in and they decided to have a drink at the Two Jacks.

Q And Mr. Lynch came back with him later on? A Yes, sir.

Q After Mr. Lynch went away what did your husband do? A He played cards with my son and son-in-law in the kitchen.

Q Until what time? A Eleven o'clock.

Q Then what did he do? A He went to bed.

Mrs. Anna Marie Klein, direct.

Q What happened, if anything, during the night? A Nothing happened; I didn't—I think he slept sound, so did I, until in the morning; I called him it is time to go to work; he told me, oh, he couldn't see—

Mr. Schoen. I object.

Q What did he say about his sight, he couldn't see?

Mr. Schoen. I object to the conversation between this lady and her husband in the absence of the defendant.

Mr. Mott. I am not asking—don't tell what he said.

The Court. One moment. Counsel says I object. Do you move to strike out what her husband said to her?

Mr. Schoen. Yes, sir.

The Court. You consent to that?

Mr. Mott. Yes, sir.

Q What did you notice about your husband the next morning? A I noticed he could not see and told him to stay home.

Q Don't tell us what you said; did he stay home? A No.

Q What did he do? A No, sir; he went out but did not get very far, but he took sick on the way going to work and came back.

Q How long was he gone from the house the next morning? A About six or seven minutes.

Q What was his condition as he left to go to work; what did you notice? A He didn't feel good and couldn't see very well.

Q What was his condition when he came back? A He was in terrible pain and could not walk; just fell to the floor in pain.

Q Just tell us what you did for him, what was done? A I telephoned for the doctor.

Q Did the doctor come? A The doctor came.

Q What was his name? A Dr. Kaplan.

Q Tell us what was done? A Well, he examined him and he could not tell what was the matter, so he decided to send him to the hospital; they took him to the City Hospital and they brought him home dead.

Q Did you see him at the hospital? A No, sir.

Q When was he brought home? A He died in the afternoon and was brought home the next day.

Edward Schaub, direct.

Cross examination by Mr. Schoen.

Q When your husband went out about five o'clock Sunday afternoon—was it Sunday afternoon? A Yes, sir.

Q Where did you go? A I stayed home; I was right in the back of the kitchen, in the store.

Q Stayed in the store? A In my store; yes, sir.

Q You didn't go out to see where your husband went? A Yes, sir.

Q You went out to see where he went? A Well, we know he was going to the Two Jacks.

Q Did you go out to see where he was going? A I did not go out, but I knew where he was going; he never went anywheres else.

Q Did you ever go with him? A No, sir.

Q How do you know? A It was the only saloon he ever went to.

Q Did he ever go to other saloons in the neighborhood? A Well, he was back in five minutes.

Q How long have you kept the store? A I have had my store fourteen years.

Q You have always been rather self supporting? A No, he worked.

Q Yes, but your husband drank up his money? A No, sir.

Q He was a heavy drinker, wasn't he? A No, sir.

Q He was not? A No, sir.

Q (*By the Court.*) Do you mean he was not a heavy drinker? A He drank like any other man, but not all the time; once in a great while he drank.

Q What time did you go to bed Sunday night? A I should judge about eleven o'clock.

Q Did you go to bed before Mr. Klein or after Mr. Klein? A I went to bed before him, but I didn't sleep, they were right in the next room playing cards.

EDWARD SCHAUB, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Where do you live? A 53 Roosevelt avenue, Maplewood.

Q Did you know Edward Klein? A Yes, sir.

Q Did you see him on the morning of the day before he died? A The same day he died I saw him.

Edward Schaub, cross.

Q Where did you first see him? A At his store, right in the kitchen.

Q What time in the morning? A About half-past six in the morning.

Q And what did you and he do? A We went to work together.

Q How far did you go? A About four blocks.

Q Then what did you do? A He turned back and I went to work.

Q What was his condition then; what did you observe about him? A He was all cramped up in his stomach; he could not go any further.

Q (*By the Court.*) Was he alone when you left him? A He was alone.

Q (*By the Court.*) When you left him? A Yes, sir.

Q How far from his house? A About three or four blocks.

Cross examination by Mr. Schoen.

Q How long have you known Mr. Klein? A About twenty-five or thirty years.

Q Was he in the habit of drinking? A Well, once in a while he would have a few.

Q What is that? A He would have a few once in a while.

Mr. Mott. Your Honor, subject to its relevancy, counsel will admit, he informs me, that Edward Klein was taken to the city hospital.

The Court. Of Newark, I presume that means.

Mr. Mott. City Hospital, Newark. He arrived at the City Hospital of Newark at or about 8:10 A. M., December 29, and died at the hospital at or about 1:45 P. M., on the same day; that is, the 29th.

The Court. That is Monday, the 29th of December.

Mr. Schoen. I object to the relevancy of this testimony until it is shown that the death of Edward Klein was due to something which can be connected with the defendant and that at the present time there has been nothing shown to connect the defendant, or any liquor which he is alleged to have kept in his possession, with the death of Klein.

Mr. Mott. Of course, that is so, but I am going to show, both by the physician who attended Klein, what his condition was, and the chemical analysis.

The Court. Yes, I will strike it out unless it is connected.

The Court. Overruled.

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.

JAMES H. MANNING, sworn in behalf of State.

Direct examination by Mr. Mott.

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

Q I show you Exhibit S. 1 for identification, a bottle, and ask you if you have seen it before? A I have.

Q Where did you see that? A At the Two Jacks saloon, corner of Hunterdon and Bigelow streets.

Q That is the saloon of Enderweis & Yeager? A Yes, sir.

Q When did you see that there? A December 29, 1919.

Q Who gave it to you? A John Yeager.

Q And what did you do with it? A Well, after he gave it to me I tipped it up to see if there was any contents in it and I found a small amount of liquor, so I took it along with me to police headquarters and later on in the afternoon took it to the laboratory of Dr. Edel in Broad street.

Q Did you take it to the laboratory of Dr. Edel, in just the condition you received it from Mr. Yeager? A Yes, sir.

Q Did you take from or add to in any way the contents of the bottle? A I did not either take from or add to.

Q I show you Exhibit S. 2 for identification; have you seen that before? A Yes, sir.

Q When did you first see that? A I seen that in the possession of Detective Kenny.

Q And you did not get that? A No, I didn't get it.

Q Did you take this anywhere? A Well, I took them both and Detective Kenny was with me at the time.

Q You mean— A To Dr. Edel's, the laboratory.

Q You took S. 1 and S. 2, both? A Both of them.

Joseph J. Kenny, direct.

Q (*By the Court.*) When you say you took something to the laboratory of Dr. Edel, to whom, if any person did you give that thing, that exhibit; did you see the doctor or his assistant? A I seen somebody in the office; I do not know who he was; some assistant of his; I asked for the doctor at the time and they said he was not in.

Not Cross Examined.

JOSEPH J. KENNY, sworn in behalf of State.

Direct examination by Mr. Mott.

Q You are a member of the Newark Police Department? A I am.

Q I show you this bottle, Exhibit S. 2, and ask you if you have ever seen it before? A I have.

Q Where did you first see it? A At the Two Jacks saloon, Hunterdon and Bigelow streets; also at police headquarters and also at the Edel laboratory.

Q From whom did you receive this? A Mr. Enderweis, John Enderweis.

Q What did you do with it? A Wrapped it up in a newspaper and put it in the automobile and took it away.

Q You took it where? A To police headquarters.

Q And then where? A To the Edel laboratory in Broad street.

Q Do you remember who you turned it over to? A I do.

Q Who? A Detective Manning had another bottle and he had the two bottles and we carried them upstairs and turned them over to a young man in the office; Dr. Edel was not there; it was a man in charge and he took charge of the bottle.

Q And do you know whether Exhibit S. 2 was turned over to the young man at Dr. Edel's laboratory in the same condition it was when you received it from Mr. Enderweis? A It was in the same condition; it was never away from me; never out of my sight.

Not Cross Examined.

Q (*By the Court.*) Anything in it when you got it from Mr. Enderweis? A There was.

John G. Yaeger, further direct—cross.

JOHN G. YEAGER, recalled in behalf of State.

Further direct examination by Mr. Mott.

Q Mr. Yeager, did you just inform me that you desired to correct your testimony in some respects? A Yes, sir, I did.

Q In what respect? A From testimony that I have heard here from Mr. Kenny, the detective, it seems—

Q I just want what you recollect, and what you know yourself.

Mr. Schoen. I object, unless this is put in question form and I know whether it is matter that can be objected to or not.

Mr. Mott. All right.

Q Well, in regard to the bottle S. 2 for identification, do you desire to correct your testimony in any way regarding the contents of that? A I wish to state, if I may, that I was under the impression that that was the bottle we kept the sherry wine in, and I hear from Mr. Kenny Mr. Enderweis gave him that from the stock room; I was mistaken in saying that was the sherry wine bottle.

Q What was the contents in that bottle? A I do not know; if that was taken from the stock room, I do not know; not if he gave that to Mr. Kenny.

Cross examination by Mr. Schoen.

Q Where have you been sitting since you left the witness stand? A Right there (indicating).

Q With whom? A Me and Mrs. Klein.

Q Who else? A That is all.

Q How long have you been in business up there? A Ever since we started seven years ago.

Q Been handling these bottles seven years? A The same bottles.

Q Bottles like them? A Yes, bottles like them.

Q Are you still in business? A No, sir.

Q Your place is open. A I am not connected with that place.

Q Who is? A My partner.

Q He is running it? A Yes, sir.

Q And you have got to come back and correct your testimony after you heard the police officer? A For the reason I thought that was the wine bottle.

John G. Yaeger, re-direct.

Q You merely think so because you heard Kenny's testimony? A Yes, sir.

Q And you think you have got to change your testimony to please the police officers? A No, sir; I want to correct myself; if Mr. Enderweis gave that to him it is not the sherry bottle.

Q You have got to put it on that basis now? A Yes, sir.

Q You were the man handling the sherry bottle? A Yes, sir.

Q You mean to say you cannot tell us it is a quart bottle? A No, it is a quart bottle and the other is a fifth.

Q (*By the Court.*) Fifth of what? A Of a gallon.

Q What was a fifth? A That bottle there.

Q The sherry bottle? A No, that is quart.

Q And the bottle used for sherry was a quart bottle and not a fifth, and this bottle you have once identified, is that a quart bottle? A Yes, sir.

Q This is the kind you used for sherry? A Yes, sir.

Q The only reason you are correcting your testimony now is because you are assuming what Kenny says is so; you are just trying to adjust yourself to Kenny? A Not at all. I am trying to be truthful in the matter.

Q You know your utensils that you used in your place of business? A Certainly.

Q And you used them a number of years? A Yes, and it was a bottle similar to that that we kept the wine in.

Re-direct examination by Mr. Mott.

Q Where did you keep the wine bottle, as you call it? A Kept the wine bottle in back with our whiskey.

Q Back where? A Back of the bar.

Q And did you have any other bottles of the same size that were in the stock room? A Yes, sir; there were all kinds of bottles that were in the stock room.

DR. ALBERT E. EDEL, sworn in behalf of the State.

Adjourned until Tuesday, May 25, 1920, at ten o'clock A. M.

SECOND DAY.

Tuesday, May 25, 1920.

STATE *vs.* SAMUEL SOLOMON.	Indictment No. 16. April Term, 1920. Wood Alcohol.

Before Hon. William P. Martin, Judge.

For the State appears Wilbur A. Mott, Esq.
For the defendant appears Edward Schoen, Esq.

Mr. Mott. At the request of counsel for the defense I will postpone the examination of Dr. Edel. That is right, is it not, Mr. Schoen?

Mr. Schoen. Yes, sir.

DR. BENJAMIN EDWARD KAPLAN, sworn in behalf of State.

Direct examination by Mr. Mott.

Q You are a licensed physician of this county? A Yes.
Q How long have you been practicing A Since 1905.
Q Did you know Edward Klein in his lifetime? A Yes, sir.
Q Were you called to see him in the latter part of December, last? A I was called one morning; I do not remember exactly the month; I was called one morning at seven A. M., to see him; I think it was in December; I do not remember the exact month.
Q Couldn't you tell by referring to your records? A I have not my records with me.
Q Well, you knew what you came here for to testify? A That is the only time I saw him, so I think that must be the time.
Q You never saw him but once? A That is all.
Q Where did you see him? A At his home.
Q At about what time in the morning? A About seven A. M.
Q Do you remember the day of the week? A Monday morning.

Dr. Benjamin Edward Kaplan, cross.

Q Just describe to the Court and jury how you found him? A I found him lying on his bed, partly dressed; he seemed to be in excruciating pain and he complained of loss of sight and extreme pain in the abdomen; he was so tender and in so much agony that I really could not examine him thoroughly; I relieved his pain by hypodermic injections of morphine and ordered him removed to the hospital immediately.

Q Were you able to diagnose in any way his case? A I thought he was suffering from some form of poison, but I could not make out exactly what it was.

Q What is the approach of blindness a symptom of? A Well, it is a symptom of a good many things.

Q Well, what are the main ones? A Well, symptom of some form of poisoning, symptom of kidney trouble, uremia; symptom of apoplexy; symptom of atrophy of the optic nerve.

Q Is it a symptom of wood alcohol poisoning? A Yes, sir.

Cross examination by Mr. Schoen.

Q Had you ever treated Edward Klein before? A No, sir.

Q You were not the family physician? A I treated some members of the family, but not Mr. Klein himself.

Q Do you know whether or not Mr. Klein suffered from kidney trouble? A I do not know; that is, from the standpoint of his physician I do not know it; I know he has been a drinking man, from a heresay, but I do not know about his physical condition.

Q You were the family physician? A Yes, sir.

Q And from your contact with the family as physician you learned that he was a drinking man? A Yes, sir.

Mr. Schoen. I object.

The Court. Sustained.

Mr. Schoen. And ask to have the answer stricken out.

The Court. Strike it out. The doctor may state what he learned from the patient while he was there, for the purpose of treating the patient or from anybody in the presence of the patient which was uttered by the patient; all else is heresay.

Q Have you ever seen or treated a case of alcholism? A I have not had very many.

Dr. Benjamin Edward Kaplan, cross.

Q Have you seen cases of alcoholism? A Yes, sir; I have seen them ni the later stages.

Q Have there been any deaths from alcholism, to your knowledge? A Yes, sir.

Q And has that occurred from the use of pure grain alcohol? A Yes, sir.

Q Good whiskey? A Yes, sir.

Q And does that produce a form of poisoning in the stomach? A It does in a chronic form.

Q Now, without the symptom of the loss of sight, were the remaining symptoms that you observed in Edward Klein, any different than would be present in a case of ordinary alcoholism? A Well, his symptoms were more acute.

Q But were they the same type of symptoms? A Some of them might have been, but his pain was more acute than in chronic alcoholism.

Q Now, Doctor, the loss of sight is not attributable only and solely to wood alcohol? A Not necessarily, no.

Q It may occur from uremia? A Yes, sir.

Q Which is a kidney disease, is it not? A Yes, sir.

Q From what other source? A May occur from apoplexy, from atrophy of the nerve.

Q So that there are at least four or five causes which might produce blindness? A Yes, sir.

Q And it is not limited merely to the use of wood alcohol or other poisoning? A No.

Q Now, have you read recently of the loss of lives from the use of poisoned olives?

Mr. Mott. I object. How is that cross examination?

The Court. I do not think you have laid any foundation for that.

Mr. Schoen. This witness says that one of the symptoms which he observed is the loss of sight and that is one of the symptoms which led him to believe that there was poisoning from wood alcohol. Now, I think this is the foundation. The question I am asking now is for the purpose of laying the foundation, for the doctor has spoken of three or four other kinds of causes from which blindness results. I want to call his attention to another cause.

The Court. He may be asked whether or not he knows of any food preservative or any forms in which food might decay or decompose or change, but what right have you to call his attention to an article until he denies the particular fact that you are after?

Mr. Schoen. I will accept the suggestion of the Court and reframe my question.

Q Doctor, have you read the article in—I do not want to seem to disregard the ruling of the Court, but I do not think that by the question in this form—I will withdraw it.

Q Did you read the articles which appeared in the newspapars some time in January of this year, and December of this year, entitled "Poisoned Olives in Eight States."

Mr. Mott. I object to the question because of its indefiniteness "in the newspapers." I think it is too indefinite.

The Court. Sustained.

Mr. Schoen. Well, to meet that objection I will reframe it.

Q Did you read the article in the Newark Evening News, February 22d, entitled "Poisoned Olives in Eight States"? A I did not read the article, but I have heard of the incident.

Q Also an article in the various New York papers? A I have heard of these cases.

Q Do you know that one of the symptoms of poisoning resulting from the eating of certain foods is blindness; do you know that is one of the symptoms discovered? A I did not know that; I did not see that.

Q Did you, in your medical studies, or have you learned that as far back as 1899 poisoning from ham occurred, which showed blindness as a symptom? A I know of ptomaine poisoning and food poisoning to occur, but I have never heard of any blindness occurring from this condition.

Q Haven't you heard of blindness as one of the symptoms of these olive poisonings? A No, sir.

Q Didn't you study the question? A I looked it up, but I never seen any blindness.

Q Have you ever seen any food poisoning? A I have seen food poisoning.

Dr. Benjamin Edward Kaplan, cross.

Q Have you seen any of the recent cases resulting from the use of poisoned olives? A No, sir.

Q Well, then, you say that you did not make a study of the symptoms resulting from the use of poisoned food in these recent food cases? A Excepting from those cases I meet in my general practice.

Q (*By the Court.*) In the case of drinking wood alcohol, how soon would the effect of excruciating pain and dimness of sight or loss of sight appear? A That would depend entirely upon the amount of liquor consumed and percentage of poison in the liquor.

Q (*By the Court.*) Would it take a longer or shorter time with grain alcohol? A Longer time with grain alcohol.

Q (*By the Court.*) What is the process of elimination of grain alcohol from the system when it is taken in? A It is eliminated through the kidneys, chiefly.

Q (*By the Court.*) And quickly? A No, very slowly.

Q (*By the Court.*) How about the gas through the lungs? A You mean in grain alcohol?

Q (*By the Court.*) Yes. A I think it is chiefly eliminated by way of the kidneys.

Q (*By the Court.*) Well, if it were a fact that Mr. Klein had not drank anything containing any kind of alcohol within ten to twelve hours before you saw him, would your judgment be that the conditions you saw were the result of grain alcohol or wood alcohol? A Wood alcohol.

Q (*By the Court.*) You say dimness of sight is sometimes due to uremia poisoning? A Yes, sir.

Q (*By the Court.*) Is that a slow or quick attack? A Why, the actual attack would be gradual coming on, but the loss of sight might come on quickly.

Q (*By the Court.*) Would it be accompanied by intense pain in the intestines? A It would be chiefly accompanied by convulsions, or coma, stupor.

Q (*By the Court.*) It would not be excruciating pain in the intestines or abdomen? A Not likely to.

Q Now, paralysis or apoplexy is the result of some slight bleeding in the brain? A Yes, sir.

Q (*By the Court.*) And in order to affect the eyesight it would have to be a bleeding in that part of the brain which controls the optic nerve? A Yes, sir.

Bart J. Freeman, direct.

Q (*By the Court.*) Is that correct? A Yes, sir.

Q (*By the Court.*) Well, if a condition of that character existed, would it be likely to affect some other part of the nerve system? A Well, it would all depend where the hemorrhage in the brain occurs, what area is involved.

Q (*By the Court.*) If it is the area that controls the optic nerve it is likely also to include some other nerve? A That would depend on the size of the hemorrhage.

Q Well, if it is enough of a hemorrhage to cause the loss of eyesight? A Not necessarily, no, sir; it might only affect that particular area.

Q (*By the Court.*) Would it be accompanied by excruciating pain in the abdomen? A No, sir.

Q Doctor, you said grain alcohol is eliminated principally by way of the kidneys? A Yes, sir.

Q Now, if the kidneys are diseased or affected, does that hinder the elimination of the alcohol? A Yes, sir.

Q And would that tend to produce a convulsion and pain in the abdomen? A It would gradually, in chronic conditions, over a long period of time.

Q Chronic condition of the kidneys? A In chronic alcoholism—if a man partook of alcohol for a long period of time, naturally his eliminatin powers would be gradually decreased and his poisoning would gradually occur.

Q What is nephritis? A Disease of the kidneys.

Q Would that disease affect the ability to eliminate alcohol? A It would affect it, almost everything; not only alcohol.

Q (*By the Court.*) What is nephritis? A It is an inflammation of the kidneys; of course, there are several forms and several types, but that is the general term.

BART J. FREEMAN, sworn in behalf of State.

Direct examination by Mr. Mott.

Q Where do you live? A 16½ Rowland street, Newark.

Q What is your occupation? A I am a deputy collector in the Internal Revenue Department.

Q Under the United States Government? A Yes, sir.

Q And were you in that position in December last? A I was.

Q Do you know Mr. Solomon, the defendant? A I know him now, yes.

Q Well, have you seen him before today? A Yes, sir; I met him once at a hearing before Commissioner Matthews.

Q Did you ever go to his saloon? A I did.

Q When? A On Saturday afternoon, December 27, 1919.

Q Did you go alone or in company with someone? A I was accompanied by Deputy Collector Heinz and Inspector Brown and Captain Maiers of the Fourth Precinct.

Q (*By the Court.*) Inspector Brown of our Newark Police Force? A Yes, sir.

Q Anyone else? A There were some policemen there; I do not know how many, two or three.

Q Do you remember whether this man, Officer Smith, was there? A Yes, sir; he was there.

Q What did you do when you got there?

Mr. Schoen. I object, on the ground that what this witness did, what occurred, in Mr. Solomon's place, on the 29th of December, is not relevant to this issue, too remote; had no connection with it.

The Court. December 27th.

Mr. Schoen. Yes, sir. Under this indictment Solomon is charged with keeping in his possession on a certain day certain specific liquor. He is charged with keeping in his possession two gallons of liquor on the 23rd of December, and on the evidence of the State so far, if that liquor was there, it was taken away on the 23rd of December by Mr. Enderweis, so that what occurred on the 27th of December can have no possible bearing upon the question before this Court and jury, as to whether on the 23rd Mr. Solomon kept two gallons of whiskey in his possession.

Mr. Mott. I do not intend to prove that he kept liquor for the purpose of barter and sale.

Mr. Schoen. I do not see how they can. Any acts after the commission of the alleged offense, and so long after that, they cannot be considered—

The Court. Four days after.

Mr. Schoen. —as part of the *res gestae*, are not binding upon the defense in any way at all. I make that objection on that ground.

Bart J. Freeman, direct.

Q (*By the Court.*) Where did you go, Mr. Freeman? A I went—I received a telephone call—

Q (*By the Court.*) I did not ask you about the call, but where did you go? A To the saloon at the corner of Waverly avenue and Belmont avenue.

Q (*By the Court.*) Do you know this defendant here in court? Have you ever seen him before? A I met him once at a hearing before Commissioner Matthews since then.

Q (*By the Court.*) Is there only one saloon on that corner? A That is all, I believe, it is No. 210 Belmont avenue.

The Court. What are you going to prove?

Mr. Mott. He says he took away some liquor.

The Court. Are you going to attempt to prove that the liquor that was taken away was a part of or similar to the liquor in question in this case?

Mr. Mott. I am going to prove that it was whiskey behind the bar.

The Court. Overruled.

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 Was Mr. Solomon there that day? A He was not.

Q Did you take anything away with you?

Mr. Schoen. I object on the further ground that whatever occurred was in the absence of Mr. Solomon.

The Court. Overruled.

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 Did you take away anything with you? A Yes, sir.

Bart J. Freeman, cross.

Q I show you Exhibit S. 3 for identification, a bottle, and ask if you saw that before? A I did.

Q Where did you first see it? A Behand the bar in Solomon's saloon.

Q What did you do with this bottle? A I seized it.

Q And where did you take it? A Took it to the revenue office.

Q What did you then do with it? A Took a sample of it with your detective from the Prosecutor's office and sealed it.

Q Mr. Hargan, stand up. Is that the man? A Yes, sir.

Q Where were you when you did that? A In the Revenue office.

Q Then what was done? A I turned it over to Mr. Hargan.

Q The sample? A Yes, sir; and sealed that bottle and put it in the bottle.

Q Are you able to say now whether this bottle has the same seal on and is in the same condition it was after you sealed it up and put it in the bottle? A That is my initial right on it and the initial of Mr. Maiers, who was with me at the time.

Q And did you take anything else? A I did, sir.

Q What? A I took that can there.

Q Where did you find that? A On the stairs leading to the cellar.

Q And did you take anything else? A Yes, sir.

Q What? A I took several packages of goods with me.

Q What did you do with them? A I put them in a truck and took them to the Internal Revenue office.

Q (*By the Court.*) Several packages of goods is very indefinite? A Well, several bottles and two packages of liquor that were without revenue stamps; I took them with me also.

Cross examination by Mr. Schoen.

Q What time of day did you get to the place? A It was about 3:30, I believe.

Q Who was in the place? A When I got there there was either one or two police officers and Mrs. Solomon.

Q Well, had you arranged with the officers to meet you there? A They arranged with me to meet me there.

Q They arranged with you? A Yes, sir.

Q Prearranged meeting; is that right? A Yes, sir.

Bart J. Freeman, cross.

Q Didn't you get some of these things from some of Mr. Solomon's living apartment? A Yes, sir.

Q And those living apartments were on what floor? A The second floor.

Q Which one of these bottles did you get from his living apartment?

Mr. Mott. Well, he has not said he got any of the bottles. I object to the question.

Mr. Schoen. This is cross examination.

Mr. Mott. It assumes he got one of the bottles from the living apartment; I do not know whether he did or not.

Q (*By the Court.*) Do you call the hallway in which you got the can from the living apartment? A No, sir; that was leading to the cellar.

The Court. Answer the question. Are you indicating the bottles on the tables, Exhibits S. 1, 2 and 3 for identification?

Mr. Schoen. Yes, sir.

Witness. Only one of these bottles.

The Court. He says one of them.

Q And was the can found in his saloon? A In the cellar; on the stairway leading to the cellar.

Q And was there any other stuff there, junk? A In the cellar?

Q Debris of all kinds? A Yes, sir.

Q Did you see any junk there, metal junk, rags? A Not where that can was.

Q Well, did you see it in the cellar? A Yes, sir.

Q It was a sort of storage place for rags and metal and cans of all kinds? A There was a lot of junk there.

Q And you picked up this one can? A Not where the junk was.

Q Well, you said it was in the cellar? A Where that junk was you went from the side street into the cellar; from the street into the cellar, but where this can was you went from a door in the saloon.

Q Couldn't you get to the same part of the cellar from the side door in the street? A I do not think so.

Q Well, it is all one cellar? A I do not think so; it is partitioned.

Q You do not say that cellar is partitioned off with brick walls? A Well, I could not get in that way from the street.

Q There is only the usual coal bins there, aren't there? A I don't know; I didn't examine it that closely.

Q Aren't there two entrances to this cellar, one through the hallway inside and one through the side street, the side door leading down the steps to the cellar on the side street? A I went in both ways.

Q You went in both ways and got into the same part of the cellar? A No.

Q Well, you got into the same cellar? A The same cellar, but I think it was partitioned off.

Q Now, did you put the bag on this can? A I did not.

Q Who did? A I do not know; that is the way I found it, with the bag on it.

Q You found it with that bag on? A Yes, sir.

Q Did you read what was on this bag? A I did not.

Q Didn't you read what was on this bag at all? A No, sir.

Q When you took it out? A No, sir.

Q Or before you took it out? A No, sir.

Q Well, did you see the printing on the bag? A I didn't pay any attention to the printing on the bag.

Q You are a revenue officer and investigator? A Yes, sir.

Q And go out to get all the information you can on these revenue cases or alleged violations of the prohibition law? A Yes, sir; when I am sent for.

Q And when you were sent to Mr. Solomon's place you went for the purpose of making an investigation? A Yes, sir.

Q And you mean to say you took this can in a haphazard way and although you saw a bag with printing on you didn't look at it and have not looked at it up to this day? A I did not look at the bag, no; I opened the can and smelled the contents of it.

Q Are there any contents in it? A I do not know; there was some in it.

Q Is this exactly in the condition you took it from Mr. Solomon's place? A No, sir; we took some goods out of here.

Q You took all the goods out of it? A No, sir; just a sample; there wasn't much in it at the time.

Bart J. Freeman, cross.

Q Did you leave anything in it; see if you can find anything in it? A Well, it is there so long—

Q See if you can find anything in it? A There is nothing in it now.

Q Is there anything unusual about that can? A There is nothing unusual about it.

Q Have you seen a can like that before? A I have seen several like it before.

Q Several? A Yes.

Q Are those cans used as a container for grain and things of that kind? A Of what?

Q What is it; how is it you were not sufficiently interested in this can to read the printing on that bag? A Well, I saw the can and I had information that—

Q Never mind what your information was.

The Court. That is what you asked.

Mr. Mott. That is what you asked.

Mr. Schoen. I want to get my objection on the record. He may say he had some information on which he acted, but I object to him stating any hearsay, what he was told.

The Court. Answer the question.

Q (Question read.)

The Court. What is the answer to that?

Witness. I received information.

Mr. Schoen. Is your Honor going to limit this witness?

The Court. No; I am going to limit him to the truth; that is all.

A I received information there was a man used to carry a can covered with a burlap bag, who would be seen going in and out every morning, or two or three times a day, from Solomon's saloon, and I looked for that can covered with burlap bag when I went there and I discovered that on the stairway leading to the cellar.

Q And that is the reason you did not take the trouble to read what was on the outside of that bag from the day you got it up to the present date? A No, although I saw it I was never sufficiently interested to read it.

Alfred J. Hargan, direct.

Q How much junk did you see in that cellar? A I did not pay any attention to the junk.

Q Haven't you any idea how much of it was there? A I have not.

Q Was there a large quantity or small quantity? A I do not know.

Q Did you have any information that there was a junk man who used that cellar for his business? A I did not.

Q That information did not come along with the information about the man who went in and out with the can? A No, sir.

Q Do you know now there was a junk man who did business in that cellar? A I do not.

Re-direct examination by Mr. Mott.

Q You say you took some of the contents out of this can? A Yes, sir.

The Court. S. 4 for identification.

Q When and where did you do that? A In the Revenue office.

Q Who was there? A Mr. Hargan and Mr. Heinz.

Q What did you do with the sample you took from the can? A Sealed it and turned it over to Mr. Hargan.

Q (*By the Court.*) When you went in there where was Mrs. Solomon? A Standing behind the bar.

Q Where was this bottle, S. 3 for identification? You already have stated it was behind the bar, but that is a very indefinite statement. Was this barroom like most barrooms in a saloon? Was there a case or drawers or compartment in behind the bar? A There was compartments behind the bar, but that was not in the compartment; that was just what they call the working table, I suppose they would call it.

Q (*By the Court.*) Was it underneath the bar? A Yes, sir.

Q (*By the Court.*) Were there other bottles there? A Yes, sir.

ALFRED J. HARGAN, sworn in behalf of State.

Direct examination by Mr. Mott.

Q You are a detective in the County Detective and Prosecutor's office? A I am.

Robert Siskind, direct.

Q And you had charge of the preparation of this case for the State? A I have.

Q I show you Exhibit S. 3 for identification and ask you if you have seen that bottle before? A I have.

Q Where did you first see it? A In the Internal Revenue Department on December 31st.

Q Who was there? A Mr. Freeman and Mr. Heinz.

Q What did you do with that? A I took part of the contents of the large bottle and put it in a smaller bottle and sealed the small bottle, which I took with me.

Q What did you do with the smaller bottle? A I delivered it to Dr. Edel at his laboratory on Broad street.

The Court. S. 5 for identification.

Q I show you Exhibit S. 5 for identification. A That bottle is the bottle that I took part of the contents of S. 3 to Dr. Edel.

Q To whom did you deliver this S. 5? A Dr. Edel himself, personally.

Q Have you seen this can, Exhibit S. 4 for identification? A I have.

Q Where did you first see that? A At the same place and at the same time.

Q What did you do in regard to that? A I took what remained of the contents of that and placed it in a bottle and sealed it and took that also to Dr. Edel.

Q I show you Exhibit S. 6 for identification and ask you what that is? A That is the bottle in which I took the contents of the can, S. 4, in to Dr. Edel.

Not cross examined.

ROBERT SISKIND, sworn in behalf of State.

Direct examination by Mr. Mott.

Q I show you this bottle, S. 1 for identification; have you seen it before? A Yes, sir; I received that bottle from the officer who came to the laboratory, Dr. Edel's laboratory.

Q After you received it what did you do with it? A I kept it in my presence until a short while later Dr. Edel came in and I turned it over to him.

Robert Siskind, direct.

Q Did you turn it over to Dr. Edel in the same condition it was when you received it? A Yes, sir.

The Court. You showed the witness S. 1?

Mr. Mott. Yes, sir. I now offer in evidence S. 1 for identification. That is the bottle that Yaeger says he put—

Mr. Schoen. I object to it going in evidence, because it does not appear that the whiskey that Yeager claims he got from Mrs. Solomon came from that bottle in exactly the same condition that he received it, or that it was in the same condition in which he received it. The evidence is that these transfers were made to bottles that were unsterilized, and therefore this defenadnt cannot be bound by the condition of any liquor taken from these bottles or from that bottle.

The Court. Overruled.

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.

The Court. It will be received in evidence by striking out the words "for identification."

Bottle marked Exhibit S. 1.

Mr. Mott. I offer in evidence Exhibit S. 3 for identification.

Mr. Schoen. I object to the admission of that in evidence on the ground that the same is alleged to have been taken from Mr. Solomon's place at a time too remote to be a part of the *res gestae* in this case, and that it in no way relates to the charge in this indictment, that on the 23rd of December he kept two gallons of whiskey in his possession for barter and sale; there is no evidence that the contents of this bottle were part of the two gallons alleged to have been kept in his possession on the 23rd of December.

The Court. What have you to say about that?

Bart J. Freeman, by the Court.

Mr. Mott. I think, your Honor, it is so close in time that it is competent. Nothing shows that the situation changed between the date alleged in the indictment and the 27th and the charge is not selling, but it is having in his possession for sale. Now, I have proven that this bottle was under the bar, back of the bar, and in the place where the bar bottles—the working bottles are kept, and I think it is competent.

The Court. Why is it competent? This indictment is that Solomon kept for barter and sale spirituous liquor, to wit, whiskey, and that the same was either manufactured with poisons or some other substances in it, described by the State, or that he adulterated it.

Mr. Mott. Yes, sir.

The Court. It is shown in the case that a jug came from his place, in the back room where Mrs. Solomon took Enderweis on Tuesday, December 23rd; it is also shown that Enderweis had three or four drinks at the bar and Mrs. Solomon and he talked over the whiskey and I think he said he wanted that whiskey; then he went to the back room and got this jug full. Is what they had in behind the bar on Saturday, December 27th, any evidence of the nature of the thing that they sold over the bar, or to Enderweis, on the 23rd?

Mr. Mott. I think it is, your Honor; I think it shows a course of habit. I think it shows method, and where are you going to draw the line? Couldn't you have taken it away afterwards; couldn't you have taken it away the next day? Remoteness may affect the value of the evidence, its weight, but I think it is competent.

The Court. Where is Freeman? Is he in court?

Mr. Mott. Yes, sir.

BART J. FREEMAN, resumes the stand in behalf of the State.

Examined by the Court.

Q Was this bottle, S. 3 for identification, corked and sealed up with metallic seal, or did it have any label on it when you got it? A No, sir.

Bart J. Freeman, by the Court.

Q What was its condition when you took it from behind the bar? A What they would call a working bottle.

Q We do not understand that answer? A Well, it is a bottle that they were using.

Q Was the cork in or out? A The cork was in.

Q Was it empty or full or otherwise? A It was not full.

Q How much was in it, if you remember? A There was about that much in it (indicating).

Q About an inch and a half, are you indicating, from the bottom? A Yes, sir.

Q That is what you call a quart bottle, or fifth? A Fifth.

Q Of a gallon? A Yes, sir.

Q And the cork was in it, but in it in such a way that it could be taken out with the fingers and not necessary to take it out with a corkscrew; is that it? A Yes, sir.

Q Did you examine the other bottles behind the bar? Just answer that yes or no. A Yes, sir.

Q Did you see any other bottles containing a liquor of similar color? A Yes, sir; there was a small flask.

Q Is that it, what counsel shows you? A Yes, sir.

Q Was there anything else containing a liquor of a similar color? A No, sir; there was several bottles of wine; half filled with wine.

The Court. Why does not that make that competent? I understand the situation is this: that it appears that Enderweis went to his saloon and asked Mrs. Solomon for whiskey and she served him with whiskey at the bar; that is something by way of evidence from which the inference may be drawn that she served him from this bottle, S. 3 for identification; that on Saturday some time it was found there, probably in the same place or near it, behind the bar, and there was something of its contents left. Without any other explanation is there not enough there from which the jury might draw an inference that this is the same bottle and the contents of the same?

Mr. Schoen. If you are going to proceed to reason, draw inferences from that hypothesis that your Honor has stated, you have got to assume just the contrary, because they were doing business there and were selling liquor over the bar—or there was four days elapsed between the time

laid in this indictment and the time Freeman went there, so that it is not fair to assume and it is not a logical inference to draw, if we are assuming the premise your Honor has stated, that they were selling over the bar. It must not be left to a bare inference to be drawn and there must be proof before this can be offered in evidence that it is part of the same whiskey, not that we infer that it might be, and I say again that the inference must be the other way on your Honor's premise.

(After argument.)

The Court. This evidence is admissible, first upon the the theory of identification of the nature and quality and actual contents of the jug containing two gallons of whiskey delivered to Enderweis; it is something from which the jury may draw an inference; second, it is admissible on the intent of the defendant in keeping the liquor, and, third, it shows the general course of dealing, the practice acquired by the defendant or permitted by the defendant in his place of business. The objection is overruled.

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.

Bottle marked Exhibit S. 3, by striking out the words "for identification."

Bottle marked Exhibit S. 1, by striking out the words "for identification."

Mr. Mott. I now offer Exhibit S. 5, being one of the samples taken by Mr. Hargan to Dr. Edel, the bottle.

Mr. Schoen. I object to the admission of this bottle; I presume your Honor does not want me to restate the reasons?

The Court. Upon the same ground as before?

Mr. Schoen. Upon the same ground.

The Court. Objection overruled.

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.

Bottle marked Exhibit S. 5 by stricking out the words "for identification."

Mr. Mott. I now offer Exhibit S. 6 for identification, being the sample taken from the tin can.

Bottle marked Exhibit S. 6 for identification by striking out the words "for identification."

Mr. Schoen. I object to that upon the same grounds and also upon the further ground that there is nothing in this can; there has been nothing shown here that fastens the ownership of this can on the defendant. It was taken from the cellar where there was a lot of other junk, rags and cans of all kinds, and there certainly is nothing with respect to this can that can in any way be binding upon the defendant to show any course of dealing or conduct.

The Court. You are offering the sample before you prove the original.

Mr. Mott. I will follow it immediately.

The Court. Objection sustained.

Mr. Mott. I offer the can.

Mr. Schoen. I object to that on the same ground.

(After argument.)

The Court. Objection sustained.

DR. GEORGE L. WARREN, sworn in behalf of State.

Direct examination by Mr. Mott.

Q You are county physician of this county? A Yes, sir.

Q How long have you been county physician? A Four years.

Q How long have you been a practicing physician? A Twenty-one years.

Q Did you perform an autopsy on the body of Edward Klein? A Yes, sir.

Q Where? A At the Newark City Hospital.

Q When? A On the 29th day of December, 1919.

Q What time of the day? A 4:30 P. M.

Q Just tell the Court and Jury what you did; what you found.

Mr. Schoen. I wish to object before the doctor testifies to testimony of the result of his autopsy, until it is shown that the death of Mr. Klein was due to liquor which he drank, which was in the possession of Mr. Solomon on the day alleged in the indictment, and that when he drank it it was in the same condition it was in when in the possession of Mr. Solomon. Now, the evidence is that it was not served to him out of the same can which they say they got it in and that they poured it into unsterilized bottles and for that reason I feel that no evidence of the result of the use of that liquor offers affirmative proof in the case that the liquor was in the condition in which it was obtained or when in Mr. Solomon's place, and is not binding upon him and is not evidential upon the question of the character of the liquor which Mr. Solomon kept in his place, if he kept it at all, at the time he kept it there.

The Court. Objection overruled.

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.

A At the autopsy we found the man had died of acute poisoning; his stomach and upper intestinal tract were swollen and distinctly reddened and the stomach and stomach contents and part of the organs were given to the chemist for analysis; I received a report from the chemist.

Q (*By the Court.*) Who is the chemist? A Dr. Albert Edel.

Q Was he present when the autopsy was performed? A No, sir; he was not.

Q Are you sure? A Positive.

Q Did you send anything to Dr. Edel? A No, sir; I didn't; he called at the hospital laboratory and obtained the samples himself.

Q From whom? A From Harry Moran.

Dr. George L. Warren, direct.

Q Go on and tell us a little more about the autopsy and what the conditions of the organs were. A The man's brain showed a slight edema; the vessels were fairly well dilated; the lungs were dry on the cut section and the left lung showed an old tubercular scar that healed; his heart was in very poor condition; his heart muscles was a type of myocarditis and he had a distinct pericarditis; his stomach and upper intestinal tract were reddened; the stomach lining was swollen; the stomach contained about four ounces of greenish yellow fluid; his liver was normal; his kidneys were low type of nephritis or Bright's disease; his arteries were poor.

Q Were you able to diagnose the kind of poisoning? A No, sir; not by the autopsy.

Q Would the condition of his organs, in which you found them, have anything to do with his susceptibility to poisoning? A Why, if his physical condition was poor; he would be more susceptible to poisoning than a normal individual; there are people who are more susceptible to poison than others.

Q Tell us about that? A Why, there is an individual susceptibility to poisoning; some will be poisoned very readily by a small dose of quinine, not seriously, and bring on a rash; a small dose of belladonna will poison some while others can take large doses without any harm.

Q What is wood alcohol? A Wood alcohol is a poison; it resembles grain alcohol in color; it is obtained by the destructive distillation of wood.

Q Now, what organs did you leave for Dr. Edel? A The stomach, the stomach contents, part of the intestinal tract, part of the liver, heart, lungs, brain, kidneys and spleen. He had samples of the blood and urine.

Q (*By the Court.*) When these were taken, were they taken to the place in separate receptacles, or were they all put in one? A The blood and urine were in separate containers; the stomach and stomach contents, with part of the intestinal tract were in one container; the other parts of the organs were placed in a third container.

Q What was the cause of death? A Acute poisoning.

Q Dr. Warren, what experience have you had with wood alcohol poisoning cases? A Well, I have had autopsies, some twelve bodies during the month of December, 1919, and January, 1920.

Dr. George L. Warren, direct.

Q Doctor, assuming that Klein was drinking Sunday night or afternoon, was sick on Monday morning, a physician called in, found to have extreme violent pains in the stomach, stricken with blindness, taken to the hospital at or about 8:15 Monday morning and died Monday afternoon about 3:15; with these facts before you, how would you diagnose the case?

Mr. Schoen. I object. This question does not contain all there is in the proof in this case. It does not state the quantity of liquor consumed, the kind of liquor; it does not state the physical condition of Klein, it does not state the condition of the heart, kidneys, lungs and arteries; it does not take into account any of these things in the case. If it is to be a hypothetical question, it ought to include everything.

The Court. Overruled.

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 Take these facts in connection with the things you found? A I would say he died of wood alcohol poisoning.

Q Why do you say that? A From the symptoms and the autopsy; the comparison of the condition of the stomach and the organs with other cases I have autopsied, where it had been proven wood alcohol was drunk; I would be of the opinion he was a wood alcohol victim.

Q Is there any difference between the progress of pure alcoholism, as we call it, grain alcohol poisoning and wood alcohol poisoning? A In grain alcohol poisoning the symptoms come on rapidly and pass away rapidly; in wood alcohol poison the fatal symptoms are delayed; they come on nine, ten or twelve hours after the alleged drinking, without the dose had been large, then they would come on rapidly, if a man took a large dose of wood alcohol the symptoms would come on quickly.

Q How about the symptoms of food poisoning? A That depends upon the character of the poisoning; if it is due to decayed food or rotten food that has been eaten, it would come

on rapidly, and in these other cases of food poisoning, the olive cases and, those due to beans, the symptoms have been delayed; they are more similar to those of wood alcohol; they come on probably within twenty-four hours, and some are delayed as long as seventy-two hours.

Q Of the latter cases, of which you are speaking, does blindness appear? A There is a double vision due to paralysis of the muscles that control the eyes, which brings on a form of blindness.

Cross examination by Mr. Schoen.

Q First let me ask you if there is such a thing as grain alcohol poisoning? A Yes, sir.

Q You know of cases in which death occurred from unadulterated grain alcohol? A Yes, sir.

Q And do you know of cases of deaths which have occurred from whiskey itself? A Yes, sir.

Q Good whiskey, not adulterated? A Unadulterated; supposed to be good whiskey, yes.

Q And you call that what in medicine, what name has it in medicine? A Alcoholism.

Q What do you call it when a man dies from the result of drinking? A Oh, acute alcoholic poisoning.

Q And have there been any deaths from alcoholic poisoning, either of your own experience, or reported? A During the past year I believe we had two that were due to grain alcohol poisoning, or whiskey poisoning, not adulterated.

Q And that comes from excessive use of whiskey, or alcohol, does it? A Yes, sir.

Q Now, are the conditions of the stomach in a case of poisoning from grain alcohol any different than the condition of the stomach, as you found it, in Mr. Klein when you autopsied him? A No difference whatever.

Q So, from the condition of Mr. Klein's stomach at the autopsy you could not say whether it was due from excessive use of unadulterated whiskey or whether it was due to whiskey adulterated with wood alcohol, could you? A No, I could not.

Q (*By the Court.*) Would it be swollen and red? A It would be just the same by either grain or wood alcohol.

Dr. George L. Warren, cross.

Q Now, you said that in grain alcohol poisoning the symptoms come on rapidly and pass off rapidly? A Either they terminate in death or the person recovers.

Q Now, when you say pass off rapidly, in what way do you want us to understand that. The grain alcohol is eliminated through what organs? A The grain alcohol is eliminated through the kidneys and lungs.

Q Now, you saw the condition of Mr. Klein's kidneys at the autopsy? A Yes, sir.

Q And you have stated that they were of a low type of nephritis? A Yes, sir.

Q Which is a chronic Bright's disease? A Chronic Bright's disease.

Q That is the condition you found Mr. Klein's kidneys in? A Yes.

Q Would that condition of the kidneys that you found retard the elimination of the grain alcohol in his system? A It would.

Q So that Mr. Klein, taking Mr. Klein as the subject, if he drank an excessive quantity of good grain alcohol of whiskey, would be unable, with the condition of his kidneys, to eliminate it rapidly? A Well, it would be a delayed elimination.

Q Would that tend to produce an alcoholic poisoning any more than if his kidneys were not in that condition? A Yes; it would.

Q And would it tend, assuming that he drank an excessive quantity of unadulterated whiskey or alcohol, would the condition of his kidneys tend to a fatal result more rapidly than if his kidneys were in good condition? A Yes.

Q You say also that his heart was in poor condition? A Yes.

Q And that he had a chronic— A A poor heart, muscles, which is called a myocarditis, and he had an adhesive pericarditis; the sac covering the heart had been inflamed at the same time and had become adherent to the heart itself.

Q Now, in addition to that, the kidneys showed the chronic Bright's disease, and what other physical defect did you find in him? A He had a healed tubercular scar in his left lung, and the arteries showed what is known as an endarteritis, or arterioritis; he had what is commonly called a hardening of the arteries.

Dr. George L. Warren, cross.

Q Now, taking all these conditions into consideration what would you say of the likelihood of Mr. Klein dying from the excessive use of unadulterated whiskey? A I could not determine; it would either be unadulterated whiskey or could be some other poisoning, as far as the autopsy is concerned.

(Question read.)

Mr. Schoen. I think that answer is not responsive and I ask that it be stricken out.

The Court. Denied. You have asked what he had to say and the likelihood. That is what the substance is. You can ask him about the comparative probability, but that is something of an answer to the question asked. I cannot strike it out as entirely irresponsive.

Q What would be the probability of Mr. Klein dying from an excessive quantity of unadulterated whiskey, taking into consideration the physical condition, in which you found his organs? A Why, that he would be very susceptible to poisoning by grain alcohol or whiskey and that death might follow very rapidly.

Q That is, whether he drank unadulterated whiskey or alcohol, the physical condition you found would make him more susceptible to poisoning, even from unadulterated whiskey? A Yes, sir.

Q And the probabilities of his death? A Following the excessive drinking of whiskey.

Juror No. 9. May I ask a question?

The Court. Yes, you may propound it and if it is proper it may be answered.

Juror No. 9. I would like to ask whether it would not show in the autopsy what was the cause of death, whether it was ordinary whiskey, or adulterated.

Witness. No, it would not show; any poison; he may have drank, mustard water, and be irritated; the autopsy would be the same.

Juror No. 9. Did I say the autopsy; I meant the analysis.

Witness. Yes, the analysis would.

Dr. George L. Warren, re-direct—re-cross.

The Court. The juror asked the question, if in a case of wood alcohol poisoning, followed by death, if the contents of the human body as you have described them, would not disclose any poison, or if the death was caused by wood alcohol it might disclose it; is that so?

A If the man had a death by wood alcohol the chemical analysis would disclose the kind of poisoning.

The Court. Listen again and if I have not properly apprehended the juror's question he will suggest the question. He asked you if where a person dies of acute grain alcohol poisoning it will show in the analysis of the contents of the humon body.

The Witness. Yes, sir; it will show.

The Court. And in the case of wood alcohol poisoning an analysis of the human body might show that?

Witness. Yes, sir.

The Court. If it does show wood alcohol poisoning is it a case of grain alcohol?

A No, it is a case of wood alcohol poisoning.

The Court. Doctor, if a man who had chronic Bright's disease, as you call it by the name that we all understand, drank alcohol and had uremia and died from uremia, would not the symptoms, or would not the autopsy disclose the same condition that you found?

Witness. You mean if he had an attack of uremia following the drinking.

Q Yes. A Yes; there wouldn't be any difference.

Re-cross examination by Mr. Schoen.

Q Doctor, suppose a man has alcoholic poison, either grain alcohol or wood alcohol, but his death is postponed some ten or twelve hours, from the fact of the delay of death, could you determine which kind of poison it was? A Yes, sir; on that symptom or fact, that he had been a wood alcohol victim.

Further re-cross examination by Mr. Schoen.

Q Didn't you tell us only a moment ago that that same symptom occurs from eating poisoned food, that is referring specially to the olive cases? A In the bottulismus cases.

Q Isn't death delayed in those symptoms? A The onset of the symptoms?

Q Just about as long as the wood alcohol symptoms? A Some are longer.

Q But most of them are about as long as the wood alcohol symptoms? A Those that have taken rather a large amount of the poisoned food come out within about twelve hours.

Q There is a striking similarity and you have referred to it, in the symptoms following the eating of poisoned food, and the symptoms following the taking of wood alcohol? A Similarity in the delayed serious symptoms.

Q And the similarity is in the delay in the symptoms, delay in the apearance of the symptoms? A Yes, sir.

Q And also in the delay of death? A Well, these victims here had lived for four or five days.

Q Well, that is delayed death? A Yes, sir.

Q (*By the Court.*) In grain alcoholic poison did you usually find a loss of eyesight? A In grain alcohol, no, we do not find a loss of eyesight.

Q Have you known of cases where it has occurred where the loss of eyesight has occurred from grain alcohol? A There is a type of blindness that comes on gradually with alcoholics, that is, people who are addicted to drink, and that is due to a disease of the kidneys and in chronic Bright's disease they get a dim vision.

Q Don't they get blindness in uremia? A Yes, sir; there is a type of blindness in uremia.

Further re-direct examination by Mr. Mott.

Q How long does it take that type of blindness to develop? A That comes on gradually.

Q What do you mean by that? A Why, over a period of months.

Further re-cross examination by Mr. Schoen.

Q Now, in some cases, isn't it a fact that it comes on suddenly, just as in wood alcohol poisoning? A It comes on gradually, and there may be a sudden onset where the vision is not totally destroyed.

Q There are cases where total blindness appears in uremia? A No; I don't know any cases which come on suddenly.

Dr. Albert E. Edel, direct.

Q Well, the loss of sight itself, does not that come on suddenly in some cases of uremia and in Bright's disease? A In Bright's disease it comes on, but it comes on gradually, there is a gradual loss of vision.

Q Isn't blindness a well known and typical symptom of uremia, acute blindness a well known and typical symptom of uremia? A No.

HARRY MOREL, sworn in behalf of the State.

The Court. It is stipulated that the organs and contents of the body of Klein that were stated to be separated by Dr. Warren, were given by this witness, Harry Morel, to Dr. Edel.

Mr. Schoen. I waive proof of it.

The Court. You can not waive proof.

Mr. Schoen. Well I stipulate it, if this witness is going to testify to that; I will stipulate that that will be his testimony.

DR. ALBERT E. EDEL, recalled in behalf of the State.

Direct examination by Mr. Mott.

Q Dr. Edel, what is your occupation? A Analytical chemist.

Q How long have you been an analytical chemist? A Twenty-ty years.

Q What study did you have of chemistry? A I studied five years in Germany, University of Berlin; graduated in 1899, and practiced chemistry ever since.

Q Where and how have you practiced? A I maintain a laboratory at 837 Broad street.

Q Well, how have you practiced? A I made a specialty of toxicological examinations for the last ten years.

Q And by toxicological examinations you mean? A Examinations for poison.

Q And have you frequently testified in court as a chemical expert? A I did.

Q In what court? A For nine years I was doing the work for Hudson County; for six years Essex County, Monmouth County, Morris County, Department of Justice and War Department.

Dr. Albert E. Edel, cross.

Q By Department of Justice you mean Federal cases, Federal Government? A Federal cases.

Q I show you Exhibit S. 1, and ask you if you have ever seen that bottle before? A I have.

Q From whom did you receive that? A A chemist of mine brought it.

Q What is his name? A Robert Siskind; the young man that was here.

Cross examination by Mr. Schoen.

Q Have you a degree from the University of Berlin? A No; I am a graduate, but I have not a degree.

Q You have no degree? A No; they don't give any degree; you have got to take a post-graduate course to get a degree; you are a graduate chemist.

Q You are not a graduate chemist? A Yes; a degree is—certain degree; doctor degree, you have to take a post-graduate course for that.

Q Have you any credentials showing your course as far as you went? A Yes, sir; I have got some.

Q What? A Just a certificate.

Q You have that with you? A No.

Q Where is it? A I have it at home, and I have a doctor of pharmacy degree of New Jersey, where I taught three years.

Q Taught what? A I taught chemistry three years.

Q The University of New Jersey, you say; is there such a university now? A No; they went out of existence.

Q When? A During the war.

Q Did the State Board of Health have anything to do with that institution going out of business? A No; I do not know anything about it; I quit in 1912.

Q Were you one of the organizers of that college? A No, sir; I was not.

Q Who were the organizers of that college? A Professor Lohman.

Q Of where? A Jersey City.

Q Who else? A A gentleman named Pope.

Q Did you know a man by the name of Luke Heins? A I do not know him.

Dr. Albert E. Edel, re-direct.

Q Was he one of the organizers of that college? A I cannot tell.

Q Don't know him at all? A I never met him.

Q Did you know a Dr. Stanley, of Orange? A Yes, sir.

Q Did you know a chauffeur that worked for him by the name of Luke Heins? A No.

Q Sure of that? A No; I don't know him; I know Dr. Stanley.

Q You don't know his chauffeur, Luke Heins, that organized the New Jersey College with you? A I do not know him; I only know some of the Board of Directors were a man by the name of Birnstein, and Judge Parry was on the board, and former Governor Fielder was a member of it at the time I was there.

Q You do not know what became of that institution? A I do not; I gave three years there and taught analytical chemistry and organic chemistry for three years.

Q Can you bring us your degree that you say you have? A Yes, sir.

By the Court.

Q When did you come to this country? A 1899 or 1900; I would have to look it up; about twenty years ago.

Q You have been here about twenty years? A Yes, sir.

Further direct examination by Mr. Mott.

Q From whom did you receive that bottle? A From the young man working in the laboratory.

Q And on its receipt what did you do? A I made a chemical analysis.

Q How much of the contents was there at the time? A There is 3.4cc.

Q What does that mean? A Approximately a teaspoonful.

Q How much of that did you use? A One-half.

Q Now, proceed to tell what you did.

Mr. Schoen. I object to the result of the analysis on the same ground I objected to the admission of the bottle itself—the contents.

The Court. Objection overruled.

Mr. Schoen. Do you wish me to restate the grounds?

Dr. Albert E. Edel, re-direct.

The Court. No; it is not necessary.

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.

A I diluted it in water and distilled it off and tested it and found it contained some grain alcohol and some wood alcohol.

Q Did you make a quantitative analysis? A I could not make a quantitative analysis correct; the sample was too small.

Q Were you able to determine approximately the amount of wood alcohol? A I did.

Q What was it? A More than two per cent.

Q Dr. Edel, I show you Exhibit S. 5; have you seen that bottle before? A I did.

Q From whom did you get it? A Lieutenant Hargan.

Q What did you do? A I made a complete analysis.

Mr. Schoen. I object to this on the same ground.

Q And by that you mean both quantitative and qualitative? A Both quantitative and qualitative.

Mr. Schoen. I object to that on the same grounds urged on the admission of the bottle itself.

The Court. S. 3. Overruled.

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.

A The sample contained 38 per cent. of absolute alcohol by weight, of which 70 per cent. of the alcohol present is wood alcohol, or 26.6 of wood alcohol.

Q (*By the Court.*) Of the whole? A Of the alcohol; yes. sir.

Dr. Albert E. Edel, cross.

Q (*By the Court.*) Of the whole contents of the wood alcohol? A No; 70 per cent. of 38 is wool alcohol which amounts to 26.6 of wood alcohol.

Q (*By the Court.*) That is the total contents? A Total contents; yes, sir.

Q Did you receive any of the organs of Klein? A I did.

Q On their receipt what did you do? A I made an analysis of them.

Q What organs did you analyze? A Stomach and stomach contents; part of liver, brain, kidneys, spleen, heart, blood and urine.

Q And what did you find? A Stomach and stomach contents contained grain and wood alcohol.

Q Did you find it in any other organs? A Yes, sir; traces in the liver, brain, kidneys and spleen had alcohol, not wood alcohol, and heart.

Q Well, did you find wood alcohol in any of the organs besides the stomach and stomach contents? A The blood contained a faint reaction of wood alcohol; chemical reaction of wood alcohol.

Q What do you mean by a reaction? A Well, a reaction is showing up the presence of.

Cross examination by Mr. Schoen.

Q Doctor, how long did your analysis of these various exhibits take you? A To January 9th.

Q From what day? A From December 30th.

Q And that was practically constant work during that time? A Well, I did some other work during that time, either distilling or extracting; I did some other work.

Q It is quite an extended process, is it? A It is.

Q And I presume known only to a chemist? A Yes, sir.

Q Have you ever heard of Dr. Reid Hunt? A I did.

Q Is he the leading American authority on the effect of alcohol? A Well, he is one of them.

Q One of the leading American authorities? A Yes, sir.

Q And has he been or is he head of the Pharmacology, or head of the Medical School of Harvard College? A As far as I know their publications.

Q Was he formerly connected with Johns Hopkins University? A All I know is the publication.

Q Has he been for some years the chief of pharmacology of the United States Health Service?

The Court. How can he say these things unless he knows what he is? How can he testify if a man is the president of a university unless he has been there at the meeting of the Board of Trustees electing him such.

Mr. Schoen. I do not think that is so. I think I could say without any danger of speaking an untruth as to the Judge of this court.

The Court. You see him here.

Mr. Schoen. Yes, sir.

The Court. You are entitled to confront the witness with a contrary opinion given by somebody else in text books or works which he says is an authority. I do not think you have a right to confront him with a man's name and say is Professor So and So known as a great professor and a careful toxicologist or analyst in chemistry, and if that man said so and so on such an occasion is it true. You may only confront him with books of a scientific nature and call his attention to the particular thing.

Q Has Dr. Reid Hunt written any book or prepared any bulletin on the question of wood alcohol, that you know of? A He did.

Q Is it true that there is not any property of wood alcohol by which anyone but a chemist can distinguish between purified wood or ordinary alcohol? A What do you mean, physically or chemically?

Q Physically. A No; there is no distinction.

Q Is the appearance and the odor and taste of the two strikingly similar? A They are strikingly similar.

Q Is it true that the appearance, odor and taste of the two are so strikingly similar that even chemists who have much experience with them are unable to distinguish them with certainty? A Yes, sir; physically they are unable to distinguish.

Q (*By the Court.*) What does that mean when you say physically; you mean the appearance? A The appearance; has almost the same odor; has almost the same taste. That is the physical. It is lighter than water.

Dr. Albert E. Edel, cross.

Q The ordinary layman or saloonkeeper even could not distinguish the difference between the two without a chemical analysis? A That is right.

Q Is that true? A That is true.

Q Now, Doctor, can you tell me the minimum quantity of wood alcohol which is fatal? A Three teaspoonfuls; my experience shows that about three teaspoonfuls.

Q How much does that amount to? A Five-eighths of an ounce; no, three-eighths of an ounce.

Q What is your authority for that? A My own authority; the cases I got; I figured out the amount of wood alcohol the man got.

Q You figured it out? A Yes, sir.

Q Was the man dead or alive? A He was dead.

Q And you figured how much he had? A Well, three men had the same amount of liquor at the same time and one died.

Q That is, you took somebody's word for that? A I had to.

Q (*By the Court.*) How much is an ounce, Doctor? A Eight teaspoonfuls to an ounce.

Q How much is a large tablespoonful? A Half and ounce.

Q Well, have you ever seen in any literature that has been published on this subject by any of the authorities, Mr. Hunt or otherwise, have you every read of any cases where less than three ounces of wood alcohol have been fatal? A No; I have seen where two teaspoonfuls killed.

Q That is, you have seen a case of death in which somebody said that two teaspoonfuls had been used? A Yes, sir.

Q But you can refer to no literature upon the subject by any authority which places this small amount as a minimum? A Reid Hunt.

Q What does he say? A Under the heading, How Much Is a Fatal Dose, this appears: "Individuals vary considerably in their susceptibility to wood alcohol; some die or become blind from amounts which seem to do no harm to others. This is true, however, of all poisons. Death or blindness has resulted from two teaspoonfuls and from one or two tablespoonfuls of the poison."

Q Well, does not that mean pure wood alcohol? It does not mean whiskey containing a percentage of wood alcohol, does it? A It don't make any difference.

Q Well, now, does it or doesn't it? A No; wood alcohol; it doesn't say pure or mixed or diluted; it said wood alcohol.

Q And that means two teaspoonfuls of wood alcohol and nothing else with it? A No; two teaspoonfuls as a dose.

Q You are talking now about 100 per cent. wood alcohol? A No; 100 per cent. wood alcohol—yes, but not taken as that; he says in another paragraph it doesn't make any difference if it is diluted or how it is.

Q Now, Reid Hunt also says, that 60 to 75 per cent. of those taking four ounces, that is, a quarter of a pint or half a glassful, have died or become permanently blind? A That is what he says.

Q So there are only 60 to 75 per cent. of the cases where results have been fatal where four ounces have been taken? A Yes, sir; that is what he says; I do not know; that is only what he said in his article

Q (*By the Court.*) Doctor, what is whiskey? A Whiskey is an alcoholic beverage made by fermenting any grain, rye, Indian corn, with malted barley and the aid of yeast.

Q (*By the Court.*) Is it a spirit of any kind? A Spirit; yes, sir.

Q (*By the Court.*) It is a spirit? A It is a spirit.

Q (*By the Court.*) Is it a distilled spirit? A It is a distilled spirit; the mash is distilled.

Q (*By the Court.*) Let me ask you if you are able from the contents of S. 1, that you examined, to state whether or not the liquid was spirits of any kind? A Well, alcohol is a spirit.

Q (*By the Court.*) Then you are able to say it is a spirit? A It is a spirit.

Q Are you able to say what kind of spirit? A I am not.

Q What method did you use in your analysis? A The U. S. P. method.

Q What is that?

The Court. The United States Pharmacopeial method.

Witness. With the Resorcin and sulphuric acid; the fuchsin, or what you call the Schiff reagent test, and the test of milk and crude hydrochloric acid and muriatic acid.

Q (*By the Court.*) Hydrochloric or muriatic? A It is the same thing.

Dr. Albert E. Edel, further re-direct.

Q Which one of these tests is the United States Pharmacopeial test? A Both. One is the new one and one is the old one; the oxidation with potassium permanganate, and Schiff reagent is the new one.

Q Doctor, isn't it true that the United States test you speak of is a test applied to grain alcohol to prove the absence of wood alcohol and not a test to prove the presence? A That is the very same, the action or the absence; you test it for the presence of the action of wood alcohol.

Q I am asking whether the United States test you have spoken of is not a test to show the absence of wood alcohol and not the presence? A As I know, it is for both; if it don't give any coloration it is not present; if it gives a certain coloration it is present.

Q Would you say it is present or may be present where there is a coloration? A It is present.

Q You think the presence of coloration, in your opinion, is absolute proof of the presence of wood alcohol? A If two or one other test—

Q We are talking now of the coloration and we are talking about the United States Pharmacopeial test? A Yes, sir.

Q Now, do you say by using the United States Pharmacopeial test the fact that you show a coloration, that that is absolute proof of the presence of wood alcohol? A It is.

Q Have you ever heard of Allen Commercial Organic Analysis? A Yes, sir.

Q Is that a standard work? A Yes, sir; volume 9.

Q Volume what? A Volume 9.

Q What is volume 9? A Of Allen's Organic Chemistry.

Q Well, I have Allen's Commercial Organic Analysis, volume 1, which contains the subject of alcohol, carbohydrate, yeast esters, formaldehyde and vegetable acids? A Yes, the last is volume 9 on that, that describes that particular test.

Q And you base your opinion that there was wood alcohol present in this liquor by the fact that you got a coloration? A Yes, sir.

Further re-direct examination by Mr. Mott.

Q With anything else; on that alone or with anything else? A No; I had what I described as the Resorcin test; gave me the

very same, and the milk test; I guess it is called the Hehner test; I am not sure of it; gave a positive reaction.

Mr. Mott. That is the case of the State, except I want to reserve the privilege of calling Dr. Edel later on to give the result of a calculation I am asking him to make. With that reservation the State will rest.

RECESS.

DR. ERNEST ELLSWORTH SMITH, sworn in behalf of the defendant.

Direct examination by Mr. Schoen.

Q Are you a practicing physician? A I am a chemist and physician.

Q Also a physician? A Yes.

Q What degree do you hold? A I have the degree of Bachelor of Philosophy from Sheffield Scientific School; Doctor of Philosophy from Yale University, Doctor of Medicine from Bellevue Hospital Medical College.

Q Have you been connected with any institutions? A I have been professor of physiology and organic chemistry at Fordham Medical, from 1906 to 1911, and I am associated with various hospitals and institutions of that kind in New York.

Q And do you hold any office at the present time in the medical profession or chemistry? A Well, I just retired from the presidency of the New York Academy of Sciences; I was president in 1918 and 1919, and I hold various official positions in the medical societies of New York.

Q Doctor, you have heard the testimony of Dr. Edel, have you not? A I have.

Q A statement was made by him that—or do you recall the quantity of liquor which he stated he analyzed from S. 1? A There was one exhibit in which I recall that he analyzed one and a half of 3.4 cc.; that would be 1.7 cc.

Q What quantity is that? A Well, that is something less than half a teaspoonful.

Q Do you recall the statement he applied several tests to this quantity of liquor to determine the presence of wood alcohol? A I do.

Dr. Albert E. Edel, recalled.

Q And he stated he applied two United States Pharmacopeial tests; am I right in that, and two others? A I remember his statement; I so understood it.

Q Doctor, is it possible to apply these four tests to so small a quantity of liquor? A It is not.

Q Will you explain to the jury. I will withdraw that. Can you tell us, Doctor, when chronic Bright's disease can and does procure sudden blindness? A It can. One of the symptoms of uremia poison is the onset of sudden blindness in a certain number of cases.

Q Do you recall whether the United States Pharmacopeial test, the quantity required in the test is specified in the test? A It is.

Q What is the quantity specified in the test?

The Court. How can he tell us what the books say? Why should he not tell us what he knows?

Mr. Schoen. Why, because Dr. Edel said he applied a certain well-known test.

The Court. All right. The way to confront Dr. Edel is to put him on the stand and confront him with the book. This witness cannot tell us what is in the book. He can tell us what he knows.

Mr. Schoen. Well, may I ask Dr. Edel a question to lay a foundation?

The Court. Yes.

DR. ALBERT E. EDEL, recalled.

Examined by Mr. Schoen.

Q Dr. Edel, does the United States Pharmacopeial test prescribe a certain quantity to make the test? A Only that it shall not contain more than ten per cent. of the total alcohol.

Q It does not specify the size or quantity of the specimen? A Not here, no, sir.

Q Well, have you seen it in the United State Pharmacopeial test? A Not to my knowledge; it only said one cc. or fifteen drops is diluted into it so as to make a certain volume and to contain more than ten per cent. of alcohol. And here it does not say how much you have to take, only it should be ten per cent.

DR. ERNEST ELLSWORTH SMITH resumes the stand.

Direct examination (continued) by Mr. Schoen.

Q Do you know whether the pharmacopeial test specifies the quantity required? A It does, the eighth and I am certain of the ninth; I am reasonably sure of the eighth; the ninth specifies five cubic centimeters.

Q Which would be how much? A 1¼ teaspoonfuls.

Q As a minimum? A Yes, sir; that may be after dilution, 1¼ teaspoonfuls, and the eighth revision pharmacopeial specifies either three or five cc.; I think it is five.

Cross examination by Mr. Mott.

Q Is that for a qualitative or quantitative? A That is what constitutes the United States Pharmacopeial test.

Q Answer my question. A That is what constitutes the United States qualitative test.

Q Now, you say that is qualitative and not quantitative? A Yes, sir; you interrupted—

Q Have you the ninth edition of the work you are speaking of there? A I have.

Q Will you show it to me? A It is in my bag down there, on page 36; I will mark it.

Q Will you point out to me where it says what the minimum is? A It does not specify what the minimum is; it specifies the amount to be taken; that is five mils; the term mils in the United States Pharmacopeial meaning cubic centimeters.

Q I understood you to say, and I think you did say, that that book specified the minimum amount that was necessary for a qualitative analysis, and you referred me to a passage in that book which you were kind enough to mark. I now ask you to read the portion you marked? A "Transfer 5 mils of dilute alcohol to test tube; add to it 2 mils of potassium permanganate solution (made by dissolving 3 grams of potassium permanganate in 100 mils of distilled water and 0.30 mils of sulphuric acid and allow mixture to stand for five minutes. Now dissolve the ppt of manganese dioxide by addition of sulphurous acid, drop by drop with agitation, then add 1 mil sulphuric acid and 5 mils of Schiff's test solution (fushin sulphurous acid) T. S. and mix them. After standing for ten minutes a colorless liquid results (methyl alcohol)."

Jeremiah Premo, direct.

Q Now, will you point out one word that refers to the amount that you must have in order to make that analysis? A Yes, sir; the instructions, "transfer 5 mils."

Q Transfer 5 mils; that is a part of the process; do you mean to say that that means you are to transfer 5 mils of what? A Of the diluted spirit or diluted to 10 per cent. alcohol, grain alcohol.

Q Do you mean to say you cannot make a qualitative analysis with less than that? A No; it does not state that.

Q Then it does not state, does it, anywhere there in the passage you have marked, the minimum amount that can be used for a qualitative analysis? A It states the amount that is to be used in order that the test should constitute the United States Pharmacopeial test.

Q Where does it state that? A It states when it specifies the amount in the test; it specifies the amount to be used, and that is what constitutes the United States Pharmacopeial test.

Q Could you chemically qualiatively analyze five drops? A Five drops of what?

Q Of liquor containing wood alcohol? A I may be able to, yes.

JEREMIAH PREMO, sworn in behalf of defendant.

Direct examination by Mr. Schoen.

Q Where do you live? A 115 Chadwick avenue, Newark.

Q How long have you lived in Newark? A Between twenty-three and twenty-five years.

Q Did you know Edward Klein? A Yes, sir.

Q How long have you known him? A Possibly seven or eight years.

Q Did you see him frequently? A Quite frequently.

Q Did you drink with Mr. Klein? A Yes, sir.

Q Drink whiskey with him? A Yes, sir.

Q Where?

Mr. Mott. When are you talking about?

Mr. Schoen. December of last year; about the 29th of December, last year.

A The 29th?

Q Yes. A Yes.

Q On a Saturday afternoon? A Yes, sir.

Q Where? A In the Two Jacks.

Q (*By the Court.*) When was this that you are talking about? A Saturday.

Q December 27th?

Mr. Mott. The 29th, he says.

Mr. Schoen. Will you let me withdraw that question?

The Court. Yes.

Q Do you know when Mr. Klein died? A On a Monday, I think.

Q Did you drink with him shortly before his death? A Sunday.

Q And did you drink with him on Saturday? A Yes, sir.

Q Did you drink the same stuff he drank?

Mr. Mott. I object.

The Court. Sustained. Strike out the answer. Ask him what he did drink.

Q Do you know what Edward Klein drank?

The Court. Fix the time and place.

Mr. Schoen. The hour?

The Court. Certainly.

Q What hour on Saturday did you—

The Court. What was ordered; what they seemed to get, and how much of it.

Q What hour on Saturday did you drink? A Somewhere after seven o'clock.

Q What hour on Sunday? A I drank in the morning and around five o'clock in the afternoon.

Q Who ordered the drinks? A Well, he ordered some and I ordered some.

Q Did you order the same thing? A Yes, sir.

Q Where? A At the Two Jacks.

Q Did you notice what you were served out of—was it out of a bottle, or a bottle or pitcher? A Out of a bottle.

Q Did what you drank come out of the same bottle as what Klein drank? A Yes, sir.

Jeremiah Premo, direct.

Q Now, did you drink the same number of drinks? A As far as I know of.

Q Did you drink the same size drinks? A Yes, sir.

Q Now, did Mr. Klein say anything about having some liquor of his own make?

Mr. Mott. I object.

The Court. That is nothing but hearsay.

Mr. Schoen. It is a statement by the deceased himself.

The Court. Yes, but it is not made in the regular course of business; it is not his books or business; nothing but hearsay. 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.

Q Did you at that same time, between Saturday and Monday, the time of his death, have anything to drink with him other than what you got at the Two Jacks? A Yes, sir.

Q Do you know who made the stuff that you and he drank other than what you got at the Two Jacks?

Mr. Mott. I want to warn the witness. Do you know; did you see it made?

The Court. Answer the question yes or no.

A No.

Q Did he tell you who made it?

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.

Q What kind of liquor was it that you and he drank other than what you drank at the Two Jacks; what kind of looking liquor was it? A It was a light colored liquor; something on the color of champagne.

Q Do you know anything about Klein's drinking habits? A Well, I was out with him several times.

Q Was he a heavy drinker?

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.

The Court. Let him state what kind of a drinker he was.

Q During the period you knew him.

The Court. Seven years.

Mr. Schoen. Yes, sir.

Mr. Mott. I object.

The Court. Sustained.

Q Let us have a period for a year before his death, if you know. A Well, I should think he was a pretty free drinker.

Q (*By the Court.*) Were you with him most of the time? A Not most of the time.

Q Could you keep up with him?

The Court. He does not know what he did when he was not around.

Q Did you keep up with him?

Mr. Mott. I object.

The Court. Sustained.

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

Jeremiah Premo, direct.

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

WM. P. MARTIN,
Judge.

Mr. Mott. Let him tell what occurred.

Q How long have you known Klein to be a free drinker, as you call it? A Well, I worked in the factory with him, possibly a year and two or three months, and that is how I came to know him.

Q Do you know whether he ever brought any liquor with him to the factory? A That I could not say; I would not want to say what I did not see.

Q About how many drinks did you see Mr. Klein drink in your presence at any time within a period of a year before his death? A That would be pretty hard to answer.

Q Well, about how many? I don't want to pin you down to the exact number. A It might have been ten or fifteen, or maybe not that.

Q That you have seen yourself? A I have seen it; I have been in his company when we stayed from eight o'clock to twelve, drinking.

Q And he was drinking whiskey during that time? A Whiskey and beer alternately.

Q Do you know the habits of Mr. Klein for, say, a year before his death as to the saloons which he patronized?

Mr. Mott. I object, except so far as this witness was with him.

The Court. What is the purpose of this testimony?

Mr. Schoen. The purpose is to show Mr. Klein's characteristics, his mode of living, his intemperance, the fact that he made it a practice to go the rounds and drink indiscriminately.

The Court. Suppose he did; you do not maintain he went around a year drinking wood alcohol.

Mr. Schoen. No, but it is a question whether a man going around drinking in all kinds of places and stuff can charge one certain saloonkeeper with his death, where

the question is whether what he got there is what actually caused his death.

The Court. The question is not what killed him. The question is whether there was any wood alcohol in the body at the time of his death.

Mr. Schoen. That only becomes important if you show there was wood alcohol in his body; that it got there solely through Mr. Solomon's liquor. If it can be shown that this man went around and visited a dozen different places, I think there is a situation from which the inference can fairly be drawn that no one place can be held accountable, and you cannot put your finger on one place and say that is the place where he got the stuff that poisoned him.

The Court. Are you trying to prove that because he was a pretty free drinker that he might have been drinking anywhere on Saturday, the 27th, and Sunday, the 28th?

Mr. Schoen. Yes, sir.

Mr. Mott. I object.

The Court. I think it is permissible on another theory to show his condition, for you must remember that Dr. Warren's testimony is absolutely uncontradicted in this case, that this man had myocarditis and pericarditis, he had trouble with his heart and lungs; he had trouble with the lining of the kidneys, and the impression is very strong in my mind that is a result of a long career of drinking alcoholic intoxicants. I just simply call your attention to that fact so that you will observe there is not any contradicton of what you contend the evidence is on that very fact, but because he was a drinker every day in the week he must have drank in that saloon on that Sunday or Monday; that is too remote. I will let the evidence in. Objection is overruled.

(Question read.)

The Court. That is objectionable; I thought it related particularly as to the quantity which he drank; that particular question is very objectionable. 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.

Q Did Mr. Klein, so far as you know, patronize only one saloon, or did he distribute his patronage?

Mr. Mott. Why don't you ask him if he was with him anywhere?

The Court. This man cannot say what his friends did and say so and so is a hard drinker; he has got to say, I was with him.

Q While you were with him, do you know of his having gone to a number of saloons to drink? A Yes, sir.

Q About how many saloons did he and you go to when you were out on a drinking tour? A Sometimes two or three or four.

Q Now, when did you part with him on Sunday, what hour? A Well, as near as I can judge, it was around five o'clock.

Q About five o'clock in the afternoon? A Five o'clock, yes, sir; as near as I can gauge the time.

Q Do you remember what hour you began to drink with him on Sunday? A It must have been around nine o'clock.

Q In the morning? A In the morning; yes, sir.

Q And did you and he keep it up all day?

Mr. Mott. I object.

The Court. 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.

Q Until what time did you and he continue to drink?

The Court. Drinking is not a continuous performance; he has got to tell what he did; let him state what they did.

Q How long did you and he continue to drink after you started?

Jeremiah Premo, cross.

Mr. Mott. I object.

The Court. Sustained. Ask him what they did.

Mr. Schoen. I do not think I am obliged to ask how many drinks. I do not think I am obliged to.

The Court. Ask the next question.

Q You started to drink at nine o'clock that morning? A Somewhere around nine o'clock.

Q How long did you remain in the Two Jacks saloon after you got there at nine o'clock? A That I forget; I could not say.

Q Have you any idea? Did you leave to have dinner? A Yes, sir.

Q Did you meet Klein again that day? A That afternoon around five o'clock.

Q And you were with him until what hour? A Probably three-quarters of an hour or so.

Q Did he leave you then? A Yes, sir.

Q Do you know where he went? A No, sir.

Cross examination by Mr. Mott.

Q Now, when you met him at nine o'clock A. M. on Sunday you say you stayed there with him until dinner hour? A No, sir.

Q How long did you stay? A He only stayed a few minutes; probably fifteen or twenty minutes.

Q How long did you stay? A I might have stayed probably an hour; I forget.

Q How many drinks did you have? A I had one with Klein in the morning.

Q How many drinks did you have while you were in that saloon that morning? A Well, to be sure, I will say three or four.

Q Of what? A Whiskey.

Q You had one drink with him in the morning? A Yes, sir.

Q He went out? A Yes, sir.

Q When did you meet him again? A Around five o'clock in the afternoon.

Q Did you have any more drinks with him? A Yes, sir.

Q How many? A Two.

John Menchner, direct.

Q What? A Whiskey.

Q Had you drank anything in the meantime? A Yes; I had some beers.

Q I suppose, inasmuch as you were a friend of Edward Klein's and went around with him, you would describe yourself as a free drinker? A Well, some might consider me so; I drink whenever I feel inclined that way.

Q Well, I was wondering what occasion there was for the kettle calling the pot black. A I am not trying to; I am trying to give the facts as I see them.

Q I want to get at what your judgment of people drinking is. That is what I mean. Well, then, again, altogether on Sunday with Mr. Klein he drank how many drinks in your presence? A We drank one apiece in the morning together and then two in the evening.

Q That is all on that day? A Yes, sir.

Q Well, so far as his record goes, on that day you would not call that heavy drinking, would you? A No, sir; I would not.

Q (*By the Court.*) Were you here yesterday? A Yes, sir.

Q (*By the Court.*) Do you know Edward Lynch? A No, sir; I do not.

Q Did you ever see him before yesterday? A You mean the gentleman that testified here?

Q (*By the Court.*) Yes. A Never saw him, as I know of.

JOHN MENCHNER, sworn in behalf of the defendant.

Direct examination by Mr. Schoen.

Q Where do you live? A 266 Peshine avenue.

Q Did you know Edward Klein? A Yes.

Q Did you ever go out with him? A No, I never went out with him.

Q Did you meet him? A Yes, sir.

Q Where? A Yeager & Enderweis' saloon.

Q Any other saloons? A Well, I did one time, yes, sir.

Q When did you meet him in Yeager & Enderweis' saloon? A Sunday afternoon.

Q About what time? A Between seven and eight.

Q In the evening? A Yes, in the evening.

Q Did you ever go around with him to other saloons? A No, sir.

Dr. Ernest Ellsworth Smith, further cross.

Q How often have you seen him in Yeager & Enderweis' saloon? A Oh, quite often.

Q What kind of a drinker was he?

Mr. Mott. I object.

The Court. Sustained.

Q How many drinks did you see him have at a time within a year before his death? A Oh, sometimes three and sometimes four.

Cross examination by Mr. Mott.

Q How many drinks did you have with him at Yeager's between 7 and 8 P. M. on Sunday? A Didn't have any with him.

Q Was he drinking? A Yes, sir.

Q How many drinks did you see him have there? A I seen him have a big beer in front of him then.

Q He was drinking beer at that time? A Yes, sir.

DR. ERNEST ELLSWORTH SMITH, recalled.

Further cross examination (continued) by Mr. Mott.

Q Doctor, referring to the passage which you marked and read into the record, I desire to ask you this question. The passage reads, "Dilute the alcohol with distilled water until it contains about 10 per cent. by volume of ethyl alcohol." Is there any indication in that as to the minimum amount of liquid that can be used for a quantative analysis? A No; there is no measure of quantity at all.

Q Well, this is the passage you referred me to as justifying your statement that it was impossible to have made an analysis in the way Dr. Edel said he made his? A I do not know that my statement was just as you have put it there, but these standard tests require that we proceed along the definite condition indicated and my opinion was that he could not proceed along those definite conditions where he used only 1.7 cc. of liquid for four different tests.

Q And then to substantiate that you refered me to this passage and marked it on page 36 A Yes, sir; as one showing the amount of diluted alcohol that should be used, and I so stated in my answer.

Dr. Ernest Ellsworth Smith, further cross.

Q Then you referred to the diluted? A I so stated that in my original answer, and I am very sure you will find that so stated in the record.

Q What do you mean by diluted alcohol? A Diluted to 10 per cent. strength.

Q Diluted in what? A Distilled water.

Q Dr. Edel was not speaking of diluted alcohol, he was speaking of undiluted alcohol? A Yes, I understood what he said.

Q Then how do you compare diluted alcohol with undiluted alcohol? A Well, because I assumed that he had it diluted; I assumed that he diluted it; he so states in his testimony that he diluted it; he said that he diluted and distilled.

Q But is there anything in the passage which you have marked that says you cannot make qualitative analysis of half a teaspoonful of undiluted alcohol? A No; there is no statement in regard to that matter at all.

Q Then why did you mark that passage and say that was a justification for your opinion? A Why, it is a justification for my answer; I was asked a certain question and this was a justification for my answer to that question, and it still remains so.

Q You say that it has nothing to do with undiluted alcohol; it refers only to the diluted? A It says dilute the alcohol; the amount it refers to is the diluted alcohol.

Q Yes; that does not show you how much undiluted alcohol you started with? A No.

Further direct examination by Mr. Schoen.

Q That book, notwithstanding all that has been said, that book still says that there must be five per cent. of alcohol to make the United States Pharmacopeial test? A Five mils of diluted alcohol to make the pharmacopeial test.

Further cross examination by Mr. Mott.

Q The question was, Doctor, that book states that there must be five mils of undiluted alcohol. That is the question.

Mr. Schoen. No, I did not; and I have had it answered.

(Question read.)

Q (*By the Court.*) Doctor, does it say that? A Five mils of diluted alcohol.

Samuel Solomon, direct.

Q (*By the Court.*) Do you make these tests pretty frequently, notwithstanding the presence of wood alcohol, in any liquids? A Yes, sir.

Q (*By the Court.*) Do you maintain a laboratory? A I do.

Q (*By the Court.*) Are you a toxicologist and analytical chemist? A I am.

Q (*By the Court.*) And you are doing that work regularly? A I am.

GEORGE W. BRIEN, sworn in behalf of the defendant.

Direct examination by Mr. Schoen.

Q Where do you live? A 331 Waverly avenue.

Q Where do you work? A Ellis Typewriter Company.

Q Did you know Edward Klein? A I know him about thirty-three or thirty-four years.

Q Did you work with him in the same factory? A Well, for the last three years before his death.

Q Did you observe in the last six months before his death whether he carried a flask of whiskey in his pocket at the factory? A There was on two occasions that I have told him, "Eddie, why don't you cover it up; you are liable to lose your job," and he said he didn't care.

Cross examination by Mr. Mott.

Q On two occasions you saw him with a flask of something you thought was whiskey; is that right? A Yes, sir.

Q How long ago? A Well, last September, October.

Q Did he continue to work there until the time of his death? A I think he did.

Q Did you? A I am working there still.

Further direct examination by Mr. Schoen.

Q Did he work every day? A To my knowledge he did.

SAMUEL SOLOMON, sworn in his own behalf.

Direct examination by Mr. Schoen.

Q You are the defendant in this suit? A Yes, sir.

Q How long have you been in the saloon business in Newark? A Seven or eight years.

Samuel Solomon, direct.

Q And how long have you been in Newark? A Thirteen or fourteen years.

Q Did you keep in your possession for barter and sale on the 23rd of December, 1919, two gallons of whiskey? A No, sir.

Q Did you keep in your possession for barter and sale on the 23rd of December, 1919, two gallons of whiskey which had been then and there adulterated with wood alcohol? A No, sir.

Q Did you make any plans to discontinue your saloon business after the prohibition laws went into effect?

Mr. Mott. I object.

Witness. Yes, sir.

The Court. Sustained.

Q What did you do after the prohibition laws went into effect with reference to your business?

Mr. Mott. I object. You are directing his time to when the war prohibition act went into effect; that is July, 1918.

Mr. Schoen. I do not recall the dates of these various acts.

Q Well, did you at any time in the last year, Mr. Solomon, make any plans to get out of the saloon business.?

Mr. Mott. I object to that question, plans.

The Court. Sustained.

Q I call your attention to a paper and ask you whether that is your signature on there? A That is.

Q And whose signature is the other one? A The contractor.

(Paper marked Exhibit D. 1 for identification.)

Mr. Schoen. An agreement made on the 28th of October, 1919, between the witness and David Kugel for the erection of a brick garage at 208 Belmont avenue; I offer it in evidence.

Mr. Mott. I object to it. I do not think it proves anything.

The Court. Sustained.

Q Did you, in pursuance of this contract, begin the erection of a garage at 208 Belmont avenue? A Yes, sir; I went in to make the garage.

Samuel Solomon, cross.

Q And is that garage in course of construction now? A Pretty near finished.

Q How far is it advanced? A Walls and roof, only the cement floor; we cannot get the cement.

Q And since October, 1919, when this contract was made, have you been busy with the building of this garage? A Going around; and the contractor said he cannot get bricks and could not get the materials, and I tried to get it.

Q Have you spent any time in your saloon since that time, yourself? A No, sir.

The Court. Since what time?

Witness. Since I made that contract.

Cross examination by Mr. Mott.

Q When you are away your wife takes care of the saloon? A Yes, sir.

Q How long has she been doing that? A Since the prohibition came in she stay there.

Q Well, has prohibition come in so far as your saloon is concerned? A Well, it is prohibition.

Q Do you sell any liquor? A No; only near-beer, soda water, cigars.

Q Where did you get your near-beer? A Feigenspan's.

Q That is all you have sold? A That is all.

Q Did you have whiskey for sale there? A No, sir.

Q Last December wasn't whiskey sold in your saloon? A No, sir.

Q Did you ever see this bottle before, Exhibit S. 3? A I had bottles of cognac; when that come in I took everything from the saloon; we had brandy, cognac and all kinds of goods in it, and I took it from the saloon; we didn't have it in the store; we had orders not to keep it in the saloon; we had got to take everything from the saloon.

Q Do you say that on December 27th this bottle was not back of your bar in your saloon? A I didn't see it back of the bar; I didn't have nothing behind the bar.

Q Do you say that bottle was not back there?

Mr. Schoen. I object to that, because Mr. Freeman testified when he came to the saloon and got that bottle Mr. Solomon was not there. How can this witness be ex-

pected to say whether it was there or not? I do not think that his testimony is competent.

The Court. He says he is not guilty; he did not keep anything behind the bar for sale, containing any alcohol of any kind and he did not authorize anybody on his behalf to have anything there. Now he is asked the question if he was there at this place, and he said, "I didn't spend much time in my saloon." It is perfectly proper to ask him whether a certain bottle was in the saloon on a certain day.

Q Did you say that that bottle was not in your place, back of your bar, on the 27th day of December last? A No, sir.

Q You mean it was not there? A It was not there; as far as I know it was not there.

The Court. You are referring to S. 3.

Witness. I didn't see it; I don't know.

Mr. Mott. Yes, sir.

Q Did you ever tell your wife to put this under your bar in your saloon? A No, sir.

Q Did you ever tell your wife to sell any liquor to anybody? A No, sir; I told her she should not sell it; she should not sell nothing at all.

Q If she did sell any she did it without your knowledge and consent and direction? A If she did so I don't know anything at all; I told her plainly she should not sell anything to anybody.

Q If she did sell she did it without your knowledge? A I don't know if she did sell or didn't.

Q Listen to my question. If she did sell it she did it without your knowledge? A If she did sell, she sold without my knowledge.

Q If she did sell she sold it without your direction to do so; is that right? A Yes, sir; I don't know she did sell.

Q You told her not to? A Yes, not to.

Q Well, since last December you have not been doing business? A No, sir; we only do what little—people coming in for beer and soda water and cigars.

Q What did you do with the liquor you had on hand in December last? A I took it upstairs in my rooms; I didn't have much left.

Q What did you have left? A Jamaica rum, kimmel, some other bottles of goods; few bottles of bitters and porter; I could not remember everything I had; I took everything from the saloon.

Q Well, the government took that all away on December 27th? A Yes.

Q And they took all you had, didn't they? A Yes.

Q At that time? A Yes; they left a few things; peach cordial.

Q So, after December 27th all you had was a little peach cordial? A And I have got it yet and didn't sell it.

Q That is all you had? A Yes.

Q About three weeks ago didn't the Federal officers come to your place and take a considerable quantity of whiskey from your saloon?

Mr. Schoen. I object to that; that certainly is an incompetent question. How does that relate to having in his possession two gallons of whiskey on the 23rd of December? The only thing, if there was a conviction of crime as a result of that, it could be shown as a conviction.

Mr. Mott. Your Honor, this witness testified that he was going out of business; that on the 27th of December last all the liquor he had, except a little preserves, were taken from him; that he made a contract with a man to build a garage for him, and that he was going in the garage business; that he had given up the liquor business. I am asking him if it is not true three weeks ago he had a large quantity of liquor in his place.

The Court. I think you can ask him that, but I do not think you have a right to say somebody went there and found it there.

Q Well, three weeks ago, didn't you have a large quantity of whiskey and other liquor in your place?

Mr. Schoen. I object.

The Court. Overruled.

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 Did you? A I had.
Q Where did you get that liquor?

Objected to.

(Question withdrawn.)

Q When did you get that liquor?

Mr. Schoen. I object.

The Court. Overruled.

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.

The Court. This situation is very clear. There ought not to be any misunderstanding about it. The defendant takes the stand and he says that at the time when prohibition came in, whenever that was, that he had decided to go out of the business and that he wanted to go into the garage business, that he took things he had to his private quarters and the police came and took even that little that remained. Why can he not be cross examined as to the proposition of being in the garage business and show that in point of fact that he was not, I think it is a clear situation.

Q Where did you get the liquor that you had three weeks ago?

Mr. Schoen. If the Court please, it seems to me that the trial of this case should be confined within the limits of the indictment. This man, as I will show, stands indicted in this Court on three indictments, one of which we are trying today, and, if necessary, that he stands indicted as a result of the same thing, the same instance, in the Federal Court.

The Court. You may state your objection to this question.

Mr. Schoen. I am stating it.

The Court. There is not any open question on the record.

Mr. Mott. No, sir; I asked him when he got the liquor.

The Court. I have already ruled on that question; it it not necessary to make any extended remarks. The Court has explained the ground of its ruling. Your defense is that he was not in the liquor business, because he was in the garage business. The State may cross examine and show he was.

Mr. Schoen. Now, the mere fact that a man who was in the saloon business and had liquor left over when prohibition came in is nothing from which an inference may be drawn he continued in the liquor business.

The Court. No, but he said he had a large quantity of liquor on hand three weeks ago. Overruled.

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 When did you get the whiskey that you had in your place three weeks ago? A When it was coming out the decision that the saloons may be open again.

Q When did you get the liquor that you had three weeks ago? A A few days before.

Q Where did you get it?

Mr. Schoen. I object to that. That certainly is not material upon this question. He has established that it was there and he got it.

The Court. Do you think a man that buys liquor is in the garage business?

Mr. Schoen. Of course not.

The Court. If this defendant says that he was in the garage business and it can be shown that he spends his

time buying and selling liquor, that is a subject of the examination.

Mr. Schoen. I stated that this man began the erection of a garage and it is not entirely finished; and that is offered to show that he began to make, and that immediately, or soon after, prohibition came in, did get into another business, and that he was endeavoring to do it. There has been no contention by me that he was actually operating the garage.

The Court. You opened to the jury and stated that he had commenced to go into the garage business and gave the impression that he was in it; and your examination tended to show that.

Mr. Schoen. I offered merely the contract for the construction of the garage and Solomon's testimony that the garage is about finished and requires a cement floor. If I created any inference in the mind of the Court that this man was already operating the garage I had no such intention, and the fact I brought out the inference that the garage was incomplete seems to me ought to free me from an attempt to create any such inference as that.

The Court. Overruled.

Q Where did you get the liquor you had three weeks ago? A I bought it.

Q Where? A A business man came around and asked me to buy it.

Q Did you ever see him before? A No.

Q Have you seen him since? A No.

Q How much did you buy of him? A I do not remember exactly.

Q About how much? A I could not remember exactly, but I think about forty or forty-five gallons.

Q Whiskey? A Twenty-five gallons of whiskey and twenty-five of others.

Q What others? A Alcohol.

Q What time of day was it you bought it? A I could not remember the day.

Q No, what time of day? A In the afternoon.

Q About what time? A Around four or five o'clock.

Samuel Solomon, re-direct.

Q How much did you pay for it; how much a gallon did you pay for the whiskey?

The Court. Is that necessary?

Mr. Mott. Well, I do not know as it is.

The Court. You have a right to cross examine him to show what he was doing, in order to refute the idea, if you can, as to what he said he was doing; in other words, it is a course of conduct contrary and inconsistent with the statement of the witness.

Q How long did you have that before three weeks ago? A Only a few days.

Q What nationality was the man you bought it of; was he an American or German? A American man.

Q Don't you know his name? A No.

Q How old a man? A Why, thirty-eight or forty years.

Q Did he bring it to your place in a wagon? A Yes, sir.

Q Walked into your place? A Yes, sir; walked in and said he sold to everybody; everybody started to buying; he bought a big quantity to sell.

Q Well, you are not getting out of the saloon business, are you? A I was under the intention of going out of the saloon business, wouldn't remain; I am going in the garage business.

Q But if you can remain in the saloon business you intend to? A I have the garage nearly done.

Q You intend to remain in the saloon business? A I intend to go into the garage business when it is ready and the garage no ready yet and that man come around and talk to me and say, "Buy, buy, everybody buy."

Re-direct examination by Mr. Schoen.

Q You saloon keepers have been living in the hope every month that the saloon business was going to survive? A Yes, sir.

Mr. Mott. I object.

The Court. Sustained.

Mr. Mott. And ask to have that answer stricken out.

The Court. Granted.

Q Did you see Mr. Enderweis in your place of business on the 23rd of December? A No, sir.

Mrs. Mollie Solomon, direct.

Mr. Schoen. I offer in evidence indictments Nos. 411 and 412 of the December Term; now Nos. 17 and 18 of the April Term.

Indictments No. 17 marked Exhibit D. 1.

Indictment No. 18 marked Exhibit D. 2.

MRS. MOLLIE SOLOMON, sworn in behalf of the defendant.

Direct examination by Mr. Schoen.

Q You are the wife of this defendant? A Yes, sir.

Q Were you at the Belmont avenue address on the 23rd of December, last year? A Yes, sir, 210 Belmont avenue.

Q Did you see Mr. Enderweis there? A Yes, sir.

Q What time did he come there? A He was there in the afternoon.

Q Was Mr. Solomon there? A He was not in.

Q Where was he, do you know? A He was out.

Q What time had he left the house that day? A That morning he left me and then he came for dinner and then he went away again and in the afternoon he did not come home until four or five o'clock.

Q Now, was he there when Enderweis came? A No, sir.

Q What did Enderweis do when he came there? A He come in and brought in a jug and asked for me I should get him some whiskey, and then I said I didn't have any whiskey to sell; so he said I shall sell it, because every saloonkeeper was; and then he came in and asked for me I shall give him some whiskey; I said I have not got any whiskey in my house, it is against the law to sell it, and I got a strict order off my husband I shall not sell any whiskey; and then he said, "What do you care, you could sell me a couple of gallons out of it, and I will give you $22 for a gallon"; and he said, "I want two gallons and then we will make you $44, and then you are going to have a little pin money myself," and I says "I don't care for the pin money, I have enough for myself; he was stewed up and I don't know how long he was acting, and I should give it to him, and I said I can't; and he says if I don't give any I will feel sorry, and I said, "I don't sell any whiskey against my husband's order," and I didn't sell any; and after that came my trouble.

Q And after that you heard he bought two gallons? A Yes; he mixed my name in; I was surprised that my name was in it.

Mrs. Mollie Solomon, cross.

Q You say he was intoxicated; what do you mean by stewed up? A Well, he was acting like funny; he told me I should give it to him and help me out, a little pin money and I am going to hide it; he wouldn't say nothing; and I didn't want to sell him any, because it was against the law and I didn't want to sell; I was afraid of my husband to sell it and I didn't sell any.

Q And you refused to sell him? A No, sir; I didn't sell him.

Q He want away? A He went away.

Q What did he say? A He say I feel sorry for it.

Cross examination by Mr. Mott.

Q What did Mr. Enderweis say to you when he first came in? A He came in and had a little beer and then he said I shall sell him some whiskey; he brought a jug in a paper; then he say I shall give him a glass of whiskey; I said I have not got any; he said, why are you afraid of me, every saloonkeeper sells and you could sell; I won't squeal on you. I said, no, I won't sell; it is against the law and against my husband's orders; he gave me strict orders not to sell any, and I have not any to sell; and he took out a bunch of money, $44, and he said I should sell him that whiskey and I could have that money for pin money; I said I have pin money; my husband it not stingy with me and I have a couple of cents for myself.

Q You were behind the bar when he came in? A Yes, sir.

Q You generally tend the bar? A Yes; I am.

Q Now, you have given two reasons for not selling him? A Yes.

Q One because your husband told you not to? A Yes.

Q That is the reason you did not sell him? A That is the reason I was afraid of him.

Q Afraid of your husband? A Yes.

Q You are sure about that? A I am sure I am afraid of him.

Q What do you mean? A I love my husband and he say I should not give him anything, it is not necessary, and I keep my promise.

Q Why were you afraid of him? A I didn't want to break his promise, because I know it is against the law and I didn't want him to suffer for it.

Mrs. Mollie Solomon, cross.

Q You realized that if you sold that liquor your husband would suffer? A Yes, if I would sell I would suffer; if I sell it I would be the one, but he told me not to sell it and I keep his promise.

Q Then the reason was not because you did not have any to sell? A I did not have any and I would not sell, because I have two orders against it, two orders against the law and against my husband.

Q If you did not have any whiskey to sell why did you have to go through the mental process of concluding that you would not sell it because you were afraid of your husband? A I could not understand what you mean by it.

Q If you did not have any whiskey to sell? A Yes.

Q Why did you have to go through the mental process of concluding that you would not sell because you were afraid of your husband? A I had upstairs kimmel and cordial and I had some, what you call it, Jamaica rum, for many years, and I have half a gallon alcohol for my own use, which my own neighborhood knows that; I am sick and I put that for my own purpose, for rheumatics, and I put that away; and I didn't have anything to sell except soft wine I got there and these cigars, cigarettes and I got soda water and bottle beer; and that is the way I make a living, hard living too.

Q I show you Exhibit S. 3; have you ever seen that bottle before? A I had a bottle like that; I will tell you the truth; I have a bottle like that, cognac bottle, and I need it, cognac, which I have in my own bedroom, and I put that away; I have Jamaica rum and my husband put that away for many years, because we heard the saloon business is closed, so we put that away for our own use; when people hear I have trouble they come around like robbers and they take everything away from me upstairs, and if they did find a bottle of cognac that is full.

The Court. She has said substantially that she had a bottle like that which was full, and it was upstairs, meaning her private apartments.

Witness. Yes.

Q You were in the saloon, were you not, on the 27th of December last, when some policemen and officers came in? A Yes, sir.

Q Was this bottle, Exhibit S. 3, under your bar at that time? A That bottle was upstairs with cognac, in my room.

Q It was not under the bar? A It was under the bar, it was there; it was upstairs; I will swear to it a hundred times; they take it down, all the goods.

Q The police at that time, when they came there, and the Federal authorities, on the 27th of December, took away most everything you had? A They took away everything, and one gentleman give me a little kimmel; I nearly fainted and I told him we all pay revenue taxes on it; and when he take those away from me—

Q Just try to answer the question and stop as quick as you can. You did have any liquor in your place then after the police went away on the 27th? A I did not have any liquor downstairs there.

Q You did not have any upstairs? A No whiskey; I didn't have no whiskey there; maybe they find a little in the bottle, but I didn't know anything about it.

Q Yet three weeks ago there was quite a large amount of whiskey in your place? A Yes, there was.

Q What time of day did that whiskey come there? A Afternoon; I do not know what time; I do not know when it came.

Q You do not know how it got there? A I do not know; I don't mix in that business; I don't know anything about it; I just tell you when I was in there.

Q When you were behind the bar— A I was behind the bar and I didn't know they come in and I didn't see it.

Q When you were behind the bar you sometimes sold some near beer? A I sold beer.

Q What did you charge for a glass of beer? A Five and ten cents.

Q What is the difference between the five and ten cent size?

Mr. Schoen. I object to this. What is the purpose of this.

Q That was your custom to sell beer behind the bar when you were there? A Yes, sir.

Q And you did that in December last, didn't you? A You tended bar sometimes and sold some near beer? A I didn't sell near beer before prohibition came in, I sold that beer and soft drinks and before I sold everything.

John P. Enderweis, direct.

Q Well, you continued to sell near beer and other things that you had to sell up to the 27th of December, didn't you? A Yes.

Q What did you do with that money you got, the money you received for the beer you sold?

Mr. Schoen. I object to that as immaterial on the issue to this indictment.

The Court. Overruled.

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 Did you turn the money over to your husband? A I expect I shall cover my bills; I can cover my bills with it.

Q Did you get that money for your own use? A I collect the money; I give it to my husband; I don't go and spend it.

Q You give it to your husband? A Yes, sir; I did; he should cover the bills with it.

Q Well, the money you got there, everything you sold there, really belonged to your husband and you gave it to him? A If I have some money it belongs just as good to my husband as to me; if my husband has some money, I have it.

Q But the money you received for selling beer and cigars and other things you sold you turned it over to your husband that he could pay the bills with? A I certainly did; yes.

DEFENDANT RESTS.

JOHN P. ENDERWEIS, recalled in behalf of the State in rebuttal.

Direct examination by Mr. Mott.

Q Mrs. Solomon says that on the day you bought this two gallons of whiskey from her that you were intoxicated when you went there; is that true? A No; I could not have been.

Q Had you been drinking at all? A Not up to that time; no, sir.

Dr. Albert E. Edel, further cross.

Q She says that she refused to serve you and that you urged her to do so, saying that she could use the money for pin money, for herself; did you say anything of that kind to her? A No, I did not.

Q And she says that she said to you that she refused to sell to you, and that you said to her when you were going away you would get even with her or words to that effect; did you say anything of that kind? A No.

Q Make her sorry for this, or anything like that; did you say anything like that? A No.

THIRD DAY.

Wednesday, May 26, 1920.

Continued pursuant to adjournment.

Appearances as before stated.

Mr. Schoen. I understood Dr. Edel was to get the certificate.

Mr. Mott. Well, he was here yesterday and you stated your case was closed.

Mr. Schoen. I would like to ask your Honor to permit me to get into communication with him either at the office or his home.

The Court. No, he made the statement on the witness stand and you said, "Have you any certificate?" And he said, "Yes," and you said, "Will you bring it here this afternoon?" And he said he would, and when recess was over there was no call made and both sides rested.

Mr. Schoen. Well, I wanted to give him all the time necessary; I didn't want to crowd him, but I call upon the State to produce it; he is the State's witness. Here is Dr. Edel now.

DR. ALBERT E. EDEL, recalled for further cross examination by Mr. Schoen.

Q Did you bring the certificates? A I did not.

Q Why not? A I could not find it.

Motion for Direction of Verdict.

Q Couldn't find your credentials showing you are a chemist? A I could not; I looked all over and could not find it.

Q You stated yesterday it was at home? A Yes, sir; I looked all over for it; I looked before, and I thought if I go all over my papers I may be able to find it.

Q How long is it since you saw this certificate? A Years ago; I moved around a good deal.

Q How is it you told us yesterday it was at home? A I had never looked; I looked a year through my papers and it was not necessary to look further.

Further direct examination by Mr. Mott.

Q How many times have you moved? A I could not say that; before I was married I moved around from one place to another place.

Q How long have you been married? A Fourteen years.

Mr. Schoen. I wish to make a motion to direct a verdict on the ground that there is no evidence tending to establish the guilt of the defendant; two, the evidence is insufficient to sustain the charge contained in the indictment; three, because the constitutional rights of the defendant are invaded by trial without indictments of the Grand Jury charging a crime, that the indictment charges no crime, because it does not set forth that the whiskey alleged was to be used as a beverage.

The Court. Denied.

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.

Mr. Schoen sums up for the defendant.

Mr. Mott sums up for the State.

The Court. The Court will reverse its ruling and reopen the case and permit the offer in evidence of the contract and mark it D. 1, by striking out the words "for identification."

(Received and marked Exhibit D. 1.)

The Court. Both sides rest?
Mr. Mott. Yes, sir.
Mr. Schoen. Yes, sir.

CHARGE.

The Court charges the jury as follows:

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 law. The jurors, however, are the sole judges of the facts weight of testimony, credibility of witnesses, inferences to be drawn from the evidence and the ultimate conclusions to be reached upon all the facts. The Court in referring to the evidence is not to be understood as deciding any fact, but merely as attempting to elucidate the evidence for the convenience or assistance of the jurors, or to illustrate or explain principles of law. If the Court errs in its statement of any evidence, or assumes the existence of any evidence, whether it is disputed or not, the jurors are to rely upon their recollection and not upon the recollection of the Court. If any part of the evidence is referred to, seemingly giving it particular emphasis, the jurors are not to disregard other evidence which they may deem of equal or greater importance. It is the duty of the jury to consider and weigh all the evidence and pertinent proof bearing upon the questions before the jury, not only those matters which are referred to or mentioned by the Court, but all that have been presented here before you.

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 State must show all of the essential elements of the crime beyond a reasonable doubt, and 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 jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. If upon such proof there be reasonable doubt remaining, the defendant is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because if the law should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

This defendant is presented here upon an indictment which contains two counts. The first is that on the 23rd day of December, 1919, Samuel Solomon, this defendant, did, in the City of Newark, keep in his possession, for barter and sale, certain spirits, to wit: two gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit: wood alcohol, contrary to the form of the statute in such case made and provided. The second count is very much like the first count, except that the charge is having certain spirits in his possession, for barter and sale, which had been then and there manufactured with spurious and poisonous ingredients. The first count, as I read it, is that the said whiskey then and there was adulterated, or had been adulterated, with spurious and poisonous ingredients.

The statute of the State of New Jersey enacted and governing an indictment of this character is one which was passed by the Legislature of the State of New Jersey and signed and approved by the Governor on April 6, 1871, some forty-nine years ago. There has been only a slight change in the act and that, I think only the elimination of a comma, as revised in the act of 1898. The act, in substance, is that "any person who shall * * * barter or sell, or keep in his possession for barter or sale, any rum;

brandy, wine or spirits of any kind * * * that shall be adulterated of mnufactured with spurious or poisonous ingredients of any description shall be guilty of a misdemeanor."

It is, therefore, necessary for the State to prove, and for you to find, beyond a reasonable doubt, upon the evidence, that this defendant did keep in his possession for barter and sale spirits of the kind alleged in the indictment, to wit: whiskey, and that the same was then and there adulterated, or had been manufactured with spurious or poisonous ingredients, contrary to the statute. There is no statement in this statute requiring that the defendant must knowingly keep such materials or liquors in his possession. It is not necessary that the State prove that he knew that the spirits were adulterated or contained poisonous ingredients. The duty is cast upon one who proposes to sell whiskey as a beverage to know it is free from adulteration and spurious or poisonous matter, or else he is responsible under the statute.

It is not the purpose of the Court in charging the jury to review the testimony that has been presented, or even to attempt to outline the evidence. You have all listened, apparently very attentively, to the taking of the evidence and I have no doubt you have excellent recollection of the testimony that has been presented. The Court will content itself by merely stating some of the principal contentions of each side, the State and the defense, which have been presented here to you, or which may be involved in the case.

It is the contention of State that this defendant did on the 30th day of June, 1919, obtain under the state law an excise license to sell liquors at retail at a place maintained or owned by him on the corner of Belmont and Wavery avenues, I think it was, and that he, having applied for a license and secured it, was offering himself as a person who would have charge of and general supervision over the conduct of the place. It is contended also by the State that there were no conditions substantially changing the general situation up to and including the dates concerning acts on which the testimony may have some reference. The State further contends that this defendant did on the 23rd day of December, 1919, while in possession and having the control and management and with his knowledge, keep two gallons of whiskey for barter and sale, and that these two gallons were actually sold by his wife, who was at the time of his

arrest an agent acting for and on his behalf, to one Enderwies; that Enderwies took the whiskey to his saloon and there his partner and himself poured from time to time whiskey from the two-gallon jug into this Exhibit S. 1, which was commonly designated and described throughout the trial as the "working bottle" of Enderwies in the "Two Jacks" saloon; that Mr. Klein drank some whiskey out of this bottle on Saturday, a glass or two on the morning of Sunday, several glasses of whiskey from five to seven or a little later Sunday evening, December 28th, and that he died from the effects of that whiskey the next day. It is the contention of the State that such small part of the liquid as remained in the bottle was sufficient for a chemical test and analysis and that it showed a trace of wood alcohol. It is the contention of the State that the testimony of Dr. Kaplan shows a beginning of a loss of eyesight at seven o'clock on the morning of Klein's death, a severe and apparently griping pain in the region of the abdomen, and that upon his death the autopsy disclosed a death caused by acute poisoning, because the stomach lining and intestines, or perhaps only the stomach lining alone, showed reddened and swollen condition, and upon examination Dr. Edel found also a trace of wood alcohol. I do not understand that the State contends that there is anything in the evidence to show the quantity or proportionate part of wood alcohol, either in Exhibit S. 1 or in the parts of the body and the organs of Kline which were removed by Dr. Warren, but that the State does contend that there was some wood alcohol in the organs of Kline and that there was some wood alcohol in the bottle S. 1. Therefore, the contention of the State is that Solomon kept in his possession two gallons of whiskey for barter and sale and that this whiskey had been theretofore adulterated or manufactured with spurious or poisonous ingredients and that you should draw the inference that this defendant is guilty and your verdict should be in accordance.

On that issue, the defense of the defendant is a denial, and then the defendant relies upon the further proposition that the law, which is entirely sound, as the Court has practically already stated to you, that whether or not this defendant has succeeded in showing to your satisfaction a complete denial, his contention is that the State has failed to show that he is guilty beyond a reasonable doubt. The testimony of the defendant is that when wartime prohibition came in, or, rather, when pro-

hibition came in, I do not think he mentioned wartime, he made up his mind that he was going out of the business of selling intoxicating liquors and while it is true that he retained the building and bar and fixtures that it was only conducted for the purpose of selling soft drinks, that is, liquors and things which are not contrary to any restrictive legislation, and the defendant also stated that he determined to go into the garage business and he says that on October 29th he entered into a contract with some persons to build a garage, and that contract has been admitted in evidence, so that it will be before the jury, and he says that he was busy and out of the place which was formerly his saloon and was not in on the 23rd day of December at any time when Enderweis was there; he says there was no liquor there kept for sale, there was no whiskey there and there was no intoxicating or spirituous liquors, or anything containing alcohol, except such as might have been left over from the time when it was entirely lawful to sell such goods and which he appropriated, and had a right to appropriate, and keep as his own personal private proerty connected with his home. The defendant also stated that the bottle S. 3, which the State introduced in evidence as a bottle found by one Freeman, a deputy collector for the United States, was like a bottle of some cognac, or something that he had, which was kept in his own private, separate, personal home, as distinguished from his former saloon. He said it was not under the bar. The defendant also introduced the testimony of his wife, who says that there was no liquor there for sale; that there was no whiskey there; that she did not sell Enderweis any whiskey; that Enderweis himself came in with the jug and asked for two gallons of whiskey and she said she would not sell it; that he offered her $22 a gallon and she refused, first, as I understand her evidence, but it is for you to decide what it was and what it means, that she did not have any such liquor, and, at all events, would not sell it if she had, and that the upshot of the matter was that Enderweis left the place saying that she would be sorry for this, or words to that effect. The defendant also presented the testimony of Dr. Ernest Ellsworth Smith, a physician, analytical chemist and toxicologist. I do not recall, but it is for you to say whether or not he contradicted Dr. Edel. My recollection is that he said that he could test five drops of liquor as to whether or not it contained wood alcohol, and I do under-

stand that he cited and referred to a test book where a certain quantity, to which might be added distilled water, should be of a certain bulk, in order to make a proper test, but there was nothing said, as I recall it, on cross examination, by Dr. Smith denying the capacity of a fully qualified analytical chemist to analyze the contents of the quantity of the liquor which Dr. Edel said he had in Exhibit S. 1. For these and many other reasons the defendant contends that he has established a denial and, at all events, whether he has or not, the State has failed to prove that he is guilty beyond a reasonable doubt, and that therefore your verdict should be not guilty.

The State contends that some of the vital points in the case turn on whether or not it is true that Enderweis purchased two gallons from Mrs. Solomon at the former saloon of this defendant; that nothing has been shown to impeach the character and forcefulness and truthfulness of the statement of the witness Freeman as to where he did obtain the bottle Exhibit S. 3, except the denial of this defendant; that the defendant's announced purpose, which is apparently shown by the garage and contract to get out of the liquor business, was eventually not carried out, because at a subsequent time it appeared that he had in his possession many gallons of alcoholic liquor.

Gentlemen, it is for you to consider and weigh all the testimony that has been presented before you and arrive at a conclusion. If you find beyond a reasonable doubt that this defendant is guilty under the evidence, your verdict should be guilty; otherwise, of course, it must be not guilty.

The defendant has presented to the Court — I thought it was twenty-two requests to charge, but I see another page has been added after the signature of counsel for the defense; twenty-four separate and distinct requests to charge.

"No. 3. The fact that in selling liquor of any kind the defendant was committing an unlawful act, does not of itself render him guilty of the charge in this indictment. The mere unlawfulness of selling liquor or having it in his possession contrary to law, does not render him guilty of the charge in this indictment." I so charge you.

"No. 16. The defendant is not on trial for the death of Edward Klein. The death of Klein is only evidential in this case as tending to show that the beverage which he drank in

Yaeger's place was adulterated with a poisonous ingredient, to wit: wood alcohol." I so charge you.

"20. The drinking of the same beverage by numerous other persons at the same time that Klein drank it, without any injurious results, may be considered by the jury as a circumstance in determining whether the beverage was in fact adulterated with wood alcohol." I so charge you. In this connection the Court ought to say that it is not necessary that Klein died solely as the result of taking into his system wood alcohol. If the wood alcohol was found in his body and if it did come from something that was kept by Solomon, then that is a circumstance which may be taken into consideration by you in connection with the responsibility of this defendant.

"21. The defendant cannot be held criminally responsible for the act of his wife, not committed in his presence and not directed by him to be done." I so charge you, and will add, however, that the defendant is not here charged under this indictment with the actual sale of any liquor denounced in the statute, but he is charged with keeping that liquor in his possession for barter or sale. The defendant would be responsible for whatever his wife might do on his behalf as his agent, or which is done by her with his knowledge and consent.

"22. If the jury is satisfied that the defendant kept the two gallons of whiskey named in the indictment in his possession, even though it was adulterated with a poisonous ingredient, but if he forbade his wife to sell it, and if she did so without his knowledge and consent and contrary to his instructions, this defendant must be found not guilty." I charge you that proposition with this modification: And that if you further find that the said two gallons of whiskey was not actually kept by him for barter or sale.

"23. The jury cannot consider the evidence that the defendant was in possession of a quantity of whiskey within the last two or three weeks as substantive proof of the truth of the charge in this indictment." Of course, gentlemen, you cannot find the defendant guilty under this indictment for something that is alleged to have taken place last December by any evidence as to the kind or character of anything that was in his possession during the last two or three weeks. I so charge you.

"24. Evidence that the defendant has whiskey in his possession at a time remote from the date named in this indictment

cannot be considered by the jury in determining the guilt of the defendant upon this indictment." I so charge you.

(The jury retires.)

Mr. Schoen. I ask you Honor to allow me an exception to the refusal of the Court to charge each request specifically as requested.

The Court. Yes, a separate exception to each refusal to charge as requested.

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

WM. P. MARTIN,
Judge.

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.

DEFENDANT'S REQUESTS TO CHARGE.

1. In measuring the responsibility of the defendant in the sale of the alleged beverage, he can only be charged with such knowledge of its ingredients as he then possessed, or which he reasonably ought to have known with the opportunities at his command. Knowledge derived from subsequent events or autopsies, and unavailable or not, reasonably inferable at the time of the alleged sale of the beverage, cannot be imputed to him.

2. If the jury have a reasonable doubt that defense has been made out the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty.

3. The fact that in selling liquor of any kind the defendant was committing an unlawful act, does not of itself render him guilty of the charge in this indictment. The mere unlawfulness of selling liquor or having it in his possession contrary to law, does not render him guilty of the charge in this indictment.

4. Criminal intent is essential to constitute a crime.

5. In order to convict the defendant, it must be shown not only that the defendant had the alleged adulterated whiskey in his possession, but that he also knew that it was adulterated.

Defendant's Requests to Charge.

6. The ordinary principle that there must be a guilty mind to constitute a guilty act, applies to this case.

7. Although the statute says nothing about knowledge, that must be imported into the statute. Knowledge is, to a certain extent, essential to the crime charged against the defendant.

8. In order to convict the defendant, the alleged adulterated whiskey must have been found in the possession of the defendant on his trial. If the defendant had parted with the possession of the whiskey, and it was found in the custody of another as in this case in the custody of Enderweis and Yaeger, the defendant must be found not guilty.

9. In order to convict the defendant upon this indictment, the alleged adulterated whiskey must be found while in the possession of the defendant.

10. Ignorance in point of fact, is in all cases of supposed offense, a sufficient excuse.

11. To make the acts of the defendant criminal, there must be both will and act entering into the transaction.

12. If the State has failed to prove, beyond a reasonable doubt, that the defendant knew, or reasonably ought to have known, that the whiskey alleged to have been in his possession was adulterated with wood alcohol, as alleged, your verdict should be not guilty.

13. Criminality cannot exist without knowledge. Knowledge of the defendant that the whiskey contained spurious and poisonout ingredients, to wit, wood alcohol, is an ingredient necessary to constitute his guilt; for without such knowledge the act charged as a crime is innocent in its character; and the defendant should be found not guilty.

14. The essence of a criminal offense is the wrongful intent, without which it cannot exist.

15. A person who deals in and sells alcoholic beverages is under no duty to make a chemical analysis to determine the ingredients thereof.

16. The defendant is not on trial for the death of Edward Klein. The death of Klein is only evidential in this case as tending to show that the beverage which he drank in Yaeger's place was adulterated with a poisonous ingredient, to wit, wood alcohol.

Defendant's Requests to Charge.

17. Unless the jury is satisfied, beyond a reasonable doubt, that Klein died from the effects of the beverage which he drank in Yaeger's saloon, his death cannot be considered by the jury as any evidence of the fact that the beverage obtained from Solomon was adulterated with a poisonous ingredient.

18. The death of Klein cannot be considered by the jury as conclusive evidence that what he drank in Yaeger's saloon was adulterated with wood alcohol unless you are satisfied from the evidence, beyond a reasonable doubt, that he died solely as a result of what he drank in Yaeger's saloon.

19. In order to justify an inference that the beverage which Klein drank in Yaeger's saloon was adulterated with wood alcohol, the State must prove, beyond a reasonable doubt, that he drank nothing or ate nothing adulterated at any other place. If it fails so to do you are not justified in considering the death of Klein as conclusive evidence that the beverage which he drank in Yaeger's saloon was adulterated with wood alcohol.

20. The drinking of the same beverage by numerous other persons at the same time that Klein drank it, without any injurious results, may be considered by the jury as a circumstance in determining whether the beverage was in fact adulterated with wood alcohol.

21. The defendant cannot be held criminally responsible for the act of his wife, not committed in his presence and not directed by him to be done.

22. If the jury is satisfied that the defendant kept the two gallons of whiskey named in the indictment in his possession, even though it was adulterated with a poisonous ingredient, but if he forbade his wife to sell it, and if she did so without his knowledge and consent and contrary to his instructions, this defendant must be found not guilty.

23. The jury cannot consider the evidence that the defendant was in possession of a quantity of whiskey within the last two or three weeks as substantive proof of the truth of the charge in this indictment.

24. Evidence that the defendant had whiskey in his possession at a time remote from the date named in this indictment cannot be considered by the jury in determining the guilt of the defendant upon this indictment.

Motion in Arrest of Judgment.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Monday, June 14, 1920.

STATE

vs.

SAMUEL SOLOMON.

Before Hon. William P. Martin, Judge.

Appearances as before stated.

Mr. Schoen. In the case of State vs. Samuel Solomon, I desire to move in arrest of judgment in this case on the following grounds:

First, because the indictment upon which the defendant was tried charged no crime, in that it does not set forth that the whiskey named in the indictment was to be used as a beverage.

Second, because the constitutional rights of the defendant were invaded by a trial without the indictment of the Grand Jury charging a crime;

Third, because there is no verdict finding the defendant guilty of any crime, and therefore, no judgment and sentence can be imposed;

Fourth, because the constitutional rights of the defendant will be invaded by the judgment and sentence in this case because the defendant had not been convicted of a crime; and,

Fifth, because the indictment does not set forth an indictable offense, for the same reason that it does not set forth that the whiskey named in the indictment was to be used as a beverage.

The Court. Motion denied.

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.

Certificate of Court Stenographer.

STATE

vs.

SAMUEL SOLOMON.

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 vs. Samuel Solomon, Wood Alcohol, which trial was held bofore Hon. William P. Martin, Presiding Judge of the Essex County General Quarter Sessions Court in and for the County of Essex, and a jury, on Monday, May 24, 1920; Tuesday, May 25, 1920; Wednesday, May 26, 1920; and Monday, June 14, 1920, at Newark, New Jersey.

HAROLD T. COOK.

Certificate of Judge.

STATE

vs.

SAMUEL SOLOMON.

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.

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

Dated August 24, 1920.

ASSIGNMENTS OF ERROR.

Filed September 30, 1920.

New Jersey Supreme Court

STATE OF NEW JERSEY, *vs.* SAMUEL SOLOMON.	*On Error to Essex Quarter Sessions.* *Assignments of Error.*

Afterwards, to wit, on the return of the writ of error issued in this cause, comes the said Samuel Solomon, by Edward Schoen, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and also in the giving of the verdict and the judgment aforesaid, there is manifest error in this respect, to wit:

1. Because the Trial Judge erroneously refused to quash the indictment.

2. Because the Trial Judge erroneously denied the motion made in arrest of judgment.

3. Because the Trial Judge erroneously denied a motion to direct a verdict of not guilty for the defendant.

4. Because the Trial Judge erroneously permitted the witness Enderweis to be asked the following question:

"Q What did you do with it?"

5. Because the Trial Judge erroneously permitted the witness Enderweis to be asked the following question:

"Q From what did you take it?"

6. Because the Trial Judge erroneously permitted the witness Yeager to be asked the following question:

"Q Don't you know there was some in the bottle when you turned it over to the police?"

7. Because the Trial Judge erroneously directed the witness Yeager to answer the following question after the defendant's counsel, as examining attorney, had withdrawn the question:

"Q Was that your idea in attempting to throw this away?

"*Witness.* May I speak?

"*The Court.* Yes.

"*Mr. Schoen.* You can answer that yes or no.

"*The Court.* No, that is not proper.

"*Mr. Schoen.* I will withdraw the question.

"*The Court.* No, you cannot withdraw the question.

"*Mr. Schoen.* I submit I have the right to withdraw the question.

"*The Court.* You answer the question. When counsel asks a question and instructs the witness to answer yes or no, and the Court rules that his instruction is not proper, he cannot then withdraw the question."

8. Because the Trial Judge erroneously refused to permit defendant's counsel, as examining attorney, to withdraw the following question put to the witness Yeager, before the witness had answered same:

"Q Was that your idea in attempting to throw this away?"

9. Because the Trial Judge erroneously permitted the witness Lynch to be asked the following question:

"Q What occurred after you and Klein got in there?"

10. Because the Trial Judge erroneously admitted the following:

"*Mr. Mott.* He arrived at the City Hospital, Newark, at or about 8:10 A. M., December 29th, and died at the hospital at or about 3:30 P. M. the same day, that is the 29th."

11. Because the Trial Judge erroneously permitted the witness Freeman to be asked the following question:

"Q What did you do when you got there?"

12. Because the Trial Judge erroneously permitted the witness Freeman to be asked the following question:

"Q Did you take anything away with you?"

13. Because the Trial Judge erroneously admitted in evidence the bottle and contents marked Exhibit S. 1.

14. Because the Trial Judge erroneously admitted in evidence Exhibit S. 3 for identification and permitted it to be marked Exhibit S. 3.

15. Because the Trial Judge erroneously admitted in evidence Exhibit S. 5.

Assignments of Error.

16. Because the Trial Judge erroneously permitted the witness Dr. George L. Warren to be asked the following question:

"Q Just tell the Court and jury what you did; what you found."

17. Because the Trial Judge erroneously permitted the witness Dr. Warren, to be asked the following question:

"Q Doctor, assuming that Klein was drinking Sunday afternoon, was sick on Monday morning and the physician called in found him to have extreme violent pains in the stomach, stricken with blindness, taken to the hospital at or about 8:15 Monday morning and died Monday afternoon at about 3:15; with these facts before you, how would you diagnose the case?"

18. Because the Trial Judge erroneously permitted the witness Edel to be asked the following question:

"Q Now proceed to tell what you did?"

19. Because the Trial Judge erroneously permitted the witness Edel to be asked the following question:

"Q What did you find?"

20. Because the Trial Judge erroneously refused to permit the defendant to ask the witness Premo the following question:

"Q Now did Mr. Klein say anything about having some liquor of his own make?"

21. Because the Trial Judge erroneously refused to permit the defendant to ask the witness Premo the following question:

"Q Did he tell you who made it?"

22. Because the Trial Judge refused to permit the defendant to ask the witness Premo the following question:

"Q Was he a heavy drinker?"

23. Because the Trial Judge erroneously refused to permit the defendant to ask the witness Premo the following question:

"Q Did you know the habits of Mr. Klein for, say a year before his death as to the saloons which he patronized?"

24. Because the Trial Judge erroneously refused to permit the defendant to ask the witness Premo the following question:

"Q And did you and he keep it up all night?"

Assignments of Error.

25. Because the Trial Judge erroneously permitted the witness Mrs. Solomon, to be asked the following question in cross examination:

> "Q What did you do with that money you got, the money you received for the beer you sold?"

26. Because the Trial Judge erroneously charged the jury as follows:

> "The act in substance, is that "any person who shall barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

27. Because the Trial Judge erroneously charged the jury as follows:

> "It is therefore necessary for the State to prove, and for you to find beyond a reasonable doubt, upon the evidence, that this defendant did keep in his possession for barter or sale, spirits of the kind alleged in the indictment, to wit whiskey and that the same was then and there adulterated, or had been manufactured with spurious or poisonous ingredients, contrary to the statute."

28 Because the Trial Judge erroneously charged the jury as follows:

> "It is not necessary that the State prove that he knew that the spirits were adulterated or contained poisonous ingredients."

29. Because the Trial Judge erroneously refused to charge the defendant's first request to charge as follows:

> "1. In measuring the responsibility of the defendant in the sale of the alleged beverage, he can only be charged with such knowledge of its ingredients as he then possessed, or which he reasonably ought to have known with the opportunities at his command. Knowledge derived from subsequent events or autopsies, and unavailable or not reasonably inferable at the time of the alleged sale of the beverage, cannot be imputed to him."

30. Because the Trial Judge erroneously refused to charge the defendant's second request to charge as follows:

> "2. If the jury have a reasonable doubt that the defense has been made out the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty."

Assignments of Error.

31. Because the Trial Judge erroneously refused to charge the defendant's fourth request to charge as follows:

"4. Criminal intent is essential to constitute a crime."

32. Because the Trial Judge erroneously refused to charge the defendant's fifth request to charge as follows:

5. In order to convict the defendant, it must be shown not only that the defendant had the alleged adulterated whiskey in his possession, but that he also knew that it was adulterated."

33. Because the Trial Judge erroneously refused to charge the defendant's sixth request to charge as follows:

"6. The ordinary principle that there must be a guilty mind to constitute a guilty act, applies to this case."

34. Because the Trial Judge erroneously refused to charge the defendant's seventh request to charge as follows:

"7. Although the statute says nothing about knowledge, that must be imported into the statute. Knowledge is, to a certain extent, essential to the crime charged against this defendant."

35. Because the Trial Judge erroneously refused to charge the defendant's eighth request to charge as follows:

"8. In order to convict the defendant the alleged adulterated whiskey must have been found in the possession of the defendant on his trial. If the defendant had parted with the possession of the whiskey, and it was found in the custody of another as in this case in the custody of Enderweis and Yeager, the defendant must be found not guilty."

36. Because the Trial Judge erroneously refused to charge the defendant's ninth request to charge as follows:

"9. In order to convict the defendant upon this indictment, the alleged adulterated whiskey must be found while in the possession of the defendant."

37. Because the Trial Judge erroneously refused to charge the defendant's tenth request to charge as follows:

"10. Ignorance in point of fact, is in all cases of supposed offense, a sufficient excuse."

38. Because the Trial Judge erroneously refused to charge the defendant's eleventh request to charge as follows:

"11. To make the acts of the defendant criminal, there must be both will and act entering into the transaction."

Assignments of Error.

39. Because the Trial Judge erroneously refused to charge the defendant's twelfth request to charge as follows:

"12. If the State has failed to prove, beyond a reasonable doubt, that the defendant knew, or reasonably ought to have known that the whiskey alleged to have been in his possession, was adulterated with wood alcohol as alleged, your verdict should be not guilty."

40. Because the Trial Judge erroneously refused to charge the defendant's thirteenth request to charge as follows:

"13. Criminality cannot exist without knowledge. Knowledge of the defendant that the whiskey contained spurious and poisonous ingredients, to wit, wood alcohol, is an ingredient necessary to constitute his guilt; for without such knowledge the act charged as a crime is innocent in its character and the defendant should be found not guilty."

41. Because the Trial Judge erroneously refused to charge the defendant's fourteenth request to charge as follows:

"14. The essence of a criminal offense is the wrongful intent, without which it cannot exist."

42. Because the Trial Judge erroneously refused to charge the defendant's fifteenth request to charge as follows:

"15. A person who deals in and sells alcoholic beverages is under no duty to make a chemical analysis to determine the ingredients thereof."

43. Because the Trial Judge erroneously refused to charge the defendant's seventeenth request to charge as follows:

"17. Unless the jury is satisfied, beyond a reasonable doubt, that Klein died from the effects of the beverage which he drank in Yeager's saloon, his death cannot be considered by the jury as any evidence of the fact that the beverage obtained from Solomon was adulterated with a poisonous ingredient."

44. Because the Trial Judge erroneously refused to charge the defendant's eighteenth request to charge as follows:

"18. The death of Klein cannot be considered by the jury as conclusive evidence that what he drank in Yaeger's saloon was adulterated with wood alcohol unless you are satisfied from the evidence, beyond a reasonable doubt, that he died solely as a result of what he drank in Yaeger's saloon."

Assignments of Error.

45. Because the Trial Judge erroneously refused to charge the defendant's nineteenth request to charge as follows:

> "19. In order to justify an inference that the beverage which Klein drank in Yaeger's saloon was adulterated with wood alcohol, the State must prove, beyond reasonable doubt, that he drank nothing or ate nothing adulterated at any other place. If it fails so to do you are not justified in considering the death of Klein as conclusive evidence that the beverage which he drank in Yaeger's saloon was adulterated with wood alcohol."

46. Because the Trial Judge erroneously refused to charge the defendant's twenty-first request to charge as follows:

> "21. The defendant cannot be held criminally responible for the act of his wife not committed in his presence and not directed by him to be done."

Wherefore said plaintiff-in-error, Samuel Solomon, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors and all other errors appearing in the record and proceedings aforesaid, and upon the giving of judgment and passing of sentence aforesaid, be reversed, cancelled and held for nothing, and that the said Samuel Solomon may be restored to all things by him lost on occasion thereof.

EDWARD SCHOEN,
Attorney for Plaintiff-in-Error.

Service of a copy of the within assignments of error acknowledged *nunc pro tunc* this 30th day of September, A. D. 1920.

J. H. HARRISON,
Prosecutor of Pleas.

SPECIFICATION OF CAUSES AND REASONS FOR REVERSAL.

Filed September 30, 1920.

Plaintiff-in-error assigns the following reasons or causes for the reversal of the verdict and judgment of the conviction in the above stated action, upon the whole record:

1. Because the Trial Judge erroneously refused to quash the indictment.

2. Because the Trial Judge erroneously denied the motion made in arrest of judgment.

3. Because the constitutional rights of the defendant were invaded by a trial without the indictment of a Grand Jury charging a crime.

4. Because the indictment upon which the defendant was tried charged no crime.

5. Because there is no verdict finding the defendant guilty of any crime, and therefore no judgment and sentence can be imposed.

6. Because the constitutional rights of the defendant were invaded by the judgment and sentence in this cause because the defendant does not stand convicted of a crime.

7. Because the Trial Judge erroneously denied the motion to direct a verdict of not guilty for the defendant.

8. Because the Trial Judge erroneously charged the jury as follows:

> "The act in substance, is that 'any person who shall barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind that shall be adulterated or manufactured, with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor.'"

9. Because the Trial Judge erroneously charged the jury as follows:

> "It is therefore necessary for the State to prove, and for you to find beyond a reasonable doubt, upon the evidence, that this defendant did keep in his possession for barter or sale, spirits of the kind alleged in the indictment, to wit, whiskey, and that the same was then and there adulterated, or had been manufactured with spurious or poisonous ingredients, contrary to the statute."

Specification of Causes and Reasons for Reversal.

10. Because the Trial Judge erroneously charged the jury as follows:

> "It is not necessary that the State prove that he knew that the spirits were adulterated or contained poisonous ingredients."

Said plaintiff-in-error, for the causes aforesaid, in addition to the assignments of error, prays that the judgment aforesaid may be reversed.

EDWARD SCHOEN,
Attorney for Plaintiff-in-Error.

Service of a copy of the within specification of causes and reasons for reversal acknowledged *nunc pro tunc* this 30th day of September, A. D. 1920.

J. H. HARRISON,
Prosecutor of Pleas.

OPINION OF SUPREME COURT.

Filed July 19, 1921.

NEW JERSEY SUPREME COURT.

February Term, 1921.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

SAMUEL SOLOMON,
Plaintiff-in-Error.

On Error to the Essex County Court of Quarter Sessions.

Submitted March 23, 1921; decided July 18th, 1921.

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

1. In an indictment under Section 98 of the Crimes Act it will be presumed that whiskey in the possession of the defendant, adulterated or manufactured with spurious or poisonous ingredients, and kept for barter and sale, is so kept to be used as a beverage, so that it is unnecessary to allege in the indictment that it is kept for barter and sale to be used as a beverage.

2. In a statutory offense the defendant's knowledge of all the physical facts which go to constitute the offence is not essential to guilt unless made so by the statute.

3. Where an act in general terms is made indictable by statute, in the absence of language in the statute or in the effect of the law evincing a purpose to require the existence of a wrongful intent, such intent need not be averred and proved.

Edward Schoen, for plaintiff-in-error.

J. Henry Harrison, Prosecutor of the Pleas, and Wilbur A. Mott, Assistant Prosecutor of the Pleas, for defendant-in-error.

New Jersey State Library

Opinion of Supreme Court.

The opinion of the court was delivered by

KATZENBACH, *J.*

The writ of error in this case is prosecuted to reverse the conviction of the defendant below in the Essex Quarter Sessions upon an indictment found under Sec. 98 of the Crimes Act. The defendant was the proprietor of a saloon in the City of Newark. On December 23, 1919, one John P. Enderweis, who also kept a saloon in the same city, went to the defendant's place of business and purchased two gallons of whiskey which he took to his saloon. Enderweis then sold to a customer, Edward Klein, four or five drinks of the whiskey purchased from the defendant. The bartender of Enderweis also sold to Klein some of this whiskey. After drinking the whiskey, Klein suffered excruciating pain, lost his sight, and died the following day. An autopsy showed that his death was due to wood alcohol poisoning.

The first ground alleged for reversal is the refusal of the Trial Court to quash the indictment. The granting or refusal of such a motion is a matter of judicial discretion and not subject to review by writ of error. State *vs.* Riggs, 92 N. J. L. 575. The same questions raised on the motion to quash were raised upon motions to direct a verdict and in arrest of judgment which were denied by the Trial Court and to which denials exceptions were taken, so that the questions raised on the motion to quash are properly before this court for review upon these exceptions and will be considered.

The first contention is that the indictment which alleges that the defendant "did keep in his possession for barter and sale, certain spirits, to wit, two gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol, contrary to the form of the statute in such cases made and provided," should aver that the defendant had the alleged adulterated spirits in his possession to be used as a beverage. The section of the statute under which the indictment was framed is as follows:

> "Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part to be used as a beverage, that shall be adulterated or manufactured with

spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

We think the defendant's position in this respect is untenable. Where rum, brandy, wine or spirits of any kind is kept for barter or sale, we are of the opinion that it is presumed to be so kept to be used for beverage purposes, and that it is only in the case where the liquid of which distilled spirits of any kind forms a component part that the indictment must allege that the liquid is kept for barter or sale to be used as a beverage. There are liquids of which distilled spirits form a component part, such for example as liniment, which are kept for barter or sale as such, and it was for the protection of vendors of such wares that the words "to be used as a beverage" were inserted in this clause of the statute. It is only when such liquids are kept for barter or sale to be used as a beverage that the vendors are brought within the statute. In adopting this construction of this statute we think the Trial Court ruled correctly.

It is further contended in behalf of the defendant that there is no averment in the indictment that the defendant knew that the whiskey was adulterated with a poisonous ingredient. This is not necessary. In statutory offences the defendant's knowledge of all the physical facts which go to constitute the offence is not essential to guilt unless made so by the statute. Waterbury *vs.* Newton, 50 N. J. L. 534. We think the defendant's knowledge of adulteration under this statute not essential to guilt and that the ruling of the Court in this respect was proper.

The third ground alleged is that there is no averment in the indictment of an intent on the part of the defendant. This was unnecessary. This case belongs to that class of cases where an act in general terms is made indictable by statute. In such a case in the absence of language in the statute or in the effect of the act evincing a purpose to require the existence of intent, a wrongful intent need not be shown and consequently need not be averred. Halstead *vs.* State, 41 N. J. L. 552.

It is also insisted in behalf of the defendant that the case is barren of evidence establishing the guilt of the defendant. This insistment is in part based upon the fact that the sale of the whiskey to Enderweis was not made by the defendant who was indicted and convicted, but by the defendant's wife. While the testimony is that Mrs. Solomon made the sale, yet the evidence

shows that the defendant held the license for the saloon; that he was present while Enderweis was on the premises; that he knew his wife was tending bar and selling liquor; that the proceeds of the sale to Enderweis was placed in the cash register and came into the possession of the defendant. This evidence would justify a jury in finding that Mrs. Solomon was the defendant's agent. It was only necessary for the State to prove that the adulterated whiskey was in the defendant's possession for barter and sale.

The Trial Court submitted all the evidence under proper instructions to the jury. The question to be determined was one of fact. We think the evidence referred to ample to justify the verdict that the defendant kept in his possession for barter and sale whiskey containing poisonous ingredients.

There are several other assignments of error which deal with the charge of the Court, the refusal of the Court to charge certain requests and the admission of evidence alleged to be illegal. We have examined the questions presented by these assignments, and find no error prejudicial to the defendant in the rulings of the Trial Court.

The judgment below is affirmed with costs.

Remittitur.

REMITTITUR.

Filed July 21, 1921.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* SAMUEL SOLOMON, *Plaintiff-in-Error.*	*On Error.* *Remittitur.*

This cause having been submitted at the February Term, nineteen hundred and twenty-one, of this court, by J. Henry Harrison, Esq., and Wilbur A. Mott, Esq., attorneys for defendant-in-error, and Edward Schoen, Esq., attorney for plaintiff-in-error, and the Court having considered the same and finding no error in the record and proceedings in 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 this judgment and the practice of said court.

Entered July 21, 1921,

On motion of

J. HENRY HARRISON,
Prosecutor of the Pleas.

ASSIGNMENT OF ERROR.

Filed September 7, 1921.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* SAMUEL SOLOMON, *Plaintiff-in-Error.*	*On Error.* *Assignment of Error.*

Afterwards, on the return day of the writ of error issued in this cause in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, comes the said Samuel Solomon, plaintiff-in-error, by Edward Schoen, his attorney, and says that:

In the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. Because the Supreme Court affirmed the verdict and judgment aforesaid, whereas the said verdict and judgment should have been reversed.

Therefore said plaintiff-in-error, Samuel Solomon, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors, and all other errors appearing in the record and proceedings aforesaid, and upon the giving of judgment and passing of sentence aforesaid, be reversed, cancelled and held for nothing, and that the said Samuel Solomon may be restored to all things by him lost on occasion thereof.

EDWARD SCHOEN,
Attorney for Plaintiff-in-Error.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

The State of New Jersey, *Defendant-in-Error,* *vs.* Samuel Solomon, *Plaintiff-in-Error.*	*On Error to the Supreme Court.*

BRIEF FOR DEFENDANT-IN-ERROR.

The indictment in this case was founded upon Section 98 of the Crimes Act of 1898. This section reads as follows:

> "98. Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part to be used as a beverage, that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

The indictment (p. 3) contained two counts:

The first count charges that Samuel Solomon * * *

> "unlawfully did keep in his possession for barter and sale, certain spirits, to wit, twenty gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol."

The second count is in the same form as the first count, except that the word "manufactured" is substituted for the word "adulterated."

Samuel Solomon was a saloon-keeper at 210 Belmont avenue Newark (p. 8).

JOHN P. ENDERWEIS TESTIFIED that he and *John Yeager* conducted a saloon at 703 Hunterdon street, Newark; that on December 23d, then last, he went to Solomon's saloon and purchased two gallons of whiskey for $22 a gallon. When Enderweis entered the saloon Samuel Solomon was there. Solomon and his wife were both behind the bar when he got there (p. 10, l. 45).

ENDERWEIS had a few drinks which were served by Mrs. Solomon. Solomon was behind the bar. Solomon remained in the saloon five or ten minutes. Enderweis says (p. 16, l. 25):

> "I seen him leave the door. He was in the rear of the bar and he went out; where he went I do not know. I waited for half an hour for him. I asked for him."

ENDERWEIS SAYS (p. 16, l, 15):

> "After waiting half an hour I asked for Mr. Solomon. I knew he was not behind his bar, and I did not know whether he was in the building. I asked her if she would sell me some whiskey. She agreed to give me some. * * * She told me it was the same I was drinking." He got the whiskey in a two-gallon jug and took it back to his place of business (p. 12). At the time he bought this whiskey Enderweis had no whiskey in his saloon (p. 13).

On Saturday afternoon, after he got this whiskey, Enderweis sold Edward Klein four or five drinks of the same whiskey he purchased from Solomon (p. 14).

MOLLY SOLOMON, the wife of the defendant testified (p. 105), that Enderweis came to the saloon, offered her $22 a gallon for whiskey, but said she did not sell him anything. She testifies (p. 108) that when she was behind the bar she sold beer, and said that before prohibition came in she sold everything. The money she took in while behind the bar she gave to her husband. "I col-

lected the money; I gave it to my husband. I didn't go out and spend it" (p. 109, l. 22).

> "Q But the money you received for selling beer and cigars and other things you sold you turned it over to your husband that he could pay the bills with? A I certainly did, yes, sir" (p. 109, l. 30).

JOHN G. YEAGER, testified that on Saturday following the 23d, he sold some of the Solomon whiskey to Edward Klein (p. 25). He says (p. 26) that on Monday morning Mr. Reilly told him something about Klein. He got excited and threw away the whiskey that was left in the working bottle, but there was some whiskey left in the bottle.

DR. BENJAMIN KAPLAN was called in on Monday morning to attend Klein. He says (p. 47):

> "I found him lying on his bed, partly dressed; he seemed to be in excruciating pain and he complained of loss of sight and extreme pain in the abdomen; he was so tender, and in so much agony that I really could not examine him thoroughly; I relieved his pain by hypodermic injections of morphine and ordered him removed to the hospital immediately. * * * I thought that he was suffering from some form of poisoning, but I could not make out exactly what it was."

DR. WARREN, the county physician, performed an autopsy on Klein, and testified (p. 67) that, in his opinion, on the facts of the case, Klein died of wood alcohol poisoning.

DR. ALBERT E. EDEL, the chemist, testified that he was present at the autopsy, removed and took with him some of Klein's organs, and made a chemical analysis of them, and found in the stomach and stomach contents, wood alcohol (p. 77, l. 15).

DR. EDEL further testified that he analyzed the contents of Exhibit S. 5, and says (p. 76, l. 40):

> "The sample contains 38 per cent. of absolute alcohol, by weight, of which 70 per cent. of the alcohol per cent. is wood alcohol."

Exhibit S. 5 contained the whiskey that remained in the working bottle after Yeager had emptied it, and out of which he poured the whiskey which Klein drank.

Subject to its relevancy, it was admitted (p. 41) that Edward Klein was taken to Newark City Hospital at or about 8:10 A. M., December 29, and that he died at the hospital at or about 1:45 P. M. on the same day.

The case comes up on a strict bill of exceptions and the entire record under the 136th section. There are forty-six assignments of error and ten specifications of causes for reversal.

We will take up the various points argued by counsel for plaintiff-in-error in the same way in which he discusses them in his brief.

POINT I.

This point alleges error in the refusal of the Court to quash the indictment.

The motion to quash was based upon three grounds. A fourth ground is stated, but is the same in substance as the third.

First, that the indictment does not set out an indictable offense against the defendant; there is no allegation that he kept the alleged adulterated whiskey in his possession to be used as a beverage.

Second, there is no averment that the defendant knew of the fact alleged.

Third, there is no averment of an intent upon the part of the defendant.

The motion to quash was denied.

We respectfully submit that the motion to quash was properly denied.

A careful reading of Section 98 of the Crimes Act will show that the words "to be used as a beverage" refer to

the word "liquid," and not to the first branch of the section. We think that Section 98, so far as the words "to be used as a beverage" is concerned, should be construed by the same rule that has been affirmed in the construction of Section 66 of the Crimes Act.

> "It has long been settled that the exception contained in Section 66 of the Crimes Act does not relate to the first branch of the section, which prohibits the sale of any vinous, spirituous, or other ardent spirits, but only to the second branch, which prohibits the sale of 'any *composition* of which any of said liquors shall form the chief ingredients.'"
>
> *State* v. *Terry,* 43 Vr. at 382;
>
> *Townley, ads. State,* 3 Harr. 311;
>
> *State* v. *Marks,* 36 Vr. 84.

The liquors mentioned in the first branch of Section 98 are presumed to be for beverage purposes, while the "*other liquid* of which distilled spirits of any kind shall form a component part," may or may not be for beverage purposes, and therefore, the words, "to be used as a beverage," relate only to the words "*other liquid.*"

The second ground on which the motion to quash is based is, that there is no averment that the defendant knew of the alleged fact, to wit, that the whiskey was adulterated with a poisonous ingredient, and the third ground is, that there is no averment of an intent on the part of the defendant.

As to the second ground, we say that the 98th section does not make knowledge a part of the crime. Indeed, if the defendant knew that the whiskey he sold contained a poisonous ingredient, and death resulted from drinking it, he would have been guilty of murder in the first degree under the statute.

Knowledge is not an element in this crime.

> *Vandergraft* v. *Meihle,* 37 Vr. 92;
>
> *Waterbury* v. *Newton,* 21 Vr. 534;
>
> *Tomlinson* v. *Armour,* 74 N. J. L. 274.

As to the third ground, we submit that it was not necessary to aver any other intent than that set out in the statute. The statute says, "keep in his possession for *barter and sale.*"

The indictment charges that the whiskey kept in possession was "for barter and sale." The statute does not make intent an element of the offense, and therefore it was not necessary to aver a special intent in the indictment.

Halsted v. *State,* 12 Vr. 552;
State v. *Kuehnle,* 56 Vr. 221 at 225.

We respectfully submit that there was no error in denying the motion to quash.

POINT II.

This point alleges error in the refusal of the Court to direct a verdict at the conclusion of the case (p. 111).

The motion was based on the following grounds:

First, there is no evidence tending to establish the guilt of the defendant.

Second, the evidence is insufficient to sustain the charge contained in the indictment.

Third, because the constitutional rights of the defendant are invaded by trial without indictment by the jury charging the crime.

Fourth, that the indictment charges no crime because it does not set forth that the whiskey alleged was to be used as a beverage.

Treating points one and two as being substantially the same, we insist that there was sufficient evidence to sustain the charge that the defendant had this whiskey in his possession for barter and sale. The evidence fully establishes that Molly Solomon acted as his agent in his saloon behind the bar for the sale of his goods.

Solomon was present when Enderweis entered the saloon and Mrs. Solomon was then behind the bar. She testified that the money she received for what she sold she turned over to him. She was there for the purpose of selling his wares, and he acquiesced in her doing so. She sold to Enderweis whiskey that he had in his possession for barter and sale.

The indictment does not charge Solomon with selling this whiskey to Enderweis, but does charge him with having it in his possession for barter and sale. It therefore, became a jury question whether or not the whiskey he had in his possession was for barter and sale.

The Court charged the jury as follows (p. 114):

> "It is, therefore necessary for the State to prove, and for you to find, beyond a reasonable doubt, upon the evidence, that this defendant did keep in his possession for barter and sale spirits of the kind alleged in the indictment, to wit, whiskey, and that the same was then and there adulterated, or had been manufactured with spurious or poisonous ingredients, contrary to the statute."

The sale to Enderweis was relevant only as evidence that the defendant did have this adulterated whiskey in his possession for barter and sale; and, under the evidence, this was a jury question.

The third and fourth points are covered by our argument on the motion to quash.

Counsel for the plaintiff-in-error, in his brief, on page 10, says:

> "The State contends that the possession of the alleged liquor by Mrs. Solomon and the sale of the same by her, may be criminally chargeable to the defendant on the theory of agency, in holding the defendant criminally accountable for the acts of Mrs. Solomon."

The State makes no such contention. The contention of the State is, that the defendant, Samuel Solomon, had this whiskey in his possession for barter and sale. If he did so have it, the crime was complete. The State points to

the fact that his agent and bartender, Molly Solomon, sold the whiskey to Enderweis as evidence of the fact that he had the whiskey in his possession for barter and sale.

Solomon, himself, testified (p. 98, l. 20), that when he was away his wife took care of the saloon. She denied that she sold whiskey to Enderweis. We therefore urgently insist that it was for the jury to determine, first, whether she did in fact sell it to Enderweis, and if they found that she did, then it was for the jury to determine whether or not she in fact sold to Enderweis whiskey which the defendant Solomon kept in his possession for barter and sale.

It is also urged in the brief of counsel for the plaintiff-in-error (p. 14), that the motion to direct a verdict should have prevailed upon the ground that there was no proof that the defendant had in his possession two gallons of whiskey, as alleged in the indictment.

Enderweis asked for two gallons of whiskey. He was sold two gallons of what was represented to him to be whiskey.

> "In this state of the case, the jury was justified in finding that the liquor sold was what it was inferentially represented to be."
> *State* v. *Marks,* 36 Vr. p. 87.

We respectfully insist that there was no error in denying the motion to direct a verdit.

POINT III.

This point alleges error in the denial of the motion in arrest of judgment (p. 122).

The motion in arrest of judgment was based upon five grounds.

All these grounds are covered by the argument on the motion to quash.

POINT IV.

This point alleges error in the charge, and is based on Assignments 26 and 27, and Specifications 8 and 9.

The questions involved in the portion of the charge set out in these assignments and specifications is the same question that we dealt with on the motion to quash.

We respectfully submit that there is no error in the portions of the charge set out in these assignments and specifications.

POINT V.

This point alleges error in the refusal of the Court to charge the defendant's second, eighth and ninth requests, and is based on Assignments 30, 33, 35 and 36.

ASSIGNMENT 30 deals with the second request to charge, which is as follows (p. 18):

> "2. If the jury have a reasonable doubt that the defense has been made out, the defendant is entitled to the benefit of that doubt and the verdict should be not guilty."

Whether or not the principle stated in this request is sound law, as applied to self-defense, it certainly is not a sound principle of law, generally, where self-defense is not involved. The State must prove the defendant's guilt beyond a reasonable doubt. The defendant is not required to prove his innocence beyond a reasonable doubt.

The charge of the Court on the question of reasonable doubt will be found on page 112, and we submit that that portion of the charge correctly stated the legal principle involved.

ASSIGNMENT 33 is based on the sixth request to charge, and is as follows:

> "6. The ordinary principle that there must be a guilty mind to constitute a guilty act, applies to this case" (p. 18).

If the defendant had adulterated whiskey in his possession for barter and sale, the crime was complete, regardless of whether he had a guilty mind, or not. This is a purely statutory offense. Any violation of the statute constitutes the crime regardless of the defendant's state of mind, if the act constituting the crime was voluntarily committed.

The statute does not make intent an element of offense, and therefore it was not necessary to aver or prove a special intent beyond having in possession for barter and sale.

Halsted v. *State,* 12 Vr. 552;
State v. *Kuehnle,* 56 Vr. 221, at 235.

ASSIGNMENTS 35 AND 36 relate to the refusal of the Trial Judge to charge the defendant's eighth and ninth requests to charge, which were as follows:

> "8. In order to convict the defendant, the alleged adulterated whiskey must have been found in the possession of the defendant on his trial. If the defendant had parted with the possession of the whiskey, and it was found in the custody of Enderweis and Yeager, the defendant must be found not guilty."
>
> "9. In order to convict the defendant upon this indictment, the alleged adulterated whiskey must be found while in the possession of the defendant."

We respectfully submit that the principle involved in these requests to charge is not sound. The statute prohibits not only the sale, but the keeping in possession for barter and sale. We have two distinct offenses. The sale does not wipe out the offense of keeping in possession for barter and sale, but is evidence that the whiskey was kept in possession for barter and sale. The fact that the defendant parted with the possession of the whiskey, was evidence that he had kept it in his possession for barter and sale. The offense denounced in the statute is not keeping adulterated whiskey in possession, but rather in keeping it in possession for barter and sale; and, as we have above pointed out, the sale of the whiskey and the parting with

the possession of it, was evidence that the defendant had kept it in his possession for barter and sale.

ASSIGNMENTS 32 AND 34 relate to the refusal of the Court to charge the defendant's fifth and seventh requests to charge, which were as follows:

> "5. In order to convict the defendant, it must be shown, not only that the defendant had the alleged adulterated whiskey in his possession, but that he also knew that it was adulterated."
>
> "7. Although the statute says nothing about knowledge, that must be imported into the statute. Knowledge is to a certain extent essential to the crime charged against the defendant."

Each of these requests involves the proposition that knowledge was an essential element of the offense. As we have already pointed out on the motion to quash, neither knowledge nor specific intent is involved in this statute. If the defendant knew that the whiskey he sold contained poisonous ingredients, and death resulted from drinking it, he would have been guilty of murder in the first degree, under the statute.

POINT VI.

This point alleges error in the admission of illegal evidence, and is based on Assignments 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 25.

ASSIGNMENT 4 relates to a question asked of Enderweis (p. 11, l. 25), as follows:

> "Q What did you do with it?"

This question related to the whiskey Enderweis bought of Mrs. Solomon, and was proper.

The answer was (p. 12, l. 11):

> "I took it back to the place of business."

ASSIGNMENT 5 relates to the question asked of Enderweis (p. 13, l. 10), and was for the purpose of showing that he sold some of the Solomon whiskey to Klein.

ASSIGNMENT 7 is a question asked on cross examination of Yeager (p. 30, l. 25), as follows:

> "Was that your idea in attempting to throw this away?"

What occurred with reference to this question is set out on page 30, and we respectfully insist that, under the circumstances there set out, counsel was not entitled to withdraw the question. The answer of the witness will be found on page 31, line 12, as follows:

> "I threw the whiskey out because I suppose it was on account of the evidence, through the excitement of the moment."

Whether or not counsel was entitled to withdraw the question, we submit that this answer did not in any way harm the defendant. Both before and after this question was put to the witness he answered other questions of like import.

ASSIGNMENT 9 relates to a question asked of the witness Lynch, who went to Enderweis' saloon with Klein (p. 35, l. 45), and was for the purpose of showing that Klein drank whiskey, which the testimony shows was the Solomon whiskey.

Assignment 10.

The record shows (p. 41, l. 28), that counsel made an admission, subject to its relevancy, that Klein was taken to the City Hospital, and died.

We submit that this admission was relevant, because the State followed it by showing that an autopsy was performed on Klein, and a chemical analysis made of the stomach contents and organs, and that they contained wood alcohol.

Assignments 11 and 12.

ASSIGNMENT 11 is based on a question asked the witness Freeman (p. 52, l. 19), and ASSIGNMENT 12 is based on a question asked of the same witness (p. 53, l. 32).

We respectfully submit that this evidence was properly admitted for the reasons stated by the Court on pages 62 and 63.

The State insisted that the whiskey found behind Solomon's bar on the 27th was part of the same whiskey that he had on the 23d and sold to Klein; and if the jury so found, it was competent, because the State proved that the whiskey found on the 27th contained wood alcohol.

ASSIGNMENTS 13, 14 AND 15 relate to the admission in evidence of various samples of the whiskey Solomon sold to Enderweis, or that were taken from Solomon's saloon.

We submit that these exhibits were properly admitted for the purpose of proving that the whiskey he had in his possession for barter and sale contained a poisonous ingredient, to wit, wood alcohol.

ASSIGNMENTS 16 AND 17 relate to questions that were asked Dr. Warren, the County Physician, who performed the autopsy.

The question involved in Assignment 16 will be found on page 65, line 2, and the question involved in Assignment 17 will be found on page 67, line 1.

We submit that both of these questions were proper.

ASSIGNMENTS 18 AND 19 are based on questions asked Edel, the chemist.

The question involved in Assignment 18 will be found on page 75, line 40, and the question involved in Assignment 19 will be found on page 77, line 17.

We submit that both of these questions were proper as leading to proof that the whiskey sold to Enderweis contained a poisonous ingredient, to wit, wood alcohol.

ASSIGNMENT 25 is based on a question asked Mrs. Solomon (p. 109, l. 10).

The purpose of this question was to show that she was acting as the bartender and agent of Solomon in the sale of whiskey which he had in his possession for barter and sale.

We respectfully submit that there was no error in the submission of the aforesaid testimony.

POINT VII.

This point alleges error in the exclusion of legal evidence, and is based on Assignments 20, 21, 22, 23 and 24.

These assignments are based on the exclusion of questions asked the witness Premo on his direct examination. Premo was called as a witness for the defense. Premo was allowed to testify (p. 88, l. 32), that Klein was "a pretty free drinker."

The first excluded question will be found on page 87, line 8; the second on the same page, line 35; the third on page 88, line 11; the fourth on page 88, line 29; the fifth on page 89, line 30.

As to these questions we say, generally, they were incompetent. It was immaterial whether Klein was a heavy drinker, or not. None of these questions related to his drinking on the 23d of December. In the second place, most of these questions are decidedly leading.

We therefore respectfully submit that there was no error in the exclusion of these particulars.

On the whole case, we respectfully insist that there was 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.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* SAMUEL SOLOMON, *Plaintiff-in-Error.*	*On Error.*

BRIEF OF PLAINTIFF-IN-ERROR.

Facts.

The indictment against the defendant alleged that he

> "unlawfully did keep in his possession for barter and sale, certain spirits, to wit, two gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit: wood alcohol." And further that he "unlawfully did keep in his possession for barter and sale, certain spirits, to wit: two gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit: wood alcohol."

The crime with which the defendant was charged was a purely statutory one, and the statute upon which it is based is found in the Compiled Statutes, Vol. II, page 1777, par. 98. It is as follows:

> "Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part *to be used as a beverage,* that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

The State's case rested largely on the evidence of one Enderweis (Case, p. 8). He testified that he was a saloonkeeper, and that on or about the day named in this indictment he bought two gallons of whiskey from *Mrs. Solomon* (Case, p. 9). That he paid the money for it to *Mrs. Solomon.*

The State's case further showed that when Enderweis bought the whiskey the defendant, Samuel Solomon, was not present

(Case, p. 14). Cross examined on this phase of the case, Enderweis testified as follows (Case, p. 15):

Q What time of day did you come to the saloon? A It was between two and four, to the best of my knowledge.

Q How long did Solomon stay there after you got there? A Five or ten minutes.

Q And during that five or ten minutes did you talk to him about buying any whiskey for your saloon? A I did not speak with Mr. Solomon at all.

Q Did you see Mr. Solomon go away? A I seen him leave the door; he was in the rear of the bar and he went out; where he went I do not know; I waited about half an hour for him and I asked for him.

Q After you saw him go out you waited a half hour before you talked to Mrs. Solomon again? A No.

Q Up to that time did you mention anything about wanting to buy two gallons of whiskey? A No.

Q And it was after Mr. Solomon had been away for half an hour that you broached the subject to Mrs. Solomon? A I should judge it was about half an hour.

Q Do you remember exactly what you said to her about buying whiskey? A My exact words I could not repeat.

Q Well, about the substance. A I asked her for Mr. Solomon, and she said he was out.

Q Why did you ask her for Mr. Solomon when you saw him go out and knew he had been out a half hour? A I thought he would come back.

Q After that you broached the subject of buying whiskey to Mrs. Solomon, you don't want to say now that you asked for Mr. Solomon? A After waiting half an hour I asked for Mr. Solomon. I knew he was not behind his bar, but I did not know whether he was in the building.

Q Isn't it the fact that you wanted to make sure he was out of the building? A Well, not exactly.

Q You didn't want to ask for any whiskey while Mr. Solomon was there, did you? A Well, I would have asked him.

Q You had an opportunity when he was there, and you didn't take it? A Well, I didn't think he was going out.

Q You did not think you would get it from him? A Well, not exactly, no.

Q What do you mean by not exactly? A I did not know whether he would or not.

Q But you knew Mrs. Solomon would? A I thought she would.

Q And you thought Mr. Solomon would not let you have any? A Well, I did not just exactly think that (Case, p. 16).

Q You never talked to Samuel Solomon about buying any whiskey at any time from him? A No, sir.

Q And you have been in his saloon several times? A Yes, sir.

Q Never broached the subject at any time? A No, sir; I could never catch him there; he would be in there and out.

Q Mr. Solomon has not been in the saloon to your knowledge when you have been down there? A Not in the afternoon when I went there, no.

Q So that you never asked him to sell you any whiskey, and he has never offered to sell you any? A Mr. Solomon, no.

Q You never told Solomon about it? A No, sir.

Q You never told him you got some whiskey in his place from his wife until the trouble came on? A No.

The defense was a denial. Mr. Solomon, the defendant, denied the allegations of the indictment. He showed that some time before the date alleged in the indictment he had prepared to go out of the saloon business; that he had actually begun the erection of a garage (Case, p. 97), and that the construction of this garage took up almost his entire time, and that he had spent no time in his saloon. That when the prohibition laws became operative, he removed some bottles of cognac and brandy from his saloon, and removed them to his living apartment. That he told his wife not to sell any liquor to anybody, and not to sell anything at all (Case, p. 99). On cross examination of the defendant, the following questions were asked:

Q Did you ever tell your wife to sell any liquor to anybody? A No, sir; I told her she should not sell it; she should not sell nothing at all.

Q If she did sell any she did it without your knowledge and consent and direction? A If she did so, I don't know anything at all; I told her plainly she should not sell anything to anybody.

Q If she did sell, she sold it without your direction to do so; is that right? A Yes, sir; I don't know she did sell.

Q You told her not to? A Yes, not to (Case, p. 99).

The defense also claimed that the indictment failed to charge the commission of a crime.

Specification of Errors Relied On.

1. The refusal of the Trial Judge to quash the indictment.

2. The denial of the motion in arrest of judgment.

3. The refusal of the Trial Judge to direct a verdict of not guilty in favor of the defendant.

4. The admission of improper evidence.

5. Exclusion of evidence.

6. Because the Trial Judge erroneously charged the jury.

7. The refusal to charge as requested.

8. The violation of the constitutional rights of the defendant by a trial and judgment without the indictment of a Grand Jury charging a crime.

9. The violation of the constitutional rights of the defendant in imposing judgment and sentence without the verdict of a jury finding the defendant guilty of a crime.

POINT I.

The Court erred in denying the motion to quash the indictment.

The offense with which the defendant was charged was purely statutory. The elements of crime are embodied in the statute. It is as follows:

> "Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part *to be used as a beverage,* that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

The indictment does not allege that the defendant had the alleged adulterated spirits in his possession, *to be used as a beverage.* The crime consists in having in possession certain prohibited agencies for barter or sale, *to be used as a beverage.* The material averment in this case is that the prohibited agency was *to be used as a beverage.* No such averment appears in the indictment in this case. The statute denounces as a crime the possession of certain things, only when in possession to be sold for a prohibited purpose, viz.: *to be used as a beverage.* The possession of these things for any other purpose than as a beverage is not denounced as a crime in the statute. There is a distinct

limitation in the statute that the possession of the liquors therein enumerated, is criminal only when they are *to be used as a beverage.* The possession of the things enumerated in the statute may be perfectly legal for every purpose except the purpose prohibited by the statute itself, viz.: *to be used as a beverage.*

Com. v. *Schollenberger,* 153 Pa. St. 625; *Com.* v. *Callahan,* 1 Pa. Dist. Rep., are directly in point. These are oleomargarine cases. The Pennsylvania oleomargarine act makes it unlawful to sell oleomargarine *as an article of food.* In the cases *supra,* the Court said:

> "In order to convict * * * it is necessary to show that he sold the oleomargarine *as an article of food.* If it was sold for some other purpose, as, for instance, for wagon grease, it would not be a violation of the law."

So, in this case, it is easily conceivable that a person may be in possession of any one of the prohibited agencies and may have them in possession for barter or sale for entirely legitimate purposes, and be guilty of no crime. It is safe to say that every druggist in the State of New Jersey, and many liquor houses, have in their possession, for barter or sale, alcohol which has been denatured and adulterated with poisonous ingredients in order to prevent its use as a beverage. In fact the Federal law requires all grain alcohol to be denatured and adulterated to prevent its use as a beverage. If the form of indictment used in this case, omitting the allegation that the liquor was to be used as a beverage, is good, then every druggist or other persons having denatured alcohol in his possession for barter or sale, would be indictable. This would lead to results that surely were not intended. The material averment, equally as essential as the averment describing the liquid, and that it was in possession of the defendant with intent to barter or sell the same, is that it was *to be used as a beverage.* It is entirely lawful for every purpose and for every use except *to be used as a beverage.*

The essential element of the statutory offense, that it was *to be used as a beverage,* is omitted in this indictment. Everything necessary to maintain the indictment must be set forth

> "In indictments for misdemeanors created by statute, the offense may be charged either in the words of statute or there may be such a particular statement of fact as will bring the accused within its operation." *State* v. *Thatcher,* 35 L., p. 445, at p. 447.

> "As to statutory offenses, the invariable rule is that every fact mentioned in the statute as constituting the

crime must be averred in the indictment." *State* v *Smith,* 46 L, p. 491.

To warrant a conviction under this statute the following facts must appear:

1. The defendant must keep in his possession rum, brandy, wine or spirits of any kind, or any other liquid, of which distilled spirits of any kind shall form a component part.

2. He must keep them in his possession for barter or sale.

3. *To be used as a beverage.*

4. They must be adulterated or manufactured with spurious or poisonous ingredients of any description.

"These are essential elements of the offense. The presence of *each* and all of them is necessary to conviction, and the absence of any one of them is fatal to the case of the State." *Zab* v *State,* 43 L., at p 641.

"Every material fact necessary to constitute the crime in question must be averred in the indictment and then proved by the prosecuting power." 1 Bish. Crim. Proc. Par. 1057.

The question is whether all the constituent parts of the offense denounced by the statute are averred in this indictment.

In *State* v. *Smith,* 46 L., p. 491, the defendant was indicted under an act to suppress the sending of indecent communications. This act made it a misdemeaner * * * for any person to send to any female * * * indecent letters, etc. * * * *without lawful purpose in sending or conveying the same.* The indictment charged the defendant with unlawfully sending such a letter, but did not allege that he did so *without lawful purpose in sending the same.* For this defect the defendant moved to quash the indictment. Justice Dixon, speaking for the Court, said:

"The absence of a lawful purpose in sending the communication is undoubtedly made by the statute a necessary ingredient of the offense, and therefore if the indictment does not charge it, it is insufficient."

"We therefore cannot see, on the face of the indictment that the Grand Jury were satisfied that the defendant had committed a misdemeanor, and for this reason the indictment must be quashed."

Zab v. *State, supra,* was cited approvingly.

Polhamus v. *State,* 57 L., p. 348, is to the same effect:

> "In charging a statutory crime, unknown to common law, every essential fact must be clearly stated. Where the indictment is silent on a material fact, no presumption against the defendant will aid it. Presumably, all that the Grand Jury heard and found is in the indictment, and if, as it stands, all that is in it may be true and still the defendant be innocent, he cannot be called to trial upon it according to law."

Citing *State* v. *Malloy,* 5 Vr. 410; *Zab* v. *State, supra; State* v. *Smith, supra.*

In *State* v. *Malloy,* 5 Vr. p. 410, Justice Scudder says:

> "The rule is thus given in Sedg. Stat. & Const. L., 115: An indictment for an offense against a statute must, by the ancient rules of pleading, with precision and certainty charge the defendant to have committed or omitted the acts under the circumstances, and with the intent mentioned in the statute, and if *any* of these ingredients be omitted, the defendant may demur and move in arrest of judgment or bring a writ of error. The defect will not be aided by verdict nor be cured by the formal conclusions that the defendant's acts are *contra formam statuti.*"
>
> "This is but a repetition and summary of what will be found in all the books. Arch. Cr. Pl., 46 a. (Ed. 1840); Arch. Cr. Prac. & Pl. (Vol. 1, 282, Ed. 1860); 2 Hale's Pleas of the Crown, 170; 1 Wharton's Am. Cr. Law, Sec. 364, &c.; People *v.* Gates, 13 Wend. 311; People *v.* Allen, 5 Denio 76; State *v.* Gibbons, 1 South. 40; State *v.* Stimson, 4 Zab. 9; State *v.* Drake, 1 Vr. 422; Rex *v.* Wheatley, 2 Burr. 1125. In the last case Lord Mansfield says that in a criminal charge there is no latitude of intention to include anything more than is charged. The charge must be explicit enough to support itself."

at p. 415:

> "The averment omitted is, therefore, an essential ingredient of the offense, and cannot be left to conjecture. The exactness required in criminal pleadings, especially in cases of statutory crimes, does not admit of such latitude of intention."
>
> "This case does not present the situation of the use of equivalent words for those used in the statute, which would be permissible, as stated in State *v.* Hickman, 3 Halstead, 299. Here there is not a substitution of equivalent words for the words of the statute, but an *omission.*"

An omission of any material averment, which is descriptive of the offense charged, is fatal.

The omission of the words "to be used as a beverage" in the indictment in this case, is an omission of an essential ingredient of the offense, and cannot be left to conjecture.

In comparing the indictment in this case with the law, an important omission is apparent. An essential ingredient of the offense, as it appears in the statute, is omitted from the indictment, viz: *"to be used as a beverage."*

> "An indictment under a statute must bring the offense expressly, and not by intendment only, within its words." *State* v. *Gibbons,* 4 L. at p. 48.
>
> "An indictment founded upon a statute must, by express words, bring the offense within the description of the statute, and such words cannot be supplied by the general conclusion, 'against the form of the statute,'" etc. *State* v. *Gibbons,* 4 L. p. 56.
>
> "It is a settled rule that in an indictment nothing material shall be taken by intendment or implication." *State* v. *Gibbons,* at p. 57.
>
> "Again it is a general rule that neither the words 'against the form of the statute' * * * intendment or conclusion will make good an indictment which does not bring the fact prohibited or commanded in the doing or not doing of which the offense consists, within the very words of the statute." *State* v. *Gibbons,* at p. 57.
>
> "Further, where the words of the statute are descriptive of the nature of the offense, the indictment must follow the very words, and expressly charge the offense upon the defendant." *State* v. *Gibbons,* at p 57.
>
> "In a criminal charge there is no latitude of intendment to include anything more than is charged." *State* v. *Gibbons,* at p. 57.
>
> The indictment must bring the party precisely within the words of the statute, otherwise, although possibly the fact may be within the statute, and though it may appear so in the evidence, yet if it be not alleged in the indictment in express words, the party though convict, shall have his clergy." *State* v. *Gibbons,* at p. 57.

Applying these rules to the case before us, the indictment clearly fails to set forth the essential ingredients of the crime denounced in the statute in the express words of the statute, or in words that are equivalent.

The indictment should have been quashed upon the motion that was made.

POINT II.

The Court erred in refusing to direct a verdict in favor of the defendant.

The motion to direct a verdict in favor of the defendant was made on the following grounds (Case, p. 111, fols. 20-30):

1. There is no evidence tending to establish the guilt of the defendant.

2. The evidence is insufficient to sustain the charge contained in the indictment.

3 Because the constitutional rights of the defendant are invaded by trial without an indictment of the Grand Jury charging a crime.

4. That the indictment charges no crime because it does not set forth that the whiskey alleged was *to be used as a beverage.*

This motion should have prevailed on the first and second grounds stated, because it appears affirmatively on the State's case, from the evidence of Enderweis, upon whom the State relied to prove the possession and the sale of the alleged whiskey, that he, Enderweis, never spoke to the defendant, Solomon, about the purchase of whiskey (Case, p. 15); that he bought the whiskey from *Mrs. Solomon* (Case, p. 15), and actually paid the money for it to her (Case, p. 9). That he got the whiskey from Mrs. Solomon (Case, p. 11); that Mr. Solomon had been away from his place of business for at least half an hour before the subject of buying whiskey was broached to Mrs. Solomon (Case, p. 17, fols. 10-20).

The case is in fact entirely barren of any evidence whatever that the defendant knew that the whiskey alleged to have been purchased by Enderweis, was in the premises, and the affirmative evidence is that he was not present when it was sold to Enderweis, and there is no evidence that he ever learned of the alleged sale until the time of his arrest. There was further affirmative proof from Enderweis (Case, p. 17, fols. 10-20), that the subject of selling whiskey was never broached to the defendant at any time because, as the State's witness expressed it (Case, p. 17), "I could never catch him there; he

would be in there and out." This was corroborative of the contention of the defendant that he had practically abandoned this business, and was devoting his time to the building of a garage (Case, p. 97).

The State contends that the possession of the alleged liquor by Mrs. Solomon, and the sale of the same by her, may be criminally chargeable to the defendant on the theory of agency, in holding the defendant criminally accountable for the acts of Mrs. Solomon. The State offered no evidence of express agency, and relied upon an implied agency. As against this, however, the uncontradicted proof of the part of the defendant was that since October, 1919 (Case, p. 98), he had been building a garage, and spent no time in the saloon. That he told his wife not to sell any liquor; that if she did sell any, she did it without his knowledge and consent and direction. He told her plainly she should not sell anything to anybody (Case, p. 99, fols. 20-40). The testimony of Mrs. Solomon was to the same effect (Case, p. 106, fols. 30-40; p. 107, fols. 10-20).

The criminal liability of a master for the acts of his servant is narrower than his civil liability.

In *Paterson* v. *State,* 21 Ala., p. 571, a similar case was dealt with. The defendant was indicted for selling spirituous liquors to a slave, without the written permission required by the statute. It appeared that the liquor was sold by the defendant's clerk in his absence. The Court said:

> "The principal is bound, if he authorized or co-operated in the illegal act of the clerk, but we think this must be an *express, not an implied authority.* We have no right to conclude that because he has sanctioned previous violations of the law, he will continue to do so. On the contrary, as every party is to be presumed innocent until his guilt is made manifest, we should presume that he repented his former transgression, and therefore did not assent to the subsequent violation. At all events, we cannot *imply an authority.*"

In *Anderson* v. *State,* 22 Ohio, 304, the Court said:

> "Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offenses are either principals or accessories. In offenses less than felony, all are principals. But when it in fact appears that the person accused in no way participated in the commission of the criminal act, he ought not, by construction, to be made punishable for it."

In *State* v. *Smith,* 10 R. I. 258, the indictment was based on a statute somewhat similar to our own. The defendant was charged with having in his possession adulterated milk. The Court said:

> "If under the statute under which this indictment has been found, a master can be convicted upon the mere proof of possession * * * by his servant, then the master may be punished for an act in which he did not participate, but which was done contrary to his orders and for the servant's own private gain. We are not prepared to adopt this view of the statute. In order to charge a master, when the milk is found in the possession of his servant, we think there should be evidence, in addition to the proof of possession for sale or exchange by the servant, that the servant in having it for sale or exchange, was acting for and in pursuance of the will of the master * * * ."

In the case now before us, the evidence is quite the contrary. On the State's case it appears that Enderweis, who purchased the liquor, waited for fully half an hour after the defendant left the premises before he broached the subject of purchasing the liquor to Mrs. Solomon. His attitude at the trial to the question directed to this phase of the case, clearly negatives any inference of knowledge on the part of the defendant that the alleged whiskey was in his place, and even assuming that he knew that it was in his place, it clearly negatives any inference that he had it in his possession for barter or sale. The affirmative evidence brought out on cross examination by the prosecutor, is that there was no liquor in his place for barter or sale; that he told his wife not to sell anything.

The Trial Judge instructed the jury that the defendant was not on trial for the actual sale of liquor, but for keeping that liquor in his possession for barter or sale. The State, however, at great length, endeavored to prove the sale of liquor to Enderweis. It relied upon this evidence of a sale having taken place, to establish one of the ingredients of the crime, viz: that the liquor was in the possession of the defendant for barter or sale. The sale was admittedly made by Mrs. Solomon in the absence of the defendant. In order to make this sale evidential against the defendant and thereby establish the ingredient of the crime that he had liquor in his possession for *barter and sale,* it is necessary to prove that Mrs. Solomon, in making the sale, was acting under the direction of the defendant, and with his knowledge or consent.

In *State* v. *Mahoney,* 23 Minn. 781, the Court said:

> "The sale by the clerk was made at defendant's saloon where he appears to have carried on the business of selling liquors, apparently under a license. The presumption, from the clerk being employed at the saloon, would be that he had authority from the defendant to make such sales *as were lawful.* A single unlawful sale by such clerk would not raise any presumption that his master had given him authority to violate the law."

In *Siebert* v. *State,* 40 Ala., p. 60, the defendant was indicted for illegal sale of liquor made by his wife in his store, in his absence. The Court said:

> "The mere fact that the wife was the clerk of the accused and her violation of the law, did not authorize the jury to find the prisoner guilty. A principal is not liable criminally for the unlawful act of his agent, or clerk, unless he participated in the act or consented to it, and this participation or consent *cannot be presumed* by the Court or jury merely from the fact that the seller was the clerk of the accused."

In *Lauer* v. *State,* 24 Ind. at page 131, the Court says:

> "We must not hold men responsible for crimes committed by others without some proof that they either procured, counselled or advised their perpetration. We know full well that in this class of cases the guilty may sometimes escape for a failure of this proof, and that it may sometimes be impossible to produce it in cases where it exists. But these considerations are also applicable to every other class of crimes. The guilty frequently go unpunished for lack of proof, but this is better than that the innocent should be punished as well as the guilty. * * * If there had been evidence that on other occasions the barkeeper had sold to infants, with the defendant's knowledge, and that the latter made no objection, or still continued him in his employ, and the jury had inferred therefrom that he did so by the defendant's authority, we would not be authorized to interfere. But there was no such evidence in these cases."

So, in this case there was no evidence of another sale at any other time. The State showed only the one isolated transaction, between Mrs. Solomon and Enderweis. There was no evidence of a continued practice of selling from which even an inference could be drawn that the defendant had in his possession any liquors for barter and sale.

In *Gaiocchio* v. *State,* 5 Blackf. 149, in dealing with an analogous statute, the Court said:

> "This act seeks to punish the person offending, not by reason of the fact that he is the dealer, but by reason of the selling, etc. The State must prove that the defendant sold, bartered or gave away the whiskey, etc., * * * but this act does not hold him guilty simply upon the ground that he is the dealer. To us such a doctrine would be monstrous. The defendant's property and, in default of that, his liberty, would be placed in the hands of his bartender. In one day the bartender could bankrupt his principal."

The statute upon which this indictment is founded, includes *any* person who shall manufacture or import already manufactured, or barter or sell or keep in his possession, for barter or sale, any rum, etc. This phraseology justifies the inference that it was the intent of the legislature to punish the person offending, and not to absolve the actual offender and endeavor to reach others on the theory of implied agency. The State does not charge this defendant with bartering or selling, and the Trial Judge clearly indicated this to the jury, and the prosecutor several times emphasized it throughout the trial. The indictment alleges only the keeping in possession. The evidence offered by the State of the sale of the alleged whiskey negatives at once the charge that he kept it in possession. The State's case shows that it was not kept in possession, but that it was sold. The statute is broad enough to cover a sale, and the State could have so framed the indictment, but having elected to ignore the sale, and rely upon a charge of keeping in possession, the State cannot now support the indictment by evidence that there was a sale. The one negatives the other.

People v. *Utter,* 44 Barb., p. 171, was an indictment for selling liquor on Sunday. The sale was not made by the defendant personally, nor in his presence, but by his barkeeper. Held, that to convict the defendant, it must be shown that the sale made by the barkeeper was participated in, connived at, or assented to by the defendant.

The motion should also have prevailed on the fourth ground stated, for the reasons set forth in Point I, upon the question of the sufficiency of the indictment. The motion to direct a verdict in favor of the defendant should therefore have been granted.

The motion should also have prevailed upon the further ground that there was no proof that the defendant had in his possession "two gallons of whiskey" as alleged in the indictment. Dr. Edel, the chemist, who testified for the State (Case, p. 80), testified as follows on this point:

> Q (*By the Court.*) Let me ask you if you are able from the contents of S. 1 that you examined, to state whether or not the liquid was spirits of any kind? A Well, alcohol is a spirit.
>
> Q Then you are able to say it is a spirit? A It is a spirit.
>
> Q Are you able to say what kind of spirit? A *I am not.*
>
> Q (*By the Court.*) Doctor, what is whiskey? A Whiskey is an alcoholic beverage made by fermenting any grain, rye, Indian corn, with malted barley and the aid of yeast.

POINT III.

The Trial Judge erred in denying the motion in arrest of judgment.

Before judgment and sentence in this case, defendant's counsel moved in arrest of judgment, on the following grounds:

> First. Because the indictment upon which the defendant was tried, charged no crime, in that it does not set forth that the whiskey named in the indictment was *to be used as a beverage.*
>
> Second. Because the constitutional rights of the defendant were invaded by a trial without the indictment of the Grand Jury charging a crime.
>
> Third. Because there is no verdict finding the defendant guilty of any crime, and therefore no judgment and sentence can be imposed.
>
> Fourth. Because the constitutional rights of the defendant will be invaded by the judgment and sentence in this case because the defendant had not been convicted of a crime, and
>
> Fifth. Because the indictment does not set forth an indictable offense, for the same reason that it does not set forth that the whiskey named in the indictment was *to be used as a beverage.*

The first and fifth grounds upon which the motion in arrest of judgment was made are the same as the ground upon which the motion to quash the indictment was made, and the argument and authorities quoted in Point I are relied upon to support the contention of the defendant. The second ground for the motion rests in Section 9, Article I of the Constitution, which is as follows:

> "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a Grand Jury."

True, there exists in this case what purports to be an indictment against the defendant, but if the contention of the defendant is sound that the indictment against him charges no crime, then in effect, it is no indictment, and hence his trial was upon an indictment which charged no crime, and in this respect his constitutional rights under the section of the constitution above referred to, were invaded.

In considering the third and fourth grounds for the motion in arrest, the form of the verdict must be considered. The jury found the defendant "*guilty in manner and form as charged in this indictment.*" (Case, p. 6, fol. 10.)

With what does the indictment charge him? If the indictment charges no crime, then the verdict of "guilty in manner and form as charged in this indictment" does not find him guilty of any crime, and therefore no judgment and sentence can be imposed.

In the first count:

> "That he unlawfully did keep in his possession, for barter and sale certain spirits, to wit: two gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit: wood alcohol, contrary to the form of the statute."

In the second count:

> "That he unlawfully did keep in his possession for barter and sale, certain spirits, to wit: two gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit: wood alcohol, contrary to the form of the statute."

The jury could only find that he had the possession of two gallons of whiskey for barter or sale, but whether in truth and in fact it was *to be used as a beverage* or not, they could not find, for it was not in the issue.

Because, then, the indictment does not follow the very words of the statute, nor expressly charge the very offense created upon the defendant, and because there can be allowed no latitude of intendment to include anything more than is charged, and because the verdict is inoperative, and no judgment could be passed upon it, the motion in arrest should have prevailed. No judgment could be passed upon the verdict finding the defendant "guilty in manner and form as charged in this indictment." The indictment having set forth no crime, his conviction "in the manner and form charged," convicts him of nothing. *State* v. *Gibbons,* 4 L. at p. 58.

POINT IV.

The Trial Judge erroneously charged the jury.

Assignment of Errror #26 and Specification #8 relate to the following portion of the charge of the Court, which is contended was erroneous:

> "The act, in substance, is that 'any person who shall barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor.'"

The act upon which the State based the indictment is clear in its terms, and is found in Compiled Statute, Vol. II, page 1777, par. 98. All the ingredients of the crime are clearly set forth in the act. The Trial Judge, in the portion of the charge complained of, omitted one of the essential ingredients of the crime, as enumerated in the statute, viz: "*to be used as a beverage.*" It may fairly be inferred that this omission was a deliberate one, because that very point had been brought to the attention of the Trial Judge on the motion to quash the indictment, and on the motion to direct a verdict, because of a similar omission in the indictment.

The statute makes the *purpose* for which the prohibited agencies are kept in possession the test by which to determine the criminality or innocence of the person so keeping it. The Trial Judge in omitting this portion of the statute in his enumeration of the ingredients of the crime, omitted the most important ingredient.

It was the right of the defendant to have every ingredient of the crime enumerated to the jury. It is the *purpose* for which the prohibited agency is kept in possession which makes the offense criminal. By omitting this portion of the statute in enumerating the ingredients of the crime, the jury were left in ignorance of the fact that the *purpose* for which the prohibited agencies are kept in possession is a part of the statute, and hence the jury was left to convict upon mere evidence of possession, not having been instructed that the purpose for which it is kept in possession must be alleged and proven as an essential ingredient of the crime.

Assignment of Error #27 and Specification #9 relate to the following portion of the charge of the Court, which it is contended, was erroneous (Case, p. 114, fol. 10):

> "It is therefore, necessary for the State to prove, and for you to find, beyond a reasonable doubt upon the evidence, that this defendant did keep in his possession for barter and sale, spirits of the kind alleged in the indictment, to wit: whiskey, and that the same was then and there adulterated or had been manufactured with spurious or poisonous ingredients, contrary to the statute."

This portion of the charge, in clear terms, emphasizes the omission of an essential ingredient of the crime, viz the purpose for which the prohibited agency was kept in possession, viz: *to be used as a beverage.*

This omission was reaffirmed and again emphasized toward the conclusion of the charge (Case, p. 115, fol. 30), as follows:

> "Therefore, the contention of the State is that Solomon kept in his possession two gallons of whiskey for barter or sale, and that this whiskey had been theretofore adulterated with poisonous or spurious ingredients, and that you should draw the inference that the defendant is guilty, and your verdict should be in accordance."

The action of the Trial Judge, on the motion to quash, the motion to direct, and in his charge, indicates his concurrence in the theory of the State, as above expressed. The omission of an important ingredient of the offense enumerated in the statute, began with the framing of the indictment, and was supported by the Trial Judge in his refusal to quash the indictment, in his refusal to direct a verdict, and in his description of the crime, in the charge, and in his enumeration of the proofs necessary for conviction. The indictment omitted an essential

ingredient of the crime; the Trial Judge omitted it in reading the statute to the jury and in the instruction as to the proof required from the State.

POINT V.

The Trial Judge erroneously refused to charge the jury as requested.

Assignment of Error #30 relates to the refusal of the Trial Judge to charge the defendant's second request to charge as follows:

> "(2) If the jury have a reasonable doubt that the defense has been made out, the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty."

This request was presented to the Trial Judge on the authority of *State* v. *Jones,* 71 L. at p. 547:

> "The accused person is entitled to the benefit of the reasonable doubt upon the whole case."

Assignment of Error #33 relates to the refusal of the Trial Judge to charge the defendant's sixth request to charge as follows:

> "(6) The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case."

In *State* v. *Halsted,* 41 L. p. 552, at p. 591, Chief Justice Beasley says:

> "In some cases, when the prohibition in a statute against doing a certain act or series of acts, is couched in general terms, courts have, to use the language of Lord Cockburn, imported into the statute, a proviso that the denoted act shall be done from a guilty mind. * * * In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention. * * * The course of the inquiry, therefore, had led to this point: is there anything in the language of the statute now to be construed, or in the legislative design displayed in it, or in the consequences, if its terms are construed strictly, by force of which this court can limit its operation to those only who act with consciousness of violating the law?"

The statute under which the indictment in this case was based, enumerates as an ingredient of the crime that the prohibited

agencies are *to be used as a beverage.* The word "intent" may well be imported into the statute before the words "to be used as a beverage." It is clear that it was the legislative purpose to require, as an ingredient of the offense, that the prohibited agencies shall be kept in possession for barter or sale with *intent* to be used as a beverage. The request to charge therefore, properly set forth the law of the case, and should have been charged as requested.

Assignments of Error #35 and #36 relate to the refusal of the Trial Judge to charge the defendant's eighth and ninth requests to charge as follows:

> "8. In order to convict the defendant, the alleged adulterated whiskey must have been found in the possession of the defendant on his trial. If the defendant had parted with the possession of the whiskey, and it was found in the custody of another, as in this case, in the custody of Enderweis and Yaeger, the defendant must be found not guilty."
>
> "9. In order to convict the defendant upon this indictment, the alleged adulterated whiskey must be found while in the possession of the defendant."

This must necessarily be so because the statute specifically denounces the *sale* of any of the prohibited agencies as a crime, and also the *keeping in posesssion.* The State based the indictment on "keeping in possession," and therefore it must be proven that the defendant did so keep in possession. If he parted with the possession, then he should have been indicted and tried for selling under the statute. Not having been so indicted, this request should have been charged. The early English case of *R.* v. *Sleep,* 8 Cox, 472, is the authority for this principle. The opinion is by Martin, *B.* and concurred in by Crompton, *J.*

Assignments of Error #32 and #34 relate to the refusal of the Trial Judge to charge the defendant's fifth and seventh requests to charge as follows:

> 5. In order to convict the defendant, it must be shown not only that the defendant had the alleged adulterated whiskey in his possession, but that he also knew that it was adulterated.
>
> 7. Although the statute says nothing about knowledge, that must be imported into the statute. Knowledge is, to a certain extent, essential to the crime charged against the defendant.

R. v. *Sleep,* 8 Cox, 472, was upon an indictment charging defendant with having in possession government stores marked with the broad arrow. Held, that the burden was on the crown to show a possession with knowledge that they were so marked.

The same principle is applicable to this case and the requests should have been charged.

POINT VI.

Illegal evidence was admitted.

Assignment of Error #4 relates to the admission of a question to the witness Enderweis (Case, p. 11, fols. 20, 30 and 40; Case, p. 12, fols. 10, 20 and 30), as follows:

Q What did you do with it?

This question was addressed to the State's witness and was for the purpose of eliciting evidence of the acts and conduct of the witness in the absence of the defendant, without any proof that there was any *concert of action* between the defendant and the witness. Objection was made to this question and an exception taken to the ruling of the Court, admitting it. On the strict bill of exceptions, the action of the Trial Judge in admitting the question, constitutes reversible error.

Assignment of Error #5 (Case, p. 13, fol. 10) relates to the admission of the following question to the State's witness, Enderweis:

Q From what did you take it?

Objection was made to this question on the same ground as as the preceding one, and was so stated to the Trial Judge.

Assignment of Error #6 relates to the admission of the following question to the State's witness Yaeger (Case, p. 27, fols. 30 and 40).

Q Don't you know there was some in the bottle when you turned it over to the police?

The questions directed to the same witness immediately preceding the one objected to, were directed to the question if whether anything was left in the bottles from which Enderweis and Yaeger had been selling whiskey. The purpose, as appears from subsequent testimony, was to establish a link in the chain of evidence by which the State sought to prove that the liquid purchased from Mrs. Solomon was taken to Yaeger's place of

business, repoured into "working bottles," and from these bottles sold over the bar. That a small quantity (a half teaspoonful), which was found in one of the "working bottles" was analyzed by a chemist, and the result of that analysis was testified to by the chemist. The sample which the chemist received was alleged to have been obtained from one of these "working bottles," by police officers. For the purpose of proving that the one-half teaspoonful of liquid which had been analyzed, came from the "working bottle," Yaeger, who handled the bottles in the saloon was called by the State and asked (Case, p. 27, fols. 20, 30 and 40):

> Q Now then, later on, did you put some whiskey in there? A I did not.
>
> Q (*By the Court.*) And there was not anything left in the jug? There was not anything in the bottle? A No.
>
> Q Do you mean that there was not anything left in the bottle?
>
> Q Didn't you say a minute ago there was some whiskey left in the bottle? A No, how could there be?
>
> Q Don't you know there was some in the bottle when you turned it over to the police?

This last question was objected to on the ground that it was a leading question, and an exception was taken to the ruling of the Court. The witness to whom the question was addressed was a State's witness. The prosecutor made no claim that he was a hostile witness, and did not allege *surprise*. Under these circumstances, the admission of such a decidedly leading question on a vital part of the case was unjustified. On the strict bill of exceptions this was reversible error.

Assignment of Error #7 (Case, p. 30) relates to the action of the Trial Judge in refusing to permit defendant's counsel, as examining attorney, to withdraw a question directed to the witness Yaeger before the question was answered, and directing the witness to answer the question after defendant's counsel announced that he withdrew the question. The question and the ruling is as follows:

> Q What was your idea in attempting to throw this away?
>
> *Witness.* May I speak?
>
> *The Court.* Yes.
>
> *Mr. Schoen.* You can answer that yes or no.
>
> *The Court.* No, that is not proper.
>
> *Mr. Schoen.* I will withdraw the question.

The Court. No, you cannot withdraw the question.

Mr. Schoen. I submit I have a right to withdraw it.

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.

(SEAL) WM. P. MARTIN,
Judge.

The Court. You answer the question. When counsel asks a question and instructs a witness to answer yes or no, and the Court rules that his instruction is not proper, he cannot then withdraw the question.

It has never been questioned that the examining attorney may control his own questions, and withdraw them before they are answered or move to strike out an answer if it is not responsive. Indeed, it has been held to be the exclusive right of an attorney to control his own questions. The action of the Trial Judge in refusing to permit defendant's counsel to withdraw his question before an answer was made thereto was the denial of a clear right and forced the defendant into a line of examination against his will.

Assignments of Error Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 25 (Case, pp. 126, 127 and 128), all relate to the admission of evidence and the grounds of objection stated to the Trial Judge are here relied upon.

As to Assignment #9, the question and the ground of objection appear on page 35, fol. 40; page 36, fols. 10, 20, 30 and 40.

As to Assignments #11 and #12, the question and the ground of objection appear on page 52, fols. 10, 20, 30 and 40; Case, p. 53, fols. 10, 20, 30 and 40.

Assignments of Error #13, #14 and #15 relate to the admission of exhibits, Case, p. 60, fols. 10, 20, 30 and 40; Case, p. 61, fols. 10, 20, 30 and 40; Case, p. 62, fols. 10, 20, 30 and 40; Case, p. 63, fols. 10, 20, 30 and 40; Case, p. 64, fol. 10.

Assignments of Error #16, #17, #18 and #19 relate to the admission of evidence. Case, p. 65, fols. 10, 20 and 30; Case, p. 67, fols. 10 and 20.

POINT VII.

Legal evidence was excluded.

Assignments of Error Nos. 20, 21, 22, 23 and 24 relate to the exclusion of evidence.

As to Assignment of Error #20, Case, p. 87, fols. 10 and 20.

As to Assignment of Error #21, Case, p. 87, fols. 30 and 40.

As to Assigment of Error #22, Case, p. 88, fols. 10 and 20.

As to Assignment of Error #23, Case, p. 89, fols. 30 and 40; Case, p. 90, fols. 10, 20, 30 and 40; Case, p. 91, fol. 10.

Assignment of Error #24, Case, p. 91, fols. 30 and 40.

For these reasons and the remaining assignments and specifications it is respectfully submitted that the judgment should be reversed.

EDWARD SCHOEN,
Of Counsel for Plaintiff-in-Error.

43 NOV.T.1921

Filed after the Oral Argument by leave of Court.

44 NOV.T.1921

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* SAMUEL SOLOMON, *Plaintiff-in-Error.*	*On Writ of Error to Supreme Court.*
THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* MAX NIEBERG, *Plaintiff-in-Error.*	

ADDITIONAL BRIEF FOR PLAINTIFF-IN-ERROR.

The purpose of this additional brief is to elaborate the point made in the original brief, that the indictment does not charge a criminal offense.

The indictment is insufficient, because there is no allegation that the whiskey, which had been adulterated with spurious and poisonous ingredients, was to be used as a beverage.

The insistment of the plaintiff-in-error is that the words of the statute "to be used as a beverage" relate to all the antecedents: rum, brandy, wine, spirits, or any other liquid of which distilled spirits of any kind shall form a component part.

The insistment of the State is, that the words "to be used as a beverage" relate only to any other liquid of which distilled spirits of any kind shall form a component part. The contention of the State was sustained by the Supreme Court. In the opinion of that Court, the argument is made: "There are liquids of which dis-

tilled spirits form a component part, such, for example, as liniment, which are kept for barter or sale as such, and it was for the protection of vendors of such wares that the words 'to be used as a beverage' were inserted in this clause of the statute."

It is also said in the opinion that there is a presumption that rum, brandy, wine or spirits of any kind kept for barter or sale are so kept to be used for beverage purposes.

The history of the legislation on this subject will aid in the solution of the question involved.

The original Act was passed in 1871, P. L. 1871, p. 105, and it is entitled: "An Act making it a criminal offense to manufacture or sell or import already manufactured for sale, any adulterated or spurious liquors in the State of New Jersey." The body of the Act reads as follows:

> "1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That if any person or persons shall manufacture or import already manufactured, or barter or sell, or keep in his possession for barter or sale any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits shall form a component part, to be used as a beverage, that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, the person or persons so offending shall be adjudged guilty of a misdemeanor, and on conviction shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labor for any term not exceeding two years, or both, at the discretion of the court.
>
> 2. And be it enacted, That if any person or person shall adulterate, mix, compound, or poison any malt liquors, with intent to barter or sell the same, or to mix, compound, or poison any malt, or vinous or spirituous liquors, the one with the other, or in any way whatever, or give, barter or sell the same, with intent to make greater profit, or with intent to produce intoxication or stupefaction, every person or persons so offending shall be ad-

judged guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding five hundred dollars, or imprisonment at hard labor for any term not exceeding one year, or both, at the discretion of the court.

3. And be it enacted, That this act shall take effect immediately.

Approved April 6, 1871."

It will be observed that Section 1 of the original act is so punctuated as to make it entirely clear, that the words "to be used as a beverage" relate to all the antecedent clauses, and are not limited to the clause "or any other liquid of which distilled spirits form a component part." The comma in the original act is placed after the word "part."

The object of this statute is clearly stated in the title: "to make the manufacture or sale of adulterated or spurious liquors" a crime. The purpose of the statute was obviously to prevent physical harm to persons using the liquors. The use of the words: "poisonous ingredients," are significant in that respect. On the margin of the original act as published is a note: "Penalty for manufacturing, importing and vending adulterated liquors." The second section of the original act prohibits the adulteration of malt liquors with intent to sell the same, or to poison any malt or vinous or spirituous liquors, the one with the other, with intent to make greater profit, or with intent to produce intoxication or stupefaction.

The marginal note on the second section is "penalty for making or vending adulterated malt liquors." The penalty under the first section is a fine of $1,000 or imprisonment at hard labor for any term not exceeding two years. The penalty provided for the violation of the second section is $500 fine, imprisonment at hard labor for any term not exceeding one year.

The Legislature deemed the making and selling of poisonous liquors to be used as a beverage a more serious offense than the making and selling adulterated

malt liquors with intent to make a greater profit, so that it seems a reasonable inference that the purpose of the statute was to prevent physical harm to persons using the liquors as a beverage.

The original act was incorporated in the revision of 1877, p. 263, in the identical form in which it was passed by the Legislature and published in P. L. 1871. The original act was also incorporated in the General Statutes of 1896, p. 1104, in its original form. The original act was included in the revision of 1898, P. L. 1898, p. 822, as sections 98 and 99 of that statute; and it is now found in Comp. Stat., p. 1777, as sections 98 and 99 of the Crimes Act.

The compilers of the revision of 1898 rearranged the words of the two sections, but did not change the meaning. In the revision of 1898 there is no comma after the word "part." This, we think, is a clerical error. The argument that there is a presumption that spirits of any kind are to be used for beverage purposes is, we think, without force. There are various spirits, such as spirits of ammonia, spirits of nitre, spirits of turpentine, which are certainly not used as a beverage. The argument, that a liniment may be kept in possession for sale to be used as a beverage, is also without force. No one ever heard of a liniment being used as a beverage, and, moreover, section 1 was not intended to protect the vendor, but to protect the purchaser. Section 2 might protect the honest vendors against the unfair competition of dishonest ones. We contend that section 98 of the Crimes Act must be construed as though it was in the form of the original act. This is the established rule of construction in this State. The law is stated with great clearness by Chief Justice Beasley in the case of *Knight* v. *Freeholders of Ocean,* 49 Law 489, at p. 487, as follows: "It has been more than once decided by this Court that the incorporation of the existing laws into the body of the revised laws in a modified form, does not give to such re-enacted laws the force of original

laws passed at the date of the revised laws. Such laws were re-enacted with no purpose of giving to them any new efficacy, but simply to the end of bestowing upon their rearrangement a legislative sanction. The laws so adjusted are not to be deemed to have acquired any different efficacy from that possessed by them in their original condition." There are other statutes which prohibit the manufacture and sale of adulterated liquors for external use. It is only necessary to call the attention of the Court briefly to those statutes, as follows:

The act to secure the purity of foods, beverages, confectionery, condiments, drugs, medicines, and to prevent deception in the distribution and sales thereof; Comp. Stat., p. 2564. This statute covers milk, vinegar, as liquids that might be used as part of a beverage, and it includes spirits of turpentine and linseed or flaxseed oil, at p. 2595.

Liniment medicinally is a liquid preparation for external application. Almost all liniments contain turpentine. The adulteration of drugs or medicines or liquids to be used externally was not contemplated when the Act of 1871 was passed. What the Legislature had in mind was the harm to the health and lives of the citizens done by the drinking of adulterated intoxicating liquors.

As this indictment fails to charge that the whiskey which the defendant kept in his possession was so kept for barter or for sale to be used as a beverage, the indictment is fatally defective and should have been quashed.

In the Solomon case, in the opinion of the Supreme Court, it is stated "that the evidence showed that he (Solomon) knew that his wife was tending bar and selling liquor; that the proceeds of the sale to Enderweis was placed in the cash register and came into the possession of the defendant."

With due deference, it is respectfully submitted that there was no such evidence. Quite the contrary was

shown. Case, pp. 14, 15, 16, 99 and 107, fol. 20; Brief, pp. 2 and 3.

The cross examination of the wife with reference to what she did with the proceeds of sales made by her appear on pp. 108 and 109 of the Case. The witness throughout the cross examination asserted that she sold nothing but near beer, soft drinks, cigars, etc., and that she gave her husband the money from these sales (Case, pp. 108 and 109). There was no evidence that the proceeds of the sale to Enderweis went into the cash register and came into the possession of the defendant.

Respectfully submitted,

EDWARD SCHOEN,
Of Counsel with Plaintiff-in-Error.

INDEX.

	Page
Writ of Error to Supreme Court	i
Return to Writ	ii
Writ of Error to Quarter Sessions	1
Return	2
Indictment	3
Plea	4
Judgment	5
Verdict	6
Motion to Quash Indictment	7
Charge to Jury	124
Exceptions to Charge	131
Defendant's Requests to Charge	133
Motion in Arrest of Judgment	136
Certificate of Court Stenographer	137
Certificate of Judge	138
Assignments of Error	139
Specification of Causes and Reasons for Reversal	144
Opinion of Supreme Court	147
Remittitur	151
Assignment of Error	152

TESTIMONY.

For the State.

Thomas F. Vesey,	direct examination	8
	cross "	13
	re-direct "	31, 35
	re-cross "	33, 38
John Richard Coleman,	direct examination	40
	cross "	44
	re-direct "	47
	re-cross "	47
Dr. Isaac Friedman,	direct examination	48
	cross "	51
Dr. LeRoy Kirkman,	direct examination	52
	cross "	53
	re-direct "	60
Thomas J. Strong,	direct examination	60
	cross "	63
Dr. Charles N. Gilmore,	direct examination	67
	cross "	68
	re-direct "	68

		Page
P. Joseph Quinn,	direct examination.....	68
	cross "	71
	re-direct "	78
	re-cross "	80
Warren Coleman,	direct examination.....	80
	cross "	82
	re-direct "	83
	re-cross "	84
Dr. Albert E. Edel,	direct examination.....	84
	cross "	89
	re-direct " 97,	100
	re-cross " 97,	100
(recalled) further	cross "	122
Edward Francis Coleman,	direct examination.....	101
	cross "	102
Dr. George L. Warren,	direct examination.....	104
	cross "	105
	re-direct "	109
	re-cross "	110
further	direct "	110
further	cross "	111

For Defendant.

Max Nieberg,	direct examination.....	112
	cross "	117
	re-direct "	119
	re-cross "	119
Morris Snyder,	direct examination.....	120
	cross "	120
Dr. Robert Schwarz,	direct examination.....	121
	cross "	121

State's Rebuttal.

Thomas F. Vesey,	direct examination.....	122
	cross "	123

Writ of Error to Supreme Court.

WRIT OF ERROR TO SUPREME COURT.

Filed August 7, 1921.

New Jersey Court of Errors and Appeals

NEW JERSEY, *ss.*

THE STATE OF NEW JERSEY, to our Justices of our Supreme Court, GREETING: Because in the (L. S.) record and proceedings and also in the giving of the judgment upon a certain indictment which was in our said Supreme Court before you, between the State, defendant-in-error, and Max Nieberg, plaintiff-in-error, on a writ of error issued out of the Supreme Court, to the Judges constituting the Court of Quarter Sessions in and for the County of Essex, as is said, manifest error hath intervened to the great damage of the said Max Nieberg, 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 Max Nieberg, do command you that if judgment be 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 nineteenth day of August, and this writ, and that the record and proceedings aforesaid being inspected we may cause to be further done what of right and according to law ought to be done.

WITNESS, Hon. Edwin Robert Walker, Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the first day of August, in the year of our Lord, one thousand nine hundred and twenty-one.

THOMAS F. MARTIN,
Clerk.

EDWARD SCHOEN,
Attorney.

Return to Writ.

RETURN.

The answer of the Justices of the Supreme Court of the State of New Jersey within named, the record and proceedings whereof mentioned is within made, with all things touching and concerning the 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.

WRIT OF ERROR.

Filed.

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 said County, GREETING:

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 one Max Nieberg, for unlawfully keeping in his possession for barter and sale certain spirits, to wit, twenty gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol, and for unlawfully keeping in his possession for barter and sale certain spirits, to wit, twenty gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit, wood alcohol, in the City of Newark, in the said County of Essex, found in our Court of Oyer and Terminer, and in and for said County heard and determined, manifest error hath intervened to the great damage of him, the said Max Nieberg, as for his complaint, we have received information, we being willing in that behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Max Nieberg, do command you that if judgment be thereupon given that then you do send the record and proceedings aforesaid, together with all things touching and concerning the same, to us, under your seal, distinctly and openly, and this writ, so that we may have them before our Supreme Court of Judicature, at Trenton, on the third day of July next, that inspecting the records 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.

Return.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, the fourteenth day of June, in the year of our Lord, nineteen hundred and twenty.

ENOCH L. JOHNSON,
Clerk.

EDWARD SCHOEN,
Attorney.

RETURN.

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

I, William P. Martin, Judge of the Court of Quarter Sessions in and for 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 18th day of August, A. D. 1920.

WM. P. MARTIN,
Judge of the Court of Quarter Sessions,
Essex Co., N. J.

Presented in open court this 14th day of June, A. D. 1920.

WM. P. MARTIN,
Judge.

Bail fixed at $7,000. W. P. M.

Indictment.

Indictment.

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

Be it remembered, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the second Tuesday in December, in the year of our Lord, one thousand nine hundred and twenty, by the Hon. William S. Gummere, Chief Justice of the Supreme 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 Arthur L. Phillips, William M. Halsey, Adolph Vogel, Frank E. Clayton, Harold C. Grant, Patrick J. O'Connor, Mark Hancher, George Bierman, Charles G. Hollister, William L. Fox, Frank L. Kramer, William G. Rockwell, George F. Hewson, LeRoy M. Ludlow, A. Eugene Geiser, Thomas H. Brooks, Frederick W. Nieder, Charles H. Pascoe, Robert Levy, Ralph B. Smith, Jr., Wilson L. Jenkins, Andrew W. McCabe and Harold W. Hack, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to enquire in behalf of the State of New Jersey in and for the said County of Essex, it is presented in manner and form following, to wit:

Essex Oyer and Terminer, December 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 Max Nieberg, late of the City of Newark, in the County of Essex aforesaid, on the sixth day of December, 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 keep in his possession for barter and sale, certain spirits, to wit, twenty gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol, 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.

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex upon their oath aforesaid, do

Plea.

further present that the said Max Nieberg, late of the City of Newark, in the County of Essex aforesaid on the sixth day of December 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 keep in his possession for barter and sale, certain spirits, to wit, twenty gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit, wood alcohol, 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.

J. H. HARRISON,
Prosecutor of the Pleas.

On the second day of March, A. D. nineteen hundred and twenty, on which day the said indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of 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 then and there made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

And afterwards, that is to say, on the fourth day of March, A. D. nineteen hundred and twenty, at a 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, Max Nieberg, in the custody of John R. Flavell, Sheriff of the County of Essex aforesaid, and the said Max Nieberg being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, say that he is not guilty thereof, and therefore for good and evil he puts himself upon the Country, &c., and Wilbur A. Mott, Prosecutor of the Pleas of said State for said County of Essex in this behalf doth the like.

Judgment.

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 twenty-second day of March, A. D. nineteen hundred and twenty, 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 Max Nieberg to recognize upon their oath whether the said Max Nieberg is guilty of the premises in the said indictment specified or not guilty because the said J. Henry Harrison, Esquire, Prosecutor, &c., as the said Max Nieberg puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

On this day, being the third day of May, A. D. nineteen hundred and twenty, to which day the trial was postponed, and at this stage of the proceeding, Edward Schoen, counsel for the defendant, Max Nieberg, asked the Court to allow the defendant, Max Nieberg, to withdraw his plea as he desires to make a motion to quash the indictment, which was consented to by the Court, the Court after hearing the motion and argument of counsel denied the motion whereupon the defendant, Max Nieberg, was again placed to the bar to plead to said indictment before mentioned.

Whereupon said defendant, Max Nieberg, being so placed before the bar pleaded not guilty to said indictment, which was re-entered by the Clerk of said Court and trial was proceeded with before the Hon. William P. Martin, Judge of the Court of Quarter Sessions, and also comes the said J. Henry Harrison, Prosecutor of the Pleas and jury of whom before mentioned.

And afterwards, that is to say, on the fifth day of May, A. D. nineteen hundred and twenty, to which day the trial of aforesaid indictment was continued, 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 Max Nieberg and the jury of whom mention is before made, and by John R. Flavell, Sheriff of the County of Essex, for this purpose empanelled and returned to wit: after the following number of challenges were exhausted, by the State 3, by the defendant 4, and 2 jurors were

Judgment.

executed for cause; William Bott, Harry L. Terhune, Frank A. Connelly, Milton M. Canfield, Harry N. Austin, James F. Clegg, William G. Coe, Edward M. Terry, Charles J. Reilly, Francis R. Esty, Thomas L. Brady, C. Irving Cannon, 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 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, Max Nieberg, guilty in manner and form as charged in this indictment, and so they say all.

And afterwards, that is to say, on the fourteenth day of June, A. D. nineteen hundred and twenty, motion in arrest of judgment was made by Edward Schoen, counsel for defendant, Max Nieberg, which motion was denied by the Court.

Whereupon all and singular, the premises being seen and by the Court now here fully understood, it is on this fourteenth day of June, A. D. nineteen hundred and twenty, ORDERED and ADJUDGED that the said Max Nieberg be committed to the State Prison of this State for the term of not less than two years, and not more than three years at hard labor and pay a fine of one thousand dollars and the costs upon his conviction and stand committed until said fine and costs are paid, which said costs are taxed by the clerk at the sum of ninety-six dollars and five cents, and the said defendant by in mercy, &c.

Judgment signed June 14, 1920.

WM. P. MARTIN,
Judge.

Motion to Quash Indictment.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Monday, May 3, 1920.

STATE	Indictment No. 10.
vs.	April Term, 1920.
MAX NIEBERG.	Wood Alcohol.

Before Hon. William P. Martin, Judge, and a jury.

For the State appears Wilbur A. Mott, Esq.
For the defendant appears Edward Schoen, Esq.

Mr. Schoen. Will your Honor permit me to withdraw the plea in this case for the purpose of making a motion to quash?

The Court. Yes.

Mr. Schoen. I move to quash this indictment on three grounds: First, that the indictment does not set out an indictable offense against the defendant; there is no allegation that he kept the alleged adulterated whiskey in his possession to be used as a beverage; second, there is no averment the defendant knew of the fact alleged; third, there is no averment of an intent upon the part of the defendant. Those are the grounds upon which I rely for my motion to quash.

The Court. This is practically the same motion as was made in the Rosch case.

Mr. Schoen. I do not know; I was not here then.

The Court. I think the same grounds were stated, except that you add the first ground as to the use of liquor as a beverage. I do not think that it is necessary to show knowledge where the statute provides that the defendant shall be responsible under certain conditions and does not mention the duty of a person who sells alcohol to be to use a high degree of care that the liquor does not contain wood alcohol. The statute does not require any intent. The statute specifically enumerates certain liquors, "rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a com-

ponent part to be used as a beverage, that shall be adulterated or manufactured with spurious or poisonous ingredients of any description," and so forth, and it would seem that by charging that the liquor sold was "rum, brandy, wine or spirits of any kind," that it would be a sufficient allegation. In this case as the Court understands the allegation, it is for the sale of spirits, to wit, whiskey. I do not think it is necessary further to allege that it was to be used as a beverage. The act was originally passed April 6, 1871, I, N. J. General Statutes, 1104; 2 Comp. Stat. 1777, Par. 98.

Motion denied.

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.

Defendant pleads not guilty to indictment.

Jury drawn and sworn.

THOMAS F. VESEY, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Mr. Vesey, where do you live? A 172 Orange street.

Q What was your business? A Saloon business. Was my business.

Q On the 6th day of December, last, what was your business? A Why, saloon business.

Q You were a licensed saloonkeeper? A Well, sold one-half per cent.

Q I mean you had a license granted you last July, had you? A Yes, sir.

Q You procured last July a license from the city of Newark? A Excise Board.

Q Yes, to conduct a saloon at 172 Orange street? A Yes, sir.

Q Do you know Mr. Nieberg? A Do I know him?

Q Yes. A Well, I have only met him on one occasion.

Thomas F. Vesey, direct.

Q What occasion was that? A Why, two occasions, the day I gave him the order and the day he delivered the stuff.

Q Where did you see him on the day you gave him the order? A My place of business.

Q Your place of business on Orange street? A Yes, sir.

Q What time of day did he come in there, about, I mean? A I should judge about nine o'clock.

Q In the morning? A In the morning; yes, sir.

Q Do you happen to remember what day in the week it was? A Saturday morning.

Q Just what was said? A Well, I was in need of some whiskey to continue the business—

Q What did you say to him or what did he say to you, when Mr. Nieberg came into your place of business on Saturday morning; what conversation did you have with him? A We were just talking about the situation or business and war time prohibition, and I happened to tell him I was in need of some whiskey when he told me that he might be able to get some for me to carry me over, and I told him that the decision might be rendered by the Supreme Court on Monday, December 6th, and if war time prohibition ban was lifted we might be able to go back to the old mode of business with the wholesaler, and he told me he could help me out and took an order for twenty gallons of whiskey.

Q (*By the Court.*) What day was this? A Saturday, December 4th.

Q (*By the Court.*) 1919?

Q What price was agreed on? A $15 per gallon.

Q What next happened after you gave him the order for twenty gallons? A Well, he could not supply me with the twenty, I believe twelve.

Q When did he deliver the twelve? A I should judge it was around five o'clock in the evening, between five and five-thirty.

Q (*By the Court.*) Twelve gallons? A Twelve gallons.

Q When you say he delivered it do you mean he delivered it at your place on Orange street? A Yes, sir.

Q How did he bring it there? A Well, that is a question I cannot answer how he brought it there, but when the stuff was delivered I happened to be in the front bar room; the space between the front bar room to the back room I should judge to

be about four feet or five and he happened to stand in the door and told me the stuff was in the back room, and when I went in the back room I found the stuff there.

Q What was the whiskey in? A Two gallon demijohn and five gallon Great Bear Spring Water bottle, and tin can, five gallon tin can.

Q Then after you got the whiskey what did you do with it? A I handed the two gallon demijohn to the bartender and he filled it up into a quart bottle we were using and put it on sale.

Q Will you come down and look at this demijohn? A I could not swear that this is the same demijohn, but it was a two gallon demijohn.

Q What subsequently became of that demijohn? A After it became empty?

Q Yes. A I put it right in the back room.

Q Then what did you do with it afterwards? A I turned it over to the police when they called for it.

Q Do you remember what policeman you turned it over to? A Yes, sir.

Q Who? A Lieutenant Quinn, or Sergeant Quinn.

Q Is this the officer (indicating)? A Yes, sir.

Q What is your name?

Mr. Quinn. Joseph Quinn.

Q Do you recall how many bottles of whiskey you filled out of this two gallon demijohn? A Well, the two gallon demijohn holds 154 ounces and I had about eight quarts; I was using a full quart bottle.

Q Did you sell any of the whiskey in the tin container; what did you do with that? A I took about a half a gallon of that.

Q And what did you do with that? A Why, put it in the same work bottle that I was using, that I used out of the two gallon demijohn.

Q And what about the glass jar? A Did not touch that at all; it is just the way it came to me; it went back to the police the same way.

Q (*By the Court.*) The glass jar, in answering that you are referring to the Great Bear Spring Water bottle? A Yes, sir.

Q So that you took a half gallon out of the tin can? A Five gallon tin can.

Thomas F. Vesey, direct.

Q (*By the Court.*) A And nothing out of the Great Bear Spring Water bottle? A No, sir.

Q (*By the Court.*) All out of the two gallon demijohn? A Yes, sir.

Q Did you subsequently turn over to the police the tin container and the Great Bear water bottle to Mr. Quinn? A Yes, sir.

Q At the same time you turned over this (indicating)? A Yes, sir.

Q Do you recall when it was, Mr. Vesey? A If I am not mistaken, I think it was on a Tuesday, on December 8th, two days after, or one day afterwards, I am not sure; I did not keep the date of it.

Q Do you know a man by the name of Richard Coleman? A Yes, sir.

Q Was he a customer in your place; did he come to your place? A Yes, sir.

Q Was Coleman in your place on the day this whiskey was delivered to you? A Richard Coleman?

Q Yes. A I believe he was; yes, sir.

Q Did you see him? A I think I did; yes, sir.

Q Did you sell him any whiskey that day?

Mr. Schoen. I object, unless there is shown in this case a concert of action between him and this defendant. I submit that the evidence of the acts of this witness is not binding upon the defendant. The defendant is here upon an indictment for keeping in his possession these goods, not the other indictment for selling, and I submit under this indictment for keeping in possession no evidence of the act of this witness when they were in his possession are competent or binding upon this defendant.

The Court. Not even if proven wood alcohol was in the whiskey?

Mr. Schoen. I would not say that now.

The Court. Well, that is the only theory upon which it can be offered. Is that the theory?

Mr. Mott. That is the theory, absolutely.

Mr. Schoen. I object on the ground stated, your Honor.

The Court. If it is offered on that theory the Court will receive it.

Thomas F. Vesey, direct.

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 Do you recall whether or not on the 6th day of December, Saturday, the day these goods were delivered to you, you sold Mr. Coleman any whiskey? A On the 6th?

Q Yes. A On the 4th the stuff was delivered to me, Saturday.

Q Yes, on the 4th. Well, did you sell any of it to Coleman? A I did not personally, myself.

Q Were you there when any was sold? A Why, yes, I was.

Q By whom was it sold? A By the bartender.

Q What is his name? A Thomas Strong.

Q Mr. Strong, stand up. Is that the man? A Yes, sir.

Q What time of day was it when this was sold? A I should judge between the hour of—it came there, I should judge, to be exact, about 5:20, and it was sold within five minutes after the stuff was delivered into the place.

Q What was sold to Mr. Coleman at that time? A What kind of a drink?

Q Yes. A I do not recall what kind of a drink was sold to him.

Q Did you sell anything to Coleman on that day or any other? A Yes; I sold to him on other days.

Q Subsequent, I mean? A Afterwards?

Q Yes. A You mean Richard or Sylvester?

Q Sylvester. A No, sir; I sold him nothing afterwards.

Q Well, now, you speak of the 4th of December; Saturday was the 6th, wasn't it? A Monday was the 6th.

Q Well, are you wrong or am I? A That was when the prohibition ban was to get a decision.

Q I am not talking about Monday, but I am wondering what day of the week it was. Can your Honor tell us, from the calendar?

The Court. The calendar says that Saturday was December 6th.

Thomas F. Vesey, cross.

Q Then Monday would be the 8th? A Then I must be wrong.

The Court. You said something happened on Tuesday, December 8th.

Witness. Well, I got mixed in my dates.

Q Now, on what day of the week was it—you say it was shortly after these goods were delivered that you or your bartender Strong sold a drink to Sylvester Coleman; is that right? A No; I am referring to Richard Coleman.

Cross examination by Mr. Schoen.

Q Did I understand you to say that you saw a drink sold to Richard Coleman? A Yes, sir.

Q Is he here? A Yes, he is here.

Q Is he alive? A Yes.

Q How many drinks did you see Richard Coleman have? A I do not recall what he drank; I seen him being served with a drink, but what it was I do not know; I would not say whether it was whiskey, ginger ale, beer, or what it was.

Q You say that you spoke to Mr. Nieberg on the 6th of December in the morning? A Well, was that Saturday, the 6th?

Mr. Schoen. I think the Court has said that was the 6th?

The Court. Yes.

Q On Saturday morning you say you had a talk with Nieberg about the war time prohibition and the likelihood of the ban being lifted and other things of that character? A Yes, sir.

Q And you say you spoke about wanting to get some whiskey to carry you over until the day when you believed or thought that the ban would be lifted? A Yes, sir.

Q That was the line of the conversation? A Yes, sir.

Q Did you ask him whether he knew where you might get some? A I asked him whether he would be able to get some whiskey for me or would he be able to supply me with some, so he thought he would be able to fix me up.

Q You did not know Nieberg? A I knew his brother personally, more than I knew him.

Thomas F. Vesey, cross.

Q Did you know Nieberg, the man you were talking to, was not a saloonkeeper? A I did not know he was a saloonkeeper; I thought he might be implicated around the saloon because of his brother being in the business.

Q You thought he might know where to get some whiskey? A Yes, sir.

Q And might tip you off where to get it; that was the idea of your conversation? A Yes, sir.

Q Did you have any idea Nieberg himself had any whiskey? A I did not know on account of his being such a close competitor against me.

Q I mean Max Nieberg? A I did not know whether he had any at the time or not.

Q Did you, as a matter of fact, know what his business was? A No; I did not know what his business was.

Q Did you know that he was not in the liquor business? A Well, I didn't know whether he held a license or whether he was in the business, or helped his brother out, or what he done.

Q Didn't you know that he was not in the business of selling liquor; didn't you know that? A I did not know whether he was in the business or could get me some whiskey or not. I don't say that I was fishing around for information. I know I thought he could put me in a position where I could get some whiskey, because I knew he had more knowledge about the business than I had.

Q So when you talked to him it was not with any actual knowledge on your part that he had any to sell, but you thought he might be able to tell you where to get it? A Yes.

Q And when you talked to him along those lines he said maybe he could get somebody who had it and might let you have it, didn't he? A Yes.

Q And so you said, if you can get somebody to send me some let them send me 20 gallons? A I did not say whether he would get some one to send it; I just gave him the order.

Q If he knew where any could be had to see that you got 20 gallons? A Yes, sir.

Q And after that you say that 12 gallons were delivered to your place of business? A Yes, sir.

Q Were you in your saloon during the entire day after you spoke to Nieberg? A Yes, sir.

Q Remained there all that day? A Yes, sir.

Thomas F. Vesey, cross.

Q You did not go out at all? A I might have went outside of the place.

Q Did you go to the bicycle races? A No, sir; there was no bicycle races on Saturday.

Q Well, any sport of some kind going on that day that you attended? A I was within 100 feet of the place all the time.

Q Were you drinking that day yourself? A I might have had a drink of port wine.

Q You think you only drank one or two drinks? A Well, I drank enough to make me feel pretty good, on account of being up the previous night.

Q You were up the previous night? A I was over to the Six Day Bicycle Races.

Q Then there were some bicycle races going on? A In New York.

Q And you were there the night before? A Yes, sir.

Q Up all night? A Yes, sir.

Q Drinking? A Well, I was over to the Garden until something went wrong with the lights and we were notified to leave the Garden and came back to Newark.

Q Did you drink anything that night? A Nothing but port wine.

Q And the next day you were drinking some more to make you feel good, or was it the result—I will withdraw that. You say you drank enough to make you feel good on Saturday? A Yes, sir.

Q Did you drink enough on Saturday to make you feel good or was it the effect of what you drank the night before? A The effect of what I drank the night before.

Q With the addition of what you had on Saturday? A Yes, sir.

Q Now, had you remained in your place all that day drinking port wine, too? A Soda water, occasionally, yes.

Q That was a chaser? A No; I did not need any chaser, because the port wine was not strong enough.

Q Well, you were feeling pretty good?

Mr. Mott. I object.

The Court. Sustained.

Q Can you give the jury any idea of how much liquor you consumed during the night preceding and all day Saturday?

Thomas F. Vesey, cross.

Mr. Mott. I object. What bearing has that? If counsel will state what bearing it has in this case—

The Court. Well, whether or not he could recognize Nieberg?

Mr. Mott. Well, if that is the point. Your Honor is giving the reason.

The Court. Well, that is one of the reasons that makes it proper cross examination, if this witness could not see Nieberg and did not know to whom he was talking to.

Mr. Mott. I agree with you, if that is the view of the counsel, if that is the purpose.

The Court. It is perfectly obvious it is proper on some theory and I do not see why counsel has to point out the theory.

(Question read.)

The Court. I presume intoxicating liquor.

Mr. Schoen. Yes. Not talking about soda water.

Witness. I consumed, I should judge, about 100 drinks of port wine, that is, from Friday morning about nine o'clock until the time I went to bed Saturday night, about one ounce drinks; that is all I drank, port wine and soda.

Q That is all you drank? A That is all I could get to drink.

Q And in that condition, after having consumed about 100 drinks of port wine, you claim you received some demijohns and other receptacles or containers, containing whiskey, at about 5 or 5:30 that afternoon at your place of business? A Yes, sir.

Q And when these things arrived at your place of business what part of your place of business were you in? A I was in the bar room.

Q Were they delivered to the bar room? A No, sir; they were delivered to the back room.

Q How far is the back room from the bar room? A The bar room from the back room?

Q How far is the back room you speak of from the bar room? A Where the stuff was delivered?

Q Yes. A I should judge about ten feet.

Q Was the door open between the back room and the bar room? A It is always exposed, the back room and the bar room.

Thomas F. Vesey, cross.

Q Was your attention directed to the back room while the delivery was being made? A When Mr. Nieberg delivered the stuff?

Q I say was your attention directed to it? A Yes, sir.

Q Did you go in the room? A When the gentleman delivered it he called my attention—

Q I ask you whether you went into the back room to see it delivered. A It was delivered when I got there; when he told me he had it already in the place on the floor.

Q When you went into the back room the stuff was already there? A Yes, sir; Mr. Nieberg called me; right here, the bar room is, like here, and you just turn to the steps.

Q Mr. Nieberg called you? A Yes, sir.

Q And up to that time you didn't see anything being delivered in the place? A No, sir.

Q You never saw these bottles in his possession at all? A I never seen them in his possession, no.

Q You do not know what they came in, whether they came in an automobile or wagon or in a truck, or in a hand satchel? A No, sir; I do not know.

Q You never saw any person actually in possession of these things, did you? A Only Mr. Nieberg.

Q Well, did you see him carrying them? A I did not see him carrying them; they were on the floor.

Q They were on the floor when you came into the back room? A When he called my attention and told me here was my things.

Q And that was all you knew about it? A Yes, sir.

Q Who was with him? A At the time?

Q Yes. A Why, I think there was a man by the name of Rosenstein with him.

Q Do you know the man who was with him? A Do I know him?

Q Yes. A Well, I have seen his face before.

Q You saw his face before? A Yes, sir.

Q Is he here? A I do not know whether he is here or not.

Q Do you know a man by the name of Jimmy, a man who is known as Jimmy? A Jimmy?

Q Have you heard of a man that was around that neighborhood by the name of Jimmy? A You don't know his last name?

Q No. A I know a lot of fellows by the name of Jimmy.

Thomas F. Vesey, cross.

Q Didn't you hear of a man by the name of Jimmy who was supplying saloonkeepers with stuff at that time? A No.

Q Sure about that? A Yes.

Q Wasn't the name of Jimmy mentioned between you and Nieberg when you were talking? Now, just think carefully, see if you do not recall something about a man by the name of Jimmy? A What business was he in?

Q Business of supplying liquor? A I never heard of the man's name at all as Jimmy; I do not know him by that name.

Q Wasn't there a man about that time who was known to be supplying saloonkeepers who was only known by his first name? It may not have been Jimmy. A I do not recall anyone by that name.

Q Well, by some other first name, about that time? Do you get my question?

The Court. Are you asking him about a rumor?

Mr. Schoen. Not rumor, no.

A I don't know of anyone else by that name of Jimmy coming around selling stuff.

Q I am not asking you now about the name of Jimmy. I say don't you recall any other man by any other first name who was talked about and talked about by you and Mr. Nieberg on the day you asked whether anybody could supply you, who was making a practice of supplying saloonkeepers with liquor and who was known only by his first name? A I do not recall talking of anyone else; our talk was mostly on stuff that was in bond, and so forth.

Q Now, when you say that Mr. Nieberg—you say you expected to pay about $15 a gallon for this stuff? A Yes, sir.

Q Was the price absolutely fixed or was it to be fixed after it was in your place? A Why, it was already fixed when the stuff was delivered.

Q Was it to be a cash transaction? A Well, it was to be a cash transaction; yes, sir.

Q And you were in the place of business at the time you say the stuff got there? A Yes.

Q And you saw Nieberg, you say? A Yes.

Q And this was to be a cash transaction? A Yes.

Q Have the goods been paid for up to the present time? A No.

Thomas F. Vesey, cross.

Q You saw Nieberg and had the opportunity of paying him that night and it was to be a cash transaction, wasn't it? A I had the opportunity of paying him that night?

Q Yes. You saw him? A I seen him.

Q And it was to be a cash transaction, that was the agreement? A When the deal was made.

Q And they have not been paid for up to now? A They have not been paid for up to now.

Q Now, as a matter of fact, Mr. Vesey, immediately after you began to sell the liquor and had this difficulty or trouble about Mr. Coleman, don't you know of the disappearance at that time of this man by the name of Jimmy?

Mr. Mott. I object.

The Court. Sustained.

Mr. Mott. Because he said he does not know any such man. The question contains a false assumption.

Q When you talked to Nieberg did he mention anything about a man by the name of Jimmy? A I do not recall him speaking of anybody by that name; I never heard the name before, as I can recall.

Q Now, Mr. Vesey, did you see any quantity of this whiskey sold over the bar? A Did I see any quantity of it sold? Yes.

Q How much of it? A I should judge about one quart.

Q That is the amount you saw sold? A Yes.

Q Do you know the people to whom it was sold? Were they steady customers of your place? A Yes, sir.

Q About how many of them? A I should judge about five or six, to my knowledge from the time to when I went upstairs and went to bed.

Q Are they all here? A No, only the bartender is.

Q Are the five or six men who you say you saw drink this stuff alive? A Yes, sir.

Q They are alive today? A Yes, sir.

Q Did you drink any yourself? A I took three drinks out of the bottle.

Q Did you see your bartender take any of it? A I didn't see him take any of it.

Q Do you know whether or not he was a drinking man? A Well, occasionally; he was a moderate drinker; he takes a little.

Thomas F. Vesey, cross.

Q You say that the two gallon demijohn was the first part of the whiskey that you used? A Yes, sir.

Q And that you put the demijohn into the back room when it was empty? A When the jug was empty, yes, demijohn.

Q A demijohn similar to the one here today? A Yes, sir.

Q And did you put it into the back room yourself? A The empty demijohn?

Q Yes. A Yes.

Q What became of the whiskey that was taken out of that demijohn? A Why, it was consumed.

Q Two gallons of it? A Yes, sir.

Q There were two gallons in that demijohn? A Yes, sir.

Q Consumed by customers over your bar? A Yes, sir

Q About how many of them? A About how many what?

Q About how many customers? A Well, I have only seen about five of them served up to the time I went to bed.

Q Did the five of them consume two gallons, to your view? A No, sir.

Q Do you know about the average number of drinks that each one of these customers took, that you saw? A I have only seen them take about one or two.

Q And that was when you went to bed? A Yes, sir.

Q And what time was that? A About seven o'clock.

Q And when was it the demijohn was emptied and put in the back room? A Sunday morning.

Q So that between seven o'clock that night when you went to bed, and Sunday morning, the two gallons was consumed in your place? A Yes, sir; that was up to the closing time.

Q And so far as you know the people who drank that are alive? A Yes, sir.

Q Now, did you ever refill that two-gallon demijohn? A Did I ever refill it?

Q Yes. A No, I never refilled it.

Q I mean from either of the other two containers? A Why, I—the night that the officer came there, Mr. Sergeant Owens and Sergeant Quinn, and they told me they wanted the stuff; I took the stuff that was in the five gallon jug and put it into that, see, out of the tin can.

Q Why was it necessary to remove the stuff out of the tin can and put it in that demijohn? A Well, the demijohn was empty, or the tin was empty, I should say, and I thought it might

create a rust; these cans, you know, was not in very fit condition to be served in, so I thought I would take it out of the can.

Q Well, did you give the can to the police? A I showed the police the empty can in its position where I had put it.

Q You mean the five gallon can was also empty? A The five gallon can was emptied and put into a stone jug.

Q Where is that? A Well, the officers and myself took it out of the five gallon jug and put it back into the tin can.

Q Then the beverage that is now in court in these three containers has at some time been in another container that Mr. Nieberg, or whoever it was you met, never brought to your place? A That was the five gallon jug.

Q There are five gallons of this beverage, whatever it may be, that is in court today, that has been in something else and poured back into this container since it was left at your place of business on the afternoon of Saturday, December 6th, is that true? A That is true; yes, sir.

Q And where is that other container that that stuff was once in? A At the place of business.

Q That you never surrendered to the police? A Never surrendered that, no.

Q And the stuff that is in this can—this is the can you filled? A A can something similar, I believe it is the same can.

Q Whatever stuff there may be in the tin can which you delivered to the police is the stuff that had been in some other container and has been poured back into this container since you claim this stuff was delivered to your place of business; is that true? A Yes, sir.

Q And the other container in which that beverage had been is a container that you do not claim Nieberg ever saw or had? A That is a five gallon jug.

Q Is that so? A That is right, sir.

Q When was the refilling done? A In the presence of the police.

Q And when was that, what day? A That was, I should judge on Tuesday or Wednesday night; I am not sure what time it was.

Q How long had the five gallons of beverage been in the jug that you speak of in your possession before you refilled the can which is now in court, or a can similar to the one which is now

in court in the presence of the police officers? A Why, I should judge it was on Sunday night.

Q You think you did that Sunday night? A Yes, sir.

Q So that whatever beverage was delivered to you on Saturday stood in the container of your own selection from Sunday until Tuesday? A Yes, sir.

Q When it was poured back into the original container in the presence of the police; is that true? A Yes, sir.

Q And you have no other reason to give this court and jury as to why you had removed the five gallons of the beverage from the tin container into a larger stone jug except that you thought the tin container might be rusted inside? A Why, Mr. Nieberg himself told me to remove the stuff from the tin can into a crockery jar, or something to that effect, because it might contain some rust; there was a paper cap instead of a cork cap on the top when it was delivered to me, and I neglected putting it in the jug that night and left it there until Sunday night, and brought it to the back room and in the presence of three or four patrons of my place refilled it in the five gallon jug and did not touch that five gallon jug until the police took it.

Q (*By the Court.*) When did Mr. Nieberg make that statement to you? A The day he delivered the stuff to me.

Q How long have you been in the saloon business? A Six years.

Q I presume you claim to know something about alcoholic beverages? A To a certain extent.

Q As a saloonkeeper of six years' experience do you know of any danger from rust so far as whiskey is concerned? A No, sir; I do not.

Q You do not know that if whiskey is kept in a receptacle that is rusted that it might affect the quality of it? A Well, it is only from a rumor I hear.

Q Have you ever known that to be so? A No, sir.

Q Then why did you take Mr. Nieberg, as you say he suggested—why did you take his say-so, and remove the five-gallons to a stone container, when you, as a saloonkeeper of six years' experience knew that there was nothing harmful in keeping whiskey in a tin can?

Thomas F. Vesey, cross.

Mr. Mott. I object, because it assumes this witness has assumed a certain thing which he has not said.

The Court. Sustained.

RECESS.

Q I do not recall whether you told us into how many bottles you poured the contents of the two gallon demijohn? A I should judge about eight; at least there should be eight to the two gallons.

Q Well, I do not mean how many bottles did you get out of it. In selling this beverage over your bar you told us that you took the contents of the two gallon demijohn and distributed that into something else.

The Court. He said in quart bottles.

Witness. Quart bottles.

The Court. And there were eight of them?

Witness. Yes, sir.

Q Eight different. A No, sir; just one bottle I was using.

Q And were refilling the one bottle all the time? A Yes, sir.

Q Did you give that bottle to the police? A Yes, sir.

Q Is that here? A I believe it is; I turned it over to the police.

Q At the time you gave that to the police was it empty or full? A I judge it was about half or one-third full.

Q And do you know whether the contents of that bottle were poured into the five gallon can? A I do not believe so; I gave it to them in separate packages.

Q Where had that bottle come from before you began to use it for this refilling purpose? A Why, it was a bottle I was using right along, a quart whiskey bottle.

Q It was a bottle you had in the store? A Yes, sir.

Q And did you do the filling yourself? A Only on Sunday night.

Q On Saturday afternoon when this beverage arrived at your place you began to sell it right away? A Yes, sir.

Q And did you begin to pour it into the quart bottle from the two-gallon jug? A My bartender did with my orders.

Q So what was done on Saturday was done by your bartender and not by you? A Yes, sir.

Thomas F. Vesey, cross.

Q And you had directed him to pour it out into a quart bottle? A When the stuff arrived.

Q And sold it out of the quart bottle? A Yes, sir.

Q And to your knowledge that quart bottle was refilled at least eight times? A Yes, sir.

Q That completely exhausted the contents of the two gallon demijohn? A Yes, sir.

Q Sure of that? A Yes, sir.

Q And after the contents of the two gallon demijohn was exhausted you found that to be on Sunday morning when you came back to the saloon? A Yes, sir.

Q Is that true? A Yes, sir.

Q And you then took that two gallon demijohn and put it away in the back room? A It was empty, yes; it was not empty on Sunday morning; it got empty around Sunday night.

Q When it became empty you put it into the back room yourself? A Yes, sir.

Q You know it was empty? A Yes, sir.

Q Sure of that? A Yes, sir.

Q And you had 12 gallons of it all together? A Yes, sir.

Q Two gallons of it you know were gone? A They were consumed over the bar, yes, sir.

Q Now, you have identified a demijohn here which you say looks like the two gallon demijohn that you had in your place; that is so, is it? A That looks something similar, yes, sir.

Q And the one you put in your back room empty? A Yes, sir.

Q Did you ever refill it yourself? A Why, in the presence of the sergeant of police.

Q You refilled it? A Yes, sir.

Q Well, out of what did you refill it? A Out of the tin can.

Q Well, didn't you tell us that you had filled the tin can out of a five gallon stone jug? A I emptied the tin can into a stone jug.

Q Yes; that was the whole five gallons? A Yes.

Q And you kept the five gallons in the stone jug until you put it back in the tin container in the presence of the police, you say? A Yes, sir.

Q Well, when did you fill the two gallon demijohn again? A Why, in the presence of the police; we had no funnel; he held the demijohn while I was emptying it out of the can.

Thomas F. Vesey, cross.

Q After emptying the contents of your five gallon stone jug into your tin can why was it then necessary, or why did you then take some out of the tin can and put it into the two gallon demijohn? A I do not just recall why we done it; he asked me for the receptacles of what it came in and I told him what I had the stuff delivered in, and I took it and turned it over to him, and we had no funnel, and when I was emptying the stuff out of the five gallon jug into the two gallon jug—when I gave the sergeant the demijohn it was empty and he advised me to turn the things over and I did just as he told me.

Q Turned what over? A The five-gallon Great Bear spring water bottle and the five gallon can and the two gallon demijohn is the stuff I received.

The Court. He did not ask you that at all. He asked you why it was that after you emptied the contents of the stone jug back again, you say, into the tin can, that you put in more—took any more from the tin can and put it in the two gallon demijohn?

Witness. I do not recall; at the time we filled it up to the best of our ability.

Q (*By the Court.*) Well, if you put five gallons from the tin can into a stone jug and put the same five gallons back into the tin can, they why did you take some more out of the tin can and put it into the two gallon demijohn A Well, we put it all in in the presence of Mr. Quinn and myself; I took the stuff and turned it over to him; I had suggested at first myself not to touch the two gallon demijohn, to leave it empty, but I do not know just what came up when we filled it up.

Q That is the explanation? A Yes, sir.

Q Now, Mr. Vesey, did it take you from Saturday night until Sunday morning to sell two gallons of whiskey? A Yes, sir.

Q And how much did you sell during Sunday? A How much did I sell during Sunday?

The Court. Why do you repeat the question? Answer it and do not repeat it.

A Well, from the time it came, I should judge up to ten o'clock, I could not just tell you how long it took to sell one gallon or two gallons; I was not there from seven o'clock until closing time Saturday night, and then when the bartender opened up

Thomas F. Vesey, cross.

Sunday morning, when I relieved him, this stuff ran out about ten o'clock.

Q In the morning? A No, in the night.

Q You continued to sell whiskey Sunday night? A Yes, sir.

Q And you continued to sell whiskey Monday? A Yes, sir.

Q And you continued to sell whiskey Tuesday? A No, sir.

Q At what time on Tuesday did you stop selling whiskey? A I did not sell any on Tuesday.

Q On Monday? A When Richard Coleman came in the place and told me his brother was sick between ten and ten-thirty.

Q How much did you sell after the two gallon demijohn was exhausted? A Oh, I cannot just recall how much I sold; about half a gallon or gallon; I did not measure all the stuff to see how much I sold.

Q Half a gallon or a gallon? A I should judge that.

Q Where did you take it from? A From the jug that I took out of the tin can there.

Q Do you know how many gallons of stuff there are in court? A No, I do not.

Q Can you tell by looking at those receptacles? A Can I look at them?

Q Yes. A I should judge there are about nine gallons there.

Q You think there are nine gallons? A I should judge; that is only guesswork.

Q You are only guessing at it? A Yes, sir.

Q You had no occasion to use any of the beverage out of the glass container at all, did you? A No, sir; I did not touch it; did not even touch the cork.

Q This container I am referring to now? A Yes.

Q Is that a five gallon container? A That is supposed to hold five gallons.

Q And it is not entirely full, is it? A No, sir.

Q And it was delivered and received by you as five gallons? A Yes, sir.

Q Do you know what kind of a jar that is? You have been in the business six years. How many gallons does that jar contain? A Why, you can get over five gallons, wine gallons, 128 ounces to the gallon in a bottle of that kind and it would not fill right up.

Thomas F. Vesey, cross.

Q Is that different from a whiskey gallon? A There is proof gallon, 100 proof, and then there is wine gallon 128 ounces.

Q How many gallons of whiskey could you put in that bottle? A I should judge you could put five in.

Q Is that a regular five gallon bottle? A I think it is; yes, sir.

Q And it was delivered to you as five gallons? A Yes, sir.

Q And you did not sell any part of that liquor out of that bottle at all? A Did not touch it.

Q If that is a five gallon bottle why did you receive it as five gallons when it is not entirely full?

Mr. Mott. If your question assumes it was not full when he received it, I object.

Mr. Schoen. He says he has not touched it.

Mr. Mott. Well, we have touched it and taken some out of it.

Mr. Schoen. I object to that statement and ask that it be stricken from the record.

The Court. I want to have the situation before the Court on the record. Judge Schoen's proposition is, I presume, that the statement of the Prosecutor should not be accepted by the jury as a statement of fact. It is a perfectly proper statement to make to the Court by way of explanation.

Mr. Mott. That was the purpose of it.

The Court. I am asking Judge Schoen so I may see what he wants the Court to do in reference to his objection.

Mr. Schoen. I do not think it is a proper statement to be made to the Court, but I am not going to argue about it. It is done, and I do not know that it is going to affect the case, but if such a thing has occurred the proper way to show it is by evidence.

Mr. Mott. If I do not produce the evidence I will apologize to you.

The Court. The objection is sustained. The jury will understand that nothing can be received except the actual evidence in the case and I so instruct you. Now, that is the objection made by Judge Schoen, which is sustained.

Thomas F. Vesey, cross.

Q (*By the Court.*) Have you said, Mr. Vesey, and is it a fact that when you received this Great Bear Spring water bottle full of something you call whiskey, that the bottle was then full? A No, sir.

Q (*By the Court.*) What was it, then? A It was not quite full.

Q (*By the Court.*) Well how much was it? A It was supposed to contain five gallons; I did not measure the bottle or I did not even take the cork out of it; I took the man's word for it.

The Court. The objection of the Prosecutor is overruled.

Q If this was a five-gallon jug or bottle why did you accept it when it was only partially filled, as five gallons of beverage? A Well, I asked the man when he delivered the stuff and he told me twelve gallons and I took it as twelve gallons and I did not measure any of it.

Q Well, a liquor man handling jugs and bottles, these various jugs become quite familiar to you? A Yes, sir.

Q You can tell a one gallon jug and a five gallon jug by looking at it? A Well, you can, yes, sir.

Q And when you looked at this glass jar which is in court did you recognize that as a five gallon jar? A Yes, sir.

Q Well, then, if it was not full when you got it why did you receive it as five gallons? A Well, I just took the man's word for it; he said there was five gallons in it.

Q Notwithstanding the fact that you could see it was not full? A At that time?

Q Yes. A I did not say it was full.

Q You said it was not full? A He told me five gallons in the Great Bear Spring Water bottle, and five gallons in the tin and two gallons in the demijohn, and that was twelve gallons all told, and that is what I took it for.

Q (*By Mr. Mott.*) "He" told you. Who? A Mr. Nieberg.

Q Then whatever is in that two gallon demijohn now is a beverage which was in a five gallon jar, which was your property? A Yes, sir.

Q Five gallon jug, rather, which was your property and been around your place of business? A Yes, sir.

Thomas F. Vesey, cross.

Q And which had been poured out of the five gallon stone jug into the tin can; is that right? A When it was put into the tin can? At the time the police came.

Q Yes; and from the tin can again transferred into the two gallon demijohn?

Objected to.

Mr. Schoen. I will withdraw that question and reframe it.

Q Whatever you poured into the two gallon demijohn on the day the police came to your place, which was on Tuesday, came through two other receptacles, didn't it, first from the five gallon jug, which was your property? A Yes.

Q Then from the tin can; is that right? A Yes.

Q And from the tin can into the demijohn; is that right? A No; I said that when I got the stuff delivered to me I was given orders to take it—

Q I am not talking about that now. I am talking about when the police came to your place? A I took it out of the five gallon jug and put it into that two gallon demijohn and then into the can, five gallon can, from the five gallon jug.

Q I understood it just the other way around. Let us see if we understand it right. You took it out of the five gallon jug, which is your jug? A Yes.

Q And you put it into the two gallon demijohn? A Yes.

Q And then your poured the contents of the two gallon demijohn into the tin can? A Yes.

Q All of it? A All that was left in the jug.

Q Which jug? A In the five gallon jug, because you couldn't put five gallons into the two gallon demijohn.

Q How many times did you fill the demijohn in emptying the five gallon jug? A Only once.

Q You told us—if you are mistaken about it I am going to have you correct it. I am not going to have you say anything that is not so. I understood you to say that you filled this tin receptacle out of the five gallon jug; did I understand you right? A When the police came there I had the five gallon jug in my apartment.

Q That was full? A Yes, and me and Sergeant Quinn took the stuff into the kitchen. I showed him what stuff came to me and he was with me and I took the five gallon jug while he held

the demijohn and filled up the two gallon demijohn, then put the contents into the five gallon tin can out of the jug.

Q (*By the Court.*) How much did the stone jug have in it? A It was supposed to be five gallons.

Q It only had the contents of the tin can? A Yes, sir.

Q Then how can you get five gallons in the stone jug from the tin can with five gallons and then fill the demijohn in addition? A Well, the tin can was not filled up.

Q Then you only put three gallons of the stone jug contents into the tin and two gallons into the demijohn? A Yes, sir.

Q Now, you said awhile ago that you poured all of the contents of the stone jug into the tin can, making at that stage of the proceedings five gallons in the tin can, and then you said you poured off two gallons of that into the demijohn? A I do not recall making that statement.

The Court. You made the statement; is that a correct statement?

Witness. No.

Q (*By the Court.*) Then what you actually did was to pour off three gallons from the stone jug into the tin can and two gallons into the demijohn? A Yes, sir.

Q Then the contents of these two containers which are in court, which you poured into them, which you say you poured into them on the day the police came, were the contents of the jug no part of which had been used or sold by you; is that true? A Yes, sir.

Q None of the contents of the stone jug have been sold by you? A You mean it was in the tin can before I put it into the jug?

Q Yes. A Well, there must have been a half a gallon taken out of it.

Q Out of what, the jug or tin can? A Why, it was taken out of the tin can before the jug was filled up.

Q And has that all been disposed of, or did you have any part of it left? A Only what the police had taken over, was in the bottle.

Q And you are positive that the containers which are in court here today, or similar containers, were used by you on the day the officers came and that you put the contents of one five-gallon

jug into these containers or containers similar to them; that is right, is it? A Yes, sir.

Q One five-gallon jug is the thing you got all the beverage out of which was put in the containers the day the police were there? A Yes, sir.

Q Did you make that statement? A Yes, sir.

Mr. Mott. You mean the jug and the tin?

Mr. Schoen. Yes.

Q Whatever you poured on the day the police came into your place, was poured out of one container, a five-gallon jug? A When the police took the stuff out of the bottle that I was working?

Q No, when you say you filled these containers or containers similar to the ones in court, you say you used a five-gallon jug to pour this beverage out of? A After the two-gallon demijohn went I took the tin can and put it into the five-gallon jug, and I had used about one gallon out of that, I guess, up to that Monday morning, about half-past ten.

Q When the police came you had the five-gallon jug, the balance of the beverage there in a five-gallon jug? A Yes, sir.

Q And what you poured in the presence of the police was out of the five-gallon jug? A Yes, sir.

Q Nothing else? A No, sir.

Q (*By the Court.*) Anything left in the quart bottle in the bar? A I think it was half full, or one-third.

Q (*By the Court.*) Did you pour anything out of that? A No, I just turned it over to the police right the way it was.

Re-direct examination by Mr. Mott.

Q Mr. Vesey, you said, if I recall rightly, that on Monday morning about half-past ten Richard Coleman came into your place and said that his brother was sick? A Yes, sir.

Q When Richard told you that what did you do with the whiskey that you had bought from Nieberg? A Why, the bottle that I was working on was the quart bottle; I had taken a pint bottle and cleaned it out myself thoroughly and had it filled up with the contents of the quart bottle we were working and took it to a chemist and had it analyzed.

Q What was his name? A Dr. I. Friedman.

Thomas F. Vesey, re-direct.

Q That was on Monday? A Monday was the—

Q When did you take this to Friedman? A On Monday, at twelve o'clock, between half-past eleven and twelve.

Q What did you do with the rest of the whiskey you had there? A I just put it out of the way.

Q Did you sell any more of it after Richard told you his brother was sick? A No, sir; I immediately stopped the sale.

Q Now, what was this five-gallon jug into which you poured the contents of the tin container? A It was one of them regular five-gallon stone jugs; composition of some kind.

Q What was its condition? A I had cleaned it out thoroughly with water before I put the contents of the five-gallon tin can into the jug; cleaned it out myself.

Q (*By the Court.*) Hot or cold water? A Why, it was lukewarm water, and then I rinsed it with cold and a little washing soda.

Q I understood you to say that your agreement with Nieberg was that you should pay him cash for the whiskey? A Why, I was to pay him cash, but I did not have the money on hand at the time when he delivered it.

Q Did you have any conversation? A I told him I would issue him a check in place of the money; I didn't have my checkbook down there at the time and I made an appointment with him to come and see me Monday morning and perhaps I would have the cash, and I had made out a check for him and the first person I came in contact with was Richard Coleman and he told me his brother was sick, and I asked him what he—

Mr. Schoen. I object.

The Court. Sustained.

A (Continuing.) So I immediately took the stuff and had it analyzed and I did not present the check.

Q And you had drawn the check? A Yes, sir.

Q Have you that check with you? A Yes, sir.

Check offered in evidence and marked Exhibit S. 1. $150, dated December 8, 1919, James F. Vesey.

Q I notice this check is drawn to cash; how is that? A Well, that is the way I was told to make it out.

Q Who told you to? A Mr. Nieberg.

Thomas F. Vesey, re-cross.

Q And was that check for the whole or a part of the amount? A Well, do you mean for the whole total amount of the stuff I received?

Q Yes. A Well, that check was made out for only ten gallons, at $15 a gallon.

Q The rest, how were you to pay that; you gave him a $150 check, and the rest, how were you to pay that? A In cash, I guess, because I didn't have the check made out for the right amount of the stuff I received.

Re-cross examination by Mr. Schoen.

Q When did you in fact make up this check to be used in court here; when has it been made? A The day?

Q No, when did you actually write this check up? A Why, Monday.

Q This last Monday? A No, December 8th.

Q You were sober, by that time, were you? A I will say. I was.

Q The one hundred glasses of port had worn off? A Yes, sir.

Q And you knew how much you owed for this stuff under your agreement? A Yes, sir.

Q And you knew you owed twelve times fifteen? A I knew I owed twelve times fifteen.

Q That would be $180? A Yes, sir.

Q And so on Monday when you were sober and you sat down to write a check to pay for the stuff you wrote a check for $150? A I made a check for $150.

Q When you say you know you owed the amount of $180? A I did not say I knew I owed him $180; my first order was twenty gallons and I only received twelve.

Q Did you go to school here? A Yes, sir.

Q You can figure? A Yes, sir.

Q Did you figure out how much twelve times fifteen is? A Yes, sir.

Q How much? A $180.

Q Notwithstanding the fact you knew it was $180 you owed this man you say you sat down and wrote out a check for $150? A Yes, sir.

Thomas F. Vesey, re-cross.

Q And that is the check you brought to court here and say is the check you had ready to give to Nieberg? A Yes, sir.

Q And you told Judge Mott, the Prosecutor, you were to pay the $180 in cash? A I knew I had to pay it; I was not guessing at it; I just simply made a mistake; instead of making it out for $180 I made it $150.

Q You made a mistake in your favor of $30? A Well, I would have had to pay the difference; there wouldn't be any difference in the final adjustment in the question of money.

Q Where has this check been since that time? A I turned the check over to the police.

Q And that was part of your scheme, wasn't it, when you thought there was going to be some trouble, you thought you would make out a check to somebody and say to the police there was somebody you bought this stuff from? A No, sir.

Q And isn't it a fact why you made it in the name of cash, because you could not think of anybody to put in in your hurry? A No, sir.

Q When the police came on Tuesday you had this check to show to them; is that so? A When I was asked for it.

Q Yes, but the check you had there if they wanted it? A Yes, sir.

Q To show to the police? A I kept it when I found out what was the trouble.

Q Now, Mr. Vesey, you say on Monday when you heard there was some trouble about Mr. Coleman, you took the bottle you had behind the bar and took it to a chemist? A Not the bottle I had behind the bar; I took—when Richard Coleman came to me and told me his brother was sick, Mr. Nieberg was also there; I went to work and took a pint bottle and rinsed it out thoroughly myself and filled it out of the quart bottle with as much as I could put in the bottle and I took it to the chemist down on Halsey street.

Q You filled a pint bottle from the contents of the quart bottle you were using behind the bar? A Yes, sir.

Q And you took that pint bottle to a chemist? A Yes, sir.

Q Did the chemist drink any of that stuff? A He did the following day; he and Mr. Nieberg both.

Q Drank some of the stuff you brought down? A That is when they separated the ingredients and the alcohol was in one glass cabinet.

Thomas F. Vesey, re-direct.

Q How do you know that? A I seen it.

Q You do not mean he separated any ingredients out of the liquor? A He told Mr. Nieberg he did; I am not any chemist.

Q Did you drink any of it? A No, sir; I did not.

Q How long had the five-gallon jug that you used to pour the contents of the five-gallon can into been in your possesison? A You mean the five-gallon jug?

Q Yes. A I should judge it was there a year or so.

Q Been in active use you say, during that time? A Well, it was in active use at times.

Q Or was it standing there that time without being used for any purpose whatever? A Well, it was in active use two or three months previous.

Q Do you remember what kind of beverage was in it that time? A Well, it was whiskey.

Q Sure it was whiskey? A It was the only jug I used for that purpose, sure.

Q Where did you keep that jug? A Under the bar.

Q And that is where it remained? A Yes, sir.

Q And all you did before you put the contents of this tin container in it was to clean it with lukewarm water? A Washing soda and cold water.

Q You have no knowledge what that thing might have been used for by the bartender or others during the year or so it had been in your place, have you? A I don't think so, no; I cannot answer that question.

Re-direct examination by Mr. Mott.

Q You say that the chemist, Dr. I. Friedman, told Mr. Nieberg in your presence, that he had separated or analyzed—what did he say?

Mr. Schoen. I object to that.

Mr. Mott. You have introduced part of this conversation and I want to know just what the conversation was.

The Court. Go ahead.

Witness. Why, Mr. Nieberg and myself went down there on Tuesday at twelve o'clock, to get a report on the stuff, and the chemist told us it contained a certain amount of methyl alcohol, and he says there wasn't enough there to

kill anybody, so he and Mr. Nieberg were talking, and he had the stuff separated in these little glass cups on a wooden rack in front of him and he took a drink of that and Mr. Nieberg also took a drink of the alcohol, in my presence, but I did not touch any of it myself there.

Q How did you come to meet Mr. Nieberg this morning? A Why, he was there at twelve o'clock.

Q At your place? A At my place.

Q What did he come for? A I did not know what purpose he came for; I thought maybe he might be looking for the check.

Q Did you say anything to him about the check? A No, sir; I just asked him to take a little ride with me down to Broad street.

Q And he did? A Yes, sir.

Paper marked Exhibit S. 2 for identification.

Q I show you Exhibit S. 2 for identification, and ask you if you have seen that before? A Yes, sir.

Q When did you get that paper? A On Tuesday, December 9th.

Q From who? A Dr. Friedman.

Q Was Mr. Nieberg there? A Yes, sir.

Q Do you know whether Mr. Nieberg saw this or not? A I do not know whether he seen it or not; I wouldn't swear to it, that he didn't or he did.

Q Do you recognize this bottle? A Yes, sir.

Q What bottle is that? A That is the work bottle that was behind the bar.

Q Are you able to say how much stuff there was in this bottle; did the police take this? A Yes, sir; I gave it to them about that way, just about the way it is; I wouldn't say it was any more; I would not be exact.

Q You say the chemist drank some of this stuff in your presence? A Yes, sir.

Q Did he say how much you could drink without doing any harm? A He explained to me you could consume at least twenty or thirty drinks without doing a man any injury.

Q That is how harmful he told you it was? A Yes, sir.

Thomas F. Vesey, re-direct.

Examined by the Court.

Q Who was in your saloon when you say that Nieberg came to you and said the stuff was in the back room? A I should judge there were about four or five men there—Richard Coleman was one; that is about all I can recall, outside of the bartender.

Q Where were you when Nieberg first spoke to you that afternoon? A I did not see him that afternoon; it was late in the evening, about five o'clock—half-past five.

Q Well, between five o'clock and half-past five? A I was in the barroom.

Q What were you doing? A When he entered I believe I was there at the lunch counter.

Q In order to get to the place where these goods were after Nieberg called your attention to them, from the street, was it necessary to go in through the barroom? A No, sir; through the side alley.

Q Was the door open in the side alley? A Yes, sir; there are two doors.

Q When you say you first saw Nieberg, about nine o'clock on Saturday morning, December 6, at your saloon, were you the only person tending bar? A I was not tending bar.

Q Was the barkeeper there? A Yes, sir.

Q What took place between you and Nieberg—what did you say to him and what did he say to you? A I was talking with him in regard to—

Q I did not ask you what you wer talking to him in regard to. I asked you to state the words that you used to him and the words that he used to you. A Well, he came in and said good morning to me, and I said good morning; so we stood there and had a cigar, and I started talking.

Q Had you ever met him before that day? A Only on one occasion.

Q Where? A On the street.

Q When? A I should judge about two or thre days previous; it is right around the freight yard there and his brother kept a place across the street; I happened to go over for ice occasionally, and I happened to run across him.

Q Go ahead. A So, I was telling him about what stuff I had in bond, and I told him—

Thomas F. Vesey, re-cross.

Q Do not tell us your conclusions. Tell us what you said and what he said. A We were talking on the subject—

Q Strike that out. Say what you said and what he said to you. A We was talking about stuff that I had in bond and I was telling him I would like to get it out, in regard to the war-time prohibition ban being lifted.

Q Strike that out. All that you have told us is that he said good morning, and that you gave him a cigar, or he gave you one, and you stood there talking. I want to know what was the first thing said and who said it and what it was. Do not tell us it was whiskey in bond. Tell us exactly what it was? A I cannot just give you the first words.

Q All right, then, if you do not recall the exact words tell us your best recollection. A I just simply tried to tell my best recollection; that was our opening conversation, in regard to our stuff in bond.

Q Who opened the conversation? A I did.

Q What did you say? A I said to him that I had some stuff in bond and I would like to know how soon I would be able to get the stuff out, and I told him the predicament I was in for the stuff, and he told me he might try to locate a man and get some for me. That is the best of my recollection I can bring back of that morning, on Saturday.

Q So that the very first thing you talked about after you saw him was the statement that you had some stuff in bond and you could not get it out and you did not have any stuff in the place, and you needed more and he told you he would try to help you? A Yes.

Q That is correct? A Yes.

Q What did you say was in bond? A Why, ten barrels of whiskey.

Q Did you say what kind of whiskey? A I do not just recall whether I told him the name of the stuff or not, but I said I had ten barrels in the Kentucky bonded warehouse.

Q Did you speak otherwise than that of the kind of whiskey you had there? A No, sir; I did not.

Re-cross examination by Mr. Schoen.

Q Have you been indicted for the sale or for the keeping of this whiskey?

Thomas F. Vesey, re-cross.

Mr. Mott. One moment. This witness may say whether he has pleaded to an indictment or not, but he does not know whether he has been indicted.

Q Have you pleaded to an indictment? A What kind?

Q Arising out of the keeping of this whiskey? A Federal indictment.

Q I mean in this state court. A No, sir.

The Court. You asked him, "Have you been indicted?" And what was his answer?

Witness. Federal indictment; I was fined $250 for violating the Volstead Act.

Q You have merely been charged by the Government with violating the Volstead Act, but have you pleaded to any indictment in the state court, for the handling of whiskey or the keeping of it, or the death of Coleman? A No, sir.

Q Were you promised immunity from indictment if you were to say that you bought this whiskey from someone? A No, sir.

Q Didn't you, in order to save yourself from indictment, have to name someone from whom you got this whiskey, so that you could be a witness and thereby save yourself from indictment? A No, sir.

Q Isn't that why you are a witness in the case? A No, sir.

Q You do not expect any punishment at all for having handled whiskey or sold it or caused the death of Coleman?

Mr. Mott. Does it make any difference what the witness expects?

Mr. Schoen. I will withdraw it for the present.

Q You know you will not be prosecuted, don't you? A That is a question I cannot answer.

Q Well, haven't you discussed it with the authorities? A Who do you mean?

Q With the police authorities or prosecutor's authorities. A No, sir; I have not.

Q And you don't know of any reason why you are absolutely free of any indictment about this matter? A I do not know.

Q You don't know why it is that you have not been called upon to plead to any indictment, do you? A I have not been called upon to plead to any indictment; no, sir.

Richard John Coleman, direct.

RICHARD JOHN COLEMAN, sworn in behalf of the State.

Q Where do you live? A 171 Orange street.

Q With whom do you live? A My parents—mother and father.

Q How old are you? A Twenty-seven.

Q Did you have a brother? A Yes.

Q What was his name? A I have several brothers.

Q Well, Sylvester? A Yes, sir.

Q Was he older or younger than you were? A Younger.

Q How old was Sylvester? A Twenty-four.

Q Is Sylvester living or dead? A Dead.

Q Do you know when he died? A Yes, sir.

Q When- A On the 8th of December.

Q Last? A Yes, sir.

Q Do you know Mr. Vesey, who keeps a saloon at 172 Orange street? A Yes, sir.

Q Were you ever in there with your brother Sylvester? A Yes, sir.

Q When was that? A Well, I was in there several times with him.

Q Well, in December last, shortly before his death? A Yes; I was in there on December 6th.

Q That was what day in the week? A Saturday.

Q And Sylvester was with you? A Yes; he and my other brother, Warren.

Q Your brother Warren, is he older or younger than you are? A Younger.

Q Older or younger than Sylvester? A Between the two of us.

Q What time of day was it when you went into Vesey's saloon? A About half-past four in the afternoon.

Q With whom? A I went in there alone in the afternoon.

Q Did you see Sylvester after that? A Well, not until later on in the evening; later on in the night, rather.

Q Do you know Mr. Nieberg? A Yes, sir.

Q How long have you known him? A Oh, for a short while; since I have been living up there; he runs a saloon a couple of doors from my house, and the other brother I have seen around there several times.

Q (*By the Court.*) Who is this one? A Max.

Richard John Coleman, direct.

Q And you have seen Max around there? A Yes, sir.

Q Have you ever seen Max in Mr. Vesey's saloon? A Yes, sir.

Q When was that? A On a Saturday, the 6th of December, I seen him there.

Q Tell us what occurred when he was there. A Well, when I first was in there it was in the morning, and soon Max Nieberg came in there and talked to Tom Vesey; of course, they were talking private; I did not hear what they were saying; I went out and did not see anything more of them until night, a quarter of six, or half-past five, I seen Max Nieberg coming in the side door. He had that tin and laid it down at the end of the shuffleboard, about midway between one shuffleboard and the other, and when he came out Vesey was sitting on the lunch bar he had there and he had a little talk and he went out.

Q What tin do you mean? A That one right there.

Q This tin container? A Yes.

Q What was Max Nieberg doing with that when you saw him? A He was bringing it in the back room.

Q Did you have anything to drink in this saloon before Sylvester came? A Yes, sir.

Q What did you drink? A Gin.

Q After Sylvester came in what happened? A When he came in about twenty after nine or half-past nine, he came up from the moving pictures; it was raining that night, so me and my other brother Warren were standing there talking and Sylvester came from the moving pictures and he met us; at that time he owed Vesey a couple of dollars and took it up; he wanted to pay him, and he did not expect to meet me or my brother, and at the time Vesey wasn't there, and he said, "What are you going to have?" I said, "I will take a drink of gin."

Q Who served you? A The bartender, John Strong; my brother took whiskey.

Q Who? A Sylvester; we had several drinks, maybe eight or nine or ten of them.

Q Of whiskey? A Yes, sir.

Q And you were driking? A Gin and beer.

Q And your brother Warren? A Drinking Italian wine; we drank until about twelve o'clock, and it was pretty near closing up time and we went on home and I went across the street with

my brother Sylvester, and Warren is married and he lived at Lyndhurst, and he went to get the car, and shortly after we went to bed he took a sick stomach; I said, "What is the matter"—

Mr. Schoen. I object to the conversation and I object to any description of what occurred.

The Court. Why to any description?

Mr. Schoen. Because it has not yet been shown that what occurred to him was the result of anything that this defendant did.

The Court. It may appear by reason of the symptoms exhibited.

Mr. Schoen. Yes, I know, but it has not been connected with this defendant yet, that the defendant had anything to do with what he later drank. This indictment is for keeping in possession, and that is absolutely opposed to any idea of parting with a thing, and this defendant having been charged with keeping a certain quantity of beverage in his possession certainly cannot be held accountable for something that occurred to someone—that this something that someone else had in his possession and distributed—and on this ground I object to this evidence at this time.

The Court. Overruled. The objection is sustained in part as to whatever his brother may have said to him. That will go out. The jury will disregard that.

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 But you say shortly after you went to bed your brother did something; go on and state the physical thing that came to your view of the condition. Tell us what happened to Sylvester, without telling what he said. A Well, that is all that happened to him; he naturally threw up out of the window and went to sleep.

Q (*By the Court.*) He vomited? A That was about twenty minutes after twelve; so about two o'clock that morning or ten after two, possibly somewhere around that, I woke up and he was doing the same thing; he was vomiting again.

Q (*By the Court.*) What time was that? A About ten after two on Sunday morning; so I did not see him no more then until Monday afternoon; I seen him when I got up in the morning; he was sleeping; so I came downstairs and went out to Morristown; so when I came back it was about five o'clock; he was laying downstairs on the couch.

Q What did you observe about him? A He looked to me as though he was pretty sick; and we were going to Proctor's, and asked him if he wanted to go, and he put on his collar and dressed himself and got as far as Orange and High street and says, "I can't go any further; I am too sick," and went home, and we went on without him.

Q Well, what time did you get home from Proctor's? A About ten after eleven.

Q Did you see Sylvester? A Yes, sir; I seen him; he was still sleeping downstairs; I said to him, "Are you going upstairs?" and he said, "Yes."

Mr. Schoen. I object to the conversation.

The Court. Sustained.

A Anyway, he went to bed upstairs and when I got up Monday morning he was sleeping, and I went up to work; anyway, I didn't go to work that day, and I came back about half-past eight and noticed his stomach was going up and down and he was grabbing at things he could not see, and all like that.

Q What did you do? A Got Dr. Kirkman on Orange street, and Dr. Kirkman came down.

Q And he then attended him. Don't tell us what he said—

Q (*By the Court.*) What time did Dr. Kirkman come there? A About eleven o'clock.

Q (*By the Court.*) Monday morning? A Yes, sir.

Q What was then done? A He made out a prescription.

Q When did you see Sylvester next? A The next time I seen him after half-past eleven I seem him laid out in the front room, dead; so I went that afternoon to get my father, and when I came back from father's shop he had been taken to the hospital and died.

Richard John Coleman, cross.

Q (*By the Court.*) What time did you see him dead? A That night.

Q What time? A About nine o'clock, when they brought the body home.

Q You were home when they brought the body in? A Yes, sir.

Cross examination by Mr. Schoen.

Q Were there any other men in the saloon at the time you and your brothers were drinking there? A Yes, sir.

Q How many? A Possibly eight or nine; maybe more.

Q Were they all drinking, the other men, as a general proposition? A Yes, sir; they all appeared to be drinking.

Q Did you notice what they were drinking? A No.

Q Did you notice what anybody else was drinking besides yourselves? A I noticed one fellow was drinking whiskey; I saw that.

Q Saw him being served at the same time your brother was? A Yes, sir.

Q Out of the same bottle? A Yes, sir.

Q Do you know that fellow? A No; I know of him.

Q Is he alive? A I don't know if he is; he went away on a ship.

Q You know he was alive to go away on a ship? A Yes, sir; that night he was to sail.

Q Did you notice how much he was drinking? A To my knowledge, five or six.

Q All out of the same bottle? A Yes, sir.

Q That your brother drank out of? A Yes, sir.

Q Did you see the bartender drink any of it? A No.

Q You did not see him take any drink with his customers? A I seen him drink lots of gin.

Q Did you notice the other man, whether he took any whiskey in a bottle after he left? A We left there before him.

Q You say your brother Sylvester had eight or nine or ten of these whiskies? A Sure.

Q Was he in the habit of drinking heavily? A No, sir.

Q Was this the first time he ever drank that much? A No, sir; I have seen him drink that much before of good whiskey.

Richard John Coleman, cross.

Q Have you ever seen him drunk before? A I seen him one New Year's.

Q Any other time? A No; he had only been back from the navy about six weeks.

Q He was in the navy? A Yes, sir.

Q Well, he was in the habit of drinking? A Oh, no; he was not; on the payday he would go out and have a couple of drinks on payday, and he only got paid twice a month; he would not have stopped that night and drunk that long if it was not that me and my other brother was there; my other brother was playing the piano; that is the reason that we were sitting there and having several drinks; he would not stay there no time that long.

Q You say you were in the saloon when he came there? A Yes, sir.

Q Do you know where your brother came from? A From the Crawford theatre.

Q That is what he told you? A Yes, sir.

Q You don't know whether he had stopped at any other saloon or not, of your own knowledge? A No; I do not know; but he was not in the habit of stopping anywhere.

Q He was not? A No; he came into Vesey's and had a glass of beer sometimes and get his supper, and either go to the moving pictures or stay in.

Q That was Monday night? A No, Saturday night.

Q Do you know whether your brother was out of the house at all on Sunday? A Why, he walked across as far as Vesey's to have his shoes shined, and he could not stand up, and he walked back.

Q Didn't he got in the saloon on Sunday; are you sure he didn't have any drinks on Sunday? A No.

Q You were not with him? A Well, the bartender told me.

Q You do not know whether he had any drinks on Sunday or not? A Well, he had water, I suppose.

Q Do you know where he was Sunday night? A Sleeping.

Q Did he go out Monday? A No, sir; he died Monday.

Q He did make an effort to go down to Proctor's with you Sunday night? A Yes, sir; got as far as High street and couldn't go any further.

Q You went on down to Proctor's? A Yes, sir.

Q Left him on the corner? A Yes, sir.

Q What corner? A Orange and High.

Q Was there any saloon there? A No, sir; on the southwest corner there is a big factory building.

Q Is there any saloon near there? A No.

Q How far did he have to go to get back to his home from that corner? A About seventy-five yards.

Q And you went right on down and paid no attention to him? A No; my youngest brother went home with him.

Q (*By the Court.*) Seventy-five yards west on Orange street? A Yes, sir.

Q (*By the Court.*) Which side of Orange street is your home? A North side.

Q You say you were in the saloon when you saw Max Nieberg come in with this tin? A Yes, sir.

Q And it was a tin similar to the one in court? A Yes, sir; gasoline tank.

Q That is all you saw? A That is all.

Q And Max Nieberg brought it right in the door? A No, sir; through the alleyway and back door, into the back room.

Q I thought you said in the barroom? A He came up in the barroom after he delivered it.

Q Where is the shuffleboard? A It lays to the right-hand wall of the back room.

Q Is it in the back or barroom? A In the back room.

Q That is the only thing you saw? A No; there was a bottle, but I only seen him bring in a tin.

Q Saw him coming through the alleyway, saw him from the time he came in, and came into the barroom and talked to Vesey? A He did not talk to Vesey the last time; Vesey was sitting on the lunch bar half asleep and Max Nieberg just went like that with is clothes (illustrating).

Q He did not talk to Vesey? A No; Vesey was half asleep.

Q Was he half asleep or drunk? A He wasn't sober.

Q And there wasn't a word said between Vesey and Nieberg at that time? A No.

Q You saw the whole thing from the time Nieberg came into the alley until he left the saloon; after buying a cigar? A Yes, sir.

Q All you saw him bring was that tin? A Yes; but I seen that Great Bear bottle and I saw that jug there, that basket affair.

Richard John Coleman, re-direct—re-cross.

Q When did you see that? A I saw that when Vesey brought it and put it behind the bar.

Q When Vesey brought it? A Yes, sir.

Q All you saw Nieberg bring was that tin; something similar to tin; is that right? A Yes, sir.

Re-direct examination by Mr. Mott.

Q How soon after Nieberg went out did Vesey bring the Great Bear bottle and jug into the barroom? A He didn't bring that; he just brought that little two-gallon affair.

Q You say you saw the Great Bear bottle? A Yes, sir; it was lying right alongside of this; right alongside of that tin can.

Q Where? A In the back room.

Re-cross examination by Mr. Schoen.

Q Were not you in the saloon during this entire time? A Yes, sir; I was in the saloon from half-past four in the afternoon until ten minutes to twelve that night.

Q And what part of the saloon were you sitting in, or were you standing at the bar? A Standing at the end of the bar.

Q And do you mean to say from that position you could see Nieberg coming into an alleyway and going through a doorway? A Yes, sir; there is a window right on the side.

Q That is how you got your view of Nieberg coming with a tin in his hand? A Yes, sir.

Q And you saw Nieberg coming into the back room? A Through the alleyway.

Q And with this tin? A Yes, sir.

Q And you saw all that through a window? A Yes, sir.

Q Where is that window? A On the side of the building.

Q Whereabouts with relation to the saloon? A Why, it is on the right-hand side looking out in the street and left-hand side looking from the street in.

Q Where were you? A At the end of the bar.

Q And you were there from four to eleven-fifty? A Not all the time.

Q Drinking what? A Gin; Gordon gin.

Q And right through one window you could follow the movements of a man that started— A Not necessarily; I did not say I could follow his movements; I say I looked out of the win-

dow and see him pass by; and I seen him deliver this can supposed to be whiskey in the back room, come up those three steps and Vesey was sitting over on the lunch counter and that is when he shook his clothes at Vesey.

Q Vesey was sound asleep? A Yes, sir.

Q He did not say anything? A Well, he talked to him. Well, just said about two words and he went over and got a cigar and went out; he seen he was asleep and he went out.

Q Is the bar on the right-hand side of the saloon as you enter the saloon from the street? A Yes, sir.

Q And the window is on the left-hand side? A Yes, sir.

Q And you were standing up against the bar? A Yes, sir; down at the end of the bar.

Q Facing the street? A Yes, sir.

Q And then you had to turn your head to look at the side of the saloon, to look out of the window? A He passed by the window; I couldn't help but see him.

Q Were there any blue shades on those windows in that saloon? A I don't know whether there is or not.

Q Don't you know? A There is, but they only put it up when the sun shines.

Q Wasn't there a blue shade that day? A It was on there; but it was rolled down; it rolls from the bottom up.

DR. ISAAC FRIEDMAN, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Dr. Friedman, where do you live? A New York.

Q (*By the Court.*) Whereabouts? A 352 West 117th street.

Q Do you have a place of business in Newark? A Yes, sir.

Q Where is your place of business? A 53 Halsey street.

Q Do you remember some time along about the 7th or 8th, or thereabouts, of December, last, this gentleman, Mr. Vesey, coming to your place? A Yes, sir.

Q And did he bring anything to you? A Yes, sir.

Q What? A A bottle of whiskey.

Q What is your business? A Chemical laboratory.

Q What experience have you had?

Mr. Mott. Is there any question about his competency?

Mr. Schoen. I don't know anything about the doctor.

The Court. You had better find out.

Q What experience have you had by way of study and by way of practicing as an analytical chemist? A I graduated in 1885 from the University of Dorport, and up to 1892 I was practicing chemistry in Russia; then I came to this country and I continued as a pharmacist in the drugstore; then I took up my doctor degree.

Q Where? A Here in New Jersey; and for the last eleven years I was connected with the chemical laboratory in New York, 329 Grand street; then I opened a laboratory here in 1912. Since that time I am located at 53 Halsey street.

Q What did you do with the contents of the bottle Mr. Vesey brought to you? A I was requested to examine it, whether it contained wood alcohol.

Q Did you? A Yes, sir.

Q And what did you find?

Mr. Schoen. I object. It has not been shown that the specimen or sample the doctor had was in the possession of the defendant.

The Court. Overruled.

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 did you find? A I found that it contained traces of wood alcohol.

Q What is the technical term of wood alcohol? A Methyl alcohol.

Q Did you make any attempt to determine the amount? A Yes, sir.

Q Did you determine the amount? A Approximately; I was not asked; I was not paid for it; but considering the seriousness of the case for my own sake I wanted to see how much it contained.

Q What did you find it contained? A I found it contained about one part to 1,500 parts, of methyl alcohol.

Q What test did you make; did you apply any scientific test to determine the quantity here? A I applied two tests.

Q How did you do it; just a rough estimate; or scientific? A This matter is used scientifically in every case; we call this colorimetrical. I made three tests; one pure alcohol; one the same amount of alcohol, with one drop of methyl alcohol and one the same amount of whiskey in question. This test consists that you get a certain color; oxidize this wood alcohol and you get a certain color. Now, the stronger it is the stronger the color will be. After I got it I had to delute the alcohol, which contained one drop, about fourteen times to get the same color which I got in the whiskey in question. This test, colorimetrical, is used—

Q Then the only test you made to determine the quantity of wood alcohol was the color test? A Two tests. They are all based on that. The other test, so-called Resorcin test is also based upon producing a certain color, which is not gotten from any other.

Q Well, that is purely a qualitative test and not a quantity? A No; quantity is what I said is colorimetrical test.

Q Then I ask you the only test to determine the quantity was the color test just stated? A Yes; that is the one, what we call this methyline blue color, but there is another test also based upon color.

Q Did you make it? A Yes, sir. The less it contains the longer it will take the color to appear.

Q I am just asking you to tell the test you applied? A Yes; this is what I applied; I applied the time and the colorimetrical.

Q (*By the Court.*) You mean measured by color? A Yes, sir.

Q Did you apply the refractometer test? A No.

Q After you had finished your work did you see Mr. Vesey; did he come down to your place? A Two were there; I think one who sold that and the other one he said he is a brother of the one who drank it. I think so, but I am not sure of that, I remember two were there; two came to find out.

Q Would you know the man who came to see you? A I think that is the man; I am not so sure of that, but I think that was the one.

Dr. Isaac Friedman, cross.

Cross examination by Mr. Schoen.

Q Doctor, you say you found a trace of wood alcohol in what you had before you? A Yes, sir.

Q And you say that that means 1 part to 1,500 parts? A Yes, sir.

Q 1,500 parts of what? A Anything of the other ingredients; it means 1,500 parts of anything.

Q Of what you had, that was the proportion? A Yes, contained one part of that.

Q In other words, the 1,500 parts contained no poisonous ingredients? A Take for example it contains 1,500 c. c., a quart and a half is 1,500 c. c.; according to my findings a quart and a half contained 1 c. c. of wood alcohol.

Q (*By the Court.*) What is c. c.? A Cubic centimeters; a thousandth part of a quart.

Q Did you drink any of this beverage? A No; I tasted it.

Q And did anyone else taste it in your presence? A I don't think so.

Q Did you give it to any of these other two men to taste? A I don't remember.

Q You took a taste of it yourself? A Simply I tasted it with my tongue; I didn't drink it.

Q After you made the test? A No; I tried before; I smelled it and then I tried tasting it.

Q Did you tell these men whether it was harmless or not? A At first I could not tell, no.

Q Did you tell them how much a man could drink of it? A I do not remember whether I said, but I do remember that when they came for the answer that I made the remark that it is so little that I did not believe it is possible—you have to drink tens of quarts—more than ten to—

Q It was so little that you made that remark? A As I say, I made the remark about that to show that acording to my opinion it was so little that it cannot be—I will tell you why.

Q Go ahead. A Now, according to the text books, that is, my teacher, Cobert, known psysiologist, he claims that the findwhich is required to produce death, it is required between 120 and 240 c. c.; it means between four ounces and eight ounces. If you should have this amount in the strength that I found you would have to have a barrel.

DR. LEROY KIRKMAN, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are a practicing physician of this city? A Yes, sir.

Q You have been for how long? A Fifteen years.

Q Were you called on early in December last to attend Sylvester Coleman? A Yes, sir.

Q Have you ever attended him before? A I attended in the family; I do not recall that it was for him in particular.

Q Where did you see Sylvester? A At his house.

Q What time of day did you see him? A About ten o'clock in the morning.

Q And do you remember the day? A I think it was the 8th of December.

Q Just tell the Court and jury what you did and what you found? A When I found him I found that he was suffering from apparently a poison of some kind; he had a very persistent vomiting and his eyes were beginning to grow dim; he was unable to see very well and the suspicion pointed to wood alcohol poisoning.

Mr. Schoen. I object to that, suspicion.

The Court. Your objection is too general. You have not made any motion to strike it out.

Mr. Schoen. I make that motion now to strike out what the doctor said were his suspicions.

The Court. He said suspicion of wood alcohol.

(Answer read.)

The Court. The suspicion pointed to wood alcohol poisoning.

Mr. Schoen. Yes, sir.

The Court. Granted. Strike it out.

Q What was there that pointed to wood alcohol poisoning, if anything?

Mr. Schoen. I object to that.

The Court. Did you say suspicion or symptoms?

Witness. Symptoms.

The Court. This objection is proper. Sustained.

Dr. LeRoy Kirkman, cross.

Q What did you diagnose the case as? A I diagnosed it as a probable wood alcohol poisoning.

Q The failure to see and failure of the eye-sight indicates what, with the other symptoms? A With the other symptoms it indicates a probable wood alcohol poisoning.

Q Did you see him afterwards? A No, sir.

Q Did you have him sent to the hospital? A Yes, sir.

Q He went to what hospital? A City Hospital.

Cross examination by Mr. Schoen.

Q Did you find any medicine on the person of Mr. Coleman when you saw him? A I do not recall that I did at the time; no, sir.

Q Any pills or tablets? A Not at that time; no, sir.

Q Did you find them afterwards? A Afterwards one of the brothers brought some tablets to my office and said—

The Court. Never mind what he said; you are asked what you found.

Q You are not the family physician for this man? A Yes, sir.

Q You knew about his general condition and situation? A Yes, sir.

Q Was he a drinking man so far as you know? A I do not know much about his habits.

Q Had you treated any other cases of wood alcohol poisoning other than this one up to that time? A I saw some in the City Hospital where I attended, where I am an attending physician, at the City Hospital.

Q Do you know the symptoms of ordinary alcoholism? A Yes, sir.

Q Did Coleman have the symptoms of alcoholism? A He had the symptoms of an aggravated alcoholism. I mean by that that wood alcohol poisoning acts a great deal like a very severe ordinary alcoholic poisoning in the beginning; it is only as the poisoning progresses that that difference between ordinary alcoholic poisoning and wood alcohol poisoning shows, and this boy at first looked suspicious of a severe alcoholic poisoning, but with the eye symptoms it led to the suspicion of a probable wood alcoholic poisoning.

Dr. LeRoy Kirkman, cross.

Q Then, so far as the other symptoms other than the eye symptoms were concerned they were the symptoms of an aggravated case of alcoholism? A Yes, sir.

Q Which any man would get by drinking the best whiskey in the world and drinking enough of it? A Yes, sir.

Q And are there many cases you know of, either in your private practice or which you have read in the books of alcoholism, resulting from good whiskey, and lots of it, enough of it? A Are there many cases?

Q Yes. A Lots of them.

Q That is something that is known to medical science as alcoholic poisoning? A Yes, sir.

Q Which comes from good straight alcohol or good straight whiskey; is that right? A Yes, sir.

Q So that in this case of Mr. Coleman had all the symptoms that he would have had if he had a straight case of alcoholic poisoning which would come from the best whiskey in the world, didn't he? A Yes, sir; plus some more.

Q Plus the additional eye symptom that you speak of? A Yes, sir.

Q And on the additional eye symptom is what you place your—based your opinion on that this was wood alcoholic poisoning and not merely alcoholism; is that right? A Yes, sir.

ADJOURNED until tomorrow, May 4, 1920.

SECOND DAY.

Tuesday, May, 4, 1920.

Continued pursuant to adjournment.

Mr. Mott. Your Honor, in order to save time counsel agree these facts shall be admitted, this is: That Sylvester Coleman was taken from his home to the Newark City Hospital on the 8th of December; that he died at the hospital around three o'clock, P. M., that day, and that Dr. Warren performed an autopsy on the body of Sylvester Coleman.

Mr. Schoen. I am willing to admit these facts after I have made an objection to the relevancy of the testimony or any testimony concerning the death of Coleman. If

your Honor rules against me on the question of relevancy I will not ask the State to prove the details by witnesses.

The Court. Yes, I have already ruled against you on the proposition. There is a tendency in the testimony, if it does show that Coleman died of wood alcohol, to prove that what he drank in the saloon was something containing wood alcohol poison. In other words, it is a proper matter to go before the jury for consideration.

Mr. Schoen. Shall I state the point that I have in mind now for the record?

The Court. Yes. I understood your point to be the same as you made yesterday.

Mr. Schoen. I object to this tender of proof on the ground that the death of Coleman is not evidential on the question of the character of the ingredients of the beverage in the possession of the defendant; that is evidential on the question of the character of the ingredients of the beverage which he is charged to have had in his possession in this indictment, unless it be first shown that Coleman drank of the beverage which the defendant is alleged to have had in his possession and that his death was due solely to that fact, the drinking of the beverage alleged to have been in the possession of this defendant.

The Court. Overruled.

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.

DR. LEROY KIRKMAN, resumes the stand for further cross examination by Mr. Schoen.

Q The fact that Coleman in addition to having every symptom of alcoholism had what you call an eye symptom, and by that I presume you mean a form of blindness, or gradual loss of sight? A Yes, sir.

Q And because Coleman had a loss of sight, suffered a loss of sight, you for that reason say that in your opinion his con-

dition as you saw it was due to wood alcoholic poisoning, is that so? A Well, if may make an explanation of why a diagnosis is made in that case—

Q You made an explanation yesterday; you have gone that far; I do not want to take any unnecessary time.

The Court. Was not this question answered yesterday?

Mr. Schoen. Yes, sir.

Q You said that he had all the symptoms of alcoholism plus one other symptom, plus the eye, and because of that additional symptom you based your opinion that it was wood alcohol poisoning?

The Court. No. He distinctly said that he had all the symptoms of an exaggerated case of alcoholism, plus the symptom of dimming of sight, and persistent vomiting.

Q Well, persistent vomiting is a symptom of alcoholism? A Persistent for that length of time, yes.

Q So that we come back to the eye symptom, which is the symptom upon which you really rely, isn't it? A It is the differential symptom between grain alcohol and wood alcohol poisoning at that time, except that, further, death seemed to be impending, which would have been unusual in a grain alcohol poisoning.

Q Haven't you, as a matter of fact, either from your experience or from your knowledge gathered in reading, heard of innumerable cases of death from alcoholism? A Not at the end of thirty-six hours. I could simplify this if I could state why.

The Court. Make your statement.

Witness. You take a man at the end of thirty-six hours who has drank grain alcohol, he would be perhaps, acutely sick, actually poisoned, but he would be having—the worst of the storm would be over by that time; he would be having a tendency to throw this off, because, as I understand the action of alcohol, grain alcohol splits up into harmless by-products and the acute poisoning would essentially be stopped. Wood alcohol splits up into poisonous by-products and the worst would be yet to come with wood alcohol poisoning, because he would not have eliminated the poisonous by-product. That is how the diagnosis

would be made between the grain alcohol and wood alcohol poisoning.

Q That is enlightening to a certain extent. The question is whether or not you have seen in your own practice or read in your medical books of death from alcoholism, from grain alcohol? A I never have personally, or in my hospital experience come in contact with a death following grain alcohol poisoning after thirty-six hours had elapsed from the time of taking.

Q I ask you again whether you have read of any deaths from grain alcohol or alcoholic poisoning? A I do not recall reading of any in my medical books.

Q You mean to say that you know of no deaths having occurred from alcoholism? A Not in my experience; no, sir.

Q You have not read of any? A I have not read of any.

Q In this particular case you told us yesterday that the eye symptom formed the chief basis for your opinion that wood alcohol caused the death of Mr. Coleman; that is so, is it? A I think I made that a little different. I think I said the severe poisoning of this man plus the eye-sight, the fact that he had an exaggerted poisoning thirty-six hours after he had taken the alcohol; plus the eye symptom.

Q It was the eye symptom in particular that differentiated the case from one of pure alcoholism?

Mr. Mott. I object to that, for the doctor has just stated to the contrary. He has stated there were two things, the exaggerated poisonous condition thirty-six hours after taking it, and the eye symptoms; he based his statement on both.

The Court. Sustained.

Q The eye symptom was one of the things that differentiated the case from alcoholism, in your opinion? A Yes, sir.

Q And do you rely upon that chiefly in coming to the conclusion that it was wood alcohol poisoning? A I rely upon that with the other symptom; the fact that the man was so critically sick, death seemed to be impending.

Q I ask you if you relied upon it chiefly in differentiating it? A You cannot say that you rely upon it chiefly, because the whole state of symptoms is what makes you form your opinion.

Q Doctor, did you on or about the 16th of January, or on the 16th of January, 1920, did you see a copy of the New York Journal, or any other paper? A No, sir.

Q Did you see that copy of the paper? A No, sir.

Q Did you see a copy of the Newark Sunday Call of February 22nd, a copy of which I show you? A I did read that; yes, sir.

Q And did you learn at that time of the cases of olive poisoning, poison from eating olives? A Yes, sir.

Q Did you read the symptoms of those cases of poisoning? A I read the article through; I did not pay a great deal of attention to it.

Q Do you know whether or not the cases of poisoning from the eating of olives, the person affected showed a loss of sight? A I do not; no, sir.

Q Well, did you read the symptoms, or find out medically what the symptoms of that kind of poison were? A I did not.

Q Don't you at this time know what the symptoms are of poisoning resulting from the eating of olives, poisoned food of any kind? A No, sir.

Q You have not informed yourself on that point? A No, sir.

Q And don't you know what the symptoms are of poisoning resulting from the eating of poisoned olives or poisoned food of any character?

The Court. What kind of poisoning?

Mr. Mott. Ptomaine or strychnine?

Mr. Schoen. The poison that exists in those things.

Mr. Mott. I object to the form of the question, because every known poison may be in food.

The Court. Sustained.

Q Can't you tell us from your experience as a physician, or from what you have read in medical reports, recent medical reports, or any other medical reports, that a person eating poisoned olive or poisoned food shows the eye symptom which you speak of, that is, loss of sight? A I have never found it, not in my experience; no, sir.

Q Well, have you read it in recent medical authorities? A I have not; no, sir.

Q Will you say whether that is so or not?

The Court. He said no, he had not read it. Now you are asking whether it is so or not. If that means anything, it means whether there was any such publication containing such statement and he does not know he says, and he has not read it.

Q When you called on Mr. Coleman do you recall what date it was? A The 8th of December.

Q It was on a Monday, I presume? A I think it was.

Q Did you talk to Mr. Coleman's brothers? A I think I did.

Q Did you talk to the one who was on the witness stand; did you see the stout young man, Richard?

Mr. Mott. Stand up, Richard.

Q Did you talk to him? A I am not positive that it was he.

Q (*By the Court.*) He is not in the court room, is he? A No, sir.

Q Do you remember how many people you saw in the house when you came there? A I do not; no, sir.

Q Well, did you talk to any of them? A Yes.

Q Was it a man or woman? A It was a man.

Q Do you know what his relationship was to Mr. Coleman? A My impression was it was his brother.

Q Did you talk to Coleman at all, the patient? A He was very sick.

Q Now, isn't it a fact, Doctor, that Mr. Coleman, or the man whom you saw in the house at the time you called, said that they had been drinking Down Neck before they went to Vesey's saloon?

Mr. Mott. I object.

(After argument. Objection sustained.)

Q I understand the doctor to say Coleman at the time was not unconscious and was able to talk? A Yes.

Q And I presume you were endeavoring to get the history of the case, as is usual, for a doctor to do? A Yes, sir.

Q And was it in the course of your endeavors to get the history of the case that whatever statements that were made were made to you? A My impression is that it was, yes, sir.

(Objection withdrawn.)

The Court. Go ahead and answer the question. The objection has been withdrawn. Did somebody also say to you there that he had been drinking down over the railroad, or Down Neck, whatever the expression was?

Witness. As I recollect it, yes, sir.

Re-direct examination by Mr. Mott.

Q What was said; do you know who said it? A My impression is that it was one of the brothers that said it.

Q What did he say? A That they had been drinking before they went across the street; that he had been drinking.

Q That who had? A The patient.

Q Before he went across the street? A Yes, sir.

Q What do you mean by across the street? A Why, to Vesey's.

Q Do you know where Vesey's place is? A Yes, sir.

Q It is on Orange street? A Yes, sir.

Q The question asked is whether he had been drinking at another place, or whether he was drinking down below the market street depot; is that what you mean? A Yes, sir; that is what I understood, that he had been drinking down below the railroad before he went there.

THOMAS J. STRONG, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Where do you live? A 149½ First street.

Q Where were you employed on the 8th of December last? Vesey's.

Q As bartender? A Yes, sir.

Q How long have you been bartender for Vesey? A Around the middle of August when I got out of the service; I was taken sick, and I went to work.

Q Do you know Max Nieberg? A Yes; I know him.

Q Around the 8th of December last, or before that time, around the 6th, did you see him anywhere? A I seen him late in the afternoon.

Q Where? A Why, I was busy there; I heard somebody holler for Vesey.

Q "There", where do you mean? A Vesey's saloon.

Thomas T. Strong, direct.

Q Tell us the conversation? A I didn't hear no conversation at all; I was busy tending bar.

Q On what day was this on? A December 6th.

Q Did you ever see this tin and the big black bottle and this other one? A No, sir; I seen something similar to that there two gallon.

Q Two-gallon jug, did you? A Yes, sir.

Q Where did you first see that? A Why, Vesey gave it to me.

Q When was that? A Around half-past five.

Q On which day? A December 6th.

Q What did you do with it? A I filled up a bottle, a bottle like that there.

The Court. S. 3 for identification.

Q Can you tell whether or not this is the bottle (showing witness bottle S. 3 for identification)? A Yes, sir; a bottle like that.

Q That was your working bottle? A Yes, sir.

Q Do you know Sylvester Coleman? A Yes, sir.

Q And his two brothers? A Yes, sir.

Q Were they in Vesey's saloon on the 6th of December last? A Yes, sir.

Q And what time were they there? A The two brothers were there early and Sylvester came in about a quarter to ten or ten o'clock.

Q At night? A At night.

Q After Sylvester came in what was done?

Mr. Schoen. I object to this question on the ground that unless there be shown a concert of action between this bartender and his employer and Nieberg, that they were acting for him; this evidence is incompetent and not evidential on the question of what the character of the liquor alleged in the indictment, alleged to have been in the possession of Nieberg, was.

The Court. Overruled.

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

Thomas T. Strong, direct.

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

WM. P. MARTIN,
Judge.

Q What was done after Sylvester came in? A They had a drink apiece.

Q What did Sylvester drink? A Whiskey.

Q Did you serve him? A Yes, sir.

Q Out of which bottle? A A bottle like that (indicating).

Q Your working bottle? A Yes, sir.

Q How many drinks did Sylvester have, very much? A I don't know; I should judge about five or six.

Q It may have been more or less? A Yes, sir.

Q What was Richard drinking? A Drinking gin.

Q And Warren? A He had a drink of whiskey, too, the first drink.

Q And his other drink was? A Wine.

Q Who went out first of the brothers, or did they all go together? A They all went out together.

Q They left about what time? A Twelve o'clock we closed up.

Q When did you next see either of those men? A I think the following morning.

Q Whom did you see? A Richard.

Q Where did you see him? A In the saloon.

Q You heard him say something to you; I am not asking what it was. A I don't remember.

Q How long did Richard stay there Sunday morning? A That I don't know.

Q Well, after Richard came in what did you do, or what did you see Mr. Vesey do, if anything? A On Sunday morning?

Q Yes. A Mr. Vesey wasn't there Sunday morning.

Q When did Mr. Vesey come in? A The afternoon; relieved me in the afternoon.

Q Did you go to Sylvester's house to see him? A Yes, sir.

Q When was that? A Monday morning.

Q Do you know how Sylvester got to the hospital? A Yes, sir.

Q How? A Taxicab.

Q Who took him? A I did.

Thomas T. Strong, cross.

Q About what time was it when you got there? A We got up there about three o'clock in the afternoon.

Q At the hospital, you mean, Newark City Hospital? A Newark City Hospital; yes, sir.

Cross examination by Mr. Schoen.

Q The only containers or receptacles that you saw in that place at any time was a jug similar to this?

The Court. What you are referring to is what some of the witnesses have referred to as the two-gallon demijohn.

Mr. Schoen. Yes.

Q Was the container marked S. 4 for identification, is that so? A Yes; one similar to that; I don't know that that is the same one or not.

Q It was a two-gallon bottle and was covered with straw or rattan, just as this is? A Yes, sir.

Q That came into your possession behind the bar from the hands of Mr. Vesey? A Yes; right after the stuff was brought there.

Q And that was about what time? A Around half-past five, between five and half-past five.

Q On Saturday? A Yes, sir.

Q Was it full at that time? A Yes, sir.

Q And did you use it up? A Yes, sir; I filled the bottle up.

Q Did you use the contents of the bottle that Vesey gave you? A Not all of it.

Q How much of it was used? A I couldn't tell you that.

Q How many times did you refill the bottle? A A a couple of times.

Q That was between what time? A Well, between twenty-five minutes to six to twelve o'clock.

Q And were you on duty Sunday morning? A Not until ten o'clock.

Q Did you start to use some of it again on Sunday morning? A Yes, sir.

Q Continue to use the contents of that two-gallon demijohn that Vesey had handed you the night before; is that right? A Yes, sir.

Thomas T. Strong, cross.

Q And did you continue to use it until it was all used up? A No, sir; I got relief in the afternoon.

Q Who relieved you? A Mr. Vesey.

Q And was there some of the contents of that two-gallon demijohn there? A There was some in the work bottle; I do not know what was left in the demijohn.

Q Were not you the man that was refilling the bottle? A Not all the time; I only filled it while I was working.

Q Well, you did all the refilling between 5:30 Saturday afternoon and 12 o'clock? A Yes, sir.

Q And then you did the refilling between ten o'clock in the morning Sunday until you were relieved? A Yes, sir.

Q Up to that time had you exhausted the contents of this two-gallon jug? A No, sir.

Q There was still some in it when you turned the place over to Vesey and he relieved you? A Yes, sir.

Q Now, between that time, 5:30 on Saturday night and twelve o'clock, about how many people did you serve out of this two-gallon demijohn that Vesey handed you? A Five, six; maybe more than that. I didn't keep track of that.

Q How many drinks did you serve to these customers? A Some had several drinks more than others.

Q About how many? A One fellow there had quite a few.

Q What do you mean by that, "quite a few"? A Twelve, thirteen, fourteen.

Q Do you know what that fellow's name was? A Doyle.

Q When did Doyle have twelve or thirteen? A Saturday night.

Q And did you see Doyle after Saturday night? A Yes, sir.

Q When did you see him again? A Seen him Tuesday night, I think the following Tuesday.

Q What was his condition? A He was all right when I see him.

Q Did he drink any more whiskey? A We didn't have any Tuesday night.

Q Did you sell him any more between Saturday night after he had twelve or thirteen and Tuesday? A No, sir; only what he took away with him

Q What did he take away? A Two half-pints.

Q When did he take those? A Saturday night.

Thomas T. Strong, cross.

Q Now, that is one customer, and, by the way, were the twelve or thirteen, and the two half-pints that he took along, out of the same demijohn? A Yes, sir.

Q And was that out of the same demijohn which the drinks which Sylvester had had come? A Yes, sir.

Q Do you recall any other people you served that day, or those three days? A Several people came in there.

Q I don't care about their names? A I do not know them; I know there were people I served.

Q There were a number of others? A Yes, sir.

Q And did you serve them all out of the same demijohn? A Out of the bottle.

Q Well, the contents of the bottle all came from the demijohn? A Yes.

Q And did all these other customers get the beverage from the two-gallon demijohn? A Same stuff.

Q And have you heard of any of these people since? A Yes, sir.

Q Are they all alive? A Yes, sir.

Q Did you drink any of it yourself? A Yes, sir.

Q When did you drink any of it? A Saturday night.

Q Did you drink any of it on Sunday? A Yes, sir; I think I did.

Q Did you drink any of it on Monday? A No, sir.

Q And how much of it did you drink? A I didn't keep track of what I drank.

Q Did you drink a few or many? A I drank a few.

Q What do you call a few? A I drank enough of it.

Q Well, what would you say—

The Court. How many? He wants to know what a few means.

A Well, seven or eight.

Q Seven or eight on Saturday? A Yes, sir.

Q And about how many did you drink on Sunday? A Well, maybe two or three.

Q Did you drink along with your customers? A Yes, sir.

Q Did you drink along with Sylvester Coleman? A Yes, sir.

Q Have you had any ill effects from the drinking of this whiskey? A No, sir.

Thomas T. Strong, cross.

Q You have not been sick any day since that time? A No, sir.

Q And did all the liquor that you drank yourself come from the same demijohn out of which Sylvester Coleman got his drinks? A Yes, sir.

Q In fact, whatever you sold or whatever you drank, whatever you gave to customers; whatever you drank yourself between Saturday at half-past five and Tuesday when you stopped selling whiskey came out of the same two-gallon demijohn? A Yes, sir.

Q (*By the Court.*) You stopped selling this whiskey on Tuesday or Monday? A Monday.

The Court. You said Tuesday at the last of the last question?

Witness. The next Monday.

Q What time on Monday? A Myself, I stopped on Sunday night; when I got through myself.

Q When did you come back on duty? A Monday, four o'clock; but I was down there early, at half-past nine or ten o'clock that morning, and I went across the street to see Mr. Sylvester Coleman and he was pretty sick then; he was supposed to go to the hospital at ten o'clock and the ambulance was not there then, and I took him up in a taxicab.

Q He lived across the street from the saloon? A Yes, sir.

Q And you know him as a friend? A Yes, sir.

Q And you did all you could to get him to the hospital? A Yes, sir.

Examined by the Court.

Q Between what streets is this saloon? A Between High and Boyden street.

Q On which side of Orange street? A Left-hand side, going up.

Q On the south side? A Yes, sir.

Q How far is it from the brick building at the southwesterly corner of High and Orange street, where Keer's factory is located? A It may be a hundred yards.

Q West of that? A Yes, sir.

Dr. Charles N. Gilmore, direct.

Cross examination (continued) by Mr. Schoen.

Q You say Sylvester Coleman lived across the street from the saloon? A Right opposite the saloon.

Q You said Sylvester had five or six drinks? A Yes, sir.

Q That is about all he had at your bar that you know of? A Yes, sir.

Q You are sure of that? A Yes, sir.

Q And you say you had seven or eight on Saturday and two or three on Sunday? A Yes, sir.

Q Did you have a great many more drinks than were served to Sylvester Coleman?

Mr. Mott. I object.

The Court. Sustained.

Q Did you serve Sylvester's brothers with any beverage?

Mr. Mott. He stated that already. He said that he gave Richard gin, Warren one drink of whiskey and the rest wine.

A Yes, sir.

DR. CHARLES N. GILMORE, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are a physician at the Newark City Hospital? A Yes, sir.

Q Do you remember receiving Sylvester Coleman there? A I do.

Q On what day did he come in? A On December 8th.

Q And did you attend him? A I did.

Q How long was he there before he died? A On the ward is all that I know about, and it was about half an hour.

Q Did you examine him? A I did.

Q What was he, in your opinion, suffering from? A We considered it—

Q No, I am asking you, just you. A We considered wood alcohol—

Mr. Schoen. I object and ask that that be stricken out.

The Court. Granted.

Witness. Frankly, we did not know.

P. Joseph Quinn, direct.

Q I am asking you, Doctor; I don't care anything about "we." Did you form an opinion yourself as to what he was suffering from? A No.

Cross examination by Mr. Schoen.

Q How many doctors did you consult with to find out what was the matter with him? A I consulted with none.

Q You did not consult with anybody?

The Court. That is what he said.

Re-direct examination by Mr. Mott.

Q You said "we"; whom did you refer to by "we"? A Rhetorical statement.

Q I don't understand you. You have said once that "we" concluded it was wood alcohol. Now, you say that by "we" you meant yourself; is that right? A Yes, sir.

Q And then, in response to my last question you said that you did not form an opinion as to what he was suffering from; which one of those statements do you mean? A The latter. I did not make any opinion of what he was suffering from.

Q What were his symptoms? A He was an unconscious man, in a dying condition; that sums up the whole thing.

Q There was no subjective symptoms because of his physical condition? A Unconscious and dying condition.

Q Were you present at the autopsy? A I do not remember.

P. JOSEPH QUINN, sworn in behalf of the State.

Direct examination by Mr. Mott.

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

Q How long have you been a member of it? A Nine years.

Q Do you know Mr. Vesey? A Yes, sir.

Q The saloonkeeper on Orange street? A Yes, sir.

Q Did you go to his place on or about the 6th, 7th or 8th of December last? A On the 9th of December I visited his place.

Q What time of day? A About nine P. M.

Q Did you go alone or in company with anyone? A In company with Sergeant Noyes.

Q And did you there get anything? A Yes.

P. Joseph Quinn, direct.

Q What? A Three containers; three whiskey containers.

Q I call your attention to Exhibits S. 4, S. 5 and S. 6. A Identify them as the containers I removed from Vesey's place.

Q And in whose possession have they been since that time? A The property clerk, Winant, of Police Headquarters.

Q Now, while you were at Vesey's place, what did you do? What was done there? 10

Mr. Schoen. I object to any evidence of what was done in the absence of this defendant.

The Court. Overruled.

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. 20

WM. P. MARTIN,
Judge.

Q Which refers to these containers?

Mr. Schoen. I renew the objection to the question as reframed.

The Court. Overruled.

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. 30

WM. P. MARTIN,
Judge.

The Court. Do not state any conversation with anybody; you may only state what you did with reference to these containers or their contents.

A On entering the place I spoke to Mr. Vesey—

Q Tell what you did. I am not asking your reasons for doing it. A Confiscated the three whiskey containers. 40

Q You mean you found them? A Yes, sir.

Q Where were they? A In the living-rooms of Mr. Vesey, over the saloon.

Q Which one? A The tin container was downstairs, empty.

P. Joseph Quinn, direct.

Q Where was the big black one? A On the second floor of the same building.

Q Now, what did you do with them? A Removed the tin container to the second floor, emptied a five-gallon jug that was upstairs containing whiskey into the tin container and into that two-gallon demijohn and removed it to Police Headquarters.

The Court. S. 7, S. 8 and S. 9 for identification?

Q I show you Exhibits S. 7, 8 and 9 for identification, being three bottles, apparently of similar size, and ask you if you have seen those bottles before? A Yes, sir.

Q Where did you first see those bottles? A The laboratories of Dr. Edel.

Q You first saw them there? A Empty, then.

Q Do you know anything about the history of those bottles before they got to Dr. Edel?

The Court. He said he found them in Dr. Edel's empty.

Q Did you take them and fill them? A Yes, sir.

Q You got those bottles from Dr. Edel? A Yes, sir.

Q What did you do with them? A Took them to Police Headquarters in company with Sergeant O'Connell.

Q Tell us what you did? A Filled the three bottles from three containers.

Q Now, can you tell which one was from which container? A Yes, sir.

Q You have in your hand Exhibit S. 7. From where did you get the contents of S. 7, the one you have in your hand? A Without referring to notes, I would say I got it from the five-gallon Great Bear Spring Water container.

Q What notes do you refer to? A I refer to the notes I made as to which container I filled these bottles from.

Q When did you make those notes? A At the time of filling them.

Q Have you got those notes with you? A Yes, sir.

Q Do you need to refer to them to refresh your memory? A Yes, sir.

Mr. Mott. Well, I submit he has a right to.

Mr. Schoen. No objection.

Witness. I find that my first answer was correct; I took this bottle from the five-gallon Great Bear Spring Water bottle.

The Court. Which is marked S. 6 for identification.

Q I now show you S. 8 for identification and ask you if you can tell where you got the contents of that bottle from? A From the two-gallon demijohn.

The Court. That is S. 4.

Q I now show you Exhibit S. 9 and ask you where you got the contents of that bottle? A From the five-gallon tin container.

Q How much was in these bottles? A They were filled.

Q After you got them filled what did you do with them? A Took them to the laboratories of Dr. Edel.

Q And to whom did you give them? A Dr. Edel, personally.

Q I show you Exhibit S. 3 for identification, the working bottle as it is called; have you ever seen that before? A Yes, sir.

Q Where did you get that from? A Vesey's saloon.

Q And what did you do with it? A Took it to police headquarters and turned it over to the property clerk.

Cross examination by Mr. Schoen.

Q When you went to the saloon you found three containers in Mr. Vesey's apartment upstairs over the saloon? A Two of the containers now in court I found upstairs and one I found downstairs.

Q You said you found the tin one downstairs? A Yes, sir.

Q In what part of the premises was the tin container? A In the back room.

Q It was entirely empty, was it? A Yes, sir.

Q And was the two-gallon demijohn which we have in court, maked S. 4, empty? A Yes, sir.

Q So that there were two empty receptacles or containers? A Yes, sir.

Q Is that so? A Yes, sir.

Q And you found a Great Bear Spring Water jar, which looked like a Great Bear Spring Water jar, you found that in Vesey's living apartment, that was full, was it? A Yes, sir.

Q Entirely? A Not entirely; it was not quite full.

Q Did you find a five-gallon jug upstairs? A Yes, sir.

Q That was also full, was it? A As nearly as I could see; yes, sir; it was practically full; probably there may have been some taken out.

Q So that there wewe two five-gallon containers which were practically full at that time; is that so;? A Yes, sir.

Q Now you say you brought the tin container upstairs? A Yes, sir.

Q Did you have that as soon as you started to go upstairs, or after you had been upstairs? A When I started upstairs.

Q You took it along with you after you had seen it downstairs? A Yes, sir.

Q Did you expect to fill it? A I did.

Q You had not been upstairs before then, had you? A No, sir.

Q You did not see the stuff that was upstairs before that, did you? A No, sir.

Q You took the tin jug with you? A Yes, sir.

Q Where was the two-gallon demijohn; was that downstairs? A To the best of my recollection it was upstairs.

Q Did you do the refilling yourself? A No.

Q Who did it? A I was assisted by Mr. Vesey.

Q Both of you did it at the same time? A Yes, sir.

Q Well, how could two of you handle one jug to do the refilling together? A One held the empty container while the other poured it in from the five-gallon jug.

Q That is the way you assisted each other? A Yes, sir.

Q Did you fill the tin container first or did you fill the demijohn first? A I could not say positively just now.

Q You cannot remember at all? A Cannot remember it, no.

Q When you took the two-gallon demijohn; when you refilled the two-gallon demijohn, you say think that was upstairs when you found it? A I am not positive it was upstairs.

Q And you began the refilling operation immediately, did you? A After a few minutes' conversation, yes.

Q There was nothing done except that you had a few minutes' conversation with Vesey before the filling operation? A No, sir.

Q What part of the premises do you recall did you find the two-gallon demijohn? A In Vesey's kitchen, as near as I can understand.

Q Do you know there was a cork in it, or whether there was not? A Yes, sir; there was a cork in it.

Q Who took the cork out? A I cannot recall just now whether it was Vesey or myself.

Q One of you two took it out? A Yes, sir.

Q Did you have a funnel? A I think we had a small one, yes, sir.

Q Where did the funnel come from? A I cannot recall as to whether Mr. Vesey had it upstairs or not.

Q Was it a tin funnel? A I think it was.

Q Did you wash it? A I did not.

Q Did Vesey wash it in your presence? A I cannot recall that he did.

Q You did not see any boiling going on of the demijohns or of the containers? A I did not.

Q So far as your present recollection goes the demijohn was picked up where found in the condition it was found in and without any washing of any kind the contents of the five-gallon jug was poured into it? A I would not say that. The demijohn was looked into; the demijohn was turned up in order to see that there wasn't anything in it at the time.

Q I am not now asking whether there was any beverage or contents in the demijohn that you could see, because there are things that require chemical analysis. Now, there was nothing done to clean the container; that is what I mean, the two-gallon demijohn? A No, sir.

Q Before you filled it up? A No, sir.

Q So that whatever is in this demijohn now you say you put that there; you put the contents in this demijohn? A Assisted by Mr. Vesey.

Q And whatever was put in there was put into the demijohn in the condition you found it, without cleaning it first? A Yes, sir.

Q And with a funnel that had not been cleaned as far as you know? A I cannot swear to that.

Q You did not see it cleaned? A I did not.

Q You did not clean it A I did not, no; it appeared to be clean.

Q Does the same apply to the tin container; did you wash that? A No; I did not.

Q Did you see Vesey wash it before you refilled it? A I did not.

Q And the same funnel was used that was used for the two-gallon demijohn? A Partly. I tried to pour it in without using the funnel and I think later I had to use the funnel.

Q And do you know where the five-gallon jar is from which this liquor came? A I do not know now.

Q Did that remain in Vesey's place? A Yes, sir.

Q Are you sure you removed all the contents of it? A I am.

Q Of course, there naturally would be some small quantity left in the bottle? A Well, possibly so; I thought that we emptied it, though.

Q But the police have not concerned themselves, so far as you know; that is, you did not concern yourself with the five-gallon jar from which the beverage was put into these other two containers that are in court, since that day? A I did not.

Q (*By the Court.*) What did you mean by that answer? Did you take it away or leave it there? A I left it there.

Q You never did anything to have a chemical analysis made of the contents of the five-gallon jug, have you A Yes, sir.

Q Of the jug itself? A Of the contents—

Q Of the jug? A No.

Q Have the jug examined A No; I have not.

Q Now, Officer, when did you take what has been referred to as the working bottle? A That same night.

Q Took that right along with you? A Yes, sir.

Q Did you find anything else in Mr. Vesey's apartment other than the five-gallon jug A I do not quite understand your question.

Q Any other containers or bottles? A I cannot remember; I do not recall that I did.

Q Was his apartment entirely clear of any containers whatever other than a five-gallon jug? A I do not remember.

Q You do not remember. How many rooms did Vesey have? A I should judge about five or six.

Q You went through them all A No, I didn't.

Q Only went through the kitchen? A Yes, sir.

Q Is that where he kept his stock? A Yes, sir.

Q And would you say that that kitchen contained only a five-gallon jug? A Oh, no; the kitchen contained several articles, household things.

Q No, I am not referring to that. I mean with reference to the liquor business that he was doing there? A To the best of my recollection that was the only whiskey container that I seen there.

Q Well, what other kind of containers did you see? A I cannot say that I saw any kind.

Q I thought you said only whiskey containers and I thought from that you meant there were other kinds. Why did you say any other whiskey containers? A I made that statement in order to make myself clear, that I did not mean household.

Q Were there any wine bottles? A I do not recall there was.

Q Were there any cordial bottles?

Mr. Mott. I object. This seems to be frivolous.

The Court. What is the purpose of it?

Mr. Schoen. I think it is within the limits of fair cross examination.

The Court. What is the purpose of this particular question?

Mr. Schoen. To show whether there were any bottles of any kind.

The Court. He has already answered. You asked whether he saw any other bottles, then have you any right to ask, "Did you see any cordial bottles, any champagne bottles, any whiskey bottles"?

Mr. Schoen. I think that frequently courts permit a particular question.

The Court. When the general question covers everything? Objection sustained.

Q Were there any other containers downstairs? A Yes, sir; several.

Q Where, what part of the place? A Why, back of the bar.

Q Were there many containers back there? A Why, several; bottles; yes, sir.

Q What kind of bottles? A As near as I could judge ginger ale and soft stuff.

Q Now, you mean to say, Officer Quinn, that in this saloon which was being condicted as a cafe saloon, apparently, that the only containers in that place were a two-gallon demijohn and a

five-gallon tin, a five-gallon Great Bear Spring Water jug and a five-gallon jug and the working bottle, which is in this court? A I do not.

Q Well, that is what I have asked you a number of times, whether there were any other bottles?

Mr. Mott. No, now you are asking him whether they were in the saloon. Your previous question related to the kitchen.

Q Well, I will reframe the question and say anywhere in the premises? A Yes, sir.

Q Well, in what part of the premises did you find any other containers, whiskey containers? A In the saloon proper.

Q Behind the bar? A Yes, sir.

Q How many of them? A I did not count them.

Q About how many of them? A Probably a dozen.

Q Were they empty? A Not as I recall it, they were partly filled.

Q Were they all filled? A Some filled and some partly filled.

Q Have the contents of those bottles been analyzed?

Mr. Mott. If you know.

Mr. Schoen. I will withdraw that question.

Q Did you take those bottles to be analyzed as you did the other bottles? A I did not.

Q And so far as you know, so far as anything you did, Mr. Vesey has been left in undisturbed possession of about a dozen whiskey containers behind his bar, some filled and some partly filled? A I did not say whiskey containers.

Q What did you say?

The Court. He said soft drink containers.

Mr. Mott. I think counsel was asking him whether he saw containers back of the bar and he said yes, and he said, did you see a dozen whiskey containers. I think he did slip the word whiskey in there and I think the witness said yes.

Q I ask you again, Officer, if there is any misunderstanding. I ask you whether in any part of these premises which was apparently conducted as a cafe saloon where whiskey was being

sold over the bar, whether you would say that the only whiskey containers found there by you, or seen there by you, were the three containers which are in court and the working bottle, which is in court, and the five gallon jug? A They were the only whiskey containers I found in the place.

Q How do you distinguish containers as whiskey containers? A Because there was whiskey in them, what was supposed to be whiskey.

Q When you were talking about probably a dozen bottles, some filled and some partially filled, what kind of beverage were you talking about? A I was talking about what I understood to be soft drinks.

Q What Vesey told you were soft drinks? A Yes, sir.

Q You did not taste any? A I did not.

Q You took his word for that? A They appeared to me to be soft drinks.

Q About how many bottles were there which were partially filled with what you thought were soft drinks or what you were told were soft drinks? A I cannot recall the exact number just now.

Q Didn't you think it was rather unusual for a bottle to be partially filled with a soft drink?

Mr. Mott. I object, whether he thought it was unusual. I do not see whether it makes any difference whether he did or not.

The Court. What is the purpose?

Mr. Schoen. Why, the credibility may be examined into in that way. The man said he saw a dozen bottles. I do not know whether he is in the habit of going through saloons or not. I am not ashamed to say that I have been in them and I know that soft drinks are not kept in bottles partially used.

The Court. I think the question here is whether or not the defendant had spirits, or whiskey in his possession with intent to sell. Objection sustained.

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

P. Joseph Quinn, re-direct.

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

WM. P. MARTIN,
Judge.

Q Did you see any gin bottles there, or any bottles containing gin? A I do not recall that I did.

Q Do you know the color of gin? A I think I do; yes, sir.

Q Was any of this stuff that you were told was soft drinks white in color? A I cannot recall that they were.

Q Were any of them a dark brown color? A As nearly as I can judge, yes.

Q Were any of them similar in color to the samples which you have brought here and been marked 7, 8 and 9? A Some of a dark color, as near as I can recall it.

Q And all those things were left in Vesey's saloon on his say so that they were soft drinks? A Not on his say so, no.

Q As a matter of fact, was the two gallon demijohn and five gallon tin filled from other containers other than the five gallon jug? A They were not.

Re-direct examination by Mr. Mott.

Q Will you come down here and look at the seals of these Exhibits, S. 4, 5, 6 and 3; do you know who put those seals on those bottles? A Yes, sir.

Q Who did? A Sergeant Callan and I.

Q When? A Right after they were taken from Vesey's saloon.

Examined by the Court.

Q Did you break them open when you took out the contents for Dr. Edel? A Yes, sir.

Q And did you seal them up again? A Yes, sir.

The Court. Excepting as to S. 3 for identification.

Mr. Mott. Counsel says that he will admit that these are the particular containers which were taken to Police Headquarters.

The Court. From Vesey's saloon?

Mr. Mott. Yes, sir. The man in whose custody they have been is here in that front seat. I therefore offer in evidence Exhibit S. 3 for identification.

P. Joseph Quinn, re-direct.

Mr. Schoen. I object to the offer on the ground that there is no evidence before the Court that the exhibit now offered was ever in the possession, or was in the possession of the defendant as charged in this indictment.

The Court. Overruled.

Mr. Mott. Well, there is evidence that it was because Mr. Vesey has testified that the contents of that bottle he obtained from the possession of the defendant.

Mr. Schoen. And on the further ground that there is evidence in the case that whatever is alleged to have been received from the defendant by the testimony of Vesey is upon the State's case shown to have been poured into other receptacles and repoured into receptacles, poured and repoured by Vesey, and that there is no evidence that the contents of the bottle now offered in evidence is in the same condition it was at the time of the alleged delivery.

The Court. Overruled.

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.

Mr. Mott. I now offer in evidence Exhibit S. 4 for identification, the check.

Mr. Schoen. I make the same objection for the same reason.

The Court. The same ruling.

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.

Mr. Mott. And Exhibit S. 5.

Mr. Schoen. Same objection to the offer.

Mr. Mott. And Exhibit S. 6.

Mr. Schoen. To S. 5 and 6.

Warren Coleman, direct.

The Court. Overruled.

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.

Re-cross examination by Mr. Schoen.

Q Officer Quinn, I do not think I asked you this question: Did you take a sample out of Exhibit S, 3, which has been referred to in this case as the working bottle for analysis? A I did not.

WARREN COLEMAN, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q How old are you? A Twenty-six years old the 14th of September.

Q You are a brother of Sylvester? A Yes, sir.

Q You live home with your people? A No, sir; I am married.

Q Sylvester lived home, did he? A Yes, sir.

Q And the home is nearly across the street from Vesey's saloon? A About fifty yards across the street; the length of the street across.

Q On December 6th, last, Saturday, were you with Sylvester at any time? A Yes, sir; I was with him in the evening.

Q What time did you see him on that day? A About twenty minutes to nine.

Q Where did you meet him? A In Thomas Vesey's saloon.

Q How long did you stay there? A About twenty minutes after twelve.

Q Who else was there with you? A My brother Richard was there.

Q What were you doing while you were there; what did you do by way of having drinks? A Well, we was just talking there and I was playing the piano for awhile and my brother Sylvester was singing.

Q Do you know whether Sylvester had anything to drink there? A Yes, sir.

Warren Coleman, direct.

Q What did he drink? A Whiskey.

Q How many whiskeys did he have? A Six or seven, to my knowledge.

Q What did you drink? A I drank what they call Italian wine.

Q What did your brother Richard drink? A He drank gin.

Q Did you have any whiskey? A No; I first ordered whiskey and I couldn't drink it and I remarked to my brother that the stuff is rotten.

Mr. Schoen. I object and move what he said be stricken out.

Mr. Mott. You mean, "I remarked to my brother" shall be stricken out.

Mr. Schoen. I object to any conversations between this witness and his brother.

The Court. That will be sustained. Now, your motion is to strike out?

Mr. Schoen. Yes, sir.

The Court. Granted.

Q Was a glass of whiskey served to you? A Yes, sir, at first.

Q What did you do with it then? A Put it up to my lips and tasted it and shoved it back and said, "that is rotten stuff."

Q I am not asking you what you said; but did you drink it? A No.

Q When you left the saloon where did you go? A I went home.

Q Where did Richard go? A He went home.

Q And Sylvester? A He went home with Richard.

Q (*By the Court.*) Where do you live? A I live in Lyndhurst.

Q When did you next see Sylvester? A The following evening, Sunday night.

Q About what time? A About twenty minutes of eight.

Q Where did you meet him? A In my house, my mother's home.

Q Well, did you go anywhere with him? A Yes, we just walked across the street; when I went in the house he was laying on the sofa and he was sick, complained of being sick and I told him to get up and take a walk out and go down to Proctor's,

and he got up and said, "I feel bum," and his mother helped him and when he got across the street he says, "I cannot go; my stomach feels awful," so we said, "You better go home," and my younger brother Edward took him home, walked back across the street, and that is the last I seen him alive.

Q Where did you see him after his death? A I came down there when they were bringing him back from the hospital in a basket.

Q That is at your mother's home? A Mother's home.

Cross examination by Mr. Schoen.

Q You are Warren Coleman? A Yes, sir.

Q Have you been in the habit of drinking whiskey yourself? A No, sir.

Q You don't drink whiskey? A No, sir, I never drank it at all, hardly.

Q That is the reason it tasted rotten to you? A No, that is not the reason; I said it was rotten; that was rotten.

Q You are not a judge of whiskey, are you? A No.

Q It was the first drink of whiskey you had in a long time? A Yes, sir.

Q You say you live in Lyndhurst? A Yes, sir.

Q What time did you come to Newark that day? A I came to Newark that night.

Q What time? A Eight o'clock, I guess.

Q And you went directly to Vesey's place? A Yes; I stopped in there.

Q Went there first, without going across the street to your mother? A Yes, sir; I didn't go to see my mother.

Q Did you expect to find your brother Sylvester there? A I didn't expect to find him there, but I knew he went in there and I thought probably I might find him there.

Q Well, do you know where your brother Sylvester worked? A Yes, sir.

Q Where? A Arlington Company, Dupont's.

Q Do you know what time he quit on Saturday? A No.

Q The first you saw of him was about twenty minutes to nine that night? A About twenty minutes to nine.

Q Then he came into Vesey's saloon? A He came in about half-past nine.

Q And you came from Lyndhurst? A Yes, sir.

Warren Coleman, re-direct.

Q And your mother lived across the street from Vesey's saloon? A Yes.

Q And you went to Vesey's saloon about eight o'clock? A About eight o'clock.

Q And you thought that you might find your brother Sylvester? A Yes, sir.

Q You did not find him? A No.

Q You didn't leave the place to go across the street to your mother's? A No.

Q You stayed there until your brother came in? A In the meantime I met my brother Richard there and was talking to him.

Q Were you standing at the bar? A He was in the back room and I asked him if he seen Sylvester and he said yes.

Q Richard was in the back room? A When he seen me he came walking out.

Q And you stood at the bar until your brother Sylvester came in? A Yes, sir.

Q And he began to drink whiskey? A Yes, sir.

Q And treated you and your brother? A Yes, sir.

Q You saw him have at least six or seven himself? A Yes, sir.

Q Did you go back to Lyndhurst that night? A Yes, sir.

Q You came back again Sunday? A Sunday night.

Q What did you do, go to Vesey's place again? A No; I went direct to my mother's house.

Q Sunday? A Sunday night.

Re-direct examination by Mr. Mott.

Q How long had Sylvester been working at Dupont's? A He had been working there ever since he came out of the navy; he came out of the navy Friday night and went there Monday morning and stayed right there; that was May, I think.

Q Where had he been in the service? A Over in France. I said when he drank that whiskey—

Mr. Schoen. I move to strike out what he said.

The Court. Your motion is to strike out what he said to his brother.

Mr. Schoen. Yes.

The Court. Granted.

Dr. Albert E. Edel, direct.

Re-cross examination by Mr. Schoen.

Q Do you know what kind of work your brother was doing at Dupont's? A I believe he was doing what they called ashing and polishing.

Q Do you know what kind of a factory it was? A Yes, sir; they manufactured all celluloid novelties.

DR. ALBERT E. EDEL, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q How old are you, Doctor? A Forty-three.

Q What is your profession? A Analytical chemist.

Q Where is your place of business? A 837 Broad street.

Q How long have you had that establishment? A In Newark for three years.

Q In Newark, I mean? A Three years.

Q What do you do there? A Analytical chemical work, toxicological work.

Q What study and experience in chemistry have you had? A I graduated in 1899, University of Berlin.

Q Did you specialize in anything there? A Yes, sir; toxicological chemistry.

Q Toxicological chemistry means what? A Examining for poisons.

Q Go on and tell us what further experience you have had? A I have practiced chemistry for the last twenty years.

Q Have you frequently made analysis and appeared in court as a witness for the State? A Yes, sir; for nine years for Hudson County; for over six years for Essex County, the County of Monmouth and County of Morris.

Q How about the Federal Government? A I did some work for the Federal Government, Department of Justice.

Mr. Mott. Do you want to cross examine him on his qualifications.

Mr. Schoen. No.

Q Doctor, I show you Exhibits S. 7, 8 and 9, and ask you if you have seen them before? A Those were received on the 30th of December.

Q From whom? A From Sergeants Quinn and Callan.

Dr. Albert E. Edel, direct.

Q After you received those bottles—what was their condition at the time you received them? A They were sealed and filled—rather filled and sealed.

Q What did you then proceed to do? A I started the same day to examine them, distilling and examining them for poisonous matter.

Q Well, now, won't you describe in rather brief detail the method which you pursued in your examination of these bottles, or the contents of these bottles? A I examined them according to the test given by the United States for the detection of methyl alcohol and ethyl alcohol.

Q Explain those terms. A Methyl alcohol is wood alcohol; ethyl alcohol is grain alcohol; in other words the detection of wood alcohol and grain alcohol.

Q Go on. A And I applied the milk and hydrochloric acid test, and the third test is a distillation, dimethylalin, given by the Department of Agricultural Bureau of Chemistry, on page 99.

Q What do you mean by given? A It is printed and given by the United States Department of Agriculture for the detection of methyl alcohol in distilled liquors.

Q What else did you do. I want you to tell what you did. A I made a quantitative analysis after I found that it contained wood alcohol, by immersion refractometer; this gave me the result.

Q Well, what did you find? A In Number 1—

Mr. Schoen. I object for the same reason stated in my objection to the introduction of the exhibit.

The Court. That does not quite relate to this. Is it your contention that these bottles and their contents, rather, were never in the possession of Nieberg, according to the evidence?

Mr. Schoen. According to the evidence, that is one ground.

Mr. Mott. Not the bottles, of course.

The Court. The contents.

Mr. Schoen. It has not been shown to have been in the possession of the defendant Nieberg; it has not been shown that he kept them in his possession as alleged in the indictment, nor that they were in his possession at this trial

and secondly, that if they ever were in his possession, that there is no evidence that the samples are now in the condition or were at the time Dr. Edel received them—were in the same condition as when the defendant had them in his possession. On the contrary the evidence is affirmatively in the State's own case that they have been put through a refilling process through other receptacles and containers, over which the defendant had no control, and that the samples analyzed by Dr. Edel are not binding upon this defendant in any way.

The Court. Overruled.

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.

Witness. Number 1, Exhibit No. S. 1, contains 27 per cent. of absolute alcohol by weight, of which 4.20 per cent. of the alcohol present it wood alcohol.

Q Now, 4.20, why don't you say 4 1/5? A Yes, sir.

The Court. What?

Witness. Per cent.

Examined by the Court.

Q You mean 4 1/5 per cent. of 27 per cent? A Is wood alcohol.

Q Or 4 1/5 per cent. of the total contents? A No, 4 1/5 per cent. of the alcohol present is wood alcohol.

Q You mean that 27 per cent. of all the contents is alcohol? A Of the combined alcohol, the grain and wood.

Q And of alcohol 4 1/5 per cent. is wood alcohol? A Yes, sir.

Q And of the total contents of the whole how much is wood alcohol? A 1.2 per cent.

Q What do you mean by that? A 1 1/5 per cent.

Q That is by volume or weight? A All by weight. No. 2, Exhibit S. 8, absolute alcohol by weight, 34 per cent. of which 1.53 or 1 53/100 of the alcohol present is methyl alcohol, wood alcohol.

Q You mean one, in writing the decimal you put a point and cipher, and then 53? A Yes.

Q Now, will it take very long to tell us that in the percentage of the total contents? A No, 82/100 of one per cent.

Q (*By Mr. Schoen.*) Of the total volume? A Yes, sir.

Q (*By Mr. Mott.*) Give us the other bottle. A No. 3, Exhibit S. 9, absolute alcohol, 32 per cent. by weight, of which 3.07 per cent. of the alcohol present is wood alcohol.

Q (*By Mr. Mott.*) Which would be how much of the total contents? A One per cent; exact 98/100.

Q You said that 4 1/5 per cent. of 27 per cent. is 1.5 of one per cent. of the total? A No; 1 1/5 per cent.

Q And you said that 5 3/10 per cent. of the 34 per cent. of alcohol is 82/100? A No.

Q Then it is 1.53, how much of the total contents is that? A 82/100 of one per cent.

Juror No. 12. I think that is a mistake. It would be about a half of one per cent. If the whole contents is 34 per cent., and the wood alcohol is 1.53, or round figures, 1½, it would necessarily follow that 1½ times 34 would be about one-half of one per cent.

The Court. I am asking the doctor to state it in a little bit different way than he has, and he may correct his figures later in the day if they are to be corrected.

Witness. And No. 3, Exhibit S. 9, 98/100 of one per cent.

Q (*By Mr. Mott.*) Total 32, of which 3.07 is wood alcohol? A That is the percentage of wood alcohol in the grain alcohol.

Q We have understood you, Doctor, to say there is a certain bottle containing a liquid, and granting all the liquid in that bottle as being 100 per cent., that 34 per cent. of that liquid is alcohol? A Yes, sir.

Q Either ethyl alcohol or methyl alcohol; either grain or wood alcohol, and that of the 34 per cent. the alcohol is wood alcohol—to the extent, in the first instance of being 27 per cent. of alcohol in the whole bottle, and 4 1/5 wood alcohol, I asked you the question how much of the total contents of all of the bottles is wood alcohol. The witness says it will take a few minutes to do it. So far as the Court is concerned he may do it later.

Dr. Albert E. Edel, direct.

Q (*By Mr. Mott.*) Were you present at the autopsy on the body of Sylvester Coleman? A I was present.

Q Who performed the autopsy? A Dr. Warren.

Q From the body at that time did you take anything, or was there anything given to you? A Yes, sir; I took the brain, kidney, liver, heart, stomach, stomach contents and some blood.

Q And what did you do with this material? A I made a chemical analysis of it.

Q What did you find? A I found no wood alcohol, but I found some formic acid.

Q What is formic acid? A An oxidation of the product of methyl, or wood alcohol.

Q Did you form a quantitative analysis? A I did not.

Q How is formic acid produced; what is it a product of? A Formic acid is made by distilling ants with water.

Q Well, what other source? A By heating oxalic acid and glycerin.

Q What other source? A And it could be made an is made from methyl alcohol; if I say methyl; I mean pure wood alcohol.

Q (*By the Court.*) What does oxidation mean? A Taking up oxygen; unites with oxygen to a certain percentage.

Q (*By the Court.*) So that given a certain quantity of wood alcohol with oxygen it would form formic acid? A Yes, sir; supplying this oxygen by chemical means.

Q What experience have you had with wood alcohol cases and autopsies? A I got up to forty-two cases since December 1st.

Q Of what? A Of wood alcohol cases.

Q All deaths? A Yes, sir; all deaths.

Q How many analyses have you made? A Forty-two, of which nineteen was positive.

Q Those were made partly for this county?

Mr. Schoen. I do not see the relevancy of this line of examination. The competency and qualifications of the doctor have been admitted, and I have not questioned his competency and I cannot see what other purpose this line of testimony can have. I object to it.

Mr. Mott. The doctor was admitted to be qualified as a chemist only; now I am just developing—

Mr. Schoen. I am not questioning his qualifications.

Dr. Albert E. Edel, cross.

Mr. Mott. I am developing the experience he has of the particular line of chemistry he is touching.

Mr. Schoen. I am not questioning him.

The Court. You have a right to show his experience and ability and knowledge, but this particular question it seems to me is a little bit beyond showing his knowledge.

Mr. Mott. I will withdraw it.

Cross examination by Mr. Schoen.

Q How long does each analysis of each sample take you, Doctor? A I analyzed them all at the same time.

Q You did not pour them all together and analyze them? A No; but I have three retorts working at the same time.

Q How long did the whole operation take you? A About thirty-six hours.

Q And you used a process known only to a qualified chemist, I presume? A Yes.

Q A process which you went to the universities to study? A Yes, sir.

Q Could you detect the presence of any wood alcohol without resorting to that minute and extensive process? A No, sir.

Q So that an ordinary saloonkeeper handling liquor over his bar—do you know of any way except the extended process of thirty-six hours and long training that you resorted to, that you used in making that analysis, by which the presence of that wood alcohol could have been detected?

Mr. Mott. I object. In the first place the defendant is not the saloonkeeper, and then in the next place we are not dealing with a class of saloonkeepers, and even if we were I would object to the particular class.

Mr. Schoen. I will withdraw that question if it in any way assumes the doctor is a saloonkeeper.

Mr. Mott. I mean your client is not a saloonkeeper.

Q I ask you if you have heard of Doctor Reid Hunt? A Yes, sir; I did.

Q Is he an authority on the question of alcohol? A Yes, sir; he is.

Q Who is he? A Professor of Pharmacology of Harvard Medical School.

Q Formerly connected with Johns Hopkins University? A Yes, sir.

Q And has he been for several years chief of the Division of Pharmacology of the United States Health Service? A I do not know, but I heard he used to be.

Q Is he recognized as an authority upon the question of alcohol and wood alcohol? A Yes, sir.

Q Is there any property of wood alcohol by which anyone but a chemist can distinguish between purified wood and ordinary grain alcohol? A No, sir.

Q Is the odor and taste of the two strikingly similar? A They are.

Q Is it so strikingly similar that even chemists who have had much experience with them, are unable by these properties to distinguish them with certainty? A Yes, sir; by the physical appearance it is hard to distinguish.

Q And the taste and odor? A Yes, sir.

Q Is this difficulty increased when essences, flavors, colors and coloring matters are added? A It is.

Q So that to sum it all up, Doctor, you agree that the only way to determine the presence of wood alcohol is by a chemical analysis by a chemist?

(Objected to.)

(Question withdrawn.)

Q Do you agree, or will you say that the only way in which to determine wood alcohol is by a chemical analysis? A Yes, sir.

Q And that chemical analysis by a trained chemist? A Yes, sir.

Q Of long experience? A Yes, sir.

Q You said that formic acid was made by distilling ants? A Yes, sir, with water.

Q Is it a fact that formic acid occurs frequently in small quantities in various vegetable and animal substances? A Yes, sir; but not as formic acid, but as a formate, as a salt of formic acid.

Q Is Leach on food analysis an authority upon the subject? A He is.

Q I read from Leach, page 898: "Formic acid is a colorless liquid at temperatures above 8.3° C.; it boils at 101° C., has a

pungent odor and strong caustic action when applied to the skin? A That is right.

Q (Hence the name) and in small quantities in various vegetable and animal substances? A Yes, that is right, but not as to formic acid, as the formates has calcium combined or magnesia.

Q I only ask you whether you agree with this statement. This says: "It (formic acid) occurs naturally in the bodies of certain ants and various vegetable and animal substances." Now, you say that is so or not?

The Court. Is that all Leach says?

Mr. Schoen. Yes, sir; that is all on that subject.

Q You qualified that statement that formic acid occurs in vegetable and animal substances. Now, you qualify that to some extent? A Yes, sir; as to formates combined with a metallic base; I found them that way.

Adjourned until tomorrow.

THIRD DAY.

Wednesday, May 5, 1920.

STATE

vs.

MAX NIEBERG.

Continued pursuant to adjournment.

Appearances as before noted.

ALBERT E. EDEL, recalled for

Further cross examination by Mr. Schoen.

Q Now, I find, further, Doctor, in this book on Food Inspection and Analysis, page 899, in referring to formic acid, after stating, as I called your attention to yesterday, that it occurs

naturally in the bodies of certain ants and in small quantities in various vegetable and animal substances; this book says further that recently a 60 per cent. solution has come into practical use as a preservative of food products; are you familiar with that? A Yes, sir.

Q Is it so? A No; I never seen it used.

Q But do you dispute this statement in the book that it has come into use as a preservative of fruit products? A I have seen it in that book, but I never came across it.

Q You are not in the business of preserving food, or food products? A I examine for all of the various Boards of Health, Elizabeth, Westfield, Millburn, food products, but I never came across formic acid.

Q I do not understand whether you mean to dispute this statement that it is used for food products? A I do not.

Q Can you give us approximately the number of different ways in which formic acid may be formed? A Yes, sir.

Q Well, how many different ways may it be formed? A By heating oxalic acid in glycerin; by the oxidation of wood alcohol; by extracting ants; you could make it from chloral hydrate and chloroform.

Q Well, in the human system how many different ways may it be formed? A It is not found in the human system as formic acid to any extent; very small.

Q Well, must it be taken into the system in that form? A No; it is not taken into the system in that form.

Q Does it form in the system from something else? A Oh, very small amounts of formates; you find it in the urine as formates; the amount in twenty-four hours, the amount in a normal person is 5/1000 part of one gram.

Q You say you found formates of formic acid? A In this particular case I found formic acid as such.

Q Would it be possible to find that in the system of a human being from formic acid when it had been used as a preservative of food products, or in any otherwise? A Yes, sir; if a man took it as formic acid you would find it in the system.

Q Now, let me ask you, Doctor: Go back to this question of percentage; have you any idea of the size of the ordinary whiskey glass that was in common use? A About two ounces.

Q Now, assuming that a man drank say ten glasses of whiskey or ten glasses of any beverage, and that he drank it out of a

two ounce glass, and that in each instance he filled the glass full, so that you would have two ounces each time, he would have consumed twenty ounces of beverage, would he not? A Yes, sir.

Q Now, if that twenty ounces of beverage on your figures which you have given us yesterday—we will take your outside figures—take the quantity that has the biggest percentage of 1.13, the biggest percentage of wood alcohol; now give us the quantity of wood alcohol that would have been present in that twenty ounces of beverage, on your figures of the highest? A One-fifth of an ounce.

Q Is the outside amount which would have been present in the whole twenty ounces of beverage? A Yes, sir.

Q If the whiskey glass was filled to the top each time and ten drinks were taken? A Yes, sir.

Q (*By the Court.*) In answering the question of Judge Schoen can you refer us to the exhibit number which you use? A My number one.

Q (*By the Court.*) That is our S. 7? A Yes, sir.

Q (*By the Court.*) So that your statement is to the effect that twenty ounces of S. 7 contains one-fifth of one ounce? A Yes, sir.

Q (*By the Court.*) Of wood alcohol? A Of wood alcohol.

Q Now, the other exhibits which you testified to all contained a smaller percentage of wood alcohol than this S. 7? A I took one per cent. It would be a little bit more than a fifth; it was 1.13 per cent. and I took 1 per cent., so that would make an average between the two.

Q I say, the other two exhibits you analyzed, S. 8 and S. 9, each contained a much smaller percentage of wood alcohol than S. 7, that you have used to do your figuring? A No, my number 3 would be approximately the same amount; .98 per cent. is pretty near 1 per cent.; my No. 3 would be about the same.

Mr. Mott. S. 9?

Witness. Yes, sir.

Q Would the figure you have used be a fair average for the whole three? A In the middle of one would be about half of that.

Q It would be half of one ounce? A Yes, sir.

Dr. Albert E. Edel, cross.

Q (*By the Court.*) You stated the percentages of alcohol in each one of these exhibits yesterday and the Court asked you to state the percentage of wood alcohol in the whole contents. Are you prepared to do that? Just state the percentage of wood alcohol in the contents of S. 7; I think you called that your Exhibit S. 1. That is a private number you put on when you received these bottles? A Yes, sir; No. 1.

Q (*By the Court.*) S. 7? A Is 1.13 of one per cent; No. 2—

Q Is what?

Mr. Mott. S. 8.

Witness. (Continuing.) .52 of one per cent.

Q (*By the Court.*) That is a little bit more than a half of one per cent? A That is right; that is a little bit more than a half of one per cent. And No. 3—

Mr. Mott. S 9.

Witness. (Continuing.) Is .98 of one per cent.

Q Now, I call your attention again, doctor, to statements by Dr. Reid Hunt, whom we referred to yesterday as the American authority on the subject of alcohol, in which he states—

(Objected to.)

(Question withdrawn.)

Q I call your attention again, to the statements by Dr. Reid Hunt, to whom we referred yesterday, in which he said that 60 to 75 per cent. of those taking four ounces of wood alcohol have died or become permanently blind.

Mr. Mott. Can you tell us where Dr. Hunt makes that statement?

Mr. Schoen. In this article I have here.

Mr. Mott. What sort of an article?

Mr. Schoen. He has prepared a bulletin.

Mr. Mott. Well, what is that a newspaper clipping?

Mr. Schoen. Yes.

Mr. Mott. Newark Sunday Call.

Mr. Schoen. Let us see whether the doctor can dispute it if it is not accurate.

The Court. Do you understand the question?

Dr. Albert E. Edel, cross.

Q I call your attention to the statement of Dr. Reid Hunt, that 60 to 75 per cent. of those taking four ounces have died or become permanently blind; now, do you agree with that statement? A I do not.

Mr. Mott. I want to object to the question. It assumes that Dr. Hunt has made that statement. There is no authority that counsel points to to sustain the fact that Dr. Hunt has ever made that statement. He says he has a newspaper report in his hand; I take it that is not evidence that Dr. Hunt ever made that statement.

Mr. Schoen. I think if that is the point of the objection it is for the witness to dispute the fact that the statement was made by Dr. Hunt.

The Court. What Dr. Hunt said is hearsay unless the expert witness says that he relies upon Dr. Hunt as an authority. He really does not say that he relies upon Dr. Hunt when he says that he relies upon a certain work or pamphlet or magazine article. I do not understand that Dr. Edell has yet adopted the article from which you apparently formed this question.

Mr. Schoen. I have not asked Dr. Edell to adopt the article; I am now asking him whether he agrees with it.

The Court. You have not any right to ask that unless he first says he recognizes a person as an authority in that article.

Mr. Schoen. He said so yesterday. I asked him that question before I began any questions with reference to Dr. Hunt's article.

The Court. Has Dr. Hunt written any standard work?

Witness. Yes, sir; he has.

The Court. Well, the answer is already in. I do not think it is worth while ruling on it at this time. Go ahead.

Q You say Dr. Hunt has written standard articles, standard works? A He did.

Q Many of them? A I have not seen many of them.

Q You have read some? A I have seen some; yes, sir.

Q Is four ounces of wood alcohol a fatal dose? A It is; four ounces is a fatal dose.

Q Is it fatal in 100 per cent. of the cases? A No. What doctor—

Q Please answer the question. A No.

Q So that even four ounces would not be fatal in all cases; is that so? A Not in all cases.

Q In what percentage of cases is four ounces fatal? A I do not know exactly.

Q Have you read anything about it? A But a larger per cent. than arsenic.

Q Have you read about it? A Yes, sir.

Q What do the authorities say as to the percentage of cases in which four ounces it fatal? A 60 or 75 of those taking four ounces; that is, a quarter of a pint or half a glass full, have died or become permanently blind.

Q (*By Mr. Mott.*) Who says that? A Hunt.

Q Let me read what I have on it and see if we have not got exactly the same thing.

Mr. Mott. I object to counsel reading as a statement of Dr. Hunt a newspaper article.

Mr. Schoen. That is exactly why I want to read it. The prosecutor has made his objection in such a way as to say that what I am holding is not an authority. Now, I want to prove to the jury it is what Dr. Edel is reading from now.

The Court. Your witness has not said anything that you need to contradict him for. You only want to show that that particular article is in accord with what the witness says?

Mr. Schoen. I do not want this jury to draw any inference from what the prosecutor has said that I am not using an article which is authentic and the same which Dr. Edel has there, which he says is Dr. Hunt's.

The Court. Finish the question.

Q Now, I will read what is here in this magazine—

The Court. You cannot read what is there until you propose to ask a question.

Q I will ask you to compare what I am going to ask you and see whether it is the same: "60 or 75 per cent. of those taking

four ounces, that is a quarter of a pint or half a glass full have died or become permanently blind." Does that compare with what you have? A That compares with my original copy.

Q And that is the percentage of fatalities where four ounces are taken, is it, Doctor? A Yes, sir.

Q And in this case we are now trying, the beverage which you examined; assuming that Mr. Coleman drank twenty ounces of it, contained one-fifth of one ounce; is that right? A Yes, sir.

Re-direct examination by Mr. Mott.

Q Doctor Edel, you were asked whether four ounces of wood alcohol was fatal, and you said it was? A Yes, sir.

Q Then wood alcohol is a poison? A Yes, sir; it is.

Q How does wood alcohol as a poison operate on various individuals; is the operation uniform, or is it not? A Even two teaspoonfuls, according to literature, kills or blinds a man.

Q What authority have you for that? A The very same bulletin.

Q What authority? A Reid Hunt.

Q What does he say? A He speaks about poisons, "Death or blindness has resulted from two teaspoonfuls and from one to two tablespoonfuls of the poison."

Q How much is a teaspoonful compared with an ounce? A One-eighth of an ounce.

Further cross examination by Mr. Schoen.

Q Two teaspoonfuls will be one-quarter of an ounce? A One-quarter of an ounce.

Q All poisons act differently on different individuals, do they not? A Yes, sir.

Q They will kill in one case and will not kill in another? A It depends a good deal on the condition of the party taking the poison, physical condition.

Q Now you were asked how formic acid was formed in the human body and you wanted to make some explanation. Will you tell us how formic acid is formed or may be injected into the human body? A Well, the wood alcohol combined with glycerols of higher fatty acids, forming glycerol formates and this glycerol formate in turn splits up in the presence of water into formic acid and glycerin, and that is a very slow process.

Dr. Albert E. Edel, re-cross.

Q Would that be accomplished in say thirty-six hours? A Well, I think it would commense before that.

Q Now, how else can formic acid be produced in the human body than from wood alcohol? A Well, chloral hydrate, but it is not formed from chloral hydrate—that is, not as formic acid; it is found as sodium formate in the intestines and chloroform.

Q Well, now, you found formic acid? A I did.

Q I am asking you how formic acid itself can be produced in the human body otherwise than from wood alcohol? A By the decomposition of wood alcohol.

Q I said otherwise? A In very small traces by splitting up of sugars.

Q What do you mean by very small traces? A By ordinary analysis, if you distill a brain you would not find any formic acid.

Q What is denatured alcohol? A It has about two hundred different denaturing agents; 5 to 10 per cent. of wood alcohol and 95 or 90 per cent. of grain alcohol is one form; one form is 50 per cent. of ether and 50 per cent. of grain alcohol; any alcohol in which a certain body is given to make it unfit for beverage purposes is a denaturing agent.

Q Do you know the relative commercial value of denatured alcohol and grain alcohol? A Yes, sir.

Q What is it? A Grain alcohol you cannot buy at all unless you have a license and they charged you from $3 a pint up to $5; that is what I have to pay for it, and a gallon of denatured alcohol, of about 10 per cent. absolutely wood alcohol is worth about 65 cents.

Q (*By the Court.*) With respect to the use of formic acid as a preservative for food products, do you know whether or not it is used to come in contact with the food itself that is eaten? A That would come directly in contact with the food.

Q Doctor, is it true that the human stomach is always acidy—always has acid in it? A Yes, sir.

Q Is it true, Doctor, that if formates in small quantities were taken into the stomach they would be found as formic acid on direct examination of the stomach contents? A No, sir.

Q Did you measure the quantity of formic acid which you found in this man's stomach? A I did not.

Q Why not? A I was only looking for the presence of it.

Dr. Albert E. Edel, re-cross.

Q Why didn't you; you didn't think it important to ascertain the quantity? A I did not think it was important; the per cent. is not important in the brain.

Q You say you were only looking for the presence of it; but were really probing for the presence of wood alcohol, were you not? A Yes, sir.

Q And you came across formic acid and not wood alcohol while you were testing? A Yes, sir.

Q And that is how you discovered the fact there was formic acid and no wood alcohol? A Yes, sir; found it in all the organs; not only in the stomach.

Q But your examination was in order to find wood alcohol? A No; I was looking for all poisons; making a complete analysis.

Q For all poisons? A Yes, sir.

Q And particularly wood alcohol? A No, sir; not particularly wood alcohol, but all poisons.

Q And in this examination for all poisons the only poisons you discovered was formic acid? A Formic acid, yes, sir.

Q Formic acid, you say, can also be formed in the human system by the splitting up of sugar? A In very small quantities; just in traces.

Q (*By the Court.*) Did you find it in all the organs? A No, sir; you would not.

Q Have you read the minimum, Doctor, that the two teaspoonfuls of wood alcohol that have been known to cause heath, referred to the absolute minimum which caused death, didn't it? A That article, yes, sir.

Q That is the absolute minimum? A Yes, sir.

Q And two teaspoonfuls you said contained one-quarter of an ounce? A Yes, sir.

Q And that is referred to as the absolute minimum. Now, your calculation as to the quantity of wood alcohol in the twenty ounces which we have referred to was one-fifth of one per cent.? A Yes, sir.

Q Which is still less than a quarter of an ounce?

Mr. Mott. I object. What is this, an argument for the doctor; I think we all know one-eighth is less than one-fifth.

Mr. Schoen. I want the doctor's testimony on the record.

The Court. You cannot have an obvious proposition that one-eighth is less than one-fifth. Sustained.

Q Is the quantity of wood alcohol that you have calculated to have been present in twenty ounces of beverage that you examined less than the minimum which could cause death to which you have referred?

Mr. Mott. You mean in his opinion?

Mr. Schoen. No, according to the figures that he has given us.

Mr. Mott. I think that is not fair. The doctor has quoted Reid Hunt as saying that two teaspoonfuls was the minimum; he has not said that was his opinion. Now, if he is asking the doctor whether that is the minimum I think he should ask him if that is not the minimum Dr. Reid Hunt named, or if he wants to draw from the witness his opinion he should ask his opinion; he says the absolute minimum that can cause death.

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.

Further re-direct examination by Mr. Mott.

Q In your opinion are two teaspoonfuls the absolute minimum of wood alcohol that can cause death? A That is very hard to say; in my practice I had one case where two teaspoonfuls killed a man; I know the exact dose the man took; there was one ounce which contained 26 per cent. of wood alcohol.

Q Well, now, do you say that two teaspoonfuls in your opinion is the absolute minimum? A No, I cannot say that; that is the only case I know positively how much the man took.

Further cross examination by Mr. Schoen.

Q You only know that one case where two teaspoonfuls have killed; is that it? A I had a case where I could exactly determine the amount taken.

Q And that was two teaspoonfuls? A Yes, sir.

Edward Francis Coleman, direct.

Q A quarter of an ounce? A Yes, sir.

Q That killed? A Yes, sir.

Q You have never had a case less than that? A I could never determine the exact amount of alcohol the man got.

EDWARD FRANCIS COLEMAN, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q How old are you? A Twenty.

Q Where do you live? A 171 Orange street.

Q And you were a brother of Sylvester, were you? A Yes, sir.

Q On Saturday, December 6th, last, what time, if at all, did you meet Sylvester? A We worked together.

Q You got up in the morning together? A Yes, sir.

Q Did you go to work in the morning together? A Yes, sir.

Q When did you go to work? A About twenty-five after six.

Q In the morning? A Started.

Q What time did you stop work that day? A Half-past three.

Q What time did he stop work that day, if you know? A Same time.

Q And did you leave the factory together? A We both left the factory together.

Q And had you been with him all day up to the time you left? A We worked alongside of each other.

Q Do you know whether he drank during the day? A He did not; I knew every move he made, because we worked alongside of each other.

Q Where did you go after you left the factory? A We had to get in line to get our pay and he forgot his pay check, and I lent him a nickle and he jumped on that jitney bus and we had to stay in line a half hour to get our pay and my mother gave him a dime to come back and he got his pay check; and I waited for him after he got out of the line.

Q What time was it after you left the factory when you got your pay check? A A quarter after five.

Q Where did you go? A Took a bus home.

Q Did he go with you? A Yes, sir.

Edward Francis Coleman, cross.

Q How long did he stay home? A He went up to the barber's to get a shave after he got dressed; he didn't put on a collar.

Q How long was he out getting shaved? A After he went to the barber's I was getting ready for a dance—about an hour.

Q Then what did he do? A Went down to the moving pictures.

Q You didn't go with him? A No.

Q What time was it when he left the house to go to the moving pictures? A About seven or a quarter after.

Q You saw him when next? A Next Sunday morning.

Q Where was he when you saw him Sunday morning? A Slept alongside of him.

Q What time did he get home that night? A I got home later than he did.

Q What did you see of him during Sunday? A He was pretty sick and I went out to a ball game, and when I came back I seen him on the other side of the street getting his shoes shined and then he came over to the house.

Q Were you there when Dr. Kirkman was there? A No, I was working; I telephoned for Dr. Kirkman.

Q You were not there when he came? A No, sir.

Cross examination by Mr. Schoen.

Q You began your testimony by saying you were with him every minute? A In the shop.

Q And at 3:30 you were in line for your pay on Saturday afternoon? A Yes, sir.

Q And he left the line and went home? A He didn't get in line; he ran right for a bus.

Q He left you at 3:30 at the factory and was away from you until what time? A Well, about a quarter after four.

Q What time did you see him again? A About a quarter after four.

Q And that would be about forty-five minutes he was away from you at that time? A Yes, sir.

Q That was the first separation between you and him? A Three-thirty.

Q Say about forty-five minutes? A Yes, sir.

Q Then did you both get your pay together? A I got mine first and then he had to get in line when he came back.

Edward Francis Coleman, cross.

Q Did you wait for him to get his? A I did.
Q Did you both get on a bus together? A We did.
Q About a quarter after five? A Yes, sir.
Q And you went home together? A Yes, sir.
Q You were in the house together? A Yes, sir.
Q And after you got in the house he left the house? A Well, he got dressed.
Q And left the house without you? A Without me; he went to the barber's.
Q And told you he was going to the barber's? A Yes, sir.
Q You didn't see him in the barber shop? A No, sir.
Q Were you still home when he returned? A I was still home.
Q What time did you think that was? A About a quarter after seven.
Q What time do you think he left the house to go to the barber's; you say he told you? A About twenty after six.
Q 6:20 and returned about? A A quarter after seven.
Q And during that interval he was away from you you didn't see where he was or what he was doing? A I did not.
Q And at a quarter after seven when he returned to the house did he have his supper? A He had his supper before he left, before he went to the barber's.
Q Well, then, how soon after a quarter after seven did you leave the house? A A quarter to eight.
Q Was Sylvester still home at that time? A He was putting on his shirt, putting on a collar.
Q Did he leave the house with you? A No; I do not think he did.
Q You think he stayed at home when you left at about a quarter after eight? A Yes, sir.
Q And from eight-fifteen on Saturday night where did you go? A To a dance.
Q And from eight fifteen on Saturday night until you saw him in bed on Sunday morning you did not see him? A I seen him about two o'clock; I think it was when I got home.
Q When you came home at two o'clock? A At two o'clock.
Q I thought you said you came home before him? A After him.
Q You found him in bed at two o'clock that morning? A Yes, sir.

Dr. George L. Warren, direct.

Q From eight-fifteen on Saturday night until two A. M. on Sunday morning you and Sylvester were separated? A Yes, sir.

Q And you do not know where he was, of your own knowledge? A No, sir.

Q And of your own knowledge you do not know what he was doing during that time? A No, sir.

Q (*By the Court.*) What kind of work did you and your brother do? A Ashing and polishing.

Q (*By the Court.*) What is that? A Polish against a rag wheel, celluloid.

Q Do you know what kind of material you use in this polishing work? A Only pumice, stuff called pumice; sand, just rub the stock against the wheel.

Q Do you know whether there is any denatured alcohol in the Dupont plant? A Yes, sir; in the manufacturing plant, but you are not allowed out of your department; if you go out of your department, you lose your job.

Q You knew the stuff was there? A It was used in the manufacture of celluloid.

Q And since prohibition has come in and liquor is hard to get have you and Sylvester and the other men discussed the fact that there is wood alcohol in the plant?

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.

DR. GEORGE L. WARREN, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are county physician of the County of Essex, are you? A Yes, sir.

Q And are a practicing physician of many years standing? A Twenty years.

Dr. George L. Warren, cross.

Q Did you perform an autopsy at the City Hospital on the body of Sylvester Coleman? A Yes, sir.

Q When? A On the 8th day of December, 1919.

Q Tell us, just briefly, what did you do? A An autopsy was made between three and four, P. M., on December 8, 1919, at the Newark City Hospital; the autopsy revealed that Sylvester Coleman had died of acute poisoning.

Q Was Dr. Edel present? A Dr. Edel was present and Dr. Arthur Casilli.

Q From the autopsy alone, the objective symptoms you saw, were you able to determine the amount of poisoning that he died of? A Not exactly, no.

Q Did it point to anything?

Mr. Schoen. I object to that.

The Court. Sustained.

Q Well, what did you find? A I found an acute irritating poison had been the cause of death; that may have been one of a number of chemical substances.

Q Assume that in addition to the objective symptoms you saw that the patient after drinking six or more glasses of whiskey, was within thirty-six hours stricken with failing eyesight, vomiting, and the chemical analysis showed the presence in the organs of formic acid, could you state the nature of the poison? A In my opinion, a case of wood alcohol poisoning.

Cross examination by Mr. Schoen.

Q On what particular symptoms, as stated by the Prosecutor in the hypothetical question, do you rely for your statement that in your opinion it was wood alcohol poisoning? A The lateness of the fatal symptoms, coming on so many hours after the alleged drinking, the loss of vision and death following.

Q Have you, in your experience, as a physician and county physician, seen many cases of death from alcoholism? A I have had a number of deaths from straight whiskey or grain alcohol poisoning; I have had a number of them; yes, sir.

Q (*By the Court.*) Well, which was it? A Well, it was the alcohol in the whiskey, a grain alcohol poisoning.

Q It is possible for death to ensue from the drinking of grain alcohol? A Yes, sir.

Dr. George L. Warren, cross.

Q And there were a number of deaths that you know of due to that cause? A Not drinking straight grain alcohol; from drinking the alcohol as found in the beverage called whiskey.

Q That is, by straight alcohol, you mean alcohol that has no poisonous ingredients in it? A It can poison, but not classed as a poison; grain alcohol is a fermentive product; wood alcohol is a destructive distillation of wood.

Q Was there anything about this man's stomach or organs that you examined in your autopsy that would indicate anything else than a straight case of alcoholic poisoning, grain alcohol? A Nothing distinctive; grain alcohol and wood alcohol poisoning would appear the same at the autopsy, or some other poisoning, which could cause the same lesions that alcohol poisoning could cause.

Q Then, so far as the man's organs were concerned, as you found in the autopsy there was nothing about them that would distinguish the case from a death resulting from grain alcohol? A No, sir.

Q And on what is it that has been added to what you saw in the autopsy, by the Prosecutor, which makes you say in your opinion it might have been a death by wood alcohol? A The clinical history and the statement made by Dr. Kirkman and the chemical analysis made by Dr. Edel; those would be the connecting links, plus the autopsy.

Q I am asking you what symptoms is it you are relying on? A The lateness of the onset and the blindness.

Q Well, the onset began on Saturday night or Sunday morning, according to the evidence as I understand it; he was in bed at two o'clock on Sunday morning and felt sick on Sunday morning; now, assuming that he felt sick Sunday morning, is that a late onset? A Yes; for grain alcohol poisoning the onset is rapid through the first period, then followed by coma or death; that comes on within at least six to twelve hours, but in wood alcohol cases the fatal symptoms have been prolonged, have come on hours after the alleged drinking of the adulterated beverage.

Q Assuming this man went to bed at two o'clock and began to feel sick, or at least said that he was feeling sick on Sunday morning, would you say that was too late for grain alcohol poisoning? A No; that would be about right, but he would eliminate rapidly—

Q (*By Mr. Mott.*) What do you mean by eliminate? A It would pass out of his body, pass out of his system or breath.

Q How long have you known men to be sick from alcohol poisoning, grain alcohol, from the time of drinking it? A The cases we have had in this county, the death has come on rapidly.

Q Well, how long? A Six to ten hours.

Q Are there any cases that you know of, or read of, in which the patient has lived longer? A Yes; when they have developed some secondary condition, like pneumonia, then they probably would have the acute poisoning from grain alcohol or whiskey and then go on and develop pneumonia, which may last five or six days.

Q Now, do you rely upon the fact that this man lost his sight; is that one of the symptoms that you are relying on? A That is one, yes.

Q Well, do you know, as a matter of fact, whether this man lost his sight?

The Court. One moment. What do you mean?

Mr. Schoen. Whether the doctor knows that there was a loss of sight.

The Court. The doctor said when he performed the autopsy he did certain things; he has not undertaken to swear he knew the man was blind from the autopsy.

Witness. That could not be detected at the time of the autopsy.

Q (*By the Court.*) You never saw this man, to your knowledge, did you, within ten days of his death? A No, sir.

Q Did this man appear to you to be a frail, weak, degenerate person who might be easily susceptible to a drug or poison? A Well, he was just the opposite; he was a robust and well developed, physically, young man about twenty years of age.

Q He was in robust condition and his organs were in robust condition? A Yes, sir.

Q So that from your examination of this man's physical condition it would be fair to assume that it would require a large dose of poison to cause a death result? A Well, it would depend on his susceptibility to poisoning; individuals differ; there is a different susceptibility to all poisons.

Q Generally a man's physical condition does count for something in that? A Yes, sir.

Q For such susceptibility. A Not always.

Q Does it in many cases? A Yes, sir.

Q That is something to be considered? A Yes, sir.

Q A good, strong, healthy man would be naturally less susceptible than a weak man? A Not necessarily, no.

Q I do not say necessarily; would it be naturally so? A It would be natural to assume that a well developed young man would be better than others; there can be an idiosyncracy and that a small amount of poison could cause death.

Q You did not find any such idiosyncracy? A No, I could not detect it by an autopsy.

Q Is there any test you resort to in your autopsy which you refer to as a negative and positive test to detect the presence of wood alcohol in the stomach? A No, sir; do not use any chemical tests.

Q Is there anything about the physical appearance of the organs which indicates to you whether or not wood alcohol is present? A Color of the lining of the stomach and the intestinal tract.

Q What would be the color if wood alcohol were present? A A pinkish color.

Q And what would be the color if it were not? A Grain alcohol or wood alcohol, or a slight irritating poison that would cause death would produce the same color as wood alcohol.

Q So that, so far as color is concerned, there is no distinction? A No distinction.

Q Well, is there any distinction as to whether the stomach was dry or wet? A In this case the stomach was dry.

Q Why was that? A We have been unable to determine why it was dry.

Q (*By the Court.*) Is this color you speak of peculiar to a poison of acute and irritating character? A Yes, depending on the amount taken; you could get the same irritating conditions with a man who had taken gasoline, ether, or small dose of oxalic acid.

Q (*By the Court.*) All you would undertake to say is that the appearance of the stomach would indicate the presence of an acute and irritating poison? A Yes, sir.

Q (*By the Court.*) And the character would have to be determined otherwise than by an autopsy? A Yes, sir.

Q You have studied chemistry? A Yes, sir.

Dr. George L. Warren, re-direct.

Q (*By the Court.*) When grain alcohol is taken into the stomach does it separate and some pass out of the urinary canal and some through the lungs? A Yes, sir.

Q Rapidly? A Rapidly.

Q (*By the Court.*) And wood alcohol has what effect? A It has a lasting effect; it does not split up, or is not eliminated so rapidly.

Q (*By the Court.*) Does it pass into the intestines? A Goes into the intestinal tract and splits up there into formaldehyde and formic acid.

Q (*By the Court.*) It does not pass off through the system? A It does not.

Q Doctor, have you discovered through your experience that the stomach is usually wet in wood alcohol poisoning? A The majority of them have been wet.

Q And in this particular case the stomach was dry? A Dry.

Re-direct examination by Mr. Mott.

Q Have you had other cases of wood alcohol poisoning where the stomach was dry? A No; this was the only case in which the stomach was dry.

Q Is the loss of eyesight a characteristic of grain alcohol poisoning? A It is not.

Q Is it ever caused? A I haven't ever known of blindness caused by grain alcohol.

Q Doctor, assume two individuals, alike, robust in health, age and strength, would their susceptibility to wood alcohol poisoning be the same? A No, it would not.

Q Well, just explain? A Why, a man in perfect health may take a small dose of quinine, which would be absolutely harmless to anyone and break out into the most terrific rash, which is the same as poisoning, like wood alcohol; I have information—

Q Just tell us what you know? A Well, there is a difference in susceptibility, whether in perfect health or not; for some reason one is poisoned more rapidly than another.

Q Is that true of all poisons? A Yes, sir.

Q And is there the same difference in wood alcohol as there is in other poisons, strychnine, or other poisons? A Yes, sir.

Dr. George L. Warren, re-cross—further direct.

Re-cross examination by Mr. Schoen.

Q On the question of eyesight, which has just been referred to by the Prosecutor, you say the loss of eyesight does not occur with grain alcohol poisoning? A As far as I know.

Q Now, have you heard of recent cases of poisoning resulting from the eating of olives, where loss of eyesight has resulted? A Yes.

Q And have you heard recently of cases where loss of eye sight hes resulted from the eating of ill preserved foods and fruits? A Yes, sir.

Further direct examination by Mr. Mott.

Q Have you had cases of the loss of eyesight from eating poisoned olives? A I have had in this county three deaths due to a food poison, by poorly canned string beans; these deaths occurred in Cedar Grove three years ago; other deaths due to botulinus bacillus.

Q Did you perform autopsies in those? A Yes, sir.

Q Can you distinguish them from wood alcohol cases?

Mr. Schoen. I object to that as a general proposition, unless it is applied to this particular case.

The Court. You brought in preserved fruit, did you not?

Mr. Schoen. Yes, sir.

The Court. Then you opened the door for a discussion.

Mr. Schoen. Not for general questions; if there is any distinguishing feature in this case that is applicable, but I do not think we are bound by distinguishing features that the doctor might have found in the examination of other bodies, unless it was on the body of Mr. Coleman; if he can point to anything in Mr. Coleman's case which distinguishes and which he has gained from his experience in other matters.

The Court. Counsel for the defense has asked the witness if he has heard of some poisoning by reason of olives with an accompanying loss of sight, and that may be explained in any way which is in accordance with the truth by the witness. Counsel has now opened the door and he has no right to complain that the door be pushed

D. George L. Warren, further cross.

further open and the whole situation be developed. Overruled.

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 The conditions that you found in Coleman's case? A Just in the autopsy?

Q Yes. A No; in food poisoning cases they were very negative: there was not anything to be seen of an irritating nature of the intestinal tract.

Q Well, now, I am asking you if you can distinguish the conditions that you found in the food poisoning cases from the conditions you found in the Coleman case? A Yes.

Q Do that. A It depends on the kind of food cases.

Q Well, olives. A The difference, that those cases I could determine by a lack of an irritating lesion in the stomach and intestines; that was absent in the food poisoning cases.

Further cross examination by Mr. Schoen.

Q That is in the string bean cases? A Yes, sir.

Q Have you seen any olive cases? A No; we have had no olive cases.

STATE RESTS.

Mr. Schoen. I would like to put on the record this motion, to direct a verdict of not guilty on the ground that there is no evidence tending to establish the guilt of the defendant; that there is no evidence of scienter, or knowledge of the defendant, that the beverage in question was adulterated; that there is no evidence that the beverage produced and offered in evidence comes within the description of the forms of the beverage denounced in the statute; that there is no evidence that the alleged beverage was mentioned in the indictment as found in the possession of the defendant; on those grounds.

The Court. Motion denied.

Max Nieberg, direct.

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.

Mr. Schoen opens for the defendant.

MAX NIEBERG, defendant, sworn in his own behalf.

Direct examination by Mr. Schoen.

Q Mr. Nieberg, you are the defendant in this case? A Yes, sir.

Q And your name is Max Nieberg? A Yes, sir.

Q How long have you lived in Newark? A Since 1907.

Q Are you married? A Yes, sir.

Q How many children have you? A Two.

Q What is your business? A Junk business.

Q How long have you been in the junk business? A Since 1911.

Q Do you know Mr. Vesey? A Yes, sir.

Q Do you know where his saloon is? A Yes, sir.

Q Have you been in the habit of going there? A Yes, sir.

Q For how long? A Well, since he has got the saloon on Orange street.

Q How long is that? A Between five and six years.

Q You went there for food and drink? A Well, I really went there to get a sandwich more than anything else; they used to put out short dinners.

Q And that has been going on for five or six years? A Yes, sir.

Q Did you know Mr. Vesey quite well in that time? A Yes, sir.

Q Did you ever see anybody known as Jimmy in the saloon? A I seen him in my brother's saloon.

Q When? A Well, I have seen him now and then; he used to come and offer to sell my brother some whiskey.

Q Was that since prohibition came in? A Yes, sir.

Q (*By the Court.*) When was it you referred to in answering that question? A Since prohibition went into effect.

Q (*By the Court.*) I ask you what you mean by that; what date do you refer to? A That I have known Jimmy?

Q (*By the Court.*) When do you refer to? A Well, some time after July.

Q (*By the Court.*) July 1st, last year? A Yes, sir.

Q After July 1st, last year, this man came to appear? A Well, not right then, but I had known Jimmy for about three months, between three and four months.

Q Before December? A Yes, sir, before December.

The Court. I suppose the witness ought to be permitted to testify. These are very leading questions.

Q Did you have a conversation with Vesey on Saturday, December 6th, in his saloon? A Yes, sir.

Q Well, about what time of day was it? A Well, I should say, around four o'clock.

Q What was said, if anything, by Vesey and what was said by you? A Well, Mr. Vesey started to talk to me about his whiskey in bond, and he asked me if I think this war time prohibition ban will be lifted, and I told him there is a chance it might and it might not, and he told me he was running shy on goods and he would like to get some; and he said he used to have a man coming around there by the name of Jimmy, but he has not seen him lately.

Q Did he say anything else to you about it? A He told me if I see him around I should send him in to see him.

Q Did you promise to do it? A I did.

Q Did you leave the saloon after that? A Yes, sir; I left the saloon about fifteen minutes after that.

Q Where did you go? A Well, I went over—I got my car and I went in the freight yard to get some old bags.

Q Where is that freight yard? A Well, it is across about fifty or sixty feet away from Vesey's saloon.

Q (*By the Court.*) Lackawanna freight yard? A Yes, sir.

Q (*By the Court.*) Just off Orange street? A Well, it is right on Orange street.

Q Do any men hang around that freight yard that you know of? A Yes, there is always a bunch of men around.

Q You went there to get some bags? A Yes, sir.

Q Did you see anybody there? A Yes, sir; I met Jimmy.

Max Nieberg, direct.

Q What did you say to him? A I told him that Mr. Vesey wants to see him on some business.

Q Anything else? A That is all.

Q What did he say? A He said he would go right over.

Q Did you see him any more that day? A I did not.

Q When did you see Vesey again? A I have not seen Vesey until Monday morning.

Q You saw Vesey again Monday morning? A Yes, sir.

Q What did you go to the saloon for? A I went in there to get a cheese sandwich.

Q How did you get there? A Got there with my car, stopped right in front of his place.

Q Did you see Vesey? A Yes.

Q What did he say? A He told me he has got a little trouble and he asked me to take him over to Halsey street and I did.

Q And you went in your machine? A Yes, sir.

Q And drove him down town? A Yes, sir.

Q Did you know where he wanted to go? A I did not know exactly.

Q Did he tell you where he wanted to go, direct you? A He did afterwards.

Q Did you follow his directions? A Yes, sir.

Q And that brought you where? A Halsey street, Dr. Friedman.

Q (*By the Court.*) This gentleman who was here? A Testified.

Q (*By the Court.*) In court? A Yes, sir.

Q What happened there? A Well, he asked him how—

Q I do not care about the conversation; did Vesey have anything with him? A He did not, not as I seen, only—

Q I say, did Vesey have anything along? A No, he didn't have anything along, only that Dr. Friedman gave it to him.

Q What do you mean? A Dr. Friedman gave him something.

Q What did he give him? A He gave him a bottle and some paper.

Q Was that the first time you were there with Vesey? A Yes, sir; but it was not Monday, it was Tuesday.

Q It was Tuesday? A Yes, sir.

Max Nieberg, direct.

Q Was that the first time you were there with Vesey on Tuesday? A Yes, sir.

Q You were not with him at any other time to this place on Halsey street? A No, sir.

Q So at the time you were there it was Dr. Friedman who was handing something to Vesey? A Yes, sir.

Q That was what? A I think it was Tuesday.

Q What was it he handed him? A He handed him a bottle and a slip of paper.

Q Now, where did you take Vesey after that? A Back to his saloon.

Q Did you hear any more about this whole matter? A I did not.

Q After that? A I did not.

Q At any time? A No, sir.

Q Well, you were arrested some time, were you? A Yes, sir.

Q When was that? A I was arrested—I was not arrested by the Federal authorities, but I was arrested by the State on New Year's night.

Q You were arrested by the State authorities when? A New Year's night, nine o'clock.

Q January 1st? A Yes, sir; it was before twelve.

Q You said New Year's? A Eve; about nine o'clock.

Q And was that the first time you heard anything about this matter? A Yes.

Q That you were charged or implicated in any way? A Yes, sir.

Q Have you pleaded—how many indictments have you pleaded to in this court as a result of this same transaction?

Mr. Mott. I object.

The Court. What is the purpose of that.

Mr. Schoen. I think it is material for the defense to show how many different indictments have been brought against him or he has been asked to plead to as a result of the same thing.

The Court. Overruled.

Mr. Mott. The way to prove that is by the record; he is asking this witness to prove something that the record will prove. I will admit the fact, but the difficulty is

I propose to show what these indictments are for, and the only way to prove this fact is by the record. The witness cannot testify to the record, and if counsel wants I will admit the record.

Mr. Schoen. I will consent to that.

Mr. Mott. All right.

Mr. Schoen. Can we agree what it is?

Mr. Mott. Yes; I will agree that there is pending against this defendant, this indictment, whatever this indictment is, it speaks for itself; a pending indictment for unlawfully keeping in his possession for barter and sale adulterated liquor; that is roughly stating it; also another indictment that the defendant unlawfully did sell to one Thomas Vesey adulterated liquor, and also an indictment for manslaughter in causing the death of Sylvester Coleman.

Mr. Schoen. I consent that that is a fair statement of the record and those three indictments are still pending; that is, the other two indictments are still pending and have not been tried.

Mr. Mott. I submit that this is a matter to be proved by the record and I will admit that that is a fact, that they have not been.

Mr. Schoen. Yes.

Q Now, you are charged in this case, Mr. Nieberg, with keeping in your possession for barter and sale, twenty gallons of whiskey which had been then and there adulterated with spurious and poisonous ingredients; to wit, wood alcohol; did you, on the 6th day of December, as charged in this indictment, have in your possession the beverage stated in this indictment? A No, sir.

Q Kept in your possession for barter and sale or for any purpose? A No, sir.

Q Have you had the exhibits which have been produced here in court, in your possession? A No, sir.

The Court. Counsel refers to S. 4, S. 5 and S. 6, do you not, and not to S. 3? You are referring to the two-gallon demijohn and tin can said to be five gallons and the five-gallon Great Bear spring water bottle; is that the way you answered?

Max Nieberg, cross.

Witness. I said no.

The Court. I mean to say when you said you never had these things in your possession you mean those things that are on the floor there, Exhibit S. 4, S. 5, and S. 6?

Witness. Yes, sir.

Q Did you keep in your possession on December 6, or at any other time, Exhibit No. 3, which I show you? A No, sir.

Mr. Mott. Of course, the evidence is that he never did have it.

Q Did you ever keep in your possession, or did you keep in your possession on December 6th—

The Court. There is not any charge that he did have those samples, and I think the State expressly disclaims the idea of any proof except as to the contents.

Mr. Schoen. I withdraw the question.

Cross examination by Mr. Mott.

Q Mr. Nieberg, you say you have been in Newark since 1907; where did you live before that? A I lived with my uncle.

Q Where? A On Orange street, 597 Orange street.

Q No; but you said you had been in Newark since 1907? A Yes, sir.

Q Now, before 1907 where did you live? A Russia.

Q When did you come to this country? A I came here in 1907.

Q Are you a citizen? A No, sir; got my first papers.

Q You are a junk dealer? A Yes, sir.

Q Where? A Montclair.

Q You have never been a junk dealer in Newark? A No, sir.

Q Now, when you went into Mr. Vesey's place on December 6th last, around four o'clock in the afternoon, just tell us the conversation you had between Mr. Vesey and yourself? A Just that Mr. Vesey asked me—he started to speak to me about bond goods that he had in bond, and he started to tell me of his shortage of goods.

Q By goods what did you think he meant? A Just what he mentioned.

Max Nieberg, cross.

Q What? A Whiskey.

Q Go on. A And he asked me did I see Jimmy around, and I told him I did not see him today; he says if I should see him I should send him in.

Q What else did he say about Jimmy? A Didn't say nothing to me; he just told me if I see Jimmy I should send him in.

Q Didn't he say to you he used to buy stuff of Jimmy and he had not seen Jimmy for some time? A Who used to buy?

Q Vesey. A Yes, sir.

Q Vesey said, "I used to buy goods of Jimmy?" A Yes, sir.

Q And he has not been around for some time. A Yes, sir.

Q And he said, "I want to see Jimmy?" A Yes, sir.

Q "I want to buy some whiskey of him?" A He did not tell me exactly that he wanted to buy whiskey of him.

Q You said that he wanted to get whiskey from Jimmy? A He did not mention to me if he wanted whiskey; he spoke to me of a shortage of whiskey and he told me if I see Jimmy send him in.

Q Yes; but he told you he used to buy whiskey of Jimmy? A Yes, sir.

Q And that he did not have any whiskey? A He said he was short.

Q And that he wanted to see Jimmy to get some more whiskey? A He didn't say it to me.

Q Isn't that what you thought he wanted to see Jimmy for? A No, sir.

Q What did you think he wanted to see Jimmy for? A For business.

Q What business? A I don't know; it was not my place to find it out.

Q You went over to the freight yard and saw Jimmy? A I had been there about half an hour and then I seen him.

Q What kind of a looking man is Jimmy? A Short, dark fellow.

Q What nationality? A Italian.

Q What is his second name? A I could not tell you.

Q How old is he? A I should judge about my age.

Q When did you last see him? A I have not seen him from that same month that I heard trouble about.

Q Have you looked for him? A Yes, sir.

Max Nieberg, re-direct—re-cross.

Q Where did you look for him? A In the freight yard.
Q Have you looked anywhere else? A No.
Q Do you know where Jimmy lived? A I did not.
Q Do you know whether he was single or married? A I couldn't tell you.
Q When you saw Jimmy there in the freight yard what did you say to him? A I said Mr. Vesey wants to see you.
Q What did he say? A All right, I am going right over.
Q And then you didn't see Vesey again until Monday morning, you say? A Yes, sir; I seen him Monday; I was in there Monday.
Q What did he say to you on Monday morning? A Well, he say that he was in some kind of trouble.
Q Did he tell you what the trouble was? A No, sir.
Q Didn't say anything about it? A No, sir.
Q Did he mention Jimmy's name? A No, sir.
Q And he asked you to take him down to Halsey street? A A Not Monday, that was Tuesday that he asked me to take him to Halsey street.
Q And you did? A I did.
Q You did not bring the three articles on the floor here to Mr. Vesey's place? A No, sir.
Q (*By the Court.*) Whereabouts on Halsey street was this, down below Market? A It was near Bamberger's stables, if I am not mistaken, between Bamberger's or Hahne's.
Q (*By the Court.*) Hahne's stables? A It might be.
Q (*By the Court.*) You mean the back entrance to Hahne's? A Yes, sir.
Q Near New street somewhere? A I think it is somewhere around there, because I am not much acquainted with Newark streets.

Re-direct examination by Mr. Schoen.

Q Do you know what the ingredients of the contents of any of the three exhibits, 4, 5 and 6 are; do you know what ingredients the contents of these containers are? A No idea.

Re-cross examination by Mr. Mott.

Q How old are you? A Twenty-nine.
Q How long have you been in this country? A Since 1907; that is how long I am here.

Morris Snyder, direct—cross.

MORRIS SNYDER, sworn in behalf of defendant.

Direct examination by Mr. Schoen.

Q Where do you live? A Bloomfield, New Jersey.

Q What is your business? A Moving picture business.

Q How long have you been in New Jersey? A I was born in New Jersey.

Q Do you know Max Nieberg, the defendant? A I know him, yes, sir.

Q How long? A About ten years.

Q Do you know his reputation in the community for honesty and morality and for uprightness?

Mr. Mott. I object, morality.

Mr. Schoen. Well, take that out.

Mr. Mott. I object to the honesty.

The Court. The question is do you know the reputation of Max Nieberg?

(After argument.)

The Court. The question is, do you know the reputation of Mr. Nieberg in the community in which he lived, with respect to honesty and uprightness. Answer that yes or no.

A Yes, sir.

Q What is that reputation? A As far as I know he has been pretty honest.

Q Well, do you know whether the reputation is good or bad?

Mr. Mott. I move to strike that answer out.

Mr. Schoen. I consent to that.

The Court. It will go out.

Q Do you know whether his reputation is good or bad? A Good reputation.

Cross examination by Mr. Mott.

Q You are in the moving picture business? A Yes, sir.

Q How long have you been in that business? A About six months.

Q What business were you in before that? A Liquor business.

Q What do you mean? A Wholesale liquor business.

Q How long were you in that business? A About eighteen years.

DR. ROBERT SCHWARZ, sworn in behalf of defendant.

Direct examination by Mr. Schoen.

Q What is your business? A Consulting and analytical chemist.

Q How long have you been consulting and analytical chemist? A For eleven years.

Q Where is your office? A 200 Worth street, New York City.

Q What college are you a graduate of? A Columbia University of New York.

Q (*By the Court.*) What year? A 1909.

Q Have you made a specialty of any particular branch of chemistry? A Chemistry and bacteriology of foods and beverages.

Q And for how long have you specialized in that particular branch? A Ever since I graduated from college.

Q Since 1911? A 1909.

Q Will you tell us, Doctor, the several ways in which formic acid may arise in the human body? A It is taken in with foods that have been preserved or treated with formates or formic acid, if a drug containing compounds of formic acid has been taken into the system and in very small quantities from glycerol or glycerin being oxidized into the syetem.

Q (*By the Court.*) From what? A Glycerol is—

Q (*By the Court.*) I did not ask you that. You said that formic acid may exist in the human body being oxidized in the system. A From the glycerol.

Q Do you think of any other way at the present time? A No, unless—no, I don't.

Cross examination by Mr. Mott.

Q Well, don't you find it in the human system sometimes as a result of wood alcohol? A That is not a normal—

Q Please answer my question. A Formic acid?

Thomas F. Vesey, direct.

Q Didn't you understand the question? A Yes, sir.
Q Then please answer it? A Yes, sir.

DR. ALBERT EDEL, recalled.

Further cross examination by Mr. Schoen.

Q Doctor, you were present at the time of the autopsy on Mr. Coleman, weren't you? A I was present.
Q Was there found at that time in the pocket of Mr. Coleman a box containing pills? A No, sir.
Q When was it found?

Mr. Mott. I will admit that certain medicine was prescribed for Coleman by Dr. Kirkman and that those pills and medicines got into the hands of Dr. Edel.

Mr. Schoen. Were they prescribed by Dr. Kirkman before he took sick?

Mr. Mott. No. I cannot tell you about that. Do you remember the date on the box? A I do—

The Court. Just answer that yes or no.

Witness. No.

Q Could you get that box here quickly? A Yes, when I go down to lunch.

RECESS.

DEFENDANT RESTS.

THOMAS F. VESEY, recalled in rebuttal.

Direct examination by Mr. Mott.

Q Mr. Nieberg says that when he came into your saloon on December 6th he had a conversation with you; that is right, isn't it? A Yes, sir.
Q He says that you told him that there was a man by the name of Jimmy that you used to get goods of; is that true? A I never knew the party.
Q Well, did you say that to him? A No, sir.
Q He says that you asked him if he knew Jimmy and he says that you answered yes; did you ask him that? A No, sir.
Q He says that you said to him, "If you see Jimmy send him around or tell him I want to see him"; did you say that to him? A No, sir.

Thomas F. Vesey, cross.

Q Did you know Jimmy or who he was? A Never heard of him.

Q Or anything about him? A No, sir.

STATE RESTS.

Cross examination by Mr. Schoen.

Q Mr. Vesey, you have now denied some statement of Mr. Nieberg as to a conversation which took place in your saloon on Saturday; you understood that; did you? A In regard to what?

Q In regard to the question the Prosecutor just asked you. A That was in regard to Jimmy?

Q Yes. A I do not know the man.

Q Well, do you know of any man that had been supplying you with liquor by any name other than Jimmy? A You mean previous to Mr. Nieberg.

Q No, on this date? A On December 6th?

Q Yes. A No, sir; I do not.

Q You say that you did not hear about a man by the name of Jimmy? A Do not know the man at all.

TESTIMONY CLOSED.

Mr. Schoen sums for the defendant.

Mr. Mott sums up for the State.

Mr. Schoen. The developments in the summing up makes it necessary to ask your Honor to charge an additional request.

CHARGE.

The Court charged the jury as follows:

MARTIN, *J.*

Gentlemen of the Jury: The function of the Court is to instruct the jury in reference to principles of law governing the case. The principles of law as charged should be accepted as a correct statement of the law. The jury, however, are the sole judges of the facts, weight of testimony, credibility of witnesses, inferences to be drawn from the evidence and the ultimate conclusions to be reached upon all the facts. The Court in referring to the evidence is not to be understood as deciding any fact, but merely as attempting to elucidate the evidence for the convenience or assistance of the jury, or to illustrate or explain principles of law. If the Court errs in its statement of any evidence, or assumes the existence of evidence that is not actually before the jury, the jurors are to rely upon their recollection and not upon the recollection of the Court. If any part of the evidence is referred to, seemingly giving it particular emphasis, the jurors are not to disregard other evidence which they may deem of equal or greater importance.

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 State must prove beyond a reasonable doubt all the essential elements of the crime and 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 jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecution. If upon such proof there be reasonable doubt remaining, the defendant is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment

of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt, because if the law should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

This defendant is presented here upon an indictment found by the Grand Jury, which contains two counts. The first charges that he did at the City of Newark on the 6th day of December, 1919, unlawfully keep in his possession, for barter and sale, certain spirits, to wit, twenty gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol, contrary to the form of the statute in such case made and provided. The second is that on the same day he unlawfully did keep in his possession, for barter and sale, certain spirits, to wit, twenty gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit, wood alcohol. These charges are very much alike. It might be that in the reading of them the difference was not readily observed. One of the principal differences is that the whiskey which it is charged that he kept in his possession for barter and sale in the first count is that the whiskey was adulterated; in the other that it had been manufactured with spurious and poisonous ingredients.

The statute of the State of New Jersey enacted and governing an indictment and charges of this character, is one which was passed by the Legislature of the State of New Jersey and signed by the Governor on April 6, 1871, some forty-nine years ago. There has been a slight change in the act and that, I think to be, only, however, the elimination of a comma, as revised by the act relating to crimes in 1898. The act provides that

"Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part to be used as a beverage, that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

It is, therefore, necessary for the State to prove, and for you to find beyond a reasonable doubt on the evidence, before you can convict the defendant, that this defendant did keep in his possession for barter or sale spirits of the kind, to wit, whiskey,

and that the same was then adulterated, or had been manufactured with spurious or poisonous ingredients of any description. There is no statement in this law requiring that the defendant must knowingly keep such materials in his possession. It is not necessary that the State prove that he knew that the spirits were adulterated or contained poisonous ingredients. The duty is cast upon one who proposes to sell liquid of the kind described in the statute as a beverage to know what there is in it and that it is free from adulteration of spurious or poisonous matters, or else he must be responsible.

In this case some evidence has been presented, which remains uncontradicted, of the good character of this defendant. It is the right of a person charged with crime to have all the relevant testimony, including that relating to his good character or reputation, considered by the jury in every case, and if, upon such consideration, there exists reasonable doubt of his guilt, even though that doubt be engendered merely by his previous good repute, he is entitled to an acquittal.

The Court will not endeavor to review the testimony, nor, indeed, even to outline the evidence which has been presented here before you.

It is the contention of the State that one Thomas F. Vesey, who maintained a place for the sale of liquor at retail on Orange street, on Saturday morning, about nine o'clock, December 6, 1919, informed this defendant that he was running short of whiskey; that he was wondering whether any whiskey could be gotten out of bond, and finally the conversation reached the point where the State contends that Vesey asked Nieberg if he knew where any whiskey could be obtained and at what price; that Nieberg said he could get him twenty gallons and the price would be $15 a gallon; that that afternoon, between five o'clock and half-past five, Nieberg came to the saloon, went into what they call the back room, left there and went to the front and spoke to Vesey and said the stuff was in the back room, or something to that effect; that Vesey went back and explained that he could not pay the cash at that time; that there was there a five-gallon tin container and apparently a five-gallon bottle container, with a Great Bear Spring Water bottle label on it, and a two-gallon demijohn. It is also the contention of the State that Nieberg returned on Monday morning and at that time Vesey refused to pay for the reason that he had heard that there was some

trouble about the contents of the bottles and the containers delivered to him by the defendant, and that subsequently Vesey obtained a chemical analysis of the contents. It is also the contention of the State that Richard J. Coleman went into this saloon at four o'clock in the afternoon and stood at the end of the bar facing the street; that from his position where he stood, by slightly turning his head, he could see a person walking in what is called the alleyway alongside the saloon and that he saw Nieberg coming in and he saw him place later the tin container on the shuffiboard in the back room; that this Mr. Coleman and the other brother, who testified I think yesterday, stated that they were at the bar and that sometime later in the evening, I think they said at half-past nine, Sylvester came in and had eight or nine or ten drinks of whiskey, which Vesey and the barkeeper, Strong, the State contends, have said was put on sale in a bottle like that which is designated here as Exhibit S. 3; that Sylvester went home about twelve o'clock and at two o'clock he was vomiting and later on on several occasions he was vomiting in the early morning and in the middle of the day, and got up Sunday afternoon; that he walked across the street and back and stayed in the house the rest of the day; that the next morning he was very ill; that Dr. Kirkman saw him and found his eyesight growing dim, and that afternoon he died at the City Hospital, and it is the contention of the State that Dr. Kirkman diagnosed the case as one of wood alcohol poisoning, and that Dr. Warren's opinion, based upon the autopsy; that is to say, the conditions discovered at the autopsy, together with the statement of Dr. Edel, corroborates the diagnosis of Dr. Kirkman that one of the troubles, if not the cause of death of Sylvester Coleman, was wood alcohol poisoning. Dr. Edel, as the Court recalls the testimony, and the State contends that it is, says that in all the organs, the sample of the stomach contents, liver, brain, and, I think he said, at all events all the organs which he took from the autopsy contained a trace of a kind of acid which I think he said was formic acid; that is, the product of the oxidation of wood alcohol. Of course, the Court does not pretend, in the slightest degree to be able to recite to the jury the technical description of the chemical processes described by the experts, but the Court does understand that the State contends that Dr. Edel found in all of the organs which he examined a trace of the kind of

acid which Dr. Edel says is the product of the oxidation of wood alcohol.

For these reasons and upon these facts, which the State contends you should draw and infer from the testimony in the case, the State contends, that Max Nieberg kept in his possession—and for this purpose it makes no difference whether he had it five minutes in his possession, or weeks, if he kept it in his possession, no matter how long it was—that he kept this whiskey in his possession he kept it for the purpose of sale, to be used as a beverage, and that he actually sold it and that it did contain a spurious or poisonous ingredient and that it was adulterated, and, therefore, that you should find this defendant guilty.

The defense, on the other hand, is a denial, and, secondly, it is a statement of the proposition of law, as the Court has already given to you, that the State must prove beyond a reasonable doubt that this defendant is guilty, and the contention of the defendant is that the State has failed to prove the defendant so guilty. The defense contends, as the Court understands some of the evidence upon which counsel has laid particular stress, that this defendant had no conversation with Vesey at nine o'clock on Saturday morning, December 6th, and that he was not in the saloon of Vesey at five o'clock, or at half-past five, or thereabouts, Saturday afternoon, but that this defendant did talk with Vesey and Vesey said he was short of whiskey and he wanted to know if Nieberg knew where Jimmy was, of whom Vesey himself said that he had been purchasing some gods; that the defendant said quite innocently, without intent, he says, to violate any law, that in response to Vesey's request if he did see Jimmy that he would send him to Vesey. The defendant says that he went out into the Lackawanna freight yard a short distance away, some fifty or sixty yards, or feet, and that he there did happen to see Jimmy and he told Jimmy what Vesey had asked him to tell him, and that he heard nothing whatever of the matter until Monday morning when he went to Vesey's place to obtain a cheese sandwich and then he took Mr. Vesey down to Halsey street to see the expert chemist. He says he was not arrested until New Year's Eve. The defendant contends also and has positively sworn that none of these articles which are here as containers, and not a drop of the contents of any of these things that you see here before you, was ever at any time in his possession. He

says he did not make the delivery in the back of the saloon. The defendant also contends that there was not an excessive amount of formic acid in the body of Coleman, that the acid that was there could have been the product of food preservatives, or food, or the breaking up of sugars, or some other cause than the sole cause of the presence of wood alcohol, and that, at all events, if Sylvester Coleman had consumed twenty ounces, or ten glassfuls of whiskey, he only would have taken into his stomach one-fifth of one ounce and that that would not have caused his death. Therefore, the defendant contends that your verdict should be not guilty.

Gentlemen of the Jury, it is your duty to search through this testimony that has been presented here before you and ascertain where the truth is, and if you find, beyond a reasonable doubt, upon the evidence that this defendant is guilty, then your verdict should be guilty; otherwise, if course, it must be not guilty.

The Court has been requested to charge some twenty-three requests to charge and a supplemental request, and in the examination of these requests to charge the Court has reached the conclusion that nearly all of them have been covered by what the Court has already said.

"No. 15. The mere fact that it was unlawful to sell intoxicating liquor does not render the seller of it liable in criminal law for all the undesigned and criminal consequences of it. The mere fact that in selling liquor or having it in his possession, the defendant was committing an unlawful act under the federal act or constitutional amendment, does not in itself render him guilty of the charge in this indictment." I so charge you, except, of course, I presume it is a mere inadvertance on the part of the person who prepared the request that the constitutional amendment did not go into effect until the 16th of January, 1920, and that there was what is popularly known as a wartime prohibition, a law that was in effect on the 6th day of December, 1919.

"No. 18. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the defendant, Nieberg, kept the alleged adulterated whiskey in his possession for barter or sale, to be used as a beverage. Unless these three elements are proven, beyond a reasonable doubt, the defendant must be found not guilty." I so charge you.

"No. 20. The defendant is not on trial for the death of Sylvester Coleman. The death of Coleman is only proven in this case as tending to show that the beverage which he drank in Vesey's place was adulterated with a poisonous ingredient, to wit, wood alcohol." I so charge you.

"No. 21. Unless the jury is satisfied, beyond a reasonable doubt, that Coleman died from the effects of the beverage which he drank in Vesey's saloon, his death cannot be considered by the jury as any evidence of the fact that the beverage was adulterated with a poisonous ingredient." I so charge you, except that the fact of the discovery of the product of oxidation of wood alcohol in his stomach is a fact which is relevant and may be considered by you.

"No. 22. If the jury is satisfied that the beverage which Coleman drank caused his death, and that it was adulterated with a poisonous ingredient, to wit, wood alcohol, but if the jury is not satified, beyond a reasonable doubt, that when Coleman drank the beverage it was in the same condition as it was when Nieberg delivered it, then the jury cannot consider the death of Coleman as any evidence of the truth of the charge in the indictment." I so charge you.

In my notes so relating to exhibits I do not find that I have stricken off the numbers 7, 8 and 9. Do you find that they have been? The evidence is that Dr. Edel has been permitted to testify as to an examination of the contents of these bottles. I thought they had been admitted, but my notes are that they have not been. The stenographer says that his notes are that they have not been, because he has not stricken off the words for identification.

Mr. Mott. If there is any doubt about it I offer them. They are in evidence from the use that has been made of them.

The Court. Re-open the case and offer them and strike out the words for identification and admit them in evidence.

Bottles marked Ex. S. 7, Ex. S. 8, and Ex. S. 9.

Mr. Schoen. Your Honor, with this discovery of a very important matter which occurred, I think, during the summing up, that is, the label on the five-gallon bottle, I would like to ask your Honor to instruct the stenographer to copy the contents of the label in the record as part of the exhibit. I suppose the

label now contains five-gallon Great Bear Spring Water bottle, and the exhibit number, but that would not be anything much in case the record goes up and has to be printed. In view of the fact there is a label on that I would like to ask your Honor to direct the stenographer to copy off.

The Court. The bottle itself is in evidence.

Mr. Schoen. Yes, but I would not be able to have that bottle part of the record which has to be printed. It will be simpler if the stenographer's record shows it.

The Court. You will take the bottle if the case goes up.

Mr. Mott. All you have got to do is to ask for the exhibits.

Mr. Schoen. Well, it seems to me it would save the defense and State and everybody if that were copied in the record.

Mr. Mott. I am willing to agree with you in open court that if there is occasion to produce that bottle that it will be.

The Court. I think this will satisfy counsel. The Court calls attention of counsel to the fact that apparently the first mention of the label on the bottle S. 6, called the five-gallon bottle bearing the label "Great Bear Spring Water bottle"—

Mr. Schoen. No, there is no such label on it.

The Court. It has been called the Great Bear Spring Water bottle and there is a label on it as follows:

Mr. Schoen. "These spirits were produced from materials fermented after September 8th, 1917." Then in the center in capitals: "All persons are warned"; that is a headline; and it goes on a new paragraph, "that their use in the manufacture or preparation of beverages, or other use, or sale for beverage purposes will subject the persons so using them or selling them to very heavy penalties. Label affixed. James M. Bell Co." Then in writing, "Gustave T. Spreckel, President. Dec. 5, 1919."

(The jury retires.)

Mr. Schoen. I would ask your Honor for a general exception to the charge.

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

WM. P. MARTIN,
Judge.

Exceptions to Charge.

Mr. Schoen. I ask an exception to the refusal of your Honor to charge the requests specifically as requested.

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

WM. P. MARTIN,
Judge.

Mr. Schoen. And, an exception to that portion of your Honor's charge in which you instructed the jury that if the defendant kept the beverage in question in his possession for barter and sale and for beverage purposes. I call your Honor's attention to that portion on the ground that the objection to this portion of the charge is that the inference cannot be drawn from mere possession that it was kept for barter and sale, and that it was to be sold for beverage purposes.

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

WM. P. MARTIN,
Judge.

Mr. Schoen. I ask an exception to your Honor's refusal to charge the supplemental request which I handed in.

The Court. The supplemental request is to the effect that if the label is on the bottle that the defendant should be found not guilty. That is altogether too comprehensive and takes away from the jury the right to consider all the circumstances of the case.

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

WM. P. MARTIN,
Judge.

DEFENDANT'S REQUESTS TO CHARGE.

1. Criminal intent is essential to constitute a crime.

2. In order to convict the defendant, it must be shown not only that the defendant had the alleged adulterated whiskey in his possession, but that he also knew that the whiskey was adulterated.

3. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case.

4. Although the statute says nothing about knowledge, that must be imported into the statute. Knowledge is, to a certain extent, essential to the crime charged against this defendant.

5. In order to convict the defendant, the alleged adulterated whiskey must have been found in the possession of the defendant on his trial. If the defendant had parted with the possession of the whiskey and it was found in the custody of another, as in this case, in the custody of one Vesey, the defendant must be found not guilty.

6. In order to convict the defendant upon this indictment, the alleged adulterated whiskey must be found while in the possession of the defendant.

7. Ignorance in point of fact is, in all cases of supposed offense, a sufficient excuse.

8. To make a transaction criminal, there must be both will and act entering into the transaction.

9. If the State has failed to prove, beyond a reasonable doubt, that the defendant knew, or had reason to know, that the whiskey alleged to have been in his possession was adulterated with wood alcohol as alleged, your verdict should be not guilty.

10. Criminality cannot exist without knowledge. Knowledge of the defendant that the whiskey contained spurious and poisonous ingredients, to wit, wood alcohol, is an ingredient necessary to constitute his guilt, for without such knowledge the act charged as a crime is innocent in its character, and the defendant should be found not guilty.

11. The essence of a criminal offense is the wrongful intent, without which it canont exist.

12. If the jury have a reasonable doubt that the defense has been made out, the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty.

Defendant's Requests to Charge.

13. In measuring the duty and responsibility of the defendant in having the alleged beverage in his possession, he can only be charged with such knowledge of its ingredients as he then possessed or reasonably ought to have known with the opportunities at his command. Knowledge derived from subsequent events or autopsies and unavailable or not reasonably inferable at the time of the alleged possession of the beverage, cannot be imputed to him.

14. A person who deals in and sells alcoholic beverages is under no duty to make a chemical analysis to determine the ingredients thereof.

15. The mere fact that it was unlawful to sell intoxicating liquor does not render the seller of it liable in criminal law for all the undersigned and criminal consequences of it. The mere fact that in selling liquor or having it in his possession, the defendant was committing an unlawful act, under federal act or constitutional amendment, does not in itself render him guilty of the charge in this indictment.

16. If the jury have a reasonable doubt of the guilt of the defendant, even if that doubt be engendered merely by evidence of his good character, the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty.

17. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the defendant, Nieberg, kept the alleged adulterated whiskey in his possession. Unless the jury is satisfied, beyond a reasonable doubt, that he so kept it, the defendant should be found not guilty.

18. In order to convict the defendant, the State must prove beyond a reasonable doubt that the defendant, Nieberg, kept the alleged adulterated whiskey in his possession for barter or sale, to be used as a beverage. Unless these three elements are proven beyond a reasonable doubt the defendant must be found not guilty.

19. If the jury have a reasonable doubt that Nieberg is the man who delivered the alleged adulterated whiskey to Vesey he must be found not guilty.

20. The defendant is not on trial for the death of Sylvester Coleman. The death of Coleman is only proven in this case as tending to show that the beverage which he drank in Vesey's

place was adulterated with a poisonous ingredient, to wit, wood alcohol.

21. Unless the jury is satisfied, beyond a reasonable doubt, that Coleman died from the effects of the beverage which he drank in Vesey's saloon, his death cannot be considered by the jury as any evidence of the fact that the beverage was adulterated with a poisonous ingredient.

22. If the jury is satisfied that the beverage which Coleman drank caused his death, and that it was adulterated with a poisonous ingredient, to wit, wood alcohol, but if the jury is not satisfied, beyond a reasonable doubt, that when Coleman drank the beverage, it was in the same condition as it was when Nieberg delivered it, then the jury cannot consider the death of Coleman as any evidence of the truth of the charge in the indictment.

23. If the State has not proven, beyond a reasonable doubt, that Coleman's death was due solely to the beverage which he drank in Vesey's saloon, and that that beverage was kept in the possession of Nieberg for barter and sale, to be used as a beverage, then the death of Coleman may be disregarded by the jury as a factor in determining whether the beverage was adulterated with a poisonous ingredient.

(Supplemental request.) That if you are satisfied beyond a reasonable doubt that Exhibit S. 6, the five-gallon Great Bear bottle, was kept in the possession of Nieberg and delivered by him to Vesey with the label, now thereon, warning against the use of the contents for beverage purposes, the verdict must be not guilty.

Motion in Arrest of Judgment.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

FOURTH DAY.

Monday, June 14, 1920.

STATE

vs.

MAX NIEBERG.

Before Hon. William P. Martin, Judge.

Appearances as before stated.

Mr. Schoen. In the case of State v. Max Nieberg, I desire to move in arrest of judgment in this case on the following grounds:

First, because the indictment upon which the defendant was tried charged no crime, in that it does not set forth that the whiskey named in the indictment was to be used as a beverage.

Second, because the constitutional rights of the defendant were invaded by a trial without the indictment of the Grand Jury charging a crime.

Third, because there is no verdict finding the defendant guilty of any crime, and, therefore, no judgment and sentence can be imposed.

Fourth, because the constitutional rights of the defendant will be invaded by the judgment and sentence in this case because the defendant has not been convicted of a crime, and

Fifth, because the indictment does not set forth an indictable offense, for the same reason that it does not set forth that the whiskey named in the indictment was to be used as a beverage.

The Court. Motion denied.

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

Certificate of Court Stenographer.

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

WM. P. MARTIN,
Judge.

STATE
vs.
MAX NIEBERG.

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. Max Nieberg, Wood Alcohol, which trial was held before the Honorable William P. Martin, Presiding Judge of the Essex County General Quarter Sessions Court in and for the County of Essex, and a jury, on Monday, May 3, 1920; Tuesday, May 4, 1920; Wednesday, May 5, 1920; Monday, June 14, 1920, at Newark, New Jersey.

HAROLD T. COOK.

Certificate of Judge.

STATE

vs.

MAX NIEBERG.

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.

Dated July 28, 1920.

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

ASSIGNMENTS OF ERROR.
Filed September 30, 1920.

New Jersey Supreme Court

STATE OF NEW JERSEY, *vs.* MAX NIEBERG.	*On Error to Essex Quarter Sessions.* *Assignments of Error.*

Afterwards, to wit, on the return of the Writ of Error issued in this cause, comes the said Max Nieberg, by Edward Schoen, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions; and also in the giving of the verdict and the judgment aforesaid, there is manifest error in this respect, to wit:

1. Because the Trial Judge erronously refused to quash the indictment.

2. Because the Trial Judge erroneously denied the motion made in arrest of judgment.

3. Because the Trial Judge erroneously permitted the witness Vesey to be asked the following question:

"Q Did you sell him any whiskey that day?"

4. Because the Trial Judge erroneously permitted the witness Isaac Friedman to be asked the following question:

"Q And what did you find?"

5. Because the Trial Judge erroneously permitted proof of the death of Sylvester Coleman.

6. Because the Trial Judge erroneously permitted the witness Strong to be asked the following question:

"Q After Sylvester came in what was done?"

7. Because the Trial Judge erroneously permitted the witness Quinn to be asked the following question:

"Q Now, while you were at Vesey's place, what did you do; what was done there?"

8. Because the Trial Judge erroneously refused to permit the defendant to ask the witness Quinn the following question:

"Q Were there any cordial bottles?"

Assignments of Error.

9. Because the Trial Judge erroneously admitted in evidence Exhibit S. 3.

10. Because the Trial Judge erroneously admitted in evidence Exhibit S. 4.

11. Because the Trial Judge erroneously admitted in evidence Exhibit S. 5.

12. Because the Trial Judge erroneously admitted in evidence Exhibit S. 6.

13. Because the Trial Judge erroneously permitted the witness Edel to be asked the following question:

"Q Well, what did you find?"

14. Because the Trial Judge erroneously refused to permit the defendant to ask the witness Edel the following question:

"Q Is the quantity of wood alcohol that you have calculated to have been present in twenty ounces of beverage that you have examined less than the minimum which could cause death to which you have referred?"

15. Because the Trial Judge erroneously refused to permit the defendant to ask the witness Edward F. Coleman the following question on cross examination:

"Q And since prohibition has come in and liquor is hard to get, have you and Sylvester and the other men discussed the fact that there is wood alcohol in the plant?"

16. Because the Trial Judge erroneously denied the motion to direct a verdict of not guilty.

17. Because the Trial Judge erronously charged the jury as follows:

"It is therefore necessary for the State to prove, and for you to find, beyond a reasonable doubt, on the evidence before you can convict the defendant that this defendant did keep in his possession for barter and sale, spirits of the kind, to wit, whiskey, and that the same was then adulterated, or had been manufactured with spurious or poisonous ingredients of any description."

18. Because the Trial Judge erroneously charged the jury as follows:

"It is not necessary that the State prove that he knew that the spirits were adulterated or contained poisonous ingredients."

Assignments of Error.

19. Because the Trial Judge erroneously refused to charge the defendant's first request to charge as follows:

1. Criminal intent is essential to constitute a crime.

20. Because the Trial Judge erroneously refused to charge the defendant's second request to charge as follows:

2. In order to convict the defendant, it must be shown not only that the defendant had the alleged adulterated whiskey in his possession, but that he also knew that the whiskey was adulterated.

21. Because the Trial Judge erroneously refused to charge the defendant's third request to charge as follows:

3. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case.

22. Because the Trial Judge erroneously refused to charge the defendant's fourth request to charge as follows:

4. Although the statute says nothing about knowledge, that must be imported into the statute. Knowledge is, to a certain extent, essential to the crime charged against this defendant.

23. Because the Trial Judge erroneously refused to charge the defendant's fifth request to charge as follows:

5. In order to convict the defendant, the alleged adulterated whiskey must have been found in the possession of the defendant on his trial. If the defendant had parted with the possession of the whiskey, and it was found in the custody of another, as in this case, in the custody of one Vesey, the defendant must be found not guilty.

24. Because the Trial Judge erroneously refused to charge the defendant's sixth request to charge as follows:

6. In order to convict the defendant upon this indictment, the alleged adulterated whiskey must be found while in the possession of the defendant.

25. Although the Trial Judge erroneously refused to charge the defendant's seventh request to charge as follows:

7. Ignorance in point of fact is, in all cases of supposed offense, a sufficient excuse.

26. Because the Trial Judge erroneously refused to charge the defendant's eighth request to charge as follows:

8. To make a transaction criminal, there must be both will and act entering into the transaction.

27. Because the Trial Judge erroneously refused to charge the defendant's ninth request to charge as follows:

> 9. If the State has failed to prove, beyond a reasonable doubt, that the defendant knew, or had reason to know, that the whiskey alleged to have been in his possession was adulterated with wood alcohol as alleged, your verdict should be not guilty.

28. Because the Trial Judge erroneously refused to charge the defendant's tenth request to charge as follows

> 10. Criminality cannot exist without knowledge. Knowledge of the defendant that the whiskey contained spurious and poisonous ingredients, to wit, wood alcohol, is an ingredient necessary to constitute his guilt; for without such knowledge the act charged as a crime is innocent in its character, and the defendant should be found not guilty.

29. Because the Trial Judge erroneously refused to charge the defendant's eleventh request to charge as follows:

> 11. The essence of a criminal offense is the wrongful intent, without which it cannot exist.

30. Because the Trial Judge erroneously refused to charge the defendant's twelfth request to charge as follows:

> 12. If the jury have a reasonable doubt that the defense has been made out, the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty.

31. Because the Trial Judge erroneously refused to charge the defendant's thirteenth request to charge as follows:

> 13. In measuring the duty and responsibility of the defendant in having the alleged beverage in his possession, he can only be charged with such knowledge of its ingredients as he then possessed or reasonably ought to have known with the opportunities at his command. Knowledge derived from subsequent events or autopsies and unavailable or not reasonably inferable at the time of the alleged possession of the beverage, cannot be imputed to him.

32. Because the Trial Judge erroneously refused to charge the defendant's fourteenth request to charge as follows:

> 14. A person who deals in and sells alcoholic beverages is under no duty to make a chemical analysis to determine the ingredients thereof.

Assignments of Error.

33. Because the Trial Judge erroneously refused to charge the defendant's nineteenth request to charge as follows:

> 19. If the jury have a reasonable doubt that Nieberg is the man who delivered the alleged adulterated whiskey to Vesey, he must be found not guilty.

34. Because the Trial Judge erroneously refused to charge the defendant's twenty-third request to charge as follows:

> 23. If the State has not proven, beyond a reasonable doubt, that Coleman's death was due solely to the beverage which he drank in Vesey's saloon, and that that beverage was kept in the possession of Nieberg for barter and sale, to be used as a beverage, then the death of Coleman may be disregarded by the jury as a factor in determining whether the beverage was adulterated with a poisonous ingredient.

35. Because the Trial Judge erroneously refused to charge the defendant's supplemental request to charge as follows:

> That if you are satisfied, beyond a reasonable doubt, that Exhibit S. 6, the five-gallon Great Bear bottle was kept in the possession of Nieberg and delivered by him to Vesey with the label now thereon, warning against the use of the contents for beverage purposes, the verdict must be not guilty.

Wherefore said plaintiff-in-error, Max Nieberg, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors and all other errors appearing in the record and proceedings aforesaid, and upon the giving of judgment and passing of sentence aforesaid, be reversed, cancelled and held for nothing, and that the said Max Nieberg may be restored to all things by him lost on occasion thereof.

EDWARD SCHOEN,
Attorney for Plaintiff-in-Error.

SPECIFICATION OF CAUSES AND REASONS FOR REVERSAL.

Filed September 30, 1920.

Plaintiff-in-error assigns the following reasons or causes for the reversal of the verdict and judgment of the conviction in the above-stated action upon the whole record.

1. Because the Trial Judge erroneously refused to quash the indictment.

2. Because the Trial Judge erroneously denied the motion in arrest of judgment.

3. Because the indictment upon which the defendant was tried charged no crime.

4. Because the constitutional rights of the defendant were invaded by trial without the indictment of a Grand Jury charging a crime.

5. Because there is no verdict finding the defendant guilty of any crime, and therefore no judgment and sentence can be imposed.

6. Because the constitutional rights of the defendant were invaded by the judgment and sentence in this cause because the defendant does not stand convicted of a crime.

7. Because the indictment does not set forth an indictable offense.

8. Because the Trial Judge refused to direct a verdict of not guilty for the defendant.

9. Because the Trial Judge erroneously charged the jury as follows:

> "It is, therefore, necessary for the State to prove, and for you to find, beyond a reasonable doubt, on the evidence before you can convict, the defendant that this defendant did keep in his possession for barter and sale, spirits of the kind, to wit, whiskey, and that the same was then adulterated, or had been manufactured with spurious or poisonous ingredients of any description."

10. Because the Trial Judge erroneously charged the jury as follows:

> "It is not necessary that the State prove that he knew that the spirits were adulterated or contained poisonous ingredients."

Specification of Causes and Reasons for Reversal.

Said plaintiff-in-error, for the causes aforesaid, in addition to the assignments of error, prays that the judgment aforesaid may be reversed.

EDWARD SCHOEN,
Attorney for Plaintiff-in-Error.

Service of a copy of the within Specification of Causes and Reasons for Reversal acknowledged *nunc pro tunc* this 30th day of September, A. D. 1920.

J. H. HARRISON,
Prosecutor of Pleas.

OPINION OF SUPREME COURT.

Filed July 19, 1921.

NEW JERSEY SUPREME COURT.

February Term, 1921.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

MAX NIEBERG,
Plaintiff-in-Error.

On error to the Essex County Court of Quarter Sessions.

Submitted March 23, 1921; decided July 18, 1921.

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

Edward Schoen for plaintiff-in-error.

J. Henry Harrison, Prosecutor of the Pleas, and Wilbur A. Mott, Assistant Prosecutor of the Pleas, for defendant-in-error.

Per curiam:

The writ of error in this case brings up for review the conviction of the defendant below in the Essex Quarter Sessions under an indictment found under Sec. 98 of the Crimes Act, relating to the keeping for barter and sale of liquor adulterated or manufactured with spurious and poisonous ingredients. On December 4th, 1919, the defendant, Nieberg ,sold to one Vesey, a saloonkeeper in Newark, whiskey, which Vesey's bartender retailed. One Sylvester Coleman purchased and drank some of this whiskey and soon after died. Coleman's attending physician testified that he died of wood alcohol poisoning. The same points with reference to the form of the indictment, lack of knowledge on the part of the defendant that the whiskey was poisonous and lack of wrongful or criminal intent were raised in this case as in the case of State *vs.* Solomon, submitted at the February Term, 1921. These questions were considered in the Solomon case and decided adversely to the plaintiff-in-error in that case.

In the present case we hold to the same rulings on these questions as in the Solomon case and decide them adversely to the contentions of the plaintiff-in-error.

There are several questions relating to the admission and exclusion of evidence which have been brought up for review under the writ of error and these will be now considered. In the examination of Thomas F. Vesey, who purchased of the defendant, Nieberg, the whiskey which was subsequently sold to Coleman, Vesey was asked this question: "Did you sell him any whiskey that day?" This question was objected to on the ground that it was inadmissible unless there was shown in the case a concert of action between Vesey and the defendant and that no evidence of the act of the witness when the whiskey was in his possession was compentent or binding upon the defendant. The question was permitted to be answered upon the theory that it identified the liquor sold to Sylvester Coleman as the liquor purchased by the witness from the defendant. We think the ruling of the Court in the allowance of the question proper, as it was a link in the chain of evidence necessary to be offered by the State to prove that the liquor sold to Coleman was that which had been kept for barter or sale by the defendant.

The next assignment of error relates to the question asked Dr. Friedman, an expert witness for the State. Dr. Friedman had been requested to examine some of the liquor alleged to contain wood alcohol and was asked: "And what did you find?" This question was objected to on the ground that it had not been shown that the sample taken had been in the possession of the defendant. The Court overruled this objection. Whether or not the sample that the witness had analyzed had been in the possession of the defendant was a question of fact to be decided by the jury. The State contended that the sample submitted to the witness had been in the possession of the defendant. It was, therefore, proper for the witness to testify as to what he had found in the sample. This testimony could in no way affect the defendant upon the question as to whether or not the sample which the witness had in his possession had been in the possession of the defendant. We find no error in the ruling of the Court upon this point.

The next question objected to was one asked of Strong, the bartender of Vesey. This witness was asked the following question: "After Sylvester came in, what was done?" This ques-

tion was objected to upon the same ground as the question asked of Vesey. We think the question competent upon the same grounds that we held a similar question asked of Vesey competent.

The next question asked to which an exception was taken was one directed to J. Joseph Quinn, a member of the Newark police department. He was asked this question: "Now, while you were at Vesey's place, what did you do? What was done there?" This question was objected to because it related to what was done in the absence of the defendant. The answer to the question was that the witness had confiscated three whiskey containers. We think it perfectly competent for the State to prove in such a case as this the taking of the whiskey containers in the place of Vesey. It was but a part of the testimony offered by the State to identify the whiskey found in Vesey's place as a part of the whiskey purchased from the defendant, and then to follow it into the hands of the chemist who made the analysis of the liquor.

There are several assignments of error based upon the offer of containers taken from Vesey's saloon. The ground of the objections is that there was no evidence that the exhibits offered were ever in the possession of the defendant, as charged in the indictment. We are of the opinion that the exhibits were properly admitted. There was evidence that the contents of the containers had been obtained when in the possession of the defendant. With this evidence in the case the exhibits were properly admitted.

The Court overruled the following question asked Dr. Edel upon cross examination: "Is the quantity of wood alcohol that you have calculated to have been present in twenty ounces of beverage that you examined less than the minimum which could cause the death to which you have referred?" The witness had quoted one Reid Hunt in saying that two teaspoonfuls are the minimum. The prosecutor pointed out that if the question related to what Dr. Reid Hunt said was the minimum, it should be so expressed, or if the defendant wished to draw from the witness his opinion as to what was the minimum, he should so frame the question. We consider this objection well taken and the action of the Court in overruling the question proper.

The defendant further contends that the Court erred in refusing to permit the witness, Edward F. Coleman, to answer this

question: "And since prohibition has come in, and liquor is hard to get, have you and Sylvester and the other men discussed the question that there is wood alcohol in the plant?" This question was properly overruled in our opinion because whether or not there had been a discussion between Edward F. Coleman and his deceased brother, Sylvester, and others had no bearing or relation to the crime for which the defendant was indicted.

The judgment below will be affirmed with costs.

Remittitur.

REMITTITUR.

Filed July 21, 1921.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* MAX NIEBERG, *Plaintiff-in-Error.*	*On Error.* *Remittitur.*

This cause having been submitted at the February Term, nineteen hundred and twenty-one, of this court, by J. Henry Harrison, Esq., and Wilbur A. Mott, Esq., attorneys for defendant-in-error, and Edward Schoen, Esq., attorney for plaintiff-in-error, and the Court having considered the same and finding no error in the record and proceedings in 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 this judgment and the practice of said court.

Entered July 21, 1921.

On motion of

J. H. HARRISON,
Prosecutor of the Pleas.

ASSIGNMENT OF ERROR.

Filed September 7, 1921.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, *Defendant-in-Error,*	*On Error.*
vs.	*Assignment of Error.*
MAX NIEBERG, *Plaintiff-in-Error.*	

Afterwards, on the return day of the writ of error issued in this cause in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Max Nieberg, plaintiff-in-error, by Edward Schoen, his attorney, and says that:

In the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error in this writ, to wit:

1. Because the Supreme Court affirmed the verdict and judgment aforesaid, whereas the said verdict and judgment should have been reversed.

Therefore, said plaintiff-in-error, Max Nieberg, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors, and all other errors appearing in the record and proceedings aforesaid, and upon the giving of judgment and passing of sentence aforesaid, be reversed, cancelled and held for nothing, and that the said Max Nieberg may be restored to all things by him lost on occasion thereof.

EDWARD SCHOEN,
Attorney for Plaintiff-in-Error.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* MAX NIEBERG, *Plaintiff-in-Error.*	*On Error to the Supreme Court.*

BRIEF OF DEFENDANT-IN-ERROR.

The indictment in this case was founded upon Section 98 of the Crimes Act of 1898. This section reads as follows:

> "98. Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part to be used as a beverage, that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

THE INDICTMENT (p. 3) contained two counts:

The first count charges that Max Nieberg * * *

> "unlawfully did keep in his possession for barter and sale certain spirits, to wit, twenty gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit, wood alcohol."

The second count is in the same form as the first count, except that the word "manufactured" is substituted for the word "adulterated."

THOMAS F. VESEY, a saloonkeeper of 172 Orange street, Newark, testified (p. 9) that on Saturday, December 4, 1919, Nieberg came into his place of business. Vesey told him he was in need of some whiskey, and Nieberg told him

he could help him out. Vesey gave him an order for twenty gallons of whiskey, for which he was to pay $15 per gallon. Nieberg delivered at Vesey's place of business twelve gallons of whiskey. The whiskey was delivered (p. 10) in a two-gallon demijohn, a five-gallon Great Bear Spring Water bottle and a five-gallon tin can.

Vesey says (p. 10, l. 14):

> "I handed the two-gallon demijohn to the bartender and he filled it up into a quart bottle we were using and put it on sale."

Later on Vesey took about half a gallon of whiskey out of the tin container and put it in the same working bottle. He sold over the bar all of the whiskey in the two-gallon demijohn (p. 11), and half a gallon out of the five-gallon tin can.

Then five minutes after the "stuff" was delivered to Vesey he saw his bartender, Thomas Strong, sell some of this whiskey to Sylvester Coleman.

Richard John Coleman testified (p. 40) that he was in Vesey's saloon on Saturday, December 6th (p. 40); that his brother Sylvester came in and they had some drinks which were served by the bartender, Thomas Strong. They had several drinks, maybe eight or ten. Sylvester drank whiskey; Richard drank gin and beer. Sylvester Coleman died the following Monday.

Dr. Le Roy Kirkman, a practicing physician, testified (p. 52) that he was called to attend Sylvester at his home; that he arrived there at about ten o'clock in the morning of December 8th. The doctor said (p. 52, l. 20):

> "When I found him I found that he was suffering apparently from a poison of some kind. He had very persistent vomiting, and his eyes were beginning to grow dim. He was unable to see very well, and the suspicion pointed to wood alcohol poisoning. * * * I diagnosed it as a probable wood alcohol poisoning."

The case comes up on a strict bill of exceptions, and on the entire record under the 136th section. There are thirty-five assignments of error and ten specifications for reversal.

POINT I.

A motion was made (p. 7) to quash the indictment upon three grounds.

First, that the indictment does not set out an indictable offense against the defendant; there is no allegation that he kept the alleged adulterated whiskey in his possession to be used as a beverage.

Second, there is no averment that the defendant knew of the fact alleged.

Third, there is no averment of an intent upon the part of the defendant.

The motion to quash was denied.

We respectfully submit that the motion to quash was properly denied.

A careful reading of section 98 of the Crimes Act will show that the words "to be used as a beverage" refer to the word "liquid," and not to the first branch of the section. We think that section 88, so far as the words "to be used as a beverage" is concerned, should be construed by the same rule that has been applied in the construction of section 66 of the Crimes Act.

> "It has long been settled that the exception contained in section 66 of the Crimes Act does not relate to the first branch of the section, which prohibits the sale of any vinous, spirituous, or other ardent spirits, but only to the second branch, which prohibits the sale of 'any *composition* of which any of said liquors shall form the chief ingredients.'"
>
> *State* v. *Terry,* 43 Vr., at 382;
>
> *Townley, ads., State,* 3 Harr. 311;
>
> *State* v. *Marks,* 36 Vr. 84.

The liquors mentioned in the first branch of section 98 are presumed to be for beverage purposes, while the "*other liquid* of which distilled spirits of any kind shall form a component part," may or may not be for beverage purposes, and, therefore, the words "to be used as a beverage" relate only to the words, "*other liquid.*"

The second ground on which the motion to quash is based is that there is no averment that the defendant knew of the alleged fact, to wit, that the whiskey was adulterated with a poisonous ingredient, and the third ground is that there is no averment of an intent on the part of the defendant.

As to the second ground, we say that the 98th section does not make knowledge a part of the crime. Indeed, if the defendant knew that the whiskey he sold contained a poisonous ingredient, and death resulted from drinking it, he would have been guilty of murder in the first degree, under the statute.

Knowledge is not an element in this crime.

Vandegraft v. *Meihle,* 37 Vr. 92;
Waterbury v. *Newton,* 21 Vr. 534;
Tomlinson v. *Armour,* 74 N. J. L. 274.

As to the third ground, we submit that it was not necessary to aver any other intent than that set out in the statute. The statute says, "keep in his possession for *barter and sale.*"

The indictment charges that the whiskey kept in possession was "for barter and sale." The statute does not make intent an element of the offense, and, therefore, it was not necessary to aver a special intent in the indictment.

Halsted v. *State,* 12 Vr. 552;
State v. *Kuehnle,* 56 Vr. 221, at 225.

We respectfully submit that there was no error in denying the motion to quash.

POINT II.

This point alleges error in denying the motion in arrest of judgment.

A motion in arrest of judgment was made (p. 136) and denied. This motion is based on five grounds, all of which attacked the validity of the indictment on the same grounds as were stated on the motion to quash. If, as we think, the motion to quash was properly denied, the motion in arrest of judgment was also properly denied.

POINT III.

At the close of the State's case a motion was made to direct a verdict of not guilty on four grounds. This motion was denied. The first ground on which the motion to direct a verdict was based was that there was no evidence tending to establish the guilt of the defendant. A sufficient reply to this is, that Vesey bought twelve gallons of whiskey from the defendant. The fourth ground was that there was no evidence that the alleged beverage, as mentioned in the indictment, was found in the possession of the defendant.

The evidence of Vesey showed that he bought the whiskey of the defendant and the defendant delivered it to him at his place of business.

The second ground was that there was no evidence of scienter, or knowledge of the defendant, that the beverage in question was adulterated. This point has been covered by the argument on the motion to quash.

As to the fourth ground, we say that the evidence shows that Albert E. Edel, a qualified chemist (p. 84), made a chemical analysis of some of the whiskey sold to Vesey by Nieberg, and found that it contained large and fatal quantities of wood alcohol, and that wood alcohol was a poison

(p. 97, l. 18). The liquor was sold by Nieberg as whiskey, and Vesey bought it as whiskey.

> "In this state of the case, the jury was justified in finding that the liquor sold was what it was inferentially represented to be."
> *State* v. *Marks*, 36 Vr., p. 87.

A motion to direct a verdict was not renewed at the conclusion of the case.

We respectfully submit that there was an abundance of evidence at the conclusion of the State's case to justify the refusal of the Court to direct a verdict.

POINT IV.

This point deals with alleged error in the charge of the Court, and is based on Assignments of Error 17 and 18, and Specifications 9 and 10.

The only error alleged in the portions of the charge set out in Assignment 17 and Specification 9 is that the Trial Judge failed to charge the jury that they must find that the whiskey was to be used as a beverage. This point we have already discussed under the motion to quash.

The only error pointed out in the portion of the charge set out in Assignment 18 and Specification 10 is that the Court failed to charge that the jury must find that the defendant had knowledge that the whiskey he had in his possession and sold to Vesey was adulterated with a poisonous ingredient. This point has also been discussed under the motion to quash.

POINT V.

This point alleges error in the refusal of the Court to charge second, fourth, ninth, tenth and thirteenth requests to charge.

Each one of these requests involves the proposition that knowledge was an essential element of the offense, and, therefore, for the reasons already stated, the Court properly refused to charge.

The State did not base the indictment on "*keeping in possession,*" as stated on page 14 of the brief for the plaintiff-in-error, but on *keeping in possession for barter and sale.*

That the defendant did have adulterated whiskey in his possession for barter and sale is shown by the fact that he did sell it to Vesey.

On page 15 of his brief counsel for the plaintiff-in-error discusses Assignment 30, which alleges error because the Trial Court refused to charge the twelfth request to charge, which is as follows:

> "12. If the jury have a reasonable doubt that the defense has been made out, the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty."

Whether or not the principle stated in this request is sound law as applied to self-defense, it certainly is not a sound principle of law, generally, where self-defense is not involved. The State must prove the defendant's guilt beyond a reasonable doubt. The defendant is not required to prove his innocence beyond a reasonable doubt.

The charge of the Court on the question of reasonable doubt will be found on page 124, and we submit that that portion of the charge correctly stated the legal principle involved.

POINT VI.

This point alleges that illegal evidence was admitted, and is based on Assignments 3, 4, 6, 7, 9, 10, 11, 12 and 13.

The question involved in Assignment 3 will be found on page 11, line 25. The only ground of objection that was stated to the Court was "I object unless there is shown in this case a concert of action between him and this defendant."

The purpose of this testimony was to show that some of the liquor purchased by Vesey from Nieberg was sold to

Sylvester Coleman, and that, as Richard Coleman testified (p. 41, l. 39), Sylvester drank nine or ten drinks of the whiskey. The particular question now involved was answered by Vesey (p. 12, l. 29).

> "I don't recall what kind of a drink was sold to him."

The purpose of showing that Sylvester Coleman drank eight or ten drinks of the whiskey that Nieberg sold Vesey was to show that, shortly after, Sylvester was stricken with blindness, and then died. That Dr. Kirkman diagnosed the case as a case of wood alcohol poisoning (p. 53, l. 1); that Dr. George L. Warren, the County Physician, who performed the autopsy on Sylvester, found, "In my opinion a case of wood alcohol poisoning" (p. 105, l. 30); that Dr. Edel, who was present at the autopsy (p. 88, l. 10), took the brain, kidney, liver, stomach, stomach contents and some blood from the body of Sylvester, made a chemical analysis and found an oxidation of the product of wood alcohol. This was a part of the evidence that the whiskey sold by Nieberg to Vesey was adulterated with wood alcohol.

ASSIGNMENT 4 relates to a question asked of the witness Friedman (p. 49, l. 21), who was a chemist, and to whom Vesey took some of the whiskey which he had purchased from Nieberg. The answer to the question was, "I found that it contained traces of wood alcohol."

The specimen about which the witness was asked to testify was connected with the defendant by the fact that Vesey testified that he took to Friedman some of the whiskey he purchased from Nieberg.

ASSIGNMENT 6 is based on a question asked of the bartender, Thomas Strong (p. 61, l. 33), and answered by the witness on page 62, that he served Sylvester five or six drinks of whiskey out of the working bottle. Vesey testified that he, from time to time, filled his working bottle with whiskey he had bought from Nieberg.

ASSIGNMENT 7 relates to a question asked of the witness Quinn (p. 69, l. 10), who was a police officer.

> "Q Now, while you were at Vesey's place, what did you do—what was done there? A Confiscated the three whiskey containers."

The ground of the objection to this question was that it sought to elicit evidence of transactions occurring in the absence of the defendant.

The purpose of the testimony was to identify the whiskey found in Vesey's saloon which Vesey said was a part of the whiskey he had purchased from Nieberg, and to follow it into the hands of Edel the chemist.

ASSIGNMENTS 9, 10, 11 AND 12 relate to the admission in evidence of Exhibits S. 3, S. 4, S. 5 and S. 6, which contained a part of the whiskey sold by Nieberg to Vesey, and had been submitted to Edel, the chemist, for examination.

There was no error in admitting these exhibits.

Of the container into which he poured the whiskey, Vesey says (p. 32, l. 15).

> "I had cleaned it out thoroughly with water before I put the contents of the five-gallon tin can into the jug; cleaned it out myself."

POINT VII.

This point alleges that legal evidence was excluded, and is based on Assignments 14 and 15..

The question involved in Assignment 14 will be found on page 100, line 6.

> "Is the quantity of wood alcohol that you have calculated to have been present in twenty ounces of beverage that you examined less than the minumum which could cause death to which you have referred?"

We submit that the form of this question is improper for the reasons stated by the prosecutor at the time.

The witness had just been cross examined in regard to some statements made by Dr. Reed Hunt. The question, as framed, was misleading, for the reasons stated on the record (p. 100), and was, therefore, improper.

ASSIGNMENT 15 is based on a question asked of Edward Francis Coleman, found on page 104, line 27, and is as follows:

> "And since prohibition has come in, and liquor is hard to get, have you and Sylvester and the other men discussed the fact that there is wood alcohol in the plant?"

This question was clearly incompetent. Whatever discussion Edward Coleman may have had with his brother Sylvester about liquor being hard to procure was certainly immaterial, and we submit that the question was properly excluded.

On the whole case, therefore, we respectfully submit that there is no error in the record, and that the judgment below should be affirmed.

J. H. HARRISON,
Prosecutor of the Pleas.

WILBUR A. MOTT,
Assistant Prosecutor.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* MAX NIEBERG, *Plaintiff-in-Error.*	*On Error.*

BRIEF OF PLAINTIFF-IN-ERROR.

Facts.

The indictment against the defendant alleged that he "unlawfully did keep in his possession for barter and sale, certain spirits, to wit, twenty gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit: wood alcohol." And further that he "unlawfully did keep in his possession for barter and sale, certain spirits to wit, twenty gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit: wood alcohol."

The crime with which the defendant was charged was a purely statutory one, and the statute upon which it is based is found in the Compiled Statutes, Vol. II, page 1777, par. 98. It is as follows:

> "Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part *to be used as a beverage,* that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

The State's case rested largely on the evidence of one Vesey (Case, p. 8). He testified that he was a saloonkeeper, and that on or about the day named in this indictment he bought twelve gallons of whiskey from the defendant.

The defense was a denial (Case, pp. 112, 113, 114, 116 and 117). The defense also claimed that indictment failed to charge the commission of a crime.

Specification of Errors Relied On.

1. The refusal of the Trial Judge to quash the indictment.
2. The denial of the motion in arrest of judgment.
3. The refusal of the Trial Judge to direct a verdict of not guilty in favor of the defendant.
4. The admission of improper evidence.
5. Exclusion of evidence.
6. Because the Trial Judge erroneously charged the jury.
7. The refusal to charge as requested.
8. The violation of the constitutional rights of the defendant by a trial and judgment without the indictment of a Grand Jury charging a crime.
9. The violation of the constitutional rights of the defendant in imposing judgment and sentence without the verdict of a jury finding the defendant guilty of a crime.

POINT I.

The Court erred in denying the motion to quash the indictment.

The motion to quash was made on the following grounds (Case, p. 7):

First, that the indictment does not set out an indictable offense against the defendant; there is no allegation that he kept the alleged adulterated whiskey in his possession *to be used as a beverage;* second—there is no averment the defendant knew of the fact alleged; third—there is no averment of an intent upon the part of the defendant.

The offense with which the defendant was charged was purely statutory. The elements of the crime are embodied in the statute.

> "Any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine or spirits of any kind, or any other liquid of which distilled spirits of any kind shall form a component part *to be used as a beverage,* that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor."

The indictment does not allege that the defendant had the alleged adulterated liquor in his possession, *to be used as a beverage.* The crime consists in having in possession certain prohibited agencies for barter or sale, *to be used as a beverage.* The

material averment in this case is that the prohibited agency was *to be used as a beverage.* No such averment appears in the indictment. The statute denounces as a crime the possession of certain things, only when in possession to be sold for a prohibited purpose, viz.: *to be used as a beverage.* The possession of these things for any other purpose than as a beverage is not denounced as a crime in the statute. There is a distinct limitation in the statute that the possession of the liquors therein enumerated, is criminal only when they are *to be used as a beverage.* The possession of the things enumerated in the statute may be perfectly legal for every purpose except the purpose prohibited by the statute itself, viz.: *to be used as a beverage.*

Com. v. *Schollenberger,* 153 Pa. St. 625; *Com.* v. *Callahan,* 1 Pa. Dist. Rep., are directly in point. These are oleomargarine cases. The Pennsylvania oleomargarine act makes it unlawful to sell oleomargarine *as an article of food.* In the cases *supra,* the Court said:

> "In order to convict * * * it is necessary to show that he sold the oleomargarine *as an article of food.* If it was sold for some other purpose, as, for instance, for wagon grease, it would not be a violation of the law."

So, in this case, it is easily conceivable that a person may be in possession of any one of the prohibited agencies and may have them in possession for barter or sale for entirely legitimate purposes, and be guilty of no crime. It is safe to say that every druggist in the State of New Jersey, and many liquor houses, have in their possession, for barter or sale, alcohol which has been denatured and adulterated with poisonous ingredients in order to prevent its use as a beverage. In fact the Federal law requires all grain alcohol to be denatured and adulterated to prevent its use as a beverage. If the form of indictment used in this case, omitting the allegation that the liquor was to be used as a beverage, is good, then every druggist or other person having denatured alcohol in his possession for barter or sale, would be indictable. This would lead to results that surely were not intended. The material averment, equally as essential as the averment describing the liquid, and that it was in possession of the defendant with intent to barter or sell the same, is that it was *to be used as a beverage.* It is entirely lawful for every purpose and for every use except *to be used as a beverage.*

The essential element of the statutory offense, that it was *to be used as a beverage,* is omitted in this indictment. Everything necessary to maintain the indictment must be set forth.

> "In indictments for misdemeanors created by statute, the offense may be charged either in the words of the statute or there may be such a particular statement of fact as will bring the accused within its operation." *State* v. *Thatcher,* 35 L., p. 445, at p. 447.

> "As to statutory offenses, the invariable rule is that every fact mentioned in the statute as constituting the crime must be averred in the indictment." *State* v *Smith,* 46 L, p. 491.

To warrant a conviction under this statute the following facts must appear:

1. The defendant must keep in his possession rum, brandy, wine or spirits of any kind, or any other liquid, of which distilled spirits of any kind shall form a component part.

2. He must keep them in his possession for barter or sale.

3. *To be used as a beverage.*

4. They must be adulterated or manufactured with spurious or poisonous ingredients of any description.

These are essential elements of the offense. The presence of *each* and *all* of them is necessary to conviction, and the absence of any one of them is fatal to the case of the State.

> "Every material fact necessary to constitute the crime in question must be averred in the indictment and then proved by the prosecuting power." 1 Bish. Crim. Proc. Par. 1057.

The question is whether all the constituent parts of the offense denounced by the statute are averred in this indictment.

In *State* v. *Smith,* 46 L., p. 491, the defendant was indicted under an act to suppress the sending of indecent communications. This act made it a misdemeanor * * * for any person to send to any female * * * indecent letters, etc. * * * *without lawful purpose in sending or conveying the same.* The indictment charged the defendant with unlawfully sending such a letter, but did not allege that he did so *without lawful purpose in sending the same.* For this defect the defendant moved

to quash the indictment. Justice Dixon, speaking for the Court, said:

> "The absence of a lawful purpose in sending the communication is undoubtedly made by the statute a necessary ingredient of the offense, and therefore if the indictment does not charge it, it is insufficient."
>
> "We therefore cannot see, on the face of the indictment that the Grand Jury were satisfied that the defendant had committed a misdemeanor, and for this reason the indictment must be quashed."

Zab v. *State,* 14 Vr. 640, was cited approvingly.

Polhamus v. *State,* 57 L., p. 348, is to the same effect:

> "In charging a statutory crime, unknown to common law, every essential fact must be clearly stated. Where the indictment is silent on a material fact, no presumption against the defendant will aid it. Presumably, all that the Grand Jury heard and found is in the indictment, and if, as it stands, all that is in it may be true and still the defendant be innocent, he cannot be called to trial upon it according to law."

Citing *State* v. *Malloy,* 5 Vr. 410; *Zab* v. *State, supra; State* v. *Smith, supra.*

In *State* v. *Malloy,* 5 Vr. p. 410, Justice Scudder says:

> "The rule is thus given in Sedg. Stat. & Const. L., 115: An indictment for an offense against a statute must, by the ancient rules of pleading, with precision and certainty charge the defendant to have committed or omitted the acts under the circumstances, and with the intent mentioned in the statute, and if *any* of these ingredients be omitted, the defendant may demur and move in arrest of judgment or bring a writ of error. The defect will not be aided by verdict nor be cured by the formal conclusions that the defendant's acts are *contra formam statuti.*"
>
> "This is but a repetition and summary of what will be found in all the books. Arch. Cr. Pl., 46 a. (Ed. 1840); Arch. Cr. Prac. & Pl. (Vol. 1, 282, Ed. 1860); 2 Hale's Pleas of the Crown, 170; 1 Wharton's Am. Cr. Law, Sec. 364, &c.; People *v.* Gates, 13 Wend. 311; People *v.* Allen, 5 Denio 76; State *v.* Gibbons, 1 South. 40; State *v.* Stimson, 4 Zab. 9; State *v.* Drake, 1 Vr. 422; Rex *v.* Wheatley, 2 Burr. 1125. In the last case Lord Mansfield says that in a criminal charge there is no latitude of intention to include anything more than is charged. The charge must be explicit enough to support itself."

at p. 415:

"The averment omitted is, therefore, an essential ingredient of the offense, and cannot be left to conjecture. The exactness required in criminal pleadings, especially in cases of statutory crimes, does not admit of such latitude of intention."

This case does not present the situation of the use of equivalent words for those used in the statute, which would be permissible, as stated in *State* v. *Hickman,* 3 Halstead, 299. Here there is not a substitution of equivalent words for the words of the statute, but an *omission.* An omission of any material averment, which is descriptive of the offense charged, is fatal.

The omission of the words *"to be used as a beverage"* in the indictment in this case, is an omission of an essential ingredient of the offense, and cannot be left to conjecture.

In comparing the indictment in this case with the law, an important omission is apparent. An essential ingredient of the offense, as it appears in the statute, is omitted from the indictment, viz: *"to be used as a beverage."*

"An indictment under a statute must bring the offense expressly, and not by intendment only, within its words." *State* v. *Gibbons,* 4 L. at p. 48.

"An indictment founded upon a statute must, by express words, bring the offense within the description of the statute, and such words cannot be supplied by the general conclusion, 'against the form of the statute,'" etc. *State* v. *Gibbons,* 4 L. at p. 56.

"It is a settled rule that in an indictment nothing material shall be taken by intendment or implication." *State* v. *Gibbons,* at p. 57.

"Again it is a general rule that neither the words 'against the form of the statute' * * * intendment or conclusion will make good an indictment which does not bring the fact prohibited or commanded in the doing or not doing of which the offense consists, within the very words of the statute." *State* v. *Gibbons,* at p. 57.

"Further, where the words of the statute are descriptive of the nature of the offense, the indictment must follow the very words, and expressly charge the offense upon the defendant." *State* v. *Gibbons,* at p 57.

"In a criminal charge there is no latitude of intendment to include anything more than is charged." *State* v. *Gibbons,* at p. 57.

> "The indictment must bring the party precisely within the words of the statute, otherwise, although possibly the fact may be within the statute, and though it may appear so in the evidence, yet if it be not alleged in the indictment in express words, the party though convict, shall have his clergy." *State* v. *Gibbons,* at p. 57.

Applying these rules to the case before us, the indictment clearly fails to set forth the essential ingredients of the crime denounced in the statute in the express words of the statute, or in words that are equivalent.

The indictment should have been quashed upon the motion that was made.

POINT II.

The Trial Judge erred in denying the motion in arrest of judgment.

Before judgment and sentence in this case, defendant's counsel moved in arrest of judgment, on the following grounds:

> First. Because the indictment upon which the defendant was tried, charged no crime, in that it does not set forth that the whiskey named in the indictment was *to be used as a beverage.*
>
> Second. Because the constitutional rights of the defendant were invaded by a trial without the indictment of the Grand Jury charging a crime.
>
> Third. Because there is no verdict finding the defendant guilty of any crime, and therefore no judgment and sentence can be imposed.
>
> Fourth. Because the constitutional rights of the defendant will be invaded by the judgment and sentence in this case because the defendant had not been convicted of a crime, and
>
> Fifth. Because the indictment does not set forth an indictable offense, for the same reason that it does not set forth that the whiskey named in the indictment was *to be used as a beverage.*

The first and fifth grounds upon which the motion in arrest of judgment was based are the same as the ground upon which the motion to quash the indictment was made, and the argument and authorities quoted in Point I are relied upon to support the contention of the defendant. The second ground

for the motion rests in Section 9, Article I of the Constitution, which is as follows:

> "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a Grand Jury."

True, there exists in this case what purports to be an indictment against the defendant, but if the contention of the defendant is sound that the indictment against him charges no crime, then in effect, it is no indictment, and hence his trial was upon an indictment which charged no crime, and in this respect his constitutional rights under the section of the constitution above referred to, were invaded.

In considering the third and fourth grounds for the motion in arrest, the form of the verdict must be considered. The jury found the defendant "*guilty in manner and form as charged in this indictment.*" (Case, p. 6, fol. 10.)

With what does the indictment charge him? If the indictment charges no crime, then the verdict of "guilty in manner and form as charged in this indictment" does not find him guilty of any crime, and therefore no judgment and sentence can be imposed.

In the first count:

> "That he unlawfully did keep in his possession, for barter and sale, certain spirits, to wit: twenty gallons of whiskey, which had been then and there adulterated with spurious and poisonous ingredients, to wit: wood alcohol, contrary to the form of the statute."

In the second count:

> "That he unlawfully did keep in his possession for barter and sale, certain spirits, to wit: twenty gallons of whiskey, which had been then and there manufactured with spurious and poisonous ingredients, to wit: wood alcohol, contrary to the form of the statute."

The jury could only find that he had the possession of twenty gallons of whiskey for barter or sale, but whether in truth and in fact it was *to be used as a beverage* or not, they could not find, for it was not in the issue.

Because, then, the indictment does not follow the very words of the statute, nor expressly charge the very offense created upon the defendant, and because there can be allowed no latitude of intendment to include anything more than is charged, and because the verdict is inoperative, and no judgment could be passed upon it, the motion in arrest should have prevailed. No

judgment could be passed upon the verdict finding the defendant "guilty in manner and form as charged in this indictment." The indictment having set forth no crime, his conviction "in the manner and form charged," convicts him of nothing. A precisely similar situation arose in the case of *State* v. *Gibbons*, 4 L. at p. 58.

POINT III.

The Court erred in refusing to direct a verdict in favor of the defendant.

The motion to direct a verdict in favor of the defendant was made on the following grounds (Case, p. 111, fols. 30-40):

1. There is no evidence tending to establish the guilt of the defendant.

2. That there is no evidence of *scienter* or knowledge of the defendant that the beverage in question was adulterated.

3. That there is no evidence that the beverage produced and offered in evidence comes within the description of the forms of the beverage denounced in the statute.

4. That there is no evidence that the alleged beverage as mentioned in the indictment was found in the possession of the defendant.

This motion should have prevailed because there is no evidence in the case that the liquid alleged to have been in the possession of the defendant was in fact whiskey, or any one of the other prohibited agencies named in the statute. The evidence of the chemist who analyzed the liquid (Case, pp. 84 to 101) fails entirely to identify the character of the liquid as one of the prohibited agencies named in the statute. Further, there was no evidence that the defendant knew that the liquid was adulterated, nor that it was found in the possession of the defendant. On the contrary the evidence on the part of the State was to the effect that the liquid was found in the possession of one Thomas F. Vesey at his place of business, 172 Orange street, Newark (Case, p. 8). It is not contended by the State that the defendant was the owner of this place, or that he had any interest therein. The evidence of the police officer who appeared as witness for the State, was to the same effect, that the liquid named in the indictment was found by him in the possession of Vesey, at his place of business (Case, pp. 68 to 79).

POINT IV.

The Trial Judge erroneously charged the jury.

Assignment of Error #17 and Specification #9 relate to the following portion of the charge of the Court, which it is contended was erroneous.

> "It is therefore necessary for the State to prove, and for you to find, beyond a reasonable doubt, on the evidence before you can convict the defendant, that this defendant did keep in his possession for barter and sale, spirits of the kind to wit; whiskey, and that the same was then adulterated and had been manufactured with spurious or poisonous ingredients of any description."

The Trial Judge, in this portion of the charge, omitted an essential element of proof required for conviction, viz: that the alleged adulterated liquid was to be used as a beverage. This was a serious omission. After having read the portion of the statute upon which the indictment was based, in which all the essential ingredients of the crime are enumerated, the Trial Judge followed this with this significant statement:

> "It is therefore necessary for the State to prove, and for you to find, beyond a reasonable doubt, on the evidence before you can convict the defendant that this defendant did keep in his possession for barter and sale, spirits of the kind, to wit: whiskey, and that the same was then adulterated or had been manufactured with spurious or poisonous ingredients of any description."

This amounted to a positive instruction that although the statute which the Trial Judge had just finished reading, names as one of the essential ingredients of the crime that the prohibited agency was *to be used as a beverage,* the State is not required to prove this in order to convict the defendant. It may fairly be inferred that this omission was a deliberate one because that very point had been brought to the attention of the Trial Judge on the motion to quash the indictment because of a similar omission in the indictment.

The statute (Comp. Stat. Vol. II, p. 1777, par. 98), makes the purpose for which the prohibited agencies are kept in possession, the test by which to determine the criminality or innocence of the person so keeping it. The Trial Judge in omitting this portion of the statute, in his enumeration of the elements of proof, required for conviction, omitted the most important element.

It was the right of the defendant to have every element of the crime necessary for conviction enumerated to the jury. It is the *purpose* for which the prohibited agency is kept in possession which makes the offense criminal. By omitting this element of proof as one of the requisites for conviction, the jury were left in ignorance of the fact that the purpose for which the liquids are kept in possession is a necessary part of the proof, and hence the jury was left free to convict upon mere evidence of possession, not having been instructed that the purpose for which it is kept in possession must be proven as an essential ingredient of the crime. The omission of an important ingredient of the offense enumerated in the statute began with the framing of the indictment, and was supported by the Trial Judge in his refusal to quash the indictment, and was now reaffirmed and emphasized in the charge in omitting it in the enumeration of the proofs necessary for conviction.

Assignment of Error #18 and Specification #10 relate to the following portion of the charge of the Court, which it is contended was erroneous:

> "It is not necessary that the State prove that he knew that the spirits were adulterated or contained poisonous ingredients."

In *R.* v. *Sleep,* 8 Cox. 472, a statute prescribed a penalty for having in possession government stores marked with a broad arrow. The defendant was indicted under this statute. It was held that the burden was on the Crown to show possession by the defendant with *knowledge* on his part that they were marked with a broad arrow. The Court said:

> "It is true that the statute says nothing about knowledge, but that must be imported into the statute." Citing Regina *v.* Cohen, 8 Cox. Crim. Cas. 41.

POINT V.

The Trial Judge erroneously refused to charge the jury as requested.

Assignments of Error Nos. 20, 22, 27, 28 and 31 relate to the refusal of the Trial Judge to charge the defendant's second, fourth, ninth, tenth and thirteenth requests, as follows, which presented to the Trial Judge, in varying forms, the principle that knowledge is essential to the crime charged against the defendant:

"(2) In order to convict the defendant it must be shown not only that the defendant had the alleged adulterated whiskey in his possession, but that he also knew that the whiskey was adulterated."

"(4) Although the statute says nothing about knowledge, that must be imported into the statute. Knowledge is, to a certain extent, essential to the crime charged against this defendant."

"(9) If the State has failed to prove, beyond a reasonable doubt, that the defendant knew, or had reason to know that the whiskey alleged to have been in possession, was adulterated with wood alcohol as alleged, your verdict should be not guilty."

"(10) Criminality cannot exist without knowledge. Knowledge of the defendant that the whiskey contained spurious and poisonous ingredients, to wit: wood alcohol, is an ingredient necessary to constitute his guilt, for without such knowledge the act charged as a crime, is innocent in its character, and the defendant should be found not guilty."

"(13) In measuring the duty and responsibility of the defendant in having the alleged beverage in his possession, he can only be charged with such knowledge of its ingredients as he then possessed, or reasonably ought to have known with the opportunities at his command. Knowledge derived from subsequent events or autopsies and unavailable or not reasonably inferable at the time of the alleged possession of the beverage, cannot be imputed to him."

In support of these requests the following authorities are relied on: *Regina* v. *Cohen,* 8 Cox. Crim. Cas. 41; *R.* v. *Sleep,* 8 Cox. 472. In *R.* v. *Sleep, supra,* Cockburn, *C. J.,* says:

"It is true that the statute says nothing about knowledge, but that must be imported into the statute."

Pollock, *C. B.,* says:

"I entirely agree that knowledge is, to a certain extent, essential to the crime."

Also *Birney* v. *State,* 8 Ohio, p. 230:

"*Scienter* or knowledge of the plaintiff-in-error, is an ingredient necessary to constitute his guilt. This knowledge should have been averred in the indictment and proved on the trial, for without such knowledge the act charged as a crime was innocent in its character."

"*Ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary."

1 Hale's P. C. 42:

> "It is true that the statute upon which the indictment is founded omits the *scienter* * * * but this is not sufficient; it cannot be assumed that an act * * * should be made grievously criminal when performed in total unconsciousness of the facts that infect it with crime."

In the case of *Anderson* v. *State,* 7 Ohio R. Part 1, 255, the plaintiff-in-error was indicted for uttering and publishing a forged certificate of deposit without averring his knowledge of such forgery. The statute under which this indictment was found does not in express terms, make this knowledge a constituent of the crime. Nevertheless, the Court held that *criminality could not exist without the knowledge,* and that an indictment that did not aver it was defective.

Assignments of Error Nos. 21, 25, 26 and 29 relate to the refusal of the Trial Judge to charge the defendant's third, seventh, eighth and eleventh requests, as follows, all of which present in varying forms, the principle that a guilty mind and a criminal intent must exist in order to convict the defendant:

> "(3) The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case."

> "(7) Ignorance in point of fact is, in all cases of supposed offense, a sufficient excuse."

> "(8) To make a transaction criminal, there must be both will and act entering into the transaction."

> "(11) The essence of a criminal offense is the wrongful intent, without which it cannot exist."

The authorities for these principles of law are as follows:

Farrell v. *State,* 32 Ohio St., p. 456:

> "To make a transaction criminal, there must be both will and act entering into the transaction." 1 Paine, C. C., 16-21; 1 Conn. 502-505; 1 Bish. Crim. Law, L. Sec. 301.

Bishop, in his work on criminal law, said (Sec. 287):

> "The doctrine which requires the existence of evil intent lies at the foundation of public justice. There is only one criterion by which the guilt of man is to be tested. It is whether the mind is criminal."

In *Regina* v. *Sleep* (*supra*), the Court said:

> "The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and it must be imported into the statute."

Myers v. *State,* 1 Conn. 503:

> "No man can be subjected to the penalty of a statute unless he is within both the letter and the spirit of it. * * * To render any act criminal, the intent with which it is done must be shown; or in other words, the will must concur with the act." 4 Bla. Com. 20, 24:
>
> "Hence ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse."

In *People* v. *Fulle,* 12 Abb. (N. C.) 196:

> "So far as the letter of the statute is concerned, it is made a crime for one to sell adulterated food or drugs irrespective of his intent, but it is claimed that a fair, just construction of the act not only requires proof of the sale of an adulterated article, but also that the sale was made with a criminal intent, * * * and in this claim, in my opinion, the counsel for the defendant is right."

Bishop, in his admirable work on the criminal law, in Section 287, 7 Ed., says:

> "The doctrine which requires an evil intent lies at the foundation of public justice. Crime cannot exist without a criminal intent.

Assignments of Error Nos. 23 and 24 relate to the refusal of the Trial Judge to charge the defendant's fifth and sixth requests as follows:

> "(5) In order to convict the defendant, the alleged adulterated whiskey must have been found in the possession of the defendant on his trial. If the defendant had parted with the possession of the whiskey and it was found in the custody of another, as in this case, in the custody of one Vesey, the defendant must be found not guilty."
>
> "(6) In order to convict the defendant upon this indictment, the alleged adulterated whiskey must be found while in the possession of the defendant."

These requests should have been charged as requested, because the statute specifically denounces the sale of any of the prohibited agencies as a crime, and also the keeping in possession. The State based the indictment on *keeping in possession,* and therefore it must be proven that the defendant did so keep in possession. If he parted with the possession, then he should have been indicted and tried for *selling* under the statute. Not having been so indicted, these requests should have been charged.

The early case of *R.* v. *Sleep,* 8 Cox, 472, dealt with a similar situation. In an opinion by Martin, *B.,* concurred in by Compton, *J.,* the principle embodied in these requests was enunciated. Crompton, *J.,* says:

> "Here there was plenty of evidence that the copper had once been in the possession of the defendant, but still, to constitute the offense, they must be found while in his possession."

Assignment of Error #30 relates to the refusal of the Trial Judge to charge the defendant's twelfth request as follows:

> "(12) If the jury have a reasonable doubt that the defense has been made out, the defendant is entitled to the benefit of that doubt, and the verdict should be not guilty."

This is a firmly established principle of law in this State, and the defendant was entitled to the benefit of it. *State* v. *Jones,* 71 L. at p. 547.

POINT VI.

Illegal evidence was admitted.

Assignment of Error #3 relates to the admission of a question to the witness Vesey (Case, pp. 11 and 12, fols. 10, 20, 30 and 40), as follows:

> Q Did you sell him any whiskey that day?

This question was addressed to the State's witness, and was objected to on the following ground:

> "I object, unless there is shown in this case a concert of action between him and this defendant. I submit that the evidence of the acts of this witness is not binding upon the defendant. The defendant is here upon an indictment for keeping in his possession these goods, not the other indictment for selling, and I submit under this indictment for keeping in possession no evidence of the act of this witness when they were in his possession are competent or binding upon this defendant."

An exception was taken to the admission of this question, and it is relied upon on the strict bill of exceptions for the reason stated to the Trial Judge.

Assignment of Error #4 relates to the admission of a question to the witness Friedman (Case, p. 49, fols. 20 and 30), as follows:

> Q And what did you find?

This question was addressed to the State's witness, a chemist, and was for the purpose of eliciting the result of a chemical analysis made by the witness of the contents of a bottle brought to him by Mr. Vesey. The specimen about which the witness was asked to testify was not connected with the defendant. The ground of objection stated to the Trial Judge was as follows:

> "I object. It has not been shown that the specimen or sample the doctor had was in the possession of the defendant."

An exception was taken to the admission of this question, and the ruling of the Trial Judge, is relied upon on the strict bill of exceptions, for the reason stated to the Trial Judge.

Assignment of Error #6 relates to the admission of a question to the witness Strong (Case, pp. 61 and 62, fols. 10 and 40), as follows:

> Q After Sylvester came in, what was done?

This question was addressed to a State's witness, and sought to elicit evidence of transactions in the absence of the defendant, and without proof that there was a concert of action between the defendant and the witness. The ground of objection stated to the Trial Judge was as follows:

> "I object to this question on the ground that unless there be shown a concert of action between this bartender and his employer and Nieberg, that they were acting for him; this evidence is incompetent and not evidential on the question of what the character of the liquor alleged in the indictment alleged to have been in the possession of Nieberg, was."

For the reasons stated to the Trial Judge, the defendant on the strict bill of exceptions respectfully submits that there was error in the ruling of the Trial Judge in admitting this question.

Assignment of Error #7 relates to the admission of a question to the witness Quinn (Case, p. 69, fols. 10, 20 and 30), as follows:

> Q Now, while you were at Vesey's place, what did you do, what was done there?

This question was addressed to a State's witness, and sought to elicit evidence of transactions occurring in the absence of the defendant. Objection was made on this ground (Case, p. 69, fols. 10, 20 and 30), and an exception taken.

Assignments of Error Nos. 9, 10, 11 and 12 relate to the admission of Exhibits S. 3, S. 4, S. 5 and S. 6. These exhibits

were bottles containing liquids and purported to be samples of liquids obtained in Vesey's saloon. The contents of the bottles constituting the exhibits were admittedly not taken from the possession of the defendant. There was also further affirmative evidence on the part of the State (Case, pp. 20, 21, 22 and 23), that the liquid which Vesey claimed the defendant brought to him were poured and repoured into other containers from time to time while in his possession. That whatever liquid was delivered to Vesey on Saturday was poured into a container selected by Vesey and remained therein from Sunday until Tuesday.

Objection was made to the admission of the exhibits (Case, p. 79, fols. 10 and 20), as follows:

> "And on the further ground that there is evidence in the case that whatever is alleged to have been received from the defendant by the testimony of Vesey, is upon the State's case shown to have been poured into other receptacles and repoured into receptacles, poured and repoured by Vesey, and that there is no evidence that the contents of the bottle now offered in evidence is in the same condition it was at the time of the alleged delivery."

An exception was taken to the ruling of the Court admitting the exhibits and it is relied upon on the strict bill of exceptions. The admission of these exhibits was followed by testimony of chemists, stating the result of a chemical analysis of their contents. They testified that the contents of the exhibits were found by them to be adulterated. This testimony of chemists, giving the result of a chemical analysis of the contents of the exhibits objected to, was the basis upon which the State relied for proof that the liquid alleged to have been in the possession of the defendant was in fact adulterated. In order to bind the defendant by this testimony, it was important that the exhibits should in fact consist of the very substance or thing which the defendant had in his possession. A liquid poured and repoured into various receptacles, none of which were sterilized, naturally and presumably acquires properties and ingredients which may not have been in it in its original receptacle. Therefore, it was manifestly prejudicial to the defendant to permit evidence of the result of a chemical analysis to be shown without proof that the liquid, at the time of the analysis, was in the same condition as when the defendant had it in possession. Not only did the State fail to prove that it was in the same condition, but on the contrary, the affirmative evidence of the

State was that the samples which constituted the exhibits did not come from the original receptacle in which the defendant is alleged to have kept the prohibited agency, but the liquid had been poured and repoured into various receptacles, over which the defendant had no control. Manifestly, the defendant cannot be chargeable with the condition of the liquid after the several repouring processes, and therefore the objection to their admission should have been sustained.

Assignment of Error #13 relates to the admission of a question to the witness Edel (Case, pp. 85 and 86, fols. 10, 20, 30 and 40), as follows:

Q Well, what did you find?

The ground of objection stated to the Trial Judge was as follows:

> "I object for the same reason stated in my objection to the introduction of the exhibit.
>
> *The Court.* That does not quite relate to this. Is it your contention that these bottles and their contents, rather, were never in the possession of Nieberg, according to the evidence?
>
> *Mr. Schoen.* According to the evidence, that is one ground.
>
> *Mr. Mott.* Not the bottles, of course.
>
> *The Court.* The contents.
>
> *Mr. Schoen.* It has not been shown to have been in the possession of the defendant Nieberg; it has not been shown that he kept them in his possession as alleged in the indictment, nor that they were in his possession at this trial and secondly, that if they ever were in his possession, that there is no evidence that the samples are now in the condition or were at the time Dr. Edel received them—were in the same condition as when the defendant had them in his possession. On the contrary, the evidence is affirmatively in the State's own case that they have been put through a refilling process through other receptacles and containers, over which the defendant had no control, and that the samples analyzed by Dr. Edel are not binding upon the defendant in any way."

Exception was taken to the ruling of the Trial Judge admitting the question over objection, and the reasons stated to the Trial Judge are now relied upon on the strict bill of exceptions.

POINT VII.

Legal evidence was excluded.

Assignments of Error Nos. 14 and 15 relate to the exclusion of evidence.

As to Assignment of Error #14 (Case, p. 100, fol. 10).

As to Assignment #15 (Case, p. 104, fol. 30).

For these reasons, it is respectfully submitted that the judgment should be reversed.

EDWARD SCHOEN,
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