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Writ of Error to Supreme Court.

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(Filed June 9, 1917.)

NEW JERSEY, SS.:

THE STATE OF NEW JERSEY to the
Chief Justice and other Justices
(Seal.) of our Supreme Court of Judica-
ture, GREETING:

Because in the record and proceedings and also
in the giving of judgment in a certain plaint which
was in our said Supreme Court of Judicature be-
fore you, on a certain indictment pending in the
New Jersey Supreme Court, in which said indict-
ment James McDonald is defendant and in which
said indictment he is charged with the crime of
robbery, and whereof he was convicted, manifest
error hath intervened, to the great damage of the
said defendant, as by his complaint we are in-
formed, we being willing that the error, if any
there be, should in due manner be corrected, and
full and speedy justice be done in his behalf, do
command you distinctly and openly to send, under
your seal, the record and proceedings aforesaid,
with all things touching and concerning the same,
also the entire record of the proceedings had upon
the trial of the said cause to our Court of Errors
and Appeals, on the 14th day of June, 1917, to-
gether with this our writ, that the record and
proceedings aforesaid being inspected, we may
further cause to be done thereupon what of right
and according to the law ought to be done.

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WITNESS, our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton, aforesaid, the ninth day of June, nineteen hundred and seventeen.

THOMAS F. MARTIN,
Clerk.

TREACY & MILTON,
Attorneys.

A true copy.

10

THOMAS F. MARTIN,
Clerk.

Assignment of Errors in Supreme Court.
NEW JERSEY COURT OF ERRORS AND APPEALS.

20

THE STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

JAMES McDONALD,

Plaintiff-in-Error.

30

Afterward, to wit, on the first Tuesday of March, 1917, before the Justices and Judges of the Court of Errors and Appeals at Trenton, comes the said James McDonald by George Cutley, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this:

I. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of the said indictment the court refused, although requested by the defendant, to charge the jury as follows (pp. 148-249):

“Robbery is the forcible and violent taking of the personal property of another by force or putting him in fear.”

40

Assignments of Errors.

II. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of the said indictment the court refused, although requested by the defendant, to charge the jury as follows:

“The defendant is charged in the indictment with the specific crime of robbery, and unless the elements making up the crime are proved by the State beyond a reasonable doubt, the defendant must be acquitted.” 10

III. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of the said indictment the Court refused, although requested by the defendant, to charge as follows:

“If you believe that the complainants or either of them had intended to engage in the consummation of a sale of counterfeit money and were outwitted by the man Burke and his colleague, and their criminal designs frustrated, you are permitted to draw the inference that the complainants are unworthy of belief as to what they testified to in regard to the robbery.” 20

IV. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant to charge as follows: 30

“If Smith or Bokin or either of them parted with the possession of their property voluntarily in the negotiations for the purchase of green goods or counterfeit money, no matter how reprehensible this transaction may be, the defendant cannot be convicted of the crime of robbery, even if participated in the green goods swindle unless the violence, force and putting in fear mentioned by the statute are 40

Assignments of Errors.

satisfactorily proved by the State beyond a reasonable doubt."

V. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of the said indictment the court refused, although requested by the defendant, to charge as follows:

10

"If Smith or Bokin parted with the possession voluntarily as a step in the sale of green goods, no robbery can be charged against the defendant."

VI. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant, to charge the jury as follows:

20

"If you believe that Smith or Bokin after a correspondence extending from the month of April, 1913 to the month of July, 1913, intended to purchase green goods and yielding to the importunities of the defendant and his confederate or confederates and in pursuance of that design, voluntarily purchased worthless paper with money which Smith and Bokin gave to the defendant or his confederate, the defendant is entitled to acquittal."

30 VII. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant, to charge as follows:

"If you believe that Smith and Bokin, by reason of their willingness to violate the criminal law in the distribution of green goods, are not persons of good fame, and are not entitled to belief, and if by reason of that fact a reasonable doubt is engendered in your mind as to the truth of the remainder of their

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Assignments of Errors.

story in relation to the robbery charge, you are to resolve that doubt in favor of the defendant and acquit him."

VIII. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of the said indictment the Court refused, although requested by the defendant, to charge as follows: **10**

"If Smith and Bokin concealed the fact of the robbery for any length of time and left the Town of Union and went to the D. L. & W. station at Hoboken and failed to raise an outcry at the place where the robbery was alleged to have been committed when it was possible and probable that they would have been heard, these and the like circumstances carry a strong but very conclusive presumption that their testimony is false, feigned and fabricated." **20**

IX. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant, to charge as follows:

"If Smith and Bokin waited for 28 days before they made a complaint to the proper police authorities and no satisfactory reason is given for this delay, their failure to complain when they had an opportunity is a strong circumstance against the truth of their whole story." **30**

X. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of the said indictment the Court refused, although requested by the defendant, to charge as follows:

"If you believe the testimony of the witnesses Burke and McHugh that Smith and Bokin sought to find a P. F. Burke before **40**

Assignments of Errors.

they had made a complaint to the police, you are justified in finding that the defendant was not guilty of robbery but that the complainants had voluntarily parted with their money."

10 XI. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant, to charge the jury as follows:

"If the identification of the defendant by Smith and Bokin is inconclusive and leaves your mind in a state of doubt as to his participation, you must find for the defendant."

20 XII. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant, to charge the jury as follows:

"The defendant is presumed to be innocent and that presumption is a cloak which the law casts about him and although you may not believe this defense in its entirety, if the testimony of defense raises a reasonable doubt in your mind as to his guilt you must acquit him."

30 XIII. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant, to charge the jury as follows:

40 "The defendant is entitled under the Constitution to be informed of the nature and cause of the accusation against him, and he is obliged only to answer the indictment on

Assignments of Errors.

which he is standing trial, so that although he may have been concerned in some transaction prohibited by our laws, he can only be tried for the crime of robbery mentioned in the indictment."

XIV. Because the Supreme Court affirmed the conviction of the plaintiff-in-error, whereas it should have reversed the same because at the trial of said indictment the Court refused, although requested by the defendant, to charge the jury as follows:

10

"If Bokin and Smith voluntarily purchased green goods from the defendant he is not on trial for that violation of the law and has not been indicted for it and consequently cannot be convicted of that offense."

XV. Because the said Court before whom the said cause was tried charged the jury as follows:

20

"It is not for the Court to say precisely whether these men were led to the jurisdiction in the County of Hudson by some ulterior purpose or design of exchanging their money for what is known as green goods, but if you are persuaded of that fact, if they came here for such a criminal purpose that would not relieve this defendant if he caused them feloniously to part with their good money and gave them in return by trick or device to part with their good money, then you may find under this indictment—I say you may find—this defendant guilty of grand larceny."

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XVI. Because the said Court before whom the said cause was tried charged the jury as follows:

"If the defendant's story is true, and you are persuaded he never saw them or had anything to do with them, of course your verdict should be not guilty."

Because the said Court before whom the said cause was tried charged the jury as follows:

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Assignments of Errors.

10 "I have already intimated to you you have a perfect right to find in this case a verdict of guilty of grand larceny if you are satisfied that the defendant was there on this occasion and that he persuaded these men to part with their money by a trick or device, but, you see, if you find this defendant guilty of grand larceny, it must necessarily presuppose that the defendant makes here of not being present at all on this occasion must fail, and therefore you have to think, you have to analyze the testimony to see whether in the face of his demand that he was there at all, your verdict should be halfway verdict or a verdict that believes him in part, that is to say, he was not guilty of the assault, but he was there as a part of their scheme to exchange good money for bad."

20 Because the said Court before whom the said cause was tried charged the jury as follows:

"This man is not being tried for any other crime than the one mentioned in the indictment for robbery and the one possible under the charge I have made of grand larceny or assault and battery as I have already indicated."

30 XVII. The Supreme Court committed error when it affirmed the conviction of the plaintiff-in-error because the trial judge charged the jury to find the defendant guilty of grand larceny under an indictment for robbery and thereby deprived McDonald of his constitutional rights to be informed of the nature and cause of accusation against him.

The Supreme Court committed error in offering conviction below when it should have reversed said conviction for the errors appearing on the record and trial of said indictment.

GEORGE CUTLEY.

40 Atty. of Plaintiff-in-Error.

Writ of Error.

NEW JERSEY, SS.:

THE STATE OF NEW JERSEY, to the
 (Seal). Court of Quarter Sessions in and
 for the County of Hudson.

GREETING:

Because in the record and proceeding and also
 in the giving of judgment in a certain indictment 10
 pending before you, in which said indictment
 James McDonald was defendant, and which said
 indictment was for robbery, and upon which in-
 dictment he is convicted, as we are informed, and,
 as we are further informed, manifest error hath
 intervened in the said proceedings and trial to the
 great damage of the said James McDonald, as by
 his complaint we are informed, we, being willing
 that speedy justice should be done in this behalf,
 do command you distinctly and openly to send 20
 under your seal the said indictment, and the
 records and proceedings aforesaid, with all things
 touching and concerning the same, also the entire
 record of the proceedings had upon the trial of
 the said indictment, to our Supreme Court on the
 23rd day of December, inst., together with this
 writ, that the record and proceedings aforesaid
 being inspected, we may further cause to be done
 thereupon what of right and according to law
 ought to be done. 30

WITNESS, WILLIAM S. GUMMERE, Esq., our Chief
 Justice at Trenton aforesaid, the 3rd day of Decem-
 ber, nineteen hundred and fifteen.

WM. C. GEBHARDT,
 Clerk.

GEORGE E. CUTLEY,
 Attorney.

Record.

STATE OF NEW JERSEY, HUDSON COUNTY, to wit:

Be it remembered, that at a Court of Oyer and Terminer holden at Jersey City, in and for the said County of Hudson, on the Third Tuesday of September in the year of our Lord one thousand nine hundred and fourteen, before Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Honorable Mark A. Sullivan and Honorable George G. Tennant, Judges of the Court of Common Pleas in and for the said County of Hudson, according to the form of the Statute in such case made and provided, by the oaths of William H. Mead, Foreman, and W. H. Archibald, Julius Berger, George W. Conklin, Sidney G. Davidson, Frank L. D'Elia, Charles Evarts, Fred. Goppoldt, Dr. Frederick C. Gray, Martin Hackett, Philip Heller, Thomas J. Kavanagh, Henry Klemme, Julius Meyer, Philip A. McAviney, John P. McMahan, John E. Moody, James L. Noble, Arthur Potterton, Edward J. Schroeder, R. Specker, good and lawful men of said County duly empanelled, sworn and charged to inquire for the State in and for the body of the said County of Hudson, it is presented in manner and form following, that is to say, that the Bills following are true Bills.

WM. H. MEAD,

Foreman.

And the foregoing being presented to the said Court on the Sixth day of October, in the year of our Lord One thousand nine hundred and fourteen, with bills of Indictment Nos. 61 to 102 inclusive, it is ordered by said Court that the said Bill of Indictment so as aforesaid included as Bill Number 97 for Robbery as charged upon James

Record.

McDonald, alias Meca, should be handed to the Court of Quarter Sessions for trial and disposal according to law, and said bill is in words as follows:

HUDSON OYER AND TERMINER.

September Term, A. D. 1914.

HUDSON COUNTY, to wit: The Grand Inquest of 10
 the State of New Jersey, in and for the body of
 the County of Hudson, upon their respective oath
 PRESENT, that P. F. Burke, whose true Christian
 name is to the Grand Inquest unknown, and James
 McDonald, alias Meca, late of the Town of Union,
 in the said County of Hudson, on the eighth day
 of July, in the year of our Lord one thousand nine
 hundred and thirteen, with force and arms, at the
 Town aforesaid, in the County aforesaid, and 20
 within the jurisdiction of this Court, in and upon
 one Charles G. Bokin, in the peace of God and of
 this State then and there being, feloniously did
 make an assault, and from the person and against
 the will of him the said Charles G. Bokin, One
 thousand dollars in lawful money of the United
 States of America, the moneys, goods and chattels
 of him the said Charles G. Bokin, did then and
 there wilfully, unlawfully, forcibly and by violence
 and by then and there putting him the said 30
 Charles G. Bokin in fear, take, steal and carry
 away, 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 Inquest aforesaid, upon their
 oath aforesaid, do further PRESENT, That the said
 P. F. Burke, whose true Christian name is to the
 Grand Inquest unknown, and James McDonald,
 alias Meca, on the eighth day of July, in the year
 of our Lord one thousand nine hundred and thir- 40

Record.

teen, at the Town of Union aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, in and upon one Charles G. Bokin in the peace of God and of this State then and there being, an assault did make on him the said Charles G. Bokin, then and there did beat, wound and ill treat and other wrongs to the said

10 Charles G. Bokin then and there did to the great damage of the said Charles G. Bokin, 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.

ROBERT S. HUDSPETH,
Prosecutor of the Pleas.

ENDORSED: Bill No. 97, Hudson Oyer and Terminer, September Term, 1914, *The State v. P. F. Burke*, whose true Christian name is to the

20 Grand Inquest unknown, and James McDonald, alias Meca, Indictment for Robbery.

ROBERT S. HUDSPETH,
Prosecutor of the Pleas

A true bill.

WM. H. MEAD,
Foreman.

Presented Oct. 6, 1914, and handed down to the Court of Quarter Sessions.

30 JOHN F. CROSBY,
Clerk.

And afterwards, to wit: on the Seventh day of December, in the year of our Lord, one thousand nine hundred and fourteen, at a session of the Court of Quarter Sessions of the County of Hudson aforesaid, being now of the Term of September, One thousand nine hundred and fourteen, in the said year, before the Honorable Mark A. Sullivan, Judge of the Court of Common Pleas in and for

40 County of Hudson, who doth constitute and hold

Record.

the Court of Quarter Sessions, in and for the County of Hudson, here cometh the said James McDonald, alias Meca, under the custody of Alexander Clements, his bail, in whose custody he had before been committed for the cause aforesaid, who being brought here in his proper person by his bail aforesaid, to whom he is also here committed, and having heard the indictment read and forthwith being demanded of and concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he says he is not guilty thereof, and therefore for good and evil he puts himself upon the country, and Robert S. Hudspeth, Esq., Prosecutor of the Pleas of said County, who prosecutes for the State of New Jersey, in this behalf, doth the like. 10

Therefore let said indictment be continued until December First, Nineteen hundred and fifteen, and let a jury come before the Honorable George G. Tennant, Judge of the Court of Common Pleas in and for the County of Hudson, constituting and holding the Court of Quarter Sessions for said County, being now the Term of September, One thousand nine hundred and fifteen, of twelve good and lawful men of this State and residents in the County of Hudson, over 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 a kin to the said James McDonald, alias Meca, to recognize on their oath whether the said James McDonald, alias Meca, be guilty of Robbery as in the indictment aforesaid is charged against him, or not guilty thereof, because as well the said Robert S. Hudspeth, Prosecutor of the Pleas of the County of Hudson aforesaid, who prosecutes for the State of New Jersey, in this behalf, as the said James McDonald, alias Meca, 20 30 40

Record.

have put themselves upon the same jury, and the same day is given to the parties aforesaid at the same time and place.

- At which time, that is to say on the First day of December, in the year of our Lord One thousand nine hundred and fifteen, at Jersey City aforesaid, in the County of Hudson aforesaid, before the
- 10 Honorable George G. Tennant, Judge as aforesaid, constituting and holding the Court of Quarter Sessions as aforesaid, here come as well the said Robert S. Hudspeth, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid, as well the said James McDonald, alias Meca, under the custody of his bail aforesaid, to whose custody he has been hitherto committed, and who being brought to the bar here in his proper person by his bail, and the
- 20 jurors of the jury by the Sheriff of the County of Hudson aforesaid, for the purpose chosen empanelled and returned, to wit: Frank B. Hague, Frank L. Hilton, Henry Dusenbery, James F. O'Melia, Henry Dimse, Elmer Yale, Henry Cordts, James W. Greene, John M. Coward, Benj. L. Duryea, Matthias Ely, Geo. W. Decker, being called come, who, being chosen, tried and sworn to speak the truth and concerning the premises, and thereupon the trial of the said issue commenced before the said Court and Jury, and was
- 30 continued during the First day of December as last aforesaid, and at which day the evidence of the parties is submitted and the Attorneys were heard thereupon, and the said issue after a charge from the Court was submitted to the said Jury, and the said Jury in charge of the said officers of the Court, duly sworn for that purpose, were taken to a private room to consider of their verdict, and afterwards, to wit, at the last aforesaid at the City of Jersey City aforesaid, the said jury
- 40 returned to the Court in charge of said officers,

Return.

sworn as aforesaid to keep them in charge, and then and there in the presence of the said Robert S. Hudspeth, Esq., Prosecutor of the Pleas as aforesaid, and of the said James McDonald, alias Meca, do say that the said James McDonald, alias Meca is guilty of Robbery as in the aforesaid indictment is charged against him.

Therefore let the said Indictment be continued 10
until December 2, 1915.

Whereupon all and singular the premises being seen and by the Court here fully understood, the sentence of the law is and it is by the Court here considered, and adjudged, that the said James McDonald, alias Meca, be and is hereby sentenced to be confined in State Prison at hard labor for a Maximum Term of Fifteen (15) years and a Minimum Term of Ten (10) years and thence 20
until the cost of prosecution are paid.

Judgment entered and signed this Second day of December, One thousand nine hundred and fifteen.

GEORGE G. TENNANT,
Judge of the Court of Quarter
Sessions in and for the County
of Hudson, State of New Jersey.

Attest:

JOHN J. MCGOVERN,
Clerk. 30

Return.

The answer of George G. Tennant, Esquire, Judge of the Court of Quarter Sessions holden in and for the County of Hudson and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same I send to the Justices of our Supreme 40

Specification of Causes.

Court of Judicature at Trenton, N. J., at the day and year within contained, in a certain appeal to this writ annexed as within I am commanded.

GEORGE G. TENNANT,
Judge.

Exception allowed and signed and sealed accordingly.

10 Refused except as already sealed.

Specification of Causes.**NEW JERSEY SUPREME COURT.**

THE STATE,

Defendant-in-Error,

vs.

JAMES McDONALD,

Plaintiff-in-Error.

20

The plaintiff-in-error specifies the following causes upon which he relies for reversal of the judgment in the above cause:

30

1. Because the said court at the above entitled cause committed error in refusing to charge the jury as follows:

“Robbery is the forcible and violent taking of the personal property of another by force or putting in fear.”

2. Because the said court at the trial of the above entitled cause aforesaid, refused, although requested by the defendant to charge the jury as follows:

40

Specification of Causes.

"The defendant is charged in the indictment with the specific crime of robbery and unless the elements making up the crime are proved by the state beyond a reasonable doubt, the defendant must be acquitted."

3. That the court refused to charge the following request, although regularly moved thereunto by the said defendant:

10

"The 'putting in fear' mentioned in the statutory definition of robbery, the fear excited must be either of injury to the person or property or reputation."

4. That the court committed error in its charge to the jury against the objection of the errors as follows:

"If you believe that the complainants or either of them had intended to engage in the consummation of a sale of counterfeit money and were outwitted by the man Burke and his colleague, and their criminal designs frustrated, you are permitted to draw the inference that the complainants are unworthy of belief as to what they testified to in regard to the robbery."

20

5. Because the said court at the trial of the above entitled cause refused, although requested by the defendant, to charge the jury as follows:

"If Smith or Bokin or either of the m part-
ed with the possession of their property vol-
untarily in the negotiations for the purchase
of green goods or counterfeit money, no mat-
ter how reprehensible this transaction may
be, the defendant cannot be convicted of the
crime of robbery, even if he participated in
the green goods swindle, unless the violence
force and putting in fear mentioned by the
statute are satisfactorily proved by the State
beyond a reasonable doubt."

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6. Because the said court at the trial of the

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Specification of Causes.

above entitled cause, although requested by the defendant refused to charge the jury as follows:

“If Smith or Bokin or either of them part-session voluntarily as a step in the sale of green goods no robbery can be charged against the defendant.”

- 10 7. Because the said Court at the trial of the above entitled cause aforesaid, although requested by the defendant, refused to charge the jury as follows:

20 “If you believe that Smith and Bokin after a correspondence extending from the month of April, 1913, to the month of July, 1913, intended to purchase green goods and yielded to the importunities of the defendant and his confederate or confederates and in pursuance of that design, voluntarily purchased worthless paper with money which Smith and Bokin to the defendant is entitled to be acquitted.”

8. Because the said Court at the trial of the above entitled cause aforesaid, although requested by the defendant refused to charge the jury as follows:

30 “If you believe that Smith and Bokin by reason of their willingness to violate the criminal law in the distribution of green goods, are not persons of good fame, and are not entitled to belief and if by reason of that fact a reasonable doubt is engendered in your mind as to the truth of the remainder of their story in relation to the robbery charge, you are to resolve that doubt in favor of the defendant and acquit him.”

9. Because the said Court at the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

40 “If Smith and Bokin concealed the fact

Specification of Causes.

of the robbery for any length of time and left the town of Union and went to the D. L. & W. station at Hoboken and failed to raise an outcry at the place where the robbery was alleged to have been committed, when it was possible and probable they would have been heard, these and the like circumstances carry a strong but not conclusive presumption that their testimony is false, feigned and fabricated." (Chases's Blackstone's Comm. Book 111—953.) 10

10. Because the said Court at the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

"If Smith and Bokin waited for 28 days before they made a complaint to the proper police authorities and no satisfactory reason is given for this delay, their failure to complain when they had an opportunity is a strong circumstance against the truth of their whole story." 20

11. Because the said Court at the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

"If you believe the testimony of the witnesses Burke and McHugh that Smith and Bokin sought to find P. F. Burke before they had made a complaint to the police, you are justified in finding that the defendant was not guilty of robbery but that the complainants had voluntarily parted with their money." 30

12. Because the said court at the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

"If the identification of the defendant by Smith and Bokin is inconclusive and leaves your mind in a state of doubt as to his participation you must find for the defendant." 40

Specification of Causes.

13. Because the Court at the trial of the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

10 "The defendant is presumed to be innocent and that presumption in a cloak which the law casts about him and although you may not believe his defense in its entirety, if the testimony of defense raises a reasonable doubt in your mind as to his guilt, you must acquit him."

14. Because the Court at the trial of the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

20 "The defendant is entitled under the constitution to be informed of the nature and cause of the accusation against him and he is obliged only to answer the indictment upon which he is standing trial so that although he may have been concerned in some transaction prohibited by our laws, he can only be tried for the crime of robbery mentioned in the indictment."

15. Because the Court at the trial of the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

30 "If Bokin and Smith voluntarily purchased green goods from the defendant, the defendant is not on trial for that violation of the law and has not been indicted for it and consequently can not be convicted of that offense."

16. The Court committed error in charging the jury at the trial, when it charged as follows:

40 "It is not for the court to say precisely whether these men were led to this jurisdiction in the county of Hudson, by some ulterior purpose or design of exchanging their money for what is known as green goods, but if you are persuaded of that fact, if they

Specification of Causes.

came here for such a criminal purpose, that would not relieve this defendant if he caused them feloniously to part with their good money and gave them in return by trick or device or some scheme of that kind, what is known as green goods, or this package of blank paper which has been referred to here, and which is in evidence; in other words, if you find that the element of assault on this complaining witness is absent and that all that was done to persuade them by a trick or device to part with their good money for green goods or this paper money, then you might find under this indictment—I say you may find—this defendant guilty of grand larceny.” 10

17. That the Court committed error in charging the jury at the trial when it speaks as follows:

“If the defendant’s story is true and you are persuaded he never saw them or had anything to do with them of course your verdict should be ‘not guilty.’” 20

18. That the Court committed error in its charge to the jury when it spoke as follows:

“I have already intimated to you, you have a perfect right to find in this case a verdict of guilty of grand larceny if you are satisfied that the defendant was there on this occasion and that he persuaded these men to part with their money by a trick or device, but you see, if you find this defendant guilty of grand larceny it must necessarily presuppose that the defense that the defendant makes here of not being present at all on this occasion must fail and therefore, you have to think, you have to analyze the testimony to see whether in the face of his denial that he was there at all, your verdict should be a halfway verdict, or a verdict that relieves him in part; that is to say that he was not guilty of the assault but that he was there as part of their scheme to exchange good money for bad.” 30 40

Assignments of Error.

19. That the Court committed error in its charge to the jury, when it said:

“This man is not being tried for any other crime than the one mentioned in the indictment of robbery, and the one possible under the charge I have made, of grand larceny or assault and battery, as I have already indicated.”

10

20. That the defendant was extradited from the State of New York to the State of New Jersey to answer to the charge of robbery for which he was indicted. The court at the trial charged the jury to find him guilty of larceny and thereby deprive him of his constitutional right to be informed of the nature and cause of the accusation against him.

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GEORGE E. CUTLEY,
Attorney of Plaintiff-in-Error.

Assignment of Errors.

NEW JERSEY SUPREME COURT.

30

THE STATE,	}	In error.
<i>Defendant-in-Error,</i>		
<i>vs.</i>		
JAMES McDONALD,		
<i>Plaintiff-in-Error.</i>		

And now at this date, before the Justices of the Supreme Court at Trenton, comes the said James McDonald by George E. Cutley, his attorney, and says that in the record and proceeding there is manifest error, to wit:

40 1. Because the said court at the above entitled cause committed error in refusing to charge the jury as follows:

Assignments of Error.

“Robbery is the forcible and violent taking of the personal property of another by force or putting in fear.”

2. Because the said court at the trial of the above entitled cause refused, although requested by the defendant to charge the jury as follows:

“The defendant is charged in the indictment with the specific crime of robbery and unless the elements making up the crime are proved by the state beyond a reasonable doubt, the defendant must be acquitted.” 10

3. That the court refused to charge the jury, although regularly moved thereunto by the said defendant.

“The ‘putting in fear’ mentioned in the statutory definition of robbery, the fear excited must be either of injury to the person or property or reputation.” 20

4. That the court committed error in refusing to charge the jury as follows:

“If you believe that the complainants or either of them had intended to engage in the consummation of a sale of counterfeit money and were outwitted by the man Burke and his colleague, and their criminal designs frustrated, you are permitted to draw the inference that the complainants are unworthy of belief as to what they testified to in regard to the robbery.” 30

5. Because the said court at the trial of the above entitled cause refused, although requested by the defendant to charge the jury as follows:

“If Smith or Bokin or either of them parted with the possession of their property voluntarily in the negotiations for the purchase of green goods or counterfeit money, no matter how reprehensible this transaction may be, the defendant cannot be convicted of the crime of robbery, even if he participated in 40

Assignments of Error.

the green goods swindle unless the violence force and putting in fear mentioned by the statute are satisfactorily proved by the State beyond a reasonable doubt."

6. Because the said court at the trial of the above entitled cause aforesaid, although requested by the defendant, to charge the jury as follows:

10

"If Smith or Bokin parted with the possession voluntarily as a step in the sale of green goods, no robbery can be charged against the defendant."

7. Because the said court at the trial of the above entitled cause aforesaid, although requested by the defendant, to charge the jury as follows:

20

"If you believe that Smith or Bokin after a correspondence extending from the month of April, 1913, to the month of July, 1913, intended to purchase green goods and yielded to the importunities of the defendant and his confederate or confederates and in purchase of that design, voluntarily purchased worthless paper with money which Smith and Bokin gave to the defendant or his confederate, the defendant is entitled to be committed."

8. Because the said court at the trial of the above entitled cause aforesaid, although requested by the defendant, to charge the jury as follows:

30

"If you believe that Smith and Bokin, by reason of their willingness to violate the Criminal law in the distribution of green goods, are not persons of good fame, and are not entitled to belief and if by reason of that fact, a reasonable doubt is engendered in your mind as to the truth of the remainder of their story in relation to the robbery charge, you are to resolve that doubt in favor of the defendant and acquit him."

40

9. Because the said court at the above entitled

Assignments of Error.

cause, although requested by the defendant, refused to charge the jury as follows:

“If Smith and Bokin concealed the fact of the robbery for any length of time and left the town of Union and went to the D. L. & W. station at Hoboken and failed to raise an outcry at the place where the robbery was alleged to have been committed when it was possible and probable that would have been heard, these and the like circumstances carry a strong but not conclusive presumption that their testimony is false, feigned and fabricated.” 10

10. Because the said court at the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

“If Smith and Bokin waited for 28 days before they made a complaint to the proper police authorities and no satisfactory reason is given for this delay, their failure to complain when they had an opportunity is a strong circumstance against the truth of their whole story.” 20

11. Because the said court at the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

“If you believe the testimony of the witnesses Burke and McHugh that Smith and Bokin sought to find P. F. Burke before they had made a complaint, to the police you are justified in finding that the defendant was not guilty of robbery but that the complainants had voluntarily parted with their money.” 30

12. Because the said court at the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

“If the identification of the defendant by Smith and Bokin is inconclusive and leaves 40

Assignments of Error.

your mind in a state of doubt as to his participation you must find for the defendant."

13. Because the court at the trial of the above entitled cause, although requested by the defendant refuses to charge the jury as follows:

10 "The defendant is presumed to be innocent and that presumption is a cloak which the law casts about him and although you may not believe his defense in its entirety, if the testimony of defense raises a reasonable doubt in your mind as to his guilt, you must acquit him."

14. Because the court at the trial, of the above entitled cause, although requested by the defendant, refused to charge the jury as follows:

20 "The defendant is entitled under the constitution to be informed of the nature and cause of the accusation against him, and he is obliged only to answer the indictment upon which he is standing trial so that although he may have been concerned in some transaction prohibited by our laws, he can only be tried for the crime of robbery mentioned in the indictment."

15. Because the court at the trial of the above entitled cause, although requested by the defendant, refuses to charge the jury as follows:

30 "If Bokin and Smith voluntarily purchased green goods from the defendant, the defendant is not on trial for that violation of the law and has not been indicted for it and consequently can not be convicted of that offense."

16. The Court committed error in charging the jury at the trial, when it charged as follows:

40 "It is not for the court to say precisely whether these men were led to this jurisdiction, in the County of Hudson, by some ulterior purpose or design of exchanging their

Assignments of Error.

money for what is known as green goods, but if you are persuaded of that fact, if they came here for such a criminal purpose, that would not relieve this defendant if he caused them feloniously to part with their good money and gave them in return by trick or device or some scheme of that kind, what is known as green goods, or this package of blank paper which has been referred to here, and which is in evidence; in other words if you find that the element of assault on this complaining witness is absent and that all that was done was to persuade them by a trick or device to part with their good money for green goods or this paper money, then you might find under this indictment—I say you may find—this defendant guilty of grand larceny.”

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17. That the Court committed an error in charging the jury of the trial when it speaks as follows:

20

“If the defendant’s story is true, and you are persuaded he never saw them or had anything to do with them of course your verdict should be ‘not guilty.’ ”

18. That the Court committed error in its charge to the jury when it spoke as follows:

“I have already intimated to you, you have a perfect right to find in this case a verdict of guilty of grand larceny if you are satisfied that the defendant was there on this occasion and that he persuaded these men to part with their money by a trick or device, but, you see, if you find this defendant guilty of grand larceny, it must necessarily presuppose that the defense that the defendant makes here of not being present at all on this occasion must fail, and therefore you have to think, you have to analyze the testimony to see whether in the face of his denial that he was there at all, your verdict should be a halfway verdict, or a verdict that

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Assignments of Error.

relieves him in part that is to say, that he was not guilty of the assault but that he was there as part of their scheme to exchange good money for bad."

19. That the Court committed error in its charge to the jury when it said:

10 "This man is not being tried for any other crime than the one mentioned in the indictment of robbery, and the one possible under the charge I have made, of grand larceny, or assault and battery, as I have already indicated."

20. That the defendant was extradited from the State of New York to the State of New Jersey to answer to the charge of robbery for which he was indicted. The Court at the trial charged the jury to find the guilty man of larceny and thereby
20 deprived him of his constitutional right to be informed of the nature and cause of the accusation against him.

GEORGE E. CUTLEY,
Attorney of Plaintiff-in-Error.

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Judge's Certificate.

HUDSON COUNTY COURT OF QUARTER SESSIONS.

<p style="text-align: center;">THE STATE, <i>Defendant-in-Error,</i> <i>vs.</i> JAMES McDONALD, <i>Plaintiff-in-Error.</i></p>	}	<p style="text-align: center;">On Indictment For Robbery.</p>	<p>10</p>
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I, GEORGE G. TENNANT, Judge of the Court of Quarter Sessions in and for the County of Hudson, before whom the above entitled indictment was tried, do hereby certify that the foregoing is the entire record of proceedings had in the indictment in the above stated cause. *The State of New Jersey v. James McDonald.*

20

GEORGE G. TENNANT,
Judge.

—•—

Dated, April 7, 1916.
Common joinder in error by State of New Jersey.

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NEW JERSEY SUPREME COURT.

JUNE TERM, 1916.

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

JAMES McDONALD,
Plaintiff-in-Error.

10

Submitted July 6, 1916; Decided November 13,
 1916.

SYLLABUS:

1. To constitute robbery there must be actual violence, or such a demonstration or threats as will create reasonable apprehension of bodily injury if the victim resists.
- 20 2. A conviction in a criminal case will not be reversed for error in an instruction which could not have prejudiced the defendant.
3. One indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is necessarily included in the higher one charged in the indictment.
4. Robbery is larceny with the element of force or fear entering into it.
- 30 5. Larceny is a necessary ingredient of the crime of robbery, and a conviction of the former crime may be had under an indictment for the latter.

On error to the Hudson Quarter Sessions Court.
 Before Gummere, Chief Justice, and Justices
 Trenchard and Black.

For the plaintiff in error, George E. Cutley.

For the defendant in error, Robert S. Huds-
peth, Prosecutor of the Pleas, and George T.
Vickers, Asst. Prosecutor of the Pleas.

The opinion of the court was delivered by
Trenchard, J.:

The defendant was indicted for and convicted
of robbery, and this review is both by strict writ
of error and under § 136 of the Criminal Proceed-
ure Act. 10

We think the judgment must be affirmed.

It is contended that there was error in the
charge of the court. We think not.

The trial judge charged that:

“To constitute robbery there must be ac-
tual violence, or such a demonstration or
threats as will create reasonable apprehen-
sion of bodily injury if the victim resists.” 20

That was correct. *State vs. Donahue*, 59 Atl.,
12. 20

He further charged in effect that if the evidence
of violence or putting in fear was insufficient to
establish the existence of those essential elements
of robbery, there might be a conviction of lar-
ceny if the evidence established the essential ele-
ments of the latter crime as defined by the court.

The defendant argues that such charge was
erroneous and should lead to a reversal because, 30
he contends, that under the indictment for rob-
bery, there could be no conviction for larceny.

But there are two complete answers to that
contention.

First: The jury having found the defendant
guilty of robbery, it is manifest that the instruc-
tion, even if erroneous, could not have prejudiced
the defendant, and hence would not justify a re-
versal. 40

Syllabus.

Secondly: The instruction was right.

One indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is necessarily included in the higher one charged in the indictment.

State vs. Jackson, 65 N. J. L., 105.

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State vs. Johnson, 30 N. J. L., 185.

In the *Jackson* case the defendant was convicted of assault and battery under an indictment for carnal abuse, and the conviction was sustained.

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In the *Johnson* case the defendant was convicted of an assault under an indictment for rape, and the conviction was sustained, the Chief Justice, in the opinion remarking in passing that "upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry."

In those cases (*Jackson* and *Johnson*) assault was the ingredient offence.

Coming now to the present case, robbery is larceny with the element of force or fear entering into it,—that is, robbery is larceny plus.

30

Larceny is therefore a necessary ingredient of the crime of robbery, and a conviction of the former crime may be had under an indictment for the latter.

The conviction in the present case is therefore supported by the indictment.

We have examined all other points made by the defendant both with respect to the charge of the court and refusal to charge, and find no merit in them.

40

The judgment below will be affirmed.

Testimony.**HUDSON COUNTY COURT OF QUARTER SESSIONS.**

<p style="text-align: center;">THE STATE,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">JAMES McDONALD AND P. F. BURKE..</p>	}	
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Trial of the above case, December 1, 1915, before Hon. George G. Tennant, and a struck jury.

A P P E A R A N C E S :

Mr. James W. McCarthy for the State.
 Mr. George E. Cutley for the defendants.
 The jury was called and sworn.
 Mr. McCarthy opened to the jury.

20

MIKE SMITH, a witness produced on behalf of the State, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. MCCARTHY:

Q. Where do you live? A. Exeter Valley, Lucerne County, Pennsylvania.

Q. Is that where you lived on the 8th day of July, 1913? A. Yes, I lived there thirty years.

Q. What business are you in up there? A. I am the business man this time, liquor dealer, about twenty years. 30

Q. Keep a saloon? A. Yes, keep saloon this time. I worked thirty years in the mines.

Q. But at the time—the 8th day of July, 1913—you were in the saloon business? A. Yes.

Q. Do you know this defendant McDonald? A. Yes, I know him very well.

40

Mike Smith—for the State—Direct.

Q. When did you first meet him and where?

A. He came up to my saloon about two years ago, July, I forget what day, he came up, I guess June or July, I don't know, he came to my saloon, says "Good morning, Mr. Smith." I said, "Good morning. How do you know me?" He said, "Mr. Burke sent me over."

10 Q. Did you know who Burke was then? A. I never saw him in my life.

Q. Did you hear of him before? A. Never in my life. I says, "What for he sent you over?" He says, "I heard you deal with Mr. Block, good business." He says, "Me want talk to you, right over to my own house, from the Bell Company."

20 Q. What kind of company? A. Liquor dealer company, distillery. I told him I says, "Go along, I can't read and write. I deal with Block ten or eighteen years, I don't want to change." He says, "You can talk with another man, you can't read and write." I says, "Yes, maybe not." He says, "You find out you bring him out to do something for us." I tell him, "Maybe not, maybe yes." He says, "I leave you address. You can meet me."

30 Q. What was the address he gave you? A. He left him address, Broadway and Empire Hotel, New York.

Q. Who was in your saloon at that time besides yourself? A. My wife. My wife. He called for drinks. He paid two dollar bill, set them up for her. I took little whisky, she take whisky, I guess he take same. He left me address, he say, "You go there, and I take you and meet Mr. Burke. As quick as you can." I never did quick. Then couple days after that a telegram came over, I take train, and come—

40 Q. Telegram came from whom? A. From Mr. Burke and Meca.

Mike Smith—for the State—Direct.

Q. What name was signed to the telegram? A. I can't tell, I forget what day, it was couple days after.

Q. How did you get that telegram, through a telegraph office? A. He sent me box cigars, empty cigar box.

Q. Through the express? A. He fill with papers inside, after that express was inside, covered up with newspaper on top. 10

Q. That was the way you got the telegram? A. Yes.

Q. Through the express company? A. Yes.

Q. Before you met him the second time did you get many telegrams? A. I got about over eight or nine.

Q. Have you these telegrams? A. I have couple ones right here, left the rest and I throw them out. I don't pay attention, as I think he is honest man. 20

Q. How long a time did he spend in your saloon on the first occasion? A. I don't know, I guess June and July.

Q. How long was he in there? A. He was there about fifteen minutes, about twenty minutes.

Q. How long? A. About twenty or fifteen minutes, something like that.

Q. When did you see him after that, and where? A. In Broadway. 30

Q. That was in response to a telegram he sent you? A. Yes, I came after him, he called me over to Broadway, and Empire Hotel.

Q. Did you go alone? A. Alone, by myself, this time.

Q. When was that? A. I can't tell. I think it was July.

Q. How long before you had your thousand dollars taken from you? A. Couple of months after that. 40

Mike Smith—for the State—Direct.

Q. Couple of months before that? A. Couple of months before he took the thousand dollars, yes.

Q. That would be about May? A. I can't tell you.

Q. Where did you see him at that time? A. At the Empire Hotel. He took me in a car. Took
 10 me on the ground, took me on the elevator. He came with me to some place up the hill, up Broadway, I told him, "Why do you take me around? I am afraid you lose me. I don't know that place at all." He said, put his hand on my shoulder, "Don't be afraid, I take care of you."

Q. Was there anybody beside you and McDonald? A. Burke and he was there.

Q. Where did you see Burke? A. Me met him
 20 in the road, him and Meca.

Q. The two of them together? A. Yes.

Q. Who introduced you to Burke? A. Burke meet me some place, as soon as me get off the car, big building.

Q. Were you introduced to Burke? A. I don't know, that big building, he said that building belongs to him.

Q. How do you know him name was Burke? A. He told me.

Q. Where did you go with Burke and McDon-
 30 ald? A. He took me around Hoboken, he says, now he says, "Have you money with you?" I says, "Yes. I have five hundred dollars," but I tell him, as soon as I see it is wrong, I am afraid on my life, he lock the door, pull the curtain down, I am afraid. I says, "I have fifteen or sixteen dollars here." He says he don't do business with that, fifteen or sixteen dollars. He says to take the train and go home and next day
 40 he will tell me I take one thousand dollars and come over.

Q. That was the second time you met him? A. Yes.

Mike Smith—for the State—Direct.

Q. When did you meet him that time? A. Sure, meet him in Hoboken station.

Q. When was that? A. I can't tell when it was. I remember that time.

Q. The 4th of July? A. Maybe the 4th of July, I don't remember about it. I didn't pay attention.

Q. How did you get to Hoboken? A. He sent me, bother me, telegram, telegram, night time, after me all the time, he says "Come over." 10

Q. Do you mean he sent you telegrams in a cigar box? A. Yes.

Q. By express? A. Yes.

Q. What did those telegrams say? A. He said, "Come over as quick as you can, you lost the business, I have lots of men got rich, if you don't come you lose, you lost the business at all." 20

Q. You lost the business? A. Yes.

Q. Did he you tell you where to meet him in Hoboken? A. Yes.

Q. Where? A. At the station.

Q. What? A. Station, next the ferry.

Q. Tell you what time to meet him? A. He told me what time he was going to meet me there.

Q. Did you bring anybody with you at that time? A. I go for Charlie Bokin, get him read my telegram. He says he go to Philadelphia, we go to see what you are going to do. Me go up to the bank, take five hundred dollars— 30

Q. Who took five hundred dollars? A. My wife, five hundred dollars I have home.

Q. You had one thousand dollars here? A. Yes.

Q. What time did you arrive here with Bokin? A. I don't know, in the morning, in the day time.

Q. What time did you leave your place up there? A. Quarter after three. 40

Q. In the morning? A. Yes, D. L. & W.

Q. Don't you remember what time you got to Hoboken? A. I don't know about.

Mike Smith—for the State—Direct.

- Q. About when? A. I can't tell you.
- Q. Was it night or morning, or what? A. I think it is morning was there.
- Q. How long did it take you to come here? A. Took me five hours.
- Q. Five hours to come in? A. Yes.
- 10 Q. If you left there at quarter to three you got here at quarter after eight? A. About three o'clock.
- Q. You left there three o'clock? A. Yes, Scranton.
- Q. You got to Hoboken what time? A. Hoboken, about eight, seven o'clock.
- Q. Seven or eight o'clock? A. About eight o'clock.
- Q. Eight o'clock in the morning? A. Yes.
- 20 Q. Did you see McDonald there? A. He walk around with a stick, in the station.
- Q. Was there anybody with him? A. He was alone, he just turn around to me, like this (indicating).
- Q. Did you talk to him? A. Yes, when he come over, he talk to me, and Bokin, he says, "Are you ready?" I say, "Yes." "Well, come along with me, do your business." He says, shall go, come on, he take me around in Hoboken, with
- 30 him. He says everybody know him, walk around, far away.
- Q. What? A. Everybody know him, so we walk couple of blocks again.
- Q. Away, you mean? A. Away. He didn't want anybody to know him. He walk there, around Hoboken, after, he take the car, Union Hill; Charlie Bokin told him, "Why do you go so far?" He says, "Never mind, we got offices all over the state." As soon as we got there, we
- 40 go up the hill, I don't know, the saloon there, the car go so far, we go right there, one side door.

Mike Smith—for the State—Direct.

Q. Side door of the saloon? A. Me don't know whether the saloon was there or not. Me go over, there is two rooms there he says "You come here, one room, you sit in another room."

Q. Who said that? A. Burke and McDonald.

Q. Where did you meet Burke? A. Right there, sitting at little table, in the room in that place.

10

Q. Was that the man Burke you had seen in New York? A. Yes, same Burke.

Q. What did McDonald say when you and Bokin got in the room? A. He said, "You go in one room, I keep Burke and Smith in another room." Meca go from one room, and I stay in another room. He say, "Don't you fool me any more, you fool me enough. Where is your money? I got certificates."

20

Q. Who said that? A. Burke.

Q. Where was McDonald then? A. McDonald was with Charlie in another room. He had a package covered with a string and newspaper in his hand. He says, "Don't you fool me, I am busy, I go to Buffalo."

Q. When you got in the room was there anything said about whisky bonds? A. He says—showed me the whisky bonds, showed me the one thousand dollar bond, he wants security, you know. I say, write it, I see whether Mr. Bokin can read it, and write it so it is safe. He said I must hurry up, scare myself, he make me scared, he is big, stout man, I pick up five hundred dollars from here and five hundred from here, as soon as he see that, he hit me one on the stomach, and one on the shoulder behind me, I fall off the chair, see red, blue and white and everything, I fell like that (indicating).

30

Q. Where did he go? A. He go quick. As soon as he knock me down he go in another room, right away, and I hear him—

40

Mike Smith—for the State—Direct.

Q. Which room did he go in, the room that McDonald and Bokin were in? A. In another room. Yes, Bokin was there already, and Meca. Burke go in another room.

Q. Burke went in the room where McDonald was; are you sure of that? A. Yes.

10 Q. What did you do? A. I sit down, I don't know where I am.

Q. You were knocked out? A. I was more than two weeks, my wife—

Q. Never mind your wife. Did you see McDonald then? A. Yes. McDonald was in another room with Bokin.

Q. Did he come back? A. I see those two men run away, couple of men run away from there.

20 Q. Did you see Bokin then? A. Sure, Bokin came in the room with McDonald.

Q. Did he go out of the room where McDonald was? A. I go to Charlie Bokin, say "Charlie—"

Q. Never mind, you cannot testify what you said to him. You went out of the place, did you? A. Yes.

Q. Where did you go? A. To Charlie Bokin's room. I see what they do for Charlie.

Q. You cannot testify to that, because McDonald was not there. A. Yes, he was there.

30 Q. Did you both go out of the place? A. Yes, we both go out together.

Q. Where did you go? A. We go, walked around, we go take the train home.

Q. Back to Pennsylvania? A. Yes.

Q. I show you a package of paper and ask you whether or not that is the paper which you say that Mr. Burke passed to you while there? A. That is the same package.

40 Q. Same package? A. There was five dollars.

Q. Five dollars, where? A. On one side.

Mike Smith—for the State—Cross.

Q. A five dollar bill? A. Yes, and ten dollars on the other side, covered over with a string.

Q. Wrapped up in paper? A. Wrapped up in a newspaper and string.

Q. Is this the package you turned over in the police court here to the detective? A. Yes.

Q. When did you make a complaint to the police—how long after you had this one thousand dollars taken from you? A. Couple of weeks after that. Me got arrested. 10

Q. This defendant McDonald, is he the man you have referred to? A. Both, Mr. McDonald—

Q. Is this the man here (indicating), Mr. McDonald? A. Yes, that is the man.

Q. Why don't you say so? A. I can prove it for a million people.

MR. McCARTHY: I ask that this package be marked for identification. 20

It is marked S-1 for identification.

CROSS EXAMINATION BY MR. CUTLEY:

Q. Why didn't you complain as soon as you were robbed? A. As soon as I was robbed?

Q. Why didn't you complain to the police or say that you were robbed, when you were robbed?

A. That time?

Q. Yes. A. Why, I can't? I was sick, I hurry home, I am afraid I would die. 30

Q. All you say he did to you was punch you in the stomach? A. Yes.

Q. You went over, but you were still able to go to see what was going on in the next room? A. Yes, a couple of minutes after.

Q. Do you want us to believe when you were punched that you were not unconscious? A. Not to believe—it is the truth. 40

Q. The minute you regained your consciousness

Mike Smith—for the State—Cross.

you went into the next room to see what was going on? A. Yes.

Q. How old are you? A. I am pretty near fifty years old.

Q. How long have you owned your own place in this town? A. Pretty near twenty years, I work in the mines.

10 Q. How long were you in business besides working in the mines? A. Pretty near twenty years.

Q. How long were you working in the mines? A. I quit thirteen years, working in the mines.

Q. You were seventeen years in business. What kind of business have you? A. This time saloon.

Q. Have you always had a saloon before that? A. This time saloon.

20 Q. How many children have you? A. I got nine.

Q. Did you have any other kind of business outside of the saloon before that? A. No, I have worked in the mines.

Q. Before you got in the saloon? A. After I got the saloon, I work in the mine too.

Q. You have a saloon? A. I got a saloon and I work in the mine too.

30 Q. Now? A. Not now, I quit twelve or thirteen years.

Q. You own your own place? A. Yes.

Q. Have you other property there? A. I have property there.

Q. You and your wife run the saloon? A. Yes.

Q. How long had you been in communication with either Burke or McDonald before July, 1913? A. About two years ago, July, that is all.

40 Q. July 8th, or the day you were assaulted—as a matter of fact, weren't you in communication with him, either by letter or telegram for about four months before July 8th? A. Well, I

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don't know anything about this, when he bother me, try to sell certificates.

Q. You know what I am saying? You were in communication with him for four months before July 8th? A. Not four months, couple of weeks.

Q. Didn't you write him in April, 1913? A. Yes, sir, write me again.

Q. Who did you write? A. That man. 10

Q. Who did you write? A. That man there (indicating).

Q. Well, was the first time you saw him in your saloon? What did you next do? A. He show me paper like that, certificate.

Q. That is not a certificate in your hand. A. Bond warehouse.

Q. How did you know it is? A. I know, because I am dealing with them since I am in business. 20

Q. Can you read it? A. No.

Q. You can't read? A. No; I got mine here.

Q. You can't read or write? A. No.

Q. Still you are buying those? A. Just the same thing. (Witness indicates papers which he takes from his pocket.)

Q. After you saw McDonald the first time when did you next see him again? A. In New York. 30

Q. What month and year? A. I can't—same year, I don't know what month.

Q. In May? A. I can't tell you honestly; I can't tell you, please.

Q. Don't you know were were in New York in the month of May, 1913, demanding Burke? A. Maybe I do.

Q. Maybe. Don't you know whether you were or not? A. Suppose so, didn't go tell him, but he call me, call me, I go. 40

Q. What did you go to New York for? A. To buy certificate.

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Q. With the certificate? A. Yes.

Q. How did you buy certificates before? A. I have Mr. Block in New York.

Q. Why did you want to change from Mr. Block to this man? A. Because he comes there, he make me trouble, he say, I am dealing with Mr. Block, I can do better. I ask him what company.
 10 He said Bell Company. Never hear in my life of that company.

Q. You never heard of it? A. No.

Q. You didn't know whether it was good or bad? A. No.

Q. Still you were going to change from the company you were dealing with for sixteen years? A. Business was slow. I go around to my place, maybe sell some, make ten dollars, I try that.
 20 Everybody tries to do what he can.

Q. You were willing to give up the company you were dealing with? A. I never change.

Q. What was it in your head, that you were going to make any money by it? A. I got good business. It was slow business, I sell whisky bonds, we pay you so much, he say.

Q. Did you say you wouldn't put any money in it? A. I pay one thousand dollars, security.

Q. Was that what you went to New York for?
 30 A. Yes.

Q. But you didn't bring the one thousand dollars with you, did you? A. No.

Q. When you first went you had some money with you? A. I had five hundred dollars.

Q. You met McDonald that day? A. Yes.

Q. He took you in the subway to some building? A. I don't know.

Q. You went to some building? A. I don't know where it was, he make me upside down, I
 40 don't know where I am.

Q. You say you were afraid? A. When he says

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he can't do business with fifteen dollars, he was pulling down the shades. I was afraid I go in the sewer.

Q. What were you afraid of? A. I see some thing was wrong, I tell him I got five hundred dollar I get killed. I am sure.

Q. You were afraid? A. Yes.

Q. So you told him you didn't have it? A. 10
Yes.

Q. Was Charile Bokin with you that day? A.
No, never was there.

Q. You came alone? A. First time I saw him.

Q. Then you brought Charlie another time?
A. Yes.

Q. That was July 8th? A. July.

Q. Why did you come the second time if you were afraid? A. My wife told me, "You lost five hundred dollars, if you go any more I am going 20
to throw you in the river."

Q. That was the second time? A. Yes.

Q. Although your wife said that to you you went the second time? A. Yes.

Q. You brought Bokin with you? A. Yes.

Q. Where did you go? A. He took me right up the hill some place, I don't know where.

Q. You got Bokin to go with you. Did he have any money with him? A. I don't know whether 30
he had money or not.

Q. Don't you know he had one thousand dollars with him. A. I don't know the second time.

Q. Did you have any money with you? A. I got five hundred dollars.

Q. Then you got Charlie to come with you although you were afraid? A. The second time.

Q. Then you came on July 8th, the third time?
A. Yes.

Q. Do you know whether Charlie had been 40
writing to Burke or anybody? A. Sure, he got two letters, him one and one me. He says, "I

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Q. Do you know what he wrote?

(No answer.)

Q. Do you know whether he signed your name to the letters? A. He signed a name, he wrote them, he says he got no time to go with him.

10 Q. Did you tell Charlie you were going to deal in New York real estate? A. I told him, Charlie Bokin, I want him to go with me, see it is all right.

Q. Did you have any talk about real estate with Charlie, about this time, about selling real estate? A. Me don't talk real estate at all.

Q. Didn't you tell him—didn't you think it was funny for you to get letters in a cigar box? A. I am thirty-five years in business, I never saw in my life.

20 Q. Did you tell your wife or Bokin? A. My whole family, my whole family, they all say that.

Q. They all told you not to go to New York? A. My wife told me not to deal with him the first time he come in my saloon, he look like that, he look like a snake.

30 Q. Although she told you he looked like a snake you went to New York to see him? A. He bother me, he bother me; he say he pay my expenses, he want to deal with me. I ask him what kind of certificate.

Q. Didn't you say to McDonald, whom you saw with Bokin in New York, that you had brought this man with you to buy green goods, that you could pass off on the Polish people in Pennsylvania? A. Never say in my life, never in my life, can kill me.

Q. Wasn't that your talk with Burke? A. We all talk about certificates.

40 Q. If you couldn't read or write you didn't know what he had? A. That was the reason I took Charlie.

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Q. You took him with you because he could read and write English? A. Yes, sir.

Q. He was on his way to Philadelphia and he stopped at New York, or went to New York on his way to Philadelphia? A. Yes.

Q. The D. L. & W. doesn't go to Philadelphia? A. Yes.

Q. He had one thousand dollars with him? A. 10
The second time.

Q. The time you were assaulted? A. Yes, he got one thousand dollars.

Q. A couple of days before the 8th of July, hadn't you and Charlie been talking about buying some whiskey certificates or something else? A. After we got—

Q. Before? A. Before, yes, I say to him, "Charlie, you come with me, you can make some money." He says, "I go with you, I work here, undertaker, I make money here, but I go with you." I say, "You can make money, business man, business no good, you can make some money." 20

Q. Charlie went with you? A. Yes.

Q. Just at that time you were buying furniture from Charlie as trustee of the church? A. Yes, I am trustee of the church too.

Q. How much furniture were you buying? A. 30
I can't tell you.

Q. About three thousand dollars worth? A. I can't tell you. He have a furniture store. I don't know how much there was, though.

Q. Did you know you were going on July 8th to Hoboken and not to New York? Did he tell you that? A. I got couple telegrams.

Q. You got that one through the telegraph office? A. Cigar box.

Q. The telegram didn't come through the express company, in a cigar box? A. Express. As soon as I go to express office, one man who was 40

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there asked me how many times I got telegram. He says, you please give me copy. I says I thought about eight or nine, and he says, "You please get me copy."

Q. You did get eight or nine, or you sent eight or nine? A. He sent me.

10 Q. You sent eight or nine answers? A. I didn't send answer at all.

Q. Didn't you tell Bokin to write letters for you? A. Yes.

Q. How did you come to go to New York on July 8th? A. By train.

Q. Why did you go? A. He tell me, you lost the business. He sent me telegram, you lost the business.

20 Q. When you got that telegram you got one thousand dollars? A. Yes.

Q. And Bokin, your friend, got another one thousand dollars, and with him you came to Hoboken, did you? A. He says in telegram, you Mr. Smith, you take friend with you, and you come and we close up the business. I go to Charlie, and says, Charlie, write him letter, see if it is right or not, he got everything, certificate, ready.

30 Q. Where is that letter? A. Mr. District Attorney has it.

Q. You got to Hoboken and McDonald met you at the station? A. Yes.

Q. Was he alone? A. Yes.

Q. He took you on the car to Union Hill? A. Yes.

Q. What kind of saloon? A. Some woods saloon. Not very big.

Q. You didn't see the saloon there? A. No. Second time me come—

40 Q. How long did you stay? A. Couple of days.

Q. How long did you stay in Union Hill? A. He got arrest right away—

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Q. The day you were assaulted by McDonald, how long did you stay in the saloon? A. Me in there—

Q. How long did you stay in the back room of the saloon? A. Couple of minutes.

Q. Then I understand McDonald punched you in the stomach? A. Burke. Burke punched me right here (indicating). 10

Q. Did you see McDonald or anything he did to the other man? A. McDonald, go in another room.

Q. Did you see what happened there? A. I hold myself up, I try to open door, I heard close the door, the door was here, I heard close the door as soon as he knock me down.

Q. Did you see any gun with anybody, or a pistol? A. I didn't see the gun. 20

Q. Nobody had a pistol that you saw? A. No, I heard it.

Q. You heard "Hands Up." What did you get Did you get a bundle or a package? A. Got a bundle like that.

Q. Each one of you? A. Yes.

Q. Tied together or separate? A. He got one package and I got my own.

Q. What did you do with your package? A. Me take package, I says, "Don't leave here." I take in my hands, put in my pocket. 30

Q. You each got a package like that? A. Yes.

Q. On top of each package was a ten dollar bill? A. Five dollar bill.

Q. You took those. What did you do? Did you say "Good-by" to McDonald or Burke? A. I didn't. I got no time to tell him "Good-by."

Q. You went out of the saloon? A. Me don't go in the saloon that day at all. We go out the same door, we go some road. 40

Q. Did they tell you to go away without saying

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anything? A. He never said a word. He threw the package on the table.

Q. You picked it up after he threw it on the table? A. He threw it on the table; I think, is that certificate? I see there is nothing else, I see there is nothing else in it, just paper.

10 Q. Did you holler, or what did you do? A. I got no time to say "Come and help me."

Q. Didn't you think you had two thousand dollars worth of green goods, counterfeit money, and you beat it back, left the saloon and went home? A. Me never was in the saloon.

Q. You went out and took a trolley car—what time of day was that? A. I couldn't tell what time.

Q. Twelve o'clock? A. After twelve.

20 Q. Lots of people around? A. I tell the people, there is lots or not; not much.

Q. Were there lots of people around when you went out of the saloon, and walked on the street? A. I see couple of ladies, couple of men, that was all.

Q. Did you see any policemen? A. I don't know where to go; Charlie says "Come on."

30 Q. Didn't you find a policeman from the time you left the saloon until you got down? A. Not that day.

Q. You got in the trolley car? A. Since we got arrested, next time—

Q. The day you were robbed, did you see any policeman in Union Hill? A. No, me don't see no policeman.

Q. You got in the car and went to the depot in Hoboken? A. Yes.

Q. How long did you wait there? A. Couple of minutes—train.

40 Q. What time was the train? A. I don't know, I guess one o'clock, one o'clock, eleven o'clock.

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Q. You didn't look at your package on the train? A. No, I didn't look at it on the train.

Q. Neither you nor Charlie looked at your packages? A. I don't ask him in there. I look as I am dead too.

Q. You were not dead when you got to Hoboken? A. I got big pain in my stomach. I beat it quick. 10

Q. Neither you nor Bokin looked at your packages until you got home to Scranton? A. No, I don't look.

Q. Bokin didn't look at his, either? A. Bokin look at his.

Q. When? A. That day.

Q. What time that day? A. I can't tell.

Q. In Scranton; he didn't look at it—A. He don't look at it in Scranton. 20

Q. Where? A. He look at it in Hoboken.

Q. What did he say? A. He says we can't do anything, we beat it from there, we will go home, we take home train, go home.

Q. Didn't he say—didn't you think because you had been buying green goods, you were afraid to be arrested with these in your possession? A. Never in my life, working man thirty-five years. I got lots mans here, ask them with kind of man I am. 30

Q. What time did you get to Scranton that day? A. As soon as we get there, we take car, go home.

Q. What time did you get to Scranton that day? A. Cost me twenty cents to ride home on the car.

Q. (By the Court.) What time did you get to Scranton that day, after you were robbed? What time did you get to Scranton? A. Will be about one o'clock, two o'clock. 40

Q. (By the Court.) What time did you leave Hoboken? A. What time I leave Hoboken?

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Q. (By the Court.) Yes. You went to the D. L. & W. station. What time did you leave Hoboken? A. Five minutes, the train go.

Q. (By the Court.) What time did you leave Hoboken? A. I cannot tell, about eleven o'clock, about one o'clock, twelve o'clock, take the train.

Q. (By the Court.) About what time did you leave Hoboken? A. Please, Mr. Judge, I don't
10 know, I tell Charlie I go home on train, my stomach was sick.

Q. (By the Court.) You must know whether it was morning or night, or when it was. A. It was afternoon.

Q. (By the Court.) It takes about five hours to get to Scranton? A. Yes. Five hours, take the street car, go home.

Q. What time were you robbed—about twelve
20 o'clock? A. Some about twelve o'clock, after twelve, about twelve o'clock.

Q. You got to the depot about one o'clock. What time did you get to Scranton, if you remember? If you don't remember, say so. A. I can tell you please, I never—

Q. Was it day or night? A. Day; same day.

Q. About what time did you go to the bank? A. No, me go second day to the bank.

Q. Did you tell your wife when you got home
30 that night, you were robbed? A. My wife seen me, I pass on the sidewalk, she said, something wrong, so like, seen walking around like—excuse me—like drunken man. I say I am skinned, all but three or four dollars.

Q. You didn't have but three or four dollars left? A. Yes.

Q. Next morning you went to the bank? A. Yes, sure.

Q. What did you do at the bank? You didn't
40 bring this package? A. Yes.

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Q. Didn't you pick off the top and bottom?

A. I fetch everything.

Q. Did you go with Charlie Bokin to the bank?

A. Yes, I go to Mr. Pfyster, I say, "Mr. Pfyster, look at that money, see is it good."

Q. You only brought him the top and bottom?

A. I didn't bought nothing.

Q. You only brought him the bill on the top and the bill on the bottom, you didn't bring him this bundle? A. Just as it was there, I show the five dollar bill and the ten dollar bill. 10

Q. (By the Court.) What money did you take to the bank? A. The paper.

Q. (By the Court.) Did you take the whole package? A. Yes, the package.

Q. Did you say—"Is this good, Mr. Pfyster?"

A. No, sir, says, this five dollar, ten dollar, good? First says, this five, this ten dollar, good. He says, "What is the matter?" I say, this kind of certificate I buy, I said, that is all he sold me, pretty near throw me in the river, kill me dead. 20

Q. Without bringing it to the bank, didn't you know that was no good? A. Yes, I show him that.

Q. Without bringing it to the bank didn't you know it was no good? A. No, the bank says the money was good, that paper was no good. That was what he said. 30

Q. You knew that without asking? A. To the bank I said, that kind of certificate I am sold. I say that is all I got for my thousand dollars.

Q. Didn't you think it was counterfeit money, and didn't you take the top and bottom bill and bring it to the bank, and the bank said it was good? A. No, I never mentioned it, counterfeit money, never mentioned counterfeit.

Q. Did you call that a certificate? A. He call me certificates, as soon as opening, I see paper. 40

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Q. After you took it to the bank, what did you do? That was the day after you were robbed?

A. Couple of weeks after that I take—

Q. Didn't you hurry back, go back to New York, to Hoboken, didn't you go to that saloon the day after you were robbed? A. Yes. Me go after arrested—

10 Q. The very next day after you were robbed, did you go to that saloon? A. Yes, me go.

Q. Didn't you have a conversation with McHugh (indicating)? Do you know him? A. I don't know. I see then there is another big fellow there.

Q. You had a talk with this man there the next day? A. Maybe he know. I forget that.

Q. Any how, you were in that saloon the next day? A. Yes.

20 Q. What were you doing there? A. I don't know what for he take me there, Burke and Meca.

Q. The day after you were robbed? A. He have them arrested.

Q. Didn't you have a conversation with this man, ask him where Burke and McDonald, or Meca, were? A. I don't remember I spoke to him about it or not. I think I told him I had pretty bad luck in here.

30 BY THE COURT:

Q. The next day after you were robbed, you came back and went to Coffey's to look for these men; is that what you say? A. Me got arrested.

Q. The next day? A. About twenty-three days after that.

Q. How many days after you were robbed, after he hit you in the stomach, did you come back and go up to this place to see if you could find these men? A. Wednesday—

40 Q. How many days after? A. About three or four days.

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Q. You said the next day. A. No, about two or three days. I forget. Because I don't think he do that business with me.

BY MR. CUTLEY:

Q. You know well, it was the next day you were there? A. I forget, please, it was the next day or not. I was crazy that time. 10

Q. Was Bokin with you? A. Bokin was with me, sure.

Q. Who sent you back--your lawyer? A. What?

Q. Didn't you go to your lawyer in Scranton, and didn't he tell you to go back, straight back? A. Never.

Q. You didn't go to any lawyer? A. No.

Q. You went back to Union Hill the next day? After you left there, where did you go? 20

MR. McCARTHY: I object. It contains an unwarranted assumption of fact.

Q. I asked you if you came back the next day. A. I couldn't tell you, exactly the next day. I tell you, maybe on the third day, on the second day.

BY THE COURT:

Q. Did you go back to this place the day after you were robbed? A. Mr. Judge, about two or three days after. 30

Q. Did you go back the day after? A. Yes, after me got robbed.

Q. The day after, you said? A. About two days after, maybe two, maybe three, I cannot tell.

BY MR. CUTLEY:

Q. After that day, you did come back, did you go to New York that same afternoon—to the Empire Hotel? A. Me arrested, me take cop, me arrested, then he call me over— 40

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Q. I didn't ask you that at all. Do you understand what I am saying?—the day you came back to Union Hill, the first time after you were robbed, you had a conversation in that saloon with this man, where you said you had bad luck; that afternoon, did you go to the police in Union Hill or to New York? A. Me after arrested, up to
 10 Union Hill, go to New York, show that building, that man take with me.

Q. You didn't go to Union Hill until three weeks after this? A. Me look him after this, me look him afterward, soon me arrested.

Q. Didn't you go a day or two after you were robbed, have the conversation I have repeated with McHugh, and didn't you go to 2380 Broadway, New York, and ask for Mr. Burke? A. I
 20 ask cop, police, show me place.

Q. I don't mean the time they were arrested. The day you came back from Scranton, a day or two after you were robbed. A. Went to Union Hill.

Q. Did you make a complaint, the two or three days after you were robbed, to the Union Hill police or the New York police? A. I cannot tell.

Q. You cannot tell? A. Couple of days.

Q. A couple of days after you went to Union
 30 Hill, did you go to New York, to 2380 Broadway? A. Me got the cop, show me, show him the place we robbed, what kind of business.

Q. You say it was two or three days after you were robbed, you told the Union Hill police that? A. I don't know.

Q. Was it a month after? You know that, don't you? A. I cannot tell you. I don't know, I don't know—that kind business.

Q. Don't you know, as you have testified in
 40 this court room, you didn't go back to New York from the police and make complaint, until some

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time either the latter part of July or the first part of August, 1913? A. Sure, me go back.

Q. Wasn't that the first time you went to the police? A. That was the first time, when I arrested.

Q. Three weeks after? A. Yes.

Q. When you went to New York did you have a conversation with a man named Joseph Burke at 2380 Broadway, and ask him where this man, Burke, who robbed you, was? A. Never. 10

Q. Didn't you have a conversation a couple of days after you were assaulted and robbed, with this Burke, where there was some conversation about the Great Northern Hotel in Chicago? A. Never.

Q. You said you wrote a letter to Mr. P. F. Burke, you asked if he was here, he said no, you said you would wait a couple of weeks until your letter comes back. You did write a letter to Burke? A. No, sir. 20

Q. You never had such a conversation—a conversation of that kind? A. No.

Q. Did you have a conversation with Burke, this bartender? A. I spoke to him, give me a drink, glass of beer.

Q. That was after the assault? A. I never went, never in any business, never about kind of business. 30

Q. Never had any conversation of that kind? A. No, sir; not the business.

Q. When you did make a complaint to the Union Hill police about three or four weeks after the assault— A. There is nothing, just arrested, no complaint.

Q. They were not arrested till a year afterward? A. He arrested there, me take him, the cop, show the cop that building, me take him down, me show alone. 40

Mike Smith—for the State—Cross.

MR. MCCARTHY: That was the fifth of August?

Q. The fifth of August? A. I forget all about it.

Q. When did you to New York in regard to the pictures—have anything to do with the police in regard to the pictures? A. Me go there—

Q. When? What day, what year? A. That was about noon time.

Q. (By the Court.) How long after the robbery, a month or ten years? A. I don't know; about two or three weeks.

Q. Who was with you, Mr. Dillman, this gentleman? A. Yes. There was another man.

Q. How long after the robbery was this?

THE COURT: He says two or three weeks.

A. Two or three weeks.

Q. Wasn't it a year? A. No.

Q. Wasn't it a year afterwards you went to New York? A. No.

Q. Two or three weeks? A. Yes.

Q. You went to some chief of police over there, and picked out the pictures? A. Yes.

Q. Where was that, you picked them out? A. He got a card there—what they call it—lots of rooms there, me first thing, look up the pictures, then he says, wait, Mr. Bokin, I got some drawer there I show you. Charlie Bokin left me there, I don't make look him over, I find some like it, he pick him up, "Here," he says, "Come here, Mr. Smith, me see something."

Q. Who said this? A. Charlie Bokin. He got—I don't know—four or five in drawer, he says, "Mr. Smith, you think that is the man?" Excuse me, look him over, I says, "That is the same man."

Q. You say he got this from a drawer? A. I forget about this.

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Q. At the last trial didn't you testify you went right over and picked it off the file? A. Yes.

Q. Which is right? He got it out of the drawer, or you picked it off the file? A. I don't remember. I told him first time me look up, little drawer, pick him up, call me over, he says, "Mr. Smith, you look at that." I can't find anything.

Q. Didn't you say at the last trial here, you didn't identify the picture you picked off the file? A. I picked up the wrong one. 10

Q. You picked up the wrong one? A. Yes.

Q. Did you say that the last time? A. What?

Q. Didn't you say to the Court, when the Court questioned you, you picked it out, it was right opposite your eyes? A. I show to Charlie Bokin. Charlie Bokin say it is not Meca.

Q. Are you sure of that? A. Sure of it. 20

Q. That is the same testimony you gave before? A. Same time Charlie Bokin pick him up there, he had twenty or twenty-four there.

Q. Then the man you picked out—how did you come to pick out the wrong one? A. I say to Charlie, that man look like him. He says, no, we look at the both rooms, after we found same picture, as soon as we got to big man, by policeman caught him some place in New York City, Judge called me in the court, in jury room. As soon as me got there, me judge in New York— 30

MR. CUTLEY: I object. It is not responsive.

A. —(continuing) as soon as me come to court, cop, him there, he goes to judge's room, him put twelve men there—

Q. That was not the day you picked out the picture? A. No, it was after.

MR. CUTLEY: I ask that it be struck out.

THE COURT: It may be struck out. 40

Mike Smith—for the State—Cross.

BY THE COURT:

Q. How did you come to pick out the wrong man from that picture gallery? A. Then went after, pick out the right man, I pick him out myself.

10 Q. How did it happen that you picked out the wrong man? A. Me pick out the wrong man, me says, "Mr. Bokin, that is the same man?" He says, "no."

Q. Charlie Bokin or the policeman said that was the same man? A. He look like him, same man.

Q. Was it the same man, though? A. Same, like that. I see Burke one time him have big hair, mustache, and second time, him no mustache, see him again, same thing in the beginning.

20 BY MR. CUTLEY:

Q. Did you tell the truth at the last trial when you said you picked out McDonald's picture from the file that was revolving? A. I tell him, McDonald, I take that for him, maybe that him or not, I fetch it right to Charlie Bokin.

Q. Weren't you sure about it? A. That was the reason I fetched him to Charlie Bokin. I said, "Charlie, look at that, maybe that picture."

30 Q. Wasn't the policeman there? Didn't the policeman take the picture down and say, "Is this the fellow"? A. The policeman never said that.

Q. Did Charlie get these four pictures from the policeman in your presence—A. There was about twenty or twenty-four in there.

40 Q. Did he pick out these four and show them to you and say "That is the man," after you had picked out another man? A. No, he never said to me that. He said to me, "Mr. Smith, look, it may be that same picture, what I got it, not where you got it."

Mike Smith—for the State—Cross.

Q. Was there any doubt in your mind? A. Yes, I say, same man, or not same man. Charlie Bokin say, not same man, he pick him out. I say, "Charlie, look," I pick and ask him, is that him?

Q. The reason you picked out a picture of McDonald was that Charlie told you you were wrong? A. Charlie told me.

Q. He said, "That is wrong," then he showed you the right one? A. He said that is picture not look like him. 10

Q. You thought it did look like him—because you had picked it out for him? A. I told him it look like him.

Q. Didn't you tell the Judge you identified McDonald's picture in the racks, in the gallery in New York, when you went right up and pointed out his picture? A. Yes, I picked him out, I say three times, one look like him, it was not him, as soon as I saw the picture in the drawer, it was exactly him. 20

Q. After you had seen this picture you went in the court room where twelve men were lined up by Detective Daly, with the defendant? A. The judge in New York, he chase him out, very much close the door, he take men from jail, take twelve men—I don't know—twelve men from somewhere, he says, "Mr. Smith, just take steps from wall, see if you can pick out the man that robbed you of your thousand dollars." He lock up the door. 30

Q. Who told you that? A. The judge in New York. Charlie was behind; I was alone.

Q. What did you do then? A. Mr. Judge, he told me, "Mr. Smith, pick him out." Then twelve, you know, I take walk from corner, as soon as I get over, I said, "Here, him that third man from corner." "Are you sure?" "Yes, I am sure. I show you million people." "Are you sure?"— 40
three times. "Yes, I am, Judge." Charlie Bokin pick him out, too. That is all I know.

Mike Smith—for the State—Cross.

Q. That was a year after you picked him out in the police station? A. I don't know.

Q. You know it was a year? A. Maybe a year, maybe not. Soon he catch him, that is the time.

10 Q. Wasn't it a year after you saw his picture, that McDonald was arrested? A. If it was year, couple months, I don't know; maybe year, maybe couple months.

Q. Wasn't it July, 1914, you picked out his picture in the police station? A. I can't tell you. Suppose I tell you lie, suppose I swear; I can't tell you lie.

20 Q. Wasn't it a year before that you had gone to police headquarters and picked out his picture? A. I tell you three times, if it was year or couple months, I don't know.

Q. At the time you identified the man you were with Dillman and this New York detective? A. Suppose—

Q. Whenever you went any place in New York in regard to this case, after July 8th, weren't you with Dillman and Mr. Daly? A. Yes, me go with him all the time.

Q. You went with him all the time? A. Yes.

30 Q. From the time you picked out this picture, until he was arrested, whenever you came to New York about the case you went to see either one of those two men? A. He catch another man, like Burke, Judge send me subpoena, he said, "Come over." Me go, he got another man, I say, that is wrong one, not same man; he said, go home.

40 Q. It was a year after you had picked out the picture, you came back, identified him in the court room, after having had conversations with Dillman and Daly, and after seeing pictures of this man? A. I can't tell you it was a year or couple months.

Mike Smith—for the State—Cross.

Q. If it was July 5, 1914— A. Something like that.

Q.—and you were assaulted July 8, 1913, that would be a year? A. About that.

Q. I want to call your attention again to the conversation at the saloon or place where you were robbed, on or about July 8th, 9th or 10th, 1913, when you spoke to McHugh, and ask you, did you have any conversation with McHugh regarding where Burke was, or what had become of those people? A. I don't speak. 10

Q. You didn't speak that? A. Me speak, luck pretty bad here, that is what I told him.

Q. What did you mean by that? A. What I can explain, to speak, to say, what I look for.

Q. I call your attention to the conversation at 2780 Broadway, New York, about this defendant, Burke, a few days after the robbery, and ask you, did you have a conversation with the bartender, **Burke**, where you talked about Meca or McDonald, or talked about Chicago, or the Great Northern Hotel? A. I tell you hundreds of times, I tell you before— 20

Q. (By the Court.) Did you have any such conversation? A. No.

Q. I call your attention to the testimony given by you at the last trial of this case in regard to your identification of this defendant at the New York police headquarters, and ask you if at that time you did not say you had picked the picture of McDonald from the revolving file at the New York police headquarters, and that you had picked it out yourself, and that you were sure it was McDonald? A. Yes, I pick it out myself, I tell them that wrong, excuse me, I says, "That is the one, that is the one." He says, "No, Mike, that is the wrong man. I pick him up." He says, that is the same man. 30 40

Mike Smith—for the State—Re-Direct.

Q. I ask you, did you make the explanation or give the same testimony at the last trial here?

A. No.

RE-DIRECT EXAMINATION BY MR. MCCARTHY:

10 Q. Please listen to the question and don't answer it unless you understand. After you were robbed in Union Hill you went home, did you?
A. Yes.

Q. When did you come back to Union Hill again? A. About two or three days.

Q. Who did you see in Union Hill when you came back? A. Me go to office, Chief of Police.

Q. You went to the police station? A. Yes.

Q. Did you see Lieutenant Dillman? A. Yes.

20 Q. Where did you go with him? A. He go with me and Charlie to the saloon.

Q. You showed him where the place was? A. Yes.

Q. That was the first time you had been to that saloon since you had been robbed? A. Yes, first time.

Q. You say that was two or three days after you were robbed? A. About two or three days afterward.

30 Q. When you saw Mr. Dillman, did you make a complaint in writing? A. Yes; in the office.

Q. Here is a complaint before Justice Stout—Mike Smith—is that the complaint you made at the time you came back to Union Hill and saw Mr. Dillman? A. Yes, that is the time.

Q. That is the fifth of August, 1913? A. Well, I forgot what date it was. That was the time.

40 Q. Are you sure that is the only time you came back to Union Hill after you were robbed? A. Yes.

Q. (By the Court.) You made the complaint that day? A. Yes.

Mike Smith—for the State—Re-Direct.

Q. Had you been to the New York police before that, or after that? A. No, after that.

Q. Did you go to the New York police the same day or after that? A. The same day, soon me arrested.

Q. Who went with you? A. Charlie Bokin.

Q. Who else? A. That cop, and another man, old man, chief. 10

Q. Chief Wallum? A. Wallum.

Q. Counsel asked you when you opened your package that Burke had thrown down to you. When was that? Did you open it in Hoboken, in Union Hill, or when did you open it? A. I opened it in Scranton.

Q. Do you know where Mr. Bokin opened his package? A. He opened it right away.

Q. Where? A. Right in Union Hill. 20

Q. In the place where you were robbed, or outside? A. Outside, I think outside, but I forget, please, Mr. District Attorney, I forget all it, I went down for dead.

Q. Weren't you anxious to see what was in your package? A. In my own package?

Q. Yes. A. My own package I got in my hands.

Q. Weren't you anxious to know what was in it? A. I don't know anything about it; as soon as I open it in Scranton I see, I don't see, there is no certificate in it, or anything. 30

Q. Did you see Mr. Bokin open his package? A. Yes.

Q. Did you see what was in his package? A. I see there is five dollars one side, and ten dollars on the other side. He says, "Look, this kind certificate we got sold."

Q. Counsel asked you—

MR. McCARTHY: Mr. McHugh, stand up. 40

Q. —counsel asked you something about talk-

Mike Smith—for the State—Re-Direct.

ing to Mr. McHugh at the saloon; you said you hadn't said anything to him. Do you remember being in his place? Yes or no. A. I believe so, there was only—there was another man, then he was there.

Q. Who was with you in that saloon? A. Mr. Bokin.

10 Q. Who else? A. Cop.

Q. That was the only time you were in that saloon after you were robbed? A. Yes.

Q. Were you in the saloon the day you were robbed? A. Me was in the saloon that time, show the cop.

Q. (By the Court.) Were you in the saloon the day you were robbed? A. No, sir. Me go home right away.

20 Q. (By the Court.) He wants to know whether you were in the saloon the day you were robbed. A. From the side door, back, behind.

Q. When you came out of the place where you were robbed that day, did you go out through the saloon or did you go out the same way you went in? A. Same door, side, back.

Q. You are sure the first time you were in the saloon was the day you went there with Mr. Dillman? A. Me don't know there was saloon or not.

30 Q. The day you went with Mr. Dillman, you knew it was a saloon? A. Yes.

Q. That was the first time you were in there? A. Yes.

Q. Was that the day you said to Mr. McHugh, "It looks bad for me"? A. Yes. That is all I talk to him.

Q. Mr. Smith, how long a time were you in the company of Mr. McDonald on that second time you met him in New York; an hour or half an hour, a minute, or what? A. What time he was
40 with me?

Mike Smith—for the State—Re-Direct.

Q. How long were you in his company? A. Second time?

Q. Yes. A. About four or five hours.

Q. The first time you say it was about twenty minutes, in Pittston, when you met him first? A. My home, about twenty or twenty-five minutes.

Q. The third time you met him, in Hoboken, how long were you with him? A. The third time, 10 in Hoboken, that was the time I am robbed.

Q. You met him the first time, in Pittston, did you? A. Yes.

Q. When your wife was there—that was about twenty minutes? A. Yes.

Q. The second time, in New York, when you went to the Empire Hotel? A. Yes.

Q. You were with him about four hours? A. He take men in the car, upside down.

Q. About how long? A. I don't know exactly 20 how long.

Q. About how long? A. About four or five hours, he talk with me, talk with me.

Q. The third time you met him in New York, Mr. Bokin was with you, was he? A. Yes.

Q. How long were you with him then? A. About noon time.

Q. How long? A. Noon time.

Q. I am talking about the third time, when you and Mr. Bokin went to— A. Third time, he meet 30 me in Hoboken.

Q. How many times did you meet him altogether? A. Three times altogether.

Q. Once in Pittston? A. Yes. I don't count them.

Q. Second time in New York, when you told him you had fifteen dollars? A. Yes.

Q. That was the second time? A. Second time.

Q. Third time, when Mr. Bokin was with you? A. Yes. 40

Q. That was in New York? A. New York, sec-

Mike Smith—for the State—Re-Direct.

ond time, Charlie Bokin was with me, that was time I got five hundred dollars.

Q. Second time, you were in New York? A. The third time in Hoboken.

Q. Please listen, won't you? The first time you met him was in Pittston, Pennsylvania? A. Yes.

10 Q. The second time you met him in New York, you had five hundred dollars in your pocket? A. Yes.

Q. You told him you had fifteen? A. Yes.

Q. That was the second time you met him? A. Yes.

Q. How long were you with him the second time? A. Couple of hours.

Q. You said four or five. A. About say, like that, yes.

20 Q. The third time you met him was also in New York? A. No, Hoboken the third time.

Q. Can't you count? Can't you figure? How many times did you see him in New York? A. Three times, once home, that is four.

Q. The first time you saw him in New York when you were alone and you had five hundred dollars in your pocket? A. Yes.

Q. How long were you with him? A. About couple hours.

30 Q. The second time you saw him in New York, you say Charlie was with you? A. Yes.

Q. How long were you in his company then? A. About two hours.

Q. The next time you saw him was in Hoboken, when you were robbed? A. Yes.

Q. That is once in Pittston, twice in New York? A. Yes.

Q. And once in Hoboken and Union Hill? A. Yes.

40 Q. Four times. Is this the man you saw in Pittston—(indicating the defendant)? A. That is same man.

Mike Smith—for the State—Re-Direct.

Q. —you saw twice in New York and once in Union Hill? A. Yes, yes. That is right man.

Q. This is the man you say you picked out later in the Magistrate's Court in New York? A. Yes, that is the same man, there.

Q. (By Mr. Cutley.) Is this the same man whose picture you took down from the rack in police headquarters in New York? A. Same man.

Q. (By Mr. Cutley.) Same man. (No answer.) 10

BY THE COURT:

Q. Do you know what he says? Is he the same man whose picture you picked out of the revolving gallery? You said a little while ago you picked out the wrong man. A. That is I tell you.

Q. He just asked you is this the same man whose picture you picked out of the rack, or the revolving gallery, in New York, in police headquarters, and you said yes. A. Yes. 20

Q. Is he the man you picked out of the revolving gallery? A. Sure, that is the man.

Q. You said you picked out the wrong man. A. Sure, that is the man. Same man me pick out of the drawer. Soon as I go home.

BY MR. CUTLEY:

Q. Do you remember testifying at the last trial you picked out McDonald's picture from the rack? A. I told you, wrong man, I told you, that is wrong man, I pick him out. 30

Q. Weren't you in Union Hill a day or two after you were robbed, and didn't you go to Coffey's saloon and talk to McHugh? A. Please, you ask me about hundred times, I tell you—

Q. I want it straight. A. That is straight.

Q. Were you there two or three days after? A. Two or three days after.

Q. Wasn't it a month after, you went to the police? A. Well, I forget. 40

Mrs. Smith—for the State—Direct.

Q. I want you to remember. Wasn't it over a month? A. Couple of weeks, couple of months.

Q. It was a month after, you went to the police, and a couple of days after, you went to McHugh and talked to McHugh? A. I don't talk to McHugh at all, me show the cop, that is all.

10 Q. That is the only time you went back, when you went back with the cop? A. That was the time. Me never was there before.

Q. Were you there a day or two after you went to the bank in Scranton? Weren't you in Coffey's? A. I don't know that.

Q. Why don't you know? A. I am sick, that is all I know.

Q. Don't you know you were there? You left Union Hill and you went to New York? A. I see cop, that is all I know.

20 Q. Hadn't you been in the saloon before you went there with the cop? A. No, me go right with cop.

Q. The day you went with the cop was August 6th, a month after the robbery? A. Yes.

MRS. SMITH, a witness produced on behalf of the State, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. MCCARTHY:

30 Q. You are the wife of the man just on the stand? A. Yes.

Q. Do you know this defendant, James McDonald? A. Yes.

Q. Where did you first see him? A. My saloon.

Q. Saloon kept by you and your husband? A. Yes.

Q. When was that? A. In July.

Q. What year? A. I don't—

Mrs. Smith—for the State—Direct.

Q. Last year? A. About two years.

Q. How long a time was he in your saloon?

A. He was about twenty minutes, maybe half an hour.

Q. Did he talk to your husband in your presence? A. Yes. I was behind the bar.

Q. Did you talk to him, too? A. Yes.

Q. What was he talking about? A. First time **10**
he called he says, "Good morning, Mr. Smith." My man say, "Good morning." He says, "How is business going?" He say, "Not so bad, middling." "Well," he says, "I hear you good business man, I sell you some certificates for bond—for bond—bond certificates." My man say, "I take it off Block, long time, eighteen, nineteen years, I don't want to change." He says, "I got good whiskey, too." My man don't know, he say, "I can't take that business because I can't read and write." He **20**
say, "Mr. Smith, if you have some man help you read the certificate?" He says, "I have some man, we talk business." If we have Charlie Bokin, I know Charlie Bokin about twenty years, I say Charlie was a smart man, you take him.

Q. (By Mr. Cutley.) Was the defendant there? (No answer.)

Q. Was McDonald there then? A. No.

MR. MCCARTHY: I consent it be stricken **30**
out.

Q. Did you see Mr. McDonald, the defendant, after that? A. Never see, this one time in the saloon.

Q. One time, until he came here to court? A. Yes, he was sell the certificates first.

Q. Did you get money out of the bank for your husband, one thousand— A. Yes, I—

Q. You gave him one thousand dollars? A. Well, because— **40**

Mrs. Smith—for the State—Cross.

Q. Did you hand it to him? A. Yes, I give him, because he want to buy.

Q. How long after you saw Mr. McDonald in your saloon did you give your husband the money? A. Not after that, I see him no more.

Q. McDonald was in your saloon? A. Yes.

Q. He went out? A. Yes.

10 Q. How long after that did you take the thousand dollars out of the bank and hand it to your husband? A. I think about a month, something like that. I forgot.

Q. Do you see the man in court who was in the saloon for twenty minutes or half an hour talking about the bonds? A. Yes.

Q. Where is he? A. In the saloon?

Q. Where is he? A. Right there (indicating). I know him good, all right. I told my man,
20 "Don't do business with this man, because he don't look good, he look like rob."

CROSS EXAMINATION BY MR. CUTLEY:

Q. When did you say that to your husband?
A. First time I see him.

Q. Then you gave him five hundred dollars to do business with this man? A. First time I give him five hundred dollars because was five hundred dollars in property that would be good.

30 Q. What did you think you were going to buy?
A. I see certificate.

Q. What did you think Mike was going to buy?

MR. MCCARTHY: I object.

Question withdrawn.

Q. What were you giving this money to Mike for? A. For security, bond, he want one thousand dollars.

40 Q. What kind of bond? A. Look like bond, look like bill.

Mrs. Smith—for the State—Cross.

Q. It wasn't a whiskey bond, was it? A. That was whiskey bond, I see it, other bond.

Q. Was it a whiskey bond you were going to buy? A. By B. K. Block.

Q. You said you heard him talking. Were they talking about whiskey bonds? A. I see them in my saloon.

Q. You saw whiskey bonds? A. Yes, only one, 10
five barrel whiskey. I buy off Block, eighteen years, I know that certificate.

Q. You thought you would do better by dealing with this man who looked like a robber? A. I told my man, "Don't do business with him," because I had good distillery.

Q. Still you gave him five hundred dollars or a thousand dollars, to deal with a man you thought looked like a robber? A. He bother him all the time, bother him all the time. 20

Q. Other people bother you? A. Who? B. K. Block?

Q. You wrote to this man, too? A. He wrote to him, to meet him.

Q. You mean Charlie Bokin? A. I am afraid he give him some kind bad certificate. Ask him, read I say, "You are going to Philadelphia, you go with my man, please examine that certificate." I don't want somebody to cheat him.

Q. Did you know that Charlie had written to these men, too? A. I suppose my man told me, I think so. 30

Q. Wasn't it Charlie got your man to go to New York? A. Yes.

Q. Didn't you get mad at Charlie? A. I don't was mad, I was afraid, he cannot read.

Q. You knew every time Mike would go to New York to meet these people, or get telegrams, he talked it over with you? A. For what?

Q. Before Mike would go to New York? A. 40
Yes, he talked me so—

Mrs. Smith—for the State—Cross.

Q. Wouldn't Mike talk it over with you? A. No.

Q. Never had any conversation with him? A. No.

Q. Never had any conversation with him? A. No.

10 Q. Do you mean to say he went to New York without talking to you about it? A. I talk to Bokin about it, two months.

Q. Did Bokin say he was going to buy whiskey bonds? A. He was going to Philadelphia on his own business.

Q. If you were afraid of this man, from the time it started, you didn't like his looks—did your husband make any complaint about this man, what he did to him on this trip to New York? A. No.

20 Q. You let him go with Bokin, and gave him the money to go? A. Yes, sure.

Q. Did you hear any talk about counterfeit money? A. Never, never, money like that, counterfeit, never, I got business—

Q. As a matter of fact, wasn't it your thought that your husband was going to buy—

MR. McCARTHY: I object.

A. Nothing only this certificate.

30 THE COURT: Is there any objection to the jury understanding, when the witnesses refer to whiskey stock or whiskey bond, they are referring to warehouse certificates?

MR. CUTLEY: That is right.

THE COURT: The certificates show so many barrels of whiskey in the warehouse.

Charles G. Bokin—for the State—Direct.

CHARLES G. BOKIN, a witness produced on behalf of the State, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. MCCARTHY:

Q. Where do you live? A. West Pittston, 133 North Street.

Q. How long have you lived there? A. Ever since I got married, over ten years. 10

Q. What is your nationality? A. I am a Lithuanian.

Q. Is Mr. Smith a countryman of yours? A. He was under Austrian government, I am under Russian. He comes under Austria.

Q. What business are you in in Pittston? A. Undertaker and furniture.

Q. That was your business in the month of July, 1913? A. Yes. 20

Q. Do you know the defendant McDonald? A. Yes.

Q. Where did you first see him? A. I seen him, office in New York.

Q. When was that? About when? A. It was either 28th or 29th of May.

Q. What year? A. 1913.

Q. Who was with you? A. Mr. Smith.

Q. Was there anybody else there beside Mr. Smith and you and McDonald? A. No, there was just him and me. 30

Q. Did you see anybody else that day? A. No.

Q. With McDonald? A. I don't see, no, his partner, or anybody, he represented, he said, distillery man, but I don't see him that day.

Q. How long were you in McDonald's company, with Mr. Smith, that day, the first time you met him? A. We been about half an hour there in the saloon when he take us out, we went about two or three blocks, after, it seems, he says, Mr. Burke, he is kind of cranky, you know, unless he 40

Charles G. Bokin—for the State—Direct.

is right, it don't do to bother him, if he don't like it, he don't bother with it, Mr. Bokin, you can stay on this corner, I will take Mr. Smith, if he want to see you, you can come up after.

Q. Who said that, McDonald? A. Yes.

Q. Did he go in, with Mr. Smith? A. Yes. Mr. Smith went with him to Mr. Burke, and Mr. Smith told me—

Q. Never mind what Mr. Smith told you. How long after he went in with McDonald did you see him again? A. In about half an hour.

Q. Then where did you go? A. We then go back. Mr. McDonald, he say, "What kind of business you fellows doing here? Do you think you are buying bushel of potatoes, you come here, fool around," he was not supposed to come with five hundred dollars, he was supposed to come with one thousand dollars.

Q. Who said that? A. McDonald.

Q. To whom? A. To Mr. Smith and me.

Q. Was there anybody else beside you there? A. No, just us three. I said I look at him, I sent Mr. Smith kind of wink, I sign to him, I thought to myself, I just tell Mr. Smith, you got that five hundred dollars, I said now, I said, "If your whiskey bond is all right, as you represent them, it may be, but you haven't got to go to Exeter Valley two or three times to see Mr. Smith, he will pay one thousand dollars like that." (Witness snaps his fingers.)

Q. To who? A. To Mr. McDonald. I pull Mr. Smith on the sleeve, I said, "I will have to go now, I don't want to miss train, you go home, these people don't look right to me." McDonald says, "You don't go away, do business, ask him yourself." We thought when he know only have five hundred dollars, we don't go Burke. We say

40 so.

Charles G. Bokin—for the State—Direct.

Q. How long were you with McDonald that day? A. It probably took hour, or maybe one and a quarter. I can't exactly say.

Q. When was the next time you saw McDonald?
A. When he took us in the Duke's House.

Q. Did you go in with Smith? A. Yes.

Q. Where were you going to go that day? A. I was going to Philadelphia. 10

Q. What for? A. The first time?

Q. I mean the time you were going to Hoboken.
A. I was going to buy a coach. The first time I was going to take my examination at Philadelphia, before the State Board.

Q. How much money did you have with you?
A. I had one thousand dollars, and eight dollars—some change.

Q. What day was this you came to Hoboken?
A. July 8, 1913. 20

Q. What time did you leave your place up there? A. We started early in the morning.

Q. What time, I say? A. Seven-thirty.

Q. From where? A. West Pittston.

Q. What time did you get to Hoboken? A. We got here a few minutes before or after twelve. We kind of sit around to wait, inside, I wasn't able to make out just exactly if he was going to wait for us there or at Duke's House—

Q. You went to the station? A. Yes. 30

Q. Smith with you? A. Yes.

Q. Did you see McDonald there? A. Yes, we found him at Duke's House.

Q. Was he there when you arrived? A. He was there, here at the Duke's House, he wasn't exactly at the station, but at the Duke's House.

Q. How long were you down in the station before you saw McDonald? A. We got to turn around there—

Q. How long were you in the station before you saw McDonald? A. Half an hour. 40

Charles G. Bokin—for the State—Direct.

Q. Waiting for him? A. Yes.

Q. Where was he when you saw him first? A. By the Duke's House, standing near, on the sidewalk.

Q. Did you go to him? A. Yes.

Q. Smith, too? A. Yes. He says, hollers, "How do you do? Good morning."

10 Q. What else? A. Mr. Smith was anxious to get washed, but he said, "Hurry up, we can stop up there." We started out, finally we going to walk this way back, I kind of feel to myself—

Q. What did you say? A. I feel, I am not going to bonded office, I hollered, he say, back here is bonded office, I thought to myself, funny way to go that way, it seems the man don't know his way and all, but then he got us on a Bergenline car.

20 Q. Did you go near the City Hall? A. Probably, but I never noticed.

Q. You had not been in Hoboken before? A. No.

Q. What car did you get on? A. Bergenline.

Q. Where did you go? A. They took us as far as Third Street on the Bergenline, then he got off, of course we got off, he took us on the car, we go in the back room, in the side door, right in big building.

30 Q. Union Hill? A. Yes.

Q. Tell us what happened in that place, from the time you went in? A. When we got in, Burke—suppose to be Burke, I don't know—

Q. Had you seen him before? A. No. Of course. Smith introduced me, told my business right away, he is Mr. Bokin, undertaker, going to Philadelphia to buy a coach, right away. I said, "I don't want to interfere with your business, I come here to see this certificate was all right, you say you sell to

40 Mr. Smith." He says, "All right." McDonald

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was standing there, he show me certificate, I look them over, I say they are not filled out, they are not signed.

Q. What did he show you? A. Whiskey bonds, whiskey certificates. I say the paper may be all right, but they are not filled out, not signed, we can't pay any money for such certificate, I say, this be filled out, be sealed, by officer or notary. 10

Q. Were they signed or sealed? A. No, they were not.

Q. What did you say to him then? A. He say, "I will fill it up," and he was kind of getting ready on little table.

Q. Who said that? A. Burke. McDonald was taking me in another room, when I going in this room, Burke says, "Just a minute, Mr. Smith." He call Mr. McDonald back, as soon as he got me in this room, he close the door, went out. That is all I know about it. 20

Q. How did you come to go into the other room, with Mr. McDonald? A. Because there was two or three chairs, not enough to sit down.

Q. Did anybody ask you? A. Burke told us to go in the other room.

Q. McDonald went in, too? A. He went in, took me in.

Q. Then he left you in that room? A. Yes.

Q. Did anybody come in that room after that? 30
A. After that, I heard little shoving in other room, and he come back—

Q. Who? A. McDonald, with a revolver, point to me, says, "Hands up, Smartie." So I raise my hands up, I thought to myself, if I am right away—

Q. What happened then? A. I kept my hands in the air, he held the revolver, Burke went through my pockets, just like that, through me here, as soon as he went, this bundle here, big 40

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bunch of money for this pocket, he didn't go in this pocket because when I was sitting down, I got left with me, eight dollars some cents on me.

Q. How much money did he take from you? A. One thousand dollars in one bunch.

10 Q. Then what happened? A. And threw the bundle on the table.

Q. Who? A. I cannot tell exactly which one because I wasn't able to look around myself. He says, "Smartie, stay here for five or ten minutes or you will get it."

Q. Who said that? A. McDonald.

Q. What happened then? A. They run out.

Q. Who? A. McDonald and Burke.

20 Q. When they ran out what happened? A. Then Mr. Smith was coming in, he says, "I am nearly killed." Well, I was.

Q. Did you go out of the place then? A. Yes; I took that bundle, I see it is paper, I see five dollar bill on one, ten dollar on the other side, I said to Mr. Smith—

Q. Never mind what you said to Mr. Smith. Did you look at anything else beside that five and ten dollar bill? A. I didn't look, nothing, I tear the paper off, see the five and ten dollar bill, outside the paper, just plain paper like that.

30 Q. You saw it was plain paper? A. Yes.

Q. You said something to Mr. Smith? A. I said—

Q. You said something to him? A. Yes, I did.

Q. Where did you go? A. We walked out, I took the number of the building, I knowed me have to remember but just what street, the name of the street, I don't remember, Bergenline car, goes on Third Street, and we took the car right to the station.

40 Q. Then you went home? A. Yes.

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Q. What time did you get back? A. We went five-fifty train, five-fifteen, I think at that time, now five-fifty.

Q. Did you come back to Union Hill after that? A. No, we didn't, we went to New York. We go next time, we go to New York.

Q. Did you go back to Union Hill? A. No.

Q. Did you see this man, Dillman? A. Yes. 10

Q. Where? A. In Union Hill.

Q. When was that? A. It was either twenty-nine or twenty-eight days after that happened. Of course, we come back before that, but simply was going to take him to the place they took me, in same time.

BY THE COURT:

Q. How long after you were robbed was it you went to Union Hill? A. Probably twenty-nine, 20
twenty-eight, twenty-seven days.

Q. Must have been in August, then? A. Yes.

BY MR. MCCARTHY:

Q. That was the first time you came back after you were robbed? A. Yes.

Q. The only time, was it? A. The only time.

Q. Where did you go after you got to Union Hill? A. I just think, I didn't make a mistake— 30
if we—I didn't come—no, I think we went first to New York.

Q. You mean after you went to Union Hill? A. We went to police headquarters.

Q. Who was with you when you went to police headquarters? A. Mr. Smith. Nobody, just Mr. Smith and I.

Q. Were there any policemen there? A. We found there at the police station, enough policemen, enough detectives.

Q. You came up to Union Hill, about twenty- 40

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seven or twenty-eight days, you think, after you were robbed? A. Yes.

Q. That was the day you made the complaint, was it? A. Yes, after getting those pictures.

BY THE COURT:

10 Q. Did you go to New York to get the pictures before you went to Union Hill? A. Yes.

Q. Did you go back to Union Hill after you were robbed, before you went to New York— A. No, we didn't.

Q. And you picked the pictures out? A. No, we didn't, we didn't go back straight to Union Hill after we were robbed.

Q. (By Mr. McCarthy.) The day you came back to Union Hill was the day you and Mr. Smith made the complaint to Dillman? A. Yes.

20 BY MR. MCCARTHY:

Q. That was the fifth of August—August 5th? A. Yes.

Q. When you came back to Union Hill? A. I suppose it was.

Q. Had you been to Union Hill after the robbery before you saw Mr. Dillman? A. No, we wasn't.

Q. Did you go to New York before you went to Union Hill to see Mr. Dillman? A. Yes.

30 Q. How long after you were in New York was it you came over to see Mr. Dillman? A. Either the same day or the next day, I can't just exactly say, we went with Dillman to see that place where we were robbed.

Q. This is the first time you were in that saloon or on those premises since the robbery? A. Yes.

BY THE COURT:

40 Q. Are you sure of that? A. I am pretty sure about it.

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Q. Why would you go to New York to look at the pictures when you were robbed in Union Hill?

A. If please your Honor, Judge, if you will let me, Judge, answer the question, we went with Mr. Smith to Block, where he is buy whiskey, he 'phone to headquarters, "I am sending you two men."

Q. What is that? A. We went to A. B. Block, in Fifth Avenue, Mr. Block ask lawyer to direct us to headquarters, we went to headquarters, of course, Mr. Doherty took up to the racks, he pulled out, after, we weren't able to find, then he pulled out—he says, "I got some pictures in the drawer," he pulled out desk. 10

Q. How many pictures in the drawer did he pull out? A. Maybe from twenty to thirty, I don't count.

Q. What did he do with them? A. I began to look around, I pull right the first one, I said, "Here is the man." I think Detective Riley, he says, "That is Milkie McDonald." Then I found more, I find four, one without mustache, one with mustache, one without hat, one with hat; on the back of the picture there was— 20

Q. Where did you go after that? A. We went to Union Hill, I think.

Q. Same day? A. I can't remember now.

Q. Then you saw Mr. Dillman? A. Yes. 30

Q. Then you went to the saloon with Mr. Dillman? A. Yes.

Q. Did you pick the four pictures of this defendant out because of something that the detective said to you? A. No.

Q. Or because you recognized the pictures as being pictures of the man you had seen on the fourth of August? A. Detective or nobody told us. I seen the man myself.

Q. Do you see the man in court? A. Yes, he 40

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is right here, sitting by his lawyer (indicates the defendant.)

Q. Did you write any letters, after the robbery, to Mr. Burke—P. F. Burke? A. Yes, I wrote one, on the same address, where the letters were going to Mr. Smith.

10 Q. Did that letter have to do with the trans-
action of the one thousand dollars? A. Yes.

Q. Spoke about "robbery," did it? A. I wrote that we will get him.

Q. Did you mail that letter, addressed to Mr. Burke? A. Yes, same address.

Q. What address? A. 2380 Broadway, New York City.

20 Q. How long after the robbery did you send that letter? A. Very shortly, it was either a three days or a week, if the fellow would know, we have to get trail of him.

Q. You mailed that letter where? A. Mailed that letter at Pittston, I think.

Q. Have you seen that letter since that day? A. When the letter come back, was opened, I suppose it was opened at his place.

MR. MCCARTHY: I consent that be struck out.

30 Q. Was that the only letter you sent? A. Let us see—

Q. At the last trial Mr. Cutley handed you a letter, addressed to Mr. Burke, you identified it as being a letter you sent to Mr. Burke— A. Yes.

Q. Did you? A. I sent it.

Q. Where did you mail that letter? A. I always mail it in Pittston.

Q. Where did you mail it? A. In Pittston Post Office.

40 Q. The one Mr. Cutley showed you at the last trial? A. That was the place where I mail them

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this day, I never mail any other place. I might drop it in any box.

Q. The letter that Mr. Cutley had in his hand at the last trial, which he showed to you, and asked you if it was in your handwriting, you said, "Yes"; is that right? A. I said yes, under my instructions it was wrote.

Q. Did you write it yourself? A. My book-keeper wrote it but it was under my instructions. 10

Q. Your bookkeeper signed your name to it? A. Yes.

Q. You recognized it as a letter you sent to Burke? A. Yes.

Q. Did that letter refer to the thousand dollars that was taken from you, or what did it refer to? A. One letter—

Q. (By the Court.) Is that what it was about? A. One letter I sent after the robbery, we will get him, and one letter he sent me something about real estate, I answered that letter. 20

Q. I am not talking about letters sent by you and Smith after the robbery. I am talking about a letter which Mr. Cutley showed you at the last trial, and asked whether you signed that letter to Burke, and you said "Yes." A. Yes.

Q. Did you send that letter to Burke? A. Yes.

Q. What was that letter about? A. I got one about real estate, I sent answer, another one I told him we will get him. 30

BY THE COURT:

Q. Do you remember testifying in another trial here? A. Yes.

Q. Do you remember Mr. Cutley showing you a letter? A. Yes.

Q. Do you remember what that letter was about? A. I don't remember exactly time, shortly after the robbery, he don't (didn't) let me read it. 40

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Q. Can't you tell us whether it was written before or after the robbery? A. One is—

Q. The one he handed to you. A. I can't tell, no, sir, because—(interrupted.)

BY MR. MCCARTHY:

10 Q. Did you write any letters to Burke just before the robbery? A. Yes, couple of times, Mr. Smith asked me to.

Q. Before the robbery? A. Yes.

Q. The letter which Mr. Cutley showed you, which you say he wouldn't let you read— A. Yes.

Q. Do you remember what it referred to? A. Which one, the first one and the second one, I don't know which one.

20 MR. MCCARTHY: I now call on counsel to produce, in accordance with the notice served upon him, a letter written to P. F. Burke, which he produced at the last trial.

MR. CUTLEY: Have you a demand for its production?

MR. MCCARTHY: Yes.

THE COURT: Read it.

(Mr. McCarthy reads a notice.)

30 MR. CUTLEY: I cannot produce such a letter because I have no such letter in my possession, there was no such letter in my possession; on the further ground, if I had it I should refuse to produce it on the ground that it would violate my client's constitutional rights in being compelled to give evidence against himself.

THE COURT: The first answer I will deal with first. You say you have no such letter?

MR. MCCARTHY: That is not so.

THE COURT: I cannot say that.

40 MR. MCCARTHY: The proof is there is such a letter, which he exhibited to this witness in open court. He says he has no such letter.

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MR. CUTLEY: I say I never had it.

MR. MCCARTHY: We demand the production of the letter.

THE COURT: They fail to produce it. Take the next step.

CROSS EXAMINATION BY MR. CUTLEY:

Q. Do you remember any such letter as the Prosecutor has spoken about? A. Yes. 10

Q. You mailed— A. Yes, I remember two.

Q. You remember one dated July 15, 1913, purporting to be written by Michael Smith? A. I don't.

Q. Do you remember any such letter, like that? A. I don't remember the date, but I remember two letters, one about real estate, another one about he will pay the money to Smith or we will get him. 20

Q. Who sent the last one? A. I suppose my name was on it.

Q. Do you know whether it was or not? A. I don't know.

Q. Why do you say you suppose? Do you know anything about it? A. I think my name was on it, because I wrote kind of sharp, a nice letter.

Q. Did you write that letter yourself? A. No, that was my bookkeeper.

Q. Do you know what was in the letter? A. Yes, I can say a few words, what was in it. 30

Q. You were asking for your money in July, 1915? A. I wasn't asking for my money.

Q. Is that the letter that was returned to you? A. Yes, it was there somewhere.

Q. Is that the letter?

MR. MCCARTHY: No. I am asking for the one you had at the last trial.

MR. CUTLEY: May I see that? 40

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MR. MCCARTHY: You produce the letter I demanded.

MR. CUTLEY: I will produce nothing.

MR. MCCARTHY: Then we won't produce this.

10 MR. CUTLEY: I think I am entitled to ask this witness about this letter. I call upon the Prosecutor to produce it. My legal rights are bound up in this proposition, there is an apparent attempt to demand from me a letter, thereby conveying to the minds of the jury the impression that I am holding a letter, which he has in his possession.

THE COURT: I don't know what he has in his possession.

MR. CUTLEY: He said, "I will give you mine if you will give me yours."

20 MR. MCCARTHY: The State wants to make one correction; counsel has stated that the State has in its possession a letter which we have required him to produce. The notice, which is in evidence here, requires him to produce a letter exhibited by him at the former trial of this man, which he has in his possession.

MR. CUTLEY: It was dated July 15th?

30 MR. MCCARTHY: Or thereabouts. A letter he had.

Q. This letter you wrote, July 15th, that was the letter you say was in the possession of the district attorney here? A. Yes.

Q. You gave it to him, didn't you? A. It is somewhere here, one letter, it should be here.

Q. You gave it to him, didn't you? A. Yes.

Q. Did you see it here to-day? A. No, I didn't see it.

40 Q. I want to call your attention to your testimony in regard to your identification of Mr. Mc-

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Donald in New York. Do you recall testifying at the last trial of this case that when you looked at the book which was shown to you by the police inspector in New York, you looked first at a picture, your mind was not made up, you looked on the back and you read something on the back about it being the picture of a man— A. I don't look on the back, I look on the face, I say right the beginning, the picture, then I look at the back, and the detectives took it away from me, didn't give me a chance to read it. **10**

Q. This picking out of the picture was done by you before you had made your complaint to the Union Hill police? A. Yes.

Q. Was Dillman there when that was done? A. I don't think so. He was in the room, though.

Q. Had you made a complaint to the police of Union Hill? A. No, we started out, we went to Union Hill— **20**

Q. (By the Court.) Had you made complaint to the police of Union Hill before you picked these pictures out? A. Yes.

Q. Was Mr. Dillman with you at the time you picked out the pictures? A. No, he was not.

Q. Who brought you to the police headquarters—Dillman? A. No, we went across from Block's building.

Q. Was Dillman there when you were picking out the pictures? A. No, he wasn't there. **30**

Q. Who was there—you and Mike? A. I and Mike; I remember Doherty, and Detective Riley; I think, as soon as I picked out the picture he said, "That is Milkie McDonald."

Q. (By the Court.) Where was Riley from? A. New York.

Q. (By the Court.) Was there any police officer there from Union Hill with you at the time you picked out the pictures? A. No. **40**

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Q. It was Riley said of the man whose picture you had picked out, "That is Milkie McDonald"?
A. Yes.

Q. Had you been looking at that picture any length of time? A. As soon as I put it out, I said this was the man.

10 Q. That was one of the pictures in the inspector's desk? A. Yes.

Q. In the drawer? A. Yes.

Q. There was another picture picked out that day? A. No.

Q. Did you and Mike have a conversation that day, in which Mike said, "That is the man," and you said "No"? A. Mike was looking on the wall. I was picking it out on the desk.

20 Q. Did he pick out a picture? A. He was showed one picture, he says was Burke, he thought it was Burke, but no satisfied it was him, picture on the wall. I see him I know him.

Q. Did he pick out McDonald's picture? A. No.

Q. Didn't you hear him testify at the last trial that he picked McDonald's picture from the wall?
A. No.

Q. Didn't you hear him say that here, to-day?
A. No, I didn't hear, because I was outside.

MR. MCCARTHY: The witness was excluded.

30 A. I was in the other room.

Q. You heard him testify to-day? A. Yes.

Q. That he picked this picture out, thought it was McDonald? A. No, not McDonald.

Q. He thought it was Burke? A. Yes.

Q. Then you showed him McDonald? A. Yes.

40 Q. Did he compare the pictures? A. As soon as he saw McDonald's picture he said, "That is the fellow." We are glad, just as glad as if we had the money back in our pocket.

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Q. Not so glad as that, were you? A. You bet, you please.

Q. When did you first meet McDonald? A. In New York?

Q. How did you come to meet McDonald? A. Mr. Smith ask me to come and examine the certificates with him.

Q. What time—year and month—was that? A. 10
Either twenty-eight—no, either eighteenth or nineteenth May, that was first time I met him.

Q. Had you written any communications to him before that? A. After I met him?

Q. Before that time? A. Before that time—I don't think so.

Q. The first conversation you had with Smith with regard to him was just before you met him, wasn't it? A. Yes, before me met him, Smith told me about such business, that an agent was after 20
him, trying to sell him—sell him—so requested me, that it will be all right, he says have been buying so many years from A. B. Block, I think probably pay little too much.

Q. He said that? A. He thought he would pay little too much.

Q. You were not interested in it, were you? A. No, sir.

Q. But you were interested enough to come to New York with him? A. I was interested enough 30
to accommodate him, because he accommodated me.

Q. He bought some furniture from you? A. He bought two thousand and twenty-two dollars and fifty cents for the church.

Q. That was before May 15th, or after? A. That was before that, way before, I think around April.

Q. As a matter of fact, didn't he buy furniture from you in February, 1913? A. No, he bought in April. 40

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Q. In April? A. Yes.

Q. After that you went to New York. How many times did you go to New York? A. Mr. Smith, he accommodate me with the furniture, about end of April, about that.

Q. How many times did you go to New York? A. Once to New York—office in Hoboken.

10 Q. When you went to New York the first time you say—how much did you have in your pocket?

A. I had some money.

Q. How much? A. I don't know.

Q. Five hundred dollars? A. I don't think so.

Q. One hundred dollars, two hundred dollars— A. I probably had.

Q. Did you have five hundred? A. I don't think so.

20 Q. The second time you went to New York how much did you have? A. I had then one thousand dollars.

Q. That was the time you came to Hoboken? A. Yes.

Q. You made two trips from Scranton? A. Yes.

30 Q. I understand you to say the reason you came the first time you intended to go to Philadelphia to take your examination as embalmer? A. To stand the examination. I had certificate. I am embalmer.

Q. But you had to go to Philadelphia for some reason? A. To stand, before the State Board examination.

Q. You left Pittston and Scranton— A. West Pittston.

40 Q. Is that the ordinary way to go to Philadelphia? A. If I didn't have to go, going with Mr. Smith, I could have taken the Lehigh Valley to go straight to Philadelphia. We took the Lehigh Valley and went to Scranton. That time we took the D. L. & W. right past Scranton to New York.

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Q. You came to New York although your intention was to go to Philadelphia? A. Yes, to go to Philadelphia on my own business.

Q. The first time, did you have to take your examination in Philadelphia? A. I went to Philadelphia.

Q. Did you go back to Philadelphia from New York to take your examination? A. Yes, I sent Mike home, went to Philadelphia. 19

Q. Where did you go from New York? A. The Lehigh Valley station.

Q. You took your examination? A. Yes.

Q. With five hundred dollars in your pocket? A. I don't know if I had five hundred, but I had some money.

Q. You know how much money you had in your pocket, because you and Mike had agreed to take so much money with you? A. I don't think so. 29

Q. Didn't you talk it over with him and agree to each bring five hundred dollars with you? A. I didn't tell you that, I talked it over with him, you are trying to put something over to me.

Q. Didn't you go—didn't you agree between yourselves, because these fellows called for one thousand dollars each, you would try to beat them down, and bring five hundred dollars? A. No, sir, we didn't. I didn't.

Q. What were you interested in? A. I wasn't interested at all. If I was interested or not, Mike—if I had those letters that come for Mr. Smith, I wouldn't take ten minutes. 30

Q. What real estate were you going to deal in? A. All around New York, lots for sale; Mr. Smith, even, has two lots here.

Q. What were you going to deal in, in your letter? What were you going to buy from the defendant—you wrote in your letter, saying you were going to buy New York real estate? A. That 40

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was in the letter, they are in the whiskey business, and real estate.

Q. Mike was going to buy whiskey? A. I answer the letter, about real estate.

Q. You said, in your letter, you were going to buy real estate? A. Why don't you read that letter? You had that letter, you showed it in my
10 face here.

Q. Were you going to buy real estate or whiskey bonds? A. I see if I make some money in; I invest my money, three hundred dollars I invested in gold mines in Cripple Creek, Colorado, one hundred and fifty dollars in the middle of April, in—

Q. In real estate? A. In real estate? Not real estate, but real estate, every time, people say real estate is best.

20 Q. How long have you been in business? A. Altogether, twelve and a half years. I sold sewing machines for one company, in same place.

Q. Altogether, twelve and a half years? A. Yes, I was in machine business, but not in undertaking business, only four years; July 15th, will be four years.

Q. How many letters did you write to this man Burke? A. Well, I tell you, when I was writing for Smith, some time I put the name on that time,
30 I put Burke's name on.

Q. Who were you writing for, yourself or Smith? A. For Smith. I didn't write for myself.

Q. Did you know what Smith was going to buy? A. He told me, was going to buy whiskey stocks.

Q. You don't mean whiskey stocks? A. Yes.

Q. You don't mean New York real estate? A. They write me one time, they were in this two kinds business, supposed to be best kind business.

40 Q. Who told you that? A. Fellows I wrote those letters, either Burke or Meca.

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Q. You sent telegrams here, didn't you? A. I send one telegram.

Q. Didn't you send five or six? A. No, I didn't.

Q. Didn't you make an appointment to meet McDonald and Burke in Hoboken? A. No, I didn't.

Q. Didn't you testify in your last trial you did?
A. Two letters and one telegram; if it would be true, it would be all. 10

Q. Didn't you send a telegram reading, "Why didn't you keep your agreement?" A. No, sir.

Q. Didn't you send a telegram the night before you left Scranton, to meet you the following Monday? Aren't you the man who made the appointment with them?

MR. McCARTHY: To whom?

MR. CUTLEY: I don't know. 20

MR. McCARTHY: I object to it as being indefinite.

THE COURT: I suppose they are entitled to know to whom. I will overrule the question.

MR. CUTLEY: I ask an exception.

THE COURT: Exception allowed.

It is signed and sealed accordingly.

(Seal.)

GEORGE G. TENNANT.

Q. Did you send any telegram to anybody directing them to meet you in Hoboken the next day, July 8th, 1913? 30

MR. McCARTHY: I object, on the same ground.

THE COURT: Upon what matter?

MR. CUTLEY: About the matter in which he subsequently went to Hoboken.

THE COURT: To what is the question directed?

MR. CUTLEY: His motive or reason for com- 40

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ing to Hoboken the day after he sent that telegram.

THE COURT: I will allow it. It goes to the witness's credibility.

A. I did send to Mecca.

Q. You did send it? A. For Mr. Smith. I didn't send it for myself.

10 Q. But you went yourself? A. Well, he asked me.

Q. And you brought one thousand dollars with you? A. He asked me to take him to New York; he asked me to write, as well as he asked me to go to New York.

Q. You didn't send it to McDonald, but to Burke? A. It was sent to Mecca.

Q. Where did you send it—address it? A. Same address.

20 Q. What? A. 2380 Broadway, New York City.

Q. What was the name? A. M-e-c-a.

Q. You went yourself, too, didn't you? A. Mr. Smith asked me to go with him.

Q. You brought one thousand dollars with you? A. I had with me one thousand some odd, small change, in another pocket.

Q. When you got to Hoboken you met Meca? A. Yes.

30 Q. With one thousand dollars in your pocket? A. Yes.

Q. In response to the telegram you sent him, telling him what train you would be on? A. We met him, yes.

Q. How did you know it was a Bergenline car? Did you make a memorandum of it? A. I put it down on a little slip of paper.

Q. You went all through Hoboken to Union Hill? A. Yes.

40 Q. How long did you remain in Union Hill?

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A. Very short time, when they got us in the place.

Q. What kind of a place was this, where you were robbed? A. Long building, this way, like; when they take us around the block, brought us to the side room, we didn't see front, didn't know what the building was. After we got out, we see what the building was, see it was a saloon. 10

Q. How far away from the car track was it? A. Not far; here is the sidewalk, here is car track.

Q. Car track? A. Yes.

Q. Right near the trolley car? A. Yes.

Q. Plenty of buildings up around there? A. Yes.

Q. Well built up? A. It seemed like—

Q. Lots of buildings on that street? A. Not that side, I don't think it was built up. 20

Q. Where the saloon was, it was built up? A. Yes.

Q. People passing all the time? A. I don't know how fast traffic was there.

Q. Many stores around there? A. I didn't look around so much—attention.

Q. You didn't see Burke hit Mike Smith, did you? A. No, I didn't; I heard shuffle, that was all.

Q. Mike Smith wasn't in the room where you were held up? A. No. 30

Q. After you got the package you put it in your pocket? A. I didn't put it in my pocket; I took the paper right off, a five dollar bill on one side, and a ten dollar bill on the other. I said, this is their game, they think we open the bundle, if we show it, it is counterfeit, we will be arrested, be locked up, be arrested.

Q. Why did you think you would be arrested? A. I ain't no professional, bad money, but when 40

Charles G. Bokin—for the State—Cross.

man throws money to you, like man, expect it will be counterfeit.

Q. After you got this bundle you went to Hoboken? A. Yes.

Q. What time did you leave the saloon? A. About five o'clock.

10 Q. Not twelve o'clock? Mike says twelve o'clock. A. He don't know what all it means, he should have interpreter here, the case would be finished long ago.

Q. You think he was wrong? A. His one boy was electrocuted not long ago, two boys was swing a wire—

Q. Where did you go from Hoboken? A. We took train from Hoboken to Scranton.

Q. What time? A. About fifteen minutes after five.

20 Q. How long did you have to wait at the station for the train? A. It is pretty hard to tell.

Q. How long did you have to wait—one hour, two hours—before you got the train to Scranton? A. At the station?

Q. Yes. A. Very short time.

Q. How long after you were robbed did you take the train? A. Right away, about five or ten minutes, as soon as we could get the car.

30 Q. You didn't have to wait at the station? A. No.

Q. What time did you get to Scranton? A. We got home, I guess, little after nine.

Q. The next day you went to the bank? A. Yes.

Q. Did you bring the roll to the bank? A. We just showed the money.

40 Q. Did both of you go together? A. I went alone. I don't know when he went. I showed this money, said, this money, is it been counterfeit?

Charles G. Bokin—for the State—Cross.

Q. Did you show this money (indicating the blank paper)? A. No, I didn't.

Q. You brought just the five and the ten dollar bill? A. I said, this money is supposed to be counterfeit.

Q. What was the name of the bank? A. The Miner's Savings Bank.

Q. Why didn't you bring all the money to the bank? A. It was all the money; if it was paper— 10
if it was all money I should take all the money.

Q. Did you tell the cashier at the bank what happened? A. No, I didn't.

Q. Didn't give it away. What did you do next? A. Next day I returned to New York.

Q. That was the tenth of July? A. Yes.

Q. That day didn't you go back to the saloon—the second day? A. No.

Q. Are you positive of that? A. No, sir. 20

Q. Where did you go when you went to New York? A. First thing, to A. B. Bloch Bloch's lawyer directed us to headquarters place, told us the street, what car to take, where to get off.

Q. Are you sure you went to headquarters the tenth of July? A. I don't know.

Q. Wasn't it the sixth of August, you went to headquarters? A. It will be probably eleventh or twelfth, I think it will be.

Q. How many days did you stay in New York? 30
A. We didn't stay long.

Q. I want you to be exact if you can. Was it the second day after the robbery you came to New York? A. Second day we went to the bank, I went to the bank.

Q. First day after the robbery you went to the bank? A. This is after we got home, next morning, we went to the bank.

Q. The second day you came to New York? A. 40
Yes.

Charles G. Bokin—for the State—Cross.

Q. That was the same day you went to police headquarters? A. Just a minute; I want to tell it over, so it may be a day over, it may be a day less.

(Noon Recess).

10

Q. At recess you were talking about whether or not you came back to New York a couple of days after the alleged assault. Do you recall now whether you did or not? A. Yes, we do.

Q. Couple of days after? A. Yes.

Q. How soon after? A. Second day, I think.

Q. Where did you go? A. Went to New York, first we went to Bloch, then we went to police headquarters.

20 Q. Was it when you went to police headquarters at that time, you picked out the pictures? A. Yes.

Q. That was the time? A. Yes.

Q. After leaving police headquarters where did you go? A. Went to Jersey City.

Q. Jersey City? A. Yes.

Q. What place in Jersey City? A. Union Hill.

Q. What part of Union Hill? A. Police station, Blum Street.

30 Q. That was before you made the complaint? A. Eh—eh—eh.

Q. That was before you made the complaint—the second day after the robbery, when you went up there? A. I don't think we made complaint at that time.

Q. Did you go to the police station the second day? A. We did.

40 Q. What did you do at the police station? A. That is right, we did swear the warrants at that time, when we got there, after we got the pictures.

Charles G. Bokin—for the State—Cross.

BY MR. MCCARTHY:

Q. Speak up, loud. A. After we did have the pictures, identified the pictures, we went to—

Q. That was the second day after this robbery, or the month after, this was done? A. No, the second time—that is right, the second time, we go to New York. We go there so many times, come to my mind now, I don't want to make mistake, Mr. Smith took me around to so many places, wanted to take me where he has been taken by Burke and McDonald, when we wasn't able to find those places, it was dark, we were tired, I wasn't able to walk on my feet any further, we went back, meantime business was going, I wasn't able to come out, then we came later and made complaint, in Union Hill. 10

Q. When you say Smith brought you to where you might find Burke or McDonald, did he bring you to Union Hill where you were robbed? A. No. 20

Q. Did he bring you to any place in New York? A. I good many—

Q. Did he bring you to 2380 Broadway? A. Yes.

Q. Did you have a conversation there with Burke, the bartender? A. I don't know the names.

Q. But you had a conversation with the bartender at that saloon, at that number? A. I believe I did. 30

Q. Did you have any conversation where you asked for this man, Burke? A. Yes.

Q. Do you remember where it was? A. At that time, when I asked where are those people that was sending letters, from this number, finally he told me he thinks those fellows come here late night, high class men, they takes quarter 40

Charles G. Bokin—for the State—Cross.

cigar, or quarter whiskeys but he don't know them, whether they are brokers from the west side or from some place, lots of fellows calls for letters here, lots of chauffeurs and like that, so the fellows wouldn't get one another letters, on account of the girls, and things like that; finally we walked out.

10 Q. That was a day or two after the robbery?

A. I guess it was the second or third day.

Q. Are you sure you didn't go to Union Hill that day? A. No, I don't think I did, no, sir.

Q. Are you positive you didn't? A. Well, I didn't, I am sure I didn't, because I wasn't able to walk any further.

Q. Hadn't you gone to Union Hill first, to find out where Burke was, and from there you went to New York to look for Burke? A. The correspondence was from 2380 Broadway, New York City. That was the place he went to look for him. Mike then he want to take me to the place where he said he took him, he took me so many places I got tired walking, I cannot walk any further.

20

Q. But you knew as much about this proposition as he did? A. It could be by a chance, when a man brings a man, that I go, myself, in that feeling, I never thought anybody could bring me in such a mess.

30

Q. I want to ask you again—I call your attention—whether on that day, the day, or the second day, after this robbery, you didn't go back to Union Hill, to Coffey's saloon, before you spoke to Burke at 2380 Broadway, New York City? A. Yes, I think we did.

Q. Are you positive of it? A. I am not positive, because we swore the warrant later, as you see—

40 Q. You are not positive? A. Well, I didn't. I am.

Charles G. Bokin—for the State—Cross.

Q. You didn't? You are positive of that? A. Yes.

Q. You told Burke— A. I don't know his name.

MR. CUTLEY: Burke, stand up.

Q. Did you ever see this man? (Indicating the man who stood up.) A. Maybe I did. 10

Q. Did you see him in New York, in that saloon? A. Maybe I did.

Q. You know you did. Didn't you talk to him for half an hour— A. No, I didn't talk to him for half an hour.

BY THE COURT:

Q. Do you recognize that man? A. If he come a little closer I might see.

(The man indicated comes toward the witness.) 20

A. Looks like the same man.

Q. What day do you fix it, you talked to this man? Two days after this robbery. A. I suppose it was about two days.

Q. When you came back from Scranton looking for these men, how long did you expect to remain? —one or two days? A. Just one day. We went right back because it got so late, and the weather was warm, my feet got sore, I wasn't able to walk any further. I say, that is enough for me, we are going to come the next day, but business—you know how my business is—yesterday I had funeral I had to take on train, to-day I have cold, I am all in, but I have to stand it. 30

Q. Did you go to police headquarters the same day you spoke to this man, Burke? A. No.

Q. When? A. After. We go later.

Q. A month after? A. Not a month, probably twenty-seven twenty-eight days. 40

Charles G. Bokin—for the State—Cross.

Q. The sixth of August, wasn't it? A. I suppose so.

Q. You went to police headquarters, picked out the pictures, then, before you went to Union Hill to make the complaint? A. Yes.

10 Q. Weren't you told in police headquarters, after you explained your story, that you would have to make a charge of robbery before you could hold these men? A. I wasn't trying to explain anything. I was simply telling what happened. I am no lawyer, I simply told them what happened, and it was written down.

Q. You waited three weeks to make complaint. That was due to the fact you had so much business? A. Yes.

Q. Didn't you consult with your lawyer in Scranton? A. No, I have no lawyer in Scranton.

20 Q. In Pittston? A. No. I have my lawyer in Wilkesbarre.

Q. Did you talk to him? A. No, I didn't.

Q. Were there any other times in your life you went to Philadelphia by way of New York? A. No, I didn't; only on account of Mr. Smith.

Q. The D. L. & W. train doesn't go to Philadelphia? A. From Pittston, I never was that way.

BY THE COURT:

30 Q. Does the D. L. & W. train go to Philadelphia, yes or no? A. I don't think so, I never went that way.

Q. Did you make complaint before the local police authorities in Pittston or Scranton—wherever you were located? A. When I—

BY THE COURT:

Q. Did you make complaint to the local police authorities, yes or no? A. No.

40 Q. The first complaint you made was to the New York police at the request of Bloch's lawyer? A. Yes.

Charles G. Bokin—for the State—Cross.

Q. The first complaint to the Union Hill police was August 5, 1913? A. I suppose so.

Q. August 5, 1913? A. Yes.

Q. When you went to Union Hill you met Mr. Dillman there, didn't you? A. Yes.

Q. He went to New York with you? A. He asked us to show him the place. We went to show him the place where we were robbed. 10

Q. That was the saloon? A. Yes.

Q. Did he go to New York with you? A. Not at that time, I don't think.

Q. You went back to Scranton, did you, after making complaint? A. I think we did—no, we went to New York with the people, expected we were going to go back, we got so late, we went home.

Q. Who? A. Mr. Dillman and Chief of Police Wallum. 20

Q. You went home without notifying them? A. Yes.

Q. When did you come back the next to New York about this case? A. Why—

Q. A year afterward? A. I cannot remember when I did come, but I remember when I heard from Detective Daly, he thought he got Burke first, when we—I sent telegram, tell him we will take all night train and we will be there eight o'clock in the morning, but we failed to identify the man, it wasn't the man. 30

Q. Then the year after that, in 1914, you came back, that was the time McDonald was arrested, was it? A. Yes. When McDonald was arrested we were glad, we come at once, I sent telegram, first train, we will come, we will come.

Q. From the time you picked out the picture at police headquarters you had not seen either the pictures or you had not seen McDonald, until you identified him in court; is that it? A. Yes. 40

Charles G. Bokin—for the State—Cross.

Q. Who was there at the identification—Mr. Daly? A. Mr. Daly, and I think I seen Mr. Wallum, Chief Wallum.

Q. Mr. Dillman? A. And Dillman.

Q. How many times did you identify him—twice? A. They just—they were—this man was mixed in with other men in the room—

10 Q. How many times did you identify him? A. As soon as I got to the door, I look at the man, I say that is the man, had gray suit, tan shoes, sitting by the man there with nose glasses on. That was his lawyer.

Q. How many times did you identify him—once or twice? A. Nobody ask me which man, I can tell myself any time.

BY THE COURT:

20 Q. How many times did you identify him? A. I guess once or twice.

Q. What police officer was with you at that time—Daly? A. I think he was there, and I think, Mr. Dillman.

Q. Did you have any conversation with either Dillman or Daly before you identified him? A. No, I didn't.

Q. Didn't speak a word to them? A. I had—

Q. Did they say what you were there for? A. Yes.

30 Q. What did they say? A. To be careful to tell the right man.

Q. Did they say McDonald was inside? A. No.

Q. What did they say? A. Go inside, see this man—

Q. What man? A. The court room where McDonald was sitting.

Q. Did they have any pictures there? A. No.

Q. That was a year after you had picked out the pictures? A. Yes, pretty near a year.

40 Q. Did you identify McDonald in the Magis-

Charles G. Bokin—for the State—Re-Direct.

trate's Court, in Judge Duell's Court? A. Well, I tell you—

Q. In the lower court? A. Never tell me what court it was, or what place it was, the number one, number two, whatever it was, but you simply—we go first to that place, it seems he was anxious to get out on bail, the judge tell him, I will fix you, set bail for you, will bail him out, so give Mr. Dillman— 10

Q. Who told you that? A. —chance to get extradition papers fixed, but that was enough for the judge to hold him on.

RE-DIRECT EXAMINATION BY MR. MCCARTHY:

Q. How many times were you in the Union Hill place, where you were robbed? A. Twice.

Q. Was the first time the time you were robbed? A. Yes. 20

Q. The second time, when you went to the police station and made the complaint? A. Yes. Then detective Dillman asked us to take him down, show him the place.

Q. You went with him to the place? A. Yes.

MR. MCCARTHY: Mr. Burke, stand up.

Q. This man who has been referred to as the bartender at 2380 Broadway, that you saw after you had been robbed—is this the man who has been referred to as Burke, the accomplice of this defendant? A. No, no, no, the other man— 30

Q. You have answered the question. A. No, sir.

Q. When you came back to New York, when you were notified by the police that the defendant was under arrest, you say you went in the court room, where there was a judge sitting on the bench, like Judge Tennant? A. Yes. 40

Q. How many people were in that court room?

Charles J. Dillman—for the State—Direct.

A. The people, I didn't count them, but probably, must be, maybe twenty, maybe twenty-four. It is a pretty hard matter to tell.

Q. Was it there you picked out Mr. McDonald?

A. Yes.

Q. Before you picked him out did any one point him out to you or say anything to you about
10 him? A. No.

Q. Did you have any difficulty in picking him out as the man who had robbed you? A. No, sir.

CHARLES J. DILLMAN, a witness produced on behalf of the State, being sworn, testified as follows:

20 DIRECT EXAMINATION BY MR. MCCARTHY:

Q. You are a lieutenant of police? A. Yes.

Q. Do you know these two complaining witnesses? A. Yes.

Q. When did you first see them? A. August 5, 1913.

Q. Is that the date the complaint was made before Judge Stout? A. That is the date the complaint was made.

30 Q. Where did you go with them after they made the complaint? A. I took them to 361 Broadway, to Coffey's saloon.

Q. Coffey—where is he now? A. He is dead.

Q. Who was his bartender? A. Eddie McHugh.

Q. Both complaining witnesses were with you, were they? A. Both with me, yes.

Q. After you left the saloon did you go anywhere else with these two complaining witnesses? A. We went back to the station house.

40 Q. Did you go to New York with either of them? A. Why no, I telegraphed them the day

Chas. J. Dillman—for the State—Cross, Re-Direct.

that the arrest was made, that was a year later. The arrest was made July 13, 1914.

Q. Arrested in New York, was the defendant?

A. The arrest was made in New York.

Q. Who arrested him in New York? A. Detective Daly.

Q. Of the New York Police? A. Of the New York Police. 10

Q. Were you there at the time he was arrested? A. No.

Q. Did you bring him over here on extradition? A. Yes.

CROSS EXAMINATION BY MR. CUTLEY:

Q. Did he voluntarily come or did you get your warrant of extradition? A. What is that?

Q. Did he come voluntarily after you had him arrested in New York? A. I had to get extradition papers for him. 20

Q. Didn't he come here voluntarily with you? A. Afterward, yes, after we had the Governor's warrant.

RE-DIRECT EXAMINATION BY MR. MCCARTHY:

Q. The Governor's warrant was a warrant issued by Governor Fielder on the Governor of New York? A. Yes. 30

Q. Not Governor Whitman's warrant, was it? A. No.

Q. Glynn's? A. Governor Glynn's warrant.

Q. When you brought him over— A. Brought him over, from New York, yes.

Q. —you had him under arrest. Had he been arrested when you saw him first? A. Yes.

Q. You brought him over after he had been arrested? A. Arraigned?

Q. Yes. A. He was arraigned in the Seventh District Court before Justice Duell, 54th Street. 40

Charles J. Dillman—for the State—Cross.

Q. Did you see him after that? A. Yes.

Q. What occurred? A. In one of the Supreme Court rooms in Center Street.

Q. That was on a writ of habeas corpus? A. They made application for bail. At the time it came up before the Supreme Court the Judge set a bond of fifteen thousand dollars.

10 Q. Was McDonald there at that time? A. Yes.

Q. That was in the Supreme Court? A. That was in the Supreme Court.

Q. Were Bokin and Smith in the Supreme Court at any time while McDonald was there? A. I couldn't swear whether they were there that day or not.

Q. Where did they pick the defendant out, if they did pick him out? A. They picked him out in the court room, in 54th Street.

20 Q. Were you there when they picked him out? A. Yes.

BY THE COURT:

Q. How many people were in the court room? A. I couldn't say, offhand.

Q. Approximately. A. Probably two dozen.

Q. As many people as are here now? A. Probably about the same as here now.

30 FURTHER CROSS EXAMINATION BY MR. CUTLEY:

Q. Do you know whether Bokin and Smith identified McDonald at any other place than in the 54th Street Court? A. Yes.

Q. Where? A. There was Mr. Smith, I believe, in the General Sessions Court in Center Street, they were going up—

Q. Where the application was being heard? A. I don't know whether it was that day. I know we were in the court that day. McDonald sat
40 down with his lawyer. We came around, and Bokin says, "There is Meca, sitting there."

Joseph A. Daly—for the State—Direct.

Q. Wasn't there some commotion when he said that? A. Yes.

Q. What? A. His lawyer made an argument, he was trying to head off identification on him.

Q. Then you were pointing him out? A. Yes, but at the time we didn't know that McDonald was there.

10

JOSEPH A. DALY, a witness being produced on behalf of the State, testifies as follows:

DIRECT EXAMINATION BY MR. MCCARTHY:

Q. You are a member of the Police Department of the City of New York? A. Yes.

Q. What rank? A. Detective Sergeant.

Q. How long have you been a member of the Police Department? A. Thirteen years.

20

Q. Do you know this defendant? A. Yes, I do.

Q. Are you the Daly who has been referred to as having made the arrest of the defendant in New York? A. Yes.

Q. Were you the Daly who notified Mr. Dillman he was under arrest? A. Yes.

Q. Did you see the two complaining witnesses at any time after the arrest? A. Yes.

Q. Where was that? A. Why, at Police Headquarters in New York, and in the Supreme Court.

30

Q. In the Supreme Court in Center Street? A. Chambers Street.

Q. Was McDonald in court? A. Yes.

Q. Will you just tell us what was done by the complaining witnesses in the court room at the time McDonald was there? A. Yes, I was walking in the court room and the complaining witnesses and officer Dillman and a lawyer for the defendants were at the door of the—leading to the

40

Joseph A. Daly—for the State—Direct.

court room. I looked in and saw the defendant McDonald in court, and immediately walked away so there could be no question about me pointing him out.

Q. Did you say anything to either complaining witness about his being there? A. No, I immediately walked away, went over and took a
 10 seat in the front of the court by myself.

Q. How many people were sitting in the court room at that time? A. I don't know; quite a few.

Q. About how many? A. I couldn't—maybe fifteen or eighteen, probably thirteen, I am not sure, but there was quite a few people there.

Q. What was done? A. Then Bokin—I had a conversation with Bokin about where McDonald was, on the way down to the court from head-
 20 quarters.

Q. What do you mean? A. That he was locked up in the tombs.

Q. You told that to Bokin? A. To both of the men.

Q. And Smith? A. Yes. And in the court room Smith said—I heard the names mentioned—the man on the stand here—Bokin?

Q. That last one? A. Yes. Bokin. Then Smith said—grabbed my arm—said, “That is Meca, that
 30 is Meca, I thought you told me he was locked up.”

Q. In the court room? A. Yes.

Q. You told him what? A. I told him he was locked up in the tombs.

Q. Before you got in the court room did you know McDonald was there? A. I don't know whether he was there, no, but I knew he was coming there, but I didn't know he was there in court.

Q. How long have you been connected with the
 40 police department? A. Thirteen years.

Joseph A. Daly—for the State—Cross.

Q. Do you know what McDonald's business is?

MR. CUTLEY: I object.

(Question withdrawn.)

CROSS EXAMINATION BY MR. CUTLEY:

Q. You say you walked past the door, you came first, you saw McDonald in there, and you jumped back; what did you jump back for? A. I didn't jump back, I went right in, in the court room and sat in the front seat. 10

Q. Why were you so suspicious? A. Because I know those fellows, if they have no other defence they attack the police. If I went right alongside of him when he was in court, or right alongside of the complaining witness when he pointed him out, they would accuse me of telling him. 20

Q. Is that your general reputation there? A. I don't know.

Q. You say you jumped back, so there would be no charge—

MR. MCCARTHY: I object. He said he walked over and took a seat.

Q. You walked over and took a seat? A. Yes.

Q. You said you had no conversation with Smith at all, but Smith said, "That is the fellow over there." Where was Smith when you had that conversation with him? A. In the court room. 30

Q. Where in the court room? A. Yes.

Q. Did you go down and sit down with Smith and Bokin? A. No.

Q. You brought those fellows to the Chambers Street Court? A. I walked down with them, yes.

Q. You knew what they were going to do, didn't you? A. Yes.

Q. You had told them? A. No. 40

Q. What had you said to them if anything, in

Joseph A. Daly—for the State—Cross.

reference to this case? A. I had very little to say to them. I only told them McDonald was locked up in the toms. That was all I had to say to them.

Q. Where did you meet them first? A. I think at Police Headquarters.

Q. You had telegraphed for them the day before, hadn't you? A. I don't recall that.

Q. How did they come to New York City—do you know? A. I think—I am not sure—whether I notified Dillman and he notified them, or whether we called up from our office or not, I am not sure about that, Counsellor.

Q. When they came down to you to New York City did they ask what they were supposed to do, what they were down there for what was their purpose there? Did they talk that proposition over with you? A. I don't recall that. I presume it was understood they came down to see if they could identify the defendants.

Q. You told them on the way down you wanted to see if they could identify the defendants? A. I don't recall that.

Q. You had some conversation with the men? A. No doubt, but I didn't write it down. If I thought it was going to come out I would have made a memorandum.

Q. You were working up this case, since you arrested this man you thought was Burke; you knew you were going to testify here to-day? A. No, I didn't know.

Q. You came here voluntarily. You were not subpoenaed? A. Oh, yes.

Q. Are you here under subpoena or are you a volunteer? A. I am here under subpoena.

Q. You are here under subpoena? A. Yes.

Q. You have been here before too? A. Not under subpoena.

Joseph A. Daly—for the State—Cross.

Q. You hadn't any idea until a few minutes ago, when you came to testify, why you were brought from Police Headquarters, had you? A. No, sir.

Q. When did you first say anything in reference to this case after the complaint was made?

A. Some time after Commissioner Doherty met me in the hallway—

Q. What month and year, if you know? A. I don't recall, but it was some time after McDonald had been picked out. 10

Q. When was that? A. Well, that was, I think in the fall of 1913, some time about the fall of 1913.

Q. What time in the fall? A. I don't recall the dates.

Q. Did you keep any memorandum in reference to these matters? A. No, sir, because I was never assigned to the case. 20

Q. When were you assigned to it? A. Never.

Q. Why did you take any interest in the case? A. When Commissioner Doherty told me the picture had been picked out.

Q. When? A. I don't recall, in the summer or fall.

Q. August, September, October? A. I can't recall.

THE COURT: He said he cannot recall. 30

Q. Did you bring these men on from Pittston to 54th Street Court, or was that done by your friend Dillman? A. We had arrested another man at another time, I thought was with McDonald.

Q. I am referring to the time when he was arraigned in the Magistrate's Court at 54th Street. Did you have anything to do with McDonald's arraignment at that time? A. Yes.

Q. You did. Did you bring on the complainant 40

Joseph A. Daly—for the State—Cross.

from Pennsylvania, telegraph or 'phone them? A. I don't think I did, at that time. Not until I communicated with Mr. Dillman, I had him there.

Q. Were you there when he was identified in 54th Street, or do you know whether there was any identification at all in 54th Street? A. I don't recall an identification in 54th Street. I
10 don't recall it.

Q. You would if there had been one, wouldn't you? A. No.

Q. You were interested in the case, you had been assigned to it? A. Yes, sir, but the identification proceeding could go on without me being there.

Q. You were there at the application for bail? A. Yes.

Q. Were you there at the Rogues' Gallery at
20 any time when these two men were there? A. No.

Q. That was after? A. Not afterwards. When his picture was picked out, I was told to arrest him if I saw him.

Q. Did you ever, from Police Headquarters until this day when you were in the Chambers Street Court— A. I am not sure about that, Counsellor.

Q. Did you have any conversation on your way over with these men? A. (No answer).

30 Q. What I am trying to get at, it is said that these men knew what they were brought from Pennsylvania for; if they didn't know, you told them why they were being brought to Headquarters, where McDonald was. You had previously said that McDonald was in the tombs, and when you got to the Chambers Street Court you were surprised to see him in court? A. Yes. I did tell them that McDonald was locked up in the tombs, and I was surprised to see McDonald there
40 before we got there, because it was before Court

Joseph A. Daly—for the State—Cross.

had opened, before the judges had got there.

Q. Then your attitude in trying to appear absolutely neutral had no personal basis in it at all as far as McDonald's particular case is concerned?

A. Not at all, I have no feeling in the matter, only as a police officer.

Q. Your saying some suspicion might attach to you was not by reason of any personal relations which might cause him to say that the identification was made under your direction? A. When there is no other defence they usually say that. 10

Q. Did some one charge you with pointing out this man and didn't you sit down quickly? A. No one charged me.

Q. Didn't some one say you pointed out this man and didn't you sit down quickly?

MR. MCCARTHY: I object, unless he was contradicted. 20

Q. Didn't Mr. Rosenberg, the attorney of the defendant, say to you the minute you entered the door with these two men, "Stop pointing out me to him?" A. Positively—

THE COURT: Do you propose to contradict him?

MR. CUTLEY: Yes. 30

Q. What was your idea in jumping away from these two men? A. I have had a great deal of criminal cases and I always try to be careful. I knew when we walked into court there, the complaining witnesses was there, and the defendant was there, it might be charged that I pointed him out, they might say that, I wanted to avoid that.

Q. And did you try to get away from that suspicion by taking your seat near McDonald? A. 40

Joseph A. Daly—for the State—Re-Direct.

Yes, just the same as you were going in a court room, I stepped to one side from them and sat down just a short distance away, I sat down so I was not with the party.

10 Q. You didn't talk to them then to Smith or Bokin after they entered the court? A. I said to them "Keep quiet, it is all right, this man is in custody." He started to say, "There he is, I thought you said he was in the tombs." I said, "That is all right, he is in custody." He didn't seem to understand the proceedings, he was brought to court there, I suppose he thought he was locked up in the tombs.

RE-DIRECT EXAMINATION BY MR. MCCARTHY:

20 Q. Were you subpoenaed by Detective Bennett of our office to come here? A. Yes.

Q. The day that Smith said, "That is Meca over there," did he say it in a loud voice or in a whisper? A. He spoke—he said it out loud.

Q. Right in the court room? A. Yes.

MR. MCCARTHY: We now offer in evidence the package of paper which has been marked for identification, S-1. The State rests.

30

40

Edwin McHugh—for Defendant—Direct.

DEFENCE.

Mr. Cutley opened to the Jury.

EDWIN MCHUGH, a witness produced on behalf of the defendant, sworn, testified as follows:

DIRECT EXAMINATION BY MR. CUTLEY:

19

Q. What is your occupation? A. Railroading.

Q. On July 8th, 1913, where were you employed? A. 361 Broadway, Union Hill.

Q. Who was proprietor of the place? A. Martin Coffey.

Q. Where is he now—is he alive or dead? A. Dead.

Q. How long were you working for Coffey? A. On and off for him, three years.

Q. Did you know Mike and Bokin, the complainants in this case? A. I know them by name now, sir.

29

Q. Do you recall whether on or about the 9th or 10th of July, 1913, you had a conversation with either one of them at Coffey's place in Union Hill?

MR. MCCARTHY: I object. It is leading. We are entitled to know when he saw these men.

30

Q. Did you ever see these men before—Bokin or Smith? A. Yes.

Q. When? A. 361 Broadway, Union Hill.

Q. When? A. The 9th or 10th or 11th, the day I saw the shorter one of the two.

BY MR. MCCARTHY:

Q. The 11th of what? A. Of July.

40

Edwin McHugh—for Defendant—Direct.

BY MR. CUTLEY:

Q. When did you see the other one? A. The following day.

Q. Did the shorter one, meaning Smith, have a conversation with you on that day you say you saw him? A. He came in and asked for private stock whiskey, and as he—he asked me, was his friend there. I asked him who he meant. I thought he meant his friend, the Polish friend. He said, "American friend," I said, "You can look around here." He says, "I was to meet him in the dining room." I said, "There is the dining room right in back." He went in back and came out and said, "He is not there." I said, "Sit down and wait for him, if you were to meet him here." He said, "No, I will look around on the corner." He went out the saloon door. He came in the front door.

Q. Did he come back? A. No.

Q. When did you see the other man? A. The following afternoon.

Q. Did you have a conversation with him? A. He asked for Mr. Burke.

Q. What did you say? A. I asked him, "Was he a railroad man?"

Q. What did he say? A. No, he was a gentleman.

Q. Is that all the conversation you had with him? A. He asked me to tell Mr. Burke he expected him to live up to his promise. I told him I couldn't tell him that when I didn't know who he was.

Q. What other conversation did you have?

MR. MCCARTHY: I don't think we ought to have the conversation, this man says he had with somebody else.

40

Q. Did you have any conversation with Smith

Edwin McHugh—for Defendant—Cross.

or Bokin in which they asked you for the address of this man Burke? A. No.

CROSS EXAMINATION BY MR. MCCARTHY:

Q. When was it you say that one of these men came into your place? A. I don't know the dates, sir. It was in July, either the 9th or 10th or 11th, the shorter one of the two came in first. 10

Q. You had never seen him before that time, had you? A. That was the first I saw of him.

Q. How many times did he come into your place after that? A. After?

Q. Yes. A. He came in two days after that with Bokin—is that the name? The taller one, Bokin.

Q. Two days after that? A. Yes.

Q. The taller one came in first? A. The shorter one came in first. 20

Q. Smith. Smith, stand up. Is that the man who came in first (indicating). A. Yes.

Q. You say he came in what day? A. Yes, sir. I am not positive whether it was the 9th or 10th or 11th, but he was the first one in.

Q. What did he ask you? A. He asked me for private stock whiskey.

Q. You gave him a drink? What else? A. He asked me was his friend here. 30

Q. Did he mention the name? A. No.

Q. What did you say? A. I said, "Who is your friend?"

Q. Then did you let him go in the back of the saloon to wait for his friend? A. He says he was to meet a friend here, in the dining room. I said, "There is the dining room, right in back, there is nobody in there, go in and look." He went in and looked and came out again. I said, "Were you to meet him here?" He said, "Yes." 40

Q. You asked him whether he was a railroad

Edwin McHugh—for Defendant—Cross.

man? A. I asked him whether his friend was a railroad man.

Q. He said—? A. No, he was talking to the other gentleman there, Mr. What's his name.

Q. I thought you said you asked him? A. No, I asked the other fellow, he came in the following day.

10 Q. Then, you said, he went out, the shorter one went out. When did the other man come in? A. The following day.

Q. What time of the day? A. Between three and five in the afternoon.

Q. Alone? A. Alone.

Q. Did he inquire for his friend too? A. He asked me for Mr. Burke. I asked him was he a railroad man? He says, "He is a gentleman."

20 Q. Do you mean to tell this court and jury that this man Bokin told you after the 9th or 10th or 11th of July, that the man named Burke was a gentleman? A. When he used the word "gentleman," he had a sneer on his face.

Q. Why didn't you say that before? A. I am telling you.

Q. Did you think that up from the time I asked you the question? A. No, I did not.

Q. Why didn't you say that when Mr. Cutley asked you? A. I didn't think it was necessary.

30 Q. You didn't. Are you telling this court and jury everything that occurred at that time? A. Yes.

Q. Don't you know that you never saw these men until Lieutenant Dillman brought them into your saloon on August 5th? A. I saw them on three different occasions before that.

Q. Do you remember when Mr. Dillman brought them in to you? A. I do.

40 Q. Do you remember him telling you they said they had been robbed in your place? A. Mr. Dillman told me that himself.

Edwin McHugh—for Defendant—Cross.

Q. You never said a word to him about them being in before? A. I told him everything I done, to that time. He knows that.

Q. Didn't you say to Dillman, "Why didn't they come in here and say something about it if they were robbed here?" A. I said, to Mr. Dillman?

Q. Yes—didn't you? A. They had come back— 10

Q. Answer the question. A. I don't know how to answer that question.

Q. Didn't you say to Dillman, "Why didn't they come in here and say something about it if they were robbed here?" A. They made no remark about being robbed in my store.

Q. Will you please answer the question?

(Question repeated).

A. I may have said that to him. 20

Q. If you said that to him, how do you reconcile that now with your testimony to this jury that you saw them in there three times before that? A. I saw the little fellow one time and I saw the other fellow one time, the following day, the big fellow, and the day after that the two of them came in together, and after that they both came in with Dillman.

Q. Why, when you told Mr. Dillman, "If these men were robbed in here, why didn't they come back and say something about it?" if they had already been in your place. A. They had never mentioned anything to me about being robbed. 30

Q. Why didn't you tell Mr. Dillman these men had been in there before and had not said anything about being robbed? A. I had spoken to Dillman about it, right on the end of the bar.

Q. Do you mean to tell the jury, that you told Dillman, when they were there, they had been in your place before? A. Yes. 40

Q. What did Dillman say? A. Charlie said

Edwin McHugh—for Defendant—Cross.

they said they had been robbed there, and I explained to him what they had said when they came back again.

Q. When did you hear of that robbery, when they came back there? A. He had made the remark at the bar.

10 Q. That was the first? A. Yes, as to the robbery. These fellows had shown me some green paper.

Q. Before Dillman came there with them? A. Yes.

Q. If so, if they had shown you some green paper, why was it necessary to say to Dillman "If they had been robbed in here why didn't they come in and say something about it?" A. They didn't say they had been robbed in the place.

20 Q. What did they say to you when they showed you this green paper? A. Two of them came in together, they had a bundle between them, they they had a drink—

Q. The first time? A. No, the third time. The two of them were together. They had a drink. They had a package with them, left the package on the barroom floor, and asked for Mr. Burke.

Q. Threw it on the floor? A. Laid it on the floor?

30 Q. How big a package? A. About that long (indicating about two feet).

Q. That was the package with paper in it? A. I don't see anything in the package at all.

Q. Did you see any package with paper in it? A. The little fellow went down in the other fellow's pocket and pulled out something similar to that? (Indicating the bundle of paper already referred to.)

Q. That was on what visit? A. On the third visit.

40 Q. On the third visit, didn't he say anything about his being robbed there? A. No.

Edwin McHugh—for Defendant—Cross.

Q. What did he say when he mentioned the paper. A. He said—he had mentioned about buying some stuff, and he went home to Scranton or some place out there, he went with the package, the man took him to the train, he was supposed not to open the package until he got home, when he got home it was blank paper.

Q. Did you tell Dillman that? A. I told Dillman that, Acting Chief Schumpp that. 10

Q. Do you mean to tell this jury that you told Dillman that he said he had bought some green goods in your place? A. Yes, I certainly did.

Q. You testified at the last trial? A. Yes. You wouldn't allow me to say that.

Q. Did you say anything about it? A. I couldn't get it in, sir. I was willing to, but I wasn't let. You wouldn't let me go into that.

Q. When did you first hear that these men were robbed? A. It came out in the paper,—“Were two men robbed in Union Hill saloon?” Something like that, something to that effect. 20

Q. Was that before or after Dillman brought them in? A. After.

Q. After. You are sure of that? A. I am quite sure of it.

BY THE COURT:

Q. Quite sure of what? A. I see this in the paper, “Were two men robbed in Union Hill saloon?” 30

Q. The question is whether you saw it before or after Dillman brought them in? A. I am not positive.

Q. You have said so. That is the thing he is asking you about? A. I don't know whether it was before or after Dillman brought them in.

BY MR. MCCARTHY:

Q. You were bartender in that place? A. Yes. 40

Edwin McHugh—for Defendant—Cross.

Q. Robberies were not of such a frequent occurrence that they would not make only impression on your mind? A. If they were robbed in the back room why didn't they come out and let me know? A. I was tending bar.

(Question repeated.)

10 A. I never knew of anybody being robbed there, sir.

Q. Can't you tell us when it was you first heard that two men were stuck up or robbed in the back room of your saloon at which you were tending bar? A. Charlie Dillman told me at the end of the bar, he told me, that they told him that.

Q. That was the first you heard of it? A. Yes, exactly.

Q. You testified at the last trial? A. Yes.

20 Q. Didn't you testify that the first you heard of it was when you read it in the Observer? A. That is the heading in the paper, "Were two men robbed in the Union Hill saloon?"

BY THE COURT:

Q. That is not the question. The question is whether you testified at the last trial that the first you heard of it was when you read it in the Observer. Did you so testify? A. I cannot say. I don't know.

30

BY MR. MCCARTHY:

Q. You did, as a matter of fact, say that the first time you heard there was a robbery in your place was when you read it in the Observer? A. I may have said that, at the last trial.

Q. Was that true, then? A. I don't know, I was all mixed up. It was two years ago; I didn't keep any memorandum of the date.

40

Q. Isn't it a fact that the first you heard anything about these two men being robbed in

Edwin McHugh—for Defendant—Cross.

your place or having bought green goods in your place was when Mr. Dillman brought them in there? Wasn't that the first time? A. He said that is what they told him, they were robbed in there and stuck up with a gun.

Q. That was the first time you heard of it? A. Of them being robbed, yes.

Q. You still insist that at that time you told Dillman that these men had been in there before? **10**

A. I did, sir.

Q. Was anybody else there besides Dillman?

A. I thought I was alone in the place.

Q. Was Coffey there? A. Dillman told me Coffey was there. No, I don't remember him being there.

Q. Why didn't you say to Dillman that these men had been there before and showed you some pieces of paper and said they had bought green goods? A. I did tell Dillman that. **20**

Q. You did? A. And Acting Chief Schrupp that.

Q. Did you turn around to these two fellows and say to them "Why didn't you tell me that when you were in here before, on one of the two or three occasions"? A. Dillman and I had our conversation to ourselves at the end of the bar. He bid me good night and went out.

Q. Do you know this man McDonald? A. No, I don't. **30**

Q. How did you come to get in this case? A. I was subpoenaed.

Q. By whom? A. By the counsel over there.

Q. The counsel for McDonald? A. Counsellor Cutley.

Q. Did you talk to anybody about these men having been in your place before Mr. Cutley subpoenaed you? A. Yes.

Q. To whom? A. We took it as a joke. **40**

Edwin McHugh—for Defendant—Cross.

Q. Took what a joke? A. These fellows coming in here and saying they had been stuck up.

Q. Do you mean to tell this jury you took as a joke a statement made by a police officer that two men had been stuck up in your place at the point of a gun? A. I am speaking of before Dillman came in.

10 Q. What did you consider a joke? A. These two fellows coming in and saying they had been robbed.

Q. Did they come in and tell you they had been robbed? A. Why, no.

Q. The first you knew they were robbed, you say, was when Dillman brought them? A. You are putting it in my mind "being robbed". I am simply using your words.

20 Q. Did you consider it a joke when Dillman came in with the two men and said they were robbed, stuck up with a gun and robbed? A. That was the first time I took it seriously.

Q. Seriously? A. Yes.

Q. Up to this you had not talked to anybody about it? A. Yes, we were talking about it, these fellows, talking about fellows coming in and buying green goods.

BY THE COURT:

30 Q. You had heard of it before Dillman came in? A. About the robbery?

Q. You know what you were talking about? A. Yes.

Q. You had talked about it? A. Yes.

BY MR. MCCARTHY:

Q. To whom? A. Some of the boys that used to frequent the place.

40 Q. Who? A. Railroad men, lots of railroad fellows come in there.

Edwin McHugh—for Defendant—Cross.

Q. You talked to everybody about these two men coming in and saying they had been robbed with green goods, swindled with green goods—

A. They hadn't mentioned to me about being swindled. The little fellow wanted to do the mouthing, but the big fellow kept kicking him in the shins and told him to keep quiet, wouldn't let him talk.

10

Q. Did they say anything about one thousand dollars being paid for the stuff by each of them?

A. I can't say they did.

Q. What did you consider a joke if they didn't tell you about being robbed at all? A. The little fellow talked about buying or something showed me that was what he got for his money, and when he opened the package a bullfrog jumped out. That created a laugh, they didn't know what he was talking about.

20

Q. Then you did know he had paid some money. Had you talked to these railroad men in your place about it? A. We were all sitting in the bar-room playing pinochle.

Q. Didn't you consider it strange that men should say they had been getting green goods, buying green goods, in the place you were bartender in? A. Why, I didn't think he was all there in the head, to tell the truth.

Q. You didn't? A. No.

30

Q. You said nothing to the police about it? A. I told them if he had a complaint to make, why didn't he go to the police department.

Q. Did you tell him where the police department was? A. Not anything more than the police station on Union Street.

Q. Did you tell him how to go? A. They knew how to go there.

Q. How do you know he did? (No answer.)

40

Joseph Burke—for Defendant—Direct.

BY THE COURT:

Q. How do you know he did? (No answer.)

Q. The question is did you direct them to the police station? A. I told them to go to the police station if he had a complaint to make.

Q. Did you tell him where it was? A. No, sir, I did not.

10 BY MR. MCCARTHY:

Q. How do you know he knew where to go? A. I have the impression in my mind, I thought maybe he might have been there. I don't know whether he had been there or not.

Q. Don't you know you never said a word to Dillman about it before he brought these men there? A. I know I told Charlie Dillman, as I said before, "I told Charlie Dillman and Acting Chief Schrumpp."

20

JOSEPH BURKE, a witness produced on behalf of the defendant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. CUTLEY:

Q. What is your occupation? A. Bartender.

Q. Where? A. 2380 Broadway, New York City.

Q. How long have you been bartender there?

A. About nine years.

30 Q. Do you know Smith and Bokin who testified in this case? A. I know them from seeing them, yes.

Q. Do you recall whether on the 9th or 10th of July, 1913, you saw those men at your place in New York City? A. Around that time I met that gentlemen with the mustache.

Q. Smith? A. I don't know his name.

Q. Was Bokin with him? A. Two men, one of them Smith, I suppose, the one with the mustache.

40

Joseph Burke—for Defendant—Direct.

Q. Did you have a conversation with them at that time? A. Yes.

Q. What was the conversation?

MR. MCCARTHY: I object.

Q. Did you have any conversation with either Smith or Bokin on or about the date of which you have testified in reference to the whereabouts of one P. F. Burke? A. Well, they came in— 10

THE COURT: Yes or no to that question.

A. Yes, on the 9th.

Q. What was the nature of that conversation? A. Inquiring for Mr. P. F. Burke.

Q. What did they say to you? A. When they called me in the back room, they sat down at a table, they told me they were over in Hoboken and they were dealing in a line of business which they didn't explain to me, but it was something about a package, and this P. F. Burke gave him a package, and this gentleman with the mustache, Smith or Brown, I don't know, says to him, he was on his way back to New York, when he discovered there was a mistake in the package, so knowing that P. F. Burke was a frequenter of 2380 Broadway, he came in there and inquired for him. I told him I didn't see him, so he told me that this P. F. Burke misrepresented the parcel to him and he has two thousand dollars of his money, and then he wanted to know where he could locate him. I told him I didn't know the party, but if they came in here, I would tell him he was here. So that was about the ninth. The next time they came back again, this P. F. Burke came in and told me he got a telegram from Chicago— 20 30

Q. P. F. Burke came in there? A. Yes, P. F. Burke says to me he was P. F. Burke, and that if his friend— 40

Joseph Burke—for Defendant—Direct.

MR. MCCARTHY: I object.

Q. Did you communicate that to Bokin? A. Sir?

Q. Did Bokin come in there after that telegram?

A. I didn't see no telegram, that was the message I was to give him. That day was the last I seen him. I never seen him since then.

10

Q. Did you have any conversation— A. I give him the message that was left for him; I told him—

MR. MCCARTHY: I object.

Q. What did they say to you?

MR. MCCARTHY: I object.

MR. CUTLEY: We have a right to prove by this witness whether he had a conversation, and what was the conversation as far as Burke or McDonald was concerned.

20

THE COURT: There is no sufficient foundation. You have not laid a foundation for this question.

Q. Did you have any conversation with either Smith or Bokin, in regard to the Great Northern Hotel in Chicago or the whereabouts of Burke in Chicago?

30

THE COURT: You may answer that yes or no.

A. Yes.

Q. What was the conversation? A. That was in regard to if a letter or telegram come from the Great Northern.

Q. What did they say to you, what did they say? A. Who?

40

Q. Smith or Bokin? A. They asked me if I seen Mr. P. F. Burke. I told them he was in and left a message he was called away to the Great Northern Hotel in Chicago, Illinois, and would write as soon as he got there. I don't recall whether it

Joseph Burke—for Defendant—Cross.

was to 2380 Broadway or to their home. I don't know.

CROSS EXAMINATION BY MR. MCCARTHY:

Q. What nationality are you? A. I am Irish descent.

Q. Where were you born? A. Cincinnati, Ohio. 10

Q. How old are you? A. Thirty-five years old.

Q. Where do you live? A. 3151 Broadway.

Q. New York City? A. Yes.

Q. What business are you in now? A. I am in the saloon business.

Q. Whereabouts? A. 2380 Broadway.

Q. Who keeps the saloon there? A. Cornelius McCarthy.

Q. You are bartender there? A. Yes.

Q. Do you know this man McDonald? A. No, 20
sir.

Q. Don't know him at all, sir? A. No, I don't know none of these men. I was subpoenaed over here unexpected, I don't—

Q. You didn't know what you were to testify to? A. The case slipped my mind and it was Mr. Cutley recalled me, called me back, that this was the case of a Hoboken robbery some time ago. I remember talking to the man, that said he lost some money. Never told me he was robbed. 30

Q. Who was present in your place talking to you about Smith and Bokin having been there in your place? A. This here case, present time?

Q. Yes. A. When I come here, I looked for Mr. Cutley and found out what the trouble was.

Q. Who was the first person you talked to about having seen Mr. Smith and Bokin in your place, in your barroom, asking for Mr. Burke? A. Who was the first person I spoke to?

Q. Yes. A. About seeing Mr. Smith, you mean? 40

Q. Yes. A. I told Burke, this here P. F. Burke,

Joseph Burke—for Defendant—Cross.

P. F. Burke come in, asked me if I would give him that message. At that time they were coming in, they were strangers to me. There was four or five of them. I don't know who they were. Supposed to be out of town people.

Q. You told Burke they were in there, didn't you? A. No, I didn't tell Mr. Burke, they told
 10 Mr. Burke and he got a letter that his friends were in there. Then they did go out on the corner and they would come in again.

Q. Burke was the only one that you told that to? A. I told Mr. Smith, too, they were all there drinking together by the bar.

Q. What Smith? A. (Witness indicates the complaining witness, Smith.)

Q. Did you tell anybody that those two men had been in your place inquiring for Burke, except
 20 Burke himself? A. No, I didn't tell anybody.

Q. Nobody at all? A. Then they come in and asked me if his friend is here.

Q. Who sent you to Mr. Cutley's office? A. Who sent me? I don't know. I was subpoenaed in the case, to come here. I have never been to Mr. Cutley's office.

Q. You were subpoenaed to go to his office? A. I got a subpoena to come to the Court House.

Q. How did you know where to go, to Mr. Cutley's office? A. I was sitting on a bench when Mr.
 30 Cutley says, "Is your name Joe Burke?"

Q. Where? A. In the front court room.

Q. You said something about some one sending you to Cutley? Who sent you to go to Mr. Cutley? A. Mr. Sullivan, I suppose, that is his name, on his envelope.

Q. Did you go to his office? A. No, I didn't know where his office is.

Q. How did you know he was in the case? A.
 40 He came to me and spoke to me about the case. I was here once before, you know.

Joseph Burke—for Defendant—Cross.

Q. I mean at the other trial, the first time you got in this case; who sent you here? A. I was summoned here.

Q. And you had not talked to anybody about it except Burke? A. Why, I didn't know Burke. I wouldn't know none of them.

Q. You had talked to Burke in the saloon, hadn't you? A. I have talked to hundreds of people in the saloon, but I didn't see Burke, since I come here. 10

Q. But you saw Burke in the saloon at the time he gave you the message, didn't you? A. Yes; I saw Mr. Burke at that time, yes.

Q. You told him that these two men had been in there looking for him? A. He came in, left a message for me to give to them, and I gave the message to them. He went away. That was the last I saw of him. 20

Q. The last you saw of Burke? A. The last I saw of him, yes.

Q. You didn't speak to anybody about these two men being in your place? A. Only to the two gentlemen there.

Q. Bokin and Smith? A. They said they had a parcel, it wasn't what it was represented to be.

Q. Do you know how McDonald knew that you could testify about these two men being in your saloon and asking for Burke? A. Well, when I was called up here he asked me if I recalled a couple of years ago, about the case of some Burke 30

Q. Who asked you? A. Mr. Cutley asked me if I could recall about some transaction taking place in my place. He told me that two men is supposed to lose two thousand dollars around here and they was trying to find out what I knew about it. I told him I didn't know anything about the case only from customers coming in and waiting on them. 40

Joseph Burke—for Defendant—Cross.

Q. You don't mean to tell this jury that you came over from New York with a subpoena in your pocket, not knowing anything about what you were going to testify to? A. The first time I didn't.

Q. The first time— A. I didn't know.

Q. Didn't know anything about it at all? A.
10 The first time I didn't know at all.

Q. You didn't know until you got in the room and Mr. Cutley talked to you? A. Mr. Cutley asked me if I can recall what happened two years ago.

Q. You don't know how Cutley knew you could testify? A. I don't know how they got my name because—

Q. Because you never told anybody? A. No, I didn't tell anybody at all.

20 Q. Except Burke? A. I didn't tell anybody at all.

Q. But you talked to Burke? A. I told him the conversation comes back to me.

Q. (By the Court) Where were you when you were subpoenaed? A. Working.

Q. (By the Court.) Where? A. 2380 Broadway, New York.

Q. (By the Court.) Who gave you the subpoena? A. I got it by mail. It says if you don't appear you are fined two hundred and fifty dollars.
30

Q. (By the Court.) You got it by mail? A. Yes.

Q. (By the Court.) Any money come with it? A. No, sir; no money came with the subpoena.

Q. (By the Court.) You came under that subpoena? A. Yes, I came under it, sure, I didn't want to be fined. I have lost three day's work in this case already.

40 Q. (By the Court.) You never got any financial assistance for coming? A. I spent my own carfare and lost three day's work.

Joseph Burke—for Defendant—Re-Direct.

Q. How many days have you been here? A. Three days.

Q. Did you get a subpoena for the last trial?

A. I got a subpoena each time I came here.

Q. The first trial? A. Three altogether, and I got one in this case.

Q. You came voluntarily, did you? A. Well, I got a subpoena, it is in my overcoat, I guess. 10

Q. (By the Court.) How did you get a subpoena for this trial? A. By mail.

Q. (By the Court.) The same way? A. Yes.

Q. (By the Court.) Didn't send you a dollar with it? A. No, sir; not a five cent piece; counsel's name on top of a big envelope, about that size (indicating) with a subpoena.

Q. You say you never saw this defendant before the first trial? A. No; I never saw him before.

Q. You are sure about that? A. Never saw him to my recollection. See lots of men every day but I can't recall him. 20

Q. Have you seen Mr. Burke since that time? A. I haven't seen that gentleman since he left the message to give to his friends.

Q. To his friends? A. Yes.

RE-DIRECT EXAMINATION BY MR. CUTLEY:

Q. In regard to the subpoena under which you came here the first time, you say that subpoena was mailed to you by me in a letter? A. Yes. 30

Q. And the second day the Judge ordered you to come back without the necessity of further subpoena, didn't he? A. Yes.

James McDonald—for Defendant—Direct.

JAMES McDONALD, the defendant, being sworn, testified on his own behalf as follows:

DIRECT EXAMINATION BY MR. CUTLEY:

Q. How old are you? A. Fifty-three.

Q. Where were you born? A. City of New York.

10 Q. Do you know Mike Smith or Charlie Bokin?
A. Never saw them in my life before until I see them in court.

Q. Were you in Pittston, Pennsylvania, in July, 1913? A. No, sir.

Q. At any time in 1913? A. No, sir.

Q. Did you ever send or sign any telegram to them, to their place in Pennsylvania, either of them? A. No.

20 Q. Did you have any conversation with Smith or Bokin in the presence of Mrs. Smith? A. No.

Q. Did you ever see those men before you saw them when you were arrested in New York? A. No.

Q. When were you arrested in New York? A. On or about July, 1914.

Q. Where were you arrested? A. On the west side of 81st Street and Columbus Avenue, the Colonial Hotel.

30 Q. You were brought to Fifty-fourth Street Court? A. Yes—no, sir.

Q. Where? A. To Police Headquarters first. I was detained there that night and the following morning I am stood up for identification on complaint of being a suspect in what they call a wire-tapping case. The complainant stepped to the line, along this line of officers there, and failed to identify anybody, and he withdraws.

40 MR. MCCARTHY: Is this the complainant in the wire-tapping case?

James McDonald—for Defendant—Direct.

THE COURT: He is explaining why he is in the hands of the police.

A. (continuing) So I am taken to court before Magistrate Duell and the officer filed a warrant from New Jersey here saying I am wanted here, and asking for me to be detained until they have time to summon the complainants in the case, and after a lapse of two days they don't appear there and my attorney applied for a writ of habeas corpus before Judge Guy. I am taken down on a writ of habeas corpus to the Supreme Court, Justice Guy, owing to him being about to go on a holiday, the next day, he said he wouldn't set bail for the present. In that case he would rather leave it go over to Justice Donnelly, he couldn't give it due consideration, but he didn't entertain the writ, but then, which of course made the writ still serviceable, so I am remanded back then to the 54th Street jail. I am there for about three or four days; finally my lawyer takes me on a writ of habeas before Supreme Court Justice Donnelly to have a motion made for him to set bail inasmuch as I was detained without any complaint.

Q. Was that when you saw the complainants for the first time? A. The complainants hadn't arrived yet. They don't arrive there up to that time. But I am produced before Justice Donnelly, my lawyer and I for the purpose of setting bail. Whilst we are waiting the arrival of the Judge to take his seat on the bench, before he came out of chambers, why, we are standing there waiting and suddenly in stepped the officers—

Q. Which officers? A. Officer Daly, Officer Dillman, and Assistant District Attorney Richter, that had the charge of the case, and the complainants and Chief Wallum, I think, from Union Hill.

James McDonald—for Defendant—Direct.

So my lawyer see some kind of a motion or whispering among them—

MR. MCCARTHY: I object.

Q. What happened then? A. The happening took place. I said to my lawyer "What is this, a point-out?"

10

MR. MCCARTHY: I object and ask that the answer be stricken out.

Q. What happened? Who was pointing you out, that you thought was pointing you out? A. Why, the officers.

20

Q. Which one? A. Officer Daly, Officer Dillman and Chief Wallum, but they claimed they were not doing it, and it was maintained they were, and he says, "This will redound to your benefit, McDonald, this is not right, give us a fair deal here."

Q. Did Daly jump to a seat in some part of the court room? A. He don't jump, he just stepped in, he said "Jim, I didn't mean to do this. I didn't know you were in here." I said, "You see them people pointing me out, don't you?"

Q. That was the first time you spoke to Smith and Bokin? A. The very first time to the best of my recollection.

30

Q. Had Daly jumped over to take a seat by you? A. We were standing; he stepped over, took a seat alongside of me, and made that remark to me.

Q. Then Smith and Bokin came in and identified you, did they? A. Certainly.

Q. Was there anything about "That is Milkie McDonald"? A. Why, yes.

Q. Who said that? A. Why, Officer Daly.

Q. Right there, and openly? A. Certainly.

40

Q. Did you ever have any meeting with Smith

James McDonald—for Defendant—Direct.

or Bokin at Hoboken, New Jersey on the 8th of July? A. No, sir.

Q. Did you ever go to Union Hill and take money, either at the point of a pistol or using force or violence? A. I did not.

Q. Were you ever in Coffey's saloon in Union Hill? A. No, sir.

Q. Did you ever have any dealings of any character— A. No, sir. 10

Q. Did you ever have any dealings of any character in which you robbed either of these men? A. No, sir.

Q. Do you know a man named P. F. Burke? A. No.

Q. Did you on the 8th of July, 1913, know a man named P. F. Burke? A. No.

Q. Were you in the town of Exeter Valley or Pittston in your life? A. No. 20

Q. Did you ever see Mrs. Smith, or did she see you, in April? A. No.

Q. Did you ever meet either of these men in New York City and have any conversation with reference— A. No.

Q. —to selling whisky or stock? A. No.

Q. Or New York real estate? A. No.

Q. When were you arrested? A. July 13, 1914.

Q. Between the 8th of July, 1913, and the day you were arrested had you been arrested as a suspicious person in the City of New York? A. Yes. 30

Q. Had you been taken to Police Headquarters in the City of New York? A. Yes.

Q. Had you been arrested as a suspicious person up to the time—before the time you have testified to already? A. Yes.

Q. Had you met Daly in New York during that time? A. I met him lots of times, to see him. 40

James McDonald—for Defendant—Direct.

Q. In the time from July, 1913, or August 1913, how many times had you been arrested? A. I must have seen him a hundred times.

Q. What particular circumstance or what particular robbery or crime had you been arrested as a suspect for? A. I was arrested three or four weeks before I was apprehended in this instance by Officer Daly, I was arrested and brought to Headquarters as a suspect for what they term the Strand Theatre robbery.

Q. Do you know of your own knowledge whether or not Daly knew you at the time he arrested you? A. That he knew me?

Q. Yes. A. Why, yes, all police headquarters knew me, because I was stood up there in the afternoon.

Q. Do you know whether Daly knew whether you were arrested in Police Headquarters? A. Do I know he knows?

Q. I don't want you to testify to the custom, whether he ought to know, but whether he knew? A. I really couldn't—

Q. Did you see him at the time you were arrested for the Strand robbery? Did you see him around Police Headquarters? A. I couldn't really say I did, that I did see him at that time, when I was in Headquarters for the Strand robbery as a suspect. I was stood up with four witnesses. They failed to identify me and I was turned out by Police Headquarters without the formality of bringing me before the judge.

Q. That Strand Theatre robbery was four weeks before you were apprehended and Bokin identified you? A. Yes, thereabouts.

Q. Had you been arrested on other occasions and brought to Headquarters? A. Around that period?

Q. Yes, between August, 1913, and the time you were apprehended for the Bokin robbery? A. I

James McDonald—for Defendant—Cross.

must have been arrested several times, three or four different times.

Q. And brought to Headquarters? A. Yes. And on one occasion Officer Daly arrested me, I think, during that interval, Officer Daly and Detective—Wilbur—Lieutenant Brady arrested me as a suspect in another wire-tapping case. I was brought to Headquarters and arraigned there for identification by other complainants in wire-tapping cases, although the complaining witnesses in that instance failed to identify me. 19

Q. That was all between August 1913, and the time of your apprehension in July 1914? A. Yes, to the best of my recollection, sir.

Q. Do you recall of your own knowledge now, whether on any of these occasions when you were apprehended you ever saw Daly, either around Police Headquarters or on the street? A, I see him hundreds of times on the street. I see him when he arrested me, once during that interval. 20

Q. He did arrest you? A. Certainly, and Detective Wilbur during that period.

Q. What for? A. As a suspect in a wire-tapping case.

Q. You have been convicted of crime, haven't you? A. Yes.

Q. You served a term in States Prison for breaking and entering? A. Yes. 30

MR. MCCARTHY: Of course that is not admissible.

THE COURT: How is that matter of defense? Have you interrogated him about the date of the robbery, whether he was there or not?

MR. CUTLEY: Yes.

CROSS EXAMINATION BY MR. MCCARTHY:

Q. You don't mean to say that Detective Daly was in the Police Headquarters at the time you 40

James McDonald—for Defendant—Cross.

were arraigned for the Strand Theatre robbery? A. I really couldn't recollect. I said around Headquarters.

Q. He was there, was he? A. I really couldn't tell. I couldn't really say whether he was or not, there is so many officers there.

10 Q. You didn't see him there, did you? A. Not to the best of my recollection, I didn't see him there, no.

Q. If you had seen him there you would have remembered it, wouldn't you? A. Well, yes, I guess I would.

20 Q. You were not arrested on the Strand Theatre robbery. You were sent for, the Detective told you you were wanted at Headquarters, you were brought before Commissioner Doherty and he asked you some questions, didn't he? A. It was not Commissioner Doherty.

Q. Commissioner Ruby? A. Yes, Commissioner Ruby. I was invited before him, I volunteered to go there. I was sick and tired of being arrested on complaints and I thought I would step right in there.

Q. You say that in the period between July 8th, 1913, when these two men say they were robbed, and the time you were arrested, in 1914, you had seen Daly several times? A. Yes.

30 Q. Is that so? A. Probably a hundred times.

Q. You say you were arrested by him during that period? A. Yes.

Q. What for? A. It was a question. I was walking the streets, somewhere around the seventies, one afternoon, and I met Mr. Daly and Mr. Wilbur, as I subsequently learned, a complaining witness in a wire-tapping case.

Q. When was that? A. That was in about 1914.

40 Q. Wasn't it November 9, 1912? A. November 9, 1912?

James McDonald—for Defendant—Cross.

Q. Yes; when you were arrested on a charge of grand larceny by Officer Daly and Detective Wilbur? A. I don't think so.

Q. You were arrested by him November 9, 1912, were you, on a charge of Grand Larceny? A. There have been so many cases, and so many complaining witnesses—

Q. So many complaining witnesses? A. Certainly; we all are what you call stall collars. The officer says, "Go out and do something," you have to find what happened—all fallacy. 10

Q. Isn't it a fact that on November 9, 1912, you were arrested by Detective Daly on a charge of grand larceny in New York? A. If you could specify the name of the complainant I might recall.

Q. A wire-tapping case? A. Sir?

Q. A wire-tapping case? A. I believe so, but I don't know what one it is now. 20

Q. So many of them? A. Maybe a half a dozen, maybe a dozen, I don't remember it. It is hard for a man to remember.

Q. Isn't it the fact from the time you were arrested November 9, 1912 by Daly, until the time you were arrested on this present complaint in 1914, that you had not been picked up by Daly at all. In other words, wasn't it the last time you were picked up by Daly, before you were picked up by Daly in this case? A. Why, I was picked up by other officers in the— 30

Q. I am talking about Daly? A. You said the last time I was picked up.

Q. Yes. A. I am telling you where I was picked up before this time, and held in Police Headquarters and turned out of Police Headquarters, by other officers. They knew about it, but no complaining witness could pick me out. 40

James McDonald—for Defendant—Cross.

MR. MCCARTHY: I ask that the question be stricken out.

Q. I am talking about Daly, the man was ordered to pick you up on sight. Were you picked up or arrested, by Daly at any time after November 9th, 1912, until you were picked up in this particular case? A. You don't specify the complainant in that case. If you could recall, I could recall.

10 Q. In a wire-tapping case? A. There is so many—

Q. So many wire-tapping cases? A. I have been arrested so many times, picked up and discharged, no complainant, no identification.

Q. You say you were not in Union Hill on July 8th, 1913; is that right? A. Positively.

Q. Where were you? A. Well, I might have been around the race course during that time. I follow
20 the turf a good deal.

Q. Don't you know? A. It is a long way to carry a man back, maybe three years.

Q. But you say you know you were not in Union Hill? A. I know I was not there. I know positively I was not there.

Q. You were arrested in 1914, a year after, weren't you? A. Yes.

Q. And you knew you were charged with robbing two men of one thousand dollars each on
30 July 8th, didn't you? A. Yes, I am charged with that, yes.

Q. Do you mean to tell this jury you cannot tell them where you were on that particular day, if you were not where these men say you were? A. I cannot exactly tell them, just specify the day and date, no. I might have been at the race tracks. I may have been in some pool room or other in the City of New York, where I was operating, doing clerical work for them.

40 Q. Since your arrest on this charge haven't you

James McDonald—for Defendant—Cross.

tried to jog your memory as to where you were on the 8th of July, in the morning and the early part of the afternoon? A. I cannot try to go back that far, Mr. McCarthy, it would be impossible for a man, no matter how bright his mentality was, to go back to an exact day or date, and time, where I was on that date, especially a man that gets his living around by—

10

Q. By what? A. Speculating—and working.

Q. Speculating in what, and working in what?

A. Well, I work for bookmakers on race courses.

Q. Yes? A. Worked in a pool room.

Q. Yes? A. Now and then I speculate a little myself.

Q. In what? A. Stocks.

Q. What kind of stocks? A. Oh speculate in railway stocks, anything I think is good.

Q. What is your business? A. My business— 20
speculator.

Q. Speculator? A. Yes.

Q. In what? A. In stocks.

Q. What kind of stocks? A. Railway stocks.

Q. You remember being asked this question at your last trial, don't you— A. Yes.

Q. You said you were a speculator in traction stock? A. Well, I figure that is somewhat analogous to railways, ain't it?

Q. When did you buy any railway stocks last? 30

A. Well, about a year ago.

Q. What month? A. Ten or eleven months ago.

Q. From whom? A. Hornblower and Weeks, my brokers.

Q. Where are they? A. Branch houses mostly all over in any large city, New York, Boston—

Q. Where did you do business with them? A. Providence.

Q. In Providence? A. Yes.

Q. Were you in Providence on the 8th of July? 40

A. The 8th of July, when?

James McDonald—for Defendant—Cross.

Q. 1913? A. I really couldn't say, I might have been.

Q. Do you remember being asked this question at your last trial, and you said, "Maybe Providence, Rhode Island"? A. That is exactly.

Q. You don't know where you were? A. Not precisely, no.

10 Q. You cannot bring anything to show to this court where you were at the time these two men say you were in Union Hill robbing them with Burke? A. Not at this time, I cannot.

Q. This case has been on for a long time? A. Yes.

Q. Have you made any effort to find out where you were at that time? A. I have tried to go back, tried to jog my memory lots of times, but I cannot bring it to that day and year.

20 Q. Isn't it a fact you were over there? A. No.

Q. Didn't you and Burke have two packages of paper like that? A. No, sir.

Q. Do you know what it is? A. I know what it is now, it is paper.

Q. You know it is green goods? A. I don't know it is green goods. You may term it that if you wish.

Q. I am asking you. Do you know what it is? A. No, it is paper.

30 Q. Do you know anything about the green goods business? A. No, sir.

Q. Have you been in it yourself? A. I have been accused of being in it.

Q. Have you ever been in it? A. I may regard myself as being in it if I was arrested one time for mis-use of the mail, that they figured, pertained to green goods.

Q. It did pertain to green goods, didn't it? A. I believe it was, yes.

40 Q. Why, you gave the name of Charles T. Thorpe, in 1908 in New York City? A. Yes.

James McDonald—for Defendant—Cross.

Q. When you were sent to the Penitentiary for violating the postal laws? A. Yes, precisely.

Q. Did you plead guilty to that? A. No.

Q. What did you plead? A. I was tried.

Q. And convicted? A. Yes.

Q. And the particular charge was that you misused the mails to defraud people by means of green goods, wasn't it? A. I believe so, yes. 10

Q. Then you do know what green goods is, don't you? A. Well, in that case I was—I didn't take any particular part in it at all, I was just simply jobbed and brought into it, in other words I had the job put up on me.

Q. You had a job put up on you? A. Yes.

Q. You don't mean to tell this jury you have had no experience in the green goods business? A. Well, not to the point of where you would like to make me. 20

Q. I don't want to make you anything. I only want the truth. Haven't you handled these very goods, this very kind of goods? A. No, I haven't, really.

Q. What have you been doing all these years? A. I told you probably I was working around gambling houses, been working for men on the race courses, employed by bookmakers and so on, that is the best I could do, a man with my questionable past, and so on, I couldn't obtain any other kind of employment. 30

Q. Whatever there is about your past that is questionable, you have made for yourself? A. In my early manhood I have had to—yes.

Q. What do you call your early manhood? A. When I was about twenty-eight or twenty-nine years of age.

Q. Have you been convicted of nothing since then? A. Except misuse of the mails. 40

Q. What? A. I have been convicted of misuse of the mails.

James McDonald—for Defendant—Cross.

BY THE COURT:

Q. You have been in the wire-tapping business?

A. Oh, yes—that is what they say.

Q. Oh, yes. Have you been in the wire-tapping business in the last year or so? A. I have never been convicted. I have been—

10 Q. Have you been in the wire-tapping business in the last year or two? A. No, I have not. I have been arrested for it, though. I have not been in the business.

Q. Let us see about that past you speak of. You were convicted of burglary in Englewood, New Jersey, safe burglary? A. No, you are mistaken there.

20 Q. You pleaded guilty? A. Yes, but not to burglary; breaking and entering and escape from jail.

Q. Breaking and entering in the night time? A. No, day time, about six o'clock in the morning. The court record you can get, the court record should show that, from Bergen County.

Q. It was for breaking and entering and larceny? A. I don't know about any larceny. I know I was found drunk in the place, intoxicated, officers came in and got me.

Q. Where? A. Englewood.

30 Q. What kind of a place? A. Grocery store.

Q. Grocery? A. Liquor store.

Q. Did you break in a liquor or a grocery store? A. I believe I had a little bit of liquor in me.

Q. Did you break open the safe? A. Not to my knowledge. I didn't know there was any safe in there. I didn't see any, not to my knowledge.

Q. There was a safe broken open in there? A. I really couldn't say.

40 Q. Who was with you on that job? A. I don't know anybody was with me.

Q. Wasn't there? A. They claimed two or three

James McDonald—for Defendant—Cross.

people was there, besides me, but I didn't see anybody.

Q. Didn't you testify at the last trial that these were men you had met, you didn't know their name? A. I don't know as I did say that. I may have met—I might have—I don't recollect saying I met anybody there on the last trial.

Q. What time did you get in Englewood that night? A. Along about five-thirty in the morning. I believe it was in the summer time, something like that. 10

Q. Do you mean to say you don't know there was a safe broken open there? A. I certainly do, because I didn't know anything about this.

Q. Didn't you say at the last trial it had been left open? A. I said it may have been open, but I didn't see it.

Q. Weren't you there? Didn't you plead guilty to breaking and entering with intent to steal, and wasn't there a safe broken there? A. I don't know about the safe. I got my sentence. 20

Q. Ten years? A. Thirteen.

Q. Ten years for breaking and entering? A. Thirteen. There was no dwelling there, nothing to show wicked intent, nothing, improverishment against anybody, simple ordinary crime.

Q. Was it after you were sentenced to ten years you escaped? A. No it was prior to that. 30

Q. You beat it out, went to Denver? A. Yes, I believe so.

Q. You were brought back from Denver? A. Yes.

Q. How many different names have you? A. Really I couldn't say. Any time I was brought in, the officer, give in any name you like to him.

Q. Did you ever use the name, Meca? A. No, 40
sir.

James McDonald—for Defendant—Cross.

Q. Never used the name, Meca? A. I should say not.

Q. What is your real name? A. James J. McDonald.

Q. You have been known as Joseph McDonald? A. I may have.

10 Q. Known as George Dominick? A. I might have.

Q. James McCormick? A. I might have.

Q. Charles T. Forbes? A. Might have.

Q. And various other names too. You say you don't know this man, Burke? A. I should say not, no.

Q. Were you ever in prison when Burke was in prison too? A. No, sir; not to my recollection.

20 Q. Do you remember at the last trial when your counsel handed a letter to Mr. Bokin when he was on the stand, and asked him if that was the letter Mr. Bokin sent to Burke? A. I didn't see no letter. I remember he showed him a paper. I don't know whether it was any letter or not. I don't know whether it was any material one way or the other.

Q. You heard Mr. Cutley ask him whether he sent that letter? A. Yes, I recollect that.

30 Q. You heard Mr. Bokin say he had sent that letter to Burke, didn't you? A. I believe I did, if I can recall rightly.

Q. How did you get possession of that letter? A. I didn't have possession of no letter. I didn't have no letter.

Q. Do you know how your counsel got it? A. I don't.

Q. Did you give it to him? A. I certainly did not. He got it on his own investigation, whatever he is working on; I don't know anything about it.

40 Q. You didn't give it to him? A. No, certainly did not.

James McDonald—for Defendant—Cross.

Q. Don't know how he came to have it? A. No.

Q. Didn't know anything about it until he flashed it on Mr. Bokin? A. No.

Q. You heard him ask Mr. Bokin and Smith whether they had sent telegrams to Burke and McDonald? A. Yes. I heard that said.

Q. You heard me ask your counsel for telegrams he was purporting to read from, didn't you? A. Yes. **10**

Q. Do you know where he got those telegrams that were sent by Smith and Bokin to Burke and you, if he didn't get them from you? A. I do not.

Q. When you were up in the Magistrate's Court in New York, arrested on this charge, you sued out a writ of habeas corpus through your lawyer, didn't you? A. Yes. **20**

Q. When you went to the Supreme Court you sat in the court room with your lawyer, didn't you? A. We were standing up waiting for the judge to come in, we were not sitting down, we were standing up.

Q. Didn't Mr. Bokin call out in the court room, "There is Meca"? A. No, sir, they didn't.

Q. Wasn't there a commotion, a disturbance, in the court? A. Not one ruffle took place there, not one ruffle, except that my attorney openly called him down for pointing me out. **30**

Q. You were there? A. Yes.

Q. You didn't see anybody pointing you out? A. My lawyer see him, I see him myself. Certainly I did.

Q. I thought you said your lawyer told you. A. No; my attorney called him down, he says he is pointing me out to them that day, he says, give me a fair deal, "never mind, McDonald, this will redound to your benefit." **40**

James McDonald—for Defendant—Cross.

Q. Who said that? A. My lawyer, K. Harry Rosenberg.

Q. Don't you know that Smith blurted out, "There is Meca"? A. No, not at all. We were in another room, Daly, Dillman, two clerks, and Assistant District Attorney Richter—had charge of the case.

10 Q. Your counsel asked Mr. Bokin to-day on the stand, reading from a paper, "did you send a telegram to Mr. McDonald—'Why didn't you keep your agreement?'" Have you seen such a telegram? A. I don't recollect him stating that. No, I don't know anything about any telegram sent to Burke or McDonald or anybody. I don't know anything about telegrams.

20 Q. Did you turn that telegram over to Mr. Cutley? A. I didn't, certainly. I never had possession of any telegrams from any of these complainants or letters, or anybody else—or anything else.

Q. Do you know how the witness, Burke, got in this case? A. No.

Q. Never saw him before? A. No, sir.

Q. When was the first time you saw him? A. First time, when he was here in this case as a witness.

Q. In court here? A. I believe so, yes.

30 Q. That was the first time? A. Yes.

Q. Never saw him before, positive? A. No, not to the best of my recollection, I never have.

Q. You don't know how he came to come here? A. No, sir; I don't. I am solely in the hands of my counsel.

DEFENCE RESTS.

Chas. J. Dillman—for State—Direct—Cross.

CHARLES J. DILLMAN, recalled.

DIRECT EXAMINATION BY MR. MCCARTHY:

Q. When you went down to Coffey's saloon with Bokin and Smith did Mr. McHugh say anything to you about Bokin and Smith having been in that place before? A. Why, no, not being there before.

10

Q. What did McHugh say, if anything, to you when you told him these two men had been robbed in his place? A. Mr. Coffey stood at the end of the bar, McHugh sat at the table. I walked to the end of the bar to Mr. Coffey. "Martin," I says, "these two men claim they were stuck up in your place and two thousand dollars taken from them." With that McHugh looked at me and walked over; I started to explain the case to Coffey. McHugh says to me, "If that happened why didn't they say a word about it? Why didn't they make a holler?"

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Q. Did he say they were in there before? A. He never mentioned they were there before, never mentioned whether they were there or not.

CROSS EXAMINATION BY MR. CUTLEY:

Q. Are you positive there was no such conversation as McHugh has testified to? A. What conversation?

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Q. In regard to whether these men had been there before or not? A. He never said anything to me about the men being there before.

Q. When was this, you were there? A. On August 5th.

Q. Had these men told you they had been to New York? A. They said they had been to New York, picked out photographs of the man, they came in, explained the case to the Acting Chief and I. At that time Chief Wallum was on his vacation.

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Q. Was Coffey proprietor of the place at that time? A. Yes.

Q. And you are positive no such conversation as McHugh says took place at all? A. He never told me they had been in the place before, no.

Q. What did he say? A. He says, "If they got stuck up here why didn't they make a holler?"

BY MR. MCCARTHY:

10 Q. Did he say anything to you about having directed them to the station house to make complaint? A. No, he didn't.

CASE CLOSED.

SUMMING UP.

20 **Requests to Charge.**

1. Robbery is the forcible and violent taking of the personal property of another by force or putting in fear.

2. The defendant is charged in the indictment with the specific crime of robbery, and unless the elements making up that crime are proved by the State beyond a reasonable doubt, the defendant must be acquitted.

30 3. The "putting in fear" mentioned in the statutory definition of robbery, the fear excited must be either of injury to the person or property or reputation.

40 4. If you believe that the complainants or either of them had intended to engage in the consummation of a sale of counterfeit money and were outwitted by the man Burke and his colleague, and their criminal designs frustrated, you are permitted to draw the inference that the complainants are unworthy of belief as to what they testified to in regard to the robbery.

Requests to Charge.

5. If Smith or Bokin or either of them parted with the possession of their property voluntarily in the negotiations for the purchase of green goods or counterfeit money, no matter how reprehensible this transaction may be, the defendant cannot be convicted of the crime of robbery, even if he participated in the green goods swindle, unless the violence, force and putting in fear mentioned by the statute are satisfactorily proved by the State beyond a reasonable doubt. 10

6. If Smith and Bokin parted with the possession voluntarily as a step in the sale of green goods, no robbery can be charged against the defendant.

7. If you believe that Smith and Bokin after a correspondence extending from the month of April, 1913, to the month of July, 1913, intended to purchase green goods and yielded to the importunities of the defendant and his confederate or confederates, and in pursuance of that design voluntarily purchased worthless paper with money which Smith & Bokin gave to the defendant or his confederate, the defendant is entitled to be acquitted. 20

8. If you believe that Smith and Bokin, by reason of their willingness to violate the criminal law in the distribution of green goods, are not persons of good fame, and are not entitled to belief, and if by reason of that fact a reasonable doubt is engendered in your mind as to the truth of the remainder of their story in relation to the robbery charge, you are to resolve that doubt in favor of the defendant and acquit him. 30

9. If Smith and Bokin concealed the fact of the robbery for any length of time and left the town of Union and went to the D. L. & W. station at Hoboken and failed to raise an outcry at the place where the robbery was alleged to have been committed, when it was possible and probable they would have been heard, these and the like circum- 40

Requests to Charge.

stances carry a strong but not conclusive presumption that their testimony is false, feigned and fabricated.

10. If Smith and Bokin waited for 28 days before they made a complaint to the proper police authorities and no satisfactory reason is given for this delay, their failure to complain when they had an opportunity is a strong circumstance
10 against the truth of their whole story.

11. If you believe the testimony of the witnesses Burke and McHugh that Smith and Bokin sought to find P. F. Burke before they had made a complaint to the police, you are justified in finding that the defendant was not guilty of robbery but that the complainants had voluntarily parted with their money.

12. If the identification of the defendant by
20 Smith and Bokin is inconclusive and leaves your mind in a state of doubt as to his participation you must find for the defendant.

13. The defendant is presumed to be innocent, and that presumption is a cloak which the law casts about him, and although you may not believe his defense in its entirety, if the testimony of defense raises a reasonable doubt in your minds as to his guilt, you must acquit him.

14. The defendant is entitled under the Consti-
30 tution to be informed of the nature and cause of the accusation against him and he is obliged only to answer the indictment upon which he is standing trial, so that although he may have been concerned in some transaction prohibited by our laws, he can only be tried for the crime of robbery mentioned in the indictment.

15. If Smith and Bokin voluntarily purchased
40 green goods from the defendant the defendant is not on trial for that violation of the law and has not been indicted for it and consequently cannot be convicted of that offense.

Charge of the Court.**GENTLEMEN OF THE JURY:**

I assumed, of course, that you gentlemen, called in this case as struck jurors, preferred to stay and finish this case to-night, even if the time were late; and what I have to say will occupy as little time as possible, having in mind the seriousness of the charge. I do not intend, in this case, to refer at all, perhaps, or certainly at any length, to the testimony, for it has seemed to me that this case is distinctly one of fact, which must be determined by you and by you alone. Therefore I will confine myself to a statement of the law, and leave it to you in that way with the instructions of the Court as to the law, and let you determine the questions of fact as to whether or not this defendant is guilty of the charge made against him. You must bear in mind, in the first instance, what this defendant, with one P. F. Burke who is named in the indictment, is charged with doing; and it is charged in that indictment that Burke and this defendant on the eighth day of July, 1913, committed what is known in the law as robbery, in that he committed an assault upon one Charles G. Bokin, and at the same time took one thousand dollars from him. The indictment is the basis of this trial. The indictment serves as complaint. The fact that the Grand Jury has indicted this defendant is not in any way to influence you in making up your mind as to his guilt. The indictment merely serves as complaint, and starts the machinery of the law in motion. The defendant is presumed to be innocent in this case until you find him guilty, and the burden of proof in this case is on the State, and unless the State satisfies you that it has borne that burden of proof of this man's guilt, you should find him not guilty. On the question of burden of proof, if you find in any

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Charge.

part of the evidence in this case that two inferences can be drawn, one as readily as the other, the defendant is entitled to the benefit of that inference which will relieve him of responsibility of the charge made against him in this matter; that is to say, if one inference leads to his guilt and one to his innocence and they are both

10 equal before you, he is entitled to have you give him the benefit of the inference which leads to his innocence. The defendant is also entitled to the benefit of all reasonable doubt you have in your minds as to his guilt. I want to say just a word on that question. There are two words in that expression. It is not "he is entitled to *any* doubt you may have as to his guilt"; the law does not say that. The law says

20 he is entitled at your hands to the benefit of any reasonable doubt, a doubt for which there is a reason, not a mere vague doubt, or a mere impression in your minds as you consider the case, that you may hereafter be sorry you found him guilty, and that therefore you ought now to find him not guilty. If you have in this case what the law expresses as an abiding conviction of his guilt, then the law says you have passed the period of reasonable doubt. Have you an abiding conviction that he did this thing? If so, then you may

30 be said to have passed that period of reasonable doubt. Take the words together in your minds, you twelve men, and weigh the evidence up and down, as you would weigh something on the scales, and if, when you conclude your deliberations, you have a doubt for which you have a reason, or if you have not an abiding conviction in your minds of the guilt of this defendant, then you should find him not guilty; but if you have passed that period

40 in your minds, if you find you have no reasonable doubt as to his guilt, you should find him guilty.

The charge against this man is named in the

Charge.

indictment as that of robbery. There is a count of assault and battery. I simply call your attention to that fact not that you will ease your minds or fail to do what the evidence requires if you feel that it requires a conviction of robbery, but in commenting upon the fact that the Grand Jury has, in addition to the charge of robbery, indicted this defendant for assault and battery. You are to bear in mind, and you should bear in mind, that the defense in this case, while not what we might call an alibi, in a measure is an alibi; he says he was not there, and of course it will be perfect nonsense for the jury to find this man guilty of assault and battery because you have a reasonable doubt in your minds that he had not committed a robbery, but that you are not quite satisfied as to what you should do. Your verdict should be a logical verdict in this case. Therefore it becomes necessary for you to examine into the facts and ascertain just what the thing is. To constitute a robbery there must be actual violence or such a demonstration and threats as will cause a reasonable apprehension of bodily injury if the victim resists. Robbery is the felonious and forcible taking of property from another man's person, or in his presence, against his will by violence or by putting him in fear. It makes no difference what pretence was used or what pretences were employed to influence the owner to surrender possession if he was put in bodily fear at the time. That is all that is sufficient. And unless you find that these elements were present in this case you must find this defendant not guilty of robbery.

Again, if this defendant was one of two men or more men, and assisted—that is to say, if this defendant assisted in the taking of money while the other party or the other parties did the bodily harm to this complaining witness or gave reason-

Charge.

able apprehension of bodily harm to one or more of them at that time, then this defendant may be found guilty of robbery. There is a suggestion in this case that these complaining witnesses, coming down from the State of Pennsylvania, had been induced to come here on the strength of buying what is known as green goods. Whatever the facts

10 may be in that respect, I want to try and draw your attention to the distinction, about which some objection has been made, which I determined on the cross examination you have heard, to lay before you in order that there may be no misunderstanding as to your powers in this respect. It is not for the Court to say precisely whether these men were led to this jurisdiction, in the County of Hudson, by some ulterior purpose or design of exchanging their money for what is known as green

20 goods, but if you are persuaded of that fact, if they came here for such a criminal purpose, that would not relieve this defendant if he caused them feloniously to part with their good money and gave them in return by trick or device or some scheme of that kind, what is known as green goods, or this package of blank paper which has been referred to here, and which is in evidence; in other words, if you find that the element of assault on this complaining witness is absent and that all

30 that was done to persuade them by a trick or device to part with their good money for green goods or this paper, then you might find under this indictment—I say you may find—this defendant guilty of grand larceny.

On that question I want to try and draw your minds as clearly as it is possible, to what seems to me to be the crux of the case. In the first place, without referring in detail to the testimony, you

40 will have observed in this case that these two men who have testified here, and the wife of one of

Charge.

them has testified with some particularity, as to the visits of this defendant to Pennsylvania; that is to say, one of the witnesses and his wife testified to the fact of such visits, and of their ability to distinguish him from other people; that the complaining witness and his associate who is here afterward saw this defendant in New York and on another occasion saw him at the Duke's House, or at or about the Duke's House in the City of Hoboken, and then or at some future time he went to the Town of Union in this county. The defendant, you will recall, denies he ever saw these men or the wife of one of these men. If the defendant's story is true, and you are persuaded he never saw them or had anything to do with them, of course your verdict should be Not Guilty. 10

I have already intimated to you, you have a perfect right to find in this case a verdict of guilty of grand larceny if you are satisfied that the defendant was there on this occasion and that he persuaded these men to part with their money by a trick or device, but, you see, if you find this defendant guilty of grand larceny it must necessarily presuppose that the defense that the defendant makes here of not being present at all on this occasion must fail, and therefore you have to think, you have to analyze the testimony to see whether in the face of his denial that he was there at all, your verdict should be a half-way verdict, or a verdict that relieves him in part; that is to say, that he was not guilty of the assault but that he was there as part of their scheme to exchange good money for bad. 20 30

Those are the facts that I will refer to and those facts only, to try and draw your attention to what seems to me to be the only perplexing question in the case, if there is any variance in the facts. 40

There is one other feature in the case I want to

Exceptions to Charge.

- mention, and that very briefly. That is this: this defendant has testified he has previously been convicted, once or twice or several times, of crime. This man is not being tried for any other crime than the one mentioned in the indictment, of robbery, and the one possible, under the charge I have made, of grand larceny, or assault and battery, as
- 10 I have already indicated. Therefore the fact that he has had a criminal career will not justify you in finding him guilty in this case. You must distinguish in this case between his previous conduct and the evidence in this case as to his guilt. The only reason why this testimony is permitted in the case is that you may weigh in your minds as to whether he is in this case telling the truth about the thing of which complaint is made here; so
- 20 that the fact that he has committed burglary or has been guilty of wire-tapping or any other of the crimes suggested in the testimony is not to weigh against him as to the crime charged here, but you may consider that testimony as bearing upon his credibility, his story of what did or didn't occur, and whether he was there or not at the time alleged.

Exceptions to Charge.

- 30 I. Defendant asks a general exception to the charge of the Court.

Exception allowed and signed and sealed accordingly.

GEORGE G. TENNANT. (Seal.)

- II. Defendant asks an exception to the language of the Court wherein the Court said:

40 "It is not for the Court to say precisely whether these men were led to this jurisdiction in the County of Hudson by some ulterior purpose or design of exchanging their money for what is known as green goods, but if you are persuaded of that fact, if they

Exceptions to Charge.

came here for such a criminal purpose, that would not relieve this defendant if he caused them feloniously to part with their good money and gave them in return by trick or device, or some scheme of that kind, what is known as green goods, or this package of blank paper which has been referred to here, and which is in evidence; in other words, if you find that the element of assault on this complaining witness is absent and that all that was done was to persuade them by a trick or device to part with their good money for green goods or this paper money, then you might find under this indictment—I say you may find—this defendant guilty of grand larceny.”

Exception allowed and signed and sealed accordingly.

GEORGE G. TENNANT. (Seal.)

III. Defendant asks an exception to the language of the Court saying that unless the jury believes the story of the defendant they must convict of grand larceny if no force is found, or robbery if force is found.

THE COURT: What was that last exception? I don't get the force of it. If there is anything that I have misstated you should call my attention to it.

MR. CUTLEY: You said that they had to believe the defendant. My objection is that the State has to prove him guilty beyond a reasonable doubt, and the defense raises the doubt.

THE COURT: I don't recall having stated any such thing as that.

IV. Defendant asks an exception to the language of the Court with reference to grand larceny, because the indictment is entitled “Robbery,” the charge is robbery, and it is the crime for which he was extradited and for which he was arrested in New York.

GEORGE G. TENNANT. (Seal.)

Exceptions to Charge.

Exception allowed and signed and sealed accordingly.

Refused except as already sealed.

GEORGE G. TENNANT. (Seal).

10 V. Defendant asks an exception to the failure of the Court to charge as requested by the defendant in and by the requests submitted to the Court before the Court's charge, as to each of such requests severally except in so far as the Court charged in accordance therewith.

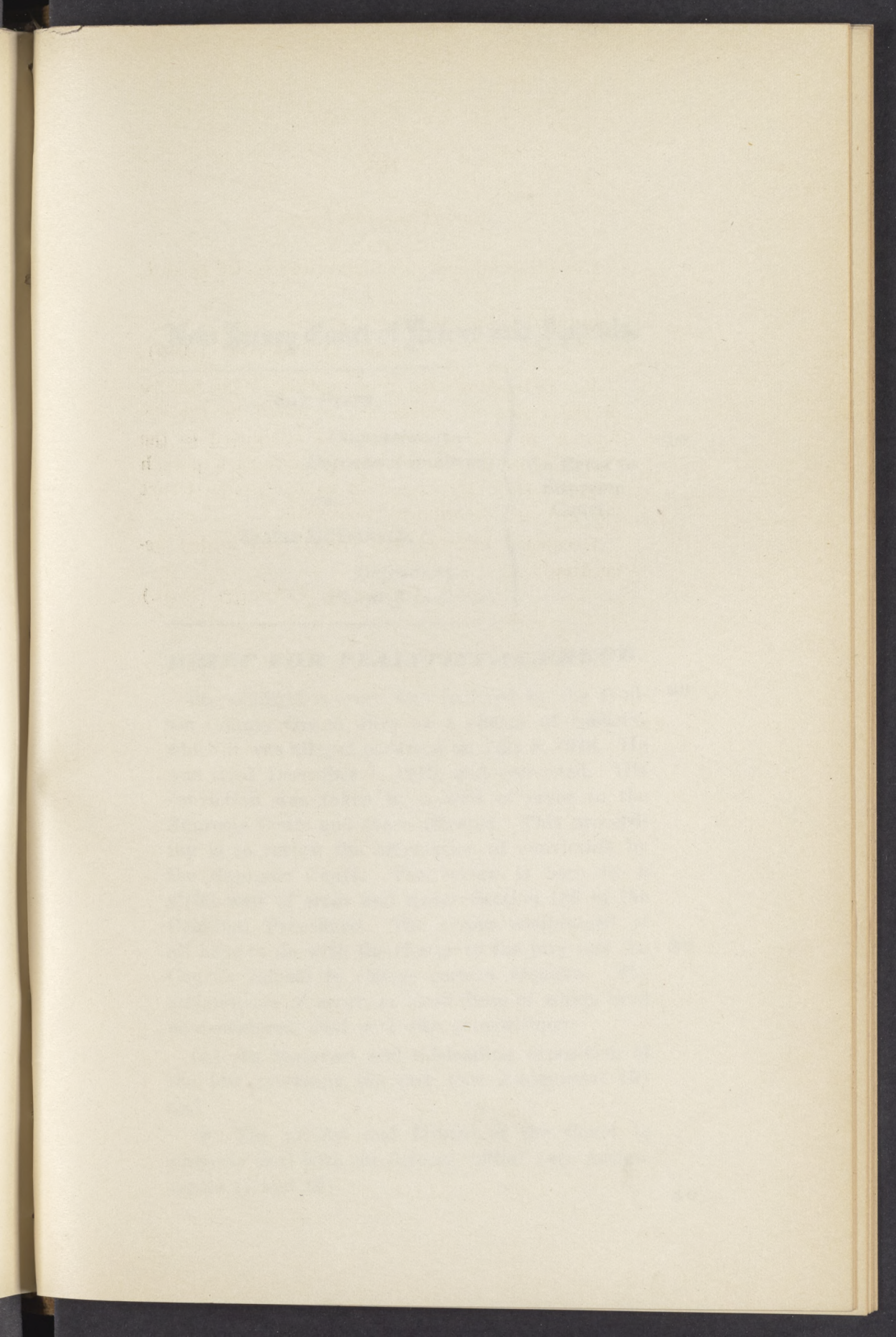
Exception allowed and signed and sealed accordingly.

GEORGE G. TENNANT. (Seal.)

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CHAPTER I

The first part of the book is devoted to a general survey of the subject. It begins with a definition of the term and a discussion of its history. The author then proceeds to a detailed examination of the various aspects of the subject, including its scope and its relation to other fields of study. The chapter concludes with a summary of the main points discussed and a list of references.

CHAPTER II

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The third part of the book is devoted to a detailed examination of the various aspects of the subject. It begins with a discussion of the scope of the subject and its relation to other fields of study. The author then proceeds to a detailed examination of the various aspects of the subject, including its history and its development over time. The chapter concludes with a summary of the main points discussed and a list of references.

New Jersey Court of Errors and Appeals

THE STATE,

*Complainant—
Defendant-in-Error,*

vs.

JAMES McDONALD,

*Defendant—
Plaintiff-in-Error.*

On Error to
Supreme
Court.

10

BRIEF FOR PLAINTIFF-IN-ERROR.

The plaintiff-in-error was indicted by the Hudson County Grand Jury on a charge of robbery, which it was alleged occurred on July 8, 1913. He was tried December 1, 1915, and convicted. His conviction was taken by a writ of error to the Supreme Court and there affirmed. This proceeding is to review the affirmation of conviction by the Supreme Court. The review is both by a strict writ of error and under Section 136 of the Criminal Procedure. The errors complained of all have to do with the charge to the jury and the Court's refusal to charge certain requests. The assignments of error, at least those of which need be considered, deal with two propositions:

(a) An incorrect and misleading exposition of the law governing the case (see Assignment 15) and

(b) The refusal and failure of the Court to properly deal with the defense "alibi" (see Assignments 11 and 16).

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POINT I.

The Court erroneously charged the jury that the defendant might be convicted of grand larceny.

In its charge the Court said:

10 “If you find that the element of the assault on this complaining witness is absent and that all that was done to persuade them by a trick or device to part with their good money for green goods or else paper money, then you might find under this indictment—I say you may find—this defendant guilty of grand larceny.”

20 The Supreme Court in affirming the court below relied upon the case of *State vs. Jackson*, 65 N. J. Law, 105, and *State vs. Johnson*, 30 N. J. Law, 185. In the Jackson case defendant was convicted of assault and battery under an indictment for carnal abuse and the conviction was sustained. In the Johnson case the defendant was convicted of an assault under an indictment for rape and the conviction was sustained. In referring to those cases the Supreme Court says:

30 “Assault was the ingredient offense” and the Court proceeded to draw an analogy by demonstrating that robbery is larceny with the element of force or fear entering into it—robbery being larceny plus. The Supreme Court concluding that *larceny* was a necessary ingredient of robbery, necessarily found that a conviction of larceny might be had under an indictment for robbery.

40 The fallacy in this reasoning lies in the assumption that if the defendant did secure money from the complaining witness under the circumstances suggested, namely, for the purchase of green goods, he could be guilty of larceny. The fact is otherwise. In order to constitute larceny there must be a parting with the possession and not the

title to property. If the owner parts with the title to the property the person who secures it, although guilty perhaps of some other crime, cannot be said to have committed larceny. For instance, in *Kellog vs. State*, 26 Ohio St., 15, it was held:

“When the owner of property voluntarily parts with the possession intending to transfer not the possession merely but also the title although he is induced thereto by fraudulent pretense of the taker, the taking and carrying away do not constitute larceny.” 10

People vs. Roe, 86 Cal., 423.

“The crime of larceny is established when by means of fraud, conspiracy or artifice, possession of property is obtained with felonious intent and the title still remains in the owner, whereas the crime is obtaining money under false pretense when the owner parted with title as well as possession.” 20

Kelly vs. People, 6 Hun, 509.

“Where the possession of personal property is obtained by artifice or trick with felonious intent the title of the owner remaining unchanged, it is larceny, but where through deception the owner parts with the title as well as the possession the offense is not larceny but false pretense.”

Haley vs. State, 49 Ark., 147.

“An instruction that if the property taken was obtained by stealth or fraud with intent to steal the same the offense of larceny was made out is erroneous. Where the owner parts with the property by consent there is no trespass and the offense is that of cheating at common law or the statutory offense of false pretense.” 30

People vs. Proctor, 82 P., 551.

“Where one parts with the possession of and title to personalty by means of false representations knowingly made the crime is not 40

larceny but that of obtaining money by false pretenses.”

1 Cal. App., 521;

Foster vs. State, 43 Se., 421; 117 Ga., 39.

“Where one by false representations induces another to sell him personalty on credit and the sale is completed by delivery and is unconditional, the intent being that the title shall pass, there is no larceny.”

10 In the Jackson case the reasoning of the Court was that inasmuch as carnal abuse is *necessarily* attended with an assault the defendant might be convicted of the latter crime upon an indictment for the former. The test, of course, is whether or not the lower offense is necessarily included in the higher one charged in the indictment.

It is respectfully insisted that upon an indictment for robbery this defendant could not be convicted of obtaining money under false pretense—
20 that crime not being necessarily included in the crime of robbery. We urge that the practice of permitting a defendant to be convicted of a crime of lower degree upon an indictment for a crime of higher degree should be pursued with great caution, having in mind defendant’s constitutional right to be informed of the nature and cause of the accusation against him.

As was said by Chief Justice Beasley in *State vs. Linden Park Horse Association*, 26 Vroom, 557:
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“By the constitution of our State no person can be held to answer for a criminal offence unless upon the presentment or indictment of a grand jury, and, in order to effectuate this provision, it is indispensable that the charge preferred by that body should be sufficiently descriptive, so as to clearly show a specific crimination. The rule of the law and of common justice is that the offence must be charged in the indictment, in a certain and identifiable form, and this principle is so es-
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sential to the personal security of the citizen that it is not to be impaired, no matter how great the particular exigency may be."

In the case at bar the Supreme Court answered the contention that such charge was erroneous by saying that the jury had found the defendant guilty of robbery and therefore it was manifest that the instructions even if erroneous could not have prejudiced the defendant and hence would not justify a reversal.

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With that conclusion of the Supreme Court we have a serious quarrel. The defendant is entitled to a clear, explicit and correct exposition of the law applicable to his case. That is one of, if not the most important, function of the Court. It should be done in such a way as not to leave room for misapprehension or mistake. Who can say that an erroneous charge by the Court upon a proposition of law constitutes no more than harmless error? Who is able to tell what confusion and doubt there was created in the mind of the jury as a result of an incorrect statement of the principles governing the case in hand? It seems to us that any right which the defendant has that should be protected at all hazards it is the one requiring the Court to correctly charge the jury upon the law of the case. (See *Roe vs. State*, 45 N. J. Law, page 49.)

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As was said in *Lane vs. State*, 32 So. Rep., 896, 44 Fla., 105:

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"Though instructions are to be considered as a whole, yet, where a special charge announces a potentially erroneous proposition it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed."

In *Sullivan vs. People*, 31 Mich., 1, it was said:

"In a criminal case it is not sufficient answer to an alleged error in the charge to

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the jury to say that the record discloses a probability that the defendant was not injured by an erroneous charge, but it must appear beyond any reasonable doubt that he could not have been so injured."

People vs. Chertoff, 75 N. Y. S., 1088.

"It is not incumbent on defendant to show prejudice through an erroneous charge, but the prosecutor must show want of prejudice."

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POINT II.

The Court erroneously dealt with defense of "alibi."

Reference to the case, pages 138 et seq., reveals that the defendant claimed he never saw the complaining witnesses prior to their identification of him in New York; that he had never dealt with them; that he was not at the place where the crime was committed upon the day of the alleged crime; that he had never dealt with them; that he was not at the place where the crime was committed upon the day of its alleged commission and that he had never been to the home of the complaining witness and in fact knew absolutely nothing about the alleged crime. The Court dealt with his defense in these words:

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"You are to bear in mind, and you should bear in mind, that the defence in this case while not what we might call an alibi in a measure is an alibi; he shows he was not there and of course it will be perfect nonsense for the jury to find this man guilty of assault and battery because you have a reasonable doubt in your minds that he had not committed a robbery but that you are not quite satisfied as to what you should do. Your verdict should be a logical verdict in this case, therefore it becomes necessary for you to examine into the facts and ascertain just what the thing is." (See page 161, line 10 et seq.).

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At page 163, line 12:

"The defendant, you will recall, denies he ever saw this man or the wife of one of these men. If the defendant's story is true and *you are persuaded* he never saw them or had anything to do with them, of course your verdict should be not guilty."

There was a request to charge (see Assignment of Error No. 11, page 6):

"If the identification of the defendant by Smith and Bokin is inconclusive and leaves your mind in a state of doubt as to his participation, you must find for the defendant." 10

The Court refused to charge in accordance with such request.

Most serious injury was done to the defendant by the refusal of the charge as requested and by the Court's handling of the defense of "alibi". The request in question is practically couched in the same language as that which was under review in the case of *State vs. De Geralmo*, 83 N. J. Law, 135. Here there was a request to charge: 20

"That if reasonable doubt of guilt is raised even by inconclusive evidence of the alibi defendant is entitled to the benefit of it." To which the Court responded: "I will charge you the evidence must satisfy you of the defendant's guilt beyond a reasonable doubt."

It was held that this was not a legal compliance with the request, the Court not having dealt with the subject matter of the request in any part of its charge. 30

The Supreme Court in the *De Geralmo* case through Mr. Justice Bergen said:

"Even if the evidence be insufficient to satisfy the jury the accused was not present it cannot be rejected but should be considered with the other evidence of the case and therefore we think that the defendant was entitled 40

to have the jury distinctly instructed that if a reasonable doubt was created by the evidence relating to the alibi, or if it did not conclusively establish it, he was entitled to the benefit of such a doubt. It is not a compliance with the request made in this case to simply charge that the jury must be satisfied by all the evidence of defendant's guilt beyond a reasonable doubt. For that ignores the concrete proposition of law presented which defendant was entitled to have applied. * * *

10 This charge * * * submitted nothing to the jury * * * the impression left upon the jury must have been that the evidence tending to show the absence of the defendant could not be given effect unless it outweighed that which tended to show his presence, and it is quite like the situation condemned in *State vs. MacQueen*, 40 Vroom, 522, 531."

In the case at bar the Court not only refused to charge his request but imposed upon the defendant a higher test or standard than he was re-

20 quired to meet when it said:

"If the defendant's story is true, and you are *persuaded* he never saw them or had anything to do with them, of course your verdict should be not guilty."

By that language the Court in the case at bar relieved the State from the burden of demonstrating beyond a reasonable doubt that the defendant's story was not true and placed upon the defendant the burden of persuading the jury that his story was true. That, it seems to us, certainly constitutes reversible error. It imposes upon the defendant a higher burden than the law imposes upon him. It did away with violence, the presumption of innocence which attached to him and called upon him to demonstrate that he was not guilty. Even if it can be said that in the beginning of its charge the Court correctly stated the law upon reasonable doubt, the specific charge

30 that the jury had to be persuaded by the defendant

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that his story was true entirely vitiated the effect of the Court's statement as to reasonable doubt.

But it is not sufficient when the defense is an alibi for the Court to content itself with generally charging the jury as to reasonable doubt and burden of proof.

In the case of *State vs. Tappack*, 78 N. J. Law, 209, the Supreme Court said:

"The Court charged generally on the subject of reasonable doubt, but without specific application of the doctrine to the question of alibi, and, after concluding, said in response to a request by defendant's attorney for a charge as to burden of proof, 'the burden of proof is upon the State to prove all the essential facts necessary to constitute the crime and the burden continues from the beginning to the end and is never shifted.' But even in view of these instructions it cannot be said that the jury must have regarded the previous instructions as to alibi as having been modified or withdrawn. The probability would seem to be that they paid heed rather to the specific instructions, which were erroneous, than to the general ones which were correct."

The effect of the Court's charge in the case at bar was to require the defendant to sustain his alibi by a preponderance of evidence.

Such a charge was declared illegal in *Sherlock vs. State*, 60 N. J. Law, page 32, where the Supreme Court through Mr. Justice Garrison said:

"Testimony tending to break the force of the State's prima facie case by testimony that the defense was 'alibi' is not the offense of an affirmative issue advanced by the defense. It is merely showing a state of facts inconsistent with the essential element of the indictment. The jury may, notwithstanding such testimony, believe that the defendant was present as charged or they may believe that he was absent, in which event he is said

to have 'proved his alibi'. A third result may be that the defendant's testimony may create such a degree of uncertainty as to his whereabouts that the jury are not satisfied, beyond a reasonable doubt, of his guilt of the crime for which he was indicted. The charge in the case before us deprived the defendant absolutely of the benefit of such reasonable doubt and hence was prejudicial in the extreme."

10 See also *State vs. MacQueen*, 69 N. J. Law, 531.

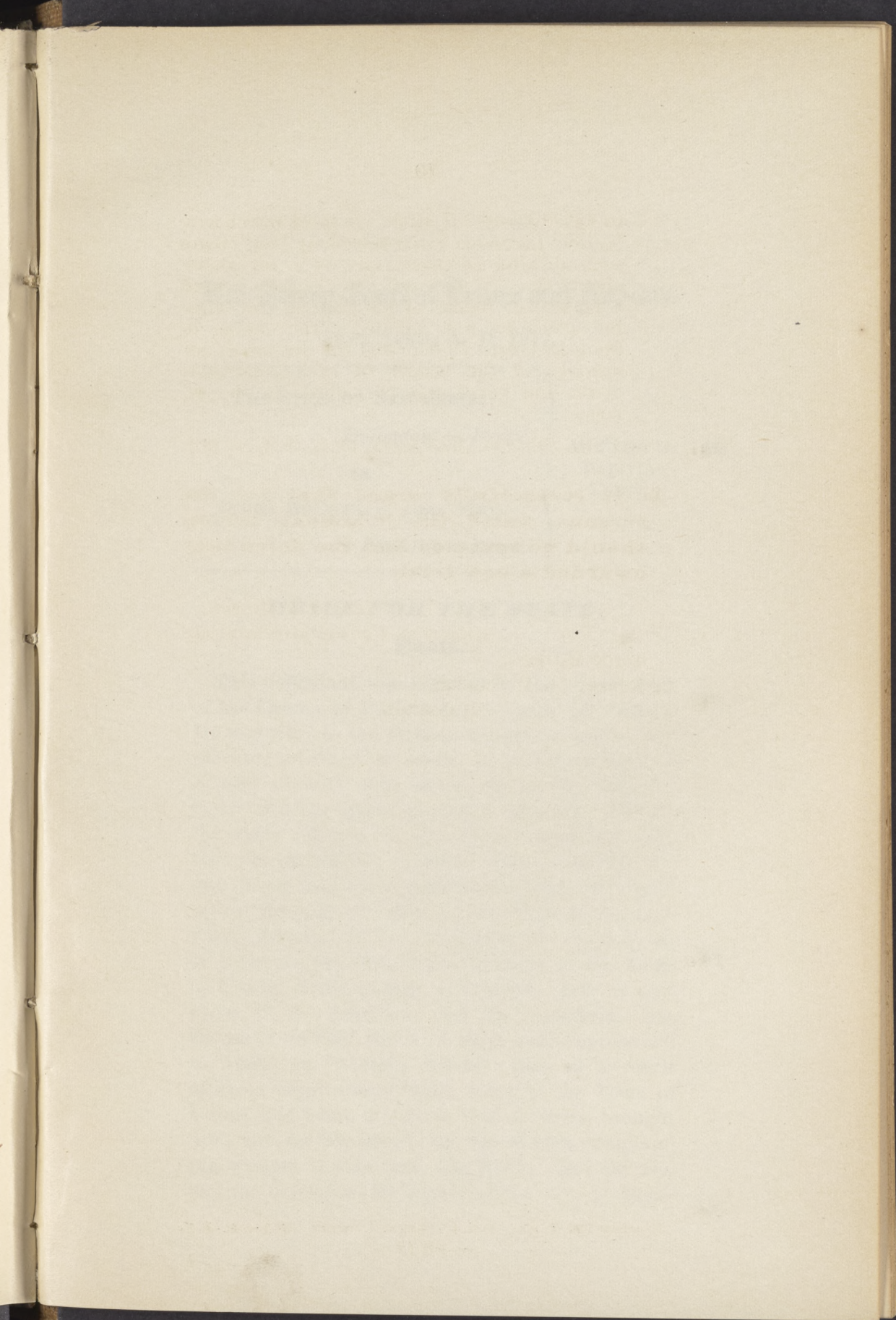
It is respectfully urged that for the reasons stated the judgment herein should be reversed and the defendant awarded a new trial.

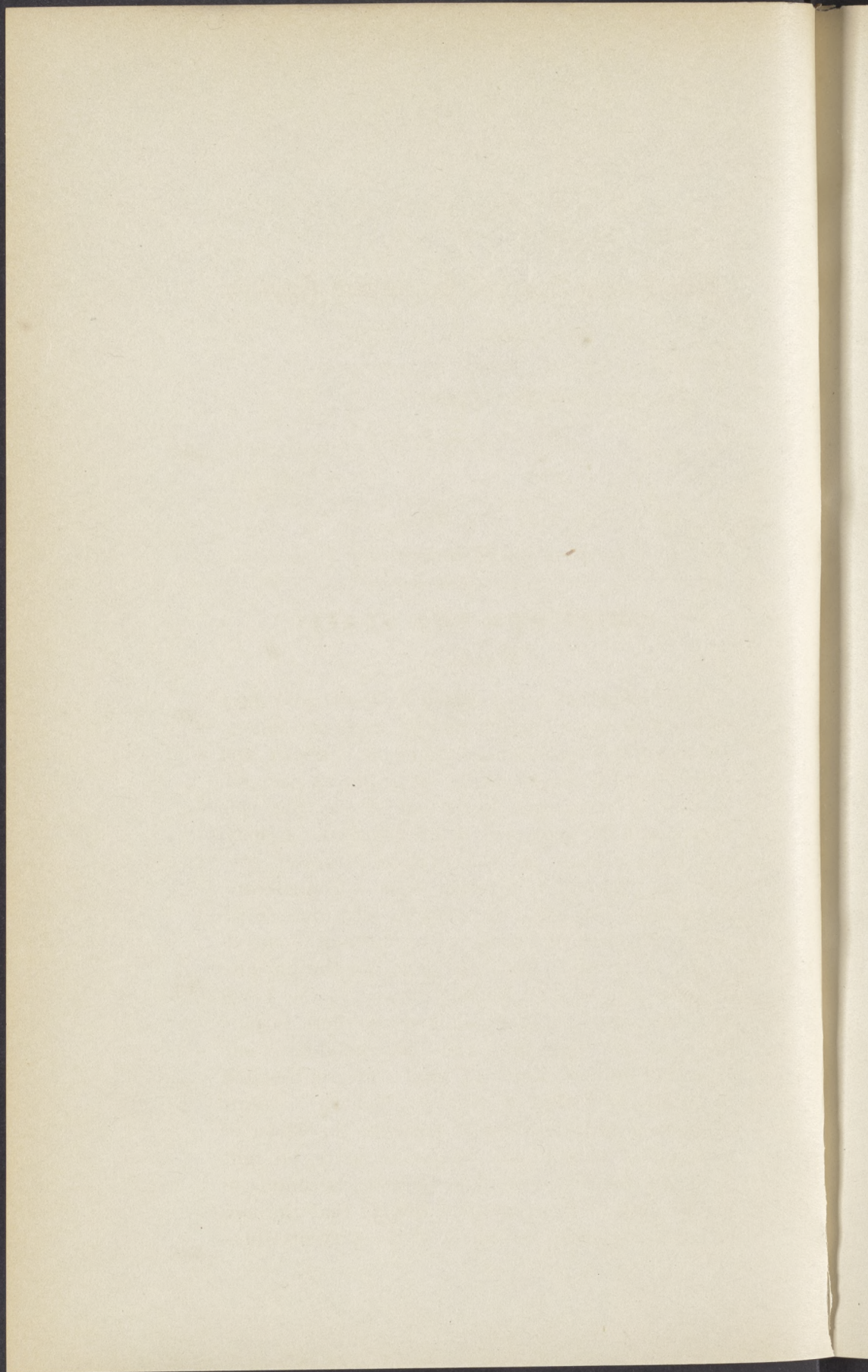
TREACY & MILTON,
Attorneys for Plaintiff-in-Error.

JOHN MILTON,
ROBERT H. McCARTER,
20 Of Counsel.

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New Jersey Court of Errors and Appeals.

JUNE TERM, A. D. 1917.

THE STATE OF NEW JERSEY,	} In Error to Supreme Court. 10
<i>Defendant-in-Error,</i>	
<i>vs.</i>	
JAMES McDONALD, alias MECA,	
<i>Plaintiff-in-Error.</i>	

BRIEF FOR THE STATE.

Facts.

This defendant was indicted by the Grand Jury of the County of Hudson for the crime of robbery. He was tried in the Hudson Quarter Sessions, and the jury returned its verdict of guilty as charged. A writ of error was issued out of the Supreme Court and the judgment below affirmed. Briefly, the facts alleged by the State's witnesses are: that the defendant, together with a confederate, one Burke, had some negotiations with one Smith in the Borough of Exter, in the State of Pennsylvania, designed by the defendant for the purpose of inducing the said Smith to come to the Town of Union, in the County of Hudson, there to purchase of the defendant and his confederate one thousand dollars' worth of what were represented to Smith as "whiskey bonds"; that as a result of these negotiations Smith came to the Town of Union, and being unable to read or write, brought with him for his protection, the State's complaining witness in this case, one Bokin; that the two met the defendant McDonald at the City of Hobo-

ken; that McDonald thereupon told them, Smith and Bokin, that he would conduct them to his office, where the business in hand would be transacted. He thereupon proceeded with his intended victims to the Town of Union, where he escorted them to a room in the rear of what appeared to be a saloon. In this room, at the time they arrived there, was seated the defendant's confederate, the said Burke; that the supposed bonds were thereupon exhibited to Smith, and the complaining witness, the said Bokin, proceeded to examine them. He made some unfavorable comment on the fact that the "bonds" were without seals, and that the blank spaces were not filled in. The said Burke then stated that he would cure the defect and fill out the "bonds" then and there, and requested that while he did so Smith and Bokin retire to the adjoining room. They were being conducted to the adjoining room by the defendant McDonald, when Burke called Smith back for some pretended purpose. Smith then remained in the room with Burke, while Bokin went into the adjoining room with McDonald. The victims being thus separated, the defendant McDonald, alone in the room with Bokin, with startling suddenness drew a revolver, held it to the face of Bokin and took from the latter's person one thousand dollars in money. Simultaneously, in the adjoining room, Burke, with a blow, knocked Smith into a state of unconsciousness, and took from the latter's person the sum of one thousand dollars in money. When Smith and Bokin realized their plight, the defendant and his confederate had made their escape, leaving with their victims, in the place of the supposed "whiskey bonds," a small packet of blank paper.

The indictment against McDonald and Burke for the crime upon Bokin is the one upon which the conviction, now under review, was had.

In the state of the case, as served by the plain-

tiff-in-error, the specifications of causes for reversal are identical with the assignments of error, with the exception of the third and twentieth specifications, which are not included in the assignments. We shall therefore deal first with the assignments and then with the third and twentieth specifications.

The plaintiff-in-error does not make the subject of any assignment any exception based upon testimony in the case. The only objections made on review are to the charge of the trial court and the trial court's refusal to charge as requested; and these objections are based upon a general exception taken to the whole of the court's charge, and upon five specific exceptions to certain parts of the court's charge and one general exception to the failure of the court to charge as requested in fifteen requests to charge, appearing on page 156 et seq. of the printed case. These fifteen requests are respectively the subjects of the assignments one to fifteen, inclusive. 10 20

POINT ONE.

There was no error in the refusal of the Trial Court to charge as follows:

"Robbery is the forcible and violent taking of the personal property of another by force or putting in fear."

The Court's instructions on the elements of robbery were proper. 30

The first assignment of error deals with the refusal of the trial judge to charge as above quoted. The language of this request is such a limitation of the definition of the crime of robbery as the court was not obliged to adopt.

What the trial judge did charge on this point, however, is as follows:

"To constitute robbery there must be actual violence, or such a demonstration or threats 40

as will create reasonable apprehension of bodily injury, if the victim resists." (Printed Case, p. 161, l. 22, et seq.)

This is the language, verbatim, used by the court in *State v. Donahue* (N. J.), 59 Atl., 12.

Then the trial judge adds:

10 "Robbery is the felonious and forcible taking of property from another man's person, or in his presence, against his will, by violence or by putting him in fear." (Printed Case, p. 161, l. 26.)

And again:

"And unless you find that these elements were present in this case, you must find this defendant not guilty of robbery." (Printed Case, p. 161, l. 33.)

20 All requests to charge contained in assignments two to fourteen inclusive were either incorporated in the Court's charge, or were in no legal sense required so to be.

POINT TWO.

There was no error in the refusal of the Trial Court to charge on the subject of reasonable doubt, as requested so to do in the request to charge contained in the twelfth assignment of error.

30 As to the presumption of innocence with which the defendant is at all times cloaked, and the benefit of all reasonable doubt of which he is at all times the object, the trial court charged as follows:

40 "The defendant is presumed to be innocent in this case until you find him guilty, and the burden of proof in this case is on the State, and unless the State satisfies you that it has borne that burden of proof of this man's guilt, you should find him not guilty. On the question of burden of proof, if you find in any part

of the evidence in this case that two inferences can be drawn, one as readily as the other, the defendant is entitled to the benefit of that inference which will relieve him of responsibility of the charge made against him in this matter; that is to say, if one inference leads to his guilt and one to his innocence and they are both equal before you, he is entitled to have you give him the benefit of the inference which leads to his innocence. The defendant is also entitled to the benefit of all reasonable doubt you have in your minds as to his guilt. I want to say just a word on that question. There are two words in that expression. It is not 'he is entitled to *any* doubt that you may have as to his guilt'; the law does not say that. The law says he is entitled at your hands to the benefit of any reasonable doubt, a doubt for which there is a reason, not a mere vague doubt, or a mere impression in your minds as you consider the case, that you may hereafter be sorry you found him guilty, and that therefore you ought now to find him not guilty. If you have in this case what the law expresses as an abiding conviction of his guilt, then the law says you have passed the period of reasonable doubt. Have you an abiding conviction that he did this thing? If so, then you may be said to have passed that period of reasonable doubt. Take the words together in your minds, you twelve men, and weigh the evidence up and down, as you would weigh something on the scales, *and if, when you conclude your deliberations, you have a doubt for which you have a reason, or if you have not an abiding conviction in your minds of the guilt of this defendant*, then you should find him not guilty; but if you have passed that period in your minds, if you find you have no reasonable doubt as to his guilt, you should find him guilty." (Printed Case, p. 159, l. 35; p. 160, l. 40.)

This may justly be said to be more than a full, fair and adequate treatment of the law of reasonable doubt. In any event it is certain that every definition of reasonable doubt and proper

instruction to the jury to give the defendant the benefit thereof, is embraced in the court's language.

For an improved form of instructions on the subject of reasonable doubt, and one which in substance strikingly resembles that under review, see *Gardner vs. State*, 55 N. J. L., 17, at p. 31.

10 "And it may be observed that in *Cliver vs. State*, 16 Vroom, 46, a charge less explicit was sustained by this Court." (Depue, J., *Gardner vs. State*, supra, at p. 32.)

On the general subject of all of defendant's requests to charge which might be claimed to embrace proper principles, it can be stated that

"A judge is not required to adopt the form, or the words or the collection of phrases in which a request to charge is framed."

Gardner vs. State, supra.

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POINT THREE.

The fourteenth, fifteenth, seventeenth, eighteenth and nineteenth assignments of error deal from one angle or another with the charge of the trial court that the jury under the evidence might find the defendant guilty of mere larceny, if they were unconvinced of the elements of force or putting in fear.

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There is no error in this feature of the judge's charge to the jury. Larceny is necessarily an ingredient of the crime of robbery.

The request to charge contained in the fourteenth assignment of error is occasioned by what appears to be the theory of plaintiff-in-error that there was a variance between the proof at the trial and the charge of the indictment.

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Neither the proof submitted nor the verdict of the jury indicates that there is any basis for this

objection. This objection, however, is, in principle, common with the objections made in the fifteenth, seventeenth, eighteenth and nineteenth assignments of error, as above stated, in the head-note under this point, that is to say, all these assignments are in principle directed to the charge of the trial court respecting the right of the jury to find this defendant guilty of grand larceny, in the event of their determining that the proof of violence or putting in fear was insufficient to establish in their minds the existence of those elements, necessary as they are to constitute the crime of robbery. 10

First: In view of the verdict of the jury, that portion of the judge's charge, here dealt with, whether right or wrong, was innocuous to the interests of the defendant at the trial; and even if in error, will, on review, be treated by the appellate tribunal as harmless, and no ground for reversal.

Second: The charge in this particular correctly states the law. 20

Concerning the first of these propositions:

The court suggested to the jury what, apparently, the jury, from the evidence, did not see fit seriously to consider; and which, if it had prevailed in the minds of the jury, would have superinduced a verdict less severe on the defendant than that actually found. How can the defendant properly object? The feature of the court's charge which he here calls into question seems to have been not only harmless, but favorable to him. 30

"A conviction will not be reversed for error in an instruction which could not have prejudiced defendant."

State v. Wells, 1 N. J. L., 424.

"Defendant accused of crime cannot object to an instruction which, if erroneous in law, was in his favor."

State v. Lyons, 70 N. J. L., 635;

State v. Hummer, 72 N. J. L., 328. 40

Concerning the second of these propositions:

Aside from the fact that the jury apparently eliminated from the reasoning that led to its verdict any consideration of the defendant's guilt of mere unaggravated grand larceny, it is insisted by the State that the trial court correctly gave to the jury the matter of considering the crime of robbery, charged in the indictment, as including all the necessary elements of grand larceny.

10 The crime of larceny is necessarily an ingredient of the crime of robbery. It cannot be conceived how the crime of robbery might be consummated without the accompanying consummation of the crime of larceny.

Robbery is usually defined as the crime of larceny committed by means of violence or putting in fear.

20 It is larceny, aggravated by the *means* with which that larceny is committed.

The indictment on which defendant was convicted alleges the amount of money of which complainant was robbed to be one thousand dollars, and this was supported by proof, so that in defining the crime of larceny, of which the jury might convict the defendant, the trial court properly confined itself to a definition of *grand* larceny.

30 "Blackstone defines robbery as the felonious and forcibly taking from the person of any goods or money of any value by violence, or putting him in fear, and he observes that violence or putting in fear is the criterion that distinguishes robbery from larceny."

Comm. v. Humphries, 7 Mass., 242, 244;
Benson v. McMahon, 127 U. S., 457;
People v. Loop (N. Y.), 3 Parker Crim.
 R., 559-60.

40 It is clear from this language that the element of violence or of putting in fear, as those elements

are associated with the crime of robbery are, when considered with reference to the crime of larceny, *cumulative* and *additional*; that robbery is larceny, plus.

“Larceny is included in the offense of robbery.”

McClain on Crim. Law, Vol. 1, Sec., 609.
(Cases cited.)

“‘Robbery’ is thus defined: ‘Every person who shall forcibly and feloniously take from the person of another any article of value by violence or putting in fear shall be deemed guilty of robbery.’ Grand larceny is to feloniously steal, take and carry away the personal goods of another of the value of five dollars or upwards. *It thus appears that robbery is larceny, committed by violence from the person of one put in fear, and that the latter is included in the former.* Therefore the State may prosecute and convict for larceny though the proof shows the offence to have been robbery.”

Hickey v. State, 23 Ind., 21, 22.

“Robbery is larceny committed by violence from the person of one put in fear. *An indictment for robbery charges a larceny, together with the aggravating matter which makes it in the particular instance robbery.*”

People v. Jones, 53 Val., 58, 59.

“Robbery is larceny with the element of force or fear entering into it.”

Comm. v. Prewitt, 82 Ky., 240, 241.

“Larceny accompanied with violence or putting in fear, was denominated ‘robbery’ at common law.”

State v. Savage, 60 Pac., 610, 611; 36 Or. 191.

“The text books speak of ‘robbery’ as an aggravated species of larceny. In East’s Pleas to the Crown the author, after speaking of certain larcenies from the person, says the

next species of aggravated larceny from the person is robbery."

State v. Rodgers, 53 Pac., 97, 98; 21 Mont., 143.

"Robbery is larceny with the aggravating circumstances of taking by force and putting in fear."

Keeton v. State, 66 S. W., 645; 70 Ark., 163.

10

"Robbery is where a person, either with violence or with threats of injury, and putting the person robbed in fear, takes and carries away a thing which is on the body, or in the immediate presence of the person from whom it was taken, *under such circumstances that in the absence of violence or threats, the act committed would be a theft.*" Steph. Cr. Dig. 208; 2 Rus. Cr. 78, as quoted in Rapalje and Lawrence's Law Dict. under "Robbery."

20

"Robbery by the common law is *larceny from the person accompanied by violence or by the putting in fear*; and an indictment therefore, must allege that the taking was from the person and that it was by violence or by putting in fear, *in addition to the averments that are necessary in indictments for other larcenies.*"

Bouvier's Law Dict., citing Jebb 62; 1 Leach 195; 7 Mass., 242; 17 Id. 539; 8 Cuch. 215.

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Clark's Criminal Law, Second Edition, Horn-book Series, at page 323, in analyzing the crime of robbery, sets forth its constituent elements as follows:

"To constitute the crime:

"(a) The property must be such as may be the subject of larceny.

"(b) *It must be taken and carried away, as in case of larceny.*

"(c) It must be taken from another person or in his actual presence.

40

“(d) It must be so taken by violence or putting in fear.

“(e) *It must be taken with intent to steal.*”

The principle that larceny is a necessary ingredient of the crime of robbery, and that, therefore, a conviction of the former under an indictment for the latter will be well founded, seems to have judicial recognition also in this State.

In *State vs. Jackson*, 65 N. J. L., 105, Chief Justice Gummere said: 10

“Under the law of this State a party indicted for a crime may be convicted of any offence of a lower degree, provided such lower offence is necessarily included in the higher one charged in the indictment.”

In the *Jackson* case the defendant was convicted of assault and battery under an indictment for carnal abuse.

The opinion in the latter case cites *State v. Jackson* 1 Id. (Vr.) 185. (The reference intended is evidently *State v. Johnson*, 1 Vr. 185.) 20

In the *Johnson* case the defendant was convicted of an assault under an indictment that charged him with rape, and the Chief Justice lays down for the Supreme Court the principle that:

“The general rule seems well settled that it is not necessary to prove all the allegations of an indictment where the evidence makes out a substantive offence of a lesser grade; that the defendant may be convicted of that, *if charged* in the indictment, *although as an ingredient in the greater offence.*” 30

And after supporting this with many citations, the Chief Justice continues:

“Upon an indictment for burglarious stealing the prisoner may be convicted of theft and acquitted of the nocturnal entry.” (Cases there cited.) 40

The ingredient offence in the two foregoing cases (*State v. Jackson*; *State v. Johnson*) is assault and battery. And assault and battery and larceny as elements respectively essential to certain higher offences have been compared:

10 “Like assault and battery, larceny and attempts to commit it constitute parts of various other indictable wrongs. For example, the substantive crime or the attempt is one of the common elements of burglary, and the substantive larceny is indispensable in robbery * * *.”

Bish. New Crim. Law, 8th Ed., p. 346, sec. 566.

Assault and Battery is not more essentially an element of the crimes passed on in the Jackson and Johnson Cases, Supra, than grand larceny is of the crime sub judice.

20

While the cases adjudicated in this State deal, in each instance, with a crime of “lesser grade” it might be supposed that the intent is thereby to distinguish between high misdemeanors and misdemeanors, and that it is a crime of only the latter class which can be said to be included in one of the former. But it would appear from the *Johnson* case (*Ibid*), that whatever doubt there may be as to the authority for convicting of a misdemeanor under an indictment charging a felony, there is no doubt whatsoever as to the propriety of convicting of another felony which is necessarily included in the felony charged in the indictment. For in the *Johnson* case the Court (J. Elmer) says, (at p. 187):

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“Notwithstanding the general doctrine of the common law that upon an indictment charging a felony the defendant could not be convicted of a misdemeanor, it is doubtful

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whether this rule was applied to the case of rape (cases cited).

"However this may be, I am satisfied that under the existing statutes and practice in New Jersey, a party indicted for a crime may be convicted of *any* offence of a lower degree, provided such lower offence is included within the description in the indictment, *without regard to the question whether it is or is not technically a felony.*"

Again, the Chief Justice, speaking for the Court in the same case, says (at pp. 186-7) : 10

"The original rule that felonies and misdemeanors could not be joined had its origin in the diversity in the mode of proceeding in the two cases, giving greater privileges on the trial for the lesser offence. That is not the case under our law, *but the reverse.*"

Now, the State's point here is that all the difficulty in the latter case seems to be on the question of convicting of a misdemeanor under an indictment for felony; there appears by corollary to be no question as to the propriety of convicting of one felony under an indictment for another. 20

It is, of course, manifest that the crime of which the defendant might be convicted because of the inclusion of that crime in the one for which he is specifically indicted, must be a crime of lesser grade—*lesser* as compared with the crime in which it is *included*. This is a palpability. In this sense of *lesser* larceny is a lesser crime than robbery, regardless of their both being felonies or high misdemeanors. Robbery is of a greater magnitude of action, and therefore of additional elements. In other words, larceny is *lesser* in the only logical and necessary sense in which it must be lesser for the purposes of this principle of inclusion. 30

Larceny also is lesser in point of statutory condemnation. Reference to the Crimes Act (Sec. 40

120) will show that robbery is punishable by fine not exceeding one thousand dollars or imprisonment at hard labor not exceeding fifteen years, or both; while grand larceny is punishable (Sec. 158) with the punishment described generally for high misdemeanors, viz: (Sec. 217) a fine of two thousand dollars, or by imprisonment with or without hard labor as the court may direct for any term not exceeding seven years or both.

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POINT IV.

Defendant might properly have been convicted of another crime than that which was the basis of his rendition from the State of New York (20th Assignment of error).

20 Though defendant was surrendered as a fugitive by the Executive of the State of New York, on an indictment for robbery, there is no error in the charge of the trial court that the jury might find the defendant guilty of grand larceny under the indictment.

“A person surrendered to this State by the executive of any other state, under extradition proceedings, to answer for a crime committed here, may be held, tried, convicted and sentenced here for another and distinct offence from that for which he was returned.”

30

Rutledge v. Krauss, 73 N. J. L., 397.

However, there is nothing in the record to show that the defendant was not tried on the indictment on which his rendition was had.

As a matter of fact, the indictment tried below was the subject of the defendant's rendition.

40

NEW JERSEY ~~SUPREME~~ COURT.
OF ERRORS AND APPEALS.

The State
Vs.
James McDonald.)

In Error to Supreme Court.

Addenda to Brief for the State.

THE REQUEST TO CHARGE, (ASSIGNMENT OF ERROR NO.11,P.6, PRINTED CASE), ON THE SUBJECT OF THE IDENTIFICATION OF THE DEFENDANT BY THE COMPLAINING WITNESSES, DOES NOT EMBRACE A CORRECT PRINCIPLE OF LAW, AND THE TRIAL JUDGE WAS THEREFORE NOT OBLIGED TO CHARGE IT.

This request was as follows:

"If the identification of defendant by Smith and Bokin is inconclusive and leaves your minds in a state of doubt as to his participation, you must find for the defendant."

This language is vitally deficient, in that the doubt referred to is not said to be a reasonable doubt. To charge the jury as thus requested would have been erroneous. Even if identification of defendant had left the minds of the jurors in a state of doubt, it would not be correct to say that the jury, in that event, "must find for the defendant". The defendant in a criminal prosecution is not entitled to any advantage from a mere "state of doubt" in the minds of the jury. If that were so the State would be required to prove him guilty beyond all doubt. Our fundamental law, however, requires that he be proved guilty only beyond a reasonable doubt. The omission from the request to charge of this word "reasonable", with all that it so vitally connotes, leaves the request subversive of the basic principle of proof in criminal trials.

"Requests to charge not embodying a legal proposition, or which relate to the weight of evidence, or the value which the jury should give to certain portions of the testimony, are discretionary with the court."

State Vs. Panelli, 79 Atl. 1064

The cases cited by defendant under this head do not sustain his contention under the request in point. In those cases the adjudication is that the defendant is entitled, not to any "state of doubt", but to any reasonable doubt, that may be left in the minds of the jury by testimony of alibi- a vital distinction.

The cases cited by defendant are all on the question of alibi. The Tapack, Sherlock and McQueen Cases deal with instructions by the trial judge that the defendant is required to prove his alibi by affirmative evidence. In the case sub judice the trial judge did no such thing. He charged the jury extensively and thoroughly on the State's burden of proving the defendant guilty beyond a reasonable doubt. And having stated certain details of the testimony of the State's witnesses, and having called attention to the fact that the defendant denied that he ever saw the complainants, the trial judge said, in a passing reference to the latter circumstance: "If the defendant's story is true, and you are

In favor of the State of Texas

The State

vs

Adams et al vs State of Texas

THE STATE OF TEXAS (PLAINTIFF) vs ADAMS ET AL (DEFENDANTS).
This is a criminal case brought by the State of Texas against Adams et al.
The State charges that Adams et al conspired to defraud the State of Texas
of certain moneys to-wit: \$100,000.00.

The State further charges that Adams et al conspired to defraud the State of Texas
of certain moneys to-wit: \$100,000.00. The State further charges that Adams et al
conspired to defraud the State of Texas of certain moneys to-wit: \$100,000.00.

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conspired to defraud the State of Texas of certain moneys to-wit: \$100,000.00.

persuaded he never saw them or had anything to do with them, of course your verdict should be not guilty." (Printed Case, P. 163, l. 15)

There is no fault to be found with this language. It places no burden on the defendant. There is no assertion, expressed or implied, that it is incumbent on the defendant to persuade the jury. The truth of defendant's story might be established in their minds affirmatively by the defense, or negatively by the character of the testimony given for the State. The effect of this language is that if the jury were persuaded by any means that defendant never saw the complainants or had anything to do with them, their verdict should be not guilty. The most that can be said against this diction is that it makes its expression in absolute terms. But is it not true, in an absolute degree, that if the jury were persuaded as indicated, the defendant could not be convicted? Surely there is no comparison of this case with the cases presented to the Court in the Tapack, Sherlock and McQueen cases.

AS A MATTER OF FACT, THE DEFENSE BELOW WAS NOT THAT OF ALIBI. The defense of alibi is universally understood to be where there is positive and definite testimony that the accused at the time of the commission of the crime charged was at an ascertained place other than the locus in quo, thus presenting the proposition that he could not have committed that crime. (The Court is referred to the definitions of Alibi collated in "Words and Phrases Judicially Defined", under that head.)

In the case sub judice there was no testimony of defendant's whereabouts at the time in question. He could not say where he was at that time. (Printed Case, P. 146, LL.18-22; LL.32-10, P.147; P.148, LL.10-13). He simply made the arbitrary assertion that he was not in the Town of Union on the day in question.

It is the State's contention that an alibi must be founded on testimony that defendant was "elsewhere", and that that proposition must amount to more than a mere corollary following upon the statement that he was not present in the locus in quo. In other words, the defense recognized as alibi is maintained by positive and definite testimony of defendant's presence at another place- ascertained and stated. In the presence case subh was not and could not have been the situation, in the face of defendant's professed total ignorance of where he was.

Though an alibi, as said in State Vs. Sherlock, "is not the offer of an affirmative issue advanced by the defense", it must certainly be regarded as definite in its character. It is the offer of a definite proposition which tends definitely to show why the defendant could not have committed the crime.

In the case sub judice, therefore, the defense embraced no particular or definite proposition; it was simply a general denial. The request to charge here in point did not even ask the Court to charge on "alibi" but on the "identification".

THE DEFENSE INVOLVING NO DISTINCT OR PARTICULAR PROPOSITION, THE COURT'S GENERAL INSTRUCTIONS ON THE SUBJECT OF REASONABLE DOUBT WERE ALL THAT WAS REQUIRED.

Brown V. State, 62 N.J.L. 666

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Of Counsel

R. S. Hudspeth,
Counsel for State.

It is respectfully submitted that the judgment of the Hudson Quarter Sessions should be affirmed.

ROBERT S. HUDSPETH,
Prosecutor of the Pleas,
County of Hudson,
Atty. for Deft. in Error,
The State of New Jersey. 10

JOHN F. DREWEN, JR.,
Of Counsel.

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