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CASE

CASE # 493

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

PART III

Before

Hon. RUFUS B. COWING, J., and a Jury.

1073

-----X
THE PEOPLE

VS.

WILLIAM H. SMITH
-----X

Tried, New York, February 16, et seq., 1905.

Indicted for Assault in the First Degree, as a Second
Offense.

Indictment filed January 6, 1905.

APPEARANCES:

Asst. District Attorney CHARLES C. NOTT, for the People;

HENRY J. GOLDSMITH, Esq., for the Defense.

Frank S. Beard,

Official Stenographer.

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MR GOLDSMITH: On behalf of the defendant, if your Honor please, the defendant desires to move for an adjournment in this case until 2 P. M., in order to prepare his defense. His counsel, Messrs O'Hare & Dinneen are not in court. Your Honor has assigned me, and I desire that much time to acquaint myself with the facts.

THE COURT: This is the third time it has been on, and yesterday, Messrs O'Hare & Dinneen were here, and asked to have it put down for to-day, saying that they would be here to try it, or otherwise, other counsel would be employed. I do not see the necessity or propriety of adjourning it any further. The defendant will have a fair trial. I will see to that.

MR GOLDSMITH: Of course, I know that; but the defendant has no witnesses in court. He is taken at a disadvantage.

THE COURT: Well, if it turns out that there are any absent witnesses when the People's case is closed, I will adjourn the case to enable you to get the absent witnesses here.

MR NOTT: Yes, sir. And, when it comes to the side of the defense if it appears that any witness is absent who should be here I shall join in the application for

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an adjournment, and do everything in my power to facilitate the obtaining of the defendant's witnesses.

THE COURT: Yes. The trial must proceed.

(The jury is sworn.)

MR GOLDSMITH: Before you open, Mr Nett, I move that all witnesses be excluded, in this case, on both sides.

THE COURT: Motion granted.

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OPENING ADDRESS FOR THE PEOPLE

of

ASSISTANT DISTRICT ATTORNEY CHARLES C. NOTT.

If the Court please:

Mr. Foreman and Gentlemen of the Jury:

This defendant has been indicted by the Grand Jury of this County for the crime of assault in the first degree, that is to say, an assault with intent to take life.

The law of our State has a provision, the wisdom of which, I think, no one will be disposed to question, that, where a man has been previously convicted of a felony, and, after that, commits another felony, he may be indicted, as it is called, as for a second offense, as a second offender; and, after the

People have proved his prior conviction against him, and then, in addition, proved the crime against him, with which he is charged on the present occasion, that fact is taken into account, if conviction follows the second time, in the matter of sentence.

Now, this defendant has been indicted by the Grand Jury as for a second offense; and the People

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will prove, therefore, his first conviction, namely, that he was convicted by a jury of the crime of attempted grand larceny in the second degree, and served a term, and underwent punishment for that crime. After having proved that, we will proceed to the proof of the crime charged in the present indictment, upon which he is on trial before you.

This defendant is one of the proprietors of a certain place, known as 23 Bowery in this city. It is a saloon, nearly opposite Pell Street, on the easterly side of the Bowery.

I wish you, gentlemen, could, as I have done, go over and look at this place, and see it thoroughly; and by a few glances about it I am sure you could learn more about the character of the place than from any amount of testimony.

It is a long, narrow saloon, and at this time, in contravention of law, there was a sort of private hallway built into it, a partition inside of the saloon, which gave a sort of private entrance to the saloon; that is to say, the saloon had a main door, going into the saloon proper; and then, right inside of the main door, there was another door, which led into this narrow hallway, which had been taken out of the

space of the saloon.

So that, a person going in the side door would not go into the saloon directly, but into this private hallway; and, by going down that private hallway, and through a rear door, he would get into a small room, opening into the saloon. On the uptown side of the building, there was a door leading into the main hallway of the building.

Overhead, were bedrooms, rented to an extremely temporary class of occupants.

MR GOLDSMITH: I object to that remark and take an exception to it, if your Honor please.

MR NOTT: I am describing the general character of the place in which the crime was committed, and the place run by the defendant.

THE COURT: I think I will allow that.

MR GOLDSMITH: And your Honor will give me the benefit of an exception to that?

THE COURT: Yes.

MR NOTT:

I should have said that, when you get to the end of the hallway, you enter the saloon through that door; and, when you get to the rear of the saloon, there is another sort of intermediate room, and, back

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of that there are two or three steps that go up; and then comes a screen, hanging, shutting off the rear room from the view, although the screen does not take up all of the space there, but it is in the middle there.

And then there is the rear room, where there are tables, and a kitchen fenced off, and, last, but not least, a piano, which is devoted to the amusement of the patrons of this resort.

That is to say, we have the saloon in front, with the little hallway by its side, and this intermediate room, and then the steps leading up to a room in the rear, where there are tables and the piano.

This defendant was the proprietor, or one of the proprietors, of that place, since last May.

One of the habitués of that place was a man by the name of O'Brien, William O'Brien; and this man O'Brien is a man who has been convicted times without number. He was one of the frequenters there.

In the month of May an occurrence took place there which the People claim is very material to this matter in hand, on the question of motive.

In the early hours of the morning, of a Sunday morning, in May, on the 8th of May, I think, last,

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there was a crowd in this place, and among the members of the crowd was a police officer, by the name of Mallen.

MR GOLDSMITH: One moment. I must interpose an objection to what happened in the month of May, and I object to it on the ground also that the District Attorney is trying to inflame the minds of the jury against the defendant with what has nothing to do with the matter here charged in the indictment. We are dealing only with matters in evidence, and he is referring to matters not material here.

MR NOTT: The People intend to prove, if your Honor please, that the witness, O'Brien, was a witness in December, as to a shooting that took place in that place, in May, and that he testified that certain unlawful acts occurring in this place, and that the trial at which he testified took place in December, and that the defendant shot this witness, O'Brien within a few weeks after. We claim that that is perfectly material on the question of motive.

THE COURT: I will allow it, and allow you an exception, on the question of motive.

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MR NOTT: Yes, sir.

MR GOLDSMITH: I take an exception. And I, also, object to it at this stage, if your Honor please, on the ground that it is too remote.

THE COURT: You may have your exception.

MR NOTT:

On this Sunday morning, while this police officer by the name of Mallon, who was off duty at that time, was drinking and carousing, in the premises 23 Bowery, he got into a dispute with a young man named Brennan, and, after a fight that occurred in that place, these parties got out to the sidewalk, and this officer shot and killed this young fellow.

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O'Brien was a witness of that occurrence. The officer, Mallon, was not tried until the month of December, 1904.

In that month, he was tried, and O'Brien was one of the important witnesses called by the People of the State of New York to testify against this officer, Mallon; and, in that trial, these acts that had been done in the place of this defendant were testified to.

That officer, officer Mallon, was convicted.

MR. GOLDSMITH: Just a moment. Your Honor gives me an exception to the entire statement of the District Attorney, on this subject matter?

THE COURT: Yes. I give you an exception to his entire statement, to everything that he has said.

MR. GOLDSMITH: Yes, sir.

MR. NOTT: On the 29th of December, 1904, about a month after this conviction of Mallon, this man O'Brien again went into the place kept by this defendant.

He was in there early in the evening, about 10:30, I think it was, and a fight took place there then, or a disturbance, and he then left.

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He came in later in the evening, and what happened then will be detailed to you by three eye witnesses of the occurrence.

The time at which it happened was between three and four o'clock in the morning, and this place had no right to be open.

There was a doorkeeper employed there to let people in, to look them over and let them in; and people that went in found the place running, and the piano going, played by a colored man, who went under the name of Maude, and a number of women in this back room, many of them in a state of intoxication, and a number of the male frequenters of the place.

The People's witnesses will be two boys, one employed by the Postal Telegraph Company, and a friend of his, who were evidently minors, under the age of eighteen, and yet they were served in this place, the defendant being there, with drinks, which was also in contravention of law.

They went in there, and went into this back room, and sat down at a table against the northerly wall there. They went in there to see what such a place as that was like, and, before the night was over, they saw.

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Another witness named Donevan, was in the saloon earlier in the evening, and came back there, later, and he saw these occurrences.

There is very little dispute as to what the facts were that these witnesses saw.

A woman, named Sadie Ennis, was sitting there. She was a woman that had been in this row, earlier in the evening, and the defendant Smith appeared there.

The defendant Smith and O'Brien stood at the top of this flight of steps, which led from the back room down into the centre of the room, and Smith and O'Brien were heard talking, and their talk grew loud, and their talk grew angry, and O'Brien was heard to apply violent language to Smith, was heard to call him a son of a bitch; and then he called him a steel pigeon for the police.

Smith shouted out some retorts, and O'Brien turned to leave the premises.

O'Brien went down these two steps, and walked across diagonally to the door that went into this little private hallway.

As he did so, Smith drew a revolver, and shouted after him, calling him a son of a bitch, and said,

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"I'll go to the chair for you," and just as O'Brien turned around to open the door, and go out, Smith fired at him, being then at a distance of some ten or twelve feet from him.

The bullet struck O'Brien fairly in the body, and made a very serious wound in the abdominal region.

O'Brien hurriedly closed the door, and got outside, leaving his hat there.

Some man in the place took his hat out to him, and he was then helped across the street to a drug store, where numerous police officers soon appeared.

The two boys followed him, and I think the man Donovan did, and saw him go over to this drug store.

And they saw Smith leave the place, with his revolver.

And they saw another man there, a waiter, named Kelly, whip out his revolver, at the same time that Smith did.

And then the place was cleared, and they ordered the persons inside out, two by two, being led out in that way by the barkeeper, and the place was

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closed, and, when the police arrived, Smith had departed.

Now, that is the testimony that will be detailed to you by these three witnesses.

They are perfectly disinterested witnesses, and who, in spite of the fact that they were in such a place, at this time, I think you will regard with favor, when you see that they are far above the usual character of the people who go there.

They are disinterested witnesses, and it is for you to say whether they are telling the truth.

As so frequently happens in cases of this sort, where crime is committed in such a place, the People will not be able to have the benefit that they ought to have of all the testimony of those who really saw the crime committed, but you can appreciate whether the people there would tell what they really saw.

And I shall call, and put on the stand before you, this witness O'Brien.

I have told you before very frankly that he is an ex-convict, and may be called a professional criminal; and O'Brien, as you will see, will refuse to remember what occurred there. As he says,

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he has been up against it once before, and does not want to be up against it again, and that once is enough for him.

But it is for you to say whether that is not an intentional lapse of memory, and whether the three People's witnesses, who were eye-witnesses, are not telling the truth.

And it will be, then, for you to determine whether the defendant, with intent to take O'Brien's life, did not fire this revolver at him, and strike him with the bullet in a vital part, intending to kill him.

O'Brien's life was given up, for some time, and he was in the hospital for a long time, and has been laid up by this injury ever since.

And it is for you to say whether the prior occurrence in that place, that I have detailed to you, had anything to do with the shooting.

And it is for you to say whether this man, who has been allowed by the police to run this place, without molestation, even after the facts in the Mallon case became public, and when charged with being a steel pigeon for the police, it is for you to say whether he had any motive, or whether that was

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the particular motive, for shooting the man whose testimony was extremely important in convicting a police officer, and in revealing the character of his own place.

If you believe that the People's witnesses are telling the truth, as we say they are, and that this man did shoot O'Brien, even though O'Brien is of the character that I have told you, it is for you to say whether this defendant has not committed the crime of assault in the first degree. But, if you do not so believe on the testimony, then, I am sure, you will promptly acquit the defendant.

THE COURT: I think, Mr. District Attorney, on your opening, that the case can be very much simplified, by confining yourself, first, to the occasion of the shooting. It may not be necessary to travel all over this ground. I think I would confine myself, now, to the occurrences at the time of the shooting, and the second offense. On cross examination, it may become necessary to prove a motive.

But I think we can simplify it, and possibly out out a great deal of matter which you have out-

lined here, and which, possibly, might be admissible on the question of motive, and for no other purpose. There may not be any necessity for going into that branch of it. Make it as simple as you can, and I think it will be then easier for the jury to determine it. Did he shoot him, and under what circumstances did he shoot him? That is the question at issue here, leaving out very largely everything that does not bear directly on that question. If they want to discover any motive on cross examination that may or might exist, let them do so.

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MR GOLDSMITH: Now I ask your Honor for the withdrawal of a juror on the ground that the statements made by the District Attorney are calculated to prejudice the defendant, and that it will be impossible for him to obtain a fair and impartial trial.

THE COURT: No; I will not do that./

MR NOTT: You say that this jury cannot give this man a fair trial?

MR GOLDSMITH: That is my motion, addressed to the Court. You may oppose it, if you like.

THE COURT: No. My suggestion was that we might simplify the case; that was all.

MR GOLDSMITH: Your Honor denied my motion?

THE COURT: Yes.

MR GOLDSMITH: I take an exception.

THE PEOPLE'S TESTIMONY.

J O H N P . B R O P H Y , a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR NOTT:

Q What is your name, please, sir? A John P. Brophy.

Q What is your occupation? A Deputy Clerk, Court of General Sessions of the Peace of the City and County of New York, and Clerk of Part III of said Court.

Q Have you, at my request, produced from the office of the Clerk of the Court of General Sessions of the County of New York the minute book, covering the dates of December 12th to 18th, 20th and 24th, 1901, of Part IV ? A I have. I have here the official record of the Court of General Sessions of the Peace, Part IV, from the 6th of May, 1901 to the 28th of February, 1902.

Q And that is produced from the office of the Clerk?

A From the office of the Clerk of the Court of General Sessions of the Peace.

Q And as Clerk of that Part you identify the record?

A Yes, sir.

Q Now, will you turn to the record of December 12, 1901?

A December 18th is the date you wish, I think.

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MR NOTT: Yes, December 18th. That is the indictment.
Have you that record?

A I have, sir.

Q Is there anything in that record as to one William H. Smith? A There is, sir.

MR NOTT: Well, now, I offer that, to be marked for identification.

(It is marked People's Exhibit 1 For Identification.)

THE COURT: Let him read the record, Mr District Attorney.

MR GOLDSMITH: No. I object to it. The book is not in evidence.

THE COURT: It is part of the record of this Court, and the Court will take cognizance of its own records; and I will let him read it, and I will give you an exception.

MR GOLDSMITH: Thank you, sir, I will take the exception.

THE WITNESS: "Wednesday morning, December 18, 1901.
The People of the State of New York against William H. Smith, on trial for grand larceny in the second degree. December 7, 1901. Feloniously to steal the sum of \$30 in lawful money of the United States of America, goods, etc. of one Frank L. Hewes. Filed, December 12, 1901. James J. Walsh, for the People. Hugh O. Pentecost, for

the defendant."

"Jurors balloted and sworn: John C. Fischer, George C. Sieburg, Daniel Sternberg, Gerson Stein, Adolph Verzi-miner, Joseph Schwartz, Maurice Regan, Jacob Halstead, Louis Werner, Herbert S. Kellogg, John H. Ray and Henry W. Rising."

"People's evidence: Frank L. Howes, George Delatour, William J. Burns-- Defendant's evidence: Frank Davey, George King, Nellie Stander, and William H. Smith."

"Officer sworn. The jury returned to the bar, and say they find the defendant guilty of an attempt to com-mit the crime of grand larceny in the second degree."

BY MR NOTT:

Q Now will you turn to the---

BY THE COURT:

Q That was against one, William H. Smith? A Yes, sir.
I so read.

BY MR NOTT:

Q Now turn to the 20th of December and see if there is an entry in the same case? A Yes, sir.

Q Please read it? A "Tuesday morning, December 24, 1901--"

MR GOLD SMITH: One moment. The same objection.

THE COURT: Yes, the same objection and the same ruling.

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He is reading from the record of the court, and the Court will take judicial notice of its own records.

MR GOLDSMITH: I take an exception to the reading of it.

A (Continued) "The People of the State of New York against William H. Smith, on conviction by verdict of an attempt to commit the crime of grand larceny in the second degree, goods, etc. of one Frank L. Hewes. Filed December 12, 1901."

"The defendant having nothing further to say, etc., judgment, in the penitentiary of the County of New York, for the term of eleven months." By his Honor, Judge Cowing, now presiding.

MR NOTT: Now, I offer those two entries in evidence, if your Honor please.

MR GOLDSMITH: I object.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

(They are marked People's Exhibits 1 and 2.)

BY MR NOTT:

Q I show you a paper and ask you where that is produced from? A This indictment is produced from the official records of the Court of General Sessions of the Peace of the City and County of New York.

MR GOLDSMITH: I object to that as a conclusion of

the witness.

THE COURT: Objection overruled. I will allow you an exception.

MR GOLDSMITH: Exception.

BY MR NOTT:

Q Will you tell me whether or not that is the indictment referred to in the entries from the records that you have read?

A Yes, sir. This indictment is the indictment referred to in the records as just read.

MR NOTT: It is offered in evidence, if your Honor please.

MR GOLDSMITH: Objected to on the ground that it is improperly proven.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

(It is marked People's Exhibit 3.)

MR NOTT: Whatever part, if your Honor please, that Mr Goldsmith wishes to read, of course he can read. I will read the face of the indictment to the jury:

(Mr Nott reads to the jury.)

MR GOLDSMITH: No questions. I move that the entire testimony given by the witness be stricken out, and the jury instructed to disregard it.

THE COURT: I deny the motion.

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MR GOLDSMITH: I take an exception.

WILLIAM J. BURNS, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR NOTT:

Q Are you a member of the Municipal Police Force of the City of New York? A Yes, sir.

Q And how long have you been such? A Going on nine years.

Q And did you hold--what position do you hold on the Force? A Roundsman, at the present time.

Q Were you on the force during the month of December, 1901? A Yes, sir.

Q And prior thereto? A Yes, sir.

Q What position did you hold then? A Precinct detective.

Q Were you a witness in the case of the People against William H. Smith, which was tried in Part IV, December 18, 1901, in this court?

MR GOLDSMITH: Objected to as immaterial, irrelevant and incompetent.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

BY THE COURT:

Q Were you a witness in the case of William H. Smith, which was tried in this court on the 18th of December, 1901, before

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Rufus B. Cowing, City Judge? A I am not quite certain, sir, about the date. I was in that case; yes, sir.

BY MR NOTT:

Q Well, were you the officer in the case? A Yes, sir.

MR GOLDSMITH: I object to that, sir, until the witness gets his entire answer on the record.

THE COURT: I will allow it.

MR GOLDSMITH: Exception.

BY MR NOTT:

Q In the case of the People against William N. Smith?

A Yes, sir.

Q And were you present at the trial? A Yes, sir.

Q And did you testify as a witness? A Yes, sir.

Q And did you see the verdict rendered? A Yes, sir.

Q And will you state whether or not you saw the defendant in that case in court? A Yes, sir.

Q Point him out? A There is the man (indicating the defendant).

BY THE COURT:

Q The prisoner at the bar? A Yes, sir.

BY MR NOTT:

Q Did you see the verdict rendered? A Yes, sir.

BY THE COURT:

Q Did you hear the verdict rendered? A Yes, sir.

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MR GOLDSMITH: One moment. I object to your Honor's statement, the prisoner at the bar. Under the code, he is a defendant at the bar.

THE COURT: I will give you an exception.

BY MR NOTT:

Q And were you present in court when he was sentenced?

A Yes, sir.

Q And do you remember what the sentence was? A Eleven months.

Q In the Penitentiary? A Yes, sir.

Q Now, you say that you are not certain, or quite certain, as to the date? Have you your memorandum book here?

A Yes, sir.

Q Can you refresh your memory by looking at that?

A Yes, sir.

Q Will you kindly do so?

MR GOLDSMITH: One moment.

BY MR GOLDSMITH:

Q When did you make the memorandum? When did you make that memorandum? A This was made a long while ago.

Q When? A I can't say when this was made.

Q This morning?

BY THE COURT:

Q Was it made about the time of the trial? A Yes, sir.

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This is a copy made from a book, made at the time of the trial.

MR GOLDSMITH: May I cross examine the witness?

THE COURT: Yes.

BY MR GOLDSMITH:

Q When did you make that memorandum? A The one I have got in my hand?

Q Yes. A About a month ago.

Q About a month ago? A Yes, sir.

MR GOLDSMITH: Now, I object to it.

THE COURT: Why do you object?

MR GOLDSMITH: On the ground---

BY THE COURT:
if

Q Now, you can look at that memorandum and then swear, independently from that, when it took place, I will allow you to do so. Can you do so? A I can do so.

Q You can do so? A Yes, sir.

Q Then do so?

MR GOLDSMITH: Objected to.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

BY MR NOTT:

Q Now, what was the date of that trial? A Well, from my memorandum---

Q No. From your memory, refreshed from the memorandum?

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A I haven't got the date of the trial.

BY THE COURT:

Q You haven't got the date of the trial? A No, sir.

BY MR NOTT:

Q Have you got the date of the sentence? A Yes, sir.

Q When was it? A December 24, 1901.

BY THE COURT:

Q And do you remember that independent from any memorandum?

A Yes, sir.

BY MR NOTT:

Q And were you a witness in the Court of General Sessions against any other William H. Smith in that month? A No, sir.

Q And that Smith against whom you testified, and who was sentenced on the 24th of December, 1901, is this defendant?

A Yes, sir.

MR GOLDSMITH: No questions. And I ask your Honor to strike out the entire evidence given by this witness.

THE COURT: Motion denied.

MR GOLDSMITH: I will take an exception.

MR NOTT: Now, if your Honor please, I understand that Mr Goldsmith has no objection to the introduction in evidence of this plan, and I ask to have it marked in evidence.

THE COURT: The plan of what? Where the alleged shoot-

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ing took place?

MR NOTT: Yes, sir.

THE COURT: It may be corrected if there any corrections to be made in it, by either side. It may go in evidence by consent.

(It is marked People's Exhibit 4.)

J O S E P H M c G I V E R N , a witness on behalf of the People, being duly sworn, testified as follows:

MR NOTT: I will ask permission of the Court to--at least I will ask the Court to ask the jury in case they do not understand anything about that plan, to kindly ask the Court, and we will straighten it out.

DIRECT EXAMINATION BY MR NOTT:

Q Now, Joseph, I want you to speak up so that the last two gentlemen here can hear you. They have got to hear you just as much as the first two? A Yes, sir.

Q How old are you, Joseph? A Seventeen last November.

Q Seventeen last November? A Yes, sir.

Q Where do you live? A 3 West 102nd Street.

Q Do you live with your parents? A Yes, sir.

Q What do you do for a living? A Messenger boy.

Q Messenger? A Yes, sir.

Q Who are you employed by? A Postal Telegraph.

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Q And how long have you been working for the Postal Telegraph? A A year and a half.

Q Are you working for them now? A Yes, sir.

Q Do you know a boy named Kelly--Brady, I mean? A Yes, sir.

Q Now, tell the jury whether or not you and Brady went to the premises, 23 Bowery on the night of January 26th, or the early morning of January 27th?

MR GOLDSMITH: That is objected to, on the ground that it is leading.

MR NOTT: I have got the date wrong. December 29th, I meant.

MR GOLDSMITH: If your Honor please, we are in a court of justice, and we want witnesses to testify, now. Now, I object to this on the ground that it is leading, as it is stating to the witness the answer, yes or no.

THE COURT: The question is, on the 29th of December, was he in this place?

MR NOTT: Yes, sir.

THE COURT: What year?

MR NOTT: 1904.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

A Yes, sir.

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BY MR NOTT:

Q That was 23 Bowery in the County of New York? A Yes, sir.

Q Now, what time did you and Brady get there? A Fifteen minutes past three.

Q In the afternoon or early morning? A In the early morning.

Q After midnight? A Yes, sir.

Q At about 3 A. M.? A Yes, sir.

Q And what door did you go in by? A There is the saloon, and then there is a door at the left of the saloon.

Q Now, on which side of the Bowery is the saloon? East side or west side? A East side.

Q And you say that as you go in there is a door on the right hand side? A Yes, sir.

Q That is, on the downtown side? A Yes, sir.

Q And did you see anybody at the door when you went in? A No, sir.

Q Well, this door that you went into, what did that let you into? A There is a hallway there, a long hall.

Q And did you go through the hallway? A Yes, sir.

Q Then where did you go? A There is a door at the end of the hallway, into a room, a small room. There is a partition there, on top of three steps.

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Q Now, when you got in there were there any other people there? A Yes, sir.

Q Many or few? A Quite a few; about two dozen.

THE COURT: Was this room in the rear of the barroom?

MR NOTT: At the rear of the hallway, before you got to the steps there, sir.

BY MR NOTT:

Q Now, where did you and Brady go then? A To a tablecover in the corner there (indicating).

Q Was it a table before you got to the steps, or after you went up the steps? A After we went up the steps.

Q And what was up at the top of the steps? A Why, this room here, and there was a lot of tables and chairs, and there was a stove at the top of the steps.

Q And was there anything else there? A A piano; over in the corner.

Q And were there any people in that room? A That's where the people all were.

Q Well, about how many were there, as near as you can put it? A About two dozen; both men and women.

Q And what were they doing? A Drinking and smoking. And one man was playing the piano.

Q Was the man playing the piano a white man or a colored man? A A white man.

Q And did you see any one else play the piano? A No, sir.

BY THE COURT:

Q Was he a colored or a white man? A A white man.

MR GOLDSMITH: What was your Honor's question?

THE COURT: I asked him whether he was a white or colored man. I didn't hear his answer to the District Attorney's question.

MR GOLDSMITH: Yes, sir. And then there was no other man playing the piano that he saw.

BY MR NOTT:

Q Did you hear anybody sing? A Yes, sir.

Q Who? A A colored man went up and sang a song.

Q Now, were the people in this room all men or all women, or men and women? A Men and women.

Q How many women were in there? A About ten or eleven.

Q Now, down in front of the steps, alongside of this hall, what was there? A I don't understand you.

Q Before you came to the steps, what was in the front part of the building? A Oh, there was an entrance to the saloon.

Q The bar? A Yes, sir.

Q Now look at People's Exhibit 4. Does that represent the premises? Here is the bar, or the front of it (indicating), and here is the hall, and the little room and the big room.

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Does that represent the premises? A Yes, sir.

Q Now, I want you to take a pencil and mark, as nearly as you can, where the table was that you and Brady sat down at, if the rear room? A There's where I sat and there's where Brady sat (indicating)

Q Well, this circle that you make, with two dots at it is the table and the chairs? A Yes, sir. And there was a bench there (indicating).

Q You say there was a bench running along this jog, right close against the wall? A Yes, sir.

Q Now, is Brady older or younger than you, that you know of? A Not that I know of.

Q What? A I don't know his age.

Q Well, is he a young fellow or an old man?

MR GOLDSMITH: Oh, I object to it. If you have got Brady, produce him before the jury.

BY MR NOTT:

Q Well, I ask you whether he is an old man or a young man?

MR GOLDSMITH: Objected to as incompetent.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

A About my own age.

BY THE COURT:

Q About your own age? A Yes,, sir; about my own age.

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Only a little larger.

Q About your own age only a little larger? A Yes, sir.
BY MR NOTT:

Q Now, after you and Brady sat down there, at three o'clock in the morning, what did you do? A We sat around for about five minutes, and then we ordered drinks.

Q What did you order? A Beer.

Q Were you served with it? A Yes, sir.

Q And did you drink it? A Yes, sir.

Q And what you were served with, was that beer? A Yes, sir.

Q And did you pay for it? A Yes, sir.

Q Now, did you see the defendant there? Did you see this man there (indicating the defendant).

MR GOLDSMITH: I object to the District Attorney pointing to anybody.

BY THE COURT:

Q Did you see the defendant there?

MR GOLDSMITH: One moment. Will your Honor give me a ruling?

THE COURT: As to what? As to his question? I will allow the question, did he see the defendant there.

MR GOLDSMITH: One moment. I desire to have the record straight. I object to the District Attorney pointing to a person at the counsel table and asking him whether he

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was that man, the defendant there.

THE COURT: Well, I will allow the question. He did point, and you may accept to that.

MR GOLDSMITH: That is what I desire the exception to.

THE COURT: Yes, I will allow the question, did you see the defendant there.

MR GOLDSMITH: I will take an exception to your Honor's ruling.

THE COURT: Exception to what? You say you object to the District Attorney's pointing to the prisoner?

MR GOLDSMITH: Yes, sir.

THE COURT: And I will give you an exception to that.

BY THE COURT:

Q Did you see the defendant there? A No, sir, I can't remember seeing that man there.

BY MR NOTT:

Q You didn't identify the man then? A No, sir, I didn't.

Q Now, look at the man standing there at the table (indicating). Did you see that man there? A Yes, sir.

Q What time was it?

A That was about a quarter past three A. M.

BY MR NOTT: Will you admit on the record that the person called

up answers to the name of William O'Brien?

MR GOLDSMITH: Yes.

THE COURT: The complainant referred to in the indictment?

MR NOTT: Yes, sir.

BY MR NOTT:

Q Now, will you tell the jury what first attracted your attention to this man O'Brien and any other man? A Well, from loud talking.

MR GOLDSMITH: Now, I object to this, if your Honor please. There is no evidence here that the defendant was there at the time.

THE COURT: What is that?

MR GOLDSMITH: There is no evidence here that the defendant was there at that time? Whatever happened there, or was said or done in his absence--

THE COURT: You cannot prove a case all in one word. Supposing they can prove that he heard a wordy discussion. I do not know what is is, going on between this man O'Brien and some other man?

MR GOLDSMITH: Would that have any bearing on the defendant?

THE COURT: And supposing that they should prove that that other man was the defendant, and that that other man, the defendant, shot O'Brien in the head, wouldn't that be admissible? They cannot connect him with it all at once. If they do not connect this defendant with the case, you will not suffer one particle.

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MR. GOLDSMITH: But must I raise my objection, and protect my client from the legal testimony going in?

THE COURT: Well, I will give you an exception to it. We want to get at this case, in some way or another.

MR. NOTT: To clear matters up, I say that I offer this on the promise to identify the other party to this conversation and transaction, as the defendant.

THE COURT: Yes. The District Attorney says he will connect the defendant with this other person.

MR. NOTT: Perhaps I ought to have called the two witnesses who identify him first, but I will connect it all right.

BY MR. NOTT:

Q Now you say you heard loud conversation? A Yes, sir.

Q And where was it taking place? A A little further down from where we were sitting, on the same side of the room, right near a door. I believe it was a toilet. I am not sure.

Q Now, was that before or after this colored man sang?

A That was after the colored man sang.

Q How long after? A I guess, about five or eight minutes. I am not positive.

Q Now, when your attention was attracted to this noise,

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you say you heard the noise down by the toilet?

A Yes, sir.

Q This toilet that appears here on this plan (indicating)? A Yes, sir; right about there (indicating).

BY THE COURT:

Q In front of the toilet? A Yes, sir.

BY MR. NOTT:

Q In front of the men's or women's toilet? A In front of the men's toilet.

Q You say you heard this conversation in front of the men's toilet? A Yes, sir.

Q And state whether or not you saw that man O'Brien there? A I know O'Brien. I seen him there.

BY THE COURT:

Q And was he one of the men engaged in this altercation?

A Yes, sir.

BY MR. NOTT:

Q And did you see anybody else there, with him?

A Some other gentleman and a lady.

Q Then there were O'Brien, another man and a woman?

A Yes, sir.

Q Could you identify that woman, if you saw her?

A Yes, sir.

Q Do you see the woman here? A Yes, sir.

Q Is this woman who just came in the woman (indicating)?

A Yes, sir.

Q And you say that she was standing with those men, with the man O'Brien and the other party, right in front of the men's toilet? A Yes, sir.

MR. GOLDSMITH: Objected to. I object to any question being put to this witness, while you bring in a woman for identification.

THE COURT: Well, I will give you an exception to that. He identifies this woman as being the person in front of this closet, talking to these two men.

BY THE COURT:

Q Do you do that, Witness? A Yes, sir.

MR. NOTT: Now, on my promise to connect, and show that the other man of these two men was the defendant, by two other witnesses, I will ask the witness for that conversation, and the subsequent occurrences.

THE COURT: Very well.

BY MR. NOTT:

Q You say you can't identify the other man that was talking there positively? A No, sir.

Q Well, go ahead and state what was said there?

MR. GOLDSMITH: I object.

THE COURT: On the statement of the District Attorney that he will connect the defendant, as being one of the two men engaged in that conversation there, at the time, I will allow it.

MR. GOLDSMITH: Exception.

A O'Brien was talking first.

BY THE COURT:

Q And what did O'Brien say, and what did the other person say? A Well O'Brien was talking kind of loud, and he pointed to different saloons around there, and he called him different names.

Q He pointed to the different saloons around there, and called him different names? A Yes, sir.

BY MR. NOTT:

Q Well, show how he pointed? A He pointed over in that direction (illustrating).

Q Now, just tell the jury how he said it? A He said, "That son of a bitch over there, and that bastard over on that corner, and some fellow down there, he would get square on the whole bunch of them."

BY THE COURT:

Q O'Brien said that? A Yes, sir.

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BY MR. NOTT:

Q Go on. A And he said, "And you, you stool pigeon, I'll get you, too."

BY THE COURT:

Q And he said "you, you stool pigeon, I will get you too?"

A Yes, sir.

BY MR. NOTT:

Q Now go on, and tell what was said by them, after that?

A I didn't hear the other man speak at all.

Q Did you hear the woman say anything? A She said they were good friends, and they shouldn't quarrel.

BY THE COURT:

Q She said, they were good friends, and they shouldn't quarrel? A Yes, sir. And O'Brien spoke up and said, "You are sticking up for all of the whops".

Q Well who said that? A O'Brien.

Q O'Brien said that this other man was sticking up for all the whops? A Yes, sir; and didn't care for his own ~~firm~~ friends at all.

Q And didn't care for his own friends, at all?

A Yes, sir. And he went to go out of the door, then, and he went over on this other side of the partition.

BY MR. NOTT:

Q Now just wait. After O'Brien made that remark

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about the whips, what did O'Brien do, if anything? A He went over towards that door.

Q Now, which door did he go over toward? Look on the plan here? A There is a partition right here (indicating), and a little opening right there; and he went down through this space (indicating), and over toward this door here (indicating).

Q Now just make a mark at the door that you mean, just put an X at the door towards which he went? A Yes, sir (indicating).

Q And he went down this space (indicating), and over towards that hall door? A Yes, sir.

BY THE COURT:

Q That is the door leading out into the hall, isn't it?

A Yes, sir.

BY MR. NOTT:

Q Into the little side hall? A Yes, sir.

Q Now had O'Brien, up to that time, done anything to this other man? A No, sir.

Q And when O'Brien started down this space, and diagonally across toward that little hall door, what did the other man do? A I didn't notice him at the time. I was watching O'Brien.

Q And what did O'Brien do? A Well, he went down those steps (indicating), and I ran over to see this other man down them three steps (indicating), with the revolver in his hand. He had a revolver in his hand.

Q Now you say you ran over. You had been sitting at that table? A Yes, sir.

Q And where did you run over to? A Over to that partition there (indicating).

Q Toward the head of the steps? A Yes, sir.

Q Now tell the jury, whether there was, at that time, anything across there, in front of the steps (indicating)?

A Yes, sir.

Q What was it? A A partition, a big wooden partition.

Q Well, a partition or a screen? A Well, it is built of wood, like a fence.

Q And that runs across there (indicating)?

A Yes, sir.

Q And does it go all the way across? A No, sir; there is two openings.

Q On either side? A Yes, sir.

Q And to which opening did you go? A This side, where O'Brien went down (indicating).

Q So that you were over there (indicating), near that

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wall, and near the head of the steps? A Yes, sir.

Q Did you look around through that opening?

A Yes, sir; I looked down that little place there (indicating).

Q Now when you looked down, what did you see?

A I seen this gentleman fire a shot.

Q You saw this gentleman fire a shot? A Yes, sir.

Q And where was O'Brien standing, at the time?

A Standing by that door, where the X is (indicating).

Q That is the door leading into the hallway?

A Yes, sir.

Q And how far away from him was this other man?

A About that entrance there into the bar (indicating).

Q About that entrance there into the bar? A Yes, sir.

Q Into the main bar? A Yes, sir.

Q That is, O'Brien was at this door (indicating) and the other man was about in front of this entrance (indicating)?

A Yes, sir.

Q Well, now, did you hear the other man say anything, at the time, or just before he fired the shot? A No, sir.

Q You say you saw him -- well, go on, and tell in your own language what happened, when you looked down there?

A O'Brien wanted to get behind the door, after the shot was

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fired.

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Q No. Before the shot was fired, tell what happened?

MR. GOLDSMITH: Objected to, as already testified to. I don't see why the witness should be asked to repeat what he has already testified.

THE COURT: Allowed.

MR. GOLDSMITH: Exception.

A O'Brien was standing, holding the knob of the door like, and he turned as if to say something again, and this gentleman fired the shot.

Q Now this gentleman, was that the same man who had been talking to O'Brien? A Yes, sir.

Q With this woman? A Yes, sir.

Q And, at the time he fired the shot, you say he was about in front of the door into the main saloon?

A Yes, sir.

Q And, when he fired the shot, what did O'Brien do?

A Well, O'Brien, he tried to edge in between that door like, and then this fellow that had the gun, he said, "Come from behind there, and I'll give you another shot."

BY THE COURT:

Q He said to O'Brien, "Come from behind there and I'll give you another shot? A Yes, sir.

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BY MR. NOTT:

Q Did he say anything else? A Not at that time, no. Some people got in there, and interfered with him, from shooting again, I don't know who they were, and O'Brien went out.

And then this fellow made a break to go into the saloon, and he said, "He as much as called me a stool pigeon."

Q Now where was O'Brien, when this other man said to him, "Come from behind that door, and I'll plug you again"?

A O'Brien was in behind the door.

Q Well did the man say anything to O'Brien, then?

A No, sir. O'Brien went out.

Q Did he say anything about the chair? A Well --

MR. GOLDSMITH: I object to leading the witness, if your Honor please, unless the witness has exhausted his memory.

BY THE COURT:

Q Can you remember anything else that he said?

A Yes, sir. He said, "He as much as called me a stool pigeon," and then he said he would go to the chair for that fellow.

BY MR. NOTT:

Q Now where did this other man go to, after he made that

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remark, and O'Brien went into the hall? A Well, I followed O'Brien. I didn't see where this other man went to.

Q Where did you follow O'Brien? A I went out on the Bowery, and O'Brien had run out before I did, and he was in Pell Street.

And he came back to the corner of Bowery and Pell, and he said, "He shot me in the stomach."

THE COURT: No. Strike that out, what O'Brien said. And I instruct the jury to disregard it. Do not give any conversations unless the defendant was present.

BY MR. NOTT:

Q Did you see anybody give anything to O'Brien?

MR. GOLDSMITH: I object to that as immaterial, irrelevant and incompetent and improper.

THE COURT: Allowed.

MR. GOLDSMITH: Exception.

A Some gentleman brought his hat to him.

BY THE COURT:

Q Some gentleman brought his hat to him?

A Yes, sir.

BY MR. NOTT:

Q And gave it to him? A Yes, sir.

Q And where was O'Brien, when that hat was handed to⁴⁹ him? A In a saloon in Pell Street.

Q On which side of the Bowery? A Uptown.

Q Uptown, in Pell Street? A Yes, sir.

Q And on which side of the Bowery? The same side as 23, or the other side? A No, sir; the other side of the Bowery.

Q The other side of the Bowery? A Yes, sir.

Q And then what did O'Brien do? A I ran up to the elevated station then, and I didn't see O'Brien after that.

BY THE COURT:

Q Did this party, whoever it was, who fired this pistol, fire more than one shot? A No, sir.

Q One shot? A Yes, sir.

BY MR. NOTT:

Q Did you ever know this defendant? A No, sir.

Q Had you ever had any trouble with him of any sort?

A No, sir.

Q Did you ever know O'Brien before that night?

A No, sir.

Q Did you ever see him before that night?

A No, sir.

Q You are not a friend of his? A No, sir.

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BY THE COURT:

Q How far was O'Brien from this man who shot? Indicate here, in thereon, the distance, to the jury. How far they were apart, at the time this man shot O'Brien, shot at him? A From where I am, about, to the District Attorney.

THE COURT: How many feet is that, gentlemen? Can you agree upon that?

BY MR. NOTT:

Q You mean Mr. Appleton, here (indicating)? A Yes, sir.

THE COURT: Would that be ten feet, gentlemen of the jury, from where he sits to where Mr. Appleton is sitting, there?

THE SIXTH JUROR: About twelve feet.

THE COURT: I want to get the record straight.

THE THIRD JUROR: About twelve feet.

MR. NOTT: Well, this diagram is drawn to a scale, and the jury can figure it out. He has located the two parties on the record, and, by calculating the scale, you can get it better, gentlemen.

THE COURT: Well, I only want to get it on the record, whether they were touching each other, or there was some appreciable space between them.

CROSS EXAMINATION BY MR. GOLDSMITH:

Q Were you working that day, McGivern? A Yes, sir;
I was working.

Q What time did you go to work? A Four o'clock in
the afternoon.

Q And what were your hours? Four o'clock until two.

Q And where did you work? At what office?

A 104th Street and Columbus Avenue.

Q And was Brady employed in the same office with you?

A No, sir.

Q Eh? A No, sir.

Q Where was he employed? A I don't know where he was
employed.

Q How long do you know Brady? A Well, he had worked
up in our office, during that summer, about four months.

Q Had you seen him any time previous to the morning
in question? A Why, yes.

Q Where? A He used to come around to the office,
every night.

Q Was he around at the office between four o'clock
that afternoon and two o'clock that morning? A He reached
there about 12 M.

Q And you were still on duty? A Yes, sir.

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Q And did you have a conversation with Brady?

A Yes, sir.

Q Were you out on any calls? A Sir?

Q (Question repeated) A No, sir.

Q You didn't leave the office that time? A No, sir.

Q Was Brady in the office too? A Yes, sir; he came in the office.

Q How long was he in the office? A About two hours.

Q From what time until what time? A From about 12 o'clock until I got off, at 2, the time I was off.

Q 12 midnight until 2 A. M.? A Yes, sir.

Q He waited there for you? A Yes, sir.

Q And you lived, as I understand, at 102nd Street?

A Yes, sir.

Q And you lived with your father and mother?

A Yes, sir.

Q Now had you been out with Brady, before this time? A The night before I was down at the same place with Brady.

Q But it wasn't the first time that you had visited this place that you were in? A No, sir; the second time.

Q Had you been in any other place along that street?

A No, sir.

Q This was the only place that you had visited, the

night before? A Yes, sir.

Q Were you in Pell Street? A Walked through Pell Street that night, before we went there.

Q Any other street that you walked through?

A No, sir.

Q Did you have any money with you? A About a dollar.

Q How much did Brady have? A He didn't have anything.

Q What? A He didn't have anything.

Q Brady was broke? A Yes, sir.

Q You were taking Brady around, eh? A He brought me around, and I had the money.

Q He was taking you around, and you were spending the money? A Yes, sir.

Q In other words, he said, "Come along down there, McGivern, and I'll treat you with your own money"? Is that the idea? A Yes, sir.

MR. NOTT: He furnished the capital, and Brady furnished the experience.

BY MR. GOLDSMITH:

Q Brady had no trouble in getting into places he wanted to get in; had he? A Yes, sir. He wanted to get in No. 9, but they wouldn't let him in.

Q Now when did you intend to go home? A I wanted to go

to Chinatown.

Q Weren't you there, the night before? A Yes, sir; but I wanted to see it again.

Q You haven't been there since? A No, sir.

Q You were in the House of Detention; were you?

A Yes, sir.

Q How long? A Saturday night I went there, and I got out on Tuesday.

Q Were you taken to any court? A Essex Market.

Q Did you make a statement in that court? A Yes, sir.

Q Was this defendant there? A I didn't see him there.

Q When was the first time that you saw this gentleman (indicating the defendant)? A This is the first time I saw him, to recognize him, to know him again.

Q This is the first time you ever saw him, ain't it?

A Yes.

Q Sure about that? A Yes.

MR. NUTT: He says, to recognize him. I object to that.

BY MR. GOLDSMITH:

Q Weren't you taken into the Tombs Prison? A Yes, sir.

Q And wasn't this man brought out to you? A Yes, sir. He was amongst a bunch of men, if he was there. I didn't

recognize him.

Q You didn't recognize him? A No, sir.

Q Now you got into this saloon about 3 o'clock in the morning; didn't you? A Yes, sir.

Q How many drinks did you have? A One.

Q Did you have any before you got there? A No.

Q Did Brady have any? A No.

Q Do you know whether Brady had been fired out of that place, about two months before that, or two nights before?

A No, sir.

Q He hadn't told you about that experience that he had?

A No, sir.

Q And, all told, how long were you in this place?

A About twenty-five minutes.

Q You saw everything that went on, or tried to?

A Well, in that time; yes.

Q In that time? A Yes, sir.

Q You were awake? A I certainly was.

Q And you went down to see everything, and you did see everything? A I seen everything I could; certainly.

Q Now you say that no colored man played the piano?

A Not while I was in there, no.

Q During the twenty-five minutes? A No, sir.

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Q A white man played the piano? A A white man played the piano.

Q Now, how did you recognize O'Brien? A Well, he was doing all the loud talking, and I seen him, and I recognized him then; and when they brought me to Gouverneur Hospital, I recognized him, and now I recognize him.

Q Now you had your eyes wide open, and were wide awake? Now can you say that the defendant was there, or not?

A His back was turned to me. I didn't notice him.

Q Well, you ran over to see where this trouble was?

A Yes, but other people were there too; I was watching O'Brien all the time.

Q But you could see the other people? A Sure.

Q Could you recognize the man that fired the shot, when you saw him, if you saw him again? A No.

Q Why not? A Because I didn't get a good look at him.

Q Because you didn't get a good look at him?

A No, sir.

Q The only man that you got a good look at was O'Brien?

A That's all.

Q And the woman? A This woman, I seen her, the night before there.

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Q This Sadie Ennis? A Yes, sir.

Q Now, after this O'Brien had been shot, did you and Brady go out? A I went out alone. Brady stayed there.

Q What did you say to Brady? Anything? A I told him I was going to beat it..

Q You were going to beat it? A Yes, sir.

Q In other words, you were going to get uptown?

A Yes, sir.

Q Did you stake your friend Brady? A No; he didn't ask me for no stake.

Q He had no money? A No, sir.

Q And you were his friend? A Yes, sir.

Q And you were going to beat it? A Certainly.

Q And you did beat it? A I did beat it.

Q And you got out on the street? A Certainly.

Q And you took the elevated, for yours? A For mine, yes.

Q Eh? A Certainly.

Q And you went right home? A Right home.

Q And when was the next time you heard anything about this thing? A In the newspapers.

Q Well, you read it in the newspapers? A Next day.

Q Did you go to work, the next day? A Certainly.

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Q And, after you went to work, did anybody call on you? A No.

Q Eh? A No, sir.

Q Who took you to court? A Some detective came up after me.

Q When? A Some detective came up after me.

Q When? A New Years Eve.

Q New Years Eve? A Yes, sir.

Q And when did this happen? A The 29th of December.

Q The 29th of december? A Yes, sir.

RE-DIRECT EXAMINATION BY MR. NOTT:

Q Oh, did you hear any name given to that colored man, who sang a song there? A They called him Maude.

MR. GOLDSMITH: What was that? I didn't catch that answer.

MR. NOTT: He says they called him Maude.

JAMES J. BRADY, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. NOTT:

Q Now, Brady, just lift your voice, and remember that these two gentlemen have got to hear every word you say. How

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old are you, Brady? A 16 years of age.

Q How old? A 16 years.

Q And when were you 16? A July 19th.

Q Last July? A Yes, sir.

Q Where do you live? A 252 West 133rd Street.

Q And what is your business? A Messenger boy.

Q Who are you a messenger boy for? A Postal Telegraph.

Q And what office? Were you working in December last?

A Yes, sir.

Q In what office? A In 30th Street and Broadway.

Q Did you know the other boy, McGivern? A Yes, sir.

Q Now, tell the jury whether or not you went anywhere with McGivern, on the night of December 29th, or the early morning hour? A Yes, sir.

Q Where did you met him? A I met McGivern at 104th Street and Columbus Avenue.

Q Did you go up there? A Yes, sir.

Q And what time was it when he got through working there?

A He got out at 2:10.

Q In the morning? A Yes, sir.

Q And then where did you and McGivern go? A Went on the 9th Avenue elevator, and then we took the 3rd Avenue elevator around to Chatham Square, and we got off, and went

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into 23 Bowery.

Q So that you came right down from McGivern's office, right down to this place, 23 Bowery? A Yes, sir.

Q Were either of you in uniform? A I wasn't. McGivern was.

Q He had his uniform on? A Yes, sir.

Q Well, do you remember which door you went into, into the place? A Yes, sir.

Q Which? A 23 -- in the saloon part. But next to the saloon there is a door.

Q Into this hallway (indicating)? A Yes, sir.

Q Now, after you went into the hallway, where did you go? A Right back into the rear room, up three steps, and sat at a table in the corner.

Q Well, now, this table, was it on the uptown or downtown side of the room? A Well, it was on the left hand side, over in that corner, like that (illustrating).

Q The left hand side, as you went in? A Yes, sir.

Q Now, this place is on the east side of the Bowery, isn't it? A On the east side.

Q 23 is on the easterly side of the Bowery?
A Yes, sir.

Q And so it was on the left hand side as you walked back

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from the street? A Yes, sir.

Q And were there any other people in that place, at that hour? A Yes, sir.

Q Were there many or few? A Oh, quite a lot.

Q Were they all men? A Old men?

Q I say, all men? A No, sir; there was most women.

Q Women and men? A Yes, sir.

Q Was there any music going on, in that place?

A Yes, sir.

Q What kind of music? A A piano.

Q Was the place lighted? A Yes, sir.

Q Was the saloon in front lighted? A A dim light, it was.

Q But the back place was lighted? A Yes, sir.

Q Was there any screen across, near those steps?

A Yes; a partition.

Q Well, you call it a partition? A Yes, sir.

Q And how near the top of the steps was that partition?

A On the top step.

Q And did it go all the way across? A No, sir.

Q Was there a space at either end? A Yes; on both ends.

Q On both ends, you could go around? A Yes, sir.

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Q As you came up the steps, there was this screen or partition as you call it, and you could go on either side of it, to get into the back room? A Yes, sir.

Q Did you hear anybody sing there? A Yes, sir.

Q Who sang? A A man they called Maude.

Q White or colored? A Colored.

Q Now, after you had been there a while, did anything attract your attention? A Yes, sir.

Q Before I come to that. What did you do, when you get into this back room? A We sat down there for about two or three minutes, and then McGivern called the waiter, and asked him for a glass of beer, and I said, "The same."

Q Well did he furnish you a glass of beer?

A Yes, sir.

Q Did either of you pay for it? A The both of us paid for it.

Q And did you drink it? A Yes, sir.

Q Now, after that did anything attract your attention?

A Yes, sir.

Q What? A An argument.

Q And where was the argument going on? A Right near the partition.

Q Near this partition, near the steps (indicating)?

A Yes, sir.

Q And who was in the argument? A Smith and O'Brien and a woman.

Q When you say Smith, who do you mean? A I mean that man there (indicating the defendant).

Q The defendant? A Yes, sir.

Q Had you ever seen him before? A Yes.

Q When? A The night before that.

Q You had been in the same place? A Yes, sir.

Q The night before? A Yes, sir.

Q And you had seen the same man? A Yes, sir.

Q And a man named O'Brien? A Yes, sir.

Q Have you seen him since? A No, sir; I never saw him before.

Q I say, have you seen him since that time?

A Yes, sir.

Q Bye the bye, did you have any money with you, that night? A I had -- no, I didn't have any money.

Q Well, where did you get the money that you paid for the drinks with? A Off Joe McGivern.

Q Now tell the jury what this argument was. Give all you heard pass between this O'Brien and this defendant, Smith?

A Well, what drew our attraction was these two men's

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argument and talk, and they were speaking to each other, and all what drawed our attention was Smith said, "I'll get even with you," naming cursing names in the place, and pointing to three places.

Q Who was it said that? A It was O'Brien said that.

Q Well now, tell what he said and how he pointed.

Just show the jury. A He pointed up that way (illustrating), and he said, "I'll get even on you," and he cursed, and said a bad word, and he said, "I'll get even on that man down there, and I'll get even on you, Smith, you God damned stool pigeon."

Q And what did Smith say? A Well, Smith said -- let me see, now.

Q Was there any one else there?

MR. GOLDSMITH: No; I object to that. I ask that the question be put to the witness, and the witness allowed to answer.

MR. NOTT: All right.

BY MR. NOTT:

Q Did you see Smith do anything there?

A Yes, sir.

Q Well, what did he say, first? A He said, "You will?" And he put his hand in his hip pocket, and he drawed this

revolver.

BY THE COURT:

Q Who said that? A Smith.

Q He said, "You will?" And put his hand in his hip pocket, and drew a revolver? A Yes, sir.

BY MR. NOTT:

Q Now was there anybody else near these two parties at the time? A Yes, sir.

Q Who? A A woman.

Q Have you seen her since? A Yes, sir.

Q Would you identify her, if you saw her again?

A Yes, sir.

MR. NOTT: Just ask her to step in.

BY MR. NOTT:

Q Well, now, go on. Did you hear this woman say anything, in this discussion? A Yes, sir.

Q What did she say? A She said to O'Brien -- no, it was to Smith -- she said, "Don't argue. You know that he is your best friend."

BY THE COURT:

Q Who said that? A The woman said that.

Q What did she say? A "Don't argue. He is your best friend."

BY MR. NOTT:

Q And what else did you hear said then? A And O'Brien said --

Q Is that the woman that you saw there (indicating)?

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1 A Yes, sir.

MR NOTT: I would like it to appear on the record that this is the same woman that was identified by McGivern.

THE COURT: Yes.

BY MR NOTT:

Q Well, go on. What did you hear said then? A And he says, "You are all the cause of it," and pushes--

Q Who said that? A O'Brien said that to the lady.

Q What did he say? A "You are all the cause of it," and pushes this lady right away.

Q Then what did you hear said, if anything? A And then it was the argument, and Smith drewed the revolver.

Q Now, before the revolver was drawn, did you hear anything else said that you remember? A I might, but I don't remember now, unless the question was put to me.

Q Did you hear anything said about Whops?

MR GOLDSMITH: Objected to as immaterial, incompetent and leading.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

A Yes, sir.

BY MR NOTT:

Q Who said anything about that? A Well, O'Brien said to Smith, "You stick up for all these whops around here".

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BY THE COURT:

Q O'Brien said to Smith, "You stick up for all these whops around here"? A Yes, sir.

Q O'Brien said that to Smith? A Yes, sir.

BY MR NOTT:

Q And, after that remark was made, what did O'Brien do?

A O'Brien?

Q Yes. Did he stay there or go anywhere, or what did he do? A Well, he walked slanting and went down three steps.

Q And what did Smith do? A He went down on the opposite of it.

Q Of what? A Of the partition.

Q That is, you say O'Brien went down on the side of the partition nearest the toilet, on that side (indicating)?

A Yes, sir.

Q And Smith went--- A No, sir. Smith went on that side.

Q O'Brien went over to the side of the partition toward the wall? A Yes, sir.

Q And went down? A Yes, sir.

Q And Smith went through the other side? A Yes, sir.

Q And what did you do? A Then I followed him right up to the top of the steps.

Q Did you follow Smith or O'Brien? A I was on the side

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of O'Brien.

Q That is, the side next to the wall? A Yes, sir.

Q Did you look around the partition? A No, I didn't.

Q Well, did you stand behind the partition, or did you get so that you could see down the steps?

MR GOLDSMITH: He said he was standing right alongside of O'Brien.

THE WITNESS: No, I didn't say that. I said I went in back of him, followed him down.

BY MR NOTT:

Q I mean, did you get where you could see between the partition and the wall, what was going on down the steps?

A Yes, sir.

Q And what did you see? A I see Smith draw the revolver, and fire a shot at him.

Q And where was Smith at the time he pulled the revolver and fired the shot; at that time? A He was down on the steps.

Q At the bottom of the steps? A Yes, sir.

Q Where was O'Brien? A O'Brien was at the bottom.

Q Well, at what part, near the bottom, was O'Brien at, with reference to the hall? A He was near the door.

Q The door going into the hall? A Yes, sir.

Q And how far away from him was Smith? A About as far as from here to you (indicating), this distance.

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Q Roughly speaking, about ten or twelve feet? A Yes, sir; ten or twelve feet.

Q And was that the time that he fired? A Yes, sir.

Q And who did he aim at, when he fired? A He aimed at O'Brien.

Q Now, up to that time, had O'Brien done anything to Smith? A No, sir.

Q Except--I mean anything except the argument? A No, sir.

Q Or what he said to him? A No, sir; he didn't hit him or nothing.

Q Did O'Brien have anything in his hands? A No, sir.

Q Now, did Smith make any remark, at the time, or about the time he fired this shot? A Yes, sir.

Q Well, what was it? A He says, "Stand out, until I get another shot at you", he says.

Q And where was O'Brien when Smith made that remark? A Behind the door. There is the door, and he was standing like that, with the door covering him (illustrating).

Q Was that after the shot? A Yes, sir; after the shot had hit him.

Q Does that door swing in or out? A It swings in.

Q As shown in this plan here (indicating)? There is the hall (indicating)? A There is the hall (indicating).

Q Now, there is the hall door (indicating)? A Yes, sir.

Q And there are the steps (indicating)? A Yes, sir.

Q And does the door swing into the room, or out into the hall? A Well, I couldn't remember that.

Q Well, where was O'Brien? Was he in the hall or in the room? A In the room.

Q Behind this door you say (indicating)? A Yes, sir.

Q And he said what? A "Stand out until I get another shot at you. I will go to the chair for you."

Q And what did O'Brien do then? A He kind of staggered, and ran out of the door.

Q And what did Smith do? A Smith took the pistol and put it in his hand and went behind the bar.

Q Into the front part? A Yes, sir.

Q And at that time did you see anybody else with a revolver there? A Yes, sir.

Q Who? A An old man with a gray beard. He said, "For God's sake, put it away."

Q Who did he say that to? A To Smith.

Q And what did Smith do then? A He put it in his hand, and put it behind the counter.

Q Behind the bar? A Yes, sir.

Q Well, what became of McGivern? A McGivern?

Q Yes. A Well, after this was all done, and he put the pistol away, he run out of this hall door, and he run up on the

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elevated station.

Q McGivern did? A Yes, sir.

Q Now, what did Smith do, after he put the revolver in behind the counter? A I couldn't tell you what he done.

Q Well, what did you do? A I went out with McGivern.

Q And what did you do then? A I went right over to follow O'Brien.

Q And where did you see him? A I think it was at Pearl Street, if I aint mistaken. I aint familiar with the streets down there.

Q What was he doing when you saw him? A He was staggering, and he said, "Oh, my"--

Q Never mind what he said. What happened then? A Two men brought him into the drug store.

Q Where was it? The drug store? A On the opposite side, near Chatham Square.

Q And did you go in there? A No, sir. But I wanted to talk to the officer about it, and he chased me away.

Q Where did you go, when he chased you away? A I went over to the main office of the Postal Telegraph.

Q And where is that? A 253 Broadway.

Q And did you go back to 23 Bowery? A After that, yes, sir.

Q Well, was that before you went over to the main office,

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or afterwards? A After.

Q Well, what did you do over at the main office? A Oh, I went back to 23 Bowery.

Q Before you went to the main office? A Yes, sir.

Q And what did you say after you got back to 23 again?

A Well, I went back there, to see could I see anything else; and this man named Kelly was putting men out by twos.

MR GOLDSMITH: Oh, I object to that, if your Honor please.

BY MR NOTT:

Q Who is Kelly? A He was the bartender.

Q Had you seen him in there before the shooting?

A Before the shooting, yes, sir.

Q And while the defendant was there? A Yes, sir.

Q He was the bartender in the place? A Yes, sir.

Q And you saw him, you say, putting men out, by twos?

A Yes, sir.

Q Did you go inside? A Yes, sir.

Q And how long were you there before you went out again?

A About three--about five minutes.

Q Were there any women in there, when you entered the second time? A No, sir.

Q What did Kelly do with them? A Put them up in a room. There was a door on that side, on the side of the toilet (in-

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dicating) with a big lock on it, and he put them up in that room and he put the men out by twos in the hall, and told them to get out before the police came.

THE COURT: No. Leave that out, what he told them to do. Do not give any conversation.

BY MR NOTT:

Q Now, did you go out? A Yes, sir; I went out. He put me out.

Q And when you got out what happened? A When I went out, there was policemen out there, grabbing everybody that came out of there, and searching their pockets, their back pockets, for the one who shot O'Brien.

Q Well, did the officers stop anybody? A Yes, sir. He let three men go, and stopped the fourth man, and he said, "I think we'll hold him."

THE COURT: No. Never mind what he said. Strike that out.

BY MR NOTT:

Q Did you see how many persons he stopped, if any?

A Yes, sir.

Q How many? A Oh, about---

Q I don't mean those he let go again, but how many did he keep? A Oh, only one.

Q Only one? A Yes, sir.

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Q And he let the others go? A Yes, sir.

Q Did he stop you? A Stop me? No, sir.

Q Then where did you go? A Then I went down, and followed this man where they were searching him, and then came back again, over to the drug store, where this O'Brien was.

Q Did you see O'Brien there? A No, sir.

Q Did you go inside? A No, sir.

Q What became of the man that the police arrested? Did you see?

MR GOLDSMITH: Objected to as immaterial, irrelevant and incompetent.

THE COURT: Was that the defendant?

MR NOTT: No, sir.

THE COURT: I do not think that is material.

BY MR NOTT:

Q Now, was the defendant in there, when you got back there the second time? A The defendant?

Q Yes, was Smith there then when you came back there the second time? A No, sir.

Q Did you see him? A No, sir.

Q Well, did you see what became of O'Brien? A O'Brien?

Q Yes. A Yes, sir.

Q What? A He was over in the drug store, and they brought him to the hospital.

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Q How did they get him there? A I didn't see what they were doing to him.

Q Well, did you see him taken out of the drug store?
A Yes, sir.

Q Well, what was he put into, if anything? A Into an ambulance.

Q And do you remember what hospital it was from? A No, sir, I don't.

Q Well, you saw him taken away in the ambulance? A Yes, sir.

Q Did you see him after that? A Yes, sir.

Q Where? A In the hospital.

Q What hospital? A I forget the name of the hospital.

Q And how long was it after that that you saw him in the hospital? A I think it was the day after.

Q Now, did you give your name to anybody? Did anybody take your name? A No, sir.

Q Well, how did you happen to be a witness in the case?
A Well, it was in 30th Street. I asked a policeman that was on the Broadway beat--I knowed him by sight--and I told him about it.

THE COURT: No. Leave out any conversation with that officer.

BY MR NOTT:

Q Now, you say when you spoke with the officers down

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there about it, they chased you out of the store? A Yes, sir.

MR GOLDSMITH: Now I object to that interpretation of the witness's testimony. He says he was ordered out of the place by the bartender.

MR NOTT: Oh, I am talking about the drug store. There isn't any bartender in the drug store.

BY MR NOTT:

Q Who was it put you out of the drug store? A I wasn't inside of the drug store. I was going in, when the policeman stopped me. I was going in to tell the policeman.

THE COURT: No. Never mind what you were going to do.

MR GOLDSMITH: I ask to have it stricken out.

THE COURT: Motion granted.

THE WITNESS: And he pushed me away.

BY THE COURT:

Q He wouldn't let you go into the drug store? A No, sir.

BY MR NOTT:

Q Now when did you see Smith after that? A When did I see Smith after that?

Q Yes. A In the Tombs.

Q How many days after? A It was two days after.

Q And under what circumstances did you see him? A I went in there to identify him.

Q Well, how many men were there? A In the line?

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Q Yes. A There was about fifteen men.

Q And where was this line of fifteen men? A Up on the second floor, I think, by the cells.

Q In the corridor? A Yes, sir.

Q Were they all lined up when you were brought in?

A Yes, sir.

Q And did you see Smith in the line? A Yes, sir.

Q And did you pick him out of that line? A Yes, sir.

Q Were these parties that were in this line, were they in uniform or in citizen's clothes, or how? A Citizen's clothes.

Q All in citizen's clothes? A Yes, sir.

Q How long had you seen Smith, on the night previous to this shooting when you say you saw him in there? A Oh, about ten minutes.

Q What was he doing then? A Only walking up and down; that is all.

Q Through the place? A Yes, sir.

Q Did you hear him give any orders to anybody? A Yes, I did.

Q Well, who did he give them to? A To a woman.

Q Who was in the place? A Yes, sir.

THE COURT:

Gentlemen of the Jury:

We will take a recess now until a quarter past two o'clock.

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Do not talk with each other about the case, nor form
or express any opinion in reference to it, until you have
heard all of the evidence.

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AFTER RECESS.

JAMES J. BRADY, being cross examined, testified as follows:

CROSS EXAMINATION BY MR GOLDSMITH:

Q You said this morning that you were working for the Postal Telegraph Company? A Yes, sir.

Q When did you go to work for the Postal Telegraph Company? A On the Saturday before Christmas.

Q And what had you been doing before that? A Before that?

Q Yes. A Well, I had been home about a month.

Q Out of work? A Yes, sir.

Q And what did you do before that? A I worked in the Postal Telegraph.

Q Why did you leave? How many times were you employed and re-employed by the Postal Telegraph Company? A Twice.

Q Were you discharged or did you leave? A No; I left it.

Q Now, when did you leave the first time? A I think it was in May.

Q And then when did you go back? A I went back in October.

Q From May to October, what were you doing? A I was to the country.

Q Where? A Asbury Park.

Q What were you doing? A Well, I have been out there for

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my vacation.

Q Where were you stopping? A I was stopping at--now, in the hotel down there where I was working, the Lafayette Hotel.

Q What were you doing in the hotel? Bell boy? A Yes, sir; bell boy.

Q Did you work there all that summer? A Up until two months, and then I got robbed there.

Q Somebody robbed you? A Yes, sir.

Q And how much did they steal from you? A They stole \$12 from me.

Q And, because you were robbed you left the hotel?
A I had to leave.

Q Why. A Because I was brought down to Freehold prison, as a witness.

Q What? A I was a witness down there.

Q You were taken to the Freehold Prison? A Yes, sir.

Q And you were locked up, weren't you? A As a witness ; yes.

Q As a witness? A Yes.

Q And how long were you in the Freehold Prison? A Until October.

Q Two months, you were in prison? A Well, yes, two months.

Q Just as a witness, eh? A Yes, sir.

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Q And after you got out of the Freehold Prison, where did you go? A I came right home to New York.

Q And where was that? A 252 West 133rd Street.

Q And that was in October? A Yes, sir.

Q And then you went to the Postal Telegraph Company and asked for employment? A Yes, sir.

Q Is that correct? A Yes, sir.

Q Is that right? A Yes, sir.

Q And how long then did you work? A I worked, I think it was, up until November--yes, about November.

Q You worked about a month, didn't you? A Yes, sir, about a month.

Q And you left then? A Yes, sir.

Q And then you didn't work again until a couple of days before Christmas? A I left until a couple of days before Christmas.

Q And what were you doing while you were out of work?
A I was home, with my father.

Q You didn't visit any of these places along the Bowery, did you? A Yes, sir.

Q Pell Street? A No, sir.

Q Doyers Street? A No, sir.

Q Chinatown? A No, sir.

Q But you had been on the Bowery? A Yes, sir.

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Q Now, where did you get that collar that you have got on?

A What?

Q You understand what I said? A I got it off my father, of course.

Q When did you get it? A Well, I couldn't exactly tell you.

Q Where did you get your collar? A I don't think it is right to ask me that. And I didn't get nothing off the House of Detention.

Q How do you know what I wanted to ask you?

A Well, it is enough to say that I did get it off there.

Q You didn't have a collar when you were arrested, did you?

A Yes.

Q Is that the collar?

A No, sir.

Q The necktie?

A Yes; no, sir. I didn't have no necktie.

Q Did you have a collar and necktie on, when you were taken to Essex Market?

A No, sir.

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Q And from there where were you taken? A From there I was taken down in the District Attorney's office.

Q And then where were you taken? A Up to the House of Detention.

Q And have you been there ever since? A Yes, sir.

Q And you knew that you will be paid 50 cents a day while you are there; don't you? A I certainly do.

Q Have you been promised anything else? A I have not.

Q Now you had been on the Bowery before this night; hadn't you? A Yes, sir.

Q How many times? A Twice, before that.

Q And when was the first time? A Well, the first time was Monday night.

Q Of that very week? A Of that very week.

Q Had you been in No. 9 Bowery? A No, sir; I never was there.

Q And you never made an attempt to go in No. 9 Bowery?
A No, sir.

Q Eh? A No, sir.

Q And what were you doing on the Bowery, on that Monday night? What did you go down there for? A To see the sights.

Q And when was the next time you went down there?

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A Tuesday night.

Q The following night, you went down there?

A Yes, sir.

Q All alone? A No, sir; with Joseph McGivern.

Q Did this trouble happen on a Tuesday night?

A No, sir.

Q Was McGivern with you, on Tuesday night?

A Yes, sir.

Q And had been with you, on the previous occasion?

A Yes, sir.

Q Now how many times, in all, had you been down with McGivern? A I have been down twice with McGivern.

Q On a Tuesday night? A Yes, sir; and on a Thursday night.

Q McGivern testified, this morning, that it was the first time that he had ever been down there.

MR. NOTT: I object to that. He testified to having seen the woman, the night before.

MR. GOLDSMITH: Oh, yes. I withdraw that question.

BY MR. GOLDSMITH:

Q Now you had been in 23 Bowery once before this?

A Yes, sir.

Q And you were put out, weren't you? A Yes, sir.

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Q By Mr. Smith? A No, sir.

Q He ordered you out? A No, sir.

Q Any words with him? A No, sir.

Q Weren't you unceremoniously ejected from the place?

A No, sir.

Q On Monday night? A On Monday night?

Q Yes, A No, sir.

Q How long were you in there, on Monday night?

A Well, for about two hours.

Q Where did you get the money from? A Well, I earned it.

Q How much did you earn? A Oh, I earned that day, about \$1.30.

Q Did you spend any of it to eat? A Yes, sir.

Q How much? A Oh, about 60 cents of it.

Q Do you usually use about 60 cents for your dinner?

A Oh, no, sir; not for my dinner; for my three meals a day.

Q And you are positive that you were not thrown out of there, on Monday night? A I am positive.

Q And on Tuesday night you went down with McGivern?

A Yes, sir.

Q And where did you meet McGivern, did you say?

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A At 104th Street and Columbus Avenue.

Q You were not working that day; were you?

A Yes, sir.

Q Did you have any money? A No, sir, not that night.

Q Eh? A No, sir; not that night.

Q Well, McGivern swore here, this morning, that you were not working.

MR. NOTT: He didn't say anything of the kind. He said he was not working with him.

A He wasn't working with me. I work in a different office from what he did.

BY MR. GOLDSMITH:

Q Now, when you came down with McGivern, did you try to get into No. 9? A Yes, sir.

Q Oh, you did? A Yes, sir.

Q You did make an attempt to go into No. 9?

A Yes, sir. I said, "We'll go in," and he said, "No."

Q And you were not allowed to go in there, were you?

A No, sir.

Q You were barred out of the place? A Yes, sir.

Q Now, why did you say, a minute ago, that you were not in No. 9, and didn't make any attempt to get in there?

A Because I wasn't in No. 9.

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Q But I asked you if you made an attempt to get in there, and you said no. A Well, because I didn't know the number of the place. I didn't even know the number of 23 Boverly, until the officer told me that.

Q Who told you that? What officer? A Officer Smith. He took me down, next day, to show me the number of the place, and the number of the license, even.

Q The number of the license? A Yes, sir.

Q What is the number of the license? A 2,375.

Q And what did you want to get the number of the license for? A I couldn't tell you that.

Q Now, will you describe O'Brien for us, please?

A Yes, sir.

Q Go on. A Well, he is a man about -- let me see -- I should judge about 5 feet, 6 or 7 inches, and kind of smooth face, and kind of rough features. That's the only thing I could describe him.

Q The only way? A Yes, sir. And I ain't good at that.

Q Now McGivern was with you all this time, in this place? A Sir?

Q (Question repeated) A Yes, sir; and we went home; and then I went back again.

Q I know. I mean, he was with you? A Yes, sir.

Q And saw what you saw? A Yes, sir; he saw what I saw. But he didn't see what I saw, when I came back, the first time.

Q No. I am talking of the first time. A Yes, sir; he did then.

Q And he was right alongside of you, all the time?

A Yes, sir.

Q And he heard what you heard? A Yes, sir; he heard what I heard.

Q And saw what you saw? A Yes, sir; and saw what I saw.

Q When you were taken into the Tombs, for the purpose of identifying Mr. Smith -- A Yes, sir.

Q You were taken to the second tier of the Tombs Prison; weren't you? A Yes, sir; I think I was; yes, sir.

Q Yes? A But, at that time, I didn't look to see what tier I was at.

Q Well, it don't make any difference. A No, sir; as long as I was in the Tombs, I think its all right.

Q And there were twelve, or thirteen, or fourteen, or fifteen men standing in line? A Yes, sir, there was.

Q Did you notice how Mr. Smith was dressed, in the

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Tombs? A Yes, sir.

Q Tell the jury. A He had his coat off.

Q Yes? A And he was standing --

Q And his hat off? A And his hat off. And he was standing right up straight.

Q He had his collar and tie on, didn't he?

A I didn't notice that particular. I only looked for his face; that's all.

Q Only for his face? A Yes, sir.

Q Did the other men have collars and ties on?

A Well, I couldn't tell you.

Q Well, isn't it a fact that he was the only man that had a collar and tie on? A I didn't say that he had a collar and tie on.

Q You don't even know that; do you? A No, sir.

CORNELIUS J. DONOVAN, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. NOTT:

Q Now, Mr. Donovan, I want you, please, to speak up, because these last two gentlemen have got to hear you, just as much as the first two. How old are you, sir?

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A 30 years old.

Q How old? A 30.

Q And what is your business? A Stenographer and typewriter.

Q On the night of the 29th of December, 1904, were you in the premises at 23 Bowery, or in the early morning?

A Early on Thursday morning -- I guess it was the 29th -- I can figure back. Christmas was Sunday, the 25th, Monday was the 26th, Tuesday the 27th. That would make Thursday, the 29th. I believe I was.

Q What time was it that you first went to those premises, that night, I mean? A That night, about half past seven o'clock.

Q In the evening? A In the evening, yes, sir.

Q Had you ever been in there before? A Yes, sir.

Q Had you ever seen the defendant Smith there?

A Yes, sir.

Q How many times had you seen him there before?

A Well, I had been in there about six nights previous to that, every night, or probably seven nights, and I had seen the defendant there, in the evening.

Q So you knew him by sight? A Yes, sir.

Q Well, when you went in there, about half past seven,

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this night, did you see him then? When was the first time, that night, you saw him? A I think, the first time, that night, that I saw him, to place it right, was later in the evening, when a wardman from Eldridge Street station came in there. I believe that was the first I had seen of him, that night; probably a little before.

Q And about what time was that, as near as you can fix it? A I should judge, between eleven and half past eleven.

Q That night? A That evening; yes, sir.

Q And did you know the wardman's name?

A I found out. I think it is Lehmeyer.

Q And did you see him talking to Smith?

A Yes, sir.

Q And how long were they in conversation together?

A I only seen them in conversation for two or three seconds, and they went outside, went out of my view.

Q Had you seen any fight or disturbance in that place, up to that time? A I had.

Q What time did that occur? A That occurred just right after Smith and Lehmeyer had a talk. They went outside, and the fight occurred probably five minutes after that.

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Q Well, how long was it after that that you saw Smith again?

A I saw Smith after that, ~~that~~ after that fight, about ten minutes. I sat down and talked with him.

Q Do you know whether or not Smith is one of the proprietors of this place?

MR. GOLDSMITH: Objected to, as calling for the conclusion of the witness.

MR. NOTT: Question withdrawn.

BY MR. NOTT:

Q What did you see Smith doing, during the nights that you were there?

MR. GOLDSMITH: Objected to, as immaterial, irrelevant and incompetent.

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THE COURT: Is that on the night in question?

MR NOTT: Yes, sir, on previous nights that he was there. I want to show Smith's relation to the premises.

THE COURT: Does it make any difference?

MR NOTT: It may, on the question of motive.

THE COURT: Oh, no; I do not think so.

BY MR NOTT:

Q Now, what was the fight that you saw immediately after you saw Smith and Lehmyer talking?

MR GOLDSMITH: Objected to, unless connected with the defendant.

THE COURT: Does it refer to this shooting?

MR NOTT: No, sir.

THE COURT: Then how is it material?

MR NOTT: Why, as showing the character of the place.

THE COURT: No; I do not think that is material.

MR GOLDSMITH: And I object to that statement, if your Honor please, of the District Attorney.

THE COURT: No, I do not think it would be material.

BY MR NOTT:

Q Now you say you saw Smith about ten minutes after this disturbance? A I did.

Q And was that still in the premises? A Yes, sir.

Q Did you see a man named O'Brien there? A I did.

Q When did you first see him there? A First I had

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seen of O'Brien was previous to the disturbance talked about.

Q And was he there during the disturbance? A He was.

Q And did you see him there afterwards? A I did.

Q Now, after this disturbance, did he stay there?

MR GOLDSMITH: Objected to. There is no evidence here that there was any disturbance.

THE COURT: Oh, yes. There is evidence that there was a shooting there.

MR GOLDSMITH: But he is not talking about that, if your Honor please. The District Attorney makes no reference to that.

MR NOTT: No; I haven't come to that yet. I want to locate O'Brien during the evening.

MR GOLDSMITH: Well, locate him, and don't insinuate.

THE COURT: I will let you locate O'Brien, of course.

MR NOTT: And I ask him if O'Brien remained after the disturbance that he speak of, or left, if the witness knows.

BY THE COURT:

Q Can you answer the question? A Yes, sir.

Q Then answer it? A O'Brien left after the disturbance.

BY MR NOTT:

Q And when did he return? A About fifteen or twenty minutes or half an hour, probably.

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Q Now, where were you sitting then? A I was sitting at one of the tables.

Q In which part of the premises? A In the rear part of the premises.

Q That is, up those steps (indicating)? A Yes, sir.

Q And about what part of the room? A About ten feet from the piano.

Q The piano is in the rear? A In the rear of the building.

Q Just take, will you please, and mark with the letter "P" where the piano is on that plan? Look at the plan, and be sure that you get your bearings right? A Yes, sir.

MR NOTT: He marks the rear corner.

BY MR NOTT:

Q And you say you were sitting about ten feet away from the piano? A About ten feet; in front of the piano.

Q In front of the piano? A Yes, sir.

Q Down this way (illustrating)? A Yes, sir.

Q Now, after you sat there, was your attention attracted to any other disturbance, early in the morning? A It was.

Q About what time was that, as near as you can place the time? A I think about 11:45 or 11:30, or probably a little later.

Q Well, you said the first disturbance took place about then. I am speaking now about the second one? A The second dis-

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turbance took place about twenty minutes or half an hour after the first disturbance.

Q Well, that is as near as you can recollect it? A That is as near as I can recollect the time.

Q Now, tell this jury in your own language what you saw and heard?

MR GOLDSMITH: Have you fixed now, the time?

THE COURT: I think, Mr Nott, I will confine you-- unless this defendant himself was engaged in that disturbance before that--in that case, I will let you show-- but I will not let you show all the disturbances there.

MR NOTT: But this is the disturbance in question.

THE COURT: That is different. The District Attorney says he refers to the shooting occurrence.

MR GOLDSMITH: I understand.

THE WITNESS: I can't locate it in any different way than that, at the time.

BY MR NOTT:

Q State what you saw and heard at that time? A I saw O'Brien and the defendant standing in the rear of the partition, or behind the partition, and I heard O'Brien say to the defendant---

Q Now what partition was that? A The partition right above the three steps.

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Q That is, the partition at the head of those three steps (indicating)? A Yes, sir.

Q Does that partition run all the way across the room?

A No, sir.

Q There is a way to pass it, on either side? A Yes, sir; it is a screen, a wooden screen.

Q Now, at which side of the screen were O'Brien and the defendant standing? Towards the toilet or the wall? A O'Brien was standing on this side of the partition (indicating), and the defendant was on the other side.

Q Now, could you hear what they said? A I heard O'Brien call the defendant a stool pigeon, and I heard the defendant say that he wouldn't stand that from any one. Further than that, I couldn't swear to what the conversation was, but I distinctly remember those words.

Q Was there any woman there? A There was.

Q Where was she? A She was sitting at a table, about five feet across from where I was.

Q Well, were there any other women there? A There were.

Q Well, after these remarks were passed about stool pigeon, did you hear anything then? A I heard no conversation, that is, that I can remember. There were some words passed there, but I don't know what they were.

Q Then what happened? A Smith went around one side of

the screen, and the defendant went around the other side of the screen.

Q Smith did what? A Smith went around on one side of the partition, and the defendant on the other.

Q The defendant? Well, Smith is the defendant? A Or O'Brien, I mean.

Q Well, then, what happened? A And I got up, and walked down to the end of that partition there (indicating)--there were some words--and I seen the defendant with a gun in his hand, or a revolver, and he ordered O'Brien out, and O'Brien didn't go out, and the defendant shot at him.

Q Where was O'Brien at the time? A O'Brien was standing a few feet away from the side entrance, that is, the door.

Q The door to the side hall? A Yes, sir. And the defendant was across on the other side of the room, down below the steps.

Q That is, the small room steps? A Yes, sir, the small room.

BY THE COURT:

Q You say O'Brien refused to go out? A I don't know whether he refused to go out, but he didn't go out.

Q He didn't go out? A No, sir.

BY MR NOTT:

Q Then you say the defendant shot at him? A Yes, sir.

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Q And what happened then? A And, after the defendant shot O'Brien, he said, "I would go to the chair for you", and he ordered O'Brien out again, and O'Brien went out; and the defendant went behind the bar, went out--I don't know whether he went behind the bar or not.

Q What were you doing? A I was standing, tussling with a girl there.

Q What was she doing there? A She wanted to get out to see the shooting, and I was holding her back.

Q Well, after the shooting, what did you do? A After the shooting, this girl punched at my eye, and I thought the best thing to do was for me to get out of there, and, on the other side of the room there is another entrance, leading upstairs.

Q To the hallway of the hotel? A Yes, sir. And I went out there and sent in for my overcoat. As I was in that entrance there, Smith and another party were in there.

Q Who was the other party? A I don't know the other party's name.

BY THE COURT:

Q By Smith you mean the defendant? A Yes, sir.

BY MR NOTT:

Q Do you know what he is called in there, that other party?

A Trilby, I think he is called.

Q Well, what was Smith and Trilby doing? A Trilby had a

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gun in his hand, and the cartridges from the revolver--in snapping it up, they fell out on the floor.

Q Well, who was taking the cartridges out? A They fell out in snapping up the gun.

Q But who snapped the gun? A Trilby

Q And what did Smith and Trilby do? A They went out of that entrance there.

Q Out of which other entrance? A The other entrance that leads into the hotel.

Q And what did you do? A I went down the Bowery, and I went about--I guess down to Mott Street, I think, if I place it right; and, as I was going down there I seen a roundsman running up the street, and I followed him up, and it led me into No. 6 Bowery, the drug store there.

I went into No. 6 Bowery and I seen O'Brien sitting on the chair, and several policemen around him, and I went over and talked to him, and he told me he was shot.

THE COURT: What he said, leave out.

A (Continued) And handed me a pocketbook, and I went out of there then.

BY MR NOTT:

Q And where did you go to then? A I went back to the saloon, 29 Bowery.

Q 29? A Yes, sir.

BY THE COURT:

Q 29 or-- A 29--23.

BY MR NOTT:

Q You mean the same place where you were before? A Yes, sir.

Q Smith's place? A Yes, sir; Smith & Buchanan.

Q And what was the state of affairs when you got back there? A The doors were closed, and the place was in darkness, except the barroom. I believe there was a light in the barroom.

Q Did you go inside? A And I went inside.

Q And who was inside there? A There was the bartender and one girl, and a couple of other fellows.

Q Were there any officers there then? A I believe two officers came in as I came in the door.

Q Well, what did they do? A They just looked around the place and went out.

Q And then where did you go? A From there I went to Eldridge Street station house--no, I first went to Hudson Street Hospital.

Q Well-- A I had heard that O'Brien was brought to the Hudson Street Hospital.

Q And was he there? A He wasn't there.

Q And then you went to Eldridge Street? A I went to

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Gouverneur Hospital and he was there, but I couldn't see him.

Q And then where did you go? A I went to Eldridge Street station.

Q And who did you see there? A I seen Detective Schmidt, I think his name was.

Q And did you have any conversation with him? A I did.

Q Did you see anybody else there? A He referred me to Detective Lohmeyer.

Q Well, did you see Lohmeyer? A I seen Lohmeyer, yes, sir.

Q Was he the same detective you had seen in Smith's place? A Yes, sir.

Q Did you have any conversation with him? A I did not. Only started to talk to him, and he told me to get out.

Q Well, when he told you to get out, had you said anything to him about this case? A Not to him. But I had to his partner, and his partner had told him.

MR GOLDSMITH: Objected to as a conclusion of the witness.

BY MR NOTT:

Q Well, did you hear his partner tell him? A I did. I heard his partner tell him, talk to him.

Q And then, when you started to talk to him he told you to get out? A Yes, sir.

Q Now, in what occupation were you engaged, at that time?

A At that time I had no regular occupation.

Q What were you doing? A I was engaged in hunting for a man, for a private party.

Q Well, was it in consequence of that occupation that you had been in this place? A No, I couldn't say it was; although I had went to several places there looking for him.

Q Well, along in that neighborhood? A Along in that neighborhood. I had been in all the places there.

Q Had you ever had any trouble with Smith? A No, sir.

Q Did you ever know O'Brien before this? A No, sir.

BY MR GOLDSMITH:

Q What are you; a private detective? A No, sir.

Q Who was the man you were hunting for? A Why, you wouldn't know him, if I told you who he was.

Q I wouldn't? A No, sir.

Q Well, I don't know who you were hunting for. I want to find out?

A Well, I don't think that is material to the case.

Q Well, just tell us who you were hunting for?

MR NOTT: Well, I don't see that that is material. I object.

THE COURT: I do not see that it is material.

BY MR GOLDSMITH:

Q Who was the party who employed you to hunt him up?

MR NOTT: Objected to as immaterial.

THE COURT: I will not compel him to answer those two questions. What is the use of dragging people's names into this case, who have nothing to do with the case?

BY MR GOLDSMITH:

Q Were you doing a piece of detective work? A I was not; not what you would call detective work.

Q Then what was the purpose of looking for this man, if you were not doing a piece of detective work? A A party wanted to locate the man.

Q For what? A I don't see that that is material, for what purpose the party wanted to locate him.

Q Now, aint that a connected story on your part? A No; no connected story at all.

Q What is your correct name? A Cornelius J. Donovan.

Q What name were you under in State's Prison? A Cornelius J. Donovan.

Q For how long? A For two years.

Q What for? A Forgery.

Q When? (No answer)

Q When? A From 1901--no, from 1902 to 1904.

Q Where? A In Alleghany, Pennsylvania.

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Q And when did you get out? A On December 7th.

Q And is that the only time you ever were in prison, that you ever served a term? A In Allegheny?

Q No. I am talking about States Prison, Sing Sing.

A I don't see that that is material.

THE COURT: Yes, that is material.

THE WITNESS: Well, I was in States Prison.

BY MR. GOLDSMITH:

Q For how long? A Two years.

Q What for? A Forgery.

Q When was that? A 1896 or 1898; I don't remember the year.

Q That is, two? A Yes, sir.

Q Any others? A No, sir.

Q You don't think these are material to this case; do you? A I do not.

Q Weren't you in Elmira? A No, sir.

Q You escaped that?

MR. NOTT: Now, I object to that question, if your Honor please.

BY MR. GOLDSMITH:

Q You escaped being sent to Elmira; didn't you?

A No, sir.

MR. NOTT: I object to that. We have all escaped

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that. I never was there.

MR. GOLDSMITH: Well, you are fortunate.

BY MR. GOLDSMITH:

Q You knew Smith; don't you? A I do.

Q Did you ever talk to Smith about this case?

A No, sir.

Q Have you communicated with Smith about this case?

A No, sir.

Q Did you ever communicate with anybody else?

A I did.

Q Look at this paper, and see if it is in your handwriting (indicating)? A It is.

MR. GOLDSMITH: I offer it in evidence.

MR. NOTT: May I see it, if your Honor please?

MR. GOLDSMITH: Certainly. Here it is.

(It is admitted in evidence without objection, and marked Defendant's Exhibit 1).

BY MR. GOLDSMITH:

Q Who did you communicate with? A A party by the name of Ryan.

Q Who is Ryan? A He is a party that I met down in one of the Bowery resorts.

Q And when did you meet him? A About two weeks before

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Christmas, or three weeks before Christmas, or four weeks before Christmas; between December 7th and 15th.

Q About the time that you were liberated from the Allegheny State Prison? A Yes, sir.

Q And where did you meet him? A I met him in the Chatham Club.

Q Where is that? A I don't know the number of the place.

Q What street is it on? A (No answer)

Q You know what street it is on? A I can't place whether it is Deyer or Pell; I can't place the difference between them.

Q Well, it was on either one of them? A Yes, sir; on either one or the other.

Q And he is a friend of yours? A No.

Q He is not? A No, he is not.

Q What is Ryan's first name? A Michael.

Q Where did you address him to? A To a party by the name of Mullins, in Mott Street.

Q Yes. When did he give you that address?

A I don't know when he give me the address. I met him in there, in Mullins's place, too.

Q And you thought a letter there would reach him?

A I thought a letter would reach him. I wasn't quite sure.

Q You say he wasn't a friend of yours? A No, sir; no friend; merely an acquaintance of mine.

Q And that's the reason you addressed him as "Dear Mike"?

A Yes, sir; as "Dear Mike".

MR. GOLDSMITH: I will read this letter to the jury.

(Mr. Goldsmith reads the exhibit to the jury).

BY MR. GOLDSMITH:

Q You sent this letter? A I sent that letter; yes.

Q What did you want to see the defendant for?

A I wanted to see the defendant, because I was getting tired of being up there.

Q Where? A Nanuet.

Q Where is that? A In the Village of Nanuet, at the house of the party I was sent up with, Mr. Hammond.

Q What party? A Mr. Hammond.

Q And were you at his house? A Yes, sir.

Q Living there? A Living there.

Q And the only day you could see this man would be on a Thursday; is that right? A On a Monday.

Q That was the day when you were not watched?

A Yes, sir.

Q You mean Mr. Hammond, the Chief of the Process Servers

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upstairs? A I do.

Q And anybody else up there with you, besides Mr. Hammond? A Yes, sir.

Q Who? A Mr. Roberts.

Q Another County Detective? A Yes, sir.

Q Anybody else? A No, sir.

Q Now, did they have a whole house? A Except the family.

Q Whose family? A Mr. Hammond's family.

Q Mr. Hammond's family? A Yes, sir.

Q How long were you up in Nanuet? A About five weeks.

Q And where did you get the paper and envelope and stamp from? A I had the paper in my grip, I believe I had it in my grip, or I may have got it in the house.

Q And you mailed it on the 7th of February, as the stamp shows? A About that time.

Q And what did you want to see Smith for?

A I was -- I was tired of being up there, and I wanted to see Smith, and arrange not to appear against him, if I could. I didn't want to appear against Smith.

Q What arrangements did you want to make with Smith?

A The arrangements was that I wouldn't appear against him.

Q For a consideration? A No, sir.

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Q What did you mean by this, "That may seem unmanly"?

A I thought it was unmanly on my part to go and not let Smith know that I was a witness against him.

Q But you were up there for five weeks, before you came to have that frame of mind? A Yes, sir.

Q And it was on your affidavit that Smith was arrested? A It was on my affidavit that he was arrested.

Q And didn't you say that you were a reporter, at the time? A Not in the affidavit; no, sir.

Q Did you make the statement to any one that you were a reporter? A Yes, sir.

Q To whom? A To several policemen.

Q Were you a reporter? A More or less, yes.

Q What paper did you report for? A At that time, I wasn't doing any reporting. I had reported for The Evening World and The World.

Q Had you done any reporting work for the two years previous to that? A No, not in New York.

Q Or any other place? A I had.

Q Where? A I done a little reporting work in Allegheny.

Q In the prison? A No, sir; outside of the prison. I was in the prison two years -- at least, I wasn't there two

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years.

Q But you told us you were there two years. A Twenty months I was there.

Q You were there twenty months? A Yes, sir.

Q And for whom did you work? A I believe I reported a speech, down there.

Q I don't want what you may have done. I want the absolute fact. A I can't say for sure, but I reported a speech for one of the newspapers there.

Q What speech did you report? A There was some speech making, at a dinner.

Q What dinner? A I can't exactly recall now, it is so far away.

Q Why, it must have been in November? A Two years ago.

Q Yes? A Let me see. I'll place the date for you. It was in April.

Q What year? A I believe, of 1902.

Q And when were you sent to prison? A In June.

Q And you had been in Allegheny for two months or three months previous to that? A Not steady; off and on. I was in Allegheny and out of Allegheny.

Q And, when you were not in Allegheny, where were you?

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A In Chicago and in Buffalo.

Q What did you do in Chicago? A I worked as a court reporter.

Q For what court, or for whom? A The firm of Walton, James & Ford.

Q And were you employed by the week, or how?

A By the week, and by the piece.

Q Were you employed by a law firm? A No, sir; by a firm of court reporters. There are no official reports in Chicago.

Q There are none? A No, sir.

Q And how long were you in Chicago? A About eight months, I think, off and on, altogether.

Q And that was right after you came out of State Prison? A Oh, no. I was in New York for a year and a half, probably, after I came out of State Prison.

Q Now tell us the name of the man that delivered the speech in Allegheny that you reported? A I can't remember the name, but I remember it was on the occasion of a dinner.

Q And who did you report that speech for? A I believe I reported that for the Pittsburg Times.

Q In Allegheny? A Yes, sir. In Pittsburg, just across the river.

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Q And you don't know the name of the dinner?

A No, sir.

Q Or the name of the man whose speech you reported?

A No, sir.

Q And you don't know anybody on the Pittsburgh Times, do you? A Not by name. I get my pay from the cashier's office. I've done work on newspapers here, and don't know the people's names.

Q Now, the cashier's office of the Pittsburgh Times is in Pittsburgh? A Yes, sir.

Q And you were in Allegheny? A Yes, sir; but it is right across the river, like Brooklyn and New York.

Q How much did you get for this work? A I think I got \$7 or \$8.

Q And how much space did it take up? A About three quarters of a column. I was employed to report the speech part of it, the shorthand work, and I charged \$10 a night for the speech reporting, the same as I have done in New York, for The New York World.

RE-DIRECT EXAMINATION BY MR. NOTT:

Q Were you detained as a witness, after this shooting?

A I was.

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Q And, instead of being sent to the House of Detention, you were taken out of town? A I was.

Q And kept up there, at this place? A Yes, sir.

Q You say that you got sick of being there?

A Yes, sir.

Q That is a small place, isn't it? A Yes, sir; a small country place. There is no one there.

Q Well, why didn't you want to appear against the defendant? A Well, I'll tell you why I didn't want to appear against him. I was afraid I would get myself in trouble.

Q Did you know anything about O'Brien? A I knew that O'Brien had appeared as a witness against a policeman.

LOUIS G. KREUTZER, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. NOTT:

Q You are a member of the Municipal Police Force?

A Yes, sir.

Q What Precinct are you attached to? A Twelfth, Eldridge Street.

Q And to what precinct were you attached, during the month of december? A Twelfth.

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Q And were you there in the month of May last?

A Yes, sir.

Q And ever since? A Yes, sir.

Q And are the premises 23 Bowery in the 12th Precinct?

A Yes, sir.

Q The dividing line between the 12th and 6th Precincts comes in the middle of the Bowery? A In the centre of the Bowery; yes, sir.

Q What was your post on December 29th?

A I believe I had two posts there.

Q Now what was your post? Don't you know that?

A My post was No. 1.

Q What did that cover? A From Division to Canal Street, on the Bowery.

Q On the Bowery? A Yes, sir; and I take in half of the block of each side street.

Q And how long had you been on that post?

A About a year.

Q Do you know this defendant? A I have seen him.

Q You know him by sight? A Yes, sir.

Q And do you know where his premises are? A At 23 Bowery.

Q Do you know where he was, before he came to those

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premises?

MR. GOLDSMITH: Objected to, as immaterial, irrelevant and incompetent, and not having any bearing on the subject matter embraced in this indictment.

THE COURT: I do not see that it is very material where he was.

MR. NOTT: It may become material. I want to show that he was employed in another place very close to there.

THE COURT: Well, this case has narrowed down to a very small compass. The question is, did he shoot this man? If he did not, no crime has been committed. A great deal that you have outlined in your case, in your opening, I do not see the bearing of.

MR. NOTT: I am aware, of course, your Honor, where there is direct evidence of a shooting, that motive is not essential; but it may be material and important, just the same.

THE COURT: Well, we will see, later on. Let us get what we call the act itself in evidence; and then, on cross examination, they may undertake to find out what motive there was for shooting the man.

BY MR. NOTT:

Q Do you know who the proprietors are, at 23 Bowery?

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A Smith & Buchanan, I believe.

MR. GOLDSMITH: I move that be stricken out, as irresponsible.

THE COURT: Well, I do not think it harms one way or the other. I will allow it to stay in, though I do not see its bearing on the case.

MR. GOLDSMITH: I take an exception to your Honor's ruling.

BY MR. NOTT:

Q You have been on that post you say for about a year? A Yes, sir.

Q At various times of the day and night? A Day and night, yes, sir.

Q And are the premises 23 Bowery a saloon? A Yes, sir; a hotel, I believe.

Q It is commonly known as a Raines Law Hotel?

MR. GOLDSMITH: Objected to.

A I don't know about that.

MR. GOLDSMITH: I object to that, and ask that the question be excluded.

THE COURT: I do not think it has any bearing on the case.

BY MR. NOTT:

Q Now, have you ever made an arrest in there?

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MR. GOLDSMITH: Objected to, as immaterial, irrelevant and incompetent, and improper.

THE COURT: Yes, I will exclude that.

BY MR. NOTT:

Q Now, were you on post -- I withdraw that. At what time were you on post, on duty, on the night and early morning of December 29th? A From 12, at night, until 6, in the morning; the late tour.

Q On that night, did you see this man O'Brien?

A No, sir.

Q What? A Yes, sir; after, I saw him.

Q Where was he when you first saw him?

A In the drug store, No. 6 Bowery.

Q And what time was it that you first saw him there?

A Somewheres around 4 o'clock.

Q In the morning? A Yes, sir.

Q You don't know of your own knowledge how long he had been there? A No; that I couldn't say.

Q How long prior to that time was it that you had passed the premises No. 23 Bowery? A Well, I passed up and down the line there, all night; about every 20 or 25 minutes.

Q Did you pass there after one o'clock? A Yes, sir, all night, from 12 o'clock until morning.

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Q After 12 o'clock had you observed anybody going in there? A No, sir.

Q Or coming out? A No, sir.

Q Was the bar room lit up? A Yes, sir, and the bar exposed.

Q Did you see anybody in there after one o'clock?

A No, sir.

Q Not a soul? A No, sir.

Q And were there any lights in this back room?

A That I couldn't say. I couldn't see in there.

Q Couldn't you see, if there had been a light there?

A Well, I couldn't swear to that.

Q What? Did you look to see? A Yes, I looked.

Q But you didn't see any? A No, sir.

Q You didn't see any persons passing in or out of this place? A No, sir; neither in or out.

Q Well, did you look to see? A Well, when I passed there, I could see any one go in or out.

Q You were looking to see if any violations of law were committed there? A Yes, sir.

Q Did you hear any plane going there? A I didn't hear any.

Q Did you listen? A Well, I didn't listen. I didn't stop there.

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Q Do you know how long Smith has been in that place?

MR. GOLDSMITH: Objected to. There is no evidence that Smith had been in the place, or had controlled or managed the place.

BY MR. NOTT:

Q Well, when was it after that that you saw O'Brien, in the drug store? A Somewheres in the neighborhood of 4 o'clock.

Q And did you have any talk with him? A I asked him --

MR. GOLDSMITH: Objected to.

BY MR. NOTT:

Q No. I don't ask what he said or you said, but did you have a talk with him? Yes or no? A Yes, sir.

Q And, after that talk, what did you do? A I called an ambulance.

Q Did you see the ambulance come? A Yes, sir.

Q Did you make any examination of O'Brien's person, or notice anything about him? A Well, I looked at him and asked him --

Q And what did you see? A He was shot, and he said --

THE COURT: No, do not give the conversation.

BY THE COURT:

Q What did you see, with your own eyes? A I saw a little blood on his shirt.

BY MR. NOTT:

Q On what part of the shirt? A Somewheres around the navel.

Q Any hole in his shirt? A A little hole.

Q The ambulance of what hospital came? A Gouverneur.

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Q After the ambulance came did it take him away? A Yes, sir.

Q What did you do then? A Carried him out when the ambulance came.

Q Yes, I say, what did you do, after the ambulance took him away? A I went over to 23 Bowery.

Q Now, how did you come to go to 23 Bowery? A Well, there had been a rumor around there that he had been shot in 23 Bowery.

MR GOLDSMITH: I move to strike that out.

THE COURT: Yes. Strike it out.

BY THE COURT:

Q You went to 23 Bowery to see about the shooting? A Yes, sir; to see whether anything occurred in there.

BY MR NOTT:

Q When you got there, was there anybody in the place?

A Three men, in the back room.

Q Anybody in the front of the premises? A Yes, sir; an officer.

Q What was his name? A Keifer, of the Sixth Precinct.

Q What was he doing when you got there? A Well, nothing in particular, but just looking out for the place, because we heard somebody had been shot in there.

MR GOLDSMITH: I object to that and ask that it be stricken out.

THE COURT: Motion granted.

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BY MR NOTT;

Q Did you see any parties coming out of the place then?

A No, sir.

Q What did you do when you got there? A Went inside, and placed the three men--

Q Did any one go in there with you? A There was two or three officers come in with me.

Q And into what part of the premises did you go? A Through the hall, into the rear.

Q Well, was that the first time you had ever been in there?

A Well, I went--that is the first time I had ever been in there, up to that time.

Q The first time? A Yes, sir.

Q And you have been on that post a year? A Yes, sir.

Q Now, into what part of the premises did you go? A I went into the rear.

Q And who did you find in there? A Three men in there, Springer, Monahan and Kelly.

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

Q Did you look for him? A Yes, sir; inquired for him.

Q And did you find him there? A No, sir.

Q You say you went in through the bar? How did you get in there? A I went in through the hall.

Q Through this private hall or the hotel hall? A The private hall, the hall on the side, not the upstairs hall.

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Q Then you went into the back room? A Yes, sir.

Q Did you notice a plane when you got in there? A I didn't notice any. I didn't pay any particular attention to the plane.

Q Well, what other part of the premises did you visit?

A That's all.

Q Did you go upstairs? A No, sir.

Q Weren't you looking for Smith? A They told me he wasn't in there.

Q You took their sayso for that; did you?

MR GOLDSMITH: Oh, I object to that, if your Honor please.

BY MR NOTT:

Q Did you go upstairs, or make any search in the upper part of the premises? A No, sir.

Q Did you place these three parties under arrest?

A Yes, sir.

Q And where did you take them to? A To Eldridge Street.

Q To the station house? A To the station house.

Q After that did you see O'Brien anywhere? A I didn't see O'Brien after he went to the hospital.

Q Had you ever seen him before? A No, sir, not to my knowledge. I seen him around there but I didn't know him as O'Brien.

Q What post did you have on the 8th of May last?

MR GOLDSMITH: Objected to as immaterial, irrelevant and incompetent, and too remote, and as having no bearing on the issues, and not the subject matter embraced in the indictment.

THE COURT: How is it material.

MR NOTT: Well, just on that general question that we have spoken of before.

THE COURT: I think not; I will exclude it.

BY MR NOTT:

Q Did you go back to those premises again that night, after you made these arrests? A No, sir. The men in the house were sent out on that again.

Q Do you know when those three parties were employed in those premises, if at all? A Only from their own statements.

CROSS EXAMINATION: None.

J O H N A . Y O U N G , a witness called on behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR NOTT:

Q Officer, you are a member of the Municipal Police Force?

A Yes, sir.

Q And you were in the month of December, 1904? A Yes,

sir.

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Q Did you go to the premises No. 6 Bowery on that night?

A On that morning.

Q Well, what time was it when you got there? A About 3:30, I guess, in the morning.

Q As near as you can place the time? A Yes, sir.

Q Who did you find there? A I found Hilly O'Brien there, with a pistol shot wound in his stomach, sitting on a chair.

Q Did you look at the wound? A Yes, sir.

Q Where was it? A Just about in here (indicating).

Q Just about the navel? A Yes, sir.

Q And you say it was a pistol shot wound? A It looked that way.

Q Well, a hole and blood? A Yes, sir.

Q Did you have a conversation with him? I don't ask you what it was. Did he talk to you? A Yes, sir, I spoke to him.

Q Did you see what was done with him? A I see he was taken in the ambulance and sent to the hospital.

Q What hospital? A The Hudson Street hospital, the New York Hospital in Hudson Street.

Q Did you observe O'Brien's condition as to sobriety?

A Well, he looked to me to be pretty sober. Of course, a man in that condition--

MR GOLDSMITH: I object to that, and ask that the answer be stricken out.

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THE COURT: No. I will allow that, whether he appeared to be sober or not.

BY MR NOTT:

Q Did you go over to the premises, 23 Bowery? A No, sir.

MR GOLDSMITH: No questions.

PHILIP E. KEIFFER, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR NOTT:

Q You are a member of the Municipal Police Force? A Yes, sir.

Q And were you a member of that force on the 29th of December, 1904? A Yes, sir.

Q Did you go to the drug store, No. 6 Bowery? A Yes, sir.

Q At what time was it when you went there? A Between three and four o'clock in the morning.

Q Who did you find there? A I found a man by the name-- I think it was O'Brien.

Q Had you ever seen him before? A No, sir; never see him before.

Q Who else did you find there? A Well, there was several policemen there. There was Roundman Horan and Officer Young and Officer McIntyre, and two or three citizens.

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Q When you got there did you observe anything about O'Brien?

A He was sitting in a chair and some one told me--

Q No. Never mind what anybody told you. Did you see anything about him? A I went over to him and examined him, and found he was shot in the stomach.

Q And then did you have any conversation with him? A I asked him who shot him.

Q No. Never mind what it was.

BY THE COURT:

Q Did you have any conversation with him, without telling what it was? A Yes, sir.

BY MR NOTT:

Q You did? A Yes, sir.

Q And what did you do after this talk?

BY THE COURT:

Q What did you do? A Well, we went out of this drug store across the street to No. 23 Bowery.

BY MR NOTT:

Q Yes. And who is we? A Officer Kreutzer, I think his name is, of the 12th Precinct.

Q And yourself? A Yes, sir. And then we were followed by the Roundsman, a little later.

Q Now, when you got to 23 Bowery, what was the condition of those premises, at that time? A The place was apparently closed?

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Q Was there any light in the barroom? A Yes, sir; there was a light in the barroom.

Q Could you see into the barroom from the street?

A Yes, sir.

Q And did you go inside or remain outside? A Well, I went inside of the door--right inside of the door.

Q Yes. Did you go back into the premises? A Well, we went inside of the doorway.

Q I knew that? A Roundsman Horan went back, I believe.

Q Did you go back, I asked you? A No, sir; I went just inside of the door of the barroom.

Q And who was in there, if anybody? A There was--I think he is a waiter--the bartender, and a fellow that said he was a piano player.

Q And what did you do with those parties? A Officer Kreutzer placed them under arrest, I believe, and brought them to the 12th Precinct station house.

Q And how was the bartender dressed? A The bartender--I guess he was in his short sleeves. I believe he had his short sleeves rolled up.

Q And the piano player? A He had--I think he had his coat and hat on.

Q Well, this was after four o'clock by that time?

A Yes, sir; somewhere around there.

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Q And the piano player was still there? A Yes, sir; he was there.

Q Yes? A And he said he was the piano player.

THE COURT: No. Strike that out.

MR GOLDSMITH: I ask to have that stricken out.

THE COURT: Yes.

BY MR NOTT:

Q Now, did you go upstairs? A No, sir.

Q Did you see any of the officers go upstairs? A No, sir; I didn't see anybody go upstairs. They might have went upstairs.

Q Did you see the defendant, Smith there? A Is this Smith (indicating the defendant)?

Q Yes. A No, sir; I didn't.

Q Did you make any inquired for Smith?

MR GOLDSMITH: I object to that, if your Honor please.

MR NOTT: I want to show that they were looking for him, or were alleged to be looking for him.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

A Well, I didn't.

BY MR NOTT:

Q Well, did you hear any of the other officers make inquiries for the defendant, Smith?

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MR GOLDSMITH: I object to it as hearsay.

THE COURT: I do not see that it is very material.

MR NOTT: Withdrawn.

BY MR NOTT:

Q And then where did you go? A We went to the 12th Precinct station house with these prisoners.

Q With these prisoners? A Yes, sir.

Q And then you went back on post? A Yes, sir.

CROSS EXAMINATION: None.

WILLIAM O'BRIEN, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR NOTT:

Q Now, O'Brien, will you kindly say whatever you see fit to say in a voice loud enough for this jury to hear you?

MR GOLDSMITH: I object to that injunction to the witness, what he sees fit to say.

THE COURT: Well, he will only answer questions.

MR GOLDSMITH: Yes, sir, he will only answer questions that are put, I believe.

BY MR NOTT:

Q How old are you? A Thirty-five.

Q What is your occupation? A Fireman.

Q You have been convicted of crime heretofore?

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A Yes, sir.

Q More than once?

A Yes, sir.

Q Do you know a woman named Sadie Ennis?

A Yes, sir.

Q Do you know whether or not she was that woman that was brought in here a couple of times?

A Well, I didn't see her brought in.

Q Well, she was out in the hall?

A Yes, sir.

Q How long have you known her?

MR GOLDSMITH: Objected to as immaterial.

THE COURT: Well, I will allow it.

MR GOLDSMITH: Exception.

A Well, I ~~was~~ I knew her between two and a half and three years; something like that.

Q Do you know a young man named Brennan?

A Yes, sir; I did know him.

Q Yes. Were you present when he was shot?

MR GOLDSMITH: Objected to.

THE COURT: Yes. I exclude it, unless it was on this occasion.

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MR NOTT: No, sir; it was not. Now, if your Honor please, it is my purpose to prove, as I have already outlined--

MR GOLDSMITH: One moment. I object.

THE COURT: I think I know what you want to prove, but I think I will exclude it. I will not go into that, in this case. It is a simple case, Mr Nott.

MR NOTT: Well, it is simple in one way, and not in the other.

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THE COURT: The question is, did the defendant shoot this man, on the stand; and, if he did, was he justified in doing it?

BY MR. NOTT:

Q Now, do you remember 9th, not the 29th day of December, 1904?

MR. GOLDSMITH: Objected to.

THE COURT: I will let that question be asked, does he remember that day.

A Well, tell me something that occurred that day, and may be I will remember. I don't remember the 9th day. Tell me something that occurred, and I may remember.

BY THE COURT:

Q You have no recollection of any occurrence on that day? A No, sir, not at present; not until he asks me something about that day.

BY MR. NOTT:

Q Now, do you remember being a witness as to something that occurred on that day, in December?

MR. GOLDSMITH: Objected to.

THE COURT: I will not ~~not~~ go into any other matter than the particular subject matter of this indictment. It could not have any bearing on the case,

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except, possibly, on the question of motive, and you are not obliged to prove motive.

BY MR. NOTT:

Q Prior to the 9th day of December, 1904, had you ever had any trouble with the defendant? A No, sir.

Q Do you remember the night of the 29th of December?

A The 29th?

Q Yes. Do you remember the night you got shot?

A Well, I don't remember the day, but as far as I remember back --

BY THE COURT:

Q You remember the occurrence? A Yes, sir; I remember the occurrence.

BY MR. NOTT:

Q Well, you were only shot once, in the month of December? A That's all.

Q Now, had you been drinking, that night?

MR. GOLDSMITH: Objected to as immaterial, irrelevant and incompetent.

MR. NOTT: I think that is very material.

THE COURT: I think that might be better on the cross examination, better than on the direct.

BY MR. NOTT:

Q Where were you shot? What part of your anatomy?

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A What do you mean by anatomy?

Q In what part of your body were you hit? A Down around here (indicating).

Q Have you got the scar there yet? A Yes, sir.

MR. NOTT: Well, I ask you to show the jury.

MR. GOLDSMITH: I object to it, any illustration or exhibition.

THE COURT: Do you concede that he was shot there?

MR. GOLDSMITH: Yes, sir. I concede that, that he was shot there.

THE COURT: Well, he concedes it.

MR. GOLDSMITH: The defendant concedes that he was shot. What do you want?

MR. NOTT: Well, don't shout; I'm not deaf, whatever I want.

BY THE COURT:

Q You were shot right below the navel? A No, sir. About there, down about the fifth rib (indicating).

BY MR. NOTT:

Q And where were you taken, after you were shot?

A Well, as I remember, I walked down the street, after I was shot, and was then taken to the drug store.

Q No. 6 Bowers? A Yes, sir.

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Q And where were you taken from there? A To the Gouverneur Hospital.

Q Do you remember any of the doctors that attended you? Dr. Tandes, for instance? A Yes, sir.

Q And how long were you in the hospital, suffering from this wound? A I think, 19 or 20 days. I don't exactly remember right. 19 or 20 days.

Q And, since you get out of the hospital, are you living in the Borough of Manhattan? A Yes, sir; I live in Brooklyn.

MR. GOLDSMITH: Is that all?

MR. NOTT: That is all.

CROSS EXAMINATION BY MR. GOLDSMITH:

Q You recollect the night that you had this trouble, don't you, O'Brien? A I do.

Q You can't forget it, can you, very well?

A (No answer)

Q Do you know who shot you?

MR. NOTT: Now, if your Honor please, I just wish to make the remark, that I haven't gone into this, and that he makes him his own witness, and that I have the right to cross examine.

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THE COURT: I will allow it.

BY THE COURT:

Q Counsel asks you who shot you? A Well, I had some trouble that night, and I --

MR. NOTT: Now you have answered the question. I object to anything further.

BY THE COURT:

Q Now who shot you? A Well, the party that I accused --

MR. NOTT: No. I object.

BY THE COURT:

Q Now who shot you? A To the best of my knowledge, I didn't see it.

BY MR. GOLDSMITH:

Q Was it the defendant? A No, sir.

Q Did you have some trouble, that night?

A Yes, sir.

Q Where did you have the trouble? A Corner of Canal and Bowery.

Q Now were you shot there, or on the sidewalk?

A In front of 17 Bowery. I won't say in front of 17 Bowery. Between 15, 17 and 19., something in that line, because I didn't hear no shot getting fired, or seen no pistol going off, but I felt a zip (illustrating) in my side, and I

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put my hand down to my side, and I pulled my hand out from my shirt, and I seen some blood on my shirt, on my hand, and I walked to an elevator post, and I lifted up my shirt, and seen a wound there.

BY THE COURT:

Q Well, but you haven't told us yet who shot you.

A Well, positively I didn't see no man shoot me. I wouldn't accuse the party that shot me.

Q Don't you know who shot you? A No, sir.

Q You say, on your oath, that you don't know who shot you? A No, sir. Probably it was the man in front of me, but I haven't seen no man in front of me.

Q You say positively, under your oath, that you don't know who shot you? A I haven't seen nobody in front of me.

Q I haven't ask you that. Positively, under your oath, you don't know who shot you, under your oath?

A No, sir.

RE-DIRECT EXAMINATION BY MR. NOTT:

Q You remember that you were in 23 Bowery, that night?

A I was.

Q And you had a fight in there, didn't you, with this Sadie Huns? A Well, you could call it a fight. She came over

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to the table, and got talking to me, and she said, "Now, you are on a drunk again. Why don't you give me that money that you promised me?" And I got up, and pushed her away from the table. I didn't hit her.

Q And then somebody got up and hit you, and there was a general row? A No; nobody hit me.

Q Did you see a sailor in there, about that time?
A No; I didn't see no sailor. There was this party that I --

Q Now, do you remember when you got in the drug store?
A Well, part of it, yes.

Q Do you remember saying to one of the officers -- and you remember the officers there asking you there who shot you, don't you?

MR. GOLDSMITH: Now, I object to that. I object to the conversation that he had in the drug store.

MR. NOTT: This is cross examination.

MR. GOLDSMITH: I object to anything that was said in the absence of the defendant.

THE COURT: I think the District Attorney may justly claim that this is an unwilling witness.

MR GOLDSMITH: Well, then, he should have put the questions on direct, and said that he was an adverse witness. One moment. I object, if your Honor please on the ground that the record does not show that this witness is an adverse witness. He is a witness brought here by the prosecution.

THE COURT: I will let the question be asked.

MR GOLDSMITH: Exception.

BY MR NOTT:

Q Do you remember the officers asking you who shot you?

MR GOLDSMITH: The same objection.

THE COURT: Question allowed.

MR GOLDSMITH: Exception.

A I do.

BY MR NOTT:

Q Do you remember stating to one of those officers that it was Billy Smith that shot you? A No, sir.

MR GOLDSMITH: Objected to.

A (Answer continued) When the officer asked me who shot me, I said I was shot in front of 17 Bowery. I recollect very well what I said.

BY MR NOTT:

Q Now, do you remember having a conversation in the hospital with the stepfather of this man, Brennan? A I do.

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Q Do you remember Brennan asking you who shot you?

MR GOLDSMITH: I object to that, if your Honor please.

THE COURT: Allowed.

MR GOLDSMITH: Exception.

A Brennan didn't ask me; no.

BY MR NOTT:

Q I mean his stepfather? A Yes, sir.

Q And do you remember saying to Brennan that you got it and you got it good, and you would settle it yourself when you got out? A I did.

Q And didn't you say, "That is what a man gets for going up against cops"? A Yes; I said that. And I said, "And that is what you get for not minding your own business, for going up against cops, and not minding your own business".

Q "And that is what you get for not minding your own business, for going up against cops, and not minding your own business"? A Yes.

MR NOTT: Now, it seems to me, if your Honor please, in view of the attitude of this witness, it seems to me material to show his connection with that other case.

THE COURT: No.

MR NOTT: If your Honor please, I have not a couple of doctors that I wish to call, and they had an operation at two o'clock to-day, and I told them that they could go for that and come in the morning; and it is so near now

the hour of adjournment, within six minutes of it, that if your Honor will indulge me I will put them on in the morning.

MR GOLDSMITH: Do you think that they can tell that this man did the shooting?

MR NOTT: No; I didn't say anything of the kind.

MR GOLDSMITH: I object to the adjournment, if your Honor please, unless your Honor is going to adjourn promptly at four o'clock.

THE COURT: I shall adjourn anyway at four o'clock.

Gentlemen of the Jury, it is so near four o'clock, I think it is better to adjourn now, even if we had the witnesses here.

Do not talk about the case, or form or express any opinion in reference to it. You may go until to-morrow morning at half-past ten o'clock.

(The trial was then adjourned until Friday morning, February 17, 1905, at 10:30 ..)

TRIAL RESUMED.

New York, February 17, 1905.

APPEARANCES:

Assist. District Attorney CHARLES C. NOTT, for the People;
HENRY J. GOLDSMITH, Esq. and THOMAS J. DINNEAN, Esq., for
the Defense.

ARCHIBALD T A B E S , a witness called in behalf of
the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR NOTT:

Q What is your profession, please? A Physician.

Q And how long have you been a physician, Doctor?

A About two years.

Q And were you connected with any institution in this
city during the month of December, 1904? A Gouverneur Hospital,
in this city.

Q And what position did you hold there? A Senior Surgeon.

Q And were you Senior Surgeon, on the morning of December
29, 1904? A Yes, sir.

Q Did you, in the course of your duties, treat one William
O'Brien on that day or morning? A Yes, sir.

Q Where was he when you first saw him? A In the--upon a carriage in the Recovery Room, just before he was taken into the Operating Room.

Q And did you have more than one William O'Brien under treatment at that time? A No.

Q Tell the jury from what injuries, if any, you found him suffering? A He was suffering from a bullet wound of the left chest wall. It was situated about four inches to the left side of the median line, and in the neighborhood of the sixth rib.

Q And did you treat the wound? A I assisted. It was treated in the Operating Room.

Q Will you put your finger on the place where the wound was, on a corresponding place, I mean? A Yes, sir (indicating).

BY THE COURT;

Q In the chest? A In the chest wall.

BY MR NOTT;

Q On the left side? A Yes, sir.

Q And how many inches below the heart? A It was just a little below the apex of the heart.

Q Is that portion of the body in which the wound was received a vital part of the body? A It depends upon the direction of the bullet.

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Q Well, it speaks for itself. Well, you say it is just below the heart? A Yes, sir.

Q And how long was O'Brien in the hospital? A I don't remember the exact number of days, but he was there about three weeks.

Q And was then discharged? A Yes, sir.

MR NOTT: Will you call O'Brien, please?

BY MR NOTT:

Q Just look at that man (indicating). Is that the man that you treated? A Yes, sir.

MR NOTT: I suppose that it may appear on the record that that is the witness O'Brien, who testified yesterday.

CROSS EXAMINATION: None.

MR NOTT: The People rest.

MR GOLDSMITH: The defense rest.

THE COURT: Gentlemen, do you want to go to the jury?

MR GOLDSMITH: Well, I renew my motions made at the close of the People's case. I don't think that there is sufficient to go to the jury.

THE COURT: I shall submit the case to the jury.

MR GOLDSMITH: Then I take an exception, sir. Will your Honor take away the second offense in this indictment?

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THE COURT: No. There are two counts, assault with intent to kill and assault with intent to do grievous bodily harm. I think I will submit it under the first count.

MR GOLDSMITH: I take an exception, sir.

(The jury found the Defendant, Guilty of Assault in the First Degree, as a second offence, as charged in the indictment)